

Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701 *et seq.*, by filing with HUD a certified copy of the state's disclosure report.

Under 24 CFR 1710.508(a), HUD's acceptance of Georgia's Certified Registration will expire 90 days after the date of this notice, unless a Georgia registrant files a registration request with HUD by that date. Under the Act, unless subdivision sales are exempt by statute or regulation, the subdivision must be effectively registered with HUD before the developer may offer to sell or lease any lots.

HUD will try to minimize the burden on Georgia developers by accepting much of the former Georgia State registration. A Georgia registrant previously registered under the State Certification Program that wants to maintain its Federal registration, must submit, within 90 days after this Notice, a modified Statement of Record that includes (1) a current Property Report and (2) an Affirmation pursuant to the instructions found at 24 CFR § 17120.219. There will be no fees required for these changes. The Property Report must be modified to include the following changes:

1. A revised cover page pursuant to the instructions found at 24 CFR 1710.105;
2. A revised Agent, Certification and Cancellation page pursuant to instructions found at 24 CFR 1710.118;
3. Deletion of the Supplemental Receipt for Georgia purchasers; and,
4. Deletion of any other information that is no longer applicable due to changes in Georgia law.

Once these above mentioned materials are accepted by the Department, a new effective date will be issued for the registration. Developers are reminded that within 30 days of each anniversary date of the new effective date, the registrant must submit to the Department an Annual Report of Activity accompanied by the prescribed fee (see 24 CFR 1710.310). Within 120 days after the close of the developer's fiscal year, the developer shall submit financial statements meeting the standards of 24 CFR 1710.212(c) to the Department.

In addition, any additional changes in material fact must be made in conformance with the Interstate Land Sales Full Disclosure Act and its implementing Regulations. For purposes of these filings, Georgia developers need only update the particular sections of the Property Report and supply any required supporting documentation.

Charles Clark, Georgia Real Estate Commissioner, sent a letter, dated May 8, 1995, to all interested parties,

notifying them of changes in Georgia's regulation of land sales development, effective July 1, 1995, pursuant to Georgia House Bills 621 and 622. This Notice of Order of Withdrawal of State Certification for the State of Georgia will be sent to the same parties.

The above constitutes the Order of Withdrawal referred to in 24 CFR 1710.508(a) with respect to the State of Georgia's certification under the Interstate Land Sales Full Disclosure Act.

Authority: 15 U.S.C. 1708.

Dated: August 7, 1995.

Nicolas P. Retsinas,

Assistant Secretary for Housing-Federal Housing Commissioner.

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 948

West Virginia Regulatory Program

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

ACTION: Final rule; approval of amendment.

SUMMARY: OSM is approving an amendment to the West Virginia permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendment concerns West Virginia's regulations for the design and construction of durable rock fills. The amendment will revise the West Virginia program to be consistent with SMCRA and the Federal regulations.

EFFECTIVE DATE: August 16, 1995.

FOR FURTHER INFORMATION CONTACT: Mr. James C. Blankenship Jr., Director, Charleston Field Office, Office of Mining Reclamation and Enforcement, 1027 Virginia Street East, Charleston, West Virginia 25301, Telephone: (304) 347-7158.

SUPPLEMENTARY INFORMATION:

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

SMCRA was passed in 1977 to address environmental and safety problems associated with coal mining.

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

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

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

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

A major goal of SMCRA is to ensure adequate reclamation of all areas disturbed by surface coal mining.

During reclamation, the removal of coal is followed by backfilling the mine pit with spoil to return the land to its approximate original contour. There is usually more spoil than is needed for backfilling because solid rock that was removed when the mine pit was excavated increases in volume. This excess rock is typically disposed of as fills in valleys adjacent to the mine pit. A "durable rock fill" is an excess spoil fill composed of at least 80 percent by volume of sandstone, limestone, or other rocks that do not slake in water. It is usually constructed in a single lift or layer and has an underdrain system that is created by the natural segregation of rock and soil as it is dumped and rolls downslope.

