

By Direction of the Commission.

**Donald S. Clark,**

*Secretary.*

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## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 917

[KY–239–FOR]

#### Kentucky Abandoned Mine Land (AML) Plan

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

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

**SUMMARY:** We are approving a proposed amendment to the Kentucky abandoned mine land reclamation plan (the “Kentucky plan”) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act).

**EFFECTIVE DATE:** November 24, 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

The Abandoned Mine Land (AML) Reclamation Program was established by Title IV of SMCRA (30 U.S.C. 1201 *et seq.*) in response to concerns over extensive environmental damage caused by past coal mining activities. The program is funded by a reclamation fee collected on each ton of coal that is produced. The money collected is used to finance the reclamation of abandoned coal mines and for other authorized activities. Section 405 of the Act allows States and Indian Tribes to assume exclusive responsibility for reclamation activity within the State or on Indian lands if they develop and submit to the Secretary of the Interior (Secretary) for approval, a program (often referred to as a plan) for the reclamation of abandoned coal mines. On the basis of these criteria, the Secretary approved the

Kentucky plan on May 18, 1982. You can find background information on the Kentucky plan, including the Secretary’s findings, the disposition of comments, and the approval of the plan in the May 18, 1982, **Federal Register** (47 FR 21435). You can find later actions concerning the Kentucky plan and amendments to the plan at 30 CFR 917.20 and 917.21.

#### II. Submission of the Proposed Amendment

By letter dated April 29, 2002 (Administrative Record No. KY–70), Kentucky sent us a proposed amendment to its plan under SMCRA (30 U.S.C. 1201 *et seq.*). Kentucky submitted the amendment to propose comprehensive changes to the plan. The formal amendment was preceded by two informal submissions in September 1997, and March 16, 2000 (Administrative Record No. KY–67). OSM reviewed the informal submissions and reported findings to Kentucky on March 30, 2001 (Administrative Record No. KY–69).

It should be noted that Kentucky’s formal submission on April 29, 2002, did not identify the specific changes being proposed. We subsequently reviewed the 635-page amendment to determine what revisions were made from the original plan. We completed our review on December 19, 2002. The proposed rule was published in the February 11, 2003, **Federal Register** (68 FR 6838). Due to the voluminous nature of the submission, only major changes or those that may otherwise be of interest to the public were identified in the proposed rule notice. Any revisions not identified in the proposed rule concern nonsubstantive wording, organizational changes, or editorial changes. A complete description of the changes addressed in this rule notice can be found in the corresponding proposed rule, published in the February 11, 2003, **Federal Register** (68 FR 6838). However, we note that in some instances, the proposed rule described certain changes as “added sections” when, in fact, they consisted of language that had been moved from the OSM-approved Errata Sheet of the original 1981 Plan into the main text of the Plan.

#### III. OSM’s Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 884.14 and 884.15. We are approving the amendment. Any revisions that we do not specifically discuss below concern nonsubstantive

wording or editorial changes. Except where otherwise indicated below, we find that these amendments do not change the objectives, scope or major policies followed by Kentucky in the conduct of its reclamation program.

#### *Acquisition, Management, and Disposal of Lands (p. 6–9)*

The subtitle “Management of Acquired Lands” has been added. This subtitle provides that land acquired “may be used for any lawful purpose that is not inconsistent with the reclamation activities and post-reclamation uses for which it was acquired.” It also establishes that users of acquired lands will be charged a use fee and that all fees collected “which are not used for the specific purpose of operating and maintaining improvement of the land will be deposited in the Abandoned Mine Reclamation Fund.”

These proposed changes meet the criteria of the counterpart Federal regulations found at 30 CFR 879.14, which provide that “[l]and acquired under this part may be used for any lawful purpose that is consistent with the necessary reclamation activities.” The State’s proposed changes has this same requirement as well as the additional caveat that acquired land may be used for any lawful purpose not inconsistent with the post-reclamation uses for which it was acquired. Additionally, Kentucky’s proposed change meets the Federal requirement, also at 30 CFR 879.14, that procedures for the collection of user fees provide that all user fees collected be deposited in the appropriate Abandoned Mine Reclamation Fund. Therefore, we are approving the proposed changes.

#### *Organization (p. 10–17)*

The subtitle “Environmental Scientist Principal” has been added. Chapter 10 of Kentucky’s AML plan describes the title, class, duties, and minimum requirements of various employment positions within the organization. These provisions were previously approved by OSM because they meet the requirements of the counterpart Federal regulation found at 30 CFR 884.13(d). The addition of the description of the Environmental Scientist Principal position further clarifies the organization of the Plan and the responsibilities of individual employees. Therefore, we find that the proposed addition also meets the requirements of the counterpart Federal regulations, and we are approving it.

*Coordination With Ramp, Indian, and Other Reclamation Plans (p. xvi)*

The Natural Resources Conservation Service is an agency of the U.S. Department of Agriculture and was formerly known as the Soil Conservation Service. Kentucky proposes to add "Natural Resources Conservation Service" throughout its plan to reflect this name change. These non-substantive changes are hereby approved.

*Maps of Eligible Lands and Waters' (p. xix)*

Kentucky proposes to change the citation in the sub-heading for this subject from "884.13(f)(1)" to "884.13(e)(1)." This change was recommended by our Lexington Field Office because 30 CFR 884.13(e)(1), rather than 884.13(f)(1), requires a map showing the general location of known or suspected eligible lands and waters. Therefore, we are approving this change.

