

**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, Interior.**ACTION:** Final rule; approval of amendment.

**SUMMARY:** We, the Office of Surface Mining Reclamation and Enforcement (OSM), are approving proposed amendments to the West Virginia regulatory program (the "West Virginia program") authorized under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The amendments consist of the State's responses to several required program amendments codified in the Federal regulations at 30 CFR 948.16. The amendments are intended to revise the West Virginia program to be consistent with the corresponding Federal regulations and SMCRA.

**EFFECTIVE DATE:** May 1, 2002.

**FOR FURTHER INFORMATION CONTACT:** Mr. Roger W. Calhoun, Director, Charleston Field Office, 1027 Virginia Street East, Charleston, West Virginia 25301. Telephone: (304) 347-7158, Internet address: [chfo@osmre.gov](mailto:chfo@osmre.gov).

**SUPPLEMENTARY INFORMATION:**

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

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

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act \* \* \*; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act." See 30 U.S.C. 1253 (a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the West Virginia program on January 21, 1981. You can find background information on the West Virginia program, including the Secretary's findings, the disposition

of comments, and the conditions of the approval in the January 21, 1981, **Federal Register** (46 FR 5915). You can also find later actions concerning the West Virginia program and program amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

**II. Submission of the Amendments**

By letter dated November 30, 2000 (Administrative Record Number WV-1189), West Virginia sent us an amendment to its program, under SMCRA (30 U.S.C. 1201 *et seq.*). The amendment includes numerous attachments and was submitted in response to the following required program amendments: 30 CFR 948.16(a), (dd), (ee), (oo), (tt), (xx), (mmm), (nnn), (ooo), (qqq), (sss), (vvv)(1), (2), (3), and (4), (www), (xxx), (zzz), (aaaa), (bbbb), (ffff), (gggg), (hhhh), (iiii), (jjjj), (kkkk), (llll), (mmmm), (nnnn), (oooo), and (pppp).

However, in a previous decision dated October 1, 1999 (64 FR 53200), we found that the State had satisfied the required amendment codified at 30 CFR 948.16(mmm) and, therefore, it was removed.

In another previous decision dated August 18, 2000 (65 FR 50409), we found that the State had satisfied the required amendments codified at 30 CFR 948.16(www) and (xxx), and, therefore, we removed them.

We announced receipt of the proposed amendment in the January 3, 2001, **Federal Register** (66 FR 335-340). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment's adequacy (Administrative Record Number WV-1194). We did not hold a public hearing or meeting, because no one requested one. The public comment period ended on February 2, 2001. However, a public commenter requested an extension of the public comment period, and to accommodate that request we extended the comment period to February 28, 2001. We received comments from one environmental organization and three Federal agencies.

We are also including in this final rule document our decisions on the State's responses to required program amendments that were submitted to us as part of a separate program amendment package dated May 2, 2001. We will address the remainder of the May 2, 2001, amendment in a separate final rule document at a later date. In a letter dated May 2, 2001 (Administrative Record Number WV-1209) West Virginia Department of Environmental Protection (WVDEP) submitted revisions to its Surface Mining Reclamation

Regulations, Code of State Regulations (CSR) 38-2. Enrolled Committee Substitute for House Bill 2663 (Administrative Record Number WV-1210) that passed the Legislature on April 14, 2001, and was signed into law by the Governor on May 2, 2001, authorized WVDEP to promulgate the regulatory revisions. A notice (66 FR 28682) announcing receipt and a public comment period on the amendment was published in the **Federal Register** on May 24, 2001 (Administrative Record Number WV-1213). The amendments that we are deciding here were submitted by WVDEP to address the required amendments codified at 30 CFR 948.16(xx), (qqq), (zzz), (ffff), (gggg), (hhhh), (jjjj), (nnnn), and (pppp). The comment period closed on the program amendment on June 25, 2001. We received comments on the State's responses to the required amendments noted above from two Federal agencies.

We are also including in this final rule document our decisions on the State's responses to required program amendments that were submitted to us as part of a separate program amendment package dated November 28, 2001. We will address the remainder of the November 28, 2001, amendment in a separate final rule document at a later date. The amendments that we are deciding here were submitted by WVDEP to address the required amendments codified at 30 CFR 948.16(kkkk), (llll), and (mmmm). A notice (67 FR 4689-4692) announcing receipt and a public comment period on the program amendment package was published in the **Federal Register** on January 31, 2002 (Administrative Record Number WV-1267). The public comment period closed on March 4, 2002. We received comments on the required amendments noted above from three Federal agencies.

On January 15, 2002 (Administrative Record Number WV-1271), we met with the State to discuss the required amendments codified at 30 CFR 948.16. In that meeting, WVDEP agreed to provide us with further clarification on how and when they would provide additional information, amend policies set forth in its Permit, Inspection and Technical Handbooks, or propose rulemaking that would resolve specific issues.

By letter dated February 26, 2002, WVDEP sent us a status report regarding the required program amendments codified at 30 CFR 948.16 (Administrative Record Number WV-1276). The report included 14 attachments, and outlined actions taken in an attempt to satisfy the required program amendments. The actions

include proposed policies, rules and laws, form changes, and referrals to legal staff. Several actions include further justification of why WVDEP considers the State program to be sufficient. WVDEP stated that the law and rule changes would be proposed during the 2002 regular legislative session, and that none of the proposed revisions would be implemented without OSM approval.

By letter dated March 8, 2002, WVDEP sent us revisions to two of the attachments it had sent us in its February 26 letter (Administrative Record Number WV-1280). The March 8, 2002, letter also included one new attachment intended to address the required amendment at 30 CFR 948.16(sss).

In the March 25, 2002, **Federal Register** (67 FR 13577-13585) we reopened the comment period to provide the public an opportunity to review and comment on the topics discussed in the January 15, 2002, meeting; WVDEP's February 26 and March 8, 2002, submittals; and related information that we provided to WVDEP (Administrative Record Number WV-1285). The comment period closed on April 9, 2002. We received comments from one industry group and two Federal agencies.

### III. OSM's Findings

Following are the findings we made pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17 concerning the proposed amendments to the West Virginia program. We are approving these amendments and removing the required amendments. Any revisions that we do not specifically discuss below concern nonsubstantive wording or editorial changes.

We are presenting our findings below in the following format: a description of the required amendment codified at 30 CFR 948.16; followed by a quotation or a description of the State's response to the required amendment; and our finding.

1. *Blasting*. 30 CFR 948.16(a) provides that 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 [subsection] 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))

In the above referenced August 30, 1994, letter (Administrative Record Number WV-934) we acknowledged that the West Virginia program does require all blasting operations to be conducted by a certified blaster. Revised CSR 38-2-6.1 provides that "a blaster certified by the Department of Environmental Protection shall be responsible for all blasting operations including the transportation, storage and use of explosives within the permit area in accordance with the blasting plan." We find, therefore, that the requirement of 30 CFR 948.16(a) is satisfied and can be removed.

2. *Revegetation*. 30 CFR 948.16(dd) provides that West Virginia must submit proposed revisions to Subsection CSR 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, West Virginia must 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

*Productivity*: The WVDEP has developed a policy (Attachment 1) that will use productivity standards developed by the Natural Resources Conservation Service (NRCS) or other publications of the United States Department of Agriculture. These standards will be compared to yields obtained from the particular site.

*Ground cover*: WVDEP has reviewed the modified Rennie-Farmer Method in addition to methods used in other states and has developed a policy (Attachment 1) which references section 3 of "Technical Guides of Reference Areas and Technical Standards for Evaluating Surface Mine Vegetation in OSM Regions I and II," by Robert E. Farmer, Jr. *et al.*, OSM\_J5701442/TV-54055A, 1981, U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement.

*Productivity*: As discussed in the May 23, 1990, **Federal Register**, the State's regulations at Subsection 9.3(f) required the measurement of productivity, but they did not establish productivity success standards for grazing land, pasture land and cropland (55 FR 21322). In addition, the State failed to select and submit its productivity sampling technique(s) to be used in evaluating productivity.

WVDEP submitted a policy on February 26, 2002, addressing this issue. The policy was revised and resubmitted to us on March 8, 2002, as Attachment 1. The policy provides that the productivity standards for grazing land and hayland will be based upon determinations for similar map units as published in the productivity tables in NRCS soil surveys for the county or from average county yields recognized by the U.S. Department of Agriculture (USDA). We note that "The West Virginia Bulletin," which is published annually by the West Virginia Agricultural Statistics Service, in cooperation with the USDA, lists average county yields for various principal crops throughout the State. The yields for grazing land or hayland will be measured in material produced per acre or animal units supported. The success of production shall be equal to or greater than that of the standard obtained from the tables. The evaluation methods for productivity to be used are described in Section 1 of "Technical Guides of Reference Areas and Technical Standards for Evaluating Surface Mine Vegetation in OSM Regions I and II," by Robert E. Farmer, Jr. *et al.*, OSM\_J5701442/TV-54055A, 1981, U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement.

CSR 38-2-9.3.f of the State's existing Surface Mining Reclamation Regulations, which establishes the success standard for grazing land and pasture land, provides where the postmining land use requires legumes and perennial grasses, the operator shall achieve at least a ninety (90) percent ground cover and a productivity level as set forth in the (Technical) Handbook during any two years of the responsibility period except for the first year. The State does not intend to revise the Technical Handbook that is referenced in its rules. Instead, the proposed policy will become part of the Permitting or Inspector Handbook.

According to the policy, the productivity success standard for cropland will be determined using yields for reference crops from unmined lands. Reference crop yields shall be determined from the current yield

records of representative local farms in the surrounding area or from the average county yields recognized by the U.S. Department of Agriculture. The success of production shall be equal to or greater than that of the reference crop from unmined areas. Evaluation methods for productivity to be used are described in Section 1 of the "Technical Guides of Reference Areas and Technical Standards for Evaluating Surface Mine Vegetation in OSM Regions I and II," by Robert E. Farmer, Jr. *et al.*, OSM\_J5701442/TV-54055A, 1981, U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement.

The policy further provides that the company (permit applicant) is responsible for providing WVDEP with copies of the productivity tables and/or data used to determine reference crop yield. Where the USDA or other agricultural data for productivity does not exist for a particular county, the applicant will work with WVDEP and USDA to develop standards for the proposed area.

CSR 38-2-9.3.f.2 provides that for areas to be used for cropland, the success of crop production from the mined area shall be equal to or greater than that of the approved standard for the crop being grown over (the) last two (2) consecutive seasons of the five growing season liability period. The proposed policy clarifies that the success standard for cropland is based on yields for reference crops from "unmined" lands. The policy further provides that reference crop yields shall be based on current yield records of representative local farms in the surrounding area or from the average county yields. The existing rules do not provide for the use of reference areas in evaluating the productivity success of cropland. As proposed in the policy, an operator will be required to use reference areas in the vicinity of the proposed mining operation or average county yield records in setting the success standard when cropland is the approved postmining land use. To ensure that management levels and other factors are given proper consideration, we recommend that yield data from both the reference areas and county records be given equal weight when establishing productivity success standards for cropland.

We encourage WVDEP to cite in its rules and/or policy the specific productivity standards developed by NRCS and the other publications of the USDA that the State plans to use. We also recommend the use of the "West Virginia Bulletin" published by the WV Department of Agriculture and the

USDA. A copy of "West Virginia Bulletin 2001, No. 32" was provided to WVDEP on February 6, 2002. NRCS officials say that some soil surveys lack sufficient information to rate the yields for a particular soil type, especially in certain mining counties, and most yield information is based on higher levels of management. Although the WV Bulletin lacks yield information based on soil type, NRCS concurs that a combination of reports may be best to use, especially when the soil survey states that the soil is too variable to rate. Nevertheless, the lack of reference to specific publications does not render the proposed policy less effective than the Federal requirements. When submitting permit applications or permit modifications for existing operations with agricultural postmining land uses, applicants will be expected to include productivity data from the most current NRCS soil surveys and USDA publications for WVDEP review and approval. The applicant will be required to consult with WVDEP, NRCS and USDA to verify existing information or to develop data when production data is insufficient or missing for a particular county or area.

CSR 38-2-9.3.d and 9.3.e provide that when evaluating vegetative success, WVDEP must use a statistically valid sampling technique with a 90 percent statistical confidence interval. The proposed policy requires the use of a sampling technique for measuring productivity as set forth in Section 1 of the "Technical Guides of Reference Areas and Technical Standards for Evaluating Surface Mine Vegetation in OSM Regions I and II." Section 1 is entitled, "Planning and Evaluating Agricultural Land Uses on Surface-Mined Areas."

As mentioned above, 30 CFR 948.16(dd) requires the establishment of productivity success standards for grazing land, pastureland, and cropland. Because the proposed policy establishes productivity success standards for grazing land, pastureland and cropland that are no less effective than those standards set forth in 30 CFR 816.116 and 817.116, this portion of the required amendment has been satisfied and can be removed. In addition, because State rules at CSR 38-2-9.3.d and 9.3.e require the use of a statistically valid sampling technique with a 90 percent statistical confidence interval and the proposed policy provides for the use of a productivity sampling technique that uses a 90-percent statistical confidence interval (i.e., one-sided test with a 0.10 alpha error) for measuring grazing land, pastureland and cropland, that portion of the required amendment has been satisfied and can be removed.

*Ground Cover:* As discussed in the May 23, 1990, **Federal Register** (55 FR 21322), the State program did not 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, the State has failed to submit for OSM approval its selected revegetation sampling techniques to be used when evaluating ground cover.

Initially, WVDEP submitted its modified Rennie-Farmer Method as its preferred method for evaluating the success of ground cover. After further evaluation of that method and other State methods, WVDEP submitted a policy on February 26, 2002, and revised it on March 8, 2002, which provides that ground cover success shall be based on the Rennie and Farmer technique described in Section 3 of the "Technical Guides of Reference Areas and Technical Standards for Evaluating Surface Mine Vegetation in OSM Regions I and II," by Robert E. Farmer, Jr. *et al.*, OSM\_J5701442/TV-54055A, 1981, U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement. Section 3 is entitled, "An Inventory System for Evaluating Revegetation of Reclaimed Surface Mines to Forest Resource Conservation Standards," and contains a statistical technique for evaluating ground cover and stockings.

CSR 38-2-9.3.d and 9.3.e. provide that when evaluating vegetative success, WVDEP must use a statistically valid sampling technique with a 90 percent statistical confidence interval. Ground cover, production, or stocking can only be considered equal to the approved success standard when they are not less than 90 percent of the success standard. When evaluating vegetative success, an inspection report must be filed by the inspector. Only after the applicable success standards have been met and documented can Phase II or Phase III bond release be approved by the State.

Because State rules at CSR 38-2-9.3 and the proposed policy require the use of a statistical sampling technique for measuring ground cover and that measurement technique requires the use of a 90-percent statistical confidence interval (i.e., one-sided test with a 0.10 alpha error), that portion of the required amendment at 30 CFR 948.16(dd) has been satisfied and can be removed.

The West Virginia program at CSR 38-2-9.1.a. and 9.1.d. provide for the establishment of a diverse, effective and permanent vegetative cover of the same seasonal variety native to the area of disturbed land, or introduced species

that are compatible with the approved postmining land use. The requirement that the established vegetation be compatible with the approved postmining land use satisfies the requirement at 30 CFR 948.16(dd) which states that revegetation must be judged on the basis of the vegetation's effectiveness for the postmining land use. Therefore, that portion of 30 CFR 948.16(dd) has been satisfied and can be removed.

30 CFR 948.16(dd) also requires that the West Virginia program contain the requirement that revegetation success be judged on the basis of the vegetation's effectiveness in meeting the general revegetation and reclamation plan requirements of subsections CSR 38-2-9.1 and 9.2. As mentioned above, CSR 38-2-9.3.e., concerning the final bond release inspection, satisfies this requirement by providing that, ". . . if applicable standards have been met, the Director shall release the remainder of the bond." CSR 38-2-12.2.c.3 further provides that only upon successful completion of the reclamation requirements of the Act, these rules and the permit conditions, may final bond release be approved by the Director. The "applicable standards" referred to at CSR 38-2-9.3.e. include the revegetation success standards and the "reclamation requirements" at CSR 38-12.2.c.3 would include all other requirements of the West Virginia program, including those requirements at CSR 38-2-9.1 and 9.2. Therefore, the remaining portion of 30 CFR 948.16(dd) has been satisfied and can be removed.

3. *Prime Farmland.* 30 CFR 948.16(ee) provides that West Virginia must submit documentation that 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 NRCS State Conservationist concurs with the negative determination criteria set forth in these paragraphs.

#### *State Response*

Comments from NRCS resolve this issue (WV Administrative Record No. WV-1203). The NRCS stated in their comment letter dated February 9, 2001, to OSM that all prime farmlands in the State have been mapped and are available. WVDEP has contacted the NRCS and has drafted a letter seeking further concurrence (Attachment 1A).

In an attempt to clarify these issues and to gain further insight into NRCS

comments of February 9, 2001 (Administrative Record Number WV-1203), we had several discussions with NRCS officials about these issues. Through these discussions we learned that NRCS does not have soil surveys completed for all counties in West Virginia. NRCS has completed soil surveys for approximately 98 percent of the State. They have draft reports for Logan, Mingo, Lincoln, and McDowell Counties that still need to be published. The final reports will not be published until late 2002 or early 2003. In the meantime, NRCS will have to conduct soil investigations in counties that do not have completed soil surveys. NRCS does not feel that it is necessary to conduct prime farmland reconnaissance inspections in all counties of West Virginia. However, the procedural details for identifying and protecting prime farmland within the State need to be negotiated through a memorandum of understanding (MOU) or an exchange of letters between NRCS and WVDEP.

In its February 25, 2002, letter that comprised Attachment 1A, WVDEP provided NRCS a copy of its rules governing prime farmlands at CSR 38-2-10. WVDEP requested that NRCS address its reconnaissance inspection requirements and concur with its negative determination criteria.

WVDEP described the State's reconnaissance inspection process as it currently exists. Included in that description were the following criteria, one or more of which can be the basis for a prime farmland negative determination: (1) No historical use of the land as cropland; (2) The slope of the land in the permit area is greater than 10 percent; (3) Other factors (i.e., rocky surface, frequent flooding) disqualify the land as prime farmland; and (4) A soil survey by a qualified person.

The letter further stated that WVDEP reviews the applicant's information in the application and will check county soil survey maps. The soils in the area are compared to a list from "West Virginia's Prime Farmland Soil Mapping Units" by NRCS (Attachment 3P). If the soils in the proposed mining area are not on the list, then the negative determinations are approved. If the negative determination is not approved, then the NRCS is consulted. If prime farmland is identified, then a much more detailed plan is required.

For counties where no mapping has been published, WVDEP's procedure is described in Attachment 2P. If the slopes are less than 10 percent and the area has historically been used as cropland, then NRCS is consulted.

WVDEP further stated that the criteria for both the slope and the rocky or flooded land were based on NRCS literature. Of all the soils identified in the "West Virginia's Prime Farmland Soil Mapping Units" document, not one has a slope greater than 10 percent and that same document says that prime farmland cannot be in areas that are flooded frequently nor in areas that are rocky (10 percent cover of rock fragments coarser than 3 inches).

Attachment 2P contains a proposed policy regarding prime farmlands identifications. The policy provides that soil surveys prepared by the NRCS will be the basis for the final determination of prime farmlands in West Virginia involving surface mining permits. In the cases where soil surveys are not complete in a county and prime farmland involvement is possible, the NRCS will conduct a soil survey for the permit area for final determination.

If a permit application contains any areas with less than 10 percent slope and it is evident the area has been used for crops at least 5 years out of the last 20 years, it is possible that these areas could be considered prime farmland.

If this condition is present, the applicant should check the NRCS soil survey for that county. If a soil survey does not exist for a particular county, the applicant should consult the local NRCS District Conservationist for a prime farmland determination.

