

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.*). This determination is based upon the fact that the telephonic hearing provisions proposed by Texas are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

**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 governmental 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 fact that the telephonic hearing provisions proposed by Texas are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

**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 fact that the telephonic hearing provisions proposed by Texas are administrative and procedural in nature

and are not expected to have a substantive effect on the regulated industry.

**List of Subjects in 30 CFR Part 943**

Intergovernmental relations, Surface mining, Underground mining.

Dated: June 5, 2003.

**Charles E. Sandberg,**

*Acting Regional Director, Mid-Continent Regional Coordinating Center.*

■ For the reasons set out in the preamble, 30 CFR part 943 is amended as set forth below:

**PART 943—TEXAS**

■ 1. The authority citation for part 943 continues to read as follows:

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

■ 2. Section 943.15 is amended in the table by adding a new entry in chronological order by “Date of final publication” to read as follows:

**§ 943.15 Approval of Texas regulatory program amendments.**

\* \* \* \* \*

Original amendment submission date	Date of final publication	Citation/description
* * * * *	* * * * *	* * * * *
February 12, 2003	July 7, 2003	16 TAC § 1.130

[FR Doc. 03-17082 Filed 7-3-03; 8:45 am]  
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**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 948**

[WV-098-FOR]

**West Virginia Regulatory Program**

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

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

**SUMMARY:** We are approving, with one exception, a proposed amendment 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 program amendment consists of changes to the Code of West Virginia (W. Va. Code) as contained in House Bills 2881 and 2882, and changes to the State’s Coal Related Dam Safety Rules at Code of State Regulations (CSR) 38-4, and West

Virginia’s Surface Mining Reclamation Regulations at CSR 38-2 as contained in House Bill 2603. The amendment concerns a variety of topics including bond release, dam safety, permit application requirements, drainage and sediment control systems, fish and wildlife considerations, revegetation, performance standards, inspection and enforcement, coal refuse, and performance standards applicable to reining operations. The amendment is intended to improve the effectiveness of the West Virginia program and to render the West Virginia program no less effective than the Federal regulations.

**EFFECTIVE DATE:** July 7, 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*.

**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 March 18, 2003, the West Virginia Department of Environmental Protection (WVDEP) sent us a proposed amendment to its program (Administrative Record Number WV-1352) under SMCRA (30 U.S.C. 1201 *et seq.*). West Virginia submitted the amendment in response to the required program amendments at 30 CFR 948.16(nnn), (ooo), and (qqqq) and made other changes at its own initiative.

We announced receipt of the proposed amendment in the April 14, 2003, **Federal Register** (68 FR 17896). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the amendment (Administrative Record Number WV-1358). We did not hold a public hearing or meeting because no one requested one. The public comment period ended on May 14, 2003. We received comments from 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 amendment to the West Virginia program. Any revisions that we do not specifically discuss below concern nonsubstantive wording or editorial changes and are approved here without discussion.

The program amendment consists of changes to the W. Va. Code as contained in House Bills 2881 and 2882, and changes to the State's Coal Related Dam Safety Rule at CSR 38-4 and to the Surface Mining Reclamation Regulations at CSR 38-2 as contained in House Bill 2603. The amendment concerns a variety of topics including bond release, dam safety, permit application requirements, drainage and sediment control systems, fish and wildlife considerations, revegetation, performance standards, inspection and enforcement, coal refuse, and remining operations. The amendment is intended to improve the effectiveness of the West Virginia program and to render the West Virginia program no less effective than the Federal regulations.

In order to expedite our review of the provisions that concern the recommendations of West Virginia's 2002 Flood Study (Governor's Executive Order No. 16-01), we have separated the amendment relating to CSR 38-4 Coal Related Dam Safety Rule and will address those proposed amendments in a separate **Federal Register** notice at a later date, except for CSR 38-4-25.14

which is addressed below at Finding 31. In addition, the proposed amendment to CSR 38-2-3.31.a is similar to language that we are currently considering under a separate program amendment. Therefore, we are removing the proposed amendment to CSR 38-2-3.31.a from the current amendment, and we will address the proposed amendment to CSR 38-2-3.31.a in a separate **Federal Register** notice at a later date. Our findings relating to the W. Va. Code and the remainder of the amendments to West Virginia's Surface Mining Reclamation Regulations are detailed below.

1. As described in Committee Substitute for House Bill 2881, W. Va. Code 22-3-23(a)-(h), concerning release of bond or deposits, are amended by changing the term "director" to "secretary" in numerous locations, and by changing the term "division" to "department" in one location. We find that these amendments accurately reflect the current organization of the WVDEP and do not render the West Virginia program less stringent than SMCRA nor less effective than the Federal regulations and can be approved.

2. As described in Committee Substitute for House Bill 2881, W. Va. Code 22-3-23(c)(1)(C), concerning bond release for all operations that are being returned to approximate original contour (AOC), is amended by adding the following language to the end of the last sentence: "where expressly authorized by legislative rule promulgated pursuant to section three, article one of this chapter." As amended, the sentence reads as follows:

"Provided, however, that the release may be made where the quality of the untreated post-mining water discharged is better than or equal to the premining water quality discharged from the mining site where expressly authorized by legislative rule promulgated pursuant to section three, article one of this chapter."

On July 11, 1985, OSM disapproved and on August 29, 1985, OSM preempted and superseded the language of the proviso that is being amended here (50 FR 28316, 28319 and 50 FR 35082, 35083, respectively). At that time, the proviso was located at W. Va. Code 22A-3-23(c)(3). OSM took that action because under certain circumstances, the proviso would permit final bond release prior to attainment of revegetation standards in accordance with the approved reclamation plan. OSM took that action after determining that the provision was inconsistent with section 519(c)(3) of SMCRA, based on the reasons cited in

Finding 6 of the July 11, 1985, **Federal Register** notice.

The language that is being added to the proviso has the effect of limiting the application of the proviso to only those regulations where such alternative water quality standards are specifically authorized. This amendment renders the language of this proviso inoffensive to section 519(c)(3) of SMCRA, because the circumstances of its applicability will be dictated by specific regulations that were promulgated in accordance with the Clean Water Act. Therefore, the specific implementing regulations authorized by this proviso must be evaluated relative to the requirements of section 519(c)(3) of SMCRA. Indeed, the State has amended its bond release requirements that apply only to remining operations at CSR 38-2-24.4, and that amendment directly relates to this proviso. See Finding 35, below for our finding on the amendment to CSR 38-2-24.4. We find that, as amended, and for the reasons further explained in Finding 35, below, the proviso at W. Va. Code 22-3-23(c)(1)(C) as quoted above is not inconsistent with SMCRA section 519(c)(3) and can be approved.

