

**Correction of Rule Published September 11, 2000**

The publication on September 11, 2000, of the subject final rules, is corrected as follows:

1. On page 54749, column three, the last sentence of the third paragraph under "Actions Since We Published the Interim Final Rules," is corrected to read as follows:

The report is also available at our public Internet site: <http://www.ssa.gov/policy/SSICildDI/child001.htm>.

**PART 416—[CORRECTED]**

2. On page 54777, column 2, the definition of "The listings" is corrected to read as follows:

**§ 416.902 General definitions and terms for this subpart.**

\* \* \* \* \*  
*The listings* means the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter. When we refer to an impairment(s) that "meets, medically equals, or functionally equals the listings," we mean that the impairment(s) meets or medically equals the severity of any listing in appendix 1 of subpart P of part 404 of this chapter, as explained in §§ 416.925 and 416.926, or that it functionally equals the severity of the listings, as explained in § 416.926a.

\* \* \* \* \*  
3. On page 54783, column 3, the first sentence of § 416.926a(e)(3)(iv) is corrected to read as follows:

**§ 416.926a Functional equivalence for children.**

\* \* \* \* \*  
(e) \* \* \*  
(iv) For the sixth domain of functioning, "Health and physical well-being," we may also consider you to have an "extreme" limitation if you are frequently ill because of your impairment(s) or have frequent exacerbations of your impairment(s) that result in significant, documented symptoms or signs substantially in excess of the requirements for showing a "marked" limitation in paragraph (e)(2)(iv) of this section. \* \* \*

**Correcting Amendments to the Code of Federal Regulations**

**List of Subjects**

*20 CFR Part 404*

Administrative practice and procedure, Aged, Alimony, Blind, Disability benefits, Government employees, Income taxes, Insurance, Investigations, Old-age, Survivors and

Disability Insurance, Penalties, Railroad retirement, Reporting and recordkeeping requirements, Social security, Travel and transportation expenses, Treaties, Veterans, Vocational rehabilitation.

*20 CFR Part 416*

Administrative practice and procedure, Alcoholism, Drug abuse, Investigations, Medicaid, Penalties, Reporting and recordkeeping requirements, Supplemental Security Income (SSI), Travel and transportation expenses, Vocational rehabilitation.

Chapter III of title 20 of the Code of Federal Regulations is amended as follows:

**PART 404—[AMENDED]**

1. The authority citation for subpart P to part 404 continues to read as follows:

**Authority:** Secs. 202, 205(a), (b), and (d)–(h), 216(i), 221 (a) and (i), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405 (a), (b), and (d)–(h), 416(i), 421(a) and (i), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Pub. L. 104–193, 110 Stat. 2105, 2189.

2. Section 404.1520 is amended by revising the last sentence of paragraph (a) to read as follows:

**§ 404.1520 Evaluation of disability in general.**

(a) \* \* \* Once you have been found entitled to disability benefits, we follow a somewhat different order of evaluation to determine whether your entitlement continues, as explained in § 404.1594(f).

**PART 416—[AMENDED]**

3. The authority citation for subpart I to part 416 continues to read as follows:

**Authority:** Secs. 702(a)(5), 1611, 1614, 1619, 1631(a), (c), and (d)(1), and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1382, 1382c, 1382h, 1383(a), (c), and (d)(1), and 1383b); secs. 4(c) and 5, 6(c)–(e), 14(a), and 15, Pub. L. 98–460, 98 Stat. 1794, 1801, 1802, and 1808 (42 U.S.C. 421 note, 423 note, 1382h note).

4. Section 416.920 is amended by revising the last sentence of paragraph (a) to read as follows:

**§ 416.920 Evaluation of disability of adults, in general.**

(a) \* \* \* Once you have been found eligible for Supplemental Security Income benefits based on disability, we follow a somewhat different order of evaluation to determine whether your eligibility continues, as explained in § 416.994(b)(5).

Dated: December 7, 2000.

**Georgia E. Myers,**

*Regulations Officer, Social Security Administration.*

[FR Doc. 00–32379 Filed 12–20–00; 8:45 am]

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**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 948**

**[WV–086–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 concerning Homestead postmining land use. 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:** December 21, 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](mailto: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.

To expedite our review of the amendment, we separated the amendment into two parts: (1) Amendments to the proposed rules at new section CSR 38–2–7.5 concerning “homesteading” as a postmining land use for mountaintop removal mining permits that meet the requirements for a variance from the approximate original contour (AOC) provisions at section 22–3–13(c) of the W.Va. Code. These provisions are the subject of this notice; and (2) Changes to the W.Va. Code in Senate Bill 614 and the regulatory changes at CSR 38–2–7.4 concerning commercial forestry postmining land use for mountaintop removal mining operations receiving an AOC variance, and various other regulatory changes. We published our final decision on those amendments in the **Federal Register** on August 18, 2000 (65 FR 50409).

## 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.

1. CSR 38–2–7.5 Homestead land use.

This subsection is new and contains the following subdivisions.

7.5. The Homestead land use meets the requirements for a variance from the AOC requirements of the Act (W.Va. Code 22–3–13(c)). An appropriately planned Homestead will promote sustainable settlement patterns that protect the environment and support the region’s economic development.

7.5.a. Operations receiving a variance from AOC for this use shall establish homesteading on at least one-half (½) of the permit area. The remainder of the permit area shall support an alternate AOC variance use.

The W.Va. Code at section 22–3–13 contains the general environmental protection performance standards for surface mining operations. Specifically, subdivision 13(c)(2) authorizes the Director of the WVDEP to grant approval of AOC variances for mountaintop removal mining operations. Subdivision 13(c)(3) identifies the following postmining land uses that are approvable for mountaintop removal mining operations: industrial, commercial, agricultural, commercial forestry, residential, public facility including recreational uses. Homestead is considered to be a “residential” postmining land use under W. Va. Code 22–3–13(c). It is important to note that Homestead is limited to mountaintop removal mining operations, and does not apply to steep slope mining operations with AOC variances as provided in section 22–3–13(e) of the W.Va. Code and CSR 38–2–14.12.a.1.

SMCRA at section 515(c)(3) and the Federal regulations at 30 CFR 784.14(c)(1) provide for the following postmining land uses for mountaintop removal operations: industrial, commercial, agricultural, residential, and public facility (including recreational facilities). The Federal regulations define “residential” under the definition of “land use” at 30 CFR 701.5 to mean, “land used for single- and multiple-family housing, mobile home parks, or other residential lodgings.” In a similar fashion, the State regulations at CSR 38–2–7.2.d define residential use to be single and multiple-family housing (other than apartment houses) with necessary support facilities. Support facilities may include commercial services incorporated in and comprising less

than five percent (5%) of the total land area of housing capacity, associated open space and minor vehicle parking and recreation facilities supporting the housing.

The proposed Homestead postmining land use is a residential use as defined at 30 CFR 701.5. Therefore, we find that the introductory language at CSR 38–2–7.5 which states that Homestead postmining land use meets the requirements for a variance from the AOC requirements of the W.Va. Code at 22–3–13(c) to be no less stringent than section 515(c)(3) of SMCRA and no less effective than the Federal regulations at 30 CFR 785.14(c)(1) and 701.5 and can be approved. We note that prior to authorizing “homestead” as a postmining land use for a mountaintop removal mining operation, the applicant must submit specific plans and assurances and the State regulatory authority must approve them in accordance with the requirements of W.Va. Code 22–3–13(c)(3) and CSR 38–2–14.10, and 14.12 to the extent that it applies to mountaintop removal mining operations. Therefore, and except as noted below, we are approving the use of Homestead as a postmining land use as provided at CSR 38–2–7.5. to the extent that it supplements or is more stringent than existing State requirements, but is not inconsistent with any existing Federal program requirements.

There is no Federal counterpart to the new language at CSR 38–2–7.5.a. concerning the percentage of the AOC variance land that must contain either the Homestead or an alternate AOC variance postmining land use. We find that this provision is not inconsistent with SMCRA or the Federal regulations and can be approved.

2. CSR 38–2–7.5.b. This provision defines the terms that are applicable only to homestead land use. This subdivision provides the following.

7.5.b. The following terms are applicable only to this subsection of this rule.

7.5.b.1. Building Pad means an accessible, designated, and properly drained area where the soil and/or mine-spoil has been specially placed and compacted to minimize post-mining surface settlement. After the building pad is completed, a registered professional engineer shall certify that the building pad was constructed as designed. This certification shall accompany the deed of conveyance.

7.5.b.2. Civic Parcel means a parcel designated in the Land Plan for public use.

7.5.b.3. Commercial Parcel means a parcel retained by the Landowner of

record and incorporated within the Homestead Area on which the landowner or its designee may develop commercial uses. The size and location of commercial parcels shall comply with the requirements of this regulation.

7.5.b.4. Community Association means an association of all the homesteaders. This association shall receive title to the civic parcels, conservation easements and nurseries at the time of final bond release.

7.5.b.5. Conservation Easement means an area, typically a strip no less than 200 feet wide, designated in the land plan for the purpose of establishing a natural habitat for the development and migration of native species of fauna and flora. These easements shall extend through the mined areas of the land, starting and ending in natural, undisturbed land. These areas shall be permanent easements maintained for conservation and not commercial purposes.

7.5.b.6. Entity Administering The Civic Parcels means the Community Association or its designee shall administer the civic parcels.

7.5.b.7. Escrow Agent means the Attorney General of the State of West Virginia shall be the Escrow Agent.

7.5.b.8. Homesteader means a citizen of the State that fulfills the requirements of this regulation and who is selected by lottery to reside on a designated homestead parcel.

7.5.b.9. Homestead Area means the entire area designated for homestead use, including roads.

7.5.b.10. Homestead Infrastructure means the facilities necessary to sustain residential use, including roads, electricity, telephone, water and sewage or septic systems.

7.5.b.11. Homestead Parcel means an individual segment of a homestead area designated as either a rural or village parcel. The permittee shall assure that each parcel has been surveyed by a licensed land surveyor before Phase I bond release.

7.5.b.12. Homestead Plan means all the required documentation, engineered drawings, authorizations, agreements and schedules which are to be submitted and approved by the Director.

7.5.b.13. Homestead Selection Lottery means a lottery sanctioned by the State, operated under rules established and administered by the Director or the Director's designee as soon as practicable after Phase I bond release.

7.5.b.14. Landowner Of Record means the surface estate owner at the time the mining permit is submitted to the Director. More than one Landowner of Record may be involved in a Homestead Plan. The Landowner of Record shall

transfer the title to the surface estate of the Homestead Area to the Escrow Agent prior to the beginning of mining. The cost of transfer shall be paid by the Landowner of Record.

7.5.b.15. Land Plan means the depiction, with supporting documentation, including surveys and narratives, of the homestead parcels, building pads, roads, easements, civic parcels, commercial parcels, and other features of the Homestead Area.

7.5.b.16. Machine Passable Grade means the maximum grade that can be safely accommodated by commonly used, self-propelled, rubber-tired farming equipment.

7.5.b.17. Rural Parcels means homesteading parcels planned to promote rural uses such as farming, orchard growing, timber management, viticulture, and Morret gardening. The rural parcels shall be an appropriate size for the designated use and may be up to 40 acres. Rural homesteaders may receive title only to that portion of the land that they have improved over the five-year period.

7.5.b.18. Service Drop means the overhead service conductors from the last pole or other aerial support to and including the splices, if any, connecting to the service-entrance conductors at the building or other structure.

7.5.b.19. Service-Entrance Conductors, Overhead System means the service conductors between the terminals of the service equipment and a point usually outside the building, clear of building walls, where joined by tap or splice to the service drop.

7.5.b.20. Service-Entrance Conductors, Underground System means the service conductors between the terminals of the service equipment and the point of connection to the service lateral.

7.5.b.21. Service Lateral means the underground service conductors between the street main, including any risers at a pole or other structure or from transformers, and the first point of connection to the service-entrance conductors in a terminal box or meter or other enclosure with adequate space, inside or outside the building wall. Where there is no terminal box, meter, or other enclosure with adequate space, the point of connection shall be considered to be the point of entrance of the service conductors into the building.

7.5.b.22. Soil Plan means the maps and descriptions of premining and postmining soil included in the Homestead Plan.

7.5.b.23. Village Parcels means homesteading parcels that provide a

higher density of residential population than rural parcels.

There are no specific counterparts to these definitions. We find that, except as noted below, the definitions are not inconsistent with SMCRA at section 515(c)(3) or the Federal regulations at 30 CFR 785.14(c)(1) concerning the approval of AOC variances for proposed postmining land use for mountaintop removal mining operations and can be approved.

The definition of "Commercial Parcel" at CSR 38-2-7.5.b.3. provides that "Commercial Parcel" means a parcel retained by the landowner of record and incorporated within the Homestead area on which the landowner or its designee may develop commercial uses. In addition, the size and location of commercial parcels shall comply with the requirements of this regulation. Under this definition, therefore, a commercial postmining land use may be incorporated within the Homestead postmining land use. SMCRA at section 515(c)(3) and the Federal regulations at 30 CFR 785.14(c)(1) provide that commercial postmining land use may be approved for mountaintop removal mining operations. Therefore, the incorporation of a commercial postmining land use within a homestead (residential) postmining land use does not render the West Virginia program less stringent than SMCRA nor less effective than the Federal regulations and can be approved. However, since the language of this provision states that the landowner "may" develop a parcel for commercial purposes, it is not clear what must be done if a landowner retains a parcel but does not develop that parcel for commercial uses. Therefore, we are requiring that CSR 38-2-7.5.b.3. be amended to clarify that parcels retained by the landowner for commercial development and incorporated within the Homestead area must be developed for commercial uses as provided by subsection CSR 38-2-7.5.g.5.

