Original amendment submission date	Date of final publication	Citation/description
* * *	* * *	* * *
October 29, 1996 and June 15, 2005	September 18, 2006	Colorado Inactive Mine Reclamation Plan, Chapter VI.

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 917

[KY–250–FOR]

Kentucky Regulatory Program

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

ACTION: Final rule; approval of amendment.

SUMMARY: We are approving an amendment, with one exception, to the Kentucky regulatory program (the ''Kentucky program'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Kentucky submitted three separate items with revisions pertaining to prepayment of civil penalties, easements of necessity for reclamation on bankruptcy sites, and various statutes to eliminate outdated language.

DATES: *Effective Date:* September 18, 2006.

FOR FURTHER INFORMATION CONTACT: William J. Kovacic, Telephone: (859) 260–8400. Telefax number: (859) 260–8410.

SUPPLEMENTARY INFORMATION:

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 21434). You can also find later actions concerning Kentucky's program and program amendments at 30 CFR 917.11, 917.12, 917.13, 917.15, 917.16 and 917.17.

II. Submission of the Proposed Amendment

By letter dated March 28, 2006, Kentucky sent us a proposed amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*) at its own initiative ([KY–250–FOR], Administrative Record No. KY–1642). The full text of the program amendment is available for you to read at the location listed above under **ADDRESSES**.

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.

The first change was mandated by the Supreme Court of Kentucky (Court) in the case of *Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet* v. *Kentec Coal Co., Inc.*, No. 2003–SC–000622–DG. The Court issued an opinion on September 22, 2005, in which it found that the provisions of 405 KAR [Kentucky Administrative Regulations] 7:092 that required a corporate permittee to prepay an assessed civil penalty to get a due process hearing on the penalty amount was an unconstitutional violation of equal protection provisions of the State and Federal constitutions. The court also held that the assessment of the penalty against Kentec without prepayment and without consideration of the permittee's inability to pay was a violation of Section 2 of the Kentucky Constitution and an unreasonable and arbitrary exercise of the Kentucky Environmental and Public Protection Cabinet's (Cabinet) authority.

The Department for Natural Resources' Division of Mine Reclamation and Enforcement, in response to this ruling, has altered the provisions on its notices of assessment of civil penalties to comply with the ruling. The Division uses the following statement of appeal rights on the assessment notices:

> Should you decide not to negotiate, you have three (3) options remaining to resolve the proposed assessment. You may (1) choose not to contest the amount of the proposed assessment or the violation in which case a final Order [order] of the Secretary will be entered.
>
> **Note:** If an administrative hearing as to the fact of the violation was properly requested under 405 KAR 7:092, the final order will only determine the amount of the penalty and *not* the fact of the violation; (2) request an assessment conference to contest the proposed assessment; **Note:** The Kentucky Bar Association has determined that the appearance of individual who is not a licensed attorney, on behalf of a third person, corporation or another entity, at a penalty assessment conference constitutes the unauthorized practice of law. Corporations or other entities must be represented by counsel at penalty assessment conferences. Individuals may represent themselves; or (3) request an administrative hearing instead of an assessment conference. See 405 KAR 7:092, Section 6. Prepayment of the proposed assessment is no longer required. [emphasis added]

The Office of Administrative Hearings has also altered language on the Penalty Assessment Conference Officer's Report that advises permittees of their rights to an administrative hearing. That language reads as follows:

> Any person issued a proposed penalty assessment may request an administrative hearing to contest the Conference Officer's recommended penalty or the fact of the violation or both by filing with the Office of Administrative Hearings, 35–36 Fountain Place, Frankfort, Kentucky 40601, a petition under Section 6 of 405 KAR 7:092. The Cabinet may also request under Section 5 of 405 KAR 7:092 an administrative hearing to contest the Conference Officer's recommended penalty. [Permittee] should take notice that given the decision by the Supreme Court of Kentucky in Environmental and Public Protection Cabinet v. Kentec, 2005 WL 2316191, ____S.W. 3d____, (2005), the provisions of 405 KAR 7:092, Section 6 (2)(b) requiring prepayment of the proposed penalty ARE NO LONGER IN EFFECT and [Permittee] DOES NOT need to prepay the recommended penalty amount in the event it decides to request a Formal Administrative Hearing.