3. As described in Committee Substitute for House Bill 2881, W. Va. Code 22-3-23(c)(2)(C), concerning bond release for operations with an approved variance from AOC, is amended by adding the following language to the end of the last sentence: "where expressly authorized by legislative rule promulgated pursuant to section three, article one of this chapter." This amendment is intended to satisfy the required program amendment codified at 30 CFR 948.16(qqqq). As amended, the sentence reads as follows:

Provided, however, that the release may be made where the quality of the untreated post mining water discharged is better than or equal to the premining water quality discharged from the mining site where expressly authorized by legislative rule promulgated pursuant to section three, article one of this chapter.

For the same reasons discussed directly above at Finding 2, we find that the amended proviso at W. Va. Code 22-3-23(c)(2)(C) is not inconsistent with SMCRA section 519(c)(3) and can be approved. Furthermore, we also find that this amendment satisfies the required program amendment codified at 30 CFR 948.16(qqqq), which can be removed.

W. Va. Code 22-3-23(c)(2)(C) is also amended by deleting the reference to subdivision 3 and continuing to require compliance with the bond release scheduling requirements of subdivisions 1 and 2 of this subsection. This change corrects a typographical error, in that

there is no subdivision 3 at subsection 22-3-23(c). We find, therefore, that this amendment does not render the provision less stringent than SMCRA nor less effective than the Federal regulations and can be approved.

4. As described in Committee Substitute for House Bill 2881, W. Va. Code 22B-1-7, concerning appeals to boards, is amended by changing the term "director" to "secretary" in several locations. We find that these amendments accurately reflect the current organization of the WVDEP and do not render the West Virginia program less stringent than SMCRA nor less effective than the Federal regulations and can be approved.

5. As described in House Bill 2882, W. Va. Code 22B-1-7(d), concerning appeals to boards, is amended by adding a proviso that unjust hardship shall not be grounds for granting a stay or suspension of an order, permit or official action for an order issued pursuant to W. Va. Code 22-3. This amendment is intended to satisfy the required program amendment codified at 30 CFR 948.16(nnn), which provides that West Virginia must revise Section 22B-1-7(d) to remove unjust hardship as a criterion to support the granting of temporary relief from an order or other decision issued under Chapter 22, Article 3 of the West Virginia Code. As discussed in the **Federal Register** on March 4, 2003, we reinstated this required amendment in order to comply with U.S. District Court Judge Haden's ruling of January 9, 2003 (68 FR 10178).

We find that as amended, section 22B-1-7(d) satisfies the required program amendment codified at 30 CFR 948.16(nnn) that unjust hardship shall not be grounds for granting a stay or suspension of an order, permit or official action for an order issued pursuant to W. Va. Code 22-3 and can be approved. Therefore, the required amendment at 30 CFR 948.16(nnn) can be removed.

6. As described in House Bill 2882, W. Va. Code 22B-1-7(h), concerning appeals to boards, is amended by deleting the reference to article "three" in regard to appeals to the environmental quality board. This amendment is intended to satisfy the required program amendment codified at 30 CFR 948.16(ooo), which provides that West Virginia must revise Section 22B-1-7(h) by removing reference to Article 3, Chapter 22, of the West Virginia Code. As discussed in the **Federal Register** on March 4, 2003, we reinstated this required amendment in order to comply with U.S. District Court Judge Haden's ruling of January 9, 2003 (68 FR 10178).

We find that the deletion of the word "three" satisfies the required program amendment codified at 30 CFR

948.16(ooo) and can be approved. Therefore, the required amendment at 30 CFR 948.16(ooo) can be removed.

The following regulatory revisions are described in Committee Substitute for House Bill 2603.

7. CSR 38-2 is amended by updating the name of the U.S. Department of Agriculture, Natural Resources Conservation Service (NRCS) (formerly Soil Conservation Service) in several locations, *i.e.*, subsections 3.2.c, 3.20, 10.2.a.4, 10.3.a.1, 10.4.c.1, 10.6.b.2, 10.6.b.7.A, 10.6.b.7.B, and 10.6.b.8. We find that these changes accurately reflect the current name of the NRCS and can be approved.

8. CSR 38-2-3.7.d, concerning disposal of excess spoil, is new and adds a requirement for a survey of the watershed identifying all man made structures and residents in proximity to the disposal area to determine potential storm runoff impacts. At least 30 days prior to any beginning of placement of material, the accuracy of the survey shall be field verified. Any changes shall be documented and brought to the attention of the Secretary to determine if there is a need to revise the permit. There is no direct Federal counterpart to this provision. We find, however, that this new provision is consistent with the Federal permit application requirement at 30 CFR 780.35 concerning the disposal of excess spoil and can be approved.

9. CSR 38-2-3.22.f.5.A, A.1 and A.2, concerning hydrologic information required in a permit application, is amended. This language is new and requires that the hydrologic reclamation plan contain a description of the measures that will be taken to replace water supplies that are contaminated, diminished, or interrupted. The plan shall include an identification of the water replacement, which includes quantity and quality descriptions including discharge rates, or usage and depth to water; and documentation that the development of identified water replacement is feasible and that the financial resources necessary to replace the affected water supply are available. We find that this new language is consistent with the Federal permitting requirements at 30 CFR 780.21(h), 784.14(g) concerning the hydrologic reclamation plan, and 30 CFR 784.20(b)(8), pertaining to subsidence control plans, and can be approved.

10. CSR 38-2-5.4.b.4, concerning sediment control, is amended by adding language to provide that all sediment control systems for valley fills,

including durable rock fills, shall be designed for the entire disturbed acreage of the fill and shall include a schedule indicating timing and sequence of construction over the life of the fill.

There is no direct Federal counterpart to the proposed language. We find that the proposed language is not inconsistent with the Federal design provisions concerning sediment control structures at 30 CFR 780.25(b) and 784.16(b), and can be approved.

11. CSR 38-2-5.4.b.11, concerning the control of water discharge, is amended by adding language to provide that the location of discharge points and the volume to be released shall not cause a net increase in peak runoff from the proposed permit area when compared to premining conditions and shall be compatible with the post-mining configuration and adequately address watershed transfer. There is no direct Federal counterpart to this proposed language. We find, however, that the proposed language is not inconsistent with the Federal requirements at 30 CFR 816/817.47 concerning discharge structures and can be approved.

12. CSR 38-2-5.6, storm water runoff, is a new provision and requires each permit application to contain a storm water runoff analysis consistent with subsections 5.6.a through 5.6.d.1.e. The new language provides as follows:

5.6.a. Each application for a permit shall contain a storm water runoff analysis which includes the following:

5.6.a.1. An analysis showing the changes in storm runoff caused by the proposed operations(s) using standard engineering and hydrologic practices and assumptions.

