§ 913.16 [Removed and reserved]

3. Section 913.16 is removed and reserved.

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 948

[WV–077–FOR]

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 revises both the West Virginia Surface Mining Reclamation Regulations and the West Virginia Surface Coal Mining and Reclamation Act. The amendment mainly consists of changes to implement the standards of the Federal Energy Policy Act of 1992. The amendment is intended to revise the State program to be consistent with the counterpart Federal provisions.

EFFECTIVE DATE: February 9, 1999.

FOR FURTHER INFORMATION CONTACT: Mr. Roger W. Calhoun, Director, Charleston Field Office, Telephone: (304) 347–7158.

SUPPLEMENTARY INFORMATION:

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

I. Background on the West Virginia Program

On January 21, 1981, the Secretary of the Interior conditionally approved the West Virginia program. Background information on the West Virginia program, including the Secretary's findings, the disposition of comments, and the conditions of the approval can be found in the January 21, 1981, **Federal Register** (46 FR 5915–5956). Subsequent actions concerning the West Virginia program and previous amendments are codified at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

II. Submission of the Amendment

By letter dated April 28, 1997 (Administrative Record Number WV–1056), the West Virginia Division of Environmental Protection (WVDEP) submitted an amendment to its approved permanent regulatory program pursuant to 30 CFR 732.17. By letter dated May 14, 1997 (Administrative Record Number WV–1057), WVDEP submitted some revisions to the original submittal. The amendment contains revisions to § 38–2–1 *et seq.* of the West Virginia Surface Mining Reclamation Regulations [Code of State Regulations (CSR)] and to § 22–3–1 *et seq.* of the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA). The amendment mainly consists of changes to implement the standards of the Federal Energy Policy Act of 1992, and is intended to revise the State program to be consistent with the counterpart Federal provisions.

On October 10, 1997, OSM provided the State a list of concerns regarding the proposed amendment (Administrative Record Number WV–1073). By letter dated April 27, 1998 (Administrative Record Number WV–1085), the State submitted its final response to OSM's comments on the amendments.

An announcement concerning the initial amendment was published in the June 10, 1997, **Federal Register** (62 FR 31543–31546). A correction notice was published on June 23, 1997 (62 FR 33785), which clarified that the public comment period closed on July 10, 1997. No one requested an opportunity to speak at a public hearing, so none was held.

III. Director's Findings

Set forth below, pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are the Director's findings concerning the proposed amendment to the West Virginia program. Minor wording changes and other non-substantive changes are not identified.

A. Surface Coal Mining and Reclamation Act—§ 22–3–1 et seq.

Definitions

1. *Sec. 22–3–3(u) Definition of ''surface mine.''* This definition is amended at subsection 3(u)(2) by adding three examples of activities that are not encompassed by the definition of ''surface mine'' under the WVSCMRA. The three exceptions are: (1) Coal extraction pursuant to a government financed reclamation contract; (2) coal extraction authorized as an incidental part of development of land for commercial, residential, industrial, or civic use; and (3) the reclamation of an abandoned or forfeited mine by a no cost reclamation contract.

Sec. 22–3–3(u)(2)(1): Coal extraction authorized pursuant to a government financed reclamation contract. Section 528(2) of SMCRA provides an exemption from the requirements of SMCRA for coal extraction incidental to government-financed highway or other construction under regulations established by the regulatory authority. The WVDEP has explained that the proposed amendments are intended to clarify that the reclamation of abandoned sites is government-financed construction that is consistent with the provisions of section 528(2) of SMCRA and, therefore, not subject to SMCRA.

OSM is in the process of amending the Federal regulations at 30 CFR 707 and 874 concerning the financing of Abandoned Mine Land reclamation (AML) projects that involve the incidental extraction of coal (63 FR 34768; June 25, 1998). The first Federal revision would amend the definition of ''government-financed construction'' at 30 CFR 707.5 to allow less than 50 percent government funding when the construction is an approved AML project under SMCRA. The second revision would add a new section at 30 CFR 874.17 which would require specific consultations and concurrences with the Title V regulatory authority for AML construction projects receiving less than 50 percent government financing. The revised final Federal regulations will be published soon, and will likely affect our decision on the West Virginia amendments that concern government financed construction on abandoned mine lands. Therefore, OSM is deferring its decision on these amendments until after the publication in the **Federal Register** of the final amendments to 30 CFR Parts 707 and 874.

Sec. 22–3–3(u)(2)(2): Coal extraction incidental to development of land for commercial, residential, industrial, or civic use. As stated above, Section 528(2) of SMCRA, and § 22–3–26(b) of the WVSCMRA provide an exemption from the requirements of SMCRA for coal extraction incidental to government-financed highway or other construction under regulations established by the regulatory authority. However, no provision currently exists which provides an exemption from the requirements of SMCRA for coal extraction incidental to privately financed development of land for commercial, residential, industrial, or civic use.

Section 701(28) of SMCRA, the definition of ''surface coal mining

operations'', does not provide for such an exemption. As discussed in the March 13, 1979, preamble to the Federal regulations, a commenter recommended that the definition of surface coal mining operations exclude private excavation which results in the incidental recovery of coal (44 FR 14901, 14914). OSM concluded that such an exemption was inconsistent with Section 528 of SMCRA.

The WVDEP asserts, however, that Section 701(28) does not define ''surface coal mining operations'' to include any and all excavation which disturbs coal. For example, the WVDEP asserts that unless done in connection with a coal mine, coal removal relative to the development of land for commercial, residential, industrial or civic use is beyond the jurisdiction of SMCRA. Further, the WVDEP refers to section 101(f) of SMCRA which provides that because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to SMCRA would rest with the States. Specifically, the WVDEP stated that because of the State's unique geographic and geologic conditions, any excavation activity in certain parts of the State will necessitate the excavation of coal. Sometimes such excavation would justify the requirement of a surface mining permit and in other instances it would not. The WVDEP stated that the proposed changes are intended to clarify when a permit is necessary and to provide for reasonable environmental controls when a permit is not required (but a special authorization under proposed section 22–3–28 would be) so as to prevent adverse impacts to the environment from excavation related disturbances. Finally, the WVDEP asserts that the proposed approach would prevent a waste of resources and provide environmental protection while accommodating development within the State.

The Director recognizes that requiring all privately financed construction activities in West Virginia which also remove coal to be permitted and regulated as surface coal mining operations may, in some instances, present both a hardship for the regulatory program and be a roadblock to development within the State. Nevertheless, OSM is bound by the constraints of SMCRA, both in its plain language and in clear expressions of Congressional intent. Congress expressly considered and rejected a blanket exemption from the definition of ''surface mining operations'' for privately financed construction. S. Rep. No. 95–337, 95th Cong., 1st Sess. 112 (1977). This West Virginia program amendment proposes precisely the same blanket exemption which Congress explicitly rejected. Therefore, the Director finds that the proposed provision is less stringent than SMCRA at section 528 and cannot be approved.

Sec. 22–3–3(u)(2)(3): The reclamation of an abandoned or forfeited mine by a no-cost reclamation contract. The State has proposed to exempt from the definition of ''surface mining'' the reclamation of abandoned or post-SMCRA forfeited mines conducted under a ''no cost'' reclamation contract.

Reclamation activities involving forfeited mines are subject to regulation under SMCRA. Bond forfeiture reclamation must be conducted in accordance with the reclamation plan of the revoked permit as provided by 30 CFR 800.50(b). Such activities are also subject to inspection under 30 CFR 842.11(e) and (f). However, reclamation activities on abandoned and forfeited mine sites do not constitute ''surface coal mining operations,'' so long as they do not include coal extraction. Therefore, the Director is approving W.Va. Code 22–3–3(u)(2)(3), because it is not, on its face, inconsistent with the Federal definition of ''surface coal mining operations'' at section 701(28). However, West Virginia has also proposed a regulation which would allow the placement of excess spoil on abandoned sites, pursuant to ''no cost'' reclamation contracts. The proposed regulation is included in a program amendment which is the subject of another rulemaking. (63 FR 32633, June 15, 1998) Therefore, the disposal of excess spoil on abandoned and forfeited sites pursuant to ''no cost'' contracts is not yet approved.

2. Sec. 22–3–3(x) is added to define ''Unanticipated event or condition.'' The Director finds the proposed definition to be substantively identical to and therefore no less stringent than the counterpart Federal provision at SMCRA section 701(33).

3. Sec. 22–3–3(y) is added to define ''Lands eligible for remining.'' Under this new definition, lands eligible for remining include lands that would be eligible for expenditure under Section 4 of the State's Abandoned Mine Lands and Reclamation Act. In addition, surface mining operations on lands eligible for remining would not affect the eligibility of such lands for AML funding, and, in the event of bond forfeiture, AML funds may be used to reclaim reaffected eligible lands. However, if conditions constitute an emergency under section 410 of SMCRA, then section 410 shall apply.

The Federal definition of ''lands eligible for remining'' at SMCRA section 701(34) provides that the term means those lands that would otherwise be eligible for expenditures under section 404 or under section 402(g)(4). Section 404 provides that surface coal mining operations on lands eligible for remining shall not affect the eligibility of such lands for reclamation and restoration. In the event of a bond or deposit forfeiture, section 404 allows the use of AML funds to reclaim the site only if the amount of the bond or deposit is not sufficient to provide for adequate reclamation or abatement.

In support of this amendment, WVDEP stated that any AML funds used at a remining site would be spent in accordance with AML guidelines, including eligibility requirements. Accordingly, the use of AML funds at remining sites would be subject to the concurrence of OSM that there is, among other things, no other responsible party at such sites and that the bond available is not sufficient to provide for adequate abatement or reclamation. Finally, the WVDEP stated that its interpretation of this program amendment is if the site was eligible for AML funds prior to remining it will be eligible for AML funds after remining. That is, section 22–3–3(y) does not preclude AML eligibility after a remining bond release.

The Director finds that the proposed amendment as explained above by the WVDEP appears to be no less stringent than SMCRA section 701(34) and can, therefore, be approved. However, that portion of section 22–3–3(y) pertaining to bond forfeitures is approved only to the extent that AML funds may be used to reclaim sites where a bond or deposit has been forfeited only if the bond or deposit is insufficient to provide for adequate reclamation or abatement.

4. Sec. 22–3–3(z) is added to define ''Replacement of water supply.'' The Director finds the proposed definition to be substantively identical to the introductory paragraph and to subsection (a) of the counterpart Federal definition at 30 CFR 701.5, except as noted below. The Federal provision provides that water supply replacements must be equivalent to ''premining'' water quantity and quality, and replacement must include payment of operation and maintenance costs in excess of customary and reasonable delivery costs of the ''premining'' water supply. The proposed State provision, however, merely provides that water supply replacements must be of

''equivalent quality and quantity.'' In support of this provision, WVDEP stated that the word ''premining'' was not included in the definition because that term can lead to confusion. The word ''equivalent'' rather than the words ''equivalent premining'' was used so that a realistic baseline (i.e., the quality and quantity of water in use prior to the permitted mining activity as determined by the premining survey) would provide certainty as to water replacement obligations. In addition, WVDEP explained that the State's definition and practice is that when a water supply is contaminated, interrupted, or disrupted the water supply must be replaced with a water supply that is equivalent in quantity, quality, and cost to that which existed prior to mining. The Director finds that the proposed definition, if implemented as explained by the WVDEP, would not be inconsistent with and is no less effective than the counterpart Federal definition at 30 CFR 701.5. The Director is approving the proposed definition with the understanding that it will be implemented as explained above. In addition, the Director notes that the proposed definition lacks a counterpart to provision (b) of the Federal definition of ''replacement of water supply'' at 30 CFR 701.5. This counterpart is necessary because W.Va. Code sec. 22–3–24(b) allows a water supply owner to waive replacement. Only pursuant to the terms of paragraph (b) of the Federal definition, however, is waiver of replacement allowed. Therefore, the required amendment, at 30 CFR 948.16(sss), remains in effect.

Performance Standards

5. *Sec. 22–3–13(b)(20).* This subparagraph, concerning revegetation performance standards, is amended by adding a provision stating that, on lands eligible for remining, the revegetation responsibility period will be not less than two growing seasons after the last year of augmented seeding. The proposed provision differs slightly from its Federal counterpart, in that it uses the term ''growing season'', while the SMCRA provision uses the term ''year.'' However, the proposal is no less stringent than Section 520(b)(20)(B) of SMCRA, because CSR 38–2–2.57 further defines growing season to mean one year. Therefore, the Director is approving the amendment.