*"Problems Occurring on A.M.L. Sites" (p. xx), "Relationship to Existing and Planned Land Uses" (p. xx), and "Social, Economic, and Environmental Conditions" (pp. xx, xxi)*

Kentucky's Plan contains an "Introduction" that explains that the Plan is divided into sections designed to facilitate review by the public, and State and Federal agencies. The introduction lists these sections along with citations to the Federal regulations that require the Plan to contain each respective section. Kentucky proposed to change the listed Federal counterpart for the sections entitled "Problems Occurring on A.M.L. Sites," "Relationship to Existing and Planned Land Uses," and "Social Economic and Environmental Conditions." The proposed changes are from 30 CFR 884.13(f)(2) to 30 CFR 884.13(e)(2); 30 CFR 884.13(f)(3) to 30 CFR 884.13(e)(3); and 30 CFR 884.13(f)(5) to 30 CFR 884.13(f)(1), (2), and (3), respectively. We are approving the proposed changes since they refer to the appropriate Federal references and were made in accordance with OSM recommendations. Finally, Kentucky proposes to add, at page xxi, a reference to Section 19 of the Plan after the requirement of a general description of endangered and threatened plants, fish and wildlife, and their habitats. The reference to Section 19 is appropriate and is hereby approved, since that Section contains a socio-economic and cultural profile of the Kentucky coalfields, which are the lands for which the general descriptions of reclamation activities must be provided,

as set forth on pages xx and xxi of the Plan.

*Objectives (pp. 3-1, 3-2)*

Kentucky has deleted subsections (g), (h), (i), pertaining to noncoal mining, and (j), pertaining to construction of public facilities in communities impacted by coal development. Each of these subsections denotes an objective of the non-coal reclamation program that comes into existence only after the Governor of a State certifies to the Secretary that all reclamation priorities for eligible land and water adversely affected by past coal mining have been completed. See SMCRA section 411(a) and (b); 30 U.S.C. 1240(a) and (b). Because Kentucky has not yet reached the certification stage with its AML program, there is no need for the Plan to contain these post-certification prioritizing criteria for non-coal reclamation. Therefore, we are approving the deletions of subsections (g), (h) and (i).

In addition, the State has revised subsection (f) to meet the requirements of the Federal regulations at 30 CFR 875.12, pertaining to eligible lands affected by noncoal mining. Specifically, subsection (f), as amended, will allow the use of AML funds to reclaim noncoal sites with adverse effects that cause extreme danger to the public health, safety and general welfare. These funds may be used, upon request by the Governor and authorization by the Secretary, prior to certification by Kentucky that all coal mining reclamation problems have been addressed. We are approving this change because it meets the requirement of the Federal regulations at 30 CFR 875.12. We note that subsection (f) refers to "pre-August 3, 1977" noncoal mining, the term used in the Federal regulation, as "past" noncoal mining. This variation from the Federal language is acceptable because it is sufficiently similar to its Federal counterpart. Also, Kentucky has revised the last paragraph to address lower priority coal mining sites. This change was moved from the errata sheet of the approved 1981 Plan into the text. Therefore, its transfer to the text is approved without further discussion. Finally, subsection (f) has been revised to prohibit the use of AML monies for reclamation of sites designated for remedial action pursuant to the Uranium Mill Tailings Radiation Control Act of 1978 and the Comprehensive Environmental Response Compensation and Liability Act of 1980. We are approving this change because it meets the requirements of the Federal regulations at 30 CFR 875.16.

*Goals and Objectives: Priority I and II Sites (p. 3-2)*

As previously approved by OSM, Kentucky's Plan contains a description of the Plan's goals. The Plan states that the principal goal of the AML program is to identify and correct adverse conditions caused by past mining practices on sites classified as Priority I. Following this statement is a paragraph explaining what Priority I and Priority II sites are. Under the previously-approved Plan, the heading to this paragraph was "Priority I Sites." Kentucky proposed to revise the heading to include Priority II sites, because this section actually discusses both Priority I and Priority II sites. No other changes to the previously approved paragraph are proposed. Since the proposed change has no substantive effect on the program, we are approving the change.

*Goals and Objectives: Priority III Sites (p. 3-4)*

This section, contained in the approved Errata Sheet for the original 1981 Plan, but now moved to the text of Chapter 3 of the Plan, explains which areas are classified as Priority III sites and lists reasons why work will be considered for priority III sites prior to reclamation of all Priority I and II sites. Kentucky's original plan listed four reasons, one being if "the project will be used for research and demonstration purposes." Kentucky proposed to remove this justification for considering early work for priority III sites, presumably because Congress eliminated "research and demonstration projects relating to the development of surface mining reclamation and water quality control program methods and techniques" from the list of priorities for AML Fund expenditures contained in section 403(a) of SMCRA in its passage of the Energy Policy Act of 1992. This deletion changes the objectives followed by Kentucky in the conduct of its reclamation projects and, therefore, can only be approved in accordance with 30 CFR 884.14. See 30 CFR 884.15(a) (pertaining to State reclamation plan amendments). In reviewing this portion of the amendment, we have: Provided adequate notice and opportunity for comment on the amendment; solicited and considered the views of other Federal agencies having an interest in the amendment; found that the State continues to have the legal authority, policies and administrative structure necessary to carry out the proposed plan, as amended; found that the State continues to have an approved State regulatory program; and, determined

that the amendment is in accordance with all applicable State and Federal laws and regulations. Accordingly, we are approving the elimination of the research and demonstration project justification for early Priority III site reclamation.

#### *Environmental Goals (p. 3–5)*

This section was added to the text of chapter 3 of the Plan, but was previously contained in the Errata Sheet for the 1981 Plan. It states that Kentucky's resources are to be protected or enhanced through AML reclamation including, but not limited to, important wildlife habitats, endangered or threatened plants and animals or their critical habitats, natural areas, wild and scenic rivers, wetlands, floodplains, soil and water, recreational resources, and agricultural productivity. Because this section has been retained exactly as it appeared in the Errata sheet, it remains approved.

#### *Phase II Inventory (p. 3–6)*

The State proposes to comply with the requirements of the Federal regulations at 30 CFR 886.23(b) by using OSM procedures concerning the Abandoned Mine Land Inventory System, required by SMCRA section 403(c). We are approving this change because it explicitly requires compliance with a provision of the Federal regulations.

