

ENERGY AND ENVIRONMENT CABINET

Department for Natural Resources

Division of Mine Permits

(Amended After Comments)

405 KAR 10:001. Definitions for 405 KAR Chapter 10.

RELATES TO: KRS Chapter 350, 7 C.F.R. Part 657, 30 C.F.R. ~~[Parts]~~ 700.5, 701.5, 707.5, 730-733, 735, 761.5, 762.5, 773.5, 800.5, 843.5, 917, 40 C.F.R. Part 136, 30 U.S.C. Chapter 25, 1253, 1255, 1291

STATUTORY AUTHORITY: KRS 350.028, 350.465, 350.500 - 350.521, 7 C.F.R. Part 657, 30 C.F.R. ~~[Parts]~~ 700.5, 701.5, ~~[707.5,]~~ 730-733, 735, ~~[761.5, 762.5,]~~ 773.5, 800.5, ~~[843.5,]~~ 917, 40 C.F.R. Part 136, 30 U.S.C. 1253, 1255, 1291

NECESSITY, FUNCTION, AND CONFORMITY: KRS Chapter 350 requires the cabinet to promulgate administrative regulations pertaining to surface coal mining and reclamation operations under the permanent regulatory program. This administrative regulation establishes definitions for terms used in 405 KAR Chapter 10.

Section 1. Definitions.

(1) "Acquisition" means the purchase, lease, or option on the land for the purpose of conducting or allowing through resale, lease, or option the action of conducting surface coal mining and reclamation operations.

(2) "Active acre":

(a) Means an acre of land or fraction thereof, permitted and bonded for surface disturbance pursuant to a surface coal mining permit as of July 1, 2013; and

(b) Does not mean:

1. Acreage contained in a permit for which the entire permit has not been initially disturbed by the permittee after permit issuance;
2. Acreage contained in a permit, or increment thereof, that has completed initial reclamation and received a minimum of a Phase 1 bond release; or
3. Undisturbed acreage completely released from liability as a result of a bond release or bond reduction.

(3) "Actuarial soundness" is defined by KRS 350.500(1).

(4) "Adjacent area" means land located outside the affected area or permit area, depending on the context in which "adjacent area" is used, where air, surface, surface water, groundwater, fish, wildlife, vegetation, or other resources protected by KRS Chapter 350 could be adversely impacted by surface coal mining and reclamation operations.

(5) "Affected area" means any land or water area that is used to facilitate, or is physically altered by, surface coal mining and reclamation operations. The affected area includes:

(a) The disturbed area;

(b) Any area upon which surface coal mining and reclamation operations are conducted;

(c) Any adjacent lands the use of which is incidental to surface coal mining and reclamation operations;

(d) All areas covered by new or existing roads used to gain access to, or for hauling coal to or from, surface coal mining and reclamation operations, except as established in this definition;

(e) Any area covered by surface excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, or shipping areas;

