

1992) to the effective date of KRS 350.421 (1) and (2) (July 15, 1994). Pursuant to newly promulgated 30 CFR 843.25, OSM intends to publish by July 31, 1995, for each State with a regulatory program, including Kentucky, final rule notices concerning the enforcement of the provisions of the Energy Policy Act in those States.

E. House Bill 707

At KRS 350.070(1), Kentucky proposes to permit extensions of the underground mining area that are not incidental boundary revisions and do not include planned subsidence or other new proposed surface disturbances to be made by application for a major revision to the permit.

The Federal rules do not require that areas overlying proposed underground workings be included in the permit area if no surface disturbance is planned. The Director finds the proposed revisions at KRS 350.070(1) not inconsistent with the requirements of SMCRA and the Federal rules.

IV. Summary and Disposition of Comments

Public Comments

The Director solicited public comments and provided an opportunity for a public hearing on the proposed amendment. Two public comments were received. Because no one requested an opportunity to speak at a public hearing, no hearing was held.

The Coal Operators and Associates Inc. expressed its general support for the amendment. The Kentucky Resources Council, Inc. (KRC) had several comments:

1. *House Bill 383*—The KRC was concerned with the practical implementation of the new protections of KRS 350.421 (1) and (2). The KRC anticipates proof difficulties where mine related water loss or quality diminution occurs. The KRC then recommended several courses of action. The Director notes that the scope of this amendment are the revisions to the Kentucky statutes and that the concerns raised by the KRC are beyond the scope of this rulemaking and do not pertain to KRS 350.421, which the KRC found to be consistent with SMCRA.

2. *Senate Bill 208*—The KRC stated that this Bill does not provide a commencement date for the operation of the statute's provisions and could be construed to require waiving permit blocking for violations that occurred before 1992 on pre-1992 permitted remining sites. KRC asserts that Congress did not intend section 510(e) to apply either to violations which

occurred prior to October 24, 1992 or to permits issued before that date. KRC posits the purpose of section 510(e) is to provide solely post-enactment date incentives for remining. KRC also cautioned of the difficulty of establishing the existence of unanticipated events or conditions at permits issued before October 24, 1992.

OSM disagrees with part of the comment. As to the date the violation occurs, Kentucky will exempt permit applicants from permit blocks for violations that occurred after July 15, 1994 as a result of an unanticipated event or condition on lands eligible for remining.

Regarding the date the remining permit is issued, the plain language of section 510(e) of SMCRA does not require that the remining permit have been issued after October 24, 1992, only that the application for the new permit be on or after October 24, 1992. While the legislative history of section 2503 of the Energy Policy Act indicates that the remining amendments to SMCRA were, as a whole, meant to provide incentives to industry to extract coal which would otherwise be bypassed, the text of section 510(e) is also consistent with Congressional awareness of, and a need to correct the inequality of permit applicants being permit blocked for a violation resulting from an event or condition at a remining site which they could not have reasonably anticipated nor over which they had any control, regardless of the date of permit issuance.

The application of section 510(e) should also not be limited on the basis of the potential difficulty of establishing unanticipated events or conditions on permits issued before October 24, 1992. As with any permit requirement, the burden is on the applicant to make the required demonstration. Regulatory authorities will decide whether to apply section 510(e) based upon information set forth in the permit application. Moreover, any difficulty a regulatory authority might experience in evaluating whether the event or condition underlying the potentially permit blocking violation was reasonably unanticipated or whether the violation occurred on lands eligible for remining would be no greater on October 23, 1992, the day before section 510(e) was enacted, than on the following day. Accordingly, OSM does not interpret this section to impose a post-October 24, 1992 limitation on when permits must have been issued. This issue may, however, become increasingly academic for there are ever fewer pre-October 24, 1992 remining permits which are still in active mining reclamation.

The KRC was concerned that revisions to KRS 350.032, 350.0301 and 350.0305 may be construed to eliminate the ability to obtain under KRS 350.032(4) temporary relief of cabinet orders and determinations that are not related to bond forfeitures or enforcement orders. In a letter dated September 1, 1994, Kentucky stated that KRS 350.032(4), its temporary relief provision, applies to orders issued "under this chapter." Kentucky interprets KRS 350.032(4) to authorize temporary relief in appeals under both KRS 350.0305 and KRS 350.032. The Director agrees with Kentucky's interpretation since the phrase "under this chapter" means Chapter 350 and sections 350.032, 350.0301 and 350.0305 all are within Chapter 350.

Federal Agency Comments

Pursuant to 30 CFR 732.17(h)(11)(i), the Director solicited comments on the proposed amendment from various Federal agencies with an actual or potential interest in the Kentucky program. The U.S. Department of the Interior, Bureau of Land Management and Bureau of Mines; the U.S. Department of Labor, Mine Safety and Health Administration; and the U.S. Department of Agriculture, Soil Conservation Service, concurred without comment. The U.S. Department of the Interior, Fish and Wildlife Service, commented that the reduction in the period of responsibility for revegetation success for remining sites from five years to two years would result in lost opportunities to assure vegetative success on highly erosive sites. It recommended that the regulation remain unchanged. The Director notes Kentucky's proposed revision is identical to SMCRA's standards at section 515(b)(20)(B).

Environmental Protection Agency (EPA)

Pursuant to 30 CFR 732.17(h)(11)(ii), OSM is required to obtain the written concurrence of the EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

On May 13, 1994, OSM solicited EPA's concurrence with the proposed amendment. By letter dated May 17, 1995, EPA concurred with the provisions of the proposed amendment.

V. Director's Decision

Based on the above findings, the Director approves, with two exceptions, the proposed amendment as submitted by Kentucky on April 29, 1994. As