



## STATEMENT OF CONSIDERATION RELATING TO

405 KAR 10:001

Energy and Environment Cabinet

Division of Mine Permits

(Amended After Comments)

405 KAR 10:015

(Not Amended After Comments)

- I. The public hearing on 405 KAR 10:001 and 10:015, scheduled for October 28, 2024, at 5:00 p.m. at the Energy and Environment Cabinet was held with no comments received; however, written comments were received during the public comment period.

- II. The following people submitted written comments:

<u>Name and Title</u>	<u>Agency/Organization/Entity/Other</u>
Tucker Davis, President	Kentucky Coal Association
Ashley Wilmes, Director	Kentucky Resources Council
Tom Fitzgerald, Of Counsel	Kentucky Resources Council
Rebecca Shelton, Director of Policy Center	Appalachian Citizen's Law
Willie Dodson, Coal Impacts Program Coor.	Appalachian Voices
Michael Washburn, Executive Director	Kentucky Waterways Alliance
Julia Finch, Director	Sierra Club Kentucky Chapter

- III. The following people from the promulgating administrative body responded to the written comments:

<u>Name and Title</u>	<u>Agency/Organization/Entity/Other</u>
Gordon Slone, Commissioner	Department for Natural Resources
Dawn Baase, Env. Scientist Consultant II	Department for Natural Resources
Wes Jones, Director	Division of Mine Permits

#### **IV. Summary of Comments and Responses**

##### **405 KAR 10:001**

**(1) Subject Matter: Long-term Treatment Definition**

**(a) Comment: Tucker Davis, Kentucky Coal Association**

Deletion of the definition of “long term treatment” is not “necessary,” but rather creates unnecessary and unlawful ambiguity. The only proposed revision to 405 KAR 10:001 is to delete the definition of “long term treatment.” The Cabinet claims the deletion of this definition is “necessary to clearly define the terms used in 405 KAR Chapter 10.” This statement is not logical. If the only function of the proposed revision is to delete a critical regulatory definition, the proposed revision does the exact opposite of “clearly defining” anything.

**(b) Response:** The Cabinet agrees that a definition of “long-term treatment” will clarify the term as used in 405 KAR 10:015. However, the current definition was disapproved by the Office of Surface Mining Reclamation and Enforcement (OSMRE), which was part of program amendment KY-262, 88 Fed. Reg 65126,65127 (September 21, 2023). OSMRE’s disapproval of the definition made it unenforceable by state law. OSMRE disapproved the definition because, in its view, the definition was less stringent than section 509(a) of Surface Mining Control Reclamation Act (SMCRA) and less effective than the corresponding federal regulation. OSMRE’s reasoning is that the need for long-term treatment could become apparent long before phase 1 bond release and postponing the need for the bond until phase 1 would be doing so after the need was discovered. Operators have an obligation to treat and bond immediately when the need is discovered. The Cabinet has amended the administrative regulation to include a definition of “long-term treatment”. This definition will need to be approved by OSMRE through another program amendment.

**(2) Subject Matter: Long-term Treatment Definition**

**(a) Comment: Tucker Davis, Kentucky Coal Association**

Deleting the definition of “long-term treatment” renders the “long-term treatment bonding” provisions of 405 KAR 10:015 unlawful. At the same time it proposes to remove any regulatory definition of “long-term treatment”, the Cabinet also proposes amending 405 KAR 10:015 to include a new “long-term treatment” bonding methodology that could impose enormous additional costs on sites where so-called long term treatment is occurring. This misguided maneuver creates legally impermissible vagueness and confusion, as the regulated community is left only to guess which sites will be deemed to engage in “long-term treatment” and therefore required to post costly additional bonds. Without a regulatory definition of “long-term treatment,” there will be no fixed standard by which permittees can make planning decisions and conform their conduct, nor is there any standard to guide the agency’s enforcement and permitting decisions.

- (b) **Response:** The Cabinet disagrees that, by deleting the definition, the provisions of 405 KAR 10:015 become unlawful. The provisions of 405 KAR 10:015 were approved by OSMRE. Additionally, the Cabinet issued Reclamation Advisory Memorandum (RAM) 169 on June 1, 2022, providing notice to industry that the "long-term treatment" definition would not be used as it was not approved by OSMRE. RAM 169 further describes that a long-term treatment bond is required when a site has a discharge needing treatment. The Cabinet has a long-term treatment inventory that is a comprehensive list of permits which have been identified as requiring some form of treatment to meet effluent requirements. When sites are added to the inventory and the Cabinet is notified, a notice is sent to the applicants to address treatment costs, etc. The Cabinet will work with applicants to obtain an effective plan at the lowest cost. Discharges related to temporary situations such as a temporary coal stockpile are not considered as long-term treatment if removal of the stockpile would alleviate the potential for substandard water discharge. The Cabinet has amended the administrative regulation to include a definition of "long-term treatment". This definition will need to be approved by OSMRE through another program amendment.