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

II. Submission of the Amendment

In a series of three letters dated June 28, 1993, and July 30, 1993 (Administrative Record Nos. WV-888, WV-889 and WV-893), the West Virginia Division of Environmental Protection (WVDEP) submitted an amendment to its approved permanent regulatory program that included numerous revisions to the West Virginia Surface Coal Mining and Reclamation Act (referred to herein as "the Act", WVSCMRA § 22A-3-1 *et seq.*) and the West Virginia Surface Mining Reclamation Regulations (CSR § 38-2-1 *et seq.*). OSM grouped the proposed revisions that concern durable rock fills into one amendment which is the subject of this notice. The main provisions of the amendment will:

- Require that certification forms for durable rock fills be accompanied by statements attesting to the percentage of non-durable material, foundation preparation, prohibited materials and sediment control measures.
- Establish criteria for testing spoil material to determine if it qualifies as durable rock.
- Require surface water runoff from areas above and adjacent to the fill to be diverted into channels designed and constructed to ensure stability of the fill, control erosion, and minimize water infiltration.
- Require additional sediment control measures if construction and operation of the fill results in significant non-

compliance with effluent limits or water quality standards.

- Prohibit certain materials from being placed in durable rock fills.

OSM announced receipt of the proposed amendment in the August 12, 1993, **Federal Register** (58 FR 42903) and invited public comment on its adequacy. Following this initial comment period, WVDEP revised the amendment on September 1, 1994, and May 16, 1995 (Administrative Record Nos. WV-937, and WV-979B). OSM reopened the comment period on August 31, 1994 (59 FR 44593), September 29, 1994 (59 FR 49619), and July 5, 1995 (60 FR 34934), and held a public hearing in Charleston, West Virginia on September 7, 1993, and a public meeting on October 27, 1994.

III. Director's Findings

A. CSR § 38-2-14.14(b)(4) Certification of Durable Rock Fills

West Virginia proposes to add a provision requiring that certification forms, submitted to WVDEP by registered professional engineers overseeing the construction of durable rock fills, be accompanied by: (1) a statement attesting that the fill contains no more than 20 percent non-durable material, (2) a statement attesting that the foundation is proceeding in accordance with the design plans, (3) a statement that the prohibited materials are not being placed, deposited, or disposed of into the fill areas, and (4) a statement that sediment control measures are constructed and being maintained in accordance with the approved design plans and the terms and conditions of the permit.

Under 30 CFR 816/817.73(c), the Federal rules require a qualified registered engineer to certify that the design of a durable rock fill will ensure the stability of the fill and meet all other applicable requirements. Furthermore, 30 CFR 816/817.71(h) requires inspections at least quarterly throughout construction and during critical construction periods. Following each inspection, the qualified registered professional engineer must submit certified reports to the regulatory authority attesting that the fill has been constructed and maintained in accordance with the approved plan and program requirements. The report must include appearances of instability, structural weakness, and other hazardous conditions. West Virginia's program already contains these requirements. Other than described above, the Federal rules do not specify that the certified report include specific statements by the engineer. Since West

Virginia proposes to require a more detailed certification, the Director finds that subsection 14.14(b)(4) is consistent with the Federal rules and is hereby approved.

B. CSR § 38-2-14.14(g)(1)(B) Testing of Fill Materials

State and Federal regulations for durable rock fills require that no more than 20 percent of the volume of the fill may be spoil material that is not durable rock as determined by tests performed by a registered engineer and approved by the regulatory authority. Durable rock is material that will not slake in water and will not degrade to soil material. West Virginia proposes to add a provision at subsection 14.14(g)(1)(B) that defines soil material, as used in the definition of durable rock, as material of which at least 50 percent is finer than 0.074 millimeters, which exhibits plasticity, and which meets the criteria for group symbol ML, CL, OL, MH, CH, or OH, as determined by the Unified Soil Classification System (ASTM D-2487). In support of this amendment, the WVDEP submitted to OSM a durable rock testing protocol which the State would implement in applying its proposed regulations (Administrative Record No. WV-932). Under the protocol, rock is first checked for durability by use of standard slake durability tests. If a rock slakes in water, it is defined as non-durable, regardless of whether or not it degrades to soil material. A rock which passes the slake durability test may be further tested under subsection 14.14(g)(1)(B), on a case-by-case basis, to determine whether it would potentially degrade to soil particles exhibiting plasticity and particle size below the specified limit.

