[9] Section 842(c)(2)(C) of Title 21 provides that in addition to the penalties set forth elsewhere in the subchapter or subchapter II of the chapter, any business that violates paragraph (11) of subsection (a) of the section shall, with respect to the first such violation, be subject to a civil penalty of not more than $250,000, but shall not be subject to criminal penalties under the section, and shall, for any succeeding violation, be subject to a civil fine of not more than $250,000 or double the last previously imposed penalty, whichever is greater. 21 U.S.C. 842(c)(2)(C) (2015). The adjustment made by this regulation regarding the penalty for a succeeding violation is only applicable to the specific statutory penalty amount stated in subsection (c)(2)(C), which is only one aspect of the possible civil penalty for a succeeding violation imposed under section 842(c)(2)(C).

[10] Section 856(d)(1) of Title 21 provides that any person who violates subsection (a) of the section shall be subject to a civil penalty of not more than the greater of $250,000; or 2 times the gross receipts, either known or estimated, that were derived from each violation that is attributable to the person. 21 U.S.C. 856(d)(1) (2015). The adjustment made by this regulation is only applicable to the specific statutory penalty amount stated in subsection (d)(1)(A), which is only one aspect of the possible civil penalty imposed under section 856(d)(1).

Dated: January 19, 2018.

**Jefferson B. Sessions III,**

*Attorney General.*

[FR Doc. 2018–01464 Filed 1–26–18; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

## Office of Surface Mining Reclamation and Enforcement

## 30 CFR Part 917

**[KY–256–FOR; OSM–2012–0014; S1D1S SS08011000 SX064A000 189S180110; S2D2S SS08011000 SX064A000 18XS501520]**

## Kentucky Regulatory Program

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

**ACTION:** Final rule; approval with exceptions.

**SUMMARY:** We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are approving, with exceptions, an amendment to the Kentucky regulatory program (hereinafter, the ''Kentucky program'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Kentucky submitted a proposed amendment to OSMRE that revises its bonding regulations to satisfy, in part, concerns OSMRE conveyed to the State pertaining to bonding inadequacies.

**DATES:** The effective date is February 28, 2018.

**FOR FURTHER INFORMATION CONTACT:** Robert Evans, Lexington Field Office Director. Telephone: (859) 260–3900. Email: *bevans@osmre.gov.*

**SUPPLEMENTARY INFORMATION:**



### I. Background on the Kentucky Program

*A. Background: Kentucky Regulatory 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 program includes, among other things, State laws and regulations that govern surface coal mining and reclamation operations in accordance with the Act and consistent with the Federal regulations. *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 effective 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 of the Kentucky program 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.

*B. Background: Kentucky Bonding Program:* The following is a description of the bonding program implemented by Kentucky and approved by OSMRE in 1986. Permittees are required to furnish a performance bond that covers the area of land upon which the operator will initiate and conduct surface coal mining and reclamation operations. The amount of the bond should be sufficient to assure completion of the reclamation plan. Kentucky's program included two options to post bond: (1) Post a full-cost bonding (performance bond covering the entire cost of reclamation); or (2) participate in a voluntary bond pool (VBP) and post a reduced permit-specific performance bond. The VBP, an alternative bonding system (ABS), was limited to qualified applicants and required membership fees and production fees that were used to supplement the reduced permit-specific performance bonds posted for surface mining operations. Generally, the second option was used by smaller operators that would otherwise have difficulty posting a full-cost bond due to limited financial resources.

*1. Permit-Specific Bonds for Non-VBP Members:* If an applicant/permittee elected not to participate or did not qualify to become a member of the VBP, the permittee was required to submit an adequate ''full-cost'' bond using a basic bond rate of $2500/acre to which several site factors (difficulty of mining, geologic/hydrologic concerns, permanent structures, etc.) were added as additional rates per acre if necessary. Over 90% of Kentucky permits were not part of the VBP.

*2. Alternative Bonding System:* In lieu of requiring all permittees to submit permit-specific performance bonds covering the full cost of permit-specific reclamation for coal mining operations, we approved a request from Kentucky to implement an ABS as provided for in 30 CFR 800.11(e). The requirements of § 800.11(e) provide that an alternative system to the permit-specific bond requirements could be authorized if the following two conditions are met: (1) The ABS would assure sufficient money is available to complete the reclamation plan for any areas which may be in default at any time and (2) the ABS provides a substantial economic incentive for the permittee to comply with all reclamation provisions. Kentucky's ABS created the VBP. We announced approval of Kentucky's ABS in the July 18, 1986, **Federal Register** (51 FR 26002).

*a. ABS—Voluntary Bond Pool Fund Membership:* Participation in the Kentucky bond pool was voluntary, limited to qualified participants, and required application for membership. Bond pool members, herein referred to as VBP members, were permitted to post a performance bond to cover the costs of reclamation under the Kentucky program that was less than the estimated full cost of reclamation if the member qualified for participation in the bond pool and paid the required fees to the VBP's supplemental fund. The VBP fund would then be used to supplement the reduced operator bond in the event of operator default on reclamation. Acceptance into the VBP was based on the applicant's financial standing and reclamation compliance record.

Applicants for membership in the VBP qualified for an ''A,'' ''B,'' or ''C'' rating, based on length of time the applicant had held a permit under the same permittee name and the type of compliance rating, ''excellent'' or ''acceptable,'' the permittee had exhibited. The rating method also considered such things as number and seriousness of violations for which the applicant had been cited, applicant's abatement of violations, timely payment

of penalties, and the applicant's bonding experiences. Other membership restrictions applied based on ownership and control by, of, or with the applicant.

Membership fees and tonnage fees were collected from VBP members and placed in an interest-bearing account. The fees were used for the following purposes: (1) To reclaim permit areas covered by the fund in the event of bond forfeiture (after permit-specific bonds were used); (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. Less than 10% of Kentucky permits were in the VBP.

*b. ABS—Voluntary Bond Pool Commission:* Kentucky created a voluntary bond pool commission consisting of seven members that was responsible for: Reviewing membership applications and ratings; notifying members of the tonnage fee required; revoking or reinstating membership; employing a certified public accountant to audit the VBP fund; authorizing necessary expenditures from the fund; and reporting yearly to the governor on the financial status of the fund. The VBP fund was administered by the Natural Resources and Environmental Protection Cabinet, now known as the Kentucky Energy and Environment Cabinet (the cabinet).

*c. ABS—Permit-Specific Performance Bond for VBP Members:* VBP members were required to provide reduced permit-specific bond amounts as follows: For each acre or fraction thereof in the proposed permit area, a basic bond rate of $500/acre was required for ''A'' rated members; $1,500/acre for ''B'' rated members; and $2,000/acre for ''C'' rated members. Other site factors (for difficulty of mining, geologic/hydrologic concerns, permanent structures, etc.) were added as additional rates/acre to the basic bond amount to determine the final bond amount. For each acre of prime farmland, $1,500 additional bond was required. A permit would not be issued to a VBP member until the permit-specific bond was posted.

*d. ABS—Membership Fees and Tonnage Fees:* Membership fees and production fees (per ton) were paid to the fund by VBP members. Membership fees were based on ratings as follows: $1,000 for A-rated members, $2,000 for B-rated members, and $2,500 for C-rated members. Tonnage fees were based on the amount of coal produced as follows: $.08 cents per ton of coal extracted by surface mining and $.01 cent per ton of coal extracted by underground mining. If the VBP fund reached $7 million, VBP members who had made 36 or more monthly payments into the VBP fund were notified that tonnage fees would be suspended. Tonnage fees were reinstated when the VBP fund fell below $5 million. These minimum and maximum dollar numbers could be raised under certain circumstances.

