

sinking of wells. Clay, rock asphalt, sand and gravel are commonly extracted through methods of surface mining. Limestone, flourspar, and oil shale, in addition to methods of surface mining, are also commonly extracted through deep mining." This addition was previously contained in the Errata Sheet for the 1981 Plan, both of which we approved in 1982, and is merely being transferred to the text of the Plan. Therefore, we are approving the transfer without further discussion.

#### IV. Summary and Disposition of Comments

##### Public Comments

We asked for public comments on the amendment (Administrative Record No. KY-72). We did not receive any comments from the public.

##### Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Kentucky program (Administrative Record No. KY-72). We received one comment from the U.S. Fish and Wildlife Service (USFWS), one from the U.S. Department of Labor's Mine Safety and Health Administration (MSHA), and one from the U.S. Department of Agriculture's Natural Resource Conservation Service (NRCS).

We received a letter from the USFWS dated March 14, 2003 (Administrative Record No. KY-72). The letter indicated that the USFWS was interested in four sections of the AML plan changes. First, it indicated that it concurs with the changes to the AML Enhancement Rule (p. 12-9), as it may reduce the impacts to fish and wildlife resources on active mining permit areas, increase the number of AML projects that can be completed each year, and enhance additional habitat for fish and wildlife through AML reclamation projects. Second, the USFWS indicated support for the addition of the new subsection Reclamation Agreements (p. 12-10) because the site-specific removal of excess spoil will enhance reclamation on AML sites. Third, it supports the additions of sections relating to threatened and endangered species at Problems Occurring on Abandoned Mine Land Sites (pp. 16-3, 16-5, 16-9, and 16-12). In addition, to the extent that soils will not be compacted and the site's ability to reforest be jeopardized, it supports the addition of the erosion minimization and sediment retention techniques. We agree with the USFWS on this matter and recognize concerns

associated with soil compaction. Finally, the USFWS indicated that it has a concern with the section Flora and Fauna of the Coalfields (Chapter 21, p. 21-79), such that it suggests that Kentucky should consult with it, in addition to the Kentucky Fish and Wildlife Service, regarding the existence of Federally listed species when implementing the Endangered Species Act. We acknowledge this concern and recognize that the USFWS has jurisdiction over both Federally listed species and the Federal Endangered Species Act. The USFWS concern in this case is handled by OSM policy set in OSM Directive GMT-10 "Federal Assistance Manual". In accordance with this policy, OSM has the responsibility for environmental compliance with NEPA. However, policy provides that initial preparation of the environmental review document and initial consultations may be completed by the State. Final review, consultation, and authorization of the environmental review document rests with OSM. By agreement with Kentucky, OSM performs the consultation responsibility with the USFWS. The USFWS concerns in this case are therefore satisfied by OSM policy, rather than the Kentucky AML Plan.

We received a letter from the MSHA dated March 13, 2003 (Administrative Record No. KY-72). MSHA indicated that the changes to the AML plan would not have an impact concerning its office or jurisdiction.

We received a letter from the NRCS dated March 10, 2003 (Administrative Record No. KY-72). NRCS indicated that it concurs with Kentucky's proposals to update its AML plan, thereby bringing it up to date with current Federal regulations. The NRCS also stated that while it concurs with the changes made concerning coordination with the Rural Abandoned Mine Program formerly administered by NRCS, there are concerns about the funding longevity of the program as it has been taken "off budget." We also share this concern, however it falls outside of the scope of our jurisdiction and as such we are unable to respond to this comment in our approval of Kentucky's AML plan amendment.

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

Under 30 CFR 732.17(h)(11)(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.*). There are no

such provisions in this amendment, so we did not seek EPA concurrence. Furthermore, the EPA did not comment on the proposed changes to the Kentucky AML Plan.

##### State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On June 12, 2002, we requested comments on Kentucky's amendment (Administrative Record No. KY-72), but neither the SHPO nor the ACHP responded to our request.

#### V. OSM's Decision

Based on the above findings, we are approving Kentucky's proposed amendment, except as follows. We are not approving the word "or," which appears at the end of paragraph 1 of the section entitled "Lands for Permanent Facilities." We are approving the incorporation by reference of the Federal AML Enhancement Rule subject to the restrictions placed upon the Federal regulation by the court in *Kentucky Resources Council v. Norton*, *supra*. Finally, the "Reclamation Agreements" provision at the end of Chapter 12 is approved only to the extent that it applies to AML reclamation projects authorized through the Federal AML grant process. The Federal regulations at 30 CFR part 917 codifying decisions concerning the Kentucky AML Plan are being amended to implement this decision. Consistency of State and Federal standards is required by SMCRA.

#### 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 and Tribal abandoned mine land reclamation plans