If a request for an administrative hearing is not filed with the Office of Administrative Hearings within thirty (30) days of mailing of this Report and Recommendation, the Secretary shall enter an order providing: (a) That [Permittee] has waived all rights to an administrative hearing on the amount of the proposed assessment; (b) that the fact of violation is deemed admitted; and (c) that the penalty assessment contained in this Report and Recommendation is deemed accepted and is due and payable to the Cabinet within thirty (30) days after the entry of the final order. If a petition requesting a hearing as to the fact of the violation has been timely filed pursuant to Section 7 of 405 KAR 7:092, the finding set forth in clause (b) of the preceding sentence shall be omitted from the Secretary's order and the penalty assessment contained in this Report and Recommendation shall be due and payable within thirty (30) days of the mailing of the final order affirming the fact of a violation. [emphasis added]

This is the second time the Supreme Court of Kentucky has ruled that prepayment requirements used by the cabinet for due process hearings regarding surface mining violations are unconstitutional under the Kentucky Constitution. The ruling in *Franklin* v. *Natural Resources and Environmental Protection Cabinet*, 799 S.W.2d 1 (Ky. 1990) held that a similar prepayment requirement that applied to all persons violated the equal protection clauses of the State and Federal constitutions. Kentucky undertook a major revamp of its hearing procedures in response to that ruling and put the current hearings process in place. That process, insofar as the prepayment requirement is concerned, has now been found unconstitutional.

The Supreme Court of Kentucky ruling notwithstanding, section 518(c) of SMCRA and the Federal regulations require prepayment of a proposed penalty if a hearing is requested. The Federal regulations at 30 CFR 845.19(a) clearly state:

The person charged with the violation may contest the proposed penalty or the fact of the violation by submitting a petition and an amount equal to the proposed penalty or, if a conference has been held, the reassessed or confirmed penalty to the Office of Hearings and Appeals (to be held in escrow * * *) within 30 days from receipt of the proposed assessment or reassessment or 30 days from the date of service of the conference officer's action, whichever is later.

Because Kentucky is waiving prepayment of the penalty specifically required by the Federal regulations, the Director finds that Kentucky's proposed revision is less stringent than section 518(c) of SMCRA and less effective than the Federal regulations at 30 CFR 845.19(a) and therefore cannot be approved.

The second proposed change is Senate Bill 219, which creates an easement of necessity to conduct reclamation operations by entities who have assumed the reclamation obligations of a bankrupt permittee and where the rights of entry held by the permittee have been terminated. The terms only apply to those areas where only reclamation is being performed. It does not apply to areas where coal removal is planned by a successor to the permittee. The legislation calls for payment of a sum certain to rights holders and allows the parties to take any disputes about the sufficiency of the payment to court for an adjudication of an appropriate amount.

There is no Federal counterpart to these provisions. Because they provide a method for ensuring reclamation that is in addition to the methods provided for in the Federal rule, the revisions Kentucky proposes in this amendment are approved in accordance with Section 505(b) of SMCRA.

The third proposed change is Senate Bill 136 which deletes certain language from Chapter 350 of the Kentucky Revised Statutes (KRS), the chapter containing the Kentucky surface mining laws. This bill eliminates language in: KRS 350.060(12) relating to the two-acre exemption and KRS 350.060(16) pertaining to permit renewal applications that were not timely filed; KRS 350.075(3) requiring the submission of regulations before August 1, 1986; KRS 350.090(1) relating to the exceptions for permit applications or renewals submitted in compliance with KRS 350.060(2) (**note:** we believe that the correct citation should be KRS 350.060(12)); KRS 350.093(9) dealing with bond coverage exceptions for third party actions; and KRS 350.445(3)(g) pertaining to roads above highwalls that ''support coal mining activities.'' Section KRS 350.285 relating to removal of coal on private lands is deleted in its entirety. Each of these amendments to statutes eliminates language from the chapter that is outdated, was disapproved by OSM in previous years, or was a counterpart to a repealed provision of SMCRA. The OSM actions to which Kentucky is responding are listed below.

At section 201 of SMCRA, OSM repealed the two-acre exemption on May 7, 1987. On May 10, 2000, OSM disapproved Kentucky's proposal at KRS 350.060(16) to issue a notice of noncompliance, instead of an Imminent Harm Cessation Order, to a person who has not yet filed a renewal application when the permit has expired (65 FR 29949). Then, on September 6, 2000, OSM set aside these provisions (65 FR 53909). On February 12, 1990, OSM disapproved Kentucky's proposal at KRS 350.093(6)(c) relieving a permittee of bond liability for actions of third parties beyond the permittee's control (55 FR 4866). Then, on June 5, 1990, OSM set aside these provisions (55 FR 22903). On November 20, 2002, OSM disapproved Kentucky's proposal at 350.285 that removal of coal on private land, incidentally and as a necessary requirement of facility construction or related excavation or landscaping, not require the landowner to obtain a surface mining permit if the coal is 5,000 tons or less, the coal is donated to a charitable organization, or if the landowner notifies Kentucky at the time the coal is first encountered (67 FR 70007). On January 16, 2003, OSM disapproved the retention of roads above highwalls ''to support coal mining activities.'' (68 FR 2196).

