

**DEPARTMENT OF THE INTERIOR****Office of Surface Mining Reclamation and Enforcement****30 CFR Part 948****[WV-101-FOR]****West Virginia Regulatory Program****AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSM), Interior.**ACTION:** Final rule; approval of amendment.

**SUMMARY:** We are removing a required program amendment from the West Virginia regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The required program amendment concerns tree stocking standards for mountaintop removal mining operations with a variance from the requirement to restore the site after mining to approximate original contour (AOC) and with an approved postmining land use of commercial forestry and forestry. The removal of the required amendment is intended to acknowledge actions taken by the State to render the West Virginia program no less effective than the Federal regulations.

**DATES:** *Effective Date:* June 17, 2004.

**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**

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**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 letters dated March 14, 2000, and March 28, 2000, and electronic mail dated April 5, 2000 (Administrative Record Numbers WV-1147, WV-1148, and WV-1149, respectively), the West Virginia Department of Environmental Protection (WVDEP) submitted an amendment to its surface coal mining regulatory program. Among other things, the amendment added new Code of State Regulations (CSR) 38-2-7.4 concerning standards applicable to AOC variance operations with a postmining land use of commercial forestry and forestry. CSR 38-2-7.4.b.1.I sets forth the standards of success for the commercial forestry postmining land use. We announced our approval of CSR 38-2-7.4, with an exception noted below, on August 18, 2000 (65 FR 50409) (Administrative Record Number WV-1174).

In our August 18, 2000, **Federal Register** notice, we did not approve the new tree stocking standards for commercial forestry and forestry postmining land use, because there was no evidence that the West Virginia Division of Forestry had reviewed and approved the proposed standards as is required by the Federal regulations at 30 CFR 816.116(b)(3)(i) (65 FR at 50422). Therefore, we required that the WVDEP consult with and obtain the approval of the Division of Forestry on the new stocking standards for commercial forestry and forestry at CSR 38-2-7.4.b.1.I. We codified this requirement in the Federal regulations at 30 CFR 948.16(aaaaa).

Under the Federal regulations at 30 CFR 816.116(b)(3)(i), the approval of the stocking standards may be on a program-wide or permit-specific basis. Since a program-wide approval had not yet been granted by the Division of Forestry at the time of our August 18, 2000, decision, we determined that the WVDEP must obtain approval on a permit-specific basis until such time that it received program-wide approval by the Division of Forestry.

By letter dated February 26, 2002, (Administrative Record Number WV-1276), the WVDEP, Division of Mining and Reclamation submitted, among

other materials, a letter dated November 17, 2000, from the Division of Forestry to the WVDEP. In that letter, the Division of Forestry approved, on a statewide basis, the stocking rates at CSR 38-2-7.4, concerning standards applicable to mountaintop removal mining operations with a postmining land use of commercial forestry and forestry.

The November 17, 2000, letter from the Division of Forestry to the WVDEP appeared to satisfy the required program amendment codified in the Federal regulations at 30 CFR 948.16(aaaaa). Therefore, in the March 25, 2004, **Federal Register**, we proposed to remove the required program amendment at 30 CFR 948.16(aaaaa) from the West Virginia program (69 FR 15275). In the same document, we opened the public comment and provided an opportunity for a public hearing or meeting on the adequacy of the proposed removal of the required program amendment (Administrative Record Number WV-1387). We did not hold a hearing or a meeting because no one requested one. The public comment period closed on April 26, 2004. We received comments from one individual that are discussed below.

**III. OSM's Findings**

The required program amendment at 30 CFR 948.16(aaaaa) provides that the WVDEP must “consult with and obtain the approval of the West Virginia Division of Forestry on the new stocking standards for commercial forestry and forestry at CSR 38-2-7.4.b.1.I.” As we noted above, by letter dated February 26, 2002, the WVDEP, Division of Mining and Reclamation submitted, among other materials, a letter dated November 17, 2000, from the Division of Forestry to the WVDEP. In that letter, the Division of Forestry approved, on a statewide basis, the stocking rates at CSR 38-2-7.4, concerning success standards applicable to mountaintop removal mining operations with a postmining land use of commercial forestry and forestry.

As required by the Federal regulations at 30 CFR 948.116(b)(3)(i), the WVDEP has established minimum statewide stocking rates at CSR 38-2-7.4.b.1.I on the basis of local and regional conditions and after consultation with and the approval by the West Virginia Division of Forestry. Therefore, we find that the November 17, 2000, letter from the Division of Forestry to the WVDEP, Division of Mining and Reclamation

satisfies the required program amendment at 30 CFR 948.16(aaaaa), which can be removed.