## II. Description of the Proposed Amendment

A review conducted by OSMRE and Kentucky resulted in a report entitled ''National Priority Oversight Evaluation of Adequacy of Kentucky Reclamation Performance Bond Amounts dated January 4, 2011.'' The review concluded that reclamation performance bonds in Kentucky were not always sufficient to complete the reclamation required in the approved permit. Bond forfeiture studies determined that a majority of forfeited permits did not always have sufficient bond to complete the reclamation to permanent program standards. Consequently, on May 1, 2012, in accordance with 30 CFR 733.12(b), we sent a letter to the cabinet (referred to as a 733 Notice) stating that we had reason to believe that Kentucky was not implementing, administering, enforcing, and maintaining the reclamation bond provisions of its approved program in a manner that ensured the amount of the performance bond for each surface coal mining and reclamation operation was ''sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture,'' as required by section 509(a) of SMCRA. As stated in the letter, our review indicated that from 2008 to 2011, bond forfeiture proceeds were insufficient to complete the approved reclamation plan for 51 of the 61 permits for which bond were forfeited in Kentucky. As a result, we required Kentucky to take immediate and long-term steps to ensure bond amounts are adequate to complete reclamation in the event of forfeiture.

Kentucky responded to the 733 Notice by taking action and sending us statutory and regulatory provisions on three different occasions. Kentucky sent us information on September 28, 2012, (Administrative Record No. KY–2000–01); July 5, 2013, (Administrative Record No. KY–2000–02); and December 3, 2013, (Administrative Record No. KY–2000–03). We announced receipt of the September 28, 2012, submission on February 20, 2013, in the **Federal Register** (78 FR 11796), (Administrative Record No. KY–2000–01d). We combined that submission with the July 5, 2013, and December 3, 2013, submissions and announced them collectively in the **Federal Register** on March 26, 2015, (Administrative Record No. KY–2000–04b). Public comments were received but no hearing was requested.

Emergency Kentucky Administrative Regulations (KARs) were submitted by Kentucky in 2012 that immediately increased minimum bond rates and effected other changes. The Governor signed House bill 66 (H.B. 66) on March 22, 2013, which provided substantive changes to Kentucky's bonding program. H.B. 66 established a bonding program that provides, among other things, creation of a new land reclamation bond-pool for members; creation of a commission to oversee the pool; changes regarding permit-specific bonds; transition provisions for members and assets of the old bond pool; and clarification that the pool shall not be used for long-term treatment of substandard water discharges and subsidence. The Kentucky Revised Statutes (KRSs), which codify the legislative provisions of H.B. 66, and the permanent KARs to administer the provisions, were later submitted.

This amendment includes: 7 emergency regulations; 11 repealed KRSs related to the old bond pool (VBP); 8 new KRSs; 3 amended KRSs; 3 repealed permanent KARs; 4 new permanent KARs; and 4 amended KARs.

Through the action of the Governor and the legislative action by the Assembly, Kentucky changed the bonding program in the following manner by: (1) Increasing bonding rates for ABS permit-specific bonds by approximately 60%; (2) requiring all permittees to participate in the Kentucky Reclamation Guaranty Fund (KRGF) at the time of conversion, unless they opt-out; (3) eliminating the classification standards and associated fees for bond pool members that were used under the old system; (4) establishing new membership and production fees; (5) requiring the Kentucky Reclamation Guaranty Fund Commission (KRGFC) to make recommendations to the cabinet regarding the KRGF's solvency; (6) increasing the supplemental assurance amounts for KRGF members; (7) requiring actuarial reviews annually for three years, then bi-annually instead of every three years as previously required; (8) changing the manner in which bonds are released for old VBP members; (9) requiring bond to be posted for the treatment of long-term treatment pollutional discharges for estimated costs covering 20 years; and (10) implementing other bonding changes.

Descriptions of the substantive changes to the Kentucky program

resulting in the changes above are noted in the Findings section that follows.

**III. OSMRE's Findings**

Section 509(a), along with 30 CFR 800.14(b) ''require that the amount of performance bond shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture.'' Section 509(c), along with 30 CFR 800.11(e), provides that an alternative system to full-cost performance bond may be approved if it will achieve the purposes of the bonding program. To gain approval, (1) a bonding program must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time; and (2) must provide a substantial economic incentive for the permittee to comply with all reclamation provisions. We reviewed the emergency KARs; statutory language of H.B. 66, its corresponding KRSs; and permanent KARs collectively to determine whether or not the bonding program/system as a whole is able to meet reclamation obligations. Below are our findings of the substantive changes to Kentucky's bonding program.

*A. Kentucky Emergency Administrative Regulations (KARs)*

Seven emergency regulations were submitted to us for approval. Two of the emergency regulations repealed other administrative regulations (405 KAR 10:011E and 405 KAR 10:201E); four created new regulations (405 KAR 10:015E, 405 KAR 10:070E, 405 KAR 10:080E, and 405 KAR 10:090E); and one amended an already existing administrative regulation (405 KAR 10:001). Three of these emergency regulations were later replaced by nearly identical permanent (ordinary) regulations (405 KAR 10:001, 405 KAR 10:015, and 405 KAR 10:090). We are not issuing findings on the three emergency provisions that were replaced because the emergency provisions are no longer in place, and we are making a finding on the nearly identical permanent ones. We are issuing findings on the other four emergency regulations because they involved the repeal or relocation of administrative regulations or they involved matters related to the transition to the new bonding system.

The following four emergency regulations remove or relocate certain administrative regulations due to changes in the bonding regulations:

*KAR 10:011E, Repeal of 405 KAR 10:010, and KAR 10:020; 405 KAR 10:010, General requirements for performance bond and liability insurance (sections 1 through 5) and 405 KAR 10:020, Amount and duration of performance bond (sections 1 through 9):* The emergency regulation repealed these performance bond and liability insurance regulations and the amount and duration of the performance bond regulations and relocated them into the new administrative regulation at 10:015, with the exception of section 4 of 405 KAR 10:010, which was relocated to 405 KAR 10:030.

*OSMRE Finding:* We find that the relocation of provisions from one regulation to another is a non-substantive change. The change documents the relocation of these provisions into the new program; therefore, 405 KAR 10:011E is approved.

*KAR 10:201E, Repeal of 10:200, Kentucky bond pool (sections 1 through 9):* The emergency regulation repealed the VBP regulations from Kentucky's program.

*OSMRE Finding:* Because we are approving, with exceptions, the new bonding system amendments proposed by Kentucky, we find that the repeal of the VBP regulations is not inconsistent with SMCRA or the Federal regulations. Therefore, 405 KAR 10:201E is hereby approved.

The following two emergency regulations specifically addressed matters related to the transition from the old bonding system to the new one and were not entirely duplicated in the permanent administrative regulations:

*405 KAR 10.070E, Kentucky Reclamation Guaranty Fund (sections 1 through 6):* In addition to establishing the new bond pool entitled the KRGF and creating the KRGFC, this regulation addressed the initial capitalization of the KRGF (transfer of assets and one-time assessments) and the terms and conditions in which these assessments were paid. It also provided the terms in which former VBP members report coal mined and sold until and after January 1, 2014. The following provisions were not included in the permanent regulations at 405 KAR 10:070: Section 2, Initial Capitalization; section 3(3) related to member production records and reporting; and section 6(b) related to a required monthly production report.

*OSMRE Finding:* The portions of this regulation that were promulgated in emergency format only, and were not converted to permanent regulations at 405 KAR 10:070, addressed the capitalization of a bond pool and forms required to document production under the old system and have no direct Federal counterparts. We find that these provisions are not inconsistent with section 509(c) of SMCRA or with the Federal regulations at § 800.11(e), and are hereby approved.

*405 KAR 10:080E: Full-cost bonding (sections 1 through 4):* In addition to allowing permittees to elect not to participate in the KRGF (opt-out) and to provide full-cost reclamation bonds for coal mine surface disturbances, this regulation also included provisions pertaining to members with permits issued prior to July 1, 2013. It provided the terms and conditions in which the permittee would make such election. This provision was not included in the permanent regulation at 405 KAR 10:080.