The Federal rules do not define soil material in the context of durable rock fills or provide a testing protocol to determine if rock degrades to soil material. Since West Virginia's protocol adds a screening test for durable rock not specifically required under the Federal regulations, the Director finds that the proposed rule when applied in conjunction with the State's protocol is no less effective than 30 CFR 816/817.73(b) and is therefore approved.

C. CSR § 38-2-14.14(g)(8) Drainage Control

WVDEP is proposing to revise subsection 14.14(g)(8) to read as follows:

Surface water runoff from areas above and adjacent to the fill shall be diverted into properly designed and constructed stabilized diversion channels which have been designed, using best current technology, to safely pass the peak runoff from a 100-year, 24-hour precipitation event. The channel

shall be designed and constructed to ensure stability of the fill, control erosion, and minimize water infiltration into the fill.

The Federal rules at 30 CFR 816/817.73(f) prohibit surface water runoff from areas adjacent to and above the fill to flow onto the fill and require water to be diverted into stabilized diversion channels designed to safely pass the runoff from a 100-year, 6-hour precipitation event. The Federal rule is more restrictive than the proposed rule with regard to the location of surface drainage diversion channels relative to the body of the fill. Under 30 CFR 816/817.73(f), drainage diversion channels must divert surface runoff from areas adjacent to and above the fill away from the fill. Such channels must be located either completely off of the fill or at the interface of the natural slope and the fill. West Virginia's proposed amendment would allow drainage diversion channels to be located anywhere, including on the fill itself, provided that the channels are designed and constructed to ensure the stability of the fill, control erosion, and minimize water infiltration into the fill.

The Federal requirement to divert runoff water away from durable rock fills was adopted on March 13, 1979, as permanent program rule 30 CFR 816.74(d). While there were no specific comments pertaining to diversions of water away from durable rock fills, commenters stated, with regard to head-of-hollow fills, that stabilized diversion channels "off of the fill" created an unnecessary disturbance and that channels on the fill could protect that portion of the fill from erosion. In the preamble, OSM justified the requirement by stating that "Diversion of water away from the fill surface is considered sound engineering practice" and cited several engineering references. OSM concluded that, while more area will be disturbed where diversions are placed off of the fill area, "less environmental harm will result from retaining the requirement to build diversions off the fill structures." (44 FR 15206).

The intent of the Federal rule prohibiting runoff diversion *onto* the fill, as explained in the preamble, was to prevent water erosion of fill material and infiltration into the fill. West Virginia's proposed rule, while not restricting the location of surface drainage diversion channels, specifically requires control of erosion and minimization of water infiltration, thus preserving the intent of the corresponding Federal regulation. The proposed rule prohibits the diversion of water into or through the fill because diversions must be designed and

constructed to minimize water infiltration.

An OSM ad hoc technical committee on excess spoil disposal considered the proposed amendment for technical sufficiency. The committee concluded that appropriate surface drainage control for durable rock fills can be accomplished under the proposed West Virginia amendment. The amendment's proposed language and the other excess spoil provisions of the West Virginia regulatory program provide clear authority for WVDEP to require permit applications containing demonstrations and technical analyses addressing adequate hydraulic design—including channel capacity, erosion control, and minimizing infiltration into the fill mass. The committee also considered that a proper channel design could overcome potential hydraulic problems from intersecting flows at channel and terrace junctions, changes in channel gradient, or anywhere hydraulic jump and/or overtopping would be likely to occur. The committee recommended to WVDEP that a permittee show designs and specifications, based upon maximum design velocities, which would encompass riprap sizing, gradation, bedding, filters, and all channel material placement. The design and specification should also address how infiltration will be minimized (e.g., through channel liners, etc.) and assure that runoff adjacent to the channel can enter the drainage diversion system with a minimum of erosion. The committee underscored the importance that runoff not be allowed over the face of the fill in locations other than the diversion channel. Finally, the committee provided WVDEP a series of recommendations on key areas of the durable rock fill drainage control system that should be inspected during and after fill construction (Administrative Record No. WV-1008).

In the absence of any clear congressional intent, OSM evaluated this amendment by comparing the advantages and disadvantages of locating surface water diversions off of and on fills from a public safety and environmental standpoint. The perimeter or groin channels required under the Federal rules would likely result in a larger disturbed area, greater instability of the natural slope adjacent to the fill and require more long-term maintenance when compared to surface water diversions located on the fill itself. However, surface diversions located off the fill are less likely to result in erosion and in surface water infiltration to the fill mass than are diversions located on the fill.