#### *Small Operator Goals (pp. 3–6 to 3–8)*

This section has been revised to reference the authorizing statute at Kentucky Revised Statutes (KRS) 350.450. In addition, the State has amended its definition of small operators to include all those anticipated to mine less than 300,000 tons of coal per year. This change mirrors the Federal regulations at 30 CFR 795.6(a)(2), which also define small operators as those mining less than 300,000 tons per year. We are therefore approving this change.

#### *Marketable Mineral Recovery (pp. 3–8, 3–9)*

This section has been revised to allow all contractors, rather than just small operators, to participate in the bidding for AML projects that involve incidental coal removal, although small operators will still receive preference. The change is intended to address the situation where small operators may occasionally lack the expertise, equipment, access, etc., to perform the needed work. Kentucky's practice of allowing only small operators to bid for AML contracts that involve the incidental removal of coal is set forth in the original Plan that

we approved in 1982. See 47 FR 21435. However, because SMCRA neither mandates nor prohibits this practice, its elimination by Kentucky can likewise be approved.

#### *Bond Forfeiture Projects (p. 3–9)*

This section has been amended to change the heading from "Supplementation of Eligible Bond Forfeiture Sites" to "Bond Forfeiture Projects." This change, already contained in the Errata Sheet that we approved in 1982, is now moved to the text of the Plan. It is non-substantive in nature and is hereby approved.

The section was further revised by deleting all but the first paragraph, and by adding a paragraph that states that it is the policy of the Kentucky Division of Abandoned Mine Lands (DAML) that only eligible bond forfeiture sites are covered by the AML plan and that bond forfeiture sites must meet all priority and grant submission requirements that all other AML problem sites meet. This change in effect eliminated the previous specific requirements for bond forfeiture sites. This change is approved because it does not conflict with section 402(g)(4)(B)(ii) of SMCRA and 30 U.S.C. 1232(g)(4)(B)(ii), which created AML Fund eligibility for certain bond forfeiture sites.

#### *Water Supply Projects (p. 3–10)*

Kentucky proposed this new section to comply with SMCRA section 403(b)(1) and 30 U.S.C. 1233(b)(1), which authorizes States and Tribes to use up to 30 percent of their annual AML grants to fund projects for water supply facilities in areas that have suffered coal mining related impacts to drinking water supplies. Kentucky's new section states that:

Title IV of SMCRA was amended in 1990 to allow a state to use up to 30% of its annual AML grant to fund projects for " \* \* \* the purpose of protecting, repairing, replacing, constructing, or enhancing facilities relating to water supply, including water distribution facilities and treatment plants, to replace water supplies adversely affected by past coal mining practices." Kentucky will use, at its discretion, up to 30% of its annual AML grant to provide drinking water to areas of the Commonwealth where water supplies have been adversely affected by AML.

Eligibility of water supply projects and funding of the projects will be made based on guidelines developed and administered by the Division of Abandoned Mine Lands. Eligibility requirements will be developed jointly with the OSM.

Kentucky's proposal to use up to 30% of its AML grant for drinking water replacement meets the requirements of Federal law since SMCRA section 403(b)(1) allows such amount to be used

for water replacement purposes. Therefore, we are approving the change.

#### *Project Selection (pp. 4–8 to 4–11)*

Kentucky's plan includes a section providing the specific criteria used to identify and rank projects to be funded through the program. As previously approved, this subsection, designated as subsection V, discusses the development of AML construction grant applications. Under this subsection, projects to be included in a year's construction grant application are selected from a grant development action list. Those projects included in the action list are "the known Priority I and II projects where the degree and imminency of impacts are most severe, plus those supplemental bond forfeiture reclamation areas yet unaddressed."

Kentucky proposed to amend subsection V by removing the phrase, "plus those supplemental bond forfeiture reclamation areas yet unaddressed." Thus, projects included in the action list would consist only of Priority I and II projects. The State also proposed to change references to the Assistant Director of the Division of Abandoned Mine Lands to references to the Director. Finally, Kentucky proposed to change the title of subsection V from "Annual Construction Grant Application" to "Project Selection." This section has also been revised to reflect the current policy of including input from all professional staff in the project selection process and the process by which grant application elements are prepared for each project. We are approving the proposed changes because they meet the requirements of the Federal regulations at 30 CFR 884.13(c)(1), which require the State to describe its criteria for ranking and identifying projects to be funded by the AML program.

#### *Coordination With RAMP, Indian, and Other Reclamation Programs (p. 5–1)*

In the second paragraph of page 5–1, the phrase "30 CFR 884.13(f)(5)(v), Flora and Fauna of the Coalfields," was deleted and replaced with the phrase "30 CFR 884.13(f)(3), Endangered and threatened plant, fish and wildlife and their habitat." This change was made because the Federal regulation at 30 CFR 884.13(f)(5)(v) has been repealed, and because the correct reference is 30 CFR 884.13(f)(3). This is not a substantial concern.

#### *Lands for Permanent Facilities (p. 6–1)*

This section has been revised to incorporate the language at KRS 350.570(3), which authorizes the Commonwealth of Kentucky to acquire

any land adversely affected by past coal mining practices, if acquisition is necessary for successful reclamation and if such acquisition is approved in advance by OSM. Federal regulations at 30 CFR 879.11 authorize State acquisition of land adversely affected by past coal mining upon approval by OSM, if the land, after restoration, abatement, control or prevention of adverse effects of past coal mining practices, will serve recreational, historic conservation or provide open space benefits, and permanent facilities will be constructed on the land for the restoration, reclamation, abatement, control or prevention of the adverse effects of past coal mining practices. By contrast, the Kentucky AML Plan proposal would allow the State to acquire the lands if the lands will serve the enumerated (*i.e.*, recreational, *etc.*) purposes or if permanent facilities will be constructed. As such, this revision does not comply with the Federal regulations or with section 407(c) of SMCRA. We are approving the proposed change to the extent that Kentucky will meet both criteria in their acquisition of lands. We are not approving the word "or," which appears at the end of paragraph 1 of the section entitled "Lands for Permanent Facilities." We note, however, that OSM approval is always required prior to acquisition of these lands and acquisition must be carried out in accordance with Federal law and regulations.