*OSMRE Finding:* This regulation provided that permittees make an election regarding participation in the KRGF by a specific date. This was a one-time event and facilitated the transition to the new bonding system. We find there are no direct Federal counterparts. However, the provisions are not inconsistent with section 509(c) of SMCRA or with the Federal regulations at § 800.11(e), and are hereby approved.

*B. Legislative Action—House Bill 66 and Kentucky Revised Statutes (KRSs)*

On March 11, 2013, H.B. 66 was passed by the legislature and enacted on March 22, 2013, when it was signed by the Governor. H.B. 66 included 14 sections and resulted in the following: 8 KRSs being added; 3 KRSs being amended; and 11 KRSs being repealed as described below:

*H.B. 66 Section 1—KRS 350.500. Definitions for KRS 350.500 to 350.521:* This is a new chapter that provides the H.B. 66 definitions of actuarial soundness, date of the establishment of the new KRGF, the KRGFC, and VBP fund.

*OSMRE Finding:* There are no comparable Federal regulations that define actuarial soundness, prescribe an effective date of a bond pool or fund, or establish a commission to govern a bond pool. However, the establishment of a bond pool is consistent with the provisions of 30 CFR 800.11(e). Therefore, we find that the proposed definitions are not inconsistent with section 509(c) of SMCRA and with the Federal regulations at 30 CFR 800.11(e), and they are hereby approved.

*H.B. 66 Section 2—KRS 350.503. Kentucky reclamation guaranty fund:* This is a new chapter that establishes the KRGF, which is assigned to the cabinet. The KRGF is an interest-bearing reclamation account designed to cover the excess costs of reclamation for coal mining sites when the permit-specific performance bond is inadequate. This chapter does not apply to permits

forfeited prior to January 1, 2014, except for obligations that may arise from the forfeiture of bonds prior to that date which were secured by the VBP. Funds are also used to compensate the cabinet for costs incurred in performance of the following duties: Administering the fund; procuring audits and actuarial studies; and operating and necessary legal expenses of the KRGFC. The KRGF cannot be used for the long-term treatment of substandard water discharges or to repair subsidence damage and is exempt from the requirements applicable to insurers.

*OSMRE Finding:* There is no counterpart in SMCRA or the Federal regulations that establishes a bond fund system such as the one established under H.B. 66. However, as we noted previously, section 509(c) of SMCRA and 30 CFR 800.11(e) provide for the establishment of an ABS if the system (1) assures the regulatory authority will have available sufficient money to complete the reclamation plan for any areas in default at any time and (2) provides an economic incentive for the permittee to comply with all reclamation provisions. Because the changes to Kentucky's bonding program noted above have only recently been established, we have no new data to suggest that there will not be sufficient funding to address land reclamation obligations or that the KRGFC or the cabinet will not fulfill their obligation to take measures to ensure the solvency of the KRGF. Kentucky's system provides an economic incentive to reclaim in KRS 350.130(3) because it requires the submission of permit-specific performance bonds and provides that no person shall be eligible to receive another permit or begin another operation until the person has reimbursed the KRGF for any money from the KRGF that was used to reclaim that person's operation. Therefore, we are approving the changes to the program because they establish an ABS that combines the use of permit-specific bonds and a bond pool to address land reclamation needs.

We note that the KRGF restricts its ABS coverage to land reclamation costs and is not intended to cover the cost of treating pollutional discharges. The cost of treating pollutional discharges needs to be adequately addressed, *e.g.,* covered under full-cost, site-specific bonds or an alternative financial mechanism that generates an income stream capable of addressing these discharges in perpetuity. Kentucky proposes to require operators to post site-specific bonds to cover the costs of long-term treatment of substandard water discharges. Our finding on this proposal is included in findings of ''C. Kentucky Administration Regulations (KARs), Section 8 of 405 KAR 10:015.''

*H.B. 66 Section 3—KRS 350.506. Reclamation Guaranty Fund Commission—Membership—Bylaws—Meetings—Conflicts of Interest—Applicability of Executive Branch Code of Ethics:* This is a new section that creates the KRGFC that is attached to the cabinet. This chapter provides the composition of the KRGFC membership, the terms and conditions of membership appointments, and the establishment of bylaws, official domicile, meeting frequency, member stipend, and attendance requirements. Further, it addresses limits on direct or indirect financial interests of the members, membership immunity from civil or criminal proceedings, and ethics terms.

*OSMRE Finding:* There are no comparable Federal regulations that address the creation or management of bond pools. However, there is nothing in these provisions that is inconsistent with section 509(c) of SMCRA or with the Federal regulations at 30 CFR 800.11(e), and they are hereby approved.

*H.B. 66 Section 4—KRS 350.509. Duties of commission:* This is a new chapter that outlines the responsibilities of the KRGFC, which include reviewing, recommending, and promulgating regulations necessary to perform the following duties: Monitor and maintain the KRGF, establish a structure for processing claims and making payments; establish the mechanisms for the review of the viability of the KRGF; set a schedule for penalties for late payment or failure to pay fees and assessments, review and assign classification of mine types for fee assessments; establish a structure for the payment of fees and assessments, authorize expenditures from the KRGF, notify the permittees of suspension/reinstatement of fees; take action against permittees to recover funds if necessary, and conduct investigations and issue subpoenas on behalf of the KRGFC to verify reporting, payment, and other activities of permittees participating in the fund.

In addition, the KRGFC is also responsible for employing a certified public accountant to perform an annual audit of the KRGF for the first five years of the operations of the KRGF, then every two years or more frequently as deemed necessary by the KRGFC. The results of the audit shall be reported to the KRGFC and the Governor. Also, the KRGFC is responsible for employing a qualified actuary to perform an actuarial study annually for the first three years of the operations of the KRGF. Thereafter, the KRGFC must have actuarial studies performed every two years or more frequently as deemed necessary by the KRGFC. Results of these studies must be reported to the KRGFC and to the Governor. The KRGFC is responsible to report to the Governor and the Interim Joint Committee on Natural Resources and Environment no later than December 31 of each year as to the financial status of the KRGFC.

*OSMRE Finding:* There are no comparable Federal regulations that address the management of bond pools. With the exception of one provision discussed below, there is nothing in these provisions that is inconsistent with section 509(c) of SMCRA or with the Federal regulations at 30 CFR 800.11(e), and they are hereby approved.

We are approving the requirement to conduct annual actuarial studies for the first three years of the implementation of the KRGF. However, as proposed, beginning in year four, actuarial studies would be required only bi-annually or more frequently as deemed necessary by the commission. Given the reliance upon the actuarial study for the adjustment of fee rates (established in Section 7), the immaturity of the KRGF, the provisions of the bonding program that have not been approved, and the rapidly changing nature of the current coal mining industry, we believe it is premature to approve a two-year lapse between actuarial evaluations. We are concerned that a two-year time period may not sufficiently ensure that needed adjustments to maintain the solvency of the KRGF are recommended and implemented in a timely matter. Therefore, we are deferring our decision on the bi-annual review provision of H.B. 66 until such time as we are able to evaluate the stability of the KRGF over its initial years of implementation. After our receipt and review of the actuarial study based upon the third full year of operation of the fund, we will reconsider our deferral and determine whether to: (1) Approve the bi-annual actuarial study requirement; (2) require that the studies continue to be performed annually; or (3) take other appropriate action.

*H.B. 66 Section 5—KRS 350.512. Office of the Reclamation Guaranty Fund—Duties of executive director:* This is a new chapter that establishes an Office of the Reclamation Guaranty Fund (ORGF), appoints an executive director to manage its affairs, and describes the responsibilities of the executive director. The responsibilities of the executive director include collecting and depositing all fees

submitted by permittees into the fund; assessing permit eligibility of permittees for late payment or nonpayment of fees; compiling information about permittees for use by the commission in assigning or revising classifications and fees; paying monies out of the fund as authorized; reporting to the commission on the status of the fund and the activities of the fund's executive director; and performing other administrative functions as necessary.

*OSMRE Finding:* There are no comparable Federal regulations that address the management of bond pools. However, there is nothing in these provisions that is inconsistent with section 509(c) of SMCRA or with the Federal regulations at 30 CFR 800.11(e) and they are hereby approved.