The definition of "Conservation Easement" at CSR 38-2-7.5.b.5. allows the creation of natural habitat areas within the Homestead postmining land use. Conservation easements are to comprise at least 10 percent of the Homestead area, including commercial parcels. Neither SMCRA at section 515(c)(3) nor the Federal regulations at 30 CFR 785.14(c)(1) specifically authorize conservation easements or the creation of natural habitat areas as approvable postmining land uses for mountaintop removal mining operations. However, such natural areas may play a supporting role in the

developmental plans of a proposed postmining land use that is approvable under SMCRA and the Federal regulations. This is consistent with the Federal regulations at 30 CFR 816.97 which encourages the enhancement of fish and wildlife in postmining land uses. Specifically, 30 CFR 816.97(i) provides that where residential, public service, or industrial uses are to be the postmining land use, and where consistent with the approved postmining land use, the operator shall intersperse reclaimed lands with green belts utilizing species of grass, shrubs and trees useful as food and cover for wildlife. As explained under the definition of "Conservation Easement," the use of natural habitat areas plays an appropriate supporting role in the Homestead postmining land use. Therefore, we find CSR 38-2-7.5.b.5. to be no less stringent than SMCRA and no less effective than the Federal regulations and can be approved.

The definition of "Homestead Area" means the entire area designated for homestead use, including roads. As discussed above at Finding 1., Homestead postmining land use is a residential postmining land use that qualifies for an AOC variance for mountaintop removal mining operations under SMCRA section 515(c)(3) and the Federal regulations at 30 CFR 785.14(c)(1). The definition of "Homestead Area" as meaning the entire area designated for homestead use, including roads is therefore also consistent with the Federal "residential" postmining land use. Therefore, we find that the definition of "Homestead Area" is consistent with and no less stringent than SMCRA section 515(c)(3) and the Federal regulations at 30 CFR 785.14(c)(1) and can be approved.

The definition of "Rural Parcels" at CSR 38-2-7.5.b.17. means homesteading parcels planned to promote rural uses such as farming, orchard growing, timber management, viticulture (grape growing), and Morret gardening. We note that the term "Rural Parcels" includes "timber management" use as one of the uses that are promoted for these rural parcels. Timber management should not be confused with the "commercial forestry and forestry" postmining land use for AOC variances for mountaintop removal mining operations that we recently approved (65 FR 50409). Homesteading postmining land use, which is a residential use under SMCRA section 515(c)(3) and 30 CFR 785.14(c)(1), is an approvable postmining land use. Timber management is one of many uses to which the homeowners of the rural

Homestead parcels may develop their land. In addition, the size of each rural parcel can be up to 40 acres, and the homesteaders may receive title only to that portion of the land that they have improved over the five-year period. Therefore, we find that the definition of "Rural Parcels" is not inconsistent with SMCRA section 515(c)(3) nor with the Federal regulations at 30 CFR 785.14(c)(1) and can be approved. In addition, we recommend that the West Virginia program be amended to define the term "Morret gardening."

3. CSR 38-2-7.5.c. This provision concerns the eligibility requirements and responsibilities for homesteaders. This subdivision provides as follows.

7.5.c. Eligibility Requirements And Responsibilities For Homesteaders;

7.5.c.1. Homesteader shall meet the following eligibility requirements:

7.5.c.1.A. Be a resident of the State of West Virginia and be at least 18 years old;

7.5.c.1.B. Apply for a homestead as required by this rule;

7.5.c.1.C. Abide by the rules of the Homestead Selection Lottery;

7.5.c.1.D. Reside on the subject parcel within 12 months after the property is certified as ready for use. Provided that subject to the approval of the Escrow Agent, occupancy may be delayed up to 6 additional months for good cause shown.

There are no Federal counterparts to the provisions at CSR 38-2-7.5.c. concerning eligibility requirements and responsibilities for homesteaders. However, we find that they are not inconsistent with SMCRA or the Federal regulations and can be approved.

4. CSR 38-2-7.5.d. This provision concerns the rules for the homestead lottery. This subdivision contains the following requirements.

7.5.d. Rules For The Lottery;

7.5.d.1. The rules for the Lottery are as follows:

7.5.d.1.A. Each household may receive no more than one homestead.

7.5.d.1.B. Homestead parcels shall be distributed by anonymous lottery.

7.5.d.1.C. For any given Homestead, the lottery shall first be opened only to West Virginians living within three (3) miles of the permitted area within five years of the date of the filing of the permit application. Provided, however, that if parcels remain after an initial lottery, subsequent lotteries shall be held in the following order. The first subsequent lottery shall be open to any resident of a county (or counties, if more than one) in which the mine is located. Further, lotteries, if necessary, shall be open to any resident of West Virginia,

and shall be held at six (6) month intervals.

7.5.d.1.D. The lottery shall be held as soon as practicable after Phase I bond release is approved. Adequate notice shall be provided at least six (6) months in advance of the lottery.

7.5.d.1.E. The lottery shall be fair, impartial, and open to the public.

7.5.d.1.F. A lottery participant who receives a parcel may decline a parcel, but may not sell the right to homestead on the parcel.

7.5.d.1.G. The right to participate in the lottery is not assignable or saleable.

7.5.d.1.H. Each lottery participant shall, before the lottery, apply for either a rural or a village parcel.

There are no Federal counterparts to the provisions at CSR 38-2-7.5.d. concerning rules for a lottery. However, we find that they are not inconsistent with SMCRA or the Federal regulations and can be approved.

5. CSR 38-2-7.5.e. This provision concerns the homestead plan development. This subdivision contains the following requirements.

7.5.e. Homestead Plan Development.

7.5.e.1. The Director may authorize Homesteading as a post-mining use only if the following conditions have been satisfied.

7.5.e.1.A. The Homestead Plan and any subsequent modifications shall be prepared under the direction of and certified by a professional engineer, a soil scientist, and a design professional that is either a licensed architect, landscape architect, or AICP certified land planner. [Note: AICP means American Institute of Certified Planners].

7.5.e.1.B. The Homestead Plan shall identify each member of a specialty group that contributed to the plan. The Plan shall be sufficiently detailed to ensure success in achieving the designated use of each homestead panel [sic] and to ensure sound future management of the homestead.

7.5.e.1.C. Homestead plan may be used alone or in conjunction with any other alternate land use plan. The Homesteading area, minus commercial parcels, shall occupy at least 50% of the permitted area. In the event that the Homestead use is used in conjunction with another land use, the Landowner of Record shall provide for the Homestead use at least as much land on the mining bench as it retains for alternate land use.

7.5.e.1.D. The Permittee shall submit plans prepared at a preferred scale of at least 1 inch = 200 feet, which include the following:

7.5.e.1.D.1. A Land Plan showing the homestead boundaries, homestead

parcels, building pads, roads, easements, civic parcels, and commercial parcels, as applicable.

7.5.e.1.D.2. A Site Plan and description of the following:

7.5.e.1.D.2.(a) wastewater and sewage systems,

7.5.e.1.D.2.(b) potable water supply,

7.5.e.1.D.2.(c) non-potable water supply (if applicable).

7.5.e.1.D.2.(d) electrical service, and

7.5.e.1.D.2.(e) telephone service.

7.5.e.1.D.3. A grading plan showing contours at an interval appropriate for the map scale and slopes, and including surface drainage and stormwater provisions. The Director shall require maps at specific scales and contour intervals to satisfy the designated uses of the homestead parcels and the land plan.

7.5.e.1.D.4. A map showing all off-bench fill areas and the outcrop of the lowest coal bed.

7.5.e.1.D.5. A Soil Plan showing soil and weathered spoil storage areas. The plan shall describe the methods to be used to distribute, protect, and enhance the stored material upon final regrading of the disturbed surfaces. The plan shall identify the proposed depths of soil and subsoil for each specific use within the Homestead Area. These specific uses may include, but shall not be limited to, the following:

7.5.e.1.D.5.(a) Haul roads;

7.5.e.1.D.5.(b) Conservation

Easements;

7.5.e.1.D.5.(c) Building Pads;

7.5.e.1.D.5.(d) Garden Plots;

7.5.e.1.D.5.(e) Waste Water and

Sewage Disposal Facilities;

7.5.e.1.D.5.(f) Storm Drainage Facilities;

7.5.e.1.D.5.(g) Wetland Facilities;

7.5.e.1.D.5.(h) Utility Easements;

7.5.e.1.D.5.(i) Civic/Public Facilities;

7.5.e.1.D.5.(j) Commercial Areas;

7.5.e.1.D.6. Soil maps.

SMCRA at section 515(c)(3)(B), and the Federal regulations at 30 CFR 785.14(c), like W.Va. Code 22-3-13(c)(3), 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 38-2-7.5.e. provide detailed requirements concerning the specific plans that must be submitted for a Homesteading postmining land use. 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. The new subdivisions at 7.5.e.1.D.3. and D.5. require the submittal of a grading plan (7.5.e.1.D.3.) and a soil plan (7.5.3.1.D.5.). However, these new requirements do not make it clear that the permittee must also submit maps, cross sections and operations plans that comply with CSR 38-2-3.4, 3.5, and 3.6. Therefore, we find that the provisions at CSR 38-2-7.5.e. are no less stringent than SMCRA nor less effective than the Federal regulations and can be approved to the extent that its provisions supplement, but do not supersede, the approved State provisions concerning maps and cross sections, and operation plans at CSR 38-2-3.4, 3.5, and 3.6.

6. CSR 38-2-7.5.f. This subdivision concerns the provisions for financial commitments. This subdivision contains the following requirements.

7.5.f. Financial Commitments.

7.5.f.1. A contract between the Permittee and the Director, binding the Permittee to complete the homestead use as soon as practicable but no later than two years after the completion of mining, shall be required.

7.5.f.2. The contract between the Permittee and the Director shall, at a minimum, require the Permittee to follow the homesteading reclamation plan.

7.5.f.3. To receive approval for a homestead use, the Permittee shall demonstrate that it has the financial capability to achieve the use and carry out the reclamation plan. The Permittee shall submit signed statements containing financial information and data sufficient to demonstrate that the Permittee has the financial capability to achieve the homesteading use.

7.5.f.4. Before approving the Permit, the Director shall find, in writing, that the Permittee has the financial capability to achieve the use.

We find that the provisions at CSR 38-2-7.5.f. are consistent with SMCRA section 515(c)(3)(B)(v), and the Federal regulations at 30 CFR 785.14(c)(1)(iii)(E) which require an applicant for a mountaintop removal permit provide appropriate assurance that the proposed postmining land use is practicable with respect to private financial capability for completion of the proposed use. In addition, new CSR 38-2-7.5.f.1. is consistent with 30 CFR

816.133(c)(3)(iii), which provides that a proposed alternative postmining land use may be approved if, among other requirements, the regulatory authority finds that the proposed use will not

“Involve unreasonable delay in implementation.” Compliance with 30 CFR 816.133(a) through (c) is required by 30 CFR 824.11(a)(4). Therefore, the new provisions at CSR 38-2-7.5.f. can be approved. We note that W.Va. Code section 22-3-13(c)(3), concerning mountaintop removal mining operations, provides that the Director of the WVDEP must make other written findings in addition to a finding concerning financial capability to achieve the proposed postmining land use. Therefore, we are approving CSR 38-2-7.5.f. to the extent that compliance with W.Va. Code section 22-3-13(c)(3) is also required.

7. CSR 38-2-7.5.g. This provision concerns the required elements for all homestead plans and contains the following requirements.

7.5.g. Required Elements For All Homestead Plans.

7.5.g.1. Boundary of the homestead area:

7.5.g.1.A. The Homestead Area shall be defined by a metes and bounds description prepared and certified by a Professional Engineer or Licensed Land Surveyor registered with the State of West Virginia.

7.5.g.1.B. Non-mined areas may be included in the Homestead Area.

7.5.g.1.C. In the event that any portion of the land transferred to the Escrow Agent is not mined, that land may revert to the Landowner of Record.

7.5.g.2. General Requirements of all Parcels:

7.5.g.2.A. Each individual parcel shall be delineated by metes and bounds description prepared by a Professional Engineer or Licensed Land Surveyor registered with the State of West Virginia.

7.5.g.2.B. Parcels shall support their designated land uses.

7.5.g.2.C. Parcels shall be configured and arranged to minimize adverse environmental impacts.

7.5.g.2.D. The Permittee shall provide adequate road frontage for access to each Homestead, Public Nursery, Civic and Commercial Parcel.

7.5.g.2.E. Houses and appurtenant facilities shall be no closer than 50 feet from the edge of a designated Conservation Easement.

7.5.g.3. Homestead parcels:

7.5.g.3.A. Homestead Parcels shall be designated as either rural or village parcels. All parcels shall contain machine passable land appropriate to the designated use.

