

**DEPARTMENT OF THE INTERIOR****Office of Surface Mining Reclamation and Enforcement****30 CFR Part 948**

[WV-106-FOR]

**West Virginia Regulatory Program**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

**ACTION:** Final rule; approval of amendment.

**SUMMARY:** We are approving, with certain exceptions, an amendment to the West Virginia regulatory program (the West Virginia program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). West Virginia amended the Code of West Virginia (W. Va. Code or WV Code) and the Code of State Regulations (CSR) as authorized by several bills passed during the State's regular 2004–2005 legislative session. The State revised its program to be consistent with certain corresponding Federal requirements, and to include other amendments at its own initiative.

**DATES:** *Effective Date:* March 2, 2006.

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**SUPPLEMENTARY INFORMATION:**

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**I. Background on the West Virginia Program**

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, “\* \* \* a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act \* \* \*; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act.” See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the West Virginia program on January 21, 1981. You can find background information

on the West Virginia program, including the Secretary's findings, the disposition of comments, and conditions of approval of the West Virginia program in the January 21, 1981, **Federal Register** (46 FR 5915). You can also find later actions concerning West Virginia's program and program amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

**II. Submission of the Amendment**

West Virginia proposed revisions to the Code of West Virginia (W. Va. Code or WV Code) and the Code of State Regulations (CSR) as authorized by several bills passed during the State's regular 2004–2005 legislative session. West Virginia also proposed an amendment that relates to the State's regulations concerning erosion protection zones (EPZ) associated with durable rock fills. The State revised its program to be consistent with certain corresponding Federal requirements, and to include other amendments at its own initiative. The amendments include, among other things, changes to the State's surface mining and blasting regulations as authorized by Committee Substitute for House Bill 2723; various statutory changes to the State's approved program as a result of the passage of Committee Substitute for House Bill 3033 and House Bills 2333 and 3236; the submission of a draft policy regarding the State's EPZ requirement and requesting that OSM reconsider its previous decision concerning EPZ; State water rights and replacement policy identifying the timing of water supply replacement; the revised Permittee's Request For Release form; the submission of a Memorandum of Agreement (MOA) between the West Virginia Department of Environmental Protection (WVDEP), Division of Mining and Reclamation, and the West Virginia Division of Natural Resources, Wildlife Resources Section that is intended to partially resolve a required program amendment relating to planting arrangements for Homestead post-mining land use; and a memorandum from the West Virginia Division of Forestry to the WVDEP supporting the tree stocking standards for Homestead.

By letters dated June 13, 2005 (Administrative Record Numbers WV-1419, WV-1420, and WV-1421), the WVDEP submitted amendments to its program under SMCRA (30 U.S.C. 1201 *et seq.*). The amendments consist of several bills passed during West Virginia's 2004–2005 legislative session and a draft policy concerning EPZs associated with durable rock fills.

House Bill (HB) 2333 amends the W. Va. Code by adding new Article 27

entitled the Environmental Good Samaritan Act (Sections 22–27–1 through 22–27–12). HB 2333 was adopted by the Legislature on March 24, 2005, and signed into law by the Governor on April 6, 2005, with an effective date of June 22, 2005. In its letter, the WVDEP stated that HB 2333 establishes a program to encourage voluntary reclamation of lands adversely affected by mining activities by limiting the liability that could arise as a result of the voluntary reclamation of abandoned lands or reduction/abatement of water pollution.

Committee Substitute for HB 2723 authorizes (at paragraph g) amendments to the West Virginia Surface Mining Reclamation Rules at CSR 38–2 and (at paragraph i) amendments to the Surface Mining Blasting Rule at CSR 199–1. This bill was passed by the Legislature on April 8, 2005, and approved by the Governor on May 3, 2005, with an effective date from the date of passage. We note that some of the amendments to CSR 38–2 and CSR 199–1 are intended to address required program amendments that are codified in the Federal regulations at 30 CFR 948.16(a), (sss), (www), (ffff), (iiii), (jjjj), (kkkk), (llll), (oooo), (pppp), and (rrrr).

Committee Substitute for HB 3033 amends the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA) at W. Va. Code Section 22–3–11 concerning the State's special reclamation tax. This bill was passed by the Legislature on April 1, 2005, and signed by the Governor on April 18, 2005, with an effective date of April 1, 2005. In its letter, the WVDEP stated that HB 3033 extends the temporary special reclamation tax that funds the State's alternative bonding system for an additional 18 months (at WV Code 22–3–11(h)(1)) and provides additional duties for the WVDEP Secretary in managing the State's alternative bonding system (at W. Va. Code 22–3–11(h)(2), (3), and (4)). We note that OSM previously approved West Virginia's temporary special reclamation tax on December 28, 2001 (66 FR 67446), with additional modification on May 29, 2002 (67 FR 37610, 37613–37614). The State's current extension of that temporary tax by an additional 18 months does not need OSM's specific approval because the State has only lengthened the time period of the temporary tax. Except as discussed below, the State has not modified any duties or functions under the approved West Virginia program, and the change is in keeping with the intent of our original approvals. Therefore, we did not seek public comment on the State's

extension of the temporary tax from thirty-nine to fifty-seven months at W. Va. Code 22-3-11(h)(1). The extension took effect from the date of passage of Committee Substitute for HB 3033, on April 1, 2005. In addition, we did not seek public comment on the State's new language at W. Va. Code 22-3-11(h)(3) and (4). These new provisions only direct the Secretary of the WVDEP to conduct various studies and authorize the Secretary of the WVDEP to propose legislative rules concerning its bonding program as appropriate. These provisions do not modify any duties or functions under the approved West Virginia program and do not, therefore, require OSM's approval. However, we asked for public comment on the State's provisions at WV Code 22-3-11(h)(2)(A) and (B). Under these new provisions, the WVDEP Secretary will be required to pursue cost effective alternative water treatment strategies, conduct formal actuarial studies every two years, and conduct informal reviews annually on the Special Reclamation Fund. Upon further consideration of new W. Va. Code 22-3-11(h)(2)(A) concerning the requirement to pursue cost effective alternative water treatment strategies, we have concluded that that requirement does not represent a substantive change to the West Virginia program. That is, new Subsection (h)(2)(A) will have no immediate effect on the implementation of the provisions of the approved West Virginia program. Additionally, in its pursuit of cost-effective water treatment strategies, if the State does identify any needed regulatory revisions or additions, such changes would be pursued through established rulemaking procedures and subject to OSM review and approval. Therefore, we have determined that the amendment to CSR 38-2-11(h)(2)(A) does not require OSM's approval and we have not made a finding on that provision in our findings below.

HB 3236 amends the WVSCMRA by adding new W. Va. Code Section 22-3-11a concerning the special reclamation tax, and adding new Section 22-3-32a concerning the special tax on coal. HB 3236 was passed by the Legislature on April 9, 2005, and approved by the Governor on May 2, 2005, with an effective date of April 9, 2005. HB 3236 provides that the special reclamation tax and the special tax, which is used to administer the State's approved regulatory program, are applicable to thin seam coal, and the special reclamation tax is subject to the WV Tax Crimes and Penalties Act and the WV Tax Procedure and Administration Act.

In addition, WVDEP submitted Committee Substitute for HB 3033

which contains strikethroughs and underscoring showing the actual language that has been added and deleted from the WVSCMRA, as a result of the passage of Enrolled Committee Substitute for HB 3033 discussed above (Administrative Record Number WV-1422).

WVDEP submitted a MOA dated September 2003 between the WVDEP, Division of Mining and Reclamation, and the West Virginia Division of Natural Resources, Wildlife Resources Section (Administrative Record Number WV-1405). This MOA outlines responsibilities of both agencies in reviewing surface and underground coal mining permit applications; evaluating lands unsuitable for mining petitions; developing wildlife planting plans as part of reclamation plans of permit applications; and restoring, protecting and enhancing fish and wildlife on mined lands within the State. The MOA was developed in response to a letter to the State from OSM in accordance with the Federal regulations at 30 CFR Part 732 and dated March 6, 1990 (Administrative Record Number WV-834). Such letters sent by OSM are often referred to as "732 letters" or "732 notifications." In the March 6, 1990, letter, OSM stated that the State program did not require that minimum stocking and planting arrangements be specified by the regulatory authority on the basis of local and regional conditions and after consultation with and approval by State agencies responsible for the administration of forestry and wildlife programs as required by 30 CFR 816/817.116(b)(3)(i). The West Virginia Division of Forestry has concurred with the State's tree stocking and groundcover standards at CSR 38-2-9.8.g.

However, OSM maintains that the Wildlife Resources Section still has to concur with the wildlife planting arrangement standards. The WVDEP submitted the MOA in response to that part of the outstanding 30 CFR Part 732 notification and, as discussed below, to satisfy part of an outstanding required amendment at 30 CFR 948.16(00000).

The Federal regulations at 30 CFR 948.16(00000) provide that the WVDEP must consult with and obtain the approval of the West Virginia Division of Forestry and the Wildlife Resources Section of the West Virginia Division of Natural Resources on the new stocking standards and planting arrangements for Homesteading at CSR 38-2-7.5.o.2. The submission of the MOA is to resolve the part of the required amendment relating to planting arrangements. The State also revised its rules earlier at CSR 38-2-9.3.g to provide that a professional

wildlife biologist employed by the Division of Natural Resources must develop the planting plan. OSM approved that revision in the **Federal Register** on February 8, 2005 (70 FR 6582). At the time of submission, WVDEP advised OSM that it had consulted with the Division of Forestry concerning the stocking standards for Homesteading. According to WVDEP, the Division of Forestry would be submitting a letter explaining its position with regard to those stocking standards (Administrative Record Number WV-1423). On August 23, 2005, the Division of Forestry submitted a memorandum to WVDEP in support of the new stocking requirements for Homesteading. Specifically, the Division of Forestry agreed with the provisions at CSR 38-2-7.5.i.8, 7.5.l.4 and 7.5.o.2 regarding conservation easements, public nurseries, and survival rates and ground cover requirements at the time of bond release (Administrative Record Number WV-1428). The WVDEP submitted this memorandum to help satisfy the required program amendment at 30 CFR 948.16(00000).

WVDEP also submitted the Permittee's Request for Release form dated March 2005 (Administrative Record Number WV-1424). This form is being submitted in response to an OSM 30 CFR Part 732 notification dated July 22, 1997 (Administrative Record Number WV-1071). In that notification, OSM advised the State that the Federal regulations at 30 CFR 800.40(a)(3) were amended to require that each application for bond release include a written, notarized statement by the permittee affirming that all applicable reclamation requirements specified in the permit have been completed. OSM notified WVDEP that the State regulations at CSR 38-2-12.2 do not contain such a requirement. In response, the State revised its bond release form by adding new item Number 11, which requires that all copies of the Permittee's Request For Release form include the following: "11. A notarized statement by the permittee that all applicable reclamation requirements specified in the permit have been completed."

We announced receipt of the proposed amendment in the August 26, 2005, **Federal Register** (70 FR 50244). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the proposed amendment (Administrative Record Number WV-1429). We did not hold a hearing or a meeting because no one requested one. The public comment

period was to close on September 26, 2005. Prior to the close of the comment period, we received a request from the West Virginia Coal Association (WVCA) to extend the comment period for an additional five days (Administrative Record Number WV-1437). On September 26, 2005, we granted their request and extended the comment period through September 30, 2005 (Administrative Record Number WV-1437). We received comments from one industry group and four Federal agencies.

### III. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment, except as discussed below. Any revisions that we do not specifically discuss below concern nonsubstantive, minor wording, editorial, or renumbering of sections changes, and are approved herein without discussion.

#### 1. House Bill 2333

HB 2333 amends the W. Va. Code by adding a new article Sections 22-27-1 through 12 to provide as follows:

#### Article 27. Environmental Good Samaritan Act

##### 22-27-1. Declaration of Policy and Purpose

This article is intended to encourage the improvement of land and water adversely affected by mining, to aid in the protection of wildlife, to decrease soil erosion, to aid in the prevention and abatement of the pollution of rivers and streams, to protect and improve the environmental values of the citizens of this state and to eliminate or abate hazards to health and safety. It is the intent of the Legislature to encourage voluntary reclamation of lands adversely affected by mining. The purpose of this article is to improve water quality and to control and eliminate water pollution resulting from mining extraction or exploration by limiting the liability which could arise as a result of the voluntary reclamation of abandoned lands or the reduction and abatement of water pollution. This article is not intended to limit the liability of a person who by law is or may become responsible to reclaim the land or address the water pollution or anyone who by contract, order or otherwise is required to or agrees to perform the reclamation or abate the water pollution.

##### 22-27-2. Legislative Findings

The Legislature finds and declares as follows:

(1) The state's long history of mining has left some lands and waters unreclaimed and polluted.

(2) These abandoned lands and polluted waters are unproductive, diminish the tax base and are serious impediments to the economic welfare and growth of this state.

(3) The unreclaimed lands and polluted waters present a danger to the health, safety and welfare of the people and the environment.

(4) The state of West Virginia does not possess sufficient resources to reclaim all the abandoned lands and to abate the water pollution.

(5) Numerous landowners, citizens, watershed associations, environmental organizations and governmental entities who do not have a legal responsibility to reclaim the abandoned lands or to abate the water pollution are interested in addressing these problems but are reluctant to engage in such reclamation and abatement activities because of potential liabilities associated with the reclamation and abatement activities.

(6) It is in the best interest of the health, safety and welfare of the people of this state and the environment to encourage reclamation of the abandoned lands and abatement of water pollution.

(7) That this act will encourage and promote the reclamation of these properties.

#### 22-27-3. Definitions

As used in this article unless used in a context that clearly requires a different meaning, the term:

(a) "Abandoned lands" means land adversely affected by mineral extraction and left or abandoned in an unreclaimed or inadequately reclaimed condition.

(b) "Consideration" means something of value promised, given or performed in exchange for something which has the effect of making a legally enforceable contract. For the purpose of this article, the term does not include a promise to a landowner to repair damage caused by a reclamation project or water pollution abatement project when the promise is made in exchange for access to the land.

(c) "Department" means the West Virginia Department of Environmental Protection.

(d) "Eligible land" means land adversely affected by mineral extraction and left or abandoned in an unreclaimed or inadequately reclaimed condition or causing water pollution and for which no person has a continuing reclamation or water pollution abatement obligation.

(e) "Eligible landowner" means a landowner that provides access to or use of the project work area at no cost for a reclamation or water pollution abatement project who is not or will not become responsible under state or federal law to reclaim the land or address the water pollution existing or emanating from the land.

(f) "Eligible project sponsor" means a person that provides equipment, materials or services at no cost or at cost for a reclamation or water pollution abatement project who is not or will not become responsible under state or federal law to reclaim the land or address the water pollution existing or emanating from the land.

(g) "Landowner" means a person who holds either legal or equitable interest in real property.

(h) "Mineral" means any aggregate or mass of mineral matter, whether or not coherent, which is extracted by mining. This includes,

but is not limited to, limestone, dolomite, sand, gravel, slate, argillite, diabase, gneiss, micaceous sandstone known as bluestone, rock, stone, earth, fill, slag, iron ore, zinc ore, vermiculite, clay and anthracite and bituminous coal.

(i) "Permitted activity site" means a site permitted by the department of environmental protection under the provisions of article two, three or four of this chapter.

(j) "Person" means a natural person, partnership, association, association members, corporation, an agency, instrumentality or entity of federal or state government or other legal entity recognized by law as the subject of rights and liabilities.

(k) "Project work area" means that land necessary for a person to complete a reclamation project or a water pollution abatement project.

(l) "Reclamation project" means the restoration of eligible land to productive use by regrading and revegetating the land to stable contours that blend in and complement the drainage pattern of the surrounding terrain with no highwalls, spoil piles or depressions to accumulate water, or to decrease or eliminate discharge of water pollution.

(m) "Water pollution" means the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water located in the state.

(n) "Water pollution abatement facilities" means the methods for treatment or abatement of water pollution located on eligible lands. These methods include, but are not limited to, a structure, system, practice, technique or method constructed, installed or followed to reduce, treat or abate water pollution.

(o) "Water pollution abatement project" means a plan for treatment or abatement of water pollution located on eligible lands.

#### 22-27-4. Eligibility and Project Inventory

(a) *General rule.*—An eligible landowner or eligible project sponsor who voluntarily provides equipment, materials or services at no charge or at cost for a reclamation project or a water pollution abatement project in accordance with the provisions of this article is immune from civil liability and may raise the protections afforded by the provisions of this article in any subsequent legal proceeding which is brought to enforce environmental laws or otherwise impose liability. An eligible landowner or eligible project sponsor is only entitled to the protections and immunities provided by this article after meeting all eligibility requirements and compliance with a detailed written plan of the proposed reclamation project or water pollution abatement project which is submitted to and approved by the department. The project plan shall include the objective of the project and a description of the work to be performed to accomplish the objective and shall, additionally, identify the project location, project boundaries, project participants and all landowners.

(b) *Notice.*—The department shall give written notice by certified mail to adjacent property owners and riparian land owners

located downstream of the proposed project, provide Class IV public notice of the proposed project in a newspaper of general circulation, published in the locality of the proposed project, and shall give public notice in the state register. The project sponsor may also provide public notice. Any person having an interest which may be adversely affected by the proposed project has the right to file written objections to the department within thirty days after receipt of the written notice or within thirty days after the last publication of the Class IV notice. The department shall provide to the project sponsor a copy of each written objection received during the public comment period, which shall conclude at the expiration of the applicable thirty-day period provided for in this section.

(c) *Advice.*—The department may provide advice to the landowner or to other interested persons based upon the department's knowledge and experience in performing reclamation projects and water pollution abatement projects.

(d) *Departmental review.*—The department shall review each proposed reclamation project and approve the project if the department determines the proposed project:

(1) Will result in the appropriate reclamation and regrading of the land according to all applicable laws and regulations;

(2) Will result in the appropriate revegetation of the site;

(3) Is not likely to result in pollution as defined in article eleven of this chapter; and

(4) Is likely to improve the water quality and is not likely to make the water pollution worse.

(e) *Project inventory.*—The department shall develop and maintain a system to inventory and record each project, the project location and boundaries, each landowner and each person identified in a project plan provided to the department. The inventory shall include the results of the department's review of the proposed project and, where applicable, include the department's findings under subsection (b), section ten of this article.

(f) *Appeal.*—A person aggrieved by a department decision to approve or disapprove a reclamation project or a water pollution abatement project has the right to file an appeal with the environmental quality board under the provisions of article one, chapter twenty-two-b of this code.

#### 22-27-5. Landowner Liability Limitation and Exceptions

(a) *General rule.*—Except as specifically provided in subsections (b) and (c) of this section, an eligible landowner who provides access to the land, without charge or other consideration, which results in the implementation of a reclamation project or a water pollution abatement project:

(1) Is immune from liability for any injury or damage suffered by persons working under the direct supervision of the project sponsor while such persons are within the project work area;

(2) Is immune from liability for any injury to or damage suffered by a third party which arises out of or occurs as a result of an act

or omission of the project sponsor which occurs during the implementation of the reclamation project or the water pollution abatement project;

(3) Is immune from liability for any injury to or damage suffered by a third party which arises out of or occurs as a result of a reclamation project or a water pollution abatement project;

(4) Is immune from liability for any pollution resulting from a reclamation project or water pollution abatement project;

(5) Is immune from liability for the operation, maintenance or repair of the water pollution abatement facilities constructed or installed during the project unless the eligible landowner negligently damages or destroys the water pollution abatement facilities or denies access to the project sponsor who is responsible for the operation, maintenance or repair [sic] the water pollution abatement facilities.

(b) *Duty to warn.*—The eligible landowner shall warn the project sponsor of known, latent, dangerous conditions located on the project work area which are not the subject of the reclamation project or the water pollution abatement project. Nothing in this article shall limit an eligible landowner's liability which results from the eligible landowner's failure to warn of such known, latent, dangerous conditions.

(c) *Exceptions to immunity.*—Nothing in this article may limit an eligible landowner's liability which results from a reclamation project or water pollution abatement project and which would otherwise exist:

(1) For injury or damage resulting from the landowner's acts or omissions which are reckless or constitute gross negligence or willful misconduct.