#### *Acquisition of Real Property by Donation (p.6-3)*

This section has been revised to eliminate subdivision 2(e), which requires itemizations of any unpaid taxes or assessments levied, assessed or due which could operate as a lien on the interest offered, and subdivision 2(f), which states that a deed of conveyance shall be executed, acknowledged and recorded in the name of the Commonwealth of Kentucky after acceptance of an offer.

The Federal regulations at 30 CFR 879.13(b) allow States to use applicable State law when accepting donations of land. Therefore, we are approving the deletion of the above provisions with the understanding that Kentucky will continue to follow all applicable State laws when accepting donations of real property.

#### *Step-by-Step Procedure for Land Acquisition (pp. 6-4 through 6-9)*

Kentucky has revised this section by updating the names of departments and titles of certain departmental officials. As these revisions do not have a

substantive effect on the State's AML program, we are approving them.

#### *Management of Acquired Lands (p. 6-9)*

Kentucky has proposed to move this section from the approved Errata Sheet for the original 1981 Plan into the text of Chapter 6 of the plan. It is intended to comply with the requirements at 30 CFR 884.13(c)(4), which requires a description of policies and procedures regarding land acquisition, management and disposal. Specifically, this section corresponds to the Federal regulations at 30 CFR 879.14, "Management of acquired land." Because the provision is identical in substance to the one approved by OSM in 1982 and contained in the Errata Sheet, it remains approved in its new location.

#### *Disposition of Reclaimed Lands (p. 6-10)*

Kentucky has proposed to revise this section by adding a requirement that the appraised value of a property be stated in a land disposition notice. This change is based on recommendations made by OSM in the 1981 OSM Review (Administrative Record No. KY-57). With this change, the Plan remains in compliance with the Federal regulations at 30 CFR 879.15, pertaining to disposition of reclaimed land. Therefore, the change is approved. Also, the State elected to allow land sales to be conducted by either public auction or sealed bid, whereas the approved Errata Sheet for the 1981 Plan allowed sealed bids to be accepted prior to the sale date, followed by a public auction. This change likewise leaves the Plan in compliance with the Federal regulations at 30 CFR 879.15, and it is therefore approved.

#### *Reclamation on Private Lands (pp. 7-4 to 7-6)*

Kentucky has proposed to revise these sections as follows:

(1) *Levy of Lien*: Addition of a requirement that the landowner be provided a statement of the increase in market value, an itemized statement of reclamation expenses, and notice that a lien will or will not be filed in accordance with 30 CFR 882.13.

In this case, the Kentucky revisions are more stringent than the Federal requirements at 30 CFR 884.13. The Federal program requires that within 60 days of filing a lien the property owners may petition under local law to determine the increase in market value to their land and may appeal any decisions under local law. Under the new section of State law, within 60 days of the reclamation work, the land owner shall be notified of the above.

Landowners are given an opportunity to appeal any increases in market value within 60 days of the lien being filed. Although the Kentucky law, as proposed, does not allow for the specific appeal of the lien itself, any liens are only possible where there is an increase in property value. Thus, here the landowner's rights are still protected. We are therefore approving this change.

(2) *Satisfaction Of Liens*: The reference to "State Abandoned Mine Reclamation Fund" is changed to "Abandoned Mine Reclamation Fund," and Appendix 7-A and Attachment 7-1 have been deleted.

This change was recommended by OSM since there is not a State Abandoned Mine Reclamation Fund in Kentucky. Kentucky works under grants of State and Secretary share monies from the Abandoned Mine Reclamation Fund defined under SMCRA. If Kentucky someday does decide to have a State Abandoned Mine Reclamation Fund it will have to be legislated and could be used to account/administer set aside funds given them from the AML Fund, since these monies cease to be "AML Funds" once given to the State. Furthermore, Appendix 7-A and its Attachment 7-1 pertain only to contracting for reclamation of pre and post law coal mining permits for which the performance bond has been forfeited. The DAML administers forfeited bond money to accomplish reclamation as a collateral duty. DAML has a separate section within their Construction Branch that handles bond forfeiture planning and reclamation, which is accounted separately from AML work to reflect Title V costs for Kentucky I&E (Title V) Grant debiting. Therefore, these procedures are best documented by DAML as standard operating procedures rather than being in the AML Plan. As such, we find that these amendments are approvable, as they do not render the State program less effective than the Federal requirements.

#### *Rights of Entry (pp. 8-7 and 8-18)*

Kentucky has revised their program so that the reference to "Division of Abandoned Lands (DAL)" has been changed here, and throughout the document, to "Division of Abandoned Mine Lands (DAML)." As this change is not substantive, and therefore will not render the State program less effective than the Federal program, we are approving it.

#### *Personnel Staffing Policies (pp. 11-1 and 11-3)*

Kentucky has revised their program in accordance with Federal requirements

to require that all personnel assignments will comply with "Title VII of the Civil Rights Act of 1964 (PL 88-352)." This change complies with 30 CFR 884.13(d)(2), which requires a description of the personnel staffing policies which will govern the assignment of personnel to the State reclamation program. It also assures that the Kentucky program is in compliance with applicable Federal law governing personnel assignments. We are approving this change.

*Purchasing and Procurement Systems*  
(pp. 12-1, 12-4, and 12-6)

Kentucky has proposed a revision to its program on page 12-1, paragraph 6, that would delete the reference to Public Law 95-87 (SMCRA) and add references to Chapter 3 of the AML Plan, pertaining to Small Operator Goals, and to 30 CFR 884.13(c)(1). These changes were contained in the 1981 Errata Sheet for the original Plan, both of which we approved in 1982, and are now incorporated into the text of the Plan in identical form. Therefore, the changes are approved.

