

Dated: February 3, 2005.

Margaret H. McFarland,

Deputy Secretary.

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 948

[WV-102-FOR]

West Virginia Regulatory Program

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

ACTION: Final rule; approval of amendment.

SUMMARY: We are approving, with certain exceptions, 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 proposed revisions to the Code of State Regulations (CSR), as authorized by Committee Substitute for House Bill 4193. The State revised 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, new provisions to ensure reclamation and husbandry techniques that are conducive to the development of productive forestlands and wildlife habitat after mining.

EFFECTIVE DATE: February 8, 2005.

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

SUPPLEMENTARY INFORMATION:

- I. Background on the West Virginia Program
- II. Submission of the Amendment
- III. OSM's Findings
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- V. OSM's Decision
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I. Background on the West Virginia Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, “* * * a

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

II. Submission of the Amendment

By letter dated March 25, 2004 (Administrative Record Number WV-1389), the West Virginia Department of Environmental Protection (WVDEP) submitted an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). The amendment consists of Committee Substitute for House Bill 4193, which authorizes amendments to the West Virginia Surface Mining Reclamation Rules at CSR 38-2. Committee Substitute for House Bill 4193 passed the Legislature on March 12, 2004, and was signed by the Governor on April 5, 2004. West Virginia Code (W.Va. Code or WV Code) 64-3-1(g) specifically authorizes WVDEP to promulgate the revisions as legislative rules.

In its letter, the WVDEP stated that the rules at CSR 38-2 were amended to be consistent with the counterpart Federal regulations. In addition, the amendment adds new provisions concerning “Forestland” and “Wildlife” to ensure that reclamation techniques and husbandry practices that are conducive to productive forestlands and wildlife habitats are followed. The WVDEP also included in its submittal, a memorandum from the West Virginia State Forester in which the State Forester endorsed the proposed rules and also provided comments on them.

The WVDEP also submitted Committee Substitute for Senate Bill 616, which was adopted by the Legislature on March 21, 2004. The Bill increased the membership of the Environmental Protection Advisory Council and established a new Quality Assurance Compliance Advisory Committee. Because this Bill was vetoed by the Governor on April 6, 2004, it is not being considered in this rulemaking.

The amendment submitted by WVDEP includes amendments to CSR 38-2-24 concerning the exemption for coal extraction incidental to the removal of other minerals. However, none of these provisions at CSR 38-2-24, which the State is proposing to amend, were previously submitted to OSM for approval. Therefore, we included CSR 38-2-24 in its entirety in our proposed rule notice, and we requested public comment on all of Section 24 (Administrative Record Number WV-1390) (Finding 10 below).

We announced receipt of the proposed amendment in the May 12, 2004, **Federal Register** (69 FR 26340). 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-1396). We did not hold a hearing or a meeting because no one requested one. The public comment period closed on June 11, 2004. We received comments from one individual and two Federal agencies.

We note that the proposed rules that we announced in the May 12, 2004, **Federal Register** differ in some respects from the final rules that are on file with the West Virginia Secretary of State. While these differences are minor and do not affect our findings below one way or the other, we recommend that the State correct these differences to avoid any confusion in the future.

III. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment, except as discussed below. Any revisions that we do not specifically discuss below concern nonsubstantive wording or editorial changes and are approved here without discussion.

1. CSR 38-2-3.12.a.1. Subsidence Control Plan

This provision is amended by changing a term relating to the scale of the topographic map that must be submitted with the subsidence control plan. In the first sentence, the word “less” is deleted and replaced by the word “more.” In the last sentence, the word “less” is deleted and replaced by the word “larger.”

The revision of the scale term used in this provision is intended to adopt standard language concerning map scales. Concerning the map scale of “1 = 1000' or “larger,” the word “larger” is intended to indicate that an acceptable scale would also be, for example, 1” =

750' or 1" = 500'. Such larger scales, though smaller in number, would allow a map to accurately show the location of small structures such as houses, churches, community buildings, etc.

We find that the amendment to the last sentence, where the word "less" is deleted and replaced by the word "larger," is consistent with and no less effective than the Federal regulations at 30 CFR 784.20(a)(1) concerning the map to be submitted with a pre-subsidence survey and can be approved. The amendment to the first sentence, however, contains an inadvertent error. In the first sentence, the word "less" is deleted and replaced by the word "more." It is our understanding that the word "more" is intended to be "larger," and the inadvertent error will be corrected in the future. Our approval of the amendments to CSR 38-2-3.12.a.1 is based upon that understanding.

We note that the amendments to this paragraph satisfy an issue in a 30 CFR part 732 notification dated June 7, 1996, that we had previously sent the State (Administrative Record Number WV-1037(a)). The Federal regulations at 30 CFR 732.17(d) provide that OSM must notify the State of all changes in SMCRA and the Federal regulations that will require an amendment to the State program. Such letters sent by us are often referred to as "732 letters or notifications." The part 732 letter issue that is being satisfied concerns the scale of the subsidence control plan map as required by the State at CSR 38-2-3.12.a.1.

2. CSR 38-2-7.6. Forest Land

This entire subsection is new. As we stated above at Section II, Submission of the Amendment, the State is adding new provisions concerning "Forestland" and "Wildlife" to ensure that reclamation techniques and husbandry practices that are conducive to productive forestlands and wildlife habitats are followed by coal mining operators. The WVDEP also included in its submittal, a memorandum from the West Virginia State Forester in which the State Forester endorsed the proposed rules and also provided comments on them.

Trees are a renewable resource, and we believe that reforestation is a good investment, both environmentally and economically. Environmentally, trees minimize soil erosion, remove carbon dioxide from the air, provide wildlife habitat and diverse plant species, and help conserve water resources. Economically, high quality timber can offer substantial revenue for landowners and job opportunities for local residents in terms of logging, furniture making,

woodworking, etc. In addition, planting trees restores our forests, which are important recreational areas for hunting, hiking, camping and mountain biking.

For the past several years, OSM has been working with its partners in the coal mining States to identify and promote methods that would enhance postmining land use by planting more high-value hardwood trees on reclaimed coal mined lands and enhancing the survival and growth rates of those trees that are planted. To accomplish these goals, OSM conducted several outreach symposia and interactive forums with coal mining States, industry representatives, reclamation researchers and others to identify information on successful reforestation efforts and technologies. OSM has also sought to identify and remove specific impediments to tree planting and for promoting technologies with potential for enhancing reforestation efforts. Recently, to promote reforestation in the Appalachian Region, OSM and the States of Kentucky, Maryland, Ohio, Pennsylvania, Tennessee, Virginia and West Virginia have jointly started the Appalachian Regional Reforestation Initiative (ARRI) to accomplish the goals of reclaiming more active and abandoned mined lands with hardwood forests, and increasing the survival and growth rates of the planted trees.

The ARRI promotes the use of specific planting methods that increase the survival and growth rates of trees. Collectively, these methods are referred to as the forestry reclamation approach (FRA). The FRA methods focus on the following: (1) Creating a suitable rooting medium for good tree growth that is no less than four feet deep and comprised of topsoil, weathered sandstone and/or the best available material; (2) loosely grading the topsoil or topsoil substitutes to create a non-compacted growth medium; (3) use of native and non-competitive ground covers that are compatible with growing trees; (4) planting two types of trees—early succession species for wildlife and soil stability, and commercially valuable crop trees; and (5) using proper tree planting techniques. Over the past 20 years of Federal oversight, OSM has learned that soil compaction by heavy equipment during postmining reclamation is a primary factor that inhibits vigorous tree growth. Likewise, OSM has learned that competition with ground cover vegetation also seriously inhibits successful reforestation. The FRA methods identified above clearly focus on eliminating both of these impediments to successful reforestation.

West Virginia's proposed regulations at CSR 38-2-7.6 concerning forest land

postmining land use (this Finding), and CSR 38-2-7.7 concerning wildlife postmining land use (Finding 3 below) incorporate the FRA methods identified above and are intended to promote vigorous hardwood forests, while providing for wildlife habitat. In this finding and in Finding 3 below, in addition to evaluating the proposed provisions for consistency with the Federal regulations, we will also review the proposed provisions in the light of the planting methods recommended under the FRA for promoting vigorous hardwood forests.

a. 7.6.a. This subsection provides as follows:

7.6.a. The Secretary may authorize forest land as a postmining land use only if the following conditions have been met: Provided, however; this subsection only applies to AOC mining operations that propose to utilize auger, area, mountain top and contour methods of mining. Proposed underground mining, coal preparation facilities, coal refuse disposal, haulroads and their related incidental facilities are not subject to the provisions of this subsection but must comply with all other applicable sections of this rule.

New CSR 38-2-7.6.a clarifies that the forest land provisions at CSR 38-2-7.6 apply only to mining operations on lands that will be returned to their approximate original contour (AOC). Other State forestry-related provisions apply to mining operations on lands that receive a variance from the requirements to return mined lands to AOC under CSR 38-2-14.12 and W.Va. Code 22-3-13(c). Specifically, CSR 38-2-7.4 provides the standards applicable to mountaintop removal mining operations with a variance from the requirement to return the land to AOC and that have a postmining land use of commercial forestry and forestry. We note that the proposed provision does not specifically provide that other applicable provisions of the approved surface mining program continue to apply. However, there is nothing in proposed subsection 7.6.a that supersedes or negates compliance with other applicable provisions such as with 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, or with the bond release requirements at CSR 38-2-12.2.

Therefore, it is our understanding that the other applicable provisions of the West Virginia program continue to apply to the extent they are consistent with promoting vigorous reforestation as stated above. While there is no specific Federal counterpart to proposed CSR 38-2-7.6.a, we find that this provision

is not inconsistent with the Federal regulations at 30 CFR 780.23 concerning reclamation plans and postmining land use information and can be approved. Our approval of this provision is based upon our understanding noted above.

b. 7.6.b. Planting Plan. Subsection 7.6.b. contains requirements concerning the development, contents, and review of the planting plan. Subsection 7.6.b. contains the following requirements.

7.6.b.1.A. West Virginia registered professional forester shall develop a planting plan for the permitted area that meets the requirements of the West Virginia Surface Coal Mining and Reclamation Act. This plan shall be made a part of the mining permit application. The plans shall be in sufficient detail to demonstrate that the requirements of forestland use can be met. The minimum contents of the plan shall be as follows:

7.6.b.1.A.1. A premining native soils map and brief description of each soil mapping unit to include at a minimum: Areal extent expressed in acres, total depth and volume to bedrock, soil horizons, including the O, A, E, B, and C horizon depths, soil texture, structure, color, reaction, bedrock type, and a site index for northern red oak. A site index for white oak for each soil mapping unit should also be provided if available. A weighted, average site index for northern red oak, based on acreage per soil mapping unit, shall be provided for the permitted area.

7.6.b.1.A.2. A surface preparation plan that includes a description of the methods for replacing and grading the soil and other soil substitutes and their preparation for seeding and tree planting.

7.6.b.1.A.3. Liming and fertilizer plans.

7.6.b.1.A.4. Mulching type, rates and procedures.

7.6.b.1.A.5. Species seeding rates and procedures for application of perennial and annual herbaceous, shrub and vine plant materials for ground cover.

7.6.b.1.A.6. A site specific tree planting prescription to establish forestland to include species, stems per acre and planting mixes.

7.6.b.1.B. Review of the Planting plan.

7.6.b.1.B.1. Before approving a forestland postmining land use, the Secretary shall assure that the planting plan is reviewed and approved by a forester employed [by] the Department of Environmental Protection. Before approving the planting plan, the Secretary shall assure that the reviewing forester has made site-specific written findings adequately addressing each of the elements of the plans. The reviewing forester shall make these findings within 45 days of receipt of the plans.

7.6.b.1.B.2. If after reviewing the planting plan, the reviewing forester finds that the plan complies with the requirements of this section, they shall prepare written findings stating the basis of approval. A copy of the findings shall be sent to the Secretary and shall be made part of the Facts and Findings section of the permit application file.

The Secretary shall ensure that the plans comply with the requirements of this rule and other provisions of the approved State surface mining program.

