

**DEPARTMENT OF THE INTERIOR****Office of Surface Mining Reclamation and Enforcement****30 CFR Part 948****[WV-088-FOR]****West Virginia Regulatory Program****AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSM), Interior.**ACTION:** Proposed rule; public comment period and opportunity for public hearing.

**SUMMARY:** OSM is announcing receipt of a proposed amendment to the West Virginia regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The program amendment consists of a written response to the required program amendments codified in the Federal regulations. The amendment is intended to render the West Virginia program no less effective than the Federal requirements.

**DATES:** If you submit written comments, they must be received on or before 4:00 p.m. (local time), on February 2, 2001. If requested, a public hearing on the proposed amendments will be held at 1:00 p.m. (local time), on January 29, 2001. Requests to speak at the hearing must be received by 4:00 p.m. (local time), on January 18, 2001.

**ADDRESSES:** Mail or hand-deliver your written comments and requests to speak at the hearing to Mr. Roger W. Calhoun, Director, Charleston Field Office at the address listed below.

You may review copies of the West Virginia program, the proposed amendment, a listing of any scheduled hearings, and all written comments received in response to this document at the addresses below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the proposed amendment by contacting OSM's Charleston Field Office.

Mr. Roger W. Calhoun, Director, Charleston Field Office, Office of Surface Mining Reclamation and Enforcement, 1027 Virginia Street, East, Charleston, West Virginia 25301. Telephone: (304) 347-7158. E-mail: [chfo@osmre.gov](mailto:chfo@osmre.gov).

West Virginia Division of Environmental Protection, 10 McJunkin Road, Nitro, West Virginia 25143. Telephone: (304) 759-0515. The proposed amendment will be posted at the Division's Internet page: <http://www.dep.state.wv.us>.

In addition, you may review copies of the proposed amendment during regular business hours at the following locations:

Office of Surface Mining Reclamation and Enforcement, Morgantown Area Office, 75 High Street, Room 229, P.O. Box 886, Morgantown, West Virginia 26507, Telephone: (304) 291-4004.

Office of Surface Mining Reclamation and Enforcement, Beckley Area Office, 323 Harper Park Drive, Suite 3, Beckley, West Virginia 25801, Telephone: (304) 255-5265.

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

**SUPPLEMENTARY INFORMATION:****I. Background on the West Virginia Program**

On January 21, 1981, the Secretary of the Interior conditionally approved the West Virginia program. You can find background information on the West Virginia program, including the Secretary's findings, the disposition of comments, and the conditions of approval in the January 21, 1981, **Federal Register** (46 FR 5915-5956). You can find later actions concerning the conditions of approval and program amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

**II. Discussion of the Proposed Amendment**

By letter dated November 30, 2000 (Administrative Record Number WV-1189), the WVDEP submitted an amendment to its program. The amendment consists of the State's written response to several required regulatory program amendments codified in the Federal regulations at 30 CFR 948.16.

In its letter to OSM, the West Virginia Division of Environmental Protection (WVDEP) stated that the amendment submittal is a revision of the WVDEP's previous letter to OSM dated August 3, 2000, concerning the required amendments codified at 30 CFR 948.16 (Administrative Record Number 1172). The August 3, 2000, letter contains several attachments that are relevant to the November submittal. The WVDEP stated in its November 30, 2000, letter that the required program amendments codified at 30 CFR 948.16(jjj), (kkk), and (lll) will be addressed separately. The State's amendment also does not address the required program amendments that we added to the West Virginia program in a final rule notice published in the **Federal Register** on

August 18, 2000 (65 FR 50409, 50430-50431).

We note that the State's responses to required amendments codified at 30 CFR 948.16(xx), (qqq), (ffff), (gggg), (hhhh), (jjjj), (nnnn), and (pppp) indicate that the WVDEP has submitted draft proposed language to the State legislature for consideration for rulemaking during its 2001 session. The WVDEP intends that the draft proposed language would satisfy the specific required program amendments identified above. If and when the State legislature approves new rules that are intended to satisfy the required program amendments identified above, and those rules are submitted to OSM for review and approval, we will announce the proposed rules in a future proposed rule notice published in the **Federal Register**. At that time we will invite public comment on whether those rules satisfy the relevant program amendments codified at 30 CFR 948.16. In addition, in the August 18, 2000, **Federal Register**, we found that the State had satisfied the required amendments codified at 30 CFR 948.16(www) and (xxx), and, therefore, we removed them.