*H.B. 66 Section 6—KRS 350.515. Mandatory participation in fund—Initial capitalization—One-time assessments—Full-cost bond in lieu of participation:* This is a new chapter that mandates that all surface coal mining permittees be participants in the KRGF, unless the permittee elects to provide full-cost bond. Member entities are given the option to provide financial assurance in one of two ways: (1) Provide full-cost bonds based on a reclamation cost estimate that reflects potential reclamation costs to the cabinet; or (2) participate in the KRGF, which includes assessment of fees noted in KRS 350.518 below.

In addition, this chapter also provides for the initial capitalization of the KRGF consisting of the following sources of funds: (1) Transfer of the assets and liabilities of the VBP fund; (2) a one-time start-up assessment for all current permittees as of July 1, 2013, in the amount of $1,500; and (3) a one-time $10 per active permitted acre assessment. Entities entering the KRGF after July 1, 2013, must pay a one-time assessment of $10,000 to the fund. No individual permit may be issued until the one-time assessments are paid. Members of the former VBP are exempt from the one-time start-up assessment and active permitted acre assessment. If an applicant opts out and elects to provide a full-cost bond, the applicant shall not be subject to these assessments.

*OSMRE Finding:* Maintaining adequate resources is essential to the success and compliance of any bond pool. The transfer of funds from the existing bond pool and the assessment of start-up fees will assist in the initial capitalization of a new bond pool. Provided the permits previously covered by the transferred funds are adequately covered by the new pool, there is nothing in these provisions that is inconsistent with section 509(c) of SMCRA or with the Federal regulations at 30 CFR 800.11(e), and they are hereby approved.

*H.B. 66 Section 7—KRS 350.518. Permittee to submit permit-specific bond under KRS 350.060(11)—Tonnage fees—Assignment of mine type classification—inclusion of future permits of existing classification—Inclusion of future permits of existing voluntary bond pool fund members—Permit-specific penal bond—Administrative regulations—Suspension of permit for arrearage in fees—Distribution of penalties collected under KRS 350.990(1)—Rights and remedies:* This is a new chapter that provides the following provisions related to the KRGF that apply to each member permittee: (1) Each member must submit a permit-specific bond; and (2) each member must pay a tonnage fee (production fee) of $.0757 per ton for surface coal mining operations (including auger and highwall mining) and $.0357 per ton for underground coal mining. If the permit consists of a combination of surface and underground mining operations, the operator must pay a fee in accordance with the predominant method of coal extraction.

This chapter also contains special provisions for permits that were subject to the VBP as follows: (1) These permits are excluded from the one-time start-up assessment/fee; (2) these permits are subject to the new tonnage fees, instead of the tonnage fees which had been previously established (prior to July 1, 2013); (3) these permits will continue to receive subsidization of the reclamation bonding authorized under these new statutes and new permanent regulations; and (4) the KRGF will continue to provide coverage for existing bonds previously issued under the VBP. This chapter also provides the criteria that members of the VBP as of July 1, 2013, must meet in order to be included in the KRGF. It also specifies a maximum allowable increase in the total amount of bonds issued to any one member of the VBP. This chapter provides that administrative regulations will be promulgated by the KRGFC to address the reporting and payment of fees (see administrative regulations section that follows). It also provides that a permit will be suspended if the permittee is in arrearage in the payment of any fees and sets out the remedies to address the suspension. It also provides the manner in which penalties collected shall be deposited and applied.

In addition, if an entity was not a participant in the VBP as of March 22, 2013, a permit may be considered for inclusion in the VBP if the entity and entity's owners can meet eligibility standards established in permanent regulations promulgated by the KRGFC.

These provisions make clear that the KRGFC must make changes to the rates set forth in these sections and other sections in an amount sufficient to maintain actuarial soundness of the fund in accordance with the actuarial studies performed.

*OSMRE Finding:* We find that these provisions are consistent with section 509(c) of SMCRA and with the Federal regulations at 30 CFR 800.11, and are hereby approved. However, subsection (4) requires some further explanation. It states that:

> The increase in the total amount of bonds issued to any one (1) member of the voluntary bond pool under subsection (3) of this section shall not exceed twenty-five (25%) of the greater of:
>
> (a) The member's aggregate amount of bonds in force and issued by the voluntary bond pool as of March 22, 2013; or
>
> (b) The total of that member's aggregate amount of bonds in force and issued by the voluntary bond pool as of March 22, 2013, plus fifty-five percent (55%) of that total.

We note that paragraph (b) will always result in a total greater than paragraph (a) and, therefore, renders the provision at paragraph (a) meaningless. Nevertheless, the introductory paragraph, coupled with paragraph (b), is consistent with section 509(c) of SMCRA and the Federal regulations at 30 CFR 800.11, and they are therefore approved.

*H.B. 66 Section 8—KRS 350.521. Forfeiture of bonds for permits covered by fund—Use of additional moneys when bond insufficient to cover estimated reclamation cost:* This is a new chapter that provides that bonds for permits covered by the fund forfeited after January 1, 2014, must be placed in the KRGF. It also provides that in the event that a forfeited bond and the cost estimate prepared by the cabinet indicates the bond is insufficient to reclaim the permit to the requirements of KRS Chapter 350, any outstanding permit-specific performance bond for reclamation on the forfeited permit must be used first before any additional monies necessary to reclaim the permit area are approved by the cabinet and withdrawn from available funds in the KRGF. It also provides the manner in which the request from the cabinet and transfer shall occur, and provides that the commission, its members, and employees must not be named a party to any forfeiture action.

*OSMRE Finding:* We find that this provision sets forth a procedure that is typical of an ABS that employs both

site-specific performance bonds and a bond pool. We find that it is consistent with section 509(c) of SMCRA and with the Federal regulations at 30 CFR 800.11(e) and is hereby approved.

*H.B. 66 Section 9—KRS 12.020. Enumeration of departments, program cabinets, and administrative bodies:* This chapter is amended to add the ORGF within the Department of Natural Resources (DNR) to the list of departments, program cabinets and their departments, and the respective major bodies.

*OSMRE Finding:* This change was included in H.B. 66, but the revised statute was not submitted for approval. We find this change does not require our approval because it is not part of the State regulatory program.

*H.B. 66 Section 10—KRS 350.595. Application for inclusion under Abandoned Mine Land Enhancement Program—Coverage under Kentucky reclamation guaranty fund:* This chapter is amended to provide that an applicant who desires to remine property which is classified as abandoned mine land under KRS 350.560, may apply to the KRGFC instead of the VBP Commission for authorization to use bond pool funds under the Abandoned Mine Land Enhancement Program. It also adds appropriate references or deletes references related to the VBP.

*OSMRE Finding:* This change is needed to acknowledge the dissolution of the old VBP commission and its replacement by the KRGFC. We find that it is not inconsistent with SMCRA or the Federal regulations and is hereby approved.

*H.B. 66 Section 11—KRS 350.990. Penalties:* This chapter is amended to require that civil penalty monies assessed pursuant to this chapter be deposited in the State Treasury, except those penalty monies collected in excess of $800,000 in any fiscal year. Fifty percent of the excess monies are required to be deposited in the KRGF (rather than the VBP) and fifty percent in a supplemental fund. The supplemental fund is comprised of the interest from the deposit of forfeited bonds and may be used to supplement forfeited bonds that are inadequate to complete reclamation plans. It removes the $16 million base amount below which the VBP could not be allowed to fall to ensure solvency of the fund.

*OSMRE Finding:* This change identifies the manner in which funds collected from civil penalties must be distributed. The $16 million base amount for the VBP is no longer required because the VBP bonding system was replaced. Under the KRGF, required actuarial studies and the KRGFC will establish the financial needs of the KRGF to ensure the solvency of the fund and assure sufficient money is available to complete the reclamation plan for any areas covered by the KRGF which may be in default at any time. As such, it is not required to establish an amount, such as $16 million, as a floor for the KRGF. There is nothing in these provisions that is inconsistent with section 509(c) of SMCRA or with the Federal regulations at 30 CFR 800.11(e), and they are approved.