(3) **Subject Matter: Long-term Treatment Definition**

(a) **Comment: Tucker Davis, Kentucky Coal Association**

Deleting the definition of "long-term treatment" is not "needed" to be consistent with any federal law. The Cabinet claims that deleting the definition of "long-term treatment" is "needed for the cabinet's permanent program to be no less effective and no less stringent than those required by federal law." This is not true, for the simple reason that federal law does not specifically address "long-term treatment," which is a Kentucky-specific term, subject to Kentucky-specific bonding provisions.

- (b) **Response:** The Cabinet disagrees with this comment as OSMRE has determined the definition is less stringent than SMCRA and less effective than the corresponding federal regulation. Therefore, the definition is inconsistent with the federal requirements. While long-term treatment is not specifically identified or defined in the federal regulations, OSMRE's acid mine drainage policy statement dated March 31, 1997, clarifies that the regulatory authority must adjust the bond amount to cover all future costs of monitoring, evaluating, abating, and treating those discharges to the extent necessary to avoid causing material damage to the hydrologic balance. The Cabinet has amended the administrative regulation to include a definition of "long-term treatment". This definition will need to be approved by OSMRE through another program amendment.

(4) **Subject Matter: Long-term Treatment Definition**

(a) **Comment: Tom Fitzgerald, Kentucky Resources Council, Inc., Appalachian Citizens' Law Center, Appalachian Voices, Kentucky Waterways Alliance, and Sierra Club.**

Commenters support the removal of the definition, since OSMRE had determined

the definition to be inconsistent with SMCRA and the Cabinet's obligations under the approved program.

- (b) **Response:** The Cabinet appreciates the support of the Kentucky Resources Council.

#### **405 KAR 10:015**

(1) **Subject Matter: Stringency of State's Program**

(a) **Comment: Tucker Davis, Kentucky Coal Association**

The proposal ignores Kentucky law requiring the state's program be no more stringent than federal requirements. KCA agrees that consistency between state and federal requirements is important. But this consistency requirement includes a requirement that Kentucky's program be no more stringent than federal law. Here, Kentucky is proposing to require minimum bond amounts based on a term that is not contained in and not defined in any federal law, based on a calculation methodology not required by federal law. Thus, it is more stringent than federal law whenever it results in an unnecessarily high bond calculation. Accordingly, the proposal risks creating a violation of KRS 350.028(5)'s "no more stringent than" requirement, which explicitly prevents Kentucky regulations from being more stringent than required by the federal SMCRA.

- (b) **Response:** The Cabinet disagrees that the proposal ignores Kentucky law. Additionally, the federal regulation, at 30 CFR 800.14, allows bond amounts to be determined by the regulatory authority. There is not a corresponding federal regulation that specifies the method by which bonds for the long-term treatment of discharges are to be calculated. This is left to the discretion of the programs. OSMRE approved Kentucky's long-term treatment calculation in the program amendment KY-261, 87 Fed. Reg. 27938, 27943 (May 10, 2022). Therefore, the proposal is no more stringent than the federal requirements.

(2) **Subject Matter: No Changes to Minimum Bond Amounts**

(a) **Comment: Tucker Davis, Kentucky Coal Association**

The claim that "there are no changes to the minimum bonding amounts imposed by this administrative regulation," is not correct, and contradicted by the Cabinet's own statements. At page 27 of the Fiscal Impact Statement, the Cabinet asserts that the proposed revision to 405 KAR 10:015 will not change minimum bond amounts. But this cannot be correct. Currently, 405 KAR 10:015 establishes a minimum bonding amount for "long-term treatment" permits. This existing regulatory text indicates that the bond should be calculated based on the "estimated annual treatment cost...multiplied by a factor of twenty-five (25) plus any capital costs of the treatment system." The proposed revisions would, however, adopt a "Long-Term Treatment Bond Calculation Form" which contains a different calculation than the

above regulatory text, and which includes an additional multiplier that increases the bond amount.