6. *Sec. 22–3–13(b)(22).* This subparagraph is amended by deleting the word ''shall'' in the last sentence and replacing that word with ''may.'' This sentence now states that ''[s]uch approval [of single lift, durable rock excess spoil disposal fills] may not be unreasonably withheld if the site is suitable. * * *'' The Director finds the proposed revision does not change the meaning of the sentence and, therefore, does not render the provision less effective than the Federal requirements in 30 CFR 816/817.73.

7. Sec. 22–3–13(c)(3) is amended to allow the approval of permits involving a variance from restoring approximate original contour (AOC) for mountaintop removal operations when the postmining land use includes fish and wildlife habitat and recreation lands. A decision on this provision is being deferred. OSM requested public comment on a new report concerning an evaluation of approximate original contour and postmining land use in West Virginia. It is expected that some of the comments received in response to the evaluation will address the proposed revision. Therefore, OSM is deferring a decision on this provision at this time, and will consider any additional comments on the proposed postmining land use.

Inspection and Enforcement

8. *Sec. 22–3–15(h).* This paragraph is added to provide that the WVDEP Director may provide a compliance conference when requested by the permittee. The provision further provides that any such conference may not constitute an inspection as defined in § 22–3–15 of the WVSCMRA. The Director finds the provision to be substantively identical to and therefore no less effective than the Federal regulations at 30 CFR 840.16(b).

9. *Sec. 22–3–17(b).* The subsection is amended by adding a paragraph which provides that, within one year following the notice of a permit revocation, subject to the discretion of the director and based upon a petition for reinstatement, the revoked permit may be reinstated. Further, the provision provides that the reinstated permit may be assigned to any person who meets the permit eligibility requirements of this article.

The Federal enforcement requirements at section 521 of SMCRA do not specifically prohibit the reinstatement of a revoked permit. However, OSM notified the WVDEP that to be approvable, the proposed State provision must provide adequate safeguards to ensure that the reinstated permit will satisfy all of the requirements of the WVSCMRA. Currently, the proposed provision only requires that an applicant meet the permit eligibility requirements of the WVSCMRA. At a minimum, the State's reinstatement provisions need to provide for public participation, require that the revoked permit will meet the appropriate permitting requirements of the WVSCMRA, and require that the mining and reclamation plan will be modified to address any outstanding violations.

In response to OSM's concerns, the WVDEP stated that it, ''plans to use a process that would be similar to a permit transfer which would require the upgrade, if necessary, of the reinstated permit to meet applicable performance standards and advertisement with the opportunity for public comments.'' The State's existing transfer, assignment or sale procedures at CSR 38–2–3.25 require an advertisement with the opportunity for a 30-day comment period, that the bond be kept in full force and effect before, during and after the transfer, assignment or sale of the permit, and that the applicant correct all outstanding unabated violations. To accommodate the sale of assets from one party to another, the procedures also allow for the approval of a transfer, assignment or sale of a permit in advance of the close of the comment period.

The Director is approving the proposed State statutory revisions in so far as Section 22–3–17(b) does not contain any provisions that are less stringent than the requirements of SMCRA. However, because the State's proposed reinstatement provisions do not reference the transfer, assignment or sale requirements of Section 22–3–19(d) of WVSCMRA or CSR 38–2–3.25, and because the WVDEP acknowledges that it has not fully developed its reinstatement procedures, the State cannot implement the proposed provisions until its program is further amended. Therefore, the Director is requiring that the State further amend the West Virginia program to adopt reinstatement procedures similar to its transfer requirements contained in CSR 38–2–3.25. The procedures must allow for public participation, require that the revoked permit meet the appropriate permitting requirements of the WVSCMRA, and require that the mining and reclamation plan be modified to address any outstanding violations for any permit reinstated pursuant to § 22–3–17(b) of the WVSCMRA. However, in no event can a reinstated permit be approved in advance of the close of the public comment period, and the party seeking reinstatement must post a performance bond that will be in effect before, during, and after the reinstatement of the revoked permit.

Permit Issuance

10. *Sec. 22–3–18(c)* This paragraph is amended by deleting the word ''shall''

in two locations and replacing those words with ''may.'' With these revisions, a permit ''may'' not be issued until the applicant submits proof that a violation is being corrected, and a permit ''may'' not be issued if the applicant is found to be affiliated with a person who has had a permit or bond revoked for failure to reclaim.

Section 510(c) of SMCRA provides that permits ''shall'' not be issued by a regulatory authority if the circumstances described above exist. Under existing Federal requirements, a regulatory authority has no discretionary authority when it is obligated by law to deny a permit. In general, the phrase ''may not'' means the same as ''shall not'' and is not discretionary.

In response to OSM's concern about the interpretation of this amendment, the WVDEP stated that the changes were of form only, and are not intended to affect the meaning of the provision. Therefore, the Director is approving the amendments because they do not change the meaning of § 22–3–18(c) of the WVSCMRA.

11. *Sec. 22–3–18(f).* This paragraph is added to provide that the prohibition of § 22–3–18(c) of the WVSCMRA may not apply to a permit application due to any violation resulting from an unanticipated event or condition at a surface coal mine eligible for remining under a permit held by the applicant. The Director finds that the proposed provision is substantively identical to and, therefore, no less stringent than, the counterpart Federal provision at section 510(e) of SMCRA.

12. *Sec. 22–3–28.* The title of this section is amended from special ''permits'' to special ''authorization'' for reclamation of existing abandoned coal processing waste piles. In addition, the following is added to the title: coal extraction pursuant to a government-financed reclamation contract; coal extraction as an incidental part of development of land for commercial, residential, industrial, or civic use; no cost reclamation contract. In addition, throughout this provision, the term ''permit'' is replaced with ''authorization.'' Some of the provisions of § 22–3–28 were initially contained in § 20–6–31 of the WVSCMRA.

Subsections 22–3–28 (a), (b), and (c) pertain to special authorizations to engage in surface mining incidental to the development of land for commercial, residential, industrial, or civic use. These subsections are amended by replacing the word ''permit'' with ''authorization.'' Under the revised statutory provisions, a person may engage in surface coal mining incidental to the development of land for commercial, residential, industrial, or civic use after obtaining a special authorization from the Director of the WVDEP. Subsection (b) is also amended by changing the duration of a valid authorization from ''until work permitted is completed'' to ''two years.''

As discussed in the preamble to the Federal regulations at 30 CFR part 707, upon considering a Senate amendment that included an exemption for all construction, the conferees agreed to a modified version of the Senate amendment which limited the exemption to extraction of coal as an incidental part of government-financed construction only, rather than all construction as originally provided in the Senate language (44 FR at 14949, March 13, 1979).

In promulgating its definition of ''surface coal mining operations'' at 30 CFR 700.5, OSM considered and rejected a provision that would have clarified that the definition did not apply to coal removal incidental to private construction. See comment 3, column 2, of 44 FR at 14914. OSM found that such an exemption was inconsistent with Section 528 of SMCRA.

Furthermore, the Interior Board of Surface Mining Appeals (IBSMA), which was subsequently incorporated into the Interior Board of Land Appeals, twice ruled that ''the extraction of coal as an incidental part of privately financed construction is not an activity excluded as such from the coverage of the * * * regulatory program.'' See James Moore, 1 IBSMA, 216 (1979) and Gobel Bartley, 4 IBSMA 219 (1992). Finally, OSM has previously determined that 22–3–28(a)–(c) is inconsistent with SMCRA. (See 46 FR 5915, 5924, Finding 14.4, January 21, 1981.) Therefore, the existing and proposed provisions in paragraphs (a), (b) and (c) of Section 22–3–28 of the WVSCMRA relating to incidental mining operations related to commercial, residential, industrial, or civic use are less stringent than the Federal requirements at Sections 528 and 701(28) of SMCRA and cannot be approved.

Subsection 22–3–28(d) pertains to reclamation contracts issued solely for the removal of existing abandoned coal processing waste piles. Subsection (d) is amended by deleting the words ''special permit'' and replacing them with the words ''reclamation contract.'' With this change, the director of the WVDEP may issue a reclamation contract for removal of existing abandoned coal processing waste piles when not in conflict with the WVSCMRA. In addition, the State is deleting the requirement to have the director of the WVDEP promulgate rules for such operations.

Subsection 22–3–28(d) is implemented in the regulations at CSR 38–2–3.14. These two sections apply only to the disposal of refuse piles that do not meet the definition of coal. The removal of abandoned refuse piles that do not meet the definition of coal as set forth in ASTM Standard D 388–77 is not subject to regulation under SMCRA (55 FR 21313–21314; May 23, 1990). Therefore, since the amended regulations pertain to activities that are not subject to regulation under SMCRA, the Director finds that the proposed changes to § 22–3–28(d) of the WVSCMRA do not render the West Virginia program inconsistent with SMCRA or the Federal regulations.

Subsection 22–3–28(e). The State proposes to add new paragraph (e) to allow the Director to provide a special authorization for coal extraction pursuant to a government-financed reclamation contract, and a no-cost reclamation contract. The primary purpose of these contracts would be to ensure the reclamation of abandoned or forfeited mine lands.

As discussed above in Finding A.1., OSM is in the process of amending the Federal regulations at 30 CFR 707 and 874 concerning the financing of Abandoned Mine Land reclamation (AML) projects that involve the incidental extraction of coal (63 FR 34768; June 25, 1998). The first Federal revision would amend the definition of ''government-financed construction'' at 30 CFR 707.5 to allow less than 50 percent government funding when the construction is an approved AML project under SMCRA. The second revision would add a new section at 30 CFR 874.17 which would require specific consultations and concurrences with the Title V regulatory authority for AML construction projects receiving less than 50 percent government financing. The revised final Federal regulations will be published soon, and will likely affect our decision on the West Virginia amendments that concern government financed construction on abandoned mine lands. Therefore, OSM is deferring its decision on these amendments until after the publication in the **Federal Register** of the final amendments to 30 CFR Parts 707 and 874.

Subsection 22–3–28(f). The WVDEP proposes to add paragraph (f) to require that any person engaging in coal extraction pursuant to Section 28 must pay all applicable fees and taxes related to coal extraction, replace or restore all water supplies affected by such extraction, and obtain the consent of the

surface and mineral owners prior to conducting such activities.

As discussed above in this Finding, not all of the proposed provisions of this § 22–3–28 are consistent with sections 528 and 701(28) of SMCRA. Therefore, section 22–3–28(f) is approved, but may be implemented only with respect to those portions of § 22–3–28 that are approved in this rulemaking.

Senate Bill 378

13. *Senate Bill 378—W.Va. Code § 19–25–1 et. seq.* Besides the changes in its surface mining law, the WVDEP also submitted revisions to Chapter 19, Article 25 of the West Virginia Code. The proposed revisions are to encourage private landowners to allow the public to enter private lands for recreational purposes; provide for limitation of landowner liability for injury to persons entering private property and injury to the property of persons entering such property; and provide an exception for liability for deliberate, intentional or malicious infliction of injury.

There is no specific language in SMCRA that limits liability of landowners. However, SMCRA does provide for public participation during the mining and reclamation process. Operators are to maintain minimum insurance liability limits to provide for personal injury and property damage protection. Citizens are also allowed to accompany an inspector on an inspection. In addition, operators and landowners are to assume responsibility for the sound future maintenance of structures, i.e., impoundments, sedimentation ponds, etc., that are to remain after mining and reclamation is completed. State landowner liability limitations cannot interfere with an individual's rights under SMCRA. Therefore, before the statutory proposal could be found to be no less stringent than SMCRA, the WVDEP was requested on October 10, 1997, to provide OSM assurance that the proposed language will not inhibit public participation under the WVSCMRA.

In response to OSM questions, the WVDEP stated that Senate Bill 378, and W.Va. Code 19–25–1 *et seq.*, are not a part of the West Virginia Surface Control Mining and Reclamation Act and will not affect the public participation in the release process, nor access to the reclaimed mine site for purposes of administering the approved program. Additionally, the landowner is required under the approved program to assume responsibility for the future maintenance of structures to be left after reclamation, by signing a form which clearly sets forth the maintenance requirements. The WVDEP stated that the change to W.Va. Code section 19–25–1 is for the purpose of limiting civil liability and does not extend to the maintenance liability of WVSCMRA.