We did not approve the tree stocking standards for commercial forestry and forestry postmining land use at CSR 38–2–7.4.b.1.I. in our August 18, 2000, decision because there was no evidence that the West Virginia Division of Forestry had reviewed and approved the proposed standards as is required by the Federal regulations at 30 CFR 816.116(b)(3)(i). Consequently, we prohibited the WVDEP from implementing those standards until the required amendment at 30 CFR 948.16(aaaaa) had been satisfied. That is, we only needed the Division of Forestry's concurrence to find the standards at CSR 38–2–7.4.b.1.I. to be consistent with the Federal regulations at 30 CFR 816.116(b)(3). Because the concurrence of the Division of Forestry has been received and the required program amendment at 30 CFR 948.16(aaaaa) has been satisfied, we are approving the stocking rates at CSR 38–2–7.4.b.1.I. These standards can now be implemented on a statewide basis.

#### IV. Summary and Disposition of Comments

##### *Public Comments*

One comment was received in response to our request for comments from the public on the proposed removal of the required program amendment at 30 CFR 948.16(aaaaa) (see section II of this preamble). The commenter requested that the proposed rule to remove the required amendment at 30 CFR 948.16(aaaaa) be re-posted, because it was not clear exactly what was being proposed (Administrative Record Number WV–1393).

We disagree with the comment that the proposed rule notice published on March 25, 2004, is unclear. We believe that the proposed rule notice adequately describes the fact that we proposed to remove the required program amendment codified in the Federal regulations at 30 CFR 948.16(aaaaa) because the State submitted a letter that satisfies the required amendment.

In the March 25, 2004, proposed notice, we stated that “we required that the WVDEP consult with and obtain the approval of the Division of Forestry on the new stocking standards for commercial forestry and forestry at CSR 38–2–7.4.b.1.I.” We further stated that “[w]e codified this requirement in the Federal regulations at 30 CFR 948.16(aaaaa).” Also in the March 25, 2004, notice, we proposed to remove the required amendment at 30 CFR 948.16(aaaaa) because, we said, “it

appears that the November 17, 2000, letter from the Division of Forestry to the WVDEP satisfies the required program amendment at 30 CFR 948.16(aaaaa).”

We also explained that the WVDEP, Division of Mining and Reclamation had submitted on February 26, 2002, a letter to us dated November 17, 2000, from the Division of Forestry to the WVDEP. In that letter, the Division of Forestry approved, on a statewide basis, the stocking rates at CSR 38–2–7.4, concerning standards applicable to mountaintop removal mining operations with a postmining land use of commercial forestry and forestry. We believe that we have adequately explained the purpose of the March 25, 2004, proposed rule notice and our proposed intent to remove the required program amendment codified at 30 CFR 948.16(aaaaa). Therefore, we maintain that the notice in question does not need to be re-posted.

The commenter also stated that it was clear that mountaintop removal mining is causing environmental damage, and OSM has been lax and negligent in allowing this environmental damage to continue. In response, we believe that the State's adoption of the stocking standards for commercial forestry and forestry at CSR 38–2–7.4.b.1.I. will help ensure that mountaintop removal mining activities in the State will comply with the State requirements that are specifically authorized under SMCRA.

We note that we received comments from the West Virginia Coal Association on the State's program amendments dated February 26, and a related submittal dated March 8, 2002, but none of the comments specifically addressed the stocking standards for commercial forestry and forestry at CSR 38–2–7.4.b.1.I., that were the subject of the required program amendment codified at 30 CFR 948.16(aaaaa).

##### *Federal Agency Comments*

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, on March 11, 2002, we requested comments on the State's February 26 and March 8, 2002, amendments from various Federal agencies with an actual or potential interest in the West Virginia program (Administrative Record Number WV–1284). We received comments from three Federal agencies which included the U.S. Army Corps of Engineers, the National Park Service, and the U.S. Environmental Protection Agency. However, none of the comments that we received from the National Park Service or the U.S. Army Corps of Engineers pertained to the State's stocking

standards for mountaintop removal mining operations with a postmining land use of commercial forestry and forestry (Administrative Record Numbers WV–1289 and WV–1291). We did not specifically ask for Federal agency comments on the proposed removal of 30 CFR 948.16(aaaaa).

##### *Environmental Protection Agency (EPA) 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.*).

By letter dated March 11, 2002, we requested comments and the concurrence from EPA with regard to the State program amendments of February 26 and March 8, 2002, which included the Division of Forestry's concurrence on the State's proposed stocking standards for commercial forestry and forestry (Administrative Record Number WV–1283).

On April 10, 2002, EPA commented and provided its concurrence on the proposed State program amendments of February 26 and March 8, 2002 (Administrative Record Number WV–1294). Because the proposed removal of the required amendment at 30 CFR 948.16(aaaaa) did not pertain to air or water quality standards, we did not ask EPA for its concurrence on the proposed removal of that required amendment after we announced our proposed rule in the **Federal Register** on March 25, 2004 (Administrative Record Number WV–1387). None of the earlier comments provided us by EPA pertained to the stocking standards for mountaintop removal mining operations with a postmining land use of commercial forestry and forestry.

#### V. OSM's Decision

Based on the above findings, we are removing the required program amendment codified at 30 CFR 948.16(aaaaa) and we are approving the stocking standards for commercial forestry and forestry at CSR 38–2–7.4.b.1.I.

