

Example. Employer A provides HDHP coverage through its cafeteria plan. Employer A automatically contributes to the HSA of each employee who is an eligible individual with HDHP coverage through the cafeteria plan. Employees make no election with respect to Employer A's HSA contributions and have no right to receive cash or other taxable benefits in lieu of the HSA contributions. Employer A contributes only to the HSAs of employees who have elected HDHP coverage through the cafeteria plan. The comparability rules apply to Employer A's HSA contributions because the HSA contributions are not made through the cafeteria plan.

Q-4. If under the employer's cafeteria plan, employees who are eligible individuals and who participate in health assessments, disease management programs or wellness programs receive an employer contribution to an HSA, unless the employees elect cash, are the contributions subject to the comparability rules?

A-4. No. The comparability rules do not apply to employer contributions to an HSA made through a cafeteria plan. See Q & A-1 in this section.

Q-5. May all or part of the excise tax imposed under section 4980G be waived?

A-5. In the case of a failure which is due to reasonable cause and not to willful neglect, all or a portion of the excise tax imposed under section 4980G may be waived to the extent that the payment of the tax would be excessive relative to the failure involved. See sections 4980G(b) and 4980E(c).

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 948

[WV-106-FOR]

West Virginia Regulatory Program

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

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We are announcing receipt of a proposed amendment to the West Virginia regulatory program (the West Virginia program) under the Surface

Mining Control and Reclamation Act of 1977 (SMCRA or the Act). West Virginia proposes revisions to the Code of West Virginia (W. Va. Code) and the Code of State Regulations (CSR) as authorized by several bills passed during the State's 2005 Legislative Session. West Virginia is also proposing an amendment that affects the State's regulations concerning erosion protection zones (EPZ) associated with durable rock fills. The State is revising its program to be consistent with certain corresponding Federal requirements, and to include other amendments at its own initiative. The amendments include, among other things, changes to the State's surface mining and blasting regulations as authorized by Committee Substitute for House Bill 2723; various statutory changes to the State's approved program as a result of the passage of Committee Substitute for House Bill 3033 and House Bills 2333 and 3236; the submission of a draft policy regarding the State's EPZ requirement and requesting that the Office of Surface Mining (OSM) reconsider its previous decision concerning EPZ; State water rights and replacement policy identifying the timing of water supply replacement; the revised Permittee's Request For Release form; and the submission of a Memorandum of Agreement (MOA) between the West Virginia Department of Environmental Protection (WVDEP), Division of Mining and Reclamation, and the West Virginia Division of Natural Resources, Wildlife Resources Section that is intended to partially resolve a required program amendment relating to planting arrangements for Homestead post-mining land use.

DATES: We will accept written comments on this amendment until 4 p.m. (local time), on September 26, 2005. If requested, we will hold a public hearing on the amendment on September 20, 2005. We will accept requests to speak at a hearing until 4 p.m. (local time), on September 12, 2005.

ADDRESSES: You may submit comments, identified by WV-106-FOR, by any of the following methods:

- E-mail: chfo@osmre.gov. Include WV-106-FOR in the subject line of the message;
- Mail/Hand Delivery: Mr. Roger W. Calhoun, Director, Charleston Field Office, Office of Surface Mining Reclamation and Enforcement, 1027 Virginia Street, East, Charleston, West Virginia 25301; or
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Comment Procedures" heading in the **SUPPLEMENTARY INFORMATION** section of this document. You may also request to speak at a public hearing by any of the methods listed above or by contacting the individual listed under **FOR FURTHER INFORMATION CONTACT**.

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

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

West Virginia Department of Environmental Protection, 601 57th Street, SE, Charleston, West Virginia 25304, Telephone: (304) 926-0490.

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

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

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

FOR FURTHER INFORMATION CONTACT: Mr. Roger W. Calhoun, Director, Charleston Field Office, Telephone: (304) 347-7158. Internet: chfo@osmre.gov.

SUPPLEMENTARY INFORMATION:

- I. Background on the West Virginia Program
- II. Description of the Proposed Amendment
- III. Public Comment Procedures
- IV. 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. Description of the Proposed Amendment

By letters dated June 13, 2005 (Administrative Record Numbers WV-1419, WV-1420, and WV-1421), the WVDEP submitted amendments to its program under SMCRA (30 U.S.C. 1201 *et seq.*). The amendments consist of several bills passed during West Virginia’s 2005 Legislative Session and a draft policy concerning EPZ associated with durable rock fills.

House Bill (HB) 2333 amends the W. Va. Code by adding new Article 27 entitled the Environmental Good Samaritan Act (Sections 22-27-1 through 22-27-12). HB 2333 was adopted by the Legislature on March 24, 2005, and signed into law by the Governor on April 6, 2005, with an effective date of June 22, 2005. In its letter, the WVDEP stated that HB 2333 establishes a program to encourage voluntary reclamation of lands adversely affected by mining activities by limiting the liability that could arise as a result of the voluntary reclamation of abandoned lands or reduction abatement of water pollution.

Committee Substitute for HB 2723 authorizes (at paragraph g) amendments to the West Virginia Surface Mining Reclamation Rules at CSR 38-2 and (at paragraph i) amendments to the Surface Mining Blasting Rule at CSR 199-1. This bill was passed by the Legislature on April 8, 2005, and approved by the Governor on May 3, 2005, with an effective date from the date of passage. We note that some of the amendments to CSR 38-2 and CSR 199-1 are intended to address required program amendments that are codified in the Federal regulations at 30 CFR 948.16(a), (sss), (wwww), (fffff), (iiiiii), (jjjjj),

(kkkkk), (lllll), (ooooo), (ppppp), and (rrrrr).

Committee Substitute for HB 3033 amends the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA) at W. Va. Code Section 22-3-11 concerning the State’s special reclamation tax. This bill was passed by the Legislature on April 1, 2005, and signed by the Governor on April 18, 2005, with an effective date of April 1, 2005. In its letter, the WVDEP stated that HB 3033 extends the temporary special reclamation tax that funds the State’s alternative bonding system for an additional 18 months (at W. Va. Code 22-3-11(h)(1)) and provides additional duties for the WVDEP Secretary in managing the State’s alternative bonding system (at W. Va. Code 22-3-11(h)(2), (3), and (4)). We note that OSM previously approved West Virginia’s temporary special reclamation tax on December 28, 2001 (66 FR 67446), with additional modification on May 29, 2002 (67 FR 37610, 37613-37614). The State’s current extension of that temporary tax by an additional 18 months does not need OSM’s specific approval because the State has only lengthened the time period of the temporary tax. Except as discussed below, the State has not modified any duties or functions under the approved West Virginia program, and the change is in keeping with the intent of our original approvals. Therefore, we are not seeking public comment on the State’s extension of the temporary tax from thirty nine to fifty seven months at W. Va. Code 22-3-11(h)(1). The extension took effect from the date of passage of Committee Substitute for HB 3033, on April 1, 2005. In addition, we are not seeking public comment on the State’s new language at W. Va. Code 22-3-(h)(3) and (h)(4). These new provisions only direct the Secretary of the WVDEP to conduct various studies and authorize the Secretary of the WVDEP to propose legislative rules concerning its bonding program as appropriate. These provisions do not modify any duties or functions under the approved West Virginia program and do not, therefore, require OSM’s approval. However, we are seeking public comment on the State’s provisions at W. Va. Code 22-3-11(h)(2)(A) and (B). Under these new provisions, the WVDEP Secretary will be required to pursue cost effective alternative water treatment strategies; and conduct formal actuarial studies every two years and conduct informal reviews annually on the Special Reclamation Fund.

HB 3236 amends the WVSCMRA by adding new W. Va. Code Section 22-3-11a concerning the special reclamation

tax, and adding new Section 22-3-32a concerning the special tax on coal. HB 3236 was passed by the Legislature on April 9, 2005, and approved by the Governor on May 2, 2005, with an effective date of April 9, 2005. HB 3236 provides that the special reclamation tax and the special tax, which is used to administer the State’s approved regulatory program, are applicable to thin seam coal, and the special reclamation tax is subject to the WV Tax Crimes and Penalties Act and the WV Tax Procedure and Administration Act.

In addition, WVDEP, submitted Committee Substitute for HB 3033 which contains strikethroughs and underscoring showing the actual language that has been added and deleted from the WVSCMRA, as a result of the passage of Enrolled Committee Substitute for HB 3033 discussed above (Administrative Record Number WV-1422).

WVDEP submitted a MOA dated September 2003, between the WVDEP, Division of Mining and Reclamation, and the West Virginia Division of Natural Resources, Wildlife Resources Section (Administrative Record Number WV-1405). This MOA outlines responsibilities of both agencies in reviewing surface and underground coal mining permit applications; evaluating lands unsuitable for mining petitions; developing wildlife planting plans as part of reclamation plans of permit applications; and restoring, protecting and enhancing fish and wildlife on mined lands within the State. The MOA was developed in response to a 30 CFR Part 732 (Part 732) notification issued by OSM on March 6, 1990, (Administrative Record Number WV-834) in which OSM stated that the State program did not require that minimum stocking and planting arrangements be specified by the regulatory authority on the basis of local and regional conditions and after consultation with and approval by State agencies responsible for the administration of forestry and wildlife programs as required by 30 CFR 816/817.116(b)(3)(i). The West Virginia Division of Forestry has concurred with the State’s tree stocking and groundcover standards at CSR 38-2-9.8.g. However, OSM maintains that the Wildlife Resources Section still has to concur with the wildlife planting arrangement standards. The WVDEP submitted the MOA in response to that part of the outstanding Part 732 notification and, as discussed below, to satisfy part of an outstanding required amendment at 30 CFR 948.16(ooooo).

