Federal Register

Friday,

December 28, 2001

Part III

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 948

West Virginia Regulatory Program; Final Rule and Proposed Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 948

[WV–093–FOR]

West Virginia Regulatory Program

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

ACTION: Final rule; approval of amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are approving a proposed amendment to the West Virginia surface coal mining regulatory program (the West Virginia program) authorized under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The program amendment consists of changes to the Code of West Virginia (W. Va. Code) as contained in Enrolled Senate Bill 5003. The amendment creates a Special Reclamation Fund Advisory Council and increases the special reclamation tax rate on coal to provide additional revenues for the West Virginia Special Reclamation Fund.

EFFECTIVE DATE: December 28, 2001.

FOR FURTHER INFORMATION CONTACT: Mr. Roger W. Calhoun, Director, Charleston Field Office, 1027 Virginia Street East, Charleston, West Virginia 25301. Telephone: (304) 347–7158.

SUPPLEMENTARY INFORMATION:

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

I. Background on the West Virginia Program

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

II. Background on West Virginia's Alternative Bonding System (ABS)

On January 21, 1981, the Secretary conditionally approved West Virginia's ABS. The ABS has two basic components: the site-specific or incremental bond posted by the permittee and the Special Reclamation Fund (the Fund), comprised of a special reclamation tax, civil penalty assessments, and interest earned on the revenues, which is intended to cover any reclamation costs in excess of the site-specific or incremental bond.

At the time of approval, the Secretary required that the State provide an actuarial study of the Fund demonstrating that the amount of money going into the Fund would cover the demands to be placed on it, along with any program changes needed to redress any deficiencies identified by the actuarial study (46 FR 5956).

The State submitted an actuarial study on October 29, 1982 (Administrative Record No. WV–456). The study concluded that the Fund was solvent, in part because it contained a funding mechanism (the special reclamation tax) to provide for the cost of future reclamation. On March 1, 1983 (41 FR 8447), we subsequently found that the State's alternative bonding provisions were in accordance with section 509(c) of SMCRA and the Federal criteria for approval of alternative bonding systems at 30 CFR 806.11(b), which has since been recodified as 30 CFR 800.11(e). Consequently, we removed the condition (25) relating to our approval of the State's ABS.

By 1988–89, our oversight evaluations indicated that the Fund lacked sufficient revenue to reclaim all outstanding bond forfeiture sites. In addition, the cash balance in the Fund ceased earning interest because of losses suffered by the State's Consolidated Investment Fund. On October 1, 1991, we notified the State, pursuant to 30 CFR 732.17(c) and (e), that a program amendment was necessary because the Fund no longer met the requirements of 30 CFR 800.11(e).

In a series of amendments beginning in 1993, West Virginia revised portions of its program in an attempt to resolve some of our concerns. For example, the State increased its special reclamation tax from one cent to three cents per ton of coal mined and adopted site-specific bonding regulations. In addition, Deloitte and Touche, an accounting and consulting company, completed an actuarial study of the Fund in March 1993. The study concluded that the Fund had an accrual deficit position as of June 30, 1992, but that the Fund would realize gradual improvement over the next five years.

On October 4, 1995 (60 FR 51900), we announced our partial approval of the State's amendments. However, as specified in 30 CFR 948.16 (jjj), (kkk), and (lll), we also required the State to amend certain statutory provisions to fully eliminate the deficit in the Special Reclamation Fund and to provide for treatment of pollutional discharges from bond forfeiture sites.

OSM and the State conducted additional studies that were completed in September 1997 and June 1999 to assess the financial condition of the Fund. The studies found that the Fund could eventually be solvent if its responsibilities were limited to land reclamation. However, the studies also determined that treatment of pollutional discharges from forfeited sites required additional revenue.

By letter dated September 29, 2000, we informed the West Virginia Department of Environmental Protection (WVDEP) that Federal corrective action would be taken, unless the Legislature adopted the necessary changes to the Fund to resolve the identified deficiencies (Administrative Record No. WV–1181). However, the Legislature adjourned without enacting the proposed changes.

On April 18, 2001, WVDEP requested additional time to develop and obtain approval of statutory and regulatory changes to the State's bonding provisions (Administrative Record No. WV–1206). In addition, WVDEP requested that we conduct an informal review of a report entitled ''The Mountain State Clean Water Trust Fund.'' Under a plan that was based on the report, WVDEP intended to bifurcate the Fund into two distinct accounts, one for land reclamation and one for water treatment.

In a letter dated June 29, 2001, we initiated corrective action under 30 CFR 733.12(b). In that letter, which is known as a Part 733 notification, we notified the State that it must initiate certain

remedial measures by July 27, 2001, to satisfy the outstanding required amendments at 30 CFR 948.16 (kkk), (jjj), and (lll) and that it must submit the necessary, fully-enacted and adopted statutory and regulatory revisions no later than 45 days after the end of the 2002 regular session of the Legislature (Administrative Record No. WV–1218). As stated in the letter, if West Virginia failed to take these measures, we intended to recommend that the Secretary partially withdraw approval of the State program and implement a partial Federal regulatory program.

On July 27, 2001, WVDEP submitted draft statutory and regulatory revisions in response to our Part 733 notification (Administrative Record No. WV–1231). The draft changes are commonly referred to as the 20/20 Plan.

By e-mail message dated August 8, 2001, WVDEP provided us with additional draft legislative changes for informal review (Administrative Record No. WV–1233A). The proposed revisions are commonly called the 7–Up Plan.