In counties where soil surveys have been published, the applicant must locate the permit on the soils map and by using the symbols on the map, determine the soil types in the proposed area. Then, comparison with the attached list of soils constituting prime farmlands in West Virginia will have to be made. If the soil type is considered prime farmland on the list, the District Conservationist for that county must be contacted for final determination.

If the permit application involves prime farmland, all provisions of Sections 507(b)(16) and 515(b)(7) of Public Law 95-87 (Sections 22-3-9(a)(15) and 22-3-13(b)(7) of the West Virginia Surface Coal Mining and Reclamation Act) and Section 10 of the West Virginia Surface Mining Reclamation Regulations will apply.

Attachment 3P contains the publication entitled, "West Virginia's Prime Farmland Soil Mapping Units." This publication contains a listing prime farmland soil mapping units throughout the State. The publication is dated April 1982.

As discussed in the May 23, 1990, **Federal Register** (55 FR 21322), although the State's negative determination criteria appeared

generally consistent with the national criteria established at 7 CFR 657, Federal rules allow the NRCS to alter these criteria and establish others. Furthermore, the definition of "prime farmland" at 30 CFR 701.5 vests responsibility for establishing prime farmland qualification criteria with the U.S. Secretary of Agriculture. To ensure that the State program is no less effective than the Federal definition of "prime farmland" in 30 CFR 30 CFR 701.5, West Virginia was required to submit documentation that the NRCS has concurred with all negative determination criteria contained in Subsection 10.2, except those of paragraph (a)(1), which pertain to historical use for cropland. In addition to demonstrating compliance with the consultation requirements of 30 CFR 785.17(b)(1), the State was to submit documentation that it has consulted with the NRCS State Conservationist in determining the nature and extent of the reconnaissance inspection.

On March 7, 2002, NRCS responded to WVDEP's inquiries regarding prime farmland (Administrative Record Number WV-1290). The NRCS acknowledged that it is the Federal agency with delegated authority under law to make determinations on the existence of prime farmland. NRCS acknowledged that it provides information on prime farmland through the soil survey program as part of its technical assistance effort to the fourteen soil conservation districts in West Virginia.

With respect to reconnaissance inspections, NRCS acknowledged that it could be satisfied by using locally available information. The soil map units in the soil survey are listed for prime farmland and are cross-referenced in the local Field Office Technical Guide. NRCS found that the reconnaissance inspection procedures outlined in WVDEP's proposed policy, "Prime Farmlands Identifications," Attachment 2P, were acceptable to them. However, they requested that WVDEP change "SCS" to "NRCS."

In regard to the negative determination criteria, NRCS stated that its definitions were not consistent with several parts of CSR 38-2-10. Because cropping history is not considered in the NRCS definition of prime farmland, it could not agree with any historic use of the land as set forth in Subsections 10.2.a.1 through 10.2.a.1.C. According to the NRCS, prime farmland can be cultivated, cropland, pasture, or forestland. However, it cannot be built up land or water. The Federal regulations at 30 CFR 701.5 define prime farmland to mean those lands

which are defined by the Secretary of Agriculture in 7 CFR Part 675 and which have historically been used for cropland. The State's requirements regarding historical use as cropland, like the Federal definition of prime farmland at 30 CFR 701.5, is consistent with Section 701(20) of SMCRA. That section defines prime farmland to have the same meaning as that previously prescribed by the Secretary of Agriculture on the basis of such factors as moisture availability, temperature regime, chemical balance, permeability, surface layer composition, susceptibility to flooding, erosion characteristics, and which historically have been used for intensive agricultural purposes. As discussed above, West Virginia was required to submit documentation that the NRCS concurs with all negative determination criteria contained in Subsection 10.2, except those of paragraph (a)(1), which pertain to historical use for cropland. In addition, the State's regulations at subsection 10.2.a.1 through 10.2.a.1.C are substantively identical to the Federal regulations at 30 CFR 701.5 (definition of "historically used for cropland"). NRCS concurred with Subsection 10.2.a.2 and 10.2.a.3 relating to slopes greater than 10 percent and the presence of stones on the surface. It also agreed with Subsection 10.2.a.4 and recommended the use of soil surveys in making negative determinations.

NRCS concluded that nearly all areas in the State have basic information on prime farmland. If new mapping is in progress, they would provide advance information at the mapping scale used. Generally, NRCS makes prime farmland determinations at the scale of mapping used for the soil survey, either 1:12,000 or 1:24,000. This information is published through the soil survey or the local Field Office Technical Guide and provided through West Virginia's fourteen soil conservation districts. NRCS stated that it was presently updating its prime farmland statewide list.

Because the NRCS concurs with the State's negative determination criteria set forth at CSR 38-2-10.2.a.2 and 10.2.a.3, regarding steepness, stoniness and flooding, OSM finds that the State prime farmland requirements at CSR 38-2-10.2 are no less effective than the Federal requirements at 30 CFR 785.17. Therefore, that portion of the required amendment at 30 CFR 948.16(ee) regarding negative determination criteria has been satisfied and can be removed.

In addition, the State was to submit documentation demonstrating that it had consulted with the NRCS in

determining the nature and extent of the reconnaissance inspection as provided under CSR 38-2-10.1. As mentioned above, the NRCS found the reconnaissance inspection procedures outlined in WVDEP's proposed policy, "Prime Farmlands Identifications," to be acceptable. Because the NRCS concurs with the State's proposed reconnaissance inspection procedures, OSM finds the State's reconnaissance inspection requirements as set forth at CSR 38-2-10.1 and further defined in the proposed policy, "Prime Farmlands Identifications," to be no less effective than those Federal requirements set forth at 30 CFR 785.17(b), which require a reconnaissance inspection in all instances. Therefore, the remaining portion of the required amendment at 30 CFR 948.16(ee) requiring the concurrence of NRCS on the State's reconnaissance inspection procedures has been satisfied and can be removed.

4. *Spillway Design.* 30 CFR 948.16(o) provides that West Virginia must 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 that 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*

The WVDEP is proposing language (Attachment 2) that all sediment control structures spillways will be designed based on a 25-year/24-hour storm, except for haulroads.

State rules at CSR 38-2-5.4.b.8 currently require all sediment control structures or other water retention structures be designed with spillways to safely pass a 25-year, 24-hour precipitation event. However, subsection 5.4.b.8 contains a provision that allows excavated sediment control structures, which are at ground level and have an open exit channel constructed of non-erodible material, to be designed to pass the peak discharge of a 10-year, 24-hour precipitation event.

As discussed in the October 4, 1991, **Federal Register** (56 FR 50260) notice, the Federal regulations require that all sediment control structures not meeting the size or other criteria of 30 CFR 77.216(a) must have spillways designed to pass the peak discharge of a 25-year, 6-hour precipitation event. Therefore, the requirement at subsection 5.4.b.8 was found to be less effective than the Federal requirements at 30 CFR 816/817.46(c)(2)(ii)(B) [now 30 CFR 816/

817.46(c)(2) and 30 CFR 816/817.49(a)(9)(ii)(C)].

The Federal regulations at 30 CFR 816/817.46(c)(2) provide that a sedimentation pond must include either a combination of principal and emergency spillways or single spillway configured as specified in 30 CFR 816/817.49(a)(9). The Federal regulations at 30 CFR 816/817.49(a)(9)(ii)(C) further provide that the spillway for an impoundment not included in paragraph (a)(9)(ii) (A) and (B) of this section must be designed and constructed to safely pass a 25-year, 6-hour or greater precipitation event as specified by the regulatory authority.

On August 30, 1994, we provided the State a follow-up letter regarding several proposed revisions that the State had made to its program in 1993 (Administrative Record Number WV-934). As mentioned above, in October 1991, we had required the State to amend its program and provide that that all sediment control structures not meeting the size or other criteria of 30 CFR 77.216(a) must have spillways designed to pass the peak discharge of a 25-year, 6-hour precipitation event. Although we required the State to amend its program, the State had not proposed any revisions at the time. Instead, the State maintained that these types of structures by their very nature are not subject to catastrophic failure or excessive erosion. According to the State, the design storm criteria are established to address these potentials and are of not significance for these structures. Initially WVDEP thought that the Illinois program contained a provision similar to the 10-year, 24-hour standard for excavated sediment control structures that WVDEP was seeking to adopt for West Virginia. However, we explained that the Illinois program does not contain such a standard. Rather, the Illinois program contains an exemption from the quarterly inspection requirements for excavated sediment control structures. The inspection frequency was reduced because most excavated sediment control structures have no embankments to examine for structural weaknesses or other hazardous conditions. West Virginia has a similar standard.

WVDEP stated that a spillway design for a 25-year, 24-hour precipitation event would adversely affect the effectiveness of the on-bench sediment control system. We and WVDEP decided that an OSM engineer and a WVDEP engineer would be assigned to review the spillway design standards and determine if the proposed change would actually reduce the effectiveness of on-bench sediment control systems. Upon

completion of the joint State/Federal review, it was determined that spillways designed to safely pass a 25-year, 24-hour precipitation event would only require minor changes, and they would not impact the use of excavated sediment control structures (Administrative Record Number WV-1273). In addition, the engineers determined that there is no peak discharge control problem because the open exit channels for these sediment control structures are currently larger than required due to the size of the equipment used to construct them. As the result of the review, WVDEP proposed revisions to its spillway design requirements at 30 CFR 38-2-5.4.b.8.

In its February 26, 2002, submission, Attachment 2 contains a proposed revision for CSR 38-2-5.4.b.8. As amended, the provision that exempted excavated sediment control structures from the 25-year, 24-hour spillway design requirement is deleted. In its place, is language that provides the following: "provided, however that this subsection does not apply to haulroads." As proposed, CSR 38-2-5.4.b.8. now reads as follows.

5.4.b.8. Be designed to safely pass a twenty-five (25) year, twenty-four (24) hour precipitation event. The combination of both principal and/or emergency spillway of the structures shall be designed to safely pass the peak discharge of a twenty-five (25) year, twenty-four (24) hour precipitation event, provided, that a single open channel spillway may be used only if it is of non-erodable construction and designed to carry sustained flows; or earth or grass-lined and designed to carry short term, infrequent flows at non-erosive velocities where sustained flows are not expected; provided, however, that this subsection does not apply to haulroads.

The proposed exemption from the 25-year, 24-hour design standard for a haulroad drainage control system is consistent with 30 CFR 816/817.151(d) and CSR 38-2-4.6, which provides that ditch lines, culverts, bridges or other structures associated with haulroads must be capable of passing the peak discharge of a 10-year, 24-hour precipitation event.

The State submitted the proposed rule changes to the Legislature in February 2002. However, because of a procedural error, the Legislature did not adopt the revised language. To correct this oversight, on April 19, 2002, WVDEP filed these changes with the Secretary of State as emergency rules. According to State law, emergency rules can remain in effect for not more than 15 months. Final legislative rules are to be adopted by the State during a special legislative session or during the regular 2003

legislative session. We will review the emergency and final rules adopted by the State to ensure that the language of those rules is substantively identical to the language that we are approving today, with the exception of the correction of typographical and grammatical errors such as the two noted in Finding 19. Any substantive differences in the language are subject to further public review as a program amendment under 30 CFR 732.17.

We find that the proposed revisions at CSR 38-2-5.4.b.8 regarding spillway design requirements for sediment control and other water retention structures are no less effective than the Federal requirements at 30 CFR 816/817.46(c)(2) and 816/817.49(a)(9)(ii)(C). On May 23, 1990, we approved the 24-hour event standard as being no less effective than a 6-hour event standard (55 FR 21304, 21318). Therefore, the required amendment at 30 CFR 948.16(o) has been satisfied and can be removed. Upon promulgation of a final rule by the State, WVDEP will be required to provide a copy of it to OSM. OSM will review it to ensure that the language contained therein is identical to that language which is being approved today. Any substantive differences in the language will be subject to further public review and approval by us as a program amendment.

5. *Certification of Sediment Control Structures.* 30 CFR 948.16(tt) provides that West Virginia must 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 B 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 Aas 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.

In its response to this required amendment, quoted above, WVDEP stated that minor changes are those within the construction tolerances described in subsection 3.35 of the rules. Sediment control structures that have been constructed with minor changes that are within approved construction tolerances are, in effect, built in accordance with the approved, certified designs in the preplan. Therefore, we find that such structures are built in compliance with the requirement at CSR 38-2-5.4.b.1. which provides that sediment control structures be "constructed in accordance with the plans, criteria, and specifications set forth in the preplan."

WVDEP also stated that a permit revision is required for as-built structures with major design changes. Therefore, the requirements at CSR 38-2-3.28 concerning permit revisions would apply. In addition, CSR 38-2-5.4.b.1., concerning design and construction requirements, provides that as-built plans must be submitted by the operator and approved by WVDEP immediately following construction. The as-built plans shall indicate the original design, the extent of changes, and reference points. CSR 38-2-5.4.b.1. also provides that all sediment control or other water retention structures be certified in accordance with CSR 38-2-5.4.d. This satisfies the portion of 30 CFR 948.16(tt) that requires certification in accordance with the detailed design plans submitted and approved pursuant to subsection 3.6.h.4, which requires the Secretary to approve detailed design plans for a structure before construction begins. CSR 38-2-5.4.d.1. provides that if as-built plans are submitted, the certification shall describe how and to what extent the construction deviates from the proposed design, and the explanation and certification of how the structure will meet the performance standards.

We find that the West Virginia program requires that as-built sediment control structures be reviewed and approved as permit revisions, and that all sediment control structures shall be certified. Therefore, the required amendment at 30 CFR 948.16(tt) is satisfied and can be removed.

6. *Constructed Outcrop Barriers.* 30 CFR 948.16(xx) provides that West Virginia must revise CSR 38-2-14.8(a) to specify design requirements for constructed outcrop barriers that will be the equivalent of natural barriers and will assure the protection of water

quality and will insure the long-term stability of the backfill.

#### *State Response*

The State added a new provision at CSR 38-2-14.8.a.6. The new language is as follows:

14.8.a.6. Constructed outcrop barriers shall be designed using standard engineering procedures to inhibit slides and erosion to ensure the long-term stability of the backfill. The constructed outcrop barriers shall have a minimum static safety factor of 1.3, and where water quality is paramount, the constructed barriers shall be composed of impervious material with controlled discharge points.

In addition, the State contended in its February 26, 2002, program submissions that:

The word "inhibit" as in "to inhibit slides and erosion" is (no) less effective than the Federal standard of "prevent" at 30 CFR 816.99(a).

The State statutory language for outcrop barriers at W.Va. Code 22-3-13(b)(25) requires the retention of the natural barrier to "inhibit" slides and erosion. As set forth in the **Federal Register** dated January 21, 1981, OSM agrees that provisions regarding natural barriers at W.Va. Code 22-3-13(b)(25) and (c)(4) were found to be consistent with Section 515(b)(25) of SMCRA.

#### *Standard Engineering Practices*

The constructed outcrop barriers are designed structures that have a required minimum long-term static safety factor, while the natural outcrop barriers are not designed structures and are not required to have a minimum factor of safety. Furthermore, the analysis of stability includes consideration of the material to be placed, the foundation, and site conditions. The WVDEP is in the process of developing guidelines for constructed outcrop barriers that will include: requirements for the outslope; sequencing of construction of the outcrop barrier; and minimum factor of safety when barrier is part of the sediment control system (Attachment 9).

The State guideline for constructed outcrop barriers is contained in Attachment 9. It is entitled "Constructed Outcrop Barriers."

Attachment 9 provides that standard engineering practices for constructed outcrop barriers shall include the following:

1. The design of the constructed barrier shall take into consideration site conditions.

2. The construction of the outcrop barrier shall occur simultaneously with the removal of the natural barrier and be located at or near the edge of the lowest coal seam being mined. Temporary measures must be (in) place until the barrier is constructed.

3. The recommended outslope of the constructed barrier is 2v:1v (This is a typographical error and should be 2h:1v) with a static safety factor of 1.3.

4. If the proposed outslope is steeper than 2v:1v (This is a typographical error and should be 2h:1v), the constructed barrier shall be designed to have a static safety factor of 1.5.

5. If constructed barrier is part of the sediment control system (sediment ditch), the constructed barrier shall be designed to have a static safety factor of 1.5.

As discussed in the January 21, 1981, **Federal Register** (46 FR 5919) notice, State law provides for the use of constructed outcrop barriers to prevent slides and erosion, while Section 525(b)(25) of SMCRA requires the retention of a natural barrier. It was determined in 1981 that the State's alternative for a constructed barrier may be more stringent than the SMCRA requirement. However, at the time, the State program lacked specific criteria for the design of constructed outcrop barriers that will ensure that their performance in preventing slides and erosion would be more effective than that of a natural barrier.

In April 1983, West Virginia submitted specific design criteria for outcrop barriers. The approval of the design criteria for constructed outcrop barriers was announced in the November 16, 1983, **Federal Register** notice (48 FR 52037). However, the design criteria were inadvertently deleted from the State program. As discussed in the October 4, 1991, **Federal Register** notice (56 FR 50265), we required the State to specify design requirements for constructed outcrop barriers.

We later published a notice in the February 21, 1996, **Federal Register** (61 FR 6525) which announced the modification of the required amendment at 30 CFR 948.16(xx) requiring that the State amend its program at CSR 38-2-14.8.a to specify design requirements of outcrop barriers that will be equivalent to natural barriers and will assure the protection of water quality and ensure the long-term stability of the backfill. The proposed rule and the new guideline are intended to satisfy that requirement.

Section 22-3-13(b)(25) of the Code of West Virginia (W. Va. Code) provides that constructed barriers may be allowed under specified circumstances, provided that, at a minimum, the constructed barrier must be of sufficient width and height to provide adequate stability and the stability factor must equal or exceed that of the natural outcrop barrier. Furthermore, where

water quality is paramount, the constructed barrier must be composed of impervious material with controlled discharge points.

As discussed above, the revised rule at CSR 38-2-14.8.a.6 further provides that constructed outcrop barriers shall be designed using standard engineering procedures to inhibit slides and erosion to ensure the long-term stability of the backfill. The constructed outcrop barriers shall have a minimum static safety factor of 1.3, and where water quality is paramount, the constructed barriers shall be composed of impervious material with controlled discharge points. The proposed rule was included in WVDEP's program amendment of May 2, 2001 (Administrative Record Number WV-1209). The promulgation of CSR 38-2-14.8.a.6 was authorized by Enrolled Committee Substitute for House Bill 2663. The bill was passed by the Legislature on April 14, 2001, and signed into law by the Governor on May 2, 2001 (Administrative Record Number WV-1210).

In addition, WVDEP has proposed a guideline that further clarifies what standard engineering practices will be followed when allowing for the removal of a natural barrier and constructing an outcrop barrier. Approval of the proposed guideline is being made with the understanding that the State will correct the typographical errors noted above.

We find that the specific design criteria described above will ensure that constructed outcrop barriers will be as effective as natural barriers in preventing slides and erosion. In addition, we find that the proposed rule at CSR 38-2-14.8.a.6, together with the proposed guideline containing standard engineering practices for the design of constructed outcrop barriers, are in accordance with Section 515(b)(25) of SMCRA. Therefore, the required program amendment codified at 30 CFR 948.16(xx) regarding constructed outcrop barriers is satisfied with the adoption of the proposed rule and guideline and can be removed.

7. *Unjust Hardship Criterion.* 30 CFR 948.16(nnn) provides that 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 W. Va. Code.

#### State Response

The WVDEP is proposing language (Attachment 3) to exclude unjust hardship as criteria to support the granting of temporary relief under WV Code 22-3.