- (b) **Response:** The Cabinet disagrees that the statement in the Fiscal Impact Statement is not correct. There are no minimum bond amounts for long-term treatment bonds. Long-term treatment bonds are based on the cost of monitoring, evaluating, abating, and treating those discharges to the extent necessary to avoid causing material damage to the hydrologic balance. Costs for long-term treatment are different for different operations. If there are no treatment costs, the long-term treatment bond amount will be zero. The Long-Term Treatment Bond Calculation Form has been incorporated by reference in the regulation to further show how these bonds are calculated and as required by KRS 350.060(11).

(3) **Subject Matter: Fiscal Impact Statement**

(a) **Comment: Tucker Davis, Kentucky Coal Association**

The Fiscal Impact Statement improperly fails to properly consider cost increases. The Fiscal Impact Statement claims that “there is not a standard cost increase associated with this administrative regulation,” despite the Cabinet having seen an average per-permit cost increase of \$1.2 Million after it began prematurely applying this calculation form. The statement therefore contradicts itself. On the one hand, it recognizes that the bonds nearly always increase, while on the other it seeks to evade further scrutiny by claiming the increase is not “standard.” Additionally, the statement concerning costs fails to recognize the impact of increased collateral requirements for reclamation bonds. The statement claims that permittees will “remain responsible for” collateral requirements, suggesting that nothing will change. But of course those collateral requirements will likely increase, since the amount of collateral a bond surety would require is tied to the scope of the bond surety’s risk (i.e., the amount of the bond). This means that as bond amounts increase, collateral and premium payments can be expected to do so as well.

- (b) **Response:** The Cabinet has indicated a cost increase for long-term treatment bonds, as they are being recalculated. However, there are no standard increases for bond amounts. Each bond is calculated based on the individual site-specific circumstances. In the exercise in recalculating these bonds, the Cabinet has noted there have been some long-term treatment bonds that have been reduced. Additionally, the Cabinet issued a Reclamation Advisory Memorandum (RAM) 169 on June 1, 2022, providing notice to industry that the modifications to the method used to calculate the amount of bond required on long-term treatment sites was approved by OSMRE as published in Federal Register, 87 Fed. Reg. 27938,27943 (May 10, 2022). RAM 169 further explains this new calculation method will be applied to all new and existing permits needing long-term treatment. Furthermore, the Cabinet included a statement related to the applicant’s continued responsibility for bond premiums and collateral requirements but cannot speak to any specifics due to the variability among bonding companies.

**(4) Subject Matter: Economic Impacts**

**(a) Comment: Tucker Davis, Kentucky Coal Association**

The proposal will have a major adverse economic impact, yet the Fiscal Impact Statement refuses to state this clearly. KCA's members have received numerous increased bond calculations pursuant to the methodology contained in the proposal, and many of these bonds have been re-calculated to increase by millions of dollars. Indeed, one member has seen the Cabinet propose to raise a single bond amount by over \$14 Million. KCA's members estimate the total financial impact to be well over \$100 Million. Knowing this to be true, the Cabinet somehow claims only a \$3.9 Million impact. The economic impact of this proposal would be a very real, adverse, and substantial one.

**(b) Response:** Long-term treatment bond rates are tied to individual proposals based on site-specific circumstances. In many cases, the method and manner of treatment can be modified to reduce costs. In response to the permit referenced in the comment that increased by over \$14 Million, the increase was due to the monthly chemical cost of over \$33,000. A significant monthly chemical cost such as this would have led to a significant increase in the bond amount. This particular increase in long-term treatment bond amounts is not typical. Additionally, it is important to note that at any time site-specific situations change, permittees can request a re-evaluation of the bond.

**(5) Subject Matter: Bond Increases**

**(a) Comment: Tucker Davis, Kentucky Coal Association**

The combined effect of these changes is to require major costly bond increases to protect against a non-existent risk. The purpose of a reclamation bond is to ensure that the Cabinet can complete reclamation (including any necessary water treatment) in the event the permit holder defaults in its obligations. During active mining operations, operators must frequently engage in "treatment" of water discharges, to make sure water that accumulates on or runs off of a mining area is safe to the environment. The Cabinet's long-term treatment bonding provisions are designed to ensure that, if an operator defaults while water treatment is ongoing, the Cabinet has sufficient bond to continue this treatment during the time it is needed. KCA understands this point. But what it does not understand is why the Cabinet believes that it must hold a bond sufficient to treat water into perpetuity, as the proposed bond calculation form requires, when most permits deemed to require "long term treatment" will not in fact require perpetual water treatment.