Presented below, you will find West Virginia's response to the required program amendments codified at 30 CFR 948.16(a), (dd), (ee), (oo), (tt), (mmm), (nnn), (ooo), (sss), (vvv)(1), (2), (3), and (4), (zzz), (aaaa), (bbbb), (iiii), (kkkk), (llll), (mmmm) and (oooo).

**30 CFR 948.16(a):** By November 26, 1985, West Virginia must submit copies of proposed regulations or otherwise propose to amend its program to provide that all surface blasting operations (including those using less than five pounds and those involving surface activities at underground mining operations) shall be conducted under the direction of a certified blaster.

**State response:**

This required program amendment should be removed. Current language in 6.1 of the rules states "a blaster certified by the Division of Environmental Protection shall be responsible for all blasting operations \* \* \*". A letter dated August 30, 1994 from James Blankenship (OSM) to David C. Callaghan (WVDEP Director) stated "required amendment 30 CFR 948.16(a) will be removed because the state has removed the offending language". (Federal counterpart 816.61(c))

The Administrative Record Number of the August 30, 1994, letter referred to above is WV-934, and is available at the locations listed under **ADDRESSES**, above.

**30 CFR 948.16(dd):** By April 30, 1991, West Virginia shall submit proposed revisions to Subsection 38-2-9.3 of its

surface mining reclamation regulations or otherwise propose to amend its program to establish productivity success standards for grazing land, pasture land and cropland; require use of the 90 percent statistical confidence interval with a one-sided test using a 0.10 alpha error in data analysis and in the design of sampling techniques; and require that revegetation success be judged on the basis of the vegetation's effectiveness for the postmining land use and in meeting the general revegetation and reclamation plan requirements of Subsections 9.1 and 9.2. Furthermore, by that date, West Virginia shall submit for OSM approval its selected productivity and revegetation sampling techniques to be used when evaluating the success of ground cover, stocking or production as required by 30 CFR 816.116 and 817.116.

*State response:*

This required program amendment should be removed. The language of 9.3.d. of the state rules provides that, "Not less than two (2) years following the last date of augmented seeding, \* \* \* the Director shall use a statistically valid sampling technique with a ninety (90) percent statistical confidence interval from the handbook". Additionally, Chapter 20 in the WVDEP Technical Handbook (copy attached) describes the "Modified Rennie Farmer Method" which contains the sampling procedures and evaluative technique developed for West Virginia to determine revegetation success standards with a 90% statistical confidence.

The productivity for grazing land, pastureland, and cropland can be based upon the productivity determinations for similar soil classifications of a particular geographic area as determined by the NRCS. Based upon such information, WVDEP by practice will develop a method to identify and measure the productivity rates for mine sites that are to have postmining land uses of grazing, pasture, or crop.

The information provided by the State (Chapter 20 of the WVDEP Technical Handbook, and a copy of a revegetation success outreach initiative) is available for review at the locations listed under **ADDRESSES**, above.

*30 CFR 948.16(ee):* By April 30, 1991, West Virginia shall submit documentation that the U.S. Soil Conservation Service (SCS), now the NRCS, has been consulted with respect to the nature and extent of the prime farmland reconnaissance inspection required under Subsection 38-2-10.1 of the State's surface mining reclamation regulations. In addition, the State shall either delete paragraphs (a)(2) and (a)(3) of Subsection 38-2-10.2 or submit documentation that the SCS State Conservationist concurs with the negative determination criteria set forth in these paragraphs.

