

placement, checking of traps, and any Medfly captures in addition to production site and packinghouse inspection records. The exporting country's NPPO must maintain an APHIS-approved quality control program to monitor or audit the trapping program. The trapping records must be maintained for APHIS's review.

(v) The tomatoes must be packed within 24 hours of harvest in a pest-exclusionary packinghouse. The tomatoes must be safeguarded by an insect-proof mesh screen or plastic tarpaulin while in transit to the packinghouse and while awaiting packing. The tomatoes must be packed in insect-proof cartons or containers, or covered with insect-proof mesh or plastic tarpaulin, for transit into the United States. These safeguards must remain intact until arrival in the United States or the consignment will be denied entry into the United States.

(vi) During the time the packinghouse is in use for exporting tomatoes to the United States, the packinghouse may only accept tomatoes from registered approved production sites.

(vii) The exporting country's NPPO is responsible for export certification, inspection, and issuance of phytosanitary certificates. Each shipment of tomatoes must be accompanied by a phytosanitary certificate issued by the NPPO and bearing the declaration, "These tomatoes were grown in an approved production site and the shipment has been inspected and found free of the pests listed in the requirements." The shipping box must be labeled with the identity of the production site.

(Approved by the Office of Management and Budget under control numbers 0579-0049, 0579-0131, and 0579-0286)

Done in Washington, DC, this 22nd day of August 2006.

**Nick Gutierrez,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. E6-14219 Filed 8-25-06; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 948

[WV-109-FOR]

#### West Virginia Regulatory Program

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

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

**SUMMARY:** We are approving an 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 revised the Code of West Virginia (W. Va. Code) as amended by Senate Bill 461 concerning water rights and replacement, and revised the Code of State Regulations (CSR) as amended by Committee Substitute for House Bill 4135 by adding a postmining land use of bio-oil cropland, and the criteria for approving bio-oil cropland as a postmining land use for mountaintop removal mining operations.

**DATES:** *Effective Date:* August 28, 2006.

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

#### **SUPPLEMENTARY INFORMATION:**

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

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

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, " \* \* \* a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act \* \* \* ; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act." See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the West Virginia program on January 21, 1981. You can find background information on the West Virginia program, including the Secretary's findings, the disposition of comments, and conditions of approval of the West Virginia program in the January 21, 1981, **Federal Register** (46 FR 5915). You can also find later actions concerning West Virginia's program and program amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

## **II. Submission of the Amendment**

By letter dated April 17, 2006 (Administrative Record Number WV-1462), the West Virginia Department of Environmental Protection (WVDEP) submitted an amendment to its permanent regulatory program in accordance with SMCRA (30 U.S.C. 1201 *et seq.*). The amendment consists of State Committee Substitute for House Bill 4135, which amends CSR 38-2 by adding a postmining land use of bio-oil cropland and criteria for approving bio-oil cropland as an alternative postmining land use for mountaintop removal mining operations with variances from approximate original contour (AOC). The State also submitted State Senate Bill 461, which amends W. Va. Code section 22-3-24 relating to water rights and replacement. In its submittal of the amendment, the WVDEP stated that the codified time table for water replacement is identical to the one contained in the agency's policy dated August 1995 (Administrative Record Number WV-1425) regarding water rights and replacement that is referenced in the Thursday, March 2, 2006, **Federal Register** (71 FR 10764, 10784-85).

The West Virginia Governor also signed Senate Bill 774, on April 4, 2006, which amends language concerning definitions, offices, and officers within the WVDEP. The amendments to Senate Bill 774 are non-substantive changes to the West Virginia program that do not require OSM approval. Therefore, the amendments to Senate Bill 774 can take effect as provided therein on June 9, 2006.

We announced receipt of the proposed amendment in the June 2, 2006, **Federal Register** (71 FR 31996). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the proposed amendment (Administrative Record Number WV-1464). We did not hold a hearing or a meeting, because no one requested one. The public comment period closed on July 3, 2006. We received comments from two Federal agencies.

#### **III. OSM's Findings**

Following are the findings that we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment in full. Any revisions that we do not specifically discuss below concern non-substantive wording or editorial changes and are approved herein without discussion.