The Director therefore finds that the amendments to W.Va. Code section 19–25–1 do not render the West Virginia program less stringent than SMCRA nor less effective than the Federal regulations. However, Senate Bill 378 need not be approved as a program amendment, because the provisions contained in it do not alter any of the obligations imposed by WVSCMRA.

B. West Virginia Surface Mining Reclamation Regulations—CSR 38–2

Definitions

1. *CSR 38–2–2.4—Definition of ''acid-producing coal seam.''* This definition is amended by deleting the names of specific coal seams commonly associated with acid-producing minerals. In addition, the last sentence is amended by deleting reference to the multiple seams whose names were deleted and to refer instead to site-specific seams. There is no direct Federal counterpart to this State definition. However, the Director finds that the proposed deletion does not diminish the intent or clarity of the State definition, and does not render the West Virginia program inconsistent with SMCRA or the Federal regulations.

2. *CSR 38–2–2.43 Definition of ''downslope.''* This definition is amended by adding the phrase ''except in operations where the entire upper horizon above the lowest coal seam is proposed to be partly or entirely removed.'' Under the proposed revision, the definition of ''downslope'' would not apply to mountaintop removal or multiple seam operations. Prior to this amendment, the definition limited spoil placement on all mining operations to the lowest coal seam being mined.

The State explained that the definition change is needed to accommodate the unique requirements of multiple seam mining operations. In effect, the State said, under the proposed change the term ''being mined'' would be limited to the lowest coal ''prepared to be mined'' in a mining sequence as part of an approved mining and reclamation plan. An area that has been prepared to be mined would have been cleared, and drainage controls would be in place.

Despite the WVDEP's explanation, however, the Director notes that the amended language merely exempts such multiple seam mining operations from the approved definition of downslope, and does nothing to explain what the definition of ''downslope'' would be for such multiple-seam operations. Therefore, the Director is not approving the amendment to the definition of ''downslope.''

3. *CSR 38–2–2.95 Definition of ''prospecting.''* This definition is amended by adding the word ''substantial'' as a modifier of the word ''disturbance.'' Under the revised definition, prospecting would include the gathering of environmental data where such activity may cause any substantial disturbance of the land. The Federal regulations at 30 CFR 701.5 contain a definition of ''coal exploration'' that is synonymous with ''prospecting,'' except the Federal definition lacks the word ''substantial.'' The WVDEP explained that the change in the definition of prospecting is intended to reflect the language of SMCRA at section 512(a) which provides that each State program shall include a requirement that coal exploration operations which substantially disturb the natural land surface be conducted in accordance with exploration regulations issued by the regulatory authority. However, the Director notes that 30 CFR 772.11 requires that a notice of intent be filed for any coal exploration operation, regardless of whether any disturbance at all will occur. In promulgating this revised Federal regulation on December 29, 1988, the Director stated that ''for the regulatory authority to determine which proposed coal exploration operations may substantially disturb the natural land surface, it must be informed of all proposed exploration.'' (53 FR 52943). The WVDEP stated that the West Virginia program will continue to require notice to the WVDEP of both activities that do and do not cause substantial disturbance of the natural land surface. These notice provisions are contained in CSR 38–2–13.1 and 38–2–13.4(b).

However, the Director notes that a conflict still exists between the State's definition of ''prospecting'', which now proposes to exclude the gathering of environmental data which does not cause ''substantial'' disturbance of the land surface, and the notice requirements of CSR 38–2–13.1. Therefore, the Director is not approving the addition of the word ''substantial'' to modify the word ''disturbance'' in the definition of ''prospecting.''

4. *CSR 38–2–2.108 Definition of ''Sediment control or other water retention structure, sediment control or other water retention system, or sediment pond.''* The amendment adds the following sentence: ''Examples include wildlife ponds, settling basins

and all ponds and facilities or structures used for water treatment.'' The Director finds that the added language is illustrative and does not render the State definition less effective than the Federal definitions of ''sedimentation pond'' and ''siltation structure'' at 30 CFR 701.5.

5. *CSR 38–2–2.120 Definition of ''Substantially disturb.''* This definition is amended by changing the phrase ''land or water resources'' to read ''land and water resources.'' The WVDEP has explained that this change was an editorial change made by the State legislature. Further, the WVDEP interprets the provision to mean that if land and/or water resources are significantly impacted by prospecting that will mean that those resources have been ''substantively disturbed.'' The Director finds that the amended definition can be approved to the extent that it is construed in the manner explained by the WVDEP. However, because future administrations could construe the use of the term ''and'' in its more commonly understood sense, as a conjunctive connector, the Director is requiring that West Virginia amend its program by changing the phrase ''land and water resources'' to ''land or water resources'', in the definition of ''substantially disturb,'' or by otherwise making it clear that the term ''substantially disturb,'' for the purposes of prospecting, includes a significant impact on either land or water resources.

6. *CSR 38–2–3.2.e Readvertisement.* This provision is amended by deleting the last sentence. The deleted language required that permits that are being renewed or significantly revised, and permit applications that are being significantly revised must be advertised in accordance with paragraph 38–2–3.2.b and paragraph (6), subsection (a), section 9 of the WVSCMRA. The Director finds that the deletion does not render the West Virginia program less effective than the Federal four-week requirement at 30 CFR 773.13(a) because the West Virginia program continues to require four weeks of newspaper advertisement at subsections 3.2(a), 3.27.a.7. and 3.28.b.1. of the State's regulations.

7. *CSR 38–2–3.12.a.1. Subsidence control plan.* This provision is amended to require that the survey and map required by this subsection also identify the location and type of water supplies, and whether or not subsidence could contaminate, diminish or interrupt water supplies within an angle of draw of at least 30 degrees. The amendment also provides for an alternative angle of draw based on site specific analysis.

The State amendments differ from the counterpart Federal requirements at 30 CFR 784.20(a) in that the Federal provision does not limit the identification of the water supplies to those within a specified angle of draw. Also, the State provision does not require identification of the type and location of all structures within the permit and adjacent areas. Finally, the amendments lack the Federal requirement, contained in 30 CFR 784.20(a)(2), that the permit application include a narrative indicating whether subsidence, if it occurred, could cause material damage to or diminish the value or reasonably foreseeable use of such structures or renewable resource lands or could contaminate, diminish, or interrupt drinking, domestic, or residential water supplies.

In response to OSM's questions, the WVDEP explained that the West Virginia program permit application, concerning the information needed for the probable hydrologic consequences (PHC) determination at section 38–2–3.22, requires an applicant for an underground mine permit to conduct a ground water and surface water inventory which includes all areas within one-half mile of the proposed operation, including underground limits. This information is then used by the WVDEP permit reviewers to evaluate for possible impacts on those resources by subsidence. If during this evaluation it appears to the reviewer that impacts are likely outside the proposed 30-degree angle of draw, then the reviewer would document that need and expand the survey beyond the 30 degree limit.

The WVDEP explained that State use of the 30-degree angle of draw standard is intended to clarify a perceived ambiguity in the Federal regulation at 30 CFR 784.20(a)(3). The Federal provision requires a survey of the quantity and quality of all drinking, domestic, and residential water supplies within the permit and adjacent area that could be contaminated, diminished, or interrupted by subsidence. To clarify and standardize the term ''adjacent area,'' the State has chosen to require the surveys within a 30-degree angle of draw. However, the WVDEP explained, that since a permittee would have already provided a surface and groundwater inventory as part of the requirements for the PHC regulations at 38–2–3.22, the WVDEP will have the information available to require an enlargement of the 30-degree angle of draw requirement, if necessary. That is, if WVDEP's analysis of the PHC information reveals that impacts are likely outside the 30-degree angle of draw area, the WVDEP can expand the area within which the subsidence-related information survey is required. Therefore, the WVDEP asserts, additional information on water supplies will not be limited by the 30-degree angle of draw provision nor by the ''adjacent area'' standard as contained in the Federal and State provisions.

The Director finds that, despite the WVDEP's explanation above concerning the use of PHC data, the State program provides no specific authority to require a pre-subsidence survey in areas outside the proposed 30 degree angle of draw. Without such authority, the West Virginia program is rendered less effective than the Federal regulations at 30 CFR 784.20(a)(1) which require a map of the permit and adjacent areas showing the location, without limitation by an angle of draw, of lands, structures, and water supplies that could be damaged by subsidence. Therefore, the Director is not approving the phrase ''within an angle of draw of at least 30-degrees'' at § 38–2–3.12.a.1. Also, the Director is requiring that the West Virginia program be further amended to also require on the map provided for by § 38–2–3.12.a.1. the identification of the type and location of all lands, structures, and drinking, domestic and residential water supplies within the permit and adjacent areas because § 38–2–3.12.a.1. lacks that requirement.

Finally, the Director is requiring that the West Virginia program be further amended to require that the permit application include a narrative indicating whether subsidence, if it occurred, could cause material damage to or diminish the value or reasonably foreseeable use of such structures or renewable resource lands or could contaminate, diminish, or interrupt drinking, domestic, or residential water supplies.

38–2–3.12.a.1 is also being amended to provide for a site-specific angle of draw other than the 30-degree angle of draw. Approval of such a site-specific angle of draw will be based on the results of site specific analyses and demonstration that a different angle of draw is justified. Computer program packages predicting surface movement and deformation caused by underground coal extraction can be utilized.

The proposed language differs from the counterpart Federal authorization at 30 CFR 817.121(c)(4)(ii) for a site specific angle of draw in the following ways. The Federal provision provides that such a site specific angle of draw be based on site-specific geotechnical analysis of the potential surface impacts

of the proposed mining operation. Furthermore, the Federal provision requires a written finding by the regulatory authority that, based on the geotechnical analysis, the site specific angle of draw has a more reasonable basis than the 30-degree angle of draw. In response to OSM's comments, the WVDEP stated that to approve an angle of less than 30 degrees, ''an affirmative demonstration is required by the applicant that there will be no subsidence within that angle of draw (i.e. the geotechnical information required to support this claim will be on a case by case basis).'' The WVDEP did not clarify, however, that the regulatory authority would make a written finding concerning each proposed site-specific angle of draw.

Considering the clarification by the WVDEP discussed above, the Director finds that the provision to allow a site-specific angle of other than the 30-degree angle of draw can be approved with the understanding that such an alternative angle of draw is justified based on a site-specific geotechnical analysis of the potential surface impacts of the mining operation.

However, the Director believes that these requirements should be added formally to the State's program, to avoid any ambiguity of interpretation in the future. Therefore, she is requiring that the State amend the West Virginia program to provide that approval of any alternative angle of draw will be based on a written finding that a proposed angle of draw of less than 30 degrees is justified based on site-specific geotechnical analysis of the potential surface impacts of the proposed mining operation.

8. *CSR 38–2–3.12.a.2—Subsidence control plan.* This new provision adds language to require surveys of water supplies and structures that could be damaged within the applicable angle of draw. Language is also added to provide for a survey of the condition of all non-commercial buildings or residential dwellings and structures related thereto that may be materially damaged or for which the foreseeable use may be diminished by subsidence within the area encompassed by the applicable angle of draw.

The proposed provision concerning the survey of water supplies is less encompassing than the counterpart Federal regulations at 30 CFR 784.20(a)(3). Specifically, 30 CFR 784.20(a)(3) provides for a pre-subsidence survey (without limitation by an angle of draw) of the quantity and quality of all drinking, domestic, and residential water supplies within the permit area and adjacent area that could be contaminated, diminished, or interrupted by subsidence. By contrast, the proposed State provision only requires the water surveys to be conducted ''within the area encompassed by the applicable angle of draw.'' As discussed above in Finding B–7, the Director has determined that the State program provides no specific authority to require a pre-subsidence survey in areas outside the proposed 30 degree angle of draw.