(2) Where the landowner accepts or requires consideration for allowing access to the land for the purpose of implementing a reclamation project or water pollution abatement project or to operate, maintain or repair water pollution abatement facilities constructed or installed during a water pollution abatement project.

(3) For the landowner's unlawful activities.

(4) For damage to adjacent landowners or downstream riparian landowners which results from a reclamation project or water pollution abatement project where written notice or public notice of the proposed project was not provided.

#### 22-27-6. Project Sponsor Liability Limitation and Exceptions

(a) *General rule.*—Except as specifically provided in subsection (b) of this section, a project sponsor who provides equipment, materials or services at no cost or at cost for a reclamation project or a water pollution abatement project:

(1) Is immune from liability for any injury to or damage suffered by a person which arises out of or occurs as a result of the water pollution abatement facilities constructed or installed during the water pollution abatement project;

(2) Is immune from liability for any pollution emanating from the water pollution abatement facilities constructed or installed during the water pollution abatement project unless the person affects an area that is

hydrologically connected to the water pollution abatement project work area and causes increased pollution by activities which are unrelated to the implementation of a water pollution abatement project. Provided that the project sponsor implements, operates, and maintains the project in accordance with the plans approved by the department;

(3) Is immune from liability for the operation, maintenance and repair of the water pollution abatement facilities constructed or installed during the water pollution abatement project.

(b) *Exceptions.*—

(1) Nothing in this article shall limit in any way the liability of a project sponsor which liability results from the reclamation project or the water pollution abatement project and which would otherwise exist:

(A) For injury or damage resulting from the project sponsor's acts or omissions which are reckless or constitute gross negligence or willful misconduct.

(B) For the person's unlawful activities.

(C) For damages to adjacent landowners or downstream riparian landowners which result from a reclamation project or a water pollution abatement project where written notice or public notice of the proposed project was not provided.

(2) Nothing in this article shall limit in any way the liability of a person who the department has found to be in violation of any other provision or provisions of this chapter.

#### 22-27-7. Permits and Zoning

Nothing in this article may be construed as waiving any existing permit requirements or waiving any local zoning requirements.

#### 22-27-8. Relationship to Federal and State Programs

The provisions of this article shall not prevent the department from enforcing requirements necessary or imposed by the federal government as a condition to receiving or maintaining program authorization, delegation, primacy or federal funds.

#### 22-27-9. General Permits

If the department determines it will further the purposes of this article, the department may issue a general permit for each reclamation project or water pollution abatement project, which shall:

(1) Encompass all of the activities included in the reclamation project or water pollution abatement project.

(2) Be issued in place of any individual required stream encroachment, earth disturbance or national pollution discharge elimination system permits.

#### 22-27-10. Exceptions

(a) *General rule.*—Any person who under existing law shall be or may become responsible to reclaim the land or treat or abate the water pollution or any person who for consideration or who receives some other benefit through a contract or any person who through a consent order and agreement or [sic] is ordered to perform or complete reclamation or treat or abate water pollution as well as a surety which provided a bond

for the site is not eligible nor may receive the benefit of the protections and immunities available under this article.

(b) *Projects near mining or coal refuse sites.*—This article does not apply to a reclamation project or a water pollution abatement project that is located adjacent to, hydrologically connected to or in close proximity to a site permitted under articles two, three or four of this chapter unless:

(1) The reclamation project or water pollution abatement project is submitted to the department in writing before the project is started; and

(2) The department finds:

(A) The reclamation project or the water pollution abatement project will not adversely affect the permittee's obligations under the permit and the applicable law;

(B) The activities on the project work area cannot be used by the permittee to avoid the permittee's reclamation or water pollution treatment or abatement obligations; and

(3) The department issues a written notice of its findings and the approval of the project.

(c) *Projects in lieu of civil or administrative penalties.*—This article shall not apply to a reclamation project or a water pollution abatement project that is performed in lieu of paying civil or administrative penalties.

#### 22–27–11. Water Supply Replacement

A public or private water supply affected by contamination or the diminution caused by the implementation of a reclamation project or the implementation of a water pollution abatement project shall be restored or replaced by the department with an alternate source of water adequate in quantity and quality for the purposes served by the water supply.

#### 22–27–12. Rules

The department may propose legislative rules in accordance with article three, chapter twenty-nine-a of this code as needed to implement the provisions of this article.

There are no specific provisions under SMCRA relating to the voluntary reclamation of lands affected by mining activities. Because this article also relates to the voluntary treatment of water pollution from abandoned mined lands, we solicited comments from the U.S. Environmental Protection Agency (EPA). Like SMCRA, the Clean Water Act (CWA) does not contain comparable provisions. However, EPA recently launched the Good Samaritan Initiative (Administrative Record Number WV–1432). This is a new agency-wide effort to foster greater collaboration to accelerate the restoration of watersheds and fisheries threatened by abandoned mine runoff. EPA is pioneering the Good Samaritan Initiative as a tool to identify an individual's rights and responsibilities related to the voluntary clean up of abandoned mines and to protect such volunteers against pre-existing liabilities. Specific comments from EPA regarding the proposed State legislation are contained in "Section IV.

Summary and Disposition of Comments." While this legislation has no direct Federal counterpart, we do not find any of the proposed State provisions presented above to be inconsistent with the purpose and intent of SMCRA, and therefore it can be approved. Furthermore, as discussed in Section IV, given EPA's concern about the possible legal effects of the proposed State legislation on EPA's authority under the CWA, we find that State's Environmental Good Samaritan Act at W. Va. Code 22–27–1 *et seq.* is only approved to the extent that none of the provisions therein can be interpreted as abrogating the authority or jurisdiction of the EPA. Section 702(a) of SMCRA provides that nothing in the Act can be construed as superseding, amending, modifying, or repealing other Federal laws or any regulations promulgated thereunder.

#### 2. Committee Substitute for House Bill 2723

This bill authorizes amendments to the West Virginia Surface Mining Reclamation Rules at CSR 38–2 and the Surface Mining Blasting Rule at CSR 199–1.

#### Amendments to CSR 38–2

a. CSR 38–2–2.92. This definition is new, and provides as follows:

2.92 Previously mined areas means land affected by surface mining operations prior to August 3, 1977, that has not been reclaimed to the standards of this rule.

In its amendment, the WVDEP stated that the revision is intended to resolve an outstanding 30 CFR Part 732 issue relating to previously mined areas as contained in a letter from OSM dated July 22, 1997 (Administrative Record Number WV–1071). We find that the State's new definition of "previously mined areas" is substantively identical to the Federal definition of "previously mined area" at 30 CFR 701.5, and it can be approved.

b. CSR 38–2–3.29.a. This provision concerns incidental boundary revisions (IBRs) and is amended by deleting the following language from the end of the first sentence: "is the only practical alternative to recovery of unanticipated reserves or necessary to enhance reclamation efforts or environmental protection."

In its submittal of this amendment, the WVDEP stated that the amendment is intended to delete language that was not approved by OSM (see the February 9, 1999, **Federal Register**, 64 FR 6201, 6208). In the February 9, 1999, notice, OSM found the language to be inconsistent with the intent of section

511(a)(3) of SMCRA and 30 CFR 774.13(d) of the Federal regulations, which pertain to IBR's.

As amended, CSR 38–2–3.29.a provides as follows:

3.29.a. Incidental Boundary Revisions (IBRs) shall be limited to minor shifts or extensions of the permit boundary into non-coal areas or areas where any coal extraction is incidental to or of only secondary consideration to the intended purpose of the IBR or where it has been demonstrated to the satisfaction of the Secretary that limited coal removal on areas immediately adjacent to the existing permit. IBRs shall also include the deletion of bonded acreage which is overbonded by another valid permit and for which full liability is assumed in writing by the successive permittee. Incidental Boundary Revisions shall not be granted for any prospecting operations, or to abate a violation where encroachment beyond the permit boundary is involved, unless an equal amount of acreage covered under the IBR for encroachment is deleted from the permitted area and transferred to the encroachment area.

We find that, with this revision, proposed CSR 38–2–3.29.a is consistent with and no less effective than the Federal regulations at 30 CFR 774.13(d), and it can be approved. The proposed deletion, however, does leave the sentence incomplete; and we advised WVDEP that it should be corrected. The State acknowledged that the rest of the sentence should have been deleted. Therefore, we are approving this provision with the understanding that the State will insert a period after "IBR" and delete the words, "or where it has been demonstrated to the satisfaction of the Secretary that limited coal removal on areas immediately adjacent to the existing permit."

c. CSR 38–2–5.4.a. This provision concerns general sediment control provisions, and it is amended by adding language to incorporate by reference the U.S. Department of Agriculture, Soil Conservation Service Technical Release No. 60, "Earth Dams and Reservoirs." As amended, Subsection 5.4.a provides as follows:

Sediment control or other water retention structures shall be constructed in appropriate locations for the purposes of controlling sedimentation. All runoff from the disturbed area shall pass through a sedimentation control system. All such systems or other water retaining structures used in association with the mining operation shall be designed, constructed, located, maintained, and used in accordance with this rule and in such a manner as to minimize adverse hydrologic impacts in the permit and adjacent areas, to prevent material damage outside the permit area and to assure safety to the public. The U.S. Department of Agriculture, Soil Conservation Service Technical Release No. 60 (210–VI–TR60, October 1985), "Earth

Dams and Reservoirs," Technical Release No. 60 (TR-60) is hereby incorporated by reference. Copies may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161, order No. PB 87-57509/AS. Copies can be inspected at the OSM Headquarters Office, Office of Surface Mining Reclamation and Enforcement, Administrative Record, 1951 Constitution Avenue, NW., Washington, DC, or at the Office of the **Federal Register**, 800 North Capitol Street, NW., suite 700, Washington, DC.

In this revision, the State added language referencing "Earth Dams and Reservoirs" Technical Release No. 60 (TR-60) (210-VI-TR60, October 1985). This new language is consistent with the Federal citation of TR-60 at 30 CFR 816/817.49(a)(1) and with the terms of a Part 732 letter that OSM sent to the State dated July 22, 1997, in accordance with the Federal regulations at 30 CFR 732.17(c). In that 732 letter, OSM asked the State to resolve issues pertaining to impoundments and criteria that the impoundments must comply with, especially impoundments meeting Class B or C criteria for dams at TR-60. We must note that due to a name change, the former Soil Conservation Service is now the Natural Resources Conservation Service (NRCS). We must also note that publication TR-60 has been revised, and the current version is Revised Amendment 1, TR-60A, dated October 1990. The WVDEP's Web page at <http://www.wvdep.org/item.cfm?ssid=9&ss1id=710> contains a copy of TR-60, and it includes the NRCS revisions that were adopted in October 1990 (Administrative Record Number WV-1438). Therefore, because the State intends to require that the revised version of TR-60 be used by operators when designing and constructing sediment control or other water retention structures within the State, we find that the proposed amendment is consistent with and no less effective than the Federal regulations at 30 CFR 816/817.49(a)(1), and it can be approved.

d. CSR 38-2-5.4.b.9. This provision concerns the design and construction of freeboards of sediment control structures, and is amended by adding a proviso that impoundments meeting the Class B or C criteria for dams in "Earth Dams and Reservoirs", TR-60 shall comply with the freeboard hydrograph criteria in "Minimum Emergency Spillway Hydrologic Criteria" table in TR-60. As amended, Subsection 5.4.b.9 provides as follows:

5.4.b.9. Provide adequate freeboard to resist overtopping by waves or sudden increases in volume and adequate slope protection against surface erosion and

sudden drawdown. Provided, however, impoundments meeting the Class B or C criteria for dams in "Earth Dams and Reservoirs", TR-60 shall comply with the freeboard hydrograph criteria in "Minimum Emergency Spillway Hydrologic Criteria" table in TR-60.

We find that, as amended, CSR 38-2-5.4.b.9 is substantively identical to the Federal regulations at 30 CFR 816/817.49(a)(5) concerning freeboard design and can be approved. The amendment also satisfies a portion of the 732 letter that OSM sent to the State dated July 22, 1997. As we discussed in Finding 2.c. above, WVDEP's Web page contains a copy of TR-60, and it includes the revisions that were adopted in October 1990. Therefore, it is apparent that the State intends to require that the revised version of TR-60 be used when designing and constructing sediment control or other water retention structures within the State. We note that, existing subsection CSR 38-2-22.4.h.1, and in a separate rulemaking proposed CSR 38-4-7.1.g, provide that any open channel spillway designed for less than 100 percent probable maximum precipitation (PMP) must be provided with a freeboard above the maximum water surface using the equation  $1+.025vd^{1/3}$ . According to State officials, the equation provides for a more simplistic freeboard design standard where "v" represents flow velocity and "d" represents flow depth of the design storm in the channel. TR-60 requires a calculation of freeboard design by surcharging the design storm. Given the proposed requirements, it is apparent that the State requires compliance with the freeboard design standards at both CSR 38-2-5.4.b.9 and CSR 38-2-22.4.h.1 (and proposed CSR 38-4-7.1.g.). According to State officials, there is no way to determine which standard (freeboard hydrograph or freeboard equation) is more stringent. Instead, this assessment must be determined on a case-by-case basis during permit preparation and resulting review. Consequently, the higher of those standards will always apply, and the lesser standard will automatically be complied with. Upon approval, the State will consider developing an interpretive policy that may include variable descriptions of the freeboard equation to further clarify this requirement.

e. CSR 38-2-5.4.b.10. This provision concerns minimum static safety factor, and has been amended by deleting language in the first sentence related to loss of life or property damage, and adding in its place language concerning impoundments meeting the Class B or C criteria for dams contained in "Earth

Dams and Reservoirs," TR-60. As amended, Subsection 5.4.b.10 provides as follows:

5.4.b.10. Provide that an impoundment meeting the size or other criteria of 30 CFR 77.216(a) or W. Va. Code [Section] 22-14 *et seq.*, or Impoundments meeting the Class B or C criteria for dams contained in "Earth Dams and Reservoirs", TR-60, shall have a minimum static safety factor of 1.5 for a normal pool with steady state seepage saturation conditions, and a seismic safety factor of at least 1.2. Impoundments not meeting the size or other criteria of 30 CFR 77.216(a) or W. Va. Code [Section] 22-14 *et seq.*, except for a coal mine waste impounding structure, and located where failure would not be expected to cause loss of life or serious property damage shall have a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions.

The Federal regulations at 30 CFR 816/817.49(a)(4)(i), concerning impoundment stability, provide that an impoundment meeting the Class B or C criteria for dams in TR-60, or the size or other criteria of 30 CFR 77.216(a), shall have a minimum static safety factor of 1.5 for a normal pool with steady state seepage saturation conditions, and a seismic safety factor of at least 1.2. Therefore, the amendment renders CSR 38-2-5.4.b.10 consistent with and no less effective than the Federal regulations at 30 CFR 816/817.49(a)(4)(i) and can be approved. However, existing language at CSR 38-2-5.4.b.10 also provides that impoundments not meeting the size or other criteria of 30 CFR 77.216(a) or W. Va. Code section 22-14 *et seq.*, except for a coal mine waste impounding structure, and located where failure would not be expected to cause loss of life or serious property damage shall have a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions. That language does not appear to be consistent with the Federal regulations at 30 CFR 816/817.49(a)(4)(ii), which provides that impoundments not included in 816/817.49(a)(4)(i), except for a coal mine waste impounding structure, shall have a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions or meet the requirements of 30 CFR 780.25(c)(3). The State's language does not specify which static safety factor, if any, applies to TR-60 Class A impoundments. The Federal regulations provide that Class A impoundments, which do not meet the Class B or C criteria for dams in TR-60, must have a minimum static safety factor of 1.3. The State maintains that the last portion of this provision is applicable to impoundments not

meeting the Class B or C criteria in TR-60 (Administrative Record Number WV-1438). Because the proposed amendment clearly provides for a static safety factor of 1.5 for impoundments that meet the size or other criteria of 30 CFR 77.216(a) and impoundments meeting the Class B or C criteria for dams in TR-60, it is our understanding that CSR 38-2-5.4.b.10 provides for a 1.3 minimum static safety factor for all other impoundments that do not meet the size or other criteria of 30 CFR 77.216(a) or are not impoundments that meet the Class B or C criteria for dams in TR-60, and are not coal mine waste impounding structures. Therefore, we find that proposed CSR 38-2-5.4.b.10 is no less effective than the Federal regulations at 30 CFR 816/817.49(a)(4), and it can be approved. Our approval of proposed CSR 38-2-5.4.b.10 is based upon our understanding discussed above.

As amended, CSR 38-2-5.4.b.10 also satisfies a portion of the July 22, 1997, 732 letter that OSM sent to the State. As we discussed above in Finding 2.c, WVDEP's Web page contains a copy of TR-60, and it includes the revisions that were adopted in October 1990. Therefore, because the State intends to require that the revised version of TR-60 be used by operators when designing and constructing sediment control or other water retention structures within the State, we find that the proposed reference to TR-60 is consistent with and no less effective than the Federal regulations at 30 CFR 816/817.49(a)(4)(i).

f. CSR 38-2-5.4.b.12. This provision provides for stable foundations of sediment control structures, and it has been amended by adding language at the end of the final sentence to clarify that the laboratory testing of foundation material shall be to determine the design requirements for foundation stability. As amended, Subsection 5.4.b.12 provides as follows:

5.4.b.12. Provide for stable foundations during all phases of construction and operation and be designed based on adequate and accurate information on the foundation conditions. For structures meeting the criteria of paragraph 5.4.b.10 of this subdivision, provide foundation investigations and any necessary laboratory testing of foundation material, shall be performed to determine the design requirements for foundation stability.

It is our understanding that the reference to CSR 38-2-5.4.b.10 in the proposed provision means that foundation investigations and any necessary laboratory testing of foundation materials must be performed for impoundments that meet the Class B

or C criteria for dams at TR-60, the size or other criteria of the Mine Safety and Health Administration (MSHA) at 30 CFR 77.216(a), or the West Virginia Dam Control Act. Thus, foundation investigations or laboratory testing of foundation material for Class A dams will not be required by this subsection. We find that as amended, CSR 38-2-5.4.b.12 is consistent with and no less effective than the Federal regulations at 30 CFR 816/817.49(a)(6) concerning foundation testing for impoundments, and can be approved. Our approval of this provision is based upon our understanding discussed above.

g. CSR 38-2-5.4.c.7. This provision is new and provides as follows:

5.4.c.7. Impoundments meeting the Class B or C criteria for dams in Earth Dams and Reservoirs, TR-60 shall comply with the following: (1) "Minimum Emergency Spillway Hydrologic Criteria" table in TR-60; (2) the emergency spillway hydrograph criteria in the "Minimum Emergency Spillway Hydrologic Criteria" table in TR-60, or larger event specified by the Secretary; and (3) and the requirements of this subdivision.

We find that the proposed language at CSR 38-2-5.4.c.7 is substantively identical to and no less effective than the Federal regulations at 30 CFR 816/817.49(a)(1), 30 CFR 816/817.49(a)(5), and 30 CFR 816/817.49(a)(9)(ii)(A), and it can be approved. The proposed amendment also satisfies a portion of the July 22, 1997, 732 letter that OSM sent to the State. As we discussed above in Finding 2.c, WVDEP's Web page contains a copy of TR-60, and it includes the revisions that were adopted in October 1990. Therefore, because the State intends to require that the revised version of TR-60 be used by operators when designing and constructing sediment control or other water retention structures within the State, we find that the proposed reference to TR-60 is consistent with and no less effective than the Federal regulations at 30 CFR 816/817.49(a)(1).