- (f) Any areas upon which are sited structures, facilities, or other property or material on the surface resulting from, or incident to, surface coal mining and reclamation operations;
- (g) The area located above underground workings associated with underground mining activities;
- (h) Auger mining or in situ mining; and
- (i) Every road used for the purposes of access to, or for hauling coal to or from, surface coal mining and reclamation operations, unless the road:
 - 1. Was designated as a public road pursuant to the laws of the jurisdiction in which it is located;
 - 2. Is maintained with public funds and constructed in a manner similar to other public roads of the same classification within the jurisdiction; and
 - 3. There is substantial (more than incidental) public use.
- (6) "Applicant" means any person seeking a permit, permit revision, permit amendment, permit renewal or transfer, assignment, or sale of permit rights from the cabinet to conduct surface coal mining and reclamation operations pursuant to KRS Chapter 350 and 405 KAR Chapters 7 through 24.
- (7) "Cabinet" is defined by KRS 350.010(10).
- (8) "C.F.R." means Code of Federal Regulations.
- (9) "Coal" means combustible carbonaceous rock, classified as anthracite, bituminous, subbituminous, or lignite by ASTM Standard D 388-77.
- (10) "Coal mined and sold" means coal severed or removed as a result of surface coal mining operations and subsequently sold, transferred, or used by the permittee or operator.
- (11) "Collateral bond" means an indemnity agreement in a sum certain payable to the cabinet executed by the permittee and supported by the deposit with the cabinet of cash, negotiable certificates of deposit, or an irrevocable letter of credit of any bank organized and authorized to transact business in the United States.
- (12) "Cropland" means land used for the production of adapted crops for harvest, alone or in a rotation with grasses and legumes, and includes row crops, small grain crops, hay crops, nursery crops, orchard crops, and other similar specialty crops.
- (13) "Day" means calendar day unless otherwise specified to be a working day.
- (14) "Department" means the Department for Natural Resources.
- (15) "Disturbed area" means an area where vegetation, topsoil, or overburden is removed or upon which topsoil, spoil, coal processing waste, underground development waste, or noncoal waste is placed by surface coal mining operations. Those areas are classified as "disturbed" until reclamation is complete, and the performance bond or other assurance of performance required by 405 KAR Chapter 10 is released.
- (16) "Dormancy fee" means the annual fee established in KRS 350.518(2)(f).
- (17) "FDIC" means Federal Deposit Insurance Corporation.
- (18) "Federal lands":
 - (a) Means any lands, including mineral interests, owned by the United States, without regard to how the United States acquired ownership of the lands or which agency manages the lands; and
 - (b) Does not mean Indian lands.
- (19) "Final disposition" means the status of an enforcement action taken by the cabinet pursuant to KRS Chapter 350 for which a final secretary's order has been entered and the time for appeal has expired or all appeals have been exhausted, or an agreed order has been entered.
- (20) "FSLIC" means Federal Savings and Loan Insurance Corporation.
- (21) "Full-cost bonding" means performance bonds that have been submitted by a permittee for surface coal mining operation permits in lieu of participation and

membership in the Kentucky Reclamation Guaranty Fund.

(22) "Historically used for cropland" means land that:

(a) Has been used for cropland for any five (5) years or more out of the ten (10) years immediately preceding the:

1. Application; or

2. Acquisition of the land for the purpose of conducting surface coal mining and reclamation operations;

(b) Would likely have been used as cropland for any five (5) out of the last ten (10) years immediately preceding the acquisition or the application but for some fact of ownership or control of the land unrelated to the productivity of the land; or

(c) The cabinet determines, on the basis of additional cropland history of the surrounding land and the land under consideration, are clearly cropland but fall outside the specific five (5) years in ten (10) criterion.

(23) "Impoundment" means a closed basin, naturally formed or artificially built, which is dammed or excavated for the retention of water, sediment, or waste.

(24) "KRGF" means the Kentucky Reclamation Guaranty Fund.

(25) "Land use" means specific functions, uses, or management-related activities of an area, and could be identified in combination when joint or seasonal uses occur and could include land used for support facilities that are an integral part of the use. In some instances, a specific use can be identified without active management.

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

~~(27) ["Long-term treatment" means the use of any active or passive water treatment necessary to meet water quality effluent standards at the time a permit or any affected permit increment attains phase one (1) bond release standards as determined by the cabinet pursuant to 405 KAR 10:040.]~~

~~(27)~~ "Member" means a permittee in the Kentucky Reclamation Guaranty Fund.

~~(28)~~ ~~(27)~~ ~~(28)~~ "Non-production fee" means the annual fee established in KRS 350.518(2)(e).

~~(29)~~ ~~(28)~~ ~~(29)~~ "Notice of noncompliance and order for remedial measures" means a written document and order prepared by an authorized representative of the cabinet that establishes with specificity the violations of KRS Chapter 350, 405 KAR Chapters 7 through 24, or permit conditions that the authorized representative of the cabinet determines to have occurred based upon an inspection, and the necessary remedial actions, if any, and the time schedule for completion thereof, necessary and appropriate to correct the violations.

~~(30)~~ ~~(29)~~ ~~(30)~~ "Operations" is defined by KRS 350.010(6).

