program approval at 30 CFR 906.11(mm)(2); and finding No. 3, removes the conditions of program approval at 30 CFR 906.11(mm)(l) (i) and (iii) because there are no requirements for State counterparts to the Federal regulations concerning (1) costs and expenses regarding discriminatory acts and (2) the administrative review process.

The Secretary approves the rules as proposed by Colorado with the provision that they be fully promulgated in identical form to the rules submitted to and reviewed by OSM and the public.

The Federal regulations at 30 CFR Part 906.11 and 906.15, codifying decisions concerning the Colorado program, are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

VI. Procedural Determinations

1. Executive Order 12866

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

2. Executive Order 12778

The Department of the Interior has conducted the reviews required by section 2 of Executive Order 12778 (Civil Justice Reform) 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 since each such 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.

3. National Environmental Policy Act

No environmental impact statement is required for this rule since 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)).

4. 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.*).

5. Regulatory Flexibility Act

The Department of the Interior has determined that 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.*). The State submittal that is the subject of this rule is 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. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. 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.

List of Subjects in 30 CFR Part 906

Intergovernmental relations, Surface mining, Underground mining.

Dated: February 13, 1996.

Bob Armstrong,

Assistant Secretary, Land and Minerals Management.

For the reasons set out in the preamble, Title 30, chapter VII, subchapter T, part 906 of the Code of Federal Regulations is amended as set forth below:

PART 906—COLORADO

1. The authority citation for part 906 continues to read as follows:

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

§ 906.11 [Removed]

2. Section 906.11 is removed.

3. Section 906.15 is amended by adding paragraph (t) to read as follows:

§ 906.15 Approval of regulatory program amendments.

* * * * *

(t) The following rules, as submitted to OSM on November 20, 1995, are approved effective February 21, 1996:

Awarding of costs, expenses, and attorney fees incurred in seeking an award—Rule 5.03.6;

Awarding costs, expenses, and attorney fees from the Division of Minerals and Geology to administrative proceeding participants other than the permittee—Rule 5.03.6(4)(e).

[FR Doc. 96–3670 Filed 2–20–96; 8:45 am]

BILLING CODE 4310–05–M

30 CFR Part 948

West Virginia Regulatory Program

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

ACTION: Final rule; Approval of amendment.

SUMMARY: OSM is approving with certain exceptions an amendment to the West Virginia permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendment contains revisions to the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA) and the West Virginia Surface Mining Reclamation Regulations. The amendment is intended to make the West Virginia program consistent with SMCRA and the corresponding Federal regulations. Additional amendments will be required to bring the West Virginia program into full compliance with SMCRA.

The statutory revisions pertain to reorganization of the State regulatory authority, extension of the State Abandoned Mine Lands and Reclamation Act, definitions, surface mine reclamation inspector qualifications, approval to remove more than 250 tons of coal during prospecting, permit transfers, permit fees, premium payments for the Workers' Compensation Fund, Small Operator Assistance Program (SOAP), hydrologic protection, blasting schedules, preblast surveys, termination of underground mining permits, excess spoil fills, variances from approximate original contour, citizen complaint investigations, issuance of notices of violation, abatement times for notices of violation, civil penalty assessments for cessation orders that are abated within twenty-four hours, permit suspension or revocation, temporary relief, burden of proof, disclosure of ownership and control information, reinstatement of right to mine, permit renewal requirements, extensions to permitted areas, surface mining activities not subject to the Act, National Pollutant Discharge Elimination system (NPDES) permitting requirements, removal of

coal from existing waste piles, and environmental boards.

The revisions to State regulations concern applicability, definitions, ownership and control information, maps, operation plan, excess spoil disposal, new and existing structures, subsidence control plan, removal of abandoned coal waste piles, approved person, fish and wildlife resources, geologic information, transfer, assignment or sale of a permit, permit renewals and revisions, incidental boundary revisions, variances exemption for government financed highway or other construction, permit issuance, permit conditions, improvidently issued permits, haulroads, transportation and support facilities, intermittent or perennial streams, design, construction, certification, inspection and abandonment of sediment control and other water retention structures, permanent impoundments, blasting, fish and wildlife, revegetation, insurance, notice of intent to prospect, hydrologic balance, steep slope mining, inactive status approval, variance from approximate original contour, excess spoil disposal, contemporaneous reclamation, control of fugitive dust, utility installations, disposal of noncoal waste, backfilling and regrading underground mines, subsidence control, small operator assistance program, citizen actions, inspection frequencies, notices of violation, show cause orders, civil penalty determinations, civil penalty assessment procedures, civil penalty assessment rates, coal refuse certification, compaction requirements for coal refuse areas, design, construction and maintenance requirements for coal refuse impoundments, inspection, examination and reporting requirements for coal refuse impoundments, training and certification of blasters, and abandoned mine lands reclamation.

EFFECTIVE DATE: February 21, 1996. Approval dates of regulatory program amendments are listed in § 948.15(p).

FOR FURTHER INFORMATION CONTACT:

Mr. James C. Blankenship Jr., Director, Charleston Field Office, Office of Surface Mining Reclamation and Enforcement, 1027 Virginia Street East, Charleston, WV 25301, Telephone (304) 347–7158.

SUPPLEMENTARY INFORMATION:

I. Background
II. Submission of the Amendment
III. Director's Findings
IV. Summary and Disposition of Comments
V. Director's Decision
VI. Procedural Determinations

I. Background

SMCRA was passed in 1977 to address environmental and safety problems associated with coal mining. Under SMCRA, OSM works with States to ensure that coal mines are operated in a manner that protects citizens and the environment during mining, that the land is restored to beneficial use following mining, and that the effects of past mining at abandoned coal mines are mitigated.

Many coal-producing States, including West Virginia, have sought and obtained approval from the Secretary of the Interior to carry out SMCRA's requirements with their borders. In becoming the primary enforcers of SMCRA, these ''primary'' States accept a shared responsibility with OSM to achieve the goals of the Act. Such States join with OSM in a shared commitment to the protection of citizens from abusive mining practices, to be responsive to their concerns, and to allow them full access to information needed to evaluate the effects of mining on their health, safety, general welfare, and property. This commitment also recognizes the need for clear, fair, and consistently applied policies that are not unnecessarily burdensome to the coal industry—producers of an important source of our Nation's energy.

Under SMCRA, OSM sets minimum regulatory and reclamation standards. Each primacy State ensures that coal mines are operated and reclaimed in accordance with the standards in its approved State program. The States serve as the front-line authorities for implementation and enforcement of SMCRA, while OSM maintains a State performance evaluation role and provides funding and technical assistance to States to carry out their approved programs. OSM also is responsible for taking direct enforcement action in a primacy State, if needed, to protect the public in cases of imminent harm or, following appropriate notice to the State, when a State acts in an arbitrary and capricious manner in not taking needed enforcement actions required under its approved regulatory program.

Currently, there are 24 primacy states that administer and enforce regulatory programs under SMCRA. These states may amend their programs, with OSM approval, at any time so long as they remain no less effective than Federal regulatory requirements. In addition, whenever SMCRA or implementing Federal regulations are revised, OSM is required to notify the States of the changes to that they can revise their programs accordingly to remain no less effective than the Federal requirements.

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

II. Submission of the Amendment

In a series of three letters dated June 28, 1993, and July 30, 1993 (Administrative Record Nos. WV–888, WV–889 and WV–893), the West Virginia Division of Environmental Protection (WVDEP) submitted an amendment to its approved permanent regulatory program that included numerous revisions to the West Virginia Surface Coal Mining and Reclamation Act (referred to herein as ''the Act'', WVSCMRA § 22A–3–1 *et seq.*) and the West Virginia Surface Mining Reclamation Regulations (CSR § 38–2–1 *et seq.*). OSM approved the proposed revisions on durable rock fills on August 16, 1996, (60 FR 42437–42443) and the proposed revisions on bonding on October 4, 1995, (60 FR 51900–51918). The remaining proposed revisions are the subject of this notice.

The statutory revisions pertain to reorganization of the State regulatory authority, extension of the State Abandoned Mine Lands and Reclamation Act, definitions, surface mine reclamation inspector qualifications, approval to remove more than 250 tons of coal during prospecting, permit transfers, permit fees, premium payments for the Workers' Compensation Fund, SOAP, hydrologic protection, blasting schedules, preblast surveys, termination of underground mining permits, excess spoil fills, variances from approximate original contour, citizen complaint investigations, issuance of notices of violation, abatement times for notices of violation, civil penalty assessments for cessation orders that are abated within twenty-four hours, permit suspension or revocation, temporary relief, burden of proof, disclosure of ownership and control information, reinstatement of right to mine, permit renewal requirements, extensions to permitted areas, surface mining activities not subject to the Act, National Pollutant Discharge Elimination System (NPDES) permitting requirements, removal of coal from existing waste piles, and environmental boards.

The revisions to State regulations concern applicability, definitions, ownership and control information, maps, operation plan, excess spoil disposal, new and existing structures, subsidence control plan, removal of abandoned coal waste piles, approved person, fish and wildlife resources, geologic information, transfer, assignment or sale of a permit, permit revisions and renewals, incidental boundary revisions, permit conditions, improvidently issued permits, exemptions for government financed highway or other construction variances, permit issuance, haulroads, transportation and support facilities, intermittent or perennial streams, design, construction, certification, inspection and abandonment of sediment control and other water retention structures, permanent impoundments, blasting, fish and wildlife, revegetation, insurance, notice of intent to prospect, hydrologic balance, steep slope mining, inactive status approval, variance from approximate original contour, excess spoil disposal, contemporaneous reclamation, control of fugitive dust, utility installations disposal of coal mine waste, backfilling and regrading underground mines, subsidence control, small operator assistance program, citizen actions, inspection frequencies, notices of violation, show cause orders, civil penalty determinations, civil penalty assessment procedures, civil penalty assessment rates, coal refuse certification, compaction requirements for coal refuse areas, design, construction and maintenance requirements for coal refuse impoundments, and inspection, examination and reporting requirements for coal refuse impoundments, training and certification of blasters, and abandoned mine lands regulation.

OSM announced receipt of the proposed amendment in the August 12, 1993, Federal Register (58 FR 42903) and invited public comment on its adequacy. Following this initial comment period, WVDEP revised the amendment on August 18, 1994, and September 1, 1994, and May 16, 1995 (Administrative Record Nos. WV–933, WV–937, and WV–979B). OSM reopened the comment period on August 31, 1994 (59 FR 44953), September 29, 1994 (59 FR 49619), and July 5, 1995 (60 FR 34934), and held public meetings/hearings in Charleston, West Virginia on September 7, 1993, October 27, 1994, and May 30, 1995.

III. Director's Findings

Only those revisions of particular interest are discussed below. Any revisions not specifically discussed below are found to be no less stringent than SMCRA and no less effective than the Federal regulations. Revisions not discussed below contain language similar to the corresponding Federal regulations, concern nonsubstantive wording changes, revise cross-references and paragraph notations to reflect organizational changes resulting from this amendment, or concern program provisions for which there is no Federal counterpart and which do not adversely affect other aspects of the West Virginia program.

A. Proposed Revisions to the West Virginia Code (Including numerous revisions to the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA)

1. § 22–1–4 Through 8 Division of Environmental Protection

The State has reorganized the Division of Environmental Protection under the Bureau of the Environment and abolished the Department of Commerce, Labor and Environmental Resources under West Virginia House Bill (H.B. 4030). Within the Bureau of Environment, Division of Environmental Protection, the State established the Office of Abandoned Mine Lands and Reclamation, and the Office of Mining and Reclamation. The Office of Abandoned Mine Lands and Reclamation is given the authority to administer and enforce the State's Abandoned Mine Lands and Reclamation Act. The Office of Mining and Reclamation is given the authority to administer and enforce the State's Surface Coal Mining and Reclamation Act (under § 22–1–7). The director is authorized to appoint a Chief of each office who is accountable and responsible for the performance of the duties, functions, and services of his or her office (§ 22–1–8(a)). The provisions also authorize the director of the division of environmental protection to employ legal counsel (H.B. 2523) (§ 22–1–6(d)(7)). The Director finds that the State regulatory authority continues to have authority under State laws to implement, administer, and enforce its State program. He is therefore approving the proposed revisions to WVSCMRA § 22–1–4 through 8. The Director is also taking this opportunity to remove the required amendment at 30 CFR 948.16(c)(1), since it refers to the creation of the Division of Mines and Minerals, which is now an obsolete designation.

2. § 22–2 Abandoned Mine Lands and Reclamation Act

West Virginia proposes to revise its statute at section 22–2–2 to reflect the extension of the abandoned land reclamation program and the collection of fees which support it to September 30, 2004. The Director finds that this revision is substantively identical to and therefore no less stringent than section 402(b) of SMCRA.

West Virginia is also amending § 22–2–4 to change the reference to Public Law 95–87 to read ''Surface Mining Control and Reclamation Act'', to change the reference to subdivision (3) to read subsection (c), to change the reference to section 404 of Public Law 95–87 to read section 402 of the Surface Mining Control and Reclamation Act, and to delete references to ''administrative and personnel expenses'' for the purposes of clarification. The Director finds that these revisions are consistent with the Abandoned Mine Land Reclamation Act of 1990 and satisfy 30 CFR 948.26(a), which is hereby removed.

The State is revising paragraph (c) by changing the ending date for abandoned mine land fund eligibility for surface mining sites where the surety became insolvent. The ending date for eligibility was changed from October 1, 1991, to November 5, 1990. Paragraph (c) is also revised by changing the reference to Public Law 95–87 to the Federal Surface Mining and Reclamation Act of 1977, as amended. The Director finds that the proposal is substantively identical to and therefore no less stringent than section 402(g) of SMCRA.

3. § 22–3–3 Definitions

a. *Operator:* The WVDEP proposes to define operator to mean any person who is granted or who should obtain a permit to engage in any activity covered by the WVSCMRA and any rule promulgated thereunder and any person who engages in surface mining or surface mining and reclamation operations, or both. The proposed definition states that the term operator shall also be construed in a manner consistent with the Federal program pursuant to SMCRA, as amended.

Section 701 of SMCRA defines operator to mean any person, partnership, or corporation engaged in coal mining who removes or intends to remove more than 250 tons of coal from the earth by coal mining within 12 consecutive calendar months in any one location. In support of the proposed definition the State submitted a policy statement stating that WVDEP would interpret ''operator'' to include all

persons who engage in surface mining or prospecting activities. This policy statement was accompanied by a legal opinion from the General Council for WVDEP which stated that the term ''operator'' as defined in the WVSCMRA applies to a person who intends to prospect or engage in coal exploration (Administrative Record No. WV–932). The Director therefore finds that the proposed definition of operator at § 22–3–3 of the WVSCMRA is no less stringent than the definition at section 701 of SMCRA and he is approving it.

b. *Surface mine, surface mining or surface mining operations:* The WVDEP proposes to revise § 22–3–3(u)(1) by inserting a semicolon between ''reclamation'' and ''in-situ'' and a comma between ''cleaning'' and ''concentrating''. Also, at subsection 3(u)(2), the exemption for permanent facilities not within the area being mined and not directly involved in the excavation, storage, or processing of coal has been removed from the definition. The Director finds that the revisions to the definition of ''surface mining operation'', which remove the exemption for certain permanent facilities and correct errors in punctuation, satisfy the requirements of 30 CFR 948.16(c)(2) and resolve the concerns which caused the Secretary not to approve the definition at 30 CFR 948.12(c) and 30 CFR 948.13(a). Accordingly, he is approving the proposed definition and removing the disapproval, set aside, and required amendment provisions at 30 CFR 948.12(c), 948.13(a), and 948.16(c)(2).

4. § 22–3–5 Surface Mining Inspectors and Supervisors

West Virginia proposes to change the probationary status for surface mining supervisors and inspectors from one year to six months. The Director has determined that this revision, for which there is no direct Federal counterpart, is within the administrative discretion of the regulatory authority, and is not inconsistent with the requirements of SMCRA or the Federal regulations.

5. § 22–3–7 Notice of Intent To Prospect

The State proposes to revise paragraph (f) to allow for the promulgation of regulations, the development of application forms and to require an application fee of $2,000 for prospecting operations intending to remove more than 250 tons of coal. While there is no direct Federal counterpart, the Director finds that proposed revisions are consistent with the Federal requirements for coal exploration permits at section 512 of SMCRA and are hereby approved.

6. § 22–3–8 Surface Mining Reclamation Permit

The State has deleted subsections 8(a) and 8(b), and renumbered the remaining subsections. The deleted subsections required coal mining operations in existence at the time of the Secretary's approval (1981) of the West Virginia program to obtain permits under the newly approved program. The Director finds that the deletion of these out-of-date provisions does not render the West Virginia program inconsistent with SMCRA or the Federal regulations.

The State proposes to revise paragraph (1) of this section to allow for the continued operation of a mine by the transferee pending approval of the transfer application, and subject to the ownership and control provisions at section 22–3–18(c). The Federal counterpart to this provision at § 506(b) of SMCRA does not refer specifically to permit transfers. However, it does allow a successor in interest to continue coal mining operations on the current permit while awaiting approval of the regulatory of its application for a new permit. The Director believes that allowing permit transfer applicants to mine while they await a decision on their application for transfer of permit is not inconsistent with the principles underlying § 506(b) of SMCRA, so long as the applicant is eligible for a permit § 22–3–18(c) (West Virginia's ownership and control provisions), and provides adequate bond. Furthermore, the opportunity for public comment will remain a meaningful one, since the regulatory authority may still ultimately deny the application for the transfer based on information obtained during the public comment period. Therefore, the Director is approving the provision. West Virginia proposes to increase the surface mining permit fee from $500 to $1,000 at paragraph (4). Also, as provided in paragraph (h), the State proposes to make compliance with the Workers' Compensation Program a requirement of permit approval. There are no direct Federal counterparts. The Director finds that these provisions are not inconsistent with the requirements of SMCRA or the Federal regulations.

7. § 22–3–9 Permit Application Requirements

West Virginia proposes to revise the eligibility requirements for its Small Operator Assistance Program (SOAP) at paragraph (b). The State is increasing the total annual production rate for SOAP eligibility from 100,000 to 300,000 tons of coal. In addition, the State has added language that identifies the services that are reimbursable under SOAP. These new services include engineering analyses and designs needed in the determination of probable hydrologic consequences, cross-section maps and plans, geologic drilling and statements of results of test borings and core samplings, preblast surveys, fish and wildlife protection and enhancement plans, and the collection of archaeological and historical information. The Director finds that WVSCMRA § 22A–3–9(b), as revised, is substantively identical to and, therefore, no less stringent than the corresponding SOAP provisions of section 507(c) of SMCRA.

At subsection 9(g), the State has added the word ''administratively'' in two locations to clarify that the provision pertains to administratively complete applications. The term ''administratively complete application'' is defined at CSR 38–2–2.9. The Director finds these changes to be consistent with section 510 of SMCRA, and no less effective than the use of the term ''administratively complete application'' at 30 CFR 773.13 concerning public participation in permit processing and the definition of the term ''administratively complete'' at 30 CFR 701.5.