Weighing the advantages and shortcomings of both methods of diversion construction, the Director concludes that neither method is clearly more environmentally preferable than the other. Therefore, the Director finds proposed subsection 14.14(g)(8) to be no less effective than 30 CFR 816/817.73(f) and he is approving it.

D. CSR § 38-2-14.14(g)(11) Sediment Control

WVDEP proposes to add a new provision which states that additional storage capacity or sediment control measures may be required through permit revision if sediment removal during operation and construction of the fill is found to be deficient to the point that significant non-compliance with applicable effluent limits and water quality standards results. In support of this amendment WVDEP stated that the term "significant" refers to the NPDES permit and enforcement thereof and that any failure to meet effluent limits constitutes a violation and a notice of non-compliance is issued (Administrative Record No. WV-934). The proposed subsection has no Federal counterpart. However, it is consistent with 30 CFR 816/817.71(a)(1) which requires that excess spoil be placed in designated disposal areas in a manner to minimize the adverse affects of leachate and surface water runoff from the fill on surface and ground waters. The Director is hereby approving subsection 14.14(g)(11).

E. CSR § 38-2-14.14(g)(12) Prohibited Materials

WVDEP proposes to add a provision which sets forth the materials that can not be placed, deposited, or disposed of in a durable rock fill or durable rock fill area. These prohibited materials include surface soils except for surface soils used to establish vegetation or surface soils placed in the fill if accounted for in design and construction as nondurable materials and not placed in critical zones. Other prohibited materials are mud, silt, or sediment; vegetation or organic materials; non-coal wastes; and coal refuse. There is no similar listing of materials prohibited from placement in durable rock fills in the Federal rules. However, 30 CFR 816/817.73(b) does require that at least 80 percent of the material in a fill be non-acid and non-toxic-forming rock; 30 CFR 816/817.71(e) requires the removal of all vegetation and organic materials from the disposal area prior to placement of excess spoil; and 30 CFR 816/817.89(b) requires the final disposal and noncoal waste in a designated disposal site in the permit area or a

State approved solid waste disposal area. Furthermore, 30 CFR 816/817.71(i) provides for the disposal of coal mine waste in excess spoil fills if approved by the regulatory authority and certain conditions are met. Since West Virginia's proposal does not allow placement in durable rock fills of any material that is prohibited by the Federal regulations, the Director finds that subsection 14.14(g)(12) is no less effective than the Federal rules and he is hereby approving it.

IV. Summary and Disposition of Comments

Public Comments

The Director solicited public comments and provided an opportunity for public hearings on the proposed amendment. A public hearing was held on September 7, 1993, and a public meeting was held on October 27, 1994 (Administrative Records Nos. WV-906 and WV-958). Comments on durable rock fills were received from GAI Consultants, Inc; Hobet Mining; Terra Engineers, Inc.; West Virginia Mining and Reclamation Association; West Virginia Coal Association; West Virginia Highlands Conservancy; Pine Ridge Coal Corporation; Burko Resources and Eastern Association Coal Corporation.

All comments received pertain to the drainage control provisions in CSR § 38-2-14.14(g)(8) as first submitted to OSM on July 30, 1993, and revised on September 1, 1994 (Administrative Record Nos. WV-893 and WV-937). In the July 30, 1993, submission, WVDEP proposed to delete the existing requirement that runoff from areas above and adjacent to durable rock fills be prohibited from flowing onto the fill and to add new language requiring diversions to be designed and constructed to pass runoff "around and through the fill." This language was revised on September 1, 1994, to read "around or through the fill." OSM objected to the design and construction of durable rock fills where surface water runoff would be allowed to be diverted "through the fill". However, all public comments received were in support of this provision. OSM, State and industry representatives met and developed new language tentatively acceptable to all parties. This was submitted to OSM on May 16, 1995 (Administrative Record No. WV-979B). When OSM reopened the public comment period on July 5, 1995, only one comment was received on proposed CSR § 38-2-14.14(g)(8) which had been revised to allow drainage diversion channels to be located anywhere, including on the fill itself, so long as the channels were

designed and constructed to ensure the stability of the fill, control erosion, and minimize water infiltration into the fill. In the following section, OSM is responding to all comments received, including those submitted in response to WVDEP's July 30, 1993, and September 1, 1994, proposals, even though these proposals were subsequently revised on May 16, 1995.