7.6.b.1.B.3. If the reviewing forester finds the plans to be insufficient, the forester shall either:

7.6.b.1.B.3.(a). Contact the preparing forester and the permittee and provide the permittee with an opportunity to make the changes necessary to bring the planting plan into compliance; or,

7.6.b.1.B.3.(b). Notify the Secretary that the planting plan does not meet the requirements of this rule. The Secretary may not approve the surface mining permit until finding that the planting plans satisfy all of the requirements of this rule.

We note that proposed CSR 38-2-7.6.b.1.B.2. provides that the Secretary of WVDEP shall ensure that the planting plans submitted under CSR 38-2-7.6.b. comply with the requirements of this rule (CSR 38-2) and other provisions of the approved State surface mining program. That is, in addition to complying with the provisions of CSR 38-2-7.6 concerning forest land postmining land use, the applicant must also comply with the other provisions of the approved State surface mining program, such as CSR 38-2-9.3.a., which allows the planting plan to be amended or modified prior to implementation, and CSR 38-2-9.3.b., which requires the submission of a final planting report following Phase 1 bond reduction.

It is our understanding that the "forester employed [by] the Department of Environmental Protection" at proposed CSR 38-2-7.6.b.1.B.1 would only be a forester within that agency.

The Federal regulations at 30 CFR 816.116(b)(3)(i) provide that minimum stocking and planting arrangements shall be specified by the regulatory authority on the basis of local and regional conditions and after consultation with and approval by the State agency responsible for the administration of forestry. Consultation and approval may occur on either a program wide or a permit-specific basis. Under the approved State program, consultation regarding stocking standards occurs on a program wide basis with assistance from the Division of Forestry on an as needed basis. A memorandum of understanding (MOU) dated June 4, 1998, currently exists between the Division of Forestry and the WVDEP. *See Administrative Record Number WV-1109.*

It is our understanding that this MOU is being updated and the required consultation with the State agency responsible for the administration of forestry would continue to occur under this MOU (Administrative Record Number WV-1404). We note that this agreement is being updated to provide for future coordination in the development and approval of planting plans specified in

this proposed provision and to ensure compliance with WV Code 30-19-1 *et seq.*, concerning Registered Foresters. Under the revised MOU, the Division of Forestry will provide WVDEP technical assistance upon request and assist State registered professional foresters in the development of those permit applications where the postmining land use includes forest land (CSR 38-2-9.3.g), commercial reforestation (CSR 38-2-9.3.h), commercial forestry (CSR 38-2-7.4), or forest land (proposed CSR 38-2-7.6).

There are no direct Federal counterparts to the proposed provisions at subsection 7.6.b concerning planting plan. However, we find that the proposed provisions at CSR 38-2-7.6.b. are not inconsistent with the Federal requirements at 30 CFR 780.18(b)(5) concerning revegetation plan, and we are approving these provisions based upon our understanding, as noted above. In the future, if the State fails to update the MOU or fails to continue the MOU in force, OSM may reconsider this decision and, if appropriate, require the State to amend the West Virginia program to add the specifics contained in the MOU, including the requirement to consult with the Division of Forestry.

c. 7.6.c. Soil placement, Substitute material and Grading. This new provision provides as follows:

7.6.c.1. Except for valley fill faces, soil or soil substitutes shall be redistributed in a uniform thickness of at least four feet across the mine area.

7.6.c.2. The use of topsoil substitutes may be approved by the Secretary providing the applicant demonstrates: the volume of topsoil on the permit area is insufficient to meet the depth requirements of 7.6.c.1, the substitute material consists of at least 75% sandstone, has a composite paste pH between 5.0 and 7.5, has a soluble salt level of less than 1.0 mmhos/cm. and is in accordance with 14.3.c. [concerning Top Soil Substitutes]. The Secretary may allow substitute materials with less than 75% sandstone provided the applicant demonstrates the overburden in the mine area does not contain an adequate volume of sandstone to meet the depth requirements of 7.6.c.1, or the quality of sandstone in the overburden does not meet the requirements of this rule. This information shall be made a part of the permit application.

7.6.c.3. Soil shall be placed in a loose and non-compacted manner while achieving a static safety factor of 1.3 or greater. Grading and tracking shall be minimized to reduce compaction. Final grading and tracking shall be prohibited on all areas that are equal to or less than a 30 percent slope. Organic debris such as forest litter, tree tops, roots, and root balls may be left on and in the soil.

7.6.c.4. The permittee may regrade and reseed only those rills and gullies that are unstable and/or disrupt the approved postmining land use or the establishment of

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

We find that proposed 7.6.c.1, which requires at least four feet of soil or soil substitutes to be redistributed in a uniform thickness, is consistent with and no less effective than the Federal regulations concerning redistribution of topsoil at 30 CFR 816.22(d) and can be approved. As we noted above in Finding 2.a., it is our understanding that the other applicable provisions of the West Virginia program, such as CSR 38-2-14.3.a concerning the removal and storage of topsoil, will continue to apply to the extent they are consistent with these provisions in promoting reestablishment of vigorous hardwood forests. Our approval of proposed 7.6.c.1 is based upon that understanding.

Proposed 7.6.c.2, concerning the demonstrations needed for the approval of topsoil substitutes, is consistent with and no less effective than 30 CFR 816.22(b) concerning soil substitutes and supplements and can be approved. We note that proposed 7.6.c.2 specifically requires compliance with the topsoil substitute requirements at CSR 38-2-14.3.c., which require a demonstration of the suitability of the substitutes for the approved postmining land use.

We find that proposed 7.6.c.3., which requires non-compaction of the replaced soil, is consistent with and no less effective than the Federal regulations at 30 CFR 816.22(d), concerning redistribution of soil and can be approved. 30 CFR 816.22(d) requires redistribution of soil in a manner which, at (i), is consistent with the approved postmining land use, and, at (ii), prevents excess compaction of the materials.

The proposed requirement for a static safety factor of 1.3 at 7.6.c.3 is consistent with and no less effective than the Federal regulations at 30 CFR 816.102(a)(3), which require the backfill to achieve a long-term slope stability factor of 1.3 and to prevent slides. The proposed authorization to allow organic debris to be left on the surface and in the soil is not inconsistent with the Federal regulations, so long as placement of the organic material is limited to the topsoil, or topsoil substitute, and this practice does not affect stability in accordance with the Federal regulations at 30 CFR 816.71(e)(1) and 816.102(a)(3). The emphasis of the State provisions toward minimizing compaction and inoculating the soil with organic materials is consistent with the needs of forestry and tree growth, and with the Federal soil redistribution requirements at 30 CFR

816.22(d). In addition, the proposed rule prohibits "final" grading and tracking on slopes of less than 30 percent or about 17 degrees. We note that the grading limitation on slopes of less than 30 percent at proposed 7.6.c.3 is restricted to "final" grading or tracking, and initial or subsequent grading will not be prohibited on any slopes, regardless of steepness. Furthermore, it is our understanding that if some areas with less than 30 percent slope require grading or tracking to ensure stability, minimize erosion, or to prevent slippage, the proposed rule would not preclude an operator from undertaking grading or tracking and normal husbandry practices as provided by CSR 38-2-11.7 and 14.15.a.1 and the Federal regulations at 30 CFR 816.102(a)(3) and 816.116(c)(4). Our approval of these provisions is based upon that understanding.

Proposed 7.6.c.4, provides for the repair of rills and gullies that are unstable and/or disrupt the postmining land use or vegetative cover or cause or contribute to a violation of water quality standards. The Federal regulations at 30 CFR 816.95(b) require that rills and gullies that either (1) disrupt the postmining land use or the reestablishment of the vegetative cover or (2) cause or contribute to the violation of water quality standards must be filled, regraded, or otherwise stabilized. We understand the amended State provision concerning repair of rills and gullies at CSR 38-2-7.6.c.4 to mean that a permittee is generally not authorized to repair rills and gullies, except those rills and gullies that are unstable and/or disrupt the approved postmining land use, the establishment of vegetative cover, or cause or contribute to a violation of water quality standards for the receiving stream. This provision is intended to eliminate the compaction of soils and the destruction of established vegetative cover that would normally take place during routine repair of rills and gullies. Such compaction can have a detrimental effect on tree growth. Therefore, we find the limitation on the repair of rills and gullies is intended to protect tree seedlings and other vegetative growth and help assure the success of the forest land postmining land use.

CSR 38-2-7.6.c.4 does not explicitly require the repair of rills and gullies that disrupt the approved postmining land use, the establishment of vegetative cover, or cause or contribute to a violation of water quality standards for the receiving stream. However, the proposed provision in no way prohibits the repair of such rills and gullies. Moreover, the approved State program

already requires restoration of the premining land use, or establishment of an approved alternative postmining land use after mining (CSR 38-2-7.1.a. and 7.3, respectively), the establishment of vegetative cover (CSR 38-2-7.6.e.1), and compliance with applicable water quality standards (CSR 38-2-14.5.b). It necessarily follows from these provisions that rills and gullies that could prevent compliance with the above requirements must be filled, regraded, or otherwise stabilized. For this reason, we find that the proposed amendment at CSR 38-2-7.6.c.4, taken in concert with the above-referenced State regulatory requirements, does not render the program less effective than 30 CFR 816.95(b) and can be approved, so long as it is implemented in a manner consistent with that Federal provision and CSR 38-2-9.2.e. If, in future reviews, we should determine that West Virginia is implementing these provisions in a manner that is inconsistent with this finding, a further amendment may be required.

d. 7.6.d. Liming and Fertilizing. This new provision provides as follows:

7.6.d. Liming and Fertilizing.

7.6.d.1. Lime shall be required where the average soil pH is less than 5.0. Lime rates will be used to achieve a uniform soil pH of 5.5. Soil pH may vary from 5.0 to a maximum of 7.5. An alternate maximum or minimum soil pH may be approved based on the optimum pH for the revegetation species.

7.6.d.2. The Secretary shall require the permittee to fertilize based upon the needs of trees and establishment of ground cover to control surface soil erosion. Between 200 and 300 lbs./acre of 10-20-10 fertilizer shall be applied with the ground cover seeding. Other fertilizer materials and rates may be used only if the Secretary finds that the substitutions are appropriate based on soil testing performed by State certified laboratories.

There are no direct Federal counterparts to the specific liming and fertilizing rates proposed by West Virginia. We find, however, that the amendments do not render the West Virginia program less effective than the Federal requirements at 30 CFR 779.21 concerning soil resources information, 30 CFR 780.18 concerning reclamation plan general requirements, and 30 CFR 816.22 concerning topsoil and subsoil and can be approved.

e. 7.6.e. Revegetation. This new provision provides as follows:

7.6.e. Revegetation.

7.6.e.1. Temporary erosion control vegetative cover shall be established as contemporaneously as practical with backfilling and grading until a permanent tree cover can be established. This cover shall consist of a combination of native and domesticated non-competitive and non-

invasive cool and warm species grasses and other herbaceous vine or shrub species including legume species and shrubs. All species shall be slow growing and compatible with tree establishment and growth. The ground vegetation shall be capable of stabilizing the soil from excessive erosion, but the species should be slow growing and non-invasive to allow the establishment and growth of native herbaceous plants and trees. Seeding rates and composition must be in the planting plan. The following ground cover mix and seeding rates (lb./acre) are strongly recommended: winter wheat or oats (10 lbs./acre), fall seeding, foxtail millet (5 lbs./acre), summer seeding, weeping lovegrass (3 lbs./acre or redtop at 5 lbs./acre), kobe lespedeza (5 lbs./acre), birdfoot trefoil (10 lbs./acre), perennial rye grass (10 lbs./acre) and white clover (3 lbs./acres). Kentucky 31 fescue, serecia lespedeza, all vetches, clovers (except ladino and white clover) and other aggressive or invasive species shall not be used. Alternate seeding rates and composition will be considered on a case by case basis by the Secretary and may be approved if site specific conditions necessitate a deviation from the above. All mixes shall be compatible with the plant and animal species of the region and forestland use.