8. § 22–3–9a Permit To Mine Two Acres or Less

The State has deleted (S.B. 579; June 7, 1991) this section which contains special provisions governing surface mining operations of two acres or smaller in size. Section 528(2) of SMCRA, which set forth the corresponding Federal provisions, was repealed pursuant to Section 201 of Public Law 100–34. Therefore, the Director finds that the proposed deletion will not render West Virginia's program less stringent than SMCRA. In addition, the Director finds that the deletion of WVSCMRA § 22A–3–9a eliminates the need for further action regarding the required amendments set forth at 948.16(c)(3), (4), (5) and (6), and the disapproval and set-aside set forth at 30 CFR 948.12(d) and 948.13(b), respectively, and he is, therefore, removing them.

9. § 22–3–13 Performance Standards

The State proposes to amend subparagraph (b)(10) to require that operators avoid acid or toxic-mine drainage by preventing or removing water from contact with toxic producing deposits, treating drainage, and casing, sealing or managing boreholes, shafts and wells to keep acid drainage from entering ground and surface waters. The Director finds that this proposal is substantively identical to and, therefore,

no less stringent than, the corresponding Federal statute at section 515(b)(10)(A) of SMCRA.

West Virginia proposes to revise subparagraph (b)(15) to require the mailing of the proposed blasting schedule to every resident within one-half mile of the blasting site, and to provide any resident or owner of a dwelling within one-half mile of any portion of the permit area the right to a preblast survey. The Director finds that this proposal is substantively identical to and, therefore, no less stringent than, the corresponding Federal statute at section 515(b)(15) of SMCRA.

In addition, the State proposes to revise subparagraph (b)(16)(C) to provide that underground mining permits shall terminate if operations have not commenced within three years of the date of permit issuance. The Director finds that this proposal is substantively identical to and, therefore, no less stringent than section 506(c) of SMCRA.

The State also proposes to revise subparagraph (b)(22) to require that rock to be used in durable rock fills not slake in water and not degrade to soil material. The Director finds that this proposal is substantively identical to and, therefore, no less effective than the corresponding Federal provision set forth at 30 CFR 816.73(b).

Finally, West Virginia proposes to revise paragraph (e) to allow the Director to promulgate rules that permit variances from approximate original contour. The Director finds that this proposal is consistent with that portion of section 515(e) of SMCRA which permits states with approved programs to allow variances from the requirements to return a steep slope area to its approximate original contour (AOC). Therefore, this revision is approved, but only to the extent that it applies to steep slope areas as defined at WVSCMRA § 22–3–13(d). In addition, the Director is requiring that West Virginia amend its program to limit such variances to industrial, commercial, residential, or public alternative postmining land use, in accordance with section 515(e)(2).

10. § 22–3–15 Inspections

West Virginia proposes to revise paragraph (b)(1)(C) to require that monitoring equipment be installed, maintained and used consistent with WVSCMRA § 22–3–9 rather than WVSCMRA § 22–3–10 as currently stated. The Director has determined that this correction of a cross-reference will not render the West Virginia program inconsistent with the requirements of SMCRA or the Federal regulations.

The State also proposes to delete the provision in paragraph (g) which provides that permittees, employees and inspectors are not to be held civilly liable for any injury sustained by a person accompanying an inspector on an inspection. The Director finds that this deletion, which resolves the concerns raised by OSM as set forth at 30 CFR 948.12(a) and 948.13(e), will not render the West Virginia program inconsistent with the requirements of SMCRA or the Federal regulations. The Director is, therefore, removing the disapproval at 30 CFR 948.12(a), and the corresponding set aside at 30 CFR 948.13(e).

Finally, the State is deleting from paragraph (g) the provision that any person accompanying an inspector on an inspection shall be responsible for supplying any safety equipment required. There is no counterpart to this rule in the Federal program, and the Director finds that the deletion of this provision will not render the West Virginia program inconsistent with the requirements of SMCRA or the Federal regulations.

11. § 22–3–17 Notice of Violation

West Virginia proposes to revise paragraph (a) of this section to make it mandatory to issue a notice of violation whenever any provision of WVSCMRA, the regulations promulgated pursuant thereto or a permit condition has not been complied with. In addition, the time set for initial abatement of a notice of violation is proposed to be changed from 15 to 30 days, and the maximum time allowed as a reasonable extension is changed from 75 to 60 days. The Director finds that these revisions are no less stringent than and are procedurally similar to section 521(a)(3) of SMCRA.

In paragraph (a), the State also proposes to delete the provision that exempts cessation orders that are released or expire within 24 hours after issuance from mandatory civil penalty assessment of seven hundred fifty dollars per day per violation. While there is no direct Federal counterpart, the Director finds that the deletion of this provision will not render the State's program inconsistent with the requirements of SMCRA or the Federal regulations.

The State proposes to revise paragraph (b) to allow the director to suspend or revoke a permit upon the operator's failure to show cause why the permit should not be suspended or revoked. In addition, if the permit is revoked, the proposal states that the commissioner shall initiate procedures to forfeit the operator's bond in accordance with rules promulgated by the Director. The Director finds that the proposals are consistent with the requirements of SMCRA at section 521(a)(4) and the Federal regulations at 30 CFR 843.13.

In addition, West Virginia proposes to recodify paragraph (d)(3) as new subsection (e) in order to clarify that appeal rights and procedures apply to all notices, orders and decisions of the commissioner, not just those relating to civil penalty assessments; and to recodify paragraph (d)(4) as new subsection (f) to clarify that temporary relief provisions apply to all enforcement actions and orders, but not to civil penalty assessments. The Director finds that the proposed recodification will not render the State's program inconsistent with the requirements of SMCRA or the Federal regulations, and satisfies the requirements of 30 CFR 948.16(c) (8) and (9), which are hereby removed.

West Virginia proposes to revise newly redesignated section (f) to provide that the filing of a request for an informal conference or formal hearing will not stay the execution of the order appealed from. The Director has determined that this proposal is substantively identical to and, therefore, no less stringent than the corresponding Federal provision at section 525(a) of SMCRA. Finally, the State proposes to revise section (f) to provide that where a request for temporary relief from an order for cessation of operations is filed, the commissioner shall issue his decision within 5 days of receipt of the request. The Director finds that this proposal is substantively identical to and, therefore, no less stringent than the corresponding Federal provision at section 525(c) of SMCRA.

12. § 22–3–18 Permit Approval

The State proposes to revise paragraph (a) of this section to require the submission of a complete permit application before a decision is rendered, and to provide that the applicant has the burden of establishing that the application is in compliance with the program requirements. The Director finds that the proposed revisions are substantively identical to and, therefore, no less stringent than the corresponding Federal statute at section 510(a) of SMCRA.

The State has amended paragraph (c) to require that permit applications contain violation information on any surface mining operation owned or controlled by the applicant, rather than just those operations located in the state of West Virginia. The Director has determined that this revision is substantively identical to and, therefore,

no less stringent than the Federal law at section 510(c) of SMCRA.

In addition, section (c) has been revised to add that no permit may be issued upon a finding of a demonstrated pattern of willful violations of (in addition to West Virginia statute) other State or Federal programs implementing SMCRA of such a degree as to indicate an intent not to comply with the State statute or SMCRA. The Director finds these changes to be substantively identical to and no less stringent than section 510(c) of SMCRA and satisfies the concerns raised in 30 CFR 948.12(g) and 948.13(f) which are hereby removed.

Finally, West Virginia is proposing to revise, in section (c), the conditions under which a permit may be issued after revocation or forfeiture, to include situations where the violations which resulted in the revocation or forfeiture have not caused irreparable damage to the environment. While there is no direct Federal counterpart, the Director finds that the proposal is not inconsistent with the permit approval provisions of section 510 of SMCRA.

13. § 22–3–19 Permit Renewal and Revision Requirements

The State proposes to revise paragraph (a)(2) of this section by deleting the references to incidental boundary revisions, and adding a requirement that where a renewal application proposes to extend the operation beyond the original boundaries, the portion of the renewal application involving the new area is subject to the full permit application requirements. The State clarified the intent of the amendment by stating that the term ''full standards'' as used in WVSCMRA § 22–3–19(a)(2) means that for the area being added to the permit, the applicant must satisfy all current permitting requirements and is subject to all inspection and enforcement provisions and all performance standards. In other words, it would be treated like a new permit application (Administrative Record No. WV–932). Given this clarification, the Director finds the revisions to be substantively identical to and, therefore, no less stringent than section 506(d)(2) of SMCRA.

In addition paragraph (a)(4) is amended to add a two thousand dollar filing fee for any permit renewal for an active permit. The Director finds that this proposal is not inconsistent with the permit fee provisions in section 507(a) of SMCRA.

Finally, West Virginia proposes to revise section (b)(3) to provide that where the permittee desires to add new area to a permit, the original permit may be amended to include the new area, provided the application for the new area is subject to all the procedures and requirements applicable to applications for original permits. The Director finds that the revision is substantively identical to and, therefore, no less stringent than section 506(d)(2) of SMCRA.

14. § 22–3–22 Designation of Areas Unsuitable for Mining

West Virginia proposes to revise paragraph (b) of this section by deleting the word commissioner. As revised, the provision gives any person having an interest which is or may be adversely affected the right to petition the Director to have the area designated as unsuitable for mining or to have such designation terminated. The Director finds the proposal to be substantively identical to and, therefore, no less stringent than section 522(c) of SMCRA.

15. § 22–3–26 Surface Mining Operations Not Subject to the Act

The State proposes to delete paragraph (b) of this section which provided an exemption for the extraction of coal by a landowner engaged in construction. There is no direct Federal counterpart to this exemption and the Director finds that the proposed deletion will not render the West Virginia program inconsistent with the requirements of SMCRA or the Federal regulations.

The exemption for government financed construction at paragraph (c) is being revised to provide that coal extraction incidental to federal, state, county, municipal, or other local government financed highway or other construction is exempt from the requirements of the Act. The Director finds that this provision is substantively identical to and, therefore, no less stringent than section 528(2) of SMCRA.

The State also proposes to delete paragraph (d) which provided an exemption for the extraction of coal affecting two acres or less. The Director finds this proposal to be consistent with the provisions of subsection 201(b) of Public Law 100–34 (effective June 6, 1987) which repealed the two-acre exemption originally set forth at section 528(2) of SMCRA and, therefore, the deletion of this provision will not render the State's rules inconsistent with the requirements of SMCRA or the Federal regulations. The Director is removing required amendment 30 CFR 948.16(c)(7) because with the deletion it is no longer relevant.

16. § 22–3–28 Special Permits for Abandoned Coal Waste Piles

West Virginia proposes to revise paragraph (d) of this section by deleting the word ''reprocessing'' and adding the word ''removal'' in order to clarify that the special permit is solely for removal of existing abandoned coal waste piles. The Director finds that this revision will not render the State program inconsistent with the requirements of SMCRA or the Federal regulations. The Director notes that the implementing rules are located at CSR 38–2–3.14(d) (see Finding B–9 below).

17. § 22–3–40 National Pollutant Discharge Elimination System (NPDES)

The State proposes to revise this section to require a filing fee for an NPDES permit application of $500 and a filing fee for a renewal application of $100. The Director finds that this proposal is not inconsistent with the general permit fee provisions of section 507(a) of SMCRA.

18. § 22B–1–4 through 12 Environmental Boards; General Policy and Purpose

The State is adding these provisions to the West Virginia program to establish the requirements under which environmental boards will operate. The Director finds that the provisions are not inconsistent with SMCRA section 503 concerning state programs. The Director notes that West Virginia's administrative hearings and appeals procedures are the same or similar to those in sections 514 and 525 of SMCRA. The Director is not approving language at section 22B–1–7(d) concerning allowing temporary relief where the appellant demonstrates that the executed decision appealed from will result in the appellant suffering an ''unjust hardship.'' because the exception is inconsistent with SMCRA sections 514(d) and 525(c). In addition, the Director is requiring that West Virginia further amend § 22B–1–7(d) to be consistent with SMCRA sections 514(d) and 525(c).

Section 7(h) would allow the Surface Mining Board to consider economic feasibility of treating or controlling discharges from surface coal mining operations in appeals from decisions of an order, permit, or official action. In this respect, the provisions are less stringent than SMCRA section 515(b)(10) and less effective than the Federal regulations at 30 CFR 816.42, because both require discharges to be controlled or treated without regard to economic feasibility. Therefore, the Director is not approving this language

to the extent that it would allow the Board to decline to order an operator to treat or control discharges due to economic considerations. In addition, the Director is requiring that West Virginia further amend § 22B–1–7(h) to be no less stringent than SMCRA section 515(b)(10) and no less effective than the Federal regulations at 30 CFR 816.42, by requiring discharges to be controlled or treated without regard to economic feasibility.

19. § 22B–3–4 Environmental Quality Board

This new provision establishes the Environmental Quality Board's rule-making authority. Under WV S.B. 287, the provision authorizes the promulgation of procedural rules granting site specific variances for water quality standards for coal remining operations; providing minimum requirements for procedures for granting variances; prohibits granting variances without requirement of best available technology and best professional judgement; prohibits granting variance without demonstration of potential for improvement; and prohibits granting variance if degradation will result. The Director finds the provision is not inconsistent with SMCRA section 503 which provides that State programs must have the capacity to establish rules and regulations to carry out the purposes of SMCRA. The provision is also not inconsistent with section 301(p) of the Federal Water Pollution Control Act (33 U.S.C. 1311) which allows alternate effluent limitations to be established for coal remining operations. The Director notes that any such procedural rules that grant variances must be submitted to OSM for approval prior to their implementation.

20. § 22B–4 Surface Mine Board

The State has renamed the ''Reclamation Board of Review'' the ''Surface Mine Board'' and has established new requirements under which it operates. However, the amendment still requires that some board members represent outside interests. Therefore, the Director finds that these revisions do not materially affect the basis for OSM original determination of the Board's multiple interest status. Since the Board continues to represent multiple interests, its members are not ''employees'' within the meaning of section 517(g) of SMCRA and the Federal regulations at 30 CFR 705.5. Therefore, the Director finds the provisions of section 22B–4 to be not inconsistent with SMCRA section 503 concerning State programs, section 514 concerning decisions of regulatory authority and appeals, and 517(g) concerning financial interests of employees.

B. Proposed Revisions to the West Virginia Surface Mining Reclamation Regulations

1. CSR § 38–2–1.2 Applicability

West Virginia proposes to delete former paragraph (b) of this subsection. The Director finds that the deletion satisfies the disapproval codified at 30 CFR 948.12(h). 30 CFR 948.12(h) is hereby removed.

West Virginia proposes to revise paragraphs (c) and (d) by providing for the termination and reassertion of jurisdiction over a completed surface mining and reclamation operation. The Director finds that the amendments to paragraphs (c)(2) and (d) are substantively identical to and no less effective than the Federal regulations at 30 CFR 700.11(d)(1)(ii) and (2), respectively, concerning termination of jurisdiction. Subsection (c)(1) is less effective than the Federal counterpart at 700.11(d)(1)(i) to the extent that subsection (c)(1) does not require compliance with the Federal initial program regulations at Subchapter B or the West Virginia permanent regulatory program as a prerequisite to the termination of jurisdiction over an initial program site. In addition, the Director is requiring that the State further amend subsection (c)(1) to require compliance with the Federal initial program regulations at Subchapter B or the West Virginia permanent regulatory program regulations as a prerequisite to the termination of jurisdiction over an initial program site.

2. CSR § 38–2–2 Definitions

a. Chemical treatment. The WVDEP proposes to define ''chemical treatment'' at subsection 2.20. This definition, among other applications, applies to the bond release provisions at CSR 38–2–12.2(e). CSR 38–2–12.2(e) prohibits bond release where chemical treatment is necessary to bring water discharged from or affected by the operation into compliance with effluent limitations or water quality standards as set forth in CSR 38–2–14.5(b). In effect, for example, under the proposed definition, bond would not be released under § 38–2–12.2(e) if water discharged from or affected by an operation is being actively treated by chemical reagents (such as sodium hydroxide or calcium carbonate) to bring a discharge into compliance. The bond would be released, however, if that same water were being treated, instead, by passive treatment systems (such as wetlands or limestone drains) to bring the discharge into compliance. The Director finds that the blanket exclusion of passive treatment systems from the definition of chemical treatment would render the West Virginia program less effective than the Federal regulations at 30 CFR 800.40(c)(3) concerning release of bond. 30 CFR 800.40(c)(3) provides that no bond shall be fully released until reclamation requirements of SMCRA are fully met. If treatment is necessary to maintain compliance, whether it be active or passive treatment, then the hydrologic protection standards of SMCRA section 515(b)(10) have not been fully met and bond cannot be released. The withheld bond helps assure that the required treatment will be continued. The fact that a treatment system is ''passive,'' and may not require human intervention as frequently as an ''active'' treatment system, does not diminish the need for assurance that treatment will be provided as long as is necessary to maintain compliance. Therefore, the Director is approving the definition of ''chemical treatment'' except to the extent that it would allow bond release where passive treatment systems are used to achieve compliance with applicable effluent limitations as discussed above. In addition, the Director is requiring that West Virginia further amend the West Virginia program to clarify that bond may not be released where passive treatment systems are used to achieve compliance with applicable effluent limitations. This finding does not mean that OSM is discouraging the use of mining and reclamation practices and the use of passive treatment systems that help minimize water pollution. On the contrary, when such practices and passive systems are designed into the approved operations and reclamation plans, they become an integral part of an effective program to minimize the formation of acidic or toxic drainage. However, when such passive systems are used to treat a discharge that would otherwise not be in compliance with effluent discharge limitations, such systems are, in effect, chemical treatment and bond release should not be granted. Passive treatment systems have not yet been proven effective for all parameters or on a long-term basis; their effectiveness appears to decrease over time. See OSM's directive TSR–10, Use of Wetland Treatment Systems for Coal Mine Drainage, for further information on this issue.

b. Impoundment or impounding structure; operator; prospecting; and sediment control or other water retention structure, sediment control or other water retention system, sediment pond. The Director finds the proposed definition of ''impoundment or impounding structure'' at CSR 38–2–2.66 is substantively identical to the Federal definition at 30 CFR 701.5 and is removing the required amendment codified at 30 CFR 948.16(f).

The State is adding the proposed definition of ''operator'' at CSR 38–2–2.81. This definition is substantively identical to the proposed statutory State definition of ''operator'' at § 22–3–3. See Finding A–3a above for a complete discussion. The Director finds the proposed definition of ''operator'' is consistent with the Federal definitions at section 701 of SMCRA and 30 CFR 701.5.