In addition, we note that the State rules at CSR 38-2-5.4.c do not require design plans for structures that meet the Class B or C criteria for dams in TR-60 to include a stability analysis, as provided by 30 CFR 780.25(f). The stability analysis must include, but is not limited to, strength parameters, pore pressures, and long-term seepage conditions. In addition, the design plan must contain a description of each engineering design assumption and calculation with a discussion of each alternative considered in selecting the specific design parameters and construction methods. CSR 38-2-5.4.c.6.D, 38-4-10 and 38-4-11.4

require stability analyses for impoundments that meet the size or other criteria of MSHA or the West Virginia Dam Control Act standards. However, State rules at CSR 38-2-5.4.c.5 and 5.4.c.6 do not specifically require a stability analysis to be conducted for Class B or C impoundments. In addition, they do not specify what must be included in the stability analysis and the design plans for such structures. According to WVDEP (Administrative Record Number WV-1438), it is necessary for permit applicants to perform a stability analysis to demonstrate that impoundments that meet Class B or C criteria for dams in TR-60 are designed to have a static safety factor of 1.5 with steady state seepage saturation conditions and a seismic safety factor of 1.2. Steady state seepage analysis techniques include flow nets, finite element analyses, or finite difference analyses. To conduct a steady state seepage analysis, State officials say a set of factors is needed, which include strength and pore pressure. Saturated conditions or long-term seepage condition is just steady seepage at maximum storage pool. Therefore, to demonstrate that Class B or C impoundments are designed to have a static safety factor of 1.5 with a steady state seepage saturation, the permit applicant would have to provide information required by Subsection 5.4.c.6.D. Therefore, CSR 38-2-5.4.c remains approved with the understanding that stability analyses will be conducted for all structures that meet the Class B or C criteria for dams in TR-60 as required by 30 CFR 780.25(f).

h. CSR 38-2-5.4.d.4. This provision concerns design and construction certification of coal refuse impoundments and embankment type impoundments and has been amended by adding language concerning impoundments meeting the Class B or C criteria for dams. As amended, Subsection 5.4.d.4 provides as follows:

5.4.d.4. Design and construction certification of coal refuse impoundments and embankment type impoundments meeting or exceeding the size requirements or other criteria of Federal MSHA regulations at 30 CFR 77.216 (a) or impoundments meeting the Class B or C criteria for dams in Earth Dams and Reservoirs, TR-60 may be performed only by a registered professional engineer experienced in the design and construction of impoundments.

The Federal regulations at 30 CFR 816/817.49(a)(3) provide that the design of impoundments shall be certified in accordance with 30 CFR 780.25(a). The Federal regulations at 30 CFR 780.25(a)

provide that impoundments meeting the Class B or C criteria for dams in TR-60 shall comply with the requirements of 30 CFR 780.25 for structures that meet or exceed the size or other criteria of MSHA. Each detailed design plan for a structure that meets or exceeds the size or other criteria of MSHA regulations at 30 CFR 77.216(a) shall, as required by 30 CFR 780.25(a)(2)(i), be prepared by, or under the direction of, and certified by a qualified registered professional engineer with assistance from experts in related fields such as geology, land surveying, and landscape architecture.

The West Virginia regulations at CSR 38-2-5.4.d.1, concerning certification, provide that prior to any surface mining activities in the component drainage area of a permit controlled by a sediment control structure, that specific structure shall be certified as to construction in accordance with the plans, designs, and specifications set forth in the preplan, or in accordance with as-built plans. The West Virginia regulations at CSR 38-2-5.4.d.4, as amended here, limit such design and construction certification to registered professional engineers experienced in the design and construction of impoundments when the designs concern MSHA impoundment regulations at 30 CFR 77.216(a) or when the impoundments meet the Class B or C criteria at TR-60.

We must note, however, that the State's requirements at Subsection 3.6.h.5 provide that only the design plan for impoundments that meet the size or storage capacity of the West Virginia Dam Control Act must be prepared by, or under the direction of, and certified by a qualified registered professional engineer. The proposed rule at Subsection 5.4.d.4 does not specifically require the design plan to be prepared by a registered professional engineer. The proposed rule only requires the design to be certified by a registered professional engineer. However, given that certification of the design by a registered professional engineer is required, we are approving Subsection 5.4.d.4 with the understanding that design plans for impoundments that meet the Class B or C criteria for dams in TR-60 and meet or exceed the size or other criteria of MSHA at 30 CFR 77.216(a) will be prepared by, or under the direction of, and certified by a registered professional engineer as provided by 30 CFR 780.25(a)(2).

Furthermore, we are approving Subsection 5.4.d.3 with the understanding that the design plans for all other structures not included in Subsections 3.6.h.5 or 5.4.d.4 will be prepared by, or under the direction of,

and certified by a registered professional engineer or licensed land surveyor as provided by 30 CFR 780.25(a)(3). In addition, as provided by 30 CFR 780.25(a)(2), the detailed design plan for an impoundment that meets the Class B or C criteria for dams in TR-60 or meets or exceeds the size or other criteria of MSHA at 30 CFR 77.216(a) must include (1) A geotechnical investigation, (2) design and construction requirements for the structure, (3) an operation and maintenance of the structure, and (4) a timetable and plans for removal of the structure. Similar design plan requirements at 30 CFR 780.25(a)(3) apply to impoundments not included in paragraph (a)(2). Such requirements are not specifically provided for in Subsection 5.4. However, similar design requirements are set forth at Subsection 3.6.h. Therefore we are approving Subsection 5.4 with the understanding that the design plan requirements at Subsection 3.6.h apply to those impoundments that meet the Class B or C criteria for dams in TR-60 or meet or exceed the size or other criteria of MSHA at 30 CFR 77.216(a) as provided by 30 CFR 780.25(a)(2). We are also approving Subsection 5.4 to the extent that the design plan requirements at Subsection 3.6.h apply to all other impoundments not identified above as provided by 30 CFR 780.25(a)(3). In summary, we find that as amended, CSR 38-2-5.4.d.4 is consistent with and no less effective than the Federal regulations at 30 CFR 780.25(a)(2) and (a)(3) and 30 CFR 816/817.49(a)(3) concerning the design and certification of impoundments, and it can be approved based upon our understanding discussed above.

The proposed amendment at CSR 38-2-5.4.d.4 also satisfies a portion of the July 22, 1997, 732 letter that OSM sent to the State. As we discussed above in Finding 2.c, WVDEP's Web page contains a copy of TR-60, and it includes the revisions that were adopted in October 1990. Therefore, because the State intends to require that the revised version of TR-60 be used by operators when designing and constructing sediment control or other water retention structures within the State, we find that the proposed reference to TR-60 is consistent with and no less effective than the Federal regulations at 30 CFR 816/817.49(a)(1).

i. CSR 38-2-5.4.e.1. This provision concerns the inspection of impoundments and sediment control structures, and has been amended by adding language concerning impoundments meeting the Class B or C criteria for dams in TR-60. As amended, Subsection 5.4.e.1 provides as follows:

5.4.e.1. A qualified registered professional engineer or other qualified professional specialist, under the direction of the professional engineer, shall inspect each impoundment or sediment control structure provided, that a licensed land surveyor may inspect those impoundments or sediment control or other water retention structures which do not meet the size or other criteria of 30 CFR 77.216(a). Impoundments meeting the Class B or C criteria for dams in Earth Dams and Reservoirs, TR-60 or W. Va. Code [Section] 22-14 *et seq.*, and which are not constructed of coal processing waste or coal refuse. The professional engineer, licensed land surveyor, or specialist shall be experienced in the construction of impoundments and sediment control structures.

The Federal regulations at 30 CFR 816/817.49(a)(11)(iv) provide that a qualified registered professional land surveyor may inspect any temporary or permanent impoundment that does not meet the Class B or C criteria of TR-60, the size or other criteria of 30 CFR 77.216(a), or is not a coal mine waste impounding structure covered by the Federal regulations at 30 CFR 816.84. The proposed amendment to CSR 38-2-5.4.e.1 provides the West Virginia program with a counterpart to the Federal regulations at 30 CFR 816/817.49(a)(11)(iv). We note, however, that as written, CSR 38-2-5.4.e.1 is not perfectly clear as to its intended meaning. Specifically, the phrase "Impoundments meeting" confuses the intended meaning of the proviso that identifies the impoundments that a licensed land surveyor may not inspect. It is our understanding that the proviso at CSR 38-2-5.4.e.1 means that a licensed land surveyor may not inspect impoundments or sediment control or other water retention structures which meet the size or other criteria of 30 CFR 77.216(a), the Class B or C criteria for dams in TR-60, or W.Va. Code section 22-14 *et seq.*, and which are constructed of coal processing waste or coal refuse. Therefore, in accordance with our understanding discussed above, we find that CSR 38-2-5.4.e.1 is consistent with and no less effective than the Federal regulations at 30 CFR 816/817.49(a)(11)(iv), and it can be approved, except for the words "Impoundments meeting" which are not approved.

The proposed amendment at CSR 38-2-5.4.e.1 also satisfies a portion of the 732 letter that OSM sent the State on July 22, 1997. As we discussed above in Finding 2.c, WVDEP's Web page contains a copy of TR-60, and it includes the revisions that were adopted in October 1990. Therefore, because the State intends to require that the revised version of TR-60 be used by operators

when designing and constructing sediment control or other water retention structures within the State, we find that the proposed reference to TR-60 is consistent with and no less effective than the Federal regulations at 30 CFR 816/817.49(a)(1).

j. CSR 38-2-5.4.f. This provision concerns examinations of embankments, and it has been amended by adding language concerning impoundments meeting the Class B or C criteria for dams in TR-60. As amended, Subsection 5.4.f provides as follows:

5.4.f. Examinations. Embankments subject to Federal MSHA regulations at 30 CFR 77.216 or impoundments meeting the Class B or C criteria for dams in Earth Dams and Reservoirs, TR-60 must be examined in accordance with 77.216-3 of said regulations. Other embankments shall be examined at least quarterly by a qualified person designated by the operator for appearance of structural weakness and other hazardous conditions. Examination reports shall be retained for review at or near the operation.

We find that, as amended, CSR 38-2-5.4.f is substantively identical to the Federal regulations at 30 CFR 816/817.49(a)(12) concerning the examination of impoundments, and it can be approved.

The proposed amendment at CSR 38-2-5.4.f also satisfies a portion of the July 22, 1997, 732 letter that OSM sent to the State. As we discussed above in Finding 2.c, WVDEP's web page contains a copy of TR-60, and it includes the revisions that were adopted in October 1990. Therefore, because the State intends to require that the revised version of TR-60 be used by operators when designing and constructing sediment control or other water retention structures within the State, we find that the proposed reference to TR-60 is consistent with and no less effective than the Federal regulations at 30 CFR 816/817.49(a)(1).

k. CSR 38-2-7.4.b.1.A.1. This provision concerns the development of a planting plan and long-term management plan for commercial forestry. The first sentence of this provision is amended by clarifying that the professional forester charged with developing the commercial forestry planting and the long-term management plan must be a West Virginia registered professional forester. The provision is to ensure compliance with WV Code 30-19-1 *et seq.* regarding State registered foresters and to clarify that the development of planting plans for mountaintop removal mining operations may only be done by a registered State forester. SMCRA at section 515(c)(3)(B) and the Federal regulations at 30 CFR 785.14(c) require that an applicant for a mountaintop removal mining permit

present specific plans for the proposed postmining use. We find that the proposed requirement that the professional forester specified at CSR 38-2-7.4.b.1.A.1 must be a West Virginia professional forester does not render the provision inconsistent with those Federal requirements, and it can be approved.

l. CSR 38-2-7.4.b.1.A.3. This provision concerns the commercial species planting plan for commercial forestry. It is amended in the first sentence to clarify that the registered professional forester must be a West Virginia registered professional forester. The provision is to ensure compliance with WV Code 30-19-1 *et seq.* regarding State registered foresters and to clarify that the development of planting plans for mountaintop removal mining operations may only be done by a registered State forester. SMCRA at section 515(c)(3)(B) and the Federal regulations at 30 CFR 785.14(c) require that an applicant for a mountaintop removal mining permit present specific plans for the proposed postmining use. We find that the proposed requirement that the professional forester specified at CSR 38-2-7.4.b.1.A.3 must be a West Virginia professional forester does not render the provision inconsistent with those Federal requirements, and it can be approved.

m. CSR 38-2-7.4.b.1.A.3.(b). This provision concerns the creation of a certified geology map relating to commercial forestry areas. The provision is amended by revising the kinds of information pertaining to physical and chemical properties of strata that must be provided in the permit application. As amended, Subsection 7.4.b.1.A.3.(b) provides as follows:

7.4.b.1.A.3.(b). An approved geologist shall create a certified geology map showing the location, depth, and volume of all strata in the mined area, the physical and chemical properties of each stratum to include rock texture, pH, potential acidity and alkalinity. For each stratum proposed as soil medium, the following information shall also be provided: total soluble salts, degree of weathering, extractable levels of phosphorus, potassium, calcium, magnesium, manganese, and iron and other properties required by the Secretary to select best available materials for mine soils.

In its submittal of its amendment to this provision, the WVDEP stated that the amendment is to clarify that only the material proposed to be the resulting soil medium needs the additional analyses. The State acknowledged that each stratum will be tested in accordance with acid-base accounting standards, but only the topsoil

substitute requires further testing (Administrative Record Number WV-1438). SMCRA and the Federal regulations do not contain specific counterparts to the amended provision. However, when an applicant proposes to use selected overburden material as a supplement or substitute for topsoil, additional analyses, trials, and tests are required as provided by 30 CFR 779.21(b). Based on that understanding, we find that as amended, CSR 38-2-7.4.b.1.A.3.(b) is not inconsistent with the requirements of SMCRA section 515(c) and the Federal regulations at 30 CFR 785.14 concerning mountaintop removal mining operations, and it can be approved.

n. CSR 38-2-7.4.b.1.A.4. This provision concerns the commercial forestry long-term management plan, and it is amended in the first sentence by adding the words "West Virginia" immediately before the words "registered professional forester." The provision is to ensure compliance with WV Code 30-19-1 *et seq.* regarding State registered foresters and to clarify that the development of the long-term management plan for a mountaintop removal mining operation may only be done by a registered State forester. SMCRA at section 515(c)(3)(B) and the Federal regulations at 30 CFR 785.14(c) require that an applicant for a mountaintop removal mining permit present specific plans for the proposed postmining use. We find that the proposed requirement that the professional forester specified at CSR 38-2-7.4.b.1.A.4 must be a West Virginia professional forester does not render the provision inconsistent with those Federal requirements, and it can be approved.

o. CSR 38-2-7.4.b.1.B.1. This provision concerns a commercial forestry and forestry reclamation plan, and is amended by deleting the word "certified" immediately before the phrase "professional soil scientist" in the first sentence. As amended, Subsection 7.4.b.1.B.1 provides that a soil scientist employed by the WVDEP will review and field verify the soil slope and sandstone mapping in mountaintop removal mining permit applications involving commercial forestry.

In its submittal of its amendment to this provision, the WVDEP stated that the word "certified" is being deleted because West Virginia does not have a certification system for soil scientist. SMCRA at section 515(c)(3)(B) and the Federal regulations at 30 CFR 785.14(c) require that an applicant for a mountaintop removal mining permit present specific plans for the proposed

postmining use. We find that the proposed deletion of the word “certified” does not render the provision inconsistent with the Federal requirements and it can be approved. We note the National Park Service (NPS) comment (see Section IV. Summary and Disposition of Comments, Federal Agency Comments, below) that the West Virginia Association of Professional Soils Scientists (WVAPSS) does have a registry of certified professional soils scientists. By requiring soil scientists to be listed on the WVAPSS registry or a similar one, the State would create a professional image throughout its regulatory program and encourage higher standards of quality.

p. CSR 38–2–7.4.b.1.C.1. This provision concerns commercial forestry areas, and is amended by adding the word “areas” immediately following the words “commercial forestry” in the first sentence, and by revising the standards for slopes of the postmining landform. As amended, Subsection 7.4.b.1.C.1 provides as follows:

7.4.b.1.C.1. For commercial forestry areas, the Secretary shall assure that the postmining landscape is rolling, and diverse. The backfill on the mine bench shall be configured to create a postmining topography that includes the principles of land forming (*e.g.*, the creation of swales) to reflect the premining irregularities in the land. Postmining landform shall provide a rolling topography with slopes between 5% and 20% with an average slope of 10% to 15%. The elevation change between the ridgeline and the valleys shall be varied. The slope lengths shall not exceed 500 feet. The minimum thickness of backfill, including mine soil, placed on the pavement of the basal seam mined in any particular area shall be ten (10) feet.

We find that the addition of the word “areas” improves the clarity of the intended meaning of this provision. In addition, the slope percentages are changed from 5% and 15% with an average slope of 10 to 12.5% to between 5% and 15% with an average slope of 10% to 15%. While the proposed change would allow an increase in the steepness of slopes by about 2.5%, the final average slopes on mountaintop removal mining operations receiving approximate original contour (AOC) variances with an approved postmining land use of commercial forestry could not exceed 15% or about 8.5 degrees. SMCRA at section 515(c)(3)(B) and the Federal regulations at 30 CFR 785.14(c) require that an applicant for a mountaintop removal mining permit present specific plans for the proposed postmining use. However, those Federal provisions do not provide the specificity that is provided in this provision. We find that the proposed amendment to CSR 38–2–7.4.b.1.C.1 does not render

the provision inconsistent with those Federal requirements, and it can be approved.

q. CSR 38–2–7.4.b.1.C.2. This provision concerns commercial forestry areas and is amended by adding the word “areas” immediately after the phrase “commercial forestry” in the first sentence. We find that the addition of the word “areas” improves the clarity of the intended meaning of this provision and does not render the provision inconsistent with the Federal requirements at 30 CFR 785.14(c) concerning mountaintop removal mining operations, and it can be approved.

r. CSR 38–2–7.4.b.1.C.3. This provision concerns commercial forestry areas and is amended by deleting the words “in areas” in the first sentence and adding the word “areas” in their place. We find that the proposed amendment to this provision improves the clarity of the intended meaning of this provision and does not render the provision inconsistent with the Federal requirements at 30 CFR 785.14(c) concerning mountaintop removal mining operations, and it can be approved.

s. CSR 38–2–7.4.b.1.C.4. This provision concerns commercial forestry areas and is amended by adding the word “areas” immediately following the words “commercial forestry” in the first sentence. In addition, the first sentence is also amended by deleting the word “permitted” and replacing that word with the words “commercial forestry.” We find that the addition of the word “areas” improves the clarity of the intended meaning of this provision. The deletion of the word “permitted” and its replacement with the words “commercial forestry” eliminates an inconsistency in the language of this provision. It is now clear that at least 3.0 acres of ponds, permanent impoundments or wetlands must be created on each 200 acres of commercial forestry area. SMCRA at section 515(c)(3)(B) and the Federal regulations at 30 CFR 785.14(c) require that an applicant for a mountaintop removal mining permit present specific plans for the proposed postmining use. However, those Federal provisions do not provide the specificity that is provided in this provision. We find that the proposed amendment to CSR 38–2–7.4.b.1.C.4 does not render the provision inconsistent with those Federal requirements and it can be approved.

t. CSR 38–2–7.4.b.1.C.5. This provision concerns forestry areas and is amended by adding the word “areas” immediately after the word “forestry” in the first sentence. We find that because

the addition of the word “areas” improves the clarity of the intended meaning of this provision and does not render the provision inconsistent with the Federal requirements at 30 CFR 785.14(c) concerning mountaintop removal mining operations, it can be approved.

u. CSR 38–2–7.4.b.1.D.6. This provision concerns soil substitutes, and is amended by adding the words “and is in accordance with 14.3.c of this rule” at the end of the first sentence. As amended, the first sentence at CSR 38–2–7.4.b.1.D.6 provides as follows:

7.4.b.1.D.6. Before approving the use of soil substitutes, the Secretary shall require the permittee to demonstrate that the selected overburden material is suitable for restoring land capability and productivity and is in accordance with 14.3.c of this rule.

