

## **405 KAR 24:040. Areas unsuitable for mining.**

RELATES TO: KRS 350.465(2)(b), 350.610

STATUTORY AUTHORITY: KRS Chapter 13A, 350.465(2), 350.610

NECESSITY, FUNCTION, AND CONFORMITY: KRS 350.465(2) and 350.610 require the cabinet to prepare, develop, and promulgate a permanent regulatory program for the implementation of SMCRA containing procedures similar to that Act. This administrative regulation sets forth procedures for reviewing applications for surface coal mining and reclamation operation permits to determine whether surface coal mining and reclamation operations are limited or prohibited.

Section 1. General. The cabinet shall prohibit or limit surface coal mining and reclamation operations on or near certain private, federal, and other public lands designated by Congress in SMCRA, except for operations which existed on August 3, 1977, or were subject to valid existing rights on that date. The cabinet shall also prohibit certain surface coal mining operations on lands designated unsuitable for all or certain types of surface coal mining and reclamation operations under 405 KAR 24:030.

Section 2. Permit Application Review. Except for operations which existed on August 3, 1977, unless the required approvals or waivers have been obtained, upon receipt of a complete and accurate application for a surface coal mining and reclamation operation permit, and subject to valid existing rights, the cabinet shall review the application and deny the permit if it determines that the lands on which the proposed operation would be conducted include:

(1) Lands within the boundaries of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including study rivers designated under Section 5(a) of the Wild and Scenic Rivers Act (16 USC 1276(a)) or study rivers or study river corridors as established in any guidelines pursuant to that Act, and the National Recreation Areas designated by Act of Congress;

(2) Lands within 300 feet, measured horizontally, of any public park, public building, school, church, community or institutional building; or

(3) Lands within 100 feet, measured horizontally, of a cemetery; except that cemeteries may be relocated if authorized by applicable state law or administrative regulations;

(4) Lands where mining will adversely affect any publicly-owned park or any places included on the National Register of Historic Places unless jointly approved by the cabinet and the federal, state, or local agency with jurisdiction over the park or place as set forth in paragraphs (a) and (b) of this subsection.

(a) The cabinet shall transmit to the federal, state, or local government agency with jurisdiction over the park or place a copy of applicable parts of the permit application, together with a request for that agency's approval or disapproval of the operation, and a notice to that agency that it has thirty (30) days from receipt of the request within which to respond and that failure to interpose a timely objection will constitute approval. The cabinet, upon request by the appropriate agency, may grant an extension to the thirty (30) day period of an additional thirty (30) days. Failure to interpose an objection within thirty (30) days or the extended period granted shall constitute an approval of the proposed permit by the agency.

(b) A permit for a surface coal mining and reclamation operation shall not be issued unless jointly approved by all affected agencies.

(5) Lands within 300 feet, measured horizontally, from any occupied dwelling, unless the owner of the dwelling has provided a written waiver consenting to surface coal mining operations closer than 300 feet.

(a) The applicant shall submit with the permit application a written waiver by lease, deed, or other

conveyance from the owner of the dwelling, clarifying that the owner and signator had the legal right to deny mining and knowingly waived that right. The waiver shall act as consent to the operation within a closer distance of the dwelling specified in the waiver. Valid waivers obtained prior to August 3, 1977 shall be valid for the purposes of this paragraph. Waivers obtained from previous owners shall remain effective for subsequent owners who had actual or constructive knowledge of the existing waiver when the dwelling was purchased. A subsequent owner shall be deemed to have constructive knowledge if the waiver has been properly filed in public property records pursuant to state law or if the mining has proceeded to within the 300-foot limit prior to the date of purchase.

(b) The waiver shall be knowingly made and separate from a lease or deed unless the lease or deed contains an explicit waiver. In this case, a copy of the lease or deed shall be included with the permit application.

(c) This subsection shall not apply when the part of the mining operation which is within 300 feet of the dwelling is a haul road or access road which connects with an existing public road on the side of the public road opposite the dwelling.