In its February 26, 2002, submission, WVDEP included Attachment 3. Attachment 3 contains a proposed revision to W. Va. Code Section 22B-1-7, Appeals to boards. The attachment consists of additions and deletions to language at paragraphs (d) and (h) of Section 22B-1-7 and identifies how these statutory provisions are to be amended. Only paragraph (d) pertains to the required amendment relating to unjust hardship.

WVDEP proposes to amend paragraph (d) by adding a proviso that provides as follows: "Provided; however, the criterion of unjust hardship cannot be used to support the granting of temporary relief for an order or other decision issued under article three, chapter twenty-two of this code." The proposed language was submitted to the Legislature for consideration.

On February 27, 2002, the proposed language was modified and reported out of committee as Senate Bill 735. The revised language reads as follows: "Provided, That unjust hardship shall not be grounds for granting a stay or suspension of such order, permit or official action for an order issued pursuant to article three, chapter twenty-two of this code." Engrossed Senate Bill 735 passed the Senate on March 1, 2002, and was reported to the House Judiciary Committee where it died in committee without further action by the Legislature.

As announced in the February 21, 1996, **Federal Register** (61 FR 6516) on we did not approve the language at Section 22B-1-7(d) concerning allowing temporary relief where the appellant demonstrates that the executed decision appealed from will result in the appellant suffering an "unjust hardship," because the language is inconsistent with Sections 514(d) and 525(c) of SMCRA, which do not allow temporary relief to be granted based on a showing of unjust hardship. As discussed in the July 14, 1998, **Federal Register** notice (63 FR 37775), our earlier required amendment regarding unjust hardship was modified based on a settlement agreement in *West Virginia Mining and Reclamation Association v. Babbitt*, Civil Action No. 2:96-0371 (S.D. W.Va., July 11, 1997). We clarified our earlier decision by stating that Section 22B-1-7(d) is not approved only to the extent that it includes 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 W. Va. Code, which is the State counterpart to SMCRA.

WVDEP has informed the Surface Mine Board that unjust hardship is an invalid basis for granting temporary relief for SMCRA purposes. In our meeting with the WVDEP on January 15, 2002, WVDEP stated that, to its knowledge, the Surface Mine Board has not used this criterion, and the State has never asked that it be a consideration in granting a stay or suspending an order pursuant to W. Va. Code 22B-1-7(d) (Administrative Record Number WV-1271).

On October 26, 1988, the West Virginia Supreme Court of Appeals in *Canestraro v. Faerber* ruled that, "When a provision of the West Virginia Surface Coal Mining and Reclamation Act, W.Va. Code 22A-3-1 *et seq.*, is inconsistent with Federal requirements in the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 *et seq.*, the State Act must be read in a way consistent with the Federal Act." See *Canestraro v. Faerber*, 179 W. Va. 793, 374 S.E.2d 319 (1988) (Administrative Record Number WV-761).

In another decision rendered on July 12, 1996, the West Virginia Supreme Court of Appeals held that, pursuant to 30 CFR 731.17(g), whenever changes to laws or regulations that make up the approved State program regarding surface mining reclamation are proposed by the State, no such change to the laws or regulations shall take effect for purposes of a State program until approved as an amendment by OSM. In addition, the Supreme Court ruled that a State regulation enacted pursuant to the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA), W. Va. Code 22A-3-1 to 40 (1993), [now West Virginia Code 22-3-1 to 32 (1994 and Supp.1995)], must be read in a manner consistent with Federal regulations enacted in accordance with SMCRA, 30 U.S.C. 1201 to 1328 (1986). See *Charles Schultz v. Consolidation Coal Company*, 197 W.Va. 375, 475 S.E.2d 467 (1996) (Administrative Record Number WV-1038).

As discussed above, we have previously ruled that West Virginia's temporary relief provision at W. Va. Code Section 22B-1-7(d) cannot be approved "to the extent that the unjust hardship criterion supports the granting of temporary relief from an order or other decision issued under Chapter 22, Article 3 of the West Virginia Code" (63 FR 37775; July 14, 1998). The effect of that decision is that the unjust hardship criterion at W. Va. Code 22B-1-7(d) is



not part of the State's approved regulatory program (63 FR 37775). Furthermore, as mentioned above, WVDEP has never asked that unjust hardship be a consideration by the Surface Mine Board in granting a stay or suspending an order pursuant to W. Va. Code 22B-1-7(d), and it has informed the Board that it should never be a basis for granting temporary relief under the approved State program. In addition, the West Virginia Supreme Court of Appeals has held that "when there is a conflict between the Federal and State provisions, the less restrictive State provision must yield to the more stringent Federal provision. \* \* \* *Canestraro*, 374 S.E.2d at 321. In light of our disapproval of the statutory language that is the subject of this required amendment, and in light of the principles articulated in *Canestraro*, and *Schultz*, we now believe that the concerns identified in the required amendment at 30 CFR 948.16(nnn) have been satisfied, thereby rendering the required amendment unnecessary. Therefore, we are removing it. However, to avoid confusion or misinterpretation of the approved State regulatory program, we recommend that the statutory provision discussed above be deleted.

8. *Economic Feasibility*. 30 CFR 948.16(ooo) provides that 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 W. Va. Code 22B-1-7(h) by removing reference to Article 3, Chapter 22.

#### State Response

In our meeting with the WVDEP on January 15, 2002, the WVDEP stated that W. Va. Code 22B-1-7(h) applies only to the Environmental Quality Board, which hears Clean Water Act appeals. In its February 26, 2002, submittal, WVDEP provided proposed language (at Attachment 3) to delete the reference to Article 3 Chapter 22 from W. Va. Code 22B-1-7(h). The language was included in Engrossed Senate Bill 735 and reported out of the Judiciary Committee on February 27, 2002. Despite WVDEP's good efforts, the bill did not pass the Legislature in the 2002 legislative session.

We have previously ruled that West Virginia's administrative appeals provision at W. Va. Code 22B-1-7(h) could not be approved "only to the extent that it references Article 3, Chapter 22 of the W. Va. Code." (63 FR 37774, 37775; July 14, 1998). The effect of that decision is that the reference to Article 3 Chapter 22 at W. Va. Code 22B-1-7(h) is not part of the approved

West Virginia program. This disapproved provision should never be implemented by the State because the West Virginia Supreme Court of Appeals has held that "when there is a conflict between the federal and state provisions, the less restrictive state provision must yield to the more stringent federal provision. \* \* \* *Canestraro*, 374 S.E.2d at 321. As noted in Finding 7, the West Virginia Supreme Court of Appeals also held in *Schultz* that no change in a State surface mining law or regulation can take effect for purposes of a State program until approved by OSM, and State surface mining reclamation regulations must be read in a manner consistent with Federal regulations enacted in accordance with SMCRA, *Schultz*, 475 S.E.2d 467. (Administrative Record Number WV-1038). Because we have previously disapproved the language that is the subject of this required amendment, and because of the principle articulated in *Canestraro* and *Schultz*, we conclude that the required amendment at 30 CFR 948.16(ooo) has been satisfied. Therefore, we are removing it.

9. *Bond Release*. 30 CFR 948.16(qqq) provides that West Virginia must revise CSR 38-2-2.20, or otherwise revise the West Virginia program to clarify that a bond may not be released where passive treatment systems are used to achieve compliance with applicable effluent limitations.

#### State Response

CSR 38-2-12.2.e was amended to provide as follows.

12.2.e. Notwithstanding any other provisions of this rule, no bond release or reduction will be granted if, at the time, water discharged from or affected by the operation requires chemical or passive treatment in order to comply with applicable effluent limitations or water quality standards. Measures approved in the permit and taken during mining and reclamation to prevent the formation of acid drainage shall not be considered passive treatment; Provided, That the Director may approve a request for Phase I but not Phase II or III, release if the applicant demonstrates to the satisfaction of the Director that either. \* \* \*

CSR 38-2-12.2.e was amended, in effect, by prohibiting bond release if water discharged from the permit area requires chemical or passive treatment. In addition, a new sentence is added that clarifies that measures approved in the permit and taken during mining and reclamation to prevent the formation of acid drainage shall not be considered passive treatment.

We find that as amended, the provision satisfies the required program

amendment codified at 30 CFR 948.16(qqq) which can, therefore, be removed. We also find that the new language which clarifies that measures approved in the permit and taken during mining and reclamation to prevent the formation of acid drainage shall not be considered passive treatment, does not render the West Virginia program less effective than the Federal regulations. Such measures might include, for example, selective placement of acid-generating materials in the backfill, placing limestone or other alkaline-generating materials in the backfill in close proximity to acid-generating materials, and the use of underdrains to prevent groundwater from wetting acid-generating materials. Measures such as these are taken to prevent the formation of acid discharges, and not to treat such discharges once they are discovered. Therefore, we find the new provision does not render the West Virginia program less effective than the Federal regulations concerning bond release at 30 CFR 800.40, and the provisions concerning hydrologic balance protection at 30 CFR 816.41 and the backfilling and grading requirements at 30 CFR 816/817.102(f) and can be approved.

10. *Water Supply Replacement Waiver*. 30 CFR 948.16(sss) provides that 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 W. Va. Code 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

In our January 15, 2002, meeting with WVDEP, State officials said they would reevaluate the Federal language set forth in the definition of "Replacement of water supply" paragraph (b), at 30 CFR 701.5. Subsequently, in its March 8, 2002, letter, WVDEP stated that it had reevaluated its water replacement and waiver requirements at W. Va. Code 22-3-24 and in its rules. WVDEP stated that it plans to propose changes for the 2003 regular legislative session that would clarify that replacement of an affected water supply that is needed for the existing land use or for the post-mining land use cannot be waived. WVDEP stated that historically, under the State program, replacement waivers are not sought nor granted for such water supplies. In addition, WVDEP stated that, until it amends its program explicitly to be consistent with the

Federal water replacement requirement, it will only allow water replacement waivers in accordance with the provisions in the definition of "Replacement of water supply," paragraph (b), at 30 CFR 701.5.

W. Va. Code 22-3-24(b) states that "[a]ny operator shall replace the water supply of an owner of interest in real property who obtains all or part of the owner's supply of water for domestic, agricultural, industrial or other legitimate use from an underground or surface source where the supply has been affected by contamination, diminution or interruption proximately caused by the surface-mining operation, unless waived by the owner." CSR 38-2-14.5(h) limits the availability of a waiver. It provides that "[a] waiver of water supply replacement granted by a landowner as provided in subsection (b) of section 24 of the Act shall apply only to underground mining operations, provided that a waiver shall not exempt any operator from the responsibility of maintaining water quality." The limitation of maintaining water quality is not sufficient to be no less effective than the corresponding Federal requirements.

30 CFR 701.5 defines the term "Replacement of water supply." Part (b) of the definition states that replacement requirements may be satisfied by demonstrating that a suitable alternative water source is available and could feasibly be developed, but only "[i]f the affected water supply was not needed for the land use in existence at the time of loss, contamination, or diminution, and if the supply is not needed to achieve the postmining land use.\* \* \*". Thus, under Federal regulations, actual replacement of water supply is required unless consideration is given to effect on premining and postmining land uses. West Virginia's waiver provision contains no equivalent consideration. Federal law is therefore more restrictive and the State regulations are less effective.

We have previously ruled that West Virginia's water replacement waiver provision could not be approved "to the extent that\* \* \* [it] would not be implemented in accordance with the definition of "Replacement of water supply" at 30 CFR 701.5." (61 FR at 6524, February 21, 1996). In addition, OSM required that the West Virginia program be further amended to clarify that under W. Va. Code Section 22-3-24(b) and CSR 38-2-14.5.h, the replacement of water supply can only be waived under the conditions set forth in the definition of "Replacement of water supply at 30 CFR 701.5(b). In the February 9, 1999, **Federal Register**,

OSM announced the approval of the State's definition of replacement of water supply at W.Va. Code 22-3-3(z), but we required that the State adopt a counterpart to 30 CFR 701.5(b) (64 FR at 6202-6203). As noted above, the WVDEP has committed to allowing waivers only in a manner consistent with the Federal definition. This commitment complies with the mandate of the West Virginia Supreme Court of Appeals, which has held that "when there is a conflict between the federal and state provisions, the less restrictive state provision must yield to the more stringent federal provision\* \* \* *Canestraro*, 379 S.E.2.d, at 321.

As noted above in Finding 7, the West Virginia Supreme Court of Appeals has ruled that "[w]hen a provision of the West Virginia Surface Coal Mining and Reclamation Act, W.Va. Code 22A-3-1 *et seq.*, is inconsistent with Federal requirements in the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 *et seq.*, the State Act must be read in a way consistent with the Federal Act." *Canestraro*, 374 S.E.2d at 321 (Administrative Record Number WV-761).

In addition, State rules must be read in a manner consistent with Federal regulations, *Schultz*. As noted above in Finding 7, the West Virginia Supreme Court of Appeals also held in *Schultz* that no change in a State surface mining law or regulation can take effect for purposes of a State program until approved by OSM, and State surface mining reclamation regulations must be read in a manner consistent with Federal regulations enacted in accordance with SMCRA, *Schultz*, 475 S.E.2d 467. (Administrative Record Number WV-1038).

Because of the State's commitment to comply with the more restrictive Federal waiver requirement, and because of the principles established in *Canestraro* and *Schultz*, we conclude that the required amendment at 30 CFR 948.16(sss) has been satisfied. Therefore, we are removing it. We recommend that the provision be included in the program at some future date to avoid confusion or misinterpretation.

11. *Existing Structures and Approximate Original Contour (AOC)*. 30 CFR 948.16(vvv)(1) provides that West Virginia must amend its 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 the requirements to restore the land to AOC.

### State Response

This required program amendment should be removed. The State regulation in subsection 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 subsection 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 subsection 3.8(c) since the WV Surface Coal Mining and Reclamation Act performance standard at Section 22-3-13(b)(3) is clear about the requirement to restore the approximate original contour with respect to surface mines.

On August 18, 2000 (65 FR 50413), we approved 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. In that same notice, we revised 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 continued to require at revised 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 (AOC).

In its response quoted above, WVDEP stated that Section 22-3-13(b)(3) of the West Virginia Surface Coal Mining and Reclamation Act is clear about the requirement to restore the AOC with respect to surface mines. W.Va. Code at 22-3-13(b)(3) requires surface mines to be restored to AOC, except those which receive a variance under W.Va. Code 22-3-13(c) concerning mountaintop removal mining operations, and for those situations where the overburden is thin and the resulting material is insufficient to achieve AOC. In addition, W.Va. Code 22-3-13(d) and (e) provide for variances from AOC for steep slope mining operations under certain circumstances. Given this clarification, we are approving the State's response to the required amendment at 30 CFR 948.16(vvv)(1) to the extent that the exemption at CSR 38-2-3.8(c) does not apply to the requirement to restore the land to AOC. Therefore, to the extent that CSR 38-2-3.8(c) is limited to existing facilities and does not apply to the requirement to restore the land to AOC, we find that the required amendment codified at 30 CFR 948.16(vvv)(1) is satisfied and can be removed.

12. *Certification of Haulroads*. 30 CFR 948.16(vvv)(2) provides that West Virginia must 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

The WVDEP has established guidelines (Series 20 Effective 1-97, page 22 of the I&E Handbook, Attachment 4) for approval of minor revisions to the original design. Minor deviations from the approved plan for haulroads (width, grade, etc.) are permissible as long they are within the construction tolerance specified in 38-3.35 [38-2-3.35].

The provision at CSR 38-2-4.12 concerns the certification of haulroads. However, the procedures that were initially submitted to OSM only applied to the approval of as-built certifications for drainage systems. During the January 15, 2002, meeting WVDEP agreed to reevaluate this issue and, if necessary, amend its policy to make it applicable to haulroads (Administrative Record Number WV-1271).

On February 26, 2002, WVDEP submitted revised guidelines for the approval of minor revisions to the original design of haulroads (Administrative Record Number WV-1276). The guidelines are set forth in Attachment 4. As noted above, the State clarified that minor deviations from the approved plan for haulroads are permissible so long as they are within the construction tolerance limits specified in CSR 38-2-3.35, not 38-3.35 as quoted above.

Attachment 4 is entitled, “Minor Revisions Approvable by Field Level Personnel” and contains the following language:

*Purpose:* Establish guidelines for approval of minor adjustments to original proposals.

*Policy/Procedures:* Minor revisions to original designs must be within the construction tolerances specified in 38-2-3.35. If not, a permit revision is required. The following are examples of minor revisions that are approvable at the field inspector level.

1. Minor drainage structure configuration changes (i.e., round vs. square, spillway one side instead of the other, etc.) as long as the required sediment storage capacity is maintained. (Approved by virtue of the inspector signing off on the as-built certification)

2. Minor road width/slope configuration (as long as the width/slope do not compromise safety considerations). (Approved as an as-built certification)

3. Additional sediment control capacity (i.e., additional sumps on roads, pre sumps in front of sediment ponds). (Approved as an as-built certification)

4. Species substitution on planting plans (i.e., substituting legume for

legume, hardwoods for hardwoods, etc.). Approved by letter submittal and inspector signs off on it.

5. Minor bench size changes on fills (i.e., wider than twenty (20) feet. (Approved on the final certification)

6. Outlets/spillways constructed of different material than originally proposed. (Approved on the as-built certification)

7. Additional rock flumes on backfill areas (letter approval when constructed).

8. Minor encroachment of the permit boundary (i.e., slips, shootovers, etc.). These need to be covered with a notice of violation (NOV) then shown on a progress map or on the final map. The acreage involved has to be included in the disturbed acreage number on the Phase I release application, and the bond reduction calculated accordingly.

Keep in mind that some of these changes need to be delineated on the “map of record.” This can be done by requesting a progress map to accompany the certification or letter, or at a mid term review, or at the time of final map submittal (Phase I release).

As described in the July 24, 1996, **Federal Register** notice (61 FR 38384), we approved West Virginia’s haulroad certification requirements, except to the extent that the Director (now Secretary) is removed from the responsibility of reviewing permit revisions as required under 30 CFR 774.11(c). In addition, we required the State to reinstate the following deleted language at CSR 38-2-4.12, “and submitted for approval to the Director as a permit revision.”

CSR 38-2-3.35 provides that all grade measurements and linear measurements in the State’s rules shall be subject to a tolerance of two (2) percent. All angles in the rules shall be measured from the horizontal and shall be subject to a tolerance of five (5) percent. Provided, however, this allowable deviation from the approved plan does not affect storage capacity and/or performance standards. We announced our approval of these requirements in the February 9, 1999, **Federal Register** (64 FR 6208). The approved tolerances pertain to the amount of allowed variance between the approved designs in the permit application and the “as built” measurements of those designs.

Only Item (2) of the proposed guidelines described above relates to haulroads. As noted in Attachment 4, a minor road width/slope configuration, as long as the width/slope revision is within the construction tolerance limits specified in CSR 38-2-3.35 and does not compromise safety considerations, can be approved as an as-built certification by field personnel. All

other as-built haulroad configurations must be approved by the Secretary as permit revisions.

Neither SMCRA nor the Federal regulations provides for the approval of as-built certifications that are within the construction tolerance limits as set forth in CSR 38-2-3.35. However, we find that the existing State requirements regarding as-built certifications, together with the proposed State clarification regarding minor changes in the width and/or slope of haulroads, as described in Item (2) of Attachment 4, appear reasonable and are not inconsistent with SMCRA or the Federal regulations. Because the State has clarified that only minor deviations from the approved designs for haulroads are permissible as long as they are within the construction tolerance limits specified at CSR 38-2-3.35, and all other as-built haulroad configurations that exceed those limits require the Secretary’s approval as permit revisions, we are approving the State’s proposal and removing the required amendment at 30 CFR 948.16(vvv)(2) which requires that all as-built certifications for haulroads be submitted and approved as permit revisions. This approval is limited to minor as-built haulroad certifications as described herein and does not apply to the other proposed minor revisions that field personnel may authorize as described in Attachment 4, “Minor Revisions Approvable by Field Level Personnel,” Series 20, page 22 of the Inspection and Enforcement Handbook. The other revisions mentioned therein do not pertain to this rulemaking.

