



United States Department of the Interior
OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
Washington, D.C. 20240



May 1, 2012

Dr. Leonard K. Peters
Secretary, Energy and Environmental Cabinet
500 Mero Street
5th Floor, Capital Plaza Tower
Frankfort, Kentucky 40601

Dear Dr. Peters:

I am writing regarding the Kentucky bonding program and Kentucky's legal obligations and my legal obligations. First, thank you for your efforts, those of Governor Beshear, and those of the officials in the Kentucky Department of Natural Resources (KYDNR) to attempt to resolve the deficiencies in Kentucky's bonding program. I appreciate the complexities of the matter and recognize the deficiencies that developed over the past decade or more will take a concerted effort over time to resolve. Nonetheless, it is time to make actual progress. I look forward to Kentucky developing a Kentucky solution to this Kentucky problem. It is my duty to notify you that I have reason to believe that Kentucky is not implementing, administering, enforcing, and maintaining its reclamation bond program as Kentucky agreed to and as required by law. With this letter I am initiating the Part 733 process. Please see 30 CFR Part 733.

In 1982, the Office of Surface Mining Reclamation and Enforcement (OSM) approved the Kentucky mining and reclamation program and granted Kentucky primary responsibility for regulating coal mining in the Commonwealth. 47 Fed. Reg. 21404, May 18, 1982. As part of its application, Kentucky agreed that it would comply with the legal requirements of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), its implementing regulations, and its approved regulatory program. 30 C.F.R. § 732.15(a). Kentucky agreed, and Federal and state law require Kentucky to implement, administer, enforce, and maintain its reclamation bonding program in a manner to ensure that coal mine operators post reclamation bonds sufficient in amount to enable Kentucky to complete the reclamation plan if the mine operator defaults on its legal obligations. 30 U.S.C. § 1259(a); 30 C.F.R. §§ 732.15(b)(6), 800.14(b) Kentucky Revised Statutes 350.060, Section 1(11).

As required by SMCRA and 30 CFR 733.12, OSM has conducted a number of reviews of the Kentucky bonding program during the past several years. KYDNR cooperated on these reviews. I appreciate Kentucky's professionalism, cooperation, and constructive input. KYDNR's insight



and expertise contributed to sound findings that accurately document the deficiencies in the Kentucky bonding program.

The first series of studies examined whether the reclamation performance bond amounts established by Kentucky were adequate to complete reclamation in the event of forfeiture. These oversight studies included a file review, site inspection, review of enforcement actions, and a comparison of the forfeited bond amounts with the reclamation cost estimates calculated by the Kentucky Division of Abandoned Mine Land (KYDAML). The 2008 Evaluation Year (EY) study found that 4 out of 5 permanent program bond forfeitures studied did not have adequate bond. A similar study conducted during EY 2009 found that 2 out of 5 permanent program bond forfeitures studied did not have adequate bond. The EY 2010 study found that 10 out of 12 permanent program bond forfeitures studied did not have adequate bond to complete reclamation. The lack of adequate reclamation bond prevents the land from being restored to a productive use.

The file reviews and review of enforcement actions found that Kentucky had not taken enforcement actions to require the mine operators to adjust the amounts of bond to be commensurate with the costs of reclaiming the disturbed areas. However, the reviews confirmed that, in general, Kentucky was ensuring that mine operators were keeping current in their reclamation.

On January 4, 2011, OSM issued a report entitled “National Priority Oversight Evaluation, Adequacy of Kentucky Reclamation Performance Bond Amounts.” This report documents the results of a further investigation OSM conducted using its own bond calculations and analysis. OSM found that reclamation performance bonds in Kentucky are not always sufficient to complete the reclamation required in the approved permit. Kentucky is not properly maintaining its bond program, as it has not adjusted its bonding protocols since 1993. The cost of reclamation has increased since then, but the Kentucky bonding protocols have not been maintained to reflect the increased costs.

