



4310-05-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 948

**[WV-124-FOR; Docket ID: OSM-2016-0012;
S1D1S SS08011000 SX064A000 190S180110;
S2D2S SS08011000 SX064A000 19XS501520]**

West Virginia Regulatory Program

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

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are announcing receipt of a proposed amendment to the West Virginia permanent regulatory program under the Surface Mining Control and Reclamation Act (SMCRA or the Act). On June 14, 2016, West Virginia Department of Environmental Protection (WVDEP) submitted a program amendment to OSMRE that includes regulatory revisions, authorized under the West Virginia Surface Coal Mining and

Reclamation Act (WVSCMRA), relating to bonding requirements for operations seeking permit renewals, topsoil, inactive status, and contemporaneous reclamation. This document gives the times and locations that the West Virginia program and this proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4 p.m., Eastern Daylight Time (e.d.t.), [Insert date 30 days after the date of publication in the FEDERAL REGISTER]. If requested, we will hold a public hearing on the amendment on [Insert date 25 days after date of publication in the FEDERAL REGISTER]. We will accept requests to speak at a hearing until 4 p.m., e.d.t. on [Insert date 15 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by WV-124-FOR, by any of the following methods:

- **Mail/Hand Delivery:** Mr. Roger W. Calhoun, Director, Charleston Field Office
Office of Surface Mining Reclamation and Enforcement, 1027 Virginia Street, East
Charleston, West Virginia 25301

- Federal eRulemaking Portal: The amendment has been assigned the Docket ID OSM-2016-0012. If you would like to submit comments go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Comment Procedures” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to review copies of the West Virginia program, this amendment, a listing of any scheduled public hearings, and all written comments received in response to this document, you must go to the address listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSMRE’s Charleston Field Office or the full text of the program amendment is available for you to read at www.regulations.gov.

Charleston Field Office

Office of Surface Mining Reclamation and Enforcement

1027 Virginia Street, East, Charleston, West Virginia 25301

E-mail: chfo@osmre.gov

West Virginia Department of Environmental Protection

601 57th Street, SE, Charleston, WV 25304

Telephone: (304) 926-0490.

In addition, you may review a copy of the amendment during regular business hours at the following locations:

Morgantown Area Office

Office of Surface Mining Reclamation and Enforcement

604 Cheat Road, Suite 150

Morgantown, West Virginia 26508

Telephone: (304) 291-4004. (By Appointment Only)

Beckley Area Office

Office of Surface Mining Reclamation and Enforcement

313 Harper Park Drive, Suite 3, Beckley, West Virginia 25801

Telephone: (304) 255-5265.

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

SUPPLEMENTARY INFORMATION:

- I. Background on the West Virginia Program
- II. Description and Submission of the Proposed Amendment
- III. Public Comment Procedures
- IV. 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, State laws and regulations that govern surface coal mining and reclamation operations in accordance with the Act and consistent with the Federal regulations. 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 the West Virginia program and program amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

II. Description and Submission of the Proposed Amendment

By letter dated June 14, 2016, and received by OSMRE on June 21, 2016 (Administrative Record No. WV-1606), WVDEP submitted an amendment to its permanent regulatory program under SMCRA (30 U.S.C. 1201 et seq.). The proposed amendment consists of regulatory revisions to West Virginia's Surface Mining Reclamation Regulations at Code of State Regulations (CSR) Title 38, Series 2. The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES**.

Senate Bill No. 357 (SB 357) was adopted by the West Virginia Legislature on March 3, 2015, and was approved by the Governor on March 12, 2015. On March 25, 2015, WVDEP notified OSMRE of the passage of SB 357 (Administrative Record No. WV-1604). Senate Bill 357 authorized WVDEP to promulgate several revisions to its Surface Mining Reclamation Regulations. The bill amended West Virginia Code Sections 22-3-13 and 19 and authorized WVDEP to promulgate revisions to its contemporaneous reclamation and inactive status regulations.

Committee Substitute for House Bill 117 (HB 117) was passed by the West Virginia Legislature on June 2, 2016. With the passage of HB 117, the Legislature authorized a legislative rule filed by WVDEP in the State Register on July 27, 2015, that includes revisions regarding contemporaneous reclamation, inactive status and topsoil. In addition, the Legislature authorized amendments regarding bonding requirements for permit renewals and incremental bonding for permit renewals. In accordance with HB 117, WVDEP filed revised regulations with the Secretary of State on June 10, 2016.

