

(iii) As a result of the application of paragraph (a)(1) of this section to E's distribution of 2 percent of L stock to A on January 1, 2004, for testing dates on and after January 1, 2004, A is treated as having acquired that 2 percent interest in L in 1994, and E is treated as having acquired only 8 percent of L stock in 1994. Because there are no owner shifts on January 1, 2004, that date is not a testing date.

(iv) July 1, 2004, is a testing date because on that date A, a 5-percent shareholder, acquires 1 percent of L stock. As of the close of that testing date, A's percentage of ownership of L stock is 7 percent, and A's lowest percentage of ownership of L stock at any time within the testing period is 2 percent (deemed acquired in 1994), representing an increase of 5 percentage points. In addition, as of the close of July 1, 2004, B's percentage of ownership of L stock is 5 percent, and B's lowest percentage of ownership of L stock at any time within the testing period is 0 percent, representing an increase of 5 percentage points. Thus, on July 1, 2004, L must take into account an increase of 10 (5 + 5) percentage points in determining whether it has an ownership change.

**Example 2—(i) Facts.** E is a qualified trust established under Plan F. L, a publicly traded corporation, has 100x shares of stock outstanding. As of January 1, 2006, C owns 5x shares of L stock and is not a participant or beneficiary of a participant in Plan F. At all times prior to January 1, 2006, E owns no L stock. On January 1, 2006, E acquires 10x shares of L stock from members of the public group of L. On December 1, 2007, E distributes 5x shares of L stock to some of the participants in Plan F. No one participant acquires all 5x shares as a result of the distribution. On February 1, 2008, C purchases 1x shares of L stock from the public group of L.

(ii) **Analysis.** Because E's acquisition of 10x shares of L stock on January 1, 2006, is an owner shift, that date is a testing date. As of the close of that date, E's percentage of stock ownership in L has increased by 10 percentage points.

(iii) As a result of the application of paragraph (a)(1) of this section to E's distribution of 5x shares of L stock to some Plan F participants on December 1, 2007, for testing dates on and after December 1, 2007, those distributees are treated as having acquired those shares of stock on January 1, 2006, from members of the public group of L, and E is not treated as having acquired those shares on that date. E's distribution of the 5x shares is not an owner shift. Therefore, December 1, 2007, is not a testing date.

(iv) February 1, 2008, is a testing date because on that date an owner shift results from C's purchase of 1x shares of L stock. As of the close of that testing date, the distributees of 5x shares of L stock are treated as members of the public group of L having acquired 5x shares of L stock from other members of the public group of L on January 1, 2006. Because those acquisitions are not by 5-percent shareholders, L does not take them into account. In addition, as of the close of February 1, 2008, E's percentage of stock ownership in L is 5 percent, and E's lowest percentage of stock ownership in L at any

time within the testing period is 0 percent, representing an increase of 5 percentage points. In addition, as of the close of February 1, 2008, C's percentage of stock ownership in L is 6 percent, and C's lowest percentage of stock ownership in L at any time within the testing period is 5 percent, representing an increase of 1 percentage point. Therefore, on February 1, 2008, L must take into account an increase of 6 (5 + 1) percentage points in determining whether it has an ownership change.

(4) **Effective date—(i) General rule.** This section applies to all distributions after June 27, 2003.

(ii) **Retroactive application.** Notwithstanding paragraph (a)(4)(i) of this section, a loss corporation may apply the rules of this section retroactively to:

(A) All distributions on or before June 27, 2003 that are within a testing period that includes June 27, 2003; or

(B) All distributions after December 31, 1986.

(b) [Reserved]

**Robert E. Wenzel,**

*Deputy Commissioner of Internal Revenue.*

Approved: June 18, 2003.

**Pamela F. Olson,**

*Assistant Secretary of the Treasury.*

[FR Doc. 03-16229 Filed 6-26-03; 8:45 am]

**BILLING CODE 4830-01-P**

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 948

[WV-097-FOR]

#### West Virginia Regulatory Program

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

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

**SUMMARY:** We are announcing our approval of amendments to the West Virginia surface coal mining regulatory program (the West Virginia program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The amendments we are approving concern various changes and additions to the Code of State Regulations as contained in State House Bill 4163 and Senate Bill 2002.

**EFFECTIVE DATE:** June 27, 2003.

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

#### II. Submission of the Amendment

By letter dated April 9, 2002 (Administrative Record Number WV-1296), the West Virginia Department of Environmental Protection (WVDEP) sent us a proposed amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). The proposed amendment consists of several changes to the Code of State Regulations (CSR) at 38-2, and the addition of new CSR 38-4, the Coal Related Dam Safety Rules, as contained in House Bill 4163.

We announced the receipt and provided an opportunity to comment on the amendment in the June 6, 2002, **Federal Register** (67 FR 38919) (Administrative Record Number WV-1311). The comment period closed on July 8, 2002. We received comments from the U.S. Department of Labor's Mine Safety and Health Administration.

By letter and electronic mail dated June 19, 2002, WVDEP sent us additional amendments to its program concerning changes to CSR 38-2 that are contained in Senate Bill 2002 (Administrative Record Number WV-1316). Senate Bill 2002 was signed by

the Governor of West Virginia on June 21, 2002; it authorized WVDEP to promulgate revisions to its Surface Mining and Reclamation Regulations.

We announced receipt of the proposed amendments in the August 16, 2002, **Federal Register** (67 FR 53542) (Administrative Record Number WV-1322). In that notice, we also identified proposed amendments that we inadvertently omitted identifying in the June 6, 2002, **Federal Register** notice, including the new Coal Related Dam Safety Rules at CSR 38-4. The comment period closed on September 16, 2002. We received comments from the U.S. Department of Labor's Mine Safety and Health Administration, the U.S. Department of the Interior's Fish and Wildlife Service, and the U.S. Environmental Protection Agency.

These two submissions include amendments to CSR 38-2 that are intended to address required program amendments codified in the Federal regulations at 30 CFR 948.16 (rrrr), (ssss), (tttt), (uuuu), (vvvv), (xxxx), (yyyy), (zzzz), (bbbb), (cccc), (dddd), (eeee), (gggg), (hhhh), (mmmm), (nnnn), and (qqqq).

Revisions to the State's contemporaneous reclamation requirements are contained in the two amendment submittals discussed above. In order to expedite our review of the State's amendments to its contemporaneous reclamation provisions, we separated those amendments from the two amendment submittals discussed above. We published our findings and decision on the State's contemporaneous reclamation amendments in the December 3, 2002, **Federal Register** (67 FR 71832) (Administrative Record Number WV-1344).