*State response:*

This required program amendment should be removed since each permit application contains a soil survey in accordance with the standards of the National Cooperative Survey. The procedure for consulting the National Soil Survey Center (NSSC) formerly USSCS, is described in Section 34 of the Permitting Handbook (copy attached). Since 1983, West Virginia has had an agreement with SCS, now NRCS, to contact them on a case by case basis since prime farmland as defined by the NRCS rarely exists in the major mining counties. In addition, the West Virginia Soil Conservation Districts are notified as part of the "affected agencies notification" process. (Federal counterpart 716.7(c)). This notification would afford NRCS the opportunity to do an investigation and provide comment (if appropriate) relative to a prime farmland determination.

In regards to deleting 10.2.a.3., the SCS at that time published the final rule pertaining to "Prime and Unique Farmlands" in the January 31, 1978 **Federal Register**, Volume 43, No. 21. In that rule, it states that "the soils are not flooded frequently during the growing season (less than once in 2 years)" and "less than 10 percent of the surface layer (upper) 6 inches) in these consists of rock fragments coarser than 3 inches (7.6 cm) in diameter. Therefore, 10.2.a.3. is consistent with the definition of Prime Farmland since it excludes frequently flooded soils and/or very rocky surfaces and is similar to its federal counterpart at 716.7(d)(2).

When the SCS listed the prime farmland soil mapping units for West Virginia, none of the units had a slope range that exceeded 10 percent. Therefore, if the slope of all land within the permit is 10 percent or greater, it does not contain any prime farmland soil mapping. The language in 10.2.a.3. is similar to its federal counterpart at 716.7(d)(3). As a general matter, the NRCS maps are used in making a vegetative determination based upon available information and site reconnaissance, and if there is a soil series (type) or other information which indicates the area could potentially be classified as prime farmland, then the NRCS is contacted for a definitive decision. WVDEP will within 90 days propose a consultation process with NRCS when the slope range for an application is less than 10%.

The information the State referred to above (Section 34 of the WVDEP Permitting Handbook) is available for review at the locations listed under **ADDRESSES**, above.

*30 CFR 948.16(oo):* By June 1, 1992, West Virginia shall submit proposed revisions to subsection 38-2-5.4(b)(8) of its surface mining reclamation regulations to require that excavated sediment control structures which are at ground level and which have an open exit channel constructed of non-erodible material be designed to pass the peak discharge of a 25-year, 24-hour precipitation event.

*State response:*

This required program amendment should be removed. In a letter dated August 30, 1994

from James Blankenship (Charleston Field Office Director of OSM) to David C. Callaghan (Director of WVDEP), it is stated that, "OSM to approve state proposal as a state exemption" (copy attached). This is similar to a provision of the Illinois approved program. A reason for providing an exemption is that since the terrain dictates to some degree the location and size of sediment control ditches and these structures (sediment ditches) are normally on bench and small in size, if the OSM referenced 25-year, 24-hour design requirement applied to on bench sediment control ditches, the spillway would be larger than the sediment pond, thus providing no retention time to provide for settling of sediment. The WVDEP's design requirement of a ten-year 24-hour storm event is as effective as the federal program. Additionally OSM recognized in the August 30, 1994 letter that "these types of structures by their very nature are not subject to catastrophic failure or excessive erosion. The design criteria are established to address these potentials and are of no significance for these structures \* \* \*" In addition, sediment control ditches are generally behind other sediment structures which are designed to pass a 25-year, 24-hour storm event.

The Administrative Record Number of the August 30, 1994, letter referred to above is WV-934, and is available at the locations listed under **ADDRESSES**, above.

*30 CFR 948.16(tt):* By June 1, 1992, West Virginia shall submit proposed revisions to subsections 38-2-5.4(b)(1) and 5.4(d)(1) to require that all structures be certified as having been built in accordance with the detailed designs submitted and approved pursuant to subsection 3.6(h)(4), and to require that as-built plans be reviewed and approved by the regulatory authority as permit revisions.

*State response:*

This required program amendment should be removed. The WVDEP has developed a procedure for review of as-built certifications. (This procedure is included in the WVDEP Inspection and Enforcement Handbook—copy attached.) For structures with minor design changes, the inspector will submit as-built plans in accordance with 5.4.b. Minor changes are those within the construction tolerances described in 3.35 of the rules. For structures with major design changes, a permit revision in accordance with 3.28.c of the rules is required to be submitted and approved prior to certification. The "as built" certifications are after review incorporated as part of the permit and the "as built" drawings become the design for the structure. A 1988 OSM directive (copy attached) describes the federal policy and procedures for processing construction certifications when they indicate that a structure has been constructed differently from the approved design and this OSM directive treats "as built" certifications in a manner similar to the WV program.

