§ 39.13 [Amended]

2. Section 39.13 is amended by removing Amendment 39–12100 (66 FR 9031, February 6, 2001).

AD 2001–01–52 R1 Bell Helicopter Textron Canada: Amendment 39–12272. Docket No. 2001–SW–02–AD. Rescinds AD 2001–01–52, Amendment 39–12100.

Applicability: Model 407 helicopters, certificated in any category.

Issued in Fort Worth, Texas, on June 8, 2001.

Eric Bries,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 01–15445 Filed 6–19–01; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 917

[KY–230–FOR]

Kentucky Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule.

SUMMARY: OSM is approving, with exceptions, an amendment to the Kentucky regulatory program (Kentucky program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Kentucky is proposing revisions to the Kentucky Revised Statutes (KRS) pertaining to ownership and control, easement of necessity for the limited purpose of abatement of violations, and roads above highwalls. This rule addresses only the easement of necessity provision. The remaining provisions will be addressed in a future rulemaking (KY–225–FOR).

EFFECTIVE DATE: June 20, 2001.

FOR FURTHER INFORMATION CONTACT: William J. Kovacic, Field Office Director, Lexington Field Office, 2675 Regency Road, Lexington, Kentucky 40503. Telephone: (859) 260–8400. Email: bkovacic@osmre.gov.

SUPPLEMENTARY INFORMATION:

I. Background on the Kentucky Program
II. Submission of the Amendment
III. Director's Findings
IV. Summary and Disposition of Comments
V. Director's Decision
VI. Procedural Determinations

I. Background on the Kentucky Program

On May 18, 1982, the Secretary of the Interior conditionally approved the Kentucky program. You can find background information on the Kentucky program, including the Secretary's findings, the disposition of comments, and the conditions of approval in the May 18, 1982 **Federal Register** (47 FR 21404). Subsequent actions concerning the Kentucky program and previous amendments are codified at 30 CFR 917.11, 917.12, 917.13, 917.15, 917.16, and 917.17.

II. Submission of the Proposed Amendment

By letter dated May 9, 2000 (Administrative Record No. KY–1473), Kentucky submitted a proposed amendment to its approved permanent regulatory program. House Bill (HB) 502 continues in effect the current administrative regulations on ownership and control. HB 599 creates a new section of KRS Chapter 350. HB 792 amends KRS 350.445(3). Only the provisions of HB 599 will be addressed in this rule.

We announced receipt of the proposed amendment in the May 31, 2000, **Federal Register** (65 FR 34625), invited public comment, and provided an opportunity for a public hearing on the adequacy of the proposed amendment. The public comment period closed on June 30, 2000.

III. Director's Findings

Following, according to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are our findings concerning the proposed amendment. Any revisions that we do not specifically discuss below concern nonsubstantive wording changes or revised cross-references and paragraph notations to reflect organizational changes that result from this amendment.

House Bill 599. Subsection (1) recognizes an easement of necessity on behalf of the permittee or operator for the limited purpose of abating a violation, with certain conditions. The permittee or operator must have been issued a notice or order directing abatement of the violation on the basis of an imminent danger to health and safety of the public or significant imminent environmental harm. The notice or order must require access to property for which the permittee or operator does not have legal right of entry and the landowner or legal occupant has refused access.

Subsection (2) establishes conditions under which the Cabinet terminates a notice of noncompliance or cessation order for a violation, other than a violation described in Subsection (1), if the party responsible for abatement of the violation has been denied access to the land necessary to allow abatement. Those conditions, in general terms, are: (a) Prior to terminating a notice of noncompliance or cessation order, and within 30 days of a request by a permittee to terminate a violation based on lack of success, the Cabinet shall verify the denial of access and advise the surface owners and legal occupants of the consequences of refusing to allow access to the property; and (b) the Cabinet shall explain the consequences by certified mail and shall make a good faith effort to notify all owners of interest and legal occupants of the consequences of the refusal to allow access.

Subsection (3) prohibits the Cabinet from terminating a notice or order if it determines that the denial of the access has been procured through collusion between the permittee and the landowner who is refusing access. It defines ''collusion'' and provides that any act of collusion will subject the permittee to certain penalties.