The proposed new Coal Related Dam Safety Rules at CSR 38-4 are intended to address, in part, a letter we sent to the State on July 22, 1997 (Administrative Record Number WV-1071), in accordance with the Federal regulations at 30 CFR 732.17(d). The Federal regulation 30 CFR 732.17(d) provides that OSM must notify the State of all changes in SMCRA and the Federal regulations that will require an amendment to the State program. Such letters sent by us are often referred to as "732 letters." We separated the State's new Coal Related Dam Safety Rules at CSR 38-4 from the amendment submittals discussed above. We will render a final decision on those new rules at a later date as part of a program amendment that addresses the State's responses to 732 letters. For more information on the State's responses to 732 letters, see the proposed rule notice

in the January 12, 2001, **Federal Register** (66 FR 2866).

We also removed from these amendments the State's proposed rules at CSR 38-2-25 concerning the exemption for coal extraction incidental to extraction of other minerals. The proposed rules at CSR 38-2-25 were submitted in response to a 732 letter dated February 7, 1990 (Administrative Record Number WV-827), concerning exemption for coal extraction incidental to the extraction of other minerals removed for purposes of commercial sale (30 CFR part 702). We separated the proposed rules at CSR 38-2-25 from the amendment submittals discussed above, and we will publish our findings at a later date as part of the program amendment that addresses the State's responses to 732 letters. For more information on the State's responses to 732 letters, see the proposed rule notice in the January 12, 2001, **Federal Register** (66 FR 2866).

In addition, the proposed rules at CSR 38-2-3.12.a.1-2 regarding Subsidence Control Plans; 38-2-5.4.b.8 regarding Excavated Sediment Control Structures; 38-2-5.4.d.3 regarding Coal Processing Waste Dams; and 38-2-16.2.c.4 regarding Bonding for Subsidence Damage are identical to what we previously considered from the submitted West Virginia House Bill 2663. Each of those amendments was approved in our decision on WV-088, which was published in the **Federal Register** on May 1, 2002 (67 FR 21904) (Administrative Record Number WV-1300). Therefore, we will not reconsider those provisions here.

### III. OSM's Findings

As discussed under "Submission of the Amendment," the State's submittal includes proposed amendments that would address required program amendments codified at 30 CFR 948.16. For the reasons discussed below, we are approving the proposed amendments as submitted on April 9, 2002, and June 19, 2002. Any revisions that we do not specifically discuss below concern nonsubstantive wording or editorial changes and are approved here without discussion.

#### *CSR 38-2 Surface Mining Reclamation Regulations*

##### 1. 38-2-2.31.b.1. Definition of Forestry

The definition of "forestry" has been amended by adding the words "for the production of wood or wood products." In its submittal of this amendment, WVDEP stated that it is intended to satisfy the required program amendment identified in the August 18, 2000,

**Federal Register** (65 FR 50409, 50411-12). The required program amendment codified at 30 CFR 948.16(rrrr) provides that CSR 38-2-2.31.b must be amended to define forestry to mean a postmining land use used or managed for the long term production of wood or wood products in accordance with the Federal definition of forestry under the definition of land use at 30 CFR 701.5. We find this change to be consistent with and no less effective than the Federal definition of "forestry" at paragraph (d) under the definition of "land use" at 30 CFR 701.5 and it can be approved. Therefore, the required program amendment codified at 30 CFR 948.16(rrrr) is satisfied and can be removed.

##### 2. 38-2-2.43. Definition of Director

This definition was deleted. The definition was rendered obsolete due to the State's changing the Division of Environmental Protection to the Department of Environmental Protection and changing the title to secretary as defined at subsection 2.108. We find that the deletion does not render the West Virginia program less effective than the Federal regulations and can be approved.

##### 3. 38-2-2.108. Definition of Secretary

This definition is new, and defines "Secretary" to mean the Secretary of the Department of Environmental Protection or the Secretary's authorized agent. We find that the definition does not render the West Virginia program less effective than the Federal regulations and can be approved.

##### 4. 38-2-3.1.i.2. Permit Application Requirements and Contents

This provision is amended by deleting the word "performance" before the word "bond." As amended, the provision requires an applicant to identify whether it has "[f]orfeited a bond or similar security in lieu of bond." In its submittal of this amendment, WVDEP stated that the deletion of the word "performance" was intended to render the definition consistent with the Code of West Virginia (W. Va. Code). W. Va. Code 22-3-11(a), concerning bonding requirements, provides that a "penal bond" shall be furnished by the applicant and conditioned upon the operator faithfully performing all of the requirements of W. Va. Code 22-3 and of the permit. OSM had approved the statutory provision previously on October 4, 1995 (60 FR 51901). We find that the deletion of the term "performance" in its regulations does not render the West Virginia program

less effective than the Federal bonding requirements at 30 CFR 800.11 concerning the requirement to file a bond and can be approved. In a similar fashion, the State has deleted the word "performance" at 38-2-3.25.a.4, 3.30.d.8, 3.32.e, 5.4.e.2, 8.2.b.3, 10.6.b.3, 11.2.b, 11.4.a.1, 11.4.a.4, and 22.7.a. For the reason stated above, we find that the deletion of the term "performance" does not render the West Virginia program less effective than the Federal bonding requirements at 30 CFR 800.11 concerning the requirement to file a bond and can be approved.

#### 5. 38-2-3.25.a.4. Reinstatement of Permits

This provision is amended by adding the word "reinstatement" following the word "transfer" that appears in the second sentence. Also, the third sentence is amended by adding the following words to the beginning of the sentence: "[e]xcept for reinstatement." The amendments are intended to clarify that CSR 38-2-3.25.a.4 also applies to the reinstatement of permits and in no event can a reinstated permit be approved in advance of the close of the public comment period. This amendment satisfies the required program amendment codified at 30 CFR 948.16(ssss). Therefore, we find that this amendment can be approved and the required program amendment codified at 30 CFR 948.16(ssss) can be removed.

#### 6. 38-2-7.4.a.1. Commercial Forestry and Forestry Postmining Land Use

This provision is amended by adding the words "[c]ommercial forestry shall be established on areas receiving a variance from AOC and" at the beginning of the third sentence. This amendment is intended to clarify that only commercial forestry postmining land use and not forestry postmining land use may be approved for areas receiving a variance from the AOC requirements. This amendment satisfies the required program amendment codified at 30 CFR 948.16(tttt). Therefore, we find that this amendment can be approved and the required program amendment codified at 30 CFR 948.16(tttt) can be removed.

#### 7. 38-2-7.4.b.1.C.5. Forestry Postmining Land Use—Ponds and Impoundments

This provision is amended by clarifying that ponds and impoundments below the fill must be removed after mining and all other ponds or impoundments that are left in place must meet the requirements of CSR 38-2-5.5. As amended, this provision satisfies the required program amendment at 30 CFR 948.16(uuuu).

Therefore, we find that this amendment can be approved and the required program amendment codified at 30 CFR 948.16(uuuu) can be removed.

