



Reclamation ▲ Advisory Memorandum

From: Susan C. Bush, Commissioner
Date: April 14, 2004
Subject: New Regulations for Noncoal Minerals

RAM # 137

Introduction

On March 15, 2004, House Bill 295 rendered null, void, and unenforceable, the nine (9) regulations for noncoal mineral operations that were adopted on September 12, 2003. Those regulations had been found deficient by two legislative subcommittees, but were put into effect by action of the Governor, notwithstanding the findings of deficiency. The September 12, 2003 regulations followed emergency regulations that had been in effect from December 13, 2002 to August 20, 2003.

2004 House Joint Resolution 98 requires the Cabinet to file emergency and ordinary regulations identical to the February 22, 1995 versions of 405 KAR 5:001, 5:030, 5:035, 5:038, 5:045, 5:060, 5:075, and 5:080. On March 16, 2004, the Cabinet filed eight (8) new emergency administrative regulations. At the same time, the Cabinet filed proposed ordinary regulations that eventually will replace the emergency regulations. A public hearing on the proposed regulations is tentatively scheduled for May 27, 2004, (but will be canceled if no one requests to attend) and written comments will be accepted until June 1, 2004.

The new regulations filed on March 16, 2004 are substantively identical to their 1995 counterparts, but because they are new regulations they have different numbers than the 1995 regulations. They are considered new regulations, rather than amendments to the September 12, 2003 regulations, because the September 12, 2003 regulations were rendered null, void, and unenforceable in their entirety by 2004 HB 295.

As specifically required by HJR 98, the new regulations include tar sands or rock asphalt. Also, there are a few minor differences from the 1995 versions scattered throughout these eight (8) new regulations that are necessary to meet formatting and language requirements of KRS Chapter 13A.

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The new emergency regulations, which took effect on March 16, 2004, are:

405 KAR 5:002E	Definitions for 405 KAR Chapter 5.
405 KAR 5:032E	Permit requirements.
405 KAR 5:036E	Signs and markers.
405 KAR 5:042E	Blasting.
405 KAR 5:048E	Protection of environmental resources.
405 KAR 5:062E	Handling of materials.
405 KAR 5:078E	Contemporaneous reclamation.
405 KAR 5:082E	Reclamation bond.

You may notice that a water replacement regulation does not appear in the new emergency regulations. 405 KAR 5:053, the water replacement regulation in the December 13, 2002 emergency regulations and the September 12, 2003 ordinary regulations, did not exist in the 1995 regulations and therefore was not among the new regulations required by 2004 HJR 98.

Effect of the New Regulations

In brief, the effect of the new emergency regulations is that requirements for noncoal mineral operations return to the requirements that were in effect from February 22, 1995 to December 13, 2002, including the various forms that were in use during that period. The Cabinet's field inspectors will now enforce the current emergency regulations.

According to agency records 50 permits were issued or changed by a permitting action under the December 13, 2002 regulations or the September 12, 2003 regulations. Those permits include completed application forms NC-3 and permit conditions based upon the 2002 and 2003 regulations. As a result, those permits include some provisions that are no longer required under the new emergency regulations. These permits do not reflect current regulatory requirements.

Because 2004 HB 295 rendered the September 12, 2003 regulations null, void, and unenforceable, provisions in the issued permits that are based solely on the 2002 or 2003 changes to the regulations, can be removed by revisions to the permits.

Revision of Permits to Comply With the Emergency Regulations

The Cabinet plans to accomplish the revisions in the simplest and least costly manner for both the permittees and the Cabinet.

Each of the 50 permits will be reissued to include a standard condition or conditions that remove certain provisions and requirements from the approved permit that are no longer required by the emergency regulations. The permit will retain the same permit number and expiration date as before. This step will not require any action by the permittee.

There are two instances in which action by the permittee may be necessary to comply with the emergency regulations -- bonding and AOC/spoil disposal.

To obtain a release or reduction of bond, the permittee must submit a request for bond release. This will use the standard form for requesting bond release, and will be processed as an administrative release.

A permittee may need a new spoil disposal area outside the pit in order to take advantage of the removal of the requirements to eliminate highwalls and return disturbed areas to the approximate original contour. If so, the permittee must obtain a permit revision or amendment to include the new disposal area, including submittal of the appropriate engineering plans.

However, if a permittee has an existing approved spoil disposal area, that area may be used in accordance with the permit without obtaining a revision. The permittee may not increase the vertical or the lateral extent ("footprint") of the disposal area beyond what is approved in the permit.

Alternatively, a permittee may place spoil in another part of the active pit, or in an inactive pit on the permit area, without applying separately for a revision. This alternative will be made a part of the reissued permit in the standard conditions.

If a permittee wishes to voluntarily revise a permit to comply with the emergency regulations, a permit revision may be filed on form NCR-2. Permittees are advised that permit revisions may be required to comply with final regulations if changes are made in response to public comments received during the promulgation process. The final regulations are anticipated to be final in five months.

Requirements No Longer Applicable, or Modified

Below is a summary of the September 12, 2003 regulatory requirements, and if applicable the corresponding items in application form NC-3, that do not appear in the March 16, 2004 emergency regulations. The affected permit items will be addressed in the standard conditions of the reissued permits as discussed above.

This is not intended to be an exhaustive listing of all requirements that are affected by the new regulations, but rather a summary of the key changes. It may fail to list some requirements that are affected. In all cases, the new emergency regulations shall govern.