The Federal counterpart to the definition of ''prospecting,'' is the Federal definition of ''coal exploration'' at 30 CFR 701.5. The State and Federal definitions are different in that the Federal definition includes all data gathering without consideration of whether or not disturbance occurs. However, the Director finds the proposed definition of ''prospecting'' at CSR 38–2–2.95, while different, doesn't render the State program less effective than the Federal regulations, in light of the fact that CSR 38–2–13.1 contains all the appropriate requirements for a notice of intent to prospect where no disturbance is anticipated (see Finding B30 below). The Director is approving the definition of prospecting, and removing the required amendment at 30 CFR 948.16(nn). In addition, the Director notes an apparent inconsistency between the definition of prospecting at CSR 38–2–2.95, which excludes the gathering of environmental data without disturbance from the definition of prospecting, and the requirements for a notice of intent to prospect at CSR 38–2–13, which recognize that prospecting can include data gathering without disturbance. The State may want to correct this.

The Director finds the definition of ''sediment control or other water retention structure, sediment control or other water retention system, or sediment pond'' at CSR 38–2–108 to be consistent with the federal definition of ''siltation structure'' at 30 CFR 701.5 and can be approved, and the required amendment at 30 CFR 948.16(n) is partially satisfied.

3. CSR § 38–2–3.1 Application Information

New subsection 3.1(o) is added to authorize the grouping of ownership and control information by permittees who are so related by the submittal and maintenance of a centralized ownership and control file. Each file must contain required information at CSR § 38–2–3.1 (a), (c), (d), and (l) and be updated at least quarterly. However, the file must be complete and accurate during the time that an application is pending. There is no counterpart to the proposed language. However, the Director finds that the proposed provision is not inconsistent with the Federal requirements at 30 CFR 773.15 concerning review of permit applications and can be approved to the extent that all permit applicants which maintain centralized ownership and control files are also required to comply with all of the informational provisions contained in CSR 38–2–3.1.

4. CSR § 38–2–3.4 Maps

The State proposes to revise paragraph (d), subparagraphs (18), (22), (23), and (24) to require that the permit application identify each topsoil and noncoal waste storage area, each explosive storage and handling facility and the area of land to be affected within the proposed permit area according to the sequence of mining and reclamation. This revision is intended to satisfy the requirements of 30 CFR 948.16(t). Paragraph (d)(23) concerning explosive storage facilities has also been amended to read as follows: ''The location of any explosive storage and handling facility; which will remain in place for an extended period of time during the life of the operation.'' The Director finds that the amendments are substantively identical to and no less effective than the requirements of 30 CFR 780.14(b), and that 30 CFR 948.16(t) can be removed.

5. CSR § 38–2–3.6 Operation Plan

West Virginia proposes to revise paragraph (k) of this subsection to require the submission of a fugitive dust control plan. This revision is intended to satisfy the requirements of 30 CFR 948.16(s). The Director finds the amendment to be substantively identical to and no less effective than 30 CFR 780.15(a)(2) concerning a plan for fugitive dust control practices, and that 30 CFR 948.16(s) is satisfied and can be removed.

6. CSR § 38–2–3.7 Excess Spoil

The State proposes to delete the provision in paragraph (a) which gives the Director authority to approve alternative design requirements for excess spoil fills. This deletion satisfies the deficiency noted at 30 CFR 948.15(k)(3) and the requirement at 948.16(i) which can be removed.

7. CSR 38–2–3.8 New and Existing Structures and Support Facilities

Subsection 3.8(a) is amended to require that each permit application contain a description, plans, and drawings for each support facility to be constructed, used or maintained within the proposed permit area. The Director finds the proposed language to be substantively identical to and no less effective than 30 CFR 780.38 concerning support facilities.

Subsection (d) is amended by adding a provision that will provide for the permitting and bonding of a facility or structure that is to be shared by two or more separately permitted mining operations. The Director finds that the provision is substantively identical to and, therefore, no less effective than the Federal provision concerning shared facilities at 30 CFR 778.22 and can be approved.

8. CSR § 38–2–3.12 Subsidence Control Plan

The State proposes to revise paragraph (a), subparagraph (5) to require that measures be taken to mitigate or remedy material damage to structures due to subsidence in accordance with subsection 16.2(c) and (d) in addition to the existing requirement of meeting 16.2(a) concerning surface owner protection. While there is no direct Federal counterpart to this proposal, the Director finds the proposed revisions to be consistent with the Federal requirements at 30 CFR 784.20(b) concerning subsidence control plans. The State also proposes to delete the phrase in paragraph (d), subparagraph (2) which does not require an identification of measures to be taken to protect structures when the applicant demonstrates the right to subside without liability. This revision is consistent with the 1992 Energy Policy Act, which added section 720 to SMCRA and requires repair or compensation by the operator for material damage to structures caused by subsidence regardless of any ''right to subside.''

9. CSR § 38–2–3.14 Removal of Abandoned Coal Waste Piles

The State proposes to revise paragraph (a) of this subsection which allows the State to issue a special permit solely for the removal of existing abandoned coal processing waste piles.

The added language requires that if the average quality of the refuse material can be classified as coal using the BTU standard in ASTM D 388–88, a permit application which meets all applicable requirements of § 38–2–3 shall be required. This revision is intended to satisfy the deficiency of 30 CFR 948.15(k)(4). The Director finds the proposed language is consistent with the Federal requirements at 30 CFR 773.11 concerning requirements to obtain permits and can be approved, and that 30 CFR 948.15(k)(4) is satisfied.

10. CSR § 38–3.15 Approved Person

West Virginia proposes to revise its approved person requirements in this subsection. The State is proposing to allow approved persons to certify associated facilities. It also proposes to require the submission of a registration or license in addition to a resume. Finally, it proposes to delete the provisions which allow the director to require a person to requalify for ''approved person'' status, and to suspend or withdraw ''approved person'' status. Although there are no Federal counterparts, the Director finds the proposed changes are not inconsistent with SMCRA and the Federal regulations concerning requirements for permits and permit processing, since the State has retained the provision, at subsection 3.15(a), which states that ''approved person'' may only be designated by the regulatory authority where the WVSCMRA does not otherwise prohibit such designations.

11. CSR § 38–2–3.16 Fish and Wildlife Resources

The State proposes to revise paragraph (a) to this subsection deleting the word ''approval''. Under the revised provision, the regulatory authority will provide only for coordination of review of permits where such coordination is appropriate pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*). The Director finds the proposed deletion does not render the West Virginia program less effective than 30 CFR 780.16 concerning fish and wildlife information.

12. CSR § 38–2–3.25 Transfer, Assignment or Sale of Permit Rights

The State proposes to revise paragraph (a), subparagraph (4) of this subsection to provide that the approval of a transfer application may be granted in advance of the close of the public comment period, provided that the Director can immediately withdraw approval if information is made available as a result of public comment that would preclude approval. There is no direct Federal counterpart to the proposed language. The Federal regulations at 30 CFR 774.17(b) provide that an applicant for approval of the transfer, assignment, or sale of permit rights shall (at (b)(2)) advertise the filing of the application and identify where written comments may be sent. The State counterpart to the notice requirements of 30 CFR 774.17(b)(2) is CSR 38–2–3.25(a)(3). While the Federal requirements at 30 CFR 774.17(b)(2) require public notice, they do not prohibit application approval prior to the end of the public comment period. The State proposal provides the regulatory authority with reasonable flexibility to promptly conclude approvals of transfer, assignment or sale of permit rights while also assuring that public comment is considered and in those cases where public comment presented information that would preclude approval, the State can immediately withdraw approval. The Director finds that the proposed language is not inconsistent with the intent of 30 CFR 774.17 concerning transfer, assignment, or sale of permit rights and can be approved. See Finding A6, above for the Director's approval of the statutory provision at § 22–3–8 concerning permit transfers.

Paragraph (a)(4) is also amended to add reference to subsection ''3.32(d)(7)'' (formerly subsection 3.31) which requires a finding by the State that the applicant has paid all reclamation fees from previous and existing operations. The Federal regulations at 30 CFR 774.17(d)(1) provide that an application for a transfer, assignment or sale may be granted where the applicant is eligible to receive a permit in accordance with 30 CFR 773.15(b) and (c). The State counterpart to 30 CFR 774.17(d)(1) is contained at CSR 38–2–3.25(a)(4).

This paragraph requires that applicants be eligible for permits in accordance with CSR 38–2–3.32(c), which is the State counterpart to 30 CFR 773.15(b). However, subsection 3.25(a)(4), as proposed, adds a cross-reference to only one portion of the State's counterpart to 30 CFR 773.15(c), namely, subsection 3.32(d)(7), pertaining to payment of reclamation fees. The State has argued, and the Director agrees, that the other findings contained in subsection 3.32(d) (30 CFR 773.15(c)) need not be made during the review of an application for transfer, assignment or sale since these findings relate to the issuance of the original permit, and should, therefore, remain valid. However, the finding at subsection 3.32(d)(7), pertaining to payment of reclamation fees, must be made, since it relates specifically to the applicant for transfer, assignment or sale. Therefore, the Director finds that the additional reference to subsection 3.32(d)(7) renders the State's program no less effective than the Federal regulations at 30 CFR 774.17(d)(1) and can be approved.

The State also proposes to revise this subsection by revising paragraph (c) and by adding paragraphs (d) and (e). These requirements provide that permit assignments (operator reassignments) be advertised, contain the ownership and control information required by Subsection 3.1 and subcontractors be subject to the eligibility requirements of Subsection 3.32. This revision is intended to satisfy the requirements of 30 CFR 948.16(v). Although there is no direct Federal counterpart, the Director finds the added language is no less effective than 30 CFR 774.17, and that 30 CFR 948.16(v) is satisfied can be removed.

13. CSR 38–2–3.26 Ownership and Control Changes

The language of this subsection is new and governs the reporting of name changes, replacements, and additions to the ownership and control information for any surface mining operation or permittee. While there is no direct Federal counterpart to the proposed language, the Director finds that the proposed language is not inconsistent with 30 CFR 778.13 concerning identification of interests and 778.14 concerning violation information and can be approved.

14. CSR 38–2–3.27(a) Permit Renewals and Permit Extensions

The WVDEP proposes to add a provision which will allow the Director to waive the requirements for permit renewal if the permittee certifies in writing that all coal extraction is completed, that all backfilling and regrading will be completed within 60 days prior to the expiration date of the permit and that an application for Phase I bond release will be filed prior to the expiration date of the permit. The proposal also provides that failure to complete backfilling and grading within 60 days prior to the expiration date of the permit will nullify the waiver. Finally, operations granted inactive status are also subject to permit renewal requirements. The Director finds this provision to be consistent with and no less effective than 30 CFR 773.11 which provides that a permittee need not renew the permit if no surface coal mining operations will be conducted under the permit and solely reclamation activities remain to be done.

15. CSR § 38–2–3.28 Permit Revisions

The State proposes to revise paragraph (b) in this subsection to require that each application for a permit revision be reviewed by the director to determine if an updated probable hydrologic consequences determination (PHC) or cumulative hydrologic impact assessment (CHIA) is needed. The Director finds the proposed revisions are substantively identical to and, therefore, no less effective than the Federal regulations at 30 CFR 780.21(f)(4) concerning PHC determinations.

The State also proposes to revise paragraph (c) to give the Director the authority to require reasonable revision of a permit at any time and to delete the provision which only required a revision to assure adequate protection of the environment or public health and safety. The revisions also require notice to the permittee of the need for revisions and reasonable time for compliance. The Director finds that the proposed revisions are similar to and no less effective than the Federal regulations at 30 CFR 774.11(b) concerning review of permits. These revisions satisfy the deficiency at 30 CFR 948.15(k)(5) and the requirements of 948.16 (j) and (w). 30 CFR 948.16 (j) and (w) are hereby removed.

16. CSR § 38–2–3.29 Incidental Boundary Revisions (IBRs)

West Virginia proposes to revise its incidental boundary revision (IBR) requirements in this subsection. The revisions in paragraph (a) provide that IBRs will be limited to minor shifts or extensions into non-coal areas or areas where coal extraction is incidental to or of only secondary consideration of the intended purpose of the IBR. IBRs will not be granted to abate a violation for encroachment beyond the original permit boundaries, unless an equal amount of area is deleted from the permitted area. Paragraph (b) is revised to allow IBRs for underground mines to be larger than 50 acres when an applicant demonstrates the need for a larger IBR. Also, applications for an IBR must be accompanied by an adequate bond, a map showing the IBR area and a reclamation plan for the area of the IBR. The State proposes to delete subparagraph (6) which provides that all provisions of the IBR which differ from the original permit meet the requirements of the Act and regulations, except as provided in this subsection. Finally, the State proposes to add paragraph (e) which gives the Director the authority to require the publication of an advertisement that provides for a ten-day public comment period for an IBR application.

There is no definition for ''incidental boundary revisions'' contained in either SMCRA or the Federal regulations. However, the Director notes that under the proposed language IBR's will not be authorized for surface or underground operations in cases where additional coal removal is the primary purpose of the revision. Therefore, the Director finds the proposed amendments to be consistent with the principal intent of sections 511(a)(3) of SMCRA and 30 CFR 774.13(d) which pertain to incidental boundary revisions.

17. CSR § 38–2–3.30 Variances

The State proposes to revise its variance requirements at paragraphs (b), (c), (d) and (e) of this subsection. These paragraphs set forth requirements for granting variances from contemporaneous reclamation. These revisions are intended to satisfy the requirements at 30 CFR 948.16(x). The Director finds the proposed language is substantively identical to and no less effective than 30 CFR 785.18 concerning variances for delay in contemporaneous reclamation requirements in combined surface and underground mining activities. The Director also finds the revisions do satisfy the requirements at 30 CFR 948.16(x), which is hereby removed.

18. CSR 38–2–3.31(a) Exemption for Government Financed Highway or Other Construction

The WVDEP proposes to revise its rules to allow exemptions from the requirements of the WVSCMRA for county, municipal or other local government-financed highway or other construction. The Director finds this amendment to be consistent with and no less effective than the Federal definitions of ''government financing agency'' and ''government-financed construction'' at 30 CFR 707.5.

19. CSR § 38–2–3.32 Permit Findings

The State proposes to delete the provision in this subsection which requires the WVDEP to use and update ownership and control information from surrounding States in the issuance of permits. While there is no direct counterpart to the language that is being deleted, the Director finds the deletion does not render the West Virginia program less effective than the requirements of 30 CFR 773.15(b) concerning review of violations. The West Virginia program continues to provide for the review of outstanding violations at CSR § 38–2–3.32 (b) and (c).

20. CSR § 38–2–3.33 Permit Conditions

The State proposes to delete subsection (i) concerning an annual submittal of information required at § 38–2–3.1. There is no direct Federal counterpart to the deleted language. The Director finds the proposed deletion does not render the West Virginia program less effective than 30 CFR 773.17 concerning permit conditions. The West Virginia program continues to retain at CSR 38–2–3.33(h) a counterpart to 30 CFR 773.17(i) concerning notification requirements following cessation orders.

21. CSR 38–2–3.34 Improvidently Issued Permits

The WVDEP proposes to amend paragraph (b) by inserting the phrase ''in paragraph (b) of subsection 3.32 of this section.'' This amendment identifies where in the West Virginia program the violations review criteria are located. The Director finds this change to be consistent with and no less effective than 30 CFR 773.20(b)(1)(i).

Subparagraph (b)(3) has been amended by deleting the existing language and adding in its place language that is substantively identical to and no less effective than 30 CFR 773.20(b)(1)(iii).

New subparagraph (b)(4) has been added to provide that a permit shall be determined to have been improvidently issued when the permittee had a permit revoked or bond forfeited and has not been reinstated, or the permittee was linked to a permit revocation or bond forfeiture through ownership or control, at the time the permit was issued and an ownership or control link between the permittee and the person whose permit was revoked or whose bond was forfeited still exists, or when the link was severed the permittee continues to be responsible for the permit revocation or bond forfeiture. Although there is no direct Federal counterpart, the Director finds the added language to be consistent with the definition of ''violation notice'' at 30 CFR 773.5, which definition includes notices of bond forfeiture, with 30 CFR 773.20 concerning improvidently issued permits.

Paragraph (c) is amended to add ''permit revocation or a bond forfeiture'' to the list of circumstances that can cause a finding that a permit was improvidently issued. While there is no direct Federal counterpart, the Director finds the added language to be consistent with the definition of ''violation notice'' at 30 CFR 773.5 and with 30 CFR 773.20(a)(1).

New subparagraph (d)(1)(E) is added to the list of circumstances that could prevent an automatic suspension or rescission of a permit. Under subparagraph (d)(1)(E), a permit would not be automatically suspended or revoked if the permittee or other person responsible for the permit revocation or bond forfeiture has been reinstated, pursuant to section 18(c) of the WVSCMRA. While there is no direct Federal counterpart, the Director finds the added language to be consistent with 30 CFR 773.21(a) concerning automatic suspension or rescission of permits.

West Virginia proposes to amend paragraph (f) of this subsection to change the cross reference in that paragraph to subsection ''(e),'' Section 17 of WVSCMRA. The Director finds the change does not render the West Virginia program less effective than 30 CFR 773.20(c)(2) concerning appeals of suspensions or rescissions of permits determined to have been improvidently issued.

Paragraph (g) is being revised to clarify that the term ''permit issuance'' also includes permit transfers, assignments, or sales of permit rights, as well as revisions for ownership and control purposes. While there is no direct Federal counterpart, the Director finds the added language is not inconsistent with 30 CFR 773.15 concerning review of permit applications.

22. CSR § 38–2–4 Haulageways, Roads, and Access Roads

West Virginia proposes to revise all of its haulroad regulations at Section 4. The new haulroad and access road requirements provide for a road classification system, plans and specifications, stream crossings, standards for infrequently used roads, construction standards, drainage design standards, performance standards, maintenance standards, reclamation standards, primary road standards and certification. In addition, Section 4 contains design, construction, maintenance and abandonment requirements for other transportation facilities.

a. § 38–2–4.1 (a) Road Classification System. The WVDEP proposes to include haulageways and access roads under its road classification system, and is defining ''primary road.'' The Director finds these amendments to be substantively identical to and no less effective than 30 CFR 816.150(a) concerning road classification system, and 30 CFR 816.150(a)(2) concerning the definition of ''primary road.''

b. § 38–2–4.2 Plans and Specifications. These amendments set for the requirements for each road to be constructed, used, or maintained within the permit area. The provisions specify that road designs are to be certified as meeting the requirements of the WVSCMRA and implementing rules. The WVDEP is also reorganizing its rules by deleting the title ''4.3 Stream Crossings'' and designating paragraph (a) of the deleted subsection 4.3 as paragraph (b) of subsection 4.2. This reorganization is intended to clarify that CSR 38–2–4.2(b) applies to all stream crossings, and is not limited to only roads in stream channels. Under the proposed revisions, CSR 38–2–4.2(b) applies to all roads whether they are within or crossing a stream. The Director finds the proposed provisions to be consistent with 30 CFR 780.37(a) concerning road systems; plans and drawings to the extent that the provisions pertain to all roads, whether they are within or crossing a stream. The Director notes that 30 CFR 780.37(a) cross references the Federal regulations at 30 CFR 816.150(d)(1) (concerning the prohibition against locating a road in the channel of a stream), and this in turn cross-references other Federal hydrologic protection rules. The State language does not contain a similar cross references in CSR 38–2–4.2(b). The Director believes, however, that a lack of such cross references does not render the State program less effective. The State hydrologic protection standards apply regardless of whether or not they are cross-referenced.

c. § 38–2–4.3 Existing Haulageways or Access Roads. This subsection provides that where it can be demonstrated that reconstruction of existing haulageways or access roads to meet the required design, construction, and environmental protection standards of the West Virginia program would result in greater environmental harm, such reconstruction may be exempt from the standards at subsection 4.5(a)(1) and (2), and subsection 4.6(a)(2)(A) and (b), where the sediment control requirements of CSR 38–2–5 can otherwise be met. The provisions in the State program contain grade requirements for roads. Since the Federal regulations contain no specific road grade requirements, for roads. Since the Federal regulations contain no specific road grade requirement but merely require, at 30 CFR 816.150(c), that designs include appropriate grade limits, the Director finds these provisions to be consistent with and no less effective than 30 CFR 780.37(a) and 816.150(c) concerning plans and drawings.

d. § 38–2–4.4 Infrequently Used Access Roads. This provision requires that infrequently used access roads be designed to ensure environmental protection appropriate for their planned duration and use, and be constructed in accordance with current prudent engineering practices and any necessary design criteria established by the Director. A statement has been added to clarify that prospecting roads are to be designed, constructed, maintained, and reclaimed in accordance with subsection 13.6 which governs prospecting roads. Cross references have also been revised. The Director finds the proposed amendments to be consistent with and no less effective than 30 CFR 816.150(c) concerning design and construction limits and establishments of design criteria.