#### 8. 38-2-7.4.b.1.D.1. Definition of Soil

This provision is amended by adding the following definitions of O horizon and Cr horizon:

O horizon means the top-most horizon or layer of soil dominated by organic material derived from dead plants and animals at various stages of decomposition; it is sometimes referred to as the duff or litter layer or the forest floor. Cr horizon means the horizon or layer below the C horizon, consisting of weathered or soft bedrock including saprolite or partly consolidated soft sandstone, siltstone, or shale.

We find that the definitions for O and Cr horizons at 38-2-7.4.b.1.D.1 are acceptable and further clarify the State's soil horizon requirements. Though different from the Federal definition of soil horizons at 30 CFR 701.5, the State's definitions are not inconsistent with the Federal definition and can be approved. As proposed, this provision partially satisfies the required program amendment at 30 CFR 948.16(vvvv).

The required program amendment at 30 CFR 948.16(vvvv) also requires that the State delete the phrase "except for those areas with a slope of at least 50%" from its regulations at CSR 38-2-7.4.1.D.2. We have reconsidered this required amendment, and for the reasons discussed below find that the phrase "except for those areas with a slope of at least 50%" does not render the West Virginia program less effective. Therefore, the required program amendment at 30 CFR 948.16(vvvv) is fully satisfied and can be removed.

The State regulations at CSR 38-2-7.4 set forth the standards applicable to mountaintop removal mining operations with a postmining land use of "commercial forestry and forestry." The CSR 38-2-7.4.b.1.D concerns soil and soil substitutes. Subsection 7.4.b.1.D.1 defines soil. Subsection 7.4.b.1.D.2 concerns the recovery of soil, and provides that the operator must recover and use the soil volume equal to the total soil volume on the mined area, except for those areas with a slope of at least 50 percent. In other words, soil, which includes the O, A, E, B, C, and Cr horizons on slopes less than 50 percent within the mined area will be recovered and used, whereas soil on slopes 50 percent or steeper will not be separately recovered. We had interpreted subsection 7.4.b.1.D.2 to mean that for slopes of 50 percent or greater, the topsoil would not be recovered and, therefore, the provision rendered the West Virginia program less

effective than the Federal regulations at 30 CFR 816.22.

Because subsection 7.4.b.1.D.2 only addresses soil, it must be read in concert with subsections 7.4.b.1.D.3, D.4, and D.5 to fully understand its effect. It is our understanding that under subsection 7.4.b.1.D.2, when slopes are 50 percent or steeper, the soil may not be separately recovered. In such cases, the requirements of subsection 7.4.b.1.D.3 concerning soil substitutes would apply. Subsection 7.4.b.1.D.3 provides that when the soil volume recovered under subsection 7.4.b.1.D.2 is not sufficient to meet the depth requirements for the postmining land use, selected overburden materials may be used as soil substitutes from within 10 feet of the soil surface on the mined area. Subsection 7.4.b.1.D.3 provides that material from this 10-foot layer may be removed with the soil and mixed with the soil in order to meet the depth requirement. We understand this to mean that, despite the fact that under subsection 7.4.b.1.D.2 soil may not be separately removed on slopes of at least 50 percent, the soil on those slopes will be removed together with the underlying 10-feet of weathered, slightly acid brown sandstone as necessary to meet the depth requirements, and the resulting soil medium will be the best available to support the proposed revegetation. (We note that subsection 7.4.b.1.D.3 contains a typographical error; in the first sentence, the word "sufficient" should be "insufficient" as noted previously in our final rule of August 18, 2000, 65 FR at 50417.)

Subsection 7.4.b.1.D.4 provides that if the soil and other materials saved under paragraph D.2 and the underlying 10 feet of weathered, slightly acid brown sandstone saved under paragraph D.3 are insufficient to meet the depth requirements, the operator will be required to use more of the weathered, slightly acid brown sandstone from below the 10 feet of soil surface on the mined area to meet the depth requirements.

Subsection 7.4.b.1.D.5 provides that upon a demonstration that the depth of materials saved under subsections 7.4.b.1.D.2, D.3, and D.4 are insufficient to meet the depth requirements, then up to 2/3 of the mine spoil may consist of the best available material or mix of materials.

Taken together, and based on our understanding discussed above, we find that these subsections are no less effective than the Federal regulations at 30 CFR 816.22. Therefore, the required program amendment at 30 CFR 948.16(vvvv) is satisfied and can be removed.

### 9. 38–2–7.4.b.1.G.1. Ground Cover Vegetation

This provision is amended by deleting the word “excessive” from the last sentence. In addition, the following language is added to the end of this provision:

Lesser or no vegetative cover may only be authorized by the Secretary when mulch or other soil stabilizing practices have been used to protect all disturbed areas unless demonstrated that the reduced cover is sufficient to control erosion and air pollution attendant to erosion regardless of slope.

These amendments are intended to satisfy the required program amendment at 30 CFR 948.16(xxxx). The requirement at 30 CFR 948.16(xxxx) provides that the West Virginia program must be amended to:

(1) Delete the word “excessive” at CSR 38–2–7.4.b.1.G.1.; and (2) provide that at CSR 38–2–7.4.b.1.G.1., lesser or no vegetative cover may only be authorized by the Director [Secretary] when mulch or other soil stabilizing practices have been used to protect all disturbed areas and it has been demonstrated that the reduced vegetative cover is sufficient to control erosion and air pollution attendant to erosion regardless of slope.

The amendments proposed by the State are identical to the requirements at 30 CFR 948.16(xxxx) except as follows. The State’s proposed language includes the word “unless” where the language of the required amendment uses the word “and.” The effect of the word “unless” is that the amendment provides that lesser or no vegetative cover may be authorized if: (1) Mulch or other soil stabilizing practices are used; or (2) the reduced vegetative cover is sufficient to control erosion and attendant air pollution, in which case mulch or other soil stabilizing practices need not be used as provided by 30 CFR 816/817.114. We find that with the removal of the word “excessive,” the required program amendment at 30 CFR 948.16(xxxx) is satisfied and the amendment can be approved. Therefore, the required program amendment at 30 CFR 948.16(xxxx) can be removed. Using the word “unless” is sufficient to assure the control of erosion while more effectively promoting tree establishment by not requiring mulch or other stabilizing practices that may inhibit tree establishment where they are not needed to control erosion.

### 10. 38–2–7.4.b.1.G.3. Rills and Gullies

This provision is being amended by adding the following language to the end of the existing provision:

and/or disrupt the approved postmining land use or the establishment of vegetative cover

or cause or contribute to a violation of the water quality standards for the receiving stream.

As amended, this provision provides as follows:

7.4.b.1.G.3. The permittee may regrade and reseed only those rills and gullies that are unstable and/or disrupt the approved postmining land use or the establishment of vegetative cover or cause or contribute to a violation of the water quality standards for the receiving stream.