The WVDEP stated in its submittal that this change has been made to comply with the required program amendment codified in the Federal regulations at 30 CFR 948.16(www). The Federal regulations at 30 CFR 948.16(www) provide that CSR 38–2–7.4.b.1.D.6 be amended to provide that the substitute material is equally suitable for sustaining vegetation as the existing topsoil and the resulting medium is the best available in the permit area to support vegetation (see 65 FR 50409, 50418; August 18, 2000). The Federal regulations at 30 CFR 816.22(b) concerning topsoil substitutes and supplements provide that the operator must demonstrate that the resulting topsoil substitute or supplement medium is equal to, or more suitable for sustaining vegetation than, the existing topsoil, and the resulting soil medium is the best available in the permit area to support revegetation. West Virginia has amended CSR 38–2–7.4.b.1.D.6 by adding that topsoil substitutes must be in accordance with CSR 38–2–14.3.c. The State provision at CSR 38–2–14.3.c. concerns topsoil substitutes, and provides for a certification of analysis by a qualified laboratory stating that, at 14.3.c.1 that “the proposed substitute material is equally suitable for sustaining vegetation as the existing topsoil,” and at Subsection 14.3.c.2, the “resulting soil medium is the best available in the permit area to support vegetation.” Therefore, we find that as amended, CSR 38–2–7.4.b.1.D.6 is no less effective than the Federal regulations at 30 CFR 816.22(b), and it can be approved. We also find that this amendment satisfies the required program amendment codified in the Federal regulations at 30 CFR 948.16(www), which can be removed.

v. CSR 38–2–7.4.b.1.D.8. This provision concerns the final surface material used as the commercial forestry mine soil and has been amended in the first sentence by adding the word “areas” immediately after the phrase “[f]or commercial forestry.” We find that the addition of the word “areas” improves the clarity of the intended meaning of this provision and does not render the provision inconsistent with the Federal requirements at 30 CFR 785.14(c) concerning mountaintop removal mining operations, and it can be approved.

w. CSR 38–2–7.4.b.1.D.9. This provision concerns the final surface material used as the forestry mine soil and has been amended in the first sentence by adding the word “areas” immediately after the phrase “[f]or forestry.” We find that the addition of the word “areas” improves the clarity of the intended meaning of this provision and does not render the provision inconsistent with the Federal requirements at 30 CFR 785.14(c) concerning mountaintop removal mining operations, and it can be approved.

x. CSR 38–2–7.4.b.1.D.11. This provision concerns forestry mine soil, and has been amended by adding the phrase “except for valley fill faces” at the end of the sentence. As amended, Subsection 7.4.b.1.D.11 provides that “[f]orestry mine soil shall, at a minimum, be placed on all areas achieving AOC, except for valley fill faces.”

In its submittal of this provision, the WVDEP stated that the amendment is intended to provide clarification. As proposed, forestry mine soil shall, at a minimum, be placed on all areas achieving AOC, except for valley fill faces. This change is intended to clarify that valley fill faces do not have to be covered with four feet of soil or a mixture of soil and suitable substitutes. However, we notified the State that the revision as proposed could be interpreted as requiring fills to be returned to AOC. Under the Federal rules, excess spoil disposal areas do not have to achieve AOC. The State acknowledged that the definition of AOC at WV Code 22–2–3(e) clarifies that excess spoil disposal areas do not have to achieve AOC (Administrative Record Number WV–1438). Unlike the Federal requirements, the proposed revision could also be interpreted as not requiring any forestry mine soil to be placed on valley fill faces. Therefore, we are approving this provision with the understanding that the exemption only applies to the four-foot requirement at CSR 38–2–7.4.b.1.D.8 and 7.4.b.1.D.9.

Sufficient forestry mine soil shall be placed on valley fill faces to sustain vegetation and support the approved postmining land use in accordance with Finding 2.ff below. Based on that understanding, we find that this revision does not render CSR 38–2–7.4.b.1.D.11 inconsistent with the Federal mountaintop removal mining requirements at 30 CFR 785.14(c) or the topsoil and subsoil provisions at 30 CFR 816.22, and it can be approved.

y. CSR 38–2–7.4.b.1.H.1. This provision concerns tree species and compositions for commercial forestry areas and forestry areas. The list of hardwoods in this provision for commercial forestry areas is amended by deleting “white and red oaks, other native oaks” and adding in their place “white oak, chestnut oak, northern red oak, and black oak” and by adding the words “basswood, cucumber magnolia” to the list. In addition, the word “areas” is added immediately following the words “[f]or forestry” in the third sentence. In addition, the list of hardwoods for forestry areas is amended by deleting the words “white and red oaks, other native oaks” and adding in their place the words “white oak, chestnut oak, northern red oak, black oak,” and by adding the words “basswood, cucumber magnolia” to the list. As amended, Subsection 7.4.b.1.H.1 provides as follows:

7.4.b.1.H.1. Commercial tree and nurse tree species selection shall be based on site-specific characteristics and long-term goals outlined in the forest management plan and approved by a registered professional forester. For commercial forestry areas, the Secretary shall assure that all areas suitable for hardwoods are planted with native hardwoods at a rate of 500 seedlings per acre in continuous mixtures across the permitted area with at least six (6) species from the following list: white oak, chestnut oak, northern red oak, black oak, white ash, yellow-poplar, basswood, cucumber magnolia, black walnut, sugar maple, black cherry, or native hickories. For forestry areas, the Secretary shall assure that all areas suitable for hardwoods are planted with native hardwoods at a rate of 450 seedlings per acre in continuous mixtures across the permitted area with at least three (3) or four (4) species from the following list: white oak, chestnut oak, northern red oak, black oak, white ash, yellow-poplar, basswood, cucumber magnolia, black walnut, sugar maple, black cherry, or native hickories.

In its submittal of the amendment to this provision, the WVDEP stated that the amendment is intended to provide clarification for oaks and mixtures. We find that the addition of the words “areas” improves the clarity of the intended meaning of this provision, and

does not render the provision inconsistent with the Federal requirements concerning mountaintop removal mining operations and can be approved. The amendment to the lists of hardwoods for both commercial forestry areas and forestry areas provides increased specificity of hardwood tree species. SMCRA at section 515(c)(3)(B) and the Federal regulations at 30 CFR 785.14(c) require that an applicant for a mountaintop removal mining permit present specific plans for the proposed postmining use. In addition, 30 CFR 816.116(b)(3) requires stocking and planting arrangements to be based on local and regional conditions and after consultation and approval by State forestry and wildlife agencies. However, those Federal provisions do not provide the specificity of tree species that is provided in this provision. Nevertheless, we find that the proposed amendment to CSR 38–2–7.4.b.1.H.1 does not render the provision inconsistent with the aforementioned Federal requirements, and it can be approved.

z. CSR 38–2–7.4.b.1.H.2. This provision has been amended in the first sentence by adding the word “areas” immediately after the phrase “[f]or commercial forestry.” We find that because the addition of the word “areas” improves the clarity of the intended meaning of this provision and does not render the provision inconsistent with the Federal requirements concerning mountaintop removal mining operations at 30 CFR 785.14(c), and it can be approved.

aa. CSR 38–2–7.4.b.1.H.6. This provision has been amended in the first sentence by adding the word “areas” immediately after the phrase “[f]or commercial forestry.” We find that because the addition of the word “areas” improves the clarity of the intended meaning of this provision and does not render the provision inconsistent with the Federal requirements concerning mountaintop removal mining operations at 30 CFR 785.14(c), and it can be approved.

bb. CSR 38–2–7.4.b.1.I.1. Subsection 7.4.b.1.I.1 has been amended in the last sentence by deleting the word “certified” immediately before the words “soil scientist” and adding in its place the word “professional.” As amended, the sentence provides as follows: “[b]efore approving Phase I bond release, a professional soil scientist shall certify, and the Secretary shall make a written finding that the mine soil meets these criteria.” In its submittal of its amendment to CSR 38–2–7.4.b.1.B.1, the WVDEP stated that the word “certified” is being deleted

because West Virginia does not have a certification system for soil scientist. SMCRA at section 515(c)(3)(B) and the Federal regulations at 30 CFR 785.14(c) require that an applicant for a mountaintop removal mining permit present specific plans for the proposed postmining use. We find that the proposed deletion of the word "certified" does not render the provision inconsistent with the Federal requirements regarding mountaintop removal mining operations at 30 CFR 785.14(c) and bond release at 30 CFR 800.40, and it can be approved. We note that as mentioned above at Finding 2.o., the NPS commented that the WVAPSS does have a registry of certified professional soils scientists. By requiring soil scientists to be listed on the WVAPSS registry or a similar one, the State would create a professional image throughout its regulatory program and encourage higher standards of quality.

cc. CSR 38–2–7.4.b.1.I.2. Subsection 7.4.b.1.I.2 has been amended in two places by adding the word "areas." The first sentence has been amended by adding the word "areas" immediately after the phrase "for commercial forestry." The second from last sentence has been amended by adding the word "areas" immediately after the phrase "both commercial forestry and forestry." We find that the addition of the word "areas" improves the clarity of the intended meaning of this provision and does not render the provision inconsistent with the Federal requirements at 30 CFR 785.14(c) concerning mountaintop removal mining operations, and it can be approved.

dd. CSR 38–2–7.4.b.1.I.3. Subsection 7.4.b.1.I.3 has been amended in three places by adding the word "areas." The first sentence has been amended by adding the word "areas" immediately after the phrase "for commercial forestry and forestry." The second sentence has been amended by adding the word "areas" immediately after the words "[f]or forestry." The third sentence has been amended by adding the word "areas" immediately after the phrase "for commercial forestry." We find that the addition of the word "areas" improves the clarity of the intended meaning of this provision and does not render the provision inconsistent with the Federal requirements at 30 CFR 785.14(c) concerning mountaintop removal mining operations, and it can be approved.

ee. CSR 38–2–7.4.b.1.I.4 The State proposes to modify Subsection 7.4.b.1.I.4 by adding the phrase, "and the site meets the standards of

Subsection 9.3.h of this rule." CSR 38–2–9.3.h contains forest resource conservation standards for commercial reforestation operations. The State rules at CSR 38–2–7.4.b.1.I.4. provide that a permittee who fails to achieve the "commercial forestry" productivity requirements at the end of the twelfth growing season must either pay into the Special Reclamation Fund an amount equal to twice the remaining bond amount or perform an equivalent amount of in-kind mitigation. The money collected under this plan will be used to establish forests on bond forfeiture sites. In-kind mitigation requires establishing forests on AML or bond forfeiture sites. According to State officials, the phrase "and the site meets the standards of Subsection 9.3.h of this rule" was to ensure that operators would, at a minimum, have to meet the commercial reforestation standards of that subsection if the 12-year productivity requirement of Subsection 7.4.b.1.I.3 was not met (Administrative Record Number WV–1438).

Initially, we were concerned that, by simply referencing the revegetation standards at Subsection 9.3.h, the State had not made it clear that all the other requirements of the approved program and the permit were fully met in accordance with section 519(c)(3) of SMCRA and 30 CFR 800.40(c)(3). That concern was further complicated by the fact that Subsection 7.4.b.1.I.5 only references the bond release requirements at Subsections 12.2.d and 12.2.e. At a minimum, we felt that the State should have referenced the bond release requirements at Subsection 12.2.c, especially Subsection 12.2.c.3. Subsection 12.2.c.3 provides that Phase III reclamation shall be considered completed and the Secretary may release the remaining bond(s) upon successful completion of the reclamation requirements of the Act, this rule, and the terms and conditions of the permit.

State officials further clarified that the references to Subsections 12.d and 12.e were added at the request of the coal industry to allow for incremental bond release, regardless of whether the operation was incrementally bonded initially or not. Accordingly, all reclamation requirements of the approved program and the permit must be met prior to final bond release for all mountaintop removal mining operations with a postmining land use of commercial forestry and forestry.

State officials also maintain that the penalty/mitigation requirement is not a civil penalty, but an optional performance standard that can be used in the determination of success if the

12-year productivity requirement is not met. According to the State, failure to achieve the productivity standard under these rules by the end of the 12th year is not a violation, and does not go through the State's civil penalty assessment process. That is, to meet the performance standards for Commercial Forestry, the permittee must meet the 12-year standards or, failing that, must meet the standards for success at CSR 38–2–9.3.h and the requirements of a commercial forestry mitigation plan. The commercial forestry mitigation plan may consist of either a payment to the Special Reclamation Fund of an amount equal to twice the remaining bond amount, or the performance of an equivalent amount of in-kind mitigation. These State provisions are in excess of OSM's 5-year revegetation requirements. The State's clarification is important, because in our previous decisions concerning this provision, we had interpreted the mitigation plan (the payment to the Special Reclamation Fund, and the in-kind mitigation) as a civil penalty provision (see the August 18, 2000, **Federal Register** (65 FR at 50423, 50424)). However, we now understand that the mitigation plan is not a substitute for or in lieu of a civil penalty to be issued under the approved program. With the clarification provided by the State, we understand that a violation will not occur unless a permittee fails to meet the requirements of CSR 38–2–9.3.h or fails to meet the requirements of the commercial forestry mitigation plan.

Considering the clarifications discussed above, we find that the provisions at Subsection 7.4.b.1.I.4 are consistent with section 519(c)(3) of SMCRA and 30 CFR 800.40(c)(3) and can be approved.

ff. CSR 38–2–7.4.b.1.J. This provision concerns the front faces of valley fills and has been amended by deleting existing Subsections 7.4.b.1.J.1.(b) and (c), correcting a typographical error in the citation at Subsection 7.4.b.1.J.1.d, and re-designating existing Subsections 7.4.b.1.J.1.(d) and (e) as new Subsections 7.4.b.1.J.1.(b) and (c). As amended, Subsection 7.4.b.1.J. provides as follows:

7.4.b.1.J. Front Faces of Valley Fills.

7.4.b.1.J.1. Front faces of valley fills shall be exempt from the requirements of this rule except that:

7.4.b.1.J.1.(a). They shall be graded and compacted no more than is necessary to achieve stability and non-erodability;

7.4.b.1.J.1.(b). The groundcover mixes described in subparagraph 7.4.b.1.G. shall be used unless the Secretary requires a different mixture;

7.4.b.1.J.1.(c) Kentucky 31 fescue, sercica lespedeza, vetches, clovers (except ladino

and white clover) or other invasive species may not be used; and

7.4.b.1.J.2. Although not required by this rule, native, non-invasive trees may be planted on the faces of fills.

To make Subsection 7.4.b.1.J.1 consistent with the other parts of Subsection 7.4, the State deleted 7.4.b.1.J.1.(b) which provides that, "No unweathered shales may be present in the upper four feet of surface material." The State also deleted 7.4.b.1.J.1.(c) which provides that, "The upper four feet of surface material shall be composed of soil and the materials described in subparagraph 7.4.b.1.D. of this rule, when available, unless the Secretary determines other material is necessary to achieve stability."

The faces of excess spoil fills do not have to be covered with four feet of surface material. However, the effect of the deletion of Subsection (c) is that the front faces of fills are exempt from all the requirements of this rule, except for those provisions set forth in Subsection 7.4.b.1.J.1 which pertain to grading, compaction, stability, and vegetative cover. As such, the revised State rule would not require topsoil or topsoil substitutes to be redistributed on fill faces to achieve an approximate uniform, stable thickness consistent with the approved postmining land use as required by 30 CFR 816.22(d)(1) and 816.71(e)(2). As a result, Subsection 7.4.b.1.J.1 is rendered inconsistent with the Federal topsoil redistribution requirements at 30 CFR 816.22(d)(1) and 816.71(e)(2). To remedy this problem, we are not approving the deletion of the following words at CSR 38-2-7.4.b.1.J.1(c): "surface material shall be composed of soil and the materials described in subparagraph 7.4.b.1.D." As a consequence of this disapproval, the language quoted above will remain in the West Virginia program. The effect of the disapproval of the language quoted above is that the front faces of valley fills will not be exempt from the requirements that topsoil or topsoil substitutes be redistributed on fill faces to achieve an approximate uniform, stable thickness consistent with the approved postmining land use as required by 30 CFR 816.22(d)(1) and 816.71(e)(2). With this disapproval, we find that the remaining portion of CSR 38-2-7.4.b.1.J.1 is consistent with the Federal topsoil redistribution requirements at 30 CFR 816.22(d)(1) and 816.71(e)(2) and can be approved.

In addition, the State changed a cross reference in new Subsection 7.4.1.J.1(b). We find that the correction of the citation of the location of groundcover plant mixes from subsection "7.4.d.1.G" to subsection "7.4.b.1.G" corrects a

typographical error and can be approved.

gg. CSR 38-2-7.5.a. Subsection 7.5 concerns Homestead postmining land use. Subsection 7.5.a has been amended by adding a new sentence to the end of the existing language. As amended, CSR 38-2-7.5.a provides as follows:

7.5.a. Operations receiving a variance from AOC for this use shall establish homesteading on at least one-half (1/2) of the permit area. The remainder of the permit area shall support an alternate AOC variance use. The acreage considered homesteading shall be the sum of the acreage associated with the following: the civic parcel; the commercial parcel; the conservation easement; the homestead parcel; the rural parcel and any required infra structure.

According to the State, the rule does not dictate the requirements for every acre, but provides flexibility for land use, so long as certain conditions exist. A breakdown based on the minimum and maximum acreages in the rule can be provided, but one must remember that they will not total 100 percent of the homestead acreage. Using a 1,000-acre mountaintop removal mining operation as an example, an operator would have to establish homesteading on 50 percent of the permitted area or 500 acres. At least 300 acres of the homestead area may be quantifiable based on the specific requirements in the rule. In this example, the common lands would be 50 acres (10% × 500); the conservation easement would be 50 acres (10% × 500); the civic parcel would be 100 acres (10% × 1,000); and the village parcel would be 100 acres (20% × 500). The remaining 200 acres, less acreage for perpetual easement, may be a combination of the civic parcel, the conservation easement, and homestead village, rural and/or commercial. If the commercial parcel is included, then the operation would not get credit for the area in the development plan (Administrative Record Number WV-1438).

We note that this revision, together with other changes discussed in Finding 2.mm., is intended to comply with the required program amendment codified in the Federal regulations at 30 CFR 948.16 (rrrrr). The requirement at 30 CFR 948.16 (rrrrr) provides for the amendment to revise: (1) CSR 38-2-7.5.a to clarify whether or not the calculated acreage of the Commercial Parcel(s) is to be summed with the total Homestead acreage for the purpose of calculating the acreage of other various components of the Homestead Area (such as Common Lands, Village Parcels, Conservation Easement, etc.); and (2) CSR 38-2-7.5.1.4 to clarify whether or not the acreage for Public

Nursery is to be calculated based on the amount of acreage available for the Village Homestead, the Civil Parcel, or the entire Homestead Area (Finding 2.mm. below addresses part 2 of 30 CFR 948.16(rrrrr)). We find that the amendment at Subsection 7.5.a satisfies part (1) of the required program amendment codified at 30 CFR 948.16 (rrrrr). The proposed amendment clarifies that the acreage for "commercial parcels" is indeed summed with the other various components of the Homestead Area (such as Common Lands, Village Parcels, Conservation Easement, etc.). Therefore, we find that part (1) of the required program amendment codified at 30 CFR 948.16 (rrrrr) is satisfied and can be removed, and the amendment can be approved.

hh. CSR 38-2-7.5.b.3. This provision concerns the definition of "Commercial parcel," and has been amended by deleting the word "regulation" in the last sentence and replacing that word with the word "rule." In addition, a new sentence has been added to the end of the provision. As amended, Subsection 7.5.b.3 provides as follows:

7.5.b.3. Commercial parcel means a parcel retained by the landowner of record and incorporated within the homestead area on which the landowner or its designee may develop commercial uses. The size and location of commercial parcels shall comply with the requirements of this rule. Provided, however, parcels retained by the landowner for commercial development and incorporated within the Homestead area must be developed for commercial uses as provided by subdivision 7.5.g.5 of this rule.

In its submittal of the amendment of this provision, the WVDEP stated that the amendment is to comply with the required program amendment codified in the Federal regulations at 30 CFR 948.16(fffff). The requirement at 30 CFR 948.16(fffff) provides that CSR 38-2-7.5.b.3 must be amended, or the West Virginia program must otherwise be amended, to clarify that parcels retained by the landowner for commercial development and incorporated within the Homestead area must be developed for commercial uses as provided by subdivision CSR 38-2-7.5.g.5. We find that the amendment satisfies the required program amendment codified in the Federal regulations at 30 CFR 948.16(fffff), and it can be removed. The amended language is approved.

ii. CSR 38-2-7.5.i.10. This provision concerns wetlands associated with Homestead areas, and is amended by adding a new sentence immediately following the existing first sentence. As amended, Subsection 7.5.i.10 provides as follows:

7.5.i.10. Wetlands. Each homestead plan may describe areas within the homestead area reserved for created wetlands. The created wetlands shall comply with the requirements of 3.5 of this rule. These created wetlands may be ponds, permanent impoundments or wetlands created during mining. They may be left in place after final bond release. Any pond or impoundment left in place is subject to requirements under subsection 5.5 of this rule.