7.6.e.2. The selection of trees and shrubs species shall be based [on] each species' site requirements (soil type, degree of compaction, ground cover, competition, topographic position and aspect) and in accordance with the approved planting plan prepared by a registered professional forester. The stocking density of woody plants shall be at least 500 plants per acre.

7.6.e.2.A. The stocking density for trees shall be at least 350 plants per acre. There shall be a minimum of five species of trees, to include at least three higher value hardwood species (white oak, northern red oak, black oak, chestnut oak, white ash, sugar maple, black cherry and yellow poplar) and at least two lower value hardwoods or softwoods species (all hickories, red maple, basswood, cucumber magnolia, sycamore, white pine, Virginia pine and pitch x loblolly hybrid pine). There shall be at least 210 high value hardwoods plants per acre and 140 lower value hardwood or softwood plants per acre (70 plants per acre for each species selected).

7.6.e.2.B. The stocking density of shrubs and other woody plants shall not exceed 150 plants per acre. There shall be a minimum of three species of shrubs or other woody plants (black locust, bristly locust, dogwood, Eastern redbud, black alder, bigtooth aspen and bicolor lespedeza, (50 plants per acre for each species selected).

There are no direct Federal counterpart regulations to the specific provisions of CSR 38-2-7.6.e.1 concerning mixes and seeding rates of temporary erosion control vegetative cover. In addition to being compatible with plant and animal species of the region, it is our understanding that the mixes, shrubs, tree seedlings and any alternatives will, as provided by subsections 9.2.a, b, c and h and 30 CFR 816.111(a) and (b), be compatible with

the approved postmining land use, have the same seasonal characteristics of growth as the original vegetation, be capable of self regeneration and plant succession, and meet State and Federal seed, poisonous, and noxious plant and introduced species requirements. Our finding that the proposed State provisions are not inconsistent with the Federal requirements concerning revegetation at 30 CFR 816.111 and 816.116 is based upon that understanding and these provisions can be approved, except as noted below.

The proposed provision at CSR 38-2-7.6.e.1 provides that the "ground vegetation shall be capable of stabilizing the soil from excessive erosion." That provision is less effective than the Federal regulations at 30 CFR 816.111(a)(4), which provides that the permittee shall establish a vegetative cover that is "[c]apable of stabilizing the soil surface from erosion." As proposed, CSR 38-2-7.6.e.1 is less effective than 30 CFR 816.111(a)(4) because the proposed standard to stabilize the soil is modified by the word "excessive." Therefore, we are not approving the word "excessive" in the phrase "capable of stabilizing the soil from excessive erosion" at CSR 38-2-7.6.e.1.

We find that the requirements concerning the selection of tree and shrub species at CSR 38-2-7.6.e.2 are consistent with the general Federal requirements concerning revegetation at 30 CFR 816.111 and can be approved. We also find that the proposed stocking density of trees at CSR 38-2-7.6.e.2.A and the stocking density of shrubs at CSR 38-2-7.6.e.2.B, which have been approved by the Division of Forestry, are consistent with and no less effective than the Federal requirements concerning revegetation standards for success at 30 CFR 816.116(b)(3) and can be approved.

f. 7.6.f. Standards for Success. This new provision provides as follows:

7.6.f. Standards for Success.

7.6.f.1. The success of vegetation shall be determined on the basis of tree and shrub survival and ground cover.

7.6.f.2. Minimum success standard shall be tree survival (including volunteer tree species) and/or planted shrubs per acre equal to or greater than four hundred and fifty (450) trees per acre and a seventy percent (70%) ground cover where ground cover includes tree canopy, shrub and herbaceous cover, and organic litter during the growing season of the last year of the responsibility period; and

7.6.f.3. At the time of final bond release, at least eighty (80) percent of all trees and shrubs used to determine such success must have been in place for at least sixty (60) percent of the applicable minimum period of responsibility. Trees and shrubs counted in determining such success shall be healthy

and shall have been in place for not less than two (2) growing seasons.

We find that the proposed success standards for revegetation at CSR 38-2-7.6.f. are consistent with and no less effective than the Federal standards for revegetation success of lands to be developed for fish and wildlife habitat, recreation, shelter belts, or forest products at 30 CFR 816.116(b)(3) and can be approved. We note that there is an apparent typographical error in paragraph 7.6.f.2. Immediately after providing that the minimum success standard shall be tree and shrub survival per acre, the provision states that the minimum standard shall be "450 trees per acre and a seventy percent (70%) ground cover * * *." It is our understanding that the intended meaning of this provision is that the minimum success standard of tree and shrub survival per acre shall be 450 trees/shrubs per acre with a seventy percent (70%) ground cover, and that this apparent typographical error will be corrected in the future. Our finding that CSR 38-2-7.6.f. is consistent with and no less effective than the Federal standards at 30 CFR 816.116(b)(3) and can be approved is based upon that understanding.

3. CSR 38-2-7.7 Wildlife

a. 7.7.a. This subsection is new and provides as follows:

7.7.a. The Secretary may authorize wildlife as a postmining land use only if the following conditions have been met. This subsection applies to all AOC mining operations that propose a postmining land use of wildlife. The Secretary shall ensure that the plans comply with the requirements of this rule and other provisions of the approved State surface mining program.

New subsection CSR 38-2-7.7.a provides that subsection CSR 38-2-7.7 applies only to surface coal mining operations where the land will be returned to AOC. In addition, the provision makes clear that plans submitted to comply with CSR 38-2-7.7 must also comply with the requirements of the other provisions of the approved State surface mining program. That is, in addition to complying with the provisions of CSR 38-2-7.7 concerning wildlife postmining land use, the applicant must also comply with the other provisions of the approved State surface mining program such as CSR 38-2-3.16 concerning fish and wildlife resources information, CSR 38-2-7.3 concerning alternative postmining land use criteria, or CSR 38-2-12.2 concerning bond release requirements. There is no specific Federal counterpart to CSR 38-2-7.7.a. However, we find that this provision is not inconsistent

with the Federal regulations at 30 CFR 780.23 concerning reclamation plans and postmining land use information and can be approved.

b. 7.7.b. Planting Plan. Subdivision 7.7.b. contains requirements concerning the development, contents, and review of the planting plan. Subsection 7.7.b. contains the following requirements:

7.7.b. Planting Plan.

7.7.b.1. A wildlife biologist employed by the West Virginia Division of Natural Resources shall develop a planting plan for the permitted area that meets the requirements of the West Virginia Surface Coal Mining and Reclamation Act. This plan shall be made a part of the mining permit application. The plan shall be in sufficient detail to demonstrate that the requirements of wildlife use can be met. The minimum contents of the plan shall be as follows:

7.7.b.1.A.1. Surface preparation plan that includes a description of the methods for replacing and grading the soil and other soil substitutes and their preparation for seeding and planting.

7.7.b.1.A.2. Liming and fertilizer plans.

7.7.b.1.A.3. Mulching type, rates and procedures.

7.7.b.1.A.4. Species seeding rates and procedures for application of perennial and annual herbaceous, shrub and vine plant materials for ground cover.

7.7.b.1.A.5. A site specific tree/shrub planting prescription to establish wildlife to include species, stems per acre and planting mixes.

We note that proposed CSR 38-2-7.7.b.1 requires the development of each proposed planting plan by a wildlife biologist employed by West Virginia Division of Natural Resources and made a part of the permit application prior to approval by the Secretary of the WVDEP. The Federal regulations at 30 CFR 816.116(b)(3)(i) provide that minimum stocking and planting arrangements may be approved by the regulatory authority, after consultation with and approval by the State agencies responsible for the administration of forestry and wildlife programs.

Consultation and approval may occur on either a program wide or a permit-specific basis. Under CSR 38-2-7.7.b.1, the approval of stocking and planting arrangements will be on a permit-specific basis. An MOU currently exists between the Division of Forestry and the WVDEP (see Finding 2.b above). In addition, a Memorandum of Agreement (MOA) dated September 16, 2003, currently exists between the Division of Natural Resources and the WVDEP (Administrative Record Number WV-1405). It is our understanding that the required consultation with the State agencies responsible for the administration of forestry and planting arrangements will continue to occur under these agreements.

There are no specific Federal counterparts to the remaining proposed provisions at subsection 7.7.b concerning planting plan. Nevertheless, we find that the proposed provisions at CSR 38-2-7.7.b. are not inconsistent with the Federal requirements at 30 CFR 780.18(b)(5) concerning revegetation plan and can be approved. However, our approval of CSR 38-2-7.7.b is based upon the understanding that the MOU between the Division of Forestry and the WVDEP and the MOA between the Division of Natural Resources and the WVDEP will continue to be in force.

c. Soil Placement, Substitute Material and Grading. This new provision provides as follows:

7.7.c. Soil placement, Substitute material and Grading.

7.7.c.1. Except for valley fill faces, soil or soil substitutes shall be redistributed in a uniform thickness of at least four feet across the mine area.

7.7.c.2. The use of topsoil substitutes may be approved by the Secretary providing the applicant demonstrates: the volume of topsoil on the permit area is insufficient to meet the depth requirements of 7.6.c.1 [7.7.c.1], the substitute material consists of at least 75% sandstone, has a composite paste pH between 5.0 and 7.5, has a soluble salt level of less than 1.0 mmhos/cm. and is in accordance with 14.3.c. The Secretary may allow substitute materials with less than 75% sandstone provided the applicant demonstrates the overburden in the mine area does not contain an adequate volume of sandstone to meet the depth requirements of 7.6.c.1, or the quality of sandstone in the overburden does not meet the requirements of this rule. Such information shall be made a part of the permit application.

7.7.c.3. Soil shall be placed in a loose and non-compacted manner while achieving a static safety factor of 1.3 or greater. Grading and tracking shall be minimized to reduce compaction. Final grading and tracking shall be prohibited on all areas that are equal to or less than a 30 percent slope. Organic debris such as forest litter, tree tops, roots, and root balls may be left on and in the soil.

7.7.c.4. The permittee may regrade and reseed only those rills and gullies that are unstable and/or disrupt the approved postmining land use or the establishment of vegetative cover or cause or contribute to a violation of water quality standards for the receiving stream.

We find that proposed 7.7.c.1, which requires at least four feet of soil or soil substitutes to be redistributed in a uniform thickness, is consistent with and no less effective than the Federal regulations concerning redistribution of topsoil at 30 CFR 816.22(d) and can be approved. As we noted above in Finding 3.a., in addition to complying with the provisions of CSR 38-2-7.7, the applicant must also comply with the other provisions of the approved State program. Therefore, our approval of

proposed 7.7.c.1 is based upon the understanding that the State's topsoil rules at CSR 38-2-14.3(a) and (b) regarding removal and redistribution will continue to apply in these situations.

Proposed 7.7.c.2, concerning the demonstrations needed for the approval of topsoil substitutes, is consistent with and no less effective than 30 CFR 816.22(b) concerning soil substitutes and supplements and can be approved. We note that proposed 7.7.c.2 specifically requires compliance with the topsoil substitute requirements at CSR 38-2-14.3.c., which requires a demonstration of the suitability of the substitutes for the approved postmining land use. We also note an apparent typographical error in proposed 7.7.c.2. The reference to the depth requirements of "7.6.c.1" should be to "7.7.c.1." However, because CSR 38-2-7.6.c.1 and CSR 38-2-7.7.c.1 are substantively identical, the typographical error has no meaningful effect. Nevertheless, we recommend that the State correct it in the future.

We find that proposed 7.7.c.3., which requires non-compaction of the replaced soil, is consistent with and no less effective than the Federal regulations at 30 CFR 816.22(d), concerning redistribution of soil and can be approved. The regulations at 30 CFR 816.22(d) require redistribution of soil in a manner which, at (i), is consistent with the approved postmining land use, and, at (ii), prevents excess compaction of the materials.