~~(31)~~ ~~(30)~~ ~~(31)~~ "Operator" is defined by KRS 350.010(8).

~~(32)~~ ~~(31)~~ ~~(32)~~ "Opt-out" means the decision by a permittee to not participate in the KRGF and to provide full-cost bonding pursuant to 405 KAR 10:080.

~~(33)~~ ~~(32)~~ ~~(33)~~ "Order for cessation and immediate compliance" means a written document and order issued by an authorized representative of the cabinet when:

(a) A person to whom a notice of noncompliance and order for remedial measures was issued has failed, as determined by a cabinet inspection, to comply with the terms of the notice of noncompliance and order for remedial measures within the time limits set therein, or as subsequently extended; or

(b) The authorized representative finds, on the basis of a cabinet inspection, any condition or practice or any violation of KRS Chapter 350, 405 KAR Chapters 7 through 24, or any condition of a permit or exploration approval that:

1. Creates an imminent danger to the health or safety of the public; or

2. Is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

~~(34)~~ ~~[(32)]~~ ~~[(34)]~~ "ORGF" means the Office of the Reclamation Guaranty Fund.

~~(35)~~ ~~[(34)]~~ ~~[(35)]~~ "Owned or controlled" and "owns or controls" mean any one (1) or a combination of the relationships established in paragraphs (a) and (b) of this definition:

(a)

1. Being a permittee of a surface coal mining operation;
2. Based on instruments of ownership or voting securities, owning of record in excess of fifty (50) percent of an entity; or
3. Having any other relationship that gives one (1) person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations; and

(b) One (1) of the following relationships, which constitutes ownership or control unless a person demonstrates that the person subject to the presumption does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted:

1. Being an officer or director of an entity;
2. Being the operator of a surface coal mining operation;
3. Having the ability to commit the financial or real property assets or working resources of an entity;
4. Being a general partner in a partnership;
5. Based on the instruments of ownership or the voting securities of a corporate entity, owning of record ten (10) through fifty (50) percent of the entity; or
6. Owning or controlling coal to be mined by another person under a lease, sublease, or other contract and having the right to receive the coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation.

~~(36)~~ ~~[(35)]~~ ~~[(36)]~~ "Performance bond" means a surety bond, a collateral bond, or a combination thereof, or bonds filed pursuant to the provisions of the Kentucky Reclamation Guaranty Fund (405 KAR 10:070, KRS 350.595, and 350.500-~~[(350.521)]~~), by which a permittee assures faithful performance of all the requirements of KRS Chapter 350, 405 KAR Chapters 7 through 24, and the requirements of the permit and reclamation plan.

~~(37)~~ ~~[(36)]~~ ~~[(37)]~~ "Permit" means written approval issued by the cabinet to conduct surface coal mining and reclamation operations.

~~(38)~~ ~~[(37)]~~ ~~[(38)]~~ "Permit area" means the area of land, indicated on the approved map submitted by the permittee with an application, required to be covered by the permittee's performance bond pursuant to 405 KAR Chapter 10 and that includes the area of land upon which the permittee proposes to conduct surface coal mining and reclamation operations pursuant to the permit, including all disturbed areas. Areas adequately bonded under another valid permit, pursuant to 405 KAR Chapter 10, could be excluded from the permit area.

~~(39)~~ ~~[(38)]~~ ~~[(39)]~~ "Permittee" means an operator or a person holding or required by KRS Chapter 350 or 405 KAR Chapters 7 through 24 to hold a permit to conduct surface coal mining and reclamation operations during the permit term and until all reclamation obligations imposed by KRS Chapter 350 and 405 KAR Chapters 7 through 24 are satisfied.

~~(40)~~ ~~[(39)]~~ ~~[(40)]~~ "Person" is defined by KRS 350.010(9).

