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## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 917

[KY-245-FOR]

#### Kentucky Regulatory Program

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

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

**SUMMARY:** We, the Office of Surface Mining Reclamation and Enforcement (OSM), are announcing the removal of a required amendment to the Kentucky regulatory program (the "Kentucky program"). The Kentucky program was established under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) and authorizes Kentucky to regulate surface coal mining and reclamation operations in Kentucky.

**EFFECTIVE DATE:** December 31, 2003.

**FOR FURTHER INFORMATION CONTACT:** William J. Kovacic, Field Office Director; Telephone: (859) 260-8400; E-mail: [bkovacic@osmre.gov](mailto:bkovacic@osmre.gov).

#### SUPPLEMENTARY INFORMATION:

- I. Background on the Kentucky Program
- II. Purpose of the Rule
- 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. Purpose of the Rule

The required amendment at 30 CFR 917.16(k) reads as follows:

By October 1, 1993, Kentucky shall submit to OSM either proposed amendments or a schedule for the submission of proposed amendments to Kentucky Administrative Regulations (KAR) to require that the assessment Conference Officer's Report mentioned in 405 KAR 7:092 Section 4(5) be served in a manner consistent with 405 KAR 7:091 Section 5, and to specify that the time allowed under 405 KAR 7:092 Section 6(1)(b) to file a petition for administrative review of the proposed penalty set forth in the Conference Officer's Report does not begin to run until service is obtained in this manner.

On March 28, 2003, OSM forwarded a letter to Kentucky requesting that the required amendment at 30 CFR 917.16(k) be addressed by forwarding to OSM a policy statement that established its procedures on mailing of Conference Officer's Reports and the date that begins the administrative petition process. In response to this request we received a letter from the Kentucky Natural Resources and Environmental Protection Cabinet, Office of Administrative Hearings, dated April 3, 2003, requesting that its policy of requiring all Conference Officer's Reports be sent by certified mail be considered by us as fulfilling the requirements of the above-mentioned amendment (Administrative Record No. KY-1576). Included in the letter was a copy of a memorandum, dated April 2, 2002, sent from the Chief Hearing Officer to the Penalty Assessments Coordinator and the Assessment Conference Officer. This memorandum reminded its recipients that, according to policy, all Conference Officer's Reports should be mailed via certified mail, return receipt requested, and that, in calculating the time for the filing of an administrative petition, the beginning date should be the date of service of the Conference Officer's Report, rather than the mailing date. The memorandum acknowledged that Kentucky's regulation, which allows service by regular mail, had been found by OSM to be less effective than a corresponding Federal regulation (Administrative Record No. KY-1605).

Based on the commitments included in the above-referenced letter and accompanying memorandum, we announced our proposal to remove this required amendment on October 3, 2003, in the **Federal Register** (68 FR

57398). In the same notice we opened the public comment period and provided an opportunity for a public hearing or meeting on whether the policy letter discussed above meets the requirements of the required amendment, thereby eliminating the need for a revision to the Kentucky regulatory program. We did not hold a public hearing or meeting because no one requested one. The public comment period closed on November 3, 2003. We received comments from two Federal agencies (U.S. Department of the Interior, Fish and Wildlife Service and the U.S. Army Corps of Engineers). We also received comments from the Kentucky Resources Council, Inc.

#### III. OSM's Findings

In our August 6, 1993, decision we determined that the required amendment was necessary because we were concerned that 405 KAR 7:092 section 4(5) was less effective than its Federal counterpart found at 30 CFR 845.18 because of the way in which Conference Officer's Reports were administratively handled (58 FR 42001, 42006). Although Kentucky has not amended its regulations in response to this required amendment, Kentucky's policy has been to serve all Conference Officer's Reports by certified mail and to begin the period for filing an administrative petition from the date of service of the report (Administrative Record No. KY-1605). Our analysis of this policy indicates that it clarifies the language of the Kentucky regulation, which requires service by "mail", without specifying whether the service must be made by "certified" or "regular" mail. 405 KAR 7:092, section 4(5). In addition, Kentucky's policy of starting the appeal period from the date of service indicates that the State interprets its regulation at 405 KAR 7:092, section 6(1)(b), which begins the appeal period on the mailing date, in a manner consistent with its policy, and with the Federal regulations. In other words, it is apparent that Kentucky interprets the term "mailing" to include service, *i.e.*, receipt, of the Conference Officer's Report. Furthermore, the record is devoid of any indication that Kentucky has failed to follow this policy in the last decade. With these policy clarifications now in place, these aspects of the Kentucky program clearly meet the requirements of, and are therefore consistent with, the Federal regulations at 30 CFR 845.17 and 845.18.