*Senate Bill 461*

Senate Bill 461, which was passed by the Legislature on March 11, 2006, and signed into law by the Governor on April 4, 2006, amends Article 3 of the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA). Specifically, section 22-3-24 concerning water rights and replacement, waiver of replacement is amended at subsection (c) by deleting the last sentence and by adding new subsections (d) and (h). As amended, section 22-3-24 provides as follows:

22-3-24. Water rights and replacement; waiver of replacement.

(a) Nothing in this article affects in any way the rights of any person to enforce or protect, under applicable law, the person's interest in water resources affected by a surface mining operation.

(b) Any operator shall replace the water supply of an owner of interest in real property who obtains all or part of the owner's supply of water for domestic, agricultural, industrial or other legitimate use from an underground or surface source where the supply has been affected by contamination, diminution or interruption proximately caused by the surface mining operation, unless waived by the owner.

(c) There is a rebuttable presumption that a mining operation caused damage to an owner's underground water supply if the inspector determines the following: (1) Contamination, diminution or damage to an owner's underground water supply exists; and (2) a preblast survey was performed, consistent with the provisions of section thirteen-a of this article, on the owner's property, including the underground water supply, that indicated that contamination, diminution or damage to the underground water supply did not exist prior to the mining conducted at the mining operation.

(d) The operator conducting the mining operation shall: (1) Provide an emergency drinking water supply within twenty-four hours; (2) provide temporary water supply within seventy-two hours; (3) within thirty days begin activities to establish a permanent water supply or submit a proposal to the secretary outlining the measures and timetables to be utilized in establishing a permanent supply. The total time for providing a permanent water supply may not exceed two years. If the operator demonstrates that providing a permanent replacement water supply can not be completed within two years, the secretary may extend the time frame on [a] case-by-case basis; and (4) pay all reasonable costs incurred by the owner in securing a water supply.

(e) An owner aggrieved under the provisions of subsections (b), (c) or (d) of this section may seek relief in court or pursuant to the provisions of section five, article three-a of this chapter.

(f) The director shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code to implement the requirements of this section.

(g) The provisions of subsection (c) of this section shall not apply to the following: (1) Underground coal mining operations; (2) the surface operations and surface impacts incident to an underground coal mine; and (3) the extraction of minerals by underground mining methods or the surface impacts of the underground mining methods.

(h) Notwithstanding the denial of the operator of responsibility for the damage of the owners [owner's] water supply or the status of any appeal on determination of liability for the damage to the owners [owner's] water supply, the operator may not discontinue providing the required water service until authorized by the division. Notwithstanding the provisions of subsection (g) of this section, on and after the effective date of the amendment and reenactment of this section during the regular legislative session of two thousand six, the provisions of this section shall apply to all mining operations for water replacement claims resulting from mining operations regardless of when the claim arose.

The sentence that was deleted from Subsection (c) provided as follows:

The operator conducting the mining operation shall: (1) Provide an emergency drinking water supply within twenty-four hours; (2) provide a temporary water supply within seventy-two hours; (3) provide a permanent water supply within thirty days; and (4) pay all reasonable costs incurred by the owner in securing a water supply.

The deleted information quoted above was added, with modifications, as new Subsection 22-3-24(d). The language at new Subsection (d) is substantively identical to the language deleted from Subsection (c) and can be approved with the following understanding. At Subsection (d), item (3) no longer requires the operator to provide a permanent water supply within thirty days. As revised, the operator is required to begin, within 30 days, activities to establish a permanent water supply or submit a proposal to the WVDEP Secretary outlining the measures and timetables to be utilized in establishing a permanent water supply. The total time for providing a permanent water supply may not exceed two years. The new language also provides that if the operator demonstrates that providing a permanent replacement water supply can not be completed within two years, the WVDEP Secretary may extend the time frame on a case-by-case basis. Our evaluation of the new language at Subsection (d), item (3) follows.

SMCRA at section 717 addresses water rights and replacement. Section 717(b) provides as follows:

(b) The operator of a surface coal mine shall replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate

use from an underground or surface source where such supply has been affected by contamination, diminution, or interruption proximately resulting from such surface coal mine operation.

The implementing Federal regulations at 30 CFR 816.41(h) is substantively identical to section 717(b).