In its submittal of the amendment of this provision, the WVDEP stated that the amendment is to comply with the required program amendment codified in the Federal regulations at 30 CFR 948.16(iiiii). The requirement at 30 CFR 948.16(iiiii) provides that CSR 38–2–7.5.i.10 must be amended, or the West Virginia program must otherwise be amended, to require compliance with the permit requirements at CSR 38–2–3.5.d. This provision requires the submittal of cross sectional areas and profiles of all drainage and sediment control structures, including ponds, impoundments, diversions, sumps, etc. We find that the amendment satisfies the required program amendment codified in the Federal regulations at 30 CFR 948.16(iiiii), and it can be removed. The amended language is approved.

jj. CSR 38–2–7.5.j.3.A. This provision concerns the definition of soil in relation to Homestead areas, and is amended in the first sentence by adding the soil horizon “E” between soil horizons “A” and “B.”

In its submittal of the amendment of this provision, the WVDEP stated that the amendment is to comply with the required program amendment codified in the Federal regulations at 30 CFR 948.16(jjjjj). The requirement at 30 CFR 948.16(jjjjj) provides that CSR 38–2–7.5.j.3.A be amended by adding an “E” horizon. The Federal definition of “topsoil” at 30 CFR 701.5 provides that topsoil is the A and E soil horizon layers of the four master soil horizons, which include the A, E, B and C horizons. The State added the “E” horizon to its definition of topsoil at 7.5.j.3.A to be consistent with the State’s definition of topsoil at CSR 38–2–2.127 and the Federal definition at 30 CFR 701.5. We find that the amendment satisfies the required program amendment codified in the Federal regulations at 30 CFR 948.16(jjjjj), and it can be removed. The amendment is approved.

kk. CSR 38–2–7.5.j.3.B. This provision concerns the recovery and use of soil on Homestead areas, and it is amended by deleting the exception that is stated in the first sentence. As amended, Subsection 7.5.j.3.B provides as follows:

7.5.j.3.B. The Secretary shall require the operator to recover and use all the soil on the

mined area, as shown on the soil maps. The Secretary shall assure that all saved soil includes all of the material from the O and A horizons.

In its submittal of this revision, the WVDEP stated that the revision is intended to comply with the required program amendment codified in the Federal regulations at 30 CFR 948.16(kkkkk). The requirement at 30 CFR 948.16(kkkkk) provides that CSR 38–2–7.5.j.3.B must be amended by deleting the phrase, “except for those areas with a slope of at least 50%,” and by deleting the phrase, “and other areas from which the applicant affirmatively demonstrates and the Director of the WVDEP finds that soil cannot reasonably be recovered.” With this change, the State rules at CSR 38–2–14.3, like the Federal rules at 30 CFR 816.22, still require an operator to save and redistribute all topsoil. Under this revision, topsoil on slopes greater than 50 percent may be removed in combination with and saved with the other soil horizons. We find that the amendment satisfies the required program amendment codified in the Federal regulations at 30 CFR 948.16(kkkkk), and it can be removed. The amended language is approved.

ll. CSR 38–2–7.5.j.3.E. This provision concerns soil substitutes and is amended by adding the phrase “and is in accordance with 14.3.c of this rule” at the end of the first sentence.

In its submittal of this revision, the WVDEP stated that the revision is intended to comply with the required program amendment codified in the Federal regulations at 30 CFR 948.16(lllll). The requirement at 30 CFR 948.16(lllll) provides that CSR 38–2–7.5.j.3.E be amended, or the West Virginia program otherwise be amended, to provide that soil substitute material must be equally suitable for sustaining vegetation as the existing topsoil and the resulting medium is the best available in the permit area to support vegetation. The West Virginia rules at CSR 38–2–14.3.c concerning top soil substitutes provide that a qualified laboratory must certify that:

14.3.c.1. The proposed substitute material is equally suitable for sustaining vegetation as the existing topsoil;

14.3.c.2. The resulting soil medium is the best available in the permit area to support vegetation; and

14.3.c.3. The analyses were conducted using standard testing procedures.

We find that the provisions at subsections 14.3.c.1 and 14.3.c.2 quoted above are substantively identical to the Federal requirements at 30 CFR 816.22(b). Therefore, we find that the required program amendment at 30 CFR 948.16(lllll) is satisfied by the addition

of the requirement that the permittee demonstrate that the selected overburden material used as soil substitute be in accordance with the requirements at CSR 38–2–14.3.c, and that 30 CFR 948.16(lllll) can be removed. The amended language is approved.

mm. CSR 38–2–7.5.l.4.A. This provision concerns public nursery associated with Homestead areas, and is amended by adding the word “village” between the words “homestead” and “area” in the first sentence.

In its submittal of this revision, the WVDEP stated that the revision is intended to comply with required program amendment codified in the Federal regulations at 30 CFR 948.16(rrrrr). The requirement at 30 CFR 948.16(rrrrr) provides for the amendment of: (1) CSR 38–2–7.5.a to clarify whether or not the calculated acreage of the Commercial Parcel(s) is to be summed with the total Homestead acreage for the purpose of calculating the acreage of other various components of the Homestead Area (such as Common Lands, Village Parcels, Conservation Easement, etc.); and (2) CSR 38–2–7.5.l.4 to clarify whether or not the acreage for Public Nursery is to be calculated based on the amount of acreage available for the Village Homestead, the Civil Parcel, or the entire Homestead Area. We find that as amended, the first sentence at CSR 38–2–7.5.l.4.A clearly provides that “the nursery shall be 1 acre per 30 acres of homestead village area.” With the proposed change, WVDEP has clarified that the acreage for Public Nursery is to be calculated based on the amount of acreage available for the Village Homestead. Therefore, we find that as amended CSR 38–2–7.5.l.4.A satisfies part (2) of the required program amendment at 30 CFR 948.16(rrrrr), and it can be removed. See Finding 2.gg., above for our finding on part (1) of 30 CFR 948.16(rrrrr). The amended language is approved.

nn. CSR 38–2–7.5.o.2. This provision concerns revegetation success standards for mountaintop removal mining operations with a Homestead postmining land use during Phase II bond release. While the State’s proposed amendment listed the required amendment at 30 CFR 948.16(ooooo), it was not addressed in the State’s initial submittal. The requirement at 30 CFR 948.16(ooooo) provides in part that WVDEP must consult with and obtain the approval of the West Virginia Division of Forestry on the new stocking arrangements for Homestead at CSR 38–2–7.5.o.2.

On August 23, 2005, the Division of Forestry submitted a memorandum to WVDEP in support of the new stocking requirements for Homesteading (Administrative Record Number WV-1428). Specifically, the Division of Forestry agreed with the provisions at CSR 38-2-7.5.i.8, 7.5.l.4, and 7.5.o.2 regarding conservation easements, public nurseries, and survival rates and ground cover requirements at the time of bond release. Therefore, we find that the Division of Forestry's memorandum dated August 23, 2005, satisfies the required program amendment codified in the Federal regulations at 30 CFR 948.16(ooooo) and it can be removed. We should note that the Wildlife Resources Section of the Department of Natural Resources already submitted its approval letter.

oo. CSR 38-2-7.5.o.2. This provision concerns Phase II bond release of mountaintop removal mining operations with a Homestead postmining land use, and is amended by adding a proviso at the end of the existing provision. As amended, CSR 38-2-7.5.o.2 provides as follows:

7.5.o.2. Phase II bond release may not occur before two years have passed since Phase I bond release. Before approving Phase II bond release, the Secretary shall assure that the vegetative cover is still in place. The Secretary shall further assure that the tree survival on the conservation easements and public nurseries are no less than 300 trees per acre (80% of which must be species from the approved list). Furthermore, in the conservation easement and public nursery areas, there shall be a 70% ground cover where ground cover includes tree canopy, shrub and herbaceous cover, and organic litter. Trees and shrubs counted in considering success shall be healthy and shall have been in place at least two years, and no evidence of inappropriate dieback. Phase II bond release shall not occur until the service drops for the utilities and communications have been installed to each homestead parcel. Provided, however, the applicable revegetation success standards for each phase of bond release on Commercial Parcels, Village Parcels, Rural Parcels, Civic Parcels and Common Lands shall be its corresponding revegetation success standards specified in 9.3 of this rule.

In its submittal of this revision, the WVDEP stated that the revision is intended to comply with the required program amendment codified in the Federal regulations at 30 CFR 948.16(ppppp). The requirement at 30 CFR 948.16(ppppp) provides that CSR 38-2-7.5.o.2 be amended, or the West Virginia program otherwise be amended, to identify the applicable revegetation success standards for each phase of bond release on Commercial Parcels, Village Parcels, Rural Parcels, Civic Parcels and Common Lands. With this

amendment, the State has clarified that the applicable revegetation standards for Commercial Parcels, Village Parcels, Rural Parcels, Civic Parcels and Common Lands are provided in the West Virginia regulations at CSR 38-2-9.3. Subsection 9.3 contains standards for evaluating vegetative cover. CSR 38-2-9.3.f provides standards for postmining land uses that require legumes and perennial grasses, such as hay land, pastureland, and rangeland. CSR 38-2-9.3.f.1 provides standards for postmining land uses to be developed for industrial or residential uses. CSR 38-2-9.3.f.2 provides standards for lands used for cropland. CSR 38-2-9.3.g provides standards for lands used for forest and/or wildlife use. CSR 38-2-9.3.h provides standards for commercial reforestation operations. We find that as amended, CSR 38-2-7.5.o.2 satisfies the required program amendment codified in the Federal regulations at 30 CFR 948.16(ppppp), and it can be removed. The amended language is approved.

pp. CSR 38-2-9.3.d. Subsection 9.3 concerns the standards for evaluating vegetative cover. Subsection 9.3.d is amended by deleting the word "determine" in the first sentence, and adding in its place the word "verify." The existing second sentence concerning a statistically valid sampling technique is deleted, and is replaced by a new sentence that requires the operator to provide the Secretary of the WVDEP with a vegetative evaluation using a statistically valid sampling technique. As amended, Subsection 9.3.d provides as follows:

9.3.d. Not less than two (2) years following the last date of augmented seeding, the Secretary shall conduct a vegetative inspection to verify that applicable standards for vegetative success have been met. The operator shall provide to the Secretary a vegetative evaluation using a statistically valid sampling technique with a ninety (90) percent statistical confidence interval. An inspection report shall be filed for each inspection and when the standard is met, the Secretary shall execute a Phase II bond release.

The Federal regulations at 30 CFR 816.116 provide the standards for success of revegetation. The Federal regulations at 816.116(a)(2) provide that the sampling techniques for measuring success shall use a 90-percent statistical confidence interval (*i.e.*, one-sided test with a 0.10 alpha error). Further, 30 CFR 816.116(a)(1) provides that the standards for success and statistically valid sampling techniques for measuring success shall be selected by the regulatory authority and included in an approved regulatory program. Currently, a State bond release specialist

conducts the vegetative evaluation prior to bond release. Under the revised rule, the operator will perform the evaluation, and a State inspection will be conducted to verify the results. The State's approved policy dated May 1, 2002, and entitled "Productivity and Ground Cover Success Standards" identifies the statistically valid sampling techniques for measuring productivity and ground cover within the State. Under the revised provisions, only these approved sampling techniques can be used by an operator to evaluate or by the State to verify revegetation success in conjunction with Phase II and III bond release. As amended, the West Virginia provision provides an alternative, yet as-effective version of the Federal requirements.

Prior to the amendment, the WVDEP used a statistically valid sampling technique with a ninety (90) percent statistical confidence interval to evaluate the success of revegetation during its vegetative evaluation inspection. The amended provision, however, appears to allow the operator to select and use a statistically valid sampling technique with a ninety (90) percent statistical confidence interval to confirm revegetation success, while a WVDEP inspection will be made to verify the operator's evaluation. The amendments to CSR 38-2-9.3.d appear to increase the flexibility of which statistical sampling techniques may be used to evaluate revegetation success while at the same time continuing to maintain the standard that the selected standard must be a statistically valid sampling technique with a ninety (90) percent statistical confidence interval as is required by the Federal regulations at 30 CFR 816.116(a)(2).

However, the Federal regulations at 30 CFR 816.116(a)(1) provide that the statistically valid sampling technique must be selected by the regulatory authority and included in an approved regulatory program. As amended, CSR 38-2-9.3.d differs from 30 CFR 816.116(a)(1) in that the State's provision appears to allow an operator to select and use a statistically valid sampling technique with a ninety (90) percent statistical confidence interval. Nevertheless, it is our understanding that the sampling technique to be used to evaluate the success of revegetation will be submitted by the operator to the WVDEP as part of the revegetation plan required by CSR 38-2-9.2, and this understanding is further supported by the fact that Subsection 9.3.e requires the use of an approved sampling technique with a ninety (90) percent statistical confidence interval. The State's requirements at CSR 38-2-9.2

provide that a complete revegetation plan shall be made part of each permit application. Therefore, it is our understanding that the statistically valid sampling technique to be used must receive the approval of the regulatory authority and it will be a part of the approved permit application. We find that, as amended, CSR 38–2–9.3.d is consistent with and no less effective than the Federal regulations for measuring revegetation success at 30 CFR 816.116(a)(1) and can be approved. Our approval of this provision is based upon our understanding discussed above.

qq. CSR 38–2–9.3.e. Subsection 9.3.e concerns request of final bond release, and is amended by adding the phrase “which includes a final vegetative evaluation using approved, statistically valid sampling techniques” to the end of the first sentence. In addition, the words “inspection to verify the” are added to the second sentence, immediately following the phrase “the Secretary shall conduct.” Finally, the words “using approved, statistically valid sampling techniques” are deleted from the end of the second sentence. As amended, Subsection 9.3.e provides as follows:

9.3.e. After five (5) growing seasons following the last augmented seeding, planting, fertilization, revegetation, or other work, the operator may request a final inspection and final bond release which includes a final vegetative evaluation using approved, statistically valid sampling techniques. Upon receipt of such request, the Secretary shall conduct a [*sic*] inspection to verify the final vegetative evaluation. A final report shall be filed and if the applicable standards have been met, the Secretary shall release the remainder of the bond. Ground cover, production, or stocking shall be considered equal to the approved success standard when they are not less than 90 (ninety) percent of the success standard.

In its submittal of the amendment of this provision, the WVDEP stated that the amendment is to make it clear that the operator will provide the information to determine if the vegetation success standard has been met. As we discussed above in Finding 2.pp., West Virginia amended its regulations at CSR 38–2–9.3.d to require the operator to select and use a statistically valid sampling technique with a ninety (90) percent statistical confidence interval to confirm revegetation success, while a WVDEP inspection will be made to verify the operator’s evaluation. Also as discussed above at Finding 2.pp., it is our understanding that the statistically valid sampling technique with a ninety (90) percent statistical confidence interval that is proposed by the operator to be

used to evaluate the success of revegetation will be submitted to the WVDEP as part of the revegetation plan required by CSR 38–2–9.2. The State’s requirements at CSR 38–2–9.2 provide that a complete revegetation plan shall be made part of each permit application. Therefore, the statistically valid sampling technique to be used must receive the approval of the regulatory authority, and it will be a part of the approved permit application. This understanding is further supported by the fact that this subsection requires the use of an approved sampling technique by the operator. We find that, as amended, CSR 38–2–9.3.e is consistent with and no less effective than the Federal regulations for measuring revegetation success at 30 CFR 816.116(a)(1) and can be approved. Our approval of this provision is based upon our understanding discussed above.

rr. CSR 38–2–14.5.h. Subsection 14.5 concerns performance standards for hydrologic balance. Subsection 14.5.h is amended by adding two new sentences at the end of this provision relating to the waiver of water supply replacement. As amended, Subsection 14.5.h provides as follows:

14.5.h. A waiver of water supply replacement granted by a landowner as provided in subsection (b) of section 24 of the Act shall apply only to underground mining operations, provided that a waiver shall not exempt any operator from the responsibility of maintaining water quality. Provided, however, the requirement for replacement of an affected water supply that is needed for the land use in existence at the time of contamination, diminution or interruption or where the affected water supply is necessary to achieve the post-mining land use shall not be waived. If the affected water supply was not needed for the land use in existence at the time of loss, contamination, or diminution, and if the supply is not needed to achieve the postmining land use, replacement requirements may be satisfied by demonstrating that a suitable alternative water source is available and could feasibly be developed. If the latter approach is selected, written concurrence must be obtained from the water supply owner.

In its submittal of this revision, the WVDEP stated that the revision is intended to comply with the required program amendment codified in the Federal regulations at 30 CFR 948.16 (sss). The requirement at 30 CFR 948.16 (sss) provides that CSR 38–2–14.5.h must be amended, or the West Virginia program must otherwise be amended, to require that, if the water supply is not needed for the existing or postmining land use, such waiver can only be approved where it is demonstrated that a suitable alternative water source is

available and could feasibly be developed. The proposed State revision clarifies that the replacement of a water supply is required, unless consideration is given to the effect on premining and postmining land uses. In addition, the proposed revision clarifies that a waiver can only be approved where it is demonstrated that a suitable alternative water source is available and could feasibly be developed. We find that the new language added to CSR 38–2–14.5.h is substantively identical to the Federal definition of “replacement of water supply,” paragraph (b), at 30 CFR 701.5 and can be approved. In addition, the new language satisfies the required program amendment codified in the Federal regulations at 30 CFR 948.16(sss), which can be removed.

ss. CSR 38–2–14.15.c.3. Subsection 14.15 concerns performance standards for contemporaneous reclamation. Subsection 14.15.c.3 is amended by deleting the reference to the “National Environmental Policy Act” and adding in its place a reference to the “Endangered Species Act.”

In its submittal of the amendment to this provision, the WVDEP stated that the amendment is to correct a wrong cross-reference. We did not act on this provision in the December 3, 2002, **Federal Register** notice (67 FR 71832). As explained in that notice, under SMCRA, the issuance of a SMCRA permit by the State is not considered an action under NEPA. In addition, individual States have no authority to require compliance with NEPA and, therefore, the State’s proposed reference to NEPA has no effect on the West Virginia program. Because we did not render a decision on the proposed language, it has not been part of the approved State program. Under the proposed revision, the WVDEP Secretary could allow operators to cut trees on areas larger than 30 acres when it is necessary to comply with the Endangered Species Act. The State is trying to protect the Indiana bat and other endangered plant and animal species by minimizing habitat loss at certain times of the year, most notably during mating season. The proposed reference to the Endangered Species Act is an attempt by the State to correct the earlier problem. Therefore, we find that this amendment corrects the erroneous reference to the “National Environmental Policy Act” and can be approved.

tt. CSR 38–2–20.6.d. Section 20 concerns inspection and enforcement. Subsection 20.6.d concerns Notice of Informal Assessment Conference, and is amended by deleting the second sentence of this provision. The deleted

sentence provided as follows: “[p]rovided, however, the operator shall forward the amount of proposed penalty assessment to the Secretary for placement in an interest bearing escrow account.” In its submittal, WVDEP stated that the requirement to pre-pay the proposed civil penalty assessment prior to informal conference caused confusion and did not achieve the desired results. We find that the deletion of the requirement to place the amount of proposed penalty assessment in an interest bearing escrow account does not render the provision less effective than the counterpart Federal regulations at 30 CFR 845.18 concerning assessment conference procedures. The regulations at 30 CFR 845.18 do not provide for the placement of the amount of proposed penalty assessment in an interest bearing escrow account. Therefore, we find that the revised State procedure at CSR 38–2–20.6.d is the same as or similar to the Federal procedure at 30 CFR 845.18 and can be approved.

uu. CSR 38–2–20.6.j. Subsection 20.6.j concerns escrow, and is amended by deleting the words “an informal conference or” and adding in their place the word “a.” As amended, CSR 38–2–20.6.j provides as follows: “Escrow. If a person requests a judicial review of a proposed assessment, the proposed penalty assessment shall be held in escrow until completion of the judicial review.”