~~(41)~~ ~~[(40)]~~ ~~[(41)]~~ "Person having an interest that is or may be adversely affected" or "person with a valid legal interest" includes any person:

- (a) Who uses any resource of economic, recreational, aesthetic, or environmental value that could be adversely affected by coal exploration or surface coal mining and reclamation operations, or by any related action of the cabinet; or

(b) Whose property is or could be adversely affected by coal exploration or surface coal mining and reclamation operations, or by any related action of the cabinet.

~~(42)~~ ~~[(41)]~~ ~~[(42)]~~ "Prime farmland" means those lands defined by the Secretary of Agriculture in 7 C.F.R. 657 and that have been "historically used for cropland".

~~(43)~~ ~~[(42)]~~ ~~[(43)]~~ "Reclamation" is defined by KRS 350.010(12).

~~(44)~~ ~~[(43)]~~ ~~[(44)]~~ "Secretary" is defined by KRS 350.010(11).

~~(45)~~ ~~[(44)]~~ ~~[(45)]~~ "SMCRA" means Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Chapter 25 ~~of 1977~~ ~~(Pub. L. [PL] 95-87)~~, as amended.

~~(46)~~ ~~[(45)]~~ ~~[(46)]~~ "Surety bond" means an indemnity agreement in a sum certain, payable to the cabinet and executed by the permittee, which is supported by the performance guarantee of a corporation licensed to do business as a surety in the Commonwealth of Kentucky.

~~(47)~~ ~~[(46)]~~ ~~[(47)]~~ "Surface coal mining and reclamation operations" is defined by KRS 350.010(3).

~~(48)~~ ~~[(47)]~~ ~~[(48)]~~ "Surface coal mining operations" is defined by KRS 350.010(1).

~~(49)~~ ~~[(48)]~~ ~~[(49)]~~ "Suspended solids" or nonfilterable residue, expressed as milligrams per liter, means organic or inorganic materials carried or held in suspension in water that are retained by a standard glass fiber filter in the procedure outlined by the U.S. EPA's regulations for waste water and analyses (40 C.F.R. 136).

~~(50)~~ ~~[(49)]~~ ~~[(50)]~~ "Ton" means 2,000 pounds avoirdupois (0.90718 metric ton).

~~(51)~~ ~~[(50)]~~ ~~[(51)]~~ "Topsoil" means the A and E soil horizon layers of the four (4) master soil horizons.

~~(52)~~ ~~[(51)]~~ ~~[(52)]~~ "U.S. EPA" means United States Environmental Protection Agency.

~~(53)~~ ~~[(52)]~~ ~~[(53)]~~ "Voluntary Bond Pool" is defined by KRS 350.500(5).

~~(54)~~ ~~[(53)]~~ ~~[(54)]~~ "Willfully" and "willful violation" mean that a person acted either intentionally, voluntarily, or consciously, and with intentional disregard or plain indifference to legal requirements, in authorizing, ordering, or carrying out an act or omission that constituted a violation of SMCRA, KRS Chapter 350, 405 KAR Chapters 7 through 24, or a permit condition, or that constituted a failure or refusal to comply with an order issued pursuant to SMCRA, KRS Chapter 350, or 405 KAR Chapters 7 through 24.

REBECCA W. GOODMAN, Secretary

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REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person:Dawn Baase

(1) Provide a brief summary of:

(a) What this administrative regulation does:

This administrative regulation defines terms used in 405 KAR Chapter 10.

(b) The necessity of this administrative regulation:

This administrative regulation is necessary to clearly define the terms used in 405 KAR Chapter 10.

(c) How this administrative regulation conforms to the content of the authorizing statutes:

KRS Chapter 350 provides the department the authority to promulgate administrative regulations for implementing a permanent program to regulate coal mining in the Commonwealth. This administrative regulation defines terms used in 405 KAR Chapter 10.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes:

This administrative regulation defines terms used in 405 KAR Chapter 10 and will assist in the interpretation of those administrative regulations.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation:

The amendment adds a definition for "long term treatment".

(b) The necessity of the amendment to this administrative regulation:

The amendment adds a definition for "long-term treatment" to be used in 405 KAR Chapter 10.

(c) How the amendment conforms to the content of the authorizing statutes:

The amendment conforms to the authorizing statutes by defining the term "long-term treatment" as used in 405 KAR Chapter 10.

