



4310-05-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 917

[SATS No. KY-253-FOR; Docket ID: OSM-2009-0014]

Kentucky Regulatory Program

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

ACTION: Proposed rule; Removal of Required Amendments; public comment period and opportunity for public hearing.

SUMMARY: We are announcing our intent to remove two required amendments to the Kentucky regulatory program (hereinafter, the "Kentucky program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). As a result of OSM's review of the Kentucky program concerning its regulations and procedures

relating to Ownership and Control, and Transfer, Assignment or Sale of Permit Rights, OSM has determined that two previously required amendments can be removed.

Kentucky's program with regard to Ownership and Control, and Transfer, Assignment, or Sale of Permit Rights, is now consistent with the corresponding Federal regulations and SMCRA.

This document gives the times and locations that the Kentucky program is available for your inspection, the comment period during which you may submit written comments, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments until 4:00 p.m., local time [Insert date 30 days after date of publication in the Federal Register]. If requested, we will hold a public hearing on [Insert date 25 days after date of publication in the Federal Register]. We will accept requests to speak until 4:00 p.m., local time on [Insert date 15 days after date of publication in the Federal Register].

ADDRESSES: You may submit comments, identified by "KY-253-FOR; Docket Number OSM-2009-0014" by either of the following two methods:

Federal eRulemaking Portal: www.regulations.gov. The proposed rule has been assigned Docket ID: OSM-2009-0014. If you would like to submit comments through the Federal eRulemaking Portal, go to www.regulations.gov and follow the instructions.

Mail/Hand Delivery/Courier:

Joseph L. Blackburn, Field Office Director

Lexington Field Office

Office of Surface Mining Reclamation and Enforcement

2675 Regency Road

Lexington, Kentucky 40503

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Comment Procedures” heading of the SUPPLEMENTARY INFORMATION section in this document.

Docket: In addition to obtaining copies of documents at www.regulations.gov, you may also obtain information at the address listed below during normal business hours, Monday through Friday, excluding holidays.

Joseph L. Blackburn, Field Office Director

Lexington Field Office

Office of Surface Mining Reclamation and Enforcement

2675 Regency Road

Lexington, Kentucky 40503

Telephone: (859) 260-3902; E-mail: jblackburn@osmre.gov

FOR FURTHER INFORMATION CONTACT: Joseph L. Blackburn, Telephone:
(859) 260-3900. E-mail: *jblackburn@osmre.gov*.

SUPPLEMENTARY INFORMATION:

- I. Background on the Kentucky Program
- II. Background on the Ownership and Control Rule
- III. Description of OSM's Proposed Action
- IV. Public Comment Procedures
- V. 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 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 this Act...; and rules and regulations consistent with regulations issued by the Secretary pursuant to this 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 of the Kentucky program in the May 18, 1982, Federal Register (47 FR 21434). You can also find later actions concerning Kentucky's program and program amendments at 30 CFR 917.11, 917.12, 917.13, 917.15, 917.16, and 917.17.

II. Background on the Ownership and Control Rule

OSM first promulgated final rules to address Ownership and Control (O&C) over 20 years ago. Since then, OSM has published a series of changes to O&C and related rules, some in response to Federal Court decisions, culminating in our latest rulemaking published on December 3, 2007, which included changes to our Transfer, Assignment, or Sale (TAS) of Permit rights rules (72 FR 68000).

The Lexington Field Office conducted an evaluation of the Kentucky regulatory program pursuant to 30 CFR 732.17 in order to determine if any changes were required. The Lexington Field Office reviewed the Kentucky program against all revisions to the Federal regulations through July 1, 2008, using a standard of "no less effective than the Federal regulations in meeting the requirements of the Act" (65 FR 79658).

As a part of the evaluation, the Lexington Field Office of OSM conducted several meetings with the Kentucky Department for Natural Resources (KDNR). As a part of its review, OSM considered whether the program is currently being implemented in accordance with the current Federal regulations. Because OSM had issued required

amendments to KDNR prior to the current final rulemaking, OSM revisited the need for those required amendments in light of the current status of the Federal regulations. As a result of that review, OSM is proposing to remove the previously required amendments as discussed below.

III. Description of OSM's Proposed Action

OSM is proposing removal of a required amendment found at 30 CFR 917.16 (e) regarding the Kentucky ownership and control regulations. Previously, OSM reviewed a program amendment submitted by Kentucky, which among other things, proposed to add a regulation which prohibited "... the issuance of a permit if the applicant, operator or anyone who owns or controls the applicant, controls or has controlled any surface coal mining and reclamation operation with a demonstrated pattern of willful violations of Kentucky Revised Statute (KRS) chapter 350 and regulations adopted pursuant thereto..." In a Federal Register notice dated September 23, 1991 (56 FR 47907), OSM found the proposed 405 KAR 8:010 Section 13 (4)(c) to be less effective than its Federal counterpart at 30 CFR 773.15 (b)(3) to the extent the proposal does not include violations of Federal regulatory programs and other State regulatory programs. OSM disapproved the proposed revisions and required Kentucky to further amend its program to correct the deficiencies identified. OSM included a required program amendment in its decision as follows:

30 CFR 917.16(e) By March 23, 1992, Kentucky shall amend its rules at 405 KAR 8:010 section 13(4)(c) to include violations of Federal regulatory programs and other State regulatory programs, not just violations of KRS chapter 350 and regulations adopted thereto.

