4310-05-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 948

WV-116-FOR; OSM-2009-0008; S1D1S SS08011000 SX064A000 245S180110; S2D2S SS08011000 SX064A000 24XS501520]

West Virginia Regulatory Program

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

ACTION: Final rule; partial approval of amendment with 12 approved provisions, 5 provisions receiving qualified approval, and 1 not approved provision.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), approve in part amendments to the West Virginia regulatory program (the West Virginia program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). These amendments make changes to the West Virginia Coal Mining and Reclamation Act (WVSCMRA), the Code of West Virginia (W.Va. Code), and the West Virginia Code of State Rules (CSR). We approve 12 provisions, approving with understanding 5 provisions, and not approving 1 provision.

DATES: This rule is effective [**INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER***].

FOR FURTHER INFORMATION CONTACT: Mr. Justin Adams, Director, Charleston Field Office, Telephone: (304)-977-7450. E-mail: osm-chfo@osmre.gov.

SUPPLEMENTARY INFORMATION:

VI. Statutory and Executive Order Review

I. Background on the West Virginia Program

Subject to OSMRE's oversight, 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 State 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. 30 U.S.C. 1253(a)(1); 30 U.S.C. 1253(a)(7). Based on these criteria, the Secretary of the Interior conditionally approved the West Virginia program on January 21, 1981. You can find additional background information on the West Virginia program, including the Secretary's findings, the disposition of comments, and conditions of approval of the West Virginia program in the January 21, 1981, *Federal Register* (46 FR 5915). You can also find later actions concerning West Virginia's program and program amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

II. Submission of the Amendment

West Virginia revised its Code of State Regulations (CSR) and the West Virginia Code (W.Va. Code), as reflected in four bills enacted by the legislature in 2009: Senate Bill (SB) 153, SB 436, SB 600, and SB 1011. The amendment approved by this final rule covers a variety of topics, including continuing oversight by the Secretary of the West Virginia Department of Environmental Protection (WVDEP) of "approved persons" who prepare, sign, or certify mining permit applications and related materials; incidental boundary revisions (IBRs) to existing permits; deletion of the Coal Bonding Calculations Tables; changing the term "Bio-oil" to "Bio-fuel"; clarifying standards at CSR 38-2-9.3.f that pertain to West Virginia's regulatory program for revegetation success standards for areas developed for hayland or pasture use; and adjusting the per-ton coal tax.

By letter dated May 11, 2009 (Administrative Record No. WV 1522), WVDEP submitted one of several amendments regarding its approved regulatory program under West Virginia's Surface Mining Reclamation Regulations at CSR title 38, series 2. This amendment includes regulatory revisions implemented by the passage of SB 153, which was adopted by the West Virginia Legislature on April 8, 2009, and signed into law by the Governor on April 30, 2009.

SB 153 included provisions for the continued oversight of "approved persons" who prepare, sign, or certify mining permit applications and related materials. The bill also included provisions modifying IBR requirements for existing permits by clarifying that certain types of collateral activities are deemed parts of the primary mining operations and, therefore, subject to the same acreage limitations while providing additional criteria for the WVDEP Secretary to consider in evaluating an application for revision. The bill deletes the requirement that the Secretary must advertise all IBR applications and provide a 10-day public comment period and would instead allow IBRs deemed "insignificant" to be approved without public notice. In addition, the bill deleted the Coal Bonding Calculations Tables without changing the regulatory criteria the tables represented, changed the term "Bio-oil" to "Bio-fuel," and clarified revegetation standards for hayland and pasture use. We initially determined that the change from "Bio-oil" to "Bio-fuel" was non-substantive and that soliciting public comment was unnecessary, but we later sought further clarification from WVDEP about the use of those terms, as further discussed below.

By letter dated May 22, 2009 (Administrative Record No. WV 1521), WVDEP submitted two additional legislative enactments, SB 436 and Committee Substitute SB 600. SB 436 was adopted by the West Virginia Legislature on April 3, 2009, and was signed into law by the Governor on April 11, 2009. SB 600, which authorized changes to West Virginia's alternative bonding system, was passed by the

Legislature on April 10, 2009, and was signed into law by the Governor on May 4, 2009, with an effective date of July 1, 2009.

SB 436 amended W.Va. Code 22-3-8. In addition to non-substantive textual changes, SB 436 replaced references to certain defunct agencies at W.Va. Code 22-3-8 (6)(A) by substituting their modern analogs. The May 22, 2009, letter advised that West Virginia considers the revisions authorized by SB 436 to be non-substantive changes and requested that they not be included in the proposed rule. Given the nature of the changes, we concurred with West Virginia's assessment and found them to be non-substantive changes. Therefore, we did not solicit public comment on these revisions in the October 21, 2009, proposed rule. Further, because the revisions amended a statutory provision of West Virginia's approved program, we are approving them without specific findings.