The Federal regulations at 30 CFR 948.16(ooooo) provide that the WVDEP

must consult with and obtain the approval of the West Virginia Division of Forestry and the Wildlife Resources Section of the West Virginia Division of Natural Resources on the new stocking standards and planting arrangements for Homesteading at CSR 38-2-7.5.o.2. The submission of the MOA is to resolve the part of the required amendment relating to planting arrangements. The State also revised its rules earlier at CSR 38-2-9.3.g to provide that a professional wildlife biologist employed by the Division of Natural Resources must develop the planting plan. OSM approved that revision in the **Federal Register** on February 8, 2005 (70 FR 6582). WVDEP advised OSM that it has consulted with the Division of Forestry concerning the stocking standards for Homesteading. According to WVDEP, the Division of Forestry will be submitting a letter explaining its position with regard to those stocking standards (Administrative Record Number WV-1423). Upon receipt of the letter, it will be included in the Administrative Record and made available for public review.

WVDEP also submitted the Permittee's Request for Release form dated March 2005 (Administrative Record Number WV-1424). This form is being submitted in response to an OSM Part 732 notification dated July 22, 1997 (Administrative Record Number WV-1071). In that notification, OSM advised the State that the Federal regulations at 30 CFR 800.40(a)(3) were amended to require that each application for bond release include a written, notarized statement by the permittee affirming that all applicable reclamation requirements specified in the permit have been completed. OSM notified WVDEP that the State regulations at CSR 38-2-12.2 do not contain such a requirement. In response, the State revised its bond release form by adding new item Number 11, which requires that all copies of the Permittee's Request For Release form include the following: "11. A notarized statement by the permittee that all applicable reclamation requirements specified in the permit have been completed."

The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES**.

Specifically, West Virginia proposes the following amendments.

1. House Bill 2333

HB 2333 amends the W. Va. Code by adding a new article Sections 22-27-1 through 12 to provide as follows:

Article 27. Environmental Good Samaritan Act

22-27-1. Declaration of policy and purpose.

This article is intended to encourage the improvement of land and water adversely affected by mining, to aid in the protection of wildlife, to decrease soil erosion, to aid in the prevention and abatement of the pollution of rivers and streams, to protect and improve the environmental values of the citizens of this state and to eliminate or abate hazards to health and safety. It is the intent of the Legislature to encourage voluntary reclamation of lands adversely affected by mining. The purpose of this article is to improve water quality and to control and eliminate water pollution resulting from mining extraction or exploration by limiting the liability which could arise as a result of the voluntary reclamation of abandoned lands or the reduction and abatement of water pollution. This article is not intended to limit the liability of a person who by law is or may become responsible to reclaim the land or address the water pollution or anyone who by contract, order or otherwise is required to or agrees to perform the reclamation or abate the water pollution.

22-27-2. Legislative findings.

The Legislature finds and declares as follows:

(1) The state's long history of mining has left some lands and waters unreclaimed and polluted.

(2) These abandoned lands and polluted waters are unproductive, diminish the tax base and are serious impediments to the economic welfare and growth of this state.

(3) The unreclaimed lands and polluted waters present a danger to the health, safety and welfare of the people and the environment.

(4) The state of West Virginia does not possess sufficient resources to reclaim all the abandoned lands and to abate the water pollution.

(5) Numerous landowners, citizens, watershed associations, environmental organizations and governmental entities who do not have a legal responsibility to reclaim the abandoned lands or to abate the water pollution are interested in addressing these problems but are reluctant to engage in such reclamation and abatement activities because of potential liabilities associated with the reclamation and abatement activities.

(6) It is in the best interest of the health, safety and welfare of the people of this state and the environment to encourage reclamation of the abandoned lands and abatement of water pollution.

(7) That this act will encourage and promote the reclamation of these properties.

22-27-3. Definitions.

As used in this article unless used in a context that clearly requires a different meaning, the term:

(a) "Abandoned lands" means land adversely affected by mineral extraction and left or abandoned in an unreclaimed or inadequately reclaimed condition.

(b) "Consideration" means something of value promised, given or performed in exchange for something which has the effect of making a legally enforceable contract. For

the purpose of this article, the term does not include a promise to a landowner to repair damage caused by a reclamation project or water pollution abatement project when the promise is made in exchange for access to the land.

(c) "Department" means the West Virginia department of environmental protection.

(d) "Eligible land" means land adversely affected by mineral extraction and left or abandoned in an unreclaimed or inadequately reclaimed condition or causing water pollution and for which no person has a continuing reclamation or water pollution abatement obligation.

(e) "Eligible landowner" means a landowner that provides access to or use of the project work area at no cost for a reclamation or water pollution abatement project who is not or will not become responsible under state or federal law to reclaim the land or address the water pollution existing or emanating from the land.

(f) "Eligible project sponsor" means a person that provides equipment, materials or services at no cost or at cost for a reclamation or water pollution abatement project who is not or will not become responsible under state or federal law to reclaim the land or address the water pollution existing or emanating from the land.

(g) "Landowner" means a person who holds either legal or equitable interest in real property.

(h) "Mineral" means any aggregate or mass of mineral matter, whether or not coherent, which is extracted by mining. This includes, but is not limited to, limestone, dolomite, sand, gravel, slate, argillite, diabase, gneiss, micaceous sandstone known as bluestone, rock, stone, earth, fill, slag, iron ore, zinc ore, vermiculite, clay and anthracite and bituminous coal.

(i) "Permitted activity site" means a site permitted by the department of environmental protection under the provisions of article two, three or four of this chapter.

(j) "Person" means a natural person, partnership, association, association members, corporation, an agency, instrumentality or entity of federal or state government or other legal entity recognized by law as the subject of rights and liabilities.

(k) "Project work area" means that land necessary for a person to complete a reclamation project or a water pollution abatement project.

(l) "Reclamation project" means the restoration of eligible land to productive use by regrading and revegetating the land to stable contours that blend in and complement the drainage pattern of the surrounding terrain with no highwalls, spoil piles or depressions to accumulate water, or to decrease or eliminate discharge of water pollution.

(m) "Water pollution" means the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water located in the state.

(n) "Water pollution abatement facilities" means the methods for treatment or abatement of water pollution located on

eligible lands. These methods include, but are not limited to, a structure, system, practice, technique or method constructed, installed or followed to reduce, treat or abate water pollution.

(c) "Water pollution abatement project" means a plan for treatment or abatement of water pollution located on eligible lands.

22-27-4. Eligibility and project inventory.

(a) *General rule.*—An eligible landowner or eligible project sponsor who voluntarily provides equipment, materials or services at no charge or at cost for a reclamation project or a water pollution abatement project in accordance with the provisions of this article is immune from civil liability and may raise the protections afforded by the provisions of this article in any subsequent legal proceeding which is brought to enforce environmental laws or otherwise impose liability. An eligible landowner or eligible project sponsor is only entitled to the protections and immunities provided by this article after meeting all eligibility requirements and compliance with a detailed written plan of the proposed reclamation project or water pollution abatement project which is submitted to and approved by the department. The project plan shall include the objective of the project and a description of the work to be performed to accomplish the objective and shall, additionally, identify the project location, project boundaries, project participants and all landowners.

(b) *Notice.*—The department shall give written notice by certified mail to adjacent property owners and riparian land owners located downstream of the proposed project, provide Class IV public notice of the proposed project in a newspaper of general circulation, published in the locality of the proposed project, and shall give public notice in the state register. The project sponsor may also provide public notice. Any person having an interest which may be adversely affected by the proposed project has the right to file written objections to the department within thirty days after receipt of the written notice or within thirty days after the last publication of the Class IV notice. The department shall provide to the project sponsor a copy of each written objection received during the public comment period, which shall conclude at the expiration of the applicable thirty-day period provided for in this section.

(c) *Advice.*—The department may provide advice to the landowner or to other interested persons based upon the department's knowledge and experience in performing reclamation projects and water pollution abatement projects.

(d) *Departmental review.*—The department shall review each proposed reclamation project and approve the project if the department determines the proposed project:

- (1) Will result in the appropriate reclamation and regrading of the land according to all applicable laws and regulations;
- (2) Will result in the appropriate revegetation of the site;
- (3) Is not likely to result in pollution as defined in article eleven of this chapter; and
- (4) Is likely to improve the water quality and is not likely to make the water pollution worse.

(e) *Project inventory.*—The department shall develop and maintain a system to inventory and record each project, the project location and boundaries, each landowner and each person identified in a project plan provided to the department. The inventory shall include the results of the department's review of the proposed project and, where applicable, include the department's findings under subsection (b), section ten of this article.

(f) *Appeal.*—A person aggrieved by a department decision to approve or disapprove a reclamation project or a water pollution abatement project has the right to file an appeal with the environmental quality board under the provisions of article one, chapter twenty-two-b of this code.

22-27-5. Landowner liability limitation and exceptions.

(a) *General rule.*—Except as specifically provided in subsections (b) and (c) of this section, an eligible landowner who provides access to the land, without charge or other consideration, which results in the implementation of a reclamation project or a water pollution abatement project:

(1) Is immune from liability for any injury or damage suffered by persons working under the direct supervision of the project sponsor while such persons are within the project work area;

(2) Is immune from liability for any injury to or damage suffered by a third party which arises out of or occurs as a result of an act or omission of the project sponsor which occurs during the implementation of the reclamation project or the water pollution abatement project;

(3) Is immune from liability for any injury to or damage suffered by a third party which arises out of or occurs as a result of a reclamation project or a water pollution abatement project;

(4) Is immune from liability for any pollution resulting from a reclamation project or water pollution abatement project;

(5) Is immune from liability for the operation, maintenance or repair of the water pollution abatement facilities constructed or installed during the project unless the eligible landowner negligently damages or destroys the water pollution abatement facilities or denies access to the project sponsor who is responsible for the operation, maintenance or repair the water pollution abatement facilities.