Section 720(a)(2) of SMCRA concerning subsidence and replacement of a water supply provides that underground coal mining operations conducted after October 24, 1992, shall:

(2) Promptly replace any drinking, domestic, or residential water supply from a well or spring in existence prior to the application for a surface coal mining and reclamation permit, which has been affected by contamination, diminution, or interruption resulting from underground coal mining operations. Nothing in this section shall be construed to prohibit or interrupt underground coal mining operations.

The implementing Federal regulation at 30 CFR 817.41(j) essentially repeat the requirement provided at section 720(a)(2) of SMCRA.

The SMCRA provisions and implementing Federal regulations described above require prompt replacement of water supplies, but they do not provide specific timetables for replacement. Moreover, neither SMCRA section 720(a)(2) nor the implementing Federal regulations at 30 CFR 817.41(j) define the term "prompt replacement" of a water supply.

The Federal provision at 30 CFR 817.41(j), concerning a drinking, domestic or residential water supply affected by underground mining activities conducted after October 24, 1992, was promulgated on March 31, 1995 (60 FR 16722, 16749). In the preamble to that promulgation, OSM provided the following guidance concerning the meaning of the term "prompt replacement" that was intended to assist regulatory authorities in deciding if water supplies have been "promptly" replaced:

OSM believes that prompt replacement should typically provide: Emergency replacement, temporary replacement, and permanent replacement of a water supply. Upon notification that a user's water supply was adversely impacted by mining, the permittee should reasonably provide drinking water to the user within 48 hours of such notification. Within two weeks of notification, the permittee should have the user hooked up to a temporary water supply. The temporary water supply should be connected to the existing plumbing, if any, and allow the user to conduct all normal domestic usage such as drinking, cooking, bathing, and washing. Within two years of notification, the permittee should connect the user to a satisfactory permanent water supply. (60 FR 16727)

We believe that the State's proposed provision, which provides that if the operator demonstrates that providing a permanent replacement water supply cannot be accomplished within two years, the WVDEP Secretary may extend the time frame on a case-by-case basis, is not unreasonable and provides the WVDEP with appropriate flexibility while continuing to require a replacement permanent water supply. Overall, the State's provision at W. Va. Code 22-3-24(d) provides for emergency, temporary, and permanent replacement of a water supply that is no less effective than the Federal requirements.

We believe that the proposed flexibility is necessary because in some instances public water lines have to be extended by public service districts and in some rare instances these extensions may take longer than two years to complete. During this period, operators cannot provide the affected water supply owner a permanent water supply hook up. This may also be true in situations where private replacement wells are to be drilled, but drilling is delayed due to very unusual circumstances. In either situation, during the period of delay, the operator will have to post a performance bond in the amount of the estimated cost to replace the water supply, as provided by 30 CFR 817.121(c)(5). The State counterpart to this Federal provision at CSR 38-2-16.2.c.4 was previously approved by OSM on May 1, 2002 (67 FR 21918-21919). It essentially requires that an escrow bond be posted whenever water supply replacement takes longer than 90 days to complete. Therefore, we find that W. Va. Code 22-3-24(d), item (3), is not inconsistent with SMCRA section 720(a)(2), which requires prompt replacement of water supplies, or the Federal regulations at 30 CFR 817.41(j) concerning the prompt replacement of water supply, and it can be approved.

New subsection (e) is being amended by including a reference to subsection (d). As amended, it states that a water supply owner aggrieved under the provisions of subsection (d) may seek relief in court or under the State claims procedures. We find that the proposed revision is in accordance with SMCRA section 720(a)(2) and consistent with the Federal water replacement requirements at 30 CFR 817.41(j) and it can be approved.

The State proposes to redesignate Subsection (f) as subsection (g). Newly designated Subsection (g) limits the applicability of Subsection (c). While there have been no substantive changes in this new subsection, it is important

to note that this provision was initially approved by OSM on November 12, 1999, with the understanding that it would not relieve an operator of replacing a water supply which is adversely affected by an underground mining operation. This same understanding continues in force (64 FR 61513).