We do recognize that this determination is being made based on program implementation based on a State policy, rather than via a statutory

or regulatory change. Should we find that in the future the State's actions concerning Conference Officer's Reports are no longer consistent with the requirements of 30 CFR 845.17 and 845.18, we will take the necessary action at that time to bring their program into compliance with this decision.

Therefore, we have determined that the required amendment at 30 CFR 917.16(k) is no longer needed and will be removed.

#### IV. Summary and Disposition of Comments

##### Public Comments

The Kentucky Citizens Coal Law Project (KCCLP), a division of the Kentucky Resources Council, submitted comments dated October 28, 2003 (Administrative Record No. KY-1603). These comments primarily relate to two specific concerns which we address below:

(1) KCCLP does not believe the Kentucky policy resolves the conflict between State and Federal regulations concerning the timing for appeal of the Conference Officer's Report.

As we discussed in the above finding, Kentucky has stated, in its policy, that the date for filing an administrative petition begins on the date of service. Therefore, we have determined that the implementation of this program is consistent with the Federal requirements. If we subsequently find that Kentucky is no longer able or willing to enforce its program in a manner consistent with Federal regulations, we will take appropriate action to bring the program back into compliance.

(2) KCCLP does not believe that a Kentucky policy of serving Conference Officer's Reports by certified mail is as effective as its Federal counterpart and violates State and Federal law. This comment appears to rest with both 30 U.S.C. 1253(1)-(7), which requires that State laws and regulations be consistent, and in accordance, with Federal requirements, and Kentucky Revised Statutes (KRS) 13A.130, which prohibits agencies in Kentucky from adopting or enforcing any policy that modifies or alters a regulation.

We agree with the commenter that 30 U.S.C. 1253(a)(1)-(7) require laws and regulations consistent with and in accordance with Federal requirements. We also agree with the commenter on what the Federal requirement is regarding service of Conference Officer Reports. However, we have determined that Kentucky's implementation of its program is consistent with the Federal

requirements. The State regulation at issue, 405 KAR 7:092, section 4(5), sets forth that "[t]he Conference Officer's Report shall be promptly served by mail \* \* \*" (Emphasis added.) The regulation does not specify, however, the type of mail delivery required. For example, it does not require the report to be served by "regular" mail. As such, a policy specifying that service be accomplished by "certified" mail is not inconsistent with the State regulatory requirement. Further, since documentation of receipt is an integral part of the certified mail process, a policy that begins the period for appeal upon receipt of the certified mail is not inconsistent with the State regulations even though it may not be expressly mandated by that regulation. Kentucky has been operating in a manner consistent with this policy and the Federal requirements for the past decade. Therefore that policy constitutes ample grounds for removing the required amendment. Nevertheless, if in the future we determine that Kentucky is not implementing its program in a manner consistent with the Federal requirements we will revisit this issue and take whatever action is necessary to ensure the State's administrative handling of Conference Officer's Reports occurs in accordance with Federal requirements.

Regarding the State's law, we believe that any step taken by OSM to analyze and interpret KRS 13A.130 in a manner inconsistent with Kentucky's documented policy and practice in applying that law is clearly outside the scope of our jurisdiction. We believe it is within the discretion of the Kentucky Natural Resources and Environmental Protection Cabinet to determine that it is complying with Kentucky's statutory limits in interpreting its regulation in the above-described way.