(b) *Duty to warn.*—The eligible landowner shall warn the project sponsor of known, latent, dangerous conditions located on the project work area which are not the subject of the reclamation project or the water pollution abatement project. Nothing in this article shall limit an eligible landowner's liability which results from the eligible landowner's failure to warn of such known, latent, dangerous conditions.

(c) *Exceptions to immunity.*—Nothing in this article may limit an eligible landowner's liability which results from a reclamation project or water pollution abatement project and which would otherwise exist:

(1) For injury or damage resulting from the landowner's acts or omissions which are reckless or constitute gross negligence or willful misconduct.

(2) Where the landowner accepts or requires consideration for allowing access to the land for the purpose of implementing a reclamation project or water pollution abatement project or to operate, maintain or repair water pollution abatement facilities constructed or installed during a water pollution abatement project.

(3) For the landowner's unlawful activities.

(4) For damage to adjacent landowners or downstream riparian landowners which results from a reclamation project or water pollution abatement project where written notice or public notice of the proposed project was not provided.

22-27-6. Project sponsor liability limitation and exceptions.

(a) *General rule.*—Except as specifically provided in subsection (b) of this section, a project sponsor who provides equipment, materials or services at no cost or at cost for a reclamation project or a water pollution abatement project:

(1) Is immune from liability for any injury to or damage suffered by a person which arises out of or occurs as a result of the water pollution abatement facilities constructed or installed during the water pollution abatement project;

(2) Is immune from liability for any pollution emanating from the water pollution abatement facilities constructed or installed during the water pollution abatement project unless the person affects an area that is hydrologically connected to the water pollution abatement project work area and causes increased pollution by activities which are unrelated to the implementation of a water pollution abatement project, Provided that the project sponsor implements, operates, and maintains the project in accordance with the plans approved by the department;

(3) Is immune from liability for the operation, maintenance and repair of the water pollution abatement facilities constructed or installed during the water pollution abatement project.

(b) *Exceptions.*—

(1) Nothing in this article shall limit in any way the liability of a project sponsor which liability results from the reclamation project or the water pollution abatement project and which would otherwise exist:

(A) For injury or damage resulting from the project sponsor's acts or omissions which are reckless or constitute gross negligence or willful misconduct.

(B) For the person's unlawful activities.

(C) For damages to adjacent landowners or downstream riparian landowners which result from a reclamation project or a water pollution abatement project where written notice or public notice of the proposed project was not provided.

(2) Nothing in this article shall limit in any way the liability of a person who the department has found to be in violation of any other provision or provisions of this chapter.

22-27-7. Permits and zoning.

Nothing in this article may be construed as waiving any existing permit requirements or waiving any local zoning requirements.

22-27-8. Relationship to federal and state programs.

The provisions of this article shall not prevent the department from enforcing requirements necessary or imposed by the Federal Government as a condition to receiving or maintaining program authorization, delegation, primacy or federal funds.

22-27-9. General permits.

If the department determines it will further the purposes of this article, the department may issue a general permit for each reclamation project or water pollution abatement project, which shall:

(1) Encompass all of the activities included in the reclamation project or water pollution abatement project.

(2) Be issued in place of any individual required stream encroachment, earth disturbance or national pollution discharge elimination system permits.

22-27-10. Exceptions.

(a) *General rule.*—Any person who under existing law shall be or may become responsible to reclaim the land or treat or abate the water pollution or any person who for consideration or who receives some other benefit through a contract or any person who through a consent order and agreement or is ordered to perform or complete reclamation or treat or abate water pollution as well as a surety which provided a bond for the site is not eligible nor may receive the benefit of the protections and immunities available under this article.

(b) *Projects near mining or coal refuse sites.*—This article does not apply to a reclamation project or a water pollution abatement project that is located adjacent to, hydrologically connected to or in close proximity to a site permitted under articles two, three or four of this chapter unless:

(1) The reclamation project or water pollution abatement project is submitted to the department in writing before the project is started; and

(2) The department finds:

(A) The reclamation project or the water pollution abatement project will not adversely affect the permittee's obligations under the permit and the applicable law;

(B) The activities on the project work area cannot be used by the permittee to avoid the permittee's reclamation or water pollution treatment or abatement obligations; and

(3) The department issues a written notice of its findings and the approval of the project.

(c) *Projects in lieu of civil or administrative penalties.*—This article shall not apply to a reclamation project or a water pollution abatement project that is performed in lieu of paying civil or administrative penalties.

22-27-11. Water supply replacement.

A public or private water supply affected by contamination or the diminution caused by the implementation of a reclamation project or the implementation of a water pollution abatement project shall be restored or replaced by the department with an alternate source of water adequate in quantity and quality for the purposes served by the water supply.

22-27-12. Rules.

The department may propose legislative rules in accordance with article three, chapter twenty-nine-a of this code as needed to implement the provisions of this article.

2. *Committee Substitute for House Bill 2723*

This bill authorizes amendments to the West Virginia Surface Mining Reclamation Rules at CSR 38-2 and the Surface Mining Blasting Rule at CSR 199-1.

Amendments to CSR 38-2

a. CSR 38-2-2.92. This definition is new, and provides as follows:

2.92 Previously mined areas means land affected by surface mining operations prior to August 3, 1977, that has not been reclaimed to the standards of this rule.

In its amendment, the WVDEP stated that the revision is intended to resolve an outstanding Part 732 issue relating to previously mined areas.

b. CSR 38-2-3.29.a. This provision concerns incidental boundary revisions (IBRs) and is amended by deleting the following language from the end of the first sentence: "is the only practical alternative to recovery of unanticipated reserves or necessary to enhance reclamation efforts or environmental protection."

In its submittal of this amendment, the WVDEP stated that the amendment is intended to delete language that was not approved by OSM (see the February 9, 1999, **Federal Register**, 64 FR 6201, at Finding 10, page 6208).

As amended, CSR 38-2-3.29.a provides as follows:

3.29.a. Incidental Boundary Revisions (IBRs) shall be limited to minor shifts or extensions of the permit boundary into non-coal areas or areas where any coal extraction is incidental to or of only secondary consideration to the intended purpose of the IBR or where it has been demonstrated to the satisfaction of the Secretary that limited coal removal on areas immediately adjacent to the existing permit. IBRs shall also include the deletion of bonded acreage which is overbonded by another valid permit and for which full liability is assumed in writing by the successive permittee. Incidental Boundary Revisions shall not be granted for any prospecting operations, or to abate a violation where encroachment beyond the permit boundary is involved, unless an equal amount of acreage covered under the IBR for encroachment is deleted from the permitted area and transferred to the encroachment area.

c. CSR 38-2-5.4.a. This provision concerns general sediment control provisions, and is amended by adding language to incorporate by reference the U.S. Department of Agriculture, Soil Conservation Service (now known as the Natural Resources Conservation Service), Technical Release No. 60, "Earth Dams and Reservoirs." As amended, Subsection 5.4.a provides as follows:

Sediment control or other water retention structures shall be constructed in appropriate locations for the purposes of controlling sedimentation. All runoff from the disturbed area shall pass through a sedimentation control system. All such systems or other water retaining structures used in association with the mining operation shall be designed, constructed, located, maintained, and used in accordance with this rule and in such a manner as to minimize adverse hydrologic impacts in the permit and adjacent areas, to prevent material damage outside the permit area and to assure safety to the public. The U.S. Department of Agriculture, Soil Conservation Service Technical Release No. 60 (210-VI-TR60, October 1985), "Earth Dams and Reservoirs," Technical Release No. 60 (TR-60) is hereby incorporated by reference. Copies may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161, order No. PB 87-57509/AS. Copies can be inspected at the OSM Headquarters Office, Office of Surface Mining Reclamation and Enforcement, Administrative Record, 1951 Constitution Avenue, NW., Washington, DC, or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

d. CSR 38-2-5.4.b.9. This provision concerns freeboard of sediment control structures, and is amended by adding a proviso that impoundments meeting the Class B or C criteria for dams in "Earth Dams and Reservoirs", TR-60 shall comply with the freeboard hydrograph criteria in "Minimum Emergency Spillway Hydrologic Criteria" table in TR-60. As amended, Subsection 5.4.b.9 provides as follows:

5.4.b.9. Provide adequate freeboard to resist overtopping by waves or sudden increases in volume and adequate slope protection against surface erosion and sudden drawdown. Provided, however, impoundments meeting the Class B or C criteria for dams in "Earth Dams and Reservoirs", TR-60 shall comply with the freeboard hydrograph criteria in "Minimum Emergency Spillway Hydrologic Criteria" table in TR-60.

e. CSR 38-2-5.4.b.10. This provision concerns minimum static safety factor, and has been amended by deleting language in the first sentence related to loss of life or property damage, and adding in its place language concerning impoundments meeting the Class B or C criteria for dams contained in "Earth Dams and Reservoirs," TR-60. As amended, Subsection 5.4.b.10 provides as follows:

5.4.b.10. Provide that an impoundment meeting the size or other criteria of 30 CFR 77.216(a) or W. Va. Code [Section] 22-14 et seq., or Impoundments meeting the Class B or C criteria for dams contained in "Earth Dams and Reservoirs", TR-60, shall have a minimum static safety factor of 1.5 for a normal pool with steady state seepage

saturation conditions, and a seismic safety factor of at least 1.2. Impoundments not meeting the size or other criteria of 30 CFR 77.216 (a) or W. Va. Code [Section] 22-14 *et seq.*, except for a coal mine waste impounding structure, and located where failure would not be expected to cause loss of life or serious property damage shall have a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions.