*H.B. 66 Section 12—KRS 350.700 to 350.755:* The following chapters are repealed due to the abolishment of the VBP:

350.700. Bond pool fund established;
350.705. Bond Pool Commission;
350.710. Powers of the Commission;
350.720. Bond Pool (Criteria compliance records);
350.725. Membership fee—tonnage fee;
350.730. Tonnage fee suspension or reinstatement;
350.735. Permit-specific penal bond;
350.740. Permit issuance;
350.745. Payments from fund for reclamation;
350.750. Revocation of membership in bond pool; and
350.755. Grounds for refusal of permit.

*OSMRE Finding:* Removal of the identified chapters involving the VBP is consistent with the newly established KRGF. However, it is our understanding that, consistent with the title, H.B. 66 was intended to also repeal KRS 350.715, Pool administrator. Because the repeal of KRS 350.715 was not specifically submitted for approval, this chapter remains in effect and cannot be removed until the repeal is submitted for approval.

*H.B. 66 Section 13—(no corresponding KRS chapter because a revised statute is not necessary):* This section provides that the assets and liabilities of the VBP be immediately transferred to the KRGF. Any records, files and documents associated with the activities of the VBP must also be transferred. The affairs of the VBP must be wound up, and the cabinet will have disposition over placement or transfer of any personnel of the VBP. No existing contract shall be impaired.

*OSMRE Finding:* This provision involves the initial capitalization of the new bonding system and administratively and financially concludes the old bonding system. We find that this transfer of funds and records is needed for establishment and proper implementation of the KRGF, and that it is not inconsistent with section 509(c) of SMCRA or with the Federal regulations at 30 CFR 800.11(e). It is hereby approved.

*H.B. 66 Section 14—(no corresponding KRS chapter because a revised statute is not necessary):* This section provides for the immediate implementation of the provisions of the bill.

*OSMRE Findings:* We find that section 14 is not inconsistent with SMCRA or the Federal regulations and is therefore approved.

*C. Kentucky Administrative Regulations (KARs)*

This portion of the program amendment includes additions and changes to current administrative regulations addressing Kentucky's bonding program. These regulations involve the repeal of three regulations; the addition of four new regulations; and amendments to four regulations as described below:

*405 KAR 10:001. Definitions for 405 KAR Chapter 10 (section 1):* This regulation is amended to add the definition of the following terms: Acquisition; active acre; actuarial soundness; dormancy fee; coal mined and sold; final disposition; full-cost bonding; Kentucky Reclamation Guaranty Fund; Office of the Reclamation Guaranty Fund (ORGF); opt-out; member, non-production fee; and acquisition as it relates to criteria for identifying land historically used for cropland. The definitions of bond pool, bond pool administrator, and bond pool commission have been deleted. Bond pool and bond pool administrator have been replaced with definitions of KRGF and the ORGF.

*OSMRE Finding:* There are no comparable Federal definitions for the definitions mentioned above. These changes are not inconsistent with section 509 of SMCRA and with the Federal regulations at 30 CFR part 800 and are hereby approved.

*405 KAR 10:015, General bonding provisions (sections 1 through 12):* This is a new regulation that combines two repealed sections (405 KAR 10:010 and 405 KAR 10:020 mentioned above as part of the Emergency Regulations) and incorporates parts of 405 KAR 10:030 (addressed below). It consolidates into one regulation all current existing bonding criteria, types of bonds, bonding methods, terms and conditions of bonds, and new calculation protocols. It also contains a protocol for bond calculation for demolition and disposal costs for materials used in mining operations at preparation plants. In addition, it provides for the calculation of costs associated with mine sites that have been identified as producers of

substandard effluent discharges requiring long-term treatment. For clarity, we note that Section 1, Bonding Requirements; Section 4, Bonding Methods; Section 5, Substitution of Bonds; Section 9, Period of Liability; and Section 10, Adjustment of Amount, were unaffected by these changes. Substantive changes are included below.

Section 2, Terms and Conditions of Performance Bond

Section 2(9) provides that for any existing permits with permit-specific bonds posted by the VBP members, prior to the establishment of the KRGF, the permit-specific bond would be released in its entirety upon successful completion of Phase I bond release requirements, while permit-specific bonds posted by these members on new permits after the establishment of the KRGF, will be released in equal percentages at each reclamation phase, which is different than the release provisions for full-cost bond permits. The Phase 1 bond release for VBP members' permit-specific bond was formerly included in the now repealed statute at KRS 350.735(3). We announced our approval of this provision, along with the other statutory portions of the VBP, in the July 18, 1986, **Federal Register** document. (51 FR 26002).

*OSMRE Finding:* We find the phase-by-phase release of equal portions of the new permit-specific bonds posted after the establishment of the KRGF ensures that two-thirds of the permit-specific bond, coupled with any moneys needed from the KRGF, will remain available for reclamation after Phase I bond release. These provisions are not inconsistent with section 519(c) of SMCRA and with the Federal regulations at 30 CFR 800.40(c), and are hereby approved. Inasmuch as permit-specific bonds in existence prior to the creation of the KRGF were posted according to the approved program at the time, the grandfather provision maintaining the release of these bonds in their entirety, upon successful completion of Phase I bond release requirements, remains approved.

Section 3, Types of Performance Bonds

Section 3(2)(c) adds to the list of approvable bonds the following types of bonds: Those filed pursuant to the provisions of the KRGF; those filed by VBP members; or a combination of both. Section 3(3) provides that permit-specific bonds associated with the VBP prior to its repeal are deemed valid and convey the same legal rights as bonds issued by the KRGF.

*OSMRE Finding:* The types of bonds allowed under section 3(2)(c) are not inconsistent with the Federal regulations since bond pools and their related bonds are permissible under 30 CFR 800.11(e). With regard to section 3(3), we find that because the bonds approved under the VBP were valid when issued, Kentucky may continue to recognize their validity after the creation of the KRGF. We are approving section 3(3) because it is consistent with section 509 of SMCRA and with the Federal regulations at 30 CFR part 800.

Section 6, Determination of Bond Amounts

Sections (6)(1) and (6)(4) make clear, by cross-references, that the new provision at 405 KAR 10:080, which is being approved in this decision and addresses full-cost bonding estimates prepared by permittees, does not apply to the determination of bond amounts for KRGF participants.

*OSMRE Finding:* These cross-references are not inconsistent with SMCRA and the Federal regulations at 30 CFR 800.11 and 800.14 and are hereby approved.

Section 6(2) allows the cabinet to use the reclamation costs submitted in the permit application to establish the bond amount required, if those costs are higher than the reclamation costs calculated by the cabinet.

*OSMRE Finding:* While there is no direct Federal counterpart to this revision, erring on the side of the higher bond amount calculation is consistent with the Federal requirements at 30 CFR 800.14(a), which governs the determination of the bond amount. Therefore, section 6(2) is hereby approved.

Section 6(3) requires the cabinet to review bond amounts established in the regulations at a minimum of every two years to determine if those amounts are adequate after consideration of the impacts of inflation and increases in reclamation costs.

*OSMRE Finding:* This revision is no less effective than the Federal regulation at 30 CFR 800.15(a), which allows the regulatory authority to specify periodic times or to set a schedule for reevaluating and adjusting the bond amount. Therefore, section 6(3) is hereby approved.

Section 6(4) requires full-cost bonding participants to provide a cost estimate that reflects the cost of reclamation to the cabinet in accordance with full-cost bonding regulations at section 405 KAR 10:080.

*OSMRE Finding:* We find that this provision is consistent with the Federal regulations at 30 CFR 800.14, and is hereby approved.

Section 7, Minimum Bond Amount

Section 7 increases minimum bond amounts to $75,000 for the entire surface area under one permit, $75,000 per increment for incrementally bonded permits, $50,000 for a permit or increment operating on previously mined areas, and $10,000 for underground mines that have only underground operations (no surface facilities).