The Federal regulations at 30 CFR 816.95(b) require that rills and gullies that either (1) disrupt the postmining land use or the reestablishment of the vegetative cover or (2) cause or contribute to the violation of water quality standards be filled, regraded, or otherwise stabilized. We understand the amended State provision to mean that a permittee is generally not authorized to repair rills and gullies, except those rills and gullies that are unstable and/or disrupt the approved postmining land use, the establishment of vegetative cover, or cause or contribute to a violation of water quality standards for the receiving stream. This provision is intended to eliminate the compaction of revegetation soils that would normally take place during routine repair of rills and gullies. Such compaction can have a detrimental effect on tree growth. Therefore, the limitation on the repair of rills and gullies is intended to help assure the success of the commercial forestry postmining land use.

An area of potential concern with this provision is that it does not explicitly require the repair of rills and gullies that disrupt the approved postmining land use, the establishment of vegetative cover, or cause or contribute to a violation of water quality standards for the receiving stream. On the other hand, the proposed provision in no way prohibits the repair of such rills and gullies. Moreover, the approved State program already requires restoration of the premining land use, or establishment of an approved alternative postmining land use after mining, (CSR 38–2–7.1.a., 7.3, respectively), the establishment of vegetative cover (38–2–7.4.b.1.G), and compliance with applicable water quality standards (CSR 38–2–14.5.b). It necessarily follows from these provisions that rills and gullies that could prevent compliance with the above requirements must be filled, regraded, or otherwise stabilized. For this reason, we find that the proposed amendment at CSR 38–2–7.4.b.1.G.3, taken in concert with the above-referenced State program requirements, does not render the program less

effective than 30 CFR 816.95(b) and can be approved so long as it is implemented in a manner consistent with that Federal provision. If, in future reviews, we should determine that West Virginia is implementing this provision in a manner that is inconsistent with this finding, a further amendment may be required. In addition, we find that this amendment satisfies the required program amendment codified at 30 CFR 948.16(yyyy), which can, therefore, be removed.

### 11. 38–2–7.4.b.1.H.2. Commercial Forestry and Forestry—Tree Species and Compositions

This provision is amended by deleting “7.4.b.1.G.1.” in two places and replacing the deleted citation with “7.4.b.1.H.1.” We find that this amendment satisfies the required program amendment at 30 CFR 948.16(zzzz) and can be approved. The requirement at 30 CFR 948.16(zzzz) can be removed.

### 12. 38–2–7.4.b.1.I.2. Commercial Forestry and Forestry—Phase II Bond Release

This provision is amended by deleting a reference to CSR 38–2–7.4.d.1.G.1 and adding in its place a reference to CSR 38–2–7.4.b.1.H.1 in the third sentence. The phrase “where there is potential for excessive erosion on slopes greater than 20%” is deleted from the fourth sentence. The words “and rock cover” are deleted from the fourth sentence and are replaced by the words “except where a lesser vegetation cover has been authorized.”

We find that the deletion of the phrase “where there is potential for excessive erosion on slopes greater than 20%” satisfies the required program amendment at 30 CFR 948.16(bbbbb) and can be approved. We find that the deletion of the words “rock cover” satisfies the required program amendment at 30 CFR 948.16(ccccc) and can be approved. Therefore, the required program amendments at 30 CFR 948.16(bbbbb) and 30 CFR 948.16(ccccc) have been satisfied and can be removed.

We find that the deletion of the reference to CSR 38–2–7.4.d.1.G.1 and the addition in its place of a reference to CSR 38–2–7.4.b.1.H.1 in the third sentence accurately corrects an erroneous citation and can be approved. This amendment also satisfies the required program amendment at 30 CFR 948.16(ddddd) which can, therefore, be removed.

We find that the addition of the words “except where a lesser vegetation cover has been authorized” does not, by itself,

render the West Virginia program less effective than the Federal regulations and can be approved. It is our understanding that this exception acknowledges the provision at CSR 38–2–7.4.b.1.G.1, concerning ground cover vegetation. CSR 38–2–7.4.b.1.G.1 authorizes the Secretary of the WVDEP to allow lesser or no vegetative cover under specified circumstances when mulch or other stabilizing practices have been used to protect all disturbed areas, unless it is demonstrated that the reduced vegetative cover is sufficient to control erosion and air pollution attendant to erosion regardless of slope (see Finding 9 above). Our determination that the addition of the language quoted above does not render the West Virginia program less effective than the Federal regulations is based upon our understanding that, where lesser vegetative cover is allowed, the vegetative cover must be sufficient to control erosion and air pollution attendant to erosion.

13. 38–2–7.4.b.1.I.3. Commercial Forestry and Forestry—Phase III Bond Release

This provision is amended by deleting the first word in the third sentence, and adding in its place the phrase “[a]bove and beyond all other standards in effect.” We find that this amendment clarifies that this provision is in addition to all other program requirements and does not render the West Virginia program less effective than the Federal regulations at 30 CFR 800.40 and can be approved.

14. 38–2–7.5.i.1.B. Homestead Roads

This provision is amended by adding, in the third sentence, the phrase “meet the primary road requirements of section 2.4 of this rule” immediately following the words “Highway standards.” It appears that the term “section 2.4” contains a typographical error, and should read “section 4.” Section “2.4” is actually the definition of “acid producing coal seam,” whereas section CSR 38–2–4 concerns “haulage-ways, roads or access roads.”

This proposed amendment is intended to address the required program amendment codified at 30 CFR 948.16(ggggg). The Federal requirement at 30 CFR 948.16(ggggg) provides that CSR 38–2–7.5.i.1.B be amended, or that the West Virginia program otherwise be amended, to clarify that roads which meet the definition of road at CSR 38–2–2.59 and 4.1 and that are to be retained as part of the postmining land use must be designated and constructed to meet the primary road requirements of CSR 38–2–4. The State has complied

with this requirement by requiring that “main roads” of homesteads shall meet the primary road requirements of section CSR 38–2–4. In addition, the county or State road authorities will accept responsibility for maintaining these homestead roads after mining. We are approving this amendment with the understanding that the apparent typographical error (“section 2.4”) is actually intended to be “section 4.” In addition, we are removing the required amendment at 30 CFR 948.16(ggggg) because it has been satisfied.

15. 38–2–7.5.i.3.Q. Homestead Water Reservoir

This provision is amended by adding a sentence to the end of this provision. The new sentence provides as follows: “The reservoir is subject to requirements under subsection 5.5 of this rule.” This amendment is intended to satisfy the required program amendment at 30 CFR 948.16(hhhhh).

The Federal requirement at 30 CFR 948.16(hhhhh) requires that CSR 38–2–7.5.i.3.Q be amended, or that the West Virginia program otherwise be amended, to require that all permanent impoundments approved for Homestead postmining land use must comply with CSR 38–2–3.6.b.1 and 5.5. We find that the proposed amendment satisfies the requirement to comply with CSR 38–2–5.5 and can be approved.