f. CSR 38-2-5.4.b.12. This provision concerns stable foundations of sediment control structures, and has been amended by adding language at the end of the final sentence to clarify that the laboratory testing of foundation material shall be performed to determine the design requirements for foundation stability. As amended, Subsection 5.4.b.12 provides as follows:

5.4.b.12. Provide for stable foundations during all phases of construction and operation and be designed based on adequate and accurate information on the foundation conditions. For structures meeting the criteria of paragraph 5.4.b.10 of this subdivision, provide foundation investigations and any necessary laboratory testing of foundation material, shall be performed to determine the design requirements for foundation stability.

g. CSR 38-2-5.4.c.7. This provision is new and provides as follows:

5.4.c.7. Impoundments meeting the Class B or C criteria for dams in Earth Dams and Reservoirs, TR-60 shall comply with the following: (1) "Minimum Emergency Spillway Hydrologic Criteria" table in TR-60; (2) the emergency spillway hydrograph criteria in the "Minimum Emergency Spillway Hydrologic Criteria" table in TR-60, or larger event specified by the Secretary; and (3) the requirements of this subdivision.

h. CSR 38-2-5.4.d.4. This provision, concerning design and construction certification of coal refuse impoundments and embankment type impoundments, has been amended by adding language concerning impoundments meeting the Class B or C criteria for dams. As amended, Subsection 5.4.d.4 provides as follows:

5.4.d.4. Design and construction certification of coal refuse impoundments and embankment type impoundments meeting or exceeding the size requirements or other criteria of Federal MSHA regulations at 30 CFR 77.216 (a) or impoundments meeting the Class B or C criteria for dams in Earth Dams and Reservoirs, TR-60 may be performed only by a registered professional engineer experienced in the design and construction of impoundments.

i. CSR 38-2-5.4.e.1. This provision concerns the inspection of impoundments and sediment control structures, and has been amended by adding language concerning

impoundments meeting the Class B or C criteria for dams. As amended, Subsection 5.4.e.1 provides as follows:

5.4.e.1. A qualified registered professional engineer or other qualified professional specialist, under the direction of the professional engineer, shall inspect each impoundment or sediment control structure provided, that a licensed land surveyor may inspect those impoundments or sediment control or other water retention structures which do not meet the size or other criteria of 30 CFR 77.216(a). Impoundments meeting the Class B or C criteria for dams in Earth Dams and Reservoirs, TR-60 or W. Va. Code [Section] 22-14 *et seq.*, and which are not constructed of coal processing waste or coal refuse. The professional engineer, licensed land surveyor, or specialist shall be experienced in the construction of impoundments and sediment control structures.

j. CSR 38-2-5.4.f. This provision concerns examinations of embankments, and has been amended by adding language concerning impoundments meeting the Class B or C criteria for dams. As amended, Subsection 5.4.f provides as follows:

5.4.f. Examinations. Embankments subject to Federal MSHA regulations at 30 CFR 77.216 or impoundments meeting the Class B or C criteria for dams in Earth Dams and Reservoirs, TR-60 must be examined in accordance with 77.216-3 of said regulations. Other embankments shall be examined at least quarterly by a qualified person designated by the operator for appearance of structural weakness and other hazardous conditions. Examination reports shall be retained for review at or near the operation.

In its submittal of the amendments concerning sediment control or other water retention structures, the WVDEP stated that the amendments are intended to resolve the outstanding Part 732 issue that impoundments meeting the Class B or C criteria for dams in Earth Dams and Reservoirs, TR-60, comply with (1) the freeboard criteria in TR-60, (2) have a minimum static safety factor of 1.5 for a normal pool with steady-state seepage saturation conditions, and a seismic safety factor of at least 1.2, (3) emergency spillway hydrologic criteria and the emergency spillway hydrograph criteria in TR-60, and (4) specify the certification, inspections, and examinations of requirements of these structures (see the Part 732 letter dated July 22, 1997, Administrative Record Number WV-1071). The WVDEP stated that the Federal counterpart is found in 30 CFR 816.49 concerning impoundments.

k. CSR 38-2-7.4.b.1.A.1. This provision concerns the development of a planting plan and long-term management plan for commercial forestry. The first sentence of this

provision is amended by clarifying that the professional forester must be a West Virginia registered professional forester.

l. CSR 38-2-7.4.b.1.A.3. This provision concerns the commercial species plan for commercial forestry and is amended in the first sentence to clarify that the registered professional forester must be a West Virginia registered professional forester.

m. CSR 38-2-7.4.b.1.A.3.(b). This provision concerns the creation of a certified geology map relating to commercial forestry areas. The provision is amended by revising the kinds of information pertaining to physical and chemical properties of strata that must be provided in the permit application. As amended, Subsection 7.4.b.1.A.3.(b) provides as follows:

7.4.b.1.A.3.(b). An approved geologist shall create a certified geology map showing the location, depth, and volume of all strata in the mined area, the physical and chemical properties of each stratum to include rock texture, pH, potential acidity and alkalinity. For each stratum proposed as soil medium, the following information shall also be provided: total soluble salts, degree of weathering, extractable levels of phosphorus, potassium, calcium, magnesium, manganese, and iron and other properties required by the Secretary to select best available materials for mine soils.

In its submittal of its amendment to this provision, the WVDEP stated that the amendment is to clarify that only the material proposed to be the resulting soil medium needs the additional analysis.

n. CSR 38-2-7.4.b.1.A.4. This provision concerns the commercial forestry long-term management plan and is amended in the first sentence by adding the words "West Virginia" immediately before the words "registered professional forester."

o. CSR 38-2-7.4.b.1.B.1. This provision concerns a commercial forestry and forestry reclamation plan, and is amended by deleting the word "certified" immediately before the phrase "professional soil scientist" in the first sentence.

In its submittal of its amendment to this provision, the WVDEP stated that the word "certified" is being deleted because West Virginia does not have a certification system for soil scientist.

p. CSR 38-2-7.4.b.1.C.1. This provision concerns commercial forestry areas, and is amended by adding the word "areas" immediately following the words "commercial forestry" in the first sentence, and by revising the standards for slopes of the postmining landform. As amended, Subsection 7.4.b.1.C.1 provides as follows:

7.4.b.1.C.1. For commercial forestry areas, the Secretary shall assure that the postmining landscape is rolling, and diverse. The backfill on the mine bench shall be configured to create a postmining topography that includes the principles of land forming (e.g., the creation of swales) to reflect the premining irregularities in the land. Postmining landform shall provide a rolling topography with slopes between 5% and 20% with an average slope of 10% to 15%. The elevation change between the ridgeline and the valleys shall be varied. The slope lengths shall not exceed 500 feet. The minimum thickness of backfill, including mine soil, placed on the pavement of the basal seam mined in any particular area shall be ten (10) feet.

q. CSR 38–2–7.4.b.1.C.2. This provision concerns commercial forestry areas and is amended by adding the word “areas” immediately after the phrase “commercial forestry” in the first sentence.

r. CSR 38–2–7.4.b.1.C.3. This provision concerns commercial forestry areas and is amended by deleting the words “in areas” in the first sentence adding the word “areas” in their place.

s. CSR 38–2–7.4.b.1.C.4. This provision concerns commercial forestry areas and is amended by adding the word “areas” immediately following the words “commercial forestry” in the first sentence. In addition, the first sentence is also amended by deleting the word “permitted” and replacing that word with the words “commercial forestry.”

t. CSR 38–2–7.4.b.1.C.5. This provision concerns forestry areas and is amended by adding the word “areas” immediately after the word “forestry” in the first sentence.

The WVDEP stated in its submittal that this change has been made to “address a concern of the QA/QC Panel that the Configuration of regrade area is still too flat (Reference: Directors Meeting October 15, 2003).”

u. CSR 38–2–7.4.b.1.D.6. This provision concerns soil substitutes, and is amended by adding the words “and is in accordance with 14.3.c of this rule” at the end of the first sentence. As amended, the first sentence at CSR 38–2–7.4.b.1.D.6 provides as follows:

7.4.b.1.D.6. Before approving the use of soil substitutes, the Secretary shall require the permittee to demonstrate that the selected overburden material is suitable for restoring land capability and productivity and is in accordance with 14.3.c of this rule.

The WVDEP stated in its submittal that this change has been made to comply with the required program amendment codified in the Federal regulations at 30 CFR 948.16(www). The Federal regulations at 30 CFR 948.16(www) provide that CSR 38–2–7.4.b.1.D.6 be amended to provide that the substitute material is equally

suitable for sustaining vegetation as the existing topsoil and the resulting medium is the best available in the permit area to support vegetation.

v. CSR 38–2–7.4.b.1.D.8. This provision concerns the final surface material used as the commercial forestry mine soil and has been amended in the first sentence by adding the word “areas” immediately after the phrase “[f]or commercial forestry.”

w. CSR 38–2–7.4.b.1.D.9. This provision concerns the final surface material used as the forestry mine soil and has been amended in the first sentence by adding the word “areas” immediately after the phrase “[f]or forestry.”

x. CSR 38–2–7.4.b.1.D.11. This provision concerns forestry mine soil, and has been amended by adding the phrase “except for valley fill faces” at the end of the sentence. As amended, Subsection 7.4.b.1.D.11 provides that “[f]orestry mine soil shall, at a minimum, be placed on all areas achieving AOC, except for valley fill faces.”