The Director is approving the proposed provision except for the phrase, ''within the area encompassed by the applicable angle of draw'' which renders the West Virginia program less effective than the counterpart Federal regulations at 30 CFR 784.20(a)(3) and cannot be approved. In addition, the Director is requiring that the West Virginia program be further amended to be no less effective than 30 CFR 784.20(a)(3) by requiring a pre-subsidence survey, without limitation by an angle of draw, of the quantity and quality of all drinking, domestic, and residential water supplies within the permit area and adjacent area that could be contaminated, diminished, or interrupted by subsidence.

§§ 38–2–3.12.a.2.A and .B. These two provisions are added to allow an exemption or postponement of the pre-subsidence structural survey requirements at § 38–2–3.12.a.2. for areas of extraction of less than or equal to 60 percent. To receive an exemption under § 38–2–3.12.a.2.A., it must be demonstrated that damage to the structure(s) will not occur. To receive a postponement under § 38–2–3.12.a.2.B., it must be demonstrated that damage to the structure(s) will not occur, and that no mining (extraction greater than 60 percent) within the applicable angle of draw shall occur until the pre-subsidence structural survey is completed. In addition, § 38–2–3.12.a.2. provides that if extraction exceeds 60 percent in areas granted an exemption and/or postponement, the exemption and/or postponement will be voided for the entire underground mining operation. Furthermore, the presumption of causation will apply to any damage to structure(s) as a result of earth movement within a 30 degree angle of draw from any underground extraction.

The counterpart Federal regulations at 30 CFR 784.20 do not explicitly allow for exemptions from or postponements of the pre-subsidence survey requirement. However, the Federal regulations at 30 CFR 784.20(a)(3) require a survey only of structures ''that may be materially damaged or for which the reasonably foreseeable use may be diminished by subsidence.'' The proposed State-authorized exemption and/or postponement are contingent on a finding by the WVDEP that the permittee has demonstrated that damage to the structure(s) will not occur. Such a finding will be based upon extraction of 60 percent or less, and upon the demonstration provided by the permittee that damage to the structure(s) will not occur. In its response to OSM dated April 24, 1998, the WVDEP stated that ''[t]he WVDEP requires the applicant to identify those areas on a map for which the exemption is being requested, to provide the necessary documentation (pillar designs, amount of cover, etc.), and limits the extraction rate to less than 60%.'' To qualify for a postponement, the applicant follows the same process as to qualify for an exemption.

The Director notes that the proposed language does not clarify what would comprise the minimum information needed in a demonstration to convince the director of the WVDEP that the exemption or postponement is warranted. That is, what should the required demonstration consist of? To be no less effective than the Federal regulations, such a demonstration should consist of a site-specific geotechnical analysis of the potential surface impacts of the mining operation.

Proposed § 38–2–3.12.a.2.B. also provides that no mining (extraction greater than 60 percent) within the applicable angle of draw shall occur until the pre-subsidence structural survey is completed. The Director notes that any amendment that would authorize a delay in the timing of the structural condition survey required by 30 CFR 784.20(a)(3) must also provide copies of the survey and any technical assessment or engineering evaluation to the property owner. In addition, the proposed provisions must provide opportunity for the structure owner to comment on the adequacy of the structural condition survey and the planned implementation of the subsidence control plan as it pertains to the structure in view of the results of the survey. The proposed amendment lacks these provisions.

The Director finds that the proposed State provisions at 38–2–3.12.a.2.A. and 3.12.a.2.B., which authorize exemptions and postponements where it is demonstrated that damage will not occur, are less effective than the Federal provisions at 30 CFR 784.20(a)(3) and 817.121(c)(4)(ii) for the reasons stated above.

38–2–3.12.a.2. also provides that if the permittee is denied access to the land or property for the purpose of

conducting the pre-subsidence survey, the permittee will notify the owner, in writing, that no presumption of causation will exist. The Director finds this provision to be substantively identical to the counterpart Federal provision at 30 CFR 784.20(a)(3).

38–2–3.12.a.2. also requires that the survey report be signed by the person or persons who prepared and conducted the survey, and that copies of the survey report be provided to the property owner and to the WVDEP. The Director finds the proposed provision to be substantively identical to and therefore no less effective than the Federal regulations at 30 CFR 784.20(a)(3).

However, the Director finds that the State's proposal lacks the requirement, contained in 30 CFR 784.20(a)(3), that the permit applicant pay for any technical assessment or engineering evaluation used to determine the premining condition or value of non-commercial buildings or occupied residential dwellings or structures related thereto and the quality of drinking, domestic or residential water supplies. Also, the State's proposal lacks the requirement that the applicant must provide copies of any technical assessment or engineering evaluation to the property owner and regulatory authority. Therefore, the Director is requiring that the State further amend the West Virginia program to be no less effective than 30 CFR 784.20(a)(3) to provide that the permit applicant pay for any technical assessment or engineering evaluation used to determine the premining condition or value of structures and water supplies, and that copies of any technical assessments or engineering evaluations be provided to the property owner and regulatory authority.

Finally, amended 30–2–3.12.a.2. includes a definition of non-commercial building. The State definition is substantively identical to the counterpart Federal definition of ''non-commercial building'' at 30 CFR 701.5 with one exception. Unlike the State definition, the Federal definition also includes any building that is used on a ''temporary basis'' as a public building, or community or institutional building. As such, the State's proposed definition is less effective than its Federal counterpart and cannot be approved. In addition, the Director is requiring that the State further amend 38–2–3.12.a.2. to clarify that ''non-commercial building'' includes such buildings used on a regular or temporary basis.

9. *CSR 38–2–3.14—Removal of abandoned coal refuse disposal piles.* The State is proposing to amend 38–2–3.14 by deleting 3.14.b.7., which requires the submission of a determination of probable hydrologic consequences, and 3.14.b.8., which requires the submission of a hydrologic reclamation plan, as part of an application for a special permit for the removal of existing abandoned coal processing waste piles. Also, the State proposes to amend 3.14.b.12.E., to require a stability analysis of the coal waste pile only if requested by the Director. Next, the State proposes to delete existing 3.14.b.15.B., which requires plans, cross sections and design specifications for diversion ditches. Finally, the State proposes a new section 3.14.b.13.B., which requires that surface water be diverted around or ''over'' the material remaining after removal of a coal waste pile, by properly designed and stabilized diversion channels which have been designed using the best current technology to provide protection to the environment and the public. The channels are required to be designed and constructed to ensure stability of the remaining material, control erosion, and minimize water infiltration into the material.

The provisions at 38–2–3.14 pertain to the disposal of refuse disposal piles that do not meet the definition of coal. The removal of abandoned refuse piles that do not meet the definition of coal as set forth in ASTM Standard D 388–77 is not subject to regulation under SMCRA (55 FR 21313–21314; May 23, 1990). Therefore, since the amended regulations pertain to activities that are not subject to regulation under SMCRA, the Director finds that the proposed deletions do not render the West Virginia program less effective and can be approved. The Director notes that the proposed State rules apply only to non-coal refuse (red dog) piles. An operator proposing to remove or reprocess refuse piles which contain coal, as provided by CSR 38–2–3.14.a, must submit a permit application that meets all of the applicable requirements of CSR 38–2–3.

10. *CSR 38–2–3.29—Incidental boundary revisions (IBR).* These provisions are amended at subsection 3.29.a. by adding language to authorize IBR's for areas where it has been demonstrated to the WVDEP director that limited coal removal on areas immediately adjacent to the existing permit is the only practical alternative to recovery of unanticipated reserves or necessary to enhance reclamation efforts or environmental protection. The WVDEP has explained that the primary purpose of this change is to facilitate enhanced reclamation of abandoned mine sites adjacent to the permit area, thus relieving the demand for reclamation funds by reducing the number of sites on the AML inventory. The WVDEP stated that such IBR's must comply with all applicable environmental performance standards, and would be subject to the required findings provided at 38–2–3.29.d. prior to approval.

The Director finds the proposed amendment to be not inconsistent with the intent and purpose of Section 511(a) of SMCRA and 30 CFR 774.13(d), except as noted below. On February 21, 1996 (61 FR 6511, 6520) the Director approved a previous amendment to this provision. In that approval, the Director stated 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.'' That is, the Director had determined that to be consistent with the intent of sections 511(a)(3) of SMCRA and 30 CFR 774.13(d) which pertain to incidental boundary revisions, coal removal cannot be the primary purpose of an IBR. Therefore, the Director is not approving the phrase ''the only practical alternative to recovery of unanticipated reserves or'' because it would authorize coal removal as the primary purpose of an IBR.

11. *CSR 38–2–3.35—Measurement tolerances.* This provision is added to specify the standards for grade and linear measurements. Specifically, all grade measurements and linear measurements shall be subject to a tolerance of two percent. All angles shall be measured from the horizontal and shall be subject to a tolerance of five percent. The amendment provides, however, that the authorized deviations from the approved plan do not affect storage capacity and/or performance standards. In effect, the measurement tolerances relate to the amount of allowed variances between approved designs and the ''as built'' measurements of those designs. That is, the measurement tolerances pertain to constructed, or ''as built'' structures and not to design measurements. Neither SMCRA nor the Federal regulations contain counterparts to these proposals. However, the Director finds that the proposed tolerances, with the requirement that approved storage capacities and performance standards must be met, are reasonable, not inconsistent with SMCRA or the Federal regulations, and can be approved.

Sediment Control Structures

12. *CSR 38–2–5.5.c—Permanent impoundments.* This provision is amended to add that for permanent impoundments, the landowner sign a request that the structure be left for

recreational or other purposes. There is no Federal counterpart to this proposal. Language is deleted which requires that the operator also sign the request, and that the request assert that the landowner assumes liability for the structure and will provide for sound future maintenance of the structure. The Federal regulations at 30 CFR 800.40(c) allow for the retention of permanent impoundments after bond release, as long as provisions for sound future maintenance by the operator or landowner have been made with the regulatory authority. The West Virginia program provides for sound future maintenance by the permittee or landowner at 38–2–12.2.c.2.D. That form (MR–12) assigns the landowner responsibility for the sound future management of any permanent impoundments. The Director finds, therefore, that the amendment at subsection 5.5.c does not render the West Virginia program less effective than the Federal regulations and can be approved.

Blasting

13. *CSR 38–2–6.5.a.—Blasting procedures.* This provision is amended by adding language to allow for blasting on Sunday if the WVDEP Director determines that the blasting is necessary and there has been an opportunity for a public hearing. The Federal regulations do not prohibit blasting on Sundays. According to the Federal regulations, an operator is only allowed to conduct blasting activities at times approved by the regulatory authority and announced in the blasting schedule. Therefore, the Director finds that the proposed revision does not render the West Virginia program less effective than the Federal requirements at 30 CFR 816/817.64.

Fish and Wildlife

14. *CSR 38–2–8.2.e.—Habitat development.* This provision is added to encourage and specify the criteria for timber windrowing to promote the enhancement of food, shelter, and habitat for wildlife. As proposed, unmarketable timber may be used for windrowing, but the use of spoil material, debris, abandoned equipment, root balls, and other undesirable material in a windrow is prohibited. Such windrowing must be approved in the mining and reclamation plan, and must be approved as part of a wildlife planting plan and authorized where the postmining land use includes wildlife habitat. The proposed requirements would apply to the construction of timber windrows in both steep and non-steep slope areas.

The Federal regulations do not contain specific criteria concerning the design or construction of timber windrows. However, SMCRA at section 515(d)(1) and the Federal regulations at 30 CFR 816.107(b) prohibit the placement of debris, including that from clearing and grubbing on the downslope in steep slope areas. The Director finds that the proposed provision is not inconsistent with the Federal provisions cited above. As with the Federal provisions, the State provision is intended to prohibit debris, such as spoil material, abandoned equipment, root balls, and other undesirable material, on the downslope. In addition, the timber windrowing would be designed for wildlife habitat, the designs would be reviewed by a State wildlife biologist specialist, and windrowing would only be approved for postmining land use that includes wildlife habitat. Though not specifically stated in the proposed rule, the WVDEP has informed OSM that the design of the windrow will be reviewed by a State wildlife biologist as part of the wildlife enhancement plan for a postmining land use containing wildlife habitat. (Administrative Record No. WV–1085) The Director finds that 38–2–8.2.e is consistent with SMCRA section 515(d)(1), and no less effective than the Federal regulations at 30 CFR 780.16 and 816.107(d) provided the design of the windrowing will be reviewed by a State wildlife biologist as part of the wildlife enhancement plan for a postmining land use containing wildlife habitat. The Director notes that the Federal regulations at 30 CFR 948.16(ttt) continue to require that the State regulations at CSR 38–2–14.19 concerning the disposal of noncoal mine wastes be amended at subsection d., which concerns windrowing. The WVDEP has indicated that 38–2–14.19.d. will be proposed for deletion in a future rulemaking session.