1. CSR 38-2-3.27 - Permit Renewals

WVDEP proposes to amend its regulations at CSR 38-2-3.27. As proposed, once an operation has received a waiver of the permit renewal requirement, it is exempt from the restriction contained in paragraph 11.4.a.2 regarding changing from full permit bonding to incremental bonding, and the operation may submit a bonding revision to the Secretary for approval.

This proposed State revision falls under the Federal provisions at 30 CFR 800.11 and section 509 of SMCRA.

2. CSR 38-2-7.6 - Forest land

WVDEP is proposing to amend its Forest land requirements at subsection 7.6.c, Soil placement and Substitute material, by replacing the word topsoil with soil before the word substitute and after the word volume in subparagraph c.2, adding soil substitute after the words soil in subparagraph c.3, and deleting the word soil after the words uniform and minimum in subparagraph 7.6.d.1 relating to Liming and Fertilizing.

These proposed revisions fall under the Federal provisions at 30 CFR 779.21, 780.18, 816/817.71(e), 816/817.22(b), 816/817.22(d), 816/817.71(e) and 816/817.102(a) and section 515(b)(5) and (b)(6) of SMCRA.

3. CSR 38-2-7.7 - Wildlife

WVDEP is proposing to amend its wildlife requirements at subsection 7.7.c, Soil placement and Substitute material, by replacing the word topsoil with soil before the word substitute and after the word volume in subparagraph c.2, adding soil substitute after the words soil in subparagraph c.3, and deleting the word soil after the words uniform and minimum in subparagraph 7.7.d.1 relating to Liming and Fertilizing.

These proposed revisions fall under the Federal provisions at 30 CFR 779.21, 780.18, 816/817.71(e), 816/817.22(b), 816/817.22(d), 816/817.71(e) and 816/817.102(a) and section 515(b)(5) and (b)(6) of SMCRA.

4. CSR 38-2-11.4.a.2 - Incremental Bonding

The State is proposing to amend its regulations at CSR 38-2-11.4.a.2. As amended, a proviso was added to this subparagraph which provides that operations that have received a waiver of the permit renewal requirements are exempt, and the operation [operator] may submit a bonding revision to the Secretary for approval.

This proposed State revision falls under the Federal provisions at 30 CFR 800.11 and section 509 of SMCRA.

5. CSR 38-2-14.3 – Topsoil

This proposed amendment addresses a conflicting use and misinterpretation of the terms "topsoil", "topsoil substitute", "soil", and "soil substitute" that was apparent in a 30 CFR

Part 733 review of a petition to OSMRE dated June 24, 2013 (Administrative Record Number WV- 1609). The proposed topsoil revisions include a reference, in Subsection 14.3.a, to the State's definition of topsoil, which is already part of the approved State program. This paragraph is also amended to provide that where the topsoil is less than six inches thick, topsoil and unconsolidated materials below it may be removed and treated, in combination, as topsoil. Subsection 14.3.c. would allow the use of substitutes where it can be shown that the existing topsoil is inadequate in quality or quantity to support and maintain the approved postmining land use.

These proposed State revisions fall under the Federal provisions at 30 CFR 816.22 and 817.22 and subsections 515(b)(5) and (b)(6) of SMCRA.

6. CSR 38-2-14.11 - Inactive Status

West Virginia seeks to revise its regulations at CSR 38-2-14.11 by addressing and clarifying the time limits including inactive status (renewable), bonding requirements, and procedure for inactive status. The proposed revisions to the State's inactive status requirements include revisions to subparagraphs 14.11.a.6, d, d.1., d.2., d.3, e, f, g, and h, and the deletion of subparagraph 14.11.c in its entirety and portions of subparagraph 14.11.d. The changes include the proposed elimination of public notice and opportunity for public comment on an application for inactive status, as well as a proposal to change the period within which inactive operations must be capable of restarting from 60 days to 180 days and not allowing the total time for inactive status to exceed three years. Finally,

full cost reclamation bonds for permits on inactive status will not have to remain in effect for the life of the operation.