On August 9 and August 28, 2001, we provided WVDEP our informal review of the proposed statutory revisions that were submitted on August 8 (Administrative Record Nos. WV–1233 and WV–1235). Under the draft legislation, the special reclamation tax would be increased from 3 cents to 14 cents per ton of clean coal mined for 39 months and reduced to 7 cents thereafter with biennial review by an advisory council.

By letter dated August 13, 2001, WVDEP provided us with a schedule for submitting statutory and regulatory revisions to the Legislature in response to our Part 733 notification (Administrative Record No. WV–1234). The letter specified that the State would formally submit the program amendment to us by April 30, 2002. The letter also indicated that the statutory changes could be presented to a special session of the Legislature before that date.

We released our financial analysis of the State's draft legislation on September 7, 2001 (Administrative Record No. WV–1236). In that report, we concluded that the proposal would generate sufficient revenues for about 9 years, but future adjustments would have to be made to meet long-term needs of the Fund.

On September 15, 2001, a special session of the West Virginia Legislature passed Senate Bill 5003, which is intended to eliminate the deficit in the Fund and provide for water treatment at bond forfeiture sites. The Governor of West Virginia (Governor) signed Enrolled Senate Bill 5003 on October 4, 2001. The effective date of the bill is October 4, 2001, but none of the provisions could be implemented without OSM approval. WVDEP submitted the legislation as a program amendment on September 24, 2001 (Administrative Record No. WV–1238).

III. Submission of the Amendment

By letter dated September 17, 2001 (Administrative Record Number WV–1237), the WVDEP notified us of the legislation that was approved during a special session of the West Virginia Legislature. By letter dated September 24, 2001 (Administrative Record Number WV–1238), the WVDEP formally submitted the legislation as a proposed program amendment.

As discussed in Section II of this preamble, the amendment, consisting of statutory revisions, was submitted in response to our Part 733 notification of June 29, 2001, and certain outstanding required program amendments. In accordance with our Part 733 notification, the State informed us on November 30, 2001, that it is developing regulatory changes that will be submitted to the Legislature during the upcoming regular legislative session that begins on January 9, 2002 (Administrative Record Number WV–1253).

The amendment being considered today consists only of changes to the W.Va. Code, as amended by Enrolled Senate Bill 5003. The amendment adds W.Va. Code section 22–1–17, which establishes the Special Reclamation Fund Advisory Council (Advisory Council). The amendment also revises W.Va. Code 22–3–11 by increasing the special reclamation tax rate and revises W.Va. Code 22–3–12 by deleting certain site-specific bonding provisions.

We announced receipt of the proposed amendment on October 24, 2001 (66 FR 53749). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the amendment (Administrative Record Number WV–1243). While the amendment consists of Enrolled Senate Bill 5003, we also made Engrossed Senate Bill 5003 available for public review and comment. With a few exceptions, Engrossed Senate Bill 5003 is substantively identical to Enrolled Senate Bill 5003. However, the engrossed bill clearly shows, via underscoring and strikethroughs, most of the statutory language that has been added to or deleted from the W.Va. Code as a result of the enactment of Senate Bill 5003. We quoted the new and revised provisions in their entirety in the October 24, 2001, **Federal Register** notice in which we asked for public comment on the amendment. We did not hold a public hearing or meeting on the amendment because no one requested one. The public comment period closed on November 23, 2001.

We received comments on this amendment from the U.S. Department of Labor, Mine Safety and Health Administration, and the U.S. Environmental Protection Agency. In addition, we received comments from the West Virginia Highlands Conservancy (WVHC); Morgan Worldwide Mining Consultants, Inc., consultant for the WVHC; and the West Virginia Coal Association, Inc.

On November 6, the WVHC requested that the comment period on the amendment be extended through December 14, 2001 (Administrative Record No. WV–1245). On November 9, 2001, we denied the request (Administrative Record Number WV–1245). See Section V., ''Public Comments'' Item 4, ''Alleged abuse of discretion by failing to grant an extension to the comment period,'' below.

IV. OSM's Findings

This section contains our findings on the amendment.

As stated above in Section II, we notified the State in accordance with 30 CFR 733.12(b) that it must submit fully-enacted and adopted statutory and regulatory revisions to fix its ABS within 45 days after the close of the 2002 regular legislative session. We estimate this deadline will occur about April 23, 2002. This rule announces our decision to approve the amendment, based on the findings in this section of the preamble. However, because of the complexity of the issues concerning the long-term solvency of the ABS, we are deferring decision on the broader issue of whether the State has fully fixed its ABS. We will use the time remaining between now and the deadline mentioned above to conduct further analysis and to allow all interested parties the necessary time to complete a comprehensive review. We will publish a separate notice in the **Federal Register** soliciting further comments on the effect these amendments have on the ABS and whether additional measures are needed to restore full consistency with Federal ABS requirements.

Under 30 CFR 732.17(h)(10), we must use the applicable criteria in 30 CFR 732.15 in approving or disapproving State program amendments. Because this amendment pertains only to performance bonds, the applicable

criteria are those in 30 CFR 732.15(b)(6). That paragraph provides that the State regulatory authority must have the authority under State laws and regulations—and the State program must include provisions—to ''[i]mplement, administer and enforce a system of performance bonds and liability insurance, or other equivalent guarantees, consistent with the requirements of subchapter J of [30 CFR Chapter VII].'' As discussed in Section II of this preamble, the Secretary made the finding required by 30 CFR 732.15(b)(6) when he conditionally approved the West Virginia ABS on January 21, 1981, with full approval following on March 1, 1983.