13. *Slurry Impoundments.* 30 CFR 948.16(vvv)(3) provides that West Virginia must amend its program by clarifying that the requirements at CSR 38-2-5.4(c) also apply to slurry impoundments.

#### State Response

The WVDEP is proposing a change to subsection 5.4.d.4 (Attachment 5) which clarifies that non-MSHA size coal processing waste dams and embankments will be certified by a registered professional engineer as indicated in 30 CFR 780.25.

In the July 24, 1996, **Federal Register** (61 FR 38384), we found that the removal of the words, “which may include slurry impoundments” from CSR 38-2-5.4.c. made it unclear as to whether slurry impoundments are subject to the impoundment requirements at CSR 38-2-5.4.c. If CSR 38-2-5.4.c. does not apply to slurry impoundments (which appeared to be the purpose of the deletion), the provision is rendered less effective than 30 CFR 816.49 and 817.49.

The State's existing rules at CSR 38-2-22.4.c. governing small impoundments state that coal refuse sites which result 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 subsections CSR 38-2-5.4 and 22.5.j.6.

By referencing subsection 5.4, the required amendment at 30 CFR 948.16(vvv)(3) appears to be satisfied in so far as it is clear that all non-MSHA size or small coal refuse impoundments must comply with the State's impoundment requirements at subsection 5.4. However, because CSR 38-2-5.4.d allows certain impoundments to be certified by a registered professional engineer or a licensed land surveyor, we questioned whether the State's existing requirements were as effective as the Federal rules. The Federal requirements at 30 CFR 780.25(a)(3)(i) provides that all coal refuse impoundments, regardless of size, must be certified by a registered professional engineer. In addition, it was unclear if coal refuse dams and embankments which are subject to the Dam Control Act or the Federal Mine Health and Safety Act are subject to the impoundment requirements at CSR 38-2-5.4(c).

On February 26, 2002, WVDEP submitted the proposed revision described above to its program (Administrative Record Number WV-1276). Attachment 5 contains a proposed revision to CSR 38-2-5.4.d. According to the State, this provision is to be amended at subdivision 38-2-5.4.d.3. by adding the words "except all coal processing waste dams and embankments covered by subsection 22.4.c. shall be certified by a registered professional engineer." As amended, CSR 38-2-5.4.d.3. would read as follows: Design and construction certification of embankment type sediment control structures may be performed only by a registered professional engineer or licensed land surveyor experienced in construction of embankments "except all coal processing waste dams and embankments covered by subsection 22.4.c. shall be certified by a registered professional engineer."

The State submitted the proposed rule changes to the Legislature in February 2002. However, because of a procedural error, the Legislature did not adopt the revised language. To correct this oversight, on April 19, 2002, WVDEP filed these changes with the Secretary of State as emergency rules. According to State law, emergency rules can remain

in effect for not more than 15 months. Final legislative rules are to be adopted by the State during a special legislative session or during the regular 2003 legislative session. We will review the emergency and final rules adopted by the State to ensure that the language of those rules is substantively identical to the language that we are approving today, with the exception of the correction of typographical and grammatical errors such as the two noted in Finding 19. Any substantive differences in the language are subject to further public review as a program amendment under 30 CFR 732.17.

As discussed above, CSR 38-2-22.4.c. clarifies that CSR 38-2-5.4 applies to small, non-MSHA size coal refuse dams and embankments. In addition, the proposed revision at CSR 38-2-5.4.d.3 clarifies that all small coal refuse dams and embankments must be certified by a registered professional engineer. Furthermore, CSR 38-2-5.4.d.4. provides that the design and construction of coal refuse impoundments meeting the MSHA size or other requirements at 30 CFR 77.216(a) may only be performed by a registered professional engineer. Given that there are design and construction certification requirements for both MSHA and non-MSHA size coal refuse impoundments at CSR 38-2-5.4.d, the structure of this section implies that all coal refuse impoundments must comply with the impoundment requirements at CSR 38-2-5.4.c. In addition, CSR 38-2-22.1 requires that all coal slurry impoundments, including MSHA size impoundments, must comply with all applicable requirements of the State program. These would include those requirements contained in CSR 38-2-5.4. In accordance with 30 CFR 780.25(a)(3)(i) and 784.16(a)(3)(i), we are approving the proposed revision at CSR 38-2-5.4.d.3. which provides that all coal processing waste dams and embankments covered by subsection 22.4.c. shall be certified by a registered professional engineer. Furthermore, given that the State has clarified that slurry impoundments, regardless of size, are subject to the requirements of CSR 38-2-5.4.c., we find that the required amendment at 30 CFR 948.16(vvv)(3) is satisfied and can be removed.

Upon promulgation of a final rule by the State, WVDEP will be required to provide a copy of it to OSM. OSM will review it to ensure that the language contained therein is identical to that language which is being approved today. Any substantive differences in the language will be subject to further public review and approval by us as a program amendment.

14. *Coal Refuse Disposal in the Backfill.* 30 CFR 948.15(vvv)(4) provides that West Virginia must amend CSR 38-2-14.15(m), or otherwise amend its 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. Coal refuse placed in the backfill pursuant to subsection 14.15(m) is placed into the mine workings or excavation areas. This placement, when done in accordance with the State's backfilling and grading, stability and toxic material handling plan requirements, is consistent with the provisions of 30 CFR 816.81 and 817.81.

In our January 15, 2002, meeting with WVDEP (Administrative Record Number WV-1271), State officials agreed to clarify how the State's existing rules require that coal processing waste outside the permit area must be disposed of in accordance with the standards at 30 CFR 816/817.81(b). In addition, WVDEP would clarify how its rules require sufficient foundation investigations as required by 30 CFR 816/817.81(d). Further, WVDEP agreed to provide us with an explanation of how its other program requirements regarding underdrains, diversions, and toxic handling plans apply to the disposal of coal refuse as allowed by CSR 38-2-14.14.m. Finally, they noted that the State's emergency procedures at CSR 38-2-14.15.m.2. are no less effective than the Federal requirements at 30 CFR 816/817.81(e).

*Material from Outside the Permit Area:* In its February 26, 2002, response State officials assured us that WVDEP requires the permittee to identify the source of the coal refuse to be disposed of in the backfill in addition to the laboratory testing. Any changes in the source of the coal refuse require the approval of the Secretary. The State noted that its rules at CSR 38-2-14.15.m.2. clearly require that prior approval of the Secretary is necessary

before placing coal refuse material in the backfill, regardless of where the material originates. This assurance from the State and the existing requirements at CSR 38-2-14.15.m.2. ensure that, as required by 30 CFR 816/817.81(b), coal refuse from activities located outside the permit area must be approved by the Secretary, and the approval must be based on a showing that the disposal will be in accordance with the standards set forth in CSR 38-2-14.15.m.

*Foundation Investigations:* According to State officials, the part of the required program amendment relating to foundation investigations is satisfied due to the requirements at CSR 38-2-14.15.a. and 14.15.m. Those requirements provide that the backfill must be designed and certified by a registered professional engineer so that a minimum long-term static safety factor of 1.3 is achieved for the final graded slope. All stability analyses include properties of the material to be placed, properties of the foundation (whether on solid bench or backfill) and include site conditions that will affect stability. The State requirements at CSR 38-2-14.15.a. and 14.15.m. ensure that sufficient foundation investigations, including any necessary laboratory testing of foundation material, will be performed prior to placing any coal refuse in a backfill as required by 30 CFR 816/817.81(d).

*Acid Material Handling Plan:* In its February 26, 2002, response WVDEP clarified that coal processing waste cannot be placed in the backfill pursuant to CSR 38-2-14.15.m., unless it is non-acid and/or non-toxic producing or is rendered non-acid and/or non-toxic producing pursuant to subsection 14.15.m.2.

CSR 38-2-14.15.m.2. provides the following:

The coal processing waste will not be placed in the backfill unless it has been demonstrated to the satisfaction of the Secretary that:

The coal processing waste to be placed based upon laboratory testing to be non-toxic and/or non-acid producing; or

An adequate handling plan including alkaline additives has been developed and the material after alkaline addition is non-toxic and/or non-acid producing.

WVDEP officials stated that the rules at subsection 14.6. apply to the handling of all acid producing material. CSR 38-2-14.6.a. requires that all acid-forming or toxic-forming material be handled and treated in accordance with the approved toxic handling plan. According to State officials, all coal refuse must be rendered non-toxic or non-acid producing before it is placed in the backfill. Furthermore, any

alkaline addition that may be required must occur prior to placement in the backfill.

In addition, CSR 38-2-14.6.b. provides that, “[a]cid-forming or toxic-forming material shall not be buried or stored in proximity to a drainage course or groundwater system.” Therefore, when a toxic handling plan for the disposal of acid-forming or toxic-forming materials is submitted under CSR 38-2-14.15.m.2.B., the plan must identify whether or not a drainage course or groundwater system exists in proximity to the burial site. If such a drainage course or groundwater system exists in proximity to the burial site, the Secretary must disapprove the burial of the acid-producing or toxic-producing material at the proposed site. This requirement ensures that where the coal processing waste proposed to be placed in the backfill contains acid- or toxic-producing materials, such materials cannot be buried or stored in proximity to any drainage course such as springs and seeps as required by 30 CFR 816/817.83(a) and 30 CFR 816/817.102(e).

In addition, we note that CSR 38-2-14.16.g. also provides that the disposal of coal processing waste and underground development waste in the mined out area of previously mined areas must be done in accordance with Section 22, except that a long-term static safety factor of 1.3 must be achieved. Subsection 14.16.g. ensures that coal refuse placed in the backfill on previously mined areas is protected from groundwater by the appropriate use of rock drains under the backfill and along the highwall and 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. Subsection 14.16.g. contains requirements regarding the disposal of coal processing waste in the backfill that are no less effective than the Federal requirements at 30 CFR 816/817.83(a) and 30 CFR 816/817.102(e).

*Emergency Procedures:* 30 CSR 38-2-14.15.m.2. provides that a qualified registered professional engineer, experienced in the design of similar earth and waste structures, shall certify the design of the disposal facility. If any examination or inspection discloses that a potential hazard exists, the Secretary shall be informed promptly of the finding and of the emergency procedures formulated for public protection and remedial action. If adequate procedures cannot be formulated or implemented, the Secretary shall be notified immediately, and the Secretary will then notify the

appropriate agencies that other emergency procedures are required to protect the public. Subsection 14.15.m.2. contains emergency procedures that are substantively identical to the Federal requirements at 30 CFR 816/817.81(e).

As discussed above, we find that CSR 38-2-14.15.m.2. provides that the disposal of coal processing waste outside the permit area must be disposed of in accordance with the standards at CSR 38-2-14.15.m., as required by 30 CFR 816/817.81(b). The State’s backfilling requirements at subsections 14.15.a. and 14.15.m. ensure that sufficient foundation investigations, including any necessary laboratory testing of foundation material, will be performed prior to placing any coal refuse in a backfill as required by 30 CFR 816/817.81(d). The State program provisions at CSR 38-2-14.15.m.2., CSR 38-2-14.6. and CSR 38-2-14.16.g. prohibit the burial or storage of acid-forming or toxic-forming materials in the backfill in proximity to a drainage course or groundwater system and ensure the protection of acid- or toxic-forming material from groundwater or from infiltration into the backfill as required by 30 CFR 816/817.83(a) and 30 CFR 816/817.102(e). Finally, CSR 38-2-14.15.m.2. contains emergency procedures that are no less effective than the Federal emergency procedures at 30 CFR 816/817.81(e). Therefore, we find that the required program amendment codified at 30 CFR 948.16(vvv)(4) relating to the disposal of coal refuse in the backfill has been satisfied and can be removed.

15. *Subsidence Control Plan.* 30 CFR 948.16(zzz) provides that 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*

In its May 2, 2001, submittal, the State amended CSR 38–2–3.12.a.1.

concerning subsidence control plans by adding the words, “a narrative indicating” to the survey and map requirements of this subsection. As amended, this provision requires a survey, map, and a narrative indicating whether or not subsidence could cause material damage to the identified structures and water supplies. We find that the addition of the words “a narrative indicating” satisfies the narrative requirement codified at 30 CFR 948.16(zzz).

In our January 15, 2002, meeting with WVDEP, State officials agreed to modify its permit application to ensure that the identification of structures would also indicate the type of structures being identified. In its February 26, 2002, letter, WVDEP submitted (at Attachment 6) a portion of its permit application that it had modified to require the identification of the location and type of structures, streams, renewable resource lands and water works. Therefore, the applicant must identify both the location and type of structures within a 30-degree angle of draw. With that submittal, the State has satisfied the requirement that the map show the location and type of structures that could be materially damaged by subsidence. We find that the revised permit application together with revised CSR 38–2–3.12.a.1. satisfy the requirements at 30 CFR 948.16(zzz) and can be approved. Therefore, 30 CFR 948.16(zzz) can be removed.

16. *Water Supply Survey.* 30 CFR 948.16(aaaa) provides that 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*

In our January 15, 2002, meeting, WVDEP agreed to amend its program. By letter dated February 26, 2002, WVDEP sent us draft language (at Attachment 7) that it had submitted to the State Legislature for approval. The proposed amendment clarifies that the State reserves the right to request surveys within a larger area based on

evaluation of the application. As submitted, the revised language at CSR 38–2–3.12.a.1. provides that the applicant for an underground coal mining permit must provide a survey on a map that identifies structures, perennial and intermittent streams or renewable resource lands and a narrative indicating whether or not subsidence could cause material damage or diminution of value or use of such structures or renewable resource lands both on the permit and adjacent areas within an angle of draw of at least 30 degrees “unless a greater area is specified by the Secretary.” In addition, the State has revised CSR 38–2–3.12.a.2. to also require a survey of the quality and quantity of water supplies that could be contaminated, diminished or interrupted by subsidence “within the permit area and adjacent areas.”

The State submitted the proposed rule changes to the Legislature in February 2002. However, because of a procedural error, the Legislature did not adopt the revised language. To correct this oversight, on April 19, 2002, WVDEP filed these changes with the Secretary of State as emergency rules. According to State law, emergency rules can remain in effect for not more than 15 months. Final legislative rules are to be adopted by the State during a special legislative session or during the regular 2003 legislative session. We will review the emergency and final rules adopted by the State to ensure that the language of those rules is substantively identical to the language that we are approving today, with the exception of the correction of typographical and grammatical errors such as the two noted in Finding 19. Any substantive differences in the language are subject to further public review as a program amendment under 30 CFR 732.17.

We find that the emergency rules approved by West Virginia satisfy the requirements codified at 30 CFR 948.16(aaaa) and can be approved. Therefore, 30 CFR 948.16(aaaa) can be removed. Upon promulgation of a final rule by the State, WVDEP will be required to provide us with a copy. We will review it to ensure that the language contained therein is identical to that language which is being approved today. Any substantive differences in the language will be subject to further public review and approval by us.

17. *Presubsidence Survey.* 30 CFR 948.16(bbbb) provides that 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 permit applicant pay for any technical assessment or engineering evaluation used to determine the premining 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*

In our January 15, 2002, meeting, WVDEP agreed to amend its program to clarify that the permit applicant must pay for any surveys, including technical assessments or engineering evaluations, conducted to determine the premining quality and quantity of water supplies and to require that copies of any technical assessments or engineering evaluations prepared as part of the survey be provided to the property owner and the WVDEP. In its February 26, 2002, letter, WVDEP submitted language at Attachment 7 to amend CSR 38–2–3.12.a.2.B. to address this issue.

As amended, CSR 38–2–3.12.a.2.B. provides that “at the cost of the applicant,” a written report of the survey “containing any technical assessments and engineering evaluation used in the survey” shall be prepared and signed by the person or persons who conducted the survey. The provision also provides that copies of the report shall be provided to the property owner and to the Secretary

The State submitted the proposed rule changes to the Legislature in February 2002. However, because of a procedural error, the Legislature did not adopt the revised language. To correct this oversight, on April 19, 2002, WVDEP filed these changes with the Secretary of State as emergency rules. According to State law, emergency rules can remain in effect for not more than 15 months. Final legislative rules are to be adopted by the State during a special legislative session or during the regular 2003 legislative session. We will review the emergency and final rules adopted by the State to ensure that the language of those rules is substantively identical to the language that we are approving today, with the exception of the correction of typographical and grammatical errors such as the two noted in Finding 19. Any substantive differences in the language are subject to further public review as a program amendment under 30 CFR 732.17.

We find that, to the extent that CSR 38–2–3.12.a.2.B. requires the permit applicant to pay for the actual technical assessments or engineering evaluations, these amendments satisfy the required amendment codified at 30 CFR

948.16(bbbb) and can be approved. Therefore, 30 CFR 948.16(bbbb) can be removed. Upon promulgation of a final rule by the State, WVDEP will be required to provide us with a copy. We will review it to ensure that the language contained therein is identical to that language which is being approved today. Any substantive differences in the language will be subject to further public review and approval by us.

18. *Extension of the 90-Day Abatement Period.* 30 CFR 948.16(ffff) provides that West Virginia must amend CSR 38–2–16.2.c.4. or otherwise amend the West Virginia program to be no less effective than the Federal regulations at 30 CFR 817.121(c)(5), which provide that an extension of the 90-day abatement period may be granted for one of only three reasons: that subsidence is not complete; that not all subsidence related material damage has occurred; or that not all reasonably anticipated changes have occurred affecting the protected water supply.

*State Response:*

In its program amendment submittal dated May 2, 2001 (Administrative Record Number WV–1209), the State amended CSR 38–2–16.2.c.4 regarding bonding for subsidence damage. CSR 38–2–16.2.c.4 has been revised in pertinent part as follows.

The director may extend the ninety (90) day abatement period but such extension shall not exceed one (1) year from the date of the notice. Provided, however, the permittee demonstrates in writing, and the director concurs that subsidence is not complete, that not all probable subsidence related material [damage] has occurred to lands or structures; or that not all reasonably anticipated changes have occurred affecting the water supply, and that it would be unreasonable to complete repairs or replacement within the ninety (90) day abatement period. If extended beyond ninety (90) days, as part of the remedial measures, the permittee shall post an escrow bond to cover the estimated costs of repairs to land or structures, or the estimated cost to replace water supply.

As discussed in the February 9, 1999, **Federal Register** notice, the State's rule at subsection 16.2.c.4. provided for an extension to the 90-day abatement period (64 FR 6212–6213). However, it allowed an extension if the permittee demonstrates that it would be unreasonable to complete repairs within the 90-day abatement period. Because Federal rules limit the circumstances under which an extension to the 90-day abatement period can be granted, it appeared that operators in West Virginia could get extensions to the abatement period for additional reasons.

The required program amendment codified at 30 CFR 948.16(ffff) requires the State to amend the West Virginia program at CSR 38–2–16.2.c.4. to be no less effective than the Federal regulations at 30 CFR 817.121(c)(5), which provide that an extension of the 90-day abatement period may be granted for one of only three reasons: that subsidence is not complete; that not all subsidence-related material damage has occurred; or that not all reasonably anticipated changes have occurred affecting the protected water supply. We find that the State's amendment to CSR 38–2–16.2.c.4., as quoted above, provides for extensions to the 90-day abatement period that are no less effective than those set forth in 30 CFR 817.121(c)(5). Therefore, the required program amendment at 30 CFR 948.16(ffff) has been satisfied, and it can be removed. We are approving this revision with the understanding that the State will revise subsection 16.2.c.4. and insert the word "damage" after the words "subsidence-related material" in the third sentence to correct a typographical error.