**(b) Response:** The Cabinet disagrees with the assertion that it is protection against a non-existent risk. If this were true, then one would assume that bonding entities would take that into consideration in the determination of bonding rates and collateral requirements. The federal regulation at 30 CFR 800.14 requires bond amounts to be sufficient to ensure completion of the reclamation plan in the event reclamation or remediation work is performed by the Cabinet. Since it is unknown

how long treatment will be necessary, the Cabinet must assume the worst-case scenario in order to cover costs for treatment in perpetuity in the event of forfeiture.

**(6) Subject Matter: Justification of Amendments to the Long-term Treatment Calculation**

**(a) Comment: Tucker Davis, Kentucky Coal Association**

The Cabinet has not justified its change in position to require an increased bond calculation. Prior to 2018, 405 KAR 10:015 Section 7 required a long-term treatment bond that was based on one years' treatment costs times 20 – a calculation resulting in a minimum bond amount substantially lower than the one the Cabinet now proposes via its "calculation worksheet".

**(b) Response:** The increase in long-term treatment bonds as amended with the calculation was necessary because OSMRE determined that the previous calculation with a 20-year multiplier would result in an inadequate bond, and therefore be less stringent than SMCRA and less effective than the federal regulations. The proposed changes to the calculation were submitted as a program amendment, KY-261, to OSMRE on November 25, 2019, which was published in the Federal Register, 85 Fed. Reg. 10634,10636 (February 25, 2020) for public comment.

**(7) Subject Matter: Stakeholder Involvement**

**(a) Comment: Tucker Davis, Kentucky Coal Association**

The proposal was developed in secret without seeking input that would have helped. The proposed changes were developed without input from the coal mining industry which is affected by the changes. In fact, to KCA's knowledge, the Cabinet did not consult with any Kentucky-based stakeholder group prior to making the proposal: not the coal industry, not the surety bond industry that provides the relevant bonds, not environmental interest groups, and not the local governments who will be impacted by the job losses this sort of cost increase will necessarily inflict.

**(b) Response:** The proposed amendments to 405 KAR 10:015, including the long-term treatment calculation, were submitted as a program amendment, KY-261, to OSMRE on November 25, 2019, which was published in the Federal Register, 85 Fed. Reg. 10634, 10636 (February 25, 2020) for public comment. The final rule and approved program amendment was published in the Federal Register, 87 Fed. Reg. 27938,27943 (May 10, 2022), in which it is noted that KCA commented in support of the amendments. Additionally, in May of 2023, Cabinet representatives met with KCA representatives to provide a detailed explanation of how long-term treatment bonds are calculated using the calculation approved by OSMRE. As a result of the most recent comments received from KCA during the open comment period for the current amendments, the Cabinet plans to engage stakeholders to discuss further in order to attempt to come to an agreement on how to proceed that will satisfy all parties involved and remain in compliance with SMCRA and federal law.

**(8) Subject Matter: Stringency of Kentucky's Regulatory Program**

**(a) Comment: Tucker Davis, Kentucky Coal Association**

The proposal renders Kentucky's program more stringent than any neighboring state, another example of agency policy making Kentucky a difficult jurisdiction in which to mine coal. No state which competes with Kentucky's coal producers has any state law bonding requirement similar to the one contained in this proposal. In particular, no other state assumes that the mere existence of responsible water treatment during active mining mandates a substantial "long-term" treatment bond. The proposal is not necessary to comply with federal law, will make Kentucky's program more stringent than any eastern coal-producing state, and represents a strong incentive for coal mining operations not to locate in Kentucky.

**(b) Response:** The Cabinet disagrees with the assertion that Kentucky's program is more stringent than any neighboring state. All surrounding states are bound by the same federal regulations and requirements. There is not a corresponding federal regulation that specifies the method by which bonds for the long-term treatment of discharges are to be calculated, but rather it is left up to the discretion of each state program. As noted by OSMRE, operators have an obligation to treat and bond immediately when the need for water treatment is discovered.

**(9) Subject Matter: Biannual Review of Long-term Treatment Bonds**

**(a) Comment: Tom Fitzgerald, Kentucky Resources Council, Inc., Appalachian Citizens' Law Center, Appalachian Voices, Kentucky Waterways Alliance, and Sierra Club**

To the extent that the forms that are incorporated by reference into the proposed amendment to 405 KAR 10:015 are consistent with, and provide for calculation of the long-term treatment bond and periodic recalculation of each such bond, Commenters do not oppose finalization of these proposed amendments to 405 KAR 10:015. Commenters would oppose any reduction in the frequency of reassessment of the adequacy of the long-term treatment bond, which is currently required to be reassessed every two years under subsection 6(3) of 405 KAR 10:015. OSMRE has noted "[w]e expect that long-term treatment bonds will be reviewed biannually under subsection 6(3) of 405 KAR 10:015 and adjusted, using this bond calculation model for long-term treatment costs, as appropriate under section 10." Please confirm that biannual review will continue to be required under the amended 405 KAR 10:015.