The subsection pertaining to purchase requisitions is being revised to reflect the current procedure for reviewing and approving requisitions. Specifically, three new paragraphs are added to the beginning of the Purchase Requisition section on page 12-4. These new paragraphs state that project plans are selectively reviewed and revised, if necessary, by the staff of the Commissioner of the Department for Surface Mining Reclamation and Enforcement (DSMRE) and, if approved are then returned to the DAML, where a purchase requisition is prepared for the Director to review and sign. After they are signed, the plans are sent to the Division of Administrative Services, which reviews the purchase requisition for accuracy and form, and to insure that sufficient funds are available.

This section, in effect, re-delegates the function and responsibility of purchase requisition review, approval, and processing. The changes comply with the Federal regulations at 30 CFR 884.13(d)(3), which require a description of the purchasing and procurement systems to be used by the agency that administers the AML Plan. Therefore, the additional paragraphs are approved.

Kentucky has proposed a revision to the first paragraph on page 12-6 to read: "When an apparent low bidder is identified for any AML reclamation contract, the Division of Abandoned Lands forwards the low bidder's name, Federal tax number, social security numbers and other information as

required to the Ownership and Control Review section of the Division of Permits of the Kentucky Department of Surface Mining for an Applicant Violator System (AVS) check for permit eligibility, in accordance with 30 CFR 874.16. Before the contract is awarded to the apparent low bidder an AVS confirmation of permit eligibility will be received from the AVS check."

This revision effectively updates the Kentucky program to be in compliance with the Federal regulations at 30 CFR 874.16, pertaining to AML contractor eligibility, and with the standard for AVS reviews. This proposed change is approved.

Also on page 12-6, the fourth sentence of the first paragraph is revised by deleting the statement that the Commonwealth has the right to "waive all informalities and technicalities of a bid when, in their judgment, the best interest of the Commonwealth of Kentucky may be served." A sentence is then added immediately after the revised fourth sentence. The new sentence states that "[a]ll rejections of bids or waivers will be in accordance with requirements of Office of Management and Budget (OMB) Circular A-102, and applicable State or local law." We previously approved these revisions in the Errata Sheet for the original 1981 Plan. This proposal merely transfers the revisions to the text of the Plan, and is therefore approved without further discussion.

*Construction* (pp. 12-7 and 12-8)

Kentucky has deleted the subsections, "Monthly Reports for Office of Surface Mining", "Final Report for the Office of Surface Mining" and "Change Orders," in their entirety. In addition, the phrase, "and change orders," at the end of the first paragraph on page 12-7 has been deleted.

Kentucky has also inserted the sentence "guidelines pertaining to change orders will be developed by the Division Director as needed" as the last sentence of the "Project Inspection" subsection.

OSM currently analyzes reports under oversight. The monthly reports to OSM noted in the previously-approved Plan were designed to keep OSM informed of Kentucky's progress during the startup of the Kentucky program in the early 1980's and were sent to the Knoxville Regional Office, which no longer exists. All monitoring and oversight of the Kentucky AML program has been moved to the Lexington Field Office, thereby rendering the reporting required by the deleted subsections unnecessary. In addition, the State has produced and follows internal standard operating

procedures for change orders, which we review under normal oversight, and notifies us of significant change orders under a provision of our Directive AML-22 Performance Agreement for oversight purposes of their construction management process. Because there is no Federal requirement that States file monthly reports, final reports, with OSM, or that change orders or major revisions be approved by OSM, we are approving these changes.

*AML Enhancement Rule* (p. 12-9)

Kentucky has added the subsection "AML Enhancement Rule." This additional section incorporates OSM's AML Enhancement Rule at 30 CFR 874.17 by reference. The rule provides guidance and procedures for AML programs when considering an AML project as government-financed construction under 30 CFR Part 707 where the level of funding will be less than 50 percent of the total cost of planned coal extraction. Because this change will add to the universe of projects that are eligible for AML funding (*i.e.*, projects that involve the incidental removal of coal and that are less than 50% government financed), it changes the scope of Kentucky's AML program. Therefore, the change can only be approved in accordance with 30 CFR 884.14. *See* 30 CFR 884.15(a) (pertaining to State reclamation plan amendments). In reviewing this portion of the amendment, we have: provided adequate notice and opportunity for comment on the amendment; solicited and considered the views of other Federal agencies having an interest in the amendment; found that the State continues to have the legal authority, policies and administrative structure necessary to carry out the proposed plan, as amended; found that the State continues to have an approved State regulatory program; and, determined that the amendment is in accordance with all applicable State and Federal laws and regulations. The incorporation, by reference, of OSM's AML Enhancement Rule is therefore approved. However, we note that the United States Court of Appeals for the District of Columbia Circuit has, in part, remanded the Federal AML Enhancement Rule for further consideration. Specifically, the court ordered OSM to explain how it can reasonably construe the term "government-financed" to include "expenses incurred directly or indirectly by [an] AML agency," even where the "AML contractor receives no funds at all from the government." *Kentucky Resources Council v. Norton*, 2002 U.S. App. Lexis 11365, Slip. Op.

at 5. (D.C. Cir. May 30, 2002). Therefore, our approval of the Kentucky AML Plan provision incorporating the Federal AML Enhancement Rule by reference is subject to the restrictions placed upon the Federal regulation by the court. Moreover, Kentucky may be required to further amend its AML Plan to conform with future revisions to the AML Enhancement Rule that will be carried out in an effort to comply with the court's remand order.

#### *Reclamation Agreements (p. 10-12)*

In this subsection, Kentucky proposes to allow operators to enter into reclamation agreements with the Division of Abandoned Mine Lands for the purpose of removal of excess spoil from adjacent or nearby active permitted operations and subsequent placement on AML sites. Placement of excess spoil on adjacent abandoned mine land has been addressed previously in other rulemaking. Specifically, in a July 9, 1991, letter to Ohio (Administrative Record No. OH-1546), the Director of OSM clarified OSM's position concerning the standards and requirements which apply to the usage of excess spoil for reclamation of abandoned mine land sites. OSM focused on the parameters for excess spoil disposal outside the permit area as established, in part, in several final rules approving such a provision in the West Virginia program (45 FR 69254-69255, October 20, 1980; 46 FR 5919, January 21, 1981; and 55 FR 21328-21329, May 23, 1990).