The relevant provisions of subchapter J are those in 30 CFR 800.11(e), which establishes criteria for approval of an ABS as part of a State or Federal program. Therefore, our findings focus on those provisions of the amendment relevant to the criteria in 30 CFR 800.11(e). We do not necessarily discuss changes that are not pertinent to those criteria.

OSM Directive STP–1 interprets the requirements of 30 CFR 800.11(e) as they pertain to State program amendment approval. Appendix 12 of Directive STP–1 specifies that, once the Secretary approves an ABS, we may approve subsequent revisions to the ABS through the State program amendment process as long as those revisions do not adversely impact previous findings. The directive further states that, when a proposed amendment concerns an ABS that no longer meets the criteria in 30 CFR 800.11(e), we may approve the amendment even if it does not fully remedy all deficiencies, provided we find that the amendment does not adversely affect the solvency of the ABS. Based upon this rationale, we may approve any amendment that improves the ABS, even as we defer on the question of whether the amendment fully restores solvency or compliance with the other requirements of 30 CFR 800.11(e).

We find that this amendment will improve the solvency of the ABS by adding approximately $1.9 million per month to the Special Reclamation Fund, beginning January 1, 2002. However, because this tax rate increase cannot take effect without our approval, we believe that delaying a decision on these funding enhancements until we decide the broader question of whether the amendment fully satisfies 30 CFR 948.16(lll), as a commenter advocates, would be counterproductive. Our findings do not attempt to determine whether the ABS as revised by this amendment would be fully consistent with the criteria in 30 CFR 800.11(e). Instead, we conclude that the amendment improves the ability of the ABS to comply with those criteria. As discussed above, we will separately determine, after opportunity for further comment, whether this amendment has satisfied all outstanding requirements or whether additional measures are needed.

See Section II above, for a review of the history of our approval of West Virginia's ABS and the circumstances that preceded the State's submittal of this amendment.

1. W.Va. Code 22–1–17 Special Reclamation Fund Advisory Council

This new section creates the Advisory Council.

Purpose and Operation of the Advisory Council

Senate Bill 5003 creates the Advisory Council to ensure ''the effective, efficient and financially stable operation of the special reclamation fund.'' As required by W.Va. Code 22–1–17, the Advisory Council must ''study the effectiveness, efficiency, and financial stability of the special reclamation fund with an emphasis on development of a financial process that ensures the long-term stability of the special reclamation program.'' The Advisory Council must submit an annual report to the West Virginia Legislature and the Governor on the adequacy of the special reclamation tax (see Finding 2) and the fiscal condition of the Fund. The report must include recommendations as to whether any adjustments to the special reclamation tax should be made, considering the cost, timeliness and adequacy of bond forfeiture reclamation, including water treatment.

The Advisory Council will consist of eight members, including the Secretary of the WVDEP (or designee), the Treasurer of the State of West Virginia (or designee), and the Director of the National Mine Land Reclamation Center at West Virginia University. In addition, the Governor will appoint five members: four representing the interests of the coal industry, environmental protection organizations, coal miners, and the general public; and one who, by training and profession, is an actuary or economist.

The Federal regulations at 30 CFR 800.11(e)(1) require that an ABS ensure that the regulatory authority has sufficient money to complete the reclamation plan for any areas which may be in default at any time. We find that the Advisory Council, which has a statutory mandate to study the effectiveness, efficiency, and financial stability of the Fund, should prove useful in helping the ABS comply with 30 CFR 800.11(e). Therefore, we are approving the addition of W.Va. Code 22–1–17 to the West Virginia program.

2. W.Va. Code 22–3–11 Bonds; Amount and Method of Bonding; Bonding Requirements; Special Reclamation Tax and Fund; Prohibited Acts; Period of Liability

a. Incremental Bonding—Bond Amount

In W.Va. Code 22–3–11(a), the State has increased the amount of the penal bond from one thousand dollars per acre to not less than one thousand dollars nor more than five thousand dollars for each acre or fraction thereof. This revision clarifies that incremental bonding is subject to the same per-acre bonding rate range as found in W.Va. Code 22–3–12(b)(1), which pertains to site-specific bonding of an entire permit area.

We find that this change would improve the ability of the West Virginia ABS to comply with 30 CFR 800.11(e). Therefore, we are approving it.

b. Use of Funds

As amended, W.Va. Code 22–3–11(g) provides that moneys accrued in the Fund are reserved for the purposes set forth in W.Va. Code 22–3–11, which concerns bonds, and W.Va. Code 22–1–17, which concerns the Advisory Council. The Legislature also added language to prohibit the expenditure of moneys from the Fund to reclaim lands that are ''eligible for abandoned mine land (AML) reclamation funds under article two of this chapter.''

The latter change is apparently related to section 402(g)(4)(B) of SMCRA. As enacted on November 5, 1990, that provision authorizes use of AML reclamation funds to perform land reclamation on, and treat pollutional discharges of water from, (1) unreclaimed sites that were mined after August 4, 1977, under a program other than a permanent regulatory program approved by the Secretary, and (2) permanent program bond forfeiture sites with surety bonds for which the surety became insolvent on or before November 5, 1990. In both cases, SMCRA authorizes use of AML reclamation funds only if funds available from the bond or other form of financial guarantee or from any other source are not sufficient to provide adequate reclamation or abatement.

West Virginia revised its Abandoned Mine Lands and Reclamation Act and its AML Plan in response to the addition of section 402(g)(4)(B) to SMCRA.

However, as discussed in the March 26, 1993, **Federal Register** (58 FR 16353, 16354), we deferred a decision on the State's proposed revisions because they were not fully consistent with the Federal provisions.