SB 600, also transmitted by the May 22, 2009, letter, amended W.Va. Code 22-3-11. As stated in West Virginia's May 22, 2009, letter transmitting the amendment for approval on an interim basis, SB 600 amended Section 22-3-11 "to implement actuarial recommendations relating to the continuing fiscal viability of the Special Reclamation Fund." The letter explained that the "legislation consolidates what has been known as 'the 7-and-7.4 tax' (the 7.4 [cents per ton] portion of which is currently subject to annual renewal) into a 14.4 cent tax per ton of clean coal mined, reviewable every 2 years by the Legislature." We approved the revision on an interim basis and solicited public comment in the *Federal Register* on July 22, 2009 (74 FR 36113) (Administrative Record No. WV 1528). The public comment period on the interim rule closed on August 21, 2009.

By letter dated July 6, 2009 (Administrative Record No. WV 1523), WVDEP also submitted a copy of SB 1011. SB 1011 amended the West Virginia Code at 22-3-10, 5B-2A-3, 5B-2A-5, 5B-2A-6, and 5B-2A-9. The amendments require surface

mine reclamation plans to comport with approved master land use plans, as defined at CSR 145-8-2.11, and authorize surface mine reclamation plans to contain alternative postmining land uses. SB 1011 was passed by the West Virginia Legislature on June 2, 2009, and was signed into law by the Governor on June 17, 2009.

In sum, West Virginia submitted a total of three letters relevant to this final rule (May 11, 2009, May 22, 2009, and July 9, 2009), transmitting four legislative enactments (SB 153, SB 436, SB 600, and SB 1011). As noted above, the changes enacted in SB 600 were adopted in an interim rule published on July 22, 2009 (74 FR 36113), and public comment was solicited. The changes reflected in SB 153, SB 436, and SB 1011 were announced in a notice of proposed rulemaking published in the *Federal Register* on October 21, 2009 (74 FR 53972). In the October 21 notice, we opened the public comment period on the proposed rule and provided an opportunity for a public hearing or meeting on the adequacy of the proposed amendments (Administrative Record No. WV 1533). We did not hold a hearing or a meeting because none were requested. The public comment period closed on November 20, 2009.

Additional administrative events in connection with WVDEP's 2009 submissions followed in 2010 and 2011. While responding to a request we submitted by e-mail on July 26, 2010 (Administrative Record No. WV 1544), we asked WVDEP to provide a definition of "Bio-oil" and "Bio-fuel" and an explanation of the differences between them. WVDEP explained that bio-fuels "are a wide range of fuels which are derived from biomass." WVDEP noted that the term bio-fuel "covers solid biomass, liquid fuels, and various biogases while bio-oil was limited to biodiesel." Given WVDEP's explanation, we reopened the 15-day comment period on February 7, 2011 (76 FR 6589) in order to afford the public the opportunity to comment on the proposed amendment to change an allowed type of cropland

postmining land use from “bio-oil” to “bio-fuel.” We did not hold a hearing or a meeting because none were requested. The public comment period closed on February 22, 2011.

In a November 9, 2011, response to our June 7, 2011, letter (Administrative Record No. WV 1559), WVDEP submitted additional clarification on its use of cropland for bio-fuel production as a postmining land use (Administrative Record No. WV 1559). In addition, WVDEP submitted West Virginia’s Noxious Weed Act Rules (title 61, series 14A) of 1976 and the Federal Noxious Weed List as of January 6, 2006 (Administrative Record No. WV 1574).

III. OSMRE’s Findings

We approve in part and disapprove in part the revisions proposed by West Virginia as described below. We made the following findings about West Virginia’s amendments as provided under SMCRA and the Federal regulations at 30 CFR 730.5, 732.15, and 732.17. Any revisions that we do not specifically discuss below concerning non-substantive wording or editorial changes can be found in the full text of the program amendment available at www.regulations.gov, searchable by the docket ID numbers referenced at the top of this notice.

1. CSR 38-2-3.15. Permit Applications: Approved Persons.

West Virginia amended CSR 38-2-3.15 by changing a reference to section “13(b)(10)” of the Act to “13(b)(10)(C)” to clarify when an approved person must be a registered professional engineer or licensed land surveyor. West Virginia also amended CSR 38-2-3.15.b by adding language to require that an approved person’s approval be in writing, the approval is subject to annual renewal, and that approvals and renewals be granted on the basis of the criteria set forth in subsections 3.15.b.1 through 3.15.b.2.

While there is no direct Federal counterpart to this requirement, we find that,

as amended, subsections 3.15.a and 3.15.b are no less effective than the Federal requirements pertaining to professional certification and other application requirements under the provisions of 30 CFR 777.11(c) (concerning application oath requirement), 777.13(b) and 780.14(c) (imposing various professional certification requirements), and that these requirements are in accordance with sections 507(b)(14) and 515(b)(10)(B)(ii) of SMCRA, 30 U.S.C. 1257(b)(14) and 1265(b)(10)(B)(ii) (setting professional certification requirements for submission of cross-sections, maps, or plans, and for design of siltation structures). For these reasons, we approve these changes.