The information submitted by the State (the WVDEP Inspection and

Enforcement Handbook—section on Drainage System Certifications, and the 1988 OSM directive on Construction Certification of Siltation Structures (TSR-9)) is available at the locations listed under **ADDRESSES**, above. TSR-9 is also available via the Internet at: <http://www.osmre.gov/>.

**30 CFR 948.16(mmm)**: By August 1, 1996, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to revise § 22-3-13(e) to limit the authorization for a variance from approximate original contour to industrial, commercial, residential, or public alternative postmining land use, in accordance with section 515(e)(2) of SMCRA.

*State response:*

This required program amendment is being addressed in a code change submitted to the OSM on March 17, 2000. A copy of the change to WV Code 22-3-13(e) is attached and pending OSM action. Additionally, a policy was implemented which requires a market need analysis as set forth in the federal regulations. The policy will operate until such time as OSM approves the program amendment.

A copy of the change to WV Code 22-3-13, and the policy referred to above are available at the locations listed under **ADDRESSES**, above. We note that the State's response above is not correct, in that the change submitted to OSM on March 17, 2000, was to WV Code 22-3-13(c)(3) concerning mountaintop removal mining, and not to WV Code 22-3-13(e) concerning steep slope mining operations. See the August 18, 2000, **Federal Register** (65 FR 50409, 50410) for our findings concerning WV Code 22-3-13(c)(3).

**30 CFR 948.16(nnn)**: By September 14, 1998, 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 Section 22B-1-7(d) to remove unjust hardship as a criterion to support the granting of temporary relief from an order or other decision issued under Chapter 22, Article 3 of the West Virginia Code.

*State response:*

This required program amendment should be removed. Since 22B-1-7(d) applies to administrative, environmental boards created for appeals other than SMCRA purposes, requiring deletion of the provision to such boards is beyond OSM jurisdiction. WVDEP in stay hearings before the Surface Mine Board has informed the Board that unjust hardship is an invalid basis to grant temporary relief for SMCRA purposes. The Surface Mine Board can, under 22B-1-3(b)(6)(c), establish procedural rules for temporary relief which in the position of

WVDEP should be the same as those that the director must apply in considering a request for temporary relief. (See WVC 22-3-17(f)). However, WVDEP does acknowledge that 22B-1-7(d) should be revised to delete unjust hardship as a criterion to support the granting of temporary relief from an order or other decision issued under Chapter 22, Article 3 of the West Virginia Code.

**30 CFR 948.16(ooo)**: By September 14, 1998, 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 Section 22B-1-7(h) by removing reference to Article 3, Chapter 22.

*State response:*

This required program amendment should be removed. The appeals heard by the Environmental Quality Board referenced in WV Code 22B-11-7(h) are not SMCRA issues but are related to the West Virginia Water Pollution and Control Act at WV Code 22-11-1 et seq. Therefore, this does not fall under OSM jurisdiction. WVDEP does acknowledge that the reference in WV Code 22B-1-7(h) to "22-3-1 et seq." is inappropriate and should be removed by the Legislature.

**30 CFR 948.16(sss)**: By August 1, 1996, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to revise CSR § 38-2-14.5(h) and § 22-3-24(b) to clarify that the replacement of water supply can only be waived under the conditions set forth in the definition of "Replacement of water supply," paragraph (b), at 30 CFR 701.5.

*State response:*

This required program amendment should be removed. The provisions of 30 CFR 701.5(b) for replacement of water supply states "If the affected water supply was not needed for the use in existence at the time of loss, contamination, or diminution, and if the supply is not needed to achieve the postmining land use, replacement requirements may be satisfied by demonstrating that a suitable alternative water source is available and could be developed." The requirement to identify an alternative source of water if it is likely the proposed mining operation may impact the quantity or quality of a significant aquifer is already a requirement for the PHC under 3.22.b.4. and 3.22.c.4. and in the hydrologic reclamation plan (3.22.f.5.). Therefore, this information is required regardless of whether a waiver was requested when a significant aquifer is likely to be contaminated or otherwise impacted. The repair or replacement requirement for water supplies impacted by mining is contained in WV Code 22-3-24.