Because of our deferral, addition of the phrase ''where the land is not eligible for abandoned mine land reclamation funds under article two of this chapter'' to W.Va. Code 22–3–11(g) does not preclude use of moneys from the Fund to reclaim any site for which a bond is required under 30 CFR Part 800 and section 509 of SMCRA. Therefore, we find that this revision to W.Va. Code 22–3–11(g) is not inconsistent with the bonding requirements of 30 CFR Part 800 and section 509 of SMCRA, and we are approving it.

c. Water Treatment Expenditures

The State has deleted a provision in W.Va. Code 22–3–11(g) that limited spending from the Fund for water treatment systems to 25 percent of the annual amount of the fees collected. This provision restricted expenditures for water treatment purposes, without regard to the amount needed to adequately treat such sites and ensure compliance with applicable effluent limitations and water quality standards. The deletion of this provision is necessary to provide for the complete abatement or treatment of pollutional discharges of water from bond forfeiture sites.

The deletion of the 25 percent limitation partially satisfies the requirement codified at 30 CFR 948.16(jjj). However, to fully satisfy this requirement, the State must also delete the 25-percent limitation in its regulations at Code of State Regulations (CSR) 38–2–12.5(d). Under 30 CFR 948.16(jjj) the State must revise W.Va. Code 22–3–11(g) and CSR 38–2–12.5(d) to remove the limitation on the expenditure of funds for water treatment or to otherwise provide for the treatment of polluted water discharged from all bond forfeiture sites. As mentioned above, WVDEP is in the process of further revising its regulations. The State has said that it plans to delete the 25-percent limitation in its regulations at CSR 38–2–12.5(d) during the upcoming regular legislative session.

In addition, revised subsection 22–3–11(g) states that the Secretary ''may,'' rather than ''shall,'' ''use the special reclamation fund for the purpose of designing, constructing and maintaining water treatment systems when they are required for a complete reclamation of the affected lands * * *.'' Ordinarily, the use of the word ''may'' implies discretion. However, the West Virginia Supreme Court of Appeals has determined that the WVDEP has a mandatory duty to use bond moneys for acid mine drainage treatment. *State ex rel. Laurel Mountain* v. *Callaghan*, 418 S.E.2d 580 (1990). Moreover, in a subsequent decision, the Court held that W.Va. Code 22A–3–11(g), now codified as 22–3–11(g), imposes upon the WVDEP ''a mandatory, nondiscretionary duty to utilize moneys from the SRF [Special Reclamation Fund] * * *, to treat AMD [acid mine drainage] at bond forfeiture sites when the proceeds of the forfeited bonds are less than the actual cost of reclamation.'' *State ex rel. West Virginia Highlands Conservancy, Inc.* v. *West Virginia DEP*, 447 S.E.2d 920, 925 (1994).

Nevertheless, we have previously found that the word ''may,'' in subsection (g), could not be approved because it provides the WVDEP with the discretion not to use Fund moneys for water treatment. (60 FR at 51902, October 4, 1995.) Therefore, we are requiring that the State amend its program to specify that moneys from the Fund must be used, where needed, to pay for water treatment on bond forfeiture sites. Otherwise, we find that these amendments would improve the ability of the West Virginia ABS to comply with 30 CFR 800.11(e) and that they are not inconsistent with that regulatory provision. As such, we are approving them. For the reasons discussed above, we are revising 30 CFR 948.16(jjj) to reflect the statutory changes and to require the State to amend its program to specify that the Fund must be used, where needed, to pay for water treatment on bond forfeiture sites.

d. Administrative Expenses

In W. Va. Code 22–3–11(g), the State deleted a reference to Articles 2 and 4 of W. Va. Code Chapter 22. The revised provision now only allows the WVDEP to expend up to 10 percent of the total annual assets in the Fund to implement and administer the provisions of W. Va. Code 22–3 and, to the extent that they apply to the Surface Mine Board, W. Va. Code 22B–1 and 4. This revision is intended to prohibit the expenditure of special reclamation funds for administrative activities under Article 2, Abandoned Mine Lands Reclamation Act, and Article 4, Surface Mining and Reclamation of Minerals Other Than Coal.

Given the current deficit in the Fund, we encouraged the State to modify this language to limit expenditures from the Fund for administrative expenses relating only to the special reclamation program. Furthermore, as discussed in the March 20, 1986, **Federal Register** and codified at former 30 CFR 948.15(i), before making any withdrawals to cover administrative expenses unrelated to bond forfeitures, West Virginia must request and receive OSM concurrence for such withdrawals (54 FR 9649). To assist in restoring and maintaining the financial solvency of the Fund, this requirement will continue to apply to any withdrawals that are not related to bond forfeiture reclamation administrative expenses.

For the reasons discussed above, we find that these revisions to W. Va. Code 22–3–11(g) would improve the ability of the West Virginia ABS to comply with 30 CFR 800.11(e). Therefore, we are approving them.

e. Special Reclamation Tax Rates/ Financial Analysis

New W. Va. Code 22–3–11(h) increases the permanent special reclamation tax rate from 3 cents per ton of clean coal mined to 7 cents per ton of clean coal mined. This subsection also levies an additional tax of 7 cents per ton of clean coal mined for a period not to exceed 39 months. Collection of both taxes will begin on or after January 1, 2002. Coal refuse reprocessing operations that require a surface mining permit must pay the tax on the clean coal obtained by these mining methods.

