

■ b. In the second sentence, the phrase “MSHA Metal and Nonmetal Mine Safety and Health District Offices and from MSHA Coal Mine Safety and Health Subdistrict Offices” is revised to read “the MSHA District Office.”

■ c. At the end of the paragraph, add “You may also submit reports by facsimile, 888-231-5515. To file electronically, follow the instructions on the MSHA Internet site at <http://www.msha.gov>. For assistance in electronic filing, contact the MSHA help desk at 877-778-6055.”

#### § 50.30-1 [Amended]

■ 14. In § 50.30-1(a), in the second sentence, the phrase “Health and Safety District or Subdistrict” is revised to read “District.”

Dated: May 7, 2004.

**Dave D. Lauriski,**

*Assistant Secretary of Labor for Mine Safety and Health.*

[FR Doc. 04-10872 Filed 5-12-04; 8:45 am]

BILLING CODE 4510-43-P

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 917

[KY-244-FOR]

#### Kentucky Regulatory Program

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

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

**SUMMARY:** We are not approving an amendment to the Kentucky regulatory program (the “Kentucky program”) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Kentucky transferred \$3,000,000 from the Kentucky Bond Pool Fund (the Fund) on June 19, 2003, and \$840,000 on March 1, 2004, to the Commonwealth’s General Fund for the 2002–2003 fiscal year.

**EFFECTIVE DATE:** May 13, 2004.

**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 telefax dated March 20, 2002, Kentucky asked us to informally review the proposed transfer of \$3,000,000 from the Fund to its General Fund (Administrative Record No. KY-1528). By letter dated March 20, 2002, we expressed concern about the transfer and directed Kentucky to submit the amendment formally. We also advised Kentucky that under 30 CFR 732.17(g), the proposed transfer could not take effect until approved by OSM as an amendment to the approved State program (Administrative Record No. KY-1528). On March 18, 2003, we sent a second letter to Kentucky stating that we had become aware of the proposed transfer of funds in House Bill 269, which had been recently passed by the Kentucky General Assembly (Administrative Record No. KY-1575). We reiterated our concerns with the transfer and referred to our letter dated March 20, 2002. We emphasized that “no such change to laws or regulations shall take effect for purposes of a State program until approved as an amendment.”

By letter dated May 22, 2003, Kentucky sent us an amendment to its program (Administrative Record No. KY-1580) under SMCRA (30 U.S.C. 1201 *et seq.*). Kentucky submitted a portion of House Bill 269, the executive branch budget bill, promulgated by the

2003 Kentucky General Assembly. Specifically, Kentucky transferred \$3,000,000 from the Fund established in Kentucky Revised Statute (KRS) 350.700 to the Commonwealth’s General Fund for the 2002–2003 fiscal year. The transfer appears on page 225, line 21 and is listed under Part V, Section J, item 5 of House Bill 269; the effective date of the transfer was June 19, 2003.

By letter dated July 10, 2003, we requested additional information from Kentucky in the form of a financial analysis (Administrative Record No. KY-1584). We asked that the analysis specifically demonstrate that the transfer of funds would not adversely impact the Fund’s ability to complete the reclamation plan for any area which may be in default at any time as required by 30 CFR 800.11(e). By letter dated August 14, 2003, Kentucky responded by stating the Madison Consulting Group would perform an actuarial review of the Fund (Administrative Record No. KY-1599). By letter dated March 3, 2004, the Department for Natural Resources (formerly the Department for Surface Mining Reclamation and Enforcement) transmitted the Kentucky Bond Pool Actuarial Report to us (Administrative Record No. KY-1615).

The actuarial review covers the time period July 1, 2000, through June 30, 2003, and takes into account that \$3,000,000 was transferred from the Fund on June 19, 2003, with an additional \$840,000 to be transferred from the Fund on March 1, 2004. The full text is available for you to read at the locations listed above at **ADDRESSES**. The key findings of the report are summarized here. The report concluded that the Fund:

1. Should be able to “reasonably withstand the failure of any two of its member companies” to be actuarially sound and viable on a long-term basis (p. 7);
2. Is “currently not able to reasonably provide for the ‘two failure’ funding scenario up to a 75 percent confidence level” (p. 8);
3. Needs to increase its assets “so as to provide for potential liabilities and future growth” (p. 8); and
4. Is in a less favorable financial situation than the last analysis completed for the period ending June 30, 2000 (p. 8).