Subsection (4) prohibits termination of a notice or order under this section if there is any common ownership and control between the permittee or operator and the landowner or legal occupant. It also prohibits termination where there is any other legal relationship between the permittee or operator and the landowner or legal occupant, except where a court has determined that the legal relationship does not provide for a right of access.

Subsection (5) requires the Cabinet to direct abatement measures to be taken by the permittee to prevent damage to lands for which access has not been denied.

Subsection (6) provides that termination of a notice or order under this Section shall not affect the assessment of a civil penalty for the violation, and provides that nothing in this Section affects a person's right for damages or injunctive relief.

The Federal regulations at 30 CFR 843.11(f) and 843.12(e) specify, respectively, that the exclusive grounds for termination of cessation orders and notices of violation are the abatement of all conditions, practices, or violations listed in the order or notice. A permittee is responsible for the reclamation of its surface coal mining operation, including abatement of all violations, regardless of impediments that may be raised by recalcitrant surface owners. *See Elk Valley Mining Company* v. *OSM,* Case No. NX6–65–R (March 31, 1988) (''It would be contrary to the purposes of the Act for the Applicant to be able to shield itself from enforcement of the Act by his failure to reach a lease agreement with a private party.'') *See, also, Wilson*

Farms Coal Co., 2 IBSMA 118 (1980) (A lease agreement does not relieve permittee of its responsibility for reclamation under the Act.) Because HB 599 allows termination of enforcement action due to denial of access to land, subsections (2) through (6) are inconsistent with these Federal regulations, and are not approved.

We will also announce our intention to set aside subsections (2) through (6) in a subsequent **Federal Register** notice. As an alternative to this proposal, Kentucky may consider enactment of legislation prohibiting surface owner interference with the performance of all reclamation obligations, rather than limiting the availability of such ''easements of necessity'' to only those violations that may result in imminent danger to the public or to the environment. As one commenter has pointed out, both West Virginia and Virginia have enacted this type of legislation. *See* W.Va. Code 22–3–11(e); Va. Code 45.1–188.

Subsection (1) is, however, no less stringent than section 521 of SMCRA and consistent with 30 CFR 843.11, because it provides a method for ensuring the abatement of an imminent danger that is in addition to the methods provided for in those provisions. Therefore, subsection (1) is approved in accordance with section 505(b) of SMCRA. Subsections (2) through (6) are not approved.

IV. Summary and Disposition of Comments

Federal Agency Comments

On February 18, 2000, we asked for comments from various Federal agencies who may have an interest in the Kentucky amendment (Administrative Record No. KY–1469) according to 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA. No one responded.

Public Comments

We received several public comments in response to our request. We will address only the comments that pertain to HB 599. Two commenters believe that the provisions of HB 599 are consistent with SMCRA and should be approved. Both parties refer to McCoy Elkhorn Coal Corporation v. Greene et al, No. 96–CA–2644–MR (unpublished opinion, March 6, 1998). The Kentucky Court of Appeals held that a coal mine operator had no implied right incident to ownership and control of coal to enter on the surface to effect subsidence repairs. One of the commenters deemed this a ''rejection by the state courts of the coal industry's attempt to gain legal access to conduct reclamation activities.'' The commenters note that HB 599, in essence, overrides the McCoy Elkhorn opinion and provides coal operators legal access (easement of necessity) to conduct reclamation activities where there is an imminent danger. They also assert that Virginia and West Virginia allow the permittee to access property to fulfill reclamation obligations.

Both commenters refer to OSM's regulation at 30 CFR 843.18, which states that the inability of a permittee to comply is not a basis to vacate a violation. They note, however, that in the preamble to this rule, OSM states that where the damage cannot be undone and when no further remedial action or affirmative obligation can be prescribed, ''the citation must be terminated.'' (44 FR 14901, 15305, March 13, 1979) The commenters interpret the provisions of HB 599 to be consistent with OSM's preamble language.