Under new Subsection (h), an operator cannot discontinue providing water service to an owner of an adversely affected water supply until authorized by the WVDEP. In addition, with the enactment of Subsection (h), the water supply replacement provisions of W. Va. Code 22-3-24 apply to all surface and underground mining operations regardless of when the claim arose. We find that the proposed statutory provisions are not inconsistent with the Federal requirements at SMCRA sections 717(b) and 720(a)(2) and they can be approved.

#### *House Bill 4135*

Committee Substitute for House Bill 4135, which was passed by the Legislature on March 11, 2006, and signed into law by the Governor on April 4, 2006, amends CSR 38-2 by authorizing the WVDEP to promulgate legislative rules. The CSR 38-2-7.2 concerns premining and postmining land use categories. The CSR 38-2-7.2.e, concerning cropland land use category is amended by adding new paragraph 38-2-7.2.e.1 concerning "Bio-oil Cropland." As amended, Subsection 7.2.e provides as follows:

7.2.e. Cropland. Land used primarily for the production of cultivated and close-growing crops for harvest alone or in association with sod crops. Land used for facilities in support of farming operations are included;

7.2.e.1. Bio-oil Cropland. Agricultural production of renewable energy crops through long-term intensive cultivation of close-growing commercial biological oil species (such as soybeans, rapeseed or canola) for harvest and ultimate production of bio-fuels as an alternative to petroleum based fuels and other valuable products;

The Federal regulations at 30 CFR 701.5, under the definition of "Land use" define "Cropland," at paragraph (a) as land used for the production of adapted crops for harvest, alone or in rotation with grasses and legumes, that include row crops, small grain crops, hay crops, nursery crops, orchard crops, and other similar crops. While the Federal regulations do not specifically define "bio-oil" cropland, we find that as proposed, the State's definition of "Bio-oil Cropland" is consistent with and no less effective than the Federal

definition of "Cropland" at 30 CFR 701.5 and it can be approved.

New Subsection 7.8, concerning bio-oil cropland, is added to provide as follows:

#### 7.8. Bio-oil Crop Land.

##### 7.8.1. Criteria for Approving Bio-oil Cropland Postmining Land Use.

7.8.1.a. An alternative postmining land use for bio-oil cropland may be approved by the secretary after consultation with the landowner and or land management agency having jurisdiction over state or federal lands: Provided, That [that] the following conditions have been met.

7.8.1.a.1. There is a reasonable likelihood for the achievement of bio-oil crop production (such as soybeans, rapeseed or canola) as witnessed by a contract between the landowner and a commercially viable individual or entity, binding the parties to the production of bio-oil crops for a measurement period of at least two years after the competition [completion] of all restoration activity within the permitted boundaries;

7.8.1.a.2. The bio-oil crop reclamation plan is reviewed and approved by an agronomist employed by the West Virginia Department of Agriculture. The applicants shall pay for any review under this section;

7.8.1.a.3. The use does not present any actual or probable hazard to the public health or safety or threat of water diminution or pollution;

7.8.1.a.4. Bio-oil crop production is not:

7.8.1.a.4.A. Impractical or unreasonable;

7.8.1.a.4.B. Inconsistent with applicable land use policies or plans;

7.8.1.a.4.C. Going to involve unreasonable delays in implementation; or

7.8.1.a.4.D. In violation of any applicable law.

7.8.2. Soil reconstruction specifications for bio-oil crop postmining land use shall be established by the W. Va. Department of Agriculture in consultation with the U. S. Natural Resources Conservation Service and based upon the standards of the National Cooperative Soil Survey and shall include, at a minimum, physical and chemical characteristics of reconstructed soils and soil descriptions containing soil-horizon depths, soil densities, soil pH, and other specifications such that constructed soils will have the capability of achieving levels of yield equal to, or higher than [than], those required for the production of commercial seed oils species (such as soybeans, rapeseed or canola) and meets the requirement of 14.3 of this rule.

##### 7.8.3. Bond Release.

7.8.3.a. Phase I bond release shall not be approved until W. Va. Department of Agriculture certifies and the secretary finds that the soil meets the criteria established in this rule and has been placed in accordance with this rule. The applicants shall pay for any review under this section.

7.8.3.b. The secretary may authorize in consultation with the W. Va. Department of Agriculture, the Phase III bond release only after the applicant affirmatively demonstrates, and the secretary finds, that the reclaimed land can support bio-oil

production; and there is a binding contract for production which meets the requirements of subdivision 7.8.1.a of this rule; and the requirements of paragraph 9.3.f.2 of this rule are met. The applicant shall pay for any review under this section.