The proposed requirement for a static safety factor of 1.3 at 7.7.c.3 is consistent with and no less effective than the Federal regulations at 30 CFR 816.102(a)(3), which require the backfill to achieve a long-term slope stability factor of 1.3 and to prevent slides. The proposed authorization to allow organic debris to be left on the surface and in the soil is not inconsistent with the Federal regulations, so long as the placement of organic material is limited to the topsoil, or topsoil substitute, and this practice does not affect stability in accordance with the Federal regulations at 30 CFR 816.71(e)(1) and 816.102(a)(3).

The emphasis of the State provisions toward minimizing compaction and inoculating the soil with organic materials is consistent with the needs of forestry and tree growth, and with the Federal soil redistribution requirements at 30 CFR 816.22(d). In addition, the proposed rule prohibits final grading and tracking on slopes of less than 30 percent or about 17 degrees. We note that the grading limitation on slopes of less than 30 percent at proposed 7.7.c.3 is restricted to "final"

grading or tracking, and initial or subsequent grading will not be prohibited on any slopes, regardless of steepness. Furthermore, it is our understanding that if some areas with less than 30 percent slope require final grading or tracking to ensure stability, minimize erosion, or to prevent slippage, the proposed rule would not preclude an operator from undertaking such activities and other normal husbandry practices as provided by CSR 38-2-11.7 and 14.15.a.1 and the Federal regulations at 30 CFR 816.102(a)(3) and 816.116(c)(4). Our approval of these provisions is based upon that understanding.

Proposed 7.7.c.4 provides for the repair of rills and gullies that are unstable and/or disrupt the postmining land use or vegetative cover or cause or contribute to a violation of water quality standards. The Federal regulations at 30 CFR 816.95(b) require that rills and gullies that either (1) disrupt the postmining land use or the reestablishment of the vegetative cover or (2) cause or contribute to the violation of water quality standards must be filled, regraded, or otherwise stabilized. We understand the amended State provision concerning repair of rills and gullies to mean that a permittee is generally not authorized to repair rills and gullies, except those rills and gullies that are unstable and/or disrupt the approved postmining land use, the establishment of vegetative cover, or cause or contribute to a violation of water quality standards for the receiving stream. This provision is intended to eliminate the compaction of soils and the destruction of established vegetative cover that would normally take place during routine repair of rills and gullies. Such compaction can have a detrimental effect on tree growth. Therefore, we find the limitation on the repair of rills and gullies is intended to protect tree seedlings and other vegetative growth and help assure the success of the forestry components of the wildlife postmining land use.

CSR 38-2-7.7.c.4 does not explicitly require the repair of rills and gullies that disrupt the approved postmining land use, the establishment of vegetative cover, or cause or contribute to a violation of water quality standards for the receiving stream. However, the proposed provision in no way prohibits the repair of such rills and gullies. Moreover, the approved State program already requires restoration of the premining land use, or establishment of an approved alternative postmining land use after mining, (CSR 38-2-7.1.a. and 7.3, respectively), the establishment of vegetative cover (CSR 38-2-7.7.e.1),

and compliance with applicable water quality standards (CSR 38-2-14.5.b). It necessarily follows from these provisions that rills and gullies that could prevent compliance with the above requirements must be filled, regraded, or otherwise stabilized. For this reason, we find that the proposed amendment at CSR 38-2-7.7.c.4, taken in concert with the above-referenced State regulatory requirements, does not render the program less effective than 30 CFR 816.95(b) and can be approved, so long as it is implemented in a manner consistent with that Federal provision and CSR 38-2-9.2.e. If, in future reviews, we should determine that West Virginia is implementing these provisions in a manner that is inconsistent with this finding, a further amendment may be required.

d. 7.7.d. Liming and Fertilizing. This new provision provides as follows:

7.7.d. Liming and Fertilizing.

7.7.d.1. Lime shall be required where the average soil pH is less than 5.0. Lime rates will be used to achieve a uniform soil pH of 5.5. Soil pH may vary from 5.0 to a maximum of 7.5. An alternate maximum or minimum soil pH may be approved based on the optimum pH for the revegetation species.

7.7.d.2. The Secretary shall require the permittee to fertilize based upon the needs of trees and establishment of ground cover to control surface soil erosion. A minimum of 300 lbs./acre of 10-20-10 fertilizer shall be applied with the ground cover seeding. Other fertilizer materials and rates may be used only if the Secretary finds that the substitutions are appropriate based on soil testing performed by State certified laboratories.

There are no direct Federal counterparts to the specific liming and fertilizing rates proposed by West Virginia. We find, however, that the proposed amendments do not render the West Virginia program less effective than the Federal requirements at 30 CFR 779.21 concerning soil resources information, 30 CFR 780.18 concerning reclamation plan general requirements, and 30 CFR 816.22 concerning topsoil and subsoil and can be approved.

e. 7.7.e. Revegetation. This new provision provides as follows:

7.7.e. Revegetation.

7.7.e.1. Temporary erosion control vegetative cover shall be established as contemporaneously as practical with backfilling and grading until a permanent tree cover can be established. This cover shall consist of a combination of native and domesticated non-competitive and non-invasive cool and warm species grasses and other herbaceous vine or shrub species including legume species and shrubs. All species shall be slow growing and compatible with tree establishment and growth. The ground vegetation shall be capable of stabilizing the soil from excessive erosion,

but the species should be slow growing and non-invasive to allow the establishment and growth of native herbaceous plants and trees. Seeding rates and composition must be in the planting plan. The following ground cover mix and seeding rates (lb./acre) are strongly recommended: winter wheat (20 lbs./acre), fall seeding, foxtail millet (10 lbs./acre), summer seeding, weeping lovegrass (3 lbs./acre or redtop at 5 lbs./acre), kobe lespedeza (5 lbs./acre), birdsfoot trefoil (15 lbs./acre), perennial rye grass (10 lbs./acre) and white clover (4 lbs./acre). Kentucky 31 fescue, sericea lespedeza, all vetches, clovers (except ladino and white clover) and other aggressive or invasive species shall not be used.

Alternate seeding rates and composition will be considered on a case by case basis by the Secretary and may be approved if site specific conditions necessitate a deviation from the above. Areas designated as openings shall contain only grasses in accordance with the approved planting plan specified under subsection 7.7.b. of this rule.

7.7.e.2. The selection of trees and shrubs species shall be based [on] each species' site requirements (soil type, degree of compaction, ground cover, competition, topographic position and aspect) and in accordance with the approved planting plan specified in under subsection 7.7.b. of this rule. The stocking density of woody plants shall be at least 500 plants per acre. Provided, that where a wildlife planting plan has been approved by a professional wildlife biologist and proposes a stocking rate of less than four hundred fifty (450) trees or shrubs per acre the standard for grasses and legumes shall meet those standards contained in subdivision 9.3.f of this rule. In all instances, there shall be a minimum of four species of tree or shrub, to include at least two hard mast producing species.

There are no direct Federal counterpart regulations concerning the specific provisions of CSR 38-2-7.7.e.1 concerning mixes and seeding rates of temporary erosion control vegetative cover. In addition to being compatible with plant and animal species of the region, it is our understanding that the mixes, shrubs, tree seedlings and any alternatives will, as provided by subsections 9.2.a, b, c and h and 30 CFR 816.111(a) and (b), be compatible with the approved postmining land use, have the same seasonal characteristics of growth as the original vegetation, be capable of self regeneration and plant succession, and meet State and Federal seed, poisonous, and noxious plant and introduced species requirements. Our finding that the proposed State provisions are not inconsistent with the Federal requirements concerning revegetation at 30 CFR 816.111 and 816.116 is based upon that understanding and can be approved, except as noted below.

The proposed provision at CSR 38-2-7.7.e.1 provides that the "ground vegetation shall be capable of stabilizing the soil from excessive erosion." That

provision is less effective than the Federal regulations at 30 CFR 816/817.111(a)(4), which provides that the permittee shall establish a vegetative cover that is "capable of stabilizing the soil surface from erosion." As proposed, CSR 38-2-7.7.e.1 is less effective than 30 CFR 816/817.111(a)(4) because the proposed standard to stabilize the soil is modified by the word "excessive." Therefore, we are not approving the word "excessive" in the phrase "capable of stabilizing the soil from excessive erosion" at CSR 38-2-7.7.e.1.

We find that the requirements concerning the selection of tree and shrub species at CSR 38-2-7.7.e.2 are consistent with the Federal requirements concerning revegetation, general requirements at 30 CFR 816.111 and can be approved, except as noted below. There is an apparent typographical error where the proposed provision requires compliance with 9.3.f when the proposed planting plan proposes a stocking rate of less than 450 trees or shrubs per acre. Given that the proposed requirements promote wildlife habitat and tree growth, the proposed citation should be to 9.3.g which provides revegetation standards for forestland and wildlife use. The citation to 9.3.f concerns revegetation success standards for grazingland, hayland and pastureland and, therefore, may not be appropriate for "wildlife" postmining land use. We find that the proposed stocking density of 450 woody plants at CSR 38-2-7.7.e.2 is consistent with and no less effective than the Federal requirements concerning revegetation standards for success at 30 CFR 816.116(b)(3) and can be approved. We are making this finding with the understanding that the citation of 9.3.f will be corrected to 9.3.g. Furthermore, any reduction in tree stocking rates beyond those set forth in 9.3.g and 9.3.h when the postmining land use includes forest land will require the approval of the Division of Forestry on a case-by-case basis.

As we noted above in Section II, the proposed rules differ from the final rules that are on file with the Secretary of State in some respects. The last sentence in proposed 7.7.e.2 provides, "In all instances, there shall be a minimum of four species of tree or shrub, to include at least two hard mast producing species." The rules on file with the Secretary of State do not include the word "two" before hard mast producing species. We believe that this omission is most likely a typographical error, and that the State intends to require a minimum of two hard mast producing species. Nevertheless, because it constitutes a

difference that would not further the objectives of the proposed rule, we recommend that this omission be corrected in the near future.

f. 7.7.f. Standards for Success. This new provision provides as follows:

7.7.f. Standards for Success.

7.7.f.1. The success of vegetation shall be determined on the basis of tree and shrub survival and ground cover.

7.7.f.2. Minimum success standard shall be tree survival (including volunteer tree species) and/or planted shrubs per acre equal to or greater than four hundred and fifty (450) trees per acre and a seventy percent (70%) ground cover where ground cover includes tree canopy, shrub and herbaceous cover, and organic litter during the growing season of the last year of the responsibility period. Provided, that where a wildlife planting plan has been approved by a professional wildlife biologist and proposes a stocking rate of less than four hundred fifty (450) trees or shrubs per acre the standard for grasses and legumes shall meet those standards contained in subdivision 9.3.f of this rule.

7.7.f.3. At the time of final bond release, at least eighty (80) percent of all trees and shrubs used to determine such success must have been in place for at least sixty (60) percent of the applicable minimum period of responsibility. Trees and shrubs counted in determining such success shall be healthy and shall have been in place for not less than two (2) growing seasons.

We find that the proposed success standards for revegetation at CSR 38-2-7.7.f. are consistent with and no less effective than the Federal standards for revegetation success of lands to be developed for fish and wildlife habitat, recreation, shelter belts, or forest products at 30 CFR 816.116(b)(3) and can be approved. We note that there is an apparent typographical error in the provision at CSR 38-2-7.7.f.2. CSR 38-2-7.7.f.1 provides that the success of vegetation shall be determined on the basis of tree and shrub survival and ground cover. The proposed provision at CSR 38-2-7.7.f.2 lacks a reference to "shrubs" after the standard of "450 trees per acre." The standard should be "450 trees/shrubs per acre with a 70 percent ground cover." It is our understanding that CSR 38-2-7.7.f. applies to trees and shrubs, and therefore, the "450" standard applies to both trees and shrubs. Our finding that CSR 38-2-7.7.f is consistent with and no less effective than the Federal standards at 30 CFR 816.116(b)(3) and can be approved is based upon that understanding.

4. *CSR 38-2-9.3.g Revegetation Standards for Areas To Be Developed for Forest Land and/or Wildlife Use*

This provision is amended by adding a sentence in the second paragraph that provides as follows:

A professional wildlife biologist employed by the West Virginia Division of Natural Resources shall develop a planting plan that meets the requirements of the West Virginia Surface Coal Mining and Reclamation Act.