Subsection 22–3–11(h) provides that the 7-cent permanent tax rate may not be reduced until the Fund has sufficient moneys to meet the State's reclamation responsibilities under W. Va. Code 22–3–11. Furthermore, this tax rate will be reviewed and, if necessary, adjusted annually by the Legislature upon recommendation of the Advisory Council (see Finding 1 above).

The increased per-ton tax assessments are intended to eliminate the existing Fund deficit and assure that the Fund will have sufficient moneys to meet the State's long-term water treatment responsibilities and complete the reclamation plans of existing and future bond forfeiture sites.

On September 7, 2001, we completed a financial analysis of a draft version of a legislative submission that would have increased the special reclamation tax rate (Administrative Record Number WV–1236). At that time, we informed the State that based on our analysis, it appeared that a proposed tax rate of 14 cents for up to 39 months and 7 cents thereafter would allow the WVDEP to eliminate the current Fund deficit and meet land reclamation and water treatment needs for several years. Our projections also indicated that, following the period of surplus, the

liabilities of the Fund would exceed its assets in about nine years and that future adjustments of the special reclamation tax rate would be necessary to maintain a positive balance to meet future land reclamation and water treatment needs.

However, as amended, the W. Va. Code provides several mechanisms intended to prevent the Fund from deteriorating to a point where its liabilities exceed its assets. First, W. Va. Code 22–3–11(h) provides that the 7-cent permanent special reclamation tax rate may not be reduced until the Fund has sufficient moneys to meet the State's reclamation responsibilities established by law. Second, W. Va. Code 22–1–17 establishes the Advisory Council to ''ensure the effective, efficient and financially stable operation of the Fund.'' If the Advisory Council fulfills its obligations, the West Virginia Legislature and the Governor will have the information and data they need to make sound decisions and effective adjustments to the special reclamation tax rate so that the Fund will maintain a positive balance to meet existing and future land and water reclamation obligations.

In addition, W. Va. Code 22–1–17(f)(6) provides that the Advisory Council must ''[s]tudy and recommend to the Legislature alternative approaches to the current funding scheme of the special reclamation fund, considering revisions which will assure future proper reclamation of all mine sites and continued financial viability of the state's coal industry.'' Because reclamation of mine sites includes meeting water treatment obligations, and because subsection 22–1–17(f)(6) provides a mechanism that, if properly implemented, could help assure proper future reclamation, we believe this provision will greatly assist in ensuring that the State is able to adequately address the Fund's long-term bond forfeiture reclamation obligations.

For the reasons discussed above, we find that the addition of W. Va. Code 22–3–11(h) would improve the ability of the West Virginia ABS to comply with 30 CFR 800.11(e). Therefore, we are approving it.

However, we are not deciding today whether the amendments satisfy the outstanding required amendment pertaining to the financial adequacy of the State's ABS at 30 CFR 948.16(lll). 30 CFR 948.16(lll) requires that the State eliminate the deficit in the ABS and ensure that sufficient money will be available to complete reclamation, including the treatment of polluted water, at all existing and future bond forfeiture sites. Commenters on the proposed amendments have expressed concern that the Fund, as currently financed by these amendments, may not maintain a positive cash balance to meet existing and future land reclamation and water treatment needs. Commenters provided information that we wish to more fully consider in our decision as to whether the amendment fully satisfies the requirements of 30 CFR 948.16(lll). Therefore, we will publish separately a new notice in the **Federal Register**, soliciting further comments on this issue.

f. Funding Mechanism

In W. Va. Code 22–3–11(k), the State eliminated language providing that the special reclamation tax must be collected whenever the reclamation liabilities of the State exceed the accrued amount in the Fund. This provision, in effect, allowed the accrued monies in the Fund to sink below the level of its reclamation and water treatment obligations. The deletion of this provision, in concert with the addition of the new provision at subsection 22–3–11(h) that prohibits the special reclamation tax rate from being reduced until the Fund has a positive balance, together with the creation of the Advisory Council at section 22–1–17, is designed to help assure that the Fund maintains a positive balance to meet the State's land reclamation and water treatment responsibilities.

The deletion of this language from W. Va. Code 22–3–11(k) satisfies the requirement codified at 30 CFR 948.16(kkk) which provides that the State must remove the provision at (former) W. Va. Code 22–3–11(g) that allows collection of the special reclamation tax only when the Fund's liabilities exceed its assets. For the reasons discussed above, we are approving the deletion of the language and we are removing 30 CFR 948.16(kkk).

g. Implementation of Amendments

New W. Va. Code 22–3–11(n) provides that the modifications to W. Va. Code 22–3–11 will become effective upon approval by the appropriate Federal agency or official. This provision is consistent with the Federal regulations at 30 CFR 732.17(g), which provide that no changes to State laws or regulations may take effect for purposes of the State program until approved as an amendment. Therefore, we are approving this subsection.

3. W. Va. Code 22–3–12 Site-specific Bonding

This amendment deletes W. Va. Code 22–3–12(b), which contained provisions requiring the formulation of legislative rules to implement site-specific bonding requirements on an interim basis. West Virginia subsequently developed and adopted those rules in November 1992. Those rules remained in effect until April 1993, at which time the State adopted final legislative rules. Therefore, W. Va. Code 22–3–12(b) is no longer relevant.

This amendment also deletes W. Va. Code 22–3–12(f), which required the WVDEP to report every 90 days on the progress in developing and implementing the site-specific bonding requirements of W. Va. Code 22–3–12. Final legislative rules, which are codified at CSR 38–2–11.6, were adopted by the Legislature in 1993 and subsequently approved by OSM in 1995.