19. *Bonding for Water Supply Replacement.* 30 CFR 948.16(gggg) provides that West Virginia must amend CSR 38–2–16.2.c.4. or otherwise amend the West Virginia program to be no less effective than the Federal regulations at 30 CFR 817.121(c)(5) by requiring additional bond whenever protected water supplies are contaminated, diminished, or interrupted by underground mining operations conducted after October 24, 1992. The amount of the additional bond must be adequate to cover the estimated cost of replacing the affected water supply.

As discussed in the February 9, 1999, **Federal Register**, 30 CFR 817.121(c)(5) requires that the permittee post additional bond whenever protected water supplies contaminated, diminished or interrupted by underground mining activities conducted after October 24, 1992 are not replaced within a specified time (64 FR 6212–6213). However, the State rule limited this requirement to water supplies that are affected by subsidence whereas the Federal rule applies this requirement to all water supplies affected by underground mining operations in general.

*State response*

In its February 26, 2002, submission, WVDEP officials stated that additional bond would be required whenever a protected water supply is contaminated, diminished, or interrupted by underground mining, and the amount of bond to be posted would be based on

the estimated cost of replacing the water supply (Administrative Record No. WV–1276). However, for clarification, WVDEP proposed to amend CSR 38–2–16.2.c.4. to read as follows:

16.2.c.4. *Bonding for Subsidence Damage:* The Secretary shall issue a notice to the permittee when subsidence related material damage has occurred to lands, structures, or when contamination, diminution or interruption occurs to a domestic or residential water supply, and that the permittee has ninety (90) days from the date of notice to complete repairs or replacement. The Secretary may extend the ninety (90) day abatement period but such extension shall not exceed one (1) year from the date of the notice. Provided, however, the permittee demonstrates in writing, and the Secretary concurs that subsidence is not complete, that not all probable subsidence related material [material damage] has occurred to lands or structures; or that not all reasonably anticipated changes have occurred affecting the water supply, and that it would be unreasonable to complete repairs or replacement within the ninety (90) day abatement period. If extended beyond ninety (90) days, as part of the remedial measures, the permittee shall post an escrow bond to cover the estimated costs of repairs to land or structures, or the estimated cost to replace water supply.

The State submitted the proposed rule changes to the Legislature in February 2002. However, because of a procedural error, the Legislature did not adopt the revised language. To correct this oversight, on April 19, 2002, WVDEP filed these changes with the Secretary of State as emergency rules. According to State law, emergency rules can remain in effect for not more than 15 months. Final legislative rules are to be adopted by the State during a special legislative session or during the regular 2003 legislative session. We will review the emergency and final rules adopted by the State to ensure that the language of those rules is substantively identical to the language that we are approving today, with the exception of the correction of typographical and grammatical errors such as the two noted in Finding 19. Any substantive differences in the language are subject to further public review as a program amendment under 30 CFR 732.17.

As proposed, the emergency rules at subsection 16.2.c.4. require additional bond whenever domestic or residential water supplies are contaminated, diminished, or interrupted by underground mining operations, not just by subsidence. In addition, the amount of the additional bond must be adequate to cover the estimated cost of replacing the affected water supply. Therefore, we find that proposed 30 CSR 38–2–16.2.c.4. is no less effective than the Federal requirements at 30 CFR

817.125(c)(5). The proposed revisions satisfy the required amendment at 30 CFR 948.16(gggg), which we are removing. Upon promulgation of a final rule by the State, WVDEP will be required to provide a copy to us. We will review it to ensure that it is substantively identical to the language being approved today. Any substantive differences in the language will be subject to further public review and approval by us. We are approving this revision with the understanding that the State will revise subsection 16.2.c.4. to replace the comma between "lands" and "structures" in the first sentence with "or" and to correct the spelling of the word "material" and insert the word "damage" after the words "subsidence-related material" in the third sentence as shown above.

20. *Timetable for Posting Bond for Subsidence-Related Material Damage and Damaged Water Supplies.* 30 CFR 948.16(hhhh) provides that West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend CSR 38-2-16.2.c.4., or to otherwise amend the West Virginia program, to be no less effective than the Federal regulations at 30 CFR 817.121(c)(5), by requiring that the 90-day period before which additional bond must be posted begin to run from the date of occurrence of subsidence-related material damage.

#### State Response

In a program amendment submittal dated May 2, 2001 (Administrative Record Number WV-1209), the State amended CSR 38-2-16.2.c.4. to read as follows:

16.2.c.4. Bonding for Subsidence Damage: The director shall issue a notice to the permittee that subsidence related material damage has occurred to lands, structures, or water supply, and that the permittee has ninety (90) days from the date of notice to complete repairs or replacement. The director may extend the ninety (90) day abatement period but such extension shall not exceed one (1) year from the date of the notice. Provided, however, the permittee demonstrates in writing, and the director concurs that subsidence is not complete, that not all probable subsidence related material [damage] has occurred to lands or structures; or that not all reasonably anticipated changes have occurred affecting the water supply, and that it would be unreasonable to complete repairs or replacement within the ninety (90) day abatement period. If extended beyond ninety (90) days, as part of the remedial measures, the permittee shall post an escrow bond to cover the estimated costs of repairs to land or structures, or the estimated cost to replace water supply.

On February 26, 2002, WVDEP proposed to further amend CSR 38-2-

16.2.c.4. by (1) replacing "director" with "Secretary," (2) replacing "that" with "when" in the first sentence immediately after the word "permittee," and (3) adding the words "when contamination, diminution or interruption occurs to a domestic or residential" before "water supply" in the first sentence. As amended, CSR 38-2-16.2.c.4. provides that the Secretary shall issue a notice to the permittee when subsidence-related material damage has occurred to lands [or] structures, or when contamination, diminution or interruption occurs to a domestic or residential water supply, and that the permittee has ninety (90) days from the date of notice to complete repairs or replacement.

As discussed in the February 9, 1999, **Federal Register**, CSR 38-2-16.2.c.4. originally differed from its Federal counterpart at 30 CFR 817.121(c)(5) in that the State rule provided that the 90-day period during which no bond need be posted began with the issuance of a notice of violation to the permittee, rather than with the date of occurrence of damage (64 FR 6212-6213). As amended, the 90-day grace period in the State rule continues to commence upon issuance of a notice (although the notice is no longer a notice of violation), not the date of occurrence of the damage. For the reasons discussed below, we no longer believe that the State must amend its rule to provide that the grace period begins on the date of occurrence of the damage.

The preamble to the Federal rule contains the following explanation of its basis and intent:

The current rules at 30 CFR Part 800 already require the permittee to adjust the amount of the bond when the costs of future reclamation increase or when a reclamation obligation is established; for example, when material damage from subsidence occurs. The final rule is intended to avoid incomplete reclamation by clarifying the application to actual subsidence damage of the requirement in 30 CFR 800.15(a) that the regulatory authority specify a period of time or a set schedule to increase the amount of bond when the cost of reclamation changes. Thus, this provision assures that funds are available in a timely fashion to cover the cost of repairs in case of default by the permittee and to encourage prompt repair through the use of a grace period.

62 FR 16742, col. 1, March 31, 1995.

While the Federal rule includes no provision for notice to the permittee, we find that the notice provision is both equitable and a practical means of implementing this requirement. The preamble quoted above indicates that we did not intend for the rule to apply before a reclamation obligation is established, which often requires some

investigation. Furthermore, exact dates that damage occurred may be unknown or difficult to establish, particularly for damage to land and damage that occurs in a gradual fashion. The cause of a water supply loss can be extremely difficult to ascertain, especially when the loss occurs near a mine during adverse climatic conditions. Like the Federal rule, the State rule establishes a deadline for posting additional bond and a 90-day grace period to encourage prompt repair or replacement. The State rule requires issuance of notice to a permittee "when" damage occurs, which we interpret as obligating the State to (1) conduct prompt investigations upon receiving a damage complaint and (2) issue a notice as soon as the investigation is completed. The permittee would be required to post the additional bond upon notification by the State if the damage cannot be corrected within 90 days. In addition, West Virginia has an alternative bonding system approved under 30 CFR 800.11(e), which means that any reclamation obligations not covered by a permittee's site-specific bond are the responsibility of the Special Reclamation Fund. Therefore, we find that the State rule is no less effective than the Federal rule, and that it satisfies the requirements of 30 CFR 948.16(hhhh), which we are removing.

The State submitted the proposed rule changes to the Legislature in February 2002. However, because of a procedural error, the Legislature did not adopt the revised language. To correct this oversight, on April 19, 2002, WVDEP filed these changes with the Secretary of State as emergency rules. According to State law, emergency rules can remain in effect for not more than 15 months. Final legislative rules are to be adopted by the State during a special legislative session or during the regular 2003 legislative session. We will review the emergency and final rules adopted by the State to ensure that the language of those rules is substantively identical to the language that we are approving today, with the exception of the correction of typographical and grammatical errors such as the two noted in Finding 19. Any substantive differences in the language are subject to further public review as a program amendment under 30 CFR 732.17.

21. *Recreational Facilities Use.* 30 CFR 948.16(iiii) provides that 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).

#### State Response

In our January 15, 2002, meeting with the WVDEP, WVDEP asserted that when the West Virginia law and rules are read together, they are no less stringent than SMCRA at section 515(c)(3). In addition, by letter dated February 26, 2002, WVDEP stated that neither State code nor State rules define the term “public facility including recreational land use.” Furthermore, WVDEP provided the following policy statement to address this required amendment.

It is the state position that the term “public facility including recreational land use,” implies structures or other significant developments that the public is able to use, or that confer some type of public benefit. Depending upon individual circumstances, this term may include schools, hospitals, airports, reservoirs, museums, and developed recreational sites such as picnic areas, campgrounds, ballfields, tennis courts, fishing ponds, equestrian and off-road vehicle trails, and amusement areas, together with any necessary supporting infrastructure such as parking lots and rest facilities. In general, those sites with a public or public facility postmining land use will provide the public with access as a matter of right on a non-profit basis. Facilities that meet a public need, like water supply reservoirs and publicly owned prisons, and facilities that provide a benefit, like flood control structures and institutions of higher education, also qualify, even if they are not readily accessible to all members of the public or completely non-profit.

We find that the state policy quoted above renders the term “recreational uses” at W. Va. Code 22–3–13(c)(3) will always include facilities. Therefore, that term is no less stringent than the term “recreational facilities use” at SMCRA section 515(c)(3) and can be approved. For this reason, we find that the required amendment codified at 30 CFR 948.16(iiii) is satisfied and can be deleted.

22. *Forfeiture of Bonds.* 30 CFR 948.16 (jjjj) provides that West Virginia must remove the words “other responsible party” at CSR 38–2–12.4.e.

#### State Response

In the program amendment submittal dated May 2, 2001, the State revised CSR 38–2–12.4.e. by deleting the words, “or other responsible party.” As amended, this provision is as follows:

12.4.e. The operator or permittee shall be liable for all costs in excess of the amount forfeited. The Director may commence civil, criminal or other appropriate action to collect such costs.

We find that the deletion of the words “or other responsible party” satisfies the

required program amendment codified at 30 CFR 948.16(jjjj) and can be approved. In addition, we are removing the required program amendment codified at 30 CFR 948.16(jjjj).

23. *Preblast Survey Requirements.* 30 CFR 948.16(kkkk) provides that 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

In the amendment submitted by letter dated November 28, 2001, concerning blasting, the State amended the W. Va. Code at 22–3–13a(g) by revising language concerning the availability of the preblast survey. As amended, the office of explosives and blasting shall provide a copy of the preblast survey to the owner or occupant. Prior to this amendment, the office was only required to notify the owner or occupant of the location and availability of a copy of the preblast survey.

As amended, W. Va. Code 22–3–13a(g) is rendered consistent with 30 CFR 817.62(d) which requires that a copy of the preblast survey be provided to the person who requested the survey. Therefore, the amendment can be approved. This amendment satisfies the required program amendment codified at 30 CFR 948.16(kkkk) which can, therefore, be removed.

24. *Preblast Survey Requirements.* 30 CFR 948.16(llll) provides that 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

In the amendment submitted by letter dated November 28, 2001, concerning blasting, the State amended W. Va. Code 22–3–13a(j) by revising language concerning applicability of section W. Va. Code 22–3–13a. Among its changes to this section, the State deleted the phrase “or the surface impacts of the underground mining methods.” As amended, section 22–3–13a(j) provides that the provisions of section 22–3–13a

do not apply to the extraction of minerals by underground mining methods.

We find that this amendment has removed the offending language and satisfies the required program amendment codified at 30 CFR 948.16(llll). Therefore, we are approving the amendment and deleting the required amendment at 30 CFR 948.16(llll).

25. *Blasting Requirements.* 30 CFR 948.16(mmmm) provides that 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

In the amendment submitted by letter dated November 28, 2001, concerning blasting, the State amended W. Va. Code 22–3–30a(a) by deleting the words “of overburden and coal.” As amended, W. Va. Code 22–3–30a(a) provides that blasting shall be conducted in accordance with the rules and laws established to regulate blasting.

We find that this revision has removed the offending language and satisfies the required program amendment codified at 30 CFR 948.16(mmmm). Therefore, we are approving the amendment and deleting the required amendment at 30 CFR 948.16(mmmm).

26. *Removal of Abandoned Coal Refuse.* 30 CFR 948.16(nnnn) provides that West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to either delete CSR 38–2–3.14 or revise CSR 38–2–3.14 to clearly specify that its provisions apply only to activities that do not qualify as surface coal mining operations as that term is defined in 30 CFR 700.5; *i.e.*, that subsection 3.14 does not apply to either the removal of abandoned mine waste piles that, on average, meet the definition of coal or to the on-site reprocessing of coal mine waste piles. If the State chooses the second option it must submit a sampling protocol that will be used to determine whether the refuse piles meet the definition of coal. The protocol must be designed to ensure that no activities meeting the definition of surface coal

mining operations escape regulation under the West Virginia Surface Coal Mining and Reclamation Act.

#### State Response

In its program amendment submittal dated May 2, 2001, the State amended CSR 38-2-3.14.a., regarding the removal of abandoned coal refuse piles, by changing the proviso concerning the minimum BTU value standard of refuse material to be classified as coal. As amended, subsection 3.14.a. now provides for:

“\* \* \* the removal of abandoned coal processing waste piles; provided that, if the average quality of the refuse material meets the minimum BTU value standards to be classified as coal, as set forth in ASTM standard D 388-99, and if not AML eligible, a permit application which meets all applicable requirements of this rule shall be required.”

Prior to this amendment, the words “and if not AML eligible” did not appear in subsection 3.14.a, and the subsection did not require the submittal of a permit application if the refuse material met the minimum BTU value to be classified as coal.

As discussed in the May 5, 2000, **Federal Register**, we approved subsection 3.14 to the extent that it would apply to the removal of abandoned coal mine refuse pile where, on average, the material to be removed did not meet the definition of coal at 30 CFR 700.5 (65 FR 26131). In addition we did not approve subsection 3.14 to the extent that it could be interpreted as applying to the on-site reprocessing of abandoned coal refuse piles. However, we noted that the removal of abandoned coal processing piles may qualify for the government-financed construction requirement under section 528(2) of SMCRA. CSR 38-2-3.31 is the approved State regulation governing government-financed construction within the State. We amended the Federal definition of government-financed construction on February 12, 1999, to provide that government funding of less than 50 percent of a project's cost may qualify if the construction is undertaken as an approved abandoned mine reclamation project under Title IV of SMRCA (64 FR 7469-7483). However, because the West Virginia program lacks counterparts to the revised Federal definition of “government-financed construction,” we concluded that the exemption is not available to West Virginia projects with less than 50 percent government financing.

In our January 15, 2002, meeting, we stated that because the State chose to clarify that subsection 3.14 does not apply to activities that qualify as surface

coal mining operations as the term is defined at 30 CFR 700.5, it needed to submit a sampling protocol to determine when a coal refuse pile would meet the definition of coal (Administrative Record Number WV-1271). The sampling protocol must be designed to ensure that no activities meeting the definition of surface coal mining operations escape regulation under the State counterpart to SMCRA and the Federal regulations. WVDEP also needed to select and submit the BTU standard that it would use to determine the difference between coal and non-coal. The ASTM criteria should be used to determine the BTU value of a sample. WVDEP agreed to provide us a sampling protocol and to set the BTU value for coal to ensure that these projects are not surface coal mining operations. The WVDEP acknowledged that since there is only bituminous coal in West Virginia, it would use a BTU value for bituminous coal from the ASTM standard.

On February 26, 2002, WVDEP sent us another program submission (Administrative Record Number WV-1276). In that submission, WVDEP was noted that:

WVDEP included the words “and if not AML eligible” to allow for the removal of abandoned coal refuse piles under AML enhancement requirements. The State has developed a sampling protocol and set the BTU value for coal (Attachment 8).

Attachment 8 contains a draft policy entitled, “Removal of Abandoned Coal Refuse Piles” and provides the following:

The Secretary may issue a reclamation contract, in accordance with 38-2-3.14, solely for the removal of existing abandoned coal processing waste piles; only if the average quality of the refuse material *does not* meet the minimum BTU value standards to be classified as coal and/or has a percent ash value of greater than 50, as set forth in ASTM standard D 388-99.

Refuse material that *does not* meet minimum BTU value standards to be classified as coal means; a pile of waste products of coal mining, physical coal cleaning, and coal preparation operations (e.g. culm, gob, etc.) containing coal, matrix material, clay, and other organic and inorganic material in which the material in the pile has a calculated average BTU value less than 10,500.

Calculation of the average BTU value of the pile will be based on the average of five minimum samples taken in different and uniformly distributed locations. The number and spacing of sampling locations shall be taken into account variability of the material in short distances.

On March 8, 2002, WVDEP submitted revisions to its program amendment submission of February 26, 2002

(Administrative Record Number WV-1280). In that amendment, the State submitted a revision to Attachment 8. The revised policy is identical to the one described above, except for the last paragraph regarding the calculation of average BTU values. The revised policy provides the following:

Calculation of the average BTU value of the pile will be based on samples taken in a minimum of five different, uniformly distributed locations. The number and spacing of sampling locations should be taken into account variability of the material in short distances.

As amended, CSR 38-2-3.14.a. requires the submittal of a surface mining permit application for the removal of existing abandoned coal processing waste piles if the average quality of the refuse material meets the minimum BTU value standards to be classified as coal, as set forth in ASTM standard D 388-99 and if not AML eligible. In addition, the State has established a sampling protocol through its policy described above that will be used to determine whether abandoned coal refuse piles meet the definition of coal. As provided by 30 CFR 700.5, coal is defined to mean combustible carbonaceous rock, classified as anthracite, bituminous, subbituminous or lignite by ASTM Standard D 388-77. The sampling protocol is designed to ensure that no activities meeting the definition of surface coal mining operations escape regulation under the approved State regulatory program. Furthermore, through the ASTM standard for coal at D 388-99, the State has established a minimum BTU value and/or ash content to be used in determining when coal refuse material does not constitute coal as that term is defined at 30 CFR 700.5.

We find that, because revised CSR 38-2-3.14.a. and the proposed State policy clearly specify that their provisions apply only to activities that do not qualify as surface coal mining operations as that term is defined in 30 CFR 700.5, the required amendment at 30 CFR 948.16(nnnn) has been satisfied, and it can be removed.

At this time, we are only approving the phrase, “and if not AML eligible” at CSR 38-2-3.14.a. to the extent that it would exempt reclamation projects approved under West Virginia's abandoned mine land reclamation program that corresponds to Title IV of SMCRA. We are interpreting the WVDEP's February 26, 2002, policy statement as a commitment to restrict the scope of this phrase in this manner. Furthermore, as noted above, until the State revises its government-financed construction requirements at CSR 38-2-

3.31, WVDEP cannot allow for the removal of abandoned coal refuse piles under an approved abandoned mined land project that is less than 50 percent government financed.

27. *Coal Removal Incidental to Development*. 30 CFR 948.16(oooo) provides that 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 CSR 38-2-23.