##### Federal Agency Comments

The U.S. Department of the Interior, Fish and Wildlife Service submitted a letter dated October 29, 2003 (Administrative Record No. KY-1605), in which they indicated it has no substantive comments regarding the removal of the required amendment.

The U.S. Army Corps of Engineers submitted a statement dated October 31, 2003 (Administrative Record No. KY-1606), in which it indicated it had no comments on the proposed rule.

#### V. OSM's Decision

Based on the above findings we have determined that the required amendment at 30 CFR 917.16(k) is no longer needed and will be removed.

#### VI. Procedural Determinations

##### Executive Order 12630—Takings

This rule is a technical amendment and does not have takings implications.

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

This rule is exempt 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.

##### Executive Order 13132—Federalism

This rule is a technical amendment and does not have federalism implications.

##### 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 determination is based on the fact that the Kentucky program does not regulate coal exploration and surface coal mining and reclamation operations on Indian lands. Therefore, the Kentucky program has no effect on federally-recognized Indian tribes.

##### 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 will not 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 rule is a technical amendment that does not impose any additional requirements on small entities.

#### *Small Business Regulatory Enforcement Fairness Act*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. For the reasons stated above, 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.

#### *Unfunded Mandates*

This rule is a technical amendment and 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.

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

Intergovernmental relations, Surface mining, Underground mining.

Dated: December 8, 2003.

#### **Brent Wahlquist,**

*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.*

#### **§ 917.16 [Amended]**

■ 2. Section 917.16 is amended by removing and reserving paragraph (k).

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### **DEPARTMENT OF HOMELAND SECURITY**

#### **Coast Guard**

#### **33 CFR Part 165**

[COTP Charleston-03-171]

**RIN 1625-AA00**

#### **Security Zones; Charleston Harbor, Cooper River, SC**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule; request for comments.

**SUMMARY:** The Coast Guard is establishing a temporary fixed security zone in the waters under the Don Holt I-526 Bridge on the Cooper River to the entrance of Foster Creek on the Cooper River. This security zone is needed for national security reasons to protect the public and ports from potential subversive acts during port embarkation operations. Vessels are prohibited from entering, transiting, anchoring, mooring, or loitering within this zone, unless specifically authorized by the Captain of the Port, Charleston, South Carolina or his designated representative.

**DATES:** This regulation is effective from 8 a.m. on December 10, 2003, until 8 a.m. on June 1, 2004. Comments and related material must reach the Coast Guard on or before March 30, 2004.

**ADDRESSES:** You may mail comments and related material to Coast Guard Marine Safety Office Charleston, 196 Tradd Street, Charleston, South Carolina 29401. Coast Guard Marine Safety Office Charleston maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of (COTP Charleston 03-171), will become part of this docket and will be available for inspection or copying at Marine Safety Office Charleston, between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** LT Kevin Floyd, Coast Guard Marine Safety Office Charleston, at (843) 720-3272.

**SUPPLEMENTARY INFORMATION:**

#### **Request for Comments**

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD07-03-171), indicate the specific section of this document to which each comment applies, and give the reason for each comment. The Coast Guard is especially interested in comments concerning the size and boundaries of this security zone and any economic impact this rule may have on you.

Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this rule in view of them.

#### **Good Cause**

Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a Notice of Proposed Rulemaking (NPRM). Publishing an NPRM would be contrary to public safety interests and national security. These regulations are needed to protect the public, the ports and waterways and the national security of the United States from the potential of subversive acts against vessels and port facilities and infrastructure during port embarkation operations occurring within the security zone. For the security concerns noted, it is in the public interest to have these regulations in effect during the port embarkation operations. In addition, notifications will be made via marine information broadcasts.

For the same reasons, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**.

#### **Background and Purpose**

Based on the September 11, 2001, terrorist attack on the World Trade Center in New York and the Pentagon in Arlington, Virginia, there is an increased risk that subversive terrorist activity could be launched by vessels or persons in close proximity to the Port of Charleston, South Carolina, against military installations or operations occurring within the security zone. This temporary security zone is necessary to protect the safety of life and property on the navigable waters, prevent potential terrorist threats aimed at military