5.6.a.2. The analysis will evaluate pre-mining, worst case during mining, and post-mining (Phase III standards) conditions. The storm used for the analysis will be the largest required design storm for any sediment control or other water retention structure proposed in the application. The analysis must take into account all allowable operational clearing and grubbing activities. The applicant will establish evaluation points on a case-by-case basis depending on site specific conditions including, but not limited to, type of operation and proximity of man-made structures.

5.6.a.3. The worst case during mining and post-mining evaluations must show no net increase in peak runoff compared to the pre-mining evaluation.

5.6.b. Each application for a permit shall contain a runoff-monitoring plan which shall include, but is not limited to, the installation and maintenance of rain gauges. The plan shall be specific to local conditions. All operations must

record daily precipitation and report monitoring results on a monthly basis and any one (1) year, twenty-four (24) [hour] storm event or greater must be reported to the Secretary within twenty-four (24) hours and shall include the results of a permit wide drainage system inspection.

5.6.c. Each application for a permit shall contain a sediment retention plan to minimize downstream sediment deposition within the watershed resulting from precipitation events. Sediment retention plans may include, but are not limited to decant ponds, secondary control structures, increased frequency for cleaning out sediment control structures, or other methods approved by the Secretary.

5.6.d. After the first day of January two thousand four, all active mining operations must be consistent with the requirements of this subdivision. The permittee must demonstrate in writing that the operation is in compliance or a revision shall be prepared and submitted to the Secretary for approval within the schedule described in 5.6.d.1. Full compliance [compliance] with the permit revision shall be accomplished within 180 days from the date of Secretary approval. Active mining operations for the purpose of this subsection exclude permits that have obtained at least a Phase I release and are vegetated. Provided, however, permits or portions of permits that meet at least Phase I standards and are vegetated will be considered on a case by case basis.

5.6.d.1. Schedule of Submittal

5.6.d.1.a. Within 180 days from the first day of January two thousand four all active mining operations with permitted acreage greater than 400 acres must demonstrate in writing that the operation is in compliance or a revision shall be prepared and submitted to the Secretary for approval.

5.6.d.1.b. Within 360 days from the first day of January two thousand four all active mining operations with permitted acreage between 200 and 400 acres must demonstrate in writing that the operation is in compliance or a revision shall be prepared and submitted to the Secretary for approval.

5.6.d.1.c. Within 540 days from the first day of January two thousand four all active mining operations with permitted acreage between 100 and less than 200 acres must demonstrate in writing that the operation is in compliance or a revision shall be prepared and submitted to the Secretary for approval.

5.6.d.1.d. Within 720 days from the first day of January two thousand four all active mining operations with

permitted acreage between 50 and less than 100 acres must demonstrate in writing that the operation is in compliance or a revision shall be prepared and submitted to the Secretary for approval.

5.6.d.1.e. Within 900 days from the first day of January two thousand four all active mining operations with permitted acreage less than 50 acres must demonstrate in writing that the operation is in compliance or a revision shall be prepared and submitted to the Secretary for approval. Provided, however, an exemption may be considered on a case by case basis. Furthermore [Furthermore], haulroads, loadouts, and ventilation facilities are excluded from this requirement.

There is no direct Federal counterpart to these provisions concerning storm water runoff. However, we find that these provisions are not inconsistent with the Federal requirements at 30 CFR 816/817.41 through 816/817.47, which require that all surface mining and reclamation activities be conducted to prevent material damage to the hydrologic balance outside the permit area, and can be approved. We note that at subsection CSR 38-2-5.6.b, the word "hour" is missing in the phrase "one (1) year, twenty-four (24) storm event." The phrase should read, "one (1) year, twenty-four (24) hour storm event." We understand this to be an inadvertent omission that will be corrected at a future date.

13. CSR 38-2-8.2.e, concerning fish and wildlife considerations, is amended by adding language to provide that in planning and constructing a windrow, the windrow shall not be placed in such manner or location to block natural drainways. We approved CSR 38-2-8.2.e on February 9, 1999 (64 FR 6201, 6209-6210). The proposed amendment to this provision is intended to make it clear that, so as not to impound water, timber used to create a windrow must not be placed in a manner or location that would block natural drainways. There is no direct Federal counterpart to this proposed language. However, we find that the proposed language does not render this provision inconsistent with SMCRA at section 515(d)(1) or less effective than the Federal regulations at 30 CFR 816/817.107(b) and can be approved. We note that this amended provision contains an inadvertent grammatical error. The amended sentence provides as follows: "In planning and constructing the windrow, care shall be taken not to impound water or and shall not be placed in such manner or location to block natural drainways." We understand the amended sentence to mean that in

planning and constructing a windrow, care shall be taken so that the windrow not impound water or be placed in such manner or location to block natural drainways. Our approval of this provision is based upon our understanding that the inadvertent grammatical error will be corrected at a future date.

14. CSR 38-2-9.1.a, concerning revegetation, is amended by adding language to provide that reforestation opportunities must be maximized for all areas not directly associated with the primary approved postmining land use; and revegetation plans for those areas to be reforested must include a map, a planting schedule and stocking rates. The intent of this provision is to encourage tree planting and reforestation where traditionally grasslands might be the revegetation of choice. There is no direct Federal counterpart to this proposed language. However, we find that the proposed language is not inconsistent with the Federal requirements concerning revegetation at 30 CFR 816/817.111(a) and can be approved.

15. CSR 38-2-9.3.d, concerning standards for evaluating vegetative cover, is amended by deleting the words "from the Handbook," so that sampling techniques will no longer be taken from the State's technical handbook. This deletion does not render the provision less effective than the Federal revegetation requirements at 30 CFR 816/817.116(a), because the State's statistically valid sampling techniques for measuring ground cover and productivity are no longer contained in the Handbook. The WVDEP submitted a policy entitled "Productivity and Ground Cover Success Standards" that we approved in the **Federal Register** on May 1, 2002 (67 FR 21904, 21906-21907). The State's statistically valid sampling techniques for measuring ground cover and productivity are set forth in the May 1, 2002, policy. Therefore, we find that the deletion of the words "from the Handbook" does not render the West Virginia program less effective than the Federal requirements and can be approved.

16. CSR 38-2-9.3.f, concerning standards for evaluating vegetative cover and productivity, is amended by deleting the words "in the Handbook," and replacing those words with the words "by the Secretary." The effect of the change is that vegetation ground cover and productivity levels will be set by the Secretary of the WVDEP, rather than as provided in the State's technical handbook. The deletion of the phrase "in the Handbook" and its replacement by the phrase "by the Secretary" does

not render the provision less effective than the Federal revegetation standards at 30 CFR 816/817.116(a), because the Secretary of WVDEP will set the productivity success standards for the State. The WVDEP submitted a policy establishing such success standards that we approved in the **Federal Register** on May 1, 2002 (67 FR 21904, 21906–21907). The State's productivity success standards for hayland, pastureland, rangeland and cropland are set forth in that policy. Therefore, we find that the proposed amendments do not render the West Virginia program less effective than the Federal requirements and can be approved.