2. CSR 38-2-3.15.b.3. Permit Applications: Approved Persons.

West Virginia has proposed to add new language at CSR 38-2-3.15.b.3 that requires an approved person, as defined in CSR 38-2-3.15.a, to use a digital signature and requires such person to maintain the capability of submitting documents bearing digital signatures to the Secretary. This provision provides that a digital signature will have the same effect as any other signature for the purposes of this subsection.

While there is no direct Federal counterpart to this requirement, we find that, as amended, subsection 3.15.b.3 is no less effective than the Federal requirements governing approved persons under the provisions of 30 CFR 777.11 (concerning applications for permits, revisions, and permit rights), 777.13, and 780.14(c) (imposing various professional certification requirements) and is in accordance with SMCRA provisions at 30 U.S.C. 1257(b)(14) and 1265(b)(10)(B)(ii) (setting professional certification requirements for submission of cross-sections, maps or plans, and for design of siltation structures). Therefore, we approve these changes.

3. CSR 38-2-3.15.e. Disciplinary Action, Procedures, Imposition of Conditions, Suspension, and Revocation of Approved Persons.

West Virginia proposes to add a new provision at CSR 38-2-3.15.e that would

authorize the Secretary of WVDEP to take disciplinary actions against a person approved to prepare, sign, or certify permit applications, such as suspending or revoking that person's "approved person" status in the event of fraud, negligence, or other enumerated behaviors.

While there is no direct Federal counterpart to these new provisions, we find that, as amended, CSR 38-2-3.15.e is no less effective than the Federal requirements governing approved persons under the provisions of 30 CFR 777.11 (concerning applications for permits, revisions, and permit rights), 777.13, and 780.14(c) (imposing various professional certification requirements) and is in accordance with SMCRA provisions at 30 U.S.C. 1257(b)(14) and 1265(b)(10)(B)(ii) (setting professional certification requirements for submission of cross-sections, maps or plans, and for design of siltation structures). Therefore, we approve this new provision.

4. CSR 38-2-3.15.f. Disciplinary Action, Procedures, Imposition of Conditions, Suspension, and Revocation of Approved Persons.

West Virginia proposes to add a new provision at CSR 38-2-3.15.f, which provides that a person adversely affected by the Secretary taking one or more actions against them under CSR 38-2-3.15.e will receive notice of the action and receive the right to request a hearing to challenge the Secretary's decision.

While there is no direct Federal counterpart to these new provisions, we find that, as amended, CSR 38-2-3.15.f is no less effective than the Federal requirements governing approved persons under the provisions of 30 CFR 777.11 (concerning applications for permits, revisions, and permit rights), 777.13, and 780.14(c)(imposing various professional certification requirements) and is in accordance with SMCRA provisions at 30 U.S.C. 1257(b)(14) and 1265(b)(10)(B)(ii) (setting professional certification requirements for submission of cross-sections, maps

or plans, and for design of siltation structures). Therefore, we approve this new provision.

5. CSR 38-2-3.28.b.1. Permit Revision.

The prior version of CSR 38-2-28.b.1 provided that where a permit revision constitutes a significant departure from the terms and conditions of the existing permit that may result in a significant impact in certain defined areas, it will be deemed to be a significant revision and be subject to the public notice requirements of CSR 38-2-3.2.a and CSR 38-2-3.2.b. West Virginia now proposes to make such permit revisions also subject to the public notice requirements at CSR 38-2-3.2.c. and CSR 38-2-3.2.d. CSR 38-2-3.2.c requires the Secretary to provide notice to State and Federal governmental agencies of such permit revisions and CSR 38-2-3.2.d requires the Secretary to maintain a file containing public comments and other similar materials and to publish or notify certain parties when a permit or revision is issued.

Section 511 of SMCRA (30 U.S.C. 1261) and the Federal regulations at 30 CFR 774.13 set forth the Federal requirements for permit revisions. Except as discussed below, we find that West Virginia's requirements are in accordance with section 511 of SMCRA and no less effective than the Federal requirements at 30 CFR 774.13.

The Federal regulations at 30 CFR 778.21 require submission of proof of publication of an advertisement notifying the public of a permit application, significant permit revision, or permit renewal to be filed with the regulatory authority no less than 4 weeks after the last date of publication; the requirements for the advertisement must comply with the requirements of 30 CFR 773.6(a)(1). West Virginia also requires proof of publication of the advertisement for a permit action at CSR 38-2-3.2.g, once the application is deemed technically complete. However, West Virginia's proposed revisions to CSR 38-2-3.28.b.1 do not also include a reference to

the proof of publication rules at CSR 38-2-3.2.g. We are nevertheless approving the West Virginia's changes to CSR 38-2-28.b.1 with the understanding that West Virginia will also require proof of publication of the advertisement for permit actions, including permit revisions, once they are deemed technically complete, as provided by CSR 38-2-3.2.g and 30 CFR 778.21. If we determine in the future that West Virginia is implementing this provision differently, we may require West Virginia to submit a program amendment to revise their program to reflect our understanding of this provision.