7.8.3.c. Once final bond release is authorized, the permittee's responsibility for implementing the bio-oil cropland reclamation plan shall cease.

As noted above, W.Va. Code 22-3-24, CSR 38-2-7.8.1.a, 7.8.1.a.1 and 7.8.2 contain typographical errors. We have inserted words in brackets which are intended to correct those errors. The most substantive change concerns Subsection 7.8.1.a.1. Instead of competition, we believe that the State intends that the measurement period for bio-oil cropland last for at least two years after "completion" of all restoration activities within the permitted boundaries. We encourage the State to correct both typographical errors at its earliest convenience.

It is important to note that, as required by Subsection 7.8.2, constructed bio-oil cropland soils will have to achieve levels of yield equal to, or higher than those required for the production of commercial seed oil species (such as soybeans, rapeseed, or canola) and meet the requirements of Subsection 14.3. Subsection 14.3 contains the topsoil requirements for all surface coal mining operations. In addition to meeting the reconstruction requirements of Subsection 7.8 as established by the West Virginia Department of Agriculture and the U.S. Natural Resources Conservation Service, all bio-oil cropland soils will have to meet the requirements of Subsection 14.3. The cross reference to subsection 14.3 ensures that Subsection 7.8.2 is no less effective than the Federal topsoil requirements at 30 CFR 816.22.

In addition, we should note that that bond release requirements at subsection 7.8.3.b provide that the WVDEP secretary may authorize final bond release, in consultation with the West Virginia Department of Agriculture, only after the applicant demonstrates and the secretary finds that (1) The reclaimed land can support bio-oil crop production, (2) there is a binding contract for that production, and (3) the requirements of Subsection 9.3.f.2 are met. Subsection 9.3.f.2 contains the reclamation success standards for areas to be used for cropland. Consistent with the Federal requirements at 30 CFR 816.116(c)(2), the State rules provide that, for areas to be used for cropland, the success of crop production from the mined area must be equal to or greater than that of the approved standard for the crop being grown over the last two

consecutive growing seasons of the five growing season liability period, which commences at the date of the initial planting of the crop being grown. In addition to requiring that the area attain certain soil standards, the proposed rule requires a demonstration of actual bio-oil crop production. Because the proposed State rule references other requirements used to demonstrate attainment of revegetation success for cropland, we find that Subsection 7.8.3.b is no less effective than the Federal requirements at 30 CFR 816.116 and 800.40(c) and it can be approved.

The new provisions at CSR 38-2-7.8 provide supplemental criteria for the approval of bio-oil cropland as an alternative postmining land use for mountaintop removal mining operations with variances from AOC. The existing State provisions at W. Va. Code 22-3-13(c) and CSR 38-2-14.10 continue to provide the requirements for approval and the environmental performance standards for a mountaintop removal mining operation with a variance from AOC.

We note that the proposed provisions do not specifically provide that other applicable provisions of the approved State surface mining program continue to apply. However, there is nothing in proposed Subsection 7.8 that supersedes or negates compliance with other applicable provisions such as the permit approval requirements at W. Va. Code 22-3-22(c), the general provisions concerning premining and postmining land use at CSR 38-2-7.1, the alternative postmining land use requirements at CSR 38-2-7.3, the bond release requirements at CSR 38-2-12.2 or the topsoil requirements at CSR 38-2-14.3, as mentioned above. It is our understanding that the other applicable provisions of the West Virginia program will continue to apply to the extent they are consistent with promoting bio-oil cropland as an approved postmining land use for mountaintop removal mining operations with AOC variances. Therefore, we find that the State's proposed bio-oil cropland provisions at CSR 38-2-7.8, as described above, are consistent with and no less stringent than SMCRA section 515(c) concerning mountaintop removal mining operations with AOC variances, and no less effective than the Federal regulations governing mountaintop removal mining activities at 30 CFR 785.14 and they can be approved. Our approval of CSR 38-2-7.8 is based upon the understandings discussed above.