Subsection 4.4 is also revised to provide that roads constructed for and used only to provide for infrequent service to facilities used in support of mining and reclamation operations may be exempt from all haulroad requirements in CSR 38–2–4, except for subsections 4.2, 4.3, 4.5(a)(1), 4.5(b), 4.6(a), 4.7, and 4.8. These ''infrequently used access roads'' include all roads defined as ''ancillary roads'' under 30 CFR 816.150(a)(3). Under the Federal regulations, ancillary roads must comply with all requirements contained in 30 CFR 816.150. To be consistent with the Federal regulations, the State program must require that all ''infrequently used access roads'' comply with the State program counterparts to 30 CFR 816.150. However, subsection 4.4, as proposed, would exempt infrequently used access roads from the requirements of subsection 4.9, which is the State program counterpart 30 CFR 816.150(f) pertaining to reclamation of roads. Therefore, the Director is not approving subsection 4.4 to the extent that it exempts infrequently used access roads from the requirements of subsection 4.9. The Director is also requiring the State to amend its program to require that all infrequently used access roads comply with CSR 38–2–4.9.

e. § 38–2–4.5 Construction. This provision sets forth the grade limits for the construction of haulageways or access roads and the tolerance standards for grade measurements and linear measurements. While there are no direct Federal counterparts, the Director finds these amendments to be consistent with 30 CFR 816.150(c), which requires that designs for roads contain appropriate grade limits.

f. § 38–2–4.6 Drainage Design. These amendments set forth the standards for all drainage designs of haulageways or access roads. The amendments also specify that culverts shall be installed and maintained to sustain the vertical soil pressure, the passive resistance of the foundation and the weight of the vehicles using the road. While there are no Federal counterparts which apply to all roads, the Director finds these amendments to be consistent with 30 CFR 816.150(c), which requires that road designs contain plans for surface drainage control, and 30 CFR 816.151(d) concerning drainage control for primary roads.

g. § 38–2–4.7 Performance Standards. These amendments are intended to set forth the performance standards for the location, design, construction, reconstruction, use, maintenance, and reclamation of roads. The Director finds the proposed amendments to be no less effective than 30 CFR 816.150(b) concerning performance standards for roads. The proposed changes governing sediment storage volume and detention time as applied to drainage from roads are intended to clarify that the regulatory authority may approve lesser storage values than 0.125 acre/feet if compliance with the applicable effluent limits and the general performance standards for roads can be achieved. OSM conducted a study of West Virginia's 0.125 acre/feet standard and determined that its application in West Virginia does not render the State program less effective than the Federal regulations at 30 CFR 816.46(c)(1)(iii) (Administrative Record Number WV–890). The study did not address the adequacy of lesser storage values. However, so long as the end result is that applicable effluent limits are not exceeded, West Virginia may allow the use of lesser storage values. Therefore, the Director finds that the proposed language, which continues to require compliance with the applicable effluent limitations and performances standards for roads and providing the regulatory authority with reasonable flexibility in implementing the West Virginia program, does not render the West Virginia program less effective than the Federal regulations at 30 CFR 816.46(c)(1)(iii) concerning siltation structures.

h. § 38–2–4.8 Maintenance. These amendments provide that roads shall be maintained to meet the West Virginia performance standards for roads and any additional standards specified by the State. Roads that are damaged by catastrophic events shall be repaired as soon as is practicable. The Director finds these amendments to be substantively identical to and no less effective than 30 CFR 816.150(e) concerning maintenance.

i. § 38–2–4.9 Reclamation. These amendments set forth the performance standards for roads that are not to be retained under the approved postmining land use. With the exception of subsection 4.9(e), the Director finds the amendments to be substantively identical to and, therefore, no less effective than 30 CFR 816.150(f)(1–4), and (6), concerning reclamation of roads. Subsection 4.9(e) contains drainage and culvert requirements for road abandonment. While there are no direct Federal counterparts, the Director finds these requirements to be consistent with and, therefore, no less effective than the requirement to protect the natural drainage contained in 30 CFR 816.150(f)(5).

j. § 38–2–4.10 Primary Roads. These amendments set forth the performance standards for primary roads. The Director finds these amendments to be substantively identical to and, therefore, no less effective than 30 CFR 816.151 concerning primary roads.

k. § 38–2–4.11. Support Facilities and Transportation Facilities. These amendments set forth the requirements for support and transportation facilities such as railroad loops, spurs, sidings, surface conveyor systems, chutes, and aerial tramways ''which are under the control of the permittee.'' The Director is concerned that the phrase ''which are under the control of the permittee'' could be interpreted to exclude from these requirements certain support facilities which are within the definition of ''surface coal mining operations'' at 30 CFR 700.5. Therefore, the Director is approving this amendment only to the extent that it does not exclude facilities that are included within the definition of ''surface coal mining operations'' at 30 CFR 700.5.

l. § 38–2–4.12. Certification. This provision requires that, upon completion of construction, all primary roads for which design criteria were approved as part of the permit shall be certified. Where the certification statement for a primary road indicates a change from design standards or construction requirements in the approved permit, such changes must be documented in as-built plans and submitted as a permit revision. The Director finds the proposed language to be consistent with and no less effective than 30 CFR 816.151(a) concerning certification, and 30 CFR 774.13 concerning permit revisions.

This subsection also requires that all roads used for transportation of coal or spoil, and which are constructed outside the permitted coal extraction area shall be certified before they are used for such transportation. Finally, any roads within the coal extraction area which are constructed concurrently with progress of mining activities shall be certified in increments of 1,000 linear feet as measured from the active pit. While there are no Federal counterparts to these two proposals, the Director finds that they are consistent with 30 CFR 780.37(b) and 816.151(a).

23. CSR § 38–2–5.2 Intermitteent or Perennial Streams

The State proposes to revise this subsection to provide that before the director can approve any mining within 100 feet of an intermittent or perennial stream, the director must find that such activities will not cause or contribute to the violation of applicable State or Federal water quality standards. The Director finds that the amendment satisfies 30 CFR 948.16(aa) and can be approved. 30 CFR 948.16(aa) is hereby removed.

24. CSR § 38–2–5.4 Sediment Control

West Virginia proposes to revise paragraph (a) of this subsection to make its sediment control requirements applicable to other water retention structures, and it is deleting all references to on-bench sediment control systems. The State has also deleted the reference to the design, construction and maintenance criteria in the Technical Handbook. The Director finds that this revision satisfies the requirements of 30 CFR 948.15(k)(6) and 30 CFR 948.16(n) and can be approved. The required amendment at 30 CFR 948.16(n) is hereby removed.

Paragraph (b) is revised to make its design and construction requirements applicable to sediment control or other water retention structures used in association with the mining operation. The State has deleted references to on-bench sediment control structures. The Director finds this deletion is consistent with the deletion at paragraph 5.4(a), and does not render the West Virginia program less effective than the Federal regulations at 30 CFR 780.25, 816,45, 816.46 and 816.49.

Subparagraph (b)(12) is revised to require that foundation investigations and any necessary laboratory testing be performed to determine foundation stability design for impoundments meeting the size or other criteria of 30 CFR 77.216(a). This revision satisfies the requirement at 30 CFR 948.16(pp) and can be approved, and 30 CFR 948.16(pp) can be removed.

Subparagraph (b)(13) has been revised to require that all sediment control and other water retention structures be certified in accordance with the design requirements of the Act and regulations and other design criteria established by the Director. The Director finds the proposed language to be consistent with and no less effective than 30 CFR 780.25 concerning reclamation plans for siltation structures, impoundments, banks, dams, and embankments.

West Virginia proposes to revise paragraph (c) to make the requirements of that paragraph applicable to all embankment type sediment control or other water retention structures, including slurry impoundments. The Director finds that this revision satisfies the requirement at 30 CFR 948.16(qq) and can be approved. 30 CFR 948.16(qq) is hereby removed.

Subparagraph (c)(3) is revised to require the installation of cutoff trenches during embankment construction to ensure stability. The Director finds that this revision satisfies the requirement at 30 CFR 948.16(rr) and can be approved. 30 CFR 948.16(rr) is hereby removed.

Subparagraph (c)(4) is revised to require prompt notification of the State if any examination or inspection of an impoundment discloses that a hazard exists. The Director finds that this revision satisfies the requirement at 30 CFR 948.16(ss) and can be approved. 30 CFR 948.16(ss) is hereby removed.

Subparagraph (c)(6) is revised to require that the design plan for an impoundment which meets the size criteria of 30 CFR 77.216(a) include a stability analysis which includes but is not limited to strength parameters, pore pressures, and long-term seepage conditions. Subparagraph (c)(6) also provides that the design plan will include a description of each engineering design assumption and calculation. These revisions satisfy the requirements at 30 CFR 948.16(ccc) and can be approved, and 948.16(ccc) can be removed.

Paragraph (d) has been revised to require that where sediment control or other water retention structures are constructed in sequence with the advance of the mining to allow for on-bench construction, such systems shall be constructed and certified in sections of 1,000 linear feet or less as measured from the active pit. While there is no direct Federal counterpart to the proposed language, the Director finds that the language is not inconsistent with 30 CFR 816.49(a)(3) concerning design certification.

The State proposes to revise paragraph (e) to require the inspection of sediment control or other water retention structures. The State also proposes to require that the professional engineer, licensed land surveyor, or other specialist involved in the inspection of impoundments be experienced in the construction of impoundments. The Director finds that this revision satisfies the requirement at 30 CFR 948.16(uu) and can be approved, and 948.16(uu) can be removed.

West Virginia proposes to revise paragraph (h) to make its abandonment requirements applicable to sediment control and other water retention structures. The Director finds that these changes do not render the State program less effective than the Federal regulations, and are consistent with the required amendment at 30 CFR 948.16(n) and can be approved.

25. CSR 38–2–5.5 Permanent Impoundments

The WVDEP proposes to clarify that sediment or water retention or impounding structures left in place after final bond release must be authorized by the Director as part of the permit application or a revision to a permit. The Director finds this revision partially satisfies 30 CFR 948.16(vv) (the first sentence) and can be approved. The Director is making this finding with the assumption that the apparent typographical error in the first sentence of subsection 5.5 (''review'' should be ''revision'') will be corrected. The State has also proposed to amend subsection 5.5(c) to require the landowner to provide for sound future maintenance of a permanent impoundment. The Director finds that this provision satisfies the requirement codified in the second sentence of 30 CFR 948.16(vv). The proposed provisions are approved, and 30 CFR 948.16(vv) is hereby removed.

26. CSR 38–2–6 Blasting

a. § 38–2–6.3(b) Public Notice of Blasting Operation. This subsection is amended to require that all local governments and residents or owners of dwellings or structures located within one-half mile of the blast site be notified of surface blasting activities incident to an underground mine. The State also proposes to require that the blasting notification be announced weekly, but in no case less than 24 hours before the blasting will occur. The Director finds the amended language to be substantively identical to and no less effective than 30 CFR 817.64(a).

b. § 38–2–6.6 Blasting Control for Other Structures. The State proposes to revise Subsection 6.6 to require that all non-protected structures in the vicinity of the blasting area be protected from damage by the establishment of a maximum allowable limit on ground vibration specified by the operator in the blasting plan and approved by the Director. The Director finds that this revision satisfies the requirement at 30 CFR 948.16(cc) and can be approved. 30 CFR 948.16(cc) is hereby removed.

c. § 38–2–6.8 Preblast Survey. Subparagraph 6.8(a) is amended to delete language that excludes a certain portions of the permit area when determining the applicability of preblast survey notification requirements. The Director finds this revision satisfies the requirements of 30 CFR 948.15(k)(7) and 948.16(l) and can be approved. 30 CFR 948.16(l) is hereby removed.

27. § CSR 38–2–8.1 Protection of Fish and Wildlife and Related Value

West Virginia proposes to add an exception to paragraphs (e)(1) and (e)(3) of Subsection 8.1 to require the use of the best technology currently available to protect raptors and large mammals, except where the Director determines that such requirements are unnecessary. The Director finds the added language to be substantively identical to and no less effective than 30 CFR 816.97(e)(1) and (3).

28. CSR § 38–2–9 Revegetation

The State proposes to revise paragraphs (g) and (h) of Subsection 9.3 to require that, in determining success on areas to be developed for forestland and wildlife resources or commercial woodlands, the trees and shrubs counted be healthy and in place for not less than two growing seasons. This revision is intended to satisfy OSM's Regulatory Reform III letter of March 6, 1990. The Director finds these amendments to be substantively identical to and no less effective than 30 CFR 816.116(b)(3)(ii) concerning revegetation, standards for success.

29. CSR § 38–2–11.1 Insurance

The State proposes to revise paragraph (a) of this subsection to clarify that liability insurance must be maintained throughout the life of the permit or any renewal thereof. The State also proposes to revise this paragraph to provide that there are no exclusions for blasting from the property damage coverage. The Director finds the proposed amendments are substantively identical to and no less effective than 30 CFR 800.60 concerning terms and conditions for liability insurance.

30. CSR § 38–2–13 Notice of Intent to Prospect

Subsection 13.1 is added to this section. Under this subsection, where prospecting operations are proposed without surface disturbance and without appreciable impacts on land, air, water, or other environmental resources, the Director may waive the requirements of this section and the bonding requirements of § 22A–3–7 of the WVSCMRA. To qualify, at least 15 days prior to commencement of any prospecting activities, the operator must file with the Director a written notice of intent to prospect. The notice must include a description of the activities to be conducted and a USGS topographic map showing the area to be prospected. The Director may approve the notice of intent subject to the findings required by paragraph (b) of Subsection 13.4. CSR 38–2–13.4(b) provides that the regulatory authority, to approve an application, must find, in writing, that the applicant has demonstrated that the prospecting operation will be conducted in accordance with section CSR 38–2–13, and other applicable provisions of the State regulations and statute, and the application. This revision is intended to satisfy in part the requirements of 30 CFR 948.15(l)(2). The Director finds that the proposed language is no less effective than 30 CFR 772.11 concerning notice requirements for exploration removing 250 tons of coal or less. The Director notes that where no surface disturbance or other appreciable impacts caused by coal exploration are anticipated, and no lands unsuitable are involved, applicants will not have some of the information required by 30 CFR 772.11, such as information related to drilling and trenching located at 772.11(b)(3) and reclamation located at 772.11(b)(5).

Subsection 38–2–13.5(b) concerning performance standards for prospecting roads is deleted and new requirements for prospecting roads are established at CSR 38–2.13.6. The new provisions provide the environmental standards relevant to the location, design, construction or reconstruction, use, maintenance, and reclamation of prospecting roads. The Director finds the proposed standards are substantively identical to and no less effective than 30 CFR 816.150 concerning general performance standards for roads.

Subsection 13.10 is revised to provide that, notwithstanding any other provision of this section, any person who proposes to conduct prospecting operations on lands which have been designated as unsuitable for surface mining pursuant to § 22A–3–22 of the WVSCMRA shall file a notice of intent in accordance with Subsection 13.3. Approval of the notice of intent shall be in accordance with Subsection 13.4. The Director finds the amendment to be consistent with and no less effective than 30 CFR 772.11(a).

31. CSR § 38–2–14.5 Hydrologic Balance

West Virginia proposes to revise paragraph (b) of this subsection to require that monitoring frequency and effluent limitations be governed by the standards set forth in a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to § 20–5–1 *et seq.* of the West Virginia Code, the Federal Water Pollution Control Act as amended, 33 U.S.C. 1251 *et seq.* and the rules and regulations promulgated thereunder. The Director finds these amendments to be consistent with and no less effective than 30 CFR 816.42 concerning water quality standards and effluent limitations.

Paragraph (c) has been revised to require that any water discharged from a permit area and treated complies with the requirements of paragraph (b) of this subsection, pertaining to NPDES permits. The Director finds this amendment is consistent with and no less effective than 30 CFR 816.42 concerning water quality standards and effluent limitations.

Paragraph (h) has been revised to provide that a waiver of water supply replacement rights granted by a landowner can apply only to underground mining, provided that it does not exempt any operator from the responsibility of maintaining water quality. Under section 720(a)(2) of SMCRA and 30 CFR 816.41(j), the permittee must promptly replace any drinking, domestic, or residential water supply that is contaminated, diminished, or interrupted by underground mining activities conducted after October 24, 1992, if the well or spring was in existence before the permit application was received. Such water supplies may be replaced by restoring a spring or an aquifer, or by providing water from an alternative source, such as from another aquifer or from a public water supply or a pipeline from another location.

While a landowner may not desire the replacement of a water supply on his or her property, a waiver is only permissible under the circumstances set forth in paragraph (b) of the definition of ''Replacement of water supply'' at 30 CFR 701.5.

The definition of ''Replacement of water supply'' at 30 CFR 701.5 provides that, at paragraph (b), 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.

Therefore, the waiver of water supply proposed to be authorized by the State must be consistent with the definition of ''Replacement of water supply'' at 30 CFR 701.5. The Director notes that while section 720(a)(2) of SMCRA does not expressly authorize waivers, the regulations implementing this provision recognize that waivers are appropriate under certain circumstances, provided the permittee demonstrates that an alternative source is available. However, under the definition, no waivers (source or delivery system) are permissible if the water supply is needed for either the existing land use or the approved postmining land use.

The Director finds that the proposed language is not inconsistent with SMCRA and the Federal regulations except to the extent that the proposed waiver would not be implemented in accordance with the definition of ''Replacement of water supply'' at 30 CFR 701.5. The Director also finds that this revision satisfies the requirements of 948.16(q), and that 30 CFR 948.16(q) can be removed. In addition, the Director is requiring that the West Virginia program be further amended to clarify that under Section 22–3–24(b) and CSR 38–2–14.5(h), the replacement of water supply can only be waived under the conditions set forth in the definition of ''Replacement of water supply,'' paragraph (b), at 30 CFR 701.5.