CSR 38–2–5.5 provides as follows:

5.5. Permanent impoundments. Those sediment control or other water retention structures or impounding structures to be left in place after final bond release shall be considered permanent and, if authorized by the Secretary as part of the permit application or a revision to a permit, may be left in accordance with the following requirements:

We understand CSR 38–2–5.5 to mean that a permanent impoundment may be left in place if approved by the Secretary of WVDEP as part of the permit application or a revision to a permit. Compliance with the permit requirements would, of course, include compliance with the requirement at CSR 38–2–3.6.b.1 for a narrative explaining the construction, modification, use, and maintenance of permanent impoundments. Therefore, we find that the required program amendment at 30 CFR 948.16(hhhhh) is fully satisfied and can be removed.

16. 38–2–7.5.i.10. Wetlands for Homesteads

This provision is amended by adding a sentence to the end of this provision. The new sentence provides as follows: “Any pond or impoundment left in place is subject to requirements under

subsection 5.5 of this rule.” We are approving the amendment because it does not render the West Virginia program less effective than the Federal regulations at 30 CFR 816.49(b).

17. 38–2–7.5.j.3.A. Soil for Homesteads

This provision is amended by adding the following definitions of O horizon and Cr horizon:

O horizon means the top-most horizon or layer of soil dominated by organic material derived from dead plants and animals at various stages of decomposition; it is sometimes referred to as the duff or litter layer or the forest floor. Cr horizon means the horizon or layer below the C horizon, consisting of weathered or soft bedrock including saprolite or partly consolidated soft sandstone, siltstone, or shale.

There are no Federal counterparts to the proposed definitions of “O” and “Cr” soil horizons. However, we find that the proposed definitions are not inconsistent with the Federal definition of “soil horizons” at 30 CFR 701.5 and can be approved.

18. 38–2–7.5.j.6.A. Ground Cover Vegetation for Homesteads

This provision is amended by deleting the word “excessive” in the fourth sentence, immediately prior to the word “erosion.” This amendment is intended to satisfy the required program amendment codified at 30 CFR 948.16(mmmmm). The Federal requirement at 30 CFR 948.16(mmmmm) provides that CSR 38–2–7.5.j.6.A should be amended by deleting the word “excessive.” We find that the proposed amendment satisfies the required program amendment codified at 30 CFR 948.16(mmmmm) and can be approved. In addition, 30 CFR 948.16(mmmmm) can be removed.

19. 38–2–7.5.j.6.B. Rills and Gullies Associated With Homesteads

This provision is being amended by adding the following language to the end of the existing provision:

And/or disrupt the approved postmining land use or the establishment of vegetative cover or cause or contribute to a violation of the water quality standards for the receiving stream.

As amended, this provision provides as follows:

7.5.j.6.B. The permittee may regrade and reseed only those rills and gullies that are unstable and/or disrupt the approved postmining land use or the establishment of vegetative cover or cause or contribute to a violation of the water quality standards for the receiving stream.

The Federal regulations at 30 CFR 816.95(b) require that rills and gullies that either (1) disrupt the postmining

land use or the reestablishment of the vegetative cover or (2) cause or contribute to the violation of water quality standards be filled, regraded, or otherwise stabilized. We understand the amended State provision to mean that a permittee is generally not authorized to repair rills and gullies, except those rills and gullies that are unstable and/ or disrupt the approved postmining land use, the establishment of vegetative cover, or cause or contribute to a violation of water quality standards for the receiving stream.

An area of potential concern with this provision is that it does not explicitly require the repair of rills and gullies that disrupt the approved postmining land use, the establishment of vegetative cover, or cause or contribute to a violation of water quality standards for the receiving stream. On the other hand, the proposed provision in no way prohibits the repair of such rills and gullies. Moreover, the approved State program already requires restoration of the premining land use, or establishment of an approved alternative postmining land use after mining, (CSR 38-2-7.1.a., 7.3., respectively), the establishment of vegetative cover (38-2-7.4.b.1.G), and compliance with applicable water quality standards (CSR 38-2-14.5.b). It necessarily follows from these provisions that rills and gullies that could prevent compliance with the above requirements must be filled, regraded, or otherwise stabilized. For this reason, we find that the proposed amendment at CSR 38-2-7.5.j.6.B, taken in concert with the above-referenced State program requirements, does not render the program less effective than 30 CFR 816.95(b) and can be approved so long as it is implemented in a manner consistent with that Federal provision. If, in future reviews, we should determine that West Virginia is implementing this provision in a manner that is inconsistent with this finding, a further amendment may be required. In addition, we find that this amendment satisfies the required program amendment codified at 30 CFR 948.16(nnnnn), which can, therefore, be removed.

#### 20. 38-2-7.5.o.2. Phase II Bond Release for Homesteads

This provision is amended by deleting the words "rock cover" from the list that defines "ground cover." This amendment is intended to satisfy the required program amendment codified at 30 CFR 948.16(qqqqq), which requires the deletion of the words "rock cover" from CSR 38-2-7.5.o.2. We find that the proposed amendment satisfies the

required program amendment at 30 CFR 948.16(qqqqq) and can be approved. In addition, we find that 30 CFR 948.16(qqqqq) can be removed.

#### 21. 38-2-10.4.a.1.D. Prime Farmland

This is a new provision and provides as follows:

10.4.a.1.D. The aggregate total prime farmland acreage shall not be decreased from that which existed prior to mining. Water bodies, if any, constructed during mining and reclamation must be located within the post reclamation non-prime farmland portions of the permit area. The creation of such water bodies must be approved by the Department of Environmental Protection and have the consent of all affected property owners within the permit area.

We find that this provision, although codified as a performance standard, is substantively identical to the Federal counterpart regulations at 30 CFR 785.17(e)(5) and can be approved because the State's permit findings for prime farmland at subsection 3.20 would require compliance with it.

#### 22. 38-2-11.5. Open Acre Limit Bonding

This subsection concerning open acre limit bonding has been deleted. In its submittal of this amendment, WVDEP stated that CSR 38-2-11.5 was deleted because these bonding provisions were obsolete and no longer utilized in the State. There is no Federal counterpart to this deleted provision. However, we find that its deletion does not render the West Virginia program less effective than the Federal regulations and can be approved.

#### 23. 38-2-11.5 (formerly 11.6) Site Specific Bonding

Subdivision 38-2-11.5.a. was amended by deleting a requirement in the fifth paragraph that existing permits be reviewed at mid-term to determine adequacy of existing bond. As amended, bond adequacy would be evaluated only at the time of permit renewal. In addition, the bond adequacy determination criteria at CSR 38-2-11.5.a.1 through a.5 are deleted. Finally, the paragraph following 38-2-11.5.a.5., concerning operations with inactive status, was deleted.