Because Kentucky's revisions at KRS 350.060(12) and (16), KRS 350.090(1), KRS 350.093(9), KRS 350.285, and KRS 350.445(3)(g) either eliminate provisions disapproved by OSM, or, in the case of the ''two acre exemption,'' eliminate a provision that had a repealed Federal counterpart, we find that the revisions do not render the Kentucky program less stringent than the provisions of SMCRA or less effective than the Federal regulations.

The following revision was made to remove outdated language. Kentucky deleted the requirement at KRS 350.075(3) to submit proposed regulations pertaining to special remining permits to OSM on or before August 1, 1986. While there is no corresponding Federal provision, we are approving the revision because it is not inconsistent with the requirements of SMCRA and the Federal regulations.

We announced receipt of the proposed amendment in the May 3, 2006, **Federal Register** (69 FR 55373), 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 June 2, 2006. We received five comments.

IV. Summary and Disposition of Comments

Public Comments

We solicited public comments on May 3, 2006, and provided an opportunity for a public hearing on the amendment. We received three public comments. Because no one requested an opportunity to speak, a hearing was not held.

The Coal Operators and Associates (COA) supports the three major revisions proposed by Kentucky in this submission. Regarding the changes to the assessment notices and reports that Kentucky made in response to the Kentucky Supreme Court ruling regarding prepayment of civil penalties, the COA suggested that OSM approve the changes or if OSM finds this provision to be less effective than SMCRA, it file an appeal to the U.S. Circuit Court of Appeals. Regarding the provisions of Senate Bill 219 concerning an easement of necessity to conduct reclamation and Senate Bill 136 concerning the removal of outdated or previously disapproved language, the COA recommended approval, but also stated that it believes the former Secretary erred in disapproving several of the provisions that Kentucky has herein proposed to delete. However, the COA conceded that its opposition to the disapprovals is a moot issue ''with the exception of our continued belief in the right of a state to be given latitude under the program to determine how best to handle specific situations that do not conflict with the overriding tenets of SMCRA itself.'' For the reasons discussed in section III above, we are approving the provisions of Senate Bills 219 and 136. However, because Kentucky's waiver of the prepayment of civil penalties is clearly less effective than the Federal regulations, it is not approvable by OSM, even though the Kentucky Supreme Court has ruled it unconstitutional. OSM's mandate, as presented in 30 CFR 732.15(a), is to ensure that a State's laws and regulations are in accordance with the provisions of SMCRA and consistent with the requirements of the Code of Federal Regulations.

The Lexington Coal Company (LCC) commented on the provisions of Senate Bill 219 which creates an easement of necessity to conduct reclamation operations in the cases of bankrupt permittees. The LCC supports the provisions because ''the law balances land owner rights with the public benefits of mine reclamation.'' We agree with the commenter and as discussed in section III above, are approving the easement provisions.

The Kentucky Resources Council (KRC) responded and had no comment on the provisions of Senate Bills 219 and 136. Pertaining to the prepayment of civil penalties, the KRC recommended that OSM address ''whether and how other mechanisms, including partial federalization of the penalty portion of the state program, can be used to provide the same deterrent effect on frivolous appeals as was intended by the prepayment requirement.'' In response, we note that we must consider all possible options in order to address the problem created by the decision in *Commonwealth of Kentucky* v. *Kentec, supra.*

Federal Agency Comments

According to 30 CFR 732.17(h)(11)(i), on May 3, 2006, we solicited comments from various Federal agencies with an actual or potential interest in the March 28, 2006, Kentucky program amendment (Administrative Record No. KY–1644). We received one response from the U.S. Department of the Interior, Bureau of Land Management, who concurred with the revisions.

State Agency Comments

According to 30 CFR 732.17(h)(4), on May 3, 2006, we solicited comments from the Kentucky State Historic Preservation Office (Administrative Record No. KY–1644) on the March 28, 2006, program amendment. Kentucky's State Historic Preservation Office responded stating the amendment has no bearing on the treatment of archaeological or historic sites.

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 finding, we are approving, with an exception, the amendment as submitted by Kentucky on March 28, 2006.

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. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

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

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining

operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 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.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon 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 10, 2006.

Hugh V. Weaver,

Acting Regional Director, Appalachian Region.

■ 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 917.12 is amended by adding paragraph (f) to read as follows:

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

* * * * *

(f) the changes to Kentucky's Notice of Assessment of Civil Penalties and Penalty Assessment Conference Officer's Report that specify that prepayment of a proposed assessment or penalty is no longer required are not approved.

■ 3. Section 917.15 is amended in the table by adding a new entry in chronological order by the ''Date of final publication'' to read as follows:

§ 917.15 Approval of Kentucky regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
* *	* * *	* *
March 28, 2006	September 18, 2006	Easements of necessity, deletion of outdated language in KRS Chapter 350

[FR Doc. E6–15443 Filed 9–15–06; 8:45 am]

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