*OSMRE Finding:* We find the proposed changes at 405 KAR 10:015 section 7 are no less effective than the Federal requirements at 30 CFR 800.14(b), which mandate a minimum bond amount of $10,000 for the entire area under one permit, and are hereby approved.

Section 8, Bonding Rate of Additional Areas

Section 8 establishes new, increased bond amounts that vary depending upon the type of area being affected (*i.e.,* coal refuse area, preparation plants, and mining areas) as follows:

- $2,500 per acre and each fraction thereof for coal haul roads, other mine access roads, and mine management areas.
- $7,500 per acre and each fraction thereof for refuse disposal areas.
- $10,000 per acre and each fraction thereof for an embankment sediment control pond. Each pond must be measured separately if the pond is located off-bench downstream of the proposed mining or storage area. The cabinet also may apply this rate to partial embankment structures as deemed necessary to meet the requirements of section 6(1) of 405 KAR 10:015.
- $3,500 per acre and each fraction thereof for coal preparation plants. In addition, the bond amount must include the costs associated with demolition and disposal of concrete, masonry, steel, timber, and other materials associated with surface coal mining and reclamation operations.
- $2,000 per acre and each fraction thereof for operations on previously mined areas.
- $3,500 per acre and each fraction thereof for all areas not otherwise addressed in 405 KAR 10:015 section 8.

*OSMRE Findings:* Because all of the changes, summarized above to bonding rates, identified in sections 8(1) through 8(6), constitute increases in bond amounts, they are not inconsistent with the Federal requirements at 30 CFR 800.14, which govern the determination

of bond amounts, and are hereby approved.

However, by approving the sections identified above, we do not conclude, in this decision, that Kentucky has satisfied all of the concerns we set forth in the May 1, 2012, letter issued pursuant to 30 CFR 733.12(b) with regard to the sufficiency of the bond amounts. That determination will be made subsequent to this decision during review of the solvency of the revised bonding system.

Section 8(7)(a) provides that for permits with substandard drainage that require long-term treatment, the cabinet must calculate and the permittee must post an additional bond amount based on the annual treatment cost provided by the permittee, multiplied by 20 years. Section (8)(7)(b) provides that the cost estimate is subject to the verification and acceptance by the cabinet. Kentucky may use its own estimate for annual treatment costs if it cannot verify the accuracy of the permittee's estimate. Section (8)(7)(c), provides that in lieu of posting this additional bond amount, the permittee may submit a satisfactory reclamation and remediation plan for the areas producing the substandard drainage.

Both SMCRA and the Federal regulations require that operators post bonds that are sufficient in amount to guarantee the completion of all reclamation, if that reclamation must be completed by the regulatory authority. See, for example, 30 CFR 800.13(a)(1), which states that performance bond liability must be for the duration of the surface coal mining and reclamation operation and for a period which is equal to the operator's period of extended responsibility for successful revegetation provided in 30 CFR 816.116/817.116 or until achievement of the reclamation requirements of the Act, regulatory programs, and permit, whichever is later. A permit may not be issued if, after sufficient study, analysis, and planning, water pollution is anticipated. Abatement of any unanticipated water pollution is an element of reclamation, and the treatment obligation may extend to perpetuity. Neither SMCRA nor its implementing regulations allow regulatory authorities to set arbitrary time limits as multipliers for calculating bond amounts. Kentucky has not demonstrated that a 20-year multiplier will result in an adequate bond. As such, we find 405 KAR 10:015 8(7)(a) is less stringent than section 509 of SMCRA, 30 U.S.C. 1259, and less effective than the Federal regulations at 30 CFR part 800, and we are not approving it. Because section 8(7)(b) refers to the water treatment calculation in 8(7)(a) that is not being approved, we are also not approving 8(7)(b).

In addition, the allowance of a land reclamation-based remediation plan in lieu of posting an adequate bond for long-term pollutional drainage treatment is unacceptable. Neither SMCRA nor its implementing regulations provide any exceptions to the requirement to post a bond that is fully adequate to cover the cost of reclamation, including water treatment.

We have approved other financial mechanisms under 30 CFR 800.11(e) that are capable of generating an income stream to address unanticipated discharges in perpetuity, *e.g.,* treatment trusts or annuities. Treatment trusts and annuities are types of financial instruments capable of generating revenue for the purpose of maintaining treatment for these discharges. See, for example, **Federal Register** document dated March 2, 2007, addressing the approval of Tennessee's use of treatment trusts. (72 FR 9616). We recommend that Kentucky avail itself of these alternative financial mechanisms to ensure adequate funds are available to fully cover the cost of reclamation. Because this provision at 405 KAR 10:015 8(7)(c) is less stringent than section 509 of SMCRA, and less effective than the Federal regulations at 30 CFR part 800, we are not approving it.

Section 11, Supplemental Assurance

Section 11 includes the supplemental assurance requirements previously located at 405 KAR 16:020 (see summary of 16:020 in *D. Kentucky Administrative Regulations Affected by the Bonding Regulations* below) and increases the supplemental assurance amount from $50,000 to $150,000.

*OSMRE Finding:* Supplemental assurance funds are required when alternative distance limits or additional pits are approved. While these provisions have no Federal counterparts, we find that, because the increases in supplemental assurance amounts provide additional assurances that reclamation will be completed, the changes are not inconsistent with the Federal regulations at 30 CFR part 800, and are hereby approved.

*405 KAR 10:070. Kentucky reclamation guaranty fund (sections 1 through 5):* This is a new regulation and provides information related to the operation and sources of revenue for the KRGF, classification of permits, reporting and payment of fees, and penalties. Permittees will automatically be considered participants in the KRGF unless they affirmatively chose to opt-out of the KRGF and post full cost performance bonds. These regulations require that permittees comply with reporting requirements, maintain production records, provide initial assessments, pay fees, comply with penalty provisions, and complete and submit required forms.

*OSMRE Finding:* We find that this provision sets forth components that are needed for the orderly establishment, monitoring, maintenance, and enforcement, where necessary, of an ABS. Therefore, we further find this provision to be consistent with section 509(c) of SMCRA and with the Federal regulations at 30 CFR 800.11(e), and is hereby approved.

We note however, that the establishment of a bond pool, particularly in a declining coal market, brings inherent risks to participating permittees and to Kentucky. As the number of bond pool members and the amount of coal produced in Kentucky declines, the production fees placed on coal being produced will need to rise correspondingly to maintain a financially sound and stable bond pool. By exercising its discretion to establish this bond pool, Kentucky is accepting these risks.

*405 KAR 10:080. Full-cost bonding (sections 1 through 4):* This is a new regulation and provides that members have the option to provide full-cost bonds in lieu of maintaining membership in the KRGF (*i.e.,* they may opt-out of the KRGF) and the manner in which a permittee shall make such declaration. These sections provide for the calculation of bonding estimates, the forms required to submit such estimates, the requirement for a registered professional engineer to certify estimates, and the requirement to submit a bond once the reclamation estimate has been accepted. A member with permits issued prior to July 1, 2013, that has made the decision to opt-out is required to post full-cost reclamation bonds with the Department before April 30, 2014, on all permits held by the member.

*OSMRE Finding:* This regulation is not inconsistent with SMCRA and the Federal regulations at 30 CFR 800.11 and 800.14, and is hereby approved.

*405 KAR 10:090. Production fee (section 1):* This is a new regulation and provides information on production fees, the amount of the fees, and the schedule that payments are to be remitted.

*OSMRE Finding:* There are no comparable Federal regulations that prescribe production fees to be imposed on permittees. We find that these changes are not inconsistent with

SMCRA or its implementing Federal regulations, and are hereby approved.

We again note that the establishment of a bond pool, particularly in a declining coal market, brings inherent risks to participating permittees and to Kentucky. As the number of bond pool members and the amount of coal produced in Kentucky declines, the production fees placed on coal being produced will need to rise correspondingly to maintain a financially sound and stable bond pool. By exercising its discretion to establish this bond pool, Kentucky is accepting these risks.

