

additional 0.5 percent for each additional month or fraction thereof during which the failure continues, but not to exceed 25 percent in the aggregate. \* \* \*

(4) *Reduction of failure to pay penalty during the period an installment agreement is in effect*—(i) *In general.* In the case of a return filed by an individual on or before the due date for the return (including extensions)—

(A) The amount added to tax for a month or fraction thereof is determined by using 0.25 percent instead of 0.5 percent under paragraph (a)(2) of this section if at any time during the month an installment agreement under section 6159 is in effect for the payment of such tax; and

(B) The amount added to tax for a month or fraction thereof is determined by using 0.25 percent instead of 0.5 percent under paragraph (a)(3) of this section if at any time during the month an installment agreement under section 6159 is in effect for the payment of such tax.

(ii) *Effective date.* This paragraph (a)(4) applies for purposes of determining additions to tax for months beginning after December 31, 1999.

\* \* \* \* \*

**Robert E. Wenzel,**

*Deputy Commissioner of Internal Revenue.*

Approved: August 1, 2000.

**Jonathan Talisman,**

*Acting Assistant Secretary of the Treasury.*

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## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 948

[WV-085-FOR]

#### West Virginia Regulatory Program

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

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

**SUMMARY:** OSM is announcing its approval, with certain exceptions, of an amendment to the West Virginia regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The program amendment consists of changes to the West Virginia regulations (38 CSR 2) contained in House Bill 4223, and changes to § 22-3 of the Code of West

Virginia contained in Senate Bill 614. The amendment is intended to comply with the Consent Decree that was agreed to by the plaintiffs and the West Virginia Division of Environmental Protection (WVDEP) and approved by the U.S. District Court for the Southern District of West Virginia on February 17, 2000, in the matter of *Bragg v. Robertson*, Civil Action No. 2:98-0636 (S.D.W.Va.).

**EFFECTIVE DATE:** August 18, 2000.

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

#### SUPPLEMENTARY INFORMATION:

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

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

On January 21, 1981, the Secretary of the Interior conditionally approved the West Virginia program. You can find background information on the West Virginia program, including the Secretary's findings, the disposition of comments, and the conditions of the approval in the January 21, 1981, **Federal Register** (46 FR 5915-5956). You can find later actions concerning the West Virginia program and previous amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

#### II. Submission of the Amendment

By letter dated March 14, 2000 (Administrative Record Number WV-1147) and March 28, 2000 (Administrative Record Number WV-1148), and electronic mail dated April 6, 2000 (Administrative Record Number WV-1149), the WVDEP submitted an amendment to its program. The amendment concerns changes to the West Virginia surface mining reclamation regulations made by the State Legislature in House Bill 4223, and changes made to the Code of West Virginia in Senate Bill 614. Most of the amendment is intended to comply with the Consent Decree that was agreed to by the plaintiffs and the WVDEP and approved by the U.S. District Court for the Southern District of West Virginia on February 17, 2000, in the matter of *Bragg v. Robertson*, Civil Action No. 2:98-0636 (S.D.W.Va.).

We announced receipt of the proposed amendment in the April 25, 2000, **Federal Register** (65 FR 24158-

24162), invited public comment, and provided an opportunity for a public hearing on the adequacy of the proposed amendment. The public comment period closed on May 25, 2000. Since no one requested a public hearing, none was held.

#### III. Director's Findings

Set forth below, pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are the Director's findings concerning the proposed amendment. Any revisions that we do not specifically discuss below concern nonsubstantive wording changes or revised paragraph notations to reflect organizational changes that result from this amendment.

In addition, to expedite our review of the amendment, we have separated from this amendment the proposed rules at new section CSR 38-2-7.5 concerning "homesteading" as a postmining land use for permits that meet the requirements for a variance from approximate original contour (AOC). These new rules were submitted to comply with the Consent Decree mentioned above. We will render our findings on new section CSR 38-2-7.5 in a separate notice to be published in the **Federal Register**.

#### A. Senate Bill 614

Numerous wording and paragraph notation changes have been made.

These are nonsubstantive changes that will not be discussed. The substantive changes are identified below.

1. W.Va. Code 22-3-3. Definitions.

At § 22-3-3(e) the definition of the term "approximate original contour" (AOC) is amended. The word, "disturbed" has been deleted from the phrase, "backfilling and grading of the disturbed areas." Added in place of the deleted word is the word, "mined." As amended, AOC means: "that surface configuration achieved by the backfilling and grading of the mined areas so that \* \* \*." We find that the amended phrase is identical to the counterpart phrase in the definition of AOC at section 701(2) of SMCRA, and at 30 CFR 701.5 of the Federal regulations. Therefore, we find the revision to be no less stringent than SMCRA and no less effective than the Federal regulations and can be approved.

At § 22-3-3(u) (2), the definition of "surface mine," "surface-mining" or "surface-mining operations" is amended by deleting the word "may" in the sentence immediately before subdivision (i), and replacing that word with the word "does." As amended, the sentence reads: "Surface-mining does

not include any of the following: \* \* \*.” We find that the amendment merely clarifies the meaning of the quoted phrase and can be approved. However, as discussed below, our approval does not mean that the three examples of exemptions to the definition are approved parts of the West Virginia program.

In the February 9, 1999, **Federal Register** (64 FR 6201–6218), we addressed a West Virginia program amendment in which the State proposed adding the three exemptions to the definition of “surface mine,” “surface-mining” or “surface-mining operations,” and which are located at section 22–3–3(u)(2)(i), (ii), and (iii). In that notice, we deferred our decision on the section 22–3–3(u)(2)(i) concerning government-financed reclamation contract; disapproved section 22–3–3(u)(2)(ii) concerning coal extraction as an incidental part of development for commercial, residential, industrial, or civic use; and approved section 22–3–3(u)(2)(iii) concerning the reclamation of an abandoned or forfeited mine by a no-cost reclamation contract to the extent that the reclamation activities do not include coal extraction. See the February 9, 1999, notice and the May 5, 2000, **Federal Register** (65 FR 26130–26136) for more information on OSM decisions relating to State amendments on government-financed reclamation contracts, coal extraction as an incidental part of development for commercial, residential, industrial, or civic use, and the reclamation of abandoned or forfeited mines by no-cost reclamation contracts.

At § 22–3–3(y), the definition of “lands eligible for remining” is amended in the second sentence by deleting the word “may” and adding in its place the word “do.” As amended, the sentence reads as follows: “Surface-mining operations on lands eligible for remining do not affect the eligibility of the lands for reclamation and restoration under article two of this chapter.” We find that the amendment to § 22–3–3(y) does not render the provision less stringent than SMCRA at section 404 which provides that surface coal mining operations on lands eligible for remining shall not affect the eligibility of such lands for reclamation and restoration. Therefore, the amendment can be approved. We note, however, that on February 9, 1999 (64 FR 6201–6218), we approved the definition of “lands eligible for remining” at section 22–3–3(y) only to the extent that AML funds may be used to reclaim sites where a bond or deposit has been forfeited only if the bond or deposit is insufficient to provide for

adequate reclamation or abatement. That qualified approval still stands.

2. W.Va. Code 22–3–13. General environmental protection performance standards for surface mining; variances.

At § 22–3–13(c)(3), concerning mountaintop removal mining operations, the list of approvable postmining land uses is amended as follows. In the first sentence, the word “woodland” is deleted, the words “commercial forestry” are added, the words “or fish and wildlife habitat and recreation lands use” are deleted, the word “facility” and the words “including recreational uses” are added. As amended, the sentence reads as follows: “In cases where an industrial, commercial, agricultural, commercial forestry, residential, public facility including recreational uses is proposed for the postmining use of the affected land \* \* \*.”

In addition, a new subdivision § 22–3–13(c)(3)(B)(iii) is added to require that the applicant provide assurances that the proposed postmining land use will be “obtainable according to data regarding expected need and market.” The previously existing subdivision (iii) is renumbered as subdivision (iv), and so on.

SMCRA at section 515(c)(3) provides for the following postmining land uses for mountaintop removal operations: industrial, commercial, agricultural, residential, and public facility (including recreational facilities). On September 1, 1983 (48 FR 39892, 39893), OSM amended its rules concerning postmining land uses and variances. In the preamble, OSM discussed amending the definition of “land use” at 30 CFR 701.5. In that discussion, OSM stated that “Agricultural use is interpreted as including cropland, pastureland or land occasionally cut for hay, grazingland, and forestry.” We have considered “forestry” to be a subset of the “agricultural” postmining land use since 1983. Even though the State has listed commercial forestry separately, it is an approvable postmining land use for mountaintop removal operations under the “agricultural” postmining land use. Therefore, the deletion of the term “woodland” and the addition of the term “commercial forestry” do not render subsection (c)(3) less stringent than section 515(c)(3) of SMCRA and can be approved.

On May 14, 1999 (64 FR 26288), we determined that the State’s postmining land use of “fish and wildlife habitat” rendered the West Virginia program less stringent than SMCRA, because SMCRA at section 515(c)(3) does not authorize “fish and wildlife habitat” as a

postmining land use for mountaintop removal operations. We disapproved the State’s proposed “fish and wildlife habitat” postmining use at section 22–3–13(c)(3), and required that the West Virginia program be amended to remove the phrase “or fish and wildlife habitat and recreation lands.” We also required that the term “public use” at section 22–3–13(c)(3) be amended to include the term “facility” and also to clarify that the term will be interpreted the same as “public facility (including recreation facilities) use” at SMCRA section 515(c)(3). We codified these required amendments in the Federal regulations at 30 CFR 948.16(iiii)(1) and (2). The State has responded to these required amendments by deleting the words “or fish and wildlife habitat and recreation lands use” and by adding the words “facility including recreational uses.” As amended, section 22–3–13(c)(3) is substantively identical to the approvable postmining land uses for mountaintop removal operations provided at section 515(c)(3) of SMCRA with one exception. The State term “public facility including recreational uses” differs from the SMCRA term “public facility (including recreational facilities).” The meaning of the difference is not readily apparent.

In May 14, 1999, **Federal Register** notice discussed above, we explained that SMCRA’s use of the term “facilities” means that various structures which support the public or recreational use of the land are required to be developed. For example, the postmining land use of “public facility (including recreational facilities)” requires a structure or development of some sort created by man that the public is able to use. A “public facility” might include developments such as governmental buildings, prisons, schools, reservoirs, or airports. “Recreational facilities” might include developed recreational facilities such as parks, camps, and amusement areas, as well as areas developed for uses such as hiking, canoeing, and other less intensive recreational uses. However, even the less intensive recreation facilities would require structures or developments to support the public uses. For example, less intensive recreation facilities such as those for hiking and camping may require access roads, parking lots, rest rooms, developed trails, boat ramps, camping shelters, etc. In the required amendment codified at 30 CFR 948.16(iiii)(2), we require that the State amend the term “public use” at section 22–3–13(c)(3) to include the term “facility” and also to clarify that the term will be interpreted

the same as "recreational facilities use" at SMCRA section 515(c)(3). In this amendment, the State has added the term "recreational use," but has not submitted an explanation as to how the term will be interpreted.

It is not clear whether or not the proposed postmining land use of "public facility including recreational uses" is intended to mean the same as "public facility (including recreational facilities) use" at section 515(c)(3) of SMCRA. Therefore, we are approving the amendment only to the extent that the term "public facility including recreational uses" is interpreted to mean the same as the SMCRA term "public facility (including recreational facilities) use" as discussed above. In addition, since the State has satisfied the provisions of the required amendment codified at 30 CFR 948.16(iiii) (1) and (2), except for providing the clarification concerning how the WVDEP will interpret the term "recreational uses," we are deleting most of the required amendment except that we will continue to require, at (iii), that the State amend the term "recreational uses" at W.Va. Code 22-3-13(c)(3) to mean "recreational facilities use" at SMCRA section 515(c)(3).

Finally, the added words "obtainable according to data regarding expected need and market" at subdivision 22-3-13(c)(3)(B)(iii) are identical to, and therefore no less stringent than, the SMCRA provision at section 515(c)(3)(B)(ii) and can be approved. These changes are in response to a study that we conducted on mountaintop removal mining in West Virginia.

3. W.Va. Code 22-3-23. Release of bond or deposits; application; notice; duties of director; public hearings; final maps on grade release.

At subsection 22-3-23(c), a new subdivision number and title at (c)(1) are added to read as follows. "(1) For all operations except those with an approved variance from approximate original contour:" Previously existing subdivisions (c)(1), (2), and (3) have been relettered as (c)(1)(A), (B), and (C). As amended, subdivision 22-3-23(c)(1) applies only to operations that do not have an approved variance from the AOC requirements. This change does not render the West Virginia program less stringent than SMCRA and can be approved.

New subdivision 22-3-23(c)(2) is added to impose specific bond release requirements on operations with an approved variance from the AOC requirements.

New subdivision 22-3-23(c)(2)(A) provides that when the operator completes the backfilling, regrading and

drainage control of a bonded area in accordance with the operator's approved reclamation plan, the release of 50 percent of the bond or collateral for the applicable bonded area will be granted: Provided, that a minimum bond of \$10,000 shall be retained after grade release.

New subdivision 22-3-23(c)(2)(B) provides that two years after the last augmented seeding, fertilizing, irrigation or other work to ensure compliance subdivision 22-3-13(b)(19) concerning revegetation, the release of an additional 10 percent of the bond or collateral for the applicable bonded area will be granted: Provided, that a minimum bond of \$10,000 shall be retained after this phase of bond release.

New subdivision 22-3-23(c)(2)(C) provides that when the operator has completed successfully all surface mining and reclamation activities, the release of the remaining portion of the bond, but not before the expiration of the revegetation responsibility period specified in subdivision 22-3-13(b)(20) will be granted: Provided, that the revegetation has been established on the regraded mined lands in accordance with the approved reclamation plan and if applicable the necessary postmining infrastructure is established and any necessary financing is completed: Provided, however, that the release may be made where the quality of the untreated postmining water discharged is better than or equal to the premining water quality discharged from the mining site.

These provisions apply to mountaintop removal and steep slope mining operations which have been granted exceptions or variances from the AOC requirements. As amended, subdivisions 22-3-23(c)(2)(A), (B), and (C) differ from the State's approved bond release provisions at subdivisions 22-3-23(c)(1)(A), (B), and (C) (and which now apply only to mined lands which were not subject to an AOC variance) in two ways: (1) the percentages of the bond that may be released at the different stages; and (2) the requirement that final bond cannot be released on lands subject to an AOC variance unless, and if applicable, any necessary postmining infrastructure is established and any necessary financing is completed. The proposed percentages of the bond that may be released at the different stages of reclamation do not exceed the percentages provided for in section 519(c) of SMCRA and the Federal regulations at 30 CFR 800.40(c). There is no direct Federal counterpart to the requirement that final bond cannot be released on lands subject to an AOC variance unless, and if applicable, any

necessary postmining infrastructure is established and any necessary financing is completed. However, we find that this requirement is not inconsistent with the SMCRA bond release requirements at section 519(c) and the mountaintop removal and steep slope mining requirements at sections 515(c) and 515(e).

The proposed language also contains the following proviso: "Provided, however, That the release may be made where the quality of the untreated postmining water discharged is better than or equal to the premining water quality discharged from the mining site." This provision is less stringent than section 519(c) of SMCRA, and less effective than 30 CFR 800.40(c)(3), which together require that all reclamation requirements of the Act and the permit, including water quality, be fully met. Under the new language, the bond could be released where the quality of the water being discharged from the reclaimed mine site does not meet effluent limitations and applicable State and Federal water quality standards as required by section 519(c) of SMCRA and 30 CFR 816.42 and 817.42. Therefore, the proviso cannot be approved.

Except for the proviso language quoted above, we find that new subdivisions 22-3-23(c)(2)(A), (B), and (C) are consistent with the Federal bond release provisions at SMCRA section 519(c) and 30 CFR 800.40(c) and can be approved. The proviso at subdivision (c)(2)(C) which provides, "Provided, however, That the release may be made where the quality of the untreated postmining water discharged is better than or equal to the premining water quality discharged from the mining site," is not approved. Therefore, we are requiring that the West Virginia program at W.Va. Code § 22-3-23(c)(2)(C) be further amended to delete the proviso which allows the release of bond where the quality of untreated postmining water discharged is better than or equal to the premining water quality discharged from the mining site. We previously disapproved and set aside similar language at section 22-3-23(c)(1)(C). We codified that disapproval at 30 CFR 948.12(e), and the set aside at 30 CFR 948.13(c). We recommend the language at section 22-3-23(c)(1)(C) that is set aside, and therefore not a part of the approved West Virginia program, also be deleted.

#### *B. House Bill 4223*

1. CSR 38-2-2.31. Definition of commercial forestry and forestry.

This new definition is added to read as follows.