In its submittal, the WVDEP stated that the amendment is intended to provide clarification.

y. CSR 38–2–7.4.b.1.H.1. This provision concerns tree species and compositions for commercial forestry areas and forestry areas. The list of hardwoods in this provision is amended by deleting “white and red oaks, other native oaks” and adding in their place “white oak, chestnut oak, northern red oak, and black oak” and by adding the words “basswood, cucumber magnolia” to the list. In addition, the word “areas” is added immediately following the words “[f]or forestry” in the third sentence. In addition, the list of hardwoods for forestry areas is amended by deleting the words “white and red oaks, other native oaks” and adding in their place the words “white oak, chestnut oak, northern red oak, black oak,” and by adding “basswood” and “cucumber magnolia” to the list. As amended, Subsection 7.4.b.1.H.1 provides as follows:

7.4.b.1.H.1. Commercial tree and nurse tree species selection shall be based on site-specific characteristics and long-term goals outlined in the forest management plan and approved by a registered professional forester. For commercial forestry areas, the Secretary shall assure that all areas suitable for hardwoods are planted with native hardwoods at a rate of 500 seedlings per acre in continuous mixtures across the permitted area with at least six (6) species from the following list: white oak, chestnut oak, northern red oak, black oak, white ash, yellow-poplar, basswood, cucumber magnolia, black walnut, sugar maple, black cherry, or native hickories. For forestry areas,

the Secretary shall assure that all areas suitable for hardwoods are planted with native hardwoods at a rate of 450 seedlings per acre in continuous mixtures across the permitted area with at least three (3) or four (4) species from the following list: white oak, chestnut oak, northern red oak, black oak, white ash, yellow-poplar, basswood, cucumber magnolia, black walnut, sugar maple, black cherry, or native hickories.

In its submittal of the amendment to this provision, the WVDEP stated that the amendment is intended to provide clarification for oaks and mixtures.

z. CSR 38–2–7.4.b.1.H.2. This provision has been amended in the first sentence by adding the word “areas” immediately after the phrase “[f]or commercial forestry.”

aa. CSR 38–2–7.4.b.1.H.6. This provision has been amended in the first sentence by adding the word “areas” immediately after the phrase “[f]or commercial forestry.”

bb. CSR 38–2–7.4.b.1.I.1. Subsection 7.4.b.1.I.1 has been amended in the last sentence by deleting the word “certified” immediately before the words “soil scientist” and adding in its place the word “professional.” As amended, the sentence provides as follows: “[b]efore approving Phase I bond release, a professional soil scientist shall certify, and the Secretary shall make a written finding that the mine soil meets these criteria.”

cc. CSR 38–2–7.4.b.1.I.2. Subsection 7.4.b.1.I.2 has been amended in two places by adding the word “areas.” The first sentence has been amended by adding the word “areas” immediately after the phrase “for commercial forestry.” The second from last sentence has been amended by adding the word “areas” immediately after the phrase “both commercial forestry and forestry.”

dd. CSR 38–2–7.4.b.1.I.3. Subsection 7.4.b.1.I.3 has been amended in three places by adding the word “areas.” The first sentence has been amended by adding the word “areas” immediately after the phrase “for commercial forestry and forestry.” The second sentence has been amended by adding the word “areas” immediately after the words “[f]or forestry.” The third sentence has been amended by adding the word “areas” immediately after the phrase “for commercial forestry.”

ee. CSR 38–2–7.4.b.1.I.4. This provision concerns a commercial forestry mitigation plan, and has been amended in the last sentence by adding the phrase “and the site meets the standards of 9.3.h of this rule” at the end of the sentence. In addition, the word “and” has been deleted in the last sentence immediately after the phrase “follow the provisions of this rule” and

that word has been replaced by a semicolon.

In its submittal of the amendment to this provision, the WVDEP stated that in an August 18, 2000, **Federal Register** notice (65 FR 50409, see pages 50423 and 50424), OSM stated that the requirement to pay twice the remaining bond is approved to the extent that payment of the civil penalty will not allow an other to receive final release. The WVDEP stated that the remainder of 7.4.1.I.4 was not approved.

ff. CSR 38–2–7.4.b.1.J. This provision concerns the front faces of valley fills and has been amended by deleting existing Subsections 7.4.b.1.J.1.(b) and (c) and re-designating existing Subsections 7.4.b.1.J.1.(d) and (e) as new Subsections 7.4.b.1.J.1.(b) and (c). As amended, Subsection 7.4.b.1.J. provides as follows:

7.4.b.1.J. Front Faces of Valley Fills.

7.4.b.1.J.1. Front faces of valley fills shall be exempt from the requirements of this rule except that:

7.4.b.1.J.1.(a). They shall be graded and compacted no more than is necessary to achieve stability and non-erodability;

7.4.b.1.J.1.(b). The groundcover mixes described in subparagraph 7.4.d.b.1.G. shall be used unless the Secretary requires a different mixture;

7.4.b.1.J.1.(c) Kentucky 31 fescue, serecia lespedeza, vetches, clovers (except ladino and white clover) or other invasive species may not be used; and

7.4.b.1.J.2. Although not required by this rule, native, non-invasive trees may be planted on the faces of fills.

In its submittal of this provision, the WVDEP stated that this provision was amended to remove language that contradicts other parts of CSR 38–2–7.4.

gg. CSR 38–2–7.5.a. Section CSR 38–2–7.5 concerns Homestead postmining land use. Subsection CSR 38–2–7.5.a has been amended by adding a new sentence to the end of the existing language. As amended, CSR 38–2–7.5.a provides as follows:

7.5.a. Operations receiving a variance from AOC for this use shall establish homesteading on at least one half (½) of the permit area. The remainder of the permit area shall support an alternate AOC variance use. The acreage considered homesteading shall be the sum of the acreage associated with the following: the civic parcel; the commercial parcel; the conservation easement; the homestead parcel; the rural parcel and any required infrastructure.

We note that this revision is intended to comply with the required program amendment codified in the Federal regulations at 30 CFR 948.16 (rrrrr). The requirement at 30 CFR 948.16 (rrrrr) provides for the amendment of: (1) CSR 38–2–7.5.a to clarify whether or not the calculated acreage of the Commercial

Parcel(s) is to be summed with the total Homestead acreage for the purpose of calculating the acreage of other various components of the Homestead Area (such as Common Lands, Village Parcels, Conservation Easement, etc.); and (2) CSR 38–2–7.5.l.4 to clarify whether or not the acreage for Public Nursery is to be calculated based on the amount of acreage available for the Village Homestead, the Civil Parcel, or the entire Homestead Area (see Item 2(mm) below).

hh. CSR 38–2–7.5.b.3. This provision concerns the definition of “Commercial parcel,” and has been amended by deleting the word “regulation” in the last sentence and replacing that word with the word “rule.” In addition, a new sentence has been added to the end of the provision. As amended, Subsection 7.5.b.3 provides as follows:

7.5.b.3. Commercial parcel means a parcel retained by the landowner of record and incorporated within the homestead area on which the landowner or its designee may develop commercial uses. The size and location of commercial parcels shall comply with the requirements of this rule. Provided, however, parcels retained by the landowner for commercial development and incorporated within the Homestead area must be developed for commercial uses as provided by subdivision 7.5.g.5 of this rule.

In its submittal of the amendment of this provision, the WVDEP stated that the amendment is to comply with the required program amendment codified in the Federal regulations at 30 CFR 948.16 (fffff). The requirement at 30 CFR 948.16 (fffff) provides that CSR 38–2–7.5.b.3 be amended, or the West Virginia program otherwise be amended, to clarify that parcels retained by the landowner for commercial development and incorporated within the Homestead area must be developed for commercial uses as provided by Subsection CSR 38–2–7.5.g.5.

ii. CSR 38–2–7.5.i.10. This provision concerns wetlands associated with Homestead areas, and is amended by adding a new sentence immediately following the existing first sentence. As amended, Subsection 7.5.i.10 provides as follows:

7.5.i.10. Wetlands. Each homestead plan may describe areas within the homestead area reserved for created wetlands. The created wetlands shall comply with the requirements of 3.5 of this rule. These created wetlands may be ponds, permanent impoundments or wetlands created during mining. They may be left in place after final bond release. Any pond or impoundment left in place is subject to requirements under subsection 5.5 of this rule.

In its submittal of the amendment of this provision, the WVDEP stated that

the amendment is to comply with the required program amendment codified in the Federal regulations at 30 CFR 948.16(iiiiii). The requirement at 30 CFR 948.16(iiiiii) provides that CSR 38–2–7.5.i.10 be amended, or the West Virginia program otherwise be amended, to require compliance with the permit requirements at CSR 38–2–3.5.d.

jj. CSR 38–2–7.5.j.3.A. This provision concerns the definition of soil in relation to Homestead areas, and is amended in the first sentence by adding the soil horizon “E” between soil horizons “A” and “B.”

In its submittal of the amendment of this provision, the WVDEP stated that the amendment is to comply with the required program amendment codified in the Federal regulations at 30 CFR 948.16(jjjjj). The requirement at 30 CFR 948.16(jjjjj) provides that CSR 38–2–7.5.j.3.A be amended by adding an “E” horizon.

kk. CSR 38–2–7.5.j.3.B. This provision concerns the recovery and use of soil on Homestead areas, and is amended by deleting the exception that is stated in the first sentence. As amended, Subsection 7.5.j.3.B provides as follows:

7.5.j.3.B. The Secretary shall require the operator to recover and use all the soil on the mined area, as shown on the soil maps. The Secretary shall assure that all saved soil includes all of the material from the O and A horizons.