In its submittal of these revisions, WVDEP stated that the purpose of these amendments was to update this section. The Federal regulations at 30 CFR 800.15(a), concerning adjustment of bond amount, provide that the amount of the permittee's bond or deposit shall be adjusted from time to time as the area requiring bond coverage is increased or decreased or where the cost of future reclamation changes. In addition, 30

CFR 774.10 requires regulatory authorities to review outstanding permits during the term of the permit. The deletion of the requirement for mid-term review at CSR 38-2-11.5.a appears to render the West Virginia program less effective than the Federal requirements at 30 CFR 774.10 and 800.15(a). However, W. Va. Code 22-3-19(c) continues to require the mid-term review, wherein the WVDEP may require reasonable revisions or modifications of a permit, based on written findings.

The deletion of the bond adequacy determination criteria at 38-2-11.5.a.1 through 11.5.a.5. does not render the State rules less effective than the Federal regulations. Despite the deletion of the criteria at 11.5.a.1 through 5., the State rules at 38-2-11.5.b. through 11.5.f. provide the criteria to determine the site-specific bond amount. Therefore, the deletion of CSR 38-2-11.5.a.1 through 11.5.a.5 can be approved.

The deletion of the paragraph following CSR 38-2-11.5.a.5, concerning operations with inactive status, does not render the West Virginia program less effective, because the site-specific criteria for determining the appropriate bond at CSR 38-2-11.5.b through 11.5.f apply to all operations, including those on inactive status. All existing permits with inactive status have been reviewed by the State since these requirements took effect and their bonds have been adjusted to comply with the site-specific bonding requirements. Therefore, the deleted paragraph concerning inactive status that appeared immediately following CSR 38-2-11.5.a.5 is no longer necessary and the deletion can be approved.

#### 24. 38-2-12.5.e. Acid Mine Drainage (AMD) Bond Forfeiture Inventory

This provision is amended by updating, from 1993 to 2002, the date that the AMD bond forfeiture inventory must be submitted to the West Virginia Legislature. In addition, the submittal of the inventory will be required annually. In its submittal of this amendment, WVDEP stated that the change will make its rules consistent with the W.Va. Code. We find that these amendments do not render the West Virginia program less effective than the Federal regulations and can be approved.

#### 25. 38-2-14.12.a.1. Variance from Approximate Original Contour (AOC) Requirements

This provision concerns the procedures for obtaining an AOC variance for steep slope mining

operations, and is amended by deleting the words "commercial forestry." This amendment is intended to satisfy the required program amendment codified at 30 CFR 948.16(eeeee). The Federal requirement at 30 CFR 948.16(eeeee) provides that the State must delete the words "commercial forestry" at CSR 38-2-14.12.a.1. This revision was necessary because agricultural uses, which may include commercial forestry, are not authorized postmining land uses for steep slope mining operations seeking a variance from the AOC restoration requirements at section 515(e)(2) of SMCRA. The deletion of the words "commercial forestry" at subsection 14.12.a.1 is no less effective than the Federal requirements at 30 CFR 785.16(a)(1). Therefore, we find that this amendment satisfies the required program amendment codified at 30 CFR 948.16(eeeee) and can be approved. In addition, the required program amendment at 30 CFR 948.16(eeeee) can be removed.

#### 26. 38-2-17.3.b.2. Eligibility for Small Operator Assistance Program (SOAP)

This provision is amended by deleting the term 5 percent, and adding in its place the term 10 percent. As amended, this provision provides that production from the following operations shall be attributed to the applicant:

17.3.b.2. The pro rata share, based upon percentage of ownership of applicant, of coal produced in other operations by persons who own more than ten percent (10%) of the applicant's operation;

We find that this revision renders the provision substantively identical to and no less effective than the counterpart Federal SOAP eligibility provision at 30 CFR 795.6(a)(2)(ii), and can be approved. In addition, we find that the proposed State revision satisfies that portion of our 732 letter dated July 22, 1997, regarding SOAP eligibility requirements.

#### 27. 38-2-17.4. Request for SOAP Assistance

This provision is amended by adding new subdivisions 17.4.a through 17.4.f.2 to provide as follows:

17.4. Request for Assistance. Each applicant requesting assistance shall provide information on forms provided by the Secretary in an application that shall be clear and concise and shall be provided in a format prescribed by the Secretary and/or a format required by the Federal Office of Surface Mining Reclamation and Enforcement. Each application for assistance shall include the following information:

17.4.a. A statement of the operator's intent to file a permit application;

17.4.b. The names and addresses of:  
17.4.b.1. The permit applicant; and  
17.4.b.2. The operator, if different from the applicant.

17.4.c. A schedule of the estimated total production of coal from the proposed permit area and all other locations from which production is attributed to the applicant. The schedule shall include for each location:

17.4.c.1. The operator or company name under which coal is or will be mined;

17.4.c.2. The permit number and Mine Safety and Health Administration (MSHA) number;

17.4.c.3. The actual coal production during the year preceding the year for which the applicant applies for assistance and production that may be attributed to the applicant; and

17.4.c.4. The estimated coal production and any production which may be attributed to the applicant for each year of the proposed permit.

17.4.d. A description of:

17.4.d.1. The proposed method of coal mining;

17.4.d.2. The anticipated starting and termination dates of mining operations;

17.3.d.3. The number of acres of land to be affected by the proposed mining operation; and

17.4.d.4. A general statement on the probable depth and thickness of the coal resource including a statement of reserves in the permit area and the method by which they were calculated.

17.4.e. A U.S. Geological Survey topographic map at a scale of 1:24,000 or larger or other topographic map of equivalent detail which clearly shows:

17.4.e.1. The area of land to be affected;

17.4.e.2. The location of any existing or proposed test borings; and

17.4.e.3. The location and extent of known workings of any underground mines.

17.4.f. Copies of documents which show that:

17.4.f.1. The applicant has a legal right to enter and commence mining within the permit area; and

17.4.f.2. A legal right of entry has been obtained for the program administrator and laboratory personnel to inspect the lands to be mined and adjacent areas to collect environmental data or to install necessary instruments.

We find these new provisions, which list information required to be submitted by applicants filing for SOAP assistance, are substantively identical to and no less effective than the counterpart Federal regulations at 30 CFR 795.7 and can be approved. In addition, we find that the proposed State revision satisfies that portion of

our 732 letter dated July 22, 1997, regarding inadequate SOAP application requirements.

17.6.a. Qualified Laboratories.