2.31.a. Commercial Forestry, as used in Subsection 7.4 of this rule, means a long-term postmining land use designed to accomplish the following: (1) Achieve greater forest productivity than that found on the mine site before mining; (2) Minimize erosion and/or sediment yield and serve the hydrologic functions of infiltrating, holding, and yielding water commonly found in undisturbed forests; (3) Result in biodiversity by facilitating rapid recruitment of native species of plants and animals via the process of natural succession; (4) Result in a premium forest that will thrive under stressful conditions; and (5) Result in landscape, vegetation and water resources that create habitat for forest-dwelling wildlife.

2.31.b. Forestry, as used in Subsection 7.4 of this rule, means a long-term postmining land use designed to accomplish the following: (1) Achieve forest productivity equal to that found on the mine site before mining; (2) Minimize erosion and/or sediment yield and serve the hydrologic functions of infiltrating, holding, and yielding water commonly found in undisturbed forests; (3) Result in biodiversity by facilitating rapid recruitment of native species of plants and animals via the process of natural succession; and (4) Result in landscape, vegetation and water resources that create habitat for forest-dwelling wildlife.

The Federal regulations at 30 CFR 701.5 define "forestry" within the definition of "land use" at paragraph (d) to mean land used or managed for the long-term production of wood, wood-fiber, or wood-derived products. Neither of the State's definitions specifically state that forestry means land used or managed for the production of wood, wood-fiber, or wood-derived products as does the Federal definition at 30 CFR 701.5. However, the State's revised definition of "Commercial Forestry" at the land use categories at CSR 38-2-7.2.i. clarifies that commercial forestry is where forest cover is managed for commercial production of timber products. We therefore find that the lack of reference to wood, wood-fiber, and wood-derived products at CSR 38-2-2.31.a. does not render the West Virginia program less effective than the Federal regulations and can be approved. However, the definition of "forestry" lacks a reference to wood products. Therefore, to be no less effective than the Federal definition of forestry under the definition of land use at 30 CFR 701.5, we are requiring that the West Virginia program at CSR 38-2-2.31.b. be amended to clearly define forestry to mean a postmining land use used or managed for the long term production of wood or wood products.

2. CSR 38-2-2.45. Definition of downslope.

This definition is amended by deleting the words "except in

operations where the entire upper horizon above the lowest coal seam is proposed to be partly or entirely removed." The deleted language was never approved by OSM. (See 64 FR 6201, 6205, February 9, 1999.) As amended, "downslope" means the land surface between the projected outcrop of the lowest coal seam being mined along each highwall, or any mining-related construction, and the valley floor. We note, however, that as amended, the State definition is identical to the Federal definition of "downslope" at 30 CFR 701.5 with the following exception.

In the proposed definition, the words "or any mining-related construction" do not appear in the Federal definition. OSM approved the mining-related construction language in the October 4, 1991 **Federal Register** (56 FR 50256, 50257-58). In that finding, OSM stated that the Federal definition is not intended to prohibit the construction of haul roads or pond embankments on steep slopes below the outcrop of the lowest coal seam being mined. Therefore, OSM determined that, to the extent that the term "mining-related construction" refers to structures such as those listed above, the State definition is no less effective than the Federal regulations. Similarly, OSM stated that to the extent that the proposed State's language is intended to prohibit the downslope placement of spoil removed by mining-related construction, it is not inconsistent with any Federal requirement. The WVDEP further clarified its definition of downslope by stating (Administrative Record Number WV-857) that the revised definition does not allow indiscriminate placement of materials on the downslope between the bench or cut and any mining-related construction. OSM approved the amended definition to the extent that the clarification provided by the State prohibits the placement of any debris, abandoned or disabled equipment, spoil material, or waste mineral matter between the lowest coal seam being mined and any mining-related construction. In our meeting with the WVDEP on May 3, 2000 (Administrative Record Number WV-1165A), the WVDEP stated that it continues to prohibit indiscriminate placement of materials on the downslope between the bench or cut and any mining-related construction. Therefore, for these reasons we find that as amended, the definition of "downslope" does not render the West Virginia program less effective than the Federal definition at 30 CFR 701.5 and can be approved.

3. CSR 38-2-2.98. Definition of prospecting.

This definition is amended by deleting the word "substantial" before the word "disturbance" in the first sentence. The effect of this deletion is that the definition of "prospecting" is no longer limited to those activities that cause "substantial" disturbance. On February 9, 1999 (64 FR 6201, 6205), we disapproved a West Virginia amendment concerning the definition of "prospecting." In that amendment, the State added the word "substantial" to its definition of "prospecting." The Federal regulations at 30 CFR 701.5 contain a definition of "coal exploration" that is synonymous with "prospecting," except the Federal definition lacks the word "substantial." In the disapproval, we noted that the Federal regulations at 30 CFR 772.11 require that a notice of intent to explore for coal be filed for any coal exploration operation, regardless of whether any disturbance at all will occur. In promulgating this revised Federal regulation on December 29, 1988, the Director stated that "for the regulatory authority to determine which proposed coal exploration operations may substantially disturb the natural land surface, it must be informed of all proposed exploration." (53 FR 52943). Therefore, we did not approve the proposed addition of the word "substantial" to modify the word "disturbance" in the State's definition of "prospecting."

We find that the deletion of the word "substantial," from the State's definition of "prospecting" fully addresses the reason for our disapproval of February 9, 1999. The State's definition of "prospecting" is now no less effective than its Federal counterpart at 30 CFR 701.5, and with the Federal regulations at 30 CFR 772.11. Therefore, the deletion of the word "substantial" can be approved.

4. CSR 38-2-2.123. Definition of substantially disturb.

This definition is amended by deleting the word "and" after the words "significantly impact land," and adding in its place the word "or." With this change, substantially disturb means to significantly impact land or water resources.

On February 9, 1999 (64 FR 6201, 6206), we approved an amendment to the State's definition of "substantially disturb" but, in the interest of clarity, also required the State to amend the phrase "land and water resources" to read "land or water resources." In its submittal of that amendment, the WVDEP stated that it interprets the definition of "substantially disturb" to mean that if land and/or water resources are significantly impacted by

prospecting that will mean that those resources have been "substantively (sic) disturbed." We approved the amended definition to the extent that it is construed in the manner explained by the WVDEP. However, because future administrations could construe the use of the term "and" in its more commonly understood sense, as a conjunctive connector, we required that the West Virginia program be further amended by changing the phrase "land and water resources" to "land or water resources" in the definition of "substantially disturb." We codified that required amendment in the Federal regulations at 30 CFR 948.16(xxx). In the currently proposed amendment, the State has clarified the definition of "substantially disturb," and thereby has satisfied the required program amendment codified at 30 CFR 948.16(xxx). Therefore, we are approving the amendment to the definition of "substantially disturb" and we are removing the required amendment codified at 30 CFR 948.16(xxx).

5. CSR 38-2-2.136. Definition of woodlands.

The definition of woodlands is deleted. As discussed above in Finding A. 2., we are approving the deletion of "woodlands" as an acceptable postmining land use for mountaintop removal operations. This postmining land use has no Federal counterpart. Therefore, we likewise find that the deletion of the definition of "woodlands" does not render the West Virginia program inconsistent with SMCRA or the Federal regulations and can be approved.

6. CSR 38-2-3.8.c. Structures and support facilities.

This subsection is amended by adding a new concluding sentence which reads as follows: "This exemption shall not apply to new and existing coal waste facilities."

The Director approved amendments to CSR 38-2-3.8(c) on July 24, 1996 (61 FR 38382, 38383). In addition to the approval, the Director required at 30 CFR 948.16(vvv)(1) that the West Virginia program be further amended to be consistent with 30 CFR 701.11(e)(2) by clarifying that the exemption at CSR 38-2-3.8(c) does not apply to: 1) the requirements for new and existing coal mine waste disposal facilities; and 2) the requirements to restore the land to approximate original contour.

The proposed amendment is intended to satisfy the required amendment codified at 30 CFR 948.16(vvv)(1)(1) by clarifying that the exemption at CSR 38-2-3.8(c) does not apply to the requirements for new and existing coal mine waste disposal facilities. The

proposed amendment, therefore, satisfies the required amendment codified at 30 CFR 948.16(vvv)(1)(1) and can be approved. However, the remaining requirement at 30 CFR 948.16(vvv)(1)(2), which is to clarify that the exemption at CSR 38-2-3.8(c) does not apply to the requirements to restore the land to AOC has not yet been satisfied and will remain in force. We will revise the required amendment codified at 30 CFR 948.16(vvv)(1) to only delete the satisfied portion at 948.16(vvv)(1)(1).

7. CSR 38-2-3.25 Transfer, assignment, or sale of permit rights and obtaining approval.

This subsection is amended by adding the term "reinstatement" in the title of the subsection, and in four locations where the phrase "transfer, assignment, or sale" appears. In addition, subdivision 3.25.b. is amended by adding a sentence which states that, "as a condition of reinstatement, the Director may require a modification to the mining and reclamation plan." With this amendment, the provisions of CSR 38-2-3.25 will apply to reinstated permits. In its submittal of this amendment, the WVDEP stated that the purpose of this amendment is to provide rules consistent with the W.Va. Code change that was approved by OSM.

On February 9, 1999 (64 FR 6201, 6203), we published a final rule notice in which we addressed an amendment to the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA) at section 22-3-17(b). That section was amended by adding a paragraph which provides that, within one year following the notice of a permit revocation, subject to the discretion of the director and based upon a petition for reinstatement, the revoked permit may be reinstated. Further, the provision provides that the reinstated permit may be assigned to any person who meets the permit eligibility requirements of the WVSCMRA at § 22-3.

We approved the reinstatement provisions because the Federal requirements do not specifically prohibit the reinstatement of a revoked permit. We note, of course, that even though WVSCMRA provides for a reinstatement period of up to one year after permit revocation, the reinstatement procedures must not result in the intentional delay of bond forfeiture reclamation by the WVDEP. We approved the statutory revision in so far as the new language added to section 22-3-17(b) did not contain any provisions that were less stringent than the requirements of SMCRA. However, because the State's proposed

reinstatement provisions did not reference the transfer, assignment or sale requirements of section 22-3-19(d) of WVSCMRA or CSR 38-2-3.25, and because the WVDEP had not fully developed its reinstatement procedures, we stated that the proposed provisions could not be implemented until the West Virginia program was further amended. We required at 30 CFR 948.16(www) that the State further amend the West Virginia program to accomplish the following: (1) adopt reinstatement procedures similar to its transfer requirements contained in CSR 38-2-3.25; (2) allow for public participation; (3) require that the revoked permit meet the appropriate permitting requirements of the WVSCMRA; and (4) require that the mining and reclamation plan be modified to address any outstanding violations for any permit reinstated pursuant to § 22-3-17(b) of the WVSCMRA. In the preamble containing our finding, we also stated that in no event can a reinstated permit be approved in advance of the close of the public comment period, and the party seeking reinstatement must post a performance bond that will be in effect before, during, and after the reinstatement of the revoked permit. The proposed regulatory amendment has been submitted to address the required amendment codified at 30 CFR 948.16(www).

The amendments to CSR 38-2-3.25 address the required amendment codified at 30 CFR 948.16(www), as follows. Concerning requirement (1), the State has adopted reinstatement procedures similar to its transfer requirements contained in CSR 38-2-3.25 by adding the term "reinstatement" to the title of section CSR 38-2-3.25, and at four locations within the section and thereby, adopting the requirements for transfer, assignment, or sale of permit rights as the reinstatement provisions. This satisfies requirement (1) at 30 CFR 948.16(www).

Concerning requirement (2), "allow for public participation," the State amendment adds the term "reinstatement" to subdivision CSR 38-2-3.25.a.3. which provides for public comment on the proposed permit reinstatement. This satisfies requirement (2) at 30 CFR 948.16(www).

Concerning requirement (3), "require that the revoked permit meet the appropriate permitting requirements of the WVSCMRA," the State amendment adds the term "reinstatement" to subdivision CSR 38-2-3.25.a.4. This subdivision provides that an approval of an application may be granted upon a written finding that the applicant will

conduct mining operations in accordance with the purpose and intent of the WVSCMRA, CSR 38-2, and the terms and conditions of the permit. Such findings, the provision states, will be based on information set forth in the application for transfer, assignment, or sale and any other information made available to the Director of the WVDEP. This satisfies requirement (3) at 30 CFR 948.16(www). We note that the word "reinstatement" was inadvertently omitted from the requirement that such findings will be based on information set forth "in the application for transfer, assignment, or sale" and any information made available to the Director of the WVDEP. Therefore, subdivision CSR 38-2-3.25.a.4. must be further amended to add the word "reinstatement" to the phrase "transfer, assignment, or sale" in the second sentence of subdivision CSR 38-2-3.25.a.4.

Concerning requirement (4), "require that the mining and reclamation plan be modified to address any outstanding violations for any permit reinstated pursuant to § 22-3-17(b) of the WVSCMRA," the State amendment added a sentence to subdivision CSR 38-2-3.25.b. The new sentence provides that, "as a condition of reinstatement, the Director may require a modification to the mining and reclamation plan." With the added sentence, CSR 38-2-3.25.b. provides that: (1) Any person who assumes ownership or control directly or indirectly of a surface mining and reclamation operation shall become responsible for the correction of all outstanding unabated violations; and (2) as a condition of reinstatement, the Director may require a modification to the mining and reclamation plan. These provisions together satisfy the intent of requirement (4), and is consistent with the "successor in interest" obligations contained in 30 CFR 774.17(f). We find that the required amendment codified at 30 CFR 948.16(www) is satisfied and can be removed, and that, therefore, the amendment can be approved.

The proposed amendment does not address our February 9, 1999, statement (at 64 FR 6201, page 6203) that, "in no event can a reinstated permit be approved in advance of the close of the public comment period \* \* \*." It may be appropriate that in cases of transfer, assignment or sale of permit rights that the procedures at CSR 38-2-3.25.b. allow for the approval of a transfer, assignment or sale of a permit in advance of the close of the comment period. Under certain limited circumstances, this could accommodate the sale of assets from one party to another.

However, in cases of reinstated permits, there would be no sale of assets from one party to another. Therefore, there should be no provision to allow approval of a reinstated permit prior to the close of the public comment period. The State has indicated its intent not to allow approval of reinstatement of a permit in advance of the close of the public comment period (Administrative Record Number WV-1165). Nevertheless, we are requiring that the West Virginia program at CSR 38-2-3.25.b. be further amended to provide that in no event can a reinstated permit be approved in advance of the close of the public comment period.

8. CSR 38-2-7.2.i. Commercial woodland.

The land use category of "commercial woodland" is amended by deleting the word "woodland," and adding in its place the word "forestry." As amended, the land use of "commercial forestry" means, "where forest cover is managed for commercial production of timber."

The Federal regulations at 30 CFR 701.5 define the term "forestry" under the definition of "land use" at paragraph (d) to mean "land used or managed for the long-term production of wood, wood fiber, or wood-derived products." As amended, the State's "commercial forestry" is similar to the Federal definition of "forestry" land use, except that the Federal definition provides slightly more detail. For example, the Federal definition states that "forestry" involves the production of wood, wood fiber, or wood-derived products. The State definition, however, merely refers to the production of timber products. The State's definition is still no less effective than the Federal definition because the timber products referred to in the State's definition could be used to produce wood fiber or wood-derived products.

The State definition of "commercial forestry" also lacks a requirement found in the Federal definition that the forest cover be managed for the "long-term" production of timber. This does not render the State definition less effective than the Federal definition. The State has added new definitions of "commercial forestry" and "forestry" at CSR 38-2-2.31.a., and .b., and both include the "long-term" standard. While these new definitions specifically apply to the new rules at CSR 38-2-7.4 concerning AOC variance operations, it is not unreasonable to conclude that all forestry operations are considered to be long-term. Therefore, we find the definition of "commercial forestry" to be no less effective than the Federal regulations at 30 CFR 701.5 and can be approved.

9. CSR 38-2-7.3. Criteria for approving alternative postmining use of land.

New subdivision 7.3.c. is added to provide that: "A change in postmining land use to grassland uses such as rangeland and/or hayland or pasture is prohibited on operations that obtain an approximate original contour variance described in WV Code § 22-3-13(b)(25)(c). Provided, however, That this subdivision is not effective until Sections 7.4 and 7.5 of this rule are approved by the federal Office of Surface Mining." It must be noted that there is a citation error in the quoted language. The mountaintop removal AOC variance provisions are located at section 22-3-13(c), not section 22-3-13(b)(25)(c). In its June 9, 2000, letter, the WVDEP stated that the citation error has been corrected (Administrative Record Number WV-1165). A spokesperson for the Secretary of State also confirmed that the citation error at subdivision 7.3.c. had been corrected in the surface mining reclamation rules that were filed by the WVDEP and which will take effect on August 1, 2000 (Administrative Record Number WV-1171).