**(b) Response:** The Cabinet confirms long-term treatment bond amounts will be reviewed biannually.

**(10) Subject Matter: Sensitivity of the Assumptions in Long-term Treatment Calculation**

**(a) Comment: Tom Fitzgerald, Kentucky Resources Council, Inc., Appalachian Citizens' Law Center, Appalachian Voices, Kentucky Waterways Alliance, and Sierra Club**

The first question concerns the worksheet, and is about the sensitivity to the assumptions, especially about the interest rate. A small error (or an error early on) could lead to a big shortfall as the numbers compound. The first worksheet calculates the annual cost of treatment. The KY Method worksheet multiplies those costs by 25, and adds a capital cost number (which amounts to 6.41 times the annual cost). It then demonstrates what would happen under its assumption over 75 years if the bond were forfeited. Each year, it has the amount left in the fund earning 6.8%, then withdrawing the estimated annual cost (adjusted for assumed 2.5% inflation each year after the first). The next year it earns interest on that much less, and withdraws the same amount adjusted for inflation. Every ten years, the Cabinet is assumed to spend 1/10 of the capital cost (adjusted for inflation). Is the assumption of 1/10th of the capital cost expenditure each year to replace equipment? Please clarify the basis for the assumption. Please confirm that the cost worksheet includes required calculations for initial capital costs as well as recurring capital expenditures.

**(b) Response: The Cabinet is required to re-evaluate long-term treatment bonds biannually. Therefore, any shortfalls will be corrected during a re-evaluation of a bond amount. Standard industry practice is to use 2, 5, or 10 years for replacement cost. The 10 year was chosen because it was one of the standard time frames chosen for amortization. The cost worksheet includes calculations for initial capital costs as well as recurring capital expenditures. This information is provided by the permittee for the complete setup cost of the treatment system at current market prices.**

**(11) Subject Matter: Interest Assumption in Long-term Treatment Calculation**

**(a) Comment: Tom Fitzgerald, Kentucky Resources Council, Inc., Appalachian Citizens' Law Center, Appalachian Voices, Kentucky Waterways Alliance, and Sierra Club**

The second question concerns the formula's interest assumption. How does the formula account for and ensure that sufficient funds will be available on an ongoing basis if the achieved interest is lower than the 6.8% assumed in the Ky Method spreadsheet? What is the objective basis for assuming the 6.8% interest rate, rather than a more conservative assumption. Additionally, how does the formula account for the possibility that there will be a capital cost upon forfeiture. How will the Cabinet assure that sufficient resources will be available on an ongoing basis if there are capital expenses that arise after forfeiture. Regarding the assumed rate of inflation, please confirm whether the calculation document assumes a rate of inflation of 2.5%. Please explain the objective basis for assuming that rate of

inflation, and whether the Cabinet considered the use of one or more indices that more accurately track and predict changes in the construction sector that would be more predictive of changes in treatment system operation, maintenance, and capital component replacement.

- (b) **Response:** The 6.8% interest rate was chosen based on a 99-year estimate used by investment groups throughout the United States. The interest rate is an average rate of return based on the 99-year estimate. Initially, the Cabinet chose to use an 8.2% interest rate, but it later decided to utilize the interest rate from the 99-year average. The Cabinet is not assuming capital cost upon forfeiture. It is assumed the structure/treatment system has already been built. The posted long-term treatment bond will assure sufficient resources are available if there are capital expenses that arise after forfeiture. The inflation rate was chosen based on the 99-year estimate.

## **V. Summary of Statement of Consideration and Action Taken by Promulgating Administrative Body**

The public hearing on this administrative regulation was held with no comments received; however, written comments were received. The Cabinet has responded to the comments and amends the administrative regulation as follows:

**405 KAR 10:001**

**Page 6**

**Section 1(26)**

**Lines 9 through 13**

After "(26)", insert the following:

**"Long-term treatment" means the use of any active or passive water treatment necessary to meet water quality effluent standards.**

**(27)**

**\*Renumber the remaining subsections accordingly**

**405 KAR 10:015**

The public hearing on this administrative regulation was held with no comments received; however, written comments were received during the public comment period. The Cabinet responded to the comments and will not be amending 405 KAR 10:015.