**30 CFR 948.16(vvv)(1)**: Amend the West Virginia program to be consistent with 30 CFR 701.11(e)(2) by clarifying that the exemption at CSR 38-2-3.8(c)

does not apply to (1) the requirements for new and existing coal mine waste disposal facilities; and (2) the requirements to restore the land to approximate original contour.

*State response:*

This required program amendment should be removed. The state regulation in 3.8.c. was amended to not apply to new and existing coal waste facilities and was submitted to the Office of Surface Mining on March 17, 2000 as a program amendment. A copy of the revised 3.8.c. is attached and is pending OSM action. The state saw no need to add language about approximate original contour to regulation at 3.8(c) since the WV Surface Coal Mining and Reclamation Act performance standard at 22-3-13(b)(3) is clear about the requirement to restore the approximate original contour with respect to surface mines.

A copy of the change to CSR 38-2-3.8.c. is available at the locations listed under **ADDRESSES**, above. See the August 18, 2000, **Federal Register** (65 FR 50409, 50413) for our final rule notice approving the State's change which clarifies that the exemption at CSR 38-2-3.8.c. does not apply to new and existing coal waste facilities. We amended 30 CFR 948.16(vvv)(1) by deleting the requirement to clarify that the exemption at CSR 38-2-3.8(c) does not apply to the requirements for new and existing coal mine waste disposal facilities. However, we are continuing to require at 30 CFR 948.16(vvv)(1) that the State clarify that the exemption at CSR 38-2-3.8(c) does not apply to the requirement to restore the land to approximate original contour.

**30 CFR 948.16(vvv)(2)**: Amend CSR 38-2-4.12 to reinstate the following deleted language: "and submitted for approval to the Director as a permit revision."

*State response:*

This required program amendment should be removed. The WVDEP has a procedure for review of as-built certifications. (This procedure is included in the Inspection and Enforcement Handbook under Drainage System Certifications.) For structures with minor design changes, the operator is to submit as-built plans in accordance with 5.4.b.1. Minor changes are those within the construction tolerances described in 3.35 of the rules. The "as built" certifications are after review incorporated as part of the permit and the "as built" drawings become the design for the structure. For structures with major design changes, a permit revision in accordance with 3.28.c of the rules is required to be submitted and approved as part of the permit prior to certification. In addition, the WVDEP approach appears to be consistent with the OSM position expressed in the OSM directive (copy attached).

The information submitted by the State (the WVDEP Inspection and Enforcement Handbook—section on

Drainage System Certifications, and the 1988 OSM directive on Construction Certification of Siltation Structures (TSR-9) are available at the locations listed under **ADDRESSES**, above. TSR-9 is also available via the Internet at: [www.osmre.gov/](http://www.osmre.gov/).

*30 CFR 948.16(vvv)(3)*: Amend the West Virginia program by clarifying that the requirements at CSR 38-2-5.4(c) also apply to slurry impoundments.

*State response:*

This required program amendment should be removed. The state program does clarify that 5.4 applies to slurry impoundments. In 22.4.c., small impoundments, it states "coal refuse sites which results in impoundments which are not subject to the Dam Control Act or the Federal Mine Health and Safety Act shall be designed, constructed, and maintained subject to the requirements of this subsection and 5.4 and 22.5.j.6." This requirement is similar to and as effective as that which appears at 816/817.49 (a)(2) and (a)(9).

*30 CFR 948.15(vvv)(4)*: Amend CSR 38-2-14.15(m), or otherwise amend the West Virginia program to require compliance with 30 CFR 816/817.81 (b), (d), and (e) regarding coal refuse disposal, foundation investigations and emergency procedures and to clarify that where the coal processing waste proposed to be placed in the backfill contains acid- or toxic-producing materials, such material must not be buried or stored in proximity to any drainage course such as springs and seeps, must be protected from groundwater by the appropriate use of rock drains under the backfill and along the highwall, and be protected from water infiltration into the backfill by the use of appropriate methods such as diversion drains for surface runoff or encapsulation with clay or other material of low permeability.