There is no direct Federal counterpart to the proposed amendment. Under section 515(c)(3) of SMCRA, industrial, commercial, agricultural, residential or public facility (including recreational facilities) uses may be approved as postmining land uses for mountaintop removal mining operations. Certain managed grassland uses, such as grazing land, hayland or pasture land, are included within the Federal "agricultural" land use category. SMCRA at section 515(c)(3)(A) provides that the regulatory authority may grant a permit for mountaintop removal operations where (among other requirements) it deems that the proposed postmining land use constitutes an equal or better economic or public use of the affected land, as compared with the premining use. In this proposed amendment, the State has apparently concluded that such low intensity agricultural uses do not represent an equal or better economic or public use of the affected land. We find that the proposed amendment is not inconsistent with SMCRA at section 515(c)(3), which requires the regulatory authority to make such determinations, and can be approved.

10. CSR 38-2-7.4. Standards applicable to approximate original contour variance operations with a postmining land use of commercial forestry and forestry.

This subsection is new and contains the following subdivisions:

a. 7.4.a. Applicability. Subdivision 7.4.a.1. provides that CSR 38–2–7.4 applies to commercial forestry and forestry as they are defined at CSR 38–2–2.31 (see Finding B. 1., above). The proposed language is as follows.

Commercial Forestry and forestry may be approved as a post mining land use for surface mining operations that receive variances from the general requirement to restore the postmining site to its approximate original contour. An applicant may request AOC variance for purposes of this section for the entire permit area or any segment thereof. Either commercial forestry or forestry shall be established on all portions of the permit area. Provided, that the faces of valley fills shall be reclaimed as described in 7.4.b.1.J of this rule.

SMCRA at section 515(c) provides that the following postmining land uses (PMLU) may be approved for mountaintop removal mining operations, provided other specified criteria are met: industrial, commercial, agricultural, residential, or public facility (including recreational facilities) use. We have recognized forestry as an agricultural PMLU since 1983 (September 1, 1983; 48 FR at 39893). Consequently, commercial forestry may be approved for mountaintop removal mining operations as an agricultural use, provided the specified criteria at section 515(c) are met.

An agricultural PMLU is not an approvable PMLU under SMCRA at section 515(e)(2) for steep slope mining operations seeking a variance from the requirements to restore the land to AOC. Therefore, since we recognize forestry only as an agricultural PMLU, commercial forestry and forestry PMLU cannot be approved for steep slope mining operations seeking a variance from the requirements to restore the land to AOC.

Consequently, CSR 38–2–7.4.a.1., which authorizes commercial forestry and forestry for mining operations that receive variances from the general requirement to restore the postmining site to its AOC is no less stringent than 515(c) of SMCRA to the extent that it applies only to mountaintop removal mining operations.

The WVDEP has stated (Administrative Record Number WV–1165A) that the definitions of “commercial forestry” and “forestry” will be applied only as follows. “Commercial forestry,” both the definition and the implementing regulations at CSR 38–2–7.4, applies only to that portion of the operation which receives a variance from the requirements to achieve AOC. “Forestry,” both the definition and the implementing regulations at CSR 38–2–

7.4, applies only to that portion of the operation which does not receive an AOC variance and the land surface after mining will achieve AOC.

We clarified in our postmining land use policy document issued on June 23, 2000, that postmining land uses for mountaintop removal mining operations must afford some added benefit either from a public policy or an economic standpoint in compensation for not returning the land to AOC. Under the Federal regulations at 30 CFR 785.14(c)(1)(ii), mountaintop removal operations must comply with the alternative postmining land use requirements of 30 CFR 816.133(a) through (c). Like section 515(b)(2) of SMCRA, paragraphs (a) and (c) of 30 CFR 816.133 specify that the only acceptable alternative postmining land uses are those that are higher or better than the premining uses. This means that the postmining use must represent an added benefit from either a public or economic standpoint. Therefore, for example, rather than a forestry premining use resulting in a forestry postmining use, to create an added benefit, a forestry premining use would have to result in a commercial forestry postmining use or some other higher or better use.

CSR 38–2–7.4.a.1. provides that “commercial forestry and forestry” may be approved as a postmining land use for surface mining operations that receive variances from the AOC requirements. As discussed above, however, only commercial forestry would provide an added benefit in compensation for not returning the land to AOC. Most likely, a forestry postmining use in West Virginia would be similar to the premining use and would not provide an added economic or public benefit for not returning the land to AOC. Therefore, forestry does not qualify as a higher or better postmining land use for an AOC variance whereas commercial forestry does qualify for an AOC variance. CSR 38–2–7.4.a.1. does not make it clear that only commercial forestry may be approved for areas receiving a variance from the AOC requirements. We are approving CSR 38–2–7.4.a.1., but only to the extent that it applies to mountaintop removal mining operations that receive an AOC variance pursuant to W.Va. Code. 22–3–13(c). In addition, we are requiring that the West Virginia program be further amended to make it clear that at CSR 38–2–7.4.a.1., only commercial forestry postmining use and not forestry postmining use may be approved for areas receiving a variance from the AOC requirements.

b. 7.4.b. Requirements. This subsection contains requirements concerning planting and management plan development, oversight procedures, landscape criteria, soil and soil substitutes, soil placement and grading, liming and fertilizing, ground cover vegetation, tree species and compositions, standards of success, front faces of valley fills, and long-term monitoring and adaptive management. Subsection 7.4.b. contains the following requirements.

7.4.b.1. This provision provides that the Director of the WVDEP may authorize commercial forestry and forestry as a postmining land use only if the following conditions have been satisfied.

7.4.b.1.A. Planting and management plan development. This subdivision contains the following requirements.

7.4.b.1.A.1. A registered professional forester shall develop a planting plan and long-term management plan for the permitted area that meets the requirements of the West Virginia Surface Coal Mining and Reclamation Act. These plans shall be made a part of the surface mining permit application and shall be the basis for determining the capability of the applicant to meet the requirements of this rule. The plans shall be in sufficient detail to demonstrate that the requirements of the commercial forestry and forestry uses can be met. The plans shall contain a signed statement of intent from the landowner demonstrating its commitment to long-term implementation and management in accordance with the plan. Once final bond release is authorized, the permittee’s responsibility for implementing the long-term management plan ceases. Upon final bond release, the jurisdiction of the Director over the permittee, the operator, the landowner or any other responsible party shall cease. The minimum required content of these plans shall be as follows:

7.4.b.1.A.2. The landowner or other responsible party shall submit their objectives for achieving commercial forestry and forestry postmining land uses. The Director may approve the uses only when the planting plan and long term management plan demonstrate that the forest will be managed only for long term forest products, such as sawlogs or veneer, that take 50 to 80 years to mature.

7.4.b.1.A.3. A commercial species planting plan and prescription shall be developed by the registered professional forester to achieve the commercial forestry and forestry use. The plan shall include the following:

7.4.b.1.A.3.(a) A topographic map of the permit area, 1:12000 or finer, showing the mapped location of premining native soil. A description of each soil mapping unit that includes, at minimum, total depth and volume to bedrock, soil horizons, including the O, A, E, B, C, and Cr horizon depths, soil texture, structure, color, reaction and bedrock type and a site index for common native tree species. An approved certified professional

soil scientist shall conduct a detailed on-site survey, create the maps, and provide the written description of the soils. As part of the field survey, the soil scientist shall map and certify the slopes that are 50% or less with a confidence level of  $\pm 2\%$ .

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

7.4.b.1.A.3.(c) A description of the present soils and soil substitutes to be used as the plant medium and the proposed handling, and placement of these materials. The handling plan shall include procedures to:

7.4.b.1.A.3.(c)(1) protect native soil organisms and the native seed pool;

7.4.b.1.A.3.(c)(2) include organic debris such as litter, branches, small logs, roots, and stumps in the soil;

7.4.b.1.A.3.(c)(3) inoculate the minesoil with native soil organisms;

7.4.b.1.A.3.(c)(4) increase soil fertility; and

7.4.b.1.A.3.(c)(5) encourage plant succession.

7.4.b.1.A.3.(d) A surface preparation plan which includes a description of the methods for replacing and grading the soil and other soil substitutes and their preparation for seeding and tree planting.

7.4.b.1.A.3.(e) Liming and fertilization plans.

7.4.b.1.A.3.(f) Mulching type, rates and procedures.

7.4.b.1.A.3.(g) Species seeding rates and procedures for application of perennial and annual herbaceous, shrub, and vine plant materials for ground cover.

7.4.b.1.A.3.(h) A tree planting prescription to establish commercial forestry and forestry, to include species, stems per acre, planting mixes, and site-specific planting arrangements to maximize productivity.

7.4.b.1.A.4. A long-term management plan shall be developed by a registered professional forester. The plan shall include:

7.4.b.1.A.4.(a) A topographic map, with a minimum scale of 1:12000 shall be used to show the boundaries and extent of the proposed surface mining operation, the boundaries of areas being planned for commercial forestry and forestry land uses, and the proposed postmining surface configuration, stream drainages and wetlands, and the plant species mix that will be planted in each area.

7.4.b.1.A.4.(b) A proposed schedule of all silvicultural activities necessary to develop the forest resources for commercial forestry and forestry.

7.4.b.1.A.4.(c) A description of activities necessary to protect the forest resources from vandalism, wildfire, insects, diseases, exotic organisms and herbivory detrimental to long-term success.

7.4.b.1.A.4.(d) A plan to assure forest access for future management, protection, and eventual utilization of the forest

resources. The plan shall be developed to minimize adverse environmental impacts, including additional road building and other land disturbances. Forestry best management practices shall be followed.

7.4.b.1.A.4.(e) A plan for using forestry best management practices to minimize silvicultural and harvesting impacts on the permit area and on waters of the State. Best Management Practices shall be sufficient to assure compliance with applicable State and Federal water quality standards.

7.4.b.1.A.5. A signed statement from the permittee containing financial information and data sufficient to demonstrate:

7.4.b.1.A.5.(a) That achieving the commercial forestry use is practicable with respect to the private financial capability necessary to achieve the use; and

7.4.b.1.A.5.(b) That the commercial forestry use will be obtainable according to data regarding expected need and market.

7.4.b.1.A.6. Two copies of the planting plan, management plan, pertinent maps and statement of intent shall be submitted to the appropriate Division of Forestry District Forester and two copies of each plan shall be submitted to the Director of the Division of Environmental Protection.

SMCRA at section 515(c)(3)(B), and the Federal regulations at 30 CFR 785.14(c) provide that an applicant for a mountaintop removal mining permit must present specific plans for the proposed postmining land use. SMCRA and the Federal regulations do not, however, contain the same level of specificity as do these regulations with respect to the plans that must be submitted to support a particular authorized postmining land use. The provisions at CSR 38–2–7.4.b.1.A. provide detailed requirements concerning the specific plans that must be submitted for commercial forestry and forestry. The new provisions are not inconsistent with the requirements of SMCRA at section 515(c)(3)(B) and the Federal regulations at 30 CFR 785.14(c), which require that an applicant for a mountaintop removal mining permit present specific plans for the proposed postmining land use. However, in addition to these specific requirements in this subdivision, an applicant must demonstrate compliance with all of the existing State requirements concerning mountaintop removal mining operations at W. Va. Code 22–3–13(c) and CSR 38–2–14.10. Therefore, we find that the provisions at CSR 38–2–7.4.b.1.A. are not less stringent than SMCRA nor less effective than the Federal regulations and can be approved to the extent that they supplement, but do not supersede, the existing mountaintop removal permitting requirements and performance standards at W. Va. Code 22–3–13(c) and CSR 38–2–14.10. In addition, we are approving these requirements to the extent that the use

of best management practices at CSR 38–2–7.4.b.1.A.4.(e) will be limited to postmining timber harvesting practices conducted after final bond release and not as a substitute for the sediment control practices required at CSR 38–2–5.4 during mining and reclamation activities. Moreover, the termination of jurisdiction portion of CSR 38–2–7.4.b.1.A.1. is no less effective than the Federal termination of jurisdiction regulation at 30 CFR 700.11(d)(1)(ii), which authorizes the regulatory authority to terminate jurisdiction over a permanent program surface coal mining operation upon final bond release, but only to the extent that the State also applies the reassertion of jurisdiction requirements in its program at CSR 38–2–1.2.d. to these sites.

7.4.b.1.B. Oversight Procedures for Achieving Commercial Forestry and Forestry. This subdivision contains the following requirements.

7.4.b.1.B.1. Before approving a commercial forestry and forestry reclamation plan, the Director shall assure that the planting plan, long-term management plan, and statement of intent are reviewed and approved by a registered professional forester employed either by the West Virginia Division of Forestry or the Director of the Division of Environmental Protection and that a certified professional soil scientist employed by the Director reviews and field verifies the soil slope and sandstone mapping. Before approving the reclamation plan, the Director shall assure that the reviewing forester has made site-specific written findings adequately addressing each of the elements of the plans and statements. The reviewing forester and soil scientist shall make these findings within 45 days of receipt of the plans and maps.

7.4.b.1.B.2. If after reviewing the plans, the reviewing forester and soil scientist find that the plans and statements comply with the requirements of this land use, they shall prepare written findings stating the basis of approval. A copy of the findings shall be sent to the Director and to the surface mining permit supervisor for the region in which the permit is located. The written findings shall be made part of the facts and findings section of the surface mining permit application file. The Director shall assure that the plans and statements comply with the requirements of this rule and other provisions of the approved State surface mining program.

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

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

7.4.b.1.B.3.(b) Notify the Director that the reclamation plan does not meet the requirements of the regulations.

The Director may not approve the surface mining permit until finding that the reclamation plans satisfy all of the requirements of the regulations.

SMCRA and the Federal regulations do not contain specific counterparts to these provisions. The new provisions are, however, not inconsistent with the requirement of SMCRA at section 515(c) and the Federal regulations at 30 CFR 785.14 concerning mountaintop removal mining operations. Furthermore, there is nothing in these provisions that replaces the existing State requirements concerning mountaintop removal mining operations at W.Va. Code 22-3-13(c) or the regulations at CSR 38-2-14.10. Rather, the new requirements at CSR 38-2-7.4.b.1.B.2. provide that the Director of the WVDEP must assure that the plans and statements comply with both the new rule, and with other provisions of the approved State surface mining program. It should be noted that these requirements are in addition to the permit approval requirements of W.Va. Code 22-3-18, which also must be satisfied prior to the issuance of a permit. Because nothing in these proposed rules supersedes or replaces the existing requirements, we find that the new provisions at CSR 38-2-7.4.b.1.B. are not inconsistent with SMCRA or the Federal regulations and can be approved.

7.4.b.1.C. Landscape Criteria. This subdivision contains the following requirements.

7.4.b.1.C.1. For commercial forestry, the Director shall assure that the postmining landscape is rolling, and diverse. The backfill on the mine bench shall be configured to create a postmining topography that includes the principles of landforming (e.g. the creation of swales) to reflect the premining irregularities in the land. Postmining landform shall provide a rolling topography with slopes of both 5% and 15% with an average slope of 10% to 12.5%. The elevation change between the ridgeline and the valleys shall be varied. The slope lengths shall not exceed 500 feet. The minimum thickness of backfill, including minesoil, placed on the pavement of the basal seam mined in any particular area shall be ten (10) feet.

7.4.b.1.C.2. For commercial forestry, the surface drainage pattern shall contain watersheds of various sizes, shall exhibit a dendritic drainage pattern that simulates the premining pattern, and shall include the drainage channels, sediment control or other water retention surfaces, which shall remain on the site after bond release.

7.4.b.1.C.3. For commercial forestry, in areas where drainage channel design criteria do not mandate erosion control materials, and in other drainage areas where applicable, bioengineering techniques such as fascines, branch packings, live crib walls, and plantings of native herbs and shrubs appropriate for the site shall be used, to the extent possible, to increase the site biodiversity. Only native stone shall be used for erosion control.

7.4.b.1.C.4. For commercial forestry, at least 3 ponds, permanent impoundments or

wetlands totaling at least 3.0 acres shall be created on each 200 acres of permitted area. They shall be dispersed throughout the landscape and each water body shall be no smaller than 0.20 acres. All ponds, permanent impoundments or wetlands shall be subject to the requirements of subsection 5.5 of this rule, and shall be left in place after final bond release. The substrate of the ponds and wetlands must be capable of retaining water to support aquatic and littoral vegetation.

7.4.b.1.C.5. For forestry, all ponds and impoundments created during mining shall be left in place after bond release and shall be subject to the requirements of section 5.5 of the Rules, except for ponds and impoundments located below the valley fills. The substrate of the ponds and wetlands must be capable of retaining water to support aquatic and littoral vegetation.

7.4.b.1.C.6. Before Phase III bond release may be approved, the ponds, permanent impoundments or wetlands used to satisfy parts 7.4.d.1.C.4. and 5. of this rule shall be vegetated on the perimeter with at least six native herbaceous species typical of the region at a density of not less than 1 plant per linear foot of edge, and at least 4 native shrub species at a density of not less than 1 shrub per 6 linear feet of edge. No species of herbaceous or shrub species shall be less than 15% of the total for its life form. This requirement may be met by planted vegetation or that which naturally colonizes the site.

7.4.b.1.C.7. The landscape criteria in parts 7.4.d.1.C.1., 2., 3., 4., 5., and 6. above, do not apply to valley fills.