7.5.g.3.B. Each rural homestead parcel shall be provided with a garden area of at least 5,000 square feet. Each village homestead parcel shall be provided with a garden area of at least 600 square

feet. The garden areas shall be constructed in compliance with the soil requirements set forth in subdivision 7.5.j. of this rule.

7.5.g.3.C. Each rural and village homestead parcel shall contain a building pad of a minimum of 2,500 square feet for a dwelling. Each rural homestead parcel shall also contain a building pad of a minimum of 2,500 square feet for an outbuilding.

7.5.g.4. Civic Parcels:

7.5.g.4.A. The Homestead Plan shall delineate one or more appropriate sites within the total proposed Homestead area for Civic Parcels. These uses may include, but are not limited to, the following: park land, playing fields, schools, post office, and community administrative facilities. This area shall occupy at least 10% of the post-mining permit area.

7.5.g.4.B. The Civic Parcels may be one contiguous parcel or appropriately sized non-contiguous parcels.

7.5.g.4.C. The Civic Parcels shall be deeded at no charge to the duly recognized Community Association.

7.5.g.4.D. The Civic Parcels shall be provided with an access road and utilities that are consistent with the proposed civic land use.

7.5.g.5. Commercial Parcels:

7.5.g.5.A. The Landowner of Record may elect to retain up to 15% of the land in the proposed Homestead Area for the purpose of commercial development; provided that the Landowner of Record may retain no more than 50% of the permitted area.

7.5.g.5.B. The retained commercial area may be comprised of one or more parcels and shall be indicated on the Land Plan.

7.5.g.5.C. In the area for the Commercial Parcel the mine-spoil shall be placed, compacted, and regraded in a manner consistent with the proposed commercial land use.

7.5.g.6. Approval:

7.5.g.6.A. Before approving a homesteading reclamation plan, the Director shall assure that Homestead Plan is reviewed and approved by either a licensed architect, landscape architect, or AICP certified land planner employed by or under contract to the Director. In addition, the Director shall assure that the plans for Rural Parcels are reviewed and approved by an agronomist employed by or under contract with the Director. The applicants shall pay for any review under this subsection.

There are no direct Federal counterparts to the provisions at CSR 38-2-7.5.g. We find that the new provisions are not inconsistent with section 515(c)(3)(B) of SMCRA which

provides that the applicant must provide specific plans for the proposed postmining land use, and can be approved. However, these provisions are only approved to the extent that compliance with the State's approved postmining land use requirements at CSR 38-2-7 is also required. We note that the term "Public Nursery" as used at subdivision CSR 38-2-7.5.g.2.D. is not defined. For clarity, we recommend that the State add a definition of this term.

8. CSR 38-2-7.5.h. This subdivision concerns the construction and conveyance of homestead parcels, and contains the following requirements.

7.5.h. Construction And Conveyance Of Homestead Parcels. All construction projects not performed by the homesteaders on Homestead Areas shall be performed by the Permittee, using a West Virginia licensed contractor.

7.5.h.1. Stabilization of the Homestead Area:

7.5.h.1.A. The Homestead Plan shall describe the methods that will be used during the placement of mine spoil to minimize mine spoil consolidation and its associated ground settlement, where such settlement will adversely affect the use of the homestead. Conditions relating to the placement of structures on the mine-spoil shall be clearly identified in the Plan.

7.5.h.1.B. The Plan must delineate the areas on each parcel where the mine-spoil will be placed in a manner to minimize post-mining land surface settlement on Building Pads, roads and other appropriate areas.

7.5.h.1.C. The placement methodology shall be specified by a qualified engineer. The Plan shall indicate the type and style of structure appropriate for each building pad. The Plan shall include the requirement that a professional engineer will monitor the construction of the building pads to certify compliance with the specifications of the plan.

7.5.h.2. Construction Of The Building Pad:

7.5.h.2.A. Building Pads shall be designed by a registered professional engineer.

7.5.h.2.B. The registered professional engineer shall supervise the placement of the uppermost 20 feet of spoil for Building Pads to minimize consolidation.

7.5.h.2.C. The engineer shall certify the integrity of the Building Pad and that the Building Pads will not settle more than 1/2 inch after the expected structure is in place.

7.5.h.2.D. Building Pads shall be designed to accommodate the type of

building expected to be placed on the pad.

7.5.h.2.E. Building Pads shall not be placed on valley fills.

7.5.h.3. Conveyance Of Homestead Parcels:

7.5.h.3.A. Estimated short and long-term costs to Homesteaders shall be designated in the Homestead Plan and presented to Homesteaders immediately after the Lottery on a parcel specific basis.

7.5.h.3.B. The rights to the surface estate shall be deeded to each Homesteader free and clear of all liens and encumbrances as soon after bond release as the Escrow Agent determines that the property is ready for use. The deeds shall not retain right of entry onto the homestead parcels to conduct future surface mining activities.

7.5.h.3.C. Consistent with State and federal law, the transfer of the surface to the Escrow Agent may be for surface rights only and need not include any minerals, oil or gas and shall be subject to usual and customary mining or extraction rights.

7.5.h.3.D. Before receiving the Homestead Parcel, each homesteader shall:

7.5.h.3.D.1. Install and reside in a dwelling whose structure complies with the Homestead Plan community association rules, and all applicable local, county and state laws;

7.5.h.3.D.2. Reside on the parcel for at least forty-five weeks each year for five (5) consecutive years prior to receipt of title to the land;

7.5.h.3.D.3. Use and improve the parcel by completing a dwelling that complies with this rule, installing an approved septic system and maintaining vegetative cover on all parts of the homestead parcel and plant trees from the Public Nursery in accordance with subdivision 7.5.l.4. of this rule.

7.5.h.3.E. In the event extreme hardship causes a homesteader to be forced to sell his property before the five-year occupancy period has expired, the Escrow Agent shall convey title early. The Escrow Agent's determination of extreme hardship shall be reasonable by the Circuit Court of County in which the homestead parcel is located.

There are no direct Federal counterparts to the provisions at CSR 38-2-7.5.f. However, we find that the new provisions are not inconsistent with section 515(c)(3)(B) of SMCRA which provides that the applicant must provide specific plans for the proposed postmining land use. We note, however, that there is an apparent editorial error at subdivision 7.5.h.2.B. Subdivision 7.5.h.2.B. provides that the registered

professional engineer shall supervise the placement of the uppermost 20 feet of spoil for Building Pads to "minimize" compaction. The term "minimize" should be "maximize." The new rules at both CSR 38-2-7.5.b.1. and 7.5.j.4.A. clearly require that the mine soil under Building Pads must be properly compacted. Without such compaction, the settlement standard for Building Pads at CSR 38-2-7.5.h.2.C. would not be achievable. Therefore, we are approving new CSR 38-2-7.5.h. to the extent that subdivision 7.5.h.2.B. means that consolidation of the uppermost 20 feet of spoil for Building Pads must be maximized. Further, we recommend that the editorial error be corrected to clarify this apparent contradiction, otherwise, it may not be possible to achieve the homestead postmining land use.

9. CSR 38-2-7.5.i. This subdivision concerns required infrastructure, and contains the following requirements.

7.5.i. Required Infrastructure.

7.5.i.1. Roads:

7.5.i.1.A. The Land Plan shall designate an all-weather road connecting the Homestead Area to a public road or highway. The road shall meet State Department of Highways' standards, and shall be certified as safe for passenger car traffic by registered professional engineer.

7.5.i.1.B. The Land Plan shall incorporate adequate road frontage to all parcels. Such roads shall be designated in the plan and referred to as "main roads." Main roads shall meet State Department of Highways standards, and shall be certified as built as safe for passenger car traffic by registered civil engineer.

Before the Director may approve a surface mining application for this use, the County or State road authority shall conditionally agree to accept responsibility for maintaining the all-weather and main roads after mining is complete.

7.5.i.1.C. The Land Plan shall provide an entrance from the main road to each parcel, complete with culvert as needed. The Homesteader shall be responsible for extending the driveway from the entrance to the building pad.

7.5.i.2. Wastewater And Sewage:

7.5.i.2.A. The Homestead Plan shall incorporate a wastewater and sewage disposal plan conditionally approved by the Director, the West Virginia Bureau of Public Health or the public health authority of the county. The wastewater/sewage disposal system shall be approved by the appropriate entities before Phase II bond release shall be authorized. No such approval

may be granted unless the system meets local health department standards.

7.5.i.2.B. A variety of wastewater and sewage disposal systems, including individual septic systems, may be proposed. Alternative/innovative systems shall be consistent with all State and federal regulations. The reclamation, topsoiling, grading, and revegetation plan of each parcel shall be designed to accommodate the proposed wastewater/sewage system.

7.5.i.2.C. The Homestead Plan shall provide a functional wastewater and sewage system for each Civic, Commercial or Homestead Parcel. The system shall describe an approved hookup/cleanout point no more than 50 feet from such homestead and civic Building Pads.

7.5.i.2.D. Each Homesteader shall be responsible for all costs incurred to connect structures on the Homestead parcel to the wastewater and sewage system. Additionally, if necessary, each homesteader shall be responsible for all costs incurred to install an individual septic system.

7.5.i.2.E. The entity administering the Civic Parcel shall be responsible for all costs incurred to connect structures on the Civic Parcel to the wastewater and sewage system.

7.5.i.2.F. The Homestead Plan shall describe the maintenance and upkeep demands of any proposed sewage disposal system, and shall designate the entity responsible for such maintenance. Phase III bond release may not be approved until the designated entity has accepted responsibility for such maintenance.

7.5.i.3. Water Supply:

7.5.i.3.A. The Homestead Plan shall include a potable water supply source or sources adequate for each Homestead Parcel. The supply of water shall be provided by one of the following methods in the following order of priority: a) water piped from an existing public water supply; b) from wells; or c) from reservoirs with catchment basins adequate to supply the homestead area. Before authorizing any system of potable water supply that is not piped from an existing water supply, the Director shall find, in writing, that the higher order methods of delivery of potable water are not feasible. The Director may rely on the sewers if an appropriate Public Health Authority.

7.5.i.3.B. The Permittee shall establish and pay for the potable water supply system.

7.5.i.3.C. The water shall be delivered at a constant rate and at water industry accepted pressure and flow.

7.5.i.3.D. The Homestead Plan shall describe the future maintenance of the

water supply system. If the water system is public, the plan shall designate the entity responsible for its upkeep.

Homesteaders may be required to pay a fair market price for the water.

Homesteaders shall not be charged for water from their own individual well, although Homesteaders shall be responsible for maintenance of their own wells.

7.5.i.3.E. Individual supply systems shall, at a minimum, meet all applicable health standards, comply with all state and federal laws, and be approved by the appropriate public health authority. Appropriate wellhead protection or watershed protection practices shall be incorporated into the Homestead Plan, and shall be protect water from potential vulnerability from future land use.

7.5.i.3.F. The source or sources of potable water must be identified within the Homesteading Plan, along with a demonstration of the adequacy of quantity and quality. Upon completion of the reclamation plan, the Permittee shall install and demonstrate the quality and adequacy of the supply. If the originally proposed water supply system proves to be inadequate or unsuitable, the Permittee shall immediately make application with the Director for approval of alternate supplies or adequate improvements to the water supply system. The resulting improvements and/or alternate supplies shall comply with the requirements in this rule and shall be subject to the approval of the appropriate public health authority. Phase I bond release may not be approved until the Director finds that the installed water supply complies with this rule and applicable State and federal law.

7.5.i.3.G. The Homestead Plan shall describe a water supply plan that is adequate to meet the needs of the Homestead Area. The water supply plan shall address the anticipated future land use of the Homestead Area, and must be reviewed and approved by the Director and the appropriate public health authorities.

7.5.i.3.H. The potable water supply sources shall meet the Federal Primary Drinking Water Maximum Contaminant Level standards. (40 CFR 141, Subpart B). Verification of such quality shall be provided to the appropriate public health authority.

7.5.i.3.I. The supply source means the contiguous water body or contiguous aquifer from which supplies are drawn. If multiple homestead unit supplies are withdrawn from the same source, determination of water quality of the source shall be made at points that are

representative of the water that will be withdrawn from the source.

7.5.i.3.J. The potable water supply shall provide for a minimum quantity of 12,500 gallons per month per homestead unit. The supply may incorporate one or a combination of sources and storage facilities demonstrated to provide an adequate supply for each homestead parcel.

7.5.i.3.K. If a ground water source is to be used, the plan and the confirmation of the installed ground water supply system shall be conducted under the direction of a qualified ground water professional. The locations of drilled wells shall be consistent with appropriate public health requirements.

7.5.i.3.L. The water supply shall be developed (or extended as applicable) free of charge to the homesteader to a point within 50 feet of the designated residence and civic parcel construction pads for each homestead unit.

7.5.i.3.M. After initial establishment of compliant water quality and quantity, responsibility for maintenance of the water supply shall revert to the homesteader or, in the event that the supply is community- or publicly-controlled, to the appropriate and capable public authority.

7.5.i.3.N. When the potable water supply is insufficient to meet the needs of the proposed use for rural homestead parcels, the Homestead Plan shall include nonpotable water supplies for uses that do not require potable water. Before approving Phase I bond release, the Director shall find that the non-potable water supply is sufficient in both quality and quantity for such uses, including agricultural uses. The plan for the system shall indicate the provisions that will be taken to assure that the potable water supply shall not be compromised. The approval of nonpotable water supplies distribution and handling system shall be consistent with State and federal law.