We find that the new language is consistent with and no less effective than the Federal regulations at 30 CFR 816.116(b)(3)(i), concerning standards for revegetation success of wildlife habitat, and can be approved. The Federal provision at 30 CFR 816.116(b)(3)(i) provides that minimum stocking and planting arrangements shall be specified by the regulatory authority after consultation with and approval by the State agencies responsible for the administration of forestry and wildlife programs.

As discussed in Finding 2.b, an MOU currently exists between the Division of Forestry and the WVDEP. In addition, as discussed in Finding 3.b, an MOA currently exists between the Division of Natural Resources and WVDEP. Because the tree and shrub stocking and planting arrangement requirements at CSR 38-2-7.6.f.2, 7.7.f.2, and 9.3.g are identical (450 trees/shrubs) as is the ground cover standard (70 percent), it is our understanding that both agreements could apply in all three cases and would require a planting plan to be developed by a wildlife biologist employed by the Division of Natural Resources when wildlife use is to be the postmining land use. However, we should note that both agreements may need to be updated to provide for future coordination in the approval of planting plans involving forest land and/or wildlife habitat.

We note that the amendment to this paragraph satisfies an item in a 30 CFR part 732 notification dated March 6, 1990, that we had previously sent the State (Administrative Record Number WV-834). The Federal regulations at 30 CFR 732.17(d) provide that OSM must notify the State of all changes in SMCRA and the Federal regulations that will require an amendment to the State program. Such letters sent by us are often referred to as "732 letters or notifications." The issue that is satisfied requires minimum stocking and planting arrangements to be specified by the regulatory authority after consultation with and approval by the State agencies responsible for the administration of forestry and wildlife programs. With this action, all issues in our March 6, 1990, part 732 notification have been satisfied.

5. *CSR 38-2-14.15.a.1. Contemporaneous Reclamation Standards; General*

The first sentence of this paragraph is amended by deleting the partial citation

“(c)(2),” and adding the words “and this rule” immediately following the amended citation. As amended, the sentence provides as follows:

14.15.a.1. Spoil returned to the mined-out area shall be backfilled and graded to the approximate original contour unless a waiver is granted pursuant to W. Va. Code 22-3-13 and this rule with all highwalls eliminated.

The proposed rule provides for an AOC waiver pursuant to WV Code 22-3-13 and this rule (CSR 38-2). The revision clarifies when an AOC variance can be granted. In addition to the mountaintop removal AOC variance provision at WV Code 22-3-13(c)(2), there is the steep slope AOC variance provision at WV Code 22-2-13(e), and the AOC variance provisions for thin or thick overburden at WV Code 22-3-13(b). We find that the proposed revision, which includes a citation to all AOC variances authorized under the approved State program, does not render the West Virginia program less stringent than Section 515 of SMCRA nor less effective than the Federal regulations and can be approved.

6. CSR 38-2-14.15.g. Variance—Permit Applications

This paragraph is amended by adding a sentence, which provides as follows:

Furthermore, the amount of bond for the operation shall be based on the maximum amount per acre specified in WV Code 22-3-12(b)(1).

In a December 3, 2002, **Federal Register** notice (67 FR 71832), we deferred rendering a decision on an earlier proposal by WVDEP to delete the language quoted above. We deferred our decision because the deletion of the requirement was an example of an action that could adversely affect the State’s alternative bonding system (ABS) and such a change needed to be reviewed by the State’s Special Reclamation Fund Advisory Council. During the Interim Hearing of August 22, 2004, of the Joint State Judiciary and Economic Development Legislative Committees, the Advisory Council warned that the State’s ABS still has insufficient revenue to meet its obligations. The proposed retention of the language should help to ensure that the State’s ABS will generate sufficient revenue to complete reclamation of bond forfeiture sites, including those with AOC variances. Therefore, we are approving the amendment. For more information, see the December 3, 2002, **Federal Register**, Finding 12 (67 FR 71832, 71836-71837).

7. CSR 38-2-20.1.a.6. Inspection Frequencies Where Permits Have Been Revoked

This provision is new and provides as follows:

20.1.a.6. When a permit has been revoked, in lieu of the inspection frequency established in paragraphs 20.1.a.1 and 20.1.a.2 of this subsection, the Secretary shall inspect each revoked site on a set frequency commensurate with the public health and safety and environmental consideration present at each specific site, but in no case shall the inspection frequency be set at less than one complete inspection per calendar year. In selecting an alternate inspection frequency, the Secretary shall first conduct a complete inspection of the site and provide public notice. The Secretary shall place a notice in the newspaper with the broadest circulation in the locality of the revoked mine site providing the public with a 30-day period in which to submit written comments. The public notice shall contain the permittee’s name, the permit number, the precise location of the land affected, the inspection frequency proposed, the general reasons for reducing the inspection frequency, the bond status of the permit, the telephone number and address of [the] Department of Environmental Protection Office where written comments on the reduced inspection frequency may be submitted, and the closing date of the comment period. Following the inspection and public notice, the Secretary shall prepare and maintain for public review a written finding justifying the alternative inspection frequency selected. This written finding shall justify the new inspection frequency by affirmatively addressing in detail all of the following criteria:

20.1.a.6.A. Whether, and to what extent, there exists on the site impoundments, earthen structures or other conditions that pose, or may reasonably be expected to ripen into, imminent dangers to the health or safety of the public or significant environmental harms to land, air, or water resources;

20.1.a.6.B. The extent to which existing impoundments or earthen structures were constructed and certified in accordance with prudent engineering designs approved in the permit;

20.1.a.6.C. The degree to which erosion and sediment control is present and functioning;

20.1.a.6.D. The extent to which the site is located near or above urbanized areas, communities, occupied dwellings, schools and other public or commercial buildings and facilities;

20.1.a.6.E. The extent of reclamation completed prior to abandonment and the degree of stability of unreclaimed areas, taking into consideration the physical characteristics of the land mined and the extent of settlement or revegetation that has occurred naturally with them; and

20.1.a.6.F. Based on a review of the complete and partial inspection report record for the site during at least two consecutive years, the rate at which adverse environmental or public health and safety conditions have and can be expected to progressively deteriorate.

The proposed revision is in response to our 30 CFR part 732 notification dated July 22, 1997 (Administrative Record Number WV-1071). We find the proposed provisions at CSR 38-2-20.1.a.6 to be substantively identical to the Federal regulations at 30 CFR 840.11(h), except as described below, and can be approved.

As we noted above in Section II, the proposed State rules differ from the final rules that are on file with the Secretary of State in some respects. The first sentence in proposed 20.1.a.6 provides, “When a permit has been revoked and is not under a reclamation contract, in lieu of the inspection frequency established in paragraphs 20.1.a.1 and 20.1.a.2 of this subsection, the Secretary shall inspect each revoked site on a set frequency commensurate with the public health and safety and environmental consideration present at each specific site, but in no case shall the inspection frequency be set at less than one complete inspection per calendar year.” The rule summary that was filed with us and the rules on file with the Secretary of State do not include the words “and is not under a reclamation contract” after the word revoked. However, this phrase does appear in the proposed State rules that were submitted to us for approval. While the presence or absence of the phrase “and is not under a reclamation contract” does not affect our decision concerning CSR 38-2-20.1.a.6, we recommend that the WVDEP resolve this apparent discrepancy for the clarity of the West Virginia program. Because the phrase quoted above is absent from the rule summary and the final rules which are on file with the Secretary of State, we have advised the State that the quoted language will not be included in our approval of CSR 38-2-20.1.a.6 (Administrative Record Number WV-1406).

The proposed rules at CSR 38-2-20.1.a.6.F, concerning written findings, provide for the review of the complete and partial inspection report record for the site during “at least two consecutive years.” The State provision differs slightly from the counterpart Federal requirement, which provides for such review of the record for the site during “at least the last two consecutive years.” The State provision at CSR 38-2-20.1.a.6.F lacks the requirement that the review of the inspection record must be for at least “the last” two consecutive years. However, in accordance with its policy dated November 3, 2004, the State will consider inspection records for at least the last two consecutive years when establishing the inspection frequency for a bond forfeiture site

(Administrative Record Number WV-1409).

The proposed rule does not include counterparts to the Federal regulations at 30 CFR 840.11(g)(1) and (g)(3). Subdivision (g) provides that “abandoned site” means a surface coal mining and reclamation operation for which the regulatory authority has found in writing that, at (g)(1), all surface and underground coal mining and reclamation activities at the site have ceased. Subdivision (g)(3) requires the regulatory authority to take appropriate measures to preclude a permittee, and owners and controllers of the permittee, with a revoked permit from receiving future permits, and to initiate alternative enforcement action to ensure abatement of existing violations at bond forfeiture sites. The State’s approved program authorizes WVDEP to take such action, but the proposed State rules do not specifically require it. However, the WVDEP’s policy dated November 3, 2004, addresses these concerns and provides the following:

In addition to the written requirements in CSR 38-2-29.1.a.6 when reducing inspection frequency at bond forfeiture sites not under reclamation contract, the following shall apply:

- * * * * *
- The agency will make a written finding that all surface and underground coal mining and reclamation activities at the site have ceased;
- The agency will make a written finding that we are taking appropriate measures to preclude the permittee and operator, and owners and controllers of the permittee and operator, with a revoked permit, from receiving future permits while violations continue at the site; and
- Make a written finding that an enforcement action pursuant to West Virginia Code 22-3-17(g), (h) or (j) is being initiated to ensure abatement of existing violations or that there will not be a reoccurrence of violations at the bond forfeiture site, except where after evaluating the circumstances it concludes that further enforcement offers little or no likelihood of successfully compelling abatement or recovering any reclamation costs.

Unlike the Federal rules, West Virginia’s proposed rules and policy do not provide for reduced inspection frequency at abandoned sites. West Virginia does not reference its show cause procedures at WV Code 22-3-17(b) in its policy, because sites with revoked permits have already been subjected to the State’s show cause process. In addition, abandoned sites for which the permits have not been revoked will still be inspected in accordance with CSR 38-2-20.1.a.1 and 38-2-20.1.a.2.

Therefore, we find that the State’s proposed inspection frequency requirements, together with the implementation of the policy as described above, are no less effective than the Federal requirements at 30 CFR 840.11(g) and (h) and can be approved. Furthermore, the proposed revision and the policy mentioned above satisfy this issue as described in our 30 CFR part 732 notification dated July 22, 1997.

8. CSR 38-2-22.5.a. Coal Refuse Performance Standards—Controlled Placement

This provision is amended in the second sentence by adding the words “hauled or conveyed and” immediately following the words “mine refuse shall be.” As amended, the sentence provides that coal mine refuse shall be hauled or conveyed and placed in a controlled manner to comply with the performance standards at CSR 38-2-22.5.a.1. through 22.5.a.5. We find that by adding the words “hauled or conveyed,” CSR 38-2-22.5.a is substantively identical to the Federal regulations at 30 CFR 816/817.81(a) and, therefore, the amendment can be approved. We note that this change is in response to and satisfies an item in OSM’s 30 CFR part 732 notification to the State of July 22, 1997 (Administrative Record Number WV-1071).

9. CSR 38-2-23. Special Authorization for Coal Extraction as an Incidental Part of Development of Land for Commercial, Residential, Industrial, or Civic Use

This section is deleted in its entirety. The remaining sections are renumbered accordingly. This provision allowed special authorizations for coal extraction as an incidental part of the development of land for commercial, residential, industrial, or civic use. The deletion of this section by the State is in response to our disapproval of Section 23 at 30 CFR 948.12(a)(4) as discussed in the May 5, 2000, and March 4, 2003, **Federal Register** notices and as required by the required program amendment codified in the Federal regulations at 30 CFR 948.16(oooo) (65 FR 26133 and 68 FR 10719, respectively). The deletion of the requirements at Section 23 renders the State’s rules no less effective than the Federal regulations and can be approved. This approval resolves the required program amendment at 30 CFR 948.16(oooo), which can be removed.