We announced receipt of the proposed amendment in the July 16, 2003, **Federal Register** (68 FR 41980), and in the same document invited public comment and provided an opportunity for a public hearing on the adequacy of the proposed amendment.

The public comment period closed on August 15, 2003.

The additional information in the form of the actuarial analysis report was announced in the March 30, 2004, **Federal Register** (69 FR 16511), when we reopened the public comment period that closed on April 14, 2004. We received comments from three private organizations and two Federal agencies.

### 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. Any revisions that we do not specifically discuss below concern nonsubstantive wording or editorial changes.

Kentucky transferred \$3,000,000 from the Fund established in KRS 350.700 to its General Fund on June 19, 2003, and an additional \$840,000 on March 1, 2004. Neither of these transfers was submitted to OSM prior to implementation in accordance with 30 CFR 732.17(g). Section 509(c) of SMCRA and the Federal regulations at 30 CFR 800.11(e) authorize OSM to approve an alternative bonding system if that system achieves the objectives and purposes of the Federal bonding system. Under this authority, OSM approved the provisions of KRS 350.700 on July 18, 1986 (51 FR 26002), and March 9, 1987 (52 FR 7132). OSM also approved, in part, revisions to the Fund on August 18, 1992 (57 FR 37086).

In the July 18, 1986, notice, we approved Kentucky's bond pool as established in Senate Bill (SB) 130. The provisions of SB 130 stipulated that bond pool monies would be collected and placed in an interest-bearing account and used for the following purposes only: (1) To reclaim permit areas covered by the Fund in the event of bond forfeiture; (2) to cover administrative costs of the Fund; (3) to fund audits and actuarial studies required for the Fund; and (4) to cover operating and legal expenses of the bond pool commission. In our approval, we noted that 30 CFR 800.11(e) authorizes approval of an alternate bonding system (ABS) if the regulatory authority will have available sufficient money to complete the reclamation plan for any areas in default at any time and if the ABS provides an economic incentive for the permittee to comply with all reclamation provisions. We found that the Kentucky ABS achieved the objectives and purposes of Section 509 of SMCRA in that it provided for funding in an amount sufficient to ensure the completion of the reclamation plan and it did not alter the approved Kentucky requirements for

liability under the bond for the mining operation and the operator's liability period. We also noted that the Fund should accrue at a rate as to provide sufficient opportunity to observe the operation of the Fund to determine the adequacy of amounts and fees. We determined that the Fund should be sufficient to supplement reduced operator bonds to the extent necessary to reclaim defaulted sites to standards in the reclamation plan, at least until such time as there is sufficient data available to determine the adequacy of the program. If the Fund was found to be inadequate to supplement member bonds in the event of member default on reclamation obligations, or could not replenish itself at a sufficient rate to avoid delays in reclamation of forfeited sites, we would require an adjustment in the Fund limits and/or fees collected for the Fund (51 FR 26004-5). Subsequent revisions to Kentucky's bond pool provisions did not alter the basis for our original approval.

Based on our review and the findings presented in the Kentucky Bond Pool Actuarial Report, we find that Kentucky's transfer of funds in the amount of \$3,840,000 violates the basis for our 1986 approval by directing funds to other nonapproved uses. Further, such transfers are not consistent with the requirements of SMCRA and the Federal regulations at 30 CFR 800.11(e) that require that the ABS ensures that the regulatory authority has sufficient funds available to complete the reclamation plan for any areas which may be in default at any time. Therefore, we cannot approve the amendment. The transfer of funds seriously jeopardizes Kentucky's ability to provide for the completion of reclamation plans as required by the Federal regulations and represents a significant departure from the terms of OSM's approvals of Kentucky's alternative bonding system on July 18, 1986.