7.5.i.3.O. Each Homesteader shall be responsible for costs incurred to connect dwellings to water facilities.

7.5.i.3.P. The entity administering the civic parcel shall be responsible for costs incurred to connect structures on the civic parcel to water facilities.

7.5.i.3.Q. If a reservoir is used, a registered professional engineer shall certify its integrity. The engineer shall also certify that, taking account of inflow, seepage and evaporation, the reservoir will provide the amount of water and water pressure required by the Homestead use.

7.5.i.4. Electrical Utilities:

7.5.i.4.A. The Homestead Plan shall provide access to electrical power for all

Homestead Parcels and for all Civic Parcels requiring electric power. The quantity of electricity supplied shall be sufficient to support the proposed use. Phase II bond release may not be approved until all the necessary facilities have been rendered operational and extended to a point where the service drop for the Homestead or Civic Parcel can be accomplished in no more than one span. If a service lateral is proposed, access to electrical power shall be deemed to have been satisfactorily provided when the service lateral is no more than 50 feet in length. Such electrical power facilities shall be designated in the plan and referred to as "main electrical power facilities".

7.5.i.4.B. All line work shall conform to the practices of the electric power utility servicing the area. The installed main utilities and associated equipment shall be conveyed to the electric power utility servicing the area.

7.5.i.4.C. Each Homesteader shall be responsible for all costs incurred to install a service drop or service lateral the building pads.

7.5.i.4.D. The entity administering the Civic Parcel shall be responsible for all costs incurred to install a service drop or service lateral to structures on the Civic Parcel.

7.5.i.4.E. Each Homesteader shall be responsible for cost of electrical service.

7.5.i.5. Communication Services:

7.5.i.5.A. The Permittee shall provide access to telephone service for all Homestead Parcels and for all Civic Parcels requiring telephone service. Phase II bond release may not be approved until access to telephone service has been rendered operational and extended to a point within 50 feet of the Parcel's building pads. Such telephone or equivalent utilities shall be designated in the plan and referred to as "main telephone facilities".

7.5.i.5.B. All service line work shall conform to the practices of the telephone service provider of the area. All line work and associated equipment shall be conveyed to the local telephone service provider.

7.5.i.5.C. Each Homesteader shall be responsible for all costs incurred to extend and connect main telephone facilities to the building pads.

7.5.i.5.D. The entity administering the Civic Parcel shall be responsible for all costs incurred to extend and connect main telephone facilities to the Civic Parcels.

7.5.i.5.E. Each Homesteader shall be responsible for the cost of telephone service.

7.5.i.6. Solid Waste:

7.5.i.6.A. The Homestead Plan shall contain a plan for the off-site disposal of solid waste that is acceptable to the Director and the appropriate public health authority.

7.5.i.7. Surface Drainage And Stormwater:

7.5.i.7.A. The Homestead Plan shall contain a detailed surface drainage pattern and stormwater runoff control plan. This plan shall be certified by a registered professional engineer.

7.5.i.7.B. The surface drainage pattern and stormwater plan shall be consistent with a surface drainage pattern that would be found on natural topography proposed in the Homestead Plan. The beds of the surface and stormwater drainways shall contain material that is as natural as practicable.

7.5.i.8. Reforested Conservation Easements:

7.5.i.8.A. The Homestead Plan shall identify areas within the Homestead Area reserved for reforested Conservation Easements. These areas shall be reforested by the Permittee at no cost to Homesteaders.

7.5.i.8.B. In the event that an isolated forest patch exists as a result of mining activities, the Conservation Easement shall serve as a corridor to establish a wind break and a forested connection with the isolated forest patch and to facilitate the adequate movement of fauna out of and into the isolated forest patch.

7.5.i.8.C. Conservation Easements may serve the purpose of a stormwater management systems. In such case, the technical specifications applicable to the design and construction of the storm water channels and their associated structures shall be satisfied.

7.5.i.8.D. Conservation Easement shall compromise [sic] at least 10% of the Homestead Area, including the Commercial Parcels.

7.5.i.8.E. The Director shall assure that all areas suitable for hardwoods in the Conservation Easement are planted with native hardwoods at a rate of 500 seedlings per acre in continuous mixtures across the conservation easement 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. Plants shall be a minimum of 3/4" in diameter at breast height at planting.

7.5.i.8.F. Each of the species shall not be less than 10% of the total planted composition and at least 75% of the total planted woody plant composition shall be from the above list of species. Species shall be selected based on their



compatibility and expected site-specific long-term dynamics.

7.5.i.8.G. At least 10% of the required number of woody plants shall be a planted 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, bristly locust, redbud, or bi-color lespedeza.

7.5.i.8.H. 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 of 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 this rule. The Director shall assure that no Conservation Easement area contains a total of more than 15% conifers.

7.5.i.8.I. 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.

7.5.i.8.J. The Director shall assure that the total planting rate of trees and nurse plants is not less than 500 stems per acre.

7.5.i.9. Perpetual Easements:

7.5.i.9.A. The Homestead Plan shall describe areas within the Homestead reserved for perpetual easements relating to storm water management, protection of out slopes and steep slopes, protection of water sources, public roads of all kinds, and utilities. These areas shall be included within Homesteader's deeded parcels and may have permanent development restrictions included within the Homesteader's deeds of conveyance.

7.5.i.9.B. Fill faces shall be placed under perpetual easements that prohibit activities that may lead to instability or erodability. Trees may be planted on the faces of the fills.

7.5.i.10. Wetlands: Each Homestead Plan may describe areas within the Homestead Area reserved for created wetlands. These created wetlands may be ponds, permanent impoundments or wetlands created during mining. They may be left in place after final bond release.

The provisions at CSR 38-2-7.5.i. provide detailed requirements concerning infrastructure that must be included in a Homesteading postmining land use. 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 infrastructure required to support a Homesteading postmining land use. Except as noted below, we find 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, and can be approved.

CSR 38-2-7.5.i.1.B. provides that main roads shall meet State Department of Highway standards and shall be certified as built as safe for passenger car traffic by a registered civil engineer. However, such main roads that meet the definition of road at CSR 38-2-2.59 and 38-2-4.1 and that are to be retained as part of the postmining land use must be designed and constructed to meet the primary road requirements of CSR 38-2-4. Therefore, we are requiring WVDEP to amend its program to clarify that roads which meet the definition of road at CSR 38-2-2.59 and 38-2-4.1 and that are to be retained as part of the postmining land use must be designed and constructed to meet the primary road requirements of CSR 38-2-4. In addition, we are approving CSR 38-2-7.5.i.1.B. to the extent that the word "conditionally" means that the County or State road authorities will accept responsibility for maintaining the all-weather and main roads after mining and reclamation is complete, and the road(s) is built.

CSR 38-2-7.5.i.2.A. provides that the Homestead Plan shall incorporate a wastewater and sewage disposal plan conditionally approved by the Director, the West Virginia Bureau of Public Health or the public authority of the county. The U.S. Environmental Protection Agency (EPA) stated in its comments concerning this provision (Administrative Record Number WV-1166) that discharges from any wastewater/sewage system must also meet Federal requirements under the Clean Water Act, specifically the NPDES permit requirements which are implemented by the State Office of Water Resources, WVDEP. The EPA recommended, so that there would be no misunderstanding, that either a statement to this effect be included in CSR 38-2-7.5.i.2.A., or, a statement be included which indicates that disposal systems shall be consistent with all

State and Federal regulations. We note that there is nothing in the new provision which indicates that NPDES permit requirements would not be complied with where applicable.

However, for the sake of clarity, we are approving this provision to the extent that the applicable NPDES permit requirements would be complied with.

CSR 38-2-7.5.i.2.B. provides that a variety of wastewater and sewage disposal systems, including individual septic systems, may be proposed in the wastewater and sewage disposal plan. The EPA commented on this provision and stated that since homestead sites are planned to be constructed on somewhat porous backfilled areas, there may be a higher potential for leachate to pass relatively unabsorbed through the fills to streams, presenting possible high fecal coliform levels and associated health risks. The EPA urged close review of this potential when considering any proposals for septic tank systems at homestead sites. We concur with EPA's recommendation.

CSR 38-2-7.5.i.3.A. provides that the Director of the WVDEP may rely on the sewers "if an appropriate Public Health Authority." It appears that the words "approved by" are missing from this provision. The final sentence should read, "The Director may rely on the sewers if approved by an appropriate Public Health Authority." We recommend that this provision be amended to correct this editorial omission.

CSR 38-2-7.5.i.3.H. provides that the potable water supplies shall meet the Federal Primary Drinking Water Maximum Contaminant Level standards of 40 CFR 141 Subpart B. The EPA stated in its comments concerning this provision that "community water systems as defined by 40 CFR 141 (those serving 25 or more people or which have 15 or more service connections) must also comply with all subparts of 40 CFR 141, A. through J." The EPA recommended that, to avoid any misunderstanding, section CSR 38-2-7.5.i.3.H. should be amended to clarify that community water systems must comply with 40 CFR 141 in its entirety. Therefore, we are approving this provision to the extent that the provisions of 40 CFR 141, A. through J. apply to community water systems as defined by 40 CFR 141 (those serving 25 or more people or which have 15 or more service connections).

CSR 38-2-7.5.i.3.Q. provides that if a reservoir is used as a water facility, a registered professional engineer shall certify its integrity. To be no less effective than the Federal regulations concerning permanent impoundments,

CSR 38-2-7.5.i.3.Q. must also require compliance with the West Virginia rules concerning permanent impoundments at CSR 38-2-5.5. Therefore, we are approving CSR 38-2-7.5.i.3.Q. only to the extent that all permanent impoundments approved for Homestead postmining land use must comply with CSR 38-2-3.6.b.1. and 38-2-5.5 concerning permanent impoundments. In addition, we are requiring that the West Virginia program be amended to require that all permanent impoundments approved for Homestead postmining land use must comply with CSR 38-2-3.6.b.1. and 38-2-5.5 concerning permanent impoundments.

CSR 38-2-7.5.i.7.A. provides for a detailed surface drainage pattern and storm water runoff control plan. The EPA commented on this provision and stated that storm water discharges resulting from construction of the homestead sites and supporting streets, depending on the acreage disturbed, may be subject to Federal National Pollutant Discharge Elimination System (NPDES) storm water requirements at 40 CFR 122.26. The EPA recommended that either a statement to this effect be included in section CSR 38-2-7.5.i.7., or a statement be included which indicates that storm water discharges shall be consistent with all State and Federal regulations. The EPA also recommended that the site developers contact the State Office of Water Resources, WVDEP, regarding the applicability of storm water regulations for specific sites. We note that there is nothing in the new provision which indicates that NPDES storm water requirements would not be complied with where applicable. However, for the sake of clarity, we are approving this provision to the extent that the applicable NPDES storm water requirements would be complied with.

CSR 38-2-7.5.i.8.D. concerns conservation easements. This provision contains the word "compromise." It appears that the word should be "comprised." We recommend that this provision be amended to correct this editorial error.

CSR 38-2-7.5.i.10. concerns wetlands. CSR 38-2-7.5.i.10. should be amended to reference CSR 38-2-3.5.d. which requires the submittal of cross sectional areas and profiles of all drainage and sediment control structures including ponds, impoundments, diversions, sumps, etc. which are created during mining and may be left after final bond release. Therefore, we are approving CSR 38-2-7.5.i.10. to the extent that the permit requirements at CSR 38-2-3.5.d. continue to apply. In addition, we are

requiring that CSR 38-2-7.5.i.10. be amended to require compliance with the permit requirements at CSR 38-2-3.5.d.

10. CSR 38-2-7.5.j. This subdivision concerns soils, soil placement and grading, and contains the following requirements.

Subdivision 7.5.j. concerns soils, soil placement and grading.

7.5.j. Soils, Soil Placement And Grading;

7.5.j.1. General Requirements:

7.5.j.1.A. Phase I bond release shall not be approved until a soil scientist certifies and the Director finds that the soil meets the criteria established in this rule and has been placed in accordance with this rule.

7.5.j.1.B. The Homestead Plan shall include a topographic map of the permit area, 1:12000 or finer, showing the location of pre-mining native solids, weathered slightly-acidic brown sandstone and drainages which includes site index for common native tree species. A profile description of each soil mapping unit that includes, at minimum, soil horizons, including the O. horizon depths, soil texture, structure, color, reaction and bedrock type. A certified professional soil scientist shall conduct a detailed on-site survey, create the maps, and provide the written description of the soils and sandstones.

7.5.j.1.C. The Homesteading Plan shall include a description of the present soils and soil substitutes to be used as the plant medium, and a description of the proposed handling, and placement of these materials. The handling plan shall include procedures to:

7.5.j.1.C.1. Protect native soil organisms and the native seed pool;

7.5.j.1.C.2. Include organic debris such as litter, branches, small logs, roots and stumps in the soil;

7.5.j.1.C.3. Inoculate the minesoil with native soil organisms; and

7.5.j.1.C.4. Increase soil fertility.

7.5.j.1.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 homesteading.

7.5.j.2. Landscape Criteria:

7.5.j.2.A. 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 to reflect the premining irregularities in the land. Postmining landform shall provide a rolling topography with slopes of between 5% and 15%. The elevation change between the ridgeline and the valleys shall be varied. The slope

lengths shall not exceed 500 feet. The minimum thickness of backfill, including minesoil, placed on the pavement of the basal seam mined in any particular area shall be 10 feet.