10. CSR 38-2-24. Exemption for Coal Extraction Incidental to Extraction of Other Minerals

This section is new and provides as follows:

CSR 38-2-24 Exemption for Coal Extraction Incidental to Extraction of Other Minerals.

24.1. Exemption determination. The term other minerals as used in this section means any commercially valuable substance mined for its mineral value, excluding coal, topsoil, waste and fill material. No later than 90 days after [the] filing of an administratively complete request for exemption, the Secretary shall make a written determination whether, and under what conditions, the persons claiming the exemption are exempt under this section, and shall notify the person making the request and persons submitting comments on the application of the determination and the basis for the determination. The determination of exemption shall be based upon information contained in the request and any other information available to the regulatory authority at that time. If the Secretary fails to provide a determination as specified in this section, an applicant who has not begun extraction may commence pending a determination unless the Secretary issues an interim finding, together with reasons, therefore, that the applicant may not begin coal extraction. Any person adversely affected by a determination of the Secretary pursuant to this section may file an appeal only in accordance with the provisions of article one, chapter twenty-two-b of this code, within thirty days after receipt of the determination. The filing of an appeal does not suspend the effect of the determination.

24.2. Contents of request for exemption. A request for exemption shall be made part of a quarrying application and shall include at a minimum:

24.2.a. The names and business address of the requestor to include a street address or route number;

24.2.b. A list of the minerals to be extracted;

24.2.c. Estimates of annual production of coal and the other minerals over the anticipated life of the operation;

24.2.d. A reasonable estimate of the number of acres of coal that will be extracted;

24.2.e. Evidence of publication of a public notice for an application for exemption. The notice that an application for exemption has been filed with the Secretary shall be published in a newspaper of general circulation in the county in which the operation is located and shall be published once and provide a thirty day comment period. The public notice must contain at a minimum:

24.2.e.1. The quarrying number identifying the operation;

24.2.e.2. A clear and accurate location map of a scale and detail found in the West Virginia General Highway Map. The map size will be at a minimum four inches (4") x four inches (4"). Longitude and latitude lines and north arrow will be indicated on the map and such lines will cross at or near the center of the quarrying operation;

24.2.e.3. The names and business address of the requestor to include a street address or route number;

24.2.e.4. A narrative description clearly describing the location of the quarrying operation;

24.2.e.5. The name and address of the Department of Environmental Protection Office where written comments on the request may be submitted;

24.2.f. Geologic cross sections, maps or plans of the quarrying operation determine the following information:

24.2.f.1. The locations (latitude and longitude) and elevations of all bore holes;

24.2.f.2. The nature and depth of the various strata or overburden including geologic formation names and/or geologic members;

24.2.f.3. The nature and thickness of any coal or other mineral to be extracted;

24.2.g. A map of appropriate scale which clearly identifies the coal extraction area versus quarrying area;

24.2.h. A general description of coal extraction and quarrying activities for the operation;

24.2.i. Estimated annual revenues to be derived from bona fide sales of coal and other minerals to be extracted;

24.2.j. If coal or the other minerals are to be used rather than sold, estimated annual fair market values at the time of projected use of the coal and other minerals to be extracted;

24.2.k. The basis for all annual production, revenue, and fair market value estimates;

24.2.l. A summary of sale commitments and agreements, if any, that the applicant has received for future delivery of other minerals to be extracted from the mining area, or a description of potential markets for the other minerals;

24.2.m. If the other minerals are to be commercially used by the applicant, a description specifying the use; and

24.2.n. Any other information pertinent to the qualification of the operation as exempt.

24.3. Requirements for exemption.

24.3.a. Activities are exempt from the requirements of the Act [the West Virginia Surface Coal Mining and Reclamation Act] if all of the following are satisfied:

24.3.a.1. The production of coal extracted from the mining area determined annually as described in this paragraph does not exceed 16½ percent of the total annual production of coal and other minerals removed during such period for purposes of bona fide sale or reasonable commercial use.

24.3.a.2. Coal is extracted from a geological stratum lying above or immediately below the deepest stratum from which other minerals are extracted for purposes of bona fide sale or reasonable commercial use.

24.3.a.3. The revenue derived from the coal extracted from the mining area, determined annually does not exceed fifty (50) percent of the total revenue derived from the coal and other minerals removed for purposes of bona fide sale or reasonable commercial use. If the coal extracted or the minerals removed are used by the operator or transferred to a related entity for use instead of being sold in a bona fide sale, then the fair market value of the coal or other minerals shall be calculated at the time of use or transfer and shall be considered rather than revenue.

24.3.b. Persons seeking or that have obtained an exemption from the requirements of the Act [West Virginia Surface Coal Mining and Reclamation Act] shall comply with the following:

24.3.b.1. Each other mineral upon which an exemption under this section is based must be a commercially valuable mineral for which a market exists or which is quarried in bona fide anticipation that a market will exist for the mineral in the reasonably foreseeable future, not to exceed twelve months. A legally binding agreement for the future sale of other minerals is sufficient to demonstrate the above standard.

24.3.b.2. If either coal or other minerals are transferred or sold by the operator to a related entity for its use or sale, the transaction must be made for legitimate business purposes.

24.4. Conditions of exemption.

A person conducting activities covered by this part shall:

24.4.a. Maintain on site the information necessary to verify the exemption including, but not limited to, commercial use and sales information, extraction tonnages, and a copy of the exemption application and the Department's exemption approval;

24.4.b. Notify the Department of Environmental Protection upon the completion or permanent cessation of all coal extraction activities.

24.5. Stockpiling of minerals.

24.5.a. Coal extracted and stockpiled may be excluded from the calculation of annual production until the time of its sale, transfer to a related entity or use:

24.5.a.1. Up to an amount equaling a 12 month supply of the coal required for future sale, transfer or use as calculated based upon the average annual sales, transfer and use from the mining area over the two preceding years; or

24.5.a.2. For a mining area where coal has been extracted for a period of less than two years, up to an amount that would represent a 12 month supply of the coal required for future sales, transfer or use as calculated based on the average amount of coal sold, transferred or used each month.

24.5.b. The Department of Environmental Protection shall disallow all or part of an operator's tonnages of stockpiled other minerals for purposes of meeting the requirements of this part if the operator fails to maintain adequate and verifiable records of the mining area of origin, the disposition of stockpiles or if the disposition of the stockpiles indicates the lack of commercial use or market for the minerals.

The Department of Environmental Protection may only allow an operator to utilize tonnages of stockpiled other minerals for purposes of meeting the requirements of this part if:

24.5.b.1. The stockpiling is necessary to meet market conditions or is consistent with generally accepted industry practices; and

24.5.b.2. Except as provided in 24.5.b.3. of this section, the stockpiled other minerals do not exceed a 12 month supply of the mineral required for future sales as approved by the regulatory authority on the basis of the exemption application.

24.5.b.3. The Department of Environmental Protection may allow an operator to utilize tonnages of stockpiled other minerals beyond the 12 month limit established in 24.5.b.2. of this section if the operator can demonstrate to the Department of Environmental

Protection's satisfaction that the additional tonnage is required to meet future business obligations of the operator, such as may be demonstrated by a legally binding agreement for future delivery of the minerals.

24.5.b.4. The Department of Environmental Protection may periodically revise the other mineral stockpile tonnage limits in accordance with the criteria established by 24.5.b.2. and 3. of this section based on additional information available to the Department of Environmental Protection.

24.6. Revocation and enforcement.

24.6.a. The Department of Environmental Protection shall conduct an annual compliance review of the operation requesting exemption.

24.6.b. If the Department of Environmental Protection has reason to believe that a specific operation was not exempt at the end of the previous reporting period, is not exempt, or will be unable to satisfy the exemption criteria at the end of the current reporting period, the Department of Environmental Protection shall notify the operator that the exemption may be revoked and the reason(s) therefore. The exemption will be revoked unless the operator demonstrates to the Department of Environmental Protection within 30 days that the operation in question should continue to be exempt.

24.6.c. If the Department of Environmental Protection finds that an operator has not demonstrated that activities conducted in the operation area qualify for the exemption, the Department of Environmental Protection shall revoke the exemption and immediately notify the operator and commenter(s). If a decision is made not to revoke an exemption, the Secretary shall immediately notify the operator and commenter(s).

24.6.d. Any adversely affected person by a determination of the Secretary pursuant to this section may file an appeal only in accordance with the provisions of WV § 22B-1-1 *et seq.* of this code, within thirty days after receipt of the determination. The filing of an appeal does not suspend the effect of the determination.

24.6.e. Direct enforcement.

24.6.e.1. An operator mining in accordance with the terms of an approved exemption shall not be cited for violations of WV § 22-3 *et seq.* or [section] 38-2 *et seq.* that occurred prior to the revocation of the exemption. Provided, however, an operator who does not conduct activities in accordance with the terms of an approved exemption and knows or should have known that the activities are not in accordance with the approved exemption shall be subject to direct enforcement action for violations of WV [section] 22-3 *et seq.* or [section] 38-2 *et seq.* that occur during the period of the activities.

24.6.e.2. Upon revocation of an exemption or denial of an exemption application, an operator shall stop conducting surface coal mining operations until a permit is obtained, and shall comply with the reclamation standards of WV [section] 22-3 *et seq.* or [section] 38-2 *et seq.* with regard to conditions, areas, and activities existing at the time of revocation or denial.

24.7. Reporting requirements.

24.7.a.1. Following approval by the Department of Environmental Protection of an exemption for an operation, the person receiving the exemption shall file a quarterly production report with the Department of Environmental Protection containing the information specified in 24.7.a.3. of this section.

24.7.a.2. The report shall be filed no later than 30 days after the end of each quarter.

24.7.a.3. The information in the report shall cover:

24.7.a.3.A. Quarterly production of coal and other minerals, and

24.7.a.3.B. The cumulative production of coal and other minerals.

24.7.a.3.C. The number of tons of coal stockpiled;

24.7.a.3.D. The number of tons of other minerals stockpiled by the operator.

24.7.b.1. Following approval by the Department of Environmental Protection of an exemption for an operation, the person receiving the exemption shall file an annual production report with the Department of Environmental Protection containing the information specified in 24.7.b.3. of this section.

24.7.b.2. The report shall be filed no later than 30 days after the end of each calendar year.

24.7.b.3. The information in the report shall include:

24.7.b.3.a. The number of tons of extracted coal sold in bona fide sales and the total revenue derived from these sales;

24.7.b.3.b. The number of tons of coal extracted and used or transferred by the operator or related entity and the estimated total fair market value of this coal;

24.7.b.3.c. The number of tons of coal stockpiled;

24.7.b.3.d. The number of tons of other commercially valuable minerals extracted and sold in bona fide sales and total revenue derived from these sales;

24.7.b.3.e. The number of tons of other commercially valuable minerals extracted and used or transferred by the operator or related entity and the estimated total fair market value of these minerals;

24.7.b.3.f. The number of tons of other commercially valuable minerals removed and stockpiled by the operator;

24.7.b.3.g. The annual production of coal and other minerals and the annual revenue derived from coal and other minerals; and 24.7.b.3.h. The annual production of coal and other minerals and the annual revenue derived from coal and other minerals during the preceding year.

24.8. Public Availability of Information.

24.8.1. Except as provided in 24.8.2, all information submitted to the Secretary shall be made immediately available for public inspection and copying at the office with jurisdiction over coal mining in the locality of the subject exempt operation, until at least three (3) years after expiration of the period during which the subject mining area is active.

24.8.2 The Secretary may keep information submitted to the Secretary confidential if the person submitting it requests in writing, at the time of submission, that it be kept confidential and if the information concerns

trade secrets or is privileged commercial or financial information of the persons intending to conduct operations under this rule.

24.8.3. Information requested to be held as confidential under subsection 24.8.2 shall not be made publicly available until after notice and opportunity to be heard is afforded persons both seeking and opposing disclosure of the information.

24.9. Right of Inspection and Entry.

24.9.1 Authorized representatives of the Secretary and the Secretary of the U.S. Department of the Interior shall have the right to conduct inspections of operations claiming exemption.

