

Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502-8283.

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**SUPPLEMENTARY INFORMATION:** The Federal Energy Regulatory Commission published in the **Federal Register** of November 6, 2002 a Final Rule amending its regulations to update its accounting and financial reporting requirements under its Uniform Systems of Accounts. The effective date is incorrect as published in the **Federal Register**. In the **Federal Register** Document 02-26809 published on November 6, 2002 (67 FR 67692) make the following correction: On page 67692, in the second column, correct the **EFFECTIVE DATE** section to read as follows:

“**EFFECTIVE DATE:** The rule will become effective December 6, 2002.”

**Linwood A. Watson, Jr.**,

*Deputy Secretary.*

[FR Doc. 02-29571 Filed 11-19-02; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 917

[KY-237-FOR]

#### Kentucky Regulatory Program

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

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

**SUMMARY:** We are not approving a proposed amendment to the Kentucky regulatory program (the “Kentucky program”) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Kentucky proposed to revise its program by creating a new section of KRS Chapter 350 to provide that a mining permit is not required of a landowner if coal extraction is incidental to and a necessary requirement of construction, under 5000 tons, and the coal or proceeds thereof are donated to charitable, governmental, or educational organizations.

**EFFECTIVE DATE:** November 20, 2002.

**FOR FURTHER INFORMATION CONTACT:** William J. Kovacic, Telephone: (859)

260-8400, Internet address: [bkovacic@osmre.gov](mailto:bkovacic@osmre.gov).

#### SUPPLEMENTARY INFORMATION:

- I. Background on the Kentucky Program
- II. Submission of the Proposed Amendment
- III. OSM’s Findings
- IV. Summary and Disposition of Comments
- V. OSM’s Decision
- VI. Procedural Determinations

#### I. Background on the Kentucky Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, “a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act \* \* \*; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act.” See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Kentucky program on May 18, 1982. You can find background information on the Kentucky program, including the Secretary’s findings, the disposition of comments, and conditions of approval in the 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.

#### II. Submission of the Proposed Amendment

By letter dated April 12, 2002 (Administrative Record No. KY-1529), Kentucky sent us an amendment to its program, under SMCRA (30 U.S.C. 1201 *et seq.*). Kentucky sent the amendment on its own initiative.

The amendment proposed a new section of the Kentucky Revised Statutes at Chapter 350 and is referenced as Kentucky House Bill 405. In sum, the proposed amendment provides that a mining permit is not required of a landowner if coal extraction on “private land” is incidental to and a necessary requirement of construction, under 5000 tons, and the coal or proceeds thereof are donated to charitable, governmental, or educational organizations. “Private land” is defined as property owned by a not-for-profit organization or by a noncommercial private owner and subject to the construction of improvements. The amendment requires that the landowner seeking the permit exemption notify the cabinet when the

coal is first encountered and prior to removal, and requires the cabinet to conduct an inspection and review of site plans, construction contracts, and other relevant information prior to deciding whether to grant the exemption. Finally, the amendment states that the cabinet may require implementation of any best management practices that are necessary to ensure compliance with stormwater discharge limits. The full text of the proposed amendment can be found in the proposed rule notice at 67 FR 38446 (June 4, 2002).

We announced receipt of the proposed amendment in the June 4, 2002 **Federal Register** (67 FR 38446). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment’s adequacy (Administrative Record No. KY-1537). We did not hold a public hearing or meeting because no one requested one. The public comment period ended on July 5, 2002. We received comments from the Kentucky Coal Association, the Mine Safety and Health Administration, the Fish and Wildlife Service, and the Kentucky Resources Council.

#### 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. Based on these findings, we are declining to approve the amendment.

Kentucky’s proposed amendment is inconsistent with and less stringent than SMCRA and less effective than its implementing regulations because it excludes from regulation certain surface coal mining operations specifically regulated under Federal law. Under SMCRA and Federal regulations, all surface coal mining and reclamation operations are subject to regulation unless an exemption applies. SMCRA section 528 and 30 CFR 700.11(a) list such exemptions.

First, SMCRA section 528(2) exempts “the extraction of coal as an incidental part of Federal, State or local government-financed highway or other construction \* \* \*” Congress’ intent regarding this exemption is clear. As discussed in a March 13, 1979, **Federal Register** notice, 44 FR 14949, the House/Senate Conference Committee explicitly limited exemptions for incidental coal removal to government financed construction projects. As originally added by the Senate, the exemption for incidental coal removal was not limited to government-financed construction. The Conference Committee modified the Senate language to “limit(s) the exemption to

extraction of coal as an incidental part of government-funded construction only, rather than all construction as originally provided in the Senate language." Since Kentucky's proposed amendment involves privately financed construction, it directly contradicts Congress' intent and cannot be approved.