The State proposes to amend its definition of qualified laboratory. These laboratories provide services under SOAP. This provision is amended by adding the word "institution" between the words "private consulting firm" and "or analytical laboratory." In addition, the following words are being added immediately following the words "or analytical laboratory:"

That can provide the required determination of a probable hydrologic consequences or statement of results of test borings or core samplings or other services as specified under the Small Operator Assistance Program and that is \* \* \*

As amended, subdivision 17.6.a. provides as follows:

17.6.a. General. A qualified laboratory means a designated public agency, private consulting firm, institution, or analytical laboratory that can provide the required determination of a probable hydrologic consequences or statement of results of test borings or core samplings or other services as specified under the Small Operator Assistance Program and that is approved by the Department of Environmental Protection as a SOAP contractor.

The Federal requirements at 30 CFR 795.9 provide the requirements concerning SOAP program services and data requirements. We find that as amended, the definition of qualified laboratory at subdivision 17.6.a. is substantively identical to and no less effective than the counterpart Federal definition of "qualified laboratory" at 30 CFR 795.3.

The Federal definition of qualified laboratory at 30 CFR 795.3 provides that a qualified laboratory must be capable of providing the services identified at 30 CFR 795.3, "or other services as specified at 30 CFR 795.9 under the Small Operator Assistance Program and that meets the standards of section 795.10." The amended definition of qualified laboratory at subdivision 17.6.a does not contain the specific citation as to the location in the West Virginia program of the "other services" that a qualified laboratory must be capable of providing. However, some of the other services offered under SOAP are specified in the West Virginia program at W. Va. Code 22-3-9(b). Therefore, we find that the lack of a specific citation at subdivision 17.6.a as to the location of the "other services as specified under the Small Operator Assistance Program," does not render the definition of "qualified laboratory" less effective than the counterpart Federal definition. However, not all

services offered under SOAP at 30 CFR 795.9 are yet identified at W.Va. Code 22-3-9(b). As requested through our 732 letter dated July 22, 1997, the State still needs to amend its SOAP rules at section 17 to include all services provided under 30 CFR 795.9.

In addition, the State definition of "qualified laboratory" lacks a counterpart to the Federal requirement that a "qualified laboratory" must meet the standards of 30 CFR 795.10 concerning qualified laboratories. However, subdivision 17.6.b, concerning basic qualifications for laboratories or contractors, provides that to qualify for designation as a qualified laboratory, the laboratory or contractor must demonstrate compliance with the requirements specified at CSR 38-2-17.6.b and 17.6.c. These provisions are the State counterparts to the Federal requirements at 30 CFR 795.10. Therefore, we find that the lack of a specific counterpart at subdivision 17.6.a to the Federal requirement that a "qualified laboratory" meet the standards of 30 CFR 795.10 does not render the State definition of "qualified laboratory" less effective than the counterpart Federal definition.

For all the reasons stated above, we find that the State's definition of qualified laboratory at subsection 17.6.a is no less effective than the Federal definition at 30 CFR 795.3 and can be approved. In addition, we find that the proposed State revision satisfies that portion of our 732 letter dated July 22, 1997, regarding qualified laboratory. As West Virginia complies with the requirement to amend section 17 to identify all the program services as provided under 30 CFR 795.9, those additional services will automatically fall within the requirement that they be performed by a qualified laboratory since the definition approved here includes all services provided under SOAP.

#### IV. Summary and Disposition of Comments

##### Public Comments

No public comments were received in response to our request for comments from the public on the proposed amendment.

##### Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, on June 14, 2002, and August 7, 2002, we requested comments on these amendments from various Federal agencies with an actual or potential interest in the West Virginia program (Administrative Record Numbers WV-1314 and WV-1321,

respectively). By letters dated July 11, 2002, and September 20, 2002, the U.S. Department of Labor's Mine Safety and Health Administration (MSHA) responded (Administrative Record Numbers WV-1320 and WV-1331). MSHA stated that it finds no changes or issues that impact upon coal miners' health and safety and that there is no conflict with MSHA regulations.

In addition, the U.S. Department of the Interior's Fish and Wildlife Service (USFWS) responded to our request for comments on September 10, 2002 (Administrative Record Number WV-1329). USFWS provided comments pursuant to the Fish and Wildlife Coordination Act and the Endangered Species Act. These comments, however, are targeted at sections of the amendment that are not being considered for approval in this rulemaking, but that have been addressed in our decision on WV-096 or will be considered at a later date for WV-089. State program amendment WV-096 and the discussion of any comments received on it were the subject of a notice published in the **Federal Register** on December 3, 2002 (67 FR 71832-71840). We have not rendered a final decision on State program amendment WV-089, which was submitted in response to several outstanding 732 letters. Any comments pertaining to those outstanding requirements will be addressed when the final rule is published in the **Federal Register** at a later date.

USFWS also identified typographical errors in two subsections that are not being revised in this amendment. At CSR 38-2-7.4.b.1.C.6, the citation "7.4.d.1.C.4" should be "7.4.b.1.C.4." At CSR 38-2-7.4.b.1.D.12, the citation "7.4.d.1.D" should be "7.4.b.1.D." We will inform WVDEP about these typographical errors.

##### Environmental Protection Agency (EPA) Concurrence/Comments

Under 30 CFR 732.17(h)(11)(ii), we are required to obtain written concurrence from 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 June 14, 2002, we requested concurrence and comments from EPA on House Bill 4163 (Administrative Record Numbers WV-1313). On August 7, 2002, we requested comments from EPA on Senate Bill 2002 (Administrative Record Number WV-1321).

EPA responded to both requests by letter dated October 28, 2002

(Administrative Record Number WV-1340). EPA concurred on the proposed amendments and provided comments on sections of the amendment that are not being considered for approval in this rulemaking. As discussed above, their comments have been addressed in our decision on WV-096 or will be considered at a later date in our decision on WV-089.

#### V. OSM's Decision

Based on the above findings, we are approving the amendments to the West Virginia program as submitted to us on April 9, 2002, and June 19, 2002. In addition, the following required program amendments are satisfied and can be removed: 30 CFR 948.16 (rrrr), (ssss), (tttt), (uuuu), (vvvv), (xxxx), (yyyy), (zzzz), (bbbb), (ccccc), (dddd), (eeee), (gggg), (hhhh), (mmmm), (nnnn), and (qqqq).

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 regulation.

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

This rule is exempt from review by the Office of Management and Budget 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 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 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, and section 503(a)(7) requires that State programs contain rules and regulations “consistent with” regulations issued by the Secretary pursuant to SMCRA.

*Executive Order 13175—Consultation and Coordination With Indian Tribal Governments*

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. This final rule applies only to the West Virginia program and therefore does not affect tribal programs.

*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 effect 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*

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

*Paperwork Reduction Act*

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

*Regulatory Flexibility Act*

The Department of the Interior certifies 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. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

*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, Federal, State, or local government agencies, or geographic regions; 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 analysis performed under various laws and executive orders for the counterpart Federal regulations.

*Unfunded Mandates*

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the analysis performed under various laws and executive orders for the counterpart Federal regulations.