17. CSR 38–2–14.5.h, concerning hydrologic balance, is amended by adding a proviso which provides that the requirement for replacement of an affected water supply that is needed for the land use in existence at the time of contamination, diminution or interruption or where the affected water supply is necessary to achieve the postmining land use shall not be waived. This amendment is intended to satisfy the required program amendment codified at 30 CFR 948.16(sss). As discussed in the **Federal Register** dated March 4, 2003, we reinstated this required amendment in order to comply with U.S. District Court Judge Haden's ruling of January 9, 2003 (68 FR 10178).

The required program amendment codified at 30 CFR 948.16(sss) provides that the West Virginia program must be amended 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, which provides as follows:

(b) If 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, replacement requirements may be satisfied by demonstrating a suitable alternative water source is available and could feasibly be developed. If the latter approach is selected, written concurrence must be obtained from the water supply owner.

We find that the proposed language provides a counterpart to the Federal requirement that limits waivers of water supply replacement to only those cases where the affected water supply is not needed for the current or proposed postmining land use. Therefore, the proposed amendment can be approved. In addition, we find that it is reasonable to presume that a waiver authorized under W. Va. Code 22–3–24(b) and CSR 38–2–14.5.h would be in writing. However, we recommend that the State amend subsection CSR 38–2–14.5.h to

clarify that a waiver of water supply replacement be in writing. Finally, the CSR 38–2–14.5.h continues to lack a requirement that a waiver can only be approved where it is demonstrated that a suitable alternative water source is available and could feasibly be developed. Therefore, we will revise the required program amendment at 30 CFR 948.16(sss) to require that CSR 38–2–14.5.h be further amended to provide a counterpart to the Federal requirement in the definition of "Replacement of water supply," paragraph (b), at 30 CFR 701.5, which provides that replacement requirements may be satisfied by demonstrating that a suitable alternative water source is available and could feasibly be developed.

18. CSR 38–2–14.14.g.1 is amended by adding language to provide that durable rock fills proposed after January 1, 2004, may only be approved with the design, construction, and use of a single lift fill if they include an erosion protection zone or a durable rock fill designed to be reclaimed from the "tow" [toe] upward. There is no direct counterpart to the proposed language in the Federal regulations concerning the design of durable rock fills. However, we find that the proposed requirements do not render CSR 38–2–14.14.g.1 less effective than the Federal regulations regarding durable rock fills at 30 CFR 816/817.73 and can be approved. We note the inadvertent typographical error ("tow" should be "toe") and understand that it will be corrected at a future date.

19. CSR 38–2–14.14.g.2 is new and adds design specifications and requirements for single lift fills with an erosion protection zone. The new language provides as follows:

14.14.g.2.A. Erosion Protection Zone. The erosion protection zone is a designed structure constructed to provide energy dissipation to minimize erosion vulnerability and may extend beyond the designed toe of the fill.

14.14.g.2.A.1. The effective length of the erosion protection zone shall be at least one half the height of the fill measured to the target fill elevation or fill design elevation as defined in the approximate original contour procedures and shall be designed to provide a continuous underdrain extension from the fill through and beneath the erosion protection zone.

14.14.g.2.A.2. The height of the erosion protection zone shall be sufficient to accommodate designed flow from the underdrain of the fill and shall comply with 14.14.e.1. of this rule.

14.14.g.2.A.3. The erosion protection zone shall be constructed of durable rock as defined in 14.14.g.1. originating from a permit area and shall be of

sufficient gradation to satisfy the underdrain function of the fill.

14.14.g.2.A.4. The outer slope or face of the erosion protection zone shall be no steeper than two (2) horizontal or one (1) vertical (2:1). The top of the erosion protection zone shall slope toward the fill at a three (3) to five (5) percent grade and slope laterally from the center toward the sides at one (1) percent grade to discharge channels capable of passing the peak runoff of a one-hundred (100) year, twenty-four (24) hour precipitation event.

14.14.g.2.A.5. Prior to commencement of single lift construction of the durable rock fill, the erosion protection zone must be seeded and certified by a registered professional engineer as a critical phase of fill construction. The erosion protection zone shall be maintained until completion of reclamation of the fill.

14.14.g.2.A.6. Unless otherwise approved in the reclamation plan, the erosion protection zone shall be removed and the area upon which it was located shall be regarded [regraded] and revegetated in accordance with the reclamation plan.

14.14.g.2.B. Single Lift Construction Requirements.

14.14.g.2.B.1. Excess spoil disposal shall commence at the head of the hollow and proceed downstream to the final toe. Unless required for construction of the underdrain, there shall be no material placed in the fill from the sides of the valley more than [than] 300 feet ahead of the advancing toe. Exceptions from side placement of material limits may be approved by the Secretary if requested and the applicant can demonstrate through sound engineering that it is necessary to facilitate access to isolated coal seams, the head of the hollow or otherwise facilitates fill stability, erosion, or drainage control.

14.14.g.2.B.2. During construction, the fill shall be designed and maintained in such a manner as to prevent water from discharging over the face of the fill.

14.14.g.2.B.2.(a). The top of the fill shall be configured to prevent water from discharging over the face of the fill and to direct water to the sides of the fill.

14.14.g.2.B.2.(b). Water discharging along the edges of the fill shall be conveyed in such a manner to minimize erosion along the edges of the fill.

14.14.g.2.B.3. Reclamation of the fill shall be initiated from the top of the fill and progress to the toe with concurrent construction of terraces and permanent drainage.

The proposed provisions are more detailed than, but are not inconsistent

with, the Federal requirements for durable rock fills at 30 CFR 816/817.73. Neither SMCRA nor the Federal regulations prohibit the construction of single-lift durable rock fills. However, the Environmental Protection Agency (EPA) commented on the proposed amendments and provided a conditional approval of CSR 38–2–14.14.g.2.A.6 concerning the removal of erosion protection zones following mining. See Section IV, Summary and Disposition of Comments, below, for a complete discussion of EPA's comments.

The EPA stated that it is concerned that erosion protection zones (EPZs) may result in permanent stream fills after completion of mining. According to CSR 38–2–14.14.g.2.A.1, the EPA stated, a 250-foot long EPZ would be required for a 500-foot high valley fill, which, EPA stated, is not unusual in southern West Virginia. Although Section 14.14.g.2.A.6 requires EPZ removal, regrading, and revegetating after mining, EPA stated, it does not appear to include removal of the stream fill associated with the EPZ or reconstruction of the stream channel.

The EPA stated that it concurs with the proposed revisions under the condition that a requirement be included to remove stream fills associated with EPZs after mining and reconstruct the stream channels.

Therefore, and considering EPA's conditional concurrence as noted above, we find that these new design specifications and requirements for single-lift fills with an erosion protection zone do not render the West Virginia program less effective than the Federal durable rock fill requirements at 30 CFR 816/817.71 and 816/817.73 and can be approved with the following exceptions.