Neither of the deleted subsections has a Federal counterpart. We find that their deletion will not have an adverse impact on the ability of the West Virginia ABS to meet the criteria in 30 CFR 800.11(e). Therefore, we are approving their removal from the West Virginia program.

V. Summary and Disposition of Comments

Public Comments

In response to our request for comments from the public on the proposed amendment (see Section III of this document), we received comments from the WVHC; Morgan Worldwide Mining Consultants, Inc., a consultant for the WVHC; and the West Virginia Coal Association, Inc. (WVCA). Our summary and disposition of those comments appears below.

1. Criteria for Approving State Program Amendments

a. The WVHC alleged that we have no authority to approve the amendment because the amendment does not fully satisfy all outstanding requirements concerning the ABS. In particular, the WVHC argued against use of the rationale that the amendment would incrementally improve the effectiveness of the bonding system as a basis for approval of the amendment. According to the WVHC, approval of the amendment on that basis would be illegal because the ABS would remain in noncompliance with federal law. The WVHC argued that use of this rationale ''would eviscerate the requirements for an adequate alternative bonding system in 30 CFR 800.11(e) and 30 CFR 948.16(lll), and would allow incremental improvements over a long period of time that never achieved those requirements.'' The WVHC further stated that deferral of an analysis of

whether the ABS as revised by the amendment would satisfy the requirements of 30 CFR 948.16(lll) would cause an unreasonable delay in remedying the inadequacies of the ABS.

Neither SMCRA nor the Federal regulations prohibit us from approving a proposed amendment that improves a deficient State program. It would be counterproductive for us to do otherwise. As discussed in Finding 2 above, we believe the amendment will greatly assist in ensuring that the West Virginia ABS is able to comply with the Federal ABS requirements at 30 CFR 800.11(e). Therefore, we are approving it.

However, we are deferring our decision as to whether these changes allow us to remove the language at 30 CFR 948.16(lll), which requires that West Virginia submit an amendment to eliminate the ABS deficit and ''to ensure that sufficient money will be available to complete reclamation, including the treatment of polluted water, at all existing and future bond forfeiture sites.'' As also discussed in Finding 2, we will open a new comment period to provide all interested parties with the opportunity to fully assess and comment on the impact that the amendment will have on the State's ABS and comment on whether the amendment is sufficient to justify removal of the required amendment at 30 CFR 948.16(lll). When that comment period closes, we will address all comments received in response to that comment period as well as all comments received in response to the comment period for this amendment that we have not responded to in this preamble.

b. The WVCA alleged that the amendment is inconsistent with Federal law and regulations because ''SMCRA neither addresses the need to bond for potential discharges of polluting water, nor does it create a special fund to supplement site specific bonds to aid in that reclamation.'' However, the WVCA argued that we must nonetheless approve the amendment because ''[t]he provisions of § 505(b) of SMCRA expressly provide that a State law that imposes requirements not found in SMCRA, or ones more stringent than those required by the federal program are not legally defective by reason of that inconsistency.''

We disagree with the commenter on both points. As discussed in Finding A.1.b. in the October 4, 1995, **Federal Register** (60 FR 51900, 51901–02), which concerns a different West Virginia ABS amendment, both SMCRA and the Federal regulations effectively require that the bond cover the cost of completing the reclamation plan in the event of forfeiture, including the expense of treating any postmining pollutional discharges that develop. And section 509(c) of SMCRA expressly provides for the development of alternative bonding systems such as the one in place in West Virginia. Each ABS must meet the criteria established in 30 CFR 800.11(e).

With respect to the commenter's second argument, section 505(a) of SMCRA prohibits us from superseding a State law or regulation ''except insofar as such State law or regulation is inconsistent with the provisions of this Act.'' Section 505(b) provides that we may not construe State laws or regulations that provide for more stringent land use and environmental controls as inconsistent with SMCRA. It also provides that any provision of State law or regulation ''for which no provision is contained in this Act shall not be construed to be inconsistent with this Act.'' In other words, section 505 precludes us from superseding a State statutory or regulatory provision merely because the State provision is more stringent or has no Federal equivalent. However, contrary to the commenter's assertion, section 505 places no affirmative duty on us to approve the pertinent provision as part of the State program. Furthermore, we would not approve a State provision that has no direct SMCRA counterpart if we determined that the State provision would conflict with a SMCRA-related requirement.

2. Reclamation Cost Estimates

The WVHC stated that we misled the public and State Legislature by claiming that the amendment would solve the State's decades-long ABS deficit. Specifically, the WVHC stated that our September 7, 2001, financial analysis of the draft version of this amendment grossly misrepresents the ability of the amendment to raise sufficient revenues to make the fund solvent, and provide an adequate reserve to promptly reclaim future forfeiture sites. We disagree.

We note that the commenters on the amendment widely disagree on the effectiveness of the amendment to solve the financial problems of the ABS. However, our September 7, 2001, financial analysis represents our best estimate of the effect that the draft version of the amendment would have on the ABS, given the information available to us at the time. By giving commenters and ourselves more time, during the new comment period referenced above, to study the potential impacts of the proposed changes, we will assure a well reasoned decision as to whether the amendment fully rectifies the long-term financial problems of the ABS.

3. Requirement to Bond for Treatment of Pollutional Discharges

The WVCA stated that SMCRA does not address the need to bond for potential discharges of polluting water and that our authority to impose that requirement at 30 CFR 948.16(lll) remains in question. The WVCA noted that the National Mining Association has filed suit in Federal court in Tennessee to have a similar program requirement there declared illegal. For these reasons, the WVCA asserted, our reference to 30 CFR 948.16(lll) is inappropriate.