In its submittal of this amendment, the WVDEP stated that the requirement to pre-pay penalty prior to informal conference did not achieve the desired results. WVDEP also stated that it has led to confusion between agency and industry alike and, therefore, the agency is deleting this requirement. We find that the deletion of the requirement to place the amount of proposed civil penalty assessment in an interest bearing escrow account prior to the informal conference does not render the provision less effective than the counterpart Federal regulations at 30 CFR 845.18 or 30 CFR 845.19. As discussed above, the Federal regulations at 30 CFR 845.18, concerning assessment conference procedures, do not require the placement of the amount of proposed penalty assessment in an interest bearing escrow account. The Federal regulations at 30 CFR 845.19 concern request for a hearing, and provide that the person charged with the violation may contest the proposed penalty assessment or reassessment by submitting a petition and an amount equal to the proposed penalty for placement in an escrow account. Therefore, we find that the revised State

procedure at CSR 38–2–20.6.j is the same as or similar to the Federal procedures at 30 CFR 845.18 and 30 CFR 845.19 and can be approved.

#### Amendments to CSR 199–1

a. CSR 199–1–2.36a. Section CSR 199–1–2 concerns definitions. New Subsection 2.36a has been added to define the term “Community or Institutional Building.” New Subsection 2.36a provides as follows:

2.36a. Community or Institutional Building means any structure, other than a public building or an occupied dwelling, which is used primarily for meetings, gatherings or functions of local civic organizations or other community groups; functions as an educational, cultural, historic, religious, scientific, correctional, mental health or physical health care facility; or is used for public services, including, but not limited to, water supply, power generation or sewage treatment.

In its submittal of the amendment to this provision, the WVDEP stated that the amendment further defines the definition, and the information was taken from CSR 38–2, the State’s Surface Mining Reclamation Regulations. We find that this new definition is substantively identical to the Federal definition of “community or institutional building” at 30 CFR 761.5 and can be approved.

b. CSR 199–1–2.36b. New Subsection 2.36b has been added to define the term “Public Building.” New Subsection 2.36b provides as follows:

2.36b. Public Building means any structure that is owned or leased by a public agency or used primarily for public business or meetings.

In its submittal of the amendment to this provision, the WVDEP stated that the amendment further defines the definition, and the information was taken from CSR 38–2, the State’s Surface Mining Reclamation Regulations. We find this new definition to be substantively identical to the Federal definition of “public building” at 30 CFR 761.5 and can be approved.

c. CSR 199–1–2.37. New Subsection 2.37 has been added to define the term “Structure.” Existing Subsections 2.37, 2.38, and 2.39 have been renumbered as Subsections 2.38, 2.39, and 2.40. New Subsection 2.37 provides as follows:

2.37 Structure means any man-made structures within or outside the permit areas which include, but is not limited to: Dwellings, outbuildings, commercial buildings, public buildings, community buildings, institutional buildings, gas lines, water lines, towers, airports, underground mines, tunnels and dams. The term does not include structures built and/or utilized for the purpose of carrying out the surface mining operation.

In its submittal of the amendment to this provision, the WVDEP stated that the definition was taken from CSR 38–2, the State’s Surface Mining Reclamation Regulations. There is no Federal counterpart definition to the State’s new definition of “structure.” However, we find that the new definition of “structure” is not inconsistent with the Federal use of the term “structure(s)” in the Federal blasting regulations at 30 CFR Parts 816/817 and can be approved.

d. CSR 199–1–3.3.b. Subsection 3.3 concerns public notice of blasting operations, and has been amended by adding new Subsection 3.3.b to provide as follows:

3.3.b. Blasting Signs. The following signs and markers shall be erected and maintained while blasting is being conducted:

3.3.b.1. Warning signs shall be conspicuously displayed at all approaches to the blasting site, along haulageways and access roads to the mining operation and at all entrances to the permit area. The sign shall at a minimum be two feet by three feet (2’ x 3’) reading “WARNING! Explosives in Use” and explaining the blasting warning and the all clear signals and the marking of blasting areas and charged holes; and

3.3.b.2. Where blasting operations will be conducted within one hundred (100) feet of the outside right-of-way of a public road, signs reading “Blasting Area”, shall be conspicuously placed along the perimeter of the blasting area.

In its submittal of the amendment to this provision, the WVDEP stated that the amendment adds information from CSR 38–2, the State’s Surface Mining Reclamation Regulations, relating to blasting signs. This change is necessary because the State’s Blasting Rule currently lacks specific provisions regarding blasting signs. Such provisions are only set forth in the State’s Surface Mining Reclamation Regulations at Subsection 14.1.e. We find that new CSR 199–1–3.3.b is substantively identical to the Federal blasting provisions at 30 CFR 816/817.66(a)(1) and (2) concerning blasting signs, warnings, and access control and can be approved.

e. CSR 199–1–3.7. Subsection 3.7.a concerns blasting control for other structures, and has been amended by deleting the words “in subsection 2.35 of this rule” in the first sentence.

In its submittal of the amendment to this provision, the WVDEP stated that the amendment eliminates an incorrect reference to the definition of “Protected Structure.” The definition of “Protected Structure” is located at CSR 199–1–2.36. With this change, these provisions still provide for the protection of protected structures and other structures. We find that the deletion of the incorrect

reference number does not render the provision less effective than the Federal blasting provisions at 30 CFR 816/817.67, concerning the control of the adverse effects of blasting, and can be approved.

f. CSR 199-1-4.8. Subsection 4.8 concerns violations by a certified blaster, and has been amended by deleting the words "director shall" and replacing those words with the words "Secretary may." In addition, the words "written notification" are added immediately after the word "issue." The phrase "or revoke the certification of" is added immediately after the phrase "a temporary suspension order," and the word "against" has been deleted. As amended, the paragraph at Subsection 4.8 provides as follows:

4.8. Violations by a Certified Blaster.—The Secretary may issue written notification, a temporary suspension order, or revoke the certification of a certified blaster who is, based on clear and convincing evidence, in violation of any of the following:

With these changes, the Secretary may issue written notification, a temporary suspension order, or revoke the certification of a certified blaster who is, based on clear and convincing evidence, in violation of the provisions listed at CSR 199-1-4.8.a through 4.8.e. We find that CSR 199-1-4.8, as revised, is consistent with the Federal regulations at 30 CFR 850.15(b), concerning suspension and revocation of blaster certification, and can be approved.

g. CSR 199-1-4.8.c. Subsection 4.8.c has been amended by deleting the words "[s]ubstantial or significant" which modify the word "violations" at the beginning of the first sentence, and by capitalizing the word "federal" in the first sentence. In a **Federal Register** notice dated December 10, 2003 (68 FR 68724, 68733), OSM approved CSR 199-1-4.8.c, except for the words "substantial or significant," which were not approved. In this amendment, the State has deleted words "substantial or significant." Therefore, any violations of Federal or State laws or regulations relating to explosives by a certified blaster could require disciplinary action. We find that, as amended, CSR 199-1-4.8.c is consistent with and no less effective than the Federal regulations at 30 CFR 850.15(b)(1)(iii), concerning violations of State or Federal explosives laws or regulations, and can be approved.

h. CSR 199-1-4.8.f and 4.8.g. Subsections 4.8.f and 4.8.g are added and provide as follows:

4.8.f. A pattern of conduct which is not consistent with acceptance of responsibility for blasting operations, *i.e.*, repeated

violations of state or federal laws pertaining to explosives; or

4.8.g. Willful Conduct.—The Secretary shall suspend or revoke the certification of a blaster for willful violations of State or Federal laws pertaining to explosive.

In its submittal of the amendment to this provision, the WVDEP stated that the amendment was made because the wording was not consistent with previously approved rule 22-4-6.01, according to OSM. In addition, the WVDEP stated that this subsection has been reorganized and renumbered for clarity reasons, as required by the Council of Joint Rulemaking. These revisions are in response to a finding made by OSM as published in the **Federal Register** on December 10, 2003 (68 FR at 68733-68734). There is no direct Federal counterpart to the new language at CSR 199-1-4.8.f. However, we find that the new language at CSR 199-1-4.8.f is consistent with the Federal requirements concerning suspension or revocation of blaster certification at 30 CFR 850.15(b) and with the requirements concerning practical experience of blasters that is needed for certification at 30 CFR 850.14(a)(2). Therefore, we find that new CSR 199-1-4.8.f can be approved.

We find that new CSR 199-1-4.8.g is consistent with and no less effective than the Federal regulations at 30 CFR 850.15(b)(1), which provide that a certification shall be suspended or revoked upon a finding of willful conduct, and can be approved. In addition, we find that new CSR 199-1-4.8.g satisfies the required program amendment codified in the Federal regulations at 30 CFR 948.16(a). The required amendment at 30 CFR 948.16(a) requires that the State must amend CSR 199-1-4.9.a and 4.9.b, or must otherwise amend the West Virginia program, to provide that upon finding of willful conduct, the Secretary shall revoke or suspend a blaster's certification. The required amendment can, therefore, be removed.

i. CSR 199-1-4.9. Subsection 4.9 concerns penalties, and has been amended, reorganized and renumbered. A new title, "Suspension and Revocation" has been added at Subsection 4.9.a. Existing Subsection 4.9.a. has been renumbered as 4.9.a.1 and 4.9.a.2. Existing Subsection 4.9.b has been renumbered as 4.9.a.3 and the reference to Subsection 12.1 deleted. New Subsection 4.9.a.4 has been added.

Existing Subsections 4.9.c and 4.9.d have been renumbered as 4.10 and 4.11, respectively. Finally, existing Subsections 4.10, 4.11, and 4.12 have been renumbered as Subsections 4.12, 4.13, and 4.14, respectively. As

amended, Subsections 4.9, and 4.10 through 4.14 provide as follows:

4.9. Penalties.

4.9.a. Suspension and Revocation.

4.9.a.1. Suspension.—Upon service of a temporary suspension order, the certified blaster shall be granted a hearing before the Secretary to show cause why his or her certification should not be suspended or revoked.

4.9.a.2. The period of suspension will be conditioned on the severity of the violation committed by the certified blaster and, if the violation can be abated, the time period in which the violation is abated. The Secretary may require remedial actions and measures and re-training and re-examination as a condition for re-instatement of certification.

4.9.a.3. Revocation.—If the remedial action required to abate a suspension order, issued by the Secretary to a certified blaster, or any other action required at a hearing on the suspension of a blaster's certification, is not taken within the specified time period for abatement, the Secretary may revoke the blaster's certification and require the blaster to relinquish his or her certification card. Revocation will occur if the certified blaster fails to re-train or fails to take and pass reexamination as a requirement for remedial action.

4.9.a.4. In addition to suspending or revoking the certification of a blaster, failure to comply with the requirements of this subsection may also result in further suspension or revocation of a blaster's certification.

4.10. Reinstatement.—Subject to the discretion of the Secretary, and based on a petition for reinstatement, any person whose blaster certification has been revoked, may, if the Secretary is satisfied that the petitioner will comply with all blasting law and rules, apply to re-take the blasters certification examination, provided the person meets all of the requirements for blasters certification specified by this subsection, and has completed all requirements of the suspension and revocation orders, including the time period of the suspension.

4.11. Civil and Criminal Penalties.—Every certified blaster is subject to the individual civil and criminal penalties provided for in W. Va. Code § 22-3-17.

4.12. Hearings and Appeals.—Any certified blaster who is served a suspension order, revocation order, or civil and criminal sanctions is entitled to the rights of hearings and appeals as provided for in W. Va. Code §§ 22-3-16 and 17.

4.13. Blasting Crew.—Persons who are not certified and who are assigned to a blasting crew, or assist in the use of explosives, shall receive directions and on-the-job training from a certified blaster.

4.14. Reciprocity With Other States.—The Secretary may enter into a reciprocal agreement with other states wherein persons holding a valid certification in that state may apply for certification in West Virginia, and upon approval by the Secretary, be certified without undergoing the training or examination requirements set forth in this rule.

In its submittal of the amendments to this provision, the WVDEP stated that

the amendments provide clarification and remove an incorrect reference. In addition, the WVDEP stated that Subsection 4.9 has been reorganized and renumbered for clarity reasons, as required by the Council of Joint Rulemaking. The deletion of the reference at re-numbered Subsection 4.9.a.3 eliminates an incorrect reference and improves the clarity of the provision. We find that the amendment to re-numbered Subsection 4.9.a.3 does not render this provision inconsistent with the Federal blasting requirements at 30 CFR 850.15(b) and can be approved.

We find that the new language at Subsection 4.9.a.4, concerning further suspension or revocation of a blasters certification upon failure to comply with the provisions of CSR 199-1-4.9, is not inconsistent with the Federal suspension and revocation provisions at 30 CFR 850.15(b) and can be approved.

As mentioned, the other changes listed above at Subsections 4.10 through 4.14 resulted from the renumbering of Subsections 4.9 through 4.12. The revisions are non-substantive changes that relate primarily to the reorganization of this section.

### 3. Committee Substitute for House Bill 3033

WV Code 22-3-11 has been amended by adding new Subdivision 22-3-11(h)(2)(B) to provide as follows:

(2) In managing the Special Reclamation Program, the Secretary shall:

\* \* \* \* \*

(B) Conduct formal actuarial studies every two years and conduct informal reviews annually on the Special Reclamation Fund.

On May 29, 2002 (67 FR 37610), OSM approved amendments to the West Virginia program that satisfied a required program amendment which required the State to eliminate the deficit in the State's alternative bonding system, commonly referred to as the Special Reclamation Fund (Fund), and to ensure that sufficient money will be available to complete reclamation, including the treatment of polluted water, at all existing and future bond forfeiture sites (Administrative Record Number WV-1308). An important component of OSM's approval of that amendment was the fact that West Virginia had previously established, at W. Va. Code 22-1-17, the Special Reclamation Fund Advisory Council (Advisory Council) to oversee the State's alternative bonding system (see OSM's approval in the December 28, 2001, **Federal Register** notice, 66 FR 67446).

One of the duties of the Advisory Council is to study the effectiveness,

efficiency and financial stability of the Special Reclamation Fund. Another duty of the Advisory Council, as provided by W. Va. Code 22-1-17(f)(5), is to contract with a qualified actuary to determine the Fund's fiscal soundness. The first actuarial study was required to be completed by December 31, 2004. Additional actuarial studies must be completed every four years thereafter.

In the proposed amendment at WV Code 22-3-11, West Virginia has added language at Subdivision 22-3-11(h)(2)(B) that requires the Secretary of the WVDEP to conduct actuarial studies every two years and to conduct annual informal reviews of the Special Reclamation Fund. As drafted, it appears that the actuarial studies required under new Subdivision 22-3-11(h)(2)(B) will be in addition to those performed under contract of the Advisory Council, because the State has not submitted any amendment to the statutory requirements of the Advisory Council at W. Va. Code 22-1-17. However, State officials acknowledge that the actuarial studies to be conducted under Subdivision 22-3-11(h)(2)(B) are to be done in lieu of those required under Subdivision 22-1-17(f)(5). The State intends to submit an amendment in the future that will correct this oversight. Nevertheless, we still find that the new requirement at Subdivision 22-3-11(h)(2)(B) is consistent with the bases of our previous approvals of State program amendments regarding the financial stability of the State's Special Reclamation Fund. The bi-annual actuarial studies and the annual, informal financial reviews of the Special Reclamation Fund should assist the WVDEP and the State in ensuring that sufficient money will be available to complete land reclamation and water treatment at existing and future bond forfeiture sites within the State, a requirement that parallels the criterion for approval of a State's alternative bonding system under 30 CFR 800.11(e)(1). Therefore, we are approving the amendment to Subdivision 22-3-11(h)(2)(B) of the W. Va. Code regarding the State's Special Reclamation Fund.

### 4. House Bill 3236

This Bill amended the W. Va. Code by adding new Section 22-3-11a and new Section 22-3-32a to provide as follows:

22-3-11a. Special reclamation tax; clarification of imposition of tax; procedures for collection and administration of tax; application of Tax Procedure and Administration Act and Tax Crimes and Penalties Act.

(a) It is the intent of the Legislature to clarify that from the date of its enactment, the special reclamation tax imposed pursuant to the provisions of section eleven of this article is intended to be in addition to any other taxes imposed on persons conducting coal surface mining operations including, but not limited to the tax imposed by section thirty-two of this article, the tax imposed by article twelve-b, chapter eleven of this code, the taxes imposed by article thirteen-a of said chapter and the tax imposed by article thirteen-v of said chapter.

(b) Notwithstanding any other provisions of section eleven of this article to the contrary, under no circumstance shall an exemption from the taxes imposed by article twelve-b, thirteen-a or thirteen-v, chapter eleven of this code be construed to be an exemption from the tax imposed by section eleven of this article.

(c) When coal included in the measure of the tax imposed by section eleven of this article is exempt from the tax imposed by article twelve-b, chapter eleven of this code, the tax imposed by section eleven of this article shall be paid to the tax commissioner in accordance with the provisions of sections four through fourteen, inclusive, article twelve-b, chapter eleven of this code, which provisions are hereby incorporated by reference in this article.

(d) General procedure and administration.—Each and every provision of the "West Virginia Tax Procedure and Administration Act" set forth in article ten, chapter eleven of the code applies to the special tax imposed by section eleven of this article with like effect as if such act were applicable only to the special tax imposed by said section eleven and were set forth *in extenso* in this article, notwithstanding the provisions of section three of said article ten.

(e) Tax crimes and penalties.—Each and every provision of the "West Virginia Tax Crimes and Penalties Act" set forth in article nine of said chapter eleven applies to the special tax imposed by section eleven of this article with like effect as if such act were applicable only to the special tax imposed by said section eleven and set forth *in extenso* in this article, notwithstanding the provisions of section two of said article nine. 22-3-32a. Special tax on coal; clarification of imposition of tax; procedures for collection and administration of tax.

(a) It is the intent of the Legislature to clarify that from the date of its enactment, the special tax on coal imposed pursuant to the provisions of section thirty-two of this article is intended to be in addition to any other taxes imposed on every person in this state engaging in the privilege of severing, extracting, reducing to possession or producing coal for sale profit or commercial use including, but not limited to the tax imposed by section eleven of this article, the tax imposed by article twelve-b, chapter eleven of this code, the taxes imposed by article thirteen-a of said chapter and the tax imposed by article thirteen-v of said chapter.

(b) Notwithstanding any other provisions of section thirty-two of this article to the contrary, under no circumstance shall an exemption from the taxes imposed by article twelve-b, thirteen-a or thirteen-v, chapter

eleven of this code be construed to be an exemption from the tax imposed by section thirty-two of this article.

(c) When coal included in the measure of the tax imposed by section thirty-two of this article is exempt from the tax imposed by article twelve-b, chapter eleven of this code, the tax imposed by section thirty-two of this article shall be paid to the tax commissioner in accordance with the provisions of sections four through fourteen, inclusive, article twelve-b, chapter eleven of this code, which provisions are hereby incorporated by reference in this article.

The HB 3236 provides for two new sections of the West Virginia Code, designated Sections 22-3-11a and 22-3-32a. These new provisions relate to the special reclamation tax (at W. Va. Code 22-3-11), which provides revenue to the State's Special Reclamation Fund, and the special tax on coal (at W. Va. Code 22-3-32), which is used to administer the State's approved regulatory program. The preamble to HB 3236 states that the new provisions are intended to clarify that both of these taxes apply to the production of thin seam coal and provide for payment thereof. Thus, this change will result in additional revenue for the reclamation of bond forfeiture sites and for program support. The HB 3236 also provides that the special reclamation tax is subject to the West Virginia Tax Crimes and Penalties Act and the West Virginia Tax Procedure and Administration Act.

While there is no direct Federal counterpart to the clarifications provided at new W. Va. Code 22-3-11a, we find that the provision is not inconsistent with SMCRA section 509(b) and 30 CFR 800.11(e), which provide that an alternative bonding system must have available sufficient revenue to complete all reclamation obligations at any given time. The proposed revision will enable the State to meet its bond forfeiture reclamation obligations under the Special Reclamation Fund. Therefore, we find that new W. Va. Code 22-3-11a is not inconsistent with the aforementioned Federal requirements and can be approved.