24.9.2. Each authorized representative of the Secretary and the Secretary of the U.S. Department of the Interior conducting an inspection under this rule shall:

24.9.2.a. Have a right of entry to, upon, and through any mining and reclamation operations without advance notice or a search warrant, upon presentation of appropriate credentials;

24.9.2.b. At reasonable times and without delay, have access to and copy any records relevant to the exemption; and

24.9.2.c. Have a right to gather physical and photographic evidence to document conditions, practices, or violations at a site.

24.9.3. No search warrant shall be required with respect to any activity under 24.9.1 and 24.9.2., except that a search warrant may be required for entry into a building.

The proposed revisions are in response to our 30 CFR part 732 notification dated March 6, 1990 (Administrative Record Number WV-834). Except as noted below, we find that the proposed amendments at CSR 38-2-24, concerning an exemption for coal extraction incidental to extraction of other minerals, are substantively identical to the counterpart Federal regulations at 30 CFR part 702 and can be approved.

CSR 38-2-24.2.c. The State provides that a request for an exemption shall be made part of a quarrying application and shall at a minimum include “[e]stimates of annual production of coal and the other minerals over the anticipated life of the operation.” The counterpart Federal regulations at 30 CFR 702.12(c) provide that, at a minimum, an application shall include estimates of annual production of coal and the other minerals within “each mining area” over the anticipated life of the mining operation. The proposed State provision lacks a counterpart to the Federal phrase “each mining area.”

The Federal regulations at 30 CFR 702.5(d) define mining area to mean an individual excavation site or pit from which coal, other minerals and overburden are removed. The intended purpose of the term “mining area” is discussed in the December 20, 1989, **Federal Register** notice in which the Federal regulations at 30 CFR part 702

were announced (54 FR 52092, 52096). In that notice, OSM stated that the primary purpose for the definition of mining area being limited to an individual excavation site or pit is to preclude an operator from averaging mineral tonnages from different locations to gain an unwarranted exemption from the Act. The definition also prohibits an operator from claiming an exemption by combining production from distinct noncoal and coal operations. Each excavation site or pit must individually qualify for the exemption in accordance with the requirements for exemption under 30 CFR 702.14. OSM further stated that it recognizes that a single excavation site or pit may, depending on its size, include a number of individual excavation activities. In this context, OSM considers a mining area to include the excavation activities occurring within a single excavation site or pit.

It is our understanding that quarries within West Virginia can be typically characterized as single excavations that may, depending on their size, include a number of individual excavation activities. For this reason, we find that proposed CSR 38-2-24.2.c does not render the West Virginia program less effective than the Federal regulations at 30 CFR 702.5(d) and can be approved. Our approval of this provision is based upon that understanding. If the State fails to implement this provision in a manner consistent with our understanding described above, OSM may require the State to amend the West Virginia program to require that an application shall include estimates of annual production of coal and the other minerals within “each mining area” over the anticipated life of the mining operation.

CSR 38-2-24.2.d and 38-2-24.2.g. The Federal regulations at 30 CFR 702.12(h) provide that an application for an exemption shall include, at a minimum, an estimate to the nearest acre of the number of acres that will compose the mining area over the anticipated life of the mining operation. While the proposed rules at CSR 38-2-24 do not contain a specific counterpart to this Federal requirement, acreage identification information is indirectly provided by two State requirements. Proposed CSR 38-2-24.2.d provides that a request for an exemption shall include, at a minimum, a reasonable estimate of the number of acres of coal that will be mined. In addition, proposed CSR 38-2-24.2.g provides that a request for an exemption shall include at a minimum a map of appropriate scale which clearly identifies the coal extraction area versus the quarrying

area. We find that the information provided by an applicant for an exemption under proposed CSR 38-2-24.2.d and CSR 38-2-24.2.g renders the proposed amendments no less effective than the Federal regulations at 30 CFR 702.12(h).

CSR 38-2-24.2.e.4. This proposed provision provides that the newspaper notice published to inform the public of the application for an exemption must contain a narrative description clearly describing the location of the quarrying operation. This requirement is substantively identical to the counterpart Federal provision at 30 CFR 702.12(i), except that the State provision does not provide for a description of the proposed operation as does 30 CFR 702.12(i). We find that this omission does not render the State provision less effective because that information is available to the public via the quarry identification number that is required by proposed CSR 38-2-24.2.e.1. Under the proposed State rules, only quarries are eligible to obtain an exemption under CSR 38-2-24, and the descriptive information about those quarries is available to the public via the quarry number and the narrative describing the location of such operations. Therefore, we find that the lack of a specific State counterpart to 30 CFR 702.12(i) concerning a description of the proposed operation does not render the provision less effective than 30 CFR 702.12(i).

CSR 38-2-24.2.f.2. The Federal regulations at 30 CFR 702.12(j) provide that an application for an exemption shall include, at a minimum, the relative position and thickness of any material not classified as "other minerals" that will also be extracted during the conduct of mining activities. There is no specific State counterpart to this Federal provision. However, the information concerning "other materials" not classified as "other minerals" that will also be extracted during the mining activities is required by the provision at CSR 38-2-24.2.f.2. The State provision provides that an application for an exemption shall include at a minimum the nature and depth of the various strata or overburden including geologic formation names and/or geologic members. This information would include, therefore, the identification of the relative position and thickness of the coal, "other minerals" to be mined and the "other materials" not classified as "other minerals" that will also be extracted during the mining process. Therefore, we find that proposed CSR 38-2-24.2.f.2 renders the West Virginia

program no less effective than the Federal regulations at 30 CFR 702.12(j).

CSR 38-2-24.6.c. We note that proposed CSR 38-2-24.6.c, concerning notification of the operator and commenter(s) of the WVDEP's determination to revoke or not revoke an exemption, uses the term "commenter(s)" whereas the counterpart Federal provision at 30 CFR 702.17(c)(1) uses the term "intervenors." Under the West Virginia program, "commenter(s)" have the same rights as "intervenors." Therefore, we find that the term "commenter(s)" at proposed CSR 38-2-24.6.c does not render that provision less effective than the Federal regulations at 30 CFR 702.17(c)(1).

CSR 38-2-24.7.a and 38-2-24.7.b. The proposed provisions at CSR 38-2-24 lack counterparts to the Federal definitions of "cumulative measurement period" at 30 CFR 702.5(a), "cumulative production" at 30 CFR 702.5(b), and "cumulative revenue" at 30 CFR 702.5(c). The Federal term "cumulative measurement period" means the period of time over which both cumulative production and cumulative revenue are measured. The Federal definition also provides criteria to determine the beginning of the cumulative measurement period, and for determining the date of annual reporting. West Virginia does not propose to use "cumulative measurement period," "cumulative production" or "cumulative revenue" to determine eligibility for the exemption.

Under the proposed rules at CSR 38-2-24.7.a and 24.7.b, West Virginia is adopting quarterly reporting of certain information and annual reporting at the end of each calendar year, respectively. All of the data required to be reported under the Federal regulations at 30 CFR part 702 are required by the proposed State provisions, except the reporting of "cumulative production" and "cumulative revenue" throughout the "cumulative measurement period."

Under the Federal definition of "cumulative measurement period" at 30 CFR 702.5(a), both production and revenue data would be recorded from the beginning of the "cumulative measurement period" to the present. These cumulative data would be used to determine eligibility for initial approval of the exemption and for continued approval of the exemption. OSM explained the purpose of the "cumulative measurement period" in the preamble to the **Federal Register** notice in which OSM approved the regulations at 30 CFR part 702. OSM stated that production rates of coal and other minerals are usually not

consistent over the life of the mining operation. In some years, a relatively large amount of coal may be produced; in other years, coal production may be small or nonexistent. "To avoid making such operations become subject to and not subject to the jurisdiction of the Act, as may occur under the 12 consecutive month test, * * * OSM is adopting a rule that measures production, adjusted for legitimate stockpiling, and revenue on a cumulative basis" (December 20, 1989; 54 FR 52092, 52095-6). West Virginia is proposing not to adopt the "cumulative measurement period" standard but, rather, will assess initial and continued eligibility for this exemption using data on an annual basis.

West Virginia has chosen not to adopt the "cumulative measurement period" and therefore does not allow for the possibility of such operations becoming subject to and not subject to the jurisdiction of the Act, as may occur if data are assessed only on an annual basis. We find that while the State's decision not to use the "cumulative measurement period" eliminates the flexibility afforded by the Federal cumulative measurement provisions, that decision does not eliminate the assurance that the tonnage or revenue derived from coal mined under an exemption in West Virginia will not exceed 16 $\frac{2}{3}$ percent of the total coal and other minerals mined as required by the Federal provisions. Furthermore, as provided by 24.7.a.2 and 24.7.b.2, a person receiving the exemption shall file a quarterly production report with the WVDEP no later than 30 days after the end of each quarter and an annual production report within 30 days after the end of each "calendar" year, respectively.

As we noted above in Section II, the proposed rules differ from the final rules that are on file with the Secretary of State in some respects. The word "calendar" has been deleted at 24.7.b.2 as shown above in the rules that are on file with the Secretary of State. Nevertheless, we find this omission to be non-substantive, and the intent of this provision remains substantially the same. Therefore, we find that CSR 38-2-24 is no less effective than the Federal regulations at 30 CFR part 702 and can be approved. We should note that the implementation of the proposed provisions at CSR 38-2-24 will require the WVDEP to conduct various financial accounting and auditing activities to assess initial and continued eligibility of operations under this exemption. OSM is available to assist the WVDEP by providing training in the monitoring

and auditing of these kinds of operations.

Federal Provisions at 30 CFR Part 702 With No Direct State Counterparts

The State amendments at CSR 38-2-24 concerning exemption for coal extraction incidental to extraction of other minerals do not contain counterparts to all the Federal provisions at 30 CFR part 702. Each instance in which the State lacks a specific Federal counterpart is discussed below.

CSR 38-2-24 has no counterpart to the Federal regulations at 30 CFR 702.12(o) concerning operations having extracted coal or other minerals prior to filing an application for an exemption. It is our understanding that West Virginia does not currently authorize coal removal for quarry operations. In addition, under the proposed amendments, quarry operations must obtain an exemption prior to the removal of coal. Therefore, we find that the lack of a counterpart to 30 CFR 702.12(o) does not render the West Virginia program less effective than the Federal regulations at 30 CFR part 702.

CSR 38-2-24 has no counterpart to the Federal regulations at 30 CFR 702.15(c) concerning conducting operations in accordance with the approved application or when authorized to extract coal under 30 CFR 702.11(b) or 702.11(e)(3) prior to submittal or approval of an exemption application in accordance with the provisions at CSR 38-2-24. We find that the lack of a counterpart to 30 CFR 702.15(c) does not render the proposed rules less effective than the Federal regulations for the following reasons. The Federal regulations at 30 CFR 702.11(b) concern existing operations that have commenced coal extraction prior to the effective date of the proposed State regulations. It is our understanding that West Virginia does not currently authorize coal removal for quarry operations, and under the proposed amendments, quarry operations must obtain an exemption prior to the removal of coal. Therefore, the West Virginia program does not need a counterpart to the Federal regulations at 30 CFR 702.11(b).

The Federal regulations at 30 CFR 702.11(e)(3) concern coal removal by an applicant if the regulatory authority fails to provide the applicant with a determination within the time specified, unless the regulatory authority issues an interim finding that the applicant may not begin coal extraction. The State's counterpart to 30 CFR 702.11(e)(3) providing for an interim finding is at

CSR 38-2-24.1, and is no less effective than 30 CFR 702.11(e)(3).