SMCRA and the Federal regulations do not contain all of the specific counterparts to these provisions. However, except as discussed below, the new provisions at CSR 38-2-7.4.b.1.C are not inconsistent with the requirements of SMCRA at section 515(c) and the Federal regulations at 30 CFR 785.14 concerning mountaintop removal mining operations and can be approved.

CSR 38-2-7.4.b.1.C.5. provides that for forestry, all ponds and impoundments created during mining shall be left in place after bond release and shall be subject to the requirements of section 5.5 of the Rules, "except for ponds and impoundments located below the valley fills." The meaning of the phrase, "except for ponds and impoundments located below the valley fills" is unclear. In our meeting with the WVDEP on May 3, 2000, the WVDEP stated that the phrase means that ponds and impoundments located below the valley fills are not required to be left in place after bond release, whereas ponds located elsewhere on the permit area are required to be left in place after bond release.

Nevertheless, the language at CSR 38-2-7.4.b.1.C.5 provides for a broad exemption from the permanent

impoundment requirements at CSR 38-2-5.5. Federal regulations at 30 CFR 816.49(b) set forth requirements applicable to all impoundments that will remain after mining, regardless of their location. The West Virginia counterpart to 30 CFR 816.49(b) is CSR 38-2-5.5. Therefore, we find that the language at CSR 38-2-7.4.b.1.C.5 which states, "except for ponds and impoundments located below the valley fills" renders the West Virginia program less effective than the Federal regulations at 30 CFR 816.49(b) and cannot be approved. Furthermore, we are requiring the State to either remove the phrase, "except for ponds and impoundments located below the valley fills," from its regulations at CSR 38-2-7.4.b.1.C.5 or revise the language to clarify that ponds and impoundments below the fill that are left in place must meet the requirements of CSR 38-2-5.5.

7.4.b.1.D. Soil and Soil Substitutes. This subdivision contains the following requirements.

7.4.b.1.D.1. Soil is defined as and shall consist of the O, A, E, B, C and Cr horizons.

7.4.b.1.D.2. The Director shall require the operator to recover and use the soil volume equal to the total soil volume on the mined area, as shown on the soil maps and survey except for those areas with a slope of at least 50%. The Director shall assure that all saved soil includes all of the material from the O through Cr horizons.

7.4.b.1.D.3. When the soil volume recovered in 7.4.b.1.D.2. above, is insufficient to meet the depth requirements, selected overburden materials may be used as soil substitutes. In such cases, the Director shall require the operator to recover and use all of the weathered, slightly acid brown sandstone from within ten (10) feet of the soil surface on the mined area. This weathered, slightly acid, brown sandstone material may contain or be supplemented with up to 25% by-volume weathered, slightly acid brown shale or siltstone from within ten (10) feet of the soil surface. Material from this layer may be removed with the soil and mixed with the soil in order to meet the depth requirement. Provided, that once the operator has recovered material sufficient to meet the depth requirements, it may cease recovering such material.

7.4.b.1.D.4. When the materials described in 7.4.b.1.D.2. and 3. of this rule are insufficient to meet the depth requirements, then the Director shall require the operator to recover and use all of the weathered, slightly acid, brown sandstone from below ten feet of the soil surface on the mined area. Provided, that once the operator has recovered material sufficient to meet the depth requirements, it may cease recovering such material.

7.4.b.1.D.5. If the applicant affirmatively demonstrates that the materials described in 7.4.b.1.D.2., 3., and 4. of this rule within the mined area are insufficient to meet the depth requirements, then up to 2/3 of the minesoil may consist of the best available material or mix of materials.

7.4.b.1.D.6. Before approving the use of soil substitutes, the Director shall require the permittee to demonstrate that the selected overburden material is suitable for restoring land capability and productivity. This will be demonstrated by the results of chemical and physical analyses that show that this material is at least 75% sandstone, has at least 15% fines (<2mm), has a net acid-base accounting between -3 and +3 calcium carbonate equivalent per 1000 tons of material excluding siderite effects, a soluble salt level less than 1.0 mmhos/cm, to result in a long-term equilibrium pH of between 5.0 and 6.5 and additional analyses as the Director deems necessary. If this spoil is made up of strongly contrasting materials with respect to acid/base accounting these materials shall be blended.

7.4.b.1.D.7. The minesoils shall be distributed across the disturbed areas, except the faces of valley fills, in a uniform and consistent mix.

7.4.b.1.D.8. For commercial forestry, the final surface material used as the planting and growth medium (hereinafter referred to as commercial forestry minesoil) shall consist of a minimum of four feet, and an average of at least five feet, of soil or a mixture of materials consisting of no less than one-third soil and two-thirds of the materials described in 7.4.b.1.D.3. and 4. of this rule.

7.4.b.1.D.9. For forestry, the final surface material used as the planting and growth medium (forestry minesoil) shall consist of a minimum of 4 feet of soil, or a mixture of soil and suitable soil substitutes described in 7.4.b.1.D.4 through 6 of this rule.

7.4.b.1.D.10. Commercial forestry minesoil shall be placed on that portion of the mined area which receives an AOC variance. For a proposed mine permit area or any specifically defined segment of the proposed permit area that does not satisfy the volumetric criteria for AOC, an AOC variance shall be required. In order to define the portion of the permit classified as AOC-compliant or AOC-variant, the permit may be divided into segments. The number of segments shall not exceed the number of excess spoil disposal areas proposed and each segment shall include at least one associated fill. In no event will there be more variance segments than there are excess spoil disposal areas on the permit area. For each segment, the AOC status shall be defined as complying with AOC if that segment meets the backfill volume, valley fill design, backfill inflection point tests and other criteria as described in the AOC policy adopted by the Director.

7.4.b.1.D.11. Forestry minesoil shall, at a minimum, be placed on all areas achieving AOC.

7.4.b.1.D.12. If the applicant does not demonstrate that there is sufficient material available on the permit area to satisfy the requirements of 7.4.d.1.D., then the Director may not authorize this post mining land use.

7.4.b.1.D.13. The Director shall require the operator to include, as part of the commercial forestry and forestry minesoil mix, organic debris such as forest litter, branches, small logs, roots and stumps in the soil to help reseed and resprout the native vegetation, inoculate the minesoil with native soil

organisms, increase soil fertility, and encourage plant succession.

7.4.b.1.D.14. The Director shall require that soil be removed and re-applied in a manner that minimizes stockpiling to protect seed pools and soil organisms. Only soil removed from the mined area during the one-year period immediately following commencement of soil removal may be placed in a long-term stockpile. Except for soil in a long-term stockpile, soil redistribution shall be done within six months of soil removal. Except for soil in a long-term stockpile, soil shall be stored for less than six months in piles less than six feet high and 24 feet wide in a stable area within the permit area where it will not be disturbed and will be protected from water or wind erosion or contaminants that lessen its capability to support vegetation. Long-term stockpiles shall be seeded with the legumes specified in the ground cover mixes used for reforestation (7.4.d.1.G.1. of this rule).

There are no specific counterparts to the provisions at CSR 38-2-7.4.b.1.D. at SMCRA section 515(c) nor the Federal regulations at 30 CFR 785.14 concerning mountaintop removal mining operations. There is nothing in these provisions that replace the existing State requirements concerning mountaintop removal mining operations at W.Va. Code 22-3-13(c) or the regulations at CSR 38-2-14.10. During our meeting with the WVDEP on May 3, 2000, the WVDEP stated that the existing State requirements concerning mountaintop removal mining operations at W.Va. Code 22-3-13(c) or the regulations at CSR 38-2-14.10. continue to apply.

The Federal regulations at 30 CFR 701.5 define topsoil to mean the A and E soil horizon layers of the four master soil horizons, which include the A, E, B and C horizons. In addition, the Federal regulations at 30 CFR 816.22(a)(1)(i) require that, prior to mining, all topsoil be removed as a separate layer and segregated. As an alternative, 30 CFR 816.22(a)(2) provides that if the topsoil is less than six inches thick, the operator may remove the topsoil and the unconsolidated materials immediately below the topsoil and treat the mixture as topsoil. During our meeting with the WVDEP on May 3, 2000, the WVDEP officials stated that the topsoil in the steep slope areas where mountaintop removal permits are requested is typically three inches thick.

The new State provision incorporates the flexibility afforded by 30 CFR 816.22(a)(ii) because of the thin topsoil in most steep slope areas of West Virginia. The new State provisions at CSR 38-2-7.4.b.1.D.2. require the operator to recover and use the soil volume equal to the total soil volume on the mined area, as shown on the soil maps and survey except for those areas

with a slope of at least 50%. All saved soil must include all of the material from the O through Cr horizons. However, the proposed rule at CSR 38-2-7.4.b.1.D.2. does not require an operator to recover and use topsoil from areas with slopes 50 percent (27 degrees) or greater. The Federal regulations at 30 CFR 816.22, like the State rules at CSR 38-2-14.3, require an operator to save and redistribute all topsoil. Therefore, we are not approving the phrase, "except for those areas with a slope of at least 50%," and we are requiring the State to delete this phrase from its regulations at CSR 38-2-7.4.1.D.2. Furthermore, the State must define the O and Cr soil horizons since neither horizon is defined in existing regulations, and we are requiring that the State amend its program to do so.

In addition, new CSR 38-2-7.4.b.1.D.6. provides that, before approving the use of soil substitutes, the Director shall require the permittee to demonstrate that the selected overburden material is suitable for restoring land capability and productivity on the basis of chemical and physical analyses. In order to be no less effective than the Federal regulations at 30 CFR 816.22(b), the proposed State rule must also provide that the substitute material is equally suitable for sustaining vegetation as the existing topsoil and the resulting medium is the best available in the permit area to support vegetation. Therefore, we are requiring that CSR 38-2-7.4.b.1.D.6. be further amended to provide that the substitute material must be equally suitable for sustaining vegetation as the existing topsoil and the resulting medium is the best available in the permit area to support vegetation.

CSR 38-2-7.4.b.1.D.10 provides that for each segment of the permit, the AOC status shall be defined as complying with AOC if that segment meets the backfill volume, valley fill design, backfill inflection point tests and other criteria as described in the AOC policy adopted by the Director. The final consent decree that was approved by U.S. District Court Chief Judge Charles Haden on February 17, 2000, which settled the *Bragg v. Robertson* case, Civil Action No. 2:98-0636 (S.D. W.Va.), required the parties to develop a plan to meet AOC and to optimize spoil placement for surface mining valley fills. In addition, the consent decree provided that the plan could only be implemented pursuant to an MOU or agreement among the affected Federal and State agencies. On March 6 and 13, 2000, the U.S. Environmental Protection Agency and the U.S. Army Corps of

Engineers, respectively, submitted letters to the WVDEP agreeing to the use of the State's AOC Process Guidance Document dated January 27, 2000 (Administrative Record Nos. WV-1153 and WV-1154). On March 24, 2000, OSM notified WVDEP that it had reviewed the AOC Process Guidance Document and, with certain exceptions, concurred with the implementation of that document (Administrative Record No. WV-1150). The final AOC Process Guidance Document was implemented by WVDEP on June 5, 2000. The proposed rule cited above will ensure compliance with that document. However, it must be noted that, in addition to the requirements set forth in the AOC Process Guidance Document, we are only approving this provision to the extent that the design and construction requirements set forth in CSR 38-2-3.7 and 38-2-14.14 for the disposal of excess spoil must also be satisfied.

CSR 38-2-7.4.b.1.D.13 provides that the Director shall require the operator to use, as part of the soil mix, organic debris such as forest litter, branches, small logs, roots and stumps in the soil to reseed and resprout the native vegetation, inoculate the mine soil, increase soil fertility and encourage plant succession. As mentioned above, soil is defined as the O, A, E, B, C, and Cr horizons. New CSR 38-2-7.4.b.1.E.1. also provides that the Director of the WVDEP must require the permittee to place mine soil loosely and in a non-compacted manner while meeting the static safety factor requirements. Therefore, organic material may only be placed in the soil mix if such placement will enhance the soil, promote vegetative growth and not affect stability.

The Federal regulations at 30 CFR 816.22(d) provide that topsoil and topsoil substitute materials must be redistributed in a manner that achieves an approximately uniform and stable thickness consistent with the approved postmining land use, contours and surface water drainage systems. These rules further provide that the regraded land must be treated if necessary to reduce potential slippage of the redistributed material and to promote root penetration. The Federal regulations also address the presence of organic materials in both backfills and excess spoil fills. For example, the Federal regulations at 30 CFR 816.102(d) concerning backfilling and grading require the removal of all organic material before placement of spoil on slope areas. Likewise, 30 CFR 816.71(e) concerning the placement of excess spoil provides that all vegetative and

organic materials shall be removed from the disposal area prior to placement of the excess spoil. 30 CFR 816.107(d) concerning the backfilling and grading of steep slopes provides that woody materials may not be placed in the backfill of steep slope areas unless the regulatory authority determines that the proposed method for placing woody material within the backfill will not deteriorate the stable condition of the backfilled area. 30 CFR 816.71(e) also provides that organic material may be included in the topsoil to control erosion, promote growth of vegetation, or increase the moisture retention of the soil. Because the proposed and existing State rules will limit the placement of organic material, such as branches, roots, and stumps, in the soil mix for redistribution, while still requiring backfilled and excess spoil areas to comply with the required static safety factors and ensuring that any woody material buried in the backfill in steep slope areas will not deteriorate the stable conditions of the backfill areas, we find that proposed CSR 38-2-7.4.b.1.D.13 is consistent with and no less effective than the Federal soil redistribution and stability requirements at 30 CFR 816.22(d), 816.71(e), 816.102(d), 816.107(d) and can be approved.

Except as discussed above, we find the new provisions at CSR 38-2-7.4.b.1.D to be consistent with the Federal topsoil and subsoil provisions at 30 CFR 816.22. They do not render the West Virginia program less stringent than SMCRA nor less effective than the Federal regulations and can be approved.

7.4.b.1.E. Soil Placement and Grading. This subdivision contains the following requirements.

7.4.b.1.E.1. The Director shall require the permittee to place minesoil loosely and in a non-compacted manner while meeting static safety factor requirements. Minesoil shall be graded only when necessary to maintain stability or on slopes greater than 20% unless otherwise approved by the Director. Grading shall be minimized to reduce compaction. When grading is approved by the Director, only light grading equipment may be used to grade the tops off the piles, roughly leveling the area with no more than one or two passes. Tracking in and rubber-tired equipment shall not be used. Non-permanent roads, equipment yards, and other trafficked areas shall be deep-ripped (24" to 36") to mitigate compaction and to allow these areas to be restored to productive commercial forestry. Soil physical quality shall be inadequate if it inhibits water infiltration or prevents root penetration or if their physical properties or water-supplying capacities cause them to restrict root growth of trees common to the area. Slopes greater than 50%

shall be compacted no more than is necessary to achieve stability and non-erodability.

7.4.b.1.E.2. The Director shall require the permittee to leave soil surfaces rough with random depressions across the entire surface to catch seed and sediment, conserve soil water, and promote revegetation. Organic debris such as forest litter, logs, and stumps shall be left on and in the soil.

These provisions are consistent with the Federal requirements for soil redistribution at 30 CFR 816.22(d) and the final grading requirements at 30 CFR 816.102(h) and (j) which allow for the construction of small depressions to retain moisture, minimize erosion and assist revegetation and for the preparation of the final graded surfaces in a manner that minimizes erosion and provides a surface for replacement of topsoil that will minimize slippage. 30 CFR 816.107(d), concerning the backfilling and grading of steep slopes, provides that woody materials may not be placed in the backfill of steep slope areas unless the regulatory authority determines that the proposed method for placing woody material within the backfill will not deteriorate the stable condition of the backfilled area. Also, the Federal requirements at 30 CFR 816.71(e) concerning the placement of excess spoil provide that the regulatory authority may approve the use of organic material on the topsoil as mulch, or in the topsoil to promote growth of vegetation or increase the moisture retention of the soil. The emphasis in the State provisions toward minimizing compaction is consistent with the needs of forestry and tree growth and the Federal soil redistribution requirements at 30 CFR 816.22(d). The provisions do, at CSR 38-2-7.4.b.1.E.1., however, require compliance with the static safety requirements for stability of the replaced soil. Therefore, the Director of the WVDEP can prohibit the placement of woody material in the soil if the stability requirements would not be met. There is nothing in the provisions at CSR 38-2-7.4.b.1.E. that supersedes or negates compliance with the West Virginia program's effluent limitations or water quality standards. Therefore, we are approving the new provisions at CSR 38-2-7.4.b.1.E. to the extent that these provisions do not supersede the State's general backfilling and grading requirements at CSR 38-2-14.15.a. which are no less effective than the Federal requirements at 30 CFR 816.102(a).

7.4.b.1.F. Liming and Fertilizing. This subdivision contains the following requirements.

7.4.b.1.F.1. The Director shall require the permittee to apply lime where the average

soil pH is less than 5.5. Lime rates will be used to achieve a uniform soil pH of 6.0. An alternate maximum or minimum soil pH may be approved, however, based on the optimum pH for the forest revegetation species. Soil pH may vary from 4.5 to a maximum of 7.0 from place to place across the reclaimed area with no more than 10% of the site below pH 5.0 and/or no more than 10% of the site above pH 6.5. Low and high pH levels may be approved only when tree species tolerant of the pH range have been approved for planting.