32. CSR § 38–2–14.8 Steep Slope Mining

The State proposes to revise subparagraph (1) of paragraph (a) of this subsection to provide that casting of spoil from a higher seam to a lower seam in multiple seam operations may only occur where the highwall of the lower seam intersects the outcrop of the upper seam; the lowest seam is mined first or in advance of the upper seams; and minimum bench widths based on slopes are established on the lower bench sufficient to accommodate both spoil placement from the upper seam and bench drainage structures. This revision is intended to satisfy in part the requirements of 30 CFR 948.15(1)(2) by

preventing the placement of spoil on natural intervening slopes.

The Federal rules do not specifically address the use of cast blasting as a means of spoil transport in multi-seam operations. However, this practice is not inherently inconsistent with any Federal requirement. The State rule does not exempt these operations from compliance with other applicable requirements of the approved program. Instead, it would provide additional assurance that cast lasting is conducted in a safe and environmentally sound manner. For example, any State authorized cast blasting would necessarily have to comply with the approved State blasting provisions at CSR 38–2–6, such as the State rules controlling flyrock at CSR 38–2–6.5(d). The approved State requirements for the compaction and stability (a 1.3 static safety factor is required) of the backfill at CSR 38–2–14.8(a)(4) also apply. In some cases, the stability analysis might require that certain materials need to be rehandled to place spoil in its final place or to achieve adequate compaction of the backfill.

The approved State requirements for contemporaneous reclamation at CSR 38–2–14.15 also apply. The approved State prohibition at CSR 38–2–14.8(a)(1) of placing spoil on the downslope also applies. Where excess spoil is involved, the approved State requirements at CSR 38–2–14.14 would also apply. The required amendment codified at 30 CFR 948.16(xx) is being revised to require that the State amend its program at CSR 38–2–14.8(a) to specify design requirements of outcrop barriers that will be the equivalent of natural barriers and will assure the protection of water quality and insure the long-term stability of the backfill. With these considerations in mind, the Director finds that the amendment to allow the use of cast blasting is not prohibited by or otherwise inconsistent with SMCRA and the Federal regulations at 30 CFR 816.107 concerning backfilling and grading of steep slopes. The Director is taking this opportunity to delete the required amendments codified at 30 CFR 948.16(yy) and (zz). The required amendments are being removed because the West Virginia rules that had the deficiencies were never approved by the West Virginia legislature and do not appear in the latest submittal of the rules.

The State also proposes to revise subparagraph (4) of paragraph (a) to prohibit placement of woody materials in the backfill unless the Director first determines that the method of placement of woody material will not deteriorate the future stability of the backfilled area. The Director finds the amended language substantively identical to 30 CFR 816.107(d), and that this revision satisfies the requirement at 30 CFR 948.16(hh). 30 CFR 948.16(hh) is hereby removed.

33. CSR § 38–2–14.11 Inactive Status

West Virginia proposes to revise paragraph (b) of this subsection to provide that the Director may grant inactive status for a period not to exceed one-half the permit term if it is determined that the application contains sufficient information to meet all requirements of paragraph (a): Provided that where the applicant documents in the application that the operations will become inactive for more than 30 days, but will be reactivated on an intermittent and/or irregular basis during the approval period, such operations are not required to reapply for inactive status except at the termination date of the initial term of approval: Provided, however, that the Director may review the approval of inactive status during its term and require updated information pursuant to paragraph (a) and, based upon this or other information, may modify or rescind the approval prior to its initial termination date. The Director finds the amended language to be no less effective than 30 CFR 816.131 concerning temporary cessation of operations, which requires notification to the regulatory authority by the operator of any intention to temporarily cease mining for more than 30 days.

34. CSR § 38–2–14.12 Variance From Approximate Original Contour Requirements

West Virginia proposes to revise paragraph (a)(6) to provide that the Director may grant a variance from the requirements for restoring the mined land in steep slope areas to approximate original contour if the watershed of the permit and adjacent area will be improved by reducing pollutants, environmental impacts, or flood hazards; provided that, the watershed will be deemed improved only if the amount of total suspended solids or other pollutants discharged to ground or surface water from the permit area will be reduced, or flood hazards will be reduced, and if changes in seasonal flow volumes from the proposed permit area will not adversely affect surface water ecology or any existing or planned use of the surface or ground water. The Director finds that this change satisfies the requirement at 30 CFR 948.16(ii) and is no less effective than 30 CFR 785.16(a)(3)(i) and (ii). 30 CFR 948.16(ii) is hereby removed.

35. CSR 38–2–14.14 Disposal of Excess Spoil

Subsection (e)(2) provides that the valley fills shall be designed to assure a long-term static safety factor of 1.5 or greater. The Director finds that this provision satisfies 30 CFR 948.16(jj) which can be removed, and is no less effective than 30 CFR 816.71(b)(2) concerning excess spoil. 30 CFR 948.16(jj) is hereby removed.

Subsection (e)(10) is amended to limit the maximum grade from the outslope of a valley fill toward the rock core to three percent. The Director finds this amendment to be substantively identical to and no less effective than 30 CFR 816.72(b)(3) concerning slopes of valley and head-of-hollow fills.

36. CSR 38–2–14.15 Contemporaneous Reclamation Standards

West Virginia has completely revised this subsection to require that the mining and reclamation plan for each operation describe how the mining and reclamation operations will be coordinated to minimize total land disturbance and to keep reclamation operations as contemporaneous as possible with the advance of mining operations. The revised provisions specify time, distance and acreage limits for single seam contour mining, single seam contour mining and auger operations, area mining, augering, multiple seam mining, and mountaintop removal operations. The proposed rules set deadlines for existing and new operations to comply with these requirements, and they allow the Director to grant variances to specific standards with proper justification. The Director finds these amended provisions to be consistent with and no less effective than 30 CFR 816.100 concerning contemporaneous reclamation, and the backfilling and grading requirements at 30 CFR 816.102. The Director notes that 30 CFR 816.101 concerning time and distance requirements for contemporaneous reclamation is suspended (57 FR 33875; July 31, 1992) and cannot be used as a standard against which to judge the effectiveness of State programs. As such, the Federal regulations do not contain specific time and distance requirements, but only require, at 30 CFR 816.100, that reclamation efforts occur as contemporaneously as practicable with mining operations.

Subsection (m) is amended to add provisions governing the placement of coal processing waste in the backfill. Under the proposed provision, compaction shall be in accordance with CSR 38–2–22.3(p) and shall achieve a

minimum static safety factor of 1.3. The coal processing waste shall not contain acid-producing or toxic-forming material and shall be placed in a controlled manner to: minimize effects on surface and groundwater quality and quantity; ensure mass stability; ensure suitable reclamation and revegetation compatible with the postmining land use; not create a public hazard; and prevent combustion. Such disposal facilities must be designed using current prudent engineering practices and must meet any design criteria established by the regulatory authority. Designs must be certified by a qualified registered professional engineer. Any potential hazards must be promptly reported. The Director finds these amendments do not render the State program less effective than 30 CFR 816.81 (a) and (c)(1). 30 CFR 816.81(b) does not apply because the State is not proposing to allow coal waste from activities located outside the permit area to be placed in the backfill. 30 CFR 816.81(d) does not apply because the coal waste will be placed in the backfill, and not in a refuse pile. The State has proposed a static safety factor of 1.3 which is identical to that required at 30 CFR 816.102(a)(3) concerning backfilling and grading; general standards. The 1.3 static safety factor is the appropriate factor to require, since the proposed provision concerns placing coal waste in a backfill and not in a waste pile. Finally, the Director notes that all the State provisions concerning the protection of the hydrologic balance will continue to apply. The prohibition in the proposed language to the placement of acid-producing and toxic-forming material in the backfill will help assure the protection of the hydrologic balance.

37. CSR § 38–2–14–17 Control of Fugitive Dust

West Virginia proposes to revise this subsection to require that all exposed surface areas be protected and stabilized to effectively control erosion and air pollution attendant to erosion.

The Director finds this revision to be substantially identical to and, therefore, no less effective than the Federal regulations at 30 CFR 816.95(a).

38. CSR 38–2–14.18 Utility Installations

WVDEP proposes to add a provision requiring that all surface mining operations be conducted in a manner that minimizes damage, destruction, or disruption of services provided by utilities. The Director finds the added provision to be substantially identical to and, therefore, no less effective than 30 CFR 816.180 concerning utility installations.

39. CSR 38–2–14–19 Disposal of Noncoal Waste

WVDEP proposes to add provisions to regulate the disposal of noncoal waste such as grease, lubricants, garbage, abandoned machinery, lumber and other materials generated during mining activities. Under the proposal, final disposal of noncoal waste will be in accordance with a permit issued pursuant to Chapter 22, Article 15 of the Code of West Virginia (Solid Waste Management Act). The Director finds these provisions consistent with the Federal regulations at 30 CFR 816.89(b) which allows operators to dispose of noncoal mine waste in State-appointed solid waste disposal areas outside of the permit area.

The proposed provisions would also allow timber from clearing and grubbing operations to be wind-rowed below the projected toe of the outslope. The Director finds these provisions to be non inconsistent with the Federal regulations at 30 CFR 816.89 concerning disposal of noncoal mine wastes. However, the proposed windrowing is less effective than the Federal steep slope regulations at 30 CFR 816.107(b). 30 CFR 816.107(b) prohibits the placement of debris, including that from clearing and grubbing, on the downslope in steep slope areas. Therefore, the Director is approving the proposed amendments except to the extent that windrowing would be allowed on the downslope in steep slope areas. In addition, the Director is requiring that West Virginia further amend CSR 38–2–14.19(d) to clarify that windrowing will not be allowed on the downslope in steep slope areas.

40. CSR 38–2–15.2 Backfilling and Regrading; Underground Mines

The State proposes to revise paragraph (b) of this subsection to require that reclamation activities of an underground mine be initiated within 30 days of completion of underground operations. The Director finds the proposed amendment to be consistent with 30 CFR 817.100 concerning contemporaneous reclamation.

41. CSR 38–2–16.2 Subsidence Control; Surface Owner Protection

West Virginia proposes to revise paragraph (c) of this subsection by deleting the phrase, ''To the extent required under applicable provisions of State law.'' This revision is intended to correct the deficiency noted at 30 CFR 948.15(k)(11). The Director finds the proposed deletion does not render the West Virginia program less effective than 30 CFR 817.121(c)(2), and satisfies the deficiency noted at 30 CFR 948.15(k)(11).

42. CSR § 38–3–17 Small Operator Assistance Program (SOAP)

The State is making numerous changes to its SOAP provisions.

a. Subsection 17.1 is amended to identify services fundable under the SOAP and to provide that the State will develop procedures for the interstate exchange of SOAP information. While there is no Federal counterpart to interstate exchanges of SOAP information, the Director finds these changes to be consistent with and no less effective than 30 CFR 795.9 concerning program services and data requirements, and no less stringent than section 507(c)(2) of SMCRA, concerning the assumption of training costs.

b. Subsection 172. is amended to clarify that requests for SOAP assistance must be in writing. The Director finds the amendment to be consistent with 30 CFR 795.7 concerning filing for assistance.

c. Subsection 17.3 is amended to increase the production limit of those operators eligible for assistance under the SOAP from 100,000 to 300,000 tons. The State is also raising, at 17.3(b)(1), the threshold ownership percentage for which coal production from an operation will be attributed to the applicant from five percent to ten percent interest. Finally, the State is requiring that all coal produced by operations owned by persons who directly or indirectly control the applicant by reason of direction of the management be attributed to the applicant. The Director finds these changes to be substantively identical to counterpart provisions at 30 CFR 795.6(a). In addition, the requirement at 30 CFR 948.16(kk) is satisfied and is hereby removed.

d. Subsection 17.4 is amended to require SOAP applicants to use application forms and format provided by the State. While there is no direct Federal counterpart, the Director finds these changes to be consistent with 30 CFR 795.7 concerning filing for assistance.

e. Subsection 17.5 is amended to provide that applicants be notified in writing of approval or denial of a SOAP application. This subsection is also amended to add that contractors may be used for SOAP assistance to qualified laboratories. The Director finds these changes to be consistent with and no less effective than 30 CFR 795.8(a) concerning application approval and

notice, and 795.10(b) concerning subcontractors.

f. Subsection 17.6 is amended to add the term SOAP contractor, and to provide that the laboratory or contractor must be qualified to perform the required determinations and statements. The Director finds the changes to be consistent with and no less effective than 30 CFR 795.10 concerning qualified laboratories and subcontractors.

g. Subsection 17.7(a)(4) and 17.7(a)(5) are amended to clarify that operator liability will be based on actual and attributed annual production for all locations of 300,000 tons during the 12-month period immediately following permit issuance. The Director finds this provision to be substantively identical to and no less effective than 30 CFR 795.12(a)(2), concerning applicant liability.

Subsection 17.7(b) is amended to require applicants to submit written statements with sufficiently demonstrate that the applicant has acted in good faith at all times prior to the State waiving the reimbursement obligation. The Director finds this provision to be substantively identical to 30 CFR 795.12(b).

43. CSR § 38–2–18.3 Review of Decision Not to Inspect or Enforce

Subsection 18.3(b) has been revised to provide that any person who is or may be adversely affected by the decision of the Director not to inspect or enforce may appeal such decision to the Surface Mine Board pursuant to § 22–4–2 of the Code of West Virginia. The Director finds the amended language to be substantively identical to and no less effective than 30 CFR 842.15(d) concerning review of decision not to inspect or enforce.

44. CSR § 38–2–20.1 Inspection Frequencies

The State proposes to revise paragraph (a) of this subsection to provide that prospecting operations be inspected ''as necessary'' to assure compliance with the Act and these regulations. The Director finds the proposed language to be substantively identical to and no less effective than 30 CFR 840.11(c) concerning inspections by State regulatory authorities.

45. CSR § 38.2–20.2 Notices of Violations

Paragraph (a) of this subsection has been amended to provide that when the Director determines that a surface mining and reclamation operation or prospecting operation is in violation of any of the requirements of the Act, these regulations or the terms and conditions of the permit or prospecting approval, a notice of violation shall be issued. Such notice of violation shall comply with all the requirements and provisions of this subsection. In the past, pursuant to its Code of Violations, the State issued enforcement actions rather than notices of violation, for certain violations. This proposal will only allow the issuance of a notice of violation. The Director finds the added language no less effective than 30 CFR 843.12(a)(1) concerning notices of violations.

Subparagraph (b)(3) has been amended to change the maximum initial abatement period from 15-days to 30-days. This change is proposed to render the regulations consistent with 22–3–17(o) of WVSCMRA which now provides for an initial abatement period of 30 days, followed by a maximum additional abatement period of 60 days following issuance of a cessation order. The Director finds the change is reasonable and does not render the West Virginia program less effective than 30 CFR 843.12(b)(3) concerning abatement of violations, or less stringent than section 521(a)(3) of SMCRA, which allows a maximum total abatement period of 90 days, following issuance of a notice of violation and cessation order.

46. CSR § 38–2–20.4 Show Cause Orders

West Virginia proposes to revise paragraph (b) of this subsection by adding the phrase, ''where violations were cited.'' The proposal provides that the Director may determine a pattern of violations exists or has existed where violations were cited on two or more inspections of the permit area within any 12-month period. The Director finds the proposed change to be substantively identical to and no less effective than 30 CFR 843.13(a)(2) concerning pattern of violations.

47. CSR § 38–2–20.5 Civil Penalty Determinations

Paragraph (b) has been revised to provide that the Director shall, for ''any'' cessation order, assess a civil penalty in accordance with § 22–3–17(a) of the WVSCMRA for each day of continuing violation, except that such penalty shall not be assessed for more than 30 days. In accordance with this change, the sentence requiring that imminent harm cessation orders shall have an initial assessment in accordance with subsection 20.7 of the regulations is deleted. The State now assesses all cessation orders, including imminent harm cessation orders, as if they were failure-to-abate cessation orders. That is, they are assessed a civil penalty at the rate of $750 per day, for 30 days, beginning with the issuance date.

The Director finds that these proposed changes return the State program to its former practice of assessing imminent harm cessation orders as failure to abate cessation orders.

This practice was included in West Virginia's original permanent program submittal, which OSM approved on January 21, 1981 (46 FR 5916–5956). However, in 1991, West Virginia proposed to change this long-standing practice to require that imminent harm cessation orders be assessed according to the State's point system at CSR 38–2–20.7. The Director did not approve this proposed change, noting that the State failed to retain the requirement that civil penalties be assessed for cessation orders in all instances, and that violations in imminent harm cessation orders be assessed an additional penalty of $750 for each day the failure to abate continues. The Director also questioned whether the State has statutory authority to assess imminent harm cessation orders using the point system (56 FR 58306, 58307; November 19, 1991). Because of these deficiencies, the Director imposed a required amendment, which is codified at 30 CFR 948.16(ddd) (*Id*. at 58311). Within the current proposal to return to its former practice, West Virginia has revised CSR 38–2–20.5(b) to require the assessment of civil penalties for ''any'' cessation orders, in accordance with § 22–3–17(a), which requires that failure to abate cessation orders be assessed at $750 per day for each day the failure to abate continues. As such, imminent harm cessation orders will be assessed penalties of $750 per day for each day a violation continues, both before and after the target date for abatement. Therefore, the reference to § 22–3–17(a) satisfies the deficiency noted at 30 CFR 948.15(m) and the requirement at 30 CFR 948.16(ddd) concerning initial and mandatory civil penalty assessment procedures for imminent harm cessation orders. 30 CFR 948.16(ddd) is hereby removed.

The State also proposes to revise this paragraph to provide that if the cessation order has not been abated within the 30-day period, the Director shall initiate action pursuant to § 22–3–17(b), (g), (h) and (j) of the WVSCMRA as appropriate. The term ''modified'' was deleted from previous language of this provision that read, ''* * * abated or modified within the thirty (30) day period * * *.'' The Director finds this revision satisfies the requirement at 30 CFR 948.16(eee). The deletion of the word ''modified'' is consistent with the Federal regulations at 30 CFR 845.15(b)

concerning assessment of violations. The Director also finds that the requirement coded at 30 CFR 948.16(fff) concerning the starting and ending dates for civil penalty assessments is satisfied by the reference to § 22–3–17(a) of the WVSCMRA at CSR 38–2–20.5(b). 30 CFR 948.16 (eee) and (fff) are hereby removed.

48. CSR § 38–2–20.6 Procedures for Assessing Civil Penalties

The State proposes to revise paragraph (d) of this subsection to remove the restrictions on public participation at assessment conferences. The proposed rule provides that any person may submit in writing at the time of the assessment conference a request to present evidence concerning the violation(s) being conferenced. Such request must be granted by the assessment officer. The Director finds these changes satisfy the deficiency codified at 30 CFR 948.15(m)(2) and the requirement at 948.16(ggg). 30 CFR 948.16(ggg) is hereby removed.