As we noted above, the State lacks a counterpart to the specific requirement at 30 CFR 702.15(c), which provides that a person conducting activities under an exemption shall conduct operations in accordance with the approved application. Although CSR 38-2-24 does not contain this specific provision, we believe that it is only logical that the proposed State rules implicitly require that an operator who has applied for and received an exemption under the proposed rules at CSR 38-2-24 or has applied for an exemption and more than 90 days has passed under CSR 38-2-24.1, shall conduct operations in accordance with the approved or pending application. It is also our understanding that under the proposed rules at CSR 38-2-24 an operator conducting activities to be covered by an exemption under that section will conduct such operations in accordance with CSR 38-2-24. Our finding that CSR 38-2-24 is not rendered less effective than the Federal regulations at 30 CFR part 702.15(c) is based upon our understandings discussed above. If, in future reviews, we should determine that West Virginia is implementing these provisions in a manner that is inconsistent with this finding, a further amendment may be required.

CSR 38-2-24 has no counterparts to the Federal definitions of "annual production" and "annual revenue" at 30 CFR 702.5(a) and (b), respectively. However, the proposed rules clearly require reporting starting with application approval, at the end of each calendar quarter pursuant to CSR 38-2-24.7.a.1, and at the end of each calendar year pursuant to CSR 38-2-24.7.b.1. Therefore, data will be collected commencing at application approval, and it will be reported both on a quarterly and annual basis. It is our understanding that the State will have available all the data it needs to accurately determine whether an exemption shall be continued or revoked. Therefore, we find that CSR 38-2-24 is not rendered less effective than the Federal regulations due to not having explicit definitions of "annual production" and "annual revenue."

IV. Summary and Disposition of Comments

Public Comments

On May 12, 2004, we asked for public comments on the amendment (Administrative Record Number WV-1396). One person responded on three occasions (Administrative Record

Numbers WV-1395, WV-1399 and WV-1407).

The commenter criticized the 1872 Mining Law and stated that it desperately needs changing (Administrative Record Number WV-1407). One of the primary purposes of this law is to promote mineral exploration and development on Federal lands in the western United States. The commenter stated that it is time that strong State regulations are put in place to stop the 1872 law from being allowed to harm people and the environment in this country today. In response, we note that coal mining operations in West Virginia, and all other States as well, are not regulated by the 1872 General Mining law per se, but are regulated under SMCRA, a Federal law that was passed in 1977. Under SMCRA, individual States are authorized to establish and implement their own surface coal mining and reclamation programs if those programs are deemed to be no less stringent than SMCRA and no less effective than the Federal regulations that implement SMCRA. West Virginia administers its own surface coal mining regulatory program that was approved by the Secretary of the Department of the Interior in 1981.

Under SMCRA, individual states with an approved surface coal mining regulatory program may amend their programs by sending to OSM copies of the State's proposed statutory and/or regulatory changes for review and approval by OSM. If OSM approves those amendments, they will become part of the approved State regulatory program. The amendments that we are approving in this notice today were submitted by the State, in accordance with applicable Federal regulations, for our approval prior to being added to the State's approved surface coal mining regulatory program. When we approve an amendment to a State's approved coal mining regulatory program, it is our judgment that the proposed amendments are no less stringent than SMCRA and no less effective than the counterpart Federal regulations at 30 CFR part 700 to end.

The commenter also stated that an environmental performance bond of at least \$25 million should be placed with the State before any work starts which guarantees environmental clean up (Administrative Record Number WV-1399). We believe this comment may address the State's amendment to CSR 38-2-14.15.g, which increases the bond amount per acre for operations seeking a variance under CSR 38-2-14.15.g, to the maximum amount specified at W. Va. Code 22-3-12(b)(1) (\$5,000 per

acre). Under the Federal regulations at 30 CFR 800.14(b), the amount of a performance bond must be sufficient to assure the completion of the reclamation plan if the work has to be performed by the regulatory authority in the event of bond forfeiture, and in no case less than \$10 thousand for the entire area under one permit. Under the Federal regulations, therefore, the performance bond amount is not based upon a fixed bond amount, but rather it is based upon the acreage of the proposed permit and the estimated cost of completing the reclamation plan if the work has to be performed by the regulatory authority in the event of bond forfeiture. Under the State's proposed revision at CSR 38-2-14.15.g, whenever a variance is sought under CSR 38-2-14.15.g, the site-specific bond amount per acre must be the maximum allowed under W. Va. Code 22-3-12(b)(1). This increase, while it may not result in a \$25 million total bond for any specific permit, will increase the bond monies available for reclamation on all permits requesting a variance under CSR 38-2-14.15.g. As we stated above at Finding 6, this proposed requirement would also help assure that the State's alternative bonding system will generate sufficient revenue to complete reclamation of bond forfeiture sites, including those with AOC variances. Therefore, we are approving the proposed amendment to CSR 38-2-14.15.g.

The commenter provided several general statements disapproving of the way surface coal mining activities, including mountaintop removal mining operations, are being regulated within the State and by OSM (Administrative Record Numbers WV-1395, WV-1399, and WV-1407). The commenter stated a desire to protect trees, birds, wildlife and earth from mining, such as from flood damage and mountaintop removal mining, that the commenter stated is taking place today. The commenter stated that the postmining land must be left clean of toxins and residue. As we noted above, surface coal mining and reclamation activities in West Virginia are regulated under an approved State program that has been found to be no less stringent than SMCRA. The proposed State provisions at CSR 38-2-7.6 concerning forest land postmining land use and CSR 38-2-7.7 concerning wildlife postmining land use were submitted by West Virginia to ensure that reclamation techniques and husbandry practices that promote productive forestlands and wildlife habitats are followed by surface coal mining operations within the State. We believe that these provisions, once

implemented, will do much to enhance reclaimed mine lands in West Virginia and to quell the commenter's concerns.

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-1391). We received comments from the U.S. Department of Labor, Mine Safety and Health Administration (MSHA). On May 15, 2004, MSHA stated that it found no changes or issues that impact upon coal miners' health and safety (Administrative Record Number WV-1398).

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.*).

By letter dated April 20, 2004, we requested comments and the concurrence from EPA on the State's program amendments (Administrative Record Number WV-1392). EPA responded by letter dated July 28, 2004, and stated that it had reviewed the revisions and determined that there are no apparent inconsistencies with the Clean Water Act or other statutes and regulations under the EPA's jurisdiction (Administrative Record Number WV-1402).

V. OSM's Decision

Based on the above findings, we are approving, except as noted below, the program amendment West Virginia sent us on March 25, 2004. In addition, the required program amendment codified at 30 CFR 948.16(oooo) is satisfied and can be removed, and the disapproval set forth at 30 CFR 948.12(a)(4) has been resolved.

At CSR 38-2-7.6.e.1, we are not approving the word "excessive."

At CSR 38-2-7.7.e.1, we are not approving the word "excessive."

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

The provisions in the rule based on counterpart Federal regulations do not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulations. The revisions made at the initiative of the State that do not have Federal counterparts have also been reviewed and a determination made that they do not have takings implications. This determination is based on the fact that the provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

Executive Order 12866—Regulatory Planning and Review

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

Executive Order 12988—Civil Justice Reform

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

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining

operations.” Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be “in accordance with” the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations “consistent with” regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. The basis for this determination is our decision is on a State regulatory program and does not involve Federal regulations involving Indian lands.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

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

Paperwork Reduction Act

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

Regulatory Flexibility Act

The Department of the Interior certifies that a portion of the provisions in 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.*) because they are 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. The Department of the Interior also certifies that the provisions in this rule that are not based upon counterpart Federal regulations will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This determination is based on the fact that the provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of \$100 million; (b) will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local 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 fact that a portion of the State provisions are based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule. For the portion of the State provisions that is not based upon counterpart Federal regulations, this determination is based upon the fact that the State provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that a portion of the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate. For the portion of the State provisions that is not based upon counterpart Federal regulations, this determination is based upon the fact that the State provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 29, 2004.

Brent Wahlquist,

Regional Director, Appalachian Regional Coordinating Center.

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

PART 948—WEST VIRGINIA

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

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

■ 2. Section 948.12 is amended by adding new paragraph (h) to read as follows.

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

* * * * *

(h) We are not approving the following provisions of the proposed program amendment that West Virginia submitted on March 25, 2004:

(1) At CSR 38–2–7.6.e.1, the word “excessive.”

(2) At CSR 38–2–7.7.e.1, the word “excessive.”

■ 3. 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 of approved provisions
March 25, 2004	February 8, 2005	CSR 38-2-3.12.a.1; 7.6 (except the word "excessive" at 7.6.e.1); 7.7 (except the word "excessive" at 7.7.e.1); 9.3.g; 14.15.a.1; 14.15.g; 20.1.a.6; 22.5.a; 23 (deleted); and 24. Reduced Inspection Frequency Policy dated November 3, 2004.

■ 4. Section 948.16 is amended by removing and reserving paragraph (oooo).
 [FR Doc. 05-2411 Filed 2-7-05; 8:45 am]
 BILLING CODE 4310-05-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[WA-04-006; FRL-7866-4]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes: Washington; Yakima PM-10 Nonattainment Area Limited Maintenance Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA or Agency) is taking final action to approve the Limited Maintenance Plan (LMP) for Yakima PM-10 nonattainment area (Yakima NAA) in the State of Washington and grant a request by the State to redesignate the Yakima NAA to attainment for the National Ambient Air Quality Standards (NAAQS) for particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM-10). In a concurrent notice of final rulemaking published today, EPA is correcting the boundary of the Yakima NAA to exclude a small portion that lies within the exterior boundary of the Yakama Indian Reservation. The State Implementation Plan (SIP) that we are approving with this action does not extend to lands which are within the boundaries of the Yakama Indian Reservation.

EFFECTIVE DATE: This rule is effective March 10, 2005.

ADDRESSES: Copies of the State's request and other supporting information used in developing this action are available for inspection during normal business hours at the following locations: EPA, Office of Air, Waste and Toxics (OAWT-107), 1200 Sixth Avenue,

Seattle, Washington 98101. Interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day. A reasonable fee may be charged for copies.

FOR FURTHER INFORMATION CONTACT: Gina Bonifacio, Office of Air Quality (OAWT-107), EPA Region 10, 1200 Sixth Avenue, Seattle, Washington 98101, (206) 553-2970.

SUPPLEMENTARY INFORMATION: Throughout this document, wherever "we," "us" or "our" is used, we mean EPA. Information is organized as follows:

Table of Contents

- I. Background
- II. Public Comments
- III. Final Action
- IV. Statutory and Executive Order Reviews

I. Background

Under the authority of the Federal Clean Air Act (Clean Air Act or the Act) EPA is taking final action to approve the Limited Maintenance Plan (LMP) for the Yakima County PM-10 Nonattainment Area (Yakima NAA) in the State of Washington and to redesignate the area to attainment for PM-10. The action to redesignate the Yakima NAA to attainment is based on valid monitoring data and analysis of ambient air quality made in the demonstration that accompanies the LMP. EPA believes the area will continue to meet the National Ambient Air Quality Standards (NAAQS or standards) for PM-10 for at least 10 years beyond this redesignation, as required by the Act. In addition, EPA believes that the area will continue to meet the Limited Maintenance Plan design value criteria outlined in the LMP policy¹. A detailed description of our proposed action to approve the Yakima NAA LMP and redesignation request was published in a proposed rulemaking in the **Federal Register** on November 29, 2004. See 69 FR 69342.

¹ August 9, 2001 memo from Lydia Wegman, Director, Air Quality Standards and Strategies Division, entitled "Limited Maintenance Plan Option for Moderate PM-10 Nonattainment Areas."

II. Public Comments

EPA provided a 30-day review and comment period and solicited comments on our proposal published in the November 29, 2004, **Federal Register**. See 69 FR 69342. No comments were received for the proposed rulemaking. EPA is now taking final action on the SIP revision consistent with the published proposal.

III. Final Action

EPA is taking final action to approve the Yakima County PM-10 Limited Maintenance Plan and to redesignate the Yakima County nonattainment area to attainment for PM-10. Washington has demonstrated compliance with the requirements of section 107(d)(3)(E) based on information provided by the Washington Department of Ecology and contained in the Washington SIP and Yakima NAA PM-10 Limited Maintenance Plan.

IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator 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.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4).

This rule also does not have tribal implications because it will not have a