Revegetation

15. *CSR 38–2–9.2.i.2.—Revegetation plan.* This provision is amended by adding a sentence to specify that an alternate maximum or minimum soil pH may be approved based on the optimum pH for the revegetated species. There is no direct Federal counterpart to the State standards for lime and soil pH. However, the Director finds that the amendment is not inconsistent with the Federal regulations at 30 CFR 816/817.111(a), which provide for the establishment of a diverse, effective, and permanent vegetative cover, and 30 CFR 816/817.22, which require that the resulting soil medium be the best available in the permit area to support revegetation. Therefore, the provision is approved.

16. *CSR 38–2–9.3.h.1.—Standards for evaluating vegetative cover.* This provision is deleted and replaced in its entirety. The new language requires that the minimum stocking rate of commercial tree species shall be in accordance with the approved forest management plan prepared by a registered professional forester. The revised provision also changes the minimum tree stocking rate from 600 trees per acre to no less than 450 stems per acre. In order to qualify for the ''Commercial Woodlands'' postmining land use and the reduced tree stocking rates contained in 38–2–9.3.h., the permittee must have an approved management plan prepared by a registered professional forester. The West Virginia Division of Forestry (WVDOF) and the WVDEP signed a memorandum of understanding on June 4, 1998, to ensure compliance with 30 CFR 816.116/817(b)(3)(i) (Administrative Record Number WV–1109). In that memorandum of understanding, the WVDOF agreed to review in a timely manner all ''Commercial Woodlands'' planting and forest management plans to be included in surface mining permits issued by the WVDEP. If after review, the WVDOF agrees that the planting and forest management plan is in conformance with the prevailing and regional conditions, the WVDOF will provide the WVDEP with a letter indicating such agreement. Therefore, the Director finds this amendment to be consistent with the Federal regulations at 30 CFR 816/817.116(b)(3)(i).

17. *CSR 38–2–9.3.h.2.—Standards for evaluating vegetative cover.* The State is proposing to delete the provision that a minimum of 75 percent of the countable trees identified in the planting plan be commercial tree species. There is no direct Federal counterpart to this provision. However, considering the memorandum of understanding between the WVDOF and the WVDEP discussed above at Finding B.16., the Director finds that the deletion does not render the West Virginia program less effective than the Federal regulations concerning the revegetation standards for success of areas to be developed for forest products at 30 CFR 816/817.116(b)(3).

18. *CSR 38–2–9.3.h.2. (formerly h.3)—Standards for evaluating vegetative cover.* This provision is amended to change the survival rate from 450 trees to 300 trees per acre, or the rate specified in the forest management plan, whichever is greater. There is no direct Federal counterpart to these amendments. However, considering the

memorandum of understanding between the WVDOF and the WVDEP discussed above at Finding B.16., the Director finds that the amendments are not inconsistent with the Federal regulations at 30 CFR 816/817.116(b)(3).

19. *CSR 38–2–14.11—Procedures to obtain inactive status.* Subsection 14.11.e. is amended to delete the exemption from the three-year limit on inactive status for preparation plants and load-out facilities. Added language authorizes the WVDEP Director to grant inactive status for a period not to exceed ten years, provided the facilities are maintained in such condition that operations could be resumed within 60 days.

Subsection 14.11.f. is added to authorize the WVDEP Director to grant inactive status for a period not to exceed current permit term plus five years for underground mining operations provided the operation is maintained in such condition that the operations could be resumed within 60 days and openings are protected from unauthorized entry.

Subsection 14.11.g. is added to authorize the WVDEP Director to grant inactive status for a period not to exceed ten years for coal refuse sites provided the completed lifts of the coal refuse site are regraded (which may include topsoiling), seeded and drainage control, where possible, has been installed in accordance with the terms and conditions of the permit.

Subsection 14.11.h. is added to provide that the WVDEP Director may grant inactive status for a permit for a longer term than set forth in 14.11.e. and f., provided the permittee furnishes and maintains bond that is equal to the estimated actual reclamation cost, as determined by the director. The director shall review the estimated actual reclamation cost at least every two and one-half years.

In support of this amendment, the WVDEP explained that the proposed amendments set maximum time limits for inactive status for underground mines, preparation plants, load-out facilities and coal refuse sites. The proposed amendments also set standards the sites must meet before inactive status can be approved and the condition the mining operations must be maintained. Furthermore, the WVDEP explained, the amendments contain a requirement that a bond adequacy determination be conducted periodically to assure bond is sufficient to accomplish reclamation in event of forfeiture.

The Federal regulations at 30 CFR 816/817.131 concerning temporary cessation of operations do not specify, as the proposed amendments do, a maximum time limit for temporary cessation, that inactive facilities must be maintained in a condition that would allow them to be reactivated within 60 days, and that the regulatory authority must periodically review the adequacy of the bond. However, the Federal regulations do provide that temporary abandonment shall not relieve a person of his obligation to comply with any provisions of the approved permit. The West Virginia program contain a similar requirement at CSR 38–2–14.11.a.9. Temporarily abandoned sites in West Virginia must be permitted, and the provisions of the permit must be met. That is, an approved permit shall be maintained throughout the life of the inactive status. If a permit expires during an inactive status and is not renewed, the site must be reclaimed. The Director finds that the amendments are not inconsistent with the Federal requirements and can be approved.

20. *CSR 38–2–14.15.b.6.A.—Contemporaneous reclamation standards for mountaintop removal.* This provision is amended to provide that the Director of the WVDEP may grant a variance to the disturbed and unreclaimed acreage standard not to exceed 500 acres on operations which consist of multiple spreads of equipment.

In support of this amendment, the WVDEP asserted that the proposed amendment better assures contemporaneous reclamation because it recognizes and accounts for operational and geologic factors in formulating the mining and reclamation plan, especially on large, multiple-seam mining operations. Furthermore, the WVDEP asserts, the variance of 500 acres proposed by this amendment is not automatically approved, but is discretionary with the regulatory authority and would be granted only when justified.

The Federal time and distance standards for contemporaneous reclamation at 30 CFR 816.101 have been indefinitely suspended. (57 FR 33875, July 31, 1992) The remaining Federal regulations at 30 CFR 816/817.100 require that reclamation efforts occur as contemporaneously as practicable with the mining operations. The WVDEP asserts that is precisely the purpose of the proposed amendment: to properly plan for contemporaneous reclamation with large, multiple-seam operations.

The Director finds that the 500-acre standard, when implemented as described by the WVDEP is not inconsistent with the Federal regulations at 30 CFR 816.100 which provide for reclamation as contemporaneously as practicable with the mining operation, and can be approved.

21. *CSR 38–2–14.15.c.—Contemporaneous reclamation standards; reclaimed areas.* The State has revised its provisions concerning reclaimed areas to delete language concerning Phase I bond release and semi-permanent ancillary facilities. Language is added to provide that regraded areas must also be stabilized.

Also added is a list that identifies areas that shall not be included in the calculation of disturbed area. The list includes: Subsection 14.15.c.1. Semi-permanent ancillary facilities (such as haulroads and drainage control systems); 14.15.c.2. Areas within the confines of excess spoil disposal fills that are being constructed in the conventional method; 14.15.c.3. Areas containing 30 aggregate acres or less which have been cleared and grubbed and have the appropriate drainage controls installed and certified; 14.15.c.4. Areas that have been cleared and grubbed which exceed the 30 aggregate acres and/or those which will not be included in the operational area within six months, if the appropriate drainage control structures are installed and certified and temporary vegetative cover is established; and 14.15.c.5. Areas which have been backfilled and graded with material placed in a stable, controlled manner which will not subsequently be moved to final grade, mechanically stabilized, and had drainage controls installed, but not necessarily certified.

In support of this amendment, the WVDEP stated that it has been determined by field observations that there is a need to recognize operational and geographic conditions in order to accomplish reclamation as contemporaneously as possible. In addition, the WVDEP stated that it recognizes the need for flexibility with earth moving activities in certain situations so that reclamation can occur as contemporaneously as practicable with coal removal. The WVDEP asserts that the proposed amendment better assures contemporaneous reclamation than the rules currently in effect because it recognizes and accounts for those conditions in formulating a mining and reclamation plan.

As stated above in Finding B–20, the Federal time and distance requirements for contemporaneous reclamation have been suspended. The existing Federal rules merely require that reclamation activities occur as contemporaneously as practicable with the mining operations. However, the amendments

appear reasonable when the type of mining operations are considered, and are not inconsistent with the concept of contemporaneous reclamation at 30 CFR 816/817.100. Therefore, the Director finds the amendments can be approved.

22. *CSR 38–2–14.15.d.—Contemporaneous reclamation standards; applicability.* This provision is amended by adding a final sentence to provide that the WVDEP Director may consider contemporaneous reclamation plans on multiple permitted areas with adjoining boundaries where contemporaneous reclamation is practiced on a total operation basis. The Federal regulations at 30 CFR 816/817.100 require that reclamation activities occur as contemporaneously as practicable with the mining operations, and do not prohibit the development of a contemporaneous reclamation plan for multiple permitted areas with adjoining boundaries. Therefore, the Director finds that the amendments are not inconsistent with the Federal requirements and can be approved.

Subsidence Control

23. *CSR 38–2–16.2.c.—Surface owner protection; material damage.* This provision is amended by adding a definition of the term ''material damage''. The proposed definition is identical to the counterpart Federal definition at 30 CFR 701.5 except that three words are missing. In response to OSM's comments, the WVDEP acknowledged the inadvertent omission of the word ''damage'' after the word ''material'' in the first sentence, and the missing words ''or facility'' after the word ''structure'' in the last part of the first sentence.

In response to OSM's comments, WVDEP concluded that the State's definition of ''structure'', at 38–2–2.116, can be construed to include ''facilities'', since it includes manmade structures. The Director is approving this amendment, therefore, with the following understandings: that the State will add the word ''damage'' after the word ''material'' in future rulemaking, and will interpret the current definition as if the inadvertently omitted word were present; and that the State will consider its definition of ''structure'' at 38–2–2.116 to include ''facilities'' as used in the Federal sense.

24. *CSR 38–2–16.2.c.2.—Surface owner protection.* This amendment adds a final sentence to provide that the provision to correct subsidence-related material damage applies only to subsidence related damage caused by underground mining activities conducted after October 24, 1992. The proposed change is to ensure consistency with the Energy Policy Act of 1992 (EPACT). EPACT was signed into law on October 24, 1992. The Federal subsidence requirements of that Act are now in section 720 of SMCRA. Section 720 of SMCRA requires underground mining operations conducted after October 24, 1992, to promptly repair or compensate for material damage caused by subsidence to non-commercial buildings or any occupied residential dwelling and related structures. The Director finds the added language to be substantively identical to SMCRA section 720 and the Federal regulations at 30 CFR 817.121(c)(2) concerning repair or compensation for subsidence damage.

25. *CSR 38–2–16.2.c.3.—Presumption of causation.* This provision is added to provide that if alleged subsidence damage occurs to protected structures as a result of earth movement within the area in which a pre-subsidence structural survey is required, a rebuttable presumption exists that the underground mining operation caused the damage.

CSR 38–2–16.2.c.3.A.—This provision is added to provide that if the permittee was denied access to conduct a pre-subsidence survey, no presumption of causation will exist.

CSR 38–2–16.2.c.3.B.—This provision is added to provide that the presumption will be rebutted if, for example, the evidence establishes that: the damage predated the mining in question; the damage was proximately caused by some other factors or was not proximately caused by subsidence; or the damage occurred outside the surface area within which subsidence was actually caused by the mining in question.

CSR 38–2–16.2.c.3.C.—This provision is added to provide that in any determination of whether damage to protected structures was caused by subsidence from underground mining, all relevant and reasonably available information will be considered by the director.

The Director finds that CSR 38–2–16.2.c.3. is substantively identical to, and therefore no less effective than, the Federal regulations at 30 CFR 817.121(c)(4), except as noted below.