We disagree with the commenters' interpretation of our statements from the 1979 preamble, because it overstates the reach of that discussion. The comments to proposed 30 CFR 843.18 were concerned about the consequences to operators whose violations could not be abated, due to a ''*technological* 'inability to comply','' and believed that such violations should be vacated. We declined to make the suggested change, however, because we believed that there were no performance standards that were ''*technologically* impossible to meet.'' *Id.* (Emphasis added) In other words, we declined to allow a violation to be vacated, because we believed that it was technologically possible to have prevented its occurrence. However, we did acknowledge that there may be instances ''when an operator violates the Act or the regulations, [and] it may be *technologically* impossible to undo the damage.'' In such instances, termination, rather than vacation, of the violation would be appropriate. *Id* (Emphasis added)

H.B. 599 would allow termination under much different circumstances. A landowner's refusal to grant access to his property does not present a technological impossibility to performing reclamation. In *Elk Valley Mining Company* v. *OSM,* Docket No. NX6–65–R (1988), the Administrative Law Judge refused to accept the failure to reach a lease agreement to ensure entry for reclamation purposes as justification for failure to abate an otherwise valid notice of violation, stating that ''It would be contrary to the purposes of the Act for the Applicant to be able to shield itself from enforcement of the Act by his failure to reach a lease agreement with a private party.'' (citing *Wilson Farms Coal Co.,* 2 IBSMA 118 (1980) (A lease agreement does not relieve permittee of its responsibility for reclamation under the Act.) From these principles, it follows that the inadequacy of a right of entry provision, whether included in a lease, deed, or some other instrument, does not relieve a permittee from the absolute responsibility to abate all violations.

One commenter also noted that OSM has approved language in the West Virginia state program which provides, with respect to notices of violation, that ''[i]f the operator has not abated the violation within the time specified in the notice, * * * the director shall order the cessation of the operation * * *, *unless the operator affirmatively demonstrates that compliance is unattainable due to conditions totally beyond the control of the operator.''* W.Va. Code 22–3–17(a) (Emphasis added) This language, according to the commenter, stands for the principle that NOVs issued for violations which cannot be abated should be terminated.

We disagree with the commenter, because the West Virginia provision merely provides an exception to the requirement to issue a Cessation Order if a violation is not abated within a specified period. It does not authorize termination of the violation, even where ''compliance is unattainable due to conditions totally beyond the control of the operator.'' As such, the West Virginia provision differs markedly from the proposed amendment that is the subject of this rulemaking. A third commenter, who helped draft the bill, feels that certain aspects of the bill need to be clarified by Kentucky. They are: (1) The process the State will employ to determine whether a request for termination of a violation based on refusal of access is not collusive, and for investigating ownership, control, and other legal relationship links between the applicant and the landowner refusing access; (2) the type of training that will be conducted to assure that field inspectors are aware of their responsibility to inform the landowner of their rights and consequences of refusal-of-access on the status of the violation; and (3) the constitutionality under state law of the state proposal, which creates a new easement burdening the lands of a party who, by definition, has been trespassed upon by a violation of the mining laws, or whether the state is in a position of sanctioning a ''taking'' of the property of a third party.

We note that we are disapproving the portions of the amendment to which the

first of these two comments pertain. The third comment addresses the amendment's constitutionality under state law. A determination of this type is also outside the scope of this rulemaking. However, we acknowledge the commenter's concerns and will forward them to Kentucky's Department for Surface Mining Reclamation and Enforcement for consideration.

Environmental Protection Agency (EPA)

Pursuant to 30 CFR 732.17(h)(11)(ii), OSM is required to solicit comments and 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.*). Since none of the proposed amendment provisions relate to air or water quality, we did not solicit EPA's concurrence.

V. Director's Decision

Based on the above findings, we approve, with the following exceptions, the proposed amendment, known as House Bill 599, submitted by Kentucky on May 9, 2000: Subsection (1) is approved; Subsections (2) through (6) are not approved. The Federal regulations at 30 CFR Part 917, codifying decisions concerning the Kentucky program, are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

Effect of the Director's Decision

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Similarly, 30 CFR 732.17(a) requires that any alteration of an approved State program be submitted to OSM for review as a program amendment. Thus, any changes to the State program are not enforceable until approved by OSM. The Federal regulations at 30 CFR 732.17(g) prohibit any unilateral changes to approved State programs. In the oversight of the Kentucky program, we will recognize only the statutes, regulations, and other materials approved by OSM, together with any consistent implementing policies, directives, and other materials. We will require that Kentucky enforce only such provisions.