The litigation referred to by WVCA (*National Mining Association* v. *Norton, Civil Action No. :00–0549, E.D. Tenn.*) has no current impact on the validity of the mandate imposed by OSM at 30 CFR 948.16(lll). Indeed, the court in that litigation has not yet decided whether SMCRA requires operators to post bonds to cover the costs of pollutional discharge treatment. Moreover, for the reasons stated in that litigation, and in our response to comments in this rulemaking in Item 1.b. above, we believe that SMCRA clearly does require operators to treat pollutional discharges during and after mining and reclamation until all applicable effluent limitations and water quality standards are met, and that, therefore, bonds must be posted to cover the costs of such treatment. We have stated this principle in several documents, including our decision on a prior West Virginia amendment as announced in the October 4, 1995, **Federal Register** (60 FR 51900, 51902), and our March 31, 1997, ''Policy Goals and Objectives on Correcting, Preventing and Controlling Acid/Toxic Mine Drainage.'' For these reasons, we disagree with WVCA's assertion that the requirement in 30 CFR 948.16(lll) is inappropriate.

4. Alleged Abuse of Discretion by Failing to Grant an Extension to the Comment Period

In a letter dated November 6, 2001 (Administrative Record Number WV–1245), the WVHC requested an extension of the public comment period on the State program amendment. By letter dated November 9, 2001 (Administrative Record Number WV–1246), we denied the request. WVHC stated in its comments to this amendment that we abused our discretion by denying its request.

We declined to reopen the comment period for two reasons. One, an extension would delay our decision on

the amendment, which could result in a loss of badly needed revenues, possibly $1.9 million per month, to the Fund. Two, we agree with WVHC that, because of the complexity and the volume of material related to questions about how the amendment will affect the West Virginia program, additional time is needed by all interested parties to assess the effect of the amendment. Consequently, we have decided to open a new comment period on the broader question of whether the amendment fully satisfies the requirement at 30 CFR 948.16(lll) concerning the adequacy of the State's ABS. The new comment period will allow WVHC and all interested parties, including OSM, valuable additional time needed to thoroughly review those materials and assess whether the changes fully correct the deficiencies in the State's ABS.

Comments submitted in response to the comment solicitation for the amendment that we are approving today need not be resubmitted. All comments submitted on the current amendment that we have not addressed in this preamble will be addressed in full following the closure of the new comment period.

5. Other WVHC Comments

The WVHC stated that the proposed amendment satisfies 30 CFR 948.16(kkk), but not 30 CFR 948.16(jjj) nor (lll). We agree that the amendment satisfies 30 CFR 948.16(kkk). See Finding 2.f. However, as we state in Finding 2.c., the amendment partially satisfies 30 CFR 948.16(jjj). To fully satisfy 30 CFR 948.16(jjj), the State must also delete the 25-percent limitation for water treatment in its regulations at CSR 38–2–12.5(d).

As we state in Finding 2.e., we are deferring our decision as to whether the amendment satisfies 30 CFR 948.16(lll) regarding the adequacy of the ABS. We will open a comment period in the near future to solicit comments on whether the amendment satisfies 30 CFR 948.16(lll).

6. Morgan Worldwide Mining Consultants, Inc. Comments

All of the comments submitted by this commenter pertain to our September 7, 2001, financial analysis of the draft version of the amendment submitted by the State. As we discussed above, we will address all comments relating to our September 7, 2001, financial analysis at a later date. We will open a new comment period to ask for comments relating to 30 CFR 948.16(lll).

7. Other WVCA Comments

This WVCA expressed support for the amendment and urged us to approve the amendments. As noted above in the findings, we are approving the amendments.

The WVCA complimented the WVDEP and the State Legislature for developing comprehensive legislation that, it said, will address the question of proper funding for bond forfeiture sites. In response, we note that although we are approving the amendments, we are not deciding today the broader question of whether the amendment satisfies 30 CFR 948.16(lll), regarding the adequacy of the ABS. We will open a new comment period to ask for comments relating to 30 CFR 948.16(lll).

The remaining comments submitted by this commenter pertain to our September 7, 2001, financial analysis of the draft version of the amendment submitted by the State. We will address all comments relating to our September 7, 2001, financial analysis in a decision we will ultimately render on the broader issue of whether the amendment satisfies the requirements of 30 CFR 948.16(lll).

Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the West Virginia program (Administrative Record Number WV–1239). The U. S. Department of Labor, Mine Safety and Health Administration (MSHA) responded and stated that it finds no issues or impact upon miner's health and safety with the State amendment (Administrative Record Number WV–1248).

Environmental Protection Agency (EPA) Comments

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

Under 30 CFR 732.17(h)(11)(i), by letter dated September 28, 2001(Administrative Record No. WV–1239), we requested comments from EPA on this amendment (Administrative Record Number WV–1238). The EPA responded by letter dated November 13, 2001 (Administrative Record Number WV–1247). The EPA commended the State for eliminating the 25-percent expenditure limitation for water treatment. As we noted in Finding 2.c. above, the deletion of the 25-percent limitation only partially satisfies the required program amendment codified at 30 CFR 948.16(jjj). The State still needs to revise its regulations to conform with the statutory changes.

The EPA also recommended eliminating the 39-month limit on the temporary tax. According to the EPA, this restriction could result in insufficient funds for possible future acid mine drainage treatment needs. The EPA stated that the State Legislature would always have the option on an annual basis to adjust the tax rate downward when the Fund is determined to have sufficient resources.