Subparagraph (h) has been amended to change the citation of § 22–3–17(d)(3) or (4), to § 22–3–17(d)(1) of WVSCMRA. This change was made to be consistent with the changes made to § 22–3–17; see Finding A 11, above. The Director finds the citation changes do not render the State program inconsistent with 30 CFR Part 845 and are approved.

49. CSR § 38–2–20.7 Assessment Rates

Paragraphs (a), (b) and (c) are revised to clarify that the monetary denomination used in the assessment of civil penalties is dollars. The Director finds the revisions satisfy the requirement at 30 CFR 948.16(hhh). 30 CFR 948.16(hhh) is hereby removed.

Paragraph (d) is revised to ensure that an operator is awarded good faith only where abatement is achieved before the time set for abatement. The Director finds these revisions satisfy the deficiency codified at 30 CFR 948.15(m)(2) and the requirements of 948.16(iii). 30 CFR 948.16(iii) is hereby removed.

50. CSR § 38–2–22 Coal Refuse

a. Subsection 22.2 to require that coal refuse disposal facilities be designed to attain a minimum long-term static safety factor of 1.5 and a seismic factor of safety of 1.2. The Director finds the change satisfies the requirements codified at 30 CFR 948.16(aaa). 30 CFR 948.16(aaa) is hereby removed.

b. Subsection 22.3(p) has been revised deleting the provision that allows coal refuse piles to be constructed with slopes exceeding two (2) horizontal to one (1) vertical. The Director finds this revision satisfies the deficiency codified at 30 CFR 948.15(l)(2) and the requirements of 948.16(bbb). 30 CFR 948.16(bbb) is hereby removed.

c. Subsection 22.4(f) has been amended to provide that Class A coal refuse impoundments be designed for a minimum P_{100}+0.12 (PMP–P_{100}) inches of rainfall in 6 hours and Class B coal refuse impoundments be designed for a minimum P_{100}+0.40 (PMP–P_{100}) inches of rainfall in 6 hours. The Director finds the proposed amendments to be consistent with and no less effective than 30 CFR 816.84(b)(2).

d. Subsection 22.4(g) has been amended to add the requirement that all impoundments meeting size or other criteria of 30 CFR 77.216(a) must be designed and constructed to safely pass the probable maximum precipitation (PMP) of a 24 hour storm event. The Director finds the proposed amendment to be no less effective than 30 CFR 816.84(b)(2) concerning the design event for coal refuse disposal impoundments meeting or exceeding the criteria of 30 CFR 77.216(a) with one exception. Rainfall data for design storms is usually obtained from the U.S. Weather Service. The U.S. Weather Service's document ''Rainfall Frequency Atlas,'' however, does not have data charts concerning PMP for a 24-hour storm event. Without such data the standard cannot be implemented. Therefore, the Director is requiring that West Virginia demonstrate how the State would implement the PMP 24-hour standard, or revise subsection 22.4(g) to require compliance with a PMP 6-hour standard. Data for the PMP 6-hour storm event is available from the U.S. Weather Service.

e. Subsections 22.4 (g) and (h) have been revised to allow the use of single open channel or open channel spillways if they are of non-erodible materials and designed to carry sustained flows or earth- or grass-lined and designed to carry short-term, infrequent flows at non-erosive velocities where sustained flows are not expected. The Director finds these revisions satisfy the requirements at 30 CFR 948.16(mm). 30 CFR 948.16(mm) is hereby removed.

f. Subsection 22.5(a)(2) has been amended to provide that all coal refuse sites be constructed and maintained so as to attain a minimum long-term static safety factor of 1.5, and that structures that have the capacity to impound water also attain a seismic safety factor of 1.2. The Director finds the proposed standards are consistent with the requirements contained in 30 CFR 948.16(aaa) and can be approved.

g. Subsection 22.7(a) has been amended to require that inspections of impounding refuse piles be made regularly, but not less than quarterly during construction. In addition, inspections will be made during placement and compaction of coal refuse material and during critical construction periods. Subsection 22.7(c) is amended to provide that impoundments not meeting MSHA size or other criteria be examined at least quarterly. Subsection 22.7(d) is amended to provide that a copy of each inspection or examination report be retained at or near the mine site. The Director finds the proposed amendments to be consistent with and no less effective than 30 CFR 816.83(d) concerning inspections of refuse piles, 30 CFR 816.49(a)(12) concerning impoundment examinations, and 816.49(a)(11)(iii) concerning inspection reports.

51. CSR 38–2C–4 Training of Blasters

Section 4 has been amended to add a provision that would allow applicants for certification or recertification to complete a self-study course in lieu of the existing training program. Self-study materials would be provided the State. While there is no direct Federal counterpart, the Director finds the proposed language is consistent with 30 CFR 850.13 concerning the training of blasters.

52. CSR 38–2C–5 Examination for Certification of Examiner/Inspector and Certified Blaster

Subsections 5.1 and 5.2 are amended to add that the examination for certified blaster will also test on information contained in the self-study course established by § 38–2C–4 as an option to completing the refresher training course. While there is no Federal counterpart, the Director finds the proposed language is not inconsistent with 30 CFR 850.13 concerning training of blasters.

53. CSR 38–2C–8.2 Refresher Training Course/Self-study Course

This subsection is amended to allow the completion of the self-study course established by § 38–2C–4 as an option to completing the refresher training course. While there is no Federal counterpart, the Director finds the proposed language is not inconsistent with 30 CFR 850.13 concerning training of blasters.

54. CSR 38–2C–10.1 Violations by a Certified Blaster

WVDEP proposes to remove language authorizing the Director to issue a cessation order and/or take other action as provided by the WVSCMRA § 22–3–16 and 17 when a certified blaster is in violation of WVSCMRA § 22–3–1. The

Director retains authority to issue a notice of violation. While the Federal regulations do not specifically provide for the issuance of either notice of violations or cessation orders against certified blasters, the Director finds the proposed changes are not inconsistent with 30 CFR 850.15(b) concerning suspension and revocation of blaster certification.

55. CSR 38–2C–11.1 Penalties

This subsection is amended to authorize the issuance of an order to suspend a blaster's certification based on clear and convincing evidence of a violation, and to provide for a hearing to show cause why a blasters certification should not be suspended. Deleted from this subsection and from subsection 11.2, and § 38–2C–12 are reference to cessation orders. The Director finds the proposed changes to be consistent with and no less effective than 30 CFR 850.15(b) concerning suspension and revocation of blaster certification.

56. CSR 38–2D–4.4 Reclamation Objectives and Priorities

This subsection is amended to clarify its objectives and priorities for abandoned mine lands reclamation projects by indicating the provision applies to ''past'' coal mining practices which may or may not constitute and extreme danger. The Director finds the proposed change to be no less stringent than section 403(a)(2) of SMCRA concerning eligible lands and water.

57. CSR 38–2D–6.3(a) Acceptance of Gifts of Land

This section is revised to remove the requirement that the Director accept gifts of land in accordance with Department of Justice procedures for the acquisition of real property. The Director finds the deletion does not render the West Virginia program less effective than 30 CFR 879.13 concerning acceptance of gifts of land.

58. CSR 38–2D–8.7 Grant Application Procedures

This section is amended to remove provisions which describe procedures for completing and submitting a grant application to OSM for the reclamation of abandoned mine lands. The Director finds the proposed deletions do not render the West Virginia program less effective than the grant application procedures at 30 CFR 886.15 which contain no counterparts to the deleted language.

IV. Summary and Disposition of Comments

Public Comments

The Director solicited public comments and provided an opportunity for public hearings on the proposed amendment on three separate occasions. Public hearings were held on September 7, 1993, October 27, 1994, and May 30, 1995, (Administrative Record Nos. WV–906, WV–958, and WV–983). OSM has published final rule notices on the provisions concerning bonding and the provisions concerning durable rock fills. Therefore, comments relating to those provisions will not be discussed here.

Following is a summary of the substantive comments. Comments voicing general support or opposition to the proposed amendment but devoid of any specific issues are not discussed. The summarized comments and responses are organized by subject. All comments and responses have been adjusted to reflect the nomenclature of the May 16, 1995, version of the regulations.

Amendment Review Process

A commenter asserted that OSM has predetermined the proposed State amendments in the Federal Register notice dated August 12, 1993 (58 FR 42903). Specifically, the commenter stated that OSM referred to a ''satisfaction in part of a federal referenced regulation'' (see proposed regulation changes #19, 20, 33, 35, 37, 50, and 53 in the August 12, 1993 notice). Such statements by OSM, the commenter asserted, indicate that a decision has already been made and that the changes will not be objectively considered by OSM. In response, the Director believes that the commenter has misunderstood OSM's intention. Under 30 CFR 732.17(h)(2)(i), OSM is required to inform the public of proposed changes to State regulatory programs, and to publish the text or a summary of the proposed State program amendments. As part of that notification, OSM also identifies those proposed amendments that are related to program deficiencies that are codified in the Federal regulations at 30 CFR 948.16 concerning required program amendments. This is done to draw the public's attention to the fact that the State is addressing program deficiencies. Sometimes, proposed amendments appear to address only part of the requirements codified at 30 CFR 948.16. In those cases, OSM often states that the proposed amendment is intended to satisfy a portion of the requirements of a specific paragraph codified at 30 CFR 948.16. In no way does such a statement by OSM mean, or imply, that OSM has predetermined whether or not the proposed amendment is approvable by OSM.

No Federal Counterpart Provisions

Some commenters made the assertion that in situations where there are no Federal counterparts to the proposed State provisions that the proposed provisions should not be of concern to OSM. In response, the Director notes that, under 30 CFR 732.17, the State must submit and OSM must review changes to approved State programs. In those cases where there are no direct Federal counterparts to the proposed State provisions, OSM will make a determination, under 30 CFR 732.15 (a) and (c), of whether or not the State provisions are in accordance with SMCRA and consistent with the Federal regulations, and that the proposed State provisions would not interfere with or preclude implementation of SMCRA or the Federal regulations.

Statutes

§ 22–3–13(b)(10) Performance standards: The commenter stated that the charge to avoid acid or toxic mine drainage implies that you have to avoid it at all costs, and that you can't have any alternative. In response, the Director notes the provision is substantively identical to section 515(b)(10)(A) of SMCRA (see Finding A9).

§ 22–3–19 Permit renewal and revision: A commenter stated that the proposed renewal fee is required only when the operator is going to continue active mining. Also, that a fee is not required for any reclamation work, including regrading and certainly not needed for the grass to grow. In response, the Director notes that under the proposed rules at CSR 38–2–3.27(a), the WVDEP may waive, under specified conditions, the requirements for permit renewal if coal removal is completed. Therefore, the $2000 filing fee may not affect permittees with only reclamation to be done.

§ 22–3–19(a)(2) Permit renewal and revision: The commenter stated that the amended statute remains more than a bit fuzzy as to whether or not the additional land area will be subject to the procedural requirements of a new permit, i.e., public notice, review and comment. The Director disagrees. The proposed language and the State's June 16, 1994 (WV–923) clarification letter, both clearly state that new areas being added to a permit at renewal will be subject to the full permitting requirements of the West Virginia program, including public review, notice, and comment.

§ 22–3–28 Special reclamation permits: The commenter said that this section should be removed from the State program even though the State has expressed interest in leaving it in the State program in the event that OSM will, in the future, approve such special permits. In response, the Director is not acting on this provision, at this time, because the State has not made any substantive changes to this section. The State will be notified via the 30 CFR part 732 process that the provisions are inconsistent with SMCRA and should be removed.

Rules

Rulemaking Authority

A commenter stated that some of the proposed rules exceed the authority granted to the Division under WV Code § 22–3–11(a) to the extent that they attempt to amend 38 CSR §§ 14.8 (steep slope mining) and 14.15 (backfilling and regrading). The commenter stated that the legislation that authorized the Division to promulgate the site-specific bonding regulations provided for a special exception from the normal rulemaking procedure (allowing the Division to proceed to final adoption without submission to the Legislature) specifically for the purpose of implementing a new bonding system, and not for any other amendments. In response, the Director notes that the West Virginia statutes at § 22–3–2 and § 22–3–13(d) authorize the director of the division of environmental protection to promulgate, administer and enforce rules pursuant to the West Virginia Surface Coal Mining and Reclamation Act. The rules the commenter referred to (CSR 38–2–14.8 and 14.15) were promulgated as legislative rules, and were approved by the State legislature. See Findings B32 and B36 above for the Director's findings on those amended rules.

General

CSR 38–2–1.2 Applicability: The commenter stated that this provision should not have retroactive application. See Section V, Director's Decision, below, for a complete explanation of the Director's retroactive approval.

Definitions

CSR 38–2–2.20 Chemical treatment: Commenters are concerned that this definition, which separates passive treatment from the definition, will lead to problems related to bond release. The specific concern is that if bond release is authorized in cases where passive treatment system (e.g., limestone drains) are maintaining water quality standards, then the risk is high that water quality will degrade after bond release as the passive treatment systems lose effectiveness. Another commenter said that there is no Federal counterpart and it should be approved. This commenter said that the definition of ''chemical treatment'' applies to all facets of the regulations, not just to bond release. The Director has approved the definition of ''chemical treatment'' except to the extent that the definition would allow bond release where passive treatment systems are used to achieve compliance with applicable effluent standards (see Finding B–2a above). Although OSM encourages the use of passive treatment systems as an integral part of surface mining and reclamation operations, the effectiveness and reliability of such passive systems to control pollutional discharges on a long-term basis has not been proven to the extent that they can be considered an effective basis for bond release.

Permits

CSR 38–2–3.7 Excess spoil: The commenters object to the removal of the authority to approve alternative design requirements for excess spoil fills. The commenter stated that identical regulations have been approved in the Virginia program at 480–03–19–816.73. In response, the Director notes that the Virginia provision was approved because it specifies criteria that such alternative designs must meet. Such criteria are not present in the West Virginia rule, and the Director did not approve the rule.

CSR 38–2–3.12 Subsidence control plan: One commenter expressed concern as to whether or not State law is still a consideration on the obligation to support the surface (from subsidence) under CSR 38–2–16.2. Another commenter stated that nothing in State SMCRA has changed to provide authority for removing the State law limitation found in the State regulation. In response, the Director notes that the deletion of the reference to state law is intended to clarify that the requirements of CSR 38–2–16.2 are not to be diminished by other State law. The amended State language is a response to the amendments made to Federal SMCRA by the Energy Policy Act of 1992. The Energy Policy Act added new section 720 to SMCRA to provide for the repair or compensation for material damage caused by subsidence, and the replacement of drinking, domestic, or residential water supplies damaged by underground coal mining operations. The Federal regulations implementing section 720 of SMCRA were published in the Federal Register on March 31, 1995 (60 FR 16722–16751). Neither section 720 of SMCRA nor the implementing regulations defer to State law concerning the requirements to repair or compensate for subsidence-caused material damage to dwellings and related structures or the replacement of water supplies damaged by underground coal mining operations.

CSR 38–2–3.14 Removal of abandoned coal waste piles: The commenter apparently disagrees with the proposed provision concerning the need for a permit if the coal waste material can be classified as coal using the BTU standard in ASTM D 388–88. In response, the Director notes that if a mined deposit is coal, a permit is required. Section 506 of SMCRA requires a permit if coal mining operations are to be conducted. The Federal regulations at 701.5 define surface mining activities to include the recovery of coal from deposits not in their original geologic location, which would include the reprocessing of abandoned waste piles.

CSR 38–2–3.27 Permit renewals: The commenter disagrees with the proposed language that allows the State to waive the requirements for permit renewal only where all coal extraction is completed and all backfilling and regrading will be completed within 60 days prior to the expiration date of the permit. The commenter states that Federal law only requires a permit in order to ''mine'' and does not require that reclamation be permitted. In response, the Director notes that the proposed State provision is consistent with and is a reasonable interpretation of the Federal requirements at 30 CFR 773.11(a) concerning the requirements to obtain permits. See Finding B.14 above for the Director's approval of this provision.

CSR 38–2–3.28 Permit revisions: The commenter disagrees with the amendments that would allow the State to determine if an updated probable hydrologic consequences (PHC) determination is necessary, or if other permit revisions are necessary. In response, the Director notes that the State requirements concerning the PHC are consistent with the Federal requirements at 30 CFR 780.21(f)(4). The State provision concerning reasonable revisions is consistent with the Federal requirements at 30 CFR 774.11(b) concerning review of permits.

CSR 38–2–3.28 Permit revisions: The commenter stated that new provisions cannot be applied retroactively. See Section V, Director's Decision, below, for a complete explanation of the Director's retroactive approval.

CSR 38–2–3.29 Incidental boundary revisions (IBR's): The commenter stated that it should be mandatory for the State to require an advertisement and a ten day public comment period for any IBR greater than 50 acres in size that might be granted pursuant to the waiver provision at the end of CSR 38–2–3.29(b)(2). The Director does not agree. A requirement to advertise in all such cases would eliminate the possibility of the regulatory authority exercising reasonable discretion in the conduct of its responsibilities. Also, neither SMCRA nor the Federal regulations require notice or comment on proposed IBR's. The approved State program does, however, provide for appeals of decisions by the regulatory authority under CSR 38–2–18.

CSR 38–2–3.34(b) and (g) Improvidently issued permits: The commenter disagrees with these amendments and stated that the provisions appear to be for the purpose of covering agency mistakes, with no regard for the coal operator. The Director disagrees. As noted in Finding B21, above, the proposed changes are consistent with the language and intent of the Federal regulations at 30 CFR 773.20 concerning improvidently issued permits and 773.15 concerning review of permit applications.

Roads

CSR 38–2–4 Haulageways or Access Roads: The commenter said there is no Federal requirement in this area. The Director disagrees. The counterpart Federal provisions are at 30 CFR 816.150 concerning roads; general, and 816.151 concerning primary roads.

CSR 38–2–4.4 Infrequently used access roads: The commenter disagrees with the need for the proposed language. The commenter stated that the key to the requirements for infrequently used access roads is use and frequency of use. Unless the road is used frequently, the operator should not be required to spend large sums of money on extensive plans, pipes, drains and other costly items. In response, the Director notes that a road's impact on the environment is only partly derived from the use of the road. The degree of alteration of the natural land configuration of the road itself can be the greater source of environmental harm. The proposed rules are designed to minimize those impacts.

Drainage and Sediment Control

CSR 38–2–5.5 Permanent impoundments: The commenter stated that permanent impoundments should be encouraged, not restricted. In response, the Director notes that the provisions concerning the retention of permanent impoundments both authorize the retention of such impoundments and ensure sound future maintenance.

Blasting

CSR 38–2–6.3(a) Public notice of blasting operations: The commenter stated that all natural gas pipelines should be included within the definition of ''public utilities'' at subsection 6.3(a) and be notified of the blasting schedule. Without such notice, the commenter stated, the opportunity for significant input on the specifics of the blasting plan may be lost without written notice at the permit stage. As discussed in Finding B26b, above, the proposed State language is substantively identical to and, therefore, no less effective than the Federal regulations at 30 CFR 817.64(a). The Director agrees that such notice would be valuable, however, and encourages the commenter to discuss this matter with the regulatory authority.

