

By letter dated July 10, 2002, (administrative record no. KY-1547), Kentucky submitted additional explanatory information in response to our letter dated February 13, 2002. Because the information merely clarified certain provisions of the proposed amendment, we did not reopen the comment period.

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. For the reasons described below, we are approving the amendment, with an exception. Any revisions that we do not specifically discuss below concern nonsubstantive wording or editorial changes.

House Bill 792, Subsection(3), amends KRS 350.445(3)—Steep Slopes. It allows disturbance of the land above the highwall for the construction of a permanent road only if the permittee affirmatively demonstrates, and the Natural Resources and Environmental Protection Cabinet (Cabinet) makes a detailed written determination, that the proposed disturbance facilitates compliance with KRS Chapter 350, and it requires that the land disturbed be limited to that amount necessary to facilitate compliance. The Cabinet determination must be made upon the permittee demonstration that certain, specific requirements will be met. These requirements are contained in KRS 350.445(3)(a) through (j). For example, the permittee must completely eliminate the production highwall and backfill the mined areas to approximate original contour with no road remaining on the bench. In addition to the specified requirements, the permittee must meet all other performance standards of this chapter.

Section 515(d)(3) of SMCRA allows disturbances above the highwall if the disturbances will facilitate compliance with the environmental protection (performance) standards of Section 515. In addition, the disturbances “shall be limited to that amount necessary to facilitate * * * compliance” with Section 515.30 U.S.C. 1265(d)(3).

Kentucky requires compliance with KRS Chapter 350. In its letter dated July 10, 2002, Kentucky clarified that KRS 350 includes both application requirements and performance standards. However, Kentucky stated that the demonstrations required of the permittee are directed towards, and would facilitate compliance with, performance standards. Kentucky further explained how constructing roads above highwalls would facilitate

that compliance by stating, “permanent roads constructed above the highwall result in a more stable mine backfill configuration than the steeper backfill required with an on-bench road at the toe of the backfill. Further, the disturbance of the area above the highwall, in creating the road cut, results in smaller volumes of excess spoil than would placement of an on-bench road at the base of the backfill resulting in a reduction of spoil materials placed in off-bench hollow fills and associated stream loss.”

Additionally, the backfilling and grading plan must incorporate a narrative, applicable specifications (plan, profile and section drawings), and volumetric calculations sufficient for the Cabinet to make an affirmative finding. The reclamation plan will be based on the construction requirements for a permanent road. No road embankments would exist. The roadbed would be surfaced with durable rock or cut to a solid rock surface. That section of the exposed road cut constructed in soils materials and the undisturbed natural barrier would be revegetated in accordance with the approved plan. The roadway width in the approved plan must be designed to be appropriate for the amount of traffic and for the equipment to manage the approved postmining land use. Evaluation of the postmining land use would be based on the level of management and road specifications (volume of traffic, size and weight of vehicles, and periodic/daily use required by the landowner). The roads will connect with other roads and must support the approved postmining land use. The Cabinet will make a written determination upon a demonstration by the permittee that the requirements of KRS 350.445 (3) (a–j) are met. Kentucky also affirmed that it retains discretion to ultimately approve or disapprove a permittee's request to construct a permanent road above a highwall.

Because the Kentucky amendment contains provisions that are substantively identical to those contained in section 515(d)(3) of SMCRA, and also imposes additional requirements for roads constructed above highwalls, we find that the proposed Kentucky amendment is no less stringent than section 515(d)(3) of SMCRA and can be approved, with one exception. Section (3)(g) requires that the road be constructed to a size and design appropriate to support coal mining activities and the proposed postmining land use. Allowing roads above highwalls “to support coal mining activities” is inconsistent with, and therefore less stringent than, section

515(d)(3) of SMCRA, which allows disturbances above highwalls only where the disturbances will facilitate compliance with environmental protection performance standards, and not where they will facilitate mining itself. For this reason, the phrase “to support coal mining activities and” cannot be approved.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment (administrative record no. KY-1494), and received two pertaining to HB 792. Because no one requested an opportunity to speak at a public hearing, none was held. By letter dated June 14, 2000 (administrative record no. KY-1480), the Kentucky Coal Association expressed its full support of HB 792. By electronic mail on July 5, 2000 (administrative record no. KY-1484), the Kentucky Resources Council, Inc. (KRC) expressed concern that to the extent that HB 792 eliminates Kentucky's discretion to approve or disapprove a proposed above-highwall disturbance and to mandate that it accepts as “facilitating compliance” any mine plan which proposes a permanent road above the top of a highwall, the provision would be inconsistent with Federal law. The KRC acknowledged that under certain configurations where a road above the highwall is constructed in lieu of a permanent mine bench road, that less spoil disposal in valley fills is necessary. It contends, however, that widespread abuse has occurred and safeguards must therefore be instituted. Kentucky must also retain discretion to determine whether the road approval will facilitate environmental compliance and meet all other performance standards. The KRC emphasized that only under narrowly drawn circumstances, with Kentucky retaining discretion to approve or disapprove the roads, can the proposed amendment be considered consistent with Federal law.

We acknowledge the KRC's concerns. We refer to Kentucky's letter dated July 10, 2002, discussed in the finding above, in which Kentucky affirms that the land above a highwall may be disturbed for the construction of a permanent road only when the applicant affirmatively demonstrates, and Kentucky makes a written determination that the proposed disturbances facilitate compliance with both application requirements and performance standards. Kentucky further affirms that it will retain full discretion to approve or disapprove a