VI. Procedural Determinations

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

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 13132—Federalism

This rule does not have federalism implications. SMCRA delineates the roles of the federal and state governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that state laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that state programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

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, to the extent allowed by law, 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 since each such 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 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.

National Environmental Policy Act

Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that a decision on a proposed state regulatory program provision does not constitute a major federal action within the meaning of section 102(2)(C) of the National Environmental Policy Act (NEPA) (42 U.S.C. 4332(2)(C)). A determination has been made that such decisions are categorically excluded from the NEPA process (516 DM 8.4.A).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The state submittal which is the subject of this rule is based upon counterpart federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the state. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart federal regulation.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of $100 million.

b. Will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the state submittal which is the subject of this rule is based upon counterpart federal regulations for which an analysis was prepared and a determination made that the federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose a cost of $100 million or more in any given year

on any governmental entity or the private sector.

List of Subjects in 30 CFR Part 917

Intergovernmental relations, Surface mining, Underground mining.

Dated: May 25, 2001.

Allen D. Klein,

Regional Director, Appalachian Regional Coordinating Center.

For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations is amended as set forth below:

PART 917—KENTUCKY

1. The authority citation for Part 917 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Section 917.12 is amended by adding paragraph (b) to read as follows:

§ 917.12 State regulatory program and proposed program amendment provisions not approved.

* * * * *

(b) Subsections (2) through (6) of the amendment submitted as House Bill 599 on May 9, 2000, are hereby not approved, effective June 20, 2001.

3. Section 917.15 is amended in the table in paragraph (a) by adding a new entry in chronological order by ''Date of Final Publication'' to read as follows:

§ 917.15 Approval of Kentucky regulatory program amendments.

(a) * * *

Original amendment submission date	Date of final publication	Citation/description
* * * * *	*	*
May 9, 2000	6/20/01	House Bill 599, subsection (1).

* * * * *

[FR Doc. 01–15498 Filed 6–19–01; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD07–01–049]

RIN 2115–AE46

Special Local Regulations: San Juan Harbor, Puerto Rico

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: Temporary Special Local Regulations are being established for the Swimming Cross San Juan Harbor, San Juan, Puerto Rico. These regulations are needed to provide for the safety of life on navigable waters by excluding vessels from the swimming area.

DATES: This rule is effective from 10 a.m. to noon on July 22, 2001.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket are part of [CGD07–01–049] and are available for inspection or copying at Coast Guard Greater Antilles Section, La Puntilla, Old San Juan, PR 00902 between 7 a.m. and 3:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. John Reyes, Greater Antilles Section at (787) 729–5381.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for these regulations. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. Publishing an NPRM would be contrary to national safety interests since immediate action is needed to minimize potential danger to the public.

Background and Purpose

These regulations are required to provide for the safety of life on navigable waters because numerous swimmers will cross a navigable channel in a commercial port. This event has taken place several times over the past years, although the date changes from year to year. This rule creates a regulated area that will prohibit vessels from entering an area between the Puerto Rico Ports Authority Pier 1 to La Puntilla Point, then across the Anagada Channel to the Catano Ferry Terminal, then to Punta Catano, and then across the San Antonio Approach to the origin.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. The Office of Management and Budget has not reviewed it under that order. It is not ''significant'' under the regulatory policies and procedures of the Department of Transportation (44 FR 11040, February 26, 1979). The regulated area will only be in effect for approximately 2 hours.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we considered whether this rule would have a significant economic effect upon a substantial number of small entities. ''Small entities'' include small business, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit or anchor in a portion of San Juan Harbor, Puerto Rico from 10 a.m., to noon, July 22, 2001. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities because the rule will only be in effect for 2 hours.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pubic Law 104–221), we offer to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process. Small entities may contact the person listed under **FOR FURTHER INFORMATION CONTACT** for assistance in understanding and participating in this rulemaking. We also have a point of contact for commenting on actions by employees of the Coast Guard. Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with Federal regulations to