The Federal regulations at 30 CFR 817.121(c)(4) contain requirements for establishing and rebutting a presumption of causation by subsidence. Unlike the Federal requirements, the proposed State provisions at 38–2–16.2.c.3. apply the presumption of causation to subsidence related damage within the area where a presubsidence structural survey is required, whereas the Federal regulations at 30 CFR 817.121(c)(4)(i) apply the presumption to the surface area within the angle of draw. Since the proposed State regulations at 38–2–3.12.a.2. require the survey to be conducted for any structures within the angle of draw, however, the effect of both the Federal and State provisions should be the same, namely, that the presumption will apply to all structures within the 30 degree angle of draw.

The WVDEP has stated, however, that it would not apply the presumption for a structure if the applicant has already provided, and the State accepted, a demonstration of ''no anticipated material damage'' for structures above areas where developmental mining occurs where coal extraction will be less than or equal to 60 percent (See, CSR 38–2–3.12.a.2.). The WVDEP argues that it would be inappropriate for the State to assert a presumption that mining caused alleged damage within the applicable angle of draw when the State has already made a finding, based on evidence presented by the permittee, that coal removal would not cause damage to structures.

The Director does not agree with the WVDEP that a presumption does not apply. The Director finds that the Federal regulations require application of the presumption to any structure within the applicable angle of draw, even if a presubsidence survey was not performed for that structure. Therefore, the Director finds that 38–2–16.2.c.3. is less effective than the Federal regulations at 30 CFR 817.121(c)(4)(i) to the extent that the presumption of causation of subsidence damage only applies within the area which a pre-subsidence structural survey is required. Therefore, the Director is requiring that § 38–2–16.2.c.3. be further amended to provide that a rebuttable presumption of causation would exist within the applicable angle of draw, regardless of whether or not a presubsidence survey has been conducted.

In addition, in Subparagraph c.3.B. the word ''or'' appears after the phrase ''other factors,'' whereas in the counterpart Federal provision at 30 CFR 817.121(c)(4)(iv) the word ''and'' appears after the phrase ''other factors.'' Under the State provision, the presumption that damage was caused by subsidence would be rebutted if the evidence establishes that the damage was proximately caused by some other factors, ''or'' was not proximately caused by subsidence. The counterpart Federal provision provides examples of how the presumption can be rebutted. The preamble discussion of the Federal provision states that the permittee must

provide information on the effect of the underground mining, but ''[t]he proof needed to rebut the presumption will be determined on a case-by-case basis.'' 60 FR 16740, col. 2. The Federal provision states that the presumption would be rebutted if, for example, the evidence establishes that the damage was proximately caused by some other factors, *and* was not proximately caused by subsidence. In instances where there is only one proximate cause, the two tests are equally rigorous, since a finding that some other factor proximately caused the damage necessarily includes a finding that subsidence was not the proximate cause. In such instances, a permittee who successfully demonstrates that subsidence did not proximately cause damage would not be required, under either the Federal or State test, to identify the other factor or factors that did proximately cause the damage. However, in a case where there may not be a single proximate cause, but two or more concurrent causes, one of which is subsidence, the State test is less effective, because it would allow a permittee to rebut the presumption by merely demonstrating that some other factor was a contributing (proximate) cause. By contrast, in such cases, the Federal example would require the permittee to demonstrate that subsidence was not a proximate cause. In this type of case, if the permittee did not demonstrate that subsidence was not a proximate cause, the Federal presumption would not be rebutted, whereas the State presumption could be. Because the State language could allow rebuttal of the presumption without information on the effect of the underground mining in such circumstances, the Director finds that CSR 38–2–16.2.c.3.B. is less effective than the Federal regulations at 30 CFR 817.121(c)(4)(iv). Consequently, the Director is requiring that the State amend CSR 38–2–16.2.c.3.B., or otherwise amend its program, to make it clear that the presumption of subsidence causation of damage can be rebutted only where the permittee demonstrates that the damage was proximately caused by some other factor or factors and was not proximately caused by subsidence.

26. *CSR 38–2–16.2.c.4.—Bonding for subsidence damage.* This provision is added to provide that when subsidence related material damage occurs to lands, structures, or water supply, and if the director issues violation(s), the director may extend the 90-day abatement period to complete repairs, but the extension shall not exceed one year from date of violation notice. To qualify for an extension, the permittee must demonstrate, in writing, that it would be unreasonable to complete repairs within the 90-day abatement period. If the abatement period is extended beyond 90 days, as part of the remedial measures, the permittee shall post an escrow bond to cover the estimated costs of repairs.

The Federal regulations contain similar requirements regarding bond adjustments for subsidence related damage. Unlike the Federal regulations, the State provision does not appear to specifically require bond adjustment when subsidence related material damage occurs to facilities. However, the WVDEP has stated that it interprets its definition of ''structures'' at CSR 38–2–2.116 to include ''facilities'' as used in the Federal language at 30 CFR 817.121(c)(5). The Director accepts the State's interpretation that ''structures'' includes ''facilities.''

Also, subsection 16.2.c.4. does not specifically require an operator, as does the Federal provision, to post additional bond in the amount of the decrease in the value of the property if the permittee will be compensating the owner, or in the amount of the estimated cost to replace the water supply until the repair, compensation, or replacement is completed. The WVDEP explained that the term ''compensation'' is not used in the State provision because ''compensation'' is a concept that must be adjudicated in West Virginia, and the WVDEP can't make that determination before the court does. The WVDEP further explained that under the phrase ''estimated cost of repair'' the WVDEP requires an escrow bond that would be the equivalent to the ''compensation'' required by the Federal regulations. The Director disagrees with the State's conclusion that ''repair'' is equivalent to ''compensation.'' Nevertheless, the Director finds that the State provision is no less effective than its Federal counterpart, because it requires the posting of an adequate bond to cover repair costs in all instances, even where the permittee proposes to compensate, rather than repair or replace. In this respect, the landowner will be assured of receiving adequate funds to cover the costs of repair or replacement of his or her structure in the event the permittee defaults on its obligation to repair, replace or compensate. Since repair, replacement and compensation are all acceptable means of meeting the permittee's obligations under the State counterpart to the Energy Policy Act of 1992, the State requirement to post a repair bond fairly meets the purposes of the Energy Policy Act.

The State provision also provides for an extension to the 90-day abatement period requirement provided that the permittee demonstrates that it would be unreasonable to complete repairs within the 90-day abatement period. The counterpart Federal requirements provide that an extension of the 90-day abatement period may be granted for three reasons: that subsidence is not complete; that not all subsidence related material damage has occurred; or that not all reasonably anticipated changes have occurred affecting the protected water supply and, therefore it would be unreasonable to complete repairs within 90 days. In response to OSM's questions concerning this difference, the WVDEP explained that the WVDEP interpretation is tied to the State rules concerning Notices of Violation (NOV). Under the State system, if repair or compensation for damage or water loss is not accomplished, the State issues an NOV to the permittee. Any extension to the time limit for repair or compensation must be compatible with the NOV provisions. The State NOV provisions at Section 20.2, however, do not specifically provide for time extensions for the reasons authorized in the Federal regulations. Without counterparts to the Federal provisions that allow for extension of the 90-day abatement period only under the circumstances identified above, it appears that operators in West Virginia may be permitted to assert additional reasons as to why the abatement period should be extended. In this respect, the State provision is less effective than its Federal counterpart, which allows extensions to the abatement period under only three different circumstances.

The Director is, therefore, requiring the State to amend its program to provide that an extension of the 90-day abatement period may be granted for one of only three reasons: that subsidence is not complete; that not all subsidence related material damage has occurred; or that not all reasonably anticipated changes have occurred affecting the protected water supply.

The State provision also differs from the counterpart Federal provision in that, under the State provision, the 90-day abatement period begins with the issuance of an NOV, rather than with the date of occurrence of subsidence-related material damage. Under the Federal scheme, the permittee's obligation to repair, replace or compensate for damage begins with the occurrence of that damage. If the appropriate remedial work has not been completed within 90 days, the Federal regulation requires the permittee to post

a bond, unless the abatement period is extended for one of the three reasons discussed above. Under the State scheme, however, the permittee's 90 day ''grace period'', wherein no bond is required, begins only after a NOV is issued. In reality, the permittee could enjoy a grace period of much longer than 90 days under the State provision, since there will always be some time lapse between the occurrence of damage and the issuance of a NOV. Therefore, the Director finds that the State provision is less effective than its Federal counterpart, and she is requiring the State to amend this provision, or otherwise amend its program, to require that the 90-day period before which additional bond must be posted begin to run from the date of occurrence of subsidence-related material damage.

The Federal bonding and 90-day abatement period requirements at CFR 817.121(c)(5) also apply to any contamination, diminution, or interruption of a drinking, domestic or residential water supply as a result of underground mining activities. The State's provision, however, only applies these requirements to subsidence-related damage to water. In response to OSM's questions, the WVDEP stated that it disagrees with OSM's interpretation because CFR 817.121(c)(5) only applies to subsidence related damage. The Director disagrees with this assessment of CFR 817.121(c)(5). CFR 817.121(c)(5) provides that ''when contamination, diminution, or interruption to a water supply protected under § 817.41(j) occurs, the regulatory authority must require the permittee to obtain additional performance bond * * * in the amount of the estimated cost to replace the protected water supply if the permittee will be replacing the water supply, until the * * * replacement is completed.'' 30 CFR 817.41 provides the hydrologic-balance protection standards for underground mining. Subsection 817.41(j) provides for the replacement of any drinking, domestic or residential water supply that is contaminated, diminished or interrupted by underground mining activities conducted after October 24, 1992, if the affected well or spring was in existence before the date the regulatory authority received the permit application for the activities causing the loss, contamination or interruption. Therefore, CFR 817.121(c)(5) clearly provides for additional bond whenever protected water supplies are contaminated, diminished or interrupted by underground mining activities conducted after October 24, 1992. The Director finds CSR 38–2–16.2.c.4. to be less effective than the counterpart Federal regulations to the extent that the West Virginia provision limits the requirement for additional bond for water supplies contaminated, diminished, or interrupted only to such water supplies that are so affected specifically by subsidence rather than by underground mining operations in general. The Director is requiring the State to further amend the West Virginia program to be no less effective than the Federal regulations at CFR 817.121(c)(5) to require additional bond whenever protected water supplies are contaminated, diminished or interrupted by underground mining activities conducted after October 24, 1992. The amount of the additional bond must be adequate to cover the estimated cost of replacing the affected water supply.

27. *CSR 38–2–20.1.e.—Inspection frequencies.* This provision is added to provide that the permittee may request an on-site compliance conference. It also sets forth the requirements related to such a conference. A compliance conference shall not constitute an inspection, within the meaning of § 22–3–15 of the WVSCMRA and CSR 38–2–20. Neither the holding of a compliance conference nor any opinion given by an authorized representative of the director at a conference shall affect the following: CSR 38–2–20.1.e.1.—Any rights or obligations of the director or by the permittee with respect to any inspection, notice of violation, or cessation order, whether prior to or subsequent to the compliance conference; or CSR 38–2–20.1.e.2.—The validity of any notice of violation or cessation order issued with any condition or practice reviewed at the compliance conference.

The Federal regulations at 30 CFR 840.16 contain procedures governing compliance conferences. The added State compliance conference procedures at subsection 20.1.e. are the same as the corresponding Federal procedures and are, therefore, approved.

IV. Summary and Disposition of Comments

Federal Agency Comments

Pursuant to section 503(b) of SMCRA and 30 CFR 732.17(h)(11)(i), comments were solicited from various interested Federal agencies. The U.S. Department of the Army, Army Corps of Engineers responded and stated that the amendments are satisfactory to the agency. The U.S. Department of Labor, Mine Safety and Health Administration (MSHA) made several comments, none of which, however, pertain to the amendments being considered by OSM. Therefore, MSHA's comments are not being addressed in this notice.

Public Comments

The following comments were received in response to the public comment periods.