7.5.j.2.B. 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 comply with all requirements of this rule, and shall be left in place after final bond release.

7.5.j.2.C. All ponds and impoundments created during mining shall be left in place after bond release and shall comply with all the requirements of this rule.

7.5.j.2.D. The ponds, permanent impoundments, surface water channels and wetlands on the Permit Area 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.

7.5.j.2.E. The landscape criteria in this rule do not apply to valley fills.

7.5.j.3. Soil:

7.5.j.3.A. Soil is defined as and shall consist of the O, A, B, C, and Cr horizons.

7.5.j.3.B. The Director shall require the operator to recover and use all the soil on the mined area, as shown on the soil maps, except for those areas with a slope of at least 50%, and other areas from which the applicant affirmatively demonstrates and the Director finds that soil cannot reasonably be recovered. The Director shall assure that all saved soil includes all of the material from the O and A horizons.

7.5.j.3.C. When the Director determines that available soil volume on the permit area is not sufficient to meet the depth requirements, selected overburden materials may be used as soil substitutes. Soil substitutes shall consist of weathered, slightly acid, brown sandstone from within 10 feet of the soil surface if the Director determines that such material is available. Material from this layer maybe removed with the soil and mixed with the soil in order to meet the depth requirement.

7.5.j.3.D. If the applicant affirmatively demonstrates and the Director finds that weathered, slightly acid, brown sandstone from within 10 feet of the soil

surface cannot reasonably be recovered, weathered, slightly acid, brown sandstone taken from below 10 feet of the soil surface from anywhere in the permit area may be substituted. Materials may be suitable for this purpose only if their bulk pH in water is between 5.0 and 7.0. Materials with net potential acidity greater than 5 tons of calcium carbonate equivalence per 1000 tons may not be used.

7.5.j.3.E. 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, including pH, total soluble salts, phosphorus, potassium, calcium, texture class, acid-base accounting, and other such analyses as necessary.

7.5.j.3.F. The final surface material used on all parts of the permit area except roads, building pads, and valley fill faces shall consist of a minimum of 4 feet of soil, or a mixture of soil and suitable soil substitutes. Homesteading soil depth shall contain at least 33% soil. If the applicant affirmatively demonstrate and the Director finds, that sufficient weathered slightly acid brown sandstone cannot reasonably be recovered from the mined area to satisfy the mine soil depth requirement, then up to one quarter of the total volume of the minesoil may consist of highly-fractured sandstone, as long as it has been demonstrated that the physical and chemical quality of this material is suitable.

7.5.j.3.G. If the applicant does not demonstrate that there is sufficient material available on the permit area to satisfy the requirements of this rule, then the Director may not authorize a Homesteading variance.

7.5.j.3.H. The Director may require the operator to include as part of the minesoil mix organic debris such as forest litter, branches, small logs, roots and stumps in the soil to help reseed the native vegetation, inoculate the minesoil with native soil organisms and increase soil fertility.

7.5.j.3.I. The Director shall require that soil be removed and reapplied in a manner that minimizes stockpiling such that seed pools and soil organisms remain biological viable. No more than 10% of the available soil, described in the Director's findings, may be placed in a long-term stockpile, soil redistribution shall be done within one month of soil removal. Except for soil in a long-term stockpile, soil shall be stored for less than one month 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 ground cover mixes used for reforestation.

#### 7.5.j.4. Soil Placement And Grading:

7.5.j.4.A. Except for valley fill faces, building pads, roads, and other areas that must be compacted, the Director shall require the Permittee to place minesoil loosely and in a non-compacted manner while meeting static safety factor requirements. Grading the final surface shall be minimized to reduce compaction. Once the material is placed, light grading equipment shall be used to grade the tops of 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.

7.5.j.4.B. 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. Slopes greater than 50% shall be compacted no more is necessary to achieve stability and non-erodability.

7.5.j.4.C. 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. Organic debris such as forest litter, logs, and stumps may be left on and in the soil.

7.5.j.5. Limiting And Fertilizing: The Permittee shall submit a liming and fertilizing plan. The Director shall assure that the liming and fertilizing plan is appropriate for establishing the ground cover vegetation.

#### 7.5.j.6. Ground Cover Vegetation:

7.5.j.6.A. The Director shall require the permittee to establish a temporary vegetative cover as contemporaneously as practicable with backfilling and grading. This cover shall consist of a combination of native and domesticated non-invasive cool and warm season grasses and other herbaceous vine or shrub species including legume species and ericaceous [sic] shrubs. All species shall be slow growing. The ground cover vegetation shall be capable of stabilizing the soil from excessive erosion. Seeding rates and composition must be in the Homestead 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), redbtop (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, serecia [sic] lespedeza, all vetches, clovers (except ladino and white clover) and other aggressive or invasive species shall not be used. On 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 (95 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 ericaceous shrub species shall be included in the ground cover mix.

7.5.j.6.B. The Permittee may regrade and reseed only those rills and gullies that are unstable.

#### 7.5.j.7. Front Faces Of Valley Fills:

7.5.j.7.A. Front faces of valley fills shall be exempt from the requirements of this rule except that:

7.5.j.7.A.1. They shall be graded and compacted no more than is necessary to achieve stability and non-erodability;

7.5.j.7.A.2. No shales may be present in the upper four feet of surface material;

7.5.j.7.A.3. The upper four feet of surface material shall be composed of soil and weathered brown sandstone when available, unless the Director determines other material is necessary to achieve stability;

7.5.j.7.A.4. The groundcover mixes described in subparagraph shall be used unless the Director requires a different mixture.

7.5.j.7.A.5. Kentucky 31 fescue, serecia [sic] lespedeza, vetches, clovers (except ladino and white clover) or other invasive species may not be used; and

7.5.j.7.B. Although not required by this rule, native, non-invasive trees may be planted on the faces of fills.

There are no specific counterparts to the provisions at CSR 38-2-7.5.j. for Homesteading 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 State regulations at CSR 38-2-14.10. Except as noted below, we find that CSR 38-2-7.5.j. is no less stringent than SMCRA and no less effective than the Federal regulations and can be approved.

CSR 38-2-7.5.j.2.C. provides that all ponds and impoundments created during mining shall be left in place after

bond release and shall comply with all the requirements of this rule. In addition to complying with the provisions of CSR 38-2-7.5., all ponds and impoundments created during mining and which will be left in place following mining must comply with the State permanent impoundment rules at CSR 38-2-5.5. Therefore, we are approving CSR 38-2-7.5.j.2.C. to the extent that all ponds and impoundments created during mining and which will be left in place following mining must comply with the State permanent impoundment rules at CSR 38-2-5.5.

CSR 38-2-7.5.j.2.E. provides that the landscape provisions of CSR 38-2-j.2. do not apply to valley fills. The use of the term "valley fills" in this provision does not make it clear that the landscaping provisions of CSR 38-2-7.5.j.2. do not apply to any fills, not just valley fills. Ponds, permanent impoundments or wetlands cannot be allowed on completed fills. Therefore, we are approving CSR 38-2-7.5.j.2.E. to the extent that the landscape criteria of CSR 38-2-7.5.j.2. do not apply to any fills.

CSR 38-2-7.5.j.3.A. defines soil as consisting of the O, A, B, C, and Cr horizons. 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. The State rules at CSR 38-2-2.125 defines topsoil to mean the A and E 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. The new provisions at subdivision CSR 38-2-7.5.j.3.A., however, lack a reference to the "E" horizon. Therefore, we are requiring the State to add "E" horizon to CSR 38-2-7.5.j.3.A.

The new State provisions at CSR 38-2-7.5.j.3.B. require the operator to recover and use the soil on the mined area, as shown on the soil maps, except for those areas with a slope of at least 50%, and other areas from which the applicant affirmatively demonstrates and the Director of the WVDEP finds that soil cannot reasonably be recovered. The Federal regulations at 30 CFR 816.22, however, 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 not approving the phrase, "and other areas from which the applicant affirmatively demonstrates and the Director of the WVDEP finds that soil cannot reasonably be recovered." In addition, we are requiring the State to delete these phrases from its regulations at CSR 38-2-7.5.j.3.B.

New CSR 38-2-7.5.j.3.E. provides that, before approving the use of soil substitutes, the Director of the WVDEP 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 38-2-7.5.j.3.E. be amended to provide that the soil substitute material must be equally suitable for sustaining vegetation as the existing topsoil and the resulting medium is the best available in the permit area to support vegetation.

CSR 38-2-7.5.j.3.H. provides that the Director may require the operator to include as part of the soil mix organic debris such as forest litter, branches, small logs, roots and stumps in the soil to help reseed the native vegetation, inoculate the mine soil with native soil organisms and increase soil fertility. 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 regulations 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 compliance with the static safety factor (see CSR 38-2-7.5.j.4.A.), we find that proposed CSR 38-2-7.5.j.3.H. 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.

CSR 38-2-7.5.j.4.A. provides that, except for valley fill faces, building pads, and other areas that must be compacted, mine soil shall be placed loosely and in a non-compacted manner while meeting static factor requirements. Subdivision 7.5.j.4.B. provides that soil physical quality shall be inadequate if it inhibits water infiltration or prevents root penetration or restricts root growth of trees. Slopes greater than 50 percent shall be compacted no more than is necessary to achieve stability and non-erodability. Subdivision 7.5.j.4.C. provides that the soil surface shall be left rough with random depressions across the entire surface to catch seed and sediment, and conserve soil water. Organic debris such as forest litter, logs, and stumps may 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. The emphasis in the State provisions toward minimizing compaction is consistent with the requirements at 30 CFR 816.22(d). In addition, the provisions at CSR 38-2-7.5.j.4.A. require compliance with the static safety requirements for stability of the replaced soil. Therefore, we are approving the new provisions at CSR 38-2-7.5.j.4. 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).

SCR 38-2-7.5.j.5 provides for a liming and fertilizing plan. 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. The State must use its technical judgement to determine the appropriate rate of fertilizer application. We find that the proposed provisions at CSR 38-2-7.5.j.5. are not inconsistent with the Federal revegetation standards and can be approved.

CSR 38-2-7.5.j.6. provides for ground cover vegetation. The Federal regulations at 30 CFR 816.111 require that the permittee establish a diverse, effective, and permanent vegetative cover that is capable of stabilizing the soil from erosion. 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 38-2-7.5.j.6. are not inconsistent with these Federal revegetation standards with the following exceptions.

CSR 38-2-7.5.j.6.A. provides that ground cover vegetation shall be capable of stabilizing the soil from excessive erosion. 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 erosion" 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 erosion," there is nothing in new CSR 38-2-7.5.j.6 that supersedes or negates the approved State provisions at CSR 38-2-14.5.b. concerning effluent limitations. However, under the proposed State rule, erosion could be allowed as long as it was not excessive, even though the erosion might provide sediment to streams that could violate

State or Federal water quality standards. CSR 38-2-14.5.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.

As proposed, CSR 38-2-7.5.j.6.A. is less effective than the Federal requirements at 30 CFR 816.111 because the proposed standard to stabilize the soil from erosion is modified by the undefined phrase, "excessive erosion." To be no less effective than the Federal requirements, the Director can only be allowed to approve ground cover vegetation that is sufficient to control erosion and air pollution attendant to erosion. Therefore, we are not approving the word "excessive" in the phrase "excessive erosion" at CSR 38-2-7.5.j.6.A. Furthermore, we are requiring the deletion of the word "excessive" from the State rule at CSR 38-2-7.5.j.6.A. to ensure compliance with State water quality requirements at CSR 38-2-14.5.b.

CSR 38-2-7.5.j.6.B. 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 38-2-7.5.j.6.B. 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 38-2-7.5.j.6.B. be 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.

The new provisions at CSR 38-2-7.5.j.7. 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 38-2-7.5.j.7. 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

which apply to all fills, including valley fills. We are approving new CSR 38-2-7.5.j.7. 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.

11. CSR 38-2-7.5.k. This subdivision concerns requirements for reclamation maps, and contains the following requirements.

7.5.k. Requirements For Reclamation Maps. An appropriately scaled, "as-built" topographic map of the Homestead Area shall be prepared and submitted as part of the permit application. An identically scaled \*overlay\* map showing the elevation contours at the base of all mined areas as well as the original ground contour of all excess mine spoil storage areas shall accompany the as-built map. The overlay map shall identify all backfilled mine sites and excess mine-spoil storage areas. The overlay map shall depict the boundaries of all parcels, areas of mine spoil specifically compacted for the placement of structures, easements, and areas that the Director may designate for special or limited uses. All post-reclamation maps shall be prepared under the direction of and certified by a registered professional engineer and shall be recorded with the county within one year following the final reclamation of the proposed Homestead Area.

There are no Federal counterparts to the provisions at CSR 38-2-7.5.k. concerning the requirements for reclamation maps for the homestead postmining land use. Except as follows, we find that they are not inconsistent with SMCRA or the Federal regulations and can be approved. The proposed rule does not require that all maps, including "as-built" or post reclamation maps, be approved by the Director as required by CSR 38-2-3.4 and 38-2-3.28.c.

Therefore, we are approving CSR 38-2-7.5.k. to the extent that any as-built or post reclamation maps that depict reclamation which varies from that approved by the Director in the permit application shall be submitted to and approved by the Director under CSR 38-2-3.28.c.