7.4.b.1.F.2. The Director shall require the permittee to fertilize based on the needs of trees and ground cover vegetation. The permittee shall apply up to 300 pounds/acre of diammonium phosphate (18–46–0) and up to 100 pounds/acre potassium sulfate (0–0–52) with the ground cover seeding. Other fertilizer materials and rates may be used only if the Director finds that the substitutions are appropriate based on soil tests performed by state certified laboratories.

The Federal revegetation regulations at 30 CFR 816.111 do not contain specific liming or fertilization standards. The Federal regulations do require that the permittee establish a diverse, effective, and permanent vegetative cover that is in accordance with the approved permit and reclamation plan.

Subsection 7.4.b.1.F.2. provides for fertilizing rates of up to 300 pounds/acre of diammonium phosphate (18–46–0) and up to 100 pounds/acre potassium sulfate (0–0–52) with the ground cover seeding. Other fertilizer materials and rates may be used only if the Director of the WVDEP finds that the substitutions are appropriate based on soil tests performed by state certified laboratories. The approved State rules at CSR 38–2–9.2.i.1 require a minimum of 600 pounds of 10–20–10 or 10–20–20 per acre, unless alternative rates are approved based on soil analyses performed by qualified laboratories. During our meeting with the WVDEP on May 3, 2000, the WVDEP stated that the new liming and fertilizing requirements at CSR 38–2–7.4.b.1.F. are intended to meet the specific needs for commercial tree growth and will be used in lieu of the fertilizing requirements at CSR 38–2–9.2.i.1 for commercial forestry and forestry postmining land use on operations receiving a mountaintop removal AOC variance. There are no corresponding Federal standards concerning fertilizer requirements. Therefore, the State must use its technical judgement to determine the appropriate rate of fertilizer application. Although the new rate is expected to promote tree growth and discourage competition from herbaceous cover, we recommend that the State require fertilizer types and rates according to soil tests of the mined area.

Nevertheless, we find that the proposed provisions at CSR 38–2–7.4.b.1.F. are not inconsistent with the Federal revegetation standards and can be approved.

7.4.b.1.G. Ground Cover Vegetation. This subdivision contains the following requirements.

7.4.b.1.G.1. The Director shall require the permittee to establish a temporary erosion control vegetative cover as contemporaneously as practicable 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 season grasses and other herbaceous vine or shrub species including legume species and ericaceous shrubs. All species shall be slow growing, tolerant of low pH, and compatible with tree establishment and growth. The ground cover vegetation shall be capable of stabilizing the soil from excessive erosion, but it should be minimized to control tree-damaging rodent population, and allow the establishment and unrestricted 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 (pounds/acre) shall be used: winter wheat (15 lbs/acre, fall seeding), foxtail millet (5 lbs/acre, summer seeding), redtop (2 lbs/acre), perennial ryegrass (2 lbs/acre), orchardgrass (5 lbs/acre), weeping lovegrass (2 lbs/acre) kobe lespedeza (5 lbs/acre), birdsfoot trefoil (10 lbs/acre), and white clover (3 lbs/acre). Kentucky-31 fescue, sericia lespedeza, all vetches, clovers (except ladino and white clover) and other aggressive or invasive species shall not be used. South- and west-facing slopes with a soil pH of 6.0 or greater, the four grasses in the mixture shall be replaced with 20 lbs/acre of warm-season grasses consisting of the following species: Niagara big bluestem (5 lbs/acre), Camper little bluestem (2 lbs/acre), Indian grass (2 lbs/acre), and Shelter switch grass (1 lb/acre), or other varieties of these species approved by the Director. Also, a selection of at least 3 native shrub species native of the area shall be included in the ground cover mix. Provided, that on slopes less than 20%, the Director may approve lesser or no vegetative cover when tree growth and productivity will be enhanced and excessive sedimentation will not result.

7.4.b.1.G.2. All mixes shall be compatible with the plant and animal species of the region and the commercial forestry use. The Director shall require the use of a variety of site-specific ground cover treatments so that different ground cover treatments are used on different parts of the reclamation area to add biodiversity and landscape mosaic to the overall plan.

7.4.b.1.G.3. The permittee may regrade and reseed only those rills and gullies that are unstable.

The Federal regulations at 30 CFR 816.111 require that the permittee establish a diverse, effective, and permanent vegetative cover that is in accordance with the approved permit

and reclamation plan. In addition, the Federal regulations at 30 CFR 816.111(c) provide for the establishment of a quick-growing, temporary, stabilizing cover provided that measures to establish permanent vegetation are included in the approved permit and reclamation plan. Furthermore, the Federal requirements at 30 CFR 816.114 provide that mulch and other soil stabilizing practices must be used on all areas that have been regraded and covered by topsoil or topsoil substitutes. The proposed provisions at CSR 38–2–7.4.b.1.G. are not inconsistent with these Federal revegetation standards with the following exceptions.

CSR 38–2–7.4.b.1.G.1. provides that on slopes less than 20%, the Director of the WVDEP may approve lesser or no erosion control vegetative cover when tree growth and productivity will be enhanced and “excessive” sedimentation will not result. The exact meaning of the term “excessive” sedimentation is not clear.

SMCRA at section 515(b)(10)(B)(i) provides that coal mining operations must be conducted so as to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow, or runoff outside the permit area, but in no event shall contributions be in excess of requirements set by applicable State or Federal law. Therefore, to be no less stringent than SMCRA, the term “excessive sedimentation” may not be interpreted to allow additional contributions of suspended solids to streamflow, or runoff outside the permit area in excess of requirements set by applicable State or Federal law. We note that, except for the phrase, “excessive sedimentation,” there is nothing in new CSR 38–2–7.4.b.1.G.1. that supersedes or negates the approved State provisions at CSR 38–2–14.5.b. concerning effluent limitations. It appears that the effluent limitations at CSR 38–2–14.5.b. would continue to apply. However, under the proposed State rule, sedimentation, as long as it was not excessive, would be allowed in streams. Subsection 14.5.b., like 30 CFR 816.42, provides that discharge from areas disturbed by surface mining shall not violate effluent limitations or cause a violation of applicable water quality standards.

By limiting the amount of temporary vegetative cover on slopes less than 20 percent, it is anticipated that tree growth and productivity will be enhanced. While temporary vegetation does to some extent compete with tree species during the early growing seasons, such vegetative cover is essential to ensure stability and prevent

erosion. Even prior to the establishment of the temporary vegetative cover, 30 CFR 816.114 requires that mulch and other soil stabilizing practices be used to protect the topsoil and topsoil substitutes. CSR 38-2-9.2.i.2 contains the State's mulch specifications. In addition, the Federal regulations at 30 CFR 816.95(a) require that all exposed surface areas be protected and stabilized to effectively control erosion and air pollution attendant to erosion.

As proposed, CSR 38-2-7.4.b.1.G.1. is less effective than the Federal requirements at 30 CFR 816.42, 816.95(a), 816.111, and 816.114 because the proposed standard to authorize lesser or no vegetative cover is modified by the undefined phrase, "excessive sedimentation." To be no less effective than the Federal requirements, the Director can only be allowed to approve lesser or no vegetative cover on slopes less than 20 percent when mulch or other soil stabilizing practices have been used to protect all disturbed areas and it has been demonstrated that the reduced vegetative cover is sufficient to control erosion and air pollution attendant to erosion. Therefore, we are not approving the word "excessive" in the phrase "excessive sedimentation" at CSR 38-2-7.4.b.1.G.1. Furthermore, we are requiring the deletion of the word "excessive" from the proposed State rule at CSR 38-2-7.4.b.1.G.1 to ensure compliance with State water quality requirements at CSR 38-2-14.5.b. In addition, we are requiring that the West Virginia program be further amended to provide that lesser or no vegetative cover may only be authorized by the Director when mulch or other soil stabilizing practices have been used to protect all disturbed areas and it has been demonstrated that the reduced vegetative cover is sufficient to control erosion and air pollution attendant to erosion regardless of slope.

CSR 38-2-7.4.b.1.G.3. only authorizes the regrading and reseeding of rills and gullies that are unstable. Normally, the presence of unstable rills and gullies indicates that excessive erosion has occurred. The Federal regulations at 30 CFR 816.95(b) require the regrading of all rills and gullies that 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. Therefore, we are approving CSR 38-2-7.4.b.1.G.3. only to the extent that it is interpreted to require the repair of all rills and gullies that 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. In addition, we are requiring that CSR 38-2-7.4.b.1.G.3. be further amended to require the repair of all rills and gullies that 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.

7.4.b.1.H. Tree Species and Compositions. This subdivision contains the following requirements.

7.4.b.1.H.1. Commercial tree and nurse tree species selection shall be based on site-specific characteristics and long-term goals outlined in the forest management plan and approved by a registered professional forester. For commercial forestry, the Director shall assure that all areas suitable for hardwoods are planted with native hardwoods at a rate of 500 seedlings per acre in continuous mixtures across the permitted area with at least six (6) species from the following list: white and red oaks, other native oaks, white ash, yellow-poplar, black walnut, sugar maple, black cherry, or native hickories. For forestry, the Director shall assure that all areas suitable for hardwoods are planted with native hardwoods at a rate of 450 seedlings per acre in continuous mixtures across the permitted area with at least three (3) or four (4) species from the following list: white and red oaks, other native oaks, white ash, yellow-poplar, black walnut, sugar maple, black cherry, or native hickories.

7.4.b.1.H.2. For commercial forestry, each of the species shall be not less than 10% of the total planted composition and at least 75% of the total planted woody plant composition shall be from the list of species in part 7.4.d.1.G.1. Species shall be selected based on their compatibility and expected site-specific long-term dynamics. For forestry, if only three species from the above list are planted, then each of the species shall be not less than 20% of the total planted composition. If four species from the list in part 7.4.d.1.G.1. are planted, then each of the species shall be not less than 15% of the total planted composition. Species shall be selected based on their compatibility and expected site-specific long-term dynamics.

7.4.b.1.H.3. Between 5% and 10% of the required number of woody plants shall be a planted in a continuous mix of three or more nurse tree and shrub species that improve soil quality and habitat for wildlife. They shall consist of black alder, black locust, bristley locust, redbud, or bi-color lespedeza or other non-invasive, native nurse tree or shrub species, approved by the Director. One to five acres within each 100 acres of the permit area shall be left unplanted with trees, but left with ponds, wetlands or ground cover vegetation only. These areas may be continuous or divided into 2-4 separate parcels, each at least 0.25 acres large.

7.4.b.1.H.4. On areas unsuitable for hardwoods, the Director may authorize the following conifers: Virginia pine, red pine, white pine, pitch pine, or pitch x loblolly hybrid pine. Areas unsuitable for hardwoods shall be limited to southwest-facing slopes

greater than 10% or areas where the soil pH is less than 5.5. These conifers shall be planted as single-species stands less than 10 acres in size at the same rate as the hardwood requirements in 7.4.b.1.H.1 of this rule. The Director shall assure that no reclaimed area of the permit area contains a total of more than 15% conifers.

7.4.b.1.H.5. The Director shall assure that the specific species and selection of trees and shrubs shall be based on the suitability of the planting site for each species' site requirements based on soil type, degree of compaction, ground cover, competition, topographic position, and aspect.

7.4.b.1.H.6. For commercial forestry only, in addition to the trees and shrubs required in the sections above, 2-0 white pine seedlings shall be planted across all sites at a rate of 5 to 10 trees per acre. These trees will be used for the productivity check required for Phase III bond release.

SMCRA at section 515(b)(19) provides for the revegetation of the affected lands with a diverse, effective, and permanent vegetative cover. The Federal regulations at 30 CFR 816.116(b)(3) provide the standards for success of revegetation for areas to be developed for forest products. Subsection 816.116(b)(3)(i) provides that the regulatory authority shall establish minimum stocking and planting arrangements based on local and regional conditions. The proposed tree species and compositions at subsection CSR 38-2-7.4.b.1.H. are consistent with SMCRA at section 515(b)(19) and with the Federal regulations at section 816.116(c)(3)(i).

New CSR 38-2-7.4.b.1.H.1 provides that "commercial forestry" requires a planting rate of 500 seedlings per acre and "forestry" requires 450 seedlings per acre. The existing rules at CSR 38-2-9.3.g provide that "forestland" requires 450 trees, including volunteer tree species, and/or shrubs and CSR 38-2-9.3.h.1 requires a stocking rate of 450 trees per acre for commercial reforestation operations. During our meeting with the WVDEP on May 3, 2000, the WVDEP stated that new CSR 38-2-7.4.b.1.H.1 provides the standards for commercial forestry and forestry for postmining land use for surface mining operations that receive variances from the requirement to restore AOC. Therefore, upon approval of CSR 38-2-7.4.b.1.H.1, the stocking rates at CSR 38-2-9.3.g and .h will only apply to surface mining operations with postmining land uses of forestland/wildlife or commercial reforestation that do not receive variances from AOC.

We note that there is a citation error at new CSR 38-2-7.4.b.1.H.2. CSR 38-2-7.4.b.1.H.2. cites CSR 38-2-7.4.d.1.G.1. as the source of a list of woody plant species. The list of woody

plant species is actually located at CSR 38-2-7.4.b.1.H.1.

Based on the findings above, and except as noted below, we find that the provisions of new CSR 38-2-7.4.b.1.H. are consistent with SMCRA at section 515(b)(19) and with the Federal regulations at section 816.116(c)(3)(i) and can be approved. The citation error noted at CSR 38-2-7.4.b.1.H.2. is a typographical error that must be corrected. Therefore, we are requiring that the West Virginia program at CSR 38-2-7.4.b.1.H.2. be amended to correct the citation error by deleting "7.4.d.1.G.1." in two places and replacing the deleted citation with "7.4.b.1.H.1."

7.4.b.1.I. Standards of Success. This subdivision contains the following requirements.

7.4.b.1.I.1. The Director shall assure the ability of the commercial forestry and forestry areas to produce a high-quality commercial forest by confirming, after on-site soil testing, that the minesoil selection, placement, and preparation criteria in 7.4.d.1.D.7 through 11 of this rule are met before Phase I bond release may occur. Before approving Phase I bond release, a certified soil scientist shall certify, and the Director shall make a written finding that the minesoil meets these criteria.

7.4.b.1.I.2. The Director shall not authorize Phase II bond release for commercial forestry before the end of the fifth tree growing season. The Director may approve Phase II bond release only if the tree survival is equal to or greater than 300 commercial trees per acre (80% of which must be commercial hardwood species listed in 7.4.b.1.H.1 of this rule) or the rate specified in the forest management plan, whichever is greater. For forestry, Phase II bond release may be granted by the Director at the end of the second growing season only if the tree survival is equal to or greater than 300 trees per acre, 60% of which must be commercial hardwood species listed in part 7.4.d.1.G.1. of this rule, or the rate specified in the forest management plan, whichever is greater. Furthermore, for both commercial forestry and forestry, where there is potential for excessive erosion on slopes greater than 20%, there shall be 70% ground cover where ground cover includes tree canopy, shrub and herbaceous cover, organic litter, and rock cover, and at least 80% of all trees and shrubs used to determine re-vegetation success must have been in place for at least 60% 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 growing seasons with no evidence of die back.

7.4.b.1.I.3. The Director may approve Phase III bond release for commercial forestry and forestry only if all criteria for Phase II bond release in 7.4.b.1.I.2 of this rule are still being met at the time Phase III bond release is considered. For forestry, Phase III bond release may not be authorized until at least five growing seasons have passed since the

trees were planted. Additionally, for commercial forestry, phase III bond release may not be authorized unless commercial forest productivity has been achieved by the end of the twelfth growing season or, if such productivity has not been achieved, if a commercial forestry mitigation plan is submitted to the Director, approved and completed. Commercial forest productivity is achieved only when annual height increments of the white pine indicator species, based on the average of four or more consecutive annual height increments, is equal to or greater than 1.5 feet. The Director shall measure the average four-year growth increment of all trees along two perpendicular transects across the site that will achieve a tree sample size of no less than two trees per acre.

7.4.b.1.I.4. A commercial forestry mitigation plan shall require a permittee who has not achieved commercial forestry productivity requirements by the end of the twelfth growing season to either pay to the Special Reclamation Fund an amount equal to twice the remaining bond amount or to perform an equivalent amount of in-kind mitigation. The Director shall use any money collected under this plan to establish forests on bond forfeiture sites. In-kind mitigation requires establishing forests on AML or bond forfeiture sites. After completion of the mitigation plan, Phase III bond release may be approved if the Director finds that the failure to achieve productivity did not result from a failure to follow the provisions of this rule and did not result in environmental damage.

7.4.b.1.I.5. The Director may release all or part of the bond for the commercial forestry and forestry variance or increment thereof in accordance with this subsection and 38-2-12.2.d. and 12.2.e. of this rule. The Director may release the variance portion if all appropriate standards have been met without regard to the bonding scheme selected for the permit.