We have consistently maintained that the removal of coal incidental to development for commercial, industrial, residential, or civic use constitutes a surface coal mining operation. In 64 FR 6201 (February 9, 1999), we did not approve a proposed amendment by West Virginia which would have allowed a person to engage in surface coal mining incidental to the development of land for commercial, residential, industrial, or civic use after obtaining a special authorization from the State. In that **Federal Register** notice, we stated that "in promulgating its definition of 'surface coal mining operations' at 30 CFR 700.5, OSM considered and rejected a provision that would have clarified that the definition did not apply to coal removal incidental to private construction \* \* \* OSM found that such an exemption was inconsistent with Section 528 of SMCRA." 64 FR at 6204.

Rejecting West Virginia's proposed amendment, we also referred to two Interior Board of Land Appeals (IBLA) decisions supporting our decision: "The [IBLA] \* \* \* twice ruled that 'the extraction of coal as an incidental part of privately financed construction is not an activity excluded as such from the coverage of the \* \* \* regulatory program.'" *Id.* On May 5, 2000 (65 FR 26130, 26133), we referred again to these decisions when declining to approve a similar proposal by West Virginia.

Second, 30 CFR 700.11(a)(2) exempts surface coal mining and reclamation operations that involve extraction of 250 tons of coal or less. Therefore, no exemption is permitted for the extraction of more than 250 tons of coal. Kentucky's proposal is inconsistent with and less effective than this Federal requirement because it exempts the extraction of up to 5000 tons of coal incidental to privately financed construction. For the foregoing reasons, the proposed amendment is inconsistent with and less effective than Federal law and cannot be approved.

#### IV. Summary and Disposition of Comments

##### *Public Comments*

We asked for public comments on the amendment (Administrative Record No.

KY-1537), and received two. First, in a letter dated June 27, 2002 (Administrative Record No. KY-1543), the Kentucky Resources Council (KRC) commented that SMCRA does not provide an exemption allowing removal of over 250 tons of coal absent a permit unless another recognized exemption applies. As explained in the findings above and because no other exemption applies, we agree with KRC. We also agree with KRC that removing the quantity of coal that Kentucky's proposal seeks to exempt without advance planning, bonding, and reclamation requirements can result in significant off-site impacts that may not be remediated. Finally, KRC commented that the proposed amendment furthers the potential for "sham" operations because the exemption would be granted on the assumption that future construction would occur.

The second public comment received was from the Kentucky Coal Association (KCA). Although KCA urged OSM to approve the proposed amendment, it did not provide specific comments or reasons why the amendment should be approved. For the reasons set forth in the above findings, we are not approving the amendment.

##### *Federal Agency Comments*

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Kentucky program (Administrative Record No. KY-1537). We received one comment from the Fish and Wildlife Service (FWS) and one from the Mine Safety and Health Administration (MSHA). In a letter dated July 9, 2002 (Administrative Record No. KY-1548), FWS stated that it believed the terms of the proposed amendment are appropriate given adequate implementation of best management practices to protect water quality. As discussed in the findings above, Kentucky's proposed amendment is inconsistent with SMCRA and its implementing regulations. Even given adequate implementation of best management practices to protect water quality, the proposed amendment would still exceed the Federal exemption limit of 250 tons. Thus, even if best management practices are followed, the amendment cannot be approved.

Comments from MSHA, submitted in a letter dated June 17, 2002 (Administrative Record No. KY-1541), simply stated MSHA does not have jurisdiction over incidental coal removal since the activity would not be

functioning for the purpose of producing a mineral.

##### *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.

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

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On June 12, 2002, we requested comments on Kentucky's amendment (Administrative Record No. KY-1537), but neither the SHPO nor the ACHP responded to our request.

#### V. OSM's Decision

Based on the above findings, we are not approving Kentucky's proposed amendment. The Federal regulations at 30 CFR Part 917 codifying decisions concerning the Kentucky program are being amended to implement this decision. Consistency of State and Federal standards is required by SMCRA.

##### *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 (OMB) under Executive Order 12866.

*Executive Order 12988—Civil Justice Reform*

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State 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 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. Hence, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

*Small Business Regulatory Enforcement Fairness Act*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of \$100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal, which is the

subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

*Unfunded Mandates*

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

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

Intergovernmental relations, Surface mining, Underground mining.

Dated: September 17, 2002.

**Michael K. Robinson,**

*Acting Regional Director, Appalachian Regional Coordinating Center.*

For the reasons set out in the preamble, 30 CFR 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 the following paragraph:

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

\* \* \* \* \*

(c) The amendment submitted by letter dated April 12, 2002, proposing a new section of the Kentucky Revised Statutes at Chapter 350 and referenced as Kentucky House Bill 405, is hereby not approved, effective November 20, 2002.

[FR Doc. 02–29305 Filed 11–19–02; 8:45 am]

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[SIP NO. MT–001–0043, FRL–7397–4]

**Approval and Promulgation of Air Quality Implementation Plans for the State of Montana; Revisions to the Administrative Rules of Montana**

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