History of durable rock performance: Commenters reported that numerous (up to about 4,000) excess spoil fills (including durable rock fills) have been constructed in West Virginia over the past 20 to 25 years. Many of these are durable rock fills. According to commenters, there are no documented massive or structural failures among the fills. Commenters reported that problems identified have been minor and not unique to subsurface or center drains. The results of a 1994 WVDEP survey of fills revealed no substantive difference in structural integrity among fills with different runoff diversion systems. One commenter's review of recent (1990-94) citizens' complaints and WVDEP and OSM inspection reports (July 1993-June 1994) supported the apparent lack of failures or significant problems with existing fills and fills under construction in the state.

In response, OSM notes that the similarity of earlier excess spoil disposal practices in West Virginia to the present is uncertain. The oldest fills in West Virginia are much smaller than many of those currently under construction, are primarily of the lift type and are influenced by smaller drainage areas. The more recent fills of up to 100,000,000 cubic yards have yet to stand the test of time, are constructed by end-dumping methods, and would typically experience significant runoff discharges from larger drainage areas. Moreover, durable rock fills may experience a greater runoff/sediment influx due to the larger upslope disturbed area found at modern-day mining operations. The WVDEP survey, and the review of inspection records and citizens' complaints would not necessarily reveal long-term subsurface problems. OSM is unaware of any attempts to revisit sites of durable rock fills that are beyond bond release. Therefore, the comparisons drawn by commenters between earlier head-of-hollow fills and present-day durable rock fills have limited value.

Commenters cited evidence for the efficacy and safety of drainage systems on fills based on their successful use on abandoned-mine-land (AML) sites. A direct comparison of diversions on AML coal refuse projects and active excess spoil disposal areas is not possible.

AML project drainage control design options are very limited since fills are in-place and site conditions may not be suitable for diversion in natural ground. Excess spoil disposal designs provide greater flexibility since the fill location can be selected and the fill material has not yet been placed. Surface water diversions on AML projects often involve linings of concrete, grouted rip rap, or other less pervious material which minimize surface drainage infiltration into the fill mass. Rarely do mine operators line channels in a similar manner.

Future stability of durable rock fills: One commenter expressed hope that " * * * future generations will put these fills to good use and will maintain surface drainage." The objective of the Federal and State rules on excess spoil design and construction is to promote permanent stability for the long term protection of the environment, life, and safety of future generations. The question of permanent stability is a fundamental issue affecting OSM's concerns about subsurface and center drains. Destabilizing subsurface processes such as piping, plugging, and pore-water pressure build-up can take place over long periods of time without being expressed on the surface. A key aspect underscoring this concern is the absence of any fill maintenance following bond release.

Some commenters contended that problems with fill stability are likely to appear during, and are limited to, the period of construction. They claimed that, during construction, fill and foundation-soil consolidation is incomplete; much of the non-durable rock will already have degraded; the outslope is at the angle of repose (i.e. not yet graded to a more stable configuration); and, sediment production is greater than it will be when revegetation becomes established. Problems stemming from inadequate drainage and a rising phreatic surface or free-water elevation will also occur soon enough to be detected and remediated. One commenter also pointed out that future fill failures, if and when they take place, will be limited to slumping of fill material into a more stable configuration. The commenter said that, under steep-slope and poor foundation conditions, flow slides would not occur, since one should not expect liquefaction in drained rock-fill material.

Presently, there is very little use and maintenance of finished excess spoil fills. The postmining land use for approximately 95 per cent of the fills is forest. Future utilization of land downstream of some fills in the form of housing developments, farming, park

grounds, industrial facilities, etc. is possible. However, there is no reason to assume that those using the land will have the knowledge or resources available to address problems that may develop or to perform needed maintenance. What maintenance will occur will partly depend on what will be observed. Problems with surface drainage systems are readily noticeable. This is not true for subsurface drains. Since OSM cannot assume that future generations will assume the liability for diversion maintenance, conservative performance standards maximizing long-term diversion effectiveness are necessary.

There are no guarantees that most fill problems will occur during construction. The benefits of fill/foundation consolidation and regrading can be counteracted by increases in the fill-mass weight (by addition of fill material or moisture during construction); or addition of moisture after bond release. The claim that degradation will be limited to the time of durable-rock-fill construction lacks supporting data. Forces working within the fill during consolidation, and action of water within the fill, can further degrade the fill following construction. Sediment entering internal drainage systems may not be adequately controlled by the amount of vegetation on the fill or mine-site surface following bond release. Sites of natural landslides are commonly considered to be prone to additional slides. The same can be said for initial slumps or slides on a constructed fill. Also, even limited or local slumps could result in more than limited consequences, depending on the concurrent usage of the site. Finally, whether or not massive flow slides will occur will depend on moisture conditions in the fill and long-term strength characteristics of the material. It can take a long time for steady-state seepage levels to occur. Thus, the effects of piping, plugging, and rising pore-water pressure may occur well beyond bond release.

Perimeter drainage channels: Several commenters in support of center and subsurface drains for surface runoff control emphasized disadvantages associated with perimeter diversion ditches. Some commenters cited the effects of geologic degradation (weathering and erosion of materials in the channels, filling of the channels from landslides or slumps from adjacent steep slopes); seepage of surface water into the fill mass through underlying colluvium; and, the difficulty in achieving effective positive drainage in very long diversion ditches. Some commenters stated that OSM Directive

TSR-6 (Transmittal Number 400, November 10, 1987), which allows perimeter ditches to be in contact with the fill mass, enhances differential settlement and erosion.

One commenter noted the annual maintenance requirements of perimeter ditches around coal refuse embankments as justification for channels on the fill mass. Another compared fills constructed with perimeter drains to those using center drains, claiming that the former fill type experiences more problems with erosion and water penetration into the fill mass.

OSM concurs that perimeter ditches—and other kinds of drainage diversion ditches—can and, in fact, do have maintenance problems. However, the problems are commonly the result of inadequate site investigation, design, or construction and not necessarily an inherent condition of all surface drains. Proper investigation of the proposed diversion location, careful planning and design, along with careful construction should alleviate many problems commonly encountered in the field. As for problems that may not be avoided over the long term (geologic degradation), surface drains still have an important advantage over subsurface drains since problems can be easily detected as they develop. Where a site investigation predicts the establishment of an effective surface drainage system to be prohibitively difficult, rejection of the site may be the best course of action.

OSM Directive TSR-6 permits contact between perimeter drainage channels and fill material. While there is some potential for differential settlement beneath interface channels, OSM does not agree that the risk of this happening is greater than for center drains. The thickness of fill material below the center channel is much greater, and assuming the fill material behaves homogeneously during consolidation, this location is more susceptible to differential settlement than interface diversion channels. Furthermore, center-channel failure could result in more erosion of the fill simply because there is more fill above natural ground at this location than beneath the interface channel. These concerns highlight the importance of design and construction methods that ensure long-term channel stability and mitigate erosion and water penetration into the fill mass.

Center drainage channels: Two commenters claimed that significant amounts of seepage into the fill mass should not occur from surface water flowing in center drains. One commenter claimed to have observed standing water in center drains as

evidence that infiltration was not occurring. Another maintained that, barring barriers to free drainage, infiltration will always be less than the drainage capacity in a dumped rock fill, especially due to the compaction of near-surface materials during construction. The latter commenter further suggested that “. . . infiltration from the ditch could be minimized by means of a compacted zone of well-graded rockfill in which the voids are completely choked with rock fines.”

OSM's position, in approval of this amendment, is that center drains are conditionally acceptable. It must be pointed out that barriers to free drainage in a constructed channel are difficult to avoid. Because durable rockfill construction is typified by less-permeable fine material in the upper reaches of the fill mass, OSM agrees that a potentially workable method for minimizing seepage from a center channel is the construction of a compacted zone of well-graded rockfill.