Further, there is no direct Federal counterpart to the clarifications provided at new W. Va. Code 22-3-32a. However, section 503(a)(3) of SMCRA, concerning State program approval, provides that a State regulatory authority must have, among other things, sufficient funding to enable the State to regulate surface coal mining and reclamation operations in accordance with the requirements of SMCRA. We find that the revisions provided at new W. Va. Code 22-3-32a are not inconsistent with SMCRA section 503(a)(3) and can be approved.

#### 5. CSR 38-2-14.14.g.2.A.6 Removal of Erosion Protection Zone (EPZ)

This amendment consists of information provided by the WVDEP, including a draft memorandum, to support its assertion that OSM should reverse its previous disapproval of language concerning EPZ at CSR 38-2-14.14.g.2.A.6. In its submittal concerning this provision, the WVDEP stated that in a letter to OSM dated March 8, 2005 (the letter's date was March 9, 2005, Administrative Record Number WV-1418), the State had explained its position on EPZ and the circumstances when the EPZ could be left in place as a permanent structure. The WVDEP's March 9, 2005, letter was in response to OSM's disapproval of language concerning EPZ at CSR 38-2-14.14.g.2.A.6 that was part of a proposed amendment submitted to OSM by letter dated March 18, 2003 (Administrative Record Number WV-1352). The language was not approved, WVDEP stated, based on the lack of U.S. Environmental Protection Agency (EPA) concurrence with the State's proposed language. Background information on OSM's previous disapproval of language concerning EPZ at CSR 38-2-14.14.g.2.A.6 is presented below.

Under the Federal regulations at 30 CFR 732.17(h)(11)(ii), OSM is required to obtain written concurrence from EPA for proposed provisions of a State program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). On April 1, 2003, we asked EPA for concurrence and comments on the proposed amendments that were submitted to OSM by letter dated March 18, 2003 (Administrative Record Number WV-1355).

The EPA responded by letter dated June 13, 2003, (Administrative Record Number WV-1363). The EPA stated that it reviewed the proposed revisions and had concerns about the requirement of EPZ associated with single-lift valley fills at CSR 38-2-14.14.g.1 (Durable Rock Fills).

OSM published its decision on a proposed West Virginia program amendment that addressed, in part, the addition of new language concerning EPZ related to durable rock fills on July 7, 2003 (see 68 FR 40157, finding 19, pages 40161 and 40162). In that finding, OSM did not approve language at CSR 38-2-14.14.g.2.A.6 that would have allowed the permanent retention of EPZ if approval were granted in the reclamation plan. In particular, OSM did not approve the words "Unless

otherwise approved in the reclamation plan" because approval would have been inconsistent with EPA's conditional concurrence to remove fill material associated with EPZs from streams and to reconstruct the stream channels after mining.

The EPA stated that it understands that an EPZ is a buffer zone between the toe of a single lift valley fill and its downstream sedimentation pond. It consists of a wide and low fill, revegetated to dissipate runoff energy from the valley fill face and prevent pond overloading during severe storm periods. The EPA stated that a single lift fill is particularly subject to erosion, since it is constructed in a downstream direction toward the pond with no reclamation or revegetation of the fill face until completion of mining.

The EPA stated that it was concerned that EPZs may result in permanent stream fills after completion of mining. According to CSR 38-2-14.14.g.2.A.1, the EPA stated, a 250-foot long EPZ would be required for a 500-foot high valley fill, which, EPA stated, is not unusual in southern West Virginia. Although Section 14.14.g.2.A.6 requires EPZ removal, regrading, and revegetating after mining, EPA stated, it does not appear to include the removal of the stream fill associated with the EPZ or reconstruction of the stream channel. An alternative valley fill design, which appears more environmentally acceptable, EPA stated, is also indicated in Section 14.14.g.1 and further described in Section 14.14.g.3. The EPA stated that this involves starting valley fill construction from the toe and proceeding upstream in multiple lifts (layers) of 100 feet or less in thickness. The EPA stated that the face of each lift would be reclaimed and revegetated before starting the next lift. The toe of the first lift would be at the sedimentation pond, the EPA stated, and an EPZ would not be necessary due to better erosion control features.

The EPA stated that it concurred with the proposed revisions submitted by the State on March 18, 2003, under the condition that a requirement be included to remove stream fills associated with EPZs after mining and reconstruct the stream channels. The EPA stated that it should also be noted that stream filling during EPZ construction requires authorization under section 404 of the Clean Water Act, administered by the U.S. Army Corps of Engineers. Considering the high erosion potential of single-lift valley fills, the EPA stated, it (EPA) recommends that the single lift method be replaced by the more environmentally favorable approach of

starting at the toe and proceeding upwards in multiple lifts. The EPA stated that it will likely make this recommendation for any proposed single lift fill coming before it for section 404 review.

In response to EPA's conditional concurrence, OSM did not approve the words "Unless otherwise approved in the reclamation plan" at CSR 38-2-14.14.g.2.A.6 because leaving an EPZ in place would be inconsistent with EPA's conditional concurrence to remove stream fills associated with EPZs and to reconstruct the stream channels after mining (see the July 7, 2003, **Federal Register**, Finding 19, pages 40161 and 40162). In addition, OSM approved CSR 38-2-14.14.g.2.A.6 only to the extent that following mining, all stream fills associated with EPZs will be removed and the stream channels shall be reconstructed.

In its June 13, 2005, submittal letter, the WVDEP requested that OSM reconsider its decision to disapprove certain language at CSR 38-2-14.14.g.2.A.6 (Administrative Record Number WV-1421). In support of its request, the WVDEP stated that following the submittal of its March 9, 2005, letter, discussion ensued among representatives of WVDEP, EPA, and OSM. The WVDEP stated that EPA expressed concern that the EPZ rule did not reference section 404 of the Clean Water Act and that it wasn't clear that the operator had to demonstrate leaving the EPZ would provide benefits to or protection to the environment and/or the public. The WVDEP stated that it reiterated that the present wording of the State rule requires removal and/or reclamation of EPZ areas and restoration of the stream, unless otherwise approved by the reclamation plan. The WVDEP further stated that the circumstances under which such areas could become permanent would be at the discretion of WVDEP, with a demonstration by the applicant to the satisfaction of the Secretary of the WVDEP that the environment/public benefits outweigh any anticipated impacts.

The WVDEP also stated that in addition to the mining requirements imposed by WVDEP, such construction is subject to provisions of section 404 of the Clean Water Act and under the ultimate jurisdiction of the U.S. Army Corps of Engineers and EPA. The WVDEP also submitted a draft memorandum to its staff for OSM's consideration in support of its request that OSM reconsider its previous decision on the EPZ provision at CSR 38-2-14.14.g.2.A.6. The draft

memorandum submitted by the WVDEP is quoted below:

#### Interoffice Memorandum

To: All DMR Employees.

From: Randy Huffman, Director.

Date:

Subject: Durable rock fills with erosion protection zone.

38-2-14.14.g.2.A.6 requires removal and reclamation of erosion protection zone, and restoration of the stream and does provide that erosion protection zone may become permanent structure approved in the reclamation plan. It states:

*"Unless otherwise approved in the reclamation plan, the erosion protection zone shall be removed and the area upon which it was located shall be regraded and revegetated in accordance with the reclamation plan."*

For an erosion protection zone to become a permanent structure, the applicant must provide a demonstration to the satisfaction of the Secretary that leaving the erosion protection zone provides benefits to or protection to the environment and/or public. Such benefits or protection include, but are not limited to; runoff attenuation, wildlife and wetland enhancement, and stream scour protection. This approval will be contingent upon the applicant obtaining all other necessary permits and/or approvals.

On November 22, 2005, EPA acknowledged that since it provided its conditional concurrence on June 13, 2003, discussions with WVDEP and OSM provided it additional information which lessened its concern about EPZs (Administrative Record Number WV-1449). EPA further stated that it was emphasized that EPZs would be left in place only where environmental/public benefits would outweigh any anticipated impacts and that EPZ construction would be subject to CWA section 404 under the jurisdiction of the U.S. Army Corps of Engineers and EPA. EPA concluded that these requirements were reiterated in the State's submission to OSM. With this understanding, EPA agreed to remove its condition for concurrence with CSR 38-2-14.14.g.2.A.6. Therefore, we are approving the provision at CSR 38-2-14.14.g.2.A.6 which provides, "Unless otherwise approved in the reclamation plan," and we find that the disapproval, which is codified at 30 CFR 948.12(g), has been fully resolved.

#### 6. State Water Rights and Replacement Policy

WVDEP submitted a policy dated August 1995 regarding water rights and replacement (Administrative Record Number WV-1425). As noted in the policy, its purpose is to define the time periods for providing temporary and permanent water replacement. This policy is to supplement the proposed regulatory revisions that the State made

at CSR 38-2-14.5(h). The policy is in response to our Part 732 notification dated June 7, 1996, regarding subsidence and water replacement (Administrative Record Number WV-1037(a)). The Federal regulations at 30 CFR 817.41(j) require prompt replacement of a residential water supply that is contaminated, diminished, or interrupted by underground mining activities conducted after October 24, 1992. We advised WVDEP that its program lacked guidance concerning timing of water supply replacement. A proposed statutory revision that was intended to address this issue failed to pass the Legislature. The policy is intended to satisfy the Federal requirement by setting forth the time periods within the State program for providing temporary and permanent water replacement. The policy provides as follows:

WV Division of Environmental Protection  
Office of Mining and Reclamation  
Inspection and Enforcement

Series: 14

Pg. No: 1 of 1

Revised: 8-95

Subject: Water Rights and Replacement.

1. Purpose: Define time periods as they relate to water rights and replacement.

2. Definitions:

3. Legal Authority: 22-3-24

4. Policy/Procedures: Upon receipt of notification that a water supply was adversely affected by mining, the permittee shall provide drinking water to the user within twenty-four (24) hours.

Within seventy two (72) hours, the permittee shall have the user hooked up to a temporary water supply. The temporary supply shall be hooked up to existing plumbing, if any, to allow the user to conduct all normal activities associated with domestic water use. This includes drinking, cooking, bathing, washing, non commercial farming, and gardening.

Within thirty (30) days of notification, the permittee shall begin activities to establish a permanent water supply or submit a proposal to the WVDEP outlining the measures and timetables to be utilized in establishing a permanent supply. The total elapsed time from notification to permanent supply hook-up cannot exceed two (2) years.

The permittee is responsible for payment of operation and maintenance costs on a replacement water supply in excess of reasonable and customary delivery costs that the user incurred.

Upon agreement by the permittee and the user (owner), the obligation to pay such operation and maintenance costs may be satisfied by a one-time lump sum amount agreed to by the permittee and the water supply user (owner).

The Federal provision at 30 CFR 817.41(j) was approved on March 31, 1995 (60 FR 16722, 16749). In the preamble to that approval, OSM provided the following guidance

concerning the meaning of the term "prompt replacement" that was intended to assist regulatory authorities in deciding if water supplies have been "promptly" replaced:

OSM believes that prompt replacement should typically provide: emergency replacement, temporary replacement, and permanent replacement of a water supply. Upon notification that a user's water supply was adversely impacted by mining, the permittee should reasonably provide drinking water to the user within 48 hours of such notification. Within two weeks of notification, the permittee should have the user hooked up to a temporary water supply. The temporary water supply should be connected to the existing plumbing, if any, and allow the user to conduct all normal domestic usage such as drinking, cooking, bathing, and washing. Within two years of notification, the permittee should connect the user to a satisfactory permanent water supply.

We find that West Virginia's Water Rights and Replacement Policy dated August 1995 is consistent with the Federal guidelines concerning the "prompt replacement" of water supply quoted above. The State policy provides for emergency, temporary, and permanent replacement of a water supply as does the Federal guidance. The State's policy also provides reasonable timeframes for replacement that are consistent with the Federal guidance. We find that the provision of the State's policy which provides that the permittee is responsible for payment of operation and maintenance costs on a replacement water supply in excess of reasonable and customary delivery costs that the user incurred is consistent with the Federal definition of "replacement of water supply" at 30 CFR 701.5. We also find that the State's policy provision which provides that upon agreement by the permittee and the user (owner), the obligation to pay such operation and maintenance costs may be satisfied by a one-time lump sum amount agreed to by the permittee and the water supply user (owner) is consistent with the Federal definition of "replacement of water supply" at 30 CFR 701.5, Subsection (a). Therefore, we find that the State's Water Rights and Replacement Policy is consistent with the Federal regulations at 30 CFR 817.41(j) concerning the prompt replacement of water supply, and it can be approved.

#### 7. Bond Release Certification

The State submitted the Permittee's Request for Release Form dated March 2005 (Administrative Record Number WV-1424). The form was being submitted in response to our Part 732 notification dated July 22, 1997

(Administrative Record Number WV-1071). In that letter, we advised the State that the Federal regulations at 30 CFR 800.40(a)(3) were amended to require that each application for bond release must include a written, notarized statement by the permittee affirming that all applicable reclamation requirements specified in the permit have been completed. We notified WVDEP that the State regulations at CSR 38-2-12.2 did not contain such a requirement. In response, the State revised its bond release form by adding new item Number 11, which requires that all copies of the Permittee's Request For Release Form include the following: "11. A notarized statement by the permittee that all applicable reclamation requirements specified in the permit have been completed." Therefore, we find that, with the addition, the revised State form dated March 2005 is consistent with the Federal regulations at 30 CFR 800.40(a)(3), and it can be approved.

#### IV. Summary and Disposition of Comments

##### Public Comments

On August 26, 2005, we published a **Federal Register** notice and asked for public comments on the amendment (Administrative Record Number WV-1429). In addition, on September 9, 2005, we solicited comments from various interest groups within the State on the proposed amendment (Administrative Record Number WV-1433). At the request of the West Virginia Coal Association (WVCA), the comment period was extended for five days and closed on September 30, 2005 (Administrative Record Number WV-1437). We received comments from the WVCA (Administrative Record Number WV-1445).

1. House Bill 3033. The WVCA requested that OSM suspend further review and approval of the provisions that OSM cited in the proposed rule notice published on August 26, 2005. The WVCA stated that OSM's review of the amendment at W. Va. Code 22-3-11(h)(2)(A) and 22-3-11(h)(2)(B) is inappropriate, because the changes do not present substantive changes to the West Virginia regulatory program. As we stated above at "Section II. Submission of the Amendment", we have determined that the amendment to W. Va. Code 22-3-11(h)(2)(A) is non-substantive and, therefore, does not require OSM's approval. Therefore, we are not addressing WVCA's comments regarding W. Va. Code 22-3-11(h)(2)(A).

The WVCA asserted that OSM's decision to review and approve

language at W. Va. Code 22-3-11(H)(2)(B) is inappropriate for the same reasons that OSM stated that it would not review other provisions at W. Va. Code 22-3-11:

These new provisions only direct the Secretary of WVDEP to conduct various studies and authorize the Secretary of WVDEP to propose legislative rules as appropriate. These provisions do not modify any duties or functions under the approved West Virginia program and do not, therefore, require OSM's approval.

The WVCA further stated that while the amendment does modify the duties and functions of the Secretary of WVDEP, it requires only studies and informal review. The WVCA asserted that these studies and reviews do not represent substantive changes to the approved West Virginia program. Such review and approval, the WVCA asserted, "equates to federal interference into the inter-workings of the approved state program."

We disagree. As we discussed above at Finding 3, on May 29, 2002 (67 FR 37610), OSM approved amendments to the West Virginia program that satisfied a required program amendment which required the State to eliminate the deficit in the State's alternative bonding system (ABS) and to ensure that sufficient money will be available to complete reclamation, including the treatment of polluted water, at all existing and future bond forfeiture sites (Administrative Record Number WV-1308). An important component of OSM's approval of that amendment was the fact that West Virginia had previously established, at W. Va. Code 22-1-17, the Special Reclamation Fund Advisory Council (Advisory Council) to oversee the State's ABS (see OSM's approval in the December 28, 2001, **Federal Register** notice at 66 FR 67446). One of the duties of the Advisory Council is to study the effectiveness, efficiency and financial stability of the Special Reclamation Fund. Another duty of the Advisory Council, as provided by W. Va. Code 22-1-17(f)(5), is to contract with a qualified actuary to determine the Fund's fiscal soundness. Following the initial actuarial study, additional studies are to be conducted every four years.

As drafted, it appears that the actuarial studies required under new Subdivision 22-3-11(h)(2)(B) will be in addition to those performed under contract of the Advisory Council, because the State has not submitted any amendment to the statutory requirements of the Advisory Council at W. Va. Code 22-1-17. However, State officials acknowledge that the actuarial studies to be conducted under

Subdivision 22-3-11(h)(2)(B) are to be done in lieu of those required under Subdivision 22-1-17(f)(5). The State intends to submit an amendment in the future that will correct this oversight. Consequently, the amendment at Subdivision 22-3-11(h)(2)(B) appears to represent a significant and substantive change that may greatly assist the WVDEP in assessing the financial stability of the State's ABS.

At Finding 3 above, we found that the new requirements at Subdivision 22-3-11(h)(2)(B) are consistent with the bases of our previous approvals of State program amendments regarding the financial stability of the State's Special Reclamation Fund. The bi-annual actuarial studies and the annual informal reviews of the Special Reclamation Fund should assist the State in ensuring that sufficient money will be available to complete land reclamation and water treatment at existing and future bond forfeiture sites within the State, a requirement that parallels the criterion for approval of a State's alternative bonding system under 30 CFR 800.11(e)(1).

2. Revisions to CSR 38-2-7.5.j.3.B. This provision concerns the recovery and use of soil, and the State is deleting language that provides as follows:

\* \* \* except for those areas with a slope of at least 50%, and other areas from which the applicant affirmatively demonstrates and the Secretary finds that soil cannot reasonably be recovered.

As we discuss above at Finding 2.kk, this revision is intended to comply with the required program amendment codified in the Federal regulations at 30 CFR 948.16 (kkkkk). The requirement at 30 CFR 948.16 (kkkkk) provides that CSR 38-2-7.5.j.3.B must be amended by deleting the phrase, "except for those areas with a slope of at least 50%," and by deleting the phrase, "and other areas from which the applicant affirmatively demonstrates and the Director of the WVDEP finds that soil cannot reasonably be recovered."

The WVCA requested that OSM reconsider the required amendment codified in the Federal regulations at 30 CFR 948.16(kkkkk). The WVCA stated that the State's rule language should be retained because of its importance to serious safety concerns on certain areas, especially on steep slopes. The WVCA also stated that a similar provision concerning an exception for areas with a slope of at least 50%, at CSR 38-2-7.4.b.1.D.2, was approved by OSM after it had reconsidered the required amendment at 30 CFR 948.16(vvvv), which had required the deletion of the 50% provision at Subsection 7.4.b.1.D.2.

The WVCA asserted that the same reasoning relied upon by OSM in its reconsideration of the 50% provision at CSR 38-2-7.4.b.1.D.2 applies with respect to the proposed revision at CSR 38-2-7.5.j.3.B currently at issue. Further, WVCA stated, OSM has admitted in past rulemaking that the Federal regulations contain no counterparts to CSR 38-2-7.5 concerning Homesteading as a post-mining land use. Therefore, WVCA asserted that OSM's concerns with respect to this section of the rules are misplaced and fall outside of OSM's statutorily-granted authority of review and approval of State program amendments.

We disagree. We reviewed the required program amendment codified in the Federal regulations at 30 CFR 948.16(kkkkk) and we believe the State's former rule language remains a problem for the following reasons. The State's provisions concerning the 50-percent slope and related provisions for Commercial Forestry, at CSR 38-2-7.4.b.1.D.2, differ significantly from those for Homesteading, at CSR 38-2-7.5.j.3.B, such that the rationale we used to approve the 50-percent provision in the Commercial Forestry rules is not applicable to the Homesteading rules. Specifically, concerning the Commercial Forestry rule, OSM asserted that while the topsoil might not be separately recovered on slopes over 50 percent, the soil would be recovered with the underlying brown sandstone that is required to be recovered by related provisions at CSR 38-2-7.4.b.1.D.3, D.4., and D.5. However, the 50-percent slope provision and related provisions in the Homesteading rule do not lend themselves to that same rationale. The Homesteading provision at CSR 38-2-7.5.j.3.D provides that if the brown sandstone from within 10 feet of the soil surface cannot reasonably be recovered, "brown sandstone taken from below 10 feet of the soil from anywhere in the permit area may be substituted." This appears to mean that the upper 10 feet of material together with the topsoil may not be saved, and material below the 10-foot level from anywhere on the permit area could be substituted for it. This still renders the provision less effective than the Federal regulations at 30 CFR 816.22 concerning topsoil and subsoil, because the substitution of other material for topsoil may be based upon criteria other than quality of the substitute material.