CSR 38–2–3.29—Incidental Boundary Revisions

The commenter stated that the state is expanding the limits for IBR's even further, and is also proposing to allow coal removal under the auspices of IBR's. In response, the Director notes that as discussed in Finding B–10, the Director is only partially approving this provision. The Director has not approved the proposed language that would have authorized coal removal as the primary purpose of the IBR. While the term incidental boundary revisions is not defined in the Federal regulations, OSM has required that such revisions be minor in nature, so as not to effect significant changes to the environment, or the environmental protection information upon which permit conditions and permit approval were based. Furthermore, the Director has determined that to be consistent with the intent of sections 511(a)(3) of SMCRA and 30 CFR 774.13(d) which pertain to incidental boundary revisions, coal removal cannot be the primary purpose of an IBR.

W.Va. Code §§ 22–3–3(u) and 22–3–28—Special Authorization for Exceptions to the Definition of Surface Mining (Special Permits)

The commenter stated that this amendment creates whole new categories of surface mining that will be exempt from the basic requirements and standards of permitting. In response, the Director notes that SMCRA at section 528(2) provides that the extraction of coal as an incidental part of Federal, State, or local government-financed highway or other construction under regulations established by the regulatory authority shall not be subject to the provisions of SMCRA. SMCRA at section 701(28) provides the definition of ''surface coal mining operations.'' Section 701(28) provides, in part, that surface coal mining operations means activities conducted on the surface of lands in connection with a surface coal mine. The proposed amendments at W.Va. Code §§ 22–3–3(u) and 22–3–28 reflect the State's interpretation that the proposed forms of coal removal and reclamation are authorized under section 528(2) of SMCRA, or are not

encompassed by the definition of surface coal mining operations at 701(28).

As discussed in Finding A–1 and Finding A–12, the Director is not approving §§ 22–3–3(u)(2)(2) and 22–3–28(a), (b), and (c) concerning coal extraction as an incidental part of development of land for commercial, residential, industrial, or civic use.

Also as discussed in Findings A–1 and A–12, the director is deferring a decision on the provisions at Sections 22–3–3(u)(2)(1) and 22–3–28(e) that concern government financed construction. The Director will render a decision on the West Virginia amendments after publication of new Federal regulations at 30 CFR 707 and 874 regarding the financing of AML projects that involve the incidental extraction of coal.

CSR 38–2–14.11.e., f., g. and h.—Inactive Status

The commenter stated that the proposed language further loosens the time frames allowed for operations to remain on inactive status and thus further clouds the ''temporary'' nature of mining (and the negative impacts of mining on communities and resources) envisioned in SMCRA. In response, the Director notes that the Federal regulations at 30 CFR 816/817.131 provide that surface facilities in which there are no current operations, but in which operations are to be resumed under an approved permit shall be effectively secured. Further, the Federal regulations provide that temporary abandonment shall not relieve a person of his or her obligation to comply with any provisions of the approved permit. While the Federal regulations do not define the term ''temporary cessation,'' the regulations make it clear that operations that are under temporary cessation must be under an approved permit, and must comply with the provisions of the approved permit. As discussed in Finding B–19, the Director has determined that temporarily abandoned sites in West Virginia must be permitted, and that the provisions of the permit must be met. Therefore, the Director found that the amendments are not inconsistent with the Federal requirements and can be approved.

CSR 38–2–14.15.c and .d—Contemporaneous Reclamation Standards

The commenter stated that approving the provisions would make inspecting even more difficult, and bonding will present even more confusion than currently exists. The commenter also stated that approval of the provisions would mean that the preferred mining methods are dictating the limits of SMCRA, rather than SMCRA controlling the limits of mining and its impacts. In response, the Director notes that it is essential to consider the methods of mining when developing the mining and reclamation plans, and that the type of mining will have direct impact on what is perceived as contemporaneous reclamation. For example, while contour mining can be conducted in a way that active coal removal pits are small and quickly backfilled with spoil removed to create an adjacent pit, mountaintop removal operations involving multiple-seam mining may disturb large areas for longer periods. However, essential to both operations is the need to control water and sediment movement to prevent soil loss and water pollution. The proposed amendments, while accommodating mountaintop removal mining in the contemporaneous reclamation standards, do not reduce or eliminate the performance standards for controlling erosion and sedimentation and protecting water. As stated above in Finding B–20, the Federal time and distance requirements for contemporaneous reclamation have been suspended. However, the amendments appear reasonable when the type of mining operations are considered, and the Director has concluded that the amendments are not inconsistent with the concept of contemporaneous reclamation at 30 CFR 816/817.100.

W.Va. Code 22–3–3(z)—Replacement of Water Supply

The commenter stated that the proposed definition of ''replacement of water supply'' is not acceptable for the following reasons. First, the definition omits reference to premining quality, quantity, and cost. Concerning cost, the commenter stated that under the proposed amendments, a person could end up with a water supply that costs them much more than their original water supply that was damaged by mining. In addition, the commenter asserted that the same specific protections are missing when the word ''premining'' is not included before the words ''quality and quantity.''

Second, the commenter asserted that the definition lacks any reference to replacement requirements 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. In those cases, the commenter said, according to OSM final rules of March 31, 1995, a demonstration is required to show that a suitable alternative water source is available and could feasibly be developed. Written concurrence from the water supply owner is also required.

In response, the Director agrees with the commenter that the proposed definition of ''replacement of water supply'' omits reference to ''premining'' water quality and quantity. The WVDEP has clarified that the word ''equivalent'' was used to clarify that water replacement would involve replacing the quality and quantity of water in use prior to the permitted mining activity. The WVDEP further stated that replacement requires a supply that is not only equivalent in quantity and quality, but also in cost. A stated above in Finding A–4, the Director found that the proposed definition, if implemented as explained by the WVDEP, is not inconsistent with and is no less effective than the counterpart Federal definition at 30 CFR 701.5.

Concerning the commenter's second comment, the Director agrees with the commenter that the proposed definition of ''replacement of water supply'' lacks a counterpart to provision (b) of the Federal definition of ''replacement of water supply'' at 30 CFR 701.5. As stated above in Finding A–4, the Director is requiring that the State further amend the West Virginia program to add such a counterpart.

CSR 38–2–16.2.c.—Material Damage

The commenter stated that possible interpretations of the word ''significant'' are troublesome at best. The commenter noted that the proposed definition of ''material damage'' reflects the minimum as set out by OSM in its final rule of March 31, 1995. The commenter also stated that the use of ''reasonably foreseeable uses'', rather than the more optimistic and far more protective ''future beneficial uses'', as incorporated in the State's Groundwater Act, is also troublesome. The Director disagrees with the commenter. As stated above in Finding B–23, except for the inadvertent omissions of words, the State's definition of ''material damage'' is substantively identical to the counterpart Federal definition at 30 CFR 701.5.

CSR 38–2–3.12—Subsidence Control Plan

The commenter stated that proposed provisions concerning subsidence control plans, presubsidence surveys, presumption of causation, repair of damage, etc. offer less protection than OSM requires and should be examined closely by OSM. The commenter is referred to Findings B–7, B–8, B–25 and B–26 wherein the Director found that

not all of the provisions contained in 38–2–3.12 and 38–2–16.2.c. could be approved. Moreover, the Director is requiring the State to amend its program to correct the deficiencies found in subsections 3.12 and 16.2.c.

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.*). OSM requested EPA concurrence on June 6, 1997 (Administrative Record Number WV–1059). Pursuant to 30 CFR 732.17(h)(11)(i), OSM solicited comments from the EPA on the proposed amendment on June 5, 1997 (Administrative Record Number WV–1060)

EPA responded to OSM's request for comments and concurrence by letter dated October 23, 1998 (Administrative Record Number WV–1108). EPA has concerns about the proposed provision at § 22–3–13(c)(3) of the WVSCMRA that would allow an exemption for mountaintop removal operations from restoring mined land to its approximate original contour (AOC) if the post-mining land use is fish and wildlife habitat and recreation lands. EPA stated that the proposed revision would allow excess overburden to be disposed in valley fills rather than on top of the mined area to achieve AOC. A use designation as fish and wildlife habitat and recreation lands would not appear to be necessary if the goal was just to provide wildlife habitat and recreation land, rather than avoid the expense of placing overburden back on top of mined areas. It is very likely, EPA stated, that wildlife habitat areas would occur naturally on post-mining lands, including areas restored to the approximate original contour, as a result of appropriate reclamation without any special use designation. In addition, it appears that the proposed designation as wildlife habitat and recreation lands is not intended for lands to be used by the public since an exemption for ''public use'' is already in the State statute. EPA said that its concern is that disposal of excess overburden in valley fills may harm aquatic life in headwater streams and possibly downstream reaches.

EPA noted OSM's intention to defer action on proposed revisions to § 22–3–13(c)(3) of the WVSCMRA regarding an exemption to approximate original contour for mountaintop removal operations until a later date and that the comment period will be reopened on this provision. With this understanding, the EPA concurred with the proposed WVDEP revisions under the condition that the EPA be given an opportunity to concur or not concur with the proposed amendment to § 22–3–13(c)(3) of the WVSCMRA.

V. Director's Decision

Based on the findings above the Director is approving West Virginia's proposed amendment submitted on April 28, 1997, except as noted below.

Sec. 22–3–3(u)(2) Amendments to the definition of ''surface mine'' are approved with the following exceptions: (1) The provision concerning coal extraction authorized pursuant to a government financed reclamation contract is deferred. (2) The provision concerning coal extraction incidental to development of land for commercial, residential, or civic use is not approved. (3) The provision concerning the reclamation of abandoned or forfeited mines by no-cost reclamation contracts is approved, except for the disposal of excess spoil on abandoned and forfeited sites pursuant to ''no cost'' contracts, which will be considered in another rulemaking.

Sec. 22–3–3(y) is approved, but the portion pertaining to bond forfeitures is approved only to the extent that AML funds may be used to reclaim sites where a bond or deposit has been forfeited only if the bond or deposit is insufficient to provide for adequate reclamation or abatement.

Sec. 22–3–3(z) Amendments to the definition of ''Replacement of water supply'' are approved with the understanding that the definition will be implemented as explained above in Finding A–4.

In addition, the required amendment, at 30 CFR 948.16(sss), remains in effect.

A decision on Sec. 22–3–13(c)(3) is deferred.

Sec. 22–3–17(b) is approved, but because the State's proposed reinstatement provisions do not reference the transfer, assignment or sale requirements of Section 22–3–19(d) of WVSCMRA or CSR 38–2–3.25, and because the WVDEP acknowledges that it has not fully developed its reinstatement procedures, the State cannot implement the proposed provisions until its program is further amended. Therefore, the Director is requiring that the State further amend the West Virginia program to adopt reinstatement procedures similar to its transfer requirements contained in CSR 38–2–3.25. The procedures must allow for public participation, require that the revoked permit meet the appropriate permitting requirements of the WVSCMRA, and require that the mining and reclamation plan be modified to address any outstanding violations for any permit reinstated pursuant to § 22–3–17(b) of the WVSCMRA. However, in no event can a reinstated permit be approved in advance of the close of the public comment period, and the party seeking reinstatement must post a performance bond that will be in effect before, during, and after the reinstatement of the revoked permit.

The provisions in Section 22–3–28 (a), (b) and (c) concerning coal mining incident to the development of land for commercial, residential, industrial or civic use are not approved.

A decision on section 22–3–28(e) is deferred.

Sec. 22–3–28(f) is approved, but may be implemented only with respect to those portions of sec. 22–3–28 that are approved in this rulemaking.

38–2–2.43 Definition of ''downslope.'' The amendment to the definition of ''downslope'' is not approved.

38–2–2.95 Definition of ''prospecting.'' The Director is not approving the addition of the word ''substantial'' to modify the word ''disturbance'' in the definition of ''prospecting.''

38–2–2.120 Definition of ''substantially disturb.'' The director is approving the amendment to this definition to the extent that the phrase ''land and water resources'' is construed to mean ''land or water resources.'' The Director is requiring that West Virginia amend its program by changing the phrase ''land and water resources'' to ''land or water resources'', in the definition of ''substantially disturb'', or by otherwise making it clear that the term ''substantially disturb'', for the purposes of prospecting, includes a significant impact on either land or water resources.