6. CSR 38-2-3.29.a. Incidental Boundary Revisions (IBRs).

West Virginia proposes to delete language prohibiting the use of IBRs to abate a violation where encroachment beyond the permit area is involved, unless an equal amount of acreage is deleted from the permit area.

The Federal requirements governing IBRs are set forth in section 511(a)(3) of SMCRA (30 U.S.C. 1261(a)(3)) and 30 CFR 774.13(d). The Federal requirements do not specifically address the potential use of IBRs to abate violations. However, section 511(a)(3) of SMCRA and 30 CFR 774.13(d) clearly provide that any extensions to an area covered by a permit except IBRs must be made by application for another permit. IBRs are intended to allow for limited or minor adjustments in permit boundaries to account for landslides, sinkholes, or other unanticipated events.

While there is no discussion in the preamble of the Federal regulations that mentions the use of IBRs to abate violations, we have discussed in our original approvals that the use of IBRs to abate violations would be contrary to the intent of SMCRA, especially when an operator intentionally removes coal beyond an original permit boundary. 55 FR 21316 (May 23, 1990); 61 FR 6520 (Feb. 21, 1996). We recognize that there could be a situation where a State regulatory authority would order an operator to obtain an IBR as part of its remedial measures to abate an

unanticipated event that would require an operator to go outside the original permit area to abate the violation. In this type of instance, the operator has no intent to remove coal beyond the existing permit area or to mine additional acreage.

Therefore, except as discussed below, we find that the proposed deletion at CSR 38-2-3.29.a is in accordance with the Federal IBR requirements at section 511(a)(3) of SMCRA and consistent with 30 CFR 774.13(d). Furthermore, we are approving the proposed deletion of the language at CSR 38-2-3.29.a, which reads, "or to abate a violation where encroachment beyond the permit boundary is involved, unless an equal amount of acreage covered under the IBR for encroachment is deleted from the permitted area and transferred to the encroachment area." We have long maintained that an IBR cannot be used for the primary purpose of increasing the size of the area from which coal may be removed. Furthermore, only minor adjustments in the area for coal removal may occur so long as the total area permitted for coal removal is not increased.

Therefore, we are approving the deletion at CSR 38-2-3.29.a with the understanding that the primary purpose of an IBR cannot be to provide for coal removal. In a situation where coal removal is intentional and the primary purpose for operations conducted outside of the existing permit area, we expect WVDEP to require an operator to remove acreage from the permitted area and transfer it to the encroachment area. If we determine, in the future, that West Virginia is implementing this provision differently, we may require West Virginia to submit a program amendment to revise their program to reflect our understanding of this provision.

7. CSR 38-2-3.29.b.2. Incidental Boundary Revisions – Acreage Limitation.

West Virginia proposes to add language that will increase its IBR acreage limitation and apply its waiver provisions for underground mining operations to other mining operations, including, but not limited to, loadout operations, coal refuse

disposal operations, and coal preparation operations. The Federal regulations at 30 CFR 774.13(d), like W.Va. Code 22-3-19(b)(3) and section 511 of SMCRA (30 U.S.C. 1261(a)(3)), provide that any extensions to the area covered by a permit, except IBRs, must be made by application for a new permit. However, the term IBR is not defined in SMCRA, the Federal regulations, or applicable West Virginia law. West Virginia attempted to fill this void by defining it through its regulations.

In the May 23, 1990 *Federal Register* (55 FR 21316), we found West Virginia's original IBR requirements to be consistent with SMCRA and no less effective than the Federal regulations because the proposed State criteria recognized the distinct differences between surface and underground mining operations as required by section 516(a) of SMCRA (30 U.S.C. 1266(a)), and the criteria gave reasonable meaning to the term "IBR" in that such revisions would result in only minor or insignificant changes to the permit area. On February 21, 1996, we approved additional State revisions that allowed IBRs for underground mines in West Virginia to be larger than 50 acres when an applicant demonstrated the need for a larger IBR, and because no IBRs would be authorized by West Virginia where additional coal removal is the primary purpose of the IBR. 61 FR 6520.

While the term "IBR" is not specifically defined in the Federal regulations, the term "incidental" at least implies that such revisions be minor in nature, so as not to cause significant changes to the environment or to the considerations upon which permit conditions and permit approval are based. With this amendment, West Virginia is proposing to increase the IBR acreage limitation for mining operations other than coal removal, including loadouts, coal refuse disposal, and coal preparation operations.