In its submittal of this revision, the WVDEP stated that the revision is intended to comply with the required program amendment codified in the Federal regulations at 30 CFR 948.16 (kkkkk). The requirement at 30 CFR 948.16 (kkkkk) provides that CSR 38–2–7.5.j.3.B be amended by deleting the phrase, “except for those areas with a slope of at least 50%,” and by deleting the phrase, “and other areas from which the applicant affirmatively demonstrates and the Director of the WVDEP finds that soil cannot reasonably be recovered.”

ll. CSR 38–2–7.5.j.3.E. This provision concerns soil substitutes and is amended by adding the phrase “and is in accordance with 14.3.c of this rule” at the end of the first sentence.

In its submittal of this revision, the WVDEP stated that the revision is intended to comply with the required program amendment codified in the Federal regulations at 30 CFR 948.16 (lllll). The requirement at 30 CFR 948.16 (lllll) provides that CSR 38–2–7.5.j.3.E be amended, or the West Virginia program otherwise be amended, to provide that soil substitute material must be equally suitable for sustaining

vegetation as the existing topsoil and the resulting medium is the best available in the permit area to support vegetation.

mm. CSR 38–2–7.5.l.4.A. This provision concerns public nursery associated with Homestead areas, and is amended by adding the word “village” between the words “homestead” and “area” in the first sentence.

In its submittal of this revision, the WVDEP stated that the revision is intended to comply with the required program amendment codified in the Federal regulations at 30 CFR 948.16 (rrrrr). The requirement at 30 CFR 948.16 (rrrrr) provides for the amendment of: (1) CSR 38–2–7.5.a to clarify whether or not the calculated acreage of the Commercial Parcel(s) is to be summed with the total Homestead acreage for the purpose of calculating the acreage of other various components of the Homestead Area (such as Common Lands, Village Parcels, Conservation Easement, etc.); and (2) CSR 38–2–7.5.l.4 to clarify whether or not the acreage for the Public Nursery is to be calculated based on the amount of acreage available for the Village Homestead, the Civil Parcel, or the entire Homestead Area.

nn. CSR 38–2–7.5.o.2. This provision concerns Phase II bond release of surface mining operations with a Homestead postmining land use, and is amended by adding a proviso at the end of the existing provision. As amended, CSR 38–2–7.5.o.2 provides as follows:

7.5.o.2. Phase II bond release may not occur before two years have passed since Phase I bond release. Before approving Phase II bond release, the Secretary shall assure that the vegetative cover is still in place. The Secretary shall further assure that the tree survival on the conservation easements and public nurseries are no less than 300 trees per acre (80% of which must be species from the approved list). Furthermore, in the conservation easement and public nursery areas, there shall be a 70% ground cover where ground cover includes tree canopy, shrub and herbaceous cover, and organic litter. Trees and shrubs counted in considering success shall be healthy and shall have been in place at least two years, and no evidence of inappropriate dieback. Phase II bond release shall not occur until the service drops for the utilities and communications have been installed to each homestead parcel. Provided, however, the applicable revegetation success standards for each phase of bond release on Commercial Parcels, Village Parcels, Rural Parcels, Civic Parcels and Common Lands shall be its corresponding revegetation success standards specified in 9.3 of this rule.

In its submittal of this revision, the WVDEP stated that the revision is intended to comply with the required program amendment codified in the

Federal regulations at 30 CFR 948.16 (ppppp). The requirement at 30 CFR 948.16 (ppppp) provides that CSR 38–2–7.5.o.2 be amended, or the West Virginia program otherwise be amended, to identify the applicable revegetation success standards for each phase of bond release on Commercial Parcels, Village Parcels, Rural Parcels, Civic Parcels and Common Lands.

oo. CSR 38–2–9.3.d. Subsection 9.3 concerns the standards for evaluating vegetative cover. Subsection 9.3.d is amended by deleting the word “determine” in the first sentence, and adding in its place the word “verify.” The existing second sentence concerning a statistically valid sampling technique is deleted, and is replaced by a new sentence that requires the operator to provide the Secretary of the WVDEP with a statistically valid sampling technique. As amended, Subsection 9.3.d provides as follows:

9.3.d. Not less than two (2) years following the last date of augmented seeding, the Secretary shall conduct a vegetative inspection to verify that applicable standards for vegetative success have been met. The operator shall provide to the Secretary a vegetative evaluation using a statistically valid sampling technique with a ninety (90) percent statistical confidence interval. An inspection report shall be filed for each inspection and when the standard is met, the Secretary shall execute a Phase II bond release.

pp. CSR 38–2–9.3.e. Subsection 9.3.e concerns request of final bond release, and is amended by adding the phrase “which includes a final vegetative evaluation using approved, statistically valid sampling techniques” to the end of the first sentence. In addition, the words “inspection to verify the” are added to the second sentence, immediately following the phrase “the Secretary shall conduct.” Finally, the words “using approved, statistically valid sampling techniques” are deleted from the end of the second sentence. As amended, Subsection 9.3.e provides as follows:

9.3.e. After five (5) growing seasons following the last augmented seeding, planting, fertilization, revegetation, or other work, the operator may request a final inspection and final bond release which includes a final vegetative evaluation using approved, statistically valid sampling techniques. Upon receipt of such request, the Secretary shall conduct an inspection to verify the final vegetative evaluation. A final report shall be filed and if the applicable standards have been met, the Secretary shall release the remainder of the bond. Ground cover, production, or stocking shall be considered equal to the approved success standard when they are not less than 90 (ninety) percent of the success standard.

In its submittal of the amendment of this provision, the WVDEP stated that the amendment is to make it clear that the operator will provide the information to determine if the vegetation success standard has been met.

qq. CSR 38–2–14.5.h. Subsection CSR 38–2–14.5 concerns performance standards for hydrologic balance. Subsection 14.5.h is amended by adding two new sentences at the end of this provision relating to the waiver of water supply replacement. As amended, Subsection 14.5.h provides as follows:

14.5.h. A waiver of water supply replacement granted by a landowner as provided in subsection (b) of section 24 of the Act [WVSMCRA] shall apply only to underground mining operations, provided that a waiver shall not exempt any operator from the responsibility of maintaining water quality. Provided, however, 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. 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 that 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.

In its submittal of this revision, the WVDEP stated that the revision is intended to comply with the required program amendment codified in the Federal regulations at 30 CFR 948.16 (sss). The requirement at 30 CFR 948.16 (sss) provides that CSR 38–2–14.5.h be amended, or the West Virginia program otherwise be amended, 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.

rr. CSR 38–2–14.15.c.3. Subsection CSR 38–2–14.15.c.3 concerns performance standards for contemporaneous reclamation. Subsection 14.15.c.3 is amended by deleting the reference to the “National Environmental Policy Act” and adding in its place a reference to the “Endangered Species Act.”

In its submittal of the amendment to this provision, the WVDEP stated that the amendment is to correct a wrong cross-reference.

ss. CSR 38–2–20.6.d. Section CSR 38–2–20 concerns Inspection and Enforcement. Subsection CSR 38–2–

20.6.d concerns Notice of Informal Assessment Conference, and is amended by deleting the second sentence of this provision. The deleted sentence provided as follows: “[p]rovided, however, the operator shall forward the amount of proposed penalty assessment to the Secretary for placement in an interest bearing escrow account.

tt. CSR 38–2–20.6.j. Subsection CSR 38–2–20.6.j concerns Escrow, and is amended by deleting the words “an informal conference or” and adding in their place the word “a.” As amended, CSR 38–2–20.6.j provides as follows: “Escrow. If a person requests a judicial review of a proposed assessment, the proposed penalty assessment shall be held in escrow until completion of the judicial review.”

In its submittal of this amendment, the WVDEP stated that the requirement to pre-pay penalty prior to informal conference did not achieve the desired results. WVDEP also stated that it has led to confusion between agency and industry alike and, therefore, the agency is deleting this requirement.

Amendments to CSR 199–1

a. CSR 199–1–2.36a. Section CSR 199–1–2 concerns Definitions. New Subsection 2.36a has been added to define the term “Community or Institutional Building.” New Subsection 2.36a provides as follows:

2.36a. Community or Institutional Building means any structure, other than a public building or an occupied dwelling, which is used primarily for meetings, gatherings or functions of local civic organizations or other community groups; functions as an educational, cultural, historic, religious, scientific, correctional, mental health or physical health care facility; or is used for public services, including, but not limited to, water supply, power generation or sewage treatment.

In its submittal of the amendment to this provision, the WVDEP stated that the amendment further defines the definition, and the information was taken from CSR 38–2.

b. CSR 199–1–2.36b. New Subsection 2.36b has been added to define the term “Public Building.” New Subsection 2.36b provides as follows:

2.36b. Public Building means any structure that is owned or leased by a public agency or used primarily for public business or meetings.

In its submittal of the amendment to this provision, the WVDEP stated that the amendment further defines the definition, and the information was taken from CSR 38–2.

c. CSR 199–1–2.37. New Subsection 2.37 has been added to define the term “Structure.” Existing Subsections 2.37,

2.38, and 2.39 have been renumbered as Subsections 2.38, 2.39, and 2.40. New Subsection 2.37 provides as follows:

2.37 Structure means any man-made structures within or outside the permit areas which include, but is not limited to: Dwellings, outbuildings, commercial buildings, public buildings, community buildings, institutional buildings, gas lines, water lines, towers, airports, underground mines, tunnels and dams. The term does not include structures built and/or utilized for the purpose of carrying out the surface mining operation.