*State response:*

WVDEP proposed to delete the incidental mining requirements at section 23 during the 2001 regular legislative session. However, the WVDEP Advisory Council recommended that the proposed deletion be removed from the final rule change.

As discussed in the May 5, 2000, **Federal Register**, we disapproved proposed regulatory provisions at CSR 38-2-23 (65 FR 26133). As proposed, CSR 38-2-23 would allow special authorization for coal extraction as an incidental part of development of land for commercial, residential, or civic use. The new requirements would allow lesser standards for coal extraction conducted as an incidental part of land development. In disapproving these provisions, we noted that on February 9, 1999, we had found similar statutory provisions at W. Va. Code 22-3-28(a) through (c) to be less stringent than sections 528 and 701(28) of SMCRA, and therefore, unapprovable (64 FR 6201-6204). In our disapproval, we stated that we are bound by the constraints of SMCRA which does not provide a blanket exemption from the definition of surface mining operation for privately financed construction as proposed by the State.

In our January 15, 2002, meeting, and in its resubmission of February 26, 2002, WVDEP acknowledged that the provisions at CSR 38-2-23 have been disapproved by OSM, and that West Virginia is not implementing them, as recently evidenced by the West Virginia Supreme Court decision in *DK Excavating, Inc. v. Michael Miano, Director, WVDEP*, 209 W.Va. 406, 549 S.E.2d 280 (2001) (Administrative Record Number WV-1292). (Administrative Record Nos. WV-1271 and WV-1276).

As noted above in Finding 7, the West Virginia Supreme Court of Appeals in *Canestraro v. Faerber* ruled that, "When a provision of the West Virginia Surface Coal Mining and Reclamation Act, W.Va. Code 22A-3-1 *et seq.*, is inconsistent with Federal requirements in the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 *et seq.*, the State Act must be read in a way

consistent with the Federal Act." *Canestraro*, 374 S.E.2d at 321 (West Virginia Administrative Record No. WV-761). See also *Schultz*, supra (State regulation enacted pursuant to the West Virginia Surface Coal Mining and Reclamation Act, W. Va. Code 22A-3-1 to 40 (1993), [now W. Va. Code 22-3-1 to 32 (1994 and Supp.1995)], must be read in a manner consistent with Federal regulations enacted in accordance with the Surface Mining Control and Reclamation Act, 30 U.S.C. 1201 to 1328 (1986)).

Also noted above in Finding 7, the West Virginia Supreme Court of Appeals also held in *Schultz* that no change in a State surface mining law or regulation can take effect for purposes of a State program until approved by OSM, and State surface mining reclamation regulations must be read in a manner consistent with Federal regulations enacted in accordance with SMCRA, *Schultz*, 475 S.E.2d 467. (Administrative Record Number WV-1038).

Finally, and as noted above, in *DK Excavating*, supra, the West Virginia Supreme Court of Appeals reversed a lower State Circuit Court ruling which provided that coal extraction authorized as an incidental part of land development did not come within the State's definition of surface mining. The Supreme Court found that, "Once a state plan is approved under the federal Surface Mining Control and Reclamation Act, any subsequent amendments to such plan do not become effective until approved by the federal Office of Surface Mining, and may not be approved by the Office of Surface Mining if inconsistent with the Surface Mining Control and Reclamation Act." *Id.* Also, "Since the Office of Surface Mining has concluded that the amendment to our state plan, codified as West Virginia Code § 22-3-3(u)(2)(ii) (1997) (Repl.Vol.1998), is inconsistent with the Surface Mining Control and Reclamation Act, that proposed amendment cannot be deemed as an amendment to the approved West Virginia surface mining plan." *Id.*

We have previously ruled that West Virginia's incidental mining requirements cannot be approved, because they are inconsistent with sections 528 and 701(28) of SMCRA. In addition, we required that the West Virginia program be further amended by removing CSR 38-2-23. As discussed above, WVDEP is committed to not implementing the disapproved provisions at CSR 38-2-23. This commitment complies with the mandate of the West Virginia Supreme Court of Appeals, which has held that "when there is a

conflict between the federal and state provisions, the less restrictive state provision must yield to the more stringent federal provision \* \* \*"  
*Canestraro*, supra. Furthermore, State rules must be read in a manner consistent with Federal regulations, *Schultz*, supra.

Given the State's commitment not to implement the disapproved regulatory provisions at CSR 38-2-23, as demonstrated by its actions in *DK Excavating*, and because of the principles established in *Canestraro*, *Schultz*, and *DK Excavating*, we conclude that the required amendment at 30 CFR 948.16(oooo) is no longer needed because the concerns contained in that required amendment have been satisfied. Therefore, we are removing it. However, to avoid further confusion or misinterpretation of its approved State regulatory program, we recommend that the State remove CSR 38-2-23.

28. *Bond Release and Premining Water Quality*. 30 CFR 948.16(pppp) provides that 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 CSR 38-2-24.4.

*State Response*

In its program amendment submittal dated May 2, 2001, the State amended CSR 38-2-24.4., regarding requirements to release bonds, by deleting language concerning an exception to the requirements to release bonds, and by adding a new proviso concerning revegetation (Administrative Record Number WV-1209). As amended, subsection 24.4 reads as follows:

24.4. Requirements to Release Bonds. Bond release for remining operations shall be in accordance with all of the requirements set forth in subsection 12.2 of this rule; Provided that there is no evidence of a premature vegetation release.

In the May 5, 2000, **Federal Register**, at Finding 9, we disapproved the predecessor to amended subsection 24.4 in part because the U.S. Environmental Protection Agency (EPA) declined to concur with the approval of CSR 38-2-24.4 due to its inconsistency with section 301(p) of the Clean Water Act (CWA) (65 FR 26133). Under section 301(p) of the CWA, the State may issue a National Pollutant Discharge Elimination System (NPDES) permit which modifies the pH, iron, and manganese standards for preexisting discharges from the remined area or affected by a qualifying remining operation. However, the permit may not allow the pH, iron, or manganese levels of any discharge to exceed the levels being discharged from the remined area

before the advent of the coal remining operation.

Section 301(p), however, does not apply to all remining operations. Instead, section 301(p) defines "coal remining operation" to mean a coal mining operation which begins after February 4, 1987 (the date of enactment of section 301(p), at a site on which coal mining was conducted before August 3, 1977 (the effective date of SMCRA). EPA declined to concur with approval with the CSR 38-2-24.4 because that subsection would allow use of the section 301(p) standards for remining operations that began prior to February 4, 1987, and for sites on which coal mining was originally conducted on or after August 3, 1977.

As discussed in our May 5, 2000, **Federal Register** decision, we noted that 30 CFR 816.42 and 817.42 require that discharges of water from areas disturbed by surface mining activities must comply with all applicable State and Federal water quality laws and regulations. Because CSR 38-2-24.4 was inconsistent with those requirements, we required its removal.

The State has not deleted CSR 38-2-24.4 in its entirety, but it has deleted the offending language. In effect, CSR 38-2-24.4 now requires that bond release for remining operations must comply with the requirements of CSR 38-2-12.2 concerning replacement, release, and forfeiture of bonds. Subsection CSR 38-2-12.2.e. provides that no bond release or reduction will be granted if, at the time, water discharged from or affected by the operation requires chemical or passive treatment in order to comply with applicable effluent or water quality standards; or long-term water treatment is provided for under subsections 12.2.e.1. or 12.2.e.2. By requiring compliance with "applicable effluent limitations or water quality standards," CSR 38-2-12.2.e requires compliance with the State's water quality requirements, including section 301(p) of the CWA. Furthermore, in our January 15, 2002, meeting with WVDEP, State officials clarified that the addition of the proviso concerning premature vegetation release is intended to ensure that there are no premature vegetation releases on remining operations (Administrative Record Number WV-1271).

For the reasons discussed above, we find that the amended provision satisfies the required amendment at 30 CFR 948.16(pppp) and can be approved. Therefore, we are removing the required amendment.

On January 23, 2002, EPA announced in the **Federal Register** that it was amending its current regulations at 40

CFR Part 434 to establish a coal remining subcategory that will address preexisting discharges at coal remining operations in the Appalachian and mid-continent coal regions of the eastern United States (67 FR 3370-3410). The new guidelines are to provide incentives for remining abandoned coal sites. According to EPA, under the new rules, remining operations will be required to implement strategies that control pollutant releases and ensure the pollutant discharges during remining activities are less than the pollutant levels released from the abandoned site prior to remining. Upon completion, the operators will reclaim the land to meet the same standards currently imposed on active mining areas. EPA believes that the new guidelines will provide operators with greater certainty about environmental requirements for remining operations. As mentioned in its letter of April 10, 2002 (Administrative Record Number WV-1294), EPA stated that it expects that WVDEP will be submitting regulations in the near future to comply with the new remining requirements at 40 CFR 434 Subpart G.

#### IV. Summary and Disposition of Comments

##### *Public Comments*

A. We asked for public comments on the State's initial amendment in the **Federal Register** on January 3, 2001 (66 FR 335) (Administrative Record Number WV-1194). By letter dated February 28, 2001 (Administrative Record Number WV-1202) the West Virginia Highlands Conservancy (WVHC) responded with the following comments.

1. 30 CFR 948.16(dd). WVHC stated that the State program is narrower and less effective than the Federal program. Whereas the Federal standards are specific and somewhat detailed, the State program is not. WVHC stated that the rules the State references are not even part of the approved program. The State effectively admits, WVHC asserted, that its program is deficient by relying on weak guidance documents to plug the holes in its approved program.

Even if its Technical Handbook were as effective as the Federal requirements, WVHC stated, the State could not rely on the Technical Handbook as part of its approved program since it can change such guidance documents at any time without notice to OSM or the public. WVHC stated that all portions of the approved State program must be codified in statute or legislative rule. These productivity rules are central to proper reclamation, and to the State's

economic future. There must be specific standards for operators to follow.

In response, we disagree that guidance documents cannot be part of an approved State program. Any changes in laws, rules, policies, or guidance documents that make up an approved State program are subject to public review and comment and require OSM approval. As discussed in Finding 2, WVDEP chose to include its productivity success standards and the statistical sampling techniques for measuring the success of ground cover, stocking, and production in a policy that will be included in its Inspection and Enforcement Handbook. As required by CSR 38-2-9.3.d. and 9.3.e., only after the applicable success standards have been met and verified by inspectors with the use of the approved statistical sampling methods can the State approve Phase II or III bond release. For the reasons set forth in Finding 2, we have determined that State's proposed policy entitled "Productivity and Ground Cover Success Standards" as set forth as Attachment 1 in its March 8, 2002, letter (Administrative Record Number WV-1280) is no less effective than the Federal requirements at 30 CFR 816.116 and 817.116. Therefore, the required amendment at 30 CFR 948.16(dd) has been satisfied and can be removed.

2. 30 CFR 948.16(ee). WVHC stated that the State cites to less effective portions of its approved program and its guidance documents. The State cannot rely on mere guidance documents, WVHC asserted, as a way to circumvent the public notice and comment process established by Congress. If the State could rely on these guidance documents, there would be no stable State program, and operators and the public would be subject to the whims of WVDEP, WVHC asserted. In any event, the provisions that the State relies on are less effective than the Federal requirements.

In response, again, we must disagree that guidance documents cannot be a part of an approved State program. These documents are subject to the same review and approval standards as laws or regulations. As provided by 30 CFR 948.16(ee), WVDEP was required to submit documentation that it had consulted with NRCS with respect to the nature and extent of its prime farmland reconnaissance inspections required by CSR 38-2-10.2 and obtained the concurrence of NRCS regarding its negative determination criteria at CSR 38-2-10.2. WVDEP submitted a letter to NRCS on February 25, 2002 (Administrative Record Number WV-1276, Attachment 1A),

outlining its requirements and procedures regarding prime farmlands and seeking specific concurrence with respect to reconnaissance inspections and its negative determination criteria. As discussed in Finding 3, on March 7, 2002, NRCS responded (Administrative Record Number WV-1290) and concurred with the State's prime farmland requirements. Therefore, the required amendment at 30 CFR 948.16(ee) has been satisfied and can be removed.

3. 30 CFR 948.16(oo). WVHC stated that OSM must not remove this requirement since it has promulgated a Federal regulation requiring these standards to prevent failure, flooding and erosion. OSM's standard has been subject to a public notice and comment process, and is necessary to protect communities and the environment from storms, the WVHC asserted. Any lesser standard is not as effective as Federal law WVHC stated.

In response, as discussed in Finding 4, WVDEP proposed modifications to its spillway design requirements at CSR 38-2-5.4.b.8 on February 26, 2002 (Administrative Record Number 1276). Under the proposed State standard, the spillways of all sediment control structures, except for haulroads, must be designed to safely pass a 25-year, 24-hour precipitation event. The proposed rule at CSR 38-2-5.4.b.8. is no less effective than the Federal requirements at 30 CFR 816/817.46(c)(2)(ii)(B). Therefore, the required amendment at 30 CFR 948.16(oo) has been satisfied and can be removed.

4. 30 CFR 948.16(tt). WVHC stated that the State submission improperly relies on guidance documents and is, in any event, less protective than the Federal program.

In response, the Federal regulations at 30 CFR 732.17 concerning State program amendments states, at paragraph (a), that 30 CFR 732.17 applies to "any alteration of an approved State program." If a State regulatory authority submits a policy, technical guidance, or written statement as a means of rendering the State program no less effective than the Federal regulations, that policy, technical guidance, or written statement, if approved by OSM, becomes part of the approved State program. If, after approval by OSM, the policy, technical guidance, or written statement subsequently changed, it should be submitted to OSM as a State program amendment.

As discussed above in Finding 5, we have determined that the State program has satisfied the part of the required amendment that requires all sediment

control structures be certified as having been built in accordance with the detailed designs submitted and approved pursuant to CSR 38-2-3.6.h.4 for the following reasons. CSR 38-2-3.6.h.4. requires that detailed design plans for a structure be certified and approved before construction begins. CSR 38-2-5.4.b.1. provides that such structures be constructed in accordance with those plans. CSR 38-2-5.4.d.1. requires that prior to any surface mining activities in the component drainage area, the controlling structures must be certified as to construction in accordance with the plans.

We have also determined that the State program has satisfied the part of the required amendment that requires as-built plans be reviewed and approved by the regulatory authority as permit revisions for the following reasons. In its submittal, WVDEP stated that for structures with major design changes, a permit revision would be necessary. WVDEP further clarified that minor design changes are those within the construction tolerances described in CSR 38-2-3.35. Therefore, major design changes are those that exceed the construction tolerances. We have concluded that sediment control structures that are constructed with only minor design changes as described above are, in effect, built to the standards of the approved, certified designs in the preplan.

5. 30 CFR 948.16(mmm). WVHC stated that the State program has completely confused the variance procedures of steep slope mining and mountaintop removal mining. There are many differences in the Federal program that must be part of the State program, WVHC stated. For example, WVHC stated, the steep slope variance is not available for agricultural variances. Accordingly, the State provisions are less effective than Federal requirements and must be rejected, WVHC stated.

In response, this required program amendment was previously satisfied and removed. See the October 1, 1999, **Federal Register** (64 FR 53200, 53201 and 53203).

6. 30 CFR 948.16(nnn). The commenter stated that WVDEP admits that its program is deficient in regard to this amendment and OSM must continue to require the State to amend its program so that it is as effective as Federal law.

In response, as discussed above in Finding 7, we are removing this required amendment because we have previously disapproved the provision that is the subject of the required amendment, and because of the principals established in *Canestraro*, we

have concluded that (nnn) has been satisfied.

7. 30 CFR 948.16(ooo). The commenter stated that the State program is less effective than the Federal program and the State must amend the program. The commenter further stated that the WVDEP admits that its citation is wrong and that it must be changed.

In response, as discussed above in Finding 8, we are removing this required amendment because we have previously disapproved the provision that is the subject of the required amendment, and because of the principals established in *Canestraro*, we concluded that (ooo) has been satisfied.

8. 30 CFR 948.16(sss). The commenter stated that the State's provision is clearly less effective than Federal law and does not require action by the operator to remedy the damage it may do to citizens' property value related to water supply. The commenter further stated that operators must be forced to pay for any damage they do to citizens' water use or potential water use that affects the value of the citizen's property.

In response, as discussed above in Finding 10, we have previously ruled that West Virginia's water replacement waiver provisions could not be approved "to the extent" \* \* \* [i]t would not be implemented in accordance with the definition of "Replacement of water supply" at 30 CFR 701.5. Because of the State's commitment to comply with the more restrictive Federal waiver requirement, and because of the principles established in *Canestraro* and *Schultz*, we conclude that the required amendment at 30 CFR 948.16(sss) has been satisfied.

9. 30 CFR 948.16(vvv)(1) through (4). The commenter stated that all three parts of this provision the State proposal is not as effective as Federal law and must be rejected, particularly as it relies on guidance documents rather than on properly adopted rules or statutes. These provisions, the commenter stated, are especially important given the potential for damage associated with refuse fills. All requirements must be scrupulously observed, the commenter stated.

In response, as discussed above in Findings 11, 12, 13, and 14, we determined that the proposed or existing State requirements were no less effective than the Federal requirements with regard to restoring the land to AOC, certification of haulroads, applicability of subsection 5.4.c to slurry impoundments, and placement of coal refuse in the backfill, respectively. Therefore, the required amendments at

30 CFR 948.16(vvv) (1), (2), (3) and (4) have been satisfied and can be removed.

10. 30 CFR 948.16(zzz). The commenter stated that none of the State's proposals are as effective as Federal law requires. For example, the commenter added, there is a clear difference between "adjacent areas" and "adjacent areas with an angle of draw of at least 30 degrees." The former protects a larger area, the commenter stated. Generally, the commenter asserted, the specific language of the Federal requirements is more protective of citizens in the area and the State should not be permitted to compromise citizens' rights by letting coal companies harm their homes and properties without compensating them.

In response, and as stated above in Finding 15, the State has complied with this required amendment by revising its permit application to require that the type and location of the applicable structures, lands and water supplies be identified. In addition, in its May 2, 2001, submittal, the State amended CSR 38-2-3.12.a.1. concerning subsidence control plans by adding the requirement to include a narrative. Therefore, the required amendment at 30 CFR 948.16(zzz) has been satisfied.

11. 30 CFR 948.16(aaaa). The commenter stated that the State provisions would not protect citizens' drinking water supplies because they are not as effective as Federal law. The commenter asserted that the WVDEP could not rely on lax and informal guidance documents as substitutes for the approved State program.

In response, as we discussed above in Finding 16, the State has addressed this required amendment by adding language to CSR 38-2-3.12.a.1. that makes it clear that the WVDEP can specify a area greater than that encompassed by a 30-degree angle of draw. In addition, the State has amended CSR 38-2-3.12.a.2. to require a survey of the quality and quantity of water supplies that could be contaminated, diminished or interrupted by subsidence "within the permit area and adjacent areas." Therefore, the required amendment at 30 CFR 948.16(aaaa) has been satisfied.

12. 30 CFR 948.16(bbbb). The commenter asserted that the State's provisions are less effective than the Federal program, and the State may not substitute guidance documents for the approved State program.

In response, and as discussed above in Finding 17, the State amended CSR 38-2-3.12.a.2.B. to clarify that the applicant must pay for the surveys and any technical assessments or engineering evaluations. Therefore, the

required amendment at 30 CFR 948.16(bbbb) has been satisfied.

13. 30 CFR 948.16(iiii). The commenter stated that the current State language is not as effective as Federal requirements, and the State must be required to submit provisions that are as stringent as Federal law.

In response, and as discussed above at Finding 21, WVDEP asserted that when the State law and rules are read in concert, there is no confusion that the State provision is no less effective than SMCRA section 515(c)(3). In addition, the WVDEP submitted its policy concerning how the provision will be interpreted by WVDEP. We found that policy renders the West Virginia program no less effective than the term "recreational facilities use" at SMCRA section 515(c)(3) and we approved that policy as part of the West Virginia program.