When we approved West Virginia's IBR requirements in the May 23, 1990, *Federal Register* (55 FR 21316), the different IBR acreage limits for surface mines

and underground mines were recognized. We acknowledged that surface disturbances for underground mines were generally smaller, more static, and of a longer term than for surface mines. Therefore, we found that the IBR acreage limitation for underground mining operations of 150 percent of the original permitted acreage or a maximum of 50 acres, whichever is less, throughout the life of the permit was not inconsistent with the Federal requirements. In addition, we approved West Virginia's waiver provision allowing larger IBR acreage limits for underground mining operations when the need for such facilities (for purposes of site development or for construction of air shafts, fan ways, vent holes, roads, staging areas, etc.) could be demonstrated by the operator. 61 FR 6520 (Feb. 21, 1996). Again, this provision was approved and limited to underground mining operations because of the distinct differences between surface and underground mining operations and because coal removal cannot be the primary purpose of an IBR.

Under the proposed amendment, West Virginia now wants to apply its IBR acreage limitation and its waiver provision for underground mining operations to other mining operations, including, but not limited to, loadout operations, coal refuse disposal operations, and coal preparation operations. In essence, this would allow IBRs for these types of surface mining operations to be larger than 50 acres. While these operations may be undertaken in support of underground mining activities, they are, by definition, surface mining operations.

As previously mentioned, we initially approved West Virginia's IBR acreage limitation criteria because of the distinct differences between underground and surface coal mining operations, and West Virginia's waiver provision was limited to facilities solely associated with underground mining operations. Under the proposed amendment, the distinction between surface and underground mining operations would no longer exist, and West Virginia would be free to grant waivers that could

allow unlimited acreage under an IBR for various types of surface mining operations. Permit boundary extensions of this size could exceed the "incidental" limitations authorized by Federal law and can only be granted under a new permit or permit amendment.

We have long maintained that IBRs were not intended to add area to construct such facilities as coal preparation plants, coal mine waste disposal areas, etc. Given that IBRs can only provide for minor or insignificant shifts in a permit area, the proposed State amendment conflicts with the intent and purpose of the Federal IBR requirements. Therefore, we find that the proposed changes to CSR 38-2-3.29.b.2 are inconsistent with the Federal IBR requirements at section 511(a)(3) of SMCRA (30 U.S.C. 1261(a)(3)) and 30 CFR 774.13(d), and we are not approving these changes.

8. CSR 38-2-3.29.d Incidental Boundary Revisions.

West Virginia proposes to delete language about the findings that the Secretary must make before approving IBRs. Currently, the Secretary must make six required findings before approving an IBR. As proposed, West Virginia intends to delete four of these required findings: the requirement for the Secretary to find that approval of the IBR does not constitute a change in the postmining land use; that approval will only involve lands for which an approved probable hydrologic consequences (PHC) determination is applicable; that approval does not constitute a change in the mining method; and that approval will not result in adverse environmental impacts of a larger scope or different nature from those described in the approved permit. Due to the proposed deletion of these four IBR findings, West Virginia proposes to renumber CSR 38-2-3.29 subsections d.5 and d.6 as subsections d.1 and d.2, respectively.

The provision that West Virginia proposes to amend sets forth findings the WVDEP Secretary must make in approving an IBR. As discussed below in Finding 9,

West Virginia has proposed criteria at CSR 38-2-3.29.e to clarify what constitutes significant and non-significant IBRs and the public notice requirements for each. The Federal regulations are silent regarding the difference between a significant and an insignificant IBR.

However, because West Virginia will require that significant IBRs be subject to the notice and comment procedures applicable to significant permit revisions, and because the Federal regulations provide broad discretion to the regulatory authority to establish guidelines for determining what constitutes a significant revision, we find that the resulting regulation, with West Virginia's proposed deletions, is consistent with the Federal IBR requirements in section 511(a)(3) of SMCRA (30 U.S.C. 1265(a)(3)) and is as effective as 30 CFR 774.13(d) (IBR requirements) and 30 CFR 774.13(b)(2) (permit revision requirements). Therefore, we approve these revisions.

9. CSR 38-2-3.29.e Incidental Boundary Revisions – Criteria for "Significant" Classification.

West Virginia proposes to add new language setting forth a standard for determining whether an IBR should be deemed significant or non-significant, to add new language about the review of IBR applications to determine if an updated PHC determination or an updated cumulative hydrologic impact assessment is required, and to delete language that gives the Secretary the authority to require IBR applications to be advertised and to provide for a 10-day public comment period.

The proposed amendment provides criteria to be used by the Secretary for determining that an IBR is "significant." The criteria that West Virginia proposes to use, appearing in subsections 3.29.e.1.A through 3.29.e.1.G, duplicate some of the existing criteria in subsection 3.28.b.1, used for determining whether a permit revision is significant. The proposed amendment also provides that "significant" IBRs are subject to the public notice requirements at CSR 38-2-3.2.a through CSR 38-2-

3.2.d. West Virginia proposes to add CSR 38-2-3.29.e.2, which would provide that where an IBR constitutes only an "insignificant" departure from the terms and conditions of an existing permit, it will be deemed to be non-significant, which requires no public notice.