In the January 21, 1981, **Federal Register** announcing approval of the West Virginia program (46 FR 5919), the Secretary found that, for purposes of excess spoil disposal, a reclamation contract governing work to be performed on a Federal AML reclamation grant project is the equivalent of permit and bond under Title V of SMCRA. In the May 23, 1990, **Federal Register** (55 FR 21329), OSM found that West Virginia's proposed disposal of excess spoil on a Federally funded AML reclamation project is approvable provided the spoil is not necessary to restore approximate original contour (AOC) on or otherwise reclaim the active mine. In addition, as stated in the May 23, 1990, **Federal Register**, fills are not to be created on AML reclamation projects. Spoil deposited on such sites may be used only to complete reclamation and to return the site to its AOC. OSM restricted eligibility for such spoil deposition to AML reclamation projects funded through the Federal AML grant process. The Director finds that Kentucky's proposal regarding

placement of excess spoil meets these requirements for AML reclamation projects authorized through the Federal AML grant process, for the reasons set forth below.

First, Kentucky's proposal requires that the excess spoil placed on an abandoned site will be "for use as cover material and a growth medium for vegetation." As such, the amount of excess spoil placed thereon will not exceed that required to restore that site to AOC. Therefore, valley, head-of-hollow and durable rock fills will not be constructed on these AML sites, because the amount of material deposited to form a fill would far exceed that necessary for use as cover material and as a growth medium for revegetation.

Second, the proposal requires that the "site must be designated as an active AML project during all reclamation activity and will be subject to oversight by (Kentucky) inspection personnel." This is interpreted to mean the project is to be administered as a Federally-funded AML project authorized through the Federal AML grant process, which must comply with requirements of the Federal Assistance Manual (OSM Directive AML-10) and the National Environmental Policy Act of 1969 (NEPA). The environmental safeguards that therefore will apply should ensure that the excess spoil is placed in an environmentally-sound fashion, and that placement will not destroy or degrade features of environmental value.

Third, and finally, the Director finds that the proposal contains sufficient performance incentives to require compliance with all applicable requirements, since the proposal states that the "AML site will be maintained, as determined by (Kentucky), by the contractor through the entire bond liability period of the permitted site from which the excess spoil originated" and should the contractor "fail to honor or satisfy the agreement, (Kentucky) may require the company to obtain a permanent program permit under Title V for the affected area. In addition, Kentucky always has AML grant funds available to reclaim these sites in the event that the operator defaults on the terms of its contract, all Title V enforcement options are exhausted, and the AML reclamation contract performance bond is insufficient to complete reclamation.

#### *Accounting Systems (p. 13-1)*

Kentucky has revised this subsection to update organizational title and office changes. As this change is not substantive, and therefore will not render the State program less effective

than the Federal program, we are approving it. This determination is based on recommendations made by OSM in the 1981 OSM Review (Administrative Record No. KY-57).

#### *Maps of Eligible Lands and Waters (p. 15-1)*

Kentucky has reworded the first paragraph to better clarify AML eligibility by referencing "Section 404 'Eligible Lands and Water' and/or 402(g)(4) of Title IV of Public Law 95-87 and/or KRS 350.560". This change provides additional clarification of which sites are eligible for reclamation with Kentucky AML grant funds. Because this amendment refers to the appropriate Federal and State laws governing AML site eligibility, we are hereby approving it. This determination is based on recommendations made by OSM in the 1981 OSM Review (Administrative Record No. KY-57).

#### *Problems Occurring on Abandoned Mine Land Sites (pp. 16-3, 16-5, 16-9 and 16-12)*

On page 16-3, first paragraph (Environmental Damage), line 3, Kentucky has added the phrase "including adverse impacts on endangered and threatened species" directly after the phrase "loss of fish and wildlife habitat." Also on page 16-3, in the paragraph entitled "Surface/Groundwater Contamination," the phrase "including adverse impacts on endangered and threatened species" is added after the phrase "aquatic vegetation."

On page 16-5, at the end of the paragraph entitled "Erosion," the following sentence is added: "On-site erosion and sediment control techniques will be used wherever practicable and feasible to minimize erosion and retain sediment within the disturbed area or limit the volume of sediment leaving the project site." Also on page 16-5, at the end of the paragraph entitled "Reduced Fish and Wildlife Habitat," the following sentence was added: "Unvegetated areas may also cause adverse impacts on endangered and threatened species."

On pages 16-6 and 16-7, a new section, entitled "Abandoned Highwalls," was added. This section enumerates and discusses problems generally associated with abandoned highwalls on AML sites. These problems include, but are not limited to, threats to life, health and safety, reduced wildlife habitat, attractive nuisances for children or hikers, and adverse impact on aesthetic, historical, cultural, or recreational resources. The new section also discussed certain

reclamation techniques to correct or abate these problems, including highwall reduction by bench reconstruction, re-establishment of wildlife routes by pulling down highwall sections, or screening or covering the highwall with appropriate species to enhance wildlife values and reduce aesthetic degradation.

On page 16–9, in the paragraph entitled “Limitation of loss of habitat,” the sentence has been changed by adding at the end the phrase “and runoff from burned areas may impede or prevent utilization of water resources by aquatic life.” Also, a second sentence is added, which states that “[s]uch [forest] fires can have adverse impacts on endangered or threatened species.”

On page 16–12, at the end of the paragraph entitled “Limitation or loss of fish and wildlife habitat,” the following sentence was added: “This [limitation or loss of fish and wildlife habitat] problem is especially serious for those endangered or threatened species, such as Federally listed bats, which inhabit caves or mine shafts subject to subsidence.”

All of these changes to section 16 were previously contained in the Errata Sheet for the 1981 Plan, both of which we approved in 1982, and are merely being transferred to the text of the Plan. Therefore, we are approving the transfers without further discussion.