14. 30 CFR 948.16(kkkk). The commenter stated that the current State language is not as effective as Federal requirements, and the State must be required to submit provisions that are as stringent as Federal law.

In response, and as we discuss above at Finding 23, the State has satisfied the required amendment at 30 CFR 948.16(kkkk) by amending the W. Va. Code at 22-3-13a(g).

15. 30 CFR 948.16(llll). The commenter stated that the current State language is not as effective as Federal requirements, and the State must be required to submit provisions that are as stringent as Federal law.

In response, and as we discuss above at Finding 24, the State has satisfied the required amendment at 30 CFR 948.16(llll) by amending the W. Va. Code at 22-3-13a(j).

16. 30 CFR 948.16(mmmm). The commenter stated that the current State language is not as effective as Federal requirements, and the State must be required to submit provisions that are as stringent as Federal law.

In response, and as we discuss above at Finding 25, the State has satisfied the required amendment at 30 CFR 948.16(mmmm) by amending the W. Va. Code at 22-3-30a(a).

B. We also published a notice in the **Federal Register** on March 25, 2002 (67 FR 13577), and requested public comments on the State's February 26, 2002, and March 8, 2002, amendments (Administrative Record Number WV-1285). By letter dated April 9, 2002 (Administrative Record Number WV-1295), the West Virginia Coal Association (WVCA) responded with the following comments.

17. According to the WVCA, for years, OSM has saddled West Virginia's

mining regulatory program with numerous required amendments. Some of these amendments were truly warranted in order for the State program to satisfy the mandates of the Federal statute and regulations. In other cases, WVCA asserted, the demanded changes have been superficial, lacking any substantive basis and generally unnecessary. WVCA stated that for WVDEP and the regulated mining community, OSM's practice of continually generating required amendments has placed the State's approved mining program in turmoil. The most offending manifestation of OSM's actions, WVCA asserted, is the legal action filed by the WVHC and currently pending in Federal District Court (*WVHC vs. Norton*, Civil Action 2:00-CV-1062). WVDEP proposed program amendments have been allowed to accrue for years, WVCA stated, giving rise to the Conservancy's legal action which seeks to substitute judicial mandate for agency discretion, a result never intended by OSM's guiding statute, SMCRA. WVCA stated that, in general, and with two exceptions, it supports the proposed amendments and responses offered by WVDEP to satisfy several outstanding required program amendments. WVCA urged OSM to approve the amendments as offered by WVDEP or accept the responses offered by the State agency in instances where it believes no program amendment is necessary.

In response, we disagree that the required amendments that have been placed on the West Virginia program are superficial, lack substance and are generally unnecessary. Changes in both State and Federal surface mining laws and regulations over the years have resulted in the imposition of the required amendments that are being considered today. Resolution of these issues will ensure that the State's program is consistent with Federal law and regulations. Compliance with these minimum Federal standards ensures that the regulation of the mining community is fair and consistent from state to state and affords West Virginians the same level of environmental protection of other States. It is unfortunate that some of these required amendments have gone unresolved for many years. We are hopeful that in the future issues of this nature will be resolved in a more timely manner.

18(a). WVCA has four main concerns regarding WVDEP's proposed amendment to CSR 38-2-5.4.b.8 offered to satisfy required program amendment (oo). First, WVCA would like a clarification that 30 CFR 948.16(oo)

deals with a standard to ensure that spillways associated with sediment control structures can “safely pass,” meaning, “withstand,” 25-year 24-hour precipitation events. WVCA stated that 30 CFR 948.16(o) and the Federal and State counterparts, 30 CFR 816.49(sic)(a)(9)(ii)(C) and W.Va. CSR 38-2-5.4.b.8, do not contain *storage capacity* requirements for sediment control structures.

In response, we agree that the required amendment at 30 CFR 948.16(o) relates to the design and construction of spillways for sediment control structures and does not concern the storage capacity of sedimentation ponds. The State’s storage capacity requirements for sedimentation ponds are contained in CSR 38-2-5.4.b.4. On May 23, 1990, these requirements were determined to be no less effective than the Federal requirements at 30 CFR 816/817.46(c)(1)(iii)(C) (55 FR 21304, 21319).

18(b). Second, WVCA maintains that CSR 38-2-5.4.b.8 not only corresponds to the Federal requirement at 30 CFR 816.49(a)(9)(ii)(C), but that CSR 38-2-5.4.b.8’s 25-year 24-hour precipitation event standard is more stringent than 30 CFR 816.49(a)(9)(ii)(C)’s 25-year 6-hour precipitation event standard.

In response, as discussed in the May 23, 1990, **Federal Register**, we found that, under most conditions in West Virginia, the peak runoff from a 24-hour precipitation event would exceed that from a 6-hour event or that the difference was insignificant in terms of design considerations. Therefore, we found that the State’s use of the 24-hour storm duration for spillway design and construction was no less effective than the Federal 6-hour standard (55 FR 21304, 21319).

18(c). Third, WVCA stated that it believes that CSR 38-2-5.4.b.8 should be applied prospectively only, as it exceeds the requirements of the corresponding Federal law and there is no reason to believe that spillways designed to pass 10-year 24-hour storm events at excavated ponds need to be rebuilt.

In response, we disagree that these requirements should only be applied prospectively and that the proposed State standard exceeds the Federal requirements. As discussed above in Finding 4, a joint review of this issue disclosed that the spillways for many of these sediment control structures are currently larger than the required 25-year, 24-hour standard due to the size of the equipment used to construct them. In addition, retroactive application of the 25-year, 24-hour standard will only pertain to excavated sediment control

structures that are at ground level, because existing State requirements already provide that other sediment control structures must have spillways designed and constructed to safely pass a 25 year, 24-hour event. Furthermore, the applicability requirements at CSR 38-2-1.2 provide for the application of these requirements to all existing and new surface mining operations. We anticipate that upon mid-term review, permit revision or permit renewal, the State will require spillways for excavated sediment control structures that do not safely pass a 25-year, 24-hour event to be redesigned and constructed to comply with these requirements.

18(d). Finally, WVCA stated that, as explained in subsequent paragraphs, it would be remiss not to identify the inconsistency of OSM regarding this required program amendment.

In response, as discussed above in Finding 4, we do not believe that we have been inconsistent in our treatment of this required amendment.

19. According to the WVCA, in the past and in news accounts following flooding, which occurred in July 2001, standards regarding the storage capacity of sediment control structures have been confused with requirements governing the integrity of spillways associated with sediment control structures. Therefore, WVCA asserted, OSM should clarify the distinction between requirements to “safely pass” a given precipitation event and requirements to “contain or treat” a given precipitation event (“storage capacity” requirements). WVCA stated that 30 CFR 948.16(o), titled “Spillway design,” requires CSR 38-2-5.4.b.8 to be amended to require that “excavated sediment control structures which are at ground level and 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.” 30 CFR 948.16(o)(emphasis added by WVCA). According to the WVCA, while CSR 38-2-5.4.b.4 and the corresponding Federal regulation at 30 CFR 816.46(c)(1)(iii)(C) focus on the requirements for “containing and treating” precipitation events, the requirement in 30 CFR 948.16(o) focuses on the storm event which a spillway must be designed to “safely pass.” 30 CFR 816.49(a)(9) is the Federal regulation that corresponds to CSR 38-2-5.4.b.8. 30 CFR 816.49(a)(9) states, “[a]n impoundment shall include either a combination of principal and emergency spillways or a single spillway \* \* \* designed and constructed to “safely pass” the applicable design precipitation event specified in paragraph (a)(9)(ii) of this

section. . . .” 30 CFR 816.49(a)(9)(emphasis added by WVCA). 30 CFR 816.46(a)(9)(ii)(C) prescribes the design event that “spillways” must be capable of withstanding, WVCA stated, and provides that: “[f]or an impoundment not included in paragraph (a)(9)(ii)(A) and (B) of this section, a 25-year 6-hour or greater event as specified by the regulatory authority.” 30 CFR 816.46(a)(9)(ii)(C). The WVCA concluded that the requirement to “safely pass” such a storm event is distinct from the requirement to “contain or treat” such a storm event.

In response, we agree that the required amendment at 30 CFR 948.16(o) pertains only to the design and construction of spillways for excavated sediment control structures. As discussed above in our response to Comment 18(a), we clarified that this required amendment does not relate to the storage capacity of sediment control structures. It should be pointed out that the Federal requirements have been revised and reorganized since this required amendment was imposed on the State’s program. This may be partly to blame for the confusion. As discussed above in Finding 4, the State’s proposed 25-year, 24-hour spillway design and construction standard is no less effective than the Federal requirements at 30 CFR 816/817.46(c)(2) and 30 CFR 816/817.49(a)(9)(ii)(C), not 30 CFR 816.46(a)(9)(ii)(C), as mentioned above.

20. According to the WVCA, the provisions of section 505(b) of SMCRA expressly provide that State law that imposes requirements not found in SMCRA or ones more stringent than required by the Federal program are not legally defective by reason of that inconsistency. WVCA asserted that the West Virginia requirement to withstand a 25-year 24-hour storm is more stringent than the federal standard in 30 CFR 816.46(a)(9)(ii)(C) requiring safe passage of a 25-year 6-hour event, because of the longer duration storm event utilized under the West Virginia standard. In this regard, WVCA concluded, West Virginia has not complied with its own statutory prohibition on adopting regulations that are more stringent than corresponding Federal regulations without first making specific findings (See W.Va. Code §§ 22-1-3(c) & -3a).

In response, a 25-year, 24-hour event is longer in duration than a 25-year, 6-hour event. Typically, a 24-hour storm yields more total water volume, but a lower peak flow (depth of water in a channel) than a 6-hour storm. However, as discussed above in response to Comment 18(b), we found that, in West

Virginia, this does not hold true. Rather, on May 23, 1990 (55 FR 21304, 21318), we found the State's proposed 25-year, 24-hour standard to be no less effective than the Federal 25-year, 6-hour standard. That is, we found that in West Virginia, under most conditions, the peak runoff from a 24-hour storm would exceed that from a 6-hour storm or that the difference was insignificant in terms of design considerations. While we agree that the State standard is no less effective than the Federal standard, we do not consider it to be more stringent than the Federal requirements. Furthermore, our determination was made four years prior to the State adopting its more stringent statutory provisions in 1994. Therefore, even if the 24-hour standard is considered to be more stringent than the Federal requirements, the State has not violated its own statutory prohibition on adopting regulations that are more stringent than corresponding Federal regulations.

21. According to the WVCA, because the proposed amendment to CSR 38-2-5.4.b.8 exceeds the requirements of the Federal program, it should be applied on a prospective basis only. Further, WVCA stated, prior scrutiny by OSM of the West Virginia program and experience have validated that use of a 10-year 24-hour storm event standard is safe. WVCA stated that in August 1994, OSM Charleston Field Office Director James Blankenship, in a letter to WV DEP Director David Callaghan regarding the West Virginia regulatory program acknowledged the sufficiency of the 10-year 24-hour storm event standard when applied to excavated sediment control structures: "These types of structures by their very nature are not subject to catastrophic failure or excessive erosion. The designed storm criteria are established to address these potentials and are of no significance for these structures" (see W.Va. Administrative Record 934). WVCA stated that historic events have further confirmed the adequacy of the previous standard utilized by WVDEP. The WVCA concluded that following a record storm event in July 2001, the West Virginia Surface Mine Board determined that structures constructed according to the 10-year 24-hour storm event standard were subjected to 100-year 24-hour storm event but did not breach or fail, just as OSM originally opined in 1994.

In response, we disagree that the proposed revision to CSR 38-2-5.4.b.8 exceeds the Federal requirements, and should only be applied prospectively. As discussed above in Finding 4, we found the State's 10-year, 24-hour standard for the design and construction

of spillways to be less effective than the Federal 25-year, 6-hour standard in October 1991. We have never approved the State's 10-year, 24-hour spillway design standard for excavated sediment control structures. Neither is the proposed 25-year, 24-hour State standard more stringent than the Federal 25-year, 6-hour spillway standard. The proposed revision will simply make the State's spillway design and construction requirements for excavated sediment control structures no less effective than the Federal requirements. Retroactive application of these requirements (ie. application to existing ground level, excavated sediment control structures on sites that have not received final bond release) is required by the State's approved program. As provided by CSR 38-2-1.2.a., these rules apply to all existing surface mining operations in the State. Only CSR 38-2-3.8.c. provides an exemption for existing structures. CSR 38-2-2.48 defines existing structure to mean a structure or facility used with or to facilitate surface coal mining and reclamation operations for which construction began prior to January 18, 1981, the effective date of the State's approved program. Even then, such structures are subject to revision or reconstruction when it is necessary to comply with a performance standard.

Furthermore, the comments made above by WVCA regarding the safety of these types of structures are incorrectly attributed to OSM. The language that WVCA quoted is the State's response to our comment that the proposed State standard was still less effective than the Federal requirements. During a meeting with the State in 1994, it was alleged that OSM had approved the 10-year, 24-hour standard in other States. In response to this allegation, we agreed to determine if a similar exemption existed in the Illinois program. As addressed above in Finding 4, there is no such standard in the Illinois program. We understand that the West Virginia Surface Mine Board recently dismissed a case based on the State's 10-year, 24-hour spillway standard. We believe that, at the time, the Surface Mine Board was not aware that OSM had earlier found the State's standard to be less effective than the Federal requirements. Furthermore, such standard cannot be considered to be part of the approved State program. As discussed above, the West Virginia Supreme Court of Appeals has held that, when an amendment to the State program is found by OSM to be inconsistent with the Federal requirements, the proposed amendment cannot be deemed an

amendment to the approved State program, *DK Excavating*, 549 S.E.2d 280, (Administrative Record Number WV-1292).

22. According to the WVCA, OSM previously pledged to remove the required program amendment at 30 CFR 948.16(o). WVCA stated that in a 1994 communication from OSM to WVDEP, Charleston Field Office Director James Blankenship pledged to resolve 30 CFR 948.16 (o) by approving CSR 38-2-5.4.b.8 "as an exemption similar to the one approved in the Illinois state program" (W.Va Administrative Record 934). Additionally, WVCA stated, in two official exchanges subsequent to Blankenship's 1994, letter WVDEP again argues that CSR 38-2-5.4.b.8 is as stringent as the federal program and that OSM's original "promise" regarding the outstanding program amendment at 30 CFR 948.16(o) should be honored. In November 2000, WVDEP responded to required amendment (o) by citing the language from the 1994 letter (WV Administrative Record 1189). Despite WVDEP's response to OSM, in January 2001 the required amendment to CSR 38-2-5.4.b.8 is again restated (66 Fed. Reg. 335) WVCA stated. In response, WVDEP again pointed to the 1994 pledge by OSM to approve the existing regulation as a program exemption. WVCA stated that to its knowledge, OSM has never clarified why the intent of the 1994 letter regarding amendment (o) was never implemented. Unfortunately, WVCA stated, the disparity of OSM regarding this particular amendment is illustrative of how the Federal agency communicates with WVDEP regarding the consistency of the State program with its Federal counterpart. Far too often, WVCA asserted, OSM demands changes of WVDEP for insignificant or nonexistent reasons. WVCA stated that, as illustrated by the Federal agency's conduct regarding 30 CFR 948.16(o), OSM often fails to follow its own directives regarding State programs. The result of this confusion between the Federal and State programs, WVCA asserted, is demonstrated by the current litigation pending against OSM in Federal District Court (*WVHC v. Norton*) and the ongoing section 733 actions undertaken by OSM against WVDEP. WVCA urged that, in the spirit of ending this confusion, OSM approve the amendment to CSR 38-2-5.4.b.8 as offered by WVDEP.

In response, as discussed above in regard to Comment 21, we agreed to consider approving the State's proposal if such an exemption had been previously approved in the Illinois program. As discussed above in Finding



4, no such exemption exists in the Illinois program. If we had determined that this provision was as effective as the Federal requirements, it would have removed the required amendment. Instead, the required amendment has remained on the State program since 1991, because the State's spillway standard for excavated sediment control structures was determined to be less effective than the Federal standard. This information was conveyed to the State both informally and formally. In addition, we regularly provides State officials and the public an update on the status of the State's outstanding required amendments and 30 CFR Part 732 issues in the West Virginia Annual Report. We stand by our earlier decision. However, as discussed above in Finding 4, because we now find the State's proposed spillway revision of February 26, 2002 (Attachment 2), to be no less effective than the Federal requirements, we are removing the required amendment at 30 CFR 948.16(oo).

23. WVCA stated that it has the following observation regarding the required amendment specified at 30 CFR 948.16(oooo). WVCA stated that by demanding that WVDEP remove CSR 38-2-23, OSM appears committed to wasting coal resources that could be extracted through incidental, non-mining related construction or development. WVCA stated that such a desire by OSM is counter to the purpose and spirit of SMCRA, and simply does not agree with conventional common sense. WVCA urged OSM, as WVDEP has for several years, to remove the required program amendment.

In response, as discussed above in Finding 28, we disapproved the State's incidental mining requirements at CSR 38-2-23 on May 5, 2000 (65 FR 26130, 26133). In addition, on February 9, 1999 (64 FR 6201, 6204), we found similar statutory provisions at W.Va. Code 22-3-28(a) through (c) to be less stringent than sections 528 and 701(28) of SMCRA, and therefore unapprovable. In our disapproval, we noted that we are bound by the constraints of SMCRA which does not provide a blanket exemption from the definition of surface mining operations for privately financed construction as proposed by the State. A similar two-acre exemption had existed under section 528(2) of SMCRA, but was repealed by Public Law 100-34 on May 7, 1987. While incidental mining activities are not exempt from the requirements of SMCRA, we have encouraged WVDEP to work with applicants in providing more timely review and approval of such applications to avoid the wasting of coal

resources. Furthermore, given the State's commitment not to implement the disapproved regulatory provisions at CSR 38-2-23, as demonstrated by its actions in *DK Excavating*, and because of the principles established in *Canestraro*, *Schultz*, and *DK Excavating*, we are removing the required amendment at 30 CFR 948.16(oooo) because the concerns contained therein have been satisfied and it is no longer needed.

C. We asked for public comments on the amendment package submitted on May 2, 2001, concerning House Bill 2663 in the **Federal Register** on May 24, 2001 (Administrative Record Number WV-1213). We did not receive any specific public comments on the State's responses to the required amendments addressed in this document. However, some of the public comments discussed above were addressed by amendments included in this submission.

D. We asked for public comments on the amendment package submitted on November 28, 2001, concerning blasting in the **Federal Register** on January 31, 2002 (Administrative Record Number WV-1267), but we did not receive any comments from the public.

#### *Federal Agency Comments*

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendments from various Federal agencies with an actual or potential interest in the West Virginia program by letters dated January 26, and May 30, 2001, and February 1, and March 11, 2002 (Administrative Record Numbers WV-1199, WV-1215, WV-1268, and WV-1284, respectively).

1. By letter dated February 14, 2001 (Administrative Record Number 1204), the United States Department of Labor, Mine Safety and Health Administration (MSHA) responded to our request for comments. MSHA requested that we contact MSHA in the event that any long-standing regulation or amendment thereto should change or alter the areas of a surface or underground coal mine or a preparation facility, including refuse piles, impoundments, sealed mines, or highwalls at surface mines. MSHA further stated that if such regulations or amendments do cause such changes or alterations, MSHA will assign a technical inspector to discuss the mine operator's approved plans concerning the affected areas for the amendment at issue.

In response, changes in State laws and regulations are usually incorporated into existing permits at the time of permit renewal, permit revision, or mid-term review. MSHA is provided copies of any request for renewal or significant

revisions to permit applications. In addition, notification of any changes in State laws or regulations that make up an approved State regulatory program are provided to MSHA for review and comment prior to our approval.