We must caution that, in using largely the same criteria to define significant IBRs as are used in the case of significant permit revisions, there may be conflicts in West Virginia's regulations, such as the restriction on adding acreage through a permit revision. In contrast, an IBR provides for minor or insignificant shifts in permit boundaries, which could result in adding acreage. However, neither SMCRA nor the Federal regulations require public notice or a public comment period for the approval of an IBR.

West Virginia proposes to make significant IBRs subject to its public notice requirements at CSR 38-2-3.2.a through CSR 38-2-3.2.d. However, these subsections do not include the requirement for proof of publication, which appears at CSR 38-2-3.2.g. The Federal regulations at 30 CFR 778.21 require proof of publication for a significant revision of a permit.

Therefore, consistent with requirements for permit revisions, we are approving CSR 38-2-3.29.e.1 with the understanding that West Virginia will require proof of publication of the advertisement for a significant IBR as required by CSR 38-2-3.2.g and 30 CFR 778.21. If we determine, in the future, that West Virginia is implementing this provision differently, we may require West Virginia to submit a program amendment to revise their program to reflect our understanding of this provision.

10. CSR 38-2-7.8. Bio-fuel Crop Land.

In our proposed rule dated October 21, 2009, announcing receipt of and a comment period on the proposed amendment, we stated that West Virginia's proposed

changes to their program, deleting "Bio-oil" and replacing it with "Bio-fuel" were non-substantive as applied to postmining land use of hayland or pasture. As explained in Section II above, WVDEP subsequently explained that "Biofuels cover are [sic] a wide range of fuels which are derived from biomass. The term covers solid biomass, liquid fuels and various biogases while bio-oil was limited to biodiesel." *See* Administrative Record No. 1544. Given these definitions, we also reopened public comment.

After the public comment period closed, we sent a letter dated June 7, 2011, (Administrative Record No. WV 1559) to WVDEP seeking additional clarification of West Virginia's rule change from "Bio-oil" to "Bio-fuel" at CSR 38-2-7.8. WVDEP responded first by e-mail on September 8, 2011, and, after we requested further clarification of the terms on November 2, 2011, WVDEP provided a final response in an email dated November 9, 2011, which provided West Virginia's procedures and rules dealing with noxious weeds (Administrative Record No. WV 1574). As part of this communication, West Virginia recognized that it cannot restrict the use of non-native plants as long as they are biofuel sources and are not considered invasive, toxic, or noxious under State or Federal law. WVDEP will not authorize biofuel as a postmining land use on sites requesting a mountaintop approximate original contour (AOC) variance unless the plans include a financial commitment to build a biofuel plant.

Given WVDEP's clarification, we find that West Virginia's change from bio-oil to bio-fuel for cropland or pasture as postmining land use on all surface mining operations neither renders West Virginia's proposed bio-fuel cropland revisions at CSR 38-2-7.8 less effective than the Federal requirements at 30 CFR 779.19, 780.18, 780.23, 783.19, 785.14, 816.111, 816.116, 816.133 and Part 824 nor inconsistent with sections 507(d), 508(a), 515(b)(2), 515(b)(19), and 515(c) of SMCRA (30 U.S.C. 1257(d), 1258(a), 1265(b)(2), 1265(b)(19), and 1265(c)). We therefore approve these changes with the understanding that West Virginia's bio-fuel cropland requirements

will be implemented in the manner described above. As with bio-oil cropland, bio-fuel cropland can be approved for all mining operations with variances from approximate original contour and in accordance with revegetative success standards provided that they meet the regulatory requirements in SMCRA and the implementing Federal regulations, and that the plans include a financial commitment to build a bio-fuel plant. In the future, if we determine that West Virginia is implementing this provision differently, we may require West Virginia to submit a program amendment to revise their program to reflect our understanding of this provision.

11. CSR 38-2-9.3.f. Revegetation Success Standards.

West Virginia proposes to amend its regulatory program's revegetation success standards by deleting the phrase "Where the post mining land use requires legumes and perennial grasses," and replacing it with the phrase "For areas to be developed for hayland or pasture use." The proposed revision would make the introductory format of CSR 38-2-9.3.f conform with the other provisions included in CSR 38-2-9.3 by providing for specific postmining land uses instead of the types of vegetative cover to be evaluated. Legumes and grasses would still qualify as appropriate vegetative cover where the postmining land use is "hayland or pasture use."