(6) Lands within 100 feet, measured horizontally, of the outside right-of-way line of any public road (except where mine access roads or haulage roads join the right-of-way). The cabinet may allow areas within 100 feet to be affected or may allow the public road to be closed or relocated, provided that, the cabinet shall:

(a) Require the applicant to obtain any necessary approval of the governmental authority with jurisdiction over the public road;

(b) Provide opportunity for a public hearing in the locality of the proposed mining operations for the purpose of determining whether the interests of the public and affected landowners will be protected;

(c) Publish notice in a newspaper of largest bona fide circulation according to the definition in KRS 424.110 to 424.120 in the county of the affected area at least two (2) weeks before the public hearing;

(d) Make a written finding within thirty (30) days after the hearing or after any public comment period ends if no hearing is held, on the basis of information received at the public hearing as to whether the interests of the public and affected landowners will be protected. No mining shall be allowed within 100 feet of the outside right-of-way line of a road nor may a road be relocated or closed unless the cabinet determines that the interests of the public and affected landowners will be protected.

(7) Federal lands within the boundaries of any national forest, unless specifically approved by the Secretary of the Interior.

Section 3. Assistance Review. (1) If the cabinet is unable to determine whether the proposed surface coal mining operation is located within the distances or boundaries of any of the lands identified in Section 2 of this administrative regulation, the cabinet shall transmit a copy of the relevant portions of the permit application to the appropriate federal, state, or local government agency for a determination or clarification of the relevant boundaries or distances, with a notice to the agency that it shall respond in writing within thirty (30) days of receipt of the request.

(2) The National Park Service or the U.S. Fish and Wildlife Service shall be notified of any request for a determination of valid existing rights pertaining to areas within the boundaries of areas under their jurisdiction and shall have thirty (30) days from receipt of notification in which to respond.

(3) The cabinet, upon request by the appropriate agency, shall grant an extension to the thirty (30) day period of an additional thirty (30) days. If no response is received within the thirty (30) day period or within the extended period granted, the cabinet may make the necessary determination based upon the information it has available.

Section 4. Valid Existing Rights. (1) Except for haul roads, "valid existing rights" means property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, contract or other instrument which authorizes the applicant to produce coal and the person proposing to conduct a surface coal mining operation on the lands either:

(a) Had been validly issued or had made a good faith effort to obtain, on or before August 3, 1977, all state and federal permits necessary to conduct surface coal mining operations on those lands, application for the permits being deemed to constitute good faith efforts to obtain the permits; or

(b) Can demonstrate to the cabinet that the coal is both needed for, and immediately adjacent to, an ongoing surface coal mining operation for which all permits were obtained prior to August 3, 1977.

(2) For haul roads, "valid existing rights" means:

(a) A recorded right-of-way, recorded easement, or a permit for coal haul road recorded as of August 3, 1977; or

(b) Any other road in existence as of August 3, 1977.

(3) "Valid existing rights" does not mean the mere expectation of a right to conduct surface coal mining operations or the right to conduct underground coal mining.

(4) Interpretation of the terms of the documents relied upon to establish existing rights shall be based upon the laws of Kentucky.

(5) A determination that coal is "needed" shall be based upon, but not be limited to, a finding that additional production originating on adjacent land is necessary to preclude a financial hardship on the mining operation measured by standard accounting and financial procedures, provided that:

(a) A fair rate-of-return on invested capital is not achievable on existing permitted land;

(b) A less than fair rate-of-return on invested capital is attributable to this chapter; and

(c) The operator can establish that the adjacent unpermitted land is part of the operator's mining plan.

(6) Where an area comes under the protection of Section 2 of this administrative regulation after August 3, 1977, valid existing rights shall be found if, on the date the protection comes into existence, a validly authorized surface coal mining operation exists on that area.

Section 5. Exploration on Land Designated as Unsuitable for Surface Coal Mining Operations. Designation of any area as unsuitable for all or certain types of surface coal mining operations pursuant to this chapter does not prohibit coal exploration operations in the area, if conducted in accordance with KRS Chapter 350 and 405 KAR Chapters 7 through 20. Exploration operations on any lands designated unsuitable for surface coal mining operations shall be approved only when the cabinet finds that the proposed exploration does not interfere with any value for which the area has been designated unsuitable for surface coal mining operations.

Section 6. Lands Designated Unsuitable. (1) If the cabinet determines that the proposed surface coal mining operation is not prohibited by Section 2 of this administrative regulation, it may nevertheless, pursuant to appropriate petitions, designate the lands as unsuitable for all or certain types of surface coal mining operations pursuant to 405 KAR 24:030.

(2) The cabinet shall not issue permits which are inconsistent with designations made pursuant to 405 KAR 24:030 and this administrative regulation. (8 Ky.R. 1597; eff. 1-6-1983; 15 Ky.R. 515; eff. 12-13-1988; 1897; eff. 6-28-1989; Crt eff. 7-3-2018.)