At CSR 38–2–14.14.g.2.A.6, we are not approving the words “[u]nless otherwise approved in the reclamation plan” because leaving an EPZ in place would be inconsistent with EPA's conditional concurrence to remove stream fills associated with EPZs and to reconstruct the stream channels after mining. We are approving CSR 38–2–14.14.g.2.A.6 only to the extent that following mining, all stream fills associated with EPZs will be removed and the stream channels shall be reconstructed in the manner described at CSR 38–2–5.3 and 14.4.a concerning stream diversions.

20. CSR 38–2–14.14.g.3 is new and adds design specifications and requirements at 14.14.g.3 through 14.14.g.3.B for durable rock fills designed to be reclaimed from the toe upward. The new language provides as follows:

14.14.g.3.A. Transportation of material to toe of fill. The method of transporting material to the toe of the fill shall be specified in the application and shall include a plan for inclement weather dumping. The means of transporting material to the toe may be by any method authorized by the Act [the West Virginia Surface Coal Mining and Reclamation Act] and this rule and is not limited to the use of roads.

14.14.g.3.A.1. Constructed roads shall be graded and sloped in such a manner that water does not discharge over the face. Sumps shall be constructed along the road in switchback areas and shall be located at least 15 feet from the outslope.

14.14.g.3.A.2. The constructed road shall be in compliance with all applicable State and Federal safety requirements. The design criteria to comply with all applicable State and Federal safety requirements shall be included in the permit.

14.14.g.3.B. Once the necessary volume of material has been transported to the toe of the fill, face construction and installation of terraces and permanent drainage shall commence. The face construction and reclamation of the fill shall be from the bottom up with progressive construction of terraces and permanent drainage in dumping increments not to exceed 100 feet.

The proposed provisions are more detailed than, but are not inconsistent with, the Federal requirements for durable rock fills at 30 CFR 816/817.73. Therefore, we find that these new design specifications and requirements for durable rock fills designed to be reclaimed from the toe upward do not render the West Virginia program less effective than the Federal durable rock fill requirements at 30 CFR 816/817.71 and 816/817.73 and can be approved. In addition, we are approving these requirements with the understanding that if roads are not used to transport the excess material as provided in subsection 14.14.g.3.A, the alternative means of transportation will ensure that the excess spoil will be transported to the toe of the fill and placed in a controlled manner as provided by CSR 38–2–14.14.a.2 and 30 CFR 816/817.71(e)(2).

21. CSR 38–2–14.15.a.2, concerning contemporaneous reclamation standards, is amended by adding language to provide that the mining and reclamation plan shall contain information on how mining and reclamation operations will be coordinated so as to minimize surface water runoff, and comply with the storm water runoff plan. There is no direct Federal counterpart to the proposed

language. We find, however, that the proposed language is not inconsistent with the Federal regulations at 30 CFR 816/817.100 concerning contemporaneous reclamation and can be approved.

22. CSR 38–2–14.15.c, concerning reclaimed area, is amended by adding the words “and seeding has occurred” to the definition of reclaimed acreage that is applicable to this subsection. As amended, the definition of reclaimed area provides that for purposes of this subsection, reclaimed acreage shall be that portion of the permit area which has at a minimum been fully regraded and stabilized in accordance with the reclamation plan, meets Phase I standards, and seeding has occurred. We find that the amendment to this provision does not render the West Virginia rule less effective than the Federal regulations concerning contemporaneous reclamation at 30 CFR 816/817.100 and bond release at 30 CFR 800.40(c) can be approved.

23. CSR 38–2–14.15.g, concerning contemporaneous reclamation variance—permit applications, is amended by adding language to require a demonstration that the variance being sought will comply with CSR 38–2–5.6 concerning the new storm water runoff provisions. There are no counterpart Federal requirements to the new West Virginia storm water runoff provisions at CSR 38–2–5.6. We find, however, that the amendment to this provision does not render the West Virginia rule less effective than the Federal regulations concerning contemporaneous reclamation at 30 CFR 816/817.100 and can be approved.

24. CSR 38–2–17.1, concerning Small Operator Assistance Program (SOAP), is amended by adding that the Secretary of WVDEP shall establish a formula for allocating funds to provide services for eligible small operators if available funds are less than those required to provide the services pursuant to CSR 38–2–17. This new language provides the West Virginia program with a counterpart to the Federal requirement at 30 CFR 795.11(b) and can be approved. We note that the State must now actually establish a formula for allocating SOAP funds.

25. CSR 38–2–20.6.a, concerning civil penalty assessments, is amended by deleting all language concerning an “assessment officer,” and adding language concerning the Secretary of WVDEP. The new language provides that the Secretary shall not determine the proposed penalty assessment until such time as an inspection of the violation has been conducted and the findings of that inspection are submitted

to the Secretary in writing. The Secretary must conduct the inspection of the violation within the first 15 days after the notice or order was served. We find that, as amended, the State's civil penalty assessment procedures are the same as or similar to those contained in section 518 of SMCRA, are consistent with the Federal procedures concerning civil penalty assessment at 30 CFR 845.17, and can be approved.

26. CSR 38-2-20.6.c, concerning notice of civil penalty assessment, is amended by deleting two sentences that provide that the "Secretary shall also give notice including any worksheet, in person or by certified mail, to the operator of any penalty adjustment as a result of an informal conference within thirty (30) days following the date of the conference. The reasons for reassessment shall be documented in the file by the assessment officer." Also, the following sentence is added immediately before the existing last sentence: "The reasons for reassessment shall be documented in the file by the Secretary." The two sentences that were deleted from this provision pertain to procedures for an informal conference, and were relocated to CSR 38-2-20.6.e concerning informal conference. We find that the amendments to CSR 38-2-20.6.c do not render the provision inconsistent with the Federal provisions concerning procedures for assessment of civil penalties at 30 CFR 845.17(b) and (c), and 845.18(c) and can be approved.

27. CSR 38-2-20.6.d, concerning notice of informal assessment conference, is amended by adding language to provide that the Secretary shall arrange for a conference to review the proposed assessment or reassessment, upon written request if received within 15 days from the date the proposed assessment or reassessment is received. Language is also added to provide that the operator shall forward the amount of proposed penalty assessment to the Secretary for placement in an interest bearing escrow account, and that the Secretary shall assign an assessment officer to hold the assessment conference.

We find that the new language is similar to and therefore consistent with the Federal provision at 30 CFR 845.18(a) concerning procedures for assessment conference even though it provides a shorter period in which to request an informal conference. We also find that requiring the operator to forward the amount of the proposed penalty assessment to the Secretary of the WVDEP prior to an assessment conference is not inconsistent with the Federal provision at 30 CFR 845.19. The Federal rule at 30 CFR 845.19 concerns

request for a hearing, and provides that the person charged with the violation may contest the proposed penalty reassessment by submitting a petition and an amount equal to the proposed penalty for placement in an escrow account. Therefore, we find that the proposed language can be approved.