405 KAR 5:001 Definitions for 405 KAR Chapter 5.

“Approximate original contour” has been deleted from the definitions.
“Tar sand or rock asphalt” has been included in the emergency regulations.

405 KAR 5:030 Permit Requirements.

Section 5. Waivers and Approvals. Form NC-3 Item 27.2

A waiver will be required if mineral extraction will take place within 100 feet of an occupied dwelling, rather than if a mineral operation will be conducted within 300 feet of an occupied dwelling. A waiver will continue to be required if blasting will occur within 300 feet of an occupied dwelling. This change does not invalidate any existing waivers.

Section 8. Map Requirements.

Section 8(1)(b). For underground mineral operations, an annual updated map showing the location of the underground workings will not be required.

Section 18. Land Use Plan. Item 27.4

A discussion of the proposed land use change from the equitable owner of record of the surface will no longer be required.

Section 20. Transportation Plan. Item 43 - 43.5

A transportation plan is no longer required.

Section 22. Newspaper Advertisement: Publication of Notice of Intention to Mine. Item 26 - 26.2

For future applications, the newspaper advertisement must be published prior to submission of the application.

Section 24. Permit Amendments.

Section 24(1). Language requiring public notice for amendments has been removed.

Section 28. Criteria for Permit Approval and Denial. Item 27.1

The National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, Wild Rivers and their corridors, State Nature Preserves, State Wildlife Management areas or similar public lands, have been deleted from the expanded listing given in the September 12, 2003 Section 28(6)(a). However, these features continue to be protected elsewhere in the new regulations, just as they were in the 1995 regulations. These areas are included within the prohibitions in new 405 KAR 5:048E, Section 1(3), just as they were in 1995 405 KAR 5:045 Section 1(3). Further, these areas are the types of areas required to be shown on the environmental resources map required under new 405 KAR 5:032E, Section 11(1), just as they were covered by 1995 405 KAR 5:030, Section 11(1).

405 KAR 5:035 Signs, Markers, and Safety Barriers.

Section 6. Safety Barriers and Warning Signs Above Highwalls. Item 34.4
Safety barriers and warning signs are no longer required.

Section 7. Safety Barriers and Warning Signs at Permit Boundary. Item 34.4
Fencing or landscape barriers between the highwall and permit boundary are no longer required.

405KAR 5:038. Blasting.

Section 3. Preblasting Survey. Item 32.2
Preblasting surveys are no longer required.

Section 4. Public Notice of Blasting Schedule. Item 32.3
Initial and subsequent publications of a blasting schedule are no longer required.

405 KAR 5:045. Protection of Environmental Resources.

Section 2. Environmental Resources.

Section 2(3). Language allowing the Cabinet to approve mining within a prohibited area if the federal or state agency with management responsibility for the area has consented in writing to the mining, has been removed.

Section 3. Other Lands Where Mineral Operations Prohibited or Limited.
Item 27.2, 27.3

Specific prohibitions or limitations in this section regarding operations near any public park, public building, school, church, community or institutional building, occupied dwelling, or public road, have been deleted from this section. However, these areas remain protected under 405 KAR 5:032E, Section 27, as they were under 1995 405 KAR 5:030, Section 27.

Section 4. Agency Assistance in Review. Items 27.1 and 30

Language requiring the Cabinet to request assistance from other state and federal agencies in certain circumstances, no longer applies.

Section 5. Valid Existing Rights. Item 27.6

Provisions addressing valid existing rights no longer apply.

405 KAR 5:053. Replacement of Water Supply. Item 27.5

Requirements and procedures pertaining to replacement of affected water supplies no longer apply.

405 KAR 5:060. Handling of Materials.

Section 1. Backfilling and Grading. Items 34.1, 34.2, 34.3

Returning disturbed areas to approximate original contour (AOC) except where it is technically or economically infeasible to do so, is no longer required. Generated spoil is not necessarily required to go back into the pit. Elimination of highwalls is no longer required.

405 KAR 5:075. Contemporaneous Reclamation. Item 27.4

Contour operations must be reclaimed within 90 days following mineral removal. Pit and underground operations must be reclaimed within 180 days after completion of mining. Detailed requirements for deferral of contemporaneous reclamation requirements no longer apply. Requirements for temporary cessation of operations, with bond requirements in some circumstances, no longer apply.

405 KAR 5:080. Reclamation Bond. Item 21

Bond of \$3,000 per acre or fraction of an acre is no longer required. Release of bond on permits for which \$3,000 per acre was required, will be handled by request only. If a bond release is desired, a request to the Cabinet must be submitted on Form NCR-12.

The changes discussed above shall in no way be construed to allow the disturbance of any area that is not under permit. Any area that is not under permit must be permitted through an amendment application before any disturbance can take place.

If you have questions about the issues discussed in this RAM and how they affect a specific permit, please contact:

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Informational versions of the new emergency regulations and proposed ordinary regulations discussed above may be found on the following pages of the website of the Department for Natural Resources.

Emergency regulations:

www.surfacemining.ky.gov/regguidance/statutes/NonCoal+Emergency+Regulations.htm

Proposed regulations:

www.surfacemining.ky.gov/regguidance/statutes/Proposed+NonCoal+Regs.htm

The current version of the various forms for noncoal mining can be downloaded at:

www.surfacemining.ky.gov/fieldservices/noncoal/Non+Coal+Downloads.htm