2. The United States Department of Agriculture, Natural Resources Conservation Service (NRCS) responded on February 9, 2001 (Administrative Record Number WV-1203), and provided the following comments. At required amendment 30 CFR 948.16(dd), NRCS suggested language to be used in place of the WVDEP's response to the required amendment codified at 30 CFR 948.16(dd). NRCS suggested the following language: "The productivity for grazing land, hayland, and cropland can be based upon the productivity determinations for similar soil classifications, or similar map units, as published in the productivity tables in NRCS soil surveys, or in the NRCS Grassland Suitability Groups."

In response, we note that after NRCS commented, the State amended its response. As discussed in Finding 2, WVDEP proposed a policy to satisfy the required amendment at 30 CFR 948.16(dd) regarding productivity and ground cover. In effect, the policy will do what the NRCS has suggested. In addition, operators will be expected to work with the NRCS, West Virginia Agricultural Statistics Service/USDA and WVDEP in developing productivity standards for proposed mining operations that have hayland, pastureland, or cropland as the postmining land use.

3. NRCS also commented on the required amendment codified at 30 CFR 948.16(ee). NRCS stated that when evaluating important farmland, NRCS uses form AD-1006 to determine a Relative Value of Farmland to be Converted. This form gives weight to Prime and Unique Farmland, and also gives weight to statewide Important Farmland and Locally Important Farmland. This is the national system of Land Evaluation and Site Assessment, or LESA. Many map units of Statewide importance exceed 10 percent slope, and impact our evaluation. Lists of Prime Farmland, Unique Farmland, Statewide Important Farmland, and Locally Important Farmland are available for each county.

In response, we note that after the NRCS commented, WVDEP revised its response to the required amendment at 30 CFR 948.16(ee). As discussed in Finding 3, WVDEP submitted its prime farmland requirements and procedures to the NRCS for review. The NRCS commented on the nature and extent of WVDEP's reconnaissance inspections

and concurred with the State's negative determination criteria for prime farmland. The documents described above are taken into consideration when evaluating areas for prime farmland.

4. The U. S. National Park Service (NPS) responded and provided two suggestions (Administrative Record Number WV-1289). Concerning the State's response to the required amendment at 30 CFR 948.16(iiii), NPS stated that recreational uses such as off-road vehicle use requires only a minimal amount of reclamation, and operators will naturally gravitate towards reclaiming areas to this level if allowed to. The State's reclamation standards in effect would be lowered through what appears to be an unintended interpretation of what constitutes "recreational facilities use" under SMCRA section 515(c)(3).

In response, SMCRA at section 515(c)(3) provides the minimum standards for approval of mountaintop removal mining operations. Section 515(c)(3)(A) provides that after consultation with the appropriate land use planning agencies, if any, the proposed postmining land use must be deemed to constitute an equal or better economic or public use of the affected land, as compared with premining use. That is, while the applicant may propose a certain postmining land use for mountaintop removal mining operations, it is the decision of the regulatory authority whether to approve a proposed postmining land use. The decision, in accordance with section 515(c)(3)(A), must focus on the value of the proposed use as compared to the premining use. In addition, SMCRA section 515(c)(3)(B) provides that the applicant must present specific plans for the proposed use and appropriate assurances that such use: will be compatible with adjacent land uses; obtainable according to data regarding expected need and market; assured of investment in necessary public facilities; supported by commitments from public agencies where appropriate; practicable with respect to private financial capability for completion of the proposed use; and planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining land use. Also, Section 515(c)(3)(C) also provides that the proposed use must be consistent with existing State and local land use plans and programs. The State counterparts to these requirements are at W. Va. Code 22-3-13(c)(3).

It is our belief that compliance with the SMCRA provisions discussed above leads to the following conclusions: (1) A

postmining land use cannot be approved where the use could be achieved without waiving the AOC requirement, except where it is demonstrated that a significant public or economic benefit will be realized therefrom; and, (2) where an exception or variance from the approximate original requirements is sought, the postmining land use must always offer a net benefit to the public or the economy. As discussed above in Finding 21, we find that the policy statement provided by WVDEP renders the term "recreational uses" at W. Va. Code 22-3-13(c)(3) no less stringent than the term "recreational facilities use" at section 515(c)(3) of SMCRA and can be approved.

5. NPS also stated that language identified in the amendments as 30 CFR 948.16(dd) allows for the continuation of the practice of returning previously mined lands to grazing land, pasture land or cropland. NPS stated that while grazing is an acceptable reclamation goal under some circumstances, it should be a limited option, especially in the highly productive hardwood forest region that surrounds the New River Gorge National River and Gauley River National Recreation Area. The circumstances under which grazing land, pasture land or cropland would be an acceptable reclamation goal, NPS stated, need to be specified and meet the higher and better use test.

In response, we note that SMCRA and the Federal regulations currently allow such considerations. Under section 515(c)(3) of SMCRA, industrial, commercial, agricultural, residential, or public facility (including recreational facilities) uses may be approved as postmining land uses for mountaintop removal mining operations. Certain managed grassland uses, such as grazing land, pasture land, or hayland, are included within the Federal "agricultural" land use category under section 515(c)(3). The State's mountaintop-removal provisions at W.Va. Code 22-3-13(c)(3) contain similar requirements. However, as discussed in the August 16, 2000, **Federal Register**, we approved a new provision at CSR 38-2-7.3.c (65 FR 50409, 50414). Subsection 7.3.c. provides that a change in postmining land uses to grassland uses, such as rangeland and/or hayland or pasture, is prohibited on mountaintop removal mining operations that receive an approximate original contour variance described in W.Va. Code 22-3-13(c). Therefore, as recommended by the NPS, the grassland uses described above, except for cropland, are no longer approvable postmining land uses for

mountaintop removal mining operations in West Virginia. Few, if any, mountaintop removal mining operations in the State have cropland as an approvable postmining land use. In addition, the change from one land use category to another category would have to satisfy the alternative postmining land use requirements of CSR 38-2-7.3.

6. By letter dated March 29, 2002 (Administrative Record Number WV-1291), the U.S. Army Corps of Engineers (COE) responded and suggested the inclusion of a statement indicating that separate authorization from the COE be required for all work involving any discharge of dredged or fill material into waters of the U.S. COE made this recommendation it said in order to avoid any inadvertent implication that the requirements of Section 404 of the Clean Water Act are somehow superseded by the amendments.

In response, as provided by section 702(a)(3) of SMCRA, we acknowledge that nothing in the SMCRA requirements may be construed as superseding, amending, modifying or repealing the Federal Water Pollution Control Act [amended as The Clean Water Act (CWA)] or the regulations promulgated thereunder. State programs do not have to contain a statement regarding the discharge of dredge or fill material in waters of the United States. However, many States make it a condition of permit approval requiring that the surface mining reclamation operation cannot commence without the issuance of a CWA Section 404 Permit by the COE.

7. By letter dated March 7, 2002 (Administrative Record Number WV-1290), NRCS stated that its definitions are not consistent with several parts of the State's rules at CSR 38-2-10 regarding negative determination criteria. Because cropping history is not considered in the NRCS definition of prime farmland, they concluded that they could not agree with any historic use of the land as set forth in the State's rules at CSR 38-2-10.2.a though 10.2.a.1.C.

In response, as discussed above in Finding 2, section 701(20) of SMCRA defines prime farmland to include lands "which have been used for intensive agricultural purposes \* \* \*." In addition, 30 CFR 701.5 defines prime farmland to mean those lands which are defined by the Secretary of Agriculture in 7 CFR Part 675 and which have been historically used for cropland. Because the State's prime farmland requirements include an historical use criterion that is no less effective than the Federal requirements at 30 CFR 701.5 and because the NRCS concurs with the

State's other negative determination criteria, we found WVDEP's proposal to be no less effective than the Federal requirements at 30 CFR 785.17. Therefore, we are removing the applicable portion of the required amendment at 30 CFR 948.16(ee).

We asked for comments from Federal agencies by letter dated May 30, 2001, concerning the amendment package submitted to us on May 2, 2001, concerning House Bill 2663 (Administrative Record Number WV-1215).

8. On June 25, 2001, the U.S. Fish and Wildlife Service responded to our request for comments, but it did not comment on any of the State's proposed revisions to the outstanding required amendments (Administrative Record Number WV-1224) that we are addressing in this document. Therefore, no response by us is necessary.

We also asked for comments from Federal agencies by letter dated February 1, 2002, concerning the amendment package submitted to us on November 28, 2001, concerning blasting (Administrative Record Number WV-1268).

9. On March 1, 2002 (Administrative Record Number WV-1281), MSHA responded and stated that the employee and adjacent landowner safety provisions are consistent with MSHA blasting standards. MSHA also stated it found no issues or impact upon coal miner's health and safety.

10. On February 26, 2002 (Administrative Record Number WV-1279), COE responded and stated that their review of the proposed amendment found it to be generally satisfactory. The COE did not have any other comments related to the required amendments codified at 30 CFR 948.16(kkkk), (llll), or (mmmm) that were addressed in the State's blasting amendment package.

11. On February 5, 2002 (Administrative Record Number WV-1270), the NPS responded to the State's blasting amendment and stated that it had no specific comments.

*Environmental Protection Agency (EPA) Comments/Concurrence*

Under 30 CFR 732.17(h)(11)(i) and (ii), we are required to get comments and the written concurrence of EPA for those provisions of the program amendment that relate to air or water quality standards issued 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 January 26, 2001, and March 11, 2002, we asked for concurrence on the amendments from EPA (Administrative

Record Numbers WV-1198 and WV-1283, respectively). On July 3, 2001, and April 10, 2002 (Administrative Record Numbers WV-1225 and WV-1294), EPA sent us its written concurrence with comments. EPA stated that there are no apparent inconsistencies with the Clean Water Act (CWA), the National Pollutant Discharge Elimination System (NPDES) regulations, or other statutes and regulations under the authority of EPA. EPA said that it is providing its concurrence with the understanding that implementation of the amendments must comply with the CWA, NPDES regulations, and other statutes and regulations under its authority.

In addition, EPA provided the following comments on the proposed amendments.

1. Required amendment codified at 30 CFR 948.16(oo) concerning the required design standard for excavated sediment control structures. EPA stated that it does not have any comments on the design of sediment control structures to pass certain size storm flows, but wished to point out that settleable solids effluent limits are required by 40 CFR Part 434 for discharges to waters of the United States resulting from 10-year, 24-hour or less storms.

In response, we acknowledge the applicability of the regulations at 40 CFR Part 434 to the West Virginia program at CSR 38-2-14.5.b.

2. Required amendment codified at 30 CFR 948.16(vvv)(4) concerning the placement of coal processing waste in the backfill. EPA stated that it emphasizes the importance that all assurances be made during placement of any acidic material into backfills, whether refuse or overburden, to minimize acid formation and prevent acid seepage. If conditions exist where there are questions about the effectiveness of measures for preventing acid seepage, EPA stated, then acidic materials should not be placed in the backfill.

In response, and as discussed above in Finding 14, acid- or toxic-producing materials will be rendered non-acid and/or non-toxic prior to being placed in a backfill. WVDEP stated that CSR 38-2-14.15.m.2. provides that coal processing waste will not be placed in the backfill unless it is non-acid and/or non-toxic material or rendered non-acid and/or non-toxic material. In addition, CSR 38-2-1.6.b. prohibits acid-forming or toxic-forming material from being buried or stored in proximity to a drainage course or groundwater system. We agree with EPA that if conditions exist where there are questions about the effectiveness of measures for preventing acid seepage, then acidic

materials should not be placed in the backfill.

3. Required amendment codified at 30 CFR 948.16(bbbb) concerning premining surveys that require technical assessments or engineering evaluations of water supplies prior to underground mining. EPA recommended that these surveys also include the quantity and chemical and biological quality of intermittent and perennial streams. Subsidence has caused impairment of aquatic habitat from water loss through streambed fissures and from ponding in subsided stream stretches, the EPA also stated.

In response, we note that the Federal regulation at 30 CFR 784.20(a)(3), upon which the State rule is based, applies only to technical assessments or engineering evaluations of certain protected water supplies, and not to land, or to streams in general.

4. On April 10, 2002, in response to the State's proposed revision to satisfy 30 CFR 948.16(pppp) regarding bond release and premining water quality, EPA noted that on January 23, 2002, it promulgated effluent guideline regulations for remining operations. The regulations are consistent with section 301(p) of the CWA (Rahall Amendment) and provide an incentive for remining by requiring less stringent effluent limits than are required for conventional mining operations. According to EPA, the remining effluent limits in 40 CFR Part 434 Subpart G apply to preexisting discharges until bond release and, at a minimum, may not exceed preexisting baseline levels. Applications for NPDES permits for remining operations must include pollution abatement plans that identify the best management practices to be used. Applications must also include monitoring data on preexisting baseline loadings, unless such monitoring is considered infeasible due to inaccessible discharges or other reasons. EPA noted that it is expected that WVDEP will be providing regulations consistent with 40 CFR Part 434 Subpart G in the near future.

In response, as discussed above in Finding 28, we acknowledge that EPA has recently issued effluent limitation guidelines for remining operations, and it is anticipated that the State's remining requirements, including CSR 38-2-24.4 if necessary, will have to be revised in the near future to comply with the new requirements.

5. We asked EPA for comments by letter dated February 1, 2001, on the amendment package submitted on November 28, 2001, concerning blasting (Administrative Record Number WV-1268). On February 28, 2002, EPA responded and stated that it has

determined that there are no apparent inconsistencies with the Clean Water Act or other statutes and regulations under EPA's jurisdiction (Administrative Record Number WV-1282).

6. We also asked EPA for comment and concurrence by letter dated May 29, 2001, on the amendment package submitted on May 2, 2001, concerning State House Bill 2663 (Administrative Record Number WV-1214). By letter dated November 23, 2001, EPA provided the following comments (Administrative Record Number WV-1252). Concerning the State's response to 30 CFR 948.16(xx), EPA stated that this provision includes a requirement that, "where water quality is paramount," outcrop barriers be constructed with impervious material and have controlled discharge points. EPA recommended that a definition or some clarification of the term "paramount" be added as it relates to water quality.

In response, as discussed above in Finding 6, the State revised its rules at CSR 38-2-14.8.6.a. to provide design requirements for constructed outcrop barriers. In addition, on February 26, 2002, WVDEP proposed guidelines that further clarify what standard engineering practices will be followed when allowing for the removal of a natural barrier and constructing an outcrop barrier. The term "paramount" that EPA recommends be defined is also contained in W.Va. Code Section 22-3-13(b)(25). Like the proposed rule, the statute provides that where water quality is paramount, the constructed barrier must be composed of impervious material with controlled discharge points. The State statutory provision allowing for constructed outcrop barriers was conditionally approved on January 21, 1981 (46 FR 5915, 5919). The conditional approval required the State to provide specific design criteria for constructed outcrop barriers. At time of approval, the State was not required to define the term, paramount. The purpose of both constructed and natural outcrop barriers is to prevent slides and to control erosion. By requiring an operator to construct an outcrop barrier of impervious material with controlled discharge points, the State should be able to ensure that the constructed barrier will effectively control erosion and protect surrounding streams. Not all outcrop barriers need to be constructed with impervious material, such as clay, to control erosion. As proposed, it can be asserted that the State believes that it may be necessary to construct some outcrop barriers of impervious material whenever water quality is paramount.

This may be due to the fact that the proposed outcrop barrier may be adjacent to or in the vicinity of a high quality stream. However, given that the State's existing statutory provision is identical to the proposed regulatory provision at CSR 38-2-14.8.a.6. and because the State's constructed outcrop barrier requirements are in accordance with the Federal requirements for natural barriers at SMCRA section 515(b)(25), we do not agree that the term "paramount" needs to be defined or further clarified as recommended by EPA.

7. Concerning the required amendments at 30 CFR 948.16(ffff), (gggg), and (hhhh), EPA noted that these provisions relate to the amount of time allowed to remedy subsidence damage to lands, structures, or water supplies. EPA stated that it is unclear in this section or other sections regarding subsidence control if the term "lands" includes streams and wetlands which may be adversely affected by water loss through subsidence cracks and ponding of subsided stream portions. To provide clarification, EPA recommended that the words "streams and wetlands" be included along with lands, structures, and water supplies in this section and other appropriate sections addressing subsidence control.

In response, we note that the Federal definition of "material damage" at 30 CFR 701.5 covers damage to the surface and to surface features, such as wetlands, streams, and bodies of water, and to structures or facilities. 60 FR 16724, col. 3, March 31, 1995. The State's definition of material damage contained in CSR 38-2-16.2.c. is substantively identical to the Federal definition in these pertinent respects. Therefore, we expect the State to interpret its definition of "material damage" in the same manner as we interpret the Federal definition.

#### V. OSM's Decision

Based on the above findings, we approve the amendments sent to us by West Virginia. In addition, we are removing the required program amendments codified at 30 CFR 948.16(a), (dd), (ee), (oo), (tt), (xx), (nnn), (ooo), (qqq), (sss), (vvv)(1) through (4), (zzz), (aaaa), (bbbb), (ffff), (gggg), (hhhh), (iiii), (jjjj), (kkkk), (llll), (mmmm), (nnnn), (oooo), and (pppp).

To implement this decision, we are amending the Federal regulations at 30 CFR Part 948, which codify decisions concerning the West Virginia program. We find that good cause exists under 5 U.S.C. 553 (d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's

program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

#### VI. Procedural Determinations

##### *Executive Order 12630—Takings*

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

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

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

##### *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 allowable 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 because each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

##### *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. Section 503(a)(7) requires that State programs contain rules and regulations "consistent with"

regulations issued by the Secretary pursuant to SMCRA.

*Executive Order 13211 “ Regulations That Significantly Affect the Supply, Distribution, or Use of Energy*

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse affect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

*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 OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

*Regulatory Flexibility Act*

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal 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: a) Does not have an annual effect on the economy of \$100 million; b) Will not cause a major increase in costs or prices for consumers, individual industries, geographic regions or Federal, State, or local government agencies; and c) 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: April 19, 2002.

**Tim L. Dieringer,**  
*Acting Regional Director, Appalachian Regional Coordinating Center.*

For the reasons set out in the preamble, 30 CFR part 948 is amended as set forth below:

**PART 948—WEST VIRGINIA**

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

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

2. Section 948.15 is amended in the table by adding a new entry in chronological order by “Date of publication of final rule” to read as follows:

**948.15 Approval of West Virginia regulatory program amendments.**

\* \* \* \* \*

Original amendment submission dates	Date of publication of final rule	Citation/description
November 30, 2000; May 2, 2001; November 28, 2001; February 26, 2002; March 8, 2002.	May 1, 2002 .....	Emergency rule provisions: CSR 38–2–3.12.a.1, a.2, a.2.B; 5.4.b.8, d.3; 16.2.c.4.  Policy/guidance documents submitted February 26, 2002: Attachments 1A; 2P; 3P and the updated listing (Administrative Record Number WV–1278); 4 except examples 1 and 3 through 8; 6; and 9. Policy/guidance documents submitted March 8, 2002: Attachments 1; 3A; and 8. In House Bill 2663: CSR 38–2–3.12.a.1; 3.14.a; 12.2.e; 12.4.e; 14.8.a.6; 16.2.c.4; and 24.4. In Senate Bill 689: W. Va. Code 22–3–13a(g), (j); 30a(a).

3. Section 948.16 is amended by removing and reserving paragraphs (a), (dd), (ee), (oo), (tt), (xx), (nnn), (ooo),

(qqq), (sss), (vvv), (zzz), (aaaa), (bbbb), (ffff), (gggg), (hhhh), (iiii), (jjjj), (kkkk),

(llll), (mmmm), (nnnn), (oooo), and (pppp).