Based upon the analysis and findings of the various studies, on February 3, 2011, Kentucky and OSM signed an “*Action Plan for Improving the Adequacy of Kentucky Performance Bond Amounts*” to resolve the deficiencies in a timely and effective manner. Kentucky committed to an April 1, 2011, deadline to develop bond computation protocols that would include the rationale and supporting documentation to demonstrate that the revised bonding protocols would result in bonds sufficient to complete reclamation should forfeiture occur. OSM appreciates Kentucky’s inclusive approach of engaging industry and environmental representatives to develop the new bonding protocols. However, OSM found that while the proposal submitted could result in improvements to the Kentucky bonding program, they were not sufficient to cure the documented deficiencies observed and fall short of meeting the applicable statutory and



regulatory requirements cited above. Furthermore, the proposal specifically excluded existing mines with inadequate reclamation bonds.

Two additional oversight studies were conducted during EY 2011. The first found that 17 out of 22 Kentucky bond forfeitures studied did not have adequate bond to complete reclamation. The second found that 18 out of 22 Kentucky bond forfeitures studied did not have adequate bond to complete reclamation.

The KYDAML completed its own study of thirty-nine forfeitures that occurred between January 1, 2007, and May 1, 2010. KYDAML prepared reclamation cost estimates and compared those costs to the amount of bond on the sites and found that over 80% of these forfeited mines did not have sufficient bond to complete reclamation to the permit standards.

On August 1, 2011, Kentucky submitted another proposal to address the bond program deficiencies. Kentucky agreed to participate with OSM in a Bond Review Team that would review and validate whether the August 1 proposal addressed the deficiencies. The Team completed its report in December 2011 and found the August 1, 2011, proposal to be an improvement of the existing bonding protocols. However, the Bond Review Team found that the proposal did not remedy the deficiencies and would not result in bonds that reflected the actual cost to reclaim the disturbed areas of mine sites.

In February and March of 2012, OSM initiated mine-specific oversight review of permits undergoing a mid-term review. OSM conducted mine site reviews, prepared reclamation cost estimates of the disturbed areas and compared the cost estimates to the amounts of bond currently posted by the operators. OSM found that the amount of bond posted for the mines were significantly less than the costs to reclaim the sites.

It is OSM's duty to monitor and oversee State program implementation by KYDNR. In keeping with OSM's policy of working closely with the States, OSM has had numerous discussions and other interactions with the officials of the Commonwealth of Kentucky regarding the current bonding situation. Significant problems with the adequacy of the reclamation bond amounts required for coal mining operations in Kentucky have been identified. Kentucky's bonding protocols used to calculate the reclamation bonds have not been modified since 1993. Moreover, Kentucky has not taken enforcement actions to require mine operators to increase their reclamation bonds to be commensurate with the costs of reclaiming the mine sites. In recognition of these problems, KYDNR has cooperated with OSM and had established a workgroup consisting of individuals representing KYDNR, the environmental community, and the mining and bonding industries. The purpose of this workgroup was to examine and make recommendations on the redesign of bond computation protocols in Kentucky that would satisfy the statutory and regulatory bonding requirements. While numerous meetings of the workgroup



were held, various proposals were advanced, and some conceptual progress was made, a resolution, establishing adequate reclamation bond amounts, has not been reached.

As Kentucky has not resolved its bond program deficiencies, I am fulfilling my statutory responsibility under section 521(b) of SMCRA and 30 CFR 733.12(b) to initiate this action. The initiation of the 733 process today continues to provide Kentucky the opportunity to correct its bond program deficiencies. However, should Kentucky not correct its bond program deficiencies, it will likely lose approval of all or part of its regulatory program, and OSM will implement a full or partial Federal program in Kentucky. In that case, Kentucky should also expect, in accordance with 30 CFR 736.24, to lose eligibility to receive Federal funding for its abandoned mine land reclamation program.

This action is necessary because I have reason to believe that Kentucky's bonding program does not meet the standards of 30 CFR Part 800 and because I have reason to believe Kentucky has not implemented, administered, enforced, and maintained its reclamation bonding program in a manner to ensure that coal mine operators post reclamation bonds sufficient in amount to enable Kentucky to complete the reclamation plans if the mine operators default on their legal obligations. A summary of the facts that support this conclusion are set forth above.