*D. Kentucky Administrative Regulations Affected by the Bonding Regulations*

These regulations are affected by the bonding regulations and involve the amendment of four regulations as described below:

*405 KAR 8:010. General provisions for permits (Sections 1 through 26):* This regulation has been amended to provide the Division of Mine Permits 30 working days after the notice of administrative completeness to review minor revisions on full-cost bonding operations. The original provisions allowed for 15 working days.

*OSMRE Finding:* We find that these changes are not inconsistent with SMCRA and the Federal regulations at 30 CFR 774.13(b)(1), and are hereby approved.

*405 KAR 10:030. General requirements for liability insurance (sections 1 through 3):* This regulation has been amended. Prior to this revision the regulation included general requirements for the types, terms, and conditions of performance bonds and liability insurance. With this revision, all references to performance bonds have been removed from sections 1 through 3, and now only requirements for liability insurance are included (former sections 4 and 5 have been renumbered as sections 2 and former section 5 has been moved to section 3). Requirements for performance bonds have been moved to 405 KAR 10:015 as noted above. Also, two forms are specified as requirements related to liability insurance coverage: (1) Certificate of Liability Insurance, and (2) Notice of Cancellation, Nonrenewal or Change of Liability Insurance.

*OSMRE Finding:* These changes are non-substantive in nature, not inconsistent with the Federal requirements at 30 CFR 800.60, and are hereby approved.

*405 KAR 12:020. Enumeration of departments, program cabinets, and administrative bodies:* This section has been amended to include the Office of the Reclamation Guaranty Fund to the list of Offices within the Department of Natural Resources.

*OSMRE Finding:* This change was mentioned in H.B. 66 but does not require our approval because it is not part of the State program.

*405 KAR 16:020. Contemporaneous reclamation (sections 1 through 5):* This regulation has been amended. A new section is included (Section 1, Definitions) and defines the term ''completed reclamation.'' Subsequently, other sections have been renumbered. Other changes include adding references to the new section, 405 KAR 10:015, and removing the section involving Supplemental Assurance. Regulatory information about supplemental assurance has been relocated to 405 KAR 10:015, noted above.

*OSMRE Finding:* There is no comparable definition within the Federal regulations. We find, however, that this section is not inconsistent with the Federal regulations and is hereby approved.

## IV. Summary and Disposition of Comments

*Public Comments*

We asked for public comments on the amendment and received responses from three entities: The Surety & Fidelity Association of America (TSFAA) on February 21, 2013, (Administrative Record No. KY–2000–06a); the Appalachian Mountain Advocates (AMA) on March 22, 2013, (Administrative Record No. KY–2000–06c); and the Kentucky Coal Association (KCA) on March 22, 2013, (Administrative Record No. 2000–06b) and April 21, 2015, (Administrative Record No 2000–06d). No public hearing was requested. The following summarizes the comments that were received.

*TSFAA:* TSFAA cited financial concerns over the surety bond increases listed at 405 KAR 10:015 in that an operator who qualified at the lower amount may not be able to qualify at the higher amount. TSFAA suggests an increase in the stringency of enforcement activities relative to contemporaneous reclamation as required in the statutes and regulations. The consequent sizeable bond amounts likely could be avoided if the operator engages in contemporaneous reclamation. Strengthening enforcement and inspection activities should be the first means to addressing the sufficiency of bonds before considering increases in bond amounts. TSFAA is concerned that the bond issued may also extend to the long-term, if not perpetual, obligation of water treatment. TSFAA suggests that Kentucky establish the necessary framework whereby a trust could be established in lieu of a bond with respect to water treatment obligations.

*OSMRE's Response:* Both SMCRA and the Federal regulations require that operators post bonds that are sufficient in amount to guarantee the completion of all reclamation, if that reclamation must be completed by the regulatory authority. Kentucky's amendments were submitted, and are being approved, with exceptions, because they are designed to improve the bonding program. If surety bonds are not available in these higher amounts, operators must obtain one of several other forms of bonding. While strengthening enforcement and inspection activities may be a laudable goal, its achievement is not a substitute for the requirement for a permittee to post an adequate bond.

The Surety & Fidelity Association of America (TSFAA) also stated:

> Water treatment obligations are a different risk, involving funding obligations in perpetuity. This could be a risk not susceptible to underwriting. Establishment of a treatment trust that would fund the treatment obligations in lieu of a bond would facilitate the availability of the bond and put less strain on the bond amount to cover the reclamation obligations. We recommend that the DNR should establish the necessary framework whereby a trust could be established in lieu of a bond with respect to water treatment obligations.

We agree with this comment.

*AMA:* The AMA is concerned that long-term pollutional discharges would allow permittees to post a bond that would not cover the full cost of reclamation. The AMA believes that the amendment to 405 KAR 10:015 section 8(7)(a) properly mandates additional bond amounts but would allow permittees to escape their duty if they submit a remediation plan for areas with inadequate drainage. The AMA also believes that there is no evidence that land reclamation techniques are effective at eliminating long-term acid mine drainage; the regulations fail to clearly require an increase in the bond amount to reflect the added cost of land remediation techniques; and the amendment's assumption of a 20-year time frame for ongoing treatment costs is arbitrary and capricious.

*OSMRE's Response:* We share the AMA's concerns. As set forth in the finding above, we are not approving the 20-year multiplier in 405 KAR 10:015 section 8(7)(a), and the provision at 405 KAR 10:015 section 8(7)(c), which allows a permittee to submit a land

reclamation and remediation plan for areas producing substandard drainage in lieu of bond.

*KCA:* The KCA commented on March 22, 2013, and April 21, 2015, stating it believes the amendment submission should render the Kentucky program fully consistent with the SMCRA statute and implementing regulations and should be approved by OSMRE. Furthermore, the KCA submits that these program revisions successfully address the alleged program deficiencies identified in the 733 Notice. Upon approval of the amendment, KCA urges that the 733 proceedings be terminated.

*OSMRE's Response:* For the reason specified in our finding with respect to 405 KAR 10:015, Section 8, we are not terminating the 733 proceedings at this time.

*Federal Agency Comments*

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, on April 21, 2015, we requested comments on the amendments from various Federal agencies with an actual or potential interest in the Kentucky program (Administrative Record No. KY–2000–05 (a–g). In a letter dated May 13, 2015, (Administrative Record No. KY–2000–06b), the Mine Safety and Health Administration responded that it did not have any comments. No other Federal agency comments were received.

*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.*). None of the revisions that Kentucky proposed to make in this amendment pertain to air or water quality standards. Therefore, we did not ask EPA to concur on the amendment, but requested comment on April 21, 2013. The EPA responded in a letter dated May 6, 2015, (Administrative Record No. KY–2000–06e) acknowledging OSMRE's efforts to collaborate with the EPA on improvements to the effectiveness and consistency of regulatory programs and efforts to reduce the environmental impacts of surface coal mine operations. They did not provide any comments specific to the amendment.

## V. OSMRE's Decision

Based on the above findings, we are approving, Kentucky's amendment that was submitted September 28, 2012, with the following two exceptions:

1. We are deferring our decision on the bi-annual actuarial review provision of H.B. 66 until such time as we are able to evaluate the stability of the KRGF over its first three full years of implementation. Following receipt and review of the third actuarial study, we will reconsider our deferral and determine whether to: (1) Approve the bi-annual actuarial study requirement; (2) require that the studies continue to be performed annually; or (3) take other appropriate action.

2. We are not approving 405 KAR 10:015 8(7), that allows for a posting of a financial performance bond covering a specified period of time and allows a permittee to submit a land reclamation and remediation plan for areas producing substandard drainage in lieu of bond. We are requiring Kentucky to take one of the following actions within 60 days following publication of this document: (1) Notify us how Kentucky will require operators to address financial assurances for the treatment of post-mining discharges, potentially in perpetuity, under its currently approved program, given that we are not approving 10:015 8(7); or (2) submit an amendment to its approved program, or a written description of an amendment, together with a timetable for enactment that is consistent with established administrative or legislative procedures in Kentucky, that requires operators to provide sufficient financial assurances for the treatment of post-mining discharges for as long as such discharges continue to exist.