CSR 38-2-7.3 concerning criteria for approving alternative postmining use of land is amended by adding new

paragraph 38-2-7.3.d to provide as follows:

7.3.d. A change in postmining land use to bio-oil cropland constitutes an equal or better use of the affected land, as compared with pre-mining use for purposes of W. Va. Code 22-3-13(c) in the determination of variances of approximate original contour for mountaintop removal operations subject to Subsection 38-2-7.8 of this rule;

SMCRA at section 515(c)(2) provides for a variance from the requirement to restore land to AOC for mountaintop removal mining operations in which an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill (except for areas required to be retained in place as a barrier to slides and erosion under section 515(c)(4)(A)) will be removed. SMCRA at section 515(c)(3) provides that in cases where an industrial, commercial, agricultural, residential, or public facility (including recreational facilities) use is proposed for the postmining use of the affected land, the regulatory authority may grant a permit for a surface mountaintop removal mining operation where, at section 515(c)(3)(A), after consultation with the appropriate land use planning agencies, if any, the proposed postmining land use is deemed to constitute an equal or better economic or public use of the affected land, as compared with premining use.

Proposed Subsection 7.3.d differs from section 515(c)(3)(A) of SMCRA and 30 CFR 785.14(c)(1)(i) in one important respect. Unlike its Federal counterparts, the State's proposed provision does not specifically require consultation with appropriate land use planning agencies, if any, on a permit-by-permit basis in order to determine whether bio-oil cropland is an equal or better use of the affected land, as compared with the premining use. Rather, CSR 38-2-7.3.d categorically states that a postmining land use of bio-oil cropland does constitute an equal or better use of the affected land, as compared with the premining use for purposes of W. Va. Code 22-3-13(c), which is the State's counterpart to SMCRA section 515(c) concerning AOC variance for mountaintop removal mining operations. Nevertheless, we believe that the West Virginia program at Subsection 7.3.d is not rendered less stringent than section 515(c)(3)(A) of SMCRA, or less effective than 30 CFR 785.14(c)(1)(i), for the following reasons.

Land use planning is a function of State law and land use planning agencies operate solely under a grant of authority under West Virginia law (W. Va. Code Chapter 8A, Articles 1 through 12). If the State Legislature elects to

withdraw that grant of authority, it has the right to do so and is thus not inconsistent with SMCRA, which only requires consultation with "appropriate land use planning agencies, if any." In this case, the West Virginia Legislature has effectively determined that there are no appropriate land use planning agencies with which consultation is needed on the question as to whether bio-fuels production is an equal or better land use.

Finally, we note that all the other requirements of the approved West Virginia program, including the alternative postmining land use approval criteria at CSR 38-2-7.3.a, will have to be met prior to the approval of an AOC variance for a mountaintop removal mining operation with a postmining land use of bio-oil cropland. Bio-oil cropland is an agricultural postmining land use that is one of the five approved postmining land uses provided for by W. Va. Code 22-3-13(c) for mountaintop removal mining operations with AOC variances; and, W. Va. Code 22-3-13(c)(3)(C) requires a determination that the proposed use would be compatible with adjacent land uses, and existing State and local land use plans and programs. Therefore, based upon the discussion above, we find that the proposed provision at CSR 38-2-7.3.d does not render the West Virginia program less stringent than SMCRA section 515(c)(3)(A) nor less effective than the Federal regulations at 30 CFR 785.14(c)(1)(i) and it can be approved.

In approving these requirements, we should note that it is our understanding that rapeseed and canola are not currently produced in West Virginia. Only soybeans are grown in commercial quantities within the State. According to the 2005 Agricultural Statistics Bulletin, West Virginia produced 828,000 bushels of soybeans in 2004. Mason and Jefferson Counties produced about 86 percent of the State's soybeans. Other unidentified counties produced 118,000 bushels of soybeans (USDA National Agricultural Statistics Service, 2005 West Virginia Bulletin No. 36 (Administrative Record Number WV-1465)). Currently, there are no coal mining activities in Mason or Jefferson Counties. Furthermore, it is believed that no soybeans were produced in counties where mountaintop removal mining activities occurred during 2005. The proposed rules are intended to encourage production of bio-crops in areas within the State where mountaintop removal mining activities occur in order to ease our Nation's dependency on foreign sources of oil.