*State response:*

This required program amendment should be removed. The refuse placed pursuant to 14.15(m) is placed into the mine workings or excavation areas. This placement in accordance with the backfilling and grading, stability and toxic material handling plans is consistent with the provisions of 30 CFR 816/817.81.

*30 CFR 948.16(zzz)*: By April 12, 1999, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to revise 38-2-3.12.a.1., or otherwise amend the West Virginia program to require that the map of all lands, structures, and drinking, domestic and residential water supplies which may be materially damaged by subsidence show the type and location of all such lands, structures, and drinking, domestic and

residential water supplies within the permit and adjacent areas, and to require that the permit application include a narrative indicating whether subsidence, if it occurred, could cause material damage to or diminish the value or reasonably foreseeable use of such structures or renewable resource lands or could contaminate, diminish, or interrupt drinking, or residential water supplies.

*State response:*

This required program amendment should be removed. It is the WVDEP's position that 3.12.a.1. is as effective as 784.20.a. (1) and (2). The wording of 3.12.a.1. requires that the applicant make a finding on whether or not subsidence could cause material damage or diminution of value or use of structures or renewable resource lands; or could contaminate, diminish or interrupt water supplies. Consequently, the applicant must submit supporting documentation that subsidence will or will not cause material damage or diminish, contaminate or interrupt water supplies."

The WVDEP contends that the phrase "adjacent areas within an angle of draw of at least 30°" is as effective as "adjacent areas". In 30 CFR 701.5, adjacent area is defined as "the area outside the permit area where a resource or resources, determined according to the context in which adjacent area is used, are or reasonably could be expected to be adversely impacted by the proposed mining operations, including probable impacts from underground workings." Therefore, adjacent area for subsidence is the area where it can reasonably be expected that adverse impacts related to subsidence could be caused by the proposed underground working. This fits in with the language of 12.a.1. that provides, "adjacent areas within an angle of draw of at least 30°". Provided, however, an angle of draw other than 30° can be used \* \* \*. Historic data and publications have demonstrated that one can reasonably expect impacts from subsidence within an angle of draw of at least 30°. However, based upon geological factors, the mining plan and historic information of the area, the impact area related to subsidence can be expanded and this is done in the form of a correction sent to the applicant by WVDEP.

In addition, to assess the potential impacts to ground and surface water resources, the WVDEP requires an applicant to conduct a ground water and surface water inventory which includes all areas within 1/2 mile of the proposed operation, including the underground mine limits. (See instructions for completing the application, Section J, copy attached.) If a surface or ground water resource could be impacted, it is identified in the Cumulative Hydrologic Impact Assessment, it is monitored and a plan developed as part of the permit which includes not only measures to protect such water resource, but a contingency plan is required to describe what steps are to be taken if it is impacted.

The information submitted by the State (instructions for completing the application, Section J) is available at the

locations listed under **ADDRESSES**, above.

*30 CFR 948.16(aaaa)*: By April 12, 1999, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to revise CSR 38-2-3.12.a.2., or otherwise amend the West Virginia program to require that the water supply survey required by CSR 38-2-3.12.a.2. include all drinking, domestic, and residential water supplies within the permit area and adjacent area, without limitation by an angle of draw, that could be contaminated, diminished, or interrupted by subsidence.

*State response:*

The state contends that 38-2-3.12.a.2. is as effective as 30 CFR 784.20(a)(3) for among other things, the reasons specified in (zzz) above.

*30 CFR 948.16(bbbb)*: By April 12, 1999, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to revise 38-2-3.12.a.2., or otherwise amend the West Virginia program to require that the permit applicant pay for any technical assessment or engineering evaluation used to determine the premining condition or value or non-commercial buildings or occupied residential dwellings or structures related thereto and the quality of drinking, domestic or residential water supplies, and to require that the applicant provide copies of any technical assessment or engineering evaluation to the property owner and to the regulatory authority.