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 rule 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. The basis for this determination is our decision is on a State regulatory program and does not involve Federal regulations involving Indian lands.

### *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: May 14, 2004.

### **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 by adding a new entry to the table 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 |
|---|-----------------------------------|----------------------|
| March 14, 2000, March 28, 2000, and April 5, 2000 | June 17, 2004                     | CSR 38-2-7.4.b.1.i.  |

### § 948.16 [Amended]

■ 3. Section 948.16 is amended by removing and reserving paragraph (aaaaa).

[FR Doc. 04-13673 Filed 6-16-04; 8:45 am]

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 117

[CGD07-04-010]

RIN 1625-AA09

### Drawbridge Operation Regulations; Palm Beach County Bridges, Atlantic Intracoastal Waterway, Palm Beach County, FL

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

**SUMMARY:** The Coast Guard is changing the operating regulations of most of the Palm Beach County bridges across the Atlantic Intracoastal Waterway, Palm Beach County, Florida. The schedule will meet the reasonable needs of navigation while accommodating increased vehicular traffic flow throughout the county. This rule will require these bridges to open twice an hour with the Boca Club, Camino Real bridge opening three times per hour.

**DATES:** This rule is effective July 19, 2004.

**ADDRESSES:** Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket [CGD07-04-010] and are available for inspection or copying at Commander (obr), Seventh Coast Guard District, 909 SE 1st Avenue, Miami, Florida 33131, between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Bridge Branch (obr), Seventh Coast Guard District, maintains the public docket for this rulemaking.

**FOR FURTHER INFORMATION CONTACT:** Mr. Barry Dragon, Project Manager, Seventh Coast Guard District, Bridge Branch, (305) 415-6743.

**SUPPLEMENTARY INFORMATION:**

### Regulatory History

On March 10, 2004, the Coast Guard published a Notice of Proposed Rulemaking (NPRM) entitled Drawbridge Operation Regulations; Palm Beach County Bridges, Atlantic Intracoastal Waterway, Palm Beach County, Florida, in the **Federal Register** (68 FR 11351). We received 733 comments on this NPRM. No public hearing was requested, and none was held.

### Background and Purpose

The Coast Guard performed a 90-day test of the proposed schedule on the Palm Beach County bridges in the spring of 2003 that was published in the **Federal Register**, March 19, 2003, (68 FR 13227) (CGD07-03-031). The purpose of the test was to collect data to determine the feasibility of changing the regulations on most of the bridges in Palm Beach County to meet the increased demands of vehicular traffic but still provide for the reasonable needs of navigation. The test results indicated that the proposed schedule would improve vehicular traffic flow while still meeting the reasonable needs of navigation. During the test period, vessel requests for openings remained at or below an average of two per hour with the exception of Camino Real bridge. A computer modeling of that bridge prescribed an opening schedule of three times per hour as optimal for a combination of vehicular and vessel traffic. The schedule allowed both vehicular and vessel traffic the opportunity to predict, on a scheduled basis, when the bridges would possibly be in the open position.

In light of the test period and follow-on computer modeling, the Coast Guard published a Notice of Proposed Rulemaking in the **Federal Register** on March 10, 2004 (69 FR 11351) (CGD07-04-010) delineating this proposed new schedule. We received 733 comments: one form letter from 440 commentors in favor of the schedules, 1 petition with 131 signatures in favor of the schedules, 145 letters from individual citizens in favor of the schedules, 4 letters from municipalities in favor of the schedules, 8 letters with various recommendations regarding different schedules and 5 letters opposing the new schedules. In addition, we received 52 e-mails with no identifiable names or addresses.

The change in operating regulations was requested by various Palm Beach County public officials to ease vehicular traffic, which has overburdened roadways, and to standardize bridge openings throughout the county for vessel traffic. The rule will allow most of the bridges in Palm Beach County to operate on a standardized schedule, which would meet the reasonable needs of navigation and improve vehicular traffic movement. The rule will provide for staggered schedules in order to facilitate the movement of vessels from bridge to bridge along the Atlantic Intracoastal Waterway.

### Discussion of Comments and Changes

We received 733 comments on the NPRM: 720 were in favor of the proposed rule, 5 were against and 8 had alternative recommendations. Two commentors recommended that the schedule for Linton Boulevard and NE. 8th Street (George Bush) be altered slightly to improve vessel traffic without impacting vehicular traffic. This recommendation was incorporated into the rule. One municipality requested an exemption for commercial vessels in their city and in a neighboring city. Tugs with tows will be exempt from this rule.

There were 440 form letters in favor of the rule which recommended a morning and afternoon curfew period. Two of the comments from municipalities requested additional curfew periods in their cities. The comments regarding morning and afternoon curfew periods were not able to be incorporated into this rule. The previous test period and extensive study disclosed that the bridges in question opened less than twice an hour and that closing the bridges for an hour unnecessarily restricts vessel traffic. As a result, the schedule is set for a constant twenty-four hours a day, every day of the week.

### Regulatory Evaluation

This rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not "significant" under the regulatory policies and procedures of