Insurance and Bonding

CSR 38–2–11.1 Insurance: The commenter stated that the amendment is unclear and that it seems as though blasting liability continues after blasting is continued. The Director disagrees. The State language clearly states that insurance coverage for blasting damage may be terminated prior to final bond release, but not before blasting activities have ceased. The provision also requires that even though blasting coverage may be terminated, the full amount of the liability coverage (from subsection 11.1(a)) shall continue throughout the life of the permit (or renewal).

Notice of Intent To Prospect

CSR 38–2–13.6(a)(7), (f)(6) Prospecting roads: The commenter recommended that the proposed language not be approved. There is no Federal counterpart for prospecting roads, the commenter asserted, and the proposed requirements would be expensive and not cost effective for such roads which are often infrequently used. In response, the Director notes that requirements for prospecting roads are intended to be counterparts to the Federal requirements for roads at 30 CFR 816.150, and as noted in Finding B30, above, the amendments are approved. 30 CFR 815.15(b) concerning coal exploration standards requires the application of 816.150(b) through (f) for coal exploration which causes substantial disturbance.

Performance Standards

CSR 38–2–14.5(h) Waiver of water supply replacement: The commenter stated that no waivers of water supply should be allowed because they would be inconsistent with the Energy Policy Act of 1992. In response, and as discussed above in Finding B31, above, the Director has determined that the proposed language is not inconsistent with SMCRA and the Federal regulations except to the extent that the proposed waiver would not be implemented in accordance with the definition of ''Replacement of water supply'' at 30 CFR 701.5. In addition, the Director is requiring that the West Virginia program be further amended to clarify that under CSR 38–2–14.5(h), the replacement of water supply can only be waived under the conditions set forth in the definition of ''Replacement of water supply,'' paragraph (b), at 30 CFR 701.5.

CSR 38–2–14.8 Steep slope mining: A commenter stated that the downslope prohibition (in 14.8(a)(1)) seems to be a new condition and does not take into consideration the unusual geologic conditions of the southern West Virginia coal fields. In response, the Director notes that, as discussed above in Finding B32, the amendment is intended to prevent the placement of spoil on natural intervening slopes in steep slope operations. The amendment renders the State provision substantively identical to 30 CFR 816.107(b)(1), which prohibits spoil placement on the downslope.

A commenter suggested that, to improve clarity of the new language at CSR 38–2–14.8(a)(1), the phrase ''multiple seam operations'' be amended to read ''multiple seam contour operations.'' The Director notes that, while the change would improve clarity, contour mining is logically implied by the amendments and the State need not be required to revise the language.

A commenter also stated disagreement with the prohibition at CSR 38–2–14.8(a)(4) concerning placement of woody material in the backfill. The commenter asserted that when done right, such placement does not cause stabilization problems. In response, the Director notes that the proposed language is substantively identical to the Federal regulations at 30 CFR 816.107(d). The State language does allow the placement of woody materials in the fill if the regulatory authority first determines that the method of placement of woody material will not deteriorate the future stability of the backfilled area.

CSR 38–2–14.15 Contemporaneous reclamation standards: The commenter

made numerous comments and provided recommended language concerning these provisions. While the comments and recommendations may have merit, the commenter is not asserting that any of the proposals are inconsistent with SMCRA or the Federal regulations. Since the Director need only decide whether amendments are in accordance with SMCRA and the Federal regulations, he will not require the State to add language to its program if it is not needed to bring the program into compliance with Federal law and regulations. As noted in Finding B36, above, the Director has determined that the State's proposed language is consistent with the Federal regulations at 30 CFR 816.100 concerning contemporaneous reclamation standards and can be approved (see Finding B36, above).

CSR 38–2–14.19(d) Disposal of noncoal mine wastes: The commenter recommended that OSM disapprove the proposal to allow the wind-rowing of timber below the toe of the outslope. The commenter stated that OSM has disapproved this practice in the past and should do so once again. As explained above in Finding B39, the Director is approving the proposed amendments except to the extent that the amendments would allow wind-rowing on the downslope in steep slope areas. Such wind-rowing in steep slope areas would be less effective than 30 CFR 816.107(b)(3).

Subsidence Control

CSR 38–2–16.2(c)(2) Subsidence control; surface owner protection: The conmenter stated that deletion of the phrase ''To the extent required under applicable provisions of State law'' should not have been proposed because court decisions negate the validity of the disapproval of that phrase and the disapproval at 30 CFR 948.15(k)(11). In response, the Director notes that the Energy Policy Act of 1992 amended SMCRA at new section 720 to require the repair or compensation for subsidence-caused material damage to certain structures. The new SMCRA provision does not provide for a deference to State law.

Inspection and Enforcement

CSR 38–2–20.6 Procedure for assessing civil penalty: Two commenters stated that this section should be modified to ensure that it is clear that citizens with information and interests which support a coal operation or operator should be equally free to participate in assessment conferences as are citizens who are opposed. The Director disagrees that the State language is unclear. The State provision clearly states that ''[a]ny person, other than the operator and Division of Environmental Protection representives, may submit in writing at the time of the conference a request to present evidence concerning the violation(s) being conferenced.'' Clearly, the provision does not state that the evidence must be either in support of or against the violation(s) being conferenced. The commenters also questioned why ''any'' person could participate in the conference, and stated that the Division of Environmental Protection should have the discretion of allowing those they feel are genuinely affected by the proceeding to attend, not just anybody or everybody who might petition. In response, the Director notes that subsection CSR 38–2–20.6(e) provides that the conference assessment officer shall consider all relevant information on the violation(s). Therefore, the assessment officer has some discretion to determine what information is relevant to the violation(s) being conferenced.

CSR 38–2–22 Coal Refuse: The commenter stated that this section should be amended to clarify that the coal refuse regulations do not apply to coal refuse placed in the backfill, but only to isolated and distinct structures designed solely or primarily for coal refuse disposal. The Director partially agrees. 30 CFR 816.81 concerning coal mine waste general requirements, provides that all coal mine waste disposed of in an area other than the mine workings or excavations shall be placed in new or existing disposal areas within the permit area. The regulations at 30 CFR 816.83 provide the standards for coal mine waste refuse piles, with particular emphasis on stability and drainage control. Coal mine waste that is placed in the backfill, however, presents potential acidity and toxicity problems that must be addressed just as those problems must be addressed if the coal waste is placed in a separate structure. The State has addressed those potential problems in its rules concerning coal refuse in the backfill at CSR 38–2–14.15(m) (see Finding B36, above). In designing those regulations, the State used applicable standards from 30 CFR 816.81 concerning coal mine waste. In approving the proposed State provisions, OSM compared them to applicable parts of 30 CFR 816.81 as the primary standards for preventing the formation of acidity and toxicity.

CSR 38–2–22.4(f) Design storm specifications: The commenter supports the proposed changes and stated that those changes bring the State standards in line with Federal standards. In response, the Director notes that as explained in Finding B50c, above, the proposed amendments are approved except to the extent that the new standards apply to impoundments that meet the size or other criteria of 30 CFR 77.216(a). 30 CFR 816.84(b)(2) provides that impoundments that meet the size or other criteria of 77.216(a) must be designed for a probable maximum precipitation (PMP) of a six-hour or greater precipitation event.

Federal Agency Comments

Pursuant to section 503(b)(1) of SMCRA and 30 CFR 732.17(h)(11)(i), OSM solicited comments on the proposed amendment from various Federal agencies with an actual or potential interest in the West Virginia program on four different occasions (Administrative Record Nos. WV–891, WV–897, WV–936, and WV–942). Comments were received from the U.S. Bureau of Land Management, the U.S. Bureau of Mines, and the U.S. Army Corps of Engineers. These Federal agencies acknowledged receipt of the amendment, but generally had no comment or acknowledged that the revisions were satisfactory.

The Mine Safety and Health Administration (MSHA) commented that CSR 38–2–14.15(m) concerning coal processing waste disposal, and CSR 38–2–14.19(d) concerning disposal of non-coal waste may be less restrictive than MSHA's requirements. For example, MSHA stated that MSHA's minimum design criteria for refuse piles (30 CFR 77.214 and 77.215) have provisions requiring the placement of clay over any exposed coal beds before constructing a refuse pile, and also prohibit the placement of any extraneous combustible materials in a refuse pile. In response, the Director notes that the State rules at CSR 38–2–14.15(m) provide that where approval for placing coal processing waste in the backfill has been granted, such placement shall be done in accordance with the compaction requirements of CSR 38–2–22.3(p). CSR 38–2–22.3(p) requires MSHA approval of any alternate construction plans for refuse piles in compacted layers exceeding two feet in thickness. In addition, the proposed language provides that the coal processing waste will not contain acid-producing or toxic-forming material. Also, CSR 38–2–14.19(c) provide that noncoal mine waste shall not be deposited in a refuse pile or impounding structure, nor shall an excavation for a noncoal mine waste disposal site be located within eight feet of any coal outcrop or coal storage area. In addition, under both of these rules,

the coal processing waste would be placed in the backfill, a location from which the coal has already been removed. Finally, nothing in CSR 38–2–14.15(m) or 14.19 excuses the operator from compliance with applicable MSHA requirements. The Director recognizes the applicability of 30 CFR 77.214 and 77.215 to refuse piles.

Environmental Protection Agency (EPA)

Pursuant to 30 CFR 732.17(h)(11)(ii), OSM is required to obtain the written concurrence of the EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated 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 July 2 and August 3, 1993 (Administrative Record Nos. WV–892 and WV–896), and June 29, 1995 (Administrative Record No. WV–999) OSM solicited EPA's concurrence on the proposed amendments. On October 17, 1994 (Administrative Record No. WV–949), EPA gave its written concurrence with a condition on subsection 5.4(b)(2) of West Virginia's regulations. Subsection CSR 38–2–5.4(b)(2) is not being amended, and is not, therefore, a subject of this rulemaking. EPA also submitted comments concerning various State provisions that are not being amended. Since the provisions are not being amended, EPA's comments will not be addressed here.

EPA also responded by letter dated January 31, 1996, with its concurrence with the proposed amendments (Administrative Record No. WV–1019). In that letter, EPA provided comments in support of CSR 38–2–14.15(m) concerning the prohibition of acidic coal processing waste being placed in backfills, and § 22B–3–4(c) concerning variances to water quality standards for coal remaining operations.

V. Director's Decision

Based on the above findings, and except as noted below, the Director is approving with certain exceptions and additional requirements the proposed amendments as submitted by West Virginia on June 28, 1993, as modified on July 30, 1993; August 18, 1994; September 1, 1994; and May 16, 1995. As discussed in the findings, there are some exceptions to this approval, and those are noted below. The Director is also requiring the State to make additional changes to certain provisions to ensure that the program is no less stringent than SMCRA and no less effective than the Federal regulations. Those requirements are also noted below.

At § 22–3–13(e)—The authorization to promulgate rules that permit variances from approximate original contour is approved to the extent that it only applies to steep slope areas as defined at WVSCMRA § 22–3–13(d). The Director is requiring that West Virginia amend its program to limit such variances to industrial, commercial, residential, or public alternative postmining land use, in accordance with section 515(e)(2) of SMCRA.

At § 22B–1–7(d)—The authorization to allow temporary relief where the appellant demonstrates that the executed decision appealed from will result in the appellant suffering an ''unjust hardship'' is not approved. The Director is requiring that West Virginia further amend § 22B–1–7(d) to be consistent with SMCRA sections 514(d) and 525(c).

At § 22B–1–7(h)—The authorization that would allow the Surface Mining Board to consider economic feasibility of treating or controlling discharges from surface coal mining operations in appeals from decisions of an order, permit, or official action is not approved. The Director is requiring that West Virginia further amend § 22B–1–7(h) to be no less stringent than SMCRA section 515(b)(10) and no less effective than the Federal regulations at 30 CFR 816.42, by requiring discharges to be controlled or treated without regard to economic feasibility.

At CSR 38–2–1.2(c)(1)—The termination of jurisdiction over an initial program site except to the extent that subsection (c)(1) does not require compliance with the Federal initial program regulations at Subchapter B or to the West Virginia permanent program as a prerequisite to the termination of jurisdiction. The Director is requiring that the State further amend subsection (c)(1) to require compliance with the Federal initial program regulations at Subchapter B or the West Virginia permanent regulatory program rules as a prerequisite to the termination of jurisdiction over an initial program site.

At CSR 38–2–2.92—The definition of ''chemical treatment'' except to the extent that the definition of ''chemical treatment'' would allow bond release where passive treatment systems are used to achieve compliance with applicable effluent limitations. The Director is requiring that West Virginia further amend the West Virginia program to clarify that bond may not be released where passive treatment systems are used to achieve compliance with applicable effluent limitations.

At CSR 38–2–3.1(o)—The grouping of ownership and control information is approved to the extend that all permit applicants which maintain centralized ownership and control files are also required to comply with all of the informational provisions contained in CSR 38–2–3.1.

At CSR 38–2–4.2(b)—Is approved to the extent that the provisions pertain to all roads, whether they are within or crossing a stream.

At CSR 38–2–4.4—Is approved except to the extent that it exempts infrequently used access roads from the requirements of subsection 4.9. The Director is also requiring the State to amend its program to require that all infrequently used access roads comply with CSR 38–2–4.9.

At CSR 38–2–4.11—Is approved to the extent that the provision does not exclude facilities that are included within the definition of ''surface coal mining operations'' at 30 CFR 700.5.

At CSR 38–2–14.5(h)—Is approved except to the extent that the proposed waiver would not be implemented in accordance with the definition of ''Replacement of water supply'' at 30 CFR 710.5. The Director is requiring that West Virginia further amend CSR 38–2–14.5(h) and amend § 22–3-24(b) to clarify that the replacement of water supply can only be waived under the conditions set forth in the definition of ''Replacement of water supply,'' paragraph (b), at 30 CFR 701.5.

At CSR 38–2–14.19—Is not approved to the extent that windrowing would be allowed on the downslope in steep slope areas. In addition, the Director is requiring that West Virginia further amend CSR 38–2–14.19(d) to clarify that windrowing will not be allowed on the downslope in steep slope areas.

At CSR 38–2–22.4(g)—The Director is requiring that West Virginia demonstrate how the State would implement the PMP 24-hour standard, or revise subsection 22.4(g) to require compliance with a PMP 6-hour standard.

The Director is amending 30 CFR Part 948 to codify this decision. With respect to those changes in State laws and regulations approved in this document, the Director is making the effective date of this approval retroactive to the date upon which they took effect in West Virginia for purposes of State law. He is taking this action in recognition of the extraordinarily complex nature of the review and approval process for this amendment and the need to affirm the validity of State actions taken during the interval between State implementation and the decision being announced today. Retroactive approval of these provisions is in keeping with the purposes of SMCRA relating to State primacy and environmental protection.

To assure consistency with 30 CFR 732.17(g), which state that ''[no] * * * change to laws or regulations shall take effect for purposes of a State Program until approved as an amendment,'' The Director's approval of the revisions, as noted in the codification below, includes West Virginia's previous and ongoing implementation of these revisions.

Retroactive approval of the revisions is appropriate because no detrimental reliance on the previous West Virginia laws or regulations has occurred for the period involved. OSM is approving these changes back only to the dates from which West Virginia began enforcing them. As support for this decision, the Director cites the rationale employed by the United States Claims Court in *McLean Hosp. Corp.* v. *United States,* 26 Cl.Ct. 1144 (1992). In *McLean,* the court held that retroactive application of a rule was appropriate where the rule was identical in substance to guidelines which had been in effect anyway during the period in question. Therefore, the Court concluded, the plaintiff could not ''claim that it relied to its detriment on a contrary rule.'' 26 Cl.Ct. at 1148. Likewise, since the Director is approving changes which the State has been enforcing there can be no claim of detrimental reliance on any contrary West Virginia Statutes or regulations in this instance.

Making portions of the approval retroactive does not require reopening of the public comment period under section 553(b)(3) of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(3). The public, in general, and the coal industry in particular have had sufficient notice of these revised statutory and regulatory revisions to support retroactive OSM approval. Retroactive approval constitutes an acknowledgement of statutory and regulatory revisions which West Virginia has been implementing since the respective approval dates of these revisions at the State level, and would have been expected as a natural outgrowth of the proposal. The retroactive approval does not apply to earlier versions of these provisions to the extent that such provisions were inconsistent with Federal requirements.

Furthermore, ''good cause'' both under section 553(b)(3)(B) of the APA, 5 U.S.C. 553(b)(3)(B), for retroactive approval (if notice were not sufficient) and under section 553(d)(3) of APA, 5 U.S.C. 553(d)(3), for not delaying the effective date of the approval for 30 days after the publication of this Federal Register decision document. As noted in the findings above, many of these program revisions are needed to render the West Virginia program consistent with SMCRA and no less effective than the Federal regulations.

Failure to make OSM approval of these statutory and regulatory provisions retroactive could cause significant disruption to the orderly enforcement and administration by the State of the West Virginia program. The Director believes that the desire to avoid a significant disruption of the West Virginia program, coupled with the lack of any prejudice to the public or to the regulated community, are sufficient bases to constitute ''good cause.''

Effect of Director's Decision

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State submits and obtains the Secretary's approval of a regulatory program. Similarly, 30 CFR 732.17(a) requires that the State submit any alteration of an approved State program to OSM for review as a program amendment. Thus, any changes to the state program are not enforceable until approved by OSM. The Federal regulations at 30 CFR 732.17(g) prohibit any unilateral changes to approved State programs. In oversight of the West Virginia program, the Director will recognize only the statutes, regulations and other materials approved by OSM, together with any consistent implementing policies, directives and other materials, and will require the enforcement by West Virginia of only such provisions. The provisions that the Director is approving today will take effect on the specified dates for purposes of the West Virginia program.

VI. Procedural Determinations

Executive Order 12866

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12778

The Department of the Interior has conducted the reviews required by section 2 of Executive Order 12778 (Civil Justice Reform) and has determined that, to the extent allowed by law, 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 since each such 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 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.

National Environmental Policy Act

No environmental impact statement is required for this rule since 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 has determined that 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.*). The State submittal which is the subject of this rule is 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. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. 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.

List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Dated: February 8, 1996.

Allen D. Klein,

Regional Director, Appalachian Regional Coordinating Center.

For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations 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.*

§ 948.12 [Amended]

2. Section 948.12 is amended by removing and reserving paragraphs (a), (c), (d), (g) and (h).

§ 948.13 [Amended]

3. Section 948.13 is amended by removing and reserving paragraphs (a), (b), (e) and (f).

4. Section 948.15 is amended by adding paragraph (p) to read:

§ 948.15 Approval of regulatory program amendments.