*State response:*

The rules at 3.12. are clear that the pre-subsidence survey is the responsibility of the applicant and that the applicant must provide the results of the survey including information and data used to develop the survey to the property owner and the director. The state has developed guidelines to provide assistance in evaluating whether the survey adequately documents pre-subsidence conditions (copy attached). Also refer to the response to (zzz) above. Consequently, WVDEP contends that the provisions of 3.12 provide for subsidence control plans that are as effective as those authorized by OSM. This is particularly true in light of the order entered April 27, 1999 in the District of Columbia, United States Court of Appeals in *National Mining Association v. Babbitt*, No. 98-5320.

The information submitted by the State (procedures for pre-subsidence structure survey) is available at the locations listed under **ADDRESSES**, above.

*30 CFR 948.16(iiii)*: By July 13, 1999, West Virginia must submit either a

proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to:

(1) Amend section 22-3-13(c)(3) of the West Virginia program to remove the phrase "or fish and wildlife habitat and recreation lands"; and

(2) Amend "public use" at section 22-3-13(c)(3) to include the term "facility" and to further clarify that the term will be interpreted the same as "public facility (including recreation facilities) use" at SMCRA section 515(c)(3).

*State response:*

This was submitted to OSM on March 17, 2000. A copy of the proposed change to WV Code 22-3-13(c)(3) is attached and pending OSM action.

See the August 18, 2000, **Federal Register** (65 FR 50409, 50410-50411) for our finding concerning this required amendment. In that finding, we determined that the State had partially satisfied the required amendment at 30 CFR 948.16(iiii). Consequently, we amended the required amendment at 30 CFR 948.16(iiii) to read as follows: "By October 17, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend the term "recreational uses" at W.Va. Code 22-3-13(c)(3) to mean "recreational facilities use" at SMCRA section 515(c)(3)."

*30 CFR 948.16(kkkk):* By January 11, 2000, 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 words "upon request" at W. VA. Code 22-3-13a(g), or otherwise amend its program to require that a copy of the pre-blast survey be provided to the owner and/or occupant even if the owner or occupant does not specifically request a copy.

*State response:*

The WVDEP has submitted rules that are currently being reviewed by the OSM. Then WVDEP will propose a code and regulation change for the 2001 legislative session.

See the proposed rule notice concerning the State's blasting rules that we published on December 5, 2000 (65 FR 75889). In addition, the proposed blasting rules are available at the locations listed under **ADDRESSES**, above.

*30 CFR 948.16(IIII):* By January 11, 2000, 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 phrase "or the surface impacts of the underground mining methods" from 22-3-13a(j)(2), or otherwise amend its program to clarify

that the surface blasting impacts of underground mining operations are subject to the requirements of 22-3-13a.

*State response:*

The WVDEP has submitted rules that are currently being reviewed by the OSM. If rules do not satisfactorily address this issue, then WVDEP will propose a code change for the 2001 legislative session.

See the proposed rule notice concerning the State's blasting rules that we published on December 5, 2000 (65 FR 75889). In addition, the proposed blasting rules are available at the locations listed under **ADDRESSES**, above.

*30 CFR 948.16(mmmm):* By January 11, 2000, 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 phrase "of overburden and coal" from W.Va. Code 22-3-30a(a), or to otherwise clarify that its general surface coal mining blasting laws and regulations apply to all blasting at surface coal mining and reclamation operations and surface blasting activities incident to underground coal mining, including, but not limited to, initial rounds of slopes and shafts.

*State response:*

The WVDEP submitted rules that are currently being reviewed by the OSM. If rules do not satisfactorily address this issue, then WVDEP will propose a code change for the 2001 legislative session.

See the proposed rule notice concerning the State's blasting rules that we published on December 5, 2000 (65 FR 75889). In addition, the proposed blasting rules are available at the locations listed under **ADDRESSES**, above.

*30 CFR 948.16(oooo):* Remove CSR 38-2-23.