During 2005, 70 percent of the State's surface coal production was produced by mountaintop mining operations, which include both steep slope and mountaintop removal mining operations. There were approximately 70 mountaintop mining operations in West Virginia in 2005. As mentioned above, mountaintop removal mining activities remove an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill. Steep slope mining activities do not remove the entire coal seam or seams and occur on slopes that are more than 20 degrees. It must be noted that the State's steep slope mining requirements at CSR 38-2-14.12.a.1, like the Federal requirements at SMCRA section 515(e)(2), do not provide for an approved postmining land use of agriculture, and therefore, steep slope mining operations cannot be approved with a postmining land use of bio-oil cropland. This postmining land use will be limited to only mountaintop removal mining operations with AOC variances.

As of April 2006, there were 65 biodiesel production plants in the United States (Administrative Record Number WV-1470). The total annual production of these plants is 395 million gallons. There are also plans to construct 50 new plants and to expand eight existing plants, according to the National Biodiesel Board. The anticipated annual production capacity for these plants will be 714 million gallons. The primary feedstock of most of these plants is soybean oil.

Currently, there are no production plants in the State that convert rapeseed, canola, or soybeans to bio-fuel. The closest plants are in Pennsylvania and Virginia. In April 2006, the West Virginia Department of Agriculture started a pilot project of selling soy-based bio-diesel. The biodiesel is sold at a farmers market in Berkeley County and purchased from a plant near Richmond, Virginia. Biodiesel is available for \$3.89 per gallon, but the price is expected to decline as biodiesel supplies increase. This is one of three facilities (farmers markets) operated by the West Virginia Department of Agriculture (Administrative Record Number WV-1471).

Biodiesel is used to power farm machinery and school buses within the State. At least 13 counties in West Virginia use a biodiesel mixture to operate their school buses as reported by The Associated Press in *The Charleston Gazette* on June 9, 2006 (Administrative Record Number WV-1466). The State usually pays 85 percent of a county's maintenance and

operational expenses, but it will pay 95 percent of those costs to counties as an incentive for using alternative fuels.

#### IV. Summary and Disposition of Comments

##### *Public Comments*

We published a **Federal Register** notice on June 2, 2006, and asked for public comments on the proposed State amendment (Administrative Record Number WV-1464). The public comment period closed on July 3, 2006. No comments were received from the public. However, two Federal agencies commented on the amendment (see below).

##### *Federal Agency Comments*

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the West Virginia program (Administrative Record Number WV-1463). We received comments from the U.S. Department of Labor, Mine Safety and Health Administration (MSHA) on June 27, 2006 (Administrative Record Number WV-1467). MSHA stated that its review revealed that none of the proposed changes are relevant to miners' health and safety. MSHA stated that it has determined that there is no inconsistency or conflicts with MSHA standards.

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

Under 30 CFR 732.17(h)(11)(ii), we are required to obtain written concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). None of the revisions that West Virginia proposed to make in this amendment pertain to air or water quality standards. Therefore, we did not ask EPA to concur on the amendment.

Under 30 CFR 732.17(h)(11)(i), we requested comments on the amendment from EPA (Administrative Record Number WV-1463). EPA responded by letter dated June 29, 2006 (Administrative Record Number WV-1468), and stated that it has reviewed the proposed revisions and has not identified any apparent inconsistencies with the Clean Water Act, Clean Air Act, or other statutes and regulations under EPA's jurisdiction. EPA also provided the following comments on the proposed use of bio-oil cropland for postmining land use.

EPA urged that bio-oil cropland be approved as a postmining land use for a particular mine only after due consideration is given to the broader watershed context in which the mine is located. If the mining proposal is part of, or should be made part of, a broader watershed mitigation or stewardship plan, the EPA stated, such a plan should take precedence over bio-oil cropland, particularly if the plan requires reforestation. In addition, the EPA stated, the impacts to downstream water quality from this kind of agricultural practice should also be considered in determining whether to approve bio-cropland for a particular mine. Tilling and fertilizing practices for bio-oil crops, the EPA stated, should be factored into potential downstream impacts as stressors to streams that may be already stressed from the mine in question as well as from mines, past and present, in other areas of the same watershed.