* * * * *

(p)(1) *General description and effective dates.* Except as noted in paragraph (p)(3) of this section, the amendment submitted by West Virginia to OSM by letter dated June 28, 1993, as revised by submittals dated July 30, 1993; August 18, 1994; September 1, 1994; and May 16, 1995, is approved to the extent set forth in paragraph (p)(2) of this section. The effective dates of the Director's approval of the provisions identified in paragraph (p)(2) of this section are:

(i) July 1, 1990, for those statutory amendments contained in HB–202;

(ii) June 7, 1991, for those amendments contained in SB–579;

(iii) October 16, 1991, for those amendments contained in HB–217;

(iv) July 1, 1994, for those amendments contained in HB–4030;

(v) June 11, 1994, for those amendments contained in HB–4065;

(vi) February 10, 1995, for those amendments contained in SB–250;

(vii) March 10, 1995, for those amendments contained in HB–2134;

(viii) June 9, 1995, for those amendments contained in SB–287 and HB–2523;

(ix) May 2, 1993, for those rule changes submitted on June 28, 1993 (WV–889);

(x) June 1, 1991, for those changes submitted on July 30, 1993 (WV–893) which were not identified as changes in the June 28, 1993, submittal (WV–889);

(xi) June 1, 1994, for those rule changes submitted on September 1, 1994 (WV–937);

(xii) May 1, 1995, for those blaster certification revisions submitted on May 8, 1995 (WV–979);

(xiii) June 1, 1995, for those abandoned mine land revisions submitted May 8, 1995 (WV–979);

(xiv) June 1, 1995, for all remaining changes submitted on May 16, 1995 (WV–979).

(2) *Approved revisions.* Except as noted in paragraph (p)(3) of this section, the following provisions of the amendment described in paragraph (p)(1) of this section are approved:

(i) Revisions to the West Virginia Surface Coal Mining and Reclamation Act

1. § 22–1–4 through 8—Division of Environmental Protection.
2. § 22–2—Abandoned Mine Lands and Reclamation Act.
3. § 22–3–3—Definitions.
4. § 22–3–5—Surface Mining Inspectors and Supervisors.
5. § 22–3–7—Notice of Intent to Prospect.
6. § 22–3–8—Surface Mining Reclamation Permit.
7. § 22–3–9—Permit Application Requirements.
8. § 22–3–9a—Permit to Mine Two Acres or Less. [Deleted]
9. § 22–3–13—Performance Standards to the extent that subsection 13(e) only applies to steep slope areas as defined in § 22–3–13(d).
10. § 22–3–15—Inspections.
11. § 22–3–17—Notice of Violation.
12. § 22–3–18—Permit Approval.
13. § 22–3–19—Permit Renewal and Revision Requirements.
14. § 22–3–22—Designation of Areas Unsuitable for Mining.
15. § 22–3–26—Surface Mining Operations Not Subject to the Act.
16. § 22–3–28—Special Permits for Abandoned Coal Waste Piles.
17. § 22–3–40—National Pollutant Discharge Elimination System (NPDES).
18. § 22B–1–4 through 12—Environmental Boards; General Policy and Purpose, except language at § 22B–1–7(d) which allows temporary relief where the appellant demonstrates that the executed decision appealed from will result in the appellant suffering an ''unjust hardship'' and except language at § 22B–1–7(h) which allows the Surface Mining Board to consider economic feasibility of treating or controlling discharges from surface coal mining operations in appeals from decisions of an order, permit, or official action.
19. § 22B–3–4—Environmental Quality Board.
20. § 22B–4—Surface mine board.

(ii) Revisions to the West Virginia Surface Mining Reclamation Regulations

1. CSR § 38–2–1.2—Applicability; except subsection 1.2(c)(1) to the extent that it does not require compliance with the Federal initial program regulations at Subchapter B or the West Virginia permanent regulatory program as a prerequisite to the termination of jurisdiction over an initial program site.

2. CSR 38–2–2—Definitions; except to the extent that the definition of ''chemical treatment'' at CSR 38–2–2.20 would be applied in the context of section CSR 38–2–12.2(e) to authorize bond release for sites with discharges that require passive treatment to meet discharge standards.

3. CSR § 38–2–3.1(o)—Application information to the extent that all permit applicants which maintain centralized ownership and control files are also required to comply with all of the informational provisions contained in CSR 38–2–3.1.

4. CSR § 38–2–3.4—Maps.

5. CSR § 38–2–3.6—Operation Plan.

6. CSR § 38–2–3.7—Excess Spoil.

7. CSR § 38–2–3.8—New and Existing Structures and Support Facilities.

8. CSR § 38–2–3.12—Subsidence Control Plan.

9. CSR § 38–2–3.14—Removal of Abandoned Coal Waste Piles.

10. CSR § 38–2–3.15—Approved Person.

11. CSR § 38–2–3.16—Fish and Wildlife Resources.

12. CSR § 38–2–3.25—Transfer, Assignment or Sale of Permit Rights.

13. CSR § 38–2–3.26—Ownership and Control Changes.

14. CSR § 38–2–3.27(a)—Permit Renewals and Permit Extensions.

15. CSR § 38–2–3.28—Permit Revisions.

16. CSR § 38–2–3.29—Incidental Boundary Revisions (IBRs).

17. CSR § 38–2–30—Variances.

18. CSR § 38–2–3.31(a)—Exemption for Government Financed Highway or Other Construction.

19. CSR § 38–2–3.32—Permit Findings.

20. CSR § 38–2–3.33—Permit Conditions.

21. CSR § 38–2–3.34—Improvidently Issued Permits.

22. CSR § 38–2–4—Haulageways, Roads, and Access Roads:

22a. CSR § 38–2–4.1(a)—Road Classification system;

22b. CSR § 38–2–4.2—Plans and Specifications; except CSR 38–2–4.2(b) is approved to the extent that the provisions pertain to all roads, whether they are within or crossing a stream;

22c. CSR § 38–2–4.3—Existing Haulageways or Access Roads;

22d. CSR § 38–2–4.4—Infrequently Used Access Roads; except CSR 38–2–4.4 is approved except to the extent that it exempts infrequently used access roads from the requirements of subsection 4.9;

22e. CSR § 38–2–4.5—Construction;

22f. CSR § 38–2–4.6—Drainage Design;

22g. CSR § 38–2–4.7—Performance Standards;

22h. CSR § 38–2–4.8—Maintenance;

22i. CSR § 38–2–4.9—Reclamation;

22j. CSR § 38–2–4.10—Primary Roads;

22k. CSR § 38–2–4.11—Support Facilities and Transportation Facilities except to the extent that the provision does not exclude facilities that are included within the definition of ''surface coal mining operations'' at 30 CFR 700.5.

22l. CSR § 38–2–4.12—Certification.

23. CSR § 38–2–5.2—Intermittent or Perennial Streams.

24. CSR § 38–2–5.4—Sediment Control.

25. CSR § 38–2–5.5—Permanent Impoundments.

26. CSR § 38–2–6—Blasting;

26a. CSR § 38–2–6.3(b)—Public Notice of Blasting Operations;

26b. CSR § 38–2–6.6—Blasting Control for Other Structures;

26c. CSR § 38–2–6.8—Preblast Survey.

27. CSR § 38–2–8.1—Protection of Fish and Wildlife and Related Values.

28. CSR § 38–2–9—Revegetation.

29. CSR § 38–2–11.1—Insurance.
30. CSR § 38–2–13—Notice of Intent to Prospect.
31. CSR § 38–2–14.5—Hydrologic Balance except to the extent that the proposed waiver at subsection (h) would not be implemented in accordance with the definition of ''Replacement of water supply'' at 30 CFR 701.5.
32. CSR § 38–2–14.8—Steep Slope Mining.
33. CSR § 38–2–14.11—Inactive Status.
34. CSR § 38–2–14.12—Variance From Approximate Original Contour Requirements.
35. CSR § 38–2–14.14—Disposal of Excess Spoil.
36. CSR § 38–2–14.15—Contemporaneous Reclamation Standards.
37. CSR § 38–2–14.17—Control of Fugitive Dust.
38. CSR § 38–2–14.18—Utility Installations.
39. CSR § 38–2–14.19—Disposal of Noncoal Waste is not approved to the extent that windrowing would be allowed on the downslope in steep slope areas.
40. CSR § 38–2–15.2—Backfilling and Regrading; Underground Mines.
41. CSR § 38–2–16.2—Subsidence Control; Surface Owner Protection.
42. CSR § 38–2–17—Small Operator Assistance Program (SOAP).
43. CSR § 38–2–18.3—Review of Decision Not to Inspect or Enforce.
44. CSR § 38–2–20.1—Inspection Frequencies.
45. CSR § 38–2–20.2—Notices of Violations.
46. CSR § 38–2–20.4—Show Cause Orders.
47. CSR § 38–2–20.5—Civil Penalty Determinations.
48. CSR § 38–2–20.6—Procedures for Assessing Civil Penalties.
49. CSR § 38–2–20.7—Assessment Rates.
50. CSR § 38–2–22—Coal Refuse.
51. CSR § 38–2C–4—Training of Blasters.
52. CSR § 38–2C–5—Examination for Certification of Examiner/Inspector and Certified Blaster.
53. CSR § 38–2C–8.2—Refresher Training Course/Self-study Course.
54. CSR § 38–2C–10.1—Violations by a Certified Blaster.
55. CSR § 38–2C–11.1—Penalties.
56. CSR § 38–2D–4.4(b) Reclamation Objectives and Priorities.
57. CSR § 38–2D–6.3(a) Acceptance of Gifts of Land.
58. CSR § 38–2D–8.7(a) Grant Application Procedures.

(3) *Exceptions.*

(i) § 22–3–13—Performance Standards is not approved to the extent that subsection 13(e) applies to areas other than steep slope areas as defined in § 22–3–13(d).

(ii) § 22B–1–4 through 12—Environmental Boards; General Policy and Purpose: Language at § 22B–1–7(d) which allows temporary relief where the appellant demonstrates that the executed decision appealed from will result in the appellant suffering an ''unjust hardship'' is not approved; and language at § 22B–1–7(h) which allows the Surface Mining Board to consider economic feasibility of treating or controlling discharges from surface coal mining operations in appeals from decisions of an order, permit, or official action is not approved.

(iii) CSR § 38–2–1.2(c)(1) concerning termination of jurisdiction over an initial program site is approved except to the extent that subsection (c)(1) does not require compliance with the Federal initial program regulations at Subchapter B or to the West Virginia permanent program as a prerequisite to the termination of jurisdiction.

(iv) CSR § 38–2–2.20 concerning the definition of ''chemical treatment'' is not approved to the extent that the definition would be applied in the context of section CSR 38–2–12.2(e) to authorize bond release for sites with discharges that require passive treatment to meet discharge standards.

(v) CSR § 38–2–4.4 is not approved to the extent that it exempts infrequently used access roads from the requirements of subsection 4.9.

(vi) CSR § 38–2–4.11 is not approved to the extent that the provision excludes facilities that are included within the definition of ''surface coal mining operations'' at 30 CFR 700.5.

(vii) CSR § 38–2–14.5(h) is not approved to the extent that the proposed waiver at subsection (h) would not be implemented in accordance with the definition of ''Replacement of water supply'' at 30 CFR 710.5.

(viii) CSR § 38–2–14.19 is not approved to the extent that windrowing would be allowed on the downslope in steep slope areas.

5. Section 948.16 is amended by removing and reserving paragraphs (c), (f), (i), (j), (l), (n), (q), (s), (t), (v), (w), (x), (aa), (cc), (hh), (ii), (jj), (kk), (mm), (nn), (pp), (qq), (rr), (ss), (uu), (vv), and (yy) through (iii); revising paragraph (xx); and adding paragraphs (mmm) through (uuu), reading as follows:

§ 948.16 Required regulatory program amendments.

* * * * *

(xx) By August 1, 1996, West Virginia shall submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to revise subsection CSR 38–2–14.8(a) to specify design requirements for constructed outcrop barriers that will be the equivalent of natural barriers and will assure the protection of water quality and insure the long-term stability of the backfill.

* * * * *

(mmm) By August 1, 1996, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to revise § 22–3–13(e) to limit the authorization for a variance from approximate original contour to industrial, commercial, residential, or public alternative postmining land use, in accordance with section 515(e)(2) of SMCRA.

(nnn) By August 1, 1996, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to revise § 22B–1–7(d) to be consistent with SMCRA sections 514(d) and 525(c).

(ooo) By August 1, 1996, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to revise § 22B–1–7(h) to be no less stringent than SMCRA section 515(b)(10) and no less effective than the Federal regulations at 30 CFR 816.42, by requiring discharges to be controlled or treated without regard to economic feasibility.

(ppp) By August 1, 1996, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to revise CSR § 38–2–1.2(c)(1) to require compliance with the Federal initial program regulations at Subchapter B or the West Virginia permanent program regulations as a prerequisite to the termination of jurisdiction over an initial program site.

(qqq) By August 1, 1996, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to revise CSR § 38–2–2.20, or otherwise amend the West Virginia program to clarify that bond may not be released where passive treatment systems are used to achieve compliance with applicable effluent limitations.

(rrr) By August 1, 1996, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to revise CSR § 38–2–4.4 to require that all infrequently used access roads comply with CSR 38–2–4.9.

(sss) By August 1, 1996, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to revise CSR § 38–2–14.5(h) and § 22–3–24(b) to clarify that the replacement of water supply can only be waived under the conditions set forth in the definition of ''Replacement of water supply,'' paragraph (b), at 30 CFR 701.5.

(ttt) By August 1, 1996, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to revise CSR § 38–2–14.19(d) to clarify that windrowing will not be allowed on the downslope in steep slope areas.

(uuu) By August 1, 1996, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to revise subsection 22.4(g) to require compliance with a PMP 6-hour standard, or demonstrate how the State would implement the PMP 24-hour standard at CSR 38–2–22.4(g).

6. Section 948.26 is amended by removing the text and reserving the heading as follows:

§ 948.26 Required abandoned mine land reclamation program/plan amendments. [Reserved]

[FR Doc. 96–3413 Filed 2–20–96; 8:45 am]

BILLING CODE 4310–05–M

30 CFR Part 950

[SPATS No. WY–024–FOR]

Wyoming Abandoned Mine Land Reclamation Plan

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) is approving, with certain exceptions and additional requirements, a proposed amendment to the Wyoming Abandoned Mine Land Reclamation (AMLR) plan (hereinafter referred to as the ''Wyoming plan'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Wyoming is revising and adding statutes pertaining to noncoal lien authority and contractor eligibility. The amendment revises the Wyoming plan to be consistent with SMCRA, to incorporate the additional flexibility afforded by the revised Federal regulations, and to improve operational efficiency.

EFFECTIVE DATE: February 21, 1996.

FOR FURTHER INFORMATION CONTACT: Guy Padgett, Casper Field Office, Telephone: (307) 261–5776.

SUPPLEMENTARY INFORMATION:

I. Background on the Wyoming Plan

On February 14, 1983, the Secretary of the Interior approved the Wyoming plan. General background information on the Wyoming plan, including the Secretary's findings and the disposition of comments, can be found in the February 14, 1983, Federal Register (48 FR 6536). Subsequent actions concerning Wyoming's plan and plan amendments can be found at 30 CFR 950.30, 950.35, and 950.36.

II. Proposed Amendment

By letter dated April 21, 1995, Wyoming submitted a proposed amendment to its plan (administrative record No. WY–AML–18–8) pursuant to SMCRA (30 U.S.C. 1201 *et seq.*). Wyoming submitted the proposed amendment at its own initiative and in response to a September 26, 1994, letter (administrative record No. WY–AML–18–1) that OSM sent to Wyoming in accordance with 30 CFR 884.15(b).

The provisions of Wyoming's statute that Wyoming proposed to revise and add were: Wyoming Statute (W.S.) 35–11–1206(a) and (b), liens for reclamation on private land, and W.S. 35–11–1209(a) and (b), contractor eligibility.

OSM announced receipt of the proposed amendment in the May 18, 1995, Federal Register (60 FR 26704), provided an opportunity for a public hearing or meeting on its substantive adequacy, and invited public comment on its adequacy (administrative record No. WY–AML–18–9). Because no one requested a public hearing or meeting, none was held. The public comment period ended on June 19, 1995.

During its review of the amendment, OSM identified concerns relating to the provisions of W.S. 35–11–1206 and the amount of the lien placed on reclaimed private lands. OSM notified Wyoming of the concerns by letter dated August 9, 1995 (administrative record No. WY–AML–18–16). Wyoming responded in a letter dated August 29, 1995, by submitting additional explanatory information for W.S. 35–11–1206 regarding the cost of reclamation in the lien computation (administrative record No. WY–AML–18–17).

Based upon the additional explanatory information for the proposed plan amendment submitted by Wyoming, OSM reopened the public comment period in the September 20, 1995, Federal Register (60 FR 48678, administrative record No. WY–AML–18–18). The public comment period closed on October 5, 1995.

III. Director's Findings

As discussed below, the Director, in accordance with SMCRA and 30 CFR 884.14 and 884.15, finds, with certain exceptions and additional requirements, that the proposed plan amendment submitted by Wyoming on April 21, 1995, and as supplemented with additional explanatory information on August 29, 1995, is in compliance with the Federal regulations at 30 CFR Subchapter R and is consistent with SMCRA. Thus, the Director approves, with certain exceptions and additional requirements, the proposed amendment.

1. W.S. 35–11–1206(a) and (b), Liens for Reclamation on Private Lands

Wyoming proposed to add the following italicized language to its provisions at W.S. 35–11–1206(a), concerning liens for reclamation on private lands, by providing, in part, that

> [w]ithin six (6) months after the completion of projects to restore, reclaim, abate, control or prevent adverse effects of past coal *or mineral* mining practices on privately owned land, the director [of the Abandoned Mine Land Division] shall itemize the monies expended and may file a lien against the property with the appropriate county clerk. If the monies expended result in a significant increase in property value, a notarized appraisal by an independent appraiser shall be filed with the lien. The lien shall not exceed the *cost of reclamation work or the* amount determined by the appraisal to be the increase in the *fair* market value of the land as a result of the restoration, reclamation, abatement, control or prevention of the adverse effects of past coal *or mineral* mining practices, *whichever is less.*

In addition, Wyoming proposed the addition of the italicized language at W.S. 35–11–1206(b) to provide that

> [t]he landowner may petition the district court for the district in which the majority of the land is located within sixty (60) days of the filing of the lien to determine the increase in the *fair* market value of the land. The amount reported to be the increase in value of the premises, *but not exceeding the cost of the reclamation work,* shall constitute the amount of the lien and shall be recorded with the lien.

As discussed below, the counterparts to these proposed State provisions are at sections 408 and 411(g) of SMCRA and in the Federal regulations at 30 CFR Part 882.

Section 408(a) of SMCRA requires that the lien shall not exceed the amount determined by the appraisal to be the increase in the market value of the land as a result of the restoration, reclamation, abatement, control, or prevention of the adverse effects of past coal mining practices. Section 408(b) of SMCRA provides that the landowner may petition to determine the increase in the market value of the land reclaimed and that the amount reported to be the increase in value of the premises shall constitute the amount of the lien. Section 411(g) of SMCRA allows the provisions of section 408 to be applied to noncoal sites after a State's