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

Intergovernmental relations, Surface mining, Underground mining.

Dated: April 18, 2003.

**Brent Wahlquist,**  
*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 date	Date of publication of final rule	Citation/description of approved provisions
April 9, 2002	June 27, 2003	CSR 38-2: 2.31.b.1; 2.43; 2.108; 3.1.i.2; 3.25.a.4; 3.30.d.8; 3.32.e; 5.4.e.2; 7.4.a.1; 7.4.b.1.C.5; 7.4.b.1.D.1; 7.4.b.1.G.1; 7.4.b.1.G.3; 7.4.b.1.H.2; 7.4.b.1.I.2; 7.4.b.1.I.3; 7.5.i.1.B; 7.5.i.3.Q; 7.5.i.10; 7.5.j.3.A; 7.5.j.6.A; 7.5.j.6.B; 7.5.o.2; 8.2.b.3; 10.4.a.1.D; 10.6.b.3; 11.2.b; 11.4.a.1; 11.4.a.4; 11.5. (deletion of former); 11.5.a; 12.5.e; 14.12.a.1; 17.3.b.2; 17.4; 17.6; and 22.7.a.

■ 3. Section 948.16 is amended by removing and reserving paragraphs (rrrr), (ssss), (tttt), (uuuu), (vvvv), (xxxx), (yyyy), (zzzz), (bbbb), (ccccc), (ddddd), (eeee), (ggggg), (hhhhh), (mmmmm), (nnnnn), and (qqqqq).

[FR Doc. 03-16353 Filed 6-26-03; 8:45 am]

BILLING CODE 4310-05-P

## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

#### 31 CFR Part 575

#### Iraqi Sanctions Regulations; Authorization of Certain New Transactions

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Interim final rule.

**SUMMARY:** The Office of Foreign Assets Control (“OFAC”) of the U.S. Department of the Treasury is amending the Iraqi Sanctions Regulations, 31 CFR part 575, to include a general license authorizing certain new transactions. The general license reflects United Nations Security Council Resolution 1483 and authorizes all transactions otherwise prohibited by subpart B of the Iraqi Sanctions Regulations, with four exceptions: Accounts and other property that were blocked as of May 23, 2003, remain blocked, certain exports and reexports to Iraq will continue to require an OFAC license, transactions with certain persons are not authorized, and transactions in certain Iraqi cultural property are not authorized. With those four exceptions, this general license effectively lifts the economic sanctions administered by OFAC with respect to Iraq.

**DATES:** Effective May 23, 2003. Written comments must be received no later than August 26, 2003.

**ADDRESSES:** Comments may be submitted to the Chief of Records, ATTN: Request for Comments, Office of Foreign Assets Control, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220. Alternatively, comments may be submitted via facsimile to the Chief of Records at 202/622-1657 or via OFAC’s Web site <http://www.treas.gov/offices/enforcement/ofac/comment.html>.

**FOR FURTHER INFORMATION CONTACT:** OFAC’s Chief of Licensing, tel. 202/622-2480, Chief of Policy Planning and Program Management, tel. 202/622-2500, or Chief Counsel, tel. 202/622-2410.

**SUPPLEMENTARY INFORMATION:**

#### Background

On August 2, 1990, upon Iraq’s invasion of Kuwait, the President issued Executive Order 12722, declaring a national emergency with respect to Iraq. This order, issued under the authority of, *inter alia*, the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), and section 301 of title 3 of the U.S. Code, imposed economic sanctions, including a complete trade embargo, with respect to Iraq. In keeping with United Nations Security Council Resolution 661 of August 6, 1990, and under the United Nations Participation Act (22 U.S.C. 287c), the President also issued Executive Order 12724 of August 9, 1990, which imposed additional restrictions. The Iraqi Sanctions Regulations, 31 CFR part 575 (the “Regulations”), implement Executive Orders 12722 and 12724 and are administered by the Treasury Department’s Office of Foreign Assets Control (“OFAC”).

On May 22, 2003, the United Nations Security Council adopted Resolution 1483, which substantially lifted the multilateral economic sanctions with respect to Iraq. On May 23, 2003, OFAC issued a general license that reflected Resolution 1483. This general license is published today as new section 575.533 of the Regulations.

Paragraph (a) of section 575.533 authorizes all transactions that are otherwise prohibited by subpart B of the Regulations, with four exceptions addressed in paragraph (b). Paragraph (b)(1) provides that all property and interests in property, including accounts, that were blocked pursuant to subpart B of the Regulations as of the effective date of this section remain blocked and subject to the prohibitions and requirements of the Regulations.

Paragraph (b)(2) provides that the exportation from the United States or, if subject to U.S. jurisdiction, the exportation or reexportation from a third country to Iraq of any goods or technology (including technical data or other information) controlled by the Department of Commerce under the Export Administration Regulations (15 CFR chapter VII, subchapter C) for exportation to Iraq must be separately authorized by OFAC. The note to paragraph (b)(2) explains the scope of the term “controlled by the Department of Commerce” and requests that exporters and reexporters contact the Department of Commerce, Bureau of Industry and Security, to inquire whether particular goods or technology are so controlled.

Paragraph (b)(3) provides that the general license does not authorize transactions with three classes of persons: (i) Specially-designated nationals or “SDNs” of the Government of Iraq, (ii) persons on the Defense Department’s 55-person Watch List, or (iii) persons identified by the 661 Committee pursuant to paragraphs 19 and 23 of United Nations Security Council Resolution 1483, adopted May 22, 2003. To the extent that such transactions would otherwise be prohibited by the Regulations, they remain prohibited.

Paragraph (b)(4) provides that the general license does not authorize transactions with respect to Iraqi cultural property or other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since August 6, 1990. Any trade in or transfer of such items, including items with respect to which reasonable suspicion exists that they have been illegally removed, remains prohibited by subpart B of the Regulations. The note to paragraph (b)(4) refers inquiries concerning particular Iraqi cultural property to the Cultural Property Office at the Department of State.

Paragraph (c) provides that the effective date of the section is May 23, 2003.

Examples of newly-authorized transactions include investment by U.S. persons in Iraq, the importation of goods or services of Iraqi origin (with the exception of the cultural properties described in paragraph (b)(4)), travel-related transactions involving Iraq, the transfer of funds to or from Iraq, and transactions related to transportation to or from Iraq. This authorization, however, does not eliminate the need to comply with other provisions of 31 CFR chapter V or with other applicable provisions of law, including any aviation, financial, or trade requirements of agencies other than OFAC. Such requirements include the International Traffic in Arms Regulations (22 CFR chapters 120–130) administered by the Department of State.

#### Request for Comments

Because amendment of these regulations involves a foreign affairs function, the provisions of Executive Order 12866 and the Administrative Procedure Act (5 U.S.C. 553) (the “APA”) requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date, are inapplicable. However,