In its submittal of the amendment to this provision, the WVDEP stated that the definition was taken from CSR 38–2.

d. CSR 199–1–3.3.b. Subsection CSR 199–1–3.3 concerns public notice of blasting operations, and has been amended by adding new Subsection 3.3.b to provide as follows:

3.3.b. Blasting Signs. The following signs and markers shall be erected and maintained while blasting is being conducted:

3.3.b.1 Warning signs shall be conspicuously displayed at all approaches to the blasting site, along haulageways and access roads to the mining operation and at all entrances to the permit area. The sign shall at a minimum be two feet by three feet (2' x 3') reading “WARNING! Explosives in Use” and explaining the blasting warning and the all clear signals and the marking of blasting areas and charged holes; and

3.3.b.2 Where blasting operations will be conducted within one hundred (100) feet of the outside right-of-way of a public road, signs reading “Blasting Area”, shall be conspicuously placed along the perimeter of the blasting area.

In its submittal of the amendment to this provision, the WVDEP stated that the amendment adds information from CSR 38–2 relating to blasting signs.

e. CSR 199–1–3.7. Subsection CSR 199–1–3.7 concerns blasting control for other structures, and has been amended by deleting the words “in subsection 2.35 of this rule” in the first sentence.

In its submittal of the amendment to this provision, the WVDEP stated that the amendment eliminates an incorrect reference.

f. CSR 199–1–4.8. Subsection CSR 199–1–4.8 concerns violations by a certified blaster, and has been amended by deleting the words “director shall” and replacing those words with the words “Secretary may.” In addition, the words “written notification” are added immediately after the word “issue.” The phrase “or revoke the certification of” is added immediately after the phrase “a temporary suspension order”, and the word “against” has been deleted. As amended, the paragraph at Subsection CSR 199–1–4.8 provides as follows:

4.8. Violations by a Certified Blaster. —The Secretary may issue written notification, a temporary suspension order, or revoke the certification of a certified blaster who is, based on clear and convincing evidence, in violation of any of the following:

g. CSR 199–1–4.8.c. This Subsection has been amended by deleting the words “[s]ubstantial or significant” at the beginning of the first sentence, and by capitalizing the word “federal” in the first sentence.

h. CSR 199–1–4.8.f and 4.8.g. These Subsections are added and provide as follows:

4.8.f. A pattern of conduct which is not consistent with acceptance of responsibility for blasting operations, *i.e.*, repeated violations of State or Federal laws pertaining to explosives; or

4.8.g. Willful Conduct—The Secretary shall suspend or revoke the certification of a blaster for willful violations of State or Federal laws pertaining to explosive.

In its submittal of the amendment to this provision, the WVDEP stated that the amendment was made because the wording was not consistent with previously approved rule 22–4–6.01, according to OSM. In addition, the WVDEP stated that this subsection has been reorganized and renumbered for clarity reasons, as required by the Council of Joint Rulemaking.

i. CSR 199–1–4.9. This subsection concerns penalties, and has been amended, reorganized and renumbered. A new title, “Suspension and Revocation” has been added at Subsection 4.9.a. Existing Subsection 4.9.a. has been renumbered as 4.9.a.1 and 4.9.a.2. Existing Subsection 4.9.b has been renumbered as 4.9.a.3. New Subsection 4.9.a.4 has been added. Existing Subsections 4.9.c and 4.9.d have been renumbered as 4.10 and 4.11, respectively. Finally, existing Subsections 4.10, 4.11, and 4.12 have been renumbered as Subsections 4.12, 4.13, and 4.14, respectively. As amended, Subsections 4.9, and 4.10 through 4.14 provide as follows:

4.9. Penalties.

4.9.a Suspension and Revocation.

4.9.a.1. Suspension.—Upon service of a temporary suspension order, the certified blaster shall be granted a hearing before the Secretary to show cause why his or her certification should not be suspended or revoked.

4.9.a.2. The period of suspension will be conditioned on the severity of the violation committed by the certified blaster and, if the violation can be abated, the time period in which the violation is abated. The Secretary may require remedial actions and measures and re-training and re-examination as a condition for re-instatement of certification.

4.9.a.3. Revocation.—If the remedial action required to abate a suspension order, issued

by the Secretary to a certified blaster, or any other action required at a hearing on the suspension of a blaster's certification, is not taken within the specified time period for abatement, the Secretary may revoke the blaster's certification and require the blaster to relinquish his or her certification card. Revocation will occur if the certified blaster fails to re-train or fails to take and pass reexamination as a requirement for remedial action.

4.9.a.4. In addition to suspending or revoking the certification of a blaster, failure to comply with the requirements of this subsection may also result in further suspension or revocation of a blaster's certification.

4.10. Reinstatement.—Subject to the discretion of the Secretary, and based on a petition for reinstatement, any person whose blaster certification has been revoked, may, if the Secretary is satisfied that the petitioner will comply with all blasting law and rules, apply to re-take the blasters certification examination, provided the person meets all of the requirements for blasters certification specified by this subsection, and has completed all requirements of the suspension and revocation orders, including the time period of the suspension.

4.11. Civil and Criminal Penalties.—Every certified blaster is subject to the individual civil and criminal penalties provided for in W. Va. Code § 22–3–17.

4.12. Hearings and Appeals.—Any certified blaster who is served a suspension order, revocation order, or civil and criminal sanctions is entitled to the rights of hearings and appeals as provided for in W. Va. Code §§ 22–3–16 and 17.

4.13. Blasting Crew.—Persons who are not certified and who are assigned to a blasting crew, or assist in the use of explosives, shall receive directions and on-the-job training from a certified blaster.

4.14. Reciprocity With Other States.—The Secretary may enter into a reciprocal agreement with other states wherein persons holding a valid certification in that state may apply for certification in West Virginia, and upon approval by the Secretary, be certified without undergoing the training or examination requirements set forth in this rule.

In its submittal of the amendments to this provision, the WVDEP stated that the amendments provide clarification and remove incorrect reference. In addition, the WVDEP stated that Subsection 4.9 has been reorganized and renumbered for clarity reasons, as required by the Council of Joint Rulemaking. We also note, that the amendments to Subsection 4.9 are intended to address the required program amendment codified in the Federal regulations at 30 CFR 948.16(a). The Federal regulations at 30 CFR 948.16(a) provide that West Virginia must amend CSR 199–1–4.9.a and 4.9.b, or otherwise amend the West Virginia program, to provide that upon finding of willful conduct, the Secretary of the

WVDEP shall revoke or suspend a blaster's certification.

3. Committee Substitute for House Bill 3033

WV Code 22–3–11 has been amended by adding new Subsection 22–3–11(h)(2) to provide as follows:

(2) In managing the Special Reclamation Program, the Secretary shall:

(A) Pursue cost effective alternative water treatment strategies; and

(B) Conduct formal actuarial studies every two years and conduct informal reviews annually on the Special Reclamation Fund.

4. House Bill 3236

This Bill amended the W. Va. Code by adding new Section 22–3–11a and new Section 22–3–32a to provide as follows:

22–3–11a. Special reclamation tax; clarification of imposition of tax; procedures for collection and administration of tax; application of Tax Procedure and Administration Act and Tax Crimes and Penalties Act.

(a) It is the intent of the Legislature to clarify that from the date of its enactment, the special reclamation tax imposed pursuant to the provisions of section eleven of this article is intended to be in addition to any other taxes imposed on persons conducting coal surface mining operations including, but not limited to the tax imposed by section thirty-two of this article, the tax imposed by article twelve-b, chapter eleven of this code, the taxes imposed by article thirteen-a of said chapter and the tax imposed by article thirteen-v of said chapter.

(b) Notwithstanding any other provisions of section eleven of this article to the contrary, under no circumstance shall an exemption from the taxes imposed by article twelve-b, thirteen-a or thirteen-v, chapter eleven of this code be construed to be an exemption from the tax imposed by section eleven of this article.

(c) When coal included in the measure of the tax imposed by section eleven of this article is exempt from the tax imposed by article twelve-b, chapter eleven of this code, the tax imposed by section eleven of this article shall be paid to the tax commissioner in accordance with the provisions of sections four through fourteen, inclusive, article twelve-b, chapter eleven of this code, which provisions are hereby incorporated by reference in this article.

(d) General procedure and administration.—Each and every provision of the “West Virginia Tax Procedure and Administration Act” set forth in article ten, chapter eleven of the code applies to the special tax imposed by section eleven of this article with like effect as if such act were applicable only to the special tax imposed by said section eleven and were set forth *in extenso* in this article, notwithstanding the provisions of section three of said article ten.

(e) Tax crimes and penalties.—Each and every provision of the “West Virginia Tax Crimes and Penalties Act” set forth in article nine of said chapter eleven applies to the special tax imposed by section eleven of this

article with like effect as if such act were applicable only to the special tax imposed by said section eleven and set forth *in extenso* in this article, notwithstanding the provisions of section two of said article nine.

22–3–32a. Special tax on coal; clarification of imposition of tax; procedures for collection and administration of tax.

(a) It is the intent of the Legislature to clarify that from the date of its enactment, the special tax on coal imposed pursuant to the provisions of section thirty-two of this article is intended to be in addition to any other taxes imposed on every person in this state engaging in the privilege of severing, extracting, reducing to possession or producing coal for sale profit or commercial use including, but not limited to the tax imposed by section eleven of this article, the tax imposed by article twelve-b, chapter eleven of this code, the taxes imposed by article thirteen-a of said chapter and the tax imposed by article thirteen-v of said chapter.

(b) Notwithstanding any other provisions of section thirty-two of this article to the contrary, under no circumstance shall an exemption from the taxes imposed by article twelve-b, thirteen-a or thirteen-v, chapter eleven of this code be construed to be an exemption from the tax imposed by section thirty-two of this article.

(c) When coal included in the measure of the tax imposed by section thirty-two of this article is exempt from the tax imposed by article twelve-b, chapter eleven of this code, the tax imposed by section thirty-two of this article shall be paid to the tax commissioner in accordance with the provisions of sections four through fourteen, inclusive, article twelve-b, chapter eleven of this code, which provisions are hereby incorporated by reference in this article.