We concur with these comments and note that the approved State provisions currently require consideration of post-reclamation water quality. The State provisions at CSR 38–2–7.3 provide the criteria for approving an alternative postmining land use. Subsection 7.3.a.2 provides that an alternative postmining land use may be approved by the WVDEP Secretary if, among other required criteria, the use does not present any actual or probable hazard to the public health or safety or threat of water diminution or pollution. As discussed above, the State's proposed bio-oil cropland provisions at Subsection 7.8 do not supersede or negate the existing State provisions at CSR 38–2–7.3.

#### V. OSM's Decision

Based on the above findings, we are approving the program amendment West Virginia sent us on April 17, 2006 (Administrative Record Number 1462). To implement this decision, we are amending the Federal regulations at 30 CFR part 948, which codify decisions concerning the West Virginia program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this rule effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

#### VI. Procedural Determinations

##### *Executive Order 12630—Takings*

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

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

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

##### *Executive Order 12988—Civil Justice Reform*

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

##### *Executive Order 13132—Federalism*

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA.

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

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-

recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. The basis for this determination is 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: August 1, 2006.

**Brent Wahlquist**,  
*Regional Director, Appalachian Region.*

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

**PART 948—WEST VIRGINIA**

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

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

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

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

\* \* \* \* \*

Original amendment submission date	Date of publication of final rule	Citation/description
April 17, 2006	August 28, 2006	W. Va. Code 22–3–24(c), (d), (e), and (h). CSR 38–2–7.2.e.1; 7.3.d; and 7.8 (qualified approval).

[FR Doc. E6–14228 Filed 8–25–06; 8:45 am]  
BILLING CODE 4310–05–P

**DEPARTMENT OF THE INTERIOR**  
**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 950**

[WY–034–FOR]

**Wyoming Regulatory Program**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.  
**ACTION:** Final rule; approval of amendment.

**SUMMARY:** We are approving an amendment to the Wyoming regulatory program (“Program” or “Wyoming program”) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). It involves revisions to and additions of rules about bonding, revegetation and highwall retention. Wyoming intends to revise its program to be consistent with the corresponding Federal regulations, and clarify ambiguities and improve operational efficiency.

**DATES:** *Effective Date:* August 28, 2006.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey Fleischman, Telephone: 307/261–6550, E-mail address: [JFleischman@osmre.gov](mailto:JFleischman@osmre.gov).

**SUPPLEMENTARY INFORMATION:**

- I. Background on the Wyoming Program
- II. Submission of the Proposed Amendment
- III. Office of Surface Mining Reclamation and Enforcement’s (OSM) Findings
- IV. Summary and Disposition of Comments
- V. OSM’s Decision
- VI. Procedural Determinations

**I. Background on the Wyoming Program**

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, “a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act \* \* \*; and rules and regulations consistent with regulations issued by the Secretary pursuant to this 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 Wyoming program on November 26, 1980. You can find background information on the Wyoming program, including the Secretary’s findings, the disposition of comments, and conditions of approval in the November 26, 1980, **Federal Register** (45 FR 78637). You can also find later actions concerning Wyoming’s program and program amendments at 30 CFR 950.12, 950.15, 950.16, and 950.20.

**II. Submission of the Proposed Amendment**

By letter dated October 24, 2005, Wyoming sent us an amendment to its program (Administrative Record No. WY–39–1) under SMCRA (30 U.S.C. 1201 *et seq.*). Wyoming sent the amendment in response to a June 19, 1997, letter (Administrative Record No. WY–39–7) that we sent to Wyoming in accordance with 30 CFR 732.17(c) and to include changes made at its own initiative. We announced receipt of the proposed amendment in the February 13, 2006, **Federal Register** (71 FR 7492). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment’s adequacy (Administrative Record No. WY–39–8). We did not hold a public hearing or meeting because no one requested one. The public comment period ended on March 14, 2006. We received comments from one industry group and two Federal agencies. A third Federal agency mailed us a “no comment” letter.

**III. OSM’s Findings**

The Federal regulation at 30 CFR 732.17(h)(10) requires that State program amendments meet the criteria for approval of State programs set forth in 30 CFR 732.15, including that the State’s laws and regulations are in accordance with the provisions of the Act and consistent with the