(d) How the amendment will assist in the effective administration of the statutes:

The amendment defines the term "long-term treatment".

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation:

This provision would apply to any entity operating a surface coal mine operation in the Commonwealth. There are currently 1,022 surface coal mines operating in Kentucky.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment:

The entities identified do not have any actions or requirements due the amendments of this administrative regulation.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3):

The entities identified will not have additional costs due to this administrative regulation.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3):

The amendment defines and clarifies the term "long-term treatment" for the entities identified.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially:

There is no cost associated with implementing this amendment.

(b) On a continuing basis:

There will be no costs associated with the implementation of this amendment.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation:

The funding for the implementation and enforcement of this administrative regulation will be with a combination of general and restricted funds.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment:

This regulatory amendment will not require an increase in fees or funding.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees:

This administrative regulation does not establish or increase fees.

(9) TIERING: Is tiering applied?

No, tiering is not applied to this administrative regulation as it only contains definitions for 405 KAR Chapter 10.

FISCAL IMPACT STATEMENT

(1) Identify each state statute, federal statute, or federal regulation that requires or authorizes the action taken by the administrative regulation.

KRS 350.028, 350.465, 350.500 - 350.521, 7 C.F.R. Part 657, 30 C.F.R. 700.5, 701.5, 730-733, 735, 773.5, 800.5, 917, 40 C.F.R. Part 136, 30 U.S.C. 1253, 1255, 129

(2) Identify the promulgating agency and any other affected state units, parts, or divisions:

The Energy and Environment Cabinet, Department for Natural Resources, Division of Mine Permits, and Division of Mine Reclamation and Enforcement.

(a) Estimate the following for the first year:

Expenditures: There are no known effects on current expenditures.

Revenues: There are no known effects on current revenues.

Cost Savings: There are no known cost savings.

(b) How will expenditures, revenues, or cost savings differ in subsequent years?

Expenditures, revenues, and cost savings will not change in subsequent years.

(3) Identify affected local entities (for example: cities, counties, fire departments, school districts):

There are no known effects for local entities.

(a) Estimate the following for the first year:

Expenditures: There are no known effects on expenditures.

Revenues: There are no known effects on revenues.

Cost Savings: There are no known cost savings.

(b) How will expenditures, revenues, or cost savings differ in subsequent years?

Expenditures, revenues, and cost savings will not change in subsequent years.

(4) Identify additional regulated entities not listed in questions (2) or (3):

Regulated entities are those who have obtained a surface coal mine permit in the Commonwealth.

(a) Estimate the following for the first year:

Expenditures: There are no known effects on expenditures.

Revenues: There are no known effects to revenues for regulated entities.

Cost Savings: There are no known cost savings for regulated entities.

(b) How will expenditures, revenues, or cost savings differ in subsequent years?

Expenditures, revenues, and cost savings will not change in subsequent years.

(5) Provide a narrative to explain the:

(a) Fiscal impact of this administrative regulation:

There are no fiscal impacts from this administrative regulation.

(b) Methodology and resources used to determine the fiscal impact:

This administrative regulation only establishes definitions of the terms used in 405 KAR Chapter 10.

(6) Explain:

(a) Whether this administrative regulation will have an overall negative or adverse major economic impact to the entities identified in questions (2) - (4). (\$500,000 or more, in aggregate)

There is not a negative or adverse major economic impact to the entities identified.

(b) The methodology and resources used to reach this conclusion:

This administrative regulation only establishes definitions of the terms used in 405 KAR Chapter 10.

FEDERAL MANDATE ANALYSIS COMPARISON

(1) Federal statute or regulation constituting the federal mandate.

30 C.F. R. Part 701

(2) State compliance standards.

KRS 350.028 and KRS 350.060.

(3) Minimum or uniform standards contained in the federal mandate.

30 C.F.R. 701.5

(4) Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate?

No, this administrative regulation does not impose stricter or additional requirements than the federal regulation.

(5) Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements.

NA