

These provisions are no less effective than their Federal counterparts at 30 CFR 816.133(a) and 817.133(a). The State regulations at 405 KAR 16:210 Section 2(1) states in relevant part, "the premining use of land to which the postmining land use is compared shall be those uses which the land previously supported if the land has not been previously mined." When Kentucky submitted this change in 1992, OSM indicated that, "[t]his rule, while similar to the Federal rule at 30 CFR 816.133(b), fails to provide that a postmining land use must be compared to premined land which was properly managed, as set forth in the cited Federal rule". [October 1, 1992, **Federal Register** (57 FR 45295, 45300)]. When OSM determined that the Kentucky rule was less effective, to the extent Kentucky failed to require a comparison to a premining land use that was properly managed, OSM required an amendment. The required amendment at 30 CFR 917.16(g) requires Kentucky to submit proposed revisions to its regulations to provide that in determining premining uses of land not previously mined, the land must have been properly managed.

We find, as discussed below, that the Kentucky program as it currently exists is no less effective than the Federal regulations and that the required amendment at 30 CFR 917.16(g) can be removed.

The Kentucky program, like the Federal regulations at 30 CFR 816.133(a) and 817.133(a), requires that all disturbed areas be restored in a timely manner to conditions that are capable of supporting either the uses that they were capable of supporting before any mining or any approved higher or better uses. (The Kentucky program also extends this requirement to all affected areas and does not limit it to disturbed areas.) In general, compliance with this requirement rests on a determination that the site has been restored to a condition capable of supporting the approved postmining land use. This determination consists primarily of two components: (1) Site configuration, which is addressed by the backfilling and grading regulations and is not dependent upon premining land use or management; and (2) revegetation success.

As authorized by 30 CFR 816.116 and 816.117, the Kentucky program (*see* 405 KAR 16:200/18:200 Section 5) relies primarily upon technical standards (ground cover; productivity standards; and tree and shrub stocking standards) to evaluate revegetation success for the various postmining land use categories. These technical standards for ground cover, stocking, and production are not

site specific and apply regardless of how the land was used or managed before mining. The technical standards are based on accepted management practices for the land use in question.

Further, Kentucky's rules allow the use of reference areas to evaluate revegetation success. These references must be on unmined areas and as close to the permit area as possible. Under 405 KAR 16:200/18:200 Section 7, reference areas must be managed in accordance with the regional norm for the approved postmining land use. Regional norms would not be considered improper management practices for purposes of determining whether the land has been restored to its premining capability.

For these reasons, we find that, with respect to the provision at issue in 30 CFR 917.16(g), Kentucky's program is no less stringent than SMCRA and no less effective than the Federal regulations implementing SMCRA. Therefore, we are removing the required amendment at 30 CFR 917.16(g).

#### IV. Summary and Disposition of Comments

##### *Public Comments*

No public comments were received on this proposed action.

##### *Federal Agency Comments*

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, on April 29, 2003, we requested comments on the proposed removal of the required amendment at 30 CFR 917.16(g). We received one Federal Agency comment. On May 14, 2003, we received a comment from the U.S. Department of Labor's Mine Safety and Health Administration (MSHA) (Administrative Record No. KY-1579). The letter indicated that upon review of the proposed removal of the required amendment, MSHA has determined that there will be no impact of concern to their office.

On June 16, 2003, the USFWS contacted the Lexington Field Office and informed them that they would have no comments.

##### *Environmental Protection Agency (EPA) Concurrence and Comments*

Under 30 CFR 732.17(h)(11)(i) and (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.*). This amendment does not pertain to air or water quality standards.

Therefore, we did not ask the EPA for their concurrence or comment.

#### V. OSM's Decision

Based on the above finding, we are removing the required amendment to Kentucky's program relating to the determination of premining uses of land not previously mined having to be properly managed.

To implement this decision, we are amending the Federal regulations at 30 CFR part 917, which codify decisions concerning the Kentucky program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. 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*

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