To implement this decision, we are amending the Federal regulations at 30 CFR part 917, which codify decisions concerning the Kentucky program. In accordance with the Administrative Procedure Act, this rule will take effect 30 days after date of publication. Section 503(a) of SMCRA requires that a State program demonstrate that such State has the capability of carrying out the provisions of the Act and meeting its purposes. SMCRA requires consistency of State and Federal standards.

## 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*

Pursuant to Office of Management and Budget (OMB) Guidance dated October 12, 1993, the approval of state program amendments is exempted from OMB review under Executive Order 12866.

*Executive Order 12988—Civil Justice Reform*

The Department of the Interior has reviewed this rule as required by Section 3(a) of Executive Order 12988. The Department determined that this **Federal Register** document meets the criteria of Section 3 of Executive Order 12988, which is intended to ensure that the agency review its legislation and proposed regulations to eliminate drafting errors and ambiguity; that the agency write its legislation and regulations to minimize litigation; and that the agency's legislation and regulations provide a clear legal standard for affected conduct rather than a general standard, and promote simplification and burden reduction. Because Section 3 focuses on the quality of Federal legislation and regulations, the Department limited its review under this Executive Order to the quality of this **Federal Register** document and to changes to the Federal regulations. The review under this Executive Order did not extend to the language of the State regulatory program or to the program amendment that the State of Kentucky drafted.

*Executive Order 13132—Federalism*

This rule is not a ''[p]olicy that [has] Federalism implications'' as defined by Section 1(a) of Executive Order 13132 because it does not have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Instead, this rule approves an amendment to the Kentucky program submitted and drafted by that State. OSMRE reviewed the submission with fundamental federalism principles in mind as set forth in Sections 2 and 3 of the Executive Order and with the principles of cooperative federalism set forth in SMCRA. See, *e.g.,* 30 U.S.C. 1201(f). As such, pursuant to Section 503(a)(1) and (7) (30 U.S.C. 1253(a)(1) and (7)), OSMRE reviewed the program amendment to ensure that it is ''in accordance with'' the requirements of SMCRA and ''consistent with'' the regulations issued by the Secretary pursuant to SMCRA.

*Executive Order 13175—Consultation and Coordination With Indian Tribal Government*

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 that our decision is 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*

Executive Order 13211 of May 18, 2001, 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 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 Kentucky 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 Kentucky 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: September 19, 2017.

**Thomas D. Shope,**

*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 paragraphs (g) and (h) to read as follows:

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

* * * * *

(g) We are deferring our decision on the bi-annual actuarial review provision of 350 KRS 350.509 until such time as we are able to evaluate the stability of the Kentucky Reclamation Guaranty Fund (KRGF) over its first three full years of implementation.

(h) We are not approving 405 KAR 10:015 8(7).

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

**§ 917.15 Approval of Kentucky regulatory program amendments.**

(a) * * *

| Original amendment submission date | Date of final publication | Citation/description |
|---|---|---|
| * * | * | * * * * |
| September 28, 2012; July 5, 2013; and December 3, 2013. | 1/29/18 | The following emergency KAR sections are approved: 10:001E; 10:070E; 10:080E; and 10:201E.<br>The following KRS sections are repealed: 350 KRS:700–755, except 350.715; the following are amended: 350:595 and 350:990; the following are added: 350.500–521.<br>The following KAR sections are repealed: 405 KAR 10:010, 10:020 and 10:200; the following are amended: 8:010, 10:001, 10:030, 16:020; the following are added: 10:015, 10:070, 10:080, and 10:090. |

* * * * *

■ 4. Section 917.16 is amended by adding paragraph (p) to read as follows:

**§ 917.16 Required regulatory program amendments.**

* * * * *

(p) We are requiring Kentucky to take one of the following actions by March 30, 2018: (1) Notify us how Kentucky will require operators to address financial assurances for the treatment of post-mining discharges, potentially in perpetuity, under its currently approved program, given that we are not approving 405 KAR 10:015 8(7); or (2) Submit an amendment to its approved program, or a written description of an amendment together with a timetable for enactment that is consistent with established administrative or legislative procedures in Kentucky, that requires operators to provide sufficient financial assurances for the treatment of post-mining discharges for as long as such discharges continue to exist.

**Editorial note:** This document was received for publication by the Office of the Federal Register on January 24, 2018.

[FR Doc. 2018–01635 Filed 1–26–18; 8:45 am]

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 117

**[Docket No. USCG–2017–1015]**

**RIN 1625–AA09**

## Drawbridge Operation Regulation; China Basin, Mission Creek, San Francisco, CA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is temporarily modifying the operating schedule that governs the 3rd Street Bridge, across China Basin, Mission Creek, mile 0.0, at San Francisco, California. The bridge owner, the City of San Francisco, submitted a request to secure the bridge in the closed-to-navigation position for 18 months in order to conduct critical mechanical and structural rehabilitation of the bridge. The temporary change to the regulations is expected to meet the reasonable needs of navigation on the waterway.

**DATES:** This temporary final rule is effective from 6 a.m. on February 28, 2018, until 11 p.m. on September 30, 2019.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov.* Type USCG–2017–1015 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary final rule, call or email Carl T. Hausner, Chief, Bridge Section, Eleventh Coast Guard District; telephone 510–437–3516; email *Carl.T.Hausner@uscg.mil.*

**SUPPLEMENTARY INFORMATION:**

### I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
IAW In accordance with
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

### II. Background Information and Regulatory History

On November 14, 2017, we published a NPRM entitled, ''Drawbridge Operation Regulation; China Basin, Mission Creek, San Francisco, CA'' in the **Federal Register** (82 FR 218). We received no comments on this rule.

### III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority 33 U.S.C. 499. The 3rd Street Bridge, across China Basin, Mission Creek, mile 0.0, at San Francisco, California, is a single leaf bascule bridge which provides 3 feet of vertical clearance at mean high water in the closed position and unlimited vertical clearance in the open position. According to the Coast Guard Drawbridge Operation Regulations in 33 CFR 117.149 the draw shall open on signal if at least one hour notice is given.

The owner of the bridge, the City of San Francisco, has submitted a request to the Coast Guard to keep the bridge in the closed-to-navigation position for 18 months to complete critical mechanical and structural rehabilitation of the bridge.

China Basin, Mission Creek, is 0.64 miles in length with the 3rd Street Bridge at the mouth of the basin. Approximately 35 recreational vessels are moored upstream of the bridge and require the drawspan to open in order to depart the basin into San Francisco Bay. There are no commercial vessels that regularly use the waterway. The City of San Francisco has indicated that they will assist vessel owners in China Basin, Mission Creek, to find alternate moorings during the closure period. Vessels able to transit the bridge, while in the closed-to-navigation position, can continue to do so during the closure period.

Under this temporary final rule the draw need not open for the passage of vessels from 6 a.m. on February 28, 2018, until 11 p.m. on September 30, 2019.

If necessary, during this temporary final rule period, the draw shall open on signal if at least 45 days notice is given.

### IV. Discussion of Comments, Changes, and the Temporary Final Rule

The Coast Guard provided a comment period of 30 days and no comments were received. As a result, no changes have been made to the rule as proposed.

### V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive Orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive Orders, and we discuss First Amendment rights of protesters.

#### *A. Regulatory Planning and Review*

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, it has not been reviewed by the Office of Management and Budget (OMB) and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the limited number of vessels impacted and the ability of those vessel owners, located upstream of the bridge, to receive assistance from the City of San Francisco in finding alternate moorings while the bridge is in the closed-to-navigation position.

#### *B. Impact on Small Entities*

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rule. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact