

miles to the Clallam County line, T32N/R7W;

(35) Then northeast along the Clallam County line approximately 14 miles to the southwestern tip of San Juan County, T32N/R4W;

(36) Then northeast along the San Juan County line approximately 51 miles to the northern tip of San Juan County, T38N/R3W;

(37) Then northwest along the Whatcom County line approximately 19 miles to the western tip of Whatcom County, T41N/R5W;

(38) Then east along the Whatcom County line approximately 58 miles to the beginning.

Signed: August 29, 1995.

Daniel R. Black,

*Acting Director.*

Approved: September 14, 1995.

John P. Simpson,

*Deputy Assistant Secretary, (Regulatory, Tariff and Trade Enforcement).*

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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, with exceptions, an amendment to the West Virginia permanent regulatory program (hereinafter referred to as the West Virginia program). The amendment revises the State's bonding requirements and the acid mine drainage treatment provisions of the Special Reclamation Fund. The amendment will improve operational efficiency, clarify ambiguities, and revise the West Virginia program to be consistent with the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and the corresponding Federal regulations. Further amendments will be required to bring the West Virginia Program into full compliance with SMCRA.

**EFFECTIVE DATE:** October 4, 1995.

Approval dates of regulatory program amendments are listed in § 948.15(o).

**FOR FURTHER INFORMATION CONTACT:** Mr. James C. Blankenship, Jr., Director, Charleston Field Office, Office of Surface Mining Reclamation and

Enforcement, 1027 Virginia Street East, Charleston, West Virginia 25301, Telephone (304) 347-7158.

#### SUPPLEMENTARY INFORMATION:

- I. Background
- II. Submission of the Proposed Amendment
- III. Director's Findings
- IV. Summary and Disposition of Comments
- V. Director's Decision
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#### I. Background

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

Many coal-producing States, including West Virginia, have sought and obtained approval from the Secretary of the Interior to carry out SMCRA's requirements within their borders. In becoming the primary enforcers of SMCRA, these "primacy" States accept a shared responsibility with OSM to achieve the goals of SMCRA. 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 coal mining. To accomplish this, mining is allowed to proceed only after an operator has filed a performance bond of sufficient amount to ensure completion of reclamation. In the event of bond forfeiture, the regulatory authority uses the performance bond money to contract for the necessary reclamation work. SMCRA also allows for the adoption of an alternative bonding system so long as it achieves the purposes and objectives of the conventional bonding system described above. Under an alternative bonding system, rather than posting full-cost reclamation bonds, an operator is allowed to participate in a bond pool or other financial mechanism that is to provide sufficient revenue at any time to complete reclamation in the event of bond forfeiture.

As part of their approved programs, primacy States have adopted procedures consistent with Federal bonding requirements. The Secretary conditionally approved West Virginia's alternative bonding system on January 21, 1981 (46 FR 5326). After receipt of a required actuarial study, the Secretary fully approved the State's alternative bonding system on March 1, 1983 (48 FR 8448).

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 Proposed Amendment

On October 1, 1991, OSM notified West Virginia that it needed to amend its alternative bonding system to be in compliance with sections 509(c) and 519(b) and 519(c)(3) of SMCRA (Administrative Record No. WV-878). OSM's annual reviews of the West Virginia program had found that the

State's alternative bonding system no longer met the requirements for such systems because, as of June 30, 1990, liabilities exceeded assets by \$6.2 million dollars. OSM also informed the State that its alternative bonding system must provide for the abatement or treatment of polluted water flowing from permanent program bond forfeiture sites unless its approved program included another form of financial guarantee to provide for water treatment. The proposed amendment now under consideration was submitted to OSM in response to this letter and concurrent State initiatives to address bonding and water quality problems.

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 bonding into one amendment that is the subject of this notice. The main provisions of the amendment will:

- Allow for the selection and prioritization of bond forfeiture sites to be reclaimed;
- Limit administrative expenditures from the Special Reclamation Fund to an amount not to exceed 10 percent of the total annual assets in the Fund;
- Raise the special reclamation tax from one cent to three cents per ton and provide for the collection of the tax whenever liabilities exceed assets;
- Require site-specific bonds that reflect the relative potential cost of reclamation but do not exceed \$5,000 per acre;
- Allow for the use of incremental and open-acre bonds;
- Require penal bonds instead of performance bonds; and
- Require bond forfeiture sites to be reclaimed in accordance with the approved reclamation plan or modifications thereof.

OSM announced receipt of the proposed amendment in the August 12, 1993, Federal Register (58 FR 42903) and invited public comment on its adequacy. Following this initial comment period, WVDEP revised the amendment on August 18, 1994, September 1, 1994, and May 16, 1995 (Administrative Record Nos. WV-933, WV-937, and WV-979B). OSM

reopened the comment period on August 31, 1994 (59 FR 44953), September 29, 1994 (59 FR 49619), and May 19, 1995 (60 FR 26855), and held public meetings in Charleston, West Virginia on September 7, 1993, October 27, 1994, and May 30, 1995.

### III. Director's Findings

#### A. Proposed Revisions to the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA)

##### 1. § 22-3-11: Bonds; Amount and Method of Bonding; Bonding Requirements; Special Reclamation Tax and Fund; Prohibited Acts; Period of Bond Liability

a. *§ 22-3-11(a): Penal Bonds.* West Virginia proposes to revise its Code to require that penal bonds payable to the State of West Virginia be furnished by each operator before a permit is issued. The reference to "performance bond" has been changed to either "penal bond" or "bond" throughout § 22-3-11 to reflect this proposed revision. Section 509(a) of SMCRA and 30 CFR 800.11(a) require that a performance bond be furnished by each operator before a permit is issued. A penal bond differs from a performance bond in that, in the event of forfeiture, the State retains the entire amount of the bond without regard to the cost of reclamation. Under a performance bond, any funds not used to reclaim the site for which the bond was forfeited must be returned to the operator.

West Virginia's proposed requirement that the total bond or collateral amount be forfeited and deposited in the State's reclamation fund lies within the discretion provided to the States by section 509(c) of SMCRA. SMCRA authorizes States to establish alternative bonding systems that will achieve the objectives and purposes of the bonding program otherwise required by SMCRA. The penal bond provisions provide substantial economic incentive for the operator to complete the required reclamation of the permitted area. This is consistent with 30 CFR 800.11(e)(2) which provides that an alternative bonding system must include a substantial economic incentive for the permittee to comply with all reclamation provisions. Also, while the court in *In re Permanent Surface Mining Regulation Litigation* held that OSM cannot approve penal bonds in a State program under SMCRA in a conventional bonding system, this decision does not prohibit the approval of penal bonds when the State independently authorizes them by statute, not by a rule promulgated under the authority of SMCRA. *In re*

*Permanent Surface Mining Regulation Litigation*, 14 ERC 1083, 1100-01 (D.D.C., 1980) and Civ. No. 79-1144, mem. op. at 48-49 (D.D.C., May 16, 1980) as stayed in part on August 15, 1980. Therefore, the Director finds the proposed amendment is not inconsistent with SMCRA or the Federal regulations and is hereby approved.

b. *§ 22-3-11(g): Special Reclamation Fund.* The West Virginia alternative bonding system was conditionally approved by the Secretary on January 21, 1981, and the condition on the approval was removed on March 1, 1983 (46 FR 5954 and 48 FR 8448). This approval was granted under section 509(c) of SMCRA, which allows for the approval of an alternative bonding system that will achieve the objectives and purposes of section 509. In drafting section 509(c), Congress was not specific on how alternative bonding programs such as West Virginia's should be financed. The only test applicable is whether the proposed alternative system achieves the objectives and purposes of a conventional bonding system as expressed in section 509 of SMCRA and as implemented by 30 CFR 800.11(e).

(1) West Virginia is revising § 22-3-11(g) to allow development of a long-range planning process for selection and prioritization of sites to be reclaimed so as to avoid inordinate short-term obligations of the fund's assets of such magnitude that the solvency of the fund is jeopardized.

Section 509(a) of SMCRA requires the operator to post a reclamation bond that is sufficient to assure completion of the reclamation plan for that permitted site if the work must be performed by the regulatory authority. In addition, 30 CFR 800.50(b)(2) requires the regulatory authority to use funds collected from bond forfeiture to complete the reclamation plan for the site to which bond coverage applies. Section 509(c) of SMCRA and 30 CFR 800.11(e) are silent on the question of prioritizing sites for reclamation, but both imply that the funds necessary for adequate reclamation must be readily available. Specifically, 30 CFR 800.11(e)(1) specifies that an alternative bonding system must ensure that "the regulatory authority will have sufficient money to complete the reclamation plan for any areas which may be in default at any time."

However, since the State's regulations at CSR 38-2-12.4(c) provide that reclamation operations must be initiated within 180 days following final forfeiture notice, a planning process for selection and prioritization of sites to be reclaimed should not adversely impact the requirement that all sites for which

bonds are posted be reclaimed in accordance with their reclamation plans.

Therefore, to the extent that the proposed provision provides only for a ranking of sites for reclamation without compromising the requirement that all sites for which bonds were posted be properly and timely reclaimed, this provision is not inconsistent with the bond forfeiture provisions at section 509(a) of SMCRA and 30 CFR 800.50(b)(2), or the alternative bonding system criteria of 30 CFR 800.11(e). The proposed provision on the selection and prioritizing of forfeiture sites is hereby approved.

(2) West Virginia proposes to revise § 22-3-11(g) to specify that the Director of WVDEP may expend up to 25 percent of the annual amount of fee collections of the special reclamation fund to design, construct, and maintain water treatment systems when they are required to complete reclamation of bond forfeiture sites.

For conventional bonds, 30 CFR 800.14(b) provides that "the amount of the bond shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture." Under 30 CFR 780.18(b)(9), 780.21(h), 784.13(b)(9), and 784.14(g), the reclamation plan must include the steps to be taken to comply with all applicable effluent limitations and State and Federal water quality laws and regulations. These steps include treatment. Therefore, when the mining and reclamation plan indicates that treatment will be needed on a temporary basis during mining and the early stages of reclamation, the bond must be calculated to include an amount adequate to provide for continued temporary treatment in the event forfeiture occurs within the timeframe during which treatment is needed.

Also, under 30 CFR 800.15(a), the regulatory authority is required to adjust the amount and terms of a conventional bond whenever the cost of future reclamation changes. Therefore, if an unanticipated treatment need arises, the regulatory authority has an obligation to order an increase in the minimum bond required for the site. This amount must be adequate to cover all foreseeable treatment costs. This interpretation is consistent with the preamble to 30 CFR 800.17, which under the heading "Section 800.17(c)" states that:

Performance bonding continues to be required at § 800.17(a) for surface disturbances incident to underground mining to ensure that the reclamation plan is completed for those areas. Completion of the reclamation plan as it relates to mine

drainage and protection of the hydrologic balance would continue to be covered by the bond with respect to requirements included in § 784.14. 48 FR 32948, July 19, 1983.

Sections 780.21(h) and 784.14(g) require a hydrologic reclamation plan showing how surface and underground mining operations will comply with applicable State and Federal water quality laws and regulations. Furthermore, section 519(b) of SMCRA requires the regulatory authority, when evaluating bond release requests, to consider whether pollution of surface and ground water is occurring, the probability of any continuing pollution, and the estimated cost of abating such pollution. Section 519(c)(3) of SMCRA and the implementing regulations at 30 CFR 800.40(c)(3) provide that no bond shall be fully released until all the reclamation requirements of the Act, the regulatory program, and the permit have been met. These requirements include abatement of surface and ground water pollution resulting from the operation.

The preamble to 30 CFR 700.11(d) clarifies that the regulatory authority may release the bond and terminate jurisdiction over a site with ongoing treatment needs, but only if an enforceable mechanism such as a contract or a trust fund of sufficient duration and with adequate resources exists to ensure that treatment continues once jurisdiction is terminated. See 53 FR 44361-62, November 2, 1988.

Section 509(c) of SMCRA authorizes the Secretary to approve an alternative bonding system if it will achieve the objectives and purposes of the otherwise mandatory conventional bonding program. As noted previously in this preamble, Section 519(c)(3) of SMCRA provides final bond release shall not occur "until all reclamation requirements of this Act are fully met." The Federal regulations at 30 CFR 800.11(e)(1) require that this system ensure that the regulatory authority has sufficient funds to assure completion of the reclamation plan, which includes treatment to meet State and Federal water quality requirements.

Therefore, to be in accordance with the above-referenced sections of SMCRA and the Federal regulations, an alternative bonding system must provide for complete abatement or treatment of water pollution from bond forfeiture sites. If particular sites were bonded with conventional bonds, such bonds would have to be sufficient to address all reclamation obligations on site, and none of these site-specific bonds could be "fully released until all reclamation requirements of this Act are fully met." See SMCRA Section 519(c)(3). Similarly, OSM cannot allow

States to set a predetermined limit on the amount of funds expended on any aspect of bond forfeiture reclamation, including water treatment. Such a limit, whether it be 25 percent of total annual revenues or any other predetermined amount, arbitrarily restricts expenditures for water treatment purposes, without regard to the amount needed to adequately treat each site so that it meets applicable effluent limits and water quality standards. In effect, such a limit means that sites covered by the alternative bonding system would be covered by bonds which are not "sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture." See SMCRA Section 509(a). In other words, the State cannot be certain, in advance, that only 25 percent of the total annual revenues of the special reclamation fund will be needed to accomplish the water treatment objectives for all bond forfeiture sites, since the alternative bonding system must assume all reclamation-related responsibilities, including water treatment, for a participant who defaults on his or her reclamation obligations.

Therefore, the Director is not approving the proposed revision to the extent that water treatment on bond forfeiture sites is made discretionary (use of the word "may" instead of "shall"). Similarly, the Director is not approving this proposed revision to the extent that it limits expenditures for water treatment to 25 percent of the fees collected annually for the special reclamation fund. The Director is requiring West Virginia to amend its program to remove the 25 percent limitation or to otherwise provide for the treatment of polluted water discharged from all bond forfeiture sites. The cost of water treatment at existing bond forfeiture sites may be addressed by program amendments that increase the special reclamation tax or provide additional funding from other sources. The cost of water treatment at future bond forfeiture sites may be addressed by adjusting site-specific bonds for water treatment where necessary, or by implementing the environmental security account envisioned in CSR § 38-2-11.7, or by increasing the special reclamation tax to cover the additional cost of water treatment.

(3) West Virginia proposes to revise § 22-3-11(g) to require that monies accrued in the special reclamation fund, including interest, be used solely and exclusively for the purposes set forth in

subsection (g). This provision clarifies that the fund can only be used for specific purposes and cannot be used to finance other State programs. Furthermore, West Virginia proposes to revise § 22-3-11(g) by limiting the amount the Director of the WVDEP may expend on administrative expenses to an amount not to exceed 10 percent of the total annual assets in the special reclamation fund. Such administrative funds can only be used to implement and administer the provisions of articles 2, 3, and 4 of chapter 22 of the West Virginia Code and, as they apply to the surface mine board, articles 1 and 4 of chapter 22b of the West Virginia Code. This revision gives the Director of WVDEP discretionary power to allocate 10 percent of the total annual assets in the special reclamation fund to administrative costs incurred under the abandoned mine land program, the mining and reclamation program, the minerals other than coal program, and the Surface Mine Board.

OSM expressed concern about the State using money from the fund for any expense not related to bond forfeiture reclamation since the fund's liabilities now exceed its assets. In response, the State indicated that the 10 percent amount generally is expended exclusively for administration of the bond forfeiture/special reclamation program (Administrative Record No. WV-916).

While there is no direct Federal counterpart authorizing expenditures of bond forfeiture funds for the purpose of administrative expenses, the Director finds that this provision is not inconsistent with the objectives and purposes of section 509 of SMCRA. The Director is approving this revision to § 22-3-11(g) to the extent that the special reclamation fund can withstand administrative cost withdrawals without hampering the State's ability to complete reclamation of bond forfeiture sites.

#### (4) Special Reclamation Tax

(a) West Virginia proposes to revise § 22-3-11(g) to increase the fee paid into the special reclamation fund from one cent to three cents per ton of clean coal mined and to clarify how the fee is to be collected. Section 509(c) of SMCRA and 30 CFR 800.11(e) of the Federal regulations do not specify the types of revenue-raising mechanisms. The Director is therefore approving these revisions because, under SMCRA, States have discretion in how to collect revenue to support alternative bonding systems and because the proposed tax increase will improve the financial condition of the fund.

(b) West Virginia proposes to add a provision to § 22-3-11(g) to require that every person liable for payment of the special reclamation tax pay the amount due without notice or demand for payment. The Tax Commissioner must provide the Director of the WVDEP a quarterly listing of all persons known to be delinquent in payment of the special tax. The Director of the WVDEP may take such delinquencies into account in making determinations on the issuance, renewal, or revision of any permit. Although there are no direct Federal counterparts to these provisions, the Director finds that they are a reasonable means of enforcing fee payment requirements and are hereby approved.

(c) West Virginia also proposes to revise § 22-3-11(g) by adding a requirement that the special reclamation tax be collected from every person conducting coal surface mining operations whenever the liabilities of the State for bond forfeiture reclamation exceed the accrued amount in the special reclamation fund. In conjunction with this new provision, the State is proposing to remove the requirement for a one million dollar cash reserve.

Existing State law requires that the special reclamation tax be collected whenever the assets in the fund fall below one million dollars and to continue to be collected until assets exceed two million dollars. This provision under normal circumstances enables the fund to maintain a cash balance to reclaim sites as they were forfeited.

Section 509(c) of SMCRA requires that, under an alternative bonding system, the regulatory authority must have available sufficient money to complete the reclamation plan for any site that may be in default at any time. An alternative bonding system cannot be allowed to incur a deficit if it is to have available adequate revenues to complete the reclamation of all outstanding bond forfeiture sites. Under a conventional bonding system, an operator must post a full-cost reclamation bond that is sufficient to cover the cost of reclamation during the life of the operation. Periodic adjustments in bond amounts are required to ensure that the bond is adequate to cover the cost of reclamation, including water treatment, at any time. Under an alternative bonding system, the sit-specific bond does not have to be sufficient to cover the cost of reclamation. However, alternative bonding systems must include reserves and revenue-raising mechanisms adequate to ensure completion of the reclamation plan and fulfillment of the permittee's

obligations, including any treatment needs.

Although the proposed site-specific bonding rates are significantly higher than the State's existing flat rate bond of \$1,000 per acre and the State is proposing to increase its special reclamation tax from one cent to three cents per ton of mined coal to generate more revenue for the fund, State records indicate that the proposed bonding rates and the increase in revenues are still insufficient to ensure complete reclamation, including water treatment, at all bond forfeiture sites.

Therefore, the Director is disapproving the proposal to the extent that it would allow the special reclamation fund to incur a deficit. He is requiring West Virginia to remove the provision that allows collection of the special reclamation tax only when the bond forfeiture liabilities of the State exceed the fund's assets.

(d) West Virginia proposed new provisions to require the Tax Commissioner to deposit the fees collected with the State Treasurer to the credit of the special reclamation fund. Monies in the fund must be placed in an interest-bearing account with interest being returned to the fund on an annual basis. This proposed revision will improve the financial condition of the fund and is hereby approved.

#### 2. § 22-3-12: Site-Specific Bonding

West Virginia proposes to develop and implement a site specific bonding system. Under the proposed system, the amount of the penal bond can not be less than \$1,000 nor more than \$5,000 per acre, and the bond must reflect the relative cost of reclamation associated with the activities to be permitted. The types of mining, mining techniques, mining methods, equipment, support facilities, topography, geology, and effect on water quality are among the factors that must be considered in determining the amount of site-specific bond. In addition, type of application, environmental enhancement, mining experience of the applicant, and compliance history of the applicant are among the factors that the Director of WVDEP may consider in determining the amount of site-specific bond.

The State's development of site-specific bonding requirements should provide greater assurance that reclamation will be completed by the permittee and will improve the financial stability of the special reclamation fund. The increase in bond should also provide a substantial economic incentive for the permittee to comply with all reclamation requirements to avoid the economic loss in case of bond

forfeiture. Therefore, the Director finds this provision is not inconsistent with the requirements of section 509(c) of SMCRA and 30 CFR 800.11(e) of the Federal regulations. Subsection 12 is hereby approved.

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

1. CSR § 38-2-11.2: All Bonds

a. The State proposes to delete old subsection 11.2(c), which required a written notification to a permittee who is without bond coverage and required the cessation of mining until bond replacement. The State proposes to revise subsection 11.2(d), which requires the Director of the WVDEP to issue a notice of violation against any operator who is without bond coverage. The notice of violation now must provide that bond coverage be replaced within 15 days instead of 90 days. Mining cannot resume until an acceptable form of bond has been posted.

The Federal regulation at 30 CFR 800.16(e)(2) has provisions which require the regulatory authority, upon notification that an operator is without bond coverage, to notify the operator, in writing, to replace bond coverage within a reasonable period, not to exceed 90 days. Section 800.16(e)(2) does not specify the form of written notification and only specifies the maximum period for bond replacement. The Director considers West Virginia's proposed requirement for replacement of bond coverage within 15 days of a notice of violation to be a reasonable period of time as required by 30 CFR 800.16(e)(2). Section 800.16(e)(2) also requires that mining operations shall not resume until the regulatory authority has determined that an acceptable bond has been posted. Therefore, the Director finds the deletion of old subsection 11.2(c) and the resultant revision of CSR § 38-2-11.2(d) do not render the revised provisions less effective than 30 CFR 800.16(e)(2).

However, the Director notes that new subsection 11.3(b)(1)(G)(vii)(III), in its provision for issuance of a notice of violation against any operator who is without bond coverage, still retains the requirement that a notice of violation specify a reasonable period to replace bond coverage, not to exceed 90 days. The Director suggests that retention of the 90 day period for replacement of bond coverage in this provision was probably an oversight by the State, and it, therefore, should be removed.

b. The State also proposes to add subsection 11.2(e) to allow the Director

of WVDEP to require a showing that the bond is sufficient or the assignee has the capability or financial resources to assume the liability for bonds and permits which are transferred, assigned, or sold and which have significant long-term environmental liability. Although there is no direct Federal counterpart to this provision in 30 CFR Part 800, the Federal regulations at 30 CFR 774.17(b)(3) require that an applicant for transfer, assignment, or sale of permit rights obtain appropriate performance bond coverage in an amount sufficient to cover the proposed operations. Therefore, the Director finds that CSR § 38-2-11.2(e) is not inconsistent with the Federal bonding requirements at 30 CFR Part 800 or the Federal permitting requirements at 30 CFR 774.17(b)(3). Subsection 11.2(e) is hereby approved.

c. The Director notes that West Virginia needs to amend its regulations at CSR § 38-2-11.2(b) to delete the word "performance" in order to remain consistent with its new penal bond requirements.

2. CSR § 39-2-11.3: Bond Instruments

The State proposes to revise and reorganize its surety bonding, collateral bonding, escrow bonding, self-bonding, and combined surety/escrow bonding requirements into new subsection 11.3, entitled "Bond Instruments." The provisions for surety bonds at old subsection 11.3 are now located at subsection 11.3(a); the provisions for collateral bond at old subsection 11.4 were reorganized at subsection 11.3(b); the provisions for escrow bonding at old subsection 11.5 were relocated to subsection 11.3(c); the provisions for self-bonding at old subsection 11.6 are now at subsection 11.3(d); and the provisions for combined surety/escrow bonding at old subsection 11.7 were reorganized at subsection 11.3(e). The substantive revisions proposed for the various types of bonding instruments are discussed below.

a. Subsection 11.3(a): Surety Bonds

(1) At subsection 11.3(a)(1), West Virginia added the requirement that a surety bond be approved by the Director of WVDEP. Although the Federal counterpart regulation at 30 CFR 800.20(a) does not contain this provision, the Federal regulations at 30 CFR 800.11 do require that before a permit is issued the operator file a bond which is acceptable to the regulatory authority. Therefore, the Director finds that CSR § 38-2-11.3(a)(1) is consistent with 30 CFR 800.20(a) and is hereby approved.

(2) At subsection 11.3(a)(2), the State proposes to delete the requirement that

the surety be notified within 30 days after receipt of a request for bond adjustment. This provision is duplicative of a provision for notification to the surety in the State's regulations at subsection 12.3.

Therefore, since subsection 12.3 is referenced in subsection 11.3(a)(2), the Director finds this deletion does not render the surety bond regulation at CSR § 38-2-11.3(a)(2) less effective than the Federal counterpart at 30 CFR 800.20(b), and he is, therefore, approving it.

b. Subsection 11.3(b): Collateral Bonds

(1) West Virginia proposed a revision to subsection 11.3(b) to clarify that collateral bonds "will be negotiable and guaranteed." Although the Federal regulations at 30 CFR 800.21 do not contain this clarifying language, the collateral bond definition at § 800.5(b) does require all forms of collateral bond to be negotiable and guaranteed. Therefore, the Director finds that subsection 11.3(b) does not render the collateral bond provisions of CSR § 38-2-11.3 less effective than the counterpart provisions of 30 CFR 800.21. Subsection 11.3(b) is hereby approved.

(2) West Virginia proposes to revise subsection 11.3(b)(1)(A) by requiring that bonds used as collateral shall be bonds of the United States or its possessions. These forms of bond satisfy the definition of "collateral bond" at 30 CFR 800.5. The Director therefore finds the revision of CSR § 38-2-11.3(b)(1)(A) is no less effective than 30 CFR 800.5 and is hereby approved.

The Director notes, however, that § 22-3-11(c)(1) of WVSCMRA still allows bonds of the Federal Land Bank or of the homeowners' loan corporation to be used as collateral bond. He is advising West Virginia that this provision should be removed to eliminate the inconsistency between the State's statute and regulations. Furthermore, it is the Director's understanding that such financial institutions no longer exist in the State.

(3) West Virginia is proposing to add full faith and credit general obligation bonds of the State of West Virginia, or other States, and any county, district municipality of the State of West Virginia or other States as acceptable forms of collateral bond. Since the definition of "collateral bond" at 30 CFR 800.5 includes negotiable bonds of a State or a municipality, the Director finds West Virginia's provision for these forms of bond at CSR § 38-2-11.3(b)(1)(B) is no less effective than the collateral bond provisions at 30 CFR

800.21. This revision of subsection 11.3(b)(1)(B) is hereby approved.

(4) West Virginia proposes to delete subsection 11.4(a)(2), which requires the regulatory authority to value collateral at its current market value, not at face value. West Virginia's Code and regulations consistently refer to market value in relation to collateral bond. The State's Code at § 22-3-11(c)(1) requires the market value of collateral bond to be equal to or greater than the sum of the bond. This is consistent with 30 CFR 800.21(e)(2), which requires that at no time can the bond value of collateral exceed the market value. Also, West Virginia's regulations at CSR § 38-2-11.3(b)(8) require that bond value be evaluated relative to market value for all collateral posted. For these reasons, the Director finds that this deletion does not render West Virginia's collateral bond provisions at CSR § 38-2-11.3(b) less effective than the Federal provisions at 30 CFR 800.21.

(5) West Virginia proposes to revise CSR § 38-2-11.3(b)(1)(G)(ii) by changing the phrase "if not replaced by other suitable evidence of financial responsibility" with the phrase "if not replaced by other suitable bond or letter of credit." This revised language is substantively identical to 30 CFR 800.21(b)(2) which requires that letters of credit utilized as securities in areas requiring continuous bond coverage shall be forfeited and collected, if not replaced by other suitable bonds or letters of credit. Therefore, the Director finds West Virginia's revised regulation is no less effective than the Federal regulation and is hereby approved.

(6) At subsection 11.3(b)(4), the State is requiring the maximum insurable amount for individual certificates to be determined only by the Federal Deposit Insurance Corporation (FDIC) by removing its reference to the Federal Savings and Loan Insurance Corporation (FSLIC). Because the functions of the FSLIC were transferred to FDIC in 1989, the Director finds West Virginia's revised regulation at CSR § 38-2-11.3(b)(4) is no less effective than the Federal regulation at 30 CFR 800.21(a)(4) and is hereby approved.

(7) West Virginia proposes to delete 11.4(a)(7) which required the applicant to deposit sufficient amounts of certificates of deposit to assure that the WVDEP could liquidate them prior to maturity, upon forfeiture, for the amount of the bond required. Neither SMCRA nor the Federal regulations at 30 CFR 800.21 include a similar provision. Therefore, the Director finds the deletion of this provision does not render the West Virginia program less

effective than SMCRA or the Federal regulations.

(8) West Virginia proposed to amend subsection 11.3(b)(8) by rewording the requirement that "in no case shall the bond value exceed the market value" to "in no case shall the market value be less than the required bond value." Although the Federal regulation at 30 CFR 800.21(e)(2) retains the replaced language, West Virginia's rewording does not change the meaning of the requirement. Both require that the market value of collateral be equal to or greater than the required bond value. Therefore, the Director finds the revision at CSR § 38-2-11.3(b)(8) does not render it less effective than 30 CFR 800.21(e) and is hereby approved.

(9) The State is proposing to add a new provision at subsection 11.3(b)(9) which allows certain collateral bonds for permits issued prior to January 1, 1993, to remain in effect unless the bond is determined to be insufficient or otherwise invalid. The West Virginia program at subsection 2.26 specifically identifies the types of collateral that could be used as a collateral bond prior to January 1, 1993. Therefore, the Director finds that the new provision at subsection 11.3(b)(9) does not render West Virginia's collateral bond provisions at CSR § 38-2-11.3(b) less effective than the Federal collateral bond provisions at 30 CFR 800.21. Subsection 11.3(b)(9) is hereby approved.

#### c. Subsection 11.3(c): Escrow Bonding

At subsection 11.3(c)(2), West Virginia is removing the FSLIC as an example of a Federal insurance program. This subsection still requires that escrow funds in Federally insured accounts are not to exceed the maximum insured amount under applicable Federal insurance programs such as FDIC. The revised Federal regulations no longer contain separate provisions governing escrow bonds, as they are now considered to be cash accounts. Since the FSLIC no longer exists, the Director finds this deletion does not render CSR 38-2-11.3(c)(2) less effective than 30 CFR 800.21(d)(4) for cash accounts.

#### d. Subsection 11.3(d): Self-Bonding

(1) West Virginia proposes to revise subsection 11.3(d)(5)(E) by deleting the phrase "if permitted under State law." The deletion would clarify that indemnity agreements may operate as judgments under forfeiture conditions. Since revised subsection 11.3(d)(5)(E) contains self-bonding provisions which are substantively the same as that of the Federal counterpart regulation, the

Director finds the State's regulation is no less effective than the Federal regulation at 30 CFR 800.23(e)(4). Subsection 11.3(d)(5)(E) is hereby approved.

(2) The State proposes to delete existing CSR § 38-2-11.6(h) which requires the issuance of a notice of violation for failure to have adequate bond coverage. This provision is duplicative of a provision in subsection 11.2(d) under the general requirements for all bonds. Therefore, the Director finds this proposed deletion does not render West Virginia's regulations at new CSR 38-2-11.3(d) less effective than the Federal regulations at 30 CFR 800.23.

#### 3. CSR § 38-2-11.4: Incremental Bonding

a. West Virginia proposed to revise subsection 11.4(a)(1) to require a bond in the appropriate amount be filed for the initial increment and each succeeding increment of land to be mined within the permit area prior to any land disturbance. Also, existing subsection 11.8(a)(3) was deleted as its substantive requirements are contained in subsection 11.4(a)(1). The incremental bonding provisions at subsection 11.4(a)(1) are substantively the same as those in the counterpart Federal regulations at 30 CFR 800.11 (b) and (c). The Federal regulations at 30 CFR 800.11(b)(1) require that a bond be filed for the initial increment, at 30 CFR 800.11(b)(2) that additional bond be filed for succeeding increments as surface coal mining and reclamation operations are initiated, and at 30 CFR 800.11(c) that an operator not disturb any surface areas or succeeding increments prior to acceptance of the bond. Therefore, the Director finds West Virginia's proposed incremental bonding provisions at CSR § 38-2-11.4(a)(1) are no less effective than the counterpart Federal provisions at 30 CFR 800.11 (b) and (c). Subsection 11.4(a)(1) is hereby approved.

b. The State also proposes to revise subsection 11.4(a)(2) to require that an operator who has chosen to bond either the entire permit area or in increments must continue the same manner of bonding during the term of the permit. The minimum amount of bond is \$10,000.

While section 509(a) of SMCRA and 30 CFR Part 800 of the Federal regulations require that the minimum amount of bond for the entire area under one permit be \$10,000, they do not specifically require that the operator's manner of bonding, entire permit area or increments of the permit area, be continued for the term of the permit.

Nonetheless, there is nothing in the State's proposal that would conflict with any Federal requirement or result in less stringent bonding of disturbed areas. Therefore, the Director finds West Virginia's proposed regulation at CSR § 38-2-11.4(a)(2) is not inconsistent with SMCRA or the Federal regulations and is hereby approved.

c. The State proposes to revise subsection 11.4(a)(3), by adding a new provision that requires independent increments to be of sufficient size and configuration so as to provide for efficient and contemporaneous reclamation operations. Because this provision is substantively identical to the Federal regulation, the Director finds that West Virginia's proposed revision is no less effective than 30 CFR 800.11(b)(4) and is hereby approved.

d. The Director notes that West Virginia needs to amend its regulations at CSR § 38-2-11.4(a)(1) and 11.4(a)(4) to delete the word "performance" in order to remain consistent with its new penal bond requirements.

#### 4. SCR § 38-2-11.5: Open-Acre Limit Bonding

West Virginia proposes to add new provisions in this subsection allowing for elective open-acre limit bonding for surface extraction operations only. These provisions would provide an alternative to bonding either the entire permit area or bonding the permit area in increments. Open-acre limit bonding is a mechanism whereby the operator bonds a designated portion of the total permit area. Only that portion of the permit area which is bonded may be disturbed. After surface extraction and reclamation has taken place on this "open-acre limit" portion of the permit, the operator is required to verify that that portion of the permit has been backfilled, graded and revegetated in accordance with the reclamation plan and the applicable statutory and regulatory provisions. At that point, the operator may apply the already established "open-acre limit" bond amount to another portion of the permit. The acreage of the next succeeding portion must not exceed the acreage of the previous portion. Mining and reclamation continue in this manner until the entire permit area has been reclaimed.

Subsection 11.5(a)(1) requires a permittee to post a general bond in the amount of \$750 per acre to ensure successful revegetation of the entire permitted area. Subsection 11.5(a)(2) requires the permittee to post an open-acre limit bond in accordance with the site-specific bonding requirements of subsection 11.6, which require a bond of

not less than \$1,000 nor more than \$5,000 per acre based on specified criteria. The minimum amount of the open-acre limit bond will be \$10,000. This subsection also requires the permittee to post an ancillary facility bond for haulroads, sediment control systems and other permanent or semi-permanent control systems and other permanent or semi-permanent ancillary facilities at a rate of \$1,000 per acre for the total proposed disturbed acreage of such facilities.

The general and ancillary facility bonds are to remain in place until released in accordance with CSR § 38-2-12.2 of the State's regulations. The open-acre limit bond can be reapplied to an undisturbed portion of the permit area after the initial open-acre limit area has been backfilled, regraded, and vegetated in accordance with the approved reclamation plan and the provisions of CSR § 38-2-14.15 of the State's regulations.

Subsection 11.5(b) contains permit application requirements for open-acre limit bonding. The permit application must contain a separate bonding section which includes: (1) An overlay outline map which depicts the location and extent of the initial open-acre limit, remaining permit area for which no initial bond is to be posted, and ancillary facilities; (2) a description of the bonding instruments for the three types of bond; and (3) a narrative description for the timing and sequence of mining and reclamation operations.

Subsection 11.5(c) provides that when mining and reclamation of the initial or succeeding open-acre limit is nearing completion, the permittee must submit a request to advance the open-acre limit into the undisturbed portions of the permit area by an amount of acreage not to exceed the acreage reclaimed within the existing open-acre limit area. An overlay map depicting the reclaimed open-acre limit area and the undisturbed area to which the bond is being transferred and a copy of the bond release advertisement must accompany the request. Subsection 11.5(d) provides that approval for transfer of the open-acre limit bond may not be granted until a review of the request and site is made and verified by the Director of WVDEP.

Subsection 11.5(e) provides that the permittee must apply for bond release in the same manner as described in section 23 of the Act and subsection 12.2 of these regulations when all mining and reclamation on the permit area are completed. As discussed in finding B.7., no portion of the open-acre bond can be released until all coal extraction operations are completed and the entire disturbed area is backfilled and

regraded. Therefore, the proposal will not allow for final release of any open-acre limit bonded area without public notice and opportunity for comment.

While the Federal conventional bonding regulations do not contain a counterpart form of West Virginia's proposed open-acre-limit bonding, section 509(c) of SMCRA and 30 CFR 800.11(e) of the Federal regulations allow the States wide latitude in establishing alternative bonding systems. Nothing in the State's proposal is inconsistent with these requirements since the open-acre bond would replace only the site-specific component of the alternative bonding system.

The permittee would still have to pay the special reclamation fee and the alternative bonding system would still remain responsible for completion of reclamation in the event the permittee defaulted. The open-acre limit bonding rules at CSR § 38-2-11.5 are hereby approved.

#### 5. CSR § 38-2-11.6: Site-Specific Bonding

West Virginia proposes adding CSR § 38-2-11.6 to implement the site-specific bonding provisions of § 22-3-12 of the West Virginia Code. The proposed rules establish separate requirements for four major categories of mining permits: surface mines, underground mines, coal refuse disposal sites, and coal preparation plants. Under the proposed rules, the site-specific bonds cannot be less than \$1,000 nor more than \$5,000 per acre or fraction thereof. This subsection includes tables to be used to calculate the per-acre bond for each category of mining included in a permit.

Subsection 11.6(a) provides that the site-specific bond criteria shall not apply where active or inactive operations are in compliance with the provisions of subsection 14.15 and where coal extraction operations are nearly completed, or when the operations are eligible for or have received Phase I bond release. In its September 1, 1994, submittal, the State proposed to exempt from the site-specific bonding criteria only those sites where coal extraction operations were "completed" and which met the other above-referenced criteria. However, this proposed subsection was revised in the May 16, 1995, submittal to exempt sites from the site-specific bonding requirements where coal extraction operations are nearly but not totally complete. Subsection 11.6(a)(1) provides that surface mine permits shall be reviewed at the time of renewal or midterm review and a determination made in accordance with specified

criteria as to whether the site-specific bond will apply. Subsections 11.6(a) (2), (3), and (4) provide that existing permits for underground mines, preparation plants, and coal refuse sites, respectively, shall be subject to the site-specific bond criteria at the time of application for renewal or midterm review and shall not be renewed by the Director of WVDEP until the appropriate amount of bond is posted.

Subsection 11.6(b) explains the major criteria that will apply to the four categories of mining permits. The criteria consists of relative cost factors associated with reclamation of a forfeited site, the risk of bond forfeiture, the operator's history of performance, and environmental enhancement potential. Subsections 11.6 (c), (d), (e) and (f) specify the subcriteria to be considered for computing the bond for surface mines, underground mines, coal preparation plants, and coal refuse sites. In the May 16, 1995, submittal, the State proposed to limit the period of consideration of an applicant's violation history and acts of environmental enhancement to within five years of the date of surface mine application approval instead of ten years as first proposed. Also, coal loading facilities will not be subject to site-specific bonding criteria applicable to coal preparation plants. Subsection 11.6(g) provides for an informal conference if the applicant contests the per-acre amount of the bond. The final decision may be appealed by the operator in accordance with § 22-5-21 of the West Virginia Code.

Since participation in West Virginia's alternative bonding system is mandatory, the requirement of 30 CFR 800.14(b) that the amount of the bond be sufficient to assure the completion of the reclamation plan in event of forfeiture is not applicable to the State's site-specific bonds. The State's development of more detailed site-specific bonding requirements should result in better reclamation of the mined lands by providing incentives to design and conduct mining operations in a more environmentally sound manner.

These bonding requirements should improve the financial condition of the special reclamation fund. To the extent that the new system results in an increase in bond amounts, it will provide greater incentive for the permittee to comply with all reclamation requirements to avoid the economic loss associated with bond forfeiture, in keeping with the requirements for alternative bonding systems at 30 CFR 800.11(e)(2). Therefore, the Director finds that the State's site-specific bonding provisions

are not inconsistent with the requirements of section 509(c) of SMCRA and 30 CFR 800.11(e) for alternative bonding systems. The site-specific bonding rules at CSR § 38-2-11.6 are hereby approved.

However, the Director's approval is subject to the stipulation that nothing in these regulations or this approval may be construed as altering or authorizing a variance or deviation from the permitting requirements and performance standards of West Virginia's approved program.

For example, subsection 11.6(c)(4)(A) could be read to be inconsistent with the West Virginia program regulations at CSR § 38-2-14.15 for timely backfilling and grading because the conversion factor at subsection 11.6(c)(4)(A)(iii) applies in part if the reclamation plan contains unspecified "vague" time and distance criteria. Subsection 14.15(b) requires that the permit include specific time, distance, or acreage standards for each type of surface mining operation. There is no provision anywhere in section 14.15 for "vague" time and distance criteria. Hence, the reference to "vague criteria" in subsection 11.6 may not be interpreted as authorizing the approval of such criteria.

The Director notes that the text of subsection 11.6(c)(1)(B)(ii) refers to a factor of "0.5" while the referenced table identifies a factor of "0.6." Also, for consistency, subsection 11.6(c)(1)(B)(ii) and Table 1 probably should be revised to read "three to six fills"; otherwise a plan calling for two fills is covered by both subparts (i) and (ii). Similarly, subsection 11.6(c)(2)(B)(i) and (ii) both apply to mining plans where two seams of coal are to be mined. To lend consistency to its regulations, subpart (ii) and Table 1 should probably be revised to read "three or four seams of coal."

#### 6. CSR § 38-2-11.7: Environmental Security Account

Proposed subsection 11.7 requires the WVDEP to study the feasibility of developing an environmental security account for water quality. The study is to include: (1) a screening process for determining which sites have the potential for producing acid mine drainage, (2) a process for predicting the rate and duration of acid mine drainage, (3) a method for estimating water treatment costs, (4) a system to ensure that sufficient monies will be placed in an escrow account to provide financial assurance that treatment will be accomplished and maintained, and (5) procedures to ensure the expenditure of funds from the escrow account in the event of default will provide water

treatment. Furthermore, subsection 11.7(f) provides that after the study is completed, the Director of WVDEP may propose regulations to implement the environmental security account for water quality, but the regulations will not become effective until approved by the legislature. Subsection 11.7(g) provides that the Director of WVDEP shall inform the legislature if statutory changes are necessary to implement an effective system for financial assurances. Subsection 11.7(h) provides that nothing in this subsection authorizes the issuance of a permit that will violate applicable effluent limitations or water quality standards without treatment.

Development of an environmental security account for water quality could enhance the financial status of the State's special reclamation fund. Therefore, the Director finds the provisions at CSR § 38-2-11.7, which provides for a feasibility study, are not inconsistent with 509(c) of SMCRA or 30 CFR 800.11(e) of the Federal regulations. The Director notes that pursuant to 30 CFR 732.17(g), any regulations proposed to implement the environmental security account as a bonding mechanism for water quality or to otherwise incorporate it into the coal regulatory program must also be approved by OSM.

#### 7. CSR § 38-2-12.2: Requirement To Release Bonds

West Virginia proposes to revise subsection 12.2(c) to provide for the release of all or part of the bond for the permit area or increment thereof. The State also proposes to revise subsection 12.2(c)(2) to delete the provision relating to chemical treatment of water at Phase II bond release and to add a provision at subsection 12.2(c)(2)(B) to require that the terms and conditions of the NPDES permit be met. Subsection 12.2(c)(2)(E) now requires that the amount of the remaining bond must be sufficient to reestablish vegetation and maintain permanent drainage control structures. These revised provisions are substantively the same as the Federal counterpart provisions at 30 CFR 800.40(c)(2) and are hereby approved.

The State proposes to add new subsection 12.2(d) to prohibit the release of any portion of the bonds posted in accordance with subsection 11.5 (open-acre limit bonding) until all coal extraction operations are completed and the entire disturbed area has been completely backfilled and regraded. Because of the floating nature of this type of bond, this restriction is needed to provide a degree of protection consistent with other types of site-

specific bond authorized under the alternative bonding system.

The State proposes to revise newly designated subsection 12.2(e) by deleting the provision for a qualified exemption to the requirement that no bond release or reduction be granted if, at the time, water discharged from or affected by the operation requires chemical treatment to comply with applicable effluent limitations or water quality standards.

The Director finds that the revised bond release provisions either remain substantively the same as the Federal regulations at 30 CFR 800.40 for conventional full-cost bonds or do not conflict with any Federal requirements or adversely impact other aspects of the West Virginia program. The changes will not negatively impact the solvency of the alternative bonding system. Therefore, the proposed revisions are not inconsistent with section 509(c) of SMCRA or the Federal regulations at 30 CFR 800.11(e). CSR § 38-2-12.2 is hereby approved.

#### 8. CSR § 38-2-12.3: Bond Adjustments

a. West Virginia proposes to revise subsection 12.3 to provide for bond adjustments for an overbonded permit area. An overbonded permit area is an area that was originally bonded by one operator for one permit, but has subsequently been bonded again for a second permit, while the original bond remains in effect. Subsection 12.3(a) of the proposed regulations provides that where a permittee demonstrates on the basis of a sworn statement and a progress map that a portion of the permit area will remain undisturbed or has been overbonded, the Director of WVDEP may adjust the amount of the bond corresponding to the number of undisturbed or overbonded acres, provided that a minimum \$10,000 bond remains for the disturbed portion of the permit. The Director of WVDEP must make a decision on the request within 30 days. If the request is denied, the Director of WVDEP must provide the permittee with an opportunity for an informal conference. Subsection 12.3(c) now contains the previously approved provision which specifies that the provisions of subsection 12.3 are not subject to the provisions of subsection 12.2.

On April 1, 1994 (Administrative Record No. WV-916), OSM requested the State to explain the term "overbonded." The State replied that this provision means that when any part of an existing permit is covered by a new permit, the amount of bond for the "double bonded area" of the existing permit can be terminated and returned

to the existing permittee. Since 30 CFR 800.15(c) provides that a permittee may request reduction of the amount of bond by submitting evidence that proves the permittee's method of operation or other circumstances reduces the estimated cost of reclamation, OSM accepted this clarification of the proposed revision. The revised State regulations at subsections 12.3 (a) and (c) are substantively the same as and therefore no less effective than the corresponding Federal regulations at 30 CFR 800.15 (b) and (c).

b. West Virginia proposes to revise subsection 12.3(b) by adding a provision that, upon receipt of a permit revision, the Director of WVDEP may review the bond adequacy and if necessary increase the amount of the bond.

Under the Federal counterpart regulation at 30 CFR 800.15(d), the regulatory authority has a mandatory duty rather than the discretionary authority to review the bond for adequacy whenever a permit is revised. However, this mandatory requirement does not apply to bonds under an alternative bonding system since the alternative bonding system provides a source of funds other than the site-specific bond for completion of the reclamation plan in the event of forfeiture. West Virginia has an alternative bonding system in which participation is mandatory. Therefore, the Director finds CSR § 38-2-12.3(b), as revised, is not inconsistent with SMCRA or the Federal regulations, and he is approving this new provision as proposed.

#### 9. CSR § 38-2-12.4: Bond Forfeiture

a. The State is proposing to revise subsection 12.4(a) to provide that, when necessary, the Director of WVDEP must forfeit the entire bond, not just an amount based on the estimated total cost of achieving the reclamation plan requirements as specified in the current regulation. These proposed revisions to subsection 12.4(a) are in accordance with the proposed revision to WV Code § 22-3-11(a), which requires that all reclamation bonds be penal in nature. For the reasons discussed in finding A.1.a., the Director finds that the proposed revisions will not render the State program less stringent than SMCRA or less effective than the Federal rules.

b. The State also proposes to revise subsection 12.4(a)(2)(B) to provide that when a surety completes the reclamation, "no surety liability shall be released until successful completion of all reclamation under the terms of the permit and in accordance with the Act and these regulations to include the

revegetation liability period." OSM questioned West Virginia about the meaning of the phrase "to include the revegetation liability period." West Virginia responded that this phrase merely provides an example and is not intended to exclude other types of reclamation responsibilities (Administrative Record No. WV-929).

The Federal regulations at 30 CFR 800.50(a)(2)(ii) provide that, when the regulatory authority allows a surety to complete the reclamation plan, no surety liability shall be released until successful completion of all reclamation under the terms of the permit, including applicable liability periods of § 800.13. The liability periods of § 800.13 include the extended responsibility period for successful revegetation and achievement of the reclamation requirements of the Act, the permanent regulatory program, and the permit. Therefore, the Director finds the revised provision of CSR § 38-2-12.4(a)(2)(B), is substantively identical to and no less effective than the counterpart Federal provision at 30 CFR 800.50(a)(2)(ii).

c. At CSR § 38-2-12.4(b), West Virginia proposes combining the provisions of existing subsections 12.4(b) and 12.4(c). West Virginia revised the provision in new subsection 12.4(b) that provides for the use of the proceeds to accomplish completion of reclamation by changing the citation reference of the regulations governing water quality from subsection 14.5 to subsection 12.5. Subsection 12.5 requires the establishment of an inventory of bond forfeiture sites and a priority listing of such sites for water treatment while subsection 14.5 contains general water quality standards for active mining operations.

The Federal regulations at 30 CFR 800.50(b)(2) require the regulatory authority to use funds collected from bond forfeiture to complete the reclamation plan. The amended reference pertains to only one of the requirements for completion of reclamation at a bond forfeiture site (water quality), however, new subsection 12.4(c) requires that a bond forfeiture site be reclaimed in accordance with the reclamation plan. Therefore, the proposed revision will not render CSR § 38-2-12.4 less effective than the counterpart Federal regulations at 30 CFR 800.50(b).

Furthermore, as discussed in finding A.1.b(2), the Director is requiring the State to revise its program to provide for the treatment of polluted water discharging from all bond forfeiture sites.

d. West Virginia reorganized the provisions of existing paragraph (d) of

subsection 12.4 into new paragraphs (c), (d), and (e).

(1) In the June 28, 1993, version of the proposed amendment, as revised by letter dated July 30, 1993 (Administrative Record Nos. WV-889 and WV-893), new subsection 12.4(c) [previously 12.4(d)(2)] required the Director of WVDEP to initiate operations to reclaim a bond forfeiture site within 180 days after the notice of forfeiture is served. It also required remediation of acid mine drainage, including chemical treatment where appropriate.

On April 1, 1994, OSM advised West Virginia that to be no less effective than 30 CFR 800.50(b)(2), bond forfeiture sites must "be reclaimed in accordance with the approved reclamation plans or modifications thereof." (Administrative Record No. WV-916). The Federal regulations at 30 CFR 800.50(b)(2) and 800.11(e) require bond forfeiture sites to be reclaimed in accordance with the reclamation plans of the revoked or suspended permits, including any modifications approved by the regulatory authority.

In its submission of September 1, 1994, West Virginia revised its regulations at CSR § 38-2-12.4(c) to clarify that bond forfeiture sites will be reclaimed in accordance with approved reclamation plans or modifications thereof (Administrative Record No. WV-937). This proposal satisfies the requirements at 30 CFR 948.15(k)(8) and 948.16(ww) that reclamation on bond forfeiture sites be completed in accordance with the approved reclamation plan. Therefore, the Director is approving this proposed revision, and he is removing the required amendment at 30 CFR 948.16(ww).

(2) New subsection 12.4(d) retains the provision from existing subsection 12.4(d)(2) that requires the Director of WVDEP to make expenditures from the special reclamation fund to complete reclamation when the proceeds of bond forfeiture are less than the actual cost of reclamation. New subsection 12.4(d) also includes the new provision requiring the Director of WVDEP to take the most effective actions possible to remediate acid mine drainage, including chemical treatment where appropriate.

Since this revised provision still makes it mandatory that West Virginia use the special reclamation fund to complete reclamation at bond forfeiture sites, the Director finds that subsection 12.4(d), as revised, is consistent with the requirements of section 509(c) of SMCRA and 30 CFR 800.11(e) of the Federal regulations and is hereby approved.

(3) At subsection 12.4(e) [previously 12.4(d)(1)], the State proposes to provide that the operator, permittee, or other responsible party be liable for all costs in excess of the amount forfeited. The Director of WVDEP may commence civil, criminal, or other appropriate action to collect such costs.

The Federal regulations at 30 CFR 800.50(d)(1) require that the operator be liable for costs in excess of the amount forfeited. They allow the regulatory authority to recover from the operator all costs of reclamation in excess of the amount forfeited. Although West Virginia does not define "other responsible party," it is commonly understood that it would include any other person who may be responsible for the mining operation.

West Virginia's proposed requirement is neither specifically authorized nor prohibited by SMCRA. However, it is consistent with the principles and purposes of SMCRA to ensure the reclamation of surface areas disturbed by coal mining. See SMCRA section 102(e). Therefore, since the proposed provision does not conflict with any Federal requirements under SMCRA, the Director finds that the proposed revision does not render subsection 12.4(e) inconsistent with SMCRA or the Federal regulations, and he is approving it.

e. West Virginia deleted existing subsection 12.4(e) pertaining to the effective date of the provisions within subsection 12.4 relating to water quality. Because the date has long since passed, the Director finds this deletion will not render the West Virginia program less effective than the Federal regulations.

#### 10. CSR § 38-2-12.5: Water Quality Enhancement

##### a. Prioritization of Forfeited Sites

West Virginia proposes to add a new subsection 12.5 to implement that portion of § 22-3-11(g) of the West Virginia Code which authorizes WVDEP to prioritize bond forfeiture sites for reclamation purposes. Subsection 12.5(a) requires the Director of WVDEP to establish an inventory of all sites for which bonds have been forfeited. The inventory is to include data relating to the quality of water being discharged from the sites. Subsection 12.5(b) requires a priority listing of these sites based upon the severity of the discharges, the quality of the receiving stream, effects on downstream water users, and other factors determined to affect the priority ranking.

Subsection 12.5(c) provides that, until the legislature supplements or adjusts the special reclamation fund, the

Director of WVDEP can selectively choose sites from the inventory for water quality enhancement projects. Subsection 12.5(d) provides that, in selecting sites for water improvement projects, the Director must consider relative benefits and costs of the projects.

Subsection 12.5(e) required the Director of WVDEP to submit to the legislature, a detailed report and inventory of acid mine drainage from bond forfeiture sites. The report, which was submitted on December 31, 1993, includes cost estimates for long-term chemical treatment of drainage from each site and proposals for supplementing and adjusting the special reclamation fund to pay for this treatment (Administrative Record No. 952).

For the reasons set forth in finding A.1.b.(1), and subject to the same stipulations, subsection 12.5 is not inconsistent with the reclamation requirements of 30 CFR 800.50(b)(2) and 800.11(e), except as discussed in finding B.10.b. below. Subsections 12.5 (a), (b), (c) and (e) are hereby approved.

##### b. Limitation on Water Treatment at Bond Forfeiture Sites

Subsection 12.5(d) also provides that expenditures from the special reclamation fund for water quality enhancement projects may not exceed 25 percent of the fund's gross annual revenue. For the reasons set forth in finding A.1.b.(2), the Director finds that this limitation is inconsistent with 30 CFR 800.11(e) and is hereby disapproved. Also, the Director is requiring that the State revise subsection 12.5(d) to remove the 25 percent limitation or to otherwise provide for the treatment of polluted water discharged from all existing and future bond forfeiture sites.

##### C. The West Virginia Alternative Bonding System

On October 1, 1991 (Administrative Record No. WV-878), OSM notified West Virginia in accordance with 30 CFR 732.17 that its regulatory program no longer met all Federal requirements. Since 1989, OSM's annual reviews of West Virginia's alternative bonding system had found the system to be incapable of meeting the Federal requirements at 30 CFR 800.11(e) since its alternative bonding system liabilities exceeded assets. As of June 30, 1990, the special reclamation fund liabilities exceeded assets by \$6.2 million. Also, a 1993 actuarial study by the accounting firm of Deloitte and Touche estimated that, by 1997, the State's special reclamation fund would have a deficit

of \$13.8 million (Administrative Record No. 952). This estimate did not include the cost of water treatment on bond forfeiture sites.

In addition, on December 31, 1993, the WVDEP submitted an "Acid Mine Drainage Bond Forfeiture Report" to the West Virginia legislature, as required by CSR § 38-2-12.5(e) (Administrative Record No. WV-952). The report identified acidic discharges from 89 bond forfeiture sites, which produce approximately 10 percent of the acid mine drainage in the State. Under the best-case scenario, the WVDEP estimated that treatment to neutralize only the discharges from bond forfeiture sites that are affecting receiving streams would require approximately \$2 million annually. Treatment of all discharges from all sites to meet Federal and State effluent limitations and water quality standards would cost approximately \$4.7 million annually.

Furthermore, State records show that, as of June 30, 1994, 243 bond forfeiture sites containing 10,996 acres have not been completely reclaimed. The State estimates that the total liabilities of the fund exceed total assets by \$22.2 million. This estimate does not include the cost of treating polluted water discharged from bond forfeiture sites. On July 20, 1994, the West Virginia Supreme Court ruled that the treatment of acid mine drainage is a component of reclamation and that the WVDEP has a mandatory nondiscretionary duty to utilize moneys from the special reclamation fund, up to 25 percent of the annual amount, to treat acid mine drainage at forfeiture sites when the proceeds from forfeited bonds are less than the actual cost of reclamation (*WVHC v. WVDEP*, No. 22233, July 20, 1994).

An alternative bonding system cannot be allowed to incur a deficit if it is to have available adequate revenues to complete the reclamation of all outstanding bond forfeiture sites. Alternative bonding systems must include reserves and revenue-raising mechanisms adequate to ensure completion of the reclamation plan and fulfillment of the permittee's obligations, including any water treatment needs.

Although the proposed site-specific bonding rates are significantly higher than the State's old flat rate bond of \$1,000 per acre and the State is proposing to increase its special reclamation tax from one cent to three cents per ton of mined coal to generate more revenue for the fund, State records indicate that the proposed bonding rates and the increase in revenues to the special reclamation fund are still

insufficient to ensure complete reclamation, including treatment of polluted water.

Therefore, the Director finds that West Virginia's alternative bonding system no longer meets the requirements of 30 CFR 800.11(e). Furthermore, it is not achieving the objectives and purposes of the conventional bonding program set forth in section 509 of SMCRA since the amount of bond and other guarantees under the West Virginia program are not sufficient to assure the completion of reclamation. Hence, the Director is requiring West Virginia to eliminate the deficit in the State's alternative bonding system and to ensure that sufficient funds will be available to complete reclamation, including the treatment of polluted water, at all existing and future bond forfeiture sites. The Director has taken and will take similar actions in all other states with deficits in alternative bonding systems.

#### IV. Summary and Disposition of Comments

##### *Public Comments*

The Director solicited public comments and provided an opportunity for public meetings on the proposed amendment on three separate occasions. Public meetings were held on September 7, 1993, October 27, 1994, and May 30, 1995 (Administrative Record Nos. WV-906, WV-958, and WV-983). Comments on the special reclamation fund and bonding provisions were received from GAI Consultants, Inc. (GAI); West Virginia Coal Association (WVCA); West Virginia Mining and Reclamation Association (WVMRA); Arch of West Virginia (AWV); Buffalo Coal Company, Inc. (BCC); National Council of Coal Lessors, Inc. (NCCL); West Virginia Highlands Conservancy (WVHC); the West Virginia Chapters of Trout Unlimited (TU) and the Sierra Club (SC); National Citizens Coal Law Project (NCCLP), and the Downstream Alliance (DA).

Following is a summary of the substantive comments received on the proposed amendment. Comments identifying errors of a purely typographical or editorial nature and comments voicing general support or opposition to the proposed amendments but devoid of any specific statements are not discussed. The summarized comments and responses to the comments are organized by the section of the amended statutes and regulations to which they pertain. All citations to the State statutes and regulations in comments and responses have been adjusted to reflect the nomenclature of the August 18, 1994, version of the

statutes and the May 16, 1995, version of the regulations.

##### *WVSCMRA § 22-3-11(c)(2): Alternative Bonding System*

WVCA, WVMRA, and the WVHC commented on WVSCMRA § 22-3-11(c)(2) which provides that the Director of the WVDEP may approve an alternative bonding system under certain conditions. The State has not proposed any revisions to this section of the West Virginia statute. In acting on State program amendments, OSM only addresses those sections of a State's laws and regulations where revisions are proposed by a State. OSM will take the comments received into consideration when reviewing the State's statute and rules pursuant to 30 CFR 732.17.

##### *WVSCMRA § 22-3-11(g): Special Reclamation Fund*

1. *Comment:* WVHC did not generally support the revisions proposed for the special reclamation fund. WVHC stated the belief that "the state has a mandatory duty to treat water as a part of the approved reclamation plan at all forfeited sites, and that the alternative bonding system/special reclamation fund is to provide the State sufficient money to complete all reclamation, at all times, at any and all forfeited sites, including water treatment where necessary to meet effluent limitations and water quality standards." This belief was also expressed by the SC which added that the 25 percent limit applied to expenditures for water treatment explicitly weakens the Federal requirement for full and prompt reclamation.

WVHC commented that the provisions of section 509(c) of SMCRA, the provisions of 30 CFR 800.11(e) of the Federal regulations, and the West Virginia Supreme Court Decision in the Mandamus action (*WVHC v. WVDEP*, No. 22233, July 20, 1994) supported its belief [See Administrative Record No. WV-930 for a copy of the referenced decision]. WVHC pointed out that the actuarial study of 1993 was not an acceptable assessment of the adequacy of the special reclamation fund since it asserted the State was not liable for water treatment at bond forfeiture sites. WVHC further urged OSM to require the State resolve the issue of inadequate funds, assess additional monies for the special reclamation fund, and expend the monies to reclaim existing bond forfeiture sites.

In general, WVHC believed that the codification language used by OSM left several unanswered questions and that findings contained in the preamble would be forgotten.

**Response:** As discussed in finding A.1.b.(2), the Director is requiring West Virginia to amend its program to remove the 25 percent limitation or to otherwise provide for treatment of polluted water discharged from all bond forfeiture sites. Also, as discussed in finding

A.1.b.(4)(c), the Director is requiring the State to remove the provision that allows collection of the special reclamation tax only when the bond forfeiture liabilities of the State exceed the fund's assets.

This rulemaking does not attempt to answer all potential questions about bonding and the reclamation of bond forfeiture sites but only to address the proposed revisions to the West Virginia program. The findings contained in this preamble should be read in conjunction with the codification section to fully understand the Director's decision.

**2. Comment:** The WVHC commented that OSM should not only disapprove as part of the State program the provision limiting the use of monies for water treatment at bond forfeiture sites but should also require the State to remove the restricting language from its rules and law. WVHC stated that in the eyes of State legislature and State Courts the provision would continue to be implemented until removed from State law and regulations. WVHC added that without clear and decisive direction and actions on the part of OSM, there will be no significant improvement in the West Virginia program.

**Response:** As discussed in finding A.1.b.(2), the director is requiring West Virginia to remove the 25 percent limitation on the use of special reclamation funds for water treatment at bond forfeiture sites from its statute and regulations or to otherwise provide for the treatment of polluted water discharged from all bond forfeiture sites.

**3. Comment:** WVMRA generally supported the proposed bonding revisions for § 22-3-11(g). WVMRA argued that the special reclamation fund revisions, including the 25 percent set aside for water treatment systems, were not OSM issues since there are no Federal requirements in these areas. The question of water treatment at forfeiture sites was thought to be a Clean Water Act issue which should be handled by the State under the NPDES program. WVMRA pointed out that West Virginia's bonding provisions were more stringent than Federal government bonding requirements and cited the State's requirement for penal bonds as an example. WVMRA commented that "the bonding program has been consistent with insuring compliance with the State law and all regulations promulgated thereunder for more than

the 17 year history since PL 97-87 was passed."

WVMRA argued that West Virginia has adequate funds to guarantee that the performance standards of the Act are carried out, and referenced two actuarial studies as support for this view. WVMRA stated that any requirements beyond the performance standards of the Act are not germane to the bonding requirements. WVMRA also stated that "any attempt to burden the State of West Virginia, and more particular (sic) its mining industry, with rules and regulations not supported by Federal or State law, will not be tolerated nor can the State of West Virginia be held to any standard not imposed upon other States, including Tennessee, in which OSM administers the program." [WVMRA referenced text in a letter dated January 15, 1993, to David Callaghan from former OSM Director Harry Snyder pertaining to requirements for water treatment as support for its comments. Since this letter was subsequently rescinded by Acting OSM Director W. Hord Tipton by letter dated January 25, 1993, it no longer reflects OSM policy and is, therefore, not being discussed.]

**Response:** Section 509(c) of SMCRA authorizes the Secretary, acting through OSM, to approve an alternative bonding system if it will achieve the objective and purposes of the otherwise mandatory conventional bonding program. The Federal regulations at 30 CFR 800.11(e)(1) require funds to be sufficient to assure completion of the reclamation plans for all bond forfeiture sites, which includes treatment to meet State and Federal water quality requirements. The Secretary conditionally approved an alternative bonding system as part of the West Virginia program on January 21, 1981 (46 FR 5924), with subsequent final approval on March 1, 1983 (48 FR 8448). West Virginia's approved alternative bonding system includes the special reclamation fund as one source of money for completing the reclamation plan for a bond forfeiture site. Also, 30 CFR 732.17(g) requires changes to laws or regulations that make up the approved State program be submitted to the Director as an amendment. Therefore, the revisions pertaining to West Virginia's special reclamation fund are OSM issues, and OSM is required to make a determination as to whether these revisions are consistent with section 509(c) of SMCRA and the implementing Federal regulations at 30 CFR 800.11(e). The Director disagrees that only performance standards of the Act are germane to bonding requirements. See discussion in findings A.1.b.(2). The

Director also disagrees that the West Virginia alternative bonding system has adequate funding. See discussion in finding A.1.b.(4)(c).

**4. Comment:** The WVHC expressed concern that withdrawals from the Special Reclamation Fund for administrative purposes for programs other than bond forfeiture reclamation will deplete the Fund.

**Response:** As discussed in finding A.1.b.(3), the State in § 22-3-11(g) is proposing to limit the use of the Special Reclamation Fund. The Director of the WVDEP will have discretionary power to allocate up to 10 percent of the total annual assets of the Fund to administrative costs incurred under the abandoned mine land program, the mining and reclamation program, the minerals other than coal program, and the Surface Mine Board. While most of these expenditures are unrelated to the reclamation of bond forfeiture sites, the Director of OSM does not have the authority under SMCRA to restrict the use of the Fund to only bond forfeiture reclamation. However, the State is accountable for ensuring that adequate moneys are available in the special reclamation fund to complete the reclamation of all forfeiture sites in a timely manner. Under West Virginia's approved alternative bonding system, any drawdown of the fund for administrative purposes unrelated to bond forfeiture reclamation must be compensated for by higher site-specific bonds, a higher special reclamation tax or both.

**5. Comment:** The WVMRA commented that OSM had overstated the magnitude of the backlog in forfeiture sites that need to be reclaimed by failing to note that of the 243 forfeiture sites, 43 have been granted Phase I release, 17 have been granted Phase II release and 12 of the forfeitures were for technicalities like failure to have proper insurance. Also, the special reclamation fund was believed to be financially sound since as of April 30, 1995, there was a balance of over \$8 million with interest accumulating at a rate of \$250,000 per quarter. Annual payments into the fund by coal operators was more than \$3.7 million. Reclamation costs on forfeiture sites were \$2,820 per acre in 1994—the lowest per acre cost in the history of the program.

**Response:** The Director acknowledges that some sites on the list of bond forfeiture sites have been partially reclaimed, however, there is still a substantial backlog in reclamation work even after allowing for these sites. The State's estimate that, as of June 30, 1994, total liabilities of the special

reclamation fund exceeded assets by \$22.2 million takes into account a cash balance in the fund.

**WVSCMRA § 22-3-23(c)(3) Colombo Amendment**

WVCA, WVMRA, and SC commented on WVSCMRA § 22-3-23(c)(3). The State has not proposed any revisions to this section of the West Virginia statute. In acting on State program amendments, OSM only addresses those sections of a State's laws and regulations where revisions are proposed by a State. OSM and the State met on August 16, 1995, to resolve differences concerning this provision and to address other matters. OSM is conducting a survey of potential Colombo sites to determine the scope and nature of the problem. The WVDEP has agreed to cooperate with OSM by providing information they may have and to not release additional sites under the Colombo provision. The disapproval of WVSCMRA § 22-3-23(c)(3) found at 30 CFR 948.12(e) and the program set aside at 30 CFR 948.13(c) remain in effect.

**CSR § 38-2-11.2(e) Bond Liability for Permits Transferred, Assigned, or Sold Under the Provisions of CSR § 38-2-3.25**

**Comment:** AWV pointed out that the provision does not give the Director of WVDEP the authority to increase bond amounts to address deficiencies in permits which are transferred or assigned. AWV further argued that "this provision should not apply to permits which are assigned pursuant to 38 W.Va. C.S.R. § 3.25(c), since liability under the bond and permit under such an arrangement remains with the original permittee." AWV stated that "the suggestion that bonds, in themselves, can be transferred is misleading and inconsistent with other provisions in the regulations." AWV also suggested that the provision should be rewritten to clarify that permits instead of bonds are transferred and to allow the Director of WVDEP to require bond adjustment as an alternative to the proposed requirement for assumption of liability.

**Response:** The intent of this provision is to ensure that the person who is to receive the permit has adequate financial resources to manage long-term environmental liabilities associated with mining such as water treatment. It is within the State's authority to require such a demonstration prior to permit transfer. Although the Director agrees that the provision could be clarified, as discussed in finding B.1.b, the new provision at CSR § 38-2-11.2(e) is not inconsistent with the Federal bonding requirements at 30 CFR Part 800 or the

Federal permitting requirements at § 774.17(b)(3).

**CSR § 38-2-11.6 Site-Specific Bonding**

**Comment:** AWV expressed support for West Virginia's efforts to implement site-specific bonding in order to improve its regulatory program. However, AWV stated that "the regulation should more clearly identify how the bonding changes will be implemented and administered."

**Subsection 11.6(a):** AWV commented that the provisions of subsection 11.6 should only apply to permits issued after its effective date. AWV further commented that considering bond is limited to \$5,000 per acre, West Virginia should add language to subsection 11.6(a) to clarify the procedures for calculating bond when more than one permit includes the same area. The DA believed that the \$5,000 per acre limit on site-specific bonds contradicted SMCRA because such a bond is insufficient to enable the regulatory authority to complete reclamation, especially in the case of underground mines where there is liability for acid mine drainage and subsidence. The WVHC commented that site-specific bonds should be required where coal extraction is complete and for operations that are eligible for or have received Phase I bond release.

**Subsection 11.6 (c), (d), (e), and (f):** AWV stated that "a general concern with respect to all of the subsection 11.6 tables is that the factors 0.2, 0.6, and 1.0 produce too many extreme and inequitable results, thereby distorting the significance of some criteria." In support of its concern, AWV presented three examples and argued that: (1) factoring under subsection 11.6(c)(1)(B) for three excess spoil disposal fills is three times higher than a plan for two, while six fills is the same as three; (2) the provisions at subsection 11.6(c)(2)(C)(ii) and (iii) differentiate between conventional and highwall auger mining even though the cost per linear foot to reclaim the highwall would not differ and (3) the provisions at subsection 11.6(d)(1)(A) do not consider the vicinity of backfill material when factoring for shaft or slope entry backfills. AWV also noted a typographical error and some inconsistencies in the provisions of subsection 11.6(c).

**Subsection 11.6(c)(5)(A):** AWV commented that West Virginia should clarify the terms "active permit" and "last full calendar year" as it relates to this provision. AWV also commented that West Virginia should add a provision to this subsection specifying

that violations pending review or appeal would not be considered.

**Subsection 11.6(v)(5)(B):** AWV pointed out that the percentages used for contemporaneous reclamation were discretionary since they were not defined. AWV also commented that consideration of an operation's "contemporaneous reclamation" status should not be limited to the permit application review period.

**Subsection 11.6(c)(6)(B):** AWV commented that national and local reclamation awards should not be a consideration since they often depend on other factors not related to success of reclamation. AWV further suggested that WVDEP factor in the amount of disturbed land reclaimed in a 24-month period instead of awards.

**Subsection 11.6(g):** AWV suggested that West Virginia add language in subparagraph (2) to allow the Director of WVDEP to not hold an informal conference if he agreed that "the amount proposed by the applicant is appropriate."

**Response:** Under an alternative bonding system, a State has considerable latitude in setting site-specific bond amounts and administering the program. The State may even choose to place a limit on the per-acre amount of the site-specific bond. The most important factor that has to be considered is whether the alternative bonding system has adequate revenue to cover the cost of reclamation of those sites that may be forfeited and that it provides substantial economic incentive for the operator to comply with all reclamation requirements. As discussed in finding B.5., the Director found the State's provisions for site-specific bonding are not inconsistent with the requirements of section 509(c) of SMCRA and 30 CFR 800.11(e) of the Federal regulations.

**CSR § 38-2-11.7 Environmental Security Account for Water Quality**

**1. Comment:** WVCA commented that "OSM appears to mischaracterize the scope and purpose of this proposed rule, which allows WVDEP to create an Environmental Security Account. OSM states that this regulation does not provide any authority for WVDEP to issue permits for discharges that will violate effluent limitations or water quality standards 'without treatment.' See 58 Fed. Reg. at 42909. If by the phrase 'without treatment' OSM means to say that this proposed regulation prohibits WVDEP from issuing permits for operations which may generate acid mine drainage, it is simply wrong. Nothing in either § 38-2-11.7 or SMCRA contains any such prohibition.

While both SMCRA and the WVSCMRA require operators to avoid production of acid mine drainage, they both also specifically recognize water treatment as one avoidance technique. *See* 30 U.S.C. §§ 1265(b)(10)(A)(ii); W. Va. Code §§ 22-3-13(b)(10)(A)(ii) & 14(b)(9)(A)(ii)."

**Response:** West Virginia included this provision in paragraph (h), which reads "nothing in this subsection shall authorize in any way the issuance of a permit in which acid mine drainage is anticipated, and which would violate applicable effluent limitations or water quality standards without treatment." The Federal Register notice stated that this language was part of the proposed State rule. Paragraph (h) of CSR § 38-2-11.7 clarifies the intent of the West Virginia State legislature when it authorized the Director of WVDEP to study the desirability of establishing an environmental security account and in promulgating rules to implement such an account. OSM has not mischaracterized the State's proposed rule since the exact language used by the West Virginia State legislature was repeated in the Federal Register.

**2. Comment:** WVHC expressed concern that the language in subsection 11.7(f) would allow statutory changes to become effective without the approval of OSM. WVHC commented that "while the Supreme Court of W.V. has reiterated the legal requirement of OSM approval of all statutes and regulations pertaining to the approved program in footnote 23 of the Mandamus decision of July 1994 (*WVHC v. WVDEP*, No. 22233, July 20, 1994), there are frequent debates and sometimes heated discussions of this matter in Legislative Committee meetings."

**Response:** As discussed in finding B.6., any regulations proposed to implement the environmental security account as a bonding mechanism for water quality or to otherwise incorporate it into the coal regulatory program must be approved by OSM. Also, 30 CFR 732.17(g) prohibits the implementation of any statutory or regulatory changes to a State program without prior OSM approval.

#### *CSR § 38-2-12.2 Requirement to Release Performance Bonds*

**1. Comment: Subsection 12.2(a)(1)** AWV commented that "subsection 11.5(a)(1) of these proposed rules states that a general bond in the amount of seven hundred fifty dollars (\$750) per acre will serve as sufficient financial assurance that the revegetation requirements of Section 9 of the regulations will be satisfied. Consistent with this statement, AWV believes that

38 W.V.A. C.S.R. § 12.2(c)(1) should be modified as that upon meeting the requirements for a Phase I bond release, a site-specified reassessment should be conducted. Assuming these requirements are met, the bond amount should be reduced to \$750 per acre, as specified in Subsection 11.5(a)(1), instead of the minimum 60 percent bond release now in effect."

**Response:** Subsection 11.5(e) provides that the operator will apply for bond release in accordance with section 23 of the Act and subsection 12.2 only after completion of all mining and reclamation on the permit area. In accordance with the State's open-acre limit bonding requirements at subsection 11.5, the State does not plan to release the open-acre bond at the completion of the backfilling and grading of each open-acre unit. This bond will be rolled over to the next increment.

**2. Comment: Subsection 12.2(e)** WVMRA commented that OSM does not have any water quality or chemical treatment requirements for bond releases. BCC and WVMRA both commented that this provision is more stringent than the OSM requirement since bond cannot be reduced or released if chemical treatment is required.

**Response:** The Director disagrees that the Federal regulations do not have any water quality or chemical treatment requirements for bond releases. Section 519(b) of SMCRA and the implementing Federal regulations at 30 CFR 800.40(b)(1) require the regulatory authority, when evaluating bond release requests, to consider whether pollution of surface and ground water is occurring, the probability of any continuing pollution, and the estimated cost of abating such pollution. Furthermore, section 519(c)(3) of SMCRA and the implementing Federal regulations at 30 CFR 800.40(c)(3) provide that no bond shall be fully released until all the reclamation requirements of SMCRA and the permit are fully met. These requirements include abatement of surface and ground water pollution resulting from the operation. Both SMCRA and the Federal regulations effectively require that discharges from the site be in compliance with all applicable effluent limitations as a prerequisite for bond release. Therefore, as discussed in finding B.7., the revised bond release provisions either remain substantively the same as the Federal regulations at 30 CFR 800.40 or do not conflict with any Federal requirements or adversely impact other aspects of the West Virginia program.

#### *CSR § 38-2-12.3 Bond Adjustments*

**Comment:** WVHC commented that the State's proposed amendment satisfies 30 CFR 800.15(d) by providing for bond adjustment in the case of increased area being added to the permit. However, the amendment should also include language to more adequately reflect compliance with 30 CFR 800.15(a) as well. "The state must be able to adjust the bond 'from time to time' not only as the area is increased or decreased, but also 'where the cost of future reclamation changes', e.g., at renewal time, or at any time during the life of a permit that some unforeseen or unanticipated complication arises that would cause the cost of reclamation to increase."

**Response:** As discussed in finding B.8.b., mandatory review for bond adequacy is limited to the States with conventional bonding programs since those States have no other source of funds other than the bond for completion of the reclamation in the event of forfeiture. Therefore, since West Virginia has an alternative bonding system with mandatory participation, which includes other sources of moneys for reclaiming bond forfeiture sites, the requirement to review bonds for adequacy is not mandatory. However, bond adjustment would be advisable so as to ensure the long-term financial soundness of an alternative bonding system.

#### *CSR § 38-2-12.4 Forfeiture of Bonds*

##### 1. Comments: Subsection 12.4(a)

**a.** GAI stated its opposition to the requirements that all bond amounts be forfeited rather than an amount based on the estimated total cost of achieving the reclamation plan requirements. GAI commented that all bonds not required to reclaim should be returned, since subsection 12.4(e) allows WVDEP to sue for all costs in excess of the amount forfeited.

**Response:** As discussed in finding A.1.a., West Virginia's proposed requirement that the total bond be forfeited, rather than an amount based on the estimated cost of reclamation, is not inconsistent with any Federal requirements.

**b.** WVCA commented that OSM should find the provision at subsection 12.4(a), which would require WVDEP to forfeit the entire amount of reclamation bonds irrespective of the actual cost to reclaim mine sites, both unauthorized by the WVSCMRA and inconsistent with SMCRA. WVCA further stated that this regulation was intended to dovetail with a statutory amendment which the WVDEP proposed, but which was

rejected by the West Virginia Legislature in the 1992/1993 legislative session. WVCA explained that the Circuit Court of Kanawha County recently ruled that the WVSCMRA does not allow WVDEP to forfeit the entire amount of a reclamation bond, but only so much as is necessary to cover the estimated costs of reclamation (*Vaco Enterprises, Inc., v. Callaghan*, Civil Action No. 92-Misc-256 (Kanawha County, Nov. 9, 1992).

WVCA further commented that OSM has rejected this form of bond release since 30 CFR 800.50(d)(2) specifically provides that in the event the amount of performance bond forfeited was more than the amount necessary to complete the reclamation, the unused funds would be returned. WVCA then referenced a Federal court decision in *In Re: Permanent Surface Mining Regulation Litigation*, 14 Env't Rep. Cas. (BNA) 1083, 1100-1101 (D.D.C. 1980). WVCA stated that "based on the court's directive, OSM expressly rejected any notion that reclamation bonds are penal in nature. OSM wrote that: 'OSM views a reclamation bond as one guaranteeing the performance of reclamation work. Therefore, it is not a penal bond. Upon forfeiture, only the amounts necessary to complete the reclamation work can be used by the regulatory authority.' 48 FR 32932, 32957 (July 19, 1983.)"

**Response:** At the time WVCA submitted its comments on September 13, 1993, the referenced Circuit Court ruling was meaningful to the proposed amendment being reviewed by OSM. However, this amendment was revised with West Virginia's submitted dated August 18, 1994. The August 1994 submittal contained House Bill 4065 which was passed by the West Virginia legislature on or before March 12, 1994. In it, the West Virginia legislature approved the use of penal bonds, thereby effectively superseding the Circuit Court ruling. As discussed in finding A.1.a., the legislature's action creating penal bonds is not inconsistent with section 509 of SMCRA and the Federal implementing regulations pertaining to performance bonds.

## 2. Comments: Subsection 12.4(b)

WVHC commented that the State's duty to meet the requirements of subsection 14.5 when reclaiming bond forfeiture sites had been replaced with meeting the requirements of subsection 12.5. Subsection 12.5 establishes an inventory of all sites where bonds have been forfeited and a priority listing of sites to receive water treatment whereas subsection 14.5 establishes water quality standards for active mining operations.

**Response:** For the reasons given in finding B.9.c., the Director is approving this revision.

## 3. Comments: Subsection 12.4(c)

a. GAI argued that instead of West Virginia looking for "the most effective method to control acid mine drainage" that they should be looking for "the most cost effective method." GAI explained that one methodology may cost \$100,000 and another may cost \$3,000,000 with only one-tenth of one percent difference in remediation between the two methods.

**Response:** The Director agrees with the desirability of seeking the most cost-effective treatment, so long as the site is brought into compliance with applicable effluent limitations and water quality standards. It is noted that subsection 12.5(d) requires the Director of WVDEP to take into consideration the relative benefits and costs of water enhancement projects for bond forfeiture sites.

b. **Comment:** WVHC stated that subsection 12.4(c) limits reclamation and the amount of acid mine drainage treatment to the amount of money available. WVHC commented that SMCRA 509(c) and 30 CFR 800.11(e) require that the amount of money be sufficient to match the problem rather than the other way around as this proposal suggests. WVHC stated that the last sentence of subsection 12.4(c) should be dropped from the rule.

**Response:** As discussed in finding C., the Director is requiring West Virginia to eliminate the deficit in the State's alternative bonding system and to ensure that sufficient money will be available to complete reclamation, including the treatment of polluted water, of all existing and future bond forfeiture sites.

c. **Comment:** WVMRA also did not support the revision at subsection 12.4(c) which requires the Director of WVDEP to take the most effective actions possible to remediate acid mine drainage, including chemical treatment where appropriate. WVMRA stated that there are no Federal or State programs which require mandatory water treatment.

**Response:** The Director disagrees with the commenter. See finding A.1.b.(2) for a discussion of this issue.

d. WVHC also commented that in its September 1, 1994, submission, WVDEP has added the phrase to reclaim the site "in accordance with the approved reclamation plan or modification thereof." WVHC commented that this could easily allow changes in reclamation plans after forfeiture to relieve the agency of any undesired

expense in land or water reclamation requirements without public notice or involvement. WVHC stated that the words "or modification thereof" are inappropriate and should be eliminated. WVHC pointed out that the State must be held responsible through the alternative bonding system for the same reclamation plan that it permitted and bonded. Doubts were also expressed on whether the State would make the proper distinction between significant and insignificant permit revisions.

**Response:** As discussed in finding B.9.d.(1), the Director is approving West Virginia's proposed amendment revising CSR § 38-2-12.4(c) to require that bond forfeiture sites be reclaimed in accordance with the approved reclamation plan or modifications thereof. The Director believes that regulatory authorities need to have the flexibility to modify reclamation plans for forfeiture sites since existing approved plans may be technically impossible to implement and may not satisfy the changing interests of surface landowners. This most often happens when forfeiture occurs before mining is completed. All modifications to the reclamation plan by the regulatory authority must be consistent with the approved State permanent program.

The remainder of the comment pertaining to public notice and involvement in reclamation plan modifications goes beyond the scope of this proposed change by West Virginia since the proposed revision merely acknowledges that modification of reclamation plans can occur. The amendment is silent as to public participation in the modification process.

4. **Comment: Subsection 12.4(d)**  
WVHC commented that this section also ends with the sentence that provides for limiting acid mine drainage treatment to the funds available. WVHC also stated that the words "in accordance with the approved reclamation plan" should be included, and the last sentence of subsection 12.4(d) should be deleted.

**Response:** Since subsection 12.4(c) provides that reclamation for bond forfeiture sites will be completed in accordance with the approved reclamation plan, West Virginia does not have to repeat this provision in paragraph (d).

5. **Comment: Subsection 12.4(e)** NCCL expressed concerns pertaining to the insertion of the language "or other responsible party" into this subsection. NCCL stated that "WVDEP proposes to amend the regulation to provide that the 'operator, permittee or other responsible party shall be liable for all costs in excess of the [bond] amount forfeited.'

The term 'other responsible party' is not defined. We believe that this undefined term is either redundant or intended by WVDEP to extend the scope of the surface mining laws to land owners and other persons that SMCRA was intended to protect."

NCCL stated that "the term 'operator' is defined in broad terms to include all persons who either should obtain a permit or who engage in surface mining and reclamation. This term thus includes all persons who might be liable for reclamation costs incurred by an operator, including those persons who might individually be liable for the violations of corporations. Accordingly, there is no need to create another category of 'other responsible persons.' We are concerned that in situations where a specific bond is insufficient to cover the cost of reclaiming a site, including potential long term treatment of acid mine drainage, WVDEP will decline to use the State Special Reclamation Fund to treat water and will instead try to impose these costs on landowners pursuant to revised subsection 12.4(e). Whatever its motivation, the WVDEP's actions are absolutely inconsistent with the goals of SMCRA."

NCCL further stated that "West Virginia has an alternative bonding system as provided in 30 CFR 800.11(e) funded by a mix of site-specific bond and 'bond pool' (i.e., the State Special Reclamation Fund) monies. Despite the bifurcated funding mechanism of this system, the full costs of reclamation are and must nonetheless be borne exclusively by the operators either through site-specific bonds or the special reclamation fund (which operators alone fund through a severance fee)." NCCL also commented that "the incentives to reclaim are absent or diminished when reclamation costs may be transferred from operators to other parties such as area landowners, which Congress intended to protect, nor hold liable for, surface mining operations. See 30 U.S.C. § 1202(b)."

NCCL also stated that "OSM has even recognized in promulgation of its expansive 'ownership and control' regulations that direct liability for reclamation costs and for compliance with SMCRA belongs solely to the operator or permittee." To support this statement, NCCL presented discussions from two Federal Register notices (54 FR 18438-43, April 28, 1989, and 53 FR 38868-85, October 3, 1988).

*Response:* As discussed in finding B.9.d.(3), the proposed requirement in CSR § 38-2-12.4(e) is not prohibited by SMCRA. Also, under the Federal Clean

Water Act, a permittee, operator and/or landowner can be held responsible for the treatment of point source discharges that do not meet NPDES effluent limitations after forfeiture.

*CSR § 38-2-12.5 Water Quality Enhancement*

*1. Comment subsection 12.5(d):* BCC commented that the proposal for supplementing and adjusting the special reclamation fund to pay for long-term acid mine drainage treatment from forfeiture sites goes far beyond any OSM counterpart.

WVMRA commented that "this policy sets a priority and inventory and makes some recommendations, but there is no legal guidance from OSM regarding what such a program should include. This makes evaluation of this policy impossible."

*Response:* As discussed in finding B.10.a., subsection 12.5 is being approved to the extent that it provides only for a ranking of sites for reclamation without compromising the requirement that all sites be properly reclaimed in a timely manner.

*2. Comment subsection 12.5(d):* WVHC stated that the alternative bonding system fund must be increased to address the liability rather than the liability being adjusted to match the funds available.

*Response:* As discussed in finding B.10.b., the Director is requiring the State to revise subsection 12.5(d) to remove the 25 percent limitation or to otherwise provide for the treatment of polluted water discharged from bond forfeiture sites.

*Retroactive Approval of Amendment*

*Comment:* The WVCA and the WVMRA objected to the proposed provision at 30 CFR 948.15(o)(1) which would make OSM's approval of the State's program amendment retroactive. WVMRA commented that OSM had no authority to retroactively approve the amendment.

*Response:* As discussed in the Director's Decision (Subsection V), the Director believes he has ample cause and legal basis for making his decision on this amendment retroactive to the dates when the proposed revisions were submitted to OSM.

*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 amendments, 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 conditional concurrence does not pertain to the bonding requirements, which are the subject of this rulemaking. Therefore, EPA's concurrence will be discussed in the third and final rulemaking on the proposed amendment.

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). In its letter dated October 17, 1994 (Administrative Record No. WV-949), EPA submitted the following comments on the proposed amendment provisions pertaining to the bonding requirements.

*1. Comment:* EPA commented that "the matrices on Tables 1 and 4 [CSR § 38-2-11.6, Site-Specific Bonding] provide a method for determining reclamation bonds with a maximum of \$5,000 per acre. It is noted that the maximum portions which can be attributed for water quality concerns are based on overburden/ material analyses and are only \$400 for surface mines and \$800 for refuse disposal sites. It is also understood that, under current State regulations, a maximum of only 25 percent of the Special Reclamation Fund, or bond pool, can be used for treatment of forfeiture sites. Considering the experience to date for long-term treatment of acid discharges from bond forfeiture sites, the above funding sources are very inadequate. It is apparent that the answer for preventing

future acid mine drainage is to scrutinize proposed mining permits for their acid drainage potentials and deny permits to those with higher potentials. For proposed mines with lower acid drainage potentials, funding from the site-specific bonds, Special Reclamation Fund or other alternative sources should be increased to amounts to provide for the contingency of long-term treatment."

**Response:** As discussed in finding A.1.b.(2), the Director is requiring West Virginia to amend its program to provide for the treatment of polluted water discharging from all bond forfeiture sites.

Also, as discussed in finding A.1.b.(4)(c), the Director disapproved the proposal that would allow the special reclamation fund to incur a deficit. Furthermore, as discussed in finding C., the Director found the State's alternative bonding system is not achieving the objectives and purposes of the conventional bonding program as set forth in section 509 SMCRA, and he is requiring the State to eliminate the deficit in the State's alternative bonding system and to ensure that sufficient money will be available to complete reclamation, including treatment of polluted water, at existing and future bond forfeiture sites.

**2. Comment:** EPA also expressed concern about the potential for acid seepage from backfills after Phase I bond is released pursuant to the provisions of section 12.2(c)(1), where 60 percent of the total bond may be released. EPA recommended that "Phase I bond release for mines with acid potential be delayed for a year or sufficient period after backfilling to determine if acid seepage will occur." EPA further recommended withholding of the entire bond if acid seepage did occur after this period.

**Response:** The Director finds that EPA's recommendations have merit. However, nothing in SMCRA or the Federal regulations require Phase I bond release to be delayed in order to determine if acid seepage will occur. It should be noted that compliance with the State's existing toxic handling and hydrologic reclamation plan requirements should prevent postmining acid seeps from occurring. Further, subsection 14.7(d) provides that after treatment facilities are removed, a one-year history of meeting applicable effluent limitations is required to establish that the hydrologic balance is being preserved.

#### *State Historical Preservation Officer and the Advisory Council on Historic Preservation (AChP)*

Pursuant to 30 CFR 732.17(h)(4), OSM solicited comments on the proposed amendment from the West Virginia Division of Culture and History and the AChP on four different occasions (Administrative Record Nos. WV-891, WV-897, WV-936, and WV-942). Neither agency commented on the proposed amendment.

#### V. Director's Decision

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

As discussed in findings A.1.b.(1) and B.10.a., the Director is approving those portions of § 22-3-11(g) of WVSCMRA and CSR § 39-2-12.5 that concern prioritization of forfeited sites only to the extent that these provisions authorize the ranking and prioritization of bond forfeiture sites for reclamation purposes. Nothing in this decision shall be construed as compromising the requirement that all bond forfeiture sites be properly reclaimed in a timely manner.

In addition, as discussed in findings A.1.b.(2), A.1.b.(4)(c), and B.10.b., the Director is not approving § 22-3-11(g) of WVSCMRA and CSR § 39-2-12.5(d) to the extent that they limit expenditures on water treatment at bond forfeiture sites to 25 percent of the assets of the special reclamation fund and authorize collection of the special reclamation tax only when the fund's liabilities exceed its assets.

As discussed in finding A.1.b.(3), the Director is approving § 22-3-11(g) of WVSCMRA concerning administrative expenses only to the extent that the special reclamation fund can withstand all authorized administrative cost withdrawals without hampering the State's ability to complete the reclamation of bond forfeiture sites in a timely manner and in accordance with their approved reclamation plans.

As discussed in finding B.5., the Director is approving CSR § 38-2-11.6 with the stipulation that nothing in these regulations or this approval may

be construed as altering or authorizing a variance or deviation from the permitting requirements and performance standards of the approved West Virginia program.

The Director is amending 30 CFR Part 948 to codify this decision. Under 30 CFR 732.17(g), no changes in State laws or regulations may take effect for purposes of the State program unless and until they are approved as a program amendment. With respect to those changes in State laws and regulations approved in this document, the Director is making the effective date of his approval retroactive to the date upon which they took effect in West Virginia for purposes of State law. He is taking this action in recognition of the extraordinarily complex nature of the review and approval process for this particular amendment, the significance of its provisions to the adequacy of the alternative bonding system, and the need to affirm the validity of State actions taken during the interval between State implementation and the decision being announced today. Retroactive approval of these provisions is in keeping with the purposes of SMCRA relating to State primary and environmental protection.

To assure consistency with 30 CFR 732.17(g), which states that "[no] \* \* \* change to laws or regulations shall take effect for purposes of a State program until approved as an amendment," the Director's approval of the revisions, as noted in the codification below, includes West Virginia's previous and ongoing implementation of these revisions. The changes approved in this rulemaking strengthen the West Virginia program and, as such, are consistent with SMCRA and the Federal regulations at 30 CFR 732.17(g).

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

been enforcing there can be no claim of detrimental reliance on any contrary West Virginia statutes or regulations in this instance.

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

Furthermore, "good cause" exists both under section 553(b)(3)(B) of the APA, 5 U.S.C. § 553(b)(3)(B), for retroactive approval (if notice were not sufficient) and under section 553(d)(3) of the APA, 5 U.S.C. § 553(d)(3), for not delaying the effective date of the approval for 30 days after the publication of this Federal Register decision document. As noted in the findings above, most of these bonding revisions are needed to improve the efficacy and financial status of West Virginia's bonding program in general, and its alternative bonding system in particular. *See, for example,* findings A.1.a. (penal bonding), A.1.b.(4)(a) (increase in the special reclamation tax), and B.5 (site-specific bonding). Failure to make OSM approval of these salutary provisions retroactive could cause significant disruption to the orderly enforcement and administration by West Virginia of its bonding program, particularly if the funding of the alternative bond system was affected. The Director believes that the desire to avoid such unfortunate consequences, coupled with the lack of any prejudice to the public or to the regulated community, are sufficient bases to constitute "good cause."

#### *Effect of Director's Decision*

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State submits and obtains the Secretary's approval of a regulatory program. Similarly, 30 CFR 732.17(a) requires that the State submit any alteration of an approved State program to OSM for review as a program amendment. Thus, any changes to the

State program are not enforceable until approved by OSM. The Federal regulations at 30 CFR 732.17(g) prohibit any unilateral changes to approved State programs. In oversight of the West Virginia program, the Director will recognize only the statutes, regulations and other materials approved by OSM, together with any consistent implementing policies, directives and other materials, and will require the enforcement by West Virginia of only such provisions. The provisions that the Director is approving today will take effect on the specified dates for purposes of the West Virginia program.

#### VI. Procedural Determinations

##### *Executive Order 12866*

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

##### *Executive Order 12778*

The Department of the Interior has conducted the reviews required by section 2 of Executive Order 12778 (Civil Justice Reform) and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 504 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.

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

Intergovernmental relations, Surface mining, Underground mining.

Dated: September 27, 1995.

Allen D. Klein,

*Regional Director, Appalachian Regional Coordinating Center.*

For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations is amended as set forth below:

#### **PART 948—WEST VIRGINIA**

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

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

2. Section 948.15 is amended by adding paragraph (o) to read:

##### **§ 948.15 Approval of regulatory program amendments.**

\* \* \* \* \*

(o)(1) *General description and effective dates.* Except as noted in paragraph (o)(3) of this section, the amendment submitted by West Virginia to OSM by letter dated June 28, 1993, as revised by submittals dated July 30, 1993; August 18, 1994; September 1, 1994; and May 16, 1995, is approved to the extent set forth in paragraph (o)(2) of this section. These portions of the amendment pertain to bonding requirements; the Director will announce a decision on the other provisions of the amendment at a later time. The effective dates of the Director's approval of the provisions identified in paragraph (o)(2) of this section are set forth below:

(i) March 10, 1990, for the statutory changes submitted to OSM by letter

dated June 28, 1993 (Administrative Record No. WV-888);

(ii) December 1, 1992, for the rule changes submitted to OSM by letter dated June 28, 1993 (Administrative Record No. WV-889);

(iii) May 2, 1993, for the rule changes submitted to OSM by letter dated July 30, 1993 (Administrative Record No. WV-893);

(iv) June 11, 1994, for the statutory changes submitted to OSM by letter dated August 18, 1994 (Administrative Record No. WV-933); and

(v) October 4, 1995, for the rule changes submitted to OSM by letters dated September 1, 1994, and May 16, 1995 (Administrative Record Nos. WV-937 and WV 979B).

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

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

§ 22-3-11(a) Bond Requirements.

§ 22-3-11(g) Special Reclamation Fund.

*(The provision authorizing annual diversions of up to 10 percent of the fund's assets for administrative costs associated with various State regulatory and reclamation programs is approved only to the extent that these withdrawals do not hamper the State's ability to complete the reclamation of bond forfeiture sites in a timely manner in accordance with the approved reclamation plans.)*

§ 22-3-12 ... Site-Specific Bonding.

(ii) *Revisions to the West Virginia Code of State Regulations (CSR).*

§ 38-2-11.2 General Requirements for All Bonds.

§ 38-2-11.3 Collateral Bonds.

§ 38-2-11.4 Incremental Bonding.

§ 38-2-11.5 Open-Acre Limit Bonding.

§ 38-2-11.6 Site-Specific Bonding.

*(These regulations are approved with the stipulation that nothing in CSR § 38-2-11.6 or the Director's approval of this subsection may be construed as altering or authorizing a variance or deviation from the permitting requirements and performance standards of the approved West Virginia program.)*

§ 38-2-11.7 .... Environmental Security Account.

§ 38-2-12.2 .... Requirement to Release Bonds.

§ 38-2-12.3 .... Bond Adjustments.

§ 38-2-12.4(a) Bond Forfeiture.

§ 38-2-12.4(b) Bond Forfeiture.

§ 38-2-12.4(c) Bond Forfeiture.

§ 38-2-12.4(d) Bond Forfeiture.

§ 38-2-12.5 .... Water Quality Enhancement.

*(These regulations are approved with the stipulation that nothing in CSR § 38-2-12.5 or the Director's approval of this subsection may be construed as compromising the program requirement that all bond forfeiture sites be fully reclaimed in a timely manner.)*

(3) *Exceptions.*

(i) Section 22-3-11(g) of the Code of West Virginia is not approved to the extent that it limits special reclamation fund expenditures on water treatment at bond forfeiture sites to 25 percent of the fund's annual fee collections and authorizes collection of the special reclamation tax only when the fund's liabilities exceed its assets.

(ii) Subsection 38-2-12.5(d) of the West Virginia Code of State Regulations is not approved to the extent that it limits expenditures on water treatment at bond forfeiture sites to 25 percent of the special reclamation fund's gross annual revenue.

3. Section 948.16 is revised by removing and reserving paragraph (ww) and by adding paragraphs (jjj), (kkk), and (lll) to read:

**§ 948.16 Required regulatory program amendments.**

\* \* \* \* \*

(jjj) By December 1, 1995, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to revise § 22-3-11(g) of the Code of West Virginia and § 38-2-12.5(d) of the West Virginia Code of State Regulations to remove the limitation on the expenditure of funds for water treatment or to otherwise provide for the treatment of polluted water discharged from all bond forfeiture sites.

(kkk) By December 1, 1995, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to remove the provision of § 22-3-11(g) of the Code of West Virginia that allows collection of the special reclamation tax only when the special reclamation fund's liabilities exceed its assets.

(lll) By December 1, 1995, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to eliminate the deficit in the State's alternative bonding system and to ensure that sufficient money will be available to complete reclamation, including the treatment of polluted water, at all existing and future bond forfeiture sites.

[FR Doc. 95-24580 Filed 10-3-95; 8:45 am]

BILLING CODE 4310-05-M

**DEPARTMENT OF DEFENSE**

**Department of the Army**

**32 CFR Part 505**

**Privacy Program**

**AGENCY:** Department of the Army, DOD.  
**ACTION:** Final rule.

**SUMMARY:** The Department of the Army system of records notice A0381-45cDAMI was deleted October 4, 1995. Therefore, the exemption rule is being deleted with this action.

In addition, the Army is amending three existing exemption rules to reflect the exemptions taken in the system of records notices. The amendments to the existing rules change the system identifiers and provide the provisions of 5 U.S.C. 552a from which the system of records may be exempt, and the reasons therefore. The system identifiers are A0381-20bDAMI, entitled Counterintelligence Operations Files; A0614-115DAMI, entitled Department of the Army Operational Support Activities; and A0318-100aDAMI, entitled Intelligence Collection Files.

**EFFECTIVE DATE:** October 4, 1995.

**FOR FURTHER INFORMATION CONTACT:** Ms. Pat Turner at (602) 538-6856 or DSN 879-6856.

**SUPPLEMENTARY INFORMATION:**

Executive Order 12866

The Director, Administration and Management, Office of the Secretary of Defense has determined that this proposed Privacy Act rule for the Department of Defense does not constitute 'significant regulatory action'. Analysis of the rule indicates that it does not have an annual effect on the economy of \$100 million or more; does not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; does not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; does not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866 (1993).

**Regulatory Flexibility Act of 1980**

The Director, Administration and Management, Office of the Secretary of Defense certifies that this Privacy Act rule for the Department of Defense does not have significant economic impact on a substantial number of small entities because it is concerned only with the administration of Privacy Act systems of records within the Department of Defense.