28. CSR 38-2-20.6.e, concerning informal conference, is amended by adding language to provide that the assessment officer shall give notice including any worksheet, in person or by certified mail, to the operator of any penalty adjustment as a result of an informal conference within 30 days following the date of the conference. The reasons for the assessment officer's action shall be documented in the file. This language was relocated from the approved program at CSR 38-2-20.6.c, and appropriately placed in this subsection concerning informal conference. We find that this amendment is consistent with the Federal provisions concerning procedures for assessment conference at 30 CFR 845.18(c) and can be approved.

29. CSR 38-2-20.6.f is new and adds the requirement that an increase or reduction of a proposed civil penalty of more than 25 percent and more than \$500.00 shall not be final and binding until approved by the Secretary. We find that this provision is substantively identical to the Federal regulations at 30 CFR 845.18(b)(4) concerning procedures for assessment conference and can be approved.

30. CSR 38-2-20.6.j, concerning escrow, is amended by adding the phrase "an informal conference or" immediately before the words "judicial review of a proposed assessment." In addition, the words "continue to" are deleted immediately before the words "be held in escrow." The amended provision provides that if a person requests an informal conference or judicial review of a proposed assessment, the proposed penalty assessment shall be held in escrow until completion of the judicial review. We find that this provision as amended is not inconsistent with the Federal provision at 30 CFR 845.19(b), which provides that funds placed in escrow shall be held in escrow pending completion of the administrative and judicial review process. Therefore, the amendments to CSR 38-2-20.6.j can be approved.

31. CSR 38-2-22.4.g.3.A concerns the design of Class C-type coal refuse impoundments without discharge structures that must be capable of storing a minimum of two six hour duration probable maximum storms. This provision is amended by deleting

the second sentence and adding three sentences in its place. The new language requires that a system shall be designed to dewater the impoundment of the probable maximum storm in 10 days by pumping or other means. The new language also states that the requirements of the Coal Related Dam Safety Rule at CSR 38-4-25.14, concerning removal of storm water from impoundments, shall be met. For existing structures exceeding the minimum two PMP (Probable Maximum Precipitation) volume requirement, the dewatering system shall be installed when the containment volume is reduced to two PMPs.

The proposed language that requires a system to be designed to dewater the impoundment of the probable maximum storm in 10 days by pumping or by other means is consistent with the State's performance standard for coal refuse impoundments provision at CSR 38-2-22.5.j.5, which provides that impounding structures constructed of or impounding coal mine refuse shall be designed so that at least 90 percent of the water stored during the design precipitation event can be removed within a 10-day period. The substantively identical Federal counterpart to CSR 38-2-22.5.j.5 is contained in 30 CFR 816/817.84(e). We find that the proposed design standard is no less effective than the counterpart Federal regulations at 30 CFR 816/817.49(c)(2)(i) and 816/817.84(e) and can be approved.

The proposed new language also provides that the requirements of the Coal Related Dam Safety Rule at CSR 38-4-25.14, concerning removal of storm water from impoundments, shall be met. We are currently reviewing the State's Coal Related Dam Safety Rule at CSR 38-4 under a separate program amendment submitted by the State. However, since CSR 38-4-25.14 is relevant to the proposed amendment at CSR 38-2-22.4.g.3.A, we will address the State's Coal Related Dam Safety Rule at CSR 38-4-25.14 here.

Proposed CSR 38-4-25.14 provides as follows:

25.14. Storm water in the impoundment shall be removed as specified in the design requirements. In addition, the slurry impoundment pool shall be maintained at the lowest practical pool level based upon the design requirements and the AHCF [Assessment of Hazards and Consequences of Failure; see CSR 38-4-3.4.c]. The mechanical storm dewatering system shall be installed as designed and maintained properly with the system being tested monthly.

Proposed CSR 38-4-25.14 provides, in effect, a counterpart to the Federal regulations at 30 CFR 816/817.84(f),

concerning the performance standard for impounding structures constructed of or impounding coal mine waste. The regulation at 30 CFR 816/817.84(f) provides that for an impounding structure constructed of or impounding coal mine waste, at least 90 percent of the water stored during the design precipitation event shall be removed within the 10-day period following the design precipitation event. We find that the proposed language at CSR 38–2–22.4.g.3.A, which requires that the Coal Related Dam Safety Rule at CSR 38–4–25.14 be met, together with the proposed regulation at CSR 38–4–25.14 are no less effective than the counterpart Federal regulations at 30 CFR 816/817.84(f) and can be approved.

The proposed new language also requires that for existing structures exceeding the minimum 2 PMP volume requirement, the “dewatering system” shall be installed when the containment volume is reduced to 2 PMPs. While the language does not specifically state that the “dewatering system” referred to is the same system as described at CSR 38–2–22.4.g.3.A, we interpret this provision to mean the same. That is, the system shall be designed to dewater the impoundment of the probable maximum storm in 10 days by pumping or other means, and the requirements of the Coal Related Dam Safety Rule at CSR 38–4–25.14, concerning removal of storm water from impoundments shall also be met. There is no Federal counterpart to this provision. We find, however, that the provision is not unreasonable, and that the proposed design standard is no less effective than the counterpart Federal regulations at 30 CFR 816/817.49(c)(2)(i) and 816/817.84(e) and can be approved.

32. CSR 38–2–22.4.i.6 is new and concerns the use of corrugated metal pipes in spillways. This provision provides that corrugated metal pipes, whether coated or uncoated, shall not be used in new or unconstructed refuse impoundments or slurry cells. If an existing corrugated metal pipe has developed leaks or otherwise deteriorated so as to cause the pipe to not function properly and such deterioration constitutes a hazard to the proper operation of the impoundment, the Secretary will require the corrugated metal pipe to be either repaired or replaced. We find that the provision is consistent with the Federal regulation at 30 CFR 816/817.84(c) which provides that spillways and outlet works of coal mine waste impounding structures shall be designed to provide adequate protection against erosion and corrosion, and that inlets shall be

protected against blockage. Therefore, we are approving the provision.

33. CSR 38–2–24.2.a, concerning the revegetation of remining operations, is amended by deleting the words “in the Handbook” at the end of the last sentence, and replacing those words with the words “by the Secretary.” The new revision provides that the determination of premining ground cover success and productivity shall be made using sampling techniques described by the Secretary. The WVDEP submitted a policy identifying statistically valid sampling techniques for measuring ground cover and productivity success that we approved on May 1, 2002 (67 FR 21904, 21906–21907). Therefore, we find that the deletion of the words “from the Handbook” does not render the West Virginia program less effective than the Federal regulations and can be approved.