To avoid any action required by 30 CFR part 732, we are therefore requesting that Kentucky do the following. Within 60 days of the date of publication of this decision in the **Federal Register**, Kentucky should either replenish the \$3,840,000 into the Fund or provide us with a written description of a plan to accomplish this action. Additionally, until the Fund is replenished, Kentucky should not initiate any actions that further jeopardize the solvency of the Fund such as increasing the number of participants or adding acreage. In short, use of the Fund to provide new financial guarantees is hereby suspended.

### IV. Summary and Disposition of Comments

#### Public Comments

We solicited public comments on July 16, 2003, and provided an opportunity for a public hearing on the amendment. Two commenters responded. Because no one requested an opportunity to speak, a hearing was not held. Upon receipt of the actuarial study, we reopened the public comment period on March 30, 2004, for fifteen days (69 FR 16511). Two commenters responded.

The Coal Operators & Associates, Inc. (COA) submitted comments by letter dated August 6, 2003 (Administrative Record No. KY-1597). The COA encourages OSM to disapprove the transfer of \$3,840,000 from the Fund to the General Fund because such transfers could make the bond pool financially unsound in that sufficient funds would not be available to cover any reclamation liability that might be incurred by a permittee's financial failure. We agree and are not approving the amendment as discussed in "OSM's Findings" above. The COA also submitted comments on April 2, 2004, (Administrative Record No. KY-1620) in response to the reopened comment period. The COA reiterated its strong opposition to the transfer of funds and encouraged OSM to disapprove the amendment. As stated earlier, we are not approving the amendment.

The Kentucky Resources Council, Inc. (KRC) submitted comments by an electronic mail message dated August 10, 2003 (Administrative Record No. KY-1598). The KRC states that the amendment must be disapproved unless and until Kentucky can produce an actuarial study demonstrating that the transfer of funds will not adversely affect the ability of the Fund to assure reclamation of all properties insured under the Fund. We agree and based, in part, on the findings presented in the Kentucky Bond Pool Actuarial Report, we are not approving the amendment as discussed in "OSM's Findings" above. The KRC further urges OSM to take prompt action to require that permitted operations obtain individual performance bond coverage if the alternative bonding mechanism fails to meet the requirements of Section 509(c) of SMCRA. Because we have not found the ABS in violation of SMCRA or the Federal regulations, we believe such action would be premature. Finally, the KRC states that in the event that the funds have already been transferred in violation of 30 CFR 733.11 and 732.17, OSM should direct that no further risks be incurred by the State bond pool, including no new operators and no new

acreage, until the State either restores the funds or demonstrates solvency of the Fund. We agree, as discussed in "OSM's Findings" above.

Financial Assurance Consulting Services (FACS) submitted comments on April 14, 2004 (Administrative Record No. KY-1622), in response to the reopened comment period. FACS recommends that OSM not approve the amendment and offers four reasons in support of its recommendation. They are: (1) The proposed transfer of funds is not in accordance with Federal regulations and further erodes the bond pool not deemed currently sufficient by the actuarial report; (2) approval of the transfer would set a precedent that could jeopardize the integrity of other bonding systems approved by OSM, and may result in additional transfers on monies if legislatures view bond pools as an available source of funds; (3) Kentucky's bond pool funds must be available to the regulatory authority in the same manner conventional bonds are to guarantee reclamation, as required by SMCRA (The transfer of funds jeopardizes that availability.); and (4) the integrity of the Kentucky Fund must be protected and Kentucky should be required to do so. Kentucky should be required to reimburse the Fund for the amount of monies transferred. Also, FACS recommends a program amendment to assure that bond monies are not jeopardized, and suggests that an insured trust/escrow account be substituted for the current trust and agency account. Further, FACS recommends that OSM require Kentucky to implement some kind of procedure or mechanism for having the legislature reimburse the bond pool fund for monies already transferred. In response, we note that because we have not found the ABS in violation of SMCRA or the Federal regulations, we believe any actions such as these would be premature. Otherwise, however, we agree on all points and are not approving the amendments as discussed in "OSM's Findings" above. We are also requesting that Kentucky replenish the Fund in the amount of the \$3,840,000.

