

at 5. (D.C. Cir. May 30, 2002). Therefore, our approval of the Kentucky AML Plan provision incorporating the Federal AML Enhancement Rule by reference is subject to the restrictions placed upon the Federal regulation by the court. Moreover, Kentucky may be required to further amend its AML Plan to conform with future revisions to the AML Enhancement Rule that will be carried out in an effort to comply with the court's remand order.

#### *Reclamation Agreements (p. 10–12)*

In this subsection, Kentucky proposes to allow operators to enter into reclamation agreements with the Division of Abandoned Mine Lands for the purpose of removal of excess spoil from adjacent or nearby active permitted operations and subsequent placement on AML sites. Placement of excess spoil on adjacent abandoned mine land has been addressed previously in other rulemaking. Specifically, in a July 9, 1991, letter to Ohio (Administrative Record No. OH–1546), the Director of OSM clarified OSM's position concerning the standards and requirements which apply to the usage of excess spoil for reclamation of abandoned mine land sites. OSM focused on the parameters for excess spoil disposal outside the permit area as established, in part, in several final rules approving such a provision in the West Virginia program (45 FR 69254–69255, October 20, 1980; 46 FR 5919, January 21, 1981; and 55 FR 21328–21329, May 23, 1990).

In the January 21, 1981, **Federal Register** announcing approval of the West Virginia program (46 FR 5919), the Secretary found that, for purposes of excess spoil disposal, a reclamation contract governing work to be performed on a Federal AML reclamation grant project is the equivalent of permit and bond under Title V of SMCRA. In the May 23, 1990, **Federal Register** (55 FR 21329), OSM found that West Virginia's proposed disposal of excess spoil on a Federally funded AML reclamation project is approvable provided the spoil is not necessary to restore approximate original contour (AOC) on or otherwise reclaim the active mine. In addition, as stated in the May 23, 1990, **Federal Register**, fills are not to be created on AML reclamation projects. Spoil deposited on such sites may be used only to complete reclamation and to return the site to its AOC. OSM restricted eligibility for such spoil deposition to AML reclamation projects funded through the Federal AML grant process. The Director finds that Kentucky's proposal regarding

placement of excess spoil meets these requirements for AML reclamation projects authorized through the Federal AML grant process, for the reasons set forth below.

First, Kentucky's proposal requires that the excess spoil placed on an abandoned site will be “for use as cover material and a growth medium for vegetation.” As such, the amount of excess spoil placed thereon will not exceed that required to restore that site to AOC. Therefore, valley, head-of-hollow and durable rock fills will not be constructed on these AML sites, because the amount of material deposited to form a fill would far exceed that necessary for use as cover material and as a growth medium for revegetation.

Second, the proposal requires that the “site must be designated as an active AML project during all reclamation activity and will be subject to oversight by (Kentucky) inspection personnel.” This is interpreted to mean the project is to be administered as a Federally-funded AML project authorized through the Federal AML grant process, which must comply with requirements of the Federal Assistance Manual (OSM Directive AML–10) and the National Environmental Policy Act of 1969 (NEPA). The environmental safeguards that therefore will apply should ensure that the excess spoil is placed in an environmentally-sound fashion, and that placement will not destroy or degrade features of environmental value.

Third, and finally, the Director finds that the proposal contains sufficient performance incentives to require compliance with all applicable requirements, since the proposal states that the “AML site will be maintained, as determined by (Kentucky), by the contractor through the entire bond liability period of the permitted site from which the excess spoil originated” and should the contractor “fail to honor or satisfy the agreement, (Kentucky) may require the company to obtain a permanent program permit under Title V for the affected area. In addition, Kentucky always has AML grant funds available to reclaim these sites in the event that the operator defaults on the terms of its contract, all Title V enforcement options are exhausted, and the AML reclamation contract performance bond is insufficient to complete reclamation.

#### *Accounting Systems (p. 13–1)*

Kentucky has revised this subsection to update organizational title and office changes. As this change is not substantive, and therefore will not render the State program less effective

than the Federal program, we are approving it. This determination is based on recommendations made by OSM in the 1981 OSM Review (Administrative Record No. KY–57).

#### *Maps of Eligible Lands and Waters (p. 15–1)*

Kentucky has reworded the first paragraph to better clarify AML eligibility by referencing “Section 404 ‘Eligible Lands and Water’ and/or 402(g)(4) of Title IV of Public Law 95–87 and/or KRS 350.560”. This change provides additional clarification of which sites are eligible for reclamation with Kentucky AML grant funds. Because this amendment refers to the appropriate Federal and State laws governing AML site eligibility, we are hereby approving it. This determination is based on recommendations made by OSM in the 1981 OSM Review (Administrative Record No. KY–57).

#### *Problems Occurring on Abandoned Mine Land Sites (pp. 16–3, 16–5, 16–9 and 16–12)*

On page 16–3, first paragraph (Environmental Damage), line 3, Kentucky has added the phrase “including adverse impacts on endangered and threatened species” directly after the phrase “loss of fish and wildlife habitat.” Also on page 16–3, in the paragraph entitled “Surface/ Groundwater Contamination,” the phrase “including adverse impacts on endangered and threatened species” is added after the phrase “aquatic vegetation.”

On page 16–5, at the end of the paragraph entitled “Erosion,” the following sentence is added: “On-site erosion and sediment control techniques will be used wherever practicable and feasible to minimize erosion and retain sediment within the disturbed area or limit the volume of sediment leaving the project site.” Also on page 16–5, at the end of the paragraph entitled “Reduced Fish and Wildlife Habitat,” the following sentence was added: “Unvegetated areas may also cause adverse impacts on endangered and threatened species.”

On pages 16–6 and 16–7, a new section, entitled “Abandoned Highwalls,” was added. This section enumerates and discusses problems generally associated with abandoned highwalls on AML sites. These problems include, but are not limited to, threats to life, health and safety, reduced wildlife habitat, attractive nuisances for children or hikers, and adverse impact on aesthetic, historical, cultural, or recreational resources. The new section also discussed certain