As a result of the recent review of the current O&C program in Kentucky, we have determined that KDNR interprets 405 KAR 8:010 Section 13 (4) in a manner that is no less stringent than SMCRA and no less effective than the corresponding Federal regulations. In our previous assessment, leading to the required amendment, OSM considered only one regulation, which on its face implied that KDNR might not consider all violations. However, our recent review determined that KDNR has been interpreting these standards consistent with the Federal regulations. When reviewing the Kentucky program in total, we tentatively determined that the program is being interpreted such that no permit will be issued to an applicant who owns or controls operations with a demonstrated pattern of willful violations of the Kentucky program, SMCRA, or any other surface coal mining regulatory program, that are of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the Kentucky program, SMCRA, or with any other surface coal mining regulatory program. For this reason, we are proposing the removal of the required amendment at 30 CFR 916.16(e).

In addition, OSM is proposing removal of a required amendment found at 30 CFR 917.16 (h) regarding the Kentucky operator change revision regulations. Previously OSM reviewed a program amendment submitted by Kentucky, which among other things,

proposed to add a regulation which "...established a new category of permit revision for operator changes that do not constitute a transfer, assignment or sale of permit rights."

In a Federal Register dated January 12, 1993 (58 FR 3833), OSM determined that the proposed change to 405 KAR 8:010 Section 20(6)(h) did not include notification to OSM, nor did the proposed rule require that the regulatory authority be notified when the approved change was consummated. OSM disapproved the proposed revision and required Kentucky to further amend its program to correct the deficiencies identified.

OSM included a required program amendment in its decision as follows:

30CFR 917.16(h) By June 14, 1993, Kentucky shall amend its rules at 405 KAR 8:010 Section 20(6)(h) by including OSM as one of the parties to be notified of the cabinet's decision to approve or deny the application for an operator change and to require that the regulatory authority be notified when the approved change is consummated.

OSM has historically interpreted the Federal rules as meaning that changes in the "operator" of a mine, as that term is defined at 30 CFR 701.5, must be processed as a TAS of permit regulations. In the December 3, 2007, Federal regulation (72 FR 68000) OSM made changes to TAS, including defining TAS as limited to "...a change of a permittee..." (30 CFR 701.5). Therefore, the Federal regulations no longer consider a change in the "operator" of a mine to fall under the definition of TAS. Kentucky continues to process a change in mine operator in a manner similar to the process developed for the TAS applications. In addition, KDNR will continue entering all data concerning a revision of the mine operator in both Applicant/Violator System (AVS) and

Kentucky Surface Mining Information System (KYSMIS).

IV. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the Kentucky program now satisfies the applicable program approval criteria of 30 CFR 732.15. If we remove the required amendments, the Kentucky program will be approved as it is currently being implemented.

Written or Electronic Comments

If you submit written comments, they should be specific, confined to issues pertinent to the proposed regulations, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent Tribal or Federal laws or regulations, technical literature, or other relevant publications. We cannot ensure that comments received after the close of the comment period (see DATES) or at locations other than those listed above (see ADDRESSES) will be included in the docket for this rulemaking and considered.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal

identifying information in your comment, be aware that your entire comment – including your personal identifying information – may be made publicly available at any time.

While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. We will not consider anonymous comments.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under "FOR FURTHER INFORMATION CONTACT" by 4:00 p.m., local time on [Insert date 15 days after date of publication in the Federal Register]. If you are disabled and need reasonable accommodations to attend a public hearing, contact the person listed under FOR FURTHER INFORMATION CONTACT. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold the hearing.

To assist the transcriber and ensure an accurate record, we request, that if possible, each person who speaks at a public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If there is only limited interest in participating in a public hearing, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under FOR FURTHER INFORMATION CONTACT. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under ADDRESSES. We will make a written summary of each meeting a part of the administrative record.

V. Procedural Determinations

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.

Other Laws and Executive Orders Affecting Rulemaking

When a State submits a program amendment to OSM for review, our regulations at 30 CFR 732.17(h) require us to publish a notice in the Federal Register indicating receipt of the proposed amendment, its text or a summary of its terms, and an opportunity for public

comment. We conclude our review of the proposed amendment after the close of the public comment period and determine whether the amendment should be approved, approved in part, or not approved. At that time, we will also make the determinations and certifications required by the various laws and executive orders governing the rulemaking process and include them in the final rule.

List of Subjects in 30 CFR Part 917

Intergovernmental relations, Surface mining, Underground mining.

Thomas D. Shope, Regional Director
Appalachian Region

August 9, 2012 _____
Date

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