12. CSR 38-2-7.5.l. This subdivision concerns homestead village. This subdivision contains the following requirements.

7.5.l. Homestead Village:

7.5.l.1. Homestead Village: The Homestead Village provides for a residential development at a higher density than in rural Homestead parcels. The Village is intended to:

7.5.1.1.A. Encourage mixed residential and commercial land uses, and 7.5.1.1.B. At least 20% of the Homestead Area shall be composed of Village parcels.

7.5.1.2. Village Parcel Requirements:

7.5.1.2.A. Each Village homestead parcel shall be no larger than one acre in size.

7.5.1.2.B. Each parcel shall have a minimum road frontage of 40 feet. No pipe stem parcel arrangements are permitted.

7.5.1.2.C. Each parcel shall be graded evenly to 5% maximum.

7.5.1.3. Common Lands: In addition to the Civic Parcels and Conservation Easements, each Homestead Area shall include a reserve of 10% of the land as a common area. The Common Land shall be conveyed to the Community Association. The planning and maintenance of the Common Land shall be the responsibility of the Community Association.

7.5.1.4. Public Nursery: Each Village Homestead shall designate an area for a Public Nursery constructed and planted by the Permittee at no cost to the Homesteaders. The nursery may be located adjacent to the Common Land but shall not constitute the required Common Land area. The Nursery shall provide woody plants of high quality and appearance for the use of the Homesteaders as specified below.

7.5.1.4.A. The nursery shall be 1 acre per 30 acres of Homestead Area. The Public Nursery shall be a civil [sic] parcel. The Permittee shall plant the nursery with the same species and to the same standards as required in the Conservation Easement. Once bond is released, the Community Association shall be responsible for maintaining the nursery. Success standards shall be the same as for the conservation easements.

7.5.1.4.B. The nursery plants shall consist of at least six species from the following list: White oak, red oak, other native oaks, white ash, yellow poplar, black walnut, sugar maple, black cherry, or native hickories.

7.5.1.4.C. Adequate water supply shall be provided for the nursery. This may be achieved through any of the water supply means specified or through the stormwater drainage system.

7.5.1.4.D. The nursery shall be maintained in manner consistent with the healthy development of the plants. The nursery plants shall meet the following criteria upon conveyance: (1) In regular form for the species, (2) 80% live branches, and (3) color consistent with the species. Materials not meeting the specifications shall be replaced with like species by the permittee. After final bond release, the nursery shall be

conveyed to the Community Association.

7.5.1.4.E. Each Homesteader shall be allowed to take trees from the nursery as determined by the Community Association. The remainder of the trees shall be for the common landscapes.

There are no direct Federal counterparts to the provisions at CSR 38-2-7.5.l. concerning homestead village. However, we find that they are not inconsistent with SMCRA or the Federal regulations and can be approved because Homestead is a residential postmining land use consistent with SMCRA section 515(c)(3).

13. CSR 38-2-7.5.m. concerns community association. This subdivision contains the following requirements.

7.5.m. Community Association:

7.5.m.1. At the completion of the lottery, a Community Association shall be established among the designated Homesteaders for each Homestead Area. The Association shall maintain and administer the public areas, Conservation Easements and Civic Parcels of the Homestead and may levy membership fees.

7.5.m.2. By-laws for the Community Association shall be developed by the Escrow Agent, working with the Homesteaders and a qualified design professional as defined by this rule. The permittee shall pay the qualified land designer for such services. The by-laws may establish rules for building standards and other Homestead Area rules, as appropriate.

7.5.m.3. Membership in the association is mandatory for all Homesteaders and their successors.

7.5.m.4. The association shall obtain liability insurance for its property and shall be responsible for maintenance of insurance and taxes on undivided open space. The association may place liens on the homes or houselots of its members who fail to pay their association dues in a timely manner. Such liens may require the imposition of penalty interest charges.

7.5.m.5. The association shall administer common facilities and pay for maintaining and developing such facilities.

There are no Federal counterparts to the provisions at CSR 38-2-7.5.m. concerning community association. However, we find that they are not inconsistent with SMCRA or the Federal regulations and can be approved.

14. CSR 38-2-7.5.n. This subdivision concerns interim homestead management. This subdivision contains the following requirements.

7.5.n. Interim Homestead Management

7.5.n.1. The Director or the Director's designee shall administer the Homestead Selection Lotteries.

7.5.n.2. The Escrow Agent shall monitor the 5-year occupancy requirement for each Homestead Parcel and transfer of the titles of the surface estates to the qualified Homesteaders.

7.5.n.3. The Escrow Agent shall manage and administer the homestead between final bond release and the time when all of the titles to the Homestead Parcels have been transferred and duly recorded with the Clerk of the County.

7.5.n.4. Funding these services shall be guaranteed by an insured Bank account established by the Permittee.

7.5.n.5. Before approving any Homestead variance, the Director shall find, in writing, that the funds in the account are sufficient to pay for these services.

7.5.n.6. After final bond release, this account shall be administered by the Escrow Agent.

7.5.n.7. The Escrow Agent shall receive the surface rights to the entire Homestead Area and all-weather and main roads before mining begins.

7.5.n.8. The Escrow Agent shall be charged with responsibility for transferring the surface rights in escrow to the Homesteaders, the Community Association, or the State or county road authority.

7.5.n.9. Such transfers shall promptly occur upon certification by the Escrow Agent that the Homesteader has met the requirements of this rule.

7.5.n.10. Before the homesteader receives title, property may revert to the Escrow Agent, when after notice and hearing, the Escrow Agent determines that the homesteader has not abided by this rule. The Escrow Agent's determination shall be reviewable by the Circuit Court of the County in which the homestead parcel is located.

7.5.n.11. If developed property reverts to Escrow, the Escrow Agent shall promptly sell the property and remit proceeds, less costs, to the homesteader, up to the value of the homesteader's investment.

7.5.n.12. Because deeds to Homestead Parcels will not be transferred to Homesteaders before a Homesteader has lived on a parcel for five years, lending institutions may be reluctant to make loans to Homesteaders before the five-year period has expired. Accordingly, to assure that lending institutions are willing to make loans to Homesteaders during this period, the Escrow Agent shall establish a system to provide mortgage insurance to homesteaders so that lenders will be able to finance private development of homestead parcels. The Escrow Agent shall have all

powers necessary to structure loans and other necessary transactions so lenders are reasonably secure.

There are no Federal counterparts to the provisions at CSR 38-2-7.5.n. concerning interim homestead management. However, we find that they are not inconsistent with SMCRA or the Federal regulations and can be approved.

15. CSR 38-2-7.5.o. This subdivision concerns bond release, and contains the following requirements.

7.5.o. Bond Release:

7.5.o.1. Before approving Phase I bond release, the Director shall assure that the soil is in place, the vegetative cover has been established, that the water system has been completed, that the roads have been completed and transferred to the State or county road authority, and that the main electricity transmission line is in place.

7.5.o.2. Phase II bond release may not occur before two years have passed since Phase I bond release. Before approving Phase II bond release, the Director shall assure that the vegetative cover is still in place. The Director shall further assure that the tree survival on the Conservation Easements and Public Nurseries are no less than 300 trees per acre (80% of which must be species from the approved list). Furthermore, in the Conservation Easement and Public Nursery areas, there shall be a 70% ground cover where ground cover includes tree canopy, shrub and herbaceous cover, organic litter, and rock cover. Trees and shrubs counted in considering success shall be healthy and shall have been in place at least two years, and no evidence of inappropriate dieback. Phase II bond release shall not occur until the service drops for the utilities and communications have been installed to each Homestead Parcel.

7.5.o.3. The Director may authorize Phase III bond release only after all parcels in the Homestead Areas are certified and ready for occupancy.

7.5.o.4. Once final bond release is authorized, the Permittee's responsibility for implementing the Homestead Plan shall cease.

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. Except as follows, the new provisions at CSR 38-2-7.5.o. 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. However, we are approving these provisions to the extent that they supplement but do not conflict the State provisions at CSR 38-2-12.2.

The Federal regulations at 30 CFR 816.97 concern the protection of fish, wildlife, and related environmental values. Subsection (i) at 30 CFR 816.97 provides that where residential, public service, or industrial uses are to be the postmining land use, and where consistent with the approved postmining land use, the operator shall intersperse reclaimed lands with greenbelts utilizing species of grass, shrubs, and trees useful as food and cover for wildlife. The Federal standards for evaluating the success of the revegetation of areas to be developed for fish and wildlife habitat, recreation, shelter belts, or forest products are at 30 CFR 816.116 (b)(3). Subdivision 816.116(b)(3) provides that the 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, subdivision 816.116 (b)(3)(iii) provides 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. However, there is no evidence that the West Virginia Division of Forestry has reviewed and approved the proposed tree stocking standards at CSR 38-2-7.5.o.2. as is required by 30 CFR 816.116(b)(3)(i). Nor is there evidence that the Wildlife Resources Section of the Division of Natural Resources has approved the shrub and planting arrangements as is required by 30 CFR 816.116(b)(3)(i). Therefore, we are not approving these planting arrangements and stocking standards at this time. In addition, we are requiring the WVDEP to consult with and obtain the approval of the West Virginia Division of Forestry and the Wildlife Resources Section of the Division of Natural Resources on the new planting arrangements and stocking standards at CSR 38-2-7.5.o.2. 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. In addition, the new rules at CSR 38-2-7.5.o.2. do not provide revegetation standards at the time of bond release for Commercial Parcels, Village Parcels, Rural Parcels, Civic Parcels and Common Lands. Therefore, we are requiring that CSR 38-2-7.5.o.2. be amended, or the West Virginia program otherwise be amended, to identify the applicable revegetation success standards for each phase of bond release on Commercial Parcels, Village Parcels, Rural Parcels, Civic Parcels and Common Lands. In the meantime, no bond release for Commercial Parcels, Village Parcels, Rural Parcels, Civic Parcels or Common Lands can be approved until a revegetation standard is approved.

The new provision at CSR 38-2-7.5.o.2. defines ground cover to include tree canopy, shrub and herbaceous cover, organic litter, 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. At a minimum, the vegetative ground cover must not be less than that required to achieve the approved use whether or not rocks are included within the State's definition of ground cover. Therefore, we are not approving the words "rock cover" as a component of the 70 percent ground cover standard at CSR 38-2-7.5.o.2. In addition, we are requiring that the West Virginia program be further amended to delete the words "rock cover" from CSR 38-2-7.5.o.2.

*Summary Finding of the Homestead Requirements*

Under the proposed rule, homesteading is a concept which allows for the development of planned communities on mountaintop removal sites that are not returned to approximate original contour (AOC). The homestead area is made up of village and rural parcels primarily for

residential use with other secondary postmining land uses that consist of conservation easements, nurseries, civic parcels, common areas and commercial parcels. The new provisions at CSR 38–2–7.5. provide the details of the Homestead postmining use. However, the details are not perfectly clear, leaving some confusion as to the intended minimum size of these supporting elements. The Homestead and supporting areas are discussed below.

#### *Homestead Area*

CSR 38–2–7.5.a. provides that operations receiving a variance from AOC must establish homesteading on at least 50 percent of the permit area, and the remainder of the permit area must support an alternate AOC use. Subsection 7.5.g.5.a. provides that the landowner can retain up to 15 percent of the homestead area for commercial development. This provision appears to be a means for limiting the size of the commercial parcel within the homestead (homestead area  $\times$  15 percent = maximum size of the commercial parcel). It should be noted, however, that subsection 7.5.g.5.A. allows the landowner to retain up to 50 percent of the permitted area for commercial development. Subsection 7.5.e.1.C. provides that the homestead area, minus the commercial parcels, must occupy at least 50 percent of the permitted area. We conclude, therefore, that the commercial area is in addition to the homestead area, and can be no larger than 15 percent of the size of the homestead area (which is at least 50% of the permit area). However, other commercial development can occur within the permitted area outside the homestead area as described above.

#### *Village Parcels*

Subsection 7.5.l.1.B. provides that at least 20 percent of the homestead area must be composed of village parcels. Subsection 7.5.l.2.A. provides that village parcels can be no larger than one-acre in size. Subsections 7.5.g.3.B. and C. provide that village parcels must contain a garden area of at least 600 square feet and a building pad of a minimum of 2,500 square feet for a dwelling.

#### *Commercial Parcels*

As discussed above, commercial parcels are actually not part of the homestead area, but are in addition to the minimum area to be allotted for Homestead use. Subsection 7.5.g.5.A. also provides that the landowner may not retain more than 50 percent of the permitted area. This provision allows

for additional commercial development outside the homestead area.

#### *Conservation Easements*

Subsection 7.5.i.8.D. provides that at least 10 percent of the homestead area, including the commercial parcels, shall be conservation easements. We interpret this to mean that the area for conservation easements shall be 10 percent of the total area of homestead plus commercial parcels. Subsection 7.5.b.5. provides that conservation easements shall typically be a strip no less than 200 feet wide and shall extend through the mined areas of the land, starting and ending in natural, undisturbed land. Such easements are for the purpose of establishing a natural habitat for wildlife, windbreaks, and storm water management.

#### *Common Areas*

Subsection 7.5.l.3 provides that 10 percent of the homestead area must be used as common areas.