SMCRA at section 519(c) and the Federal regulations at 30 CFR 800.40(c) provide for the release of performance bonds. The approved West Virginia program provisions for bond release are at W.Va. Code 22-3-23 and in the rules at CSR 38-2-12.2.c. The new provisions at CSR 38-2-7.4.b.1.I. provide additional bond release requirements for surface mining operations with commercial forestry and forestry postmining land use that receive variances from AOC.

Except as follows, the new provisions at CSR 38-2-7.4.b.1.I. are consistent with and no less stringent than the revegetation success and bond release provisions of SMCRA at sections 515(b)(19) and (20), and 519(c) and no less effective than the Federal bond release and revegetation success regulations at 30 CFR 800.40 and 816.116 and can be approved.

The Federal regulations at 30 CFR 816.116(b)(3) contain the revegetation success standards for areas to be

developed for fish and wildlife habitat, recreation or forest products. Minimum stocking and planting arrangements must be specified by the regulatory authority on the basis of local and regional conditions and after consultation with and approval by the State agencies responsible for the administration of forestry and wildlife programs. In addition, the Federal regulations at 30 CFR 816.116(b)(3)(iii) provide that vegetative cover must not be less than that required to achieve the postmining land use. Furthermore, 30 CFR 816.95 requires all exposed surface areas to be protected and stabilized to effectively control erosion and air pollution attendant to erosion.

The West Virginia Division of Forestry has approved the State's existing tree stocking and ground cover standards at CSR 38-2-9.3.g. and .h. However, there is no evidence that the West Virginia Division of Forestry has reviewed and approved the proposed standards for commercial forestry and forestry as is required by 30 CFR 816.116(b)(3)(i). Therefore, we are not approving these provisions at this time. In addition, we are requiring the WVDEP to consult with and obtain the approval of the West Virginia Division of Forestry on the new stocking standards for commercial forestry and forestry at CSR 38-2-7.4.b.1.I. Under the Federal regulations, this approval can be on a program-wide or permit-specific basis. Since a program-wide approval has not yet been granted by the Division of Forestry, the WVDEP must obtain approval on a permit-specific basis until such time that it receives program-wide approval by the Division of Forestry.

The proposed rule at CSR 38-2-7.4.b.1.I.2. only requires ground cover for surface mining operations with commercial forestry and forestry on slopes greater than 20 percent where there is potential for excessive erosion, and the proposed rule at CSR 38-2-7.4.b.1.G.1. does not require any ground cover on slopes less than 20 percent. The WVDEP has not submitted any evidence to show that the lesser ground cover standards would effectively comply with the vegetative ground cover stabilization standards at 30 CFR 816.95(a), 816.111(a), (b), and (c), 816.114, and 816.116(b)(3)(iii), nor with the water quality standards for offsite discharges from disturbed areas at 30 CFR 816.42. Section 22-3-23(c) of the W.Va. Code provides that no part of the bond or deposit may be released so long as the lands to which the release would be applicable are contributing additional suspended solids to streamflow or runoff outside the permit

area in excess of the requirements set by section 22-3-13 (concerning the performance standards). Therefore, Phase II bond cannot be released under new section 38-2-7.4.b.1.I.2. so long as the lands to which the release would be applicable are contributing additional suspended solids to streamflow or runoff outside the permit area in excess of the requirements set by section 22-3-13.

As we found above with respect to the ground cover vegetation requirements at CSR 38-2-7.4.b.1.G.1., to be no less effective than the Federal requirements, the Director of the WVDEP may only be allowed to approve lesser or no vegetative cover on slopes less than 20 percent when mulch or other soil stabilizing practices have been used to protect all disturbed areas and it has been demonstrated that the reduced vegetative cover is sufficient to control erosion and air pollution attendant to erosion. We find that the lack of an absolute requirement for ground cover for slopes greater than 20 percent at CSR 38-2-7.4.b.1.I.2. renders the West Virginia program less effective than the Federal requirements at 30 CFR 816.95(b), 816.111(a), (b), and (c), 816.114, 816.116(b)(3)(iii), and 816.42. Therefore, and for similar reasons, we are not approving language at CSR 38-2-7.4.b.1.I.2. which states, "where there is potential for excessive erosion on slopes greater than 20%." In addition, we are requiring that the West Virginia program be further amended at CSR 38-2-7.4.b.1.I.2. to delete the phrase, "where there is potential for excessive erosion on slopes greater than 20%."

The new provision at CSR 38-2-7.4.b.1.I.2. defines ground cover to include tree canopy, shrub, organic litter, herbaceous cover, and rock cover. Under the Federal definition of ground cover at 30 CFR 701.5, ground cover means the area of ground covered by the combined aerial parts of vegetation and the litter that is produced naturally on site. The Federal definition includes only naturally produced organic material, and it does not include "rock cover." In addition, the approved State standards for evaluating vegetative cover at CSR 38-2-9.3 do not refer to either rocks or litter as being included in the term "vegetative cover." Despite these differences, the Federal standard for revegetation success at 30 CFR 816.116(b)(3)(iii) provides that vegetative ground cover shall not be less than that required to achieve the approved postmining land use. Therefore, at a minimum, the vegetative ground cover must not be less than that required to achieve the approved commercial forestry or forestry land use

whether or not rocks are included within the State's definition of ground cover.

While rock cover is included in the State's standard for success for Phase II bond release, there appears to be no limit on the amount or size of rock that can be present on the surface. Certainly, large rocks and boulders left on the surface could interfere with the ability to harvest mature trees and, therefore, interfere with the ability to achieve the PMLU. This would render the West Virginia program less effective than 30 CFR 824.11(a)(11) which provides that spoil must be placed as necessary to achieve the approved PMLU. Therefore, we are not approving the words "rock cover" as a component of the 70 percent ground cover standard at CSR 38-2-7.4.b.1.I.2. In addition, we are requiring that the West Virginia program be further amended to delete the words "rock cover" from CSR 38-2-7.4.b.1.I.2.

In addition, CSR 38-2-7.4.b.1.I.2. incorrectly cites part "7.4.d.1.G.1." as a list of commercial hardwood species. The correct citation is part "7.4.b.1.H.1." This typographical error must be corrected. Therefore, we are requiring that the West Virginia program at CSR 38-2-7.4.b.1.I.2. be further amended to correct the citation error by deleting "7.4.d.1.G.1." and replacing the deleted citation with "7.4.b.1.H.1."

CSR 38-2-7.4.b.1.I.4. provides that a permittee who fails to achieve the "commercial forestry" productivity requirements at the end of the twelfth growing season must either pay into the Special Reclamation Fund an amount equal to twice the remaining bond amount or perform an equivalent amount of in-kind mitigation. The money collected under this plan will be used to establish forests on bond forfeiture sites. In-kind mitigation requires establishing forests on AML or bond forfeiture sites.

Subdivision I.4. raises some concerns. First, the requirement to pay twice the remaining bond amount in the event of failure, though not specified as such, appears to be a civil penalty provision, particularly because the payment must be deposited into the State's Special Reclamation Fund. W.Va. Code 22-3-17(d)(2) also provides that all civil penalties are to be deposited in the Special Reclamation Fund. Monies deposited in the Special Reclamation Fund can only be used to reclaim lands abandoned after August 3, 1977. Inasmuch as it imposes a civil penalty for failure to meet productivity requirements by the end of the twelfth growing season, which exceeds its current five-year revegetation responsibility period, we must agree

that subdivision I.4. comports with the existing State program and is not inconsistent with the civil penalty requirements at section 518 of SMCRA and at 30 CFR part 845 to the extent that payment of the civil penalty will not allow an operator to receive final bond release. However, subdivision I.4. also provides for "in-kind mitigation" as an alternative to payment of the civil penalty. Though not specifically authorized under SMCRA or the Federal regulations as a substitute for a civil penalty for non-compliance with a program requirement, reclamation in lieu of civil penalties has been approved by OSM in Pennsylvania. 54 FR 46383, November 3, 1989. In that decision, OSM determined that neither SMCRA nor the Federal regulations specify the method of payment for assessed penalties, and that, therefore, reclamation may be substituted for cash payments, so long as the work to be performed is equivalent in value and the other requirements are met, including the requirement that a cash penalty be paid if reclamation has not been accomplished within a specified amount of time. *Id.* at 46384. In-kind mitigation may be approvable under this or similar rationale, provided the State further defines this term. However, for the reasons discussed below, we are not approving the use of in-kind mitigation in this rulemaking.

What is more troubling about subdivision I.4 is that it would allow final, Phase III bond release after completion of an in-kind mitigation plan, even where commercial forestry productivity requirements have not been met at the end of the twelve year responsibility period. In this respect, subdivision I.4. appears to be inconsistent with section 519(c)(3) of SMCRA and with 30 CFR 800.40 (c)(3), which provide that no bond shall be fully released until all reclamation requirements of SMCRA or the approved State program, and the permit, are fully met. Moreover, the inconsistency is not cured by the imposition of a twelve year responsibility period, even though this period is longer than the five year revegetation responsibility period imposed by SMCRA, because the new provision does not require that all reclamation requirements be met prior to final bond release. For these reasons, we are not approving the in-kind mitigation provisions at subdivision I.4, nor are we approving the phrase "or, if a commercial forestry mitigation plan is submitted to the Director, approved and completed," contained in subdivision I.3, at this time. We will reconsider our

decision on these provisions, however, if the State provides adequate rationale for substituting in-kind mitigation for civil penalties and will agree that "Commercial forestry productivity requirements" are defined solely as the annual height increment criteria contained in subdivision I.3, since these criteria are in addition to the minimum stocking and planting requirements, contained in 30 CFR 816/817.116(b)(3), that partially define revegetation success under the Federal regulations; and, that Phase III bond release will not be granted until all other requirements of the approved State program and the permit are fully met, in accordance with section 519(c)(3) of SMCRA and 30 CFR 800.40(c)(3).

Finally, the meaning of the last sentence of CSR 38-2-7.4.b.1.I.5., which allows the bonding scheme selected for the permit to be ignored, is not clear. However, WVDEP stated in the May 3, 2000, meeting that the provision wouldn't affect the responsibility period or other bond release requirements. Therefore, we are approving CSR 38-2-7.4.b.1.I.5. only to the extent that the provision does not affect the responsibility period or other bond release requirements.

7.4.b.1.J. Front Faces of Valley Fills. This subdivision contains the following requirements.

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

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

7.4.b.1.J.1.(b) No unweathered shales may be present in the upper four feet of surface material;

7.4.b.1.J.1.(c) The upper four feet of surface material shall be composed of soil and the materials described in 7.4.b.1.D. of this rule, when available, unless the Director determines other material is necessary to achieve stability;

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

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

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

The new provisions at CSR 38-2-7.4.b.1.J. concerning the front faces of valley fills do not add any provisions to the West Virginia program that render the State program less stringent than the Federal provisions concerning excess spoil disposal fills in SMCRA at section 515(b)(22) and the Federal regulations at 30 CFR 816.71 and 816.72. However,

new CSR 38-2-7.4.b.1.J. does not make it clear that the proposed State standards are in addition to the excess spoil disposal requirements at W.Va. Code 22-3-13(b)(22) and CSR 38-2-14.14 and apply to all fills, including valley fills. During our meeting with the WVDEP on May 3, 2000, the WVDEP stated that the State's approved excess spoil disposal standards at W.Va. Code 22-3-13(b)(22) and CSR 38-2-14.14 apply to CSR 38-2-7.4.b.1.J. Therefore, we are approving new CSR 38-2-7.4.b.1.J. to the extent that the proposed State standards are in addition to the excess spoil disposal requirements at W.Va. Code 22-3-13(b)(22) and CSR 38-2-14.14 and apply to all fills, including valley fills.

7.4.b.1.K. Long-term Monitoring and Adaptive Management. This provision provides that the Director of the WVDEP shall undertake, with the assistance of the Division of Forestry or other forestry research units, a performance assessment of all Commercial Forestland permits within 10 years of Phase III bond release. Species composition, biodiversity, productivity, carbon capture, wildlife habitat, stream and wetland biota, and hydrologic function will be assessed. Results will be reported, analyzed, interpreted and used as part of an adaptive management program to improve the regulations and guidelines for Commercial Forestland.

There is no counterpart to this provision in SMCRA or the Federal regulations. The new provision is not, however, inconsistent with SMCRA or the Federal regulations. Therefore, this provision can be approved.

11. CSR 38-2-14.12. Variance from AOC requirements.

This provision is amended at subdivision 14.12.a.1. to delete the word "woodlands" and add in its place the words "commercial forestry." As amended, the provision provides that the permit area for an AOC variance must be, "located on steep slopes as defined in subdivision 14.8.a of this rule and the land after reclamation is suitable for industrial, commercial, residential, commercial forestry, or public use (including recreational facilities)." This change renders the provision less stringent than SMCRA at section 515(e)(2) concerning steep slope mining operations seeking a variance from the AOC requirements because agricultural uses (including forestry and commercial forestry) are not authorized for postmining land uses for steep slope mining operations seeking a variance from the AOC restoration requirements.

SMCRA at section 515(e)(2) provides that a variance for steep slope mining operations from the AOC requirement

may be granted by the regulatory authority in cases where the PMLU will be industrial, commercial, residential, or public use (including recreational facilities) use. The "agricultural" PMLU is not authorized at section 515(e)(2). On September 1, 1983 (48 FR at 39893) OSM amended its rules concerning postmining land uses and variances. In the preamble, OSM discussed amending the definition of "land use" at 30 CFR 701.5. In that discussion, OSM stated that "Agricultural use is interpreted as including cropland, pastureland or land occasionally cut for hay, grazingland, and forestry." We have considered "forestry" to be a subset of the "agricultural" PMLU since 1983. Therefore, to be no less effective than the Federal regulations, neither forestry nor commercial forestry can be approved under CSR 38-2-14.12.a.1. for steep slope mining operations seeking a variance from the AOC restoration requirements.

Therefore, we are not approving the term "commercial forestry" at CSR 38-2-14.12.a.1., because section 515(e)(2) of SMCRA does not authorize agricultural uses (including forestry uses) as postmining land uses for steep slope operations seeking a variance from the requirement to return the mined area to AOC. In addition, we are requiring the State to remove the term "commercial forestry" from CSR 38-2-14.12.a.1.

12. CSR 38-2-14.15. Contemporaneous reclamation standards.

This provision is amended at subdivision 14.15.f. concerning contemporaneous reclamation variances for permit applications to add a sentence which reads as follows: "Furthermore, the amount of bond for the operation shall be the maximum per acre specified in WV Code § 22-3-12(c)(1)." In effect, under this provision, permits which receive a contemporaneous reclamation variance under CSR 38-2-14.15.f. shall be bonded at the maximum amount per acre specified in WV Code 22-3-12(c)(1).

There is no direct Federal counterpart to this provision. Contemporaneous reclamation variances are not specifically authorized under the Federal regulations, but they are allowed under CSR 38-2-14.15. The proposed change is to ensure that the bond amount will be sufficient to complete the reclamation plan of a revoked permit with a contemporaneous reclamation variance in the event of bond forfeiture. The requirement to set bond at the maximum amount per acre specified in WV Code 22-3-12(c)(1)

does not render the West Virginia program less stringent than SMCRA at section 509, nor less effective than the Federal bonding provisions at 30 CFR 800.14 and can be approved.

#### IV. Summary and Disposition of Comments

##### *Federal Agency Comments*

On April 12, 2000, we asked for comments from various Federal agencies who may have an interest in the West Virginia amendment (Administrative Record Number WV-1152). We solicited comments in accordance with section 503(b) of SMCRA and 30 CFR 732.17(h)(11)(i) of the Federal regulations.

The U.S. Department of Labor, Mine Safety and Health Administration responded and stated that it had no comments (Administrative Record Number WV-1162).

The U.S. Department of Army, Corps of Engineers responded and stated that it found the amendments to be satisfactory (Administrative Record Number WV-1164).

The U.S. Fish and Wildlife Service (USFWS) responded (Administrative Record Number WV-1161) with the following comments. Concerning Senate Bill 614, the USFWS stated that it seems inappropriate, at W.Va. Code 22-3-23(c)(2)(C), to release bond if vegetation is not established.

We believe the commenter has misinterpreted the provision. The proposed provision provides that revegetation must be established on the regraded mine land. However, as discussed in Finding A.3. above, we disapproved the language that would allow release of bond if the quality of the untreated postmining water discharged is better than or equal to the premining water quality discharged from the mining site.