Subsurface drainage systems: One commenter cited the results of his flow-through model study in support of the State's original proposal for surface drainage through fills which was subsequently withdrawn from further consideration. The commenter concluded that the laboratory bench-scale test proved that a durable rock fill is capable of internally passing 24-hour, 100-year storm events. The commenter stated that a draw-down of water level occurred in the model as flow approached the toe of the simulated fill. The commenter also pointed out that flow through rock voids seldom exceeds three feet per second but can reach many times this value in surface perimeter ditches. Some commenters have argued against the potential occurrence of plugging in the subsurface drains by claiming that the end-dumping method produces a graded fill that effectively prevents migration of fines. One commenter emphasized the general absence of evidence for plugging, stating that an autopsy of the simulated durable rock fill found only rock dust covering the rock particles and/or a minor accumulation of fines in the bottom of the fill. The commenter stated that there was no evidence that “* * * fines tended to migrate through the fill.” Finally, the commenter suggested that fills with internal drains may have the potential effect of flood mitigation via runoff attenuation. The commenter stated that the model outflow was “* * * a lot less than the peak into it.”

The commenter also responded to OSM's (September–December 1993) reviews of the model study. The reviews

concentrated on comparing the model with actual durable rock fills constructed in the field. The commenter asserted that the model was sufficiently representative of real-life fills with respect to its materials, void ratio, particle gradation, and scale. The commenter also disputed the OSM contention that durable rock fills have yet to be tested by a 24-hour, 100-year storm event. The commenter stated that the 1977 flood "* * * generally recognized as a 100-year event over much of Southern West Virginia;" the 1985 flood over eastern and central West Virginia "* * * considered to be 500+ year event;" and, localized storms "* * * equal to or greater than the 100 year 24 hour storm."

Again, OSM's position on routing surface runoff through subsurface drains is based on the potential, long-term and not-readily-observed effects of piping and plugging. Furthermore, it would appear that the rock dust and minor sediment accumulation in the simulated fill could not have occurred without migration of fine material. The model may not represent actual conditions with respect to fine material. The position that the end-dumping method prevents fines migration by producing a graded fill is conceptually feasible, but scientifically undocumented.

The comments pertaining to precipitation events in West Virginia are at variance with available data. Construction of the earliest West Virginia durable-rock fills commenced around 1980. Hourly data recorded at stations throughout West Virginia since 1980 do not show a 100-year, 24-hour event nor multiples of such events. Also, the suggestion that routing surface runoff into subsurface drains may have a mitigating effect on floods should create as much concern as it might portend a potential advantage. Retained water increases the weight of a fill mass, potentially increasing the driving force for sliding, and may engender sufficient pore water pressures to reduce the fill's resistance to failure.

Previous studies: Some comments included references to literature that the commenter believed supports routing surface runoff through subsurface drains. These include: the U.S. Department of Agriculture Soil Conservation Service Engineering Handbook; WVDEP Mining and Reclamation Handbook; OSM Engineering and Design Manual for Disposal of Excess Spoil (1983); recommendations of the Durable Rockfill Committee (1983); 1981 National Academy of Science report; Department of Energy study by Skelly and Loy on excess-spoil disposal in the

watersheds of Buffalo Creek, Logan County; several issues of Green Lands Magazine; and "Embankment-Dam Engineering" by Casagrande in 1973.

The commenters also reference a 1984 OSM drilling project investigating fills placed in greater than four-foot lifts that reported high calculated factors of safety (2.2-2.5) for these types of fills. Another OSM project mentioned by a commenter is the Crown City Mining Company experimental practice of single-lift fills with structural faces in Gallia and Lawrence Counties, Ohio. According to the commenter, this was reported to be a "short term success."

OSM has evaluated the above references and concluded that they do not specifically promote or support the diversion of surface runoff into subsurface drainage systems in durable rock fills. The fills that were drilled by OSM in 1984 were placed in multiple lifts—a practice not comparable to end-dumping methods being considered in this rulemaking. The results of the experimental practice in Ohio are not applicable because the fills involved placement of durable rock in a non-steep-slope area and there was no routing of runoff through the fill.

Design flexibility: Several proponents of routing surface runoff into subsurface and center drains have contended that a mine operator needs regulatory flexibility in order to design durable-rock-fill drainage systems appropriate to site-specific conditions. A commenter suggested that the requirement for fills to be designed by a professional engineer experienced with earth and rock fills should be a sufficient safeguard. Commenters said that detailed requirements, or the insistence that a specified "recipe" be followed, result in unnecessary costs to the mining industry and an impediment to the development of design improvements.