As discussed in Finding 2.e. above, the legislation provides that the permanent 7-cent tax rate ''may not be reduced until the special reclamation fund has sufficient moneys to meet the reclamation responsibilities. * * *''

In addition, as noted in that finding, the amendment provides an appropriate mechanism, via the Advisory Council, to effectively manage and monitor the financial condition of the Fund and the adequacy of the special reclamation tax. Therefore, we are approving the amendment. However, we plan to solicit further comments to determine if the State's ABS provides for the amount of financial resources and kinds of assurances that EPA feels is necessary if the State is to meet long-term water treatment needs at bond forfeiture sites.

VI. OSM's Decision

Based on the above findings, we are approving the amendment submitted by West Virginia on September 24, 2001. In addition, we are removing the required program amendment at 30 CFR 948.16(kkk).

We are also revising 30 CFR 948.16(jjj) to reflect the statutory changes and to require the State to amend its program to specify that moneys from the Fund must be used, where needed, to pay for water treatment on bond forfeiture sites. We are also taking this opportunity to update obsolete information at 30 CFR 948.10 and 948.20. The changes to 30 CFR 948.10 and 948.20 are technical revisions that do not require public comment.

To implement this decision, we are amending the Federal regulations at 30 CFR part 948, which codify decisions concerning the West Virginia program. Our regulations at 30 CFR 732.17(h)(12)

specify that all decisions approving or disapproving amendments will be published in the **Federal Register** and that they will be effective upon publication, unless the notice specifies a different date. We are making this final rule effective immediately to expedite the State program amendment process and to assist the State in making its program conform with the Federal standards as required by the Act.

VII. Procedural Determinations

Executive Order 12630—Takings

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

Executive Order 12866—Regulatory Planning and Review

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

Executive Order 12988—Civil Justice Reform

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

Executive Order 13132—Federalism

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

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

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

National Environmental Policy Act

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

Paperwork Reduction Act

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

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the 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 an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Dated: December 13, 2001.

Tim L. Dieringer,

Acting Regional Director, Appalachian Regional Coordinating Center.

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

PART 948—WEST VIRGINIA

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

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

2. Section 948.10 is revised to read as follows:

§ 948.10 State regulatory program approval.

The West Virginia program, as submitted on March 3, 1980, as clarified on July 16, 1980, and as resubmitted on December 19, 1980, is conditionally approved, effective January 21, 1981. Beginning on that date and continuing until July 11, 1985, the Department of Natural Resources was deemed the regulatory authority in West Virginia for all surface coal mining and reclamation operations and all exploration operations on non-Federal and non-Indian lands. Beginning on July 11, 1985, the Department of Energy was deemed the regulatory authority

pursuant to the program transfer provisions of Enrolled Committee Substitute for House Bill 1850, as signed by the Governor of West Virginia on May 3, 1985. Beginning on October 16, 1991, the Division of Environmental Protection was deemed the regulatory authority pursuant to Enrolled Committee Substitute for House Bill 217 that was signed by the Governor on October 25, 1991. On December 3, 1991, OSM found that it was not necessary to amend the State program to effect the redesignation of the regulatory authority from the Division of Energy to the Division of Environmental Protection (58 FR 42904, August 12, 1993). Beginning on April 14, 2001, the Department of Environmental Protection was deemed the regulatory authority pursuant to Enrolled Committee Substitute for House Bill 2218. The bill, which was signed by the Governor on April 30, 2001, transferred programs and redesignated the Division of Environmental Protection as the Department of Environmental Protection within the executive branch. Copies of the conditionally approved program, as amended, are available at:

(a) Office of Surface Mining, Charleston Field Office, 1027 Virginia Street East, Charleston, West Virginia 25301–2816. Telephone: (304) 347–7158.

(b) West Virginia Department of Environmental Protection, Division of Mining and Reclamation, 10 McJunkin Road, Nitro, West Virginia 25143–2506. Telephone: (304) 759–0510.

3. Section 948.15 is amended by adding a new entry to the table in chronological order by ''Date of final publication'' 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
*	*	* * * * *
September 24, 2001	December 28, 2001	W. Va. Code 22–1–17; 22–3–11(a), (c), (d), (g) through (n); 22–3–12(a) through (f).

4. Section 948.16 is amended by removing and reserving paragraph (kkk) and revising paragraph (jjj) to read as follows:

§ 948.16 Required regulatory program amendments.

* * * * *

(jjj) By March 28, 2002, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to revise CSR 38–2–12.5(d) to remove the 25-percent limitation on the expenditure of funds for water treatment or to otherwise provide for the treatment of polluted water discharged from all bond forfeiture sites. In addition, the State must amend its program to specify that moneys from the Special Reclamation Fund must be used, where needed, to pay for water treatment on bond forfeiture sites.

* * * * *

5. Section 948.20 is revised to read as follows:

§ 948.20 Approval of State abandoned mine land reclamation plan.

The West Virginia Abandoned Mine Reclamation Plan as submitted on October 29, 1980, and as amended on December 12, 1980, is approved effective February 23, 1981. Copies of the approved plan are available at the following locations:

(a) Office of Surface Mining, Charleston Field Office, 1027 Virginia Street East, Charleston, West Virginia 25301–2816. Telephone: (304) 347–7158.

(b) West Virginia Department of Environmental Protection, Abandoned Mine Lands and Reclamation, 10 McJunkin Road, Nitro, West Virginia 25143–2506. Telephone: (304) 759–0521.

[FR Doc. 01–31612 Filed 12–27–01; 8:45 am]

BILLING CODE 4310–05–P