#### *Federal Agency Comments*

According to 30 CFR 732.17(h)(11)(i), on July 16, 2003, we solicited comments on the amendment submitted on May 22, 2003, from various Federal agencies with an actual or potential interest in the Kentucky program. Two commenters responded. By letter dated July 28, 2003, the Department of Labor, Mine Safety and Health Administration, commented that the proposed amendment had no apparent impact on its program (Administrative Record No.

KY-1596). By an electronic mail message dated July 31, 2003, the U.S. Fish and Wildlife Service commented that it was concerned that Kentucky's proposed transfer of funds from the Bond Pool Fund to the General Fund sets "an extremely bad precedence for future activities of this nature" (Administrative Record No. KY-1595). We agree and are not approving the amendment as discussed in "OSM's Findings" above.

#### *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.*). Because the provisions of this amendment do not relate to air or water quality standards, we did not request EPA's concurrence.

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

Based on the above findings, we are not approving the amendment as submitted by Kentucky on May 22, 2003. We are requesting that within 60 days of publication of this decision in the **Federal Register**, Kentucky either replenish the \$3,840,000 into the Fund or submit to us a written description of a plan to accomplish this action. Additionally, Kentucky should not initiate any actions that would further jeopardize the Fund's solvency, such as increasing the number of participants or adding additional acreage. The use of the Fund to provide new financial guarantees is hereby suspended.

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 of 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 approved State programs that are not approved by OSM. In the oversight of the Kentucky program, we will recognize only the statutes, regulations, and other materials we have approved, 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 that warrant the preparation of a takings implication assessment. This determination is based on an analysis of the action being taken by OSM. Our decision not to approve the State program amendment and, therefore, the transfer of \$3,840,000 from the Fund to the Commonwealth's General Fund will not affect the use or value of private property within the meaning of Executive Order 12630.

##### *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 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. The basis for this determination is our decision on a State regulatory program and does not involve a Federal regulation involving Indian lands.

*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.*). This determination is based on an analysis of the action being taken. The decision by OSM not to approve the State program amendment and, therefore, the transfer of \$3,840,000 from the Fund to the Commonwealth's General Fund is an administrative action that does not impose new obligations or requirements on small entities as determined by the size standard of the Small Business Administration at 13 CFR 121.201.

*Small Business Regulatory Enforcement Fairness Act*

For the reasons previously stated, 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.

*Unfunded Mandates*

For the reasons previously stated, 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.

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

Intergovernmental relations, Surface mining, Underground mining.

Dated: April 21, 2004.

**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.*

■ 2. Section 917.17 is amended by revising the section heading and adding paragraph (c) to read as follows:

**§ 917.17 State regulatory program amendments not approved.**

\* \* \* \* \*

(c) The amendment to Kentucky's program transferring \$3,840,000 from the Kentucky Bond Pool Fund to the Commonwealth's General Fund for the 2002–2003 fiscal year is not approved. The use of the Fund to provide new financial guarantees is hereby suspended.

\* \* \* \* \*

[FR Doc. 04–10746 Filed 5–12–04; 8:45 am]

**BILLING CODE 4310–05–P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[R07–OAR–2004–MO–0001; FRL–7661–4]

**Approval and Promulgation of Implementation Plans; State of Missouri**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** EPA is announcing it is approving a revision to the Missouri State Implementation Plan (SIP) which updates changes to the non-regulatory portion of the Inspection and Maintenance (I/M) Program for the St. Louis area. The original SIP for the centralized St. Louis I/M program was approved in 2000 and the program was implemented in April 2000. Due to a regulatory amendment, the SIP was revised in 2002. At that time, the non-regulatory portion of the SIP was not revised. Approval of this revision will ensure consistency between the description of the program included in the approved SIP and the current Missouri program description.

**DATES:** This direct final rule will be effective July 12, 2004, without further notice, unless EPA receives adverse comment by June 14, 2004. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Regional Material in EDocket (RME) ID Number R07–OAR–2004–MO–0001, by one of the following methods:

1. Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

2. Agency Web site: <http://docket.epa.gov/rmepub/>. RME, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Once in the