34. CSR 38–2–24.3 concerns water quality exemptions for coal remining operations. This provision is amended by adding the following language at the end of the last sentence: “or a coal remining operation as defined in 40 CFR part 434 as amended may qualify for the water quality exemptions set forth in 40 CFR part 434 as amended.” The amended provision provides that a coal remining operation which began after February 4, 1987, and on a site which was mined prior to August 3, 1977, may qualify for the water quality exemptions set forth in subsection (p), section 301 of the Federal Clean Water Act, as amended or a coal remining operation as defined in 40 CFR part 434 as amended may qualify for the water quality exemptions set forth in 40 CFR part 434 as amended.

The existing language of this provision incorporates the added flexibility provided by the 1987 revision to the Clean Water Act that added section 301(p) (33 U.S.C. 1311(p)), often called the Rahall Amendment, that provides incentives for remining abandoned mine lands that predate the passage of SMCRA. The State’s proposed language is intended to incorporate the added flexibility provided by amendments to the Federal regulations at 40 CFR 434.70–434.75, which added effluent limitations and performance standards to a new Coal Remining Subcategory (Subpart G) under the existing regulations for the Coal Mining Point Source Category (January 23, 2002; 67 FR 3370). New Subpart G applies to coal remining operations, which are defined at 40 CFR 434.70(a) as coal mining operations at sites on which coal mining was previously conducted and where the

sites have been abandoned or the performance bonds have been forfeited. Since the additional language incorporates water quality exemptions authorized under the Clean Water Act, we find that the addition of the proposed language does not render the West Virginia program less stringent than SMCRA nor less effective than the Federal regulations and can be approved.

35. CSR 38–2–24.4 concerns bond release requirements for remining operations. This provision is amended by adding the following language at the end of the first sentence: “and the terms and conditions set forth in the NPDES [National Pollutant Discharge Elimination System] Permit in accordance with subsection (p), section 301 of the Federal Clean Water Act, as amended or 40 CFR part 434 as amended.” The new revision provides that bond release for remining operations shall be in accordance with all of the requirements set forth in subsection 12.2 of this rule and the terms and conditions set forth in the NPDES Permit in accordance with subsection (p), section 301 of the Federal Clean Water Act, as amended or 40 CFR part 434 as amended. The proposed new language is intended to establish effluent limitations guidelines and new source performance standards for coal remining operations that are authorized under section 301(p) of the Clean Water Act, and at subpart G of the Federal regulations at 40 CFR part 434 (see Finding 34 above for more information). For the same reasons as those set forth in Finding 34, above, we find that the addition of the proposed language does not render the West Virginia program less stringent than SMCRA nor less effective than the Federal regulations and can be approved.

#### IV. Summary and Disposition of Comments

##### *Public Comments*

No public comments were received in response to our requests for comments from the public on the proposed amendments.

##### *Federal Agency Comments*

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, on April 2 and 4, 2003, we requested comments on the amendments from various Federal agencies with an actual or potential interest in the West Virginia program (Administrative Record Number WV–1356 and 1357). On June 4, 2003, the U.S. Department of Labor, Mine Safety and Health Administration (MSHA),



responded (Administrative Record Number WV-1362) and stated that it has no comments on the changes in House Bills 2881 and 2882. MSHA stated that House Bill 2603 lacks the word "hour" on page 10, line one, at CSR 38-2-5.6.b, concerning storm water runoff. MSHA stated that in referring to the storm event, the statement "one (1) year, twenty-four (24) storm event" should read "one (1) year, twenty-four hour storm event". We acknowledged that the word "hour" is missing in Finding 12, above, and approved the provision with the understanding that the inadvertent omission would be corrected at a future date. MSHA had the following comments concerning the amendments to the regulations at CSR 38-2.

Section 3.7.d, concerning disposal of excess spoil. MSHA stated that it has no counterparts to these regulations that require a survey of the watershed to identify all man-made structures and residents and to determine the potential storm runoff impacts, and that require that the accuracy of the survey be verified by field work. As noted in Finding 8, above, we determined that there are no Federal counterparts to the provision, but that it is consistent with the Federal permit application requirement at 30 CFR 780.35 concerning the disposal of excess spoil and can be approved.

MSHA identified the proposed amendments at CSR 38-2-5.4.b.4, 5.6, 22.4.g.3.a, and 22.4.i.g [i], but did not provide any comments on those changes.

MSHA also provided comments on the changes to CSR 38-4, Coal Related Dam Safety Rule. As we noted above in Section III, in order to expedite our review of the State's proposed provisions that concern the recommendations of West Virginia's 2002 Flood Study, we separated all except one of the amendments relating to CSR 38-4, Coal Related Dam Safety Rule from this amendment. We will address the proposed amendments to CSR 38-4 and MSHA's comments relating to the proposed amendments to CSR 38-4, in a separate **Federal Register** notice at a later date.

#### *Environmental Protection Agency (EPA) Concurrence and Comments*

Under 30 CFR 732.17(h)(11)(ii), we are required to get a 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 April 1, 2003, we asked for concurrence and comments on the amendment

(Administrative Record Number WV-1355).

The EPA responded by letter dated June 13, 2003, (Administrative Record Number WV-1363).

The EPA stated that it reviewed the proposed revisions and has concerns about the requirement of erosion protection zones (EPZs) associated with single-lift valley fills at CSR 38-2-14.14.g.1 (Durable Rock Fills).

**EPZ Purpose**—The EPA stated that it is EPA's understanding that an EPZ is a buffer zone between the toe of a single lift valley fill and its downstream sedimentation pond. It consists of a wide and low fill, revegetated to dissipate runoff energy from the valley fill face and prevent pond overloading during severe storm periods. The EPA stated that a single lift fill is particularly subject to erosion, since it is constructed in a downstream direction toward the pond with no reclamation or revegetation of the fill face until completion of mining.

**EPA's Concern**—The EPA stated that it is concerned that EPZs may result in permanent stream fills after completion of mining. According to CSR 38-2-14.14.g.2.A.1, the EPA stated, a 250-foot long EPZ would be required for a 500-foot high valley fill, which, EPA stated, is not unusual in southern West Virginia. Although Section 14.14.g.2.A.6 requires EPZ removal, regrading, and revegetating after mining, EPA stated, it does not appear to include the removal of the stream fill associated with the EPZ or reconstruction of the stream channel. An alternative valley fill design, which appears more environmentally acceptable, EPA stated, is also indicated in Section 14.14.g.1 and further described in Section 14.14.g.3. The EPA stated that this involves starting valley fill construction from the toe and proceeding upstream in multiple lifts (layers) of 100 feet or less in thickness. The EPA stated that the face of each lift would be reclaimed and revegetated before starting the next lift. The toe of the first lift would be at the sedimentation pond, the EPA stated, and an EPZ would not be necessary due to better erosion control features.