*State response:*

The WVDEP proposed to delete this section in the rule change for the 2001 legislative session. However, the WVDEP Advisory Council indicated that the proposed deletion be removed from the final rule change. A copy of the Advisory Council's minutes is attached. Additionally, because of local geographic conditions, WVDEP will continue to pursue approval of incidental coal removal so that potentially unregulated excavation for development can be regulated without wasting of the coal.

The information submitted by the State (the minutes of the July 6, 2000, meeting of the Environmental Protection Advisory Council) is available at the locations listed under **ADDRESSES**, above. CSR 38-2-23 concerns special authorization for coal extraction as an incidental part of development of land

for commercial, residential, or civic use. See the May 5, 2000, **Federal Register** (65 FR 26130, 26133) for our finding and explanation for the required program amendment codified at 30 CFR 948.16(oooo). Also see the February 9, 1999, **Federal Register** (6201, 6204) for our finding concerning WV Code 22-3-28(a), (b), and (c) which concern special authorizations to engage in surface mining incidental to the development of land for commercial, residential, industrial, or civic use.

### III. Public Comment Procedures

In accordance with the provisions of 30 CFR 732.17(h), OSM is seeking comments, on whether the proposed amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If the amendment is deemed adequate, it will become part of the West Virginia program.

#### *Written Comments*

If you submit written or electronic comments on the proposed amendment during the 30-day comment period, they should be specific, should be confined to issues pertinent to the notice, and should explain the reason for your recommendation(s). We may not be able to consider or include in the Administrative Record comments delivered to an address other than the one listed above (see **ADDRESSES**).

#### *Electronic Comments*

Please submit Internet comments as an ASCII, Word Perfect, or Word file avoiding the use of special characters and any form of encryption. Please also include "Attn: SPATS NO. WV-088-FOR" and your name and return address in your Internet message. If you do not receive a confirmation that we have received your Internet message, contact the Charleston Field office at (304) 347-7158.

#### *Availability of Comments*

Our practice is to make comments, including names and home addresses of respondents, available for public review during our regular business hours at the OSM Administrative Record Room (see **ADDRESSES**). Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We

will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

#### Public Hearing

If you wish to speak at the public hearing, you should contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4:00 p.m. (local time), on January 18, 2001. The location and time of the hearing will be arranged with those persons requesting the hearing. If no one requests an opportunity to speak at the public hearing, the hearing will not be held.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who testifies at a public hearing provide us with a written copy of his or her testimony. The public hearing will continue on the specified date until all persons scheduled to speak have been heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after all persons scheduled to speak and persons present in the audience who wish to speak have been heard.

Any disabled individual who has need for a special accommodation to attend a public hearing should contact the individual listed under **FOR FURTHER INFORMATION CONTACT**.

#### Public Meeting

If only one person requests an opportunity to speak at a hearing, a public meeting, rather than a public hearing, may be held. If you wish to meet with OSM representatives to discuss the proposed amendment, you may request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings will be open to the public and, if possible, notices of meetings will be posted at the locations listed under **ADDRESSES**. A written summary of each meeting will be made a part of the Administrative Record.

### IV. Procedural Determinations

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

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

#### Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart federal regulation.

#### Executive Order 13132—Federalism

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

#### Executive Order 12988—Civil Justice Reform

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

#### National Environmental Policy Act

Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that a decision on a proposed state regulatory program provision does not constitute a major federal action within the meaning of section 102(2)(C) of the National Environmental Policy Act (NEPA) (42 U.S.C. 4332(2)(C)). A determination has been made that such decisions are categorically excluded from the NEPA process (516 DM 8.4.A).

#### Paperwork Reduction Act

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

#### Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The state submittal which is the subject of this rule is based upon counterpart federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the state. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart federal regulation.

#### Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

- Does not have an annual effect on the economy of \$100 million.
- Will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions.
- Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the state submittal which is the subject of this rule is based upon counterpart federal regulations for which an analysis was prepared and a determination made that the federal regulation was not considered a major rule.

#### Unfunded Mandates

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

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

Intergovernmental relations, Surface mining, Underground mining.

Dated: December 22, 2000.

**Allen D. Klein,**

*Regional Director, Appalachian Regional Coordinating Center.*

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