#### *Relationship to Existing and Planned Land Use (pp. 17 B1, 17–6, and 17–7)*

Kentucky has revised this section to recognize the presence of endangered or threatened species during reclamation and land use planning. A sentence has been added on page 17–6, stating that the Big South Fork National River and Recreation Area has been adversely affected by erosion, sedimentation and acid mine drainage from AML sites. On pages 17–6 and 17–7, it is noted that commercial forest land in the Eastern Kentucky Coalfield includes 670,000 acres of the Daniel Boone National Forest. These revisions to section 17 were previously contained in the Errata Sheet for the 1981 Plan, both of which we approved in 1982, and are merely being transferred to the text of the Plan. Therefore, we are approving the transfers without further discussion.

#### *Quantities of Land and Water Affected by A.M.L. (p. 18–1)*

Kentucky has added the following two sentences on page 18–1, at the end of the first paragraph: “Not all of the acres listed are priority I or II sites. The acreages represent an approximation of the total mined acres in each coalfield, some of which may be determined to be

acceptable in their current state or may require limited efforts to correct remaining problems.” This revision to section 18 was previously contained in the Errata Sheet for the 1981 Plan, both of which we approved in 1982, and is merely being transferred to the text of the Plan. Therefore, we are approving the transfer without further discussion.

#### *Socio-Economic and Cultural Profile of the Coalfields (p. 19–23)*

Kentucky has changed the first sentence of “The Redbird Purchase Unit” paragraph to make it clear that the unit is not purely a recreational area. This revision to section 19 was previously contained in the Errata Sheet for the 1981 Plan, both of which we approved in 1982, and is merely being transferred to the text of the Plan. Therefore, we are approving the transfer without further discussion.

#### *Flora and Fauna of the Coalfields (Chapter 21)*

Kentucky has revised its program to include references to the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C., 4321 *et seq.*), and Executive Orders 11988 and 11990 on page 21–77. This change is approved as a non-substantive change because it merely notes that NEPA and the aforementioned Executive Orders, along with other statutes already listed, require that fish and wildlife be considered in the initial reclamation planning for a project.

Kentucky has added a requirement for DSMRE to consult with the Kentucky Department of Fish and Wildlife Resources regarding the existence of Federally endangered or threatened species during the NEPA review process on page 21–79. We are approving this change because the Kentucky Department of Fish and Wildlife Resources is the appropriate state agency for purposes of consultation with respect to endangered or threatened species.

Kentucky has added the current title of the “Natural Resources and Environmental Protection Cabinet” to its AML plan. As this change does not substantively affect the Kentucky AML program, it is approved.

Kentucky has also revised its program to incorporate NEPA compliance measures into the AML plan rather than the previous requirement to do an “environmental assessment.” We are approving this change because it more accurately accounts for the varying levels of review that may be required pursuant to NEPA.

Kentucky has added numerous changes to the text of its AML Plan that

are composed mostly of additional references to various species of flora and fauna. These changes were previously contained in the Errata Sheet for the 1981 Plan, both of which we approved in 1982, and are merely being transferred to the text of the Plan. Therefore, we are approving the transfers without further discussion.

#### *Commercially Minable Coal Seams and Projects, Methods of Extraction (pp. 22–5, 22–14, 22–24, and 22–26)*

The Figure 22–2, “Preliminary Correlation Chart of Coal Beds and Key Beds of the Pennsylvanian Rocks of Eastern Kentucky,” has been added and the section has been revised to present options in determining remining feasibility, and to eliminate references to Site Score Sheets and matrices to rank AML sites. The references to be deleted are found on page 22–22 of the currently approved AML plan, and are discussed further below.

The State has eliminated the use of Site Score Sheets and matrices to rank AML sites, and approved a new system that is found in Chapter 4 of the current plan, “Project Ranking and Selection Procedures” which was approved on July 14, 1987 (52 FR 26299). Based on that change, we recommended that the references in Chapter 22 to these previously removed features be removed from Chapter 22 of the current plan amendment as well. Kentucky has complied with this suggestion and we thus find that these deletions render the State AML program internally consistent with respect to AML site ranking and hereby approve them.

The sentences inserted to provide options in determining remining feasibility are found on page 22–14 of this amendment, and state that “Kentucky may use different systems to analyze the consideration for probability for remining. In 1980, the Kentucky Geological Survey developed a system of moderate complexity for ranking probability of remining.” We are approving this change because it accords with the elimination of the references to Site Score Sheets.

On page 22–26, pertaining to non-coal minerals, Kentucky has deleted the reference to the Site Score Sheet, but the potential for non-coal mineral recovery remains a factor to be considered when ranking AML sites. This deletion is approved for the reasons stated above in this same finding. In that same paragraph, the following four sentences are being added: “Extraction of these non-coal minerals in the Commonwealth may take place by any of several methods. Petroleum and natural gas are extracted through the

sinking of wells. Clay, rock asphalt, sand and gravel are commonly extracted through methods of surface mining. Limestone, flourspar, and oil shale, in addition to methods of surface mining, are also commonly extracted through deep mining." This addition was previously contained in the Errata Sheet for the 1981 Plan, both of which we approved in 1982, and is merely being transferred to the text of the Plan. Therefore, we are approving the transfer without further discussion.

#### IV. Summary and Disposition of Comments

##### Public Comments

We asked for public comments on the amendment (Administrative Record No. KY-72). We did not receive any comments from the public.

##### 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-72). We received one comment from the U.S. Fish and Wildlife Service (USFWS), one from the U.S. Department of Labor's Mine Safety and Health Administration (MSHA), and one from the U.S. Department of Agriculture's Natural Resource Conservation Service (NRCS).