We are also concerned with the language at CSR 38-2-7.5.j.3.B that would exempt "other areas from which the applicant affirmatively demonstrates and the Secretary finds that soil cannot

reasonably be recovered." This language also appears to render the provision less effective than the Federal requirements. When approving the 50-percent slope provision for Commercial Forestry, we recognized concern about the safety of trying to separately recover soil from other material within the top 10 feet on such steep slopes. The safety issue does not seem applicable to the "other areas" provision for Homesteading. In addition, the phrase "cannot reasonably be recovered" is not in the approved Commercial Forestry rules. Therefore, as noted above at Finding 3, we are approving the State's deletion of the language that concerns the exception for 50-percent slopes and other areas where soil cannot reasonably be recovered.

3. Erosion Protection Zone CSR 38-2-14.14.g.2.A.6. The WVCA stated that it supports the WVDEP's position that OSM should reconsider its initial disapproval of language regarding the Erosion Protection Zone (EPZ) related to durable rock fills. The WVCA stated that it believes that the information supplied by WVDEP should be sufficient to address the concerns of both OSM and EPA. The WVCA also stated that it also maintains that the ability to leave the EPZ in place after fill construction is essential to overall regulatory success of the revised valley fill construction rules. The WVCA also stated that OSM's decision to review and approve provisions of State regulations that have no parallel in the Federal program has jeopardized the overall success of new State regulations.

As discussed above under Finding 5, EPA reconsidered its earlier decision regarding EPZs. EPA stated that recent discussions with WVDEP and OSM provided it additional information which lessened its concern about EPZs. EPA noted that EPZs would be left in place only where environmental/public benefits would outweigh any anticipated impacts and that EPZ construction would be subject to CWA section 404 under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Because these requirements were reiterated in the State's submission to OSM, EPA agreed to remove its condition for concurrence with CSR 38-2-14.14.g.2.A.6.

#### *Federal Agency Comments*

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the West Virginia program (Administrative Record Number WV-1427). We received comments from the U.S. Department of Labor, Mine Safety and Health

Administration (MSHA) (Administrative Record Number WV-1435). MSHA stated that its review of the State's amendments revealed that only those amendments which addressed impoundment design/construction and blasting practices were relevant to miners' health and safety. MSHA stated that it had determined that there was no inconsistency in those areas of the State's amendment with MSHA's regulations.

The Department of the Interior, National Park Service (NPS) responded with comments (Administrative Record Number WV-1434). The NPS commented on the amendment to CSR 38-2-7.4.b.1.A.3(b), and the phrase "an approved geologist shall create a certified geology map showing \* \* \*." We note that this language is currently part of the approved West Virginia program, was not amended, and we did not request comment on that language. Therefore, we will not address that comment.

The NPS commented on CSR 38-2-7.4.b.1.B.1, and the phrase " \* \* \* that a professional soil scientist employed by the Secretary \* \* \*" and again at CSR 38-2-7.4.b.1.I.1, and the phrase " \* \* \* a professional soil scientist shall certify \* \* \*." The NPS stated that soils scientists also come with national or State certifications. Though West Virginia does not have a certification program for soils scientists, the West Virginia Association of Professional Soils Scientists (WVAPSS) does have a registry of certified "Professional Soils Scientists." The NPS recommended changing the language to specifically reflect a certified professional status for performing soils analysis. The NPS also stated that the proposed revisions call for the use of registered professional foresters or registered professional engineers. By requiring certified soils scientists and geologists, the NPS stated, the State would be creating a coherent and professional image throughout the WVDEP regulatory program.

In response, we note that there is no specific Federal counterpart to the language at CSR 38-2-7.4.b.1.B.1. The intent of this provision is to require that a professional soil scientist employed by the Secretary of the WVDEP review and field verify the soil slope and sandstone mapping information provided in a commercial forestry and forestry reclamation plan. The amendment merely deletes the word "certified" because West Virginia does not have a State certification system for soil scientists. As we noted above in Finding 2.o, we find that as amended, CSR 38-2-7.4.b.1.B.1 is not inconsistent with the requirements of SMCRA at section

515(c)(3)(B) and the Federal regulations at 30 CFR 785.14(c) concerning mountaintop removal mining operations. However, as suggested by NPS, and though not mandatory, we did encourage the State to require the use of a registry such as the WVAPSS or a similar one.

The U.S. Department of Agriculture, Forest Service responded with comments (Administrative Record Number WV-1430). The U.S. Forest Service urged that the amendment contain stronger language to restrict using any seed or mulch that is not certified as weed free. In response, the U.S. Forest Service's comments concern provisions that were not amended by the State. Therefore, we will not address those comments here.

The U.S. Forest Service also encouraged the involvement of the West Virginia Division of Forestry to provide the WVDEP evidence of meeting the various standards of success when pertaining to forestry-related items. For example, the U.S. Forest Service stated that CSR 38-2-9.3.e, concerning final inspection for final bond release, could be re-written to require that, "[u]pon receipt of such request, the WV Division of Forestry shall conduct an inspection to verify the final vegetative evaluation for the Secretary." The U.S. Forest Service stated that involving the WV Division of Forestry for final inspections and certification for the Secretary of the WVDEP assures that an impartial entity with both the expertise and the public trust carries out that assignment rather than continuing to rely on a forestry consultant. In response, while this recommendation by the U.S. Forest Service has merit, the requirement at CSR 38-2-9.3.e that the Secretary of the WVDEP conduct the inspection for final bond release is no less effective than the Phase III bond release requirements in the Federal regulations at 30 CFR 800.40(c)(3). In addition, WVDEP has already solicited and received approval from the WV Division of Forestry and the Wildlife Resources Section of the Division of Natural Resources with regard to the State's stocking rates and planting arrangements as required by 30 CFR 816.116(b)(3)(i).

#### *Environmental Protection Agency (EPA) Concurrence and Comments*

Under 30 CFR 732.17(h)(11) (ii), we are required to obtain written concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

By letter dated August 2, 2005, we requested comments and the concurrence from EPA on the State's program amendments (Administrative Record Number WV-1426). EPA responded by letter dated November 22, 2005 (Administrative Record Number WV-1449) and further clarified its response on December 13, 2005 (Administrative Record Number WV-1452).

On November 22, 2005, EPA advised us that it had reviewed the State's proposed revisions that we had submitted, and it had not identified any apparent inconsistencies with CWA, Clean Air Act, or other statutes and regulations under EPA's jurisdiction. EPA, therefore, concurred with the proposed State revisions pertaining to environmental standards.

EPA also provided the following comments on the proposed revisions.

#### 1. Environmental Protection Zones—CSR 38-2-14.14.g.2.A.6

According to EPA, this proposed revision allows placement of erosion protection zones (EPZs) between valley fills and sedimentation ponds. EPZs consist of low, wide fills up to a few hundred feet long depending on the heights of the valley fills. Their purpose would be to slow down storm runoff from valley fills, prior to completion of reclamation and revegetation, in order to prevent scouring of sedimentation ponds.

EPA stated that on June 13, 2003, it provided conditional concurrence with this same proposed revision. Its concern was that the stream fills associated with EPZs would remain permanently. EPA's condition for concurrence required that the stream fills would be removed and stream channel reconstructed after completion of mining and reclamation.

According to EPA, since then, information received during its discussions with WVDEP and OSM lessened its concern about EPZs. EPA acknowledged that EPZs would be left in place only where environmental/public benefits would outweigh any anticipated impacts and that EPZ construction would be subject to CWA section 404 under the jurisdiction of the U.S. Army Corps of Engineers and EPA. According to EPA, these requirements were reiterated in a June 13, 2005, letter from WVDEP to OSM, a copy of which was included in documents submitted to EPA on August 2, 2005. It was with this understanding that EPA removed its condition for concurrence with CSR 38-2-14.14.g.2.A.6.

As discussed above under Finding 5, OSM is now approving, with EPA's concurrence, the provision at CSR 38-

2–14.14.g.2.A.6 which provides, “Unless otherwise approved in the reclamation plan.” In the future, EPZs will be left in place only where environmental/public benefits will outweigh any anticipated impacts, and EPZ construction will be subject to CWA section 404 under the jurisdiction of EPA and the U.S. Army Corps of Engineers. WVDEP’s draft EPZ policy identified under Finding 5 further describes the type of benefits that must be demonstrated before an EPZ can become a permanent structure.

## 2. Alternative Bonding Requirements—House Bill 3033

EPA acknowledged that House Bill 3033 proposes feasibility studies for alternative bonding approaches, including a possible separate funding mechanism for water treatment. EPA said that it supports all efforts toward finding the most effective approaches for preventing drainage problems after mine closure. To prevent perpetual postmining drainage problems, EPA stated that it is important to have a well funded bonding program to provide for postmining contingencies. Also important, is an effective permit review program which identifies acid-producing potentials of proposed mining sites and denies permits where it is determined that treatment of postmine drainage would likely be necessary.

OSM agrees that an alternative bonding system must provide sufficient revenue to complete the reclamation plans for any sites that may be in default at any time as required by 30 CFR 800.11(e). As discussed above, we concluded that the requirement for the State to pursue cost effective alternative water treatment strategies does not represent a substantive change to the State program, and it has no immediate effect on its implementation. Furthermore, we concluded that if the State does identify any needed regulatory revisions, such changes will be subject to further review and approval. Therefore, OSM determined that the proposed State revision at W.Va. Code 22–3–11(h)(2)(A) regarding alternative water treatment strategies does not require our approval.

## 3. Good Samaritan Act—House Bill 2333

EPA stated that the intent of House Bill 2333 is to increase incentives for non-profit volunteer groups to reclaim abandoned mines and abate mine drainage. According to EPA, the bill is intended to provide immunity from civil liability, under the laws of West Virginia, for injury or pollution

problems which may result from these activities. EPA said that to avoid projects which have the potentials for creating additional pollution, the bill requires WVDEP’s review and approval and a determination that the completed project would likely result in improved water quality. EPA stated that it supports volunteer programs for abating abandoned mine drainage and certainly does not want liability concerns to dissuade good faith efforts. EPA noted that its non-point source program under CWA section 319 is very active in providing funds to citizen watershed organizations for addressing these situations throughout the coal-mining states. However, to assure that this State legislation is clearly understood to accomplish its intended purpose and not to limit EPA’s jurisdiction or authority in any way, EPA requested that the following text be included in House Bill 2333, “Nothing herein is intended to abrogate the jurisdiction or authority of the United States Environmental Protection Agency.”

In response, we notified EPA Region III, that apparently there was some concern about the intended purpose of the State’s legislation and that it could limit EPA’s jurisdiction or authority. We noted that the State’s statutory provisions cannot be amended without further legislative action. EPA responded on December 13, 2005, and stated that it was not their intention that their recommendation should be interpreted as a condition of concurrence. EPA acknowledged that it did not wish to delay implementation of this provision and rather than requiring a statutory change, it concurred with OSM’s alternative approach (Administrative Record Number WV–1452).

As discussed above under Finding 1, EPA has launched a Good Samaritan Initiative, but it does not have these requirements under either the CWA or its implementing regulations. Although EPA supports the proposed State requirements, it needed assurance that the State provisions would not limit its authority. Therefore, as acknowledged in Finding 1, OSM approved the State’s Environmental Good Samaritan Act at W.Va. Code 22–27–1 *et seq.* with the understanding that none of the provisions therein can be interpreted now or in the future as abrogating the authority or jurisdiction of the EPA under the CWA.

## V. OSM’s Decision

Based on the above findings, we are approving, except as noted below, the program amendment that West Virginia sent us on June 13, 2005, and that was

modified on August 23, 2005. In addition, the following required program amendments are satisfied and can be removed: 30 CFR 948.16(a), (sss), (www), (fffff), (iiiiii), (jjjjj), (kkkkk), (lllll), (ooooo), (ppppp), and (rrrrr).

W.Va. Code 22–27–1 *et seq.* (the State’s Environmental Good Samaritan Act) is only approved to the extent that none of the provisions therein can be interpreted as abrogating the authority or jurisdiction of the EPA.

CSR 38–2–3.29.a is approved with the understanding that the State will insert a period after “IBR” and delete the words, “or where it has been demonstrated to the satisfaction of the Secretary that limited coal removal on areas immediately adjacent to the existing permit.”

CSR 38–2–5.4.b.10 is approved with the understanding that it provides for a 1.3 minimum static safety factor for all other impoundments that do not meet the size or other criteria of 30 CFR 77.216(a) or are not impoundments that meet the Class B or C criteria for dams in TR–60, and are not coal mine waste impounding structures.

CSR 38–2–5.4.b.12 is approved with the understanding that the reference to CSR 38–2–5.4.b.10 in the proposed provision means that foundation investigations and any necessary laboratory testing of foundation materials must be performed for impoundments that meet the Class B or C criteria for dams at TR–60, the size or other criteria of MSHA at 30 CFR 77.216(a), or the West Virginia Dam Control Act.

CSR 38–2–5.4.c remains approved with the understanding that stability analyses will be conducted for all structures that meet the Class B or C criteria for dams in TR–60 as required by 30 CFR 780.25(f).

CSR 38–2–5.4.d.4 is approved with the understanding that design plans for impoundments that meet the Class B or C criteria for dams in TR–60 and meet or exceed the size or other criteria of MSHA at 30 CFR 77.216(a) will be prepared by, or under the direction of, and certified by a registered professional engineer as provided by 30 CFR 780.25(a)(2). Also, CSR 38–2–5.4.d.3 is approved with the understanding that the design plans for all other structures not included in Subsections 3.6.h.5 or 5.4.d.4 will be prepared by, or under the direction of, and certified by a registered professional engineer or licensed land surveyor as provided by 30 CFR 780.25(a)(3). Subsection 38–2–5.4 is approved with the understanding that the design plan requirements at Subsection 3.6.h apply to those impoundments that meet the Class B or

C criteria for dams in TR-60 or meet or exceed the size or other criteria of MSHA at 30 CFR 77.216(a) as provided by 30 CFR 780.25(a)(2). Subsection 5.4 to the extent that the design plan requirements at Subsection 3.6.h apply to all other impoundments not identified above as provided by 30 CFR 780.25(a)(3).

At CSR 38-2-5.4.e.1, the words "Impoundments meeting" are not approved.

CSR 38-2-7.4.b.1.D.11 is approved with the understanding that sufficient forestry mine soil shall be placed on valley fill faces to sustain vegetation and support the approved postmining land use.

At CSR 38-2-7.4.b.1.J.1(c), the deletion of the following words is not approved: "surface material shall be composed of soil and the materials described in subparagraph 7.4.b.1.D."

CSR 38-2-9.3.d and 9.3.e are approved with the understanding that the statistically valid sampling technique to be used must receive the approval of the regulatory authority, and it will be a part of the approved permit application.

At CSR 38-2-14.14.g.2.A.6, the language which provides "Unless otherwise approved in the reclamation plan," is approved and the disapproval codified at 30 CFR 948.12(g) has been fully resolved.

To implement this decision, we are amending the Federal regulations at 30 CFR part 948, which codify decisions concerning the West Virginia program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this rule effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

## VI. Procedural Determinations

### *Executive Order 12630—Takings*

The provisions in the rule based on counterpart Federal regulations do not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulations. The revisions made at the initiative of the State that do not have Federal counterparts have also been reviewed and a determination made that they do not have takings implications. This determination is based on the fact that the provisions are administrative and procedural in nature and are not

expected to have a substantive effect on the regulated industry.

### *Executive Order 12866—Regulatory Planning and Review*

This rule is exempt from review by the Office of Management and Budget under Executive Order 12866.

### *Executive Order 12988—Civil Justice Reform*

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

### *Executive Order 13132—Federalism*

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA.

### *Executive Order 13175—Consultation and Coordination With Indian Tribal Governments*

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and

Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. The basis for this determination is that our decision is on a State regulatory program and does not involve Federal regulations involving Indian lands.

### *Executive Order 13211—Regulations That Significantly Affect The Supply, Distribution, or Use of Energy*

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

### *National Environmental Policy Act*

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

### *Paperwork Reduction Act*

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

### *Regulatory Flexibility Act*

The Department of the Interior certifies that a portion of the provisions in this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because they are based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations. The Department of the Interior also certifies that the provisions in this rule that are not based upon counterpart Federal regulations will not have a significant economic impact on a substantial

number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This determination is based on the fact that the provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

*Small Business Regulatory Enforcement Fairness Act*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of \$100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that a portion of the State provisions are based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule. For the portion of the State provisions that is not based upon counterpart Federal regulations, this determination is based upon the fact that the State provisions are

administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

*Unfunded Mandates*

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that a portion of the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate. For the portion of the State provisions that is not based upon counterpart Federal regulations, this determination is based upon the fact that the State provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

**List of Subjects in 30 CFR Part 948**

Intergovernmental relations, Surface mining, Underground mining.

Dated: January 12, 2006.

**Michael K. Robinson,**  
*Acting Regional Director, Appalachian Region.*

■ For the reasons set out in the preamble, 30 CFR part 948 is amended as set forth below:

**PART 948—WEST VIRGINIA**

■ 1. The authority citation for part 948 continues to read as follows:

*Authority:* 30 U.S.C. 1201 *et seq.*

■ 2. Section 948.12 is amended by removing and reserving paragraph (g) and adding new paragraph (i) to read as follows.

**§ 948.12 State statutory, regulatory, and proposed program amendment provisions not approved.**

\* \* \* \* \*

(i) We are not approving the following provisions of the proposed program amendment that West Virginia submitted on June 13, 2005, and modified on August 23, 2005:

(1) At CSR 38–2–5.4.e.1, the words “Impoundments meeting.”

(2) At CSR 38–2–7.4.b.1.J.1(c), the deletion of the words “surface material shall be composed of soil and the materials described in subparagraph 7.4.b.1.D.”

■ 3. Section 948.15 is amended by adding a new entry to the table in chronological order by “Date of publication of final rule” to read as follows:

**§ 948.15 Approval of West Virginia regulatory program amendments.**

\* \* \* \* \*

Original amendment submission date	Date of publication of final rule	Citation/description
* * * * * June 13, 2005, and modified on August 23, 2005.	* * * * * March 2, 2006 .....	* * * * * W.Va. Code 22–3–11(h)(2)(B); 11a; 32a; 22–27–1 through 12. CSR 38–2–2.92; 3.29.a; 5.4.a, b.9, b.10, b.12, c.7, d.3, d.4, e.1, f; 7.4.b.1.A.1, A.3, A.3(b), A.4, B.1, C.1, C.2, C.3, C.4, C.5, D.6, D.8, D.9, D.11, H.1, H.2, H.6, I.1, I.2, I.3, I.4, J.1; 7.5.a, b.3, i.10, j.3.A, j.3.B, j.3.E, I.4.A, o.2; 9.3.d, 9.3.e; 14.5.h, 14.14.g.2.A.6; 14.15.c.3; 20.6.d, 20.6.j. CSR 199–1–2.36a, 2.36b, 2.37; 3.3.b, 3.7; 4.8, 4.8.c, 4.8.f, 4.8.g, 4.9; Water Rights and Replacement Policy (August 1995); September 2003 MOA between WVDEP, DMR and WVDNR, Wild Resources Section; Permittee’s Request for Release form, Item 11, dated March 2005.

**§ 948.16 [Amended]**

■ 4. Section 948.16 is amended by removing and reserving paragraphs (a),

(sss), (wwww), (fffff), (iiiiii), (jjjjj),

(kkkkk), (lllll), (ooooo), (ppppp), and (rrrrr).

[FR Doc. 06–1901 Filed 3–1–06; 8:45 am]

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