5. CSR 38–2–14.14.g.2.A.6 Removal of Erosion Protection Zone (EPZ)

This amendment consists of information provided by the WVDEP, including a draft memorandum, to support its assertion that OSM should reverse its previous disapproval of language concerning EPZ at CSR 38–2–14.14.g.2.A.6. In its submittal concerning this provision, the WVDEP stated that in a letter to OSM dated March 8, 2005 (actually, the letter's date was March 9, 2005, Administrative Record Number WV–1418), the State had explained its position on EPZ and the circumstances when the EPZ could be left in place as a permanent structure. The WVDEP's March 9, 2005, letter was in response to OSM's disapproval of language concerning EPZ at CSR 38–2–14.14.g.2.A.6 that was part of a proposed amendment submitted to OSM by letter dated March 18, 2003 (Administrative Record Number WV–1352). The language was not approved, WVDEP stated, based on the lack of U.S. Environmental Protection Agency (EPA) concurrence with the State's proposed language. Background information on OSM's previous disapproval of language

concerning EPZ at CSR 38–2–14.14.g.2.A.6 is presented below.

Under the Federal regulations at 30 CFR 732.17(h)(11)(ii), OSM is required to obtain written concurrence from EPA for proposed provisions of a State 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 EPA for concurrence and comments on the proposed amendments that were submitted to OSM by letter dated March 18, 2003 (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 EPZ associated with single-lift valley fills at CSR 38–2–14.14.g.1 (Durable Rock Fills).

OSM published its decision on a proposed West Virginia program amendment that addressed, in part, the addition of new language concerning EPZ related to durable rock fills on July 7, 2003 (see 68 FR 40157, finding 19, pages 40161 and 40162). In that finding, OSM did not approve language at CSR 38–2–14.14.g.2.A.6 that would have allowed the permanent retention of EPZ if approval were granted in the reclamation plan. In particular, OSM did not approve the words “Unless otherwise approved in the reclamation plan” because approval would have been inconsistent with EPA’s conditional concurrence to remove fill material associated with EPZs from streams and to reconstruct the stream channels after mining.

EPZ Purpose—The EPA stated that it understands 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 concurred with the proposed revisions submitted by the State on March 18, 2003, 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, OSM did not approve the words “Unless otherwise approved in the reclamation plan” at CSR 38–2–14.14.g.2.A.6 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 (see Finding 19, pages 40161 and 40162). In addition, OSM approved 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 its June 13, 2005, submittal letter, the WVDEP requests that OSM reconsider its decision to disapprove certain language at CSR 38–2–14.14.g.2.A.6 (Administrative Record Number WV–1421). In support of its request, the WVDEP stated that following the submittal of its March 9,

2005, letter discussion ensued among representatives of WVDEP, EPA, and OSM. The WVDEP stated that EPA expressed concern that the EPZ rule did not reference Section 404 of the Clean Water Act and that it wasn’t clear that the operator had to demonstrate leaving the EPZ would provide benefits to or protection to the environment and/or the public. The WVDEP stated that it reiterated that the present wording of the State rule requires removal and/or reclamation of EPZ areas and restoration of the stream, unless otherwise approved by the reclamation plan. The WVDEP further stated that the circumstances under which such areas could become permanent would be at the discretion of WVDEP, with a demonstration by the applicant to the satisfaction of the Secretary of the WVDEP that the environment/public benefits outweigh any anticipated impacts.

The WVDEP also stated that in addition to the mining requirements imposed by WVDEP, such construction is subject to provisions of Section 404 of the Clean Water Act and under the ultimate jurisdiction of the U.S. Army Corps of Engineers and EPA. The WVDEP also submitted a draft memorandum to its staff for OSM’s consideration in support of its request that OSM reconsider its previous decision on the EPZ provision at CSR 38–2–14.14.g.2.A.6. The draft memorandum submitted by the WVDEP is quoted below.

Interoffice Memorandum

To: All DMR Employees
From: Randy Huffman, Director
Date:

Subject: Durable rock fills with erosion protection zone

38–2–14.14.g.2.A.6 requires removal and reclamation of erosion protection zone, and restoration of the stream and does provide that erosion protection zone may become permanent structure approved in the reclamation plan. It states:

“Unless otherwise approved in the reclamation plan, the erosion protection zone shall be removed and the area upon which it was located shall be reg[ra]ded and revegetated in accordance with the reclamation plan.”

For an erosion protection zone to become a permanent structure, the applicant must provide a demonstration to the satisfaction of the Secretary that leaving the erosion protection zone provides benefits to or protection to the environment and/or public. Such benefits or protection include, but are not limited to; runoff attenuation, wildlife and wetland enhancement, and stream scour protection. This approval will be contingent upon the applicant obtaining all other necessary permits and/or approvals.

6. State Water Rights and Replacement Policy

WVDEP submitted a policy dated August 1995 regarding water rights and replacement (Administrative Record Number WV-1425). As noted in the policy, its purpose is to define the time periods for providing temporary and permanent water replacement. This policy is to supplement the proposed regulatory revisions that the State made at CSR 38-2-14.5(h). The policy is in response to an OSM Part 732 notification dated June 7, 1996, regarding subsidence and water replacement (Administrative Record Number WV-1037(a)). The Federal regulations at 30 CFR 817.41(j) require prompt replacement of a residential water supply that is contaminated, diminished, or interrupted by underground mining activities conducted after October 24, 1992. OSM advised WVDEP that its program lacked guidance concerning timing of water supply replacement. A proposed statutory revision that was intended to address this issue failed to pass the Legislature. The policy is intended to satisfy the Federal requirement by setting forth the time periods within the State program for providing temporary and permanent water replacement. The policy provides as follows:

WV Division of Environmental Protection, Office of Mining and Reclamation, Inspection and Enforcement.

Series: 14, Pg. No: 1 of 1, Revised: 8-95.

SUBJECT: Water Rights and Replacement

1. Purpose: Define time periods as they relate to water rights and replacement.

2. Definitions:

3. Legal Authority: 22-3-24

4. Policy/Procedures: Upon receipt of notification that a water supply was adversely affected by mining, the permittee shall provide drinking water to the user within twenty-four (24) hours.

Within seventy two (72) hours, the permittee shall have the user hooked up to a temporary water supply. The temporary supply shall be hooked up to existing plumbing, if any, to allow the user to conduct all normal activities associated with domestic water use. This includes drinking, cooking, bathing, washing, non commercial farming, and gardening.

Within thirty (30) days of notification, the permittee shall begin activities to establish a permanent water supply or submit a proposal to the WVDEP outlining the measures and timetables to be utilized in establishing a permanent supply. The total elapsed time from notification to permanent supply hook-up cannot exceed two (2) years.

The permittee is responsible for payment of operation and maintenance costs on a replacement water supply in excess of reasonable and customary delivery costs that the user incurred.

Upon agreement by the permittee and the user (owner), the obligation to pay such

operation and maintenance costs may be satisfied by a one-time lump sum amount agreed to by the permittee and the water supply user (owner).

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether these amendments satisfy the applicable program approval criteria of 30 CFR 732.15. If we approve these revisions, they will become part of the West Virginia program.

Written Comments

Send your written or electronic comments to OSM at the address given above. Your written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of your recommendations. We may not consider or respond to your comments when developing the final rule if they are received after the close of the comment period (see **DATES**). We will make every attempt to log all comments into the administrative record, but comments delivered to an address other than the Charleston Field Office may not be logged in.

Electronic Comments

Please submit Internet comments as an ASCII, Word file avoiding the use of special characters and any form of encryption. Please also include "Attn: SATS NO. WV-106-FOR" and your name and return address in your Internet message. If you do not receive a confirmation that we have received your Internet message, contact the Charleston Field office at (304) 347-7158.

Availability of Comments

We will make comments, including names and addresses of respondents, available for public review during normal business hours. We will not consider anonymous comments. If individual respondents request confidentiality, we will honor their request to the extent allowable by law. Individual respondents who wish to withhold their name or address from public review, except for the city or town, must state this prominently at the beginning of their comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under

FOR FURTHER INFORMATION CONTACT by 4 p.m. (local time), on September 12, 2005. If you are disabled and need special accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold a hearing.

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

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings will be open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the Administrative Record.

IV. 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 that our decision is on a State regulatory program and does not involve a Federal regulation 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: July 29, 2005

Brent Wahlquist,

Regional Director, Appalachian Region.

[FR Doc. 05–17002 Filed 8–25–05; 8:45 am]

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DEPARTMENT OF EDUCATION

34 CFR Part 226

State Charter School Facilities Incentive Program

AGENCY: Office of Innovation and Improvement, Department of Education.
ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary issues these proposed regulations to administer the State Charter School Facilities Incentive program. Under this program, the Department of Education (“Department”) provides competitive grants to States to help charter schools meet their need for facilities.

DATES: We must receive your comments on or before September 26, 2005.

ADDRESSES: Address all comments about these proposed regulations to Jim Houser, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W245, Washington, DC 20202–6140. If you prefer to send your comments through the Internet, you may address them to us at the U.S. Government Web site: <http://www.regulations.gov>; or you may send your Internet comments to us at the following address: comments@ed.gov.

You must include the term “state incentive” in the subject line of your electronic message.

If you want to comment on the information collection requirements, you must send your comments to the Office of Management and Budget (OMB) at the address listed in the Paperwork Reduction Act section of this preamble. You may also send a copy of these comments to the Department representative named in this section.

FOR FURTHER INFORMATION CONTACT: Ann Margaret Galiatsos or Jim Houser, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202–6140. Telephone: (202) 205–9765 or via Internet: charter.facilities@ed.gov.