Because WVDEP is only changing the nomenclature from 'legumes and perennial grasses' to 'hayland and pasture use' and is not adjusting the revegetation standards or the vegetative cover allowed, we find the proposed amendment to CSR 38-2-9.3.f (concerning success standards for evaluating vegetative cover and productivity for hayland and pasture use) as effective as the Federal revegetation success standards at 30 CFR 816.116(b)(1) and 817.116(b)(1). Therefore, we approve this amendment.

12. CSR 38-2-11. Site Specific Bonding Tables.

West Virginia is proposing to delete the Coal Bonding Calculations Tables 1, 2, 3, and 4 at CSR 38-2-11.5 for surface mines, underground mines, coal preparation plants, and coal refuse sites. In addition, West Virginia is proposing to delete language at CSR 38-2-11.5.c through CSR 38-2-11.5.f referring to the Bonding Calculations Tables. Inclusion of the bonding tables in West Virginia's initial program submittal was discretionary and intended to demonstrate how the bond rates would be calculated for individual permitted sites. West Virginia now seeks to delete these tables as part of its regulatory program. The criteria for calculating bond remain the same as stated in the existing State regulations. Because removal of the tables does not alter the process of determining bond amounts or the regulations that govern the calculations at 30 CFR 800.14, this revision would make no change to substantive law. Therefore, we approve this revision.

13. W.Va. Code 5B-2A-3. Definitions.

West Virginia proposes to add, at W.Va. Code 5B-2A-3(a)(3), a definition for the term "Operator" that cross references the existing definition for that term given at W.Va. Code 22-3-3(n). West Virginia also proposes to add the following definition for "Renewable and alternative energy" at W.Va. Code 5B-2A-3(a)(4):

(4) "Renewable and alternative energy" means energy produced or generated from natural or replenishable resources other than traditional fossil fuels or nuclear resources and includes, without limitation, solar energy, wind power, hydropower, geothermal energy, biomass energy, biologically derived fuels, energy produced with advanced coal technologies, coalbed methane, fuel produced by a coal gasification or liquefaction facility, synthetic gas, waste coal, tire-derived fuel, pumped storage hydroelectric power or similar energy sources.

We find that the proposed definition for "operator" is in accordance with the

definition at found at section 701(13) of SMCRA (30 U.S.C. 1291(13)) and consistent with the definition for "operator" found at 30 CFR 701.5. While there is no direct Federal counterpart to the proposed definition for "Renewable and alternative energy," we find that, as amended, these definitions added at W.Va. Code 5B-2A-3 are no less stringent than the definitions in section 701 of SMCRA (30 U.S.C. 1291) and are no less effective than the Federal requirements at 30 CFR 700.5 and 30 CFR 701.5. Therefore, these revisions are approved.

14. W.Va. Code 5B-2A-5. Powers and duties.

W.Va. Code 5B-2A-5(8) provides that the West Virginia Office of Coalfield Community Development (OCCD) may, on its own initiative or by request of a community near a mining operation, offer assistance to facilitate the development of economic or community assets. The previous version of W.Va. Code 5B-2A-5(8) continued: "Such assistance may include the preparation of a master land use plan pursuant to the provisions of section nine of this article." West Virginia has proposed to amend this sentence to replace "may," which is discretionary, with "shall," which is ambiguous but, in this context, is intended to make the preparation of a master land use plan required.

While there is no direct Federal counterpart to this requirement, we find that, as amended, this change is no less stringent than section 508 of SMCRA (30 U.S.C. 1258) and no less effective than the Federal requirements of 30 CFR 780.23. Therefore, we approve this change.

15. W.Va. Code 5B-2A-6. Community impact statement.

West Virginia proposes to add a new provision at W.Va. Code 5B-2A-6(9), which would require the community impact statement to include the operator's acknowledgment of recommendations and infrastructure components identified by the master land use plan. West Virginia has also proposed to move the prior provisions of

W.Va. Code 5B-2A-6(d) to 5B-2A-6(e) and add a new provision at W.Va. Code 5B-2A-6(d), which would require the local, county, or regional development authorities in the vicinity of a surface mining operation to provide a written acknowledgment of receipt of the community impact statement to the OCCD. The former provisions of W.Va. Code 5B-2A-6(d), which provides the effective date of W.Va. Code 5B-2A-6, has been moved to newly created W.Va. Code 5B-2A-6(e). At W.Va. Code 5B-2A-6(e)(1), West Virginia has proposed to replace "the effective date of this article" with "June 11, 1999."

Under the proposed revisions, operators must not only develop community impact statements but also must provide an acknowledgement of the recommendations of any approved master land use plan that pertains to the land to be mined and any infrastructure components needed to accomplish the postmining land use required by the plan. While there is no direct Federal counterpart to this requirement, we find that, as amended, the new language added at W.Va. Code 5B-2A-6 is no less effective than the Federal requirements in 30 CFR 780.23, 784.15, 784.16, 816/817.133 and Part 824, and no less stringent than SMCRA sections 507, 508, and 515(b), (c), (d) and (e) (30 U.S.C. 1257, 1268, 1265(b), (c) and (e)). Therefore, we approve the revisions.