38–2–3.12.a.1. The phrase ''within an angle of draw of at least 30-degrees'' at § 38–2–3.12.a.1 is not approved. In addition, the Director is requiring that the State amend its program to require that the map of all lands, structures, and drinking, domestic and residential water supplies which may be materially damaged by subsidence show the type and location of all such lands, structures, and drinking, domestic and residential water supplies. Finally, the Director is requiring that the State amend its program to require that the permit application include a narrative indicating whether subsidence, if it occurred, could cause material damage to or diminish the value or reasonably foreseeable use of such structures or

renewable resource lands or could contaminate, diminish, or interrupt drinking, domestic, or residential water supplies.

38–2–3.12.a.1., pertaining to alternative, site-specific angles of draw, is approved with the understanding that such an alternative angle of draw would be justified based on a site-specific geotechnical analysis of the potential surface impacts of the mining operation. In addition, the Director is requiring that the State further amend the West Virginia program to clarify that approval of any alternative angle of draw will be based on a written finding that the proposed angle of draw has a more reasonable basis than the 30-degree angle of draw based on site-specific geotechnical analysis of the potential surface impacts of the proposed mining operation.

38–2–3.12.a.2. is approved except that the phrase ''within the area encompassed by the applicable angle of draw'' as it applies to water supply surveys is not approved. The definition of ''non-commercial building'' is not approved. The Director is requiring that the State amend the definition of ''non-commercial building'' at 38–2–3.12.a.2., or otherwise amend the West Virginia program, to clarify that ''non-commercial building'' includes such buildings used on a regular or temporary basis. In addition, the Director is requiring that the West Virginia program be further amended to be no less effective than 30 CFR 784.20(a)(3) by requiring a pre-subsidence survey, without limitation by an angle of draw, of the quantity and quality of all drinking, domestic, and residential water supplies within the permit area and adjacent area that could be contaminated, diminished, or interrupted by subsidence.

38–2–3.12.a.2.A. and .B. are not approved.

The Director is also requiring that West Virginia amend CSR 38–2–3.12.a.2., or otherwise amend its program, to require that the permit applicant pay for any technical assessment or engineering evaluation used to determine the premining condition or value of non-commercial buildings or occupied residential dwellings or structures related thereto and the quality of drinking, domestic or residential water supplies, and to require that the applicant provide copies of any technical assessment or engineering evaluation to the property owner and to the regulatory authority.

38–2–3.29.a. is approved except the phrase ''the only practical alternative to recovery of unanticipated reserves or'' is not approved.

38–2–8.2.e. is approved with the understanding that the design of the windrowing will be reviewed by a State wildlife biologist as part of the wildlife enhancement plan for a postmining land use containing wildlife habitat.

38–2–16.2.c. is approved with the understanding that the State will correct the inadvertent omission of words in future rulemaking, and will interpret the current definition as if the inadvertently omitted words were present; and that the State will consider its definition of ''structure'' at 38–3–2.116 to include ''facilities'' as used in the Federal sense.

38–2–16.2.c.3. is less effective than the Federal regulations at 30 CFR 817.121(c)(4)(i) to the extent that the presumption of causation of subsidence damage only applies within the area which a pre-subsidence structural survey is required. The Director is requiring that § 38–2-16.2.c.3. be further amended to provide that a rebuttable presumption of causation would exist within the applicable angle of draw, regardless of whether or not a presubsidence survey has been conducted.

38–2–16.2.c.3.B. The Director is requiring the State to further amend CSR 38–2–16.2.c.3.B, or otherwise amend its program, to make it clear that the presumption of subsidence causation of damage can be rebutted only where the permittee demonstrates that the damage was proximately caused by some other factor or factors and was not proximately caused by subsidence.

CSR 38–2–16.2.c.4 is approved except: To the extent that it does not limit extensions of the 90-day abatement period under circumstances set forth in the Federal regulations at 30 CFR 817.121(c)(5); to the extent that it limits the requirement for additional bond for water supplies contaminated, diminished, or interrupted only to such water supplies that are so affected specifically by subsidence rather than by underground mining operations in general; and, to the extent that it provides that the 90-day period before which additional bond must be posted does not begin to run until an NOV is issued. In addition, the Director is requiring that the State amend 38–2–16.2.c.4., or otherwise amend the West Virginia program, to be no less effective than the Federal regulations at 30 CFR 817.121(c)(5), which provide that an extension of the 90-day abatement period may be granted for one of only three reasons: that subsidence is not complete; that not all subsidence related material damage has occurred; or that not all reasonably anticipated changes have occurred affecting the protected water supply. The Director is also requiring that the State amend 38–2–16.2.c.4., or otherwise amend the West Virginia program, to be no less effective than the Federal regulations at 30 CFR 817.121(c)(5) by requiring additional bond whenever protected water supplies are contaminated, diminished or interrupted by underground mining operations conducted after October 24, 1992. The amount of the additional bond must be adequate to cover the estimated cost of replacing the affected water supply. Finally, the Director is requiring that the State amend 38–2–16.2.c.4., or otherwise amend the West Virginia program, to require that the 90-day period before which additional bond must be posted begin to run from the date of occurrence of subsidence-related material damage.

The Federal regulations at 30 CFR 948 codifying decisions concerning the West Virginia 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

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 12988

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (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 corresponding 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 corresponding Federal regulations.

Unfunded Mandates

This rule will not impose a cost of $100 million or more in any given year on any governmental entity or the private sector.

List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Dated: January 27, 1999.

Michael K. Robinson,

Acting 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.*

2. Section 948.15 is amended in the table by adding a new entry in chronological order by ''Date of Final Publication'' to read as follows:

§ 948.15 Approval of West Virginia regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
*	*	* * * * *
April 28, 1997	February 9, 1999	W.Va. Code 22–3 Sections 3(u)(2)(1) (decision deferred), (2)(not approved), (3); 3(x), (y)(partial approval), (z)(partial approval); 13(b)(20), (22), (c)(3)(decision deferred); 15(h); 17(b); 18(c), (f); 28(a-c) (not approved), (d), (e)(decision deferred), (f). WV Regulations CSR 38–2 Sections 2.4, 2.43 (not approved), 2.95 (not approved), 2.108, 2.120; 3.2.e; 3.12.a.1 (partial approval), .2 (partial approval); 3.14.b.7 & .8 deleted, .12.E, .15.B deleted, .13.B; 3.29.a (partial approval); 3.35; 5.5.c; 6.5.a; 8.2.e; 9.2.i.2; 9.3.h.1, .2; 14.11.e, .f, .g, .h; 14.15.b.6.A, .c, .d; 16.2.c (partial approval), .2, .3 (partial approval), .4 (partial approval); 20.1.e.

3. Section 948.16 is amended by adding new paragraphs (www through hhhh) to read as follows:

§ 948.16 Required regulatory program amendments.

* * * * *

(www) By April 12, 1999, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to adopt reinstatement procedures similar to its transfer requirements contained in CSR 38–2–3.25 and to allow for public participation, require that the revoked permit meet the appropriate permitting requirements of the WVSCMRA, and require that the mining and reclamation plan be modified to address any outstanding violations for any permit reinstated pursuant to § 22–3–17(b) of the WVSCMRA.

(xxx) By April 12, 1999, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to require that West Virginia amend its program by changing the phrase ''land and water resources'' to ''land *or* water resources'', in the definition of ''substantially disturb'' at 38–2–2.120, or by otherwise making it clear that the term ''substantially disturb'', for the purposes of prospecting, includes a significant impact on either land or water resources.

(yyy) By April 12, 1999, 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 38–2–3.12.a.1., or otherwise amend the West Virginia program to clarify that approval of any alternative angle of draw will be based on a written finding that the proposed angle of draw has a more reasonable basis than the 30-degree angle of draw based on site-specific geotechnical analysis of the potential impacts of the proposed mining operation.

(zzz) By April 12, 1999, 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 38–2–3.12.a.1., or otherwise amend the West Virginia program to require that the map of all lands, structures, and drinking, domestic and residential water supplies which may be materially damaged by subsidence show the type and location of all such lands, structures, and drinking, domestic and residential water supplies within the permit and adjacent areas, and to require that the permit application include a narrative indicating whether subsidence, if it occurred, could cause material damage to or diminish the value or reasonably foreseeable use of such structures or renewable resource lands or could contaminate, diminish, or interrupt drinking, domestic, or residential water supplies.

(aaaa) By April 12, 1999, 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 38–2–3.12.a.2., or otherwise amend the West Virginia program to require that the water supply survey required by CSR 38–2–3.12.a.2. include all drinking, domestic, and residential water supplies within the permit area and adjacent area, without limitation by an angle of draw, that could be contaminated, diminished, or interrupted by subsidence.

(bbbb) By April 12, 1999, 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 38–2–3.12.a.2., or otherwise amend the West Virginia program to require that the permit applicant pay for any technical assessment or engineering evaluation used to determine the premining condition or value of non-commercial buildings or occupied residential dwellings or structures related thereto and the quality of drinking, domestic or residential water supplies, and to require that the applicant provide copies of any technical assessment or engineering evaluation to the property owner and to the regulatory authority.

(cccc) By April 12, 1999, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend the definition of ''non-commercial building'' at 38–2–3.12.a.2. to clarify that ''non-commercial building'' includes such buildings used on a regular or temporary basis.

(dddd) By April 12, 1999, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend its regulations at CSR 38–2–16.2.c.3., or otherwise amend the West Virginia program, to provide that a rebuttable presumption of causation would exist within the applicable angle of draw, regardless of whether or not a presubsidence survey has been conducted.

(eeee) By April 12, 1999, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend its regulations at CSR 38–2–16.2.c.3.B., or otherwise amend its program, to make it clear that the presumption of causation of damage by subsidence can be rebutted by evidence that the damage was proximately caused by some other factors and was not proximately caused by subsidence.

(ffff) By April 12, 1999, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend 38–2–16.2.c.4., or otherwise amend the West Virginia program, to be no less effective than the Federal regulations at 30 CFR 817.121(c)(5), which provide that an extension of the 90-day abatement period may be granted for one of only three reasons: that subsidence is not complete; that not all subsidence related material damage has occurred; or that not all reasonably anticipated changes have occurred affecting the protected water supply.

(gggg) By April 12, 1999, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend 38–2–16.2.c.4., or to otherwise amend the West Virginia program, to be no less effective than the Federal regulations at 30 CFR 817.121(c)(5) by requiring additional bond whenever protected water supplies are contaminated, diminished or interrupted by underground mining operations conducted after October 24, 1992. The amount of the additional bond must be adequate to cover the estimated cost of replacing the affected water supply.

(hhhh) By April 12, 1999, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend CSR 38–2–16.2.c.4., or to otherwise amend the West Virginia program, to be no less effective than the Federal regulations at 30 CFR 817.121(c)(5), by requiring that the 90-day period before which additional bond must be posted begin to run from the date of occurrence of subsidence-related material damage.

[FR Doc. 99–3128 Filed 2–8–99; 8:45 am]

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 235

Sale or Rental of Sexually Explicit Material on DoD Property

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This rule concerns sexually explicit audio recordings, films, video recordings, or periodicals with visual depictions available for sale or rental on property under the jurisdiction of the Department of Defense. It implements 10 U.S.C. 2489a.

EFFECTIVE DATE: This rule is effective June 29, 1998.

FOR FURTHER INFORMATION CONTACT: LTC Bernard Ingold, USA, 703–697–3387.

SUPPLEMENTARY INFORMATION:

Executive Order 12866, ''Regulatory Planning and Review''

It has been determined that 32 CFR part 235 is not a significant regulatory action. The rule does not:

(1) Have an annual effect to the economy of $100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

Pub. L. 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. 601)

It has been certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Pub. L. 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

It has been certified that this part does not impose any reporting or recordkeeping requirements under the Paperwork Reduction act of 1995.

List of Subjects in 32 CFR Part 235

Business, Civilian personnel, Concessions, Government contracts, Military personnel.

Accordingly, title 32 of the Code of Federal Regulations, Chapter I, subchapter M, is amended to add part 235 to read as follows:

PART 235—SALE OR RENTAL OF SEXUALLY EXPLICIT MATERIAL ON DOD PROPERTY

Sec.
235.1 Purpose.
235.2 Applicability and scope.
235.3 Definitions.
235.4 Policy.
235.5 Responsibilities.
235.6 Procedures.
235.7 Information requirements.

Authority: 10 U.S.C. 2489a.