The USFWS had the following comments on the provisions of House Bill 4223. Concerning the transfer, reinstatement, assignment, or sale of permit rights provisions at CSR 38-2-3.25, the USFWS recommended that there be a time limit imposed for commencement of mining operations and/or reclamation for permits that are "reinstatements." In response, while CSR 38-2-3.25 does not impose a time limitation on the reinstatement of revoked permits, West Virginia Code 22-3-17(b), which was approved by OSM on February 9, 1999, 64 FR 6203, clearly provides that the reinstatement of revoked permits must occur within one year following the notice of permit revocation. Revoked permits that are not reinstated during the one-year period

will not be eligible for reinstatement. As discussed above under Finding 7, this provision does not allow the State to delay reclamation of bond forfeiture sites. It merely provides that permits which are revoked may be reinstated within one year of permit revocation provided the requirements of West Virginia Code 22-3-17(b) and CSR 38-2-3.25 are satisfied. Upon approval of a permit reinstatement, the permittee immediately assumes responsibility for all the requirements, conditions, and obligations of the permit, including the responsibility for the correction of any outstanding unabated violations. The new permittee is also subject to all of the requirements of the WVSCMRA and its implementing rules.

The USFWS stated that at two places in new CSR 38-2-7.4.b.1.H.2. and at one place in CSR 38-2-7.4.b.1.I.2., references are incorrectly made to CSR 38-2-7.4.b.1.G.1. for a list of species to be used as woody plants. However, CSR 38-2-7.4.b.1.G.1. lists only ground cover species, not woody species. The references should be made to CSR 38-2-7.4.b.1.H., tree species and compositions. In response, we agree that the citations are incorrect. As discussed above in Finding B.10.b., we have identified the citation errors, and have required that the West Virginia program be further amended to correct the errors.

The USFWS stated that it sees no reason for the authorization at CSR 38-2-7.4.b.1.H.4. that conifers, instead of hardwoods, may be planted on southwest-facing slopes greater than 10% or areas where the soil pH is less than 5.5. The USFWS stated that hardwoods do very well on slopes greater than 10% and with soil pH less than 5.5. The proposed rule does not prohibit the planting of hardwoods (commercial species) on southwest-facing slopes, but merely limits areas where conifers may be planted. Generally, hardwoods grow best on northern-facing slopes. The optimum medium for tree growth has been demonstrated to have a pH of between 5.0 and 6.0. Conifers grow best in soil with a pH of less than 5.5. We agree that many hardwoods in the State are growing on slopes greater than 10%. While the proposed rule does not prohibit the planting of hardwoods on steep slopes, it is recommended that hardwoods be restricted to less than 10% slopes to allow for improved harvesting and because the soil in these areas will be loosely compacted to maximize tree growth and productivity.

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

Pursuant to 30 CFR 732.17(h)(11)(i) and (ii), OSM is required to solicit

comments and obtain the written concurrence of the EPA with respect to those provisions of the proposed amendment that relate to air or water quality standards promulgated 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 10, 2000, we requested comments and concurrence from EPA (Administrative Record No. WV-1151) on the State's proposed amendment of March 14, 2000 (Administrative Record Number WV-1147) and March 28, 2000 (Administrative Record Number WV-1148), and electronic mail dated April 6, 2000 (Administrative Record Number WV-1149).

By letter dated June 21, 2000, the EPA responded and stated that it has reviewed the proposed revisions and has determined that they comply with the Clean Water Act. The EPA further stated that its review indicates that the proposed revisions do not appear to relate to air emissions or other issues which EPA would regulate under the Clean Air Act. Therefore, the EPA concurred with the proposed revisions.

In addition, the EPA provided comments and recommendations on several concerns regarding potential water quality impacts. EPA also noted that in a number of places the State provisions indicate that they are intended to comply with the Consent Decree between WVDEP and the Plaintiff in Civil Action No. 2:98-0636. The EPA stated that it is not a party to that Consent Decree. Accordingly, the EPA stated its comments are not intended and should not be construed as a determination by EPA as to whether any particular provision does or does not comply with the referenced Consent Decree.

EPA submitted several comments, including comments on the standards applicable to AOC variance operations with a postmining land use of commercial forestry and forestry at CSR 38-2-7.4, and postmining land use of homestead at CSR 38-2-7.5. We will address EPA's comments which concern the homestead postmining land use at CSR 38-2-7.5. in a separate **Federal Register** notice at a later date. The remainder of EPA's comments are addressed below.

1. *Applicable State and Federal laws/regulations*—The EPA stated that there are a number of Federal and State statutes and regulations protective of air and/or water quality which may apply to commercial forestry. The EPA recommended that the regulations governing each postmining land use include a statement that activities performed in connection with the

postmining use must comply with all applicable State and Federal laws and regulations.

In response, we agree that the State regulations governing each postmining land use could be improved by including a statement that the provisions must comply with all applicable State and Federal laws and regulations. However, there is nothing in the new commercial forestry provisions that precludes or prohibits compliance with all applicable State and Federal laws and regulations. Therefore, the lack of such a statement in the State's commercial forestry provisions does not render the new provisions less effective than the Federal regulations.

2. *AOC variances*—The EPA stated that in general, its concerns with AOC variances are that they limit the amount of spoil placed back on mined areas and usually necessitate the creation or expansion of valley fills which cover biologically productive waters of the United States. Therefore, the EPA stated, it believes that the use of AOC variances should be minimized, and it strongly recommended that any necessary variances be scrutinized in order to determine: (1) Whether all practicable alternatives to the discharge have been evaluated pursuant to EPA's Section 404(b)(1) guidelines; (2) whether spoil disposal in valley fills has been minimized to the extent compatible with those uses; and, (3) whether the project complies with all applicable regulations, including the buffer zone regulations.

For the most part, EPA's comments concerning AOC do not relate directly to any of the specific amendments to the West Virginia program being addressed in this notice. Rather, the EPA's comment relates to the general concept of AOC variances, and the regulatory authority's role in reviewing and approving proposed variances. It should be noted, however, that the State's reference to its AOC policy at CSR 38–2–7.4.b.1.D.10. should ensure compliance with the State's AOC variance requirements, which in turn should satisfy the concerns listed above by EPA.

3. *Erosion and sedimentation control*—The EPA stated that the State's requirements for commercial forestry are very comprehensive and appear to include ample conditions for promoting successful tree growth. However, the EPA stated, it has concerns about possible excessive erosion and runoff at commercial forestry sites. Although section CSR 38–2–7.4.b.1.G.1. of HB 4223 requires a temporary erosion control vegetative cover until a

permanent tree cover is established, CSR 38–2–7.4.b.1.E. requires mine spoil to be placed loosely in a non-compacted manner in order to provide a porous growing base for trees. Also, the EPA stated, CSR 38–2–7.5.j.6.B. indicates that at homestead sites, regrading and reseeded may take place only on those rills and gullies which are unstable. We note that a similar provision exists in the commercial forestry provisions at CSR 38–2–7.4.b.1.G.3. While it is understood, the EPA stated, that porous soil must be provided for effective tree growth, the requirement of uncompacted backfills, as well as unseeded rills and gullies, appear to increase the potential for sediment runoff and resulting stream degradation during storm periods. The EPA recommended consideration of options to avoid such situations, including limiting uncompacted areas to just the areas immediately around the tree plantings, maintaining effective sedimentation control ponds below these areas, and providing extensive vegetative cover in all areas except directly adjacent to tree plantings.

In response, and as noted above in Finding B.10.b., CSR 38–2–7.4.b.1.G.1. provides that on slopes less than 20 percent, the Director of the WVDEP may approve lesser or no erosion control vegetative cover when tree growth and productivity will be enhanced and excessive sedimentation will not result. In addition, CSR 38–2–7.4.b.1.I.2. only requires 70 percent ground cover where there is the potential for excessive erosion on slopes greater than 20 percent.

Temporary vegetation does to some extent compete with tree species during the early growing seasons. However, such vegetative cover is essential to ensure soil stability and prevent erosion. 30 CFR 816.114 requires that mulch and other soil stabilizing practices be used to protect the topsoil and topsoil substitutes even prior to the establishment of the temporary vegetative cover. In addition, the Federal regulations at 30 CFR 816.95(a) require that all exposed surface areas be protected and stabilized to effectively control erosion and air pollution attendant to erosion.

We have determined that, as proposed, CSR 38–2–7.4.b.1.G.1. and 7.4.b.1.I.2. are less effective than the Federal requirements at 30 CFR 816.42, 816.95(a), 816.111, and 816.114. To be no less effective than the Federal requirements, the Director can only be allowed to approve lesser or no vegetative cover on slopes less than 20 percent when mulch or other soil stabilizing practices have been used to

protect all disturbed areas and it has been demonstrated that the reduced vegetative cover is sufficient to control erosion and air pollution attendant to erosion. We have required the deletion of the word "excessive," from the proposed State rule at CSR 38–2–7.4.b.1.G.1 to ensure compliance with State water quality requirements at CSR 38–2–14.5.b. and required the State to amend its rules at CSR 38–2–7.4.b.1.G.1 to provide that lesser or no vegetative cover may only be authorized by the Director when mulch or other soil stabilizing practices have been used to protect all disturbed areas and it has been demonstrated that the reduced vegetative cover is sufficient to control erosion and air pollution attendant to erosion regardless of slope. Furthermore, we are not approving and requiring the State to amend CSR 38–2–7.4.b.1.I.2 to delete the phrase, "where there is potential for excessive erosion on slopes greater than 20 percent."

CSR 38–2–7.4.b.1.G.3. only authorizes the regrading and reseeded of rills and gullies that are unstable. Normally, the presence of unstable rills and gullies indicates that excessive erosion has already occurred. The Federal regulations at 30 CFR 816.95(b) require the regrading of all rills and gullies that 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. Therefore, we have approved CSR 38–2–7.4.b.1.G.3. only to that extent. In addition, in accordance with 30 CFR 816.95(b) and 816.111, we have required the State to revise CSR 38–2–7.4.b.1.G.3 to require the repair of all rills and gullies that 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.

4. *AOC definition change*—The EPA stated that section 22–3–3(c) of SB 614 changes the requirement for achieving AOC from "disturbed" areas to "mined" areas. Since the overall area disturbed during a mining operation is greater than just the area where coal extraction takes place, the EPA stated that it is concerned that this change reduces the area subject to AOC.

In response, as discussed above in Finding A.1., the amended phrase is identical to, and therefore no less effective than, the counterpart language in SMCRA at section 701(2), and the Federal definition of AOC at 30 CFR 701.5.

5. *Bond release water quality criteria*—The EPA stated that sections 22–3–23(c)(2) and (c)(2)(C) of SB 614

state that bond release for approval of AOC variances may be made where the quality of the untreated postmining water discharged is better than or equal to the pre-mining water quality discharged from the mining site. The EPA noted that there may be instances where provisions of the Clean Water Act (CWA) would apply to the discharge of the untreated postmining water. In such instances, compliance with section 22-3-23(c)(2) would not relieve the discharger from compliance with any applicable provisions of the CWA.

In response, and as discussed above in Finding A.3., we did not approve the language at section 22-3-23(c)(2)(C) which is of concern to the EPA. Under that language, bond could be released where the quality of the water being discharged from the reclaimed mine site does not meet effluent limitations and applicable State and Federal water quality standards as required by section 519(c) of SMCRA and 30 CFR 816.42 and 817.42. Therefore, we found that the language is less stringent than SMCRA and less effective than the Federal regulations and can not be approved.

#### *Public Comments*

We solicited public comments on the amendment. One person responded with comments. The commenter stated that at section 22-3-23(c)(2)(C) of the W.Va. Code, the new bond release provision would allow bond release for operations with an approved AOC variance where the quality of postmining water discharges is better than or equal to the quality of premining discharges. The commenter stated that this provision is less stringent than SMCRA at section 519(c)(2) which, by cross reference to section 515(b)(10) requires postmining discharges to meet effluent limitations of State and Federal law. We agree with this comment. As noted above at Finding A.3., we did not approve this provision because discharges from mine sites must meet effluent limitations and applicable State and Federal water quality laws at all times and all reclamation requirements of SMCRA must be fully met prior to final bond release. In addition, we have also required that the West Virginia program be further amended to delete the disapproved provision.

CSR 38-2-7.4.a.1. The commenter stated that the new rule at section 38-2-7.4.a.1. would allow commercial forestry and forestry to be approved as "higher or better" postmining land uses on areas of permits granted variances from AOC. The commenter stated that the provision should not be approved because it is inconsistent with

Congressional intent, as expressed in the OSM's draft postmining land use (PMLU) policy guidelines for mountaintop removal and steep slope mining operations seeking a variance from the AOC requirements. We disagree with this comment. We maintain that the commercial forestry and forestry use, as proposed by the State, is an acceptable postmining land use for mountaintop removal operations as provided in section 515(c)(3) of SMCRA and can satisfy the Federal "higher or better" use criteria at 30 CFR 701.5 and 30 CFR 816.133. However, we agree that, as presented, this postmining land use does not satisfy the postmining land use requirements for a steep slope mining operation with a variance from AOC at section 515(e)(2) of SMCRA.

The commenter stated that, as clarified on page 3, paragraph 2 of the Introduction (I.A.) of the draft October 1999, PMLU policy guidelines, any specific PMLU will, with rare exceptions, be approved only where the use could not be achieved without a waiver of the AOC requirement. Commercial forestry and forestry, the commenter asserted, can be achieved on the premining landscape. In response, we note that the commenter has inaccurately paraphrased the draft October 1999, PMLU guidelines. In addition, in response to public comment we revised this language in the PMLU final policy that was released on June 23, 2000. The final PMLU policy guidelines states, at page 1, section I.A., that, "a postmining land use cannot be approved where the use could be achieved without waiving the AOC requirement, except where it is demonstrated that a significant public or economic benefit will be realized therefrom." We removed the words, "in those rare instances" from the draft language. These words were deleted to clarify that a decision concerning whether or not to approve a proposed PMLU should not be narrowly focused on whether or not the proposed use could be achieved on the premining land or on land returned to AOC. Rather, the focus of whether or not to approve a proposed PMLU should be on whether or not the proposed PMLU represents a significant public or economic benefit when compared with the premining use. This is consistent with a plain reading of SMCRA at section 515(c)(3)(A). Therefore, the possibility that forestry can be conducted on premining steep slope lands or on lands returned to AOC, would not of itself disqualify a proposed use from being approved as a PMLU for mountaintop removal operations.

Instead, this possibility must be considered by the regulatory authority as part of its assessment of whether or not the proposed PMLU represents a significant public or economic benefit when compared with the premining use. This is the assessment that must be made by the regulatory authority prior to permit approval.

The commenter also stated that gently rolling contours do not enhance the growth and harvesting of commercial species, and would not accept such an assertion unless the State provides technical documentation applicable to the appropriate forest types. In response, the State's landscape criteria at CSR 38-2-7.4.b.1.C.1. do require a rolling and diverse landscape and it is generally agreed that harvesting of commercial tree species on gently rolling slopes is easier, safer, and less expensive than harvesting which is conducted on steep slopes. In addition, this provision is in accordance with SMCRA at section 515(c)(2) which provides that the State regulatory authority may only grant a permit for mountaintop removal mining operations where, among other requirements, the permittee will create a level plateau or a gently rolling contour with no highwalls remaining, and capable of supporting the proposed postmining use.

The commenter stated that to be approvable, a proposed PMLU must represent or require intensive management in order to qualify for an AOC variance. We disagree with this comment. The decision that a regulatory authority must make is not whether or not a proposed PMLU requires intensive management but, as required by SMCRA at section 515(c)(3)(A), whether a proposed PMLU represents a public or economic benefit when compared with the premining use. If a proposed PMLU is a low-intensity use, the regulatory authority must take particular care to assess the proposed use to determine whether or not the use represents a public or economic benefit when compared with the premining use. For example, a proposed low-intensity agricultural use of pastureland, where only a few cattle will be grazing on the proposed PMLU area is unlikely to provide an economic benefit to the public or the landowner when compared with the premining use. However, a proposed pastureland use that would support a dairy operation with 150 head of cattle would likely yield significant economic benefit to the landowner and the community. In that same sense, a premining forest that is occasionally harvested for timber may be compared to a proposed commercial

forestry PMLU. Even though it may be argued that a commercial forestry operation is not a high-intensity use, it may be considered by the regulatory authority and land use planning agencies to be an economic or public benefit when compared to the premining use. Such a use may be deemed to represent a higher or better use (as is required by 30 CFR 816.133(c)) because of anticipated increased yields of higher quality timber, more jobs for timber management and harvesting, or the potential for creating sustainable wood product industries such as the manufacturing of hardwood flooring or fine hardwood furniture.

CSR 38-2-7.3.c. The commenter stated that the first sentence concerning the prohibition of grassland uses should be approved. As noted above in Finding B.9., we have approved this prohibition. The commenter also stated that the second sentence, which delays the implementation of this provision until OSM approves the proposed forestry and homestead provisions should not be approved. The commenter based this comment on the assertion that forestry cannot be approved as a PMLU for mountaintop removal mining operations. We disagree with this comment. As discussed above in Finding B.10.a., commercial forestry can be approved as a PMLU for mountaintop removal mining operations. We have recognized forestry as an agricultural PMLU use since 1983 (September 1, 1983; 48 FR at 39893), and agricultural PMLU is authorized by SMCRA at section 515(c)(3) as a PMLU for mountaintop removal operations. Of course, to be in compliance with SMCRA section 515(c) and the implementing Federal regulations, prior to approving any PMLU, the regulatory authority must consult with land use planning agencies to determine whether the proposed PMLU will result in a net public or economic benefit when compared with the premining use. Therefore, if the applicable requirements of SMCRA and Federal regulations are met, commercial forestry may be approved as a PMLU for mountaintop removal mining operations. Also, the continued use of grassland as a PMLU until OSM approves commercial forestry and homesteading as PMLU's is not inconsistent with section 515(c)(3) of SMCRA, since that provision allows grassland as an agricultural PMLU for mountaintop removal mining operations.