We received a letter from the USFWS dated March 14, 2003 (Administrative Record No. KY-72). The letter indicated that the USFWS was interested in four sections of the AML plan changes. First, it indicated that it concurs with the changes to the AML Enhancement Rule (p. 12-9), as it may reduce the impacts to fish and wildlife resources on active mining permit areas, increase the number of AML projects that can be completed each year, and enhance additional habitat for fish and wildlife through AML reclamation projects. Second, the USFWS indicated support for the addition of the new subsection Reclamation Agreements (p. 12-10) because the site-specific removal of excess spoil will enhance reclamation on AML sites. Third, it supports the additions of sections relating to threatened and endangered species at Problems Occurring on Abandoned Mine Land Sites (pp. 16-3, 16-5, 16-9, and 16-12). In addition, to the extent that soils will not be compacted and the site's ability to reforest be jeopardized, it supports the addition of the erosion minimization and sediment retention techniques. We agree with the USFWS on this matter and recognize concerns

associated with soil compaction. Finally, the USFWS indicated that it has a concern with the section Flora and Fauna of the Coalfields (Chapter 21, p. 21-79), such that it suggests that Kentucky should consult with it, in addition to the Kentucky Fish and Wildlife Service, regarding the existence of Federally listed species when implementing the Endangered Species Act. We acknowledge this concern and recognize that the USFWS has jurisdiction over both Federally listed species and the Federal Endangered Species Act. The USFWS concern in this case is handled by OSM policy set in OSM Directive GMT-10 "Federal Assistance Manual". In accordance with this policy, OSM has the responsibility for environmental compliance with NEPA. However, policy provides that initial preparation of the environmental review document and initial consultations may be completed by the State. Final review, consultation, and authorization of the environmental review document rests with OSM. By agreement with Kentucky, OSM performs the consultation responsibility with the USFWS. The USFWS concerns in this case are therefore satisfied by OSM policy, rather than the Kentucky AML Plan.

We received a letter from the MSHA dated March 13, 2003 (Administrative Record No. KY-72). MSHA indicated that the changes to the AML plan would not have an impact concerning its office or jurisdiction.

We received a letter from the NRCS dated March 10, 2003 (Administrative Record No. KY-72). NRCS indicated that it concurs with Kentucky's proposals to update its AML plan, thereby bringing it up to date with current Federal regulations. The NRCS also stated that while it concurs with the changes made concerning coordination with the Rural Abandoned Mine Program formerly administered by NRCS, there are concerns about the funding longevity of the program as it has been taken "off budget." We also share this concern, however it falls outside of the scope of our jurisdiction and as such we are unable to respond to this comment in our approval of Kentucky's AML plan amendment.

##### Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(ii), we are required to get a written concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). There are no

such provisions in this amendment, so we did not seek EPA concurrence. Furthermore, the EPA did not comment on the proposed changes to the Kentucky AML Plan.

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

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On June 12, 2002, we requested comments on Kentucky's amendment (Administrative Record No. KY-72), but neither the SHPO nor the ACHP responded to our request.

#### V. OSM's Decision

Based on the above findings, we are approving Kentucky's proposed amendment, except as follows. We are not approving the word "or," which appears at the end of paragraph 1 of the section entitled "Lands for Permanent Facilities." We are approving the incorporation by reference of the Federal AML Enhancement Rule subject to the restrictions placed upon the Federal regulation by the court in *Kentucky Resources Council v. Norton, supra*. Finally, the "Reclamation Agreements" provision at the end of Chapter 12 is approved only to the extent that it applies to AML reclamation projects authorized through the Federal AML grant process. The Federal regulations at 30 CFR part 917 codifying decisions concerning the Kentucky AML Plan are being amended to implement this decision. Consistency of State and Federal standards is required by SMCRA.

#### VI. Procedural Determinations

##### Executive Order 12630—Takings

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

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

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

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

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State and Tribal abandoned mine land reclamation plans

and plan amendments because each plan is drafted and promulgated by a specific State or Tribe, not by OSM. Decisions on proposed abandoned mine land reclamation plans and plan amendments submitted by a State or Tribe are based solely on a determination of whether the submittal meets the requirements of Title IV of SMCRA (30 U.S.C. 1231–1243) and 30 CFR Part 884 of the Federal Regulations.

#### *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 abandoned mine land reclamation programs. 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 405(d) of SMCRA requires State abandoned mine reclamation programs be in compliance with procedures, guidelines, and requirements established by SMCRA.

#### *Executive Order 13175—Consultation and Coordination With Indian Tribal Governments*

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. This final rule applies only to the Kentucky program and therefore does not affect tribal programs.

#### *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 agency decisions on proposed

State and Tribal abandoned mine land reclamation plans and plan amendments are categorically excluded from compliance with the National Environmental Policy Act (42 U.S.C. 4332) by the Manual of the Department of the Interior (516 DM 6, appendix 8, paragraph 8.4B(29)).

#### *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: August 27, 2003.

#### **Brent Walquist,**

*Regional Director, Appalachian Regional Coordinating Center.*

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

#### **PART 917—KENTUCKY**

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

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

#### **§ 917.21 [Amended]**

■ 2. Section 917.21 is amended by adding paragraph (d) to read as follows:

\* \* \* \* \*

(d) The Kentucky Abandoned Mine Land Reclamation Plan amendment, submitted to OSM on April 29, 2002, is approved with the following exceptions. The word “or,” which appears at the end of paragraph 1 of the section entitled “Lands for Permanent Facilities,” is not approved. We are approving the State of Kentucky’s incorporation by reference of the Federal AML Enhancement Rule into their regulations. This approval is subject to the restrictions placed upon the Federal regulation by the court in *Kentucky Resources Council v. Norton*, 2002 U.S. App. Lexis 11365, Slip. Op. at 5. (D.C. Cir. May 30, 2002) The “Reclamation Agreements” provision at the end of Chapter 12 only applies to AML reclamation projects authorized through the Federal AML grant process. Copies may be obtained at the address listed in (a)(2) of this section for OSM or the Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet, Division of Abandoned Mine Lands, 2521 Old Lawrenceburg Road, Frankfort, Kentucky 40601.

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