In response, OSM notes that the only restriction at issue concerns the use of subsurface drains for surface runoff control in durable-rock excess spoil fills. Proposed CSR § 38-2-14.14(g)(8) requires that the fill be designed and constructed with diversion channels that minimize surface water infiltration into the fill. Therefore, the diversion of surface runoff into subsurface drains is prohibited. OSM finds that if this condition is met the proposed rule allows adequate flexibility for the engineer to design a drainage control system that fits site-specific conditions.

Federal Agency Comments

Pursuant to section 503(b)(1) of SMCRA and 30 CFR 732.17(h)(11)(i), OSM solicited comments on the

proposed amendment from various Federal agencies with an actual or potential interest in the West Virginia program on four different occasions (Administrative Record Nos. WV-891, WV-897, WV-936, and WV-942). Comments were received from the U.S. Bureau of Land Management, the Mine Safety and Health Administration, the U.S. Bureau of Mines, and the U.S. Army Corps of Engineers. These Federal agencies acknowledged receipt of the amendment, but generally had no comment or acknowledged that the revisions were satisfactory.

Environmental Protection Agency (EPA)

Pursuant to 30 CFR 732.17(h)(11)(ii), OSM is required to obtain the written concurrence of the EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

On July 2 and August 3, 1993 (Administrative Record Nos. WV-892 and WV-896), OSM solicited EPA's concurrence with the proposed amendment. On October 17, 1994 (Administrative Record No. WV-949), EPA gave its written concurrence with a condition based on subsection 5.4(b)(4) of West Virginia's regulations. This condition does not pertain to durable rock fills which are the subject of this rulemaking.

Pursuant to 30 CFR 732.17(h)(11)(i), the Director solicited comments on the proposed amendment from EPA on four different occasions in 1993 and 1994 (Administrative Record Nos. WV-891, WV-897, WV-936, and WV-942). No comments were received concerning durable rock fills.

V. Director's Decision

Based on the above findings, the Director is approving the proposed amendment pertaining to durable rock fills as submitted by West Virginia on July 30, 1993, and revised on September 1, 1994 and May 16, 1995.

The Federal regulations at 30 CFR Part 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 12778

The Department of the Interior has conducted the reviews required by section 2 of Executive Order 12778 (Civil Justice Reform) and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15 and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA [30 U.S.C. 1292(d)] provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

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

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that

existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Dated: August 10, 1995.

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 by adding paragraph (n) to read:

§ 948.15 Approval of regulatory program amendments.

* * * * *

(n) The sections of the amendment submitted by West Virginia to OSM by letter dated July 30, 1993, as revised by submittals dated September 1, 1994, and May 16, 1995, pertaining to durable rock fills are approved effective August 16, 1995.

[FR Doc. 95-20272 Filed 8-15-95; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 180**

[PP 4F4395/R2161; FRL-4971-3]

RIN 2070-AB78

Plant Pesticide *Bacillus Thuringiensis* CryIA(b) Delta-Endotoxin and the Genetic Material Necessary for its Production (Plasmid Vector pCIB4431) in Corn

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule establishes an exemption from the requirement of a tolerance for residues of the plant pesticide active ingredient *Bacillus thuringiensis* CryIA(b) delta-endotoxin

and the genetic material necessary for its production (plasmid vector pCIB4431) in corn. A request for an exemption from the requirement of a tolerance was submitted by Ciba-Geigy Corp. (Ciba Seeds). This regulation eliminates the need to establish a maximum permissible level for residues of this plant pesticide in the raw agricultural commodities of field corn, sweet corn, and popcorn.

EFFECTIVE DATE: Effective on August 16, 1995.

ADDRESSES: Written objections and hearing requests, identified by the document control number, [PP 4F4395/R2161] and may be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections shall be labeled "tolerance petition fees" and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk should be identified by the document control number and submitted to: Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring copy of objections and hearing requests to: Rm. 1132, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA 22202.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Copies of objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and hearing requests will also be accepted on disks in WordPerfect in 5.1 file format or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket number, [PP 4F4395/R2161]. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries. Additional information on electronic submissions can be found below in this document.

FOR FURTHER INFORMATION CONTACT: By mail: Michael L. Mendelsohn, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.