

#### 4. Summary and Disposition of Comments

##### Public Comments

We solicited public comments and provided an opportunity for a public hearing on the proposed amendment submitted on July 30, 1997, and revised on March 4, 1998, March 16, 1998, and July 14 1998. Because no one requested an opportunity to speak, a hearing was not held. The National Citizens' Coal Law Project, a part of Kentucky Resources Council, Inc. (KRC), submitted comments on several different occasions in response to the original Kentucky submission and the subsequent revisions. The comments are summarized below and organized by date of submission. Only those comments pertaining to the issues contained in this rule are included here.

*July 11, 2002 (administrative record no. KY-1553)*—the KRC addressed issues contained in OSM's May 26, 2000, issue letter and Kentucky's subsequent response on August 10, 2000. The remarks supplement previous comments on record by the KRC.

(a) 405 KAR 16/18:100 sections 1(9)(c) and 1(10)(b)—the KRC states that embankment failure is not the only mechanism that could cause release from impoundments and that the exemption from inspections for non-embankment impoundments should be disapproved. We agree. As stated in our findings at (c)2, we are not approving the proposed regulation at 1(9)(c) because even completely incised impoundments may have a hazard potential, for example, larger impoundments or those located in steep slopes. We are approving the proposed regulation at 1(10)(b) to the extent that it is implemented and managed in accordance with the provisions of OSM Directive TSR-2 dated September 14, 1987. As required in OSM Directive TSR-2, for impoundments that are to be considered for exemption from inspection, but were not included in the permit application, such as those created by a depression left by backfilling and grading, there will have to be case-by-case decisions made by Kentucky based on additional information specific to each impoundment being considered for exemption from quarterly examinations. This has to include, at a minimum, a certified report that the impoundment does not meet the Class B or C impoundment hazard criteria and there are no safety or environmental concerns.

(b) 405 KAR 16/18:160 section 3(1)(c)—the KRC states that a reference to TR-60 should be included in the Kentucky impoundment regulations. We

agree that a reference to TR-60 or equivalent criteria should be included. As discussed in finding (c)3, we found Kentucky's reference to 405 KAR 7:040 section 5 and 405 KAR 4:030, and the Division of Water Engineering Memorandum No. 5 to be no less effective than 30 CFR 816/817.49 (a)(5). Therefore, adding a reference to TR-60 is not necessary.

*December 9, 1998 (administrative record no. KY-1446)*—the KRC addressed those changes submitted by Kentucky on November 14, 1997, and formally submitted to OSM on March 4, 1998.

(a) 405 KAR 16/18:090 section 3—the KRC notes that it sought and received clarification from Kentucky that the requirement that all drainage from disturbed areas pass through a sediment pond, and that the pond be constructed before any other disturbance, apply with equal force to other treatment facilities (administrative record no. KY-1431, November 14, 1997).

(b) 405 KAR 16/18:100 sections 1(9)(c) and 1(10)(b)—the KRC objected to the categorical exemption from engineering inspections at sections 1(9)(c) and 1(10)(b). We note that only section 1(9)(c) concerns exemption from engineering inspections. As noted above, we are disapproving section 1(9)(c).

(c) 405 KAR 16/18:100 section 1(1)(b)—the KRC states that the deletion of former 405 KAR 16:090 section 20 allows temporary structures, which fall within the definition of dams to avoid meeting the requirements of 405 KAR 7:040 section 5 and 401 KAR 4:030, since 405 KAR 16:100 section 1(1)(b) limits to "permanent" dams. The KRC suggested that the word "permanent" should be removed from the phrase "permanent dams" so as not to limit the applicability of the regulation. First, Kentucky's definition of "dams" at KRS 151.100 is less inclusive than Kentucky's definition of "impoundments", which is substantively identical to the Federal definition. We note that the complete language of 405 KAR 16/18:100 section 1(1)(b) reads, "all impoundments classified as Class B-moderate or Class C-high hazard, and all permanent 'dams' as defined in KRS 151.00, shall comply with 405 KAR 7:040, section 5 and 401 KAR 4:030." All impoundments, temporary or permanent, meeting the specified criteria must meet the requirements. The retention of the word "permanent" does not, therefore, limit compliance.

(d) 405 KAR 16/18:160—the KRC supports the retention of requirements relating to minimum freeboard,

vegetative matter removal, and spillway design. The KRC sought and received clarification from Kentucky that the use of the term "coal mine waste," (rather than "coal processing waste") is not intended to allow use of underground development waste that is toxic or acid-forming, and that the natural slaking and combustion potential of the underground development waste will be accounted for in the assessment of embankment stability. Accordingly, since the KRC supports the language, no additional response is necessary.

*October 6, 1997 (administrative record no. KY-1415)*—the KRC submitted comments on several issues already addressed in the comment sections above.

##### Federal Agency Comments

According to 30 CFR 732.17(h)(11)(i), we solicited comments on the proposed amendment submitted on July 30, 1997, and revised on March 4, 1998, March 16, 1998, and July 14, 1998, from various Federal agencies with an actual or potential interest in the Kentucky program. The Department of Labor, Mine Safety and Health Administration, commented that the proposed amendment had no apparent impact on its program (administrative record nos. KY-1542 and KY-1554).

##### 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.*). By letter dated June 6, 2000, we solicited EPA's comments and/or concurrence (administrative record no. KY-1477). The EPA submitted comments in a letter dated November 28, 2000 (administrative record no. KY-1501). Only those comments pertaining to the specific regulations included in this rule will be addressed here.

At 405 KAR 16/18:090 section 1, the EPA recommends that language be incorporated that specifically states that "watershed disturbance" include activities like timber harvesting and construction of haul roads. We note that Kentucky's proposed regulation is no less effective than the Federal regulations. Examples of activities are not necessary because Kentucky requires that sedimentation ponds be in place before any disturbance. We are not requiring that Kentucky further revise its regulations. The EPA also commented that there is little evidence