These proposed State revisions fall under the Federal provisions at 30 CFR 816.131 and 817.131 and sections 501, 503, 509, 510, 515 and 516 of SMCRA.

7. CSR 38-2-14.15 - Contemporaneous Reclamation, Backfilling and Grading, Excess Spoil Disposal, Variance

West Virginia also seeks to revise program requirements at CSR 38-2-14.15 by addressing and clarifying time, distance and acreage requirements for contemporaneous reclamation standards. It also clarifies the bonding requirements for a contemporaneous reclamation variance and a procedure to remove it once the variance is no longer needed.

WVDEP proposes to revise subparagraph 14.15.b.1 to eliminate the maximum exceeding acreage requirement of 35 acres, provided that the requirements stipulated in subparagraphs 14.15.d and 14.15.c.2 are met. Subparagraph 14.15.b.3 is proposed to be revised to extend the timeframe within which grading and backfilling is to be completed from 35 to 60 days and to increase the distance for the same activity from one thousand (1000) feet to one thousand five hundred (1500) feet.

Subparagraph 14.15.b.4 contains a revision to clarify for a stair step mining approach

with multiple steps that the subsequent cut of the underlying seam occurs within one hundred eighty (180) days from the initial pit excavation with backfilling and regrading to follow within one hundred eighty (180) days of removal of the lowest seam in the operation.

Subparagraphs 14.15.b.5, 14.15.b.6.A and 14.15.b.6.B.2 are proposed to change similar language as addressed in 14.15.b.4. The proposed revision to subparagraph 14.15.b.6.B.1 seeks to eliminate redundancy, as this stipulation is already addressed in subparagraph 14.15.b.6.A.

The proposed State revisions regarding contemporaneous reclamation fall under the Federal provisions at 30 CFR 816.100, 816.101, 816.102, and subsections 515(b)(16), (c), (d) and (e) of SMCRA.

The proposed State revisions regarding excess spoil disposal fall under the Federal provisions at 30 CFR 816.71, 816.100, 816.101, 816.102 and subsections 515(b)(16), and (b)(22) of SMCRA.

The proposed State revisions regarding variances fall under the Federal provisions at 30 CFR 785.14, 785.15, 785.16, 816.100, 816.101, 816.102, and subsections 515(b)(16), (c), (d) and (e) of SMCRA

8. CSR 38-2-22.3.t.4 - Coal Refuse – Abandonment Plan

WVDEP proposes to delete the word “topsoiling” near the end of this requirement. Instead of topsoiling refuse, an operator will cover fine refuse in an impoundment with coarse refuse or other fill material prior to it being covered with the non-toxic and non-combustible material.

The proposed State revision regarding coal refuse disposal abandonment plans fall under the Federal provisions at 30 CFR 780.25(d), 784.16(d), 816/817.81, 816/817.83, and 816/817.84, and subsections 515(b)(11), (13), and (f) and 516(b)(5) of SMCRA.

IV. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the State program.

Electronic or Written Comments

If you submit written or electronic comments, they should be specific, confined to issues pertinent to the proposed regulations, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its

implementing regulations, case law, other pertinent State or Federal laws or regulations, technical literature, or other relevant publications.

We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4:00 p.m., e.d.t. on [Insert date 15 days after date of publication in the FEDERAL REGISTER]. If you are disabled and need reasonable accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an

opportunity to speak, we will not hold a hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at the public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

V. Procedural Determinations

Executive Order 12866 - Regulatory Planning and Review

Pursuant to Office of Management and Budget (OMB) Guidance and dated October 12, 1993, the approval of state program amendments is exempted from OMB review under Executive Order 12866.

Other Laws and Executive Orders Affecting Rulemaking

When a State submits a program amendment to OSMRE for review, our regulations at 30 CFR 732.17(h) require us to publish a notice in the Federal Register indicating receipt of the proposed amendment, its text or a summary of its terms, and an opportunity for public comment. We conclude our review of the proposed amendment after the close of the public comment period and determine whether the amendment should be approved, approved in part, or not approved. At that time, we will also make the determinations and certifications required by the various laws and executive orders governing the rulemaking process and include them in the final rule.

List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Dated: October 12, 2018.

Thomas D. Shope, Regional Director

Appalachian Region

Editorial Note: This document was received for publication by the Office of the Federal Register on March 29, 2019.

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