The tenets of primacy call for Kentucky to attempt to resolve this problem in the first instance. I recognize that you and KYDNR have put forth proposals to improve the situation. However, the proposals lack specificity, any immediate action to address the situation, and a commitment to a specific timeline to ensure that the deficiencies will be fully addressed in a timely and realistic manner. While I recognize that this situation did not develop overnight, and Kentucky will require time to develop and implement a solution, the status of Kentucky's inadequate bonding system remains relatively unchanged today despite several years of studies and collective efforts to correct the situation.

Pursuant to 30 CFR 733.12(b)(3), within 30 days of the date of this letter, Kentucky must submit a detailed and specific plan that outlines the immediate and long-term actions that Kentucky will take to eliminate the deficiencies in its bonding program. Specifically, the Kentucky submission must address the steps and implementation schedule to:

- (1) Ensure that all new permits issued will have adequate bond to enable Kentucky to complete the approved reclamation plan to meet statutory and regulatory requirements.
- (2) Re-evaluate and adjust the amount of bond required on existing permitted mines to ensure they will have adequate bond to enable Kentucky to complete the approved reclamation plan to meet statutory and regulatory requirements.



- (3) Ensure that the Kentucky bonding program will be maintained so that the amount of each bond is periodically adjusted as the cost of future reclamation changes to reflect the actual costs of reclamation.
- (4) Ensure that amount of bond on each mining permit is regularly reviewed and adjusted so that Kentucky will have adequate bond to enable Kentucky to complete the approved reclamation plan to meet statutory and regulatory requirements.

In addition, Kentucky has known of its bonding program deficiencies for quite some time and during this time mine sites without adequate bond to complete the reclamation have been forfeited and will likely continue to be forfeited. I request that you inform me of the steps Kentucky will take to ensure that forfeited sites that do not have sufficient bond will be reclaimed in accordance with the approved reclamation plan to meet statutory and regulatory requirements.

Under 30 CFR 733.12(c), Kentucky is entitled to an informal conference to discuss either the facts supporting the assertions contained in this letter, or the timetable for initiating and completing the necessary remedial measures. Kentucky may request an informal conference no later than 45 days from the date of this letter.

As provided in 30 CFR 733.12(d), after the conference, or after expiration of the time allowed to request a conference, whichever is later, I will notify you as to whether I continue to have reason to believe that Kentucky is not adequately implementing, administering, enforcing, or maintaining its bonding program. If such a basis still exists, I will notify you and the public and will then schedule a public hearing in Kentucky.

Following the public hearing, if I find that Kentucky has not demonstrated the capability and intent to require and maintain adequate reclamation performance bonds on all surface coal mining and reclamation operations and that Kentucky has failed to implement, administer, enforce, and maintain its reclamation bonding program in a manner to ensure that coal mine operators post reclamation bonds sufficient in amount to enable Kentucky to complete the reclamation plans if the mine operators default on their legal obligations, I will, in accordance with 30 CFR 733.12(e), either substitute direct Federal enforcement of all or part of the State program, or recommend to the Secretary of the Interior that he withdraw approval of the State program, in whole or in part.

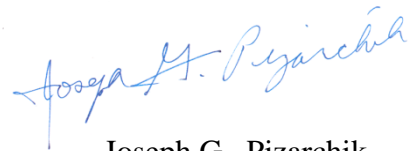
The Part 733 process provides OSM with a formal mechanism for communicating with State governments that immediate attention should be directed to the identified concerns, so the proper safeguards for the regulation of surface coal mining and reclamation operations are put in place. The process also provides Kentucky with the opportunity to reassert its commitment to primacy and the effective administration of SMCRA's environmental standards.



I am confident that Kentucky will take this opportunity to correct the deficiencies described in this letter in conformance with its primacy program.

If you have any questions regarding this decision or if you would like to discuss options for consideration, please contact Thomas Shope, Regional Director for the Appalachian Region, at (412) 937-2828. Please contact Joseph Blackburn at (859) 260-3902 for any assistance you may require in developing remedial measures. I look forward to a mutually satisfactory resolution of this issue.

Sincerely,



Joseph G. Pizarchik
Director

cc: Steve Hohmann, Commissioner
Kentucky Department for Natural Resources