#### *Civic Parcels*

Subsection 7.5.g.4.A. provides that civic parcels consisting of schools, parks and other community facilities must occupy at least 10 percent of the postmining permitted area. We interpret the phrase “postmining permitted area” to mean the entire permit area, and not limited to just the Homestead area plus the commercial parcels.

#### *Rural Parcels*

The new rules do not specify a minimum size area for rural parcels. Therefore, Rural parcels must be the remaining acreage of the homestead land after the minimum acreage of the supporting areas (e.g., Civic parcel) have been satisfied. Subsections 7.5.b.17 and 7.5.g.3.B. and C. provide that rural parcels are planned to promote farming or timber management and may be up to 40 acres. Rural parcels must contain a garden area of at least 5,000 square feet and building pads for a dwelling and outbuilding of 2,500 square feet each.

#### *Public Nursery*

Subsection 7.5.l.4. provides that each village homestead shall designate an area for a public nursery constructed and planted by the permittee at no cost to the homesteaders. Subsection 7.5.l.4.A. provides that the nursery must be one acre per 30 acres of homestead area. The public nursery shall be a civic parcel. As proposed, it is not clear if the public nursery is limited in size due to the village parcel, the civic parcel or the total homestead area. Given the requirements of subsection 7.5.i.4.A.,

we believe that the public nursery is a separate component of the homestead area, and is not a subcomponent of the village parcel. Furthermore, we believe the reference to civic parcel is merely to clarify that the nursery will be accessible to and used primarily to benefit the homesteaders. However, given the conflicting nature of these requirements, we recommend that the State clarify these provisions.

In summary, a minimum of 20 percent of the Homestead area must be used for one-acre village parcels, and 10 percent for common land. A minimum of 10 percent of the Homestead area plus commercial parcels must be used for conservation easements, and 10 percent of the permitted area for civic parcels. An additional area, equivalent to up to 15 percent of the Homestead area may be retained for commercial development. The remaining area is to be used for 40-acre rural parcels and public nurseries. Our concern is not that the percentages are inconsistent with SMCRA, for they appear not to be, but to demonstrate how we expect implementation of these provisions might work.

To understand how these requirements interrelate, we need to apply them to a typical mountaintop-removal mining situation. For example, in order to permit a 1,000 acre mountaintop removal mining operation with an AOC variance, the operator would have to select one or more of the approvable postmining land uses set forth in Section 22–3–13(c)(3) of the W.Va. Code. If homesteading is selected, the operator would have to establish homesteading on at least 50 percent of the permitted area, or 500 acres. If the operator also plans a commercial development, the commercial parcel could not exceed 75 acres (15 percent of 500 acres). The homestead area would then have to be considered to be 575 acres to ensure that the homestead area minus the commercial parcel is at least 50 percent of the permitted area as is required by Subsection 7.5.e.1.C. The remaining portion of the permitted area would have to support an alternate AOC postmining use as provided in Section 22–3–13(c)(3) of the W.Va. Code.

Under this example, the village parcel would occupy 115 acres of the homestead area (20 percent  $\times$  575 acres). The conservation easement and the common areas would occupy 58 acres each (10 percent  $\times$  575 acres). The civic parcel would occupy 100 acres of the homestead area, which is equal to 10 percent of the 1000-acre permitted area. The public nursery must consist of one acre for every 30 acres of homestead area and would occupy 19 acres



(575+30). Finally, the rural parcel would occupy the remainder of the homestead area or 150 acres. Therefore, the rural parcel would amount to 26 percent of the homestead area (150 ÷ 575).

Based on these requirements and as shown above in the example, when a landowner chooses to retain a portion of the homestead area for commercial development, the homestead area will have to comprise 58 percent of the permitted area, not 50 percent as provided in Subsection 7.5.a. While the rules provide that the conservation easements, common area, and village parcels are to be a percentage of the homestead area, it is not clear if these calculations are to include or exclude the commercial parcels, which can comprise 15 percent of the homestead area. This is further complicated by the fact that Subsection 7.5.i.8.D. provides that conservation easements are to comprise at least 10 percent of the homestead area, including the commercial parcels, civic parcels are to be 10 percent of the permitted area, and the public nursery could be considered a component of the homestead area, village parcel or civic parcel.

Given the apparent inconsistencies and the resulting difficulty in understanding the intended application of the percentages of the various components of the Homestead Area, the State needs to clarify how the acreage for each of the components of a Homestead Area will be calculated. Specifically, we are requiring that: (1) CSR 38–2–7.5.a. be amended to clarify whether or not the calculated acreage of the Commercial Parcel(s) is to be summed with the total Homestead acreage for the purpose of calculating the acreage of other various components of the Homestead Area (such as Common Lands, Village Parcels, Conservation Easement, etc.); and (2) CSR 38–2–7.5.l.4 be amended to clarify whether or not the acreage for Public Nursery is to be calculated based on the amount of acreage available for the Village Homestead, the Civil Parcel, or the entire Homestead Area.

#### IV. Summary and Disposition of Comments

##### *Federal Agency Comments*

On April 12, 2000, we asked for comments from various Federal agencies that 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 they 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), but did not provide any comments concerning CSR 38–2–7.5.

##### *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 (Administrative Record Number WV–1166), 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 the State indicated that the new rules 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 addressed EPA's comments which concern the postmining land use of commercial forestry and forestry at CSR 38–2–7.4 in a previous notice in the **Federal Register** (August 18, 2000; 65 FR 50409, 50425–50427) (Administrative Record Number WV–1174). EPA's comments concerning the homestead postmining land use at CSR 38–2–7.5. 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 homesteading activities. For example, a National Pollutant Discharge Elimination System (NPDES) permit may be required for the discharge of pollutants in storm water associated with construction activity related to the homesteading activities. 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 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 provisions does not render the new provisions less effective than the Federal regulations.

2. *Erosion and sedimentation control*—The EPA stated that it has concerns about possible excessive erosion and runoff at homestead sites. 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. 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 10., CSR 38–2–7.5.j.6.A., 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 erosion” 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. Except for the phrase, “excessive erosion,” there is nothing in new CSR 38–2–7.5.j.6.A. 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, erosion would be allowed as long as it was not excessive, even though that erosion would be allowed to provide sediment to streams. Subdivision CSR 38–2–14.5.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.

We have determined that as proposed, CSR 38–2–7.5.j.6.A. is less effective than the Federal requirements at 30 CFR 816.111 because the proposed standard to stabilize the soil from erosion is modified by the undefined phrase, “excessive erosion.” To be no less effective than the Federal requirements, the Director can only be allowed to approve ground cover vegetation that is sufficient to control erosion and air pollution attendant to erosion. Therefore, we are not approving the word “excessive” in the phrase “excessive erosion” at CSR 38–2–7.5.j.6. Furthermore, we are requiring the deletion of the word “excessive” from the proposed State rule at CSR 38–2–7.5.j.6.A. to ensure compliance with State water quality requirements at CSR 38–2–14.5.b.

CSR 38–2–7.5.j.6.B. 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 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 38–2–7.5.j.6.B. 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 38–2–7.5.j.6.B. 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.

3. *Wastewater and sewage disposal plans*—The EPA stated that section 38–2–7.5.i.2.A. states that wastewater/sewage disposal plans for homestead sites must be approved by the West Virginia Bureau of Public Health or the public health authority of the county, and that the wastewater/sewage systems must meet local health department standards. In addition, the EPA stated, discharges from any wastewater/sewage system must also meet Federal requirements under the Clean Water Act, specifically the NPDES permit requirements which are implemented by the Office of Water Resources, WVDEP. The EPA recommended, so there would be no misunderstanding, that either a statement to this effect be included in section 38–2–7.5.i.2.A., or a statement be included which indicates that disposal systems shall be consistent with all State and Federal regulations. In response, and as we stated above at Finding 9, we are approving the provisions to the extent that the applicable NPDES permitting requirements will be complied with.

4. *Individual septic tanks*—The EPA stated that section 38–2–7.5.i.2.B. indicates that septic tank systems may be proposed for use at homestead sites. Since homestead sites are planned to be constructed on somewhat porous backfilled areas, the EPA stated, there may be a higher potential for leachate to pass relatively unabsorbed through the fills to streams, presenting possible high fecal coliform levels and associated health risks. The EPA urged close review of this potential when considering any proposals for septic tank systems at homestead sites. In response, and as we stated above at Finding 9, we agree with EPA’s recommendation.

5. *Water supply*—The EPA stated that section 38–2–7.5.i.3.A. indicates that

the water supply for a homestead site may be provided by either connecting to an existing public supply, constructing individual wells, or constructing a small reservoir to serve the community. Section 7.5.i.3.H. further states that potable water supply sources shall meet Federal Primary Drinking Water Maximum Contaminant level standards in 40 CFR 141, Subpart B. The EPA stated that community water systems as defined by 40 CFR 141 (those serving 25 or more people or which have 15 or more service connections) also must comply with all subparts of 40 CFR 141, A. through J. The EPA recommended that another sentence be added to section 38–2–7.5.i.3.H. which indicates that community water systems must comply with 40 CFR 141 in its entirety. As discussed above at Finding 9, we are approving this provision to the extent that the provisions of 40 CFR 141, A. through J. apply to community water systems as defined by 40 CFR 141 (those serving 25 or more people or which have 15 or more service connections).

6. *Storm water/surface drainage from homestead sites*—The EPA stated that section 38–2–7.5.i.7. requires that a detailed storm water and surface water drainage plan for homestead sites be certified by a registered engineer. The EPA stated that storm water discharges resulting from construction of the homestead sites and supporting streets, depending on the acreage disturbed, may be subject to Federal NPDES storm water regulations in 40 CFR 122.26. The EPA recommended that either a statement to this effect be included in section 7.5.i.7., or a statement be included which indicates that storm water discharges shall be consistent with all State and Federal regulations. The EPA also recommended that the site developers contact the Office of Water Resources, WVDEP, regarding the applicability of storm water regulations for specific sites. In response, and as stated above at Finding 9, for the sake of clarity, we are approving CSR 38–2–7.5.i.7.A. to the extent that applicable NPDES storm water requirements would be complied with.

#### *Public Comments*

We solicited public comments on the amendment. One person responded with comments (Administrative Record Number WV–1163).

The commenter stated that the new homestead rules go far beyond what is in SMCRA. It seems to be true, the commenter stated, that the details would allow the WVDEP to make the necessary findings for higher/better postmining land use on AOC variance areas. We agree with this comment.

The commenter stated that the WVDEP will need extra staff to enforce these requirements. In addition, the commenter stated, OSM must decide if it would provide grant funds for the additional employees. In response, we have no information concerning the likelihood of increased permit applications for homestead postmining land use for mountaintop removal mining operations. Therefore, it is premature to conclude that the WVDEP would need additional staff to process such applications. In our oversight of the West Virginia program, we will monitor the number and processing of such permit applications, and if necessary, we will meet with the State to discuss any need for additional staff.

The commenter stated that CSR 38-2-7.5.b.14. concerning the transfer of title, would require the landowner to transfer title to the Attorney General. Clearly, the commenter stated, this requires compensation. This point should be clarified, the commenter stated. In addition, the purchasing of land for homesteading goes beyond the bounds of SMCRA, the commenter stated, and therefore, OSM could not provide matching Federal grant funds. In response, we agree with the commenter that the rules do not clearly state whether or not the landowner of record will be compensated for the land, and by whom. It is our understanding that the landowner will not be compensated for the land. The fact that the operator will not be required to return the site to AOC may be sufficient compensation under the proposed rule. It is believed that by donating the land for homesteading, the higher or better public use requirements of SMCRA will be better satisfied. Even though some may argue that this provision goes beyond the boundaries of SMCRA, it is not inconsistent with the provisions of SMCRA. Therefore, it can be approved. Finally, we agree with the commenter that Federal funds cannot be used to purchase homestead properties.

The commenter stated that the new rules regarding homesteading appear not to be supported by statutory authority. In response, we disagree with this comment. The W.Va. Code section 22-3-13(c)(3) authorizes residential land uses for AOC variances for mountaintop removal mining operations. Homesteading is primarily a residential use, and is, therefore, approvable for mountaintop removal mining operations. Furthermore, CSR 38-2-7.5.a. provides that the remainder of the permit area (that part of the permit area that will not be Homestead use) shall support an alternate AOC variance use. This means that such areas

shall support postmining uses approvable under the W.Va. Code section 22-3-13(c)(3).

#### V. Director's Decision

Based on the findings above, and except as noted below, we are approving the use of Homestead as a postmining land use as provided at CSR 38-2-7.5. to the extent that it supplements or is more stringent than existing State requirements, but is not inconsistent with any existing Federal program requirements.

We are requiring that CSR 38-2-7.5.b.3. be amended to clarify that parcels retained by the landowner for commercial development and incorporated within the Homestead area must be developed for commercial uses as provided by subdivision CSR 38-2-7.5.g.5.

CSR 38-2-7.5.e. is approved to the extent that its provisions supplement, but do not supersede, the approved State provisions concerning maps and cross sections, and operations plans at CSR 38-2-3.4, 3.5, and 3.6.

CSR 38-2-7.5.f. is approved to the extent that compliance with W.Va. Code section 22-3-13(c)(3) is also required.