**Conditional Concurrence**—The EPA stated that it concurs with the proposed revisions under the condition that a requirement be included to remove stream fills associated with EPZs after mining and reconstruct the stream channels. The EPA stated that it should also be noted that stream filling during EPZ construction requires authorization under Section 404 of the Clean Water Act, administered by the U.S. Army Corps of Engineers. Considering the high erosion potential of single-lift

valley fills, the EPA stated, they (EPA) recommend that the single lift method be replaced by the more environmentally favorable approach of starting at the toe and proceeding upwards in multiple lifts. The EPA stated that it will likely make this recommendation for any proposed single lift fill coming before it for Section 404 review.

In response to EPA's conditional concurrence, and as we noted above in Finding 19, at CSR 38-2-14.14.g.2.A.6, we are not approving the words "[u]nless otherwise approved in the reclamation plan" because leaving an EPZ in place would be inconsistent with EPA's conditional concurrence to remove stream fills associated with EPZs and to reconstruct the stream channels after mining. In addition, we are approving CSR 38-2-14.14.g.2.A.6 only to the extent that following mining, all stream fills associated with EPZs will be removed and the stream channels shall be reconstructed.

The EPA also provided the following comments in support of specific amendments:

1. CSR 38-2-5.6.a.3 (Storm Water Runoff)—The EPA stated that this section requires that mining cause no net increase in peak runoff as compared to pre-mining conditions. The EPA stated that this is an important requirement for preventing mining operations from causing or increasing local flooding conditions. We concur with EPA's comment.

2. CSR 38-2-9.1.a (Revegetation)—The EPA stated that this section requires maximization of reforestation opportunities during mining reclamation. The EPA stated that it is a very beneficial approach to return land to its original forested state, unless there are other specific post-mining land uses. We concur with EPA's comment.

3. CSR 38-2-24.3 and 24.4 (Remining)—The EPA stated that these sections reference EPA's remining effluent guideline regulations promulgated in 2002 and listed in 40 CFR part 434, as amended. The EPA stated that they implement the Clean Water Act statute regarding remining, section 301(p), passed in 1987. The EPA stated that it considers remining to be an important tool for improving water quality and reclaiming scarred land associated with abandoned mines. The EPA stated that it supports providing of incentives to companies for remining salvageable coal from abandoned mines while making these environmental improvements with no cost to the public. The EPA stated that it is planning on holding workshops on implementation of the 2002 remining

regulations during the summer of 2003. We concur with EPA's comments concerning CSR 38-2-24.3 and 24.4.

#### V. OSM's Decision

Based on the above findings, and except as noted below, we approve the amendment sent to us by West Virginia on March 18, 2003. In addition, the following required program amendments are satisfied and can be removed at 30 CFR 948.16(nnn), (ooo), and (qqq).

The amendments to CSR 38-2-14.5.h (Finding 17) partially satisfy the required program amendment at 30 CFR 948.16(sss). Therefore, we will revise the required program amendment at 30 CFR 948.16(sss) to require that, if the water supply is not needed for the existing or postmining land use, such waiver can only be approved where it is demonstrated that a suitable alternative water source is available and could feasibly be developed.

At CSR 38-2-14.14.g.2.A.6 (Finding 19), we are not approving the words "[u]nless otherwise approved in the reclamation plan" because leaving an EPZ in place would be inconsistent with EPA's conditional concurrence to remove stream fills associated with EPZs and to reconstruct the stream channels after mining. We are approving CSR 38-2-14.14.g.2.A.6 only to the extent that following mining, all stream fills associated with EPZs will be removed and the stream channels shall be reconstructed.

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 upon the analysis performed under various laws and executive orders 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 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: June 20, 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 948.12 is amended by adding new paragraph (g) to read as follows:

§ 948.12 State statutory, regulatory, and proposed program amendment provisions not approved.

\* \* \* \* \*

(g) We are not approving the following provision in the proposed program amendment submitted on March 18, 2003: At CSR 38-2-14.14.g.2.A.6, the words "Unless otherwise approved in the reclamation plan."

3. 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.

\* \* \* \* \*

Table with 3 columns: Original amendment submission dates, Date of publication of final rule, Citation/description. Row 1: March 18, 2003, July 7, 2003, W. Va. Code 22-3-23(a)-(h), 23(c)(1)(C), (c)(2)(C); 22B-1-7, 7(d), 7(h).

948.16 [Amended]

4. Section 948.16 is amended by removing and reserving paragraphs (nnn), (ooo) and (qqqq), and revising paragraph (sss) to read as follows:

(sss) By September 5, 2003, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a time table for adoption to amend CSR 38-2-14.5.h, or otherwise amend the West Virginia program, to require that, if the water supply is not needed for the existing or postmining land use, such waiver can only be approved where it is demonstrated that a suitable alternative water source is available and could feasibly be developed.

[FR Doc. 03-17080 Filed 7-3-03; 8:45 am]

BILLING CODE 4310-05-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[CGD01-03-051]

Special Local Regulation: City of Stamford Fireworks, Stamford, CT

AGENCY: Coast Guard, DHS.

ACTION: Notice of implementation of regulation.

SUMMARY: This notice puts into effect the permanent regulations for the annual City of Stamford, CT fireworks. The regulation is necessary to control vessel traffic within the immediate vicinity of the event due to the hazards presented by a fireworks display to the maritime community, thus providing for the safety of life and property on the affected navigable waters.

DATES: The regulations in 33 CFR 100.114 (7.8) are effective from 8 p.m. on July 3, 2003 through 10 p.m. on July 5, 2003. This rule will be enforced on July 3, 2003 from 8 p.m. through 10 p.m. If the fireworks display is cancelled due to weather, this rule will be enforced on July 5, 2003 from 8 p.m. through 10 p.m.

FOR FURTHER INFORMATION CONTACT: Petty Officer Austin Nagle, Office of Search and Rescue, First Coast Guard District, (617) 223-8460.

SUPPLEMENTARY INFORMATION: This notice implements the permanent special local regulation governing the Stamford Fireworks, Stamford, CT. A portion of Westcott Cove, Stamford, CT will be closed during the effective period to all vessel traffic, except the fireworks barge and local, state or Coast Guard patrol craft. The regulated area is that area of Westcott Cove in a 500-yard radius of the fireworks launch platform located at approximate position 41°02'01" N, 73°30'3" W. All coordinates are North American Datum 1983. Additional public notification will be made via the First Coast Guard District Local Notice to Mariners and marine safety broadcasts. The full text of this regulation is found in 33 CFR 100.114.

Dated: June 10, 2003.

John L. Grenier,

Captain, Coast Guard, Acting Commander, First Coast Guard District.

[FR Doc. 03-16968 Filed 7-3-03; 8:45 am]

BILLING CODE 4910-15-U