CSR 38-2-7.4.b.1.K. The commenter stated agreement with this provision which requires the WVDEP to undertake

a future investigation of all commercial forestland permits to determine the success of the program and to make changes if indicated. We concur with this comment.

The commenter also stated that it isn't clear whether or not the requirement would apply outside AOC-variance areas. In response, CSR 38-2-7.4. pertains only to AOC variance operations with a PMLU of commercial forestry and forestry. However, scientific data and evidence gained from monitoring productivity, biodiversity, and hydrologic functions on both the AOC and non-AOC portions of permits with AOC variances will most likely benefit other operations throughout the State.

Finally, the commenter asked whether the WVDEP would still have right of entry ten years after Phase III bond release. In response, under SMCRA at section 517(b)(3), the regulatory authority has right of entry to any permitted or unpermitted surface coal mining and reclamation operation. At the time of final bond release, the WVDEP usually terminates jurisdiction. It will be up to the State, in these situations, to determine what special provisions must be made in the forest management plans or lease agreements to allow State officials and other researchers access to these sites after final bond release to conduct the required studies. However, there is no counterpart to the provision in SMCRA, and we have approved the provision because it is not inconsistent with the requirements of SMCRA.

The commenter had additional comments concerning CSR 38-2-7.5, the Homestead PMLU. As noted above in the second paragraph of Section III, we have separated from this amendment the Homestead PMLU provisions at CSR 38-2-7.5. We will render our findings on new CSR 38-2-7.5 in a separate final rule notice to be published in the **Federal Register**, and will address the commenter's statements concerning CSR 38-2-7.5 at that time.

#### V. Director's Decision

Based on the findings above, and except as noted below, we are approving the amendments to the West Virginia program.

Section 22-3-13(c)(3) of the W. Va. Code is approved to the extent that the term "public facility (including recreational uses)" is interpreted to mean the same as the SMCRA term "public facility (including recreational facilities)." In addition, most of the required amendment codified at 30 CFR 948.16(iiii) is satisfied and can be deleted. However, we are continuing to

require at (iiii), that the State amend the term "recreational uses" at W.Va. Code 22-3-13(c)(3) to mean "recreational facilities use" at SMCRA section 515(c)(3).

Section 22-3-23(c)(2) of the W. Va. Code is approved except that the proviso at subsection (c)(2)(C) which states, "Provided, however, That the release may be made where the quality of the untreated postmining water discharged is better than or equal to the premining water quality discharged from the mining site" is not approved. We are requiring that the West Virginia program at section 22-3-23(c)(2)(C) be further amended to delete the proviso concerning bond release if the quality of postmining untreated discharge water is better than or equal to the premining water quality discharged from the site.

CSR 38-2-2.31.b. must be amended to clearly define forestry to mean a postmining land use used or managed for the long term production of wood or wood products in accordance with the Federal definition of "forestry" under the definition of "land use" at 30 CFR 701.5.

CSR 38-2-3.25.b. must be further amended to: (1) provide that in no event can a reinstated permit be approved in advance of the close of the public comment period; and (2) add the word "reinstatement" to the phrase "transfer, assignment, or sale" in the second sentence of CSR 38-2-3.25.a.4.

CSR 38-2-7.4.a.1. is approved only to the extent that it applies to mountaintop removal mining operations that receive an AOC variance pursuant to W.Va. Code 22-3-13(c). We are requiring that the West Virginia program be further amended to make it clear that at CSR 38-2-7.4.a.1., only commercial forestry postmining use and not forestry postmining use may be approved for areas receiving a variance from the AOC requirements.

CSR 38-2-7.4.b.1.A. is approved only to the extent that it supplements, but does not supersede, the existing mountaintop removal permitting requirements and performance standards at W.Va. Code 22-3-13(c) and CSR 38-2-14.10; and to the extent that the use of best management practices at CSR 38-2-7.4.b.1.A.4.(e) will be limited to postmining timber harvesting practices conducted after final bond release and not as a substitute for the sediment control practices required at CSR 38-2-5.4 during mining and reclamation activities. Moreover, the termination of jurisdiction portion of CSR 38-2-7.4.b.1.A.1. is approved, but only to the extent that the State also applies the reassertion of jurisdiction

requirements in its program at CSR 38–2–1.2.d. to these sites.

At CSR 38–2–7.4.b.1.C.5., the phrase, “except for ponds and impoundments located below the valley fills” is not approved. We are requiring the State to either remove the phrase, “except for ponds and impoundments located below the valley fills,” from CSR 38–2–7.4.b.1.C.5 or revise the language to clarify that ponds and impoundments below the fill that are left in place must meet the requirements of CSR 38–2–5.5.

At CSR 38–2–7.4.b.1.D.2, we are not approving the phrase, “except for those areas with a slope of at least 50%.” We are requiring the State to delete the phrase “except for those areas with a slope of at least 50%” from its regulations at CSR 38–2–7.4.1.D.2. Furthermore, we are requiring the State to define the terms O and Cr soil horizons.

CSR 38–2–7.4.b.1.D.6. must be further amended to provide that the substitute material is equally suitable for sustaining vegetation as the existing topsoil and the resulting medium is the best available in the permit area to support vegetation.

CSR 38–2–7.4.b.1.D.10. is approved with the understanding that the design and construction requirements set forth in CSR 38–2–3.7 and 38–2–14.14 for the disposal of excess spoil must also be satisfied.

CSR 38–2–7.4.b.1.E. is approved to the extent that these provisions do not supersede the State’s general backfilling and grading requirements at CSR 38–2–14.15.a.

At CSR 38–2–7.4.b.1.G.1., the word “excessive” is not approved. We are requiring the deletion of the word “excessive” at CSR 38–2–7.4.b.1.G.1. We are also requiring that CSR 38–2–7.4.b.1.G.1. be further amended to provide that lesser or no vegetative cover may only be authorized by the Director when mulch or other soil stabilizing practices have been used to protect all disturbed areas and it has been demonstrated that the reduced vegetative cover is sufficient to control erosion and air pollution attendant to erosion regardless of slope.

CSR 38–2–7.4.b.1.G.3. is approved only to the extent that it is interpreted to require the repair of all rills and gullies that 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 are requiring that CSR 38–2–7.4.b.1.G.3. be further amended to require the repair of all rills and gullies that 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.

CSR 38–2–7.5.b.1.H.2. must be amended to correct a typographical error by deleting “7.4.d.1.G.1.” in two places and replacing the deleted citation with “7.4.b.1.H.1.”

At CSR 38–2–7.4.b.1.I., the new stocking standards for commercial forestry and forestry are not approved. We are requiring the WVDEP to consult with and obtain the approval of the West Virginia Division of Forestry on the new stocking standards for commercial forestry and forestry at CSR 38–2–7.4.b.1.I.

At CSR 38–2–7.4.b.1.I.2., we are not approving the phrase, “where there is potential for excessive erosion on slopes greater than 20%.” In addition, CSR 38–2–7.4.b.1.I.2. must be amended to delete the phrase, “where there is potential for excessive erosion on slopes greater than 20%.”

At CSR 38–2–7.4.b.1.I.2., the words “rock cover” are not approved. We are requiring that the words “rock cover” be deleted from CSR 38–2–7.4.b.1.I.2.

CSR 38–2–7.4.b.1.I.2. must be amended to correct the citation error by deleting “7.4.d.1.G.1.” and replacing the deleted citation with “7.4.b.1.H.1.”

At CSR 38–2–7.4.b.1.I.3. the phrase “or, if a commercial forestry mitigation plan is submitted to the Director, approved, and completed” is not approved.

At CSR 38–2–7.4.b.1.I.4., the requirement to pay twice the remaining bond amount is approved to the extent that payment of the civil penalty will not allow an operator to receive final bond release. We are not approving the remainder of CSR 38–2–7.4.b.1.I.4. concerning in-kind mitigation plan.

CSR 38–2–7.4.b.1.I.5. is approved only to the extent that the provision does not affect the responsibility period or other bond release requirements.

CSR 38–2–7.4.b.1.J. is approved to the extent that the proposed State standards are in addition to the excess spoil disposal requirements at W.Va. Code 22–3–13(b)(22) and CSR 38–2–14.14 and apply to all fills, including valley fills.

At CSR 38–2–14.12.a.1., the term “commercial forestry” is not approved. We are requiring the State to remove the term “commercial forestry” from CSR 38–2–14.12.a.1.

The required program amendment codified at 30 CFR 948.16(www) is satisfied and can be deleted.

The required program amendment codified at 30 CFR 948.16(xxx) is satisfied and can be deleted.

The required program amendment codified at 30 CFR 948.16(vvv)(1)(1) can be deleted.

This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

## VI. Procedural Determinations

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

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

### *Executive Order 12630—Takings*

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

### *Executive Order 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 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, to the extent allowed by law, 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 since each such 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 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.

*National Environmental Policy Act*

Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that a decision on a proposed state regulatory program provision does not constitute a major federal action within the meaning of section 102(2)(C) of the National Environmental Policy Act (NEPA) (42 U.S.C. 4332(2)(C)). A determination has been made that such decisions are categorically excluded from the NEPA process (516 DM 8.4.A).

*Paperwork Reduction Act*

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

*Regulatory Flexibility Act*

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The state submittal which is the subject of this rule is based upon counterpart federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the state. 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 regulation.

*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.
- c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the 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 was not considered a major rule.

*Unfunded Mandates*

This rule will not impose a cost of \$100 million or more in any given year on any governmental entity or the private sector.

**List of Subjects in 30 CFR Part 948**

Intergovernmental relations, Surface mining, Underground mining.

Dated: July 28, 2000.

**Allen D. Klein,**

*Regional Director, Appalachian Regional Coordinating Center.*

For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations 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 (b) to read as follows.

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

\* \* \* \* \*

(b) We are not approving the following provisions of the proposed program amendment that West Virginia submitted on March 14, 2000, March 28, 2000, and April 6, 2000:

(1) The proviso at W.Va. Code 22–3–23(c)(2)(C) which concerns Phase III bond release where the quality of the untreated postmining water discharged is better than or equal to the premining water quality discharged from the mining site.

(2) At CSR 38–2–7.4.b.1.C.5., the phrase, “except for ponds and impoundments located below the valley fills.”

(3) At CSR 38–2–7.4.b.1.D.2, the phrase, “except for those areas with a slope of at least 50%.”

(4) At CSR 38–2–7.4.b.1.G.1., the word “excessive.”

(5) At CSR 38–2–7.4.b.1.I., the new stocking standards for commercial forestry and forestry.

(6) At CSR 38–2–7.4.b.1.I.2., the phrase, “where there is potential for excessive erosion on slopes greater than 20%.”

(7) At CSR 38–2–7.4.b.1.I.2., the words “rock cover.”

(8) At CSR 38–2–7.4.b.1.I.3., the phrase “or, if a commercial forestry mitigation plan is submitted to the Director, and approved and completed.”

(9) The portion of CSR 38–2–7.4.b.1.I.4. concerning in-kind mitigation plans.

(10) At CSR 38–2–14.12.a.1., the term “commercial forestry.”

\* \* \* \* \*

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
March 14, 2000, March 28, 2000, and April 6, 2000.	August 18, 2000 ....	W.Va. Code 22–3– at 3(e), (u)(2); (y); 13(c)(3) (qualified approval), (c)(3)(B)(iii); 23(c)(1), (2) (partial approval). CSR 38–2– at 2.31, 2.45, 2.98, 2.123, 2.136; 3.8c; 3.25; 7.2.i; 7.3; 7.4.a (qualified approval); 7.4.b.1; 7.4.b.1.A. (qualified approval), 7.4.b.1.B., C. (partial approval), D. (partial approval), E. (qualified approval), F., G. (partial approval), H., I. (partial approval), J. (qualified approval), K.; 14.15.f.

4. Section 948.16 is amended by removing and reserving paragraphs (www), and (xxx), revising paragraphs

(vvv)(1) and (iii), and adding paragraphs (qqqq) through (eeee) to read as follows:

**§ 948.16 Required regulatory program amendments.**

\* \* \* \* \*

(vvv) \* \* \*

(1) Amend the West Virginia program to be consistent with 30 CFR 701.11(e)(2) by clarifying that the exemption at CSR 38-2-3.8(c) does not apply to the requirements to restore the land to approximate original contour.

\* \* \* \* \*

(iiii) By October 17, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend the term "recreational uses" at W.Va. Code 22-3-13(c)(3) to mean "recreational facilities use" at SMCRA section 515(c)(3).

\* \* \* \* \*

(qqqq) By October 17, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to delete the proviso from W. Va. Code 22-3-23(c)(2)(C) which provides that Phase III bond can be released if the quality of postmining untreated discharge water is better than or equal to the premining water quality discharged from the site.

(rrrr) By October 17, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend CSR 38-2-2.31.b. to clearly define forestry to mean a postmining land use used or managed for the long term production of wood or wood products in accordance with the Federal definition of forestry under the definition of land use at 30 CFR 701.5.

(ssss) By October 17, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend CSR 38-2-3.25 to: (1) add the word "reinstatement" to the phrase "transfer, assignment, or sale" in the second sentence of subdivision CSR 38-2-3.25.a.4., and (2) amend 38-2-3.25.b. to provide that in no event can a reinstated permit be approved in advance of the close of the public comment period.

(tttt) By October 17, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to make it clear that at CSR 38-2-7.4.a.1., only commercial forestry postmining use and not forestry postmining use may be approved for areas receiving a variance from the AOC requirements.

(uuuu) By October 17, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together

with a timetable for adoption to either remove the phrase, "except for ponds and impoundments located below the valley fills," from its regulations at CSR 38-2-7.4.b.1.C.5 or revise the language to clarify that ponds and impoundments below the fill that are left in place must meet the requirements of CSR 38-2-5.5.

(vvvv) By October 17, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to delete the phrase "except for those areas with a slope of at least 50%" from its regulations at CSR 38-2-7.4.1.D.2. Furthermore, the State must define the terms O and Cr soil horizons.

(wwww) By October 17, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend CSR 38-2-7.4.b.1.D.6. to provide that the substitute material is equally suitable for sustaining vegetation as the existing topsoil and the resulting medium is the best available in the permit area to support vegetation.

(xxxx) By October 17, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to: (1) delete the word "excessive" at CSR 38-2-7.4.b.1.G.1.; and (2) provide that at CSR 38-2-7.4.b.1.G.1., lesser or no vegetative cover may only be authorized by the Director when mulch or other soil stabilizing practices have been used to protect all disturbed areas and it has been demonstrated that the reduced vegetative cover is sufficient to control erosion and air pollution attendant to erosion regardless of slope.

(yyyy) By October 17, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to amend CSR 38-2-7.4.b.1.G.3. to require the repair of all rills and gullies that 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.

(zzzz) By October 17, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend CSR 38-2-7.4.b.1.H.2. by deleting "7.4.d.1.G.1." in two places and replacing the deleted citation with "7.4.b.1.H.1."

(aaaa) By October 17, 2000, West Virginia WVDPEP must consult with and obtain the approval of the West Virginia Division of Forestry on the new stocking

standards for commercial forestry and forestry at CSR 38-2-7.4.b.1.I.

(bbbbb) By October 17, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend CSR 38-2-7.4.b.1.I.2., or otherwise amend the West Virginia program, to delete the phrase, "where there is potential for excessive erosion on slopes greater than 20%."

(ccccc) By October 17, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend CSR 38-2-7.4.b.1.I.2. to delete the words "rock cover."

(ddddd) By October 17, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend CSR 38-2-7.4.b.1.I.2. to correct the citation error by deleting "7.4.d.1.G.1." and replacing the deleted citation with "7.4.b.1.H.1."

(eeeee) By October 17, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to delete the term "commercial forestry" at CSR 38-2-14.12.a.1.

[FR Doc. 00-20800 Filed 8-17-00; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 180

[OPP-301032; FRL-6599-4]

RIN 2070-AB78

### Fosetyl-Al; Pesticide Tolerance

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes a tolerance for residues of fosetyl-Al in or on cranberries. Interregional Research Project Number 4 (IR4) requested this tolerance under the Federal Food, Drug, and Cosmetic Act, (FFDCA) as amended by the Food Quality Protection Act of 1996.

**DATES:** This regulation is effective August 18, 2000. Objections and requests for hearings, identified by docket control number OPP-301032, must be received by EPA on or before October 17, 2000.

**ADDRESSES:** Written objections and hearing requests may be submitted by