CSR 38-2-7.5.g. is approved to the extent that compliance with the State's approved postmining land use requirements at CSR 38-2-7. is also required.

CSR 38-2-7.5.h. is approved to the extent that subdivision 7.5.h.2.B. means that consolidation of the uppermost 20 feet of spoil for Building Pads must be maximized.

CSR 38-2-7.5.i.1.B. is approved to the extent that the word "conditionally" means that the County or State road authorities will accept responsibility for maintaining the all-weather and main roads after mining and reclamation is complete, and the road(s) is built.

We are requiring that CSR 38-2-7.5.i.1.B. be amended, or the West Virginia program otherwise be amended, to clarify that roads which meet the definition of road at CSR 38-2-2.59 and 38-2-4.1 and that are to be retained as part of the postmining land use must be designed and constructed to meet the primary road requirements of CSR 38-2-4.

CSR 38-2-7.5.i.3.H. is approved to the extent that the provisions of 40 CFR 141, A. through J. apply to community water systems as defined by 40 CFR 141 (those serving 25 or more people or which have 15 or more service connections).

CSR 38-2-7.5.i.3.Q. is approved only to the extent that all permanent impoundments approved for Homestead postmining land use must comply with

CSR 38-2-3.6.b.1. and 38-2-5.5 concerning permanent impoundments. In addition, we are requiring that the West Virginia program be amended to require that all permanent impoundments approved for Homestead postmining land use must comply with CSR 38-2-3.6.b.1. and 38-2-5.5 concerning permanent impoundments.

CSR 38-2-7.5.i.7.A. is approved to the extent that the applicable NPDES storm water requirements would be complied with.

CSR 38-2-7.5.i.10. is approved to the extent that the permit requirements at CSR 38-2-3.5.d. continue to apply. In addition, we are requiring that CSR 38-2-7.5.i.10. be amended to require compliance with the permit requirements at CSR 38-2-3.5.d.

CSR 38-2-7.5.j.2.C. is approved to the extent that all ponds and impoundments created during mining and which will be left in place following mining must comply with the State permanent impoundment rules at CSR 38-2-5.5.

CSR 38-2-7.5.j.2.E. is approved to the extent that the landscape criteria at CSR 38-2-7.5.j.2. do not apply to any fills.

We are requiring that CSR 38-2-7.5.j.3.A. be amended to add an "E" horizon.

At CSR 38-2-7.5.j.3.B., the phrase, "except for those areas with a slope of at least 50%" is not approved, and the phrase, "and other areas from which the applicant affirmatively demonstrates and the Director of the WVDEP finds that soil cannot reasonably be recovered" is not approved. In addition, we are requiring the State to delete these phrases from its regulations at CSR 38-2-7.5.j.3.B.

CSR 38-2-7.5.j.3.E. must be amended to provide that the soil substitute material must be equally suitable for sustaining vegetation as the existing topsoil and the resulting medium is the best available in the permit area to support vegetation.

CSR 38-2-7.5.j.4. 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. which are no less effective than the Federal requirements at 30 CFR 816.102(a).

At CSR 38-2-7.5.j.6.A., the word "excessive" in the phrase "excessive erosion" is not approved. We are requiring the word "excessive" be deleted from CSR 38-2-7.5.j.6.A.

CSR 38-2-7.5.j.6.B. is approved 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 38–2–7.5.j.6.B. be 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.j.7. 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.

CSR 38–2–7.5.k. is approved to the extent that any as-built or post reclamation maps that depict reclamation which varies from that approved by the Director in the permit application shall be submitted to and approved by the Director under CSR 38–2–3.28.c.

CSR 38–2–7.5.o. is approved to the extent that it supplements but does not supersede the State provisions at CSR 38–2–12.2.

At CSR 38–2–7.5.o.2., the new planting arrangements and stocking standards are not approved. We are requiring the WVDEP to consult with and obtain the approval of the West Virginia Division of Forestry and the Wildlife Resources Section of the Division of Natural Resources on the new planting arrangements and stocking standards at CSR 38–2–7.5.o.2.

We are requiring that CSR 38–2–7.5.o.2. be amended to, or the West Virginia program otherwise be amended, to identify the applicable revegetation success standards for each phase of bond release on Commercial Parcels, Village Parcels, Rural Parcels, Civic Parcels and Common Lands. In the meantime, no bond release for Commercial Parcels, Village Parcels, Rural Parcels, Civic Parcels or Common Lands can be approved until a revegetation standard is approved.

At CSR 38–2–7.5.o.2., the words “rock cover” are not approved. We are requiring that the words “rock cover” be deleted from CSR 38–2–7.5.o.2.

Finally, we are requiring that: (1) CSR 38–2–7.5.a. be amended to clarify whether or not the calculated acreage of the Commercial Parcel(s) is to be summed with the total Homestead acreage for the purpose of calculating the acreage of other various components of the Homestead Area (such as Common Lands, Village Parcels, Conservation Easement, etc.); and (2) CSR 38–2–7.5.1.4 be amended to clarify whether or not the acreage for Public Nursery is to be calculated based on the amount of acreage available for the

Village Homestead, the Civil Parcel, or the entire Homestead Area.

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: December 7, 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 (c) to read as follows:

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

(c) 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) At CSR 38–2–7.5.j.3.B., the phrase, “except for those areas with a slope of at least 50%” is not approved, and the

phrase, “and other areas from which the applicant affirmatively demonstrates and the Director of the WVDEP finds that soil cannot reasonably be recovered” is not approved.

(2) At CSR 38–2–7.5.j.6.A., the word “excessive” in the phrase “excessive erosion” is not approved.

(3) At CSR 38–2–7.5.o.2., the new planting arrangements and stocking standards are not approved.

(4) At CSR 38–2–7.5.o.2., the words “rock cover” are not approved.

\* \* \* \* \*

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

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

\* \* \* \* \*

Original amendment submission date	Date of publication of final rule	Citation/description of approved provisions
* * * * * March 14, 2000, March 28, 2000, and April 6, 2000.	* * * * * 12/21/00 .....	* * * * * CSR 38–2–7.5.(qualified approval), 7.5.a., b., c., d., e. (qualified approval), f. (qualified approval), g. (qualified approval), h. (h.2.B. is a qualified approval), i. (i.1.B., i.3.H., i.3.Q. and i.7.A., and i.10. are qualified approvals), j. (j.2.C. and j.2.E. are qualified approvals; j.3.B. partial approval; j.4. qualified approval, j.6.A. partial approval, j.6.B. qualified approval, j.7. qualified approval), k. (qualified approval), l., m., n., o. (qualified approval; o.2. is a partial approval).

4. Section 948.16 is amended by adding paragraphs (ffff) through (rrrr) to read as follows:

**§ 948.16 Required regulatory program amendments.**

\* \* \* \* \*

(ffff) By February 20, 2001, 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 38–2–7.5.b.3., or otherwise amend the West Virginia program to clarify that parcels retained by the landowner for commercial development and incorporated within the Homestead area must be developed for commercial uses as provided by subdivision CSR 38–2–7.5.g.5.

(ggggg) By February 20, 2001, 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 38–2–7.5.i.1.B., or to otherwise amend the West Virginia program, to clarify that roads which meet the definition of road at CSR 38–2–2.59 and 38–2–4.1 and that are to be retained as part of the postmining land use must be

designed and constructed to meet the primary road requirements of CSR 38–2–4.

(hhhhh) By February 20, 2001, 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 38–2–7.5.i.3.Q., or otherwise amend the West Virginia program, to require that all permanent impoundments approved for Homestead postmining land use must comply with CSR 38–2–3.6.b.1. and 38–2–5.5 concerning permanent impoundments.

(iiii) By February 20, 2001, 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 38–2–7.5.i.10., or otherwise amend the West Virginia program, to require compliance with the permit requirements at CSR 38–2–3.5.d.

(jjjj) By February 20, 2001, 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 38–2–7.5.j.3.A. by adding an “E” horizon.

(kkkkk) By February 20, 2001, 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 38–2–7.5.j.3.B. to delete the phrase, “except for those areas with a slope of at least 50%,” and to delete the phrase, “and other areas from which the applicant affirmatively demonstrates and the Director of the WVDEP finds that soil cannot reasonably be recovered.”

(lllll) By February 20, 2001, 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 38–2–7.5.j.3.E., or otherwise amend the West Virginia program, to provide that the soil substitute material must be equally suitable for sustaining vegetation as the existing topsoil and the resulting medium is the best available in the permit area to support vegetation.

(mmmmm) By February 20, 2001, 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 word "excessive" from CSR 38-2-7.5.j.6.A.

(nnnnn) By February 20, 2001, 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 38-2-7.5.j.6.B., or otherwise amend the West Virginia program, 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.

(ooooo) By February 20, 2001, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to consult with and obtain the approval of the West Virginia Division of Forestry and the Wildlife Resources Section of the Division of Natural Resources on the new stocking standards and planting arrangements at CSR 38-2-7.5.o.2.

(ppppp) By February 20, 2001, 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 38-2-7.5.o.2., or otherwise amend the West Virginia program, to identify the applicable revegetation success standards for each phase of bond release on Commercial Parcels, Village Parcels, Rural Parcels, Civic Parcels and Common Lands. In the meantime, no bond release for Commercial Parcels, Village Parcels, Rural Parcels, Civic Parcels or Common Lands can be approved until a revegetation standard is approved.

(qqqqq) By February 20, 2001, 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 words "rock cover" from CSR 38-2-7.5.o.2.

(rrrrr) By February 20, 2001, 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: (1) CSR 38-2-7.5.a. to clarify whether or not the calculated acreage of the Commercial Parcel(s) is to be summed with the total Homestead acreage for the purpose of calculating the acreage of other various components of the Homestead Area (such as Common Lands, Village Parcels, Conservation Easement, etc.); and (2) CSR 38-2-7.5.l.4 to clarify whether or not the acreage for Public Nursery is to be calculated based on the amount of acreage available for the Village

Homestead, the Civil Parcel, or the entire Homestead Area.

[FR Doc. 00-32428 Filed 12-20-00; 8:45 am]

BILLING CODE 4310-05-P

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 21

RIN 2900-AJ90

#### Miscellaneous Montgomery GI Bill Eligibility and Entitlement Issues; Correction

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule; technical corrections.

**SUMMARY:** In a document published in the *Federal Register* on November 9, 2000 (65 FR 67265), we amended the regulations concerning eligibility for and entitlement to educational assistance under the Montgomery GI Bill—Active Duty (MGIB). This document makes technical corrections to eliminate duplicate numbering of paragraphs and to correct typographical errors.

**DATES:** *Effective Date:* This final rule is effective December 21, 2000.

**FOR FURTHER INFORMATION CONTACT:**

William G. Susling, Jr., Assistant Director for Policy and Program Development (225), Veterans Benefits Administration, Department of Veterans Affairs, (202) 273-7187.

**SUPPLEMENTARY INFORMATION:** This document merely makes technical corrections. Accordingly, there is a basis for dispensing with prior notice-and-comment and a delayed effective date under 5 U.S.C. 552 and 553.

The Catalog of Federal Domestic Assistance number for the program affected by this final rule is 64.124.

#### List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces, Civil rights, Claims, Colleges and universities, Conflict of interests, Defense Department, Education, Employment, Grant programs-education, Grant programs-veterans, Health care, Loan programs-education, Loan programs-veterans, Manpower training programs, Reporting and recordkeeping requirements, Schools, Travel and transportation expenses, Veterans, Vocational education, Vocational rehabilitation.

Approved: December 15, 2000.

**Thomas O. Gessel,**

*Director, Office of Regulations Management.*

In rule FR Doc. 00-28702 published on November 9, 2000 (65 FR 67265), make the following corrections:

#### § 21.7042 [Corrected]

1. On page 67266, in the second column, correct amendatory instruction 3.E. concerning § 21.7042 by removing "(10)" and adding, in its place, "(11)" and by removing "(9)" and adding, in its place, "(10)".

2. On the same page, in the same column, in § 21.7042, in the introductory text of paragraph (b)(2) and in the paragraph number of the paragraph added by amendatory instruction 3.E., remove "(10)" and add, in its place, "(11)".

#### § 21.7044 [Corrected]

3. On the same page, in the third column, correct amendatory instruction 4.D. concerning § 21.7044 by removing "paragraph (d)" and adding, in its place, "Paragraph (d)" and by removing "paragraph (c)" and adding, in its place, "Paragraph (c)".

[FR Doc. 00-32599 Filed 12-20-00; 8:45 am]

BILLING CODE 8320-01-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[WY-001-0006a; FRL-6886-8]

#### Clean Air Act Approval and Promulgation of State Implementation Plan; Wyoming; Revisions to Air Pollution Regulations

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

**ACTION:** Direct final rule.

**SUMMARY:** The EPA partially approves and partially disapproves revisions to the State Implementation Plan (SIP) submitted by the Governor of Wyoming on May 21, 1999. The submittal incorporates revisions to the following sections of the Wyoming Air Quality Standards and Regulations (WAQSR): Section 2 Definitions, Section 4 Sulfur oxides, Section 5 Sulfuric acid mist, Section 8 Ozone, Section 9 Volatile organic compounds, Section 10 Nitrogen oxides, Section 14 Control of particulate emissions, and Section 21 Permit requirements for construction, modification and operation. We partially approve these SIP revisions because they are consistent with Federal requirements. We are also partially