16. W.Va. Code 5B-2A-9. Securing developable land and infrastructure.

W.Va. Code 5B-2A-9(f) generally describes that State and local government entities are responsible for determining land and infrastructure needs in the general area of mining operations and describes the creation, revision, and review of a master land use plan. At W.Va. Code 5B-2A-9(f), West Virginia proposes to delete a provision that "[p]articipation in a master land use plan is voluntary." At W.Va. Code 5B-2A-9(f)(1), which describes the target West Virginia governmental units responsible for developing a master land use plan, West Virginia proposes to replace

"State, local, county or regional development or redevelopment authorities" with "[t]he county commission or other governing body for each county in which there are surface mining operations that are subject to this article." This change would require those authorities to determine land and infrastructure needs and develop a master land use plan along certain lines; the revision also adds several examples to a non-exclusive list of postmining land uses to be considered. In addition, West Virginia proposes to add language to the end of W.Va. Code 5B-2A-9(f)(1) that would allow a county commission or other governing body of a county to designate a regional development or redevelopment authority to assist in the development of a master land use plan and to add that such commission may adopt a master land use plan developed after July 1, 2009, only after a reasonable public comment period.

West Virginia proposes to delete the prior version of W.Va. Code 5B-2A-9(f)(2), which required OCCD to review and WVDEP to approve, any master land use plan to ensure compliance with W.Va. Code 22-3-10. West Virginia proposes to add a requirement that OCCD assists in the development of the master land use plan on request of a county or designated development or redevelopment authority. West Virginia proposes to renumber W.Va. Code 5B-2A-9(f)(3) to W.Va. Code 5B-2A-9(f)(4) and add new provisions at W.Va. Code 5B-2A-9(f)(3)(A) through W.Va. Code 5B-2A-9(f)(3)(D). These new provisions would require OCCD and WVDEP to review master land use plans existing as of July 1, 2009, to determine compliance with the amended rules and regulations, require that master land use plans be submitted to OCCD to be approved or disapproved within 3 months of submission, require OCCD to review approved master land use plans every 3 years, provide stipulations for submission and public comment of updated master land use plans, and require the county or designated development authority to submit a supplemental master land use plan if a prior plan was disapproved by OCCD.

Under these requirements, an operator must include in the surface mining permit application a master land use plan developed by the county or by the development or redevelopment authority and approved by OCCD. Infrastructure component standards must be in place before the respective county development or redevelopment authority may accept ownership of property donated pursuant to a master land use plan. As provided in the introduction to W.Va. Code 5B-2A-9(f), no provision of W.Va. Code 5B-2A-9 may be construed as modifying the requirements of WVSCMRA (W.Va. Code 22-3-1 *et seq.*). Even as modified, and even with the new requirement for a master land use plan in the permit application, the Secretary still retains oversight over permit issuance and compliance with WVSCMRA. This includes ensuring that permits satisfy reclamation plan requirements at W.Va. Code 22-3-10 and comply with the requirement to restore the approximate original contour at W.Va. Code 22-3-13.

While there are no direct Federal counterparts to these requirements about master land use plans, we find that, as amended, W.Va. Code 5B-2A-9 is not inconsistent with the Federal requirements at 30 CFR 780.23, 784.15, 784.16, 816/817.133 and Part 824 and is in accordance with SMCRA sections 507, 508, and 515(b)-(e) (30 U.S.C. 1257, 1258, 1265(b)-(e)). Therefore, we approve these changes.

17. W.Va. Code 22-3-10. Reclamation plan requirements.

West Virginia proposes to add new language to W.Va. Code 22-3-10 providing a non-exclusive list of alternative postmining land uses, allowing the Secretary to approve postmining land uses not specified in the master land use plan under certain circumstances, allowing an operator to seek a permit revision to include a postmining land use approved in a master land use plan, and specifying the effective date of these amendments.

The revised provisions are intended to require that surface mine reclamation

plans conform with master land use plans approved by OCCD or to authorize surface mine reclamation plans that include alternative, non-conforming postmining land uses under certain circumstances. Although there are no specific requirements governing compliance with master land use plans in SMCRA, we find that, except as discussed below, the proposed revisions at W.Va. Code 22-3-10(a)(3), (b), and (d) are in accordance with the provisions at SMCRA sections 507, 508, and 515(b)-(e) (30 U.S.C. 1257, 1258, 1265(b)-(e)) and consistent with the Federal regulations at 30 CFR 780.23, 784.15, 784.16, 816/817.133, and are therefore approved.

West Virginia's proposed changes to W.Va. Code 5B-2A-9(f)(2) would remove the requirement that WVDEP approve a master land use plan ensuring compliance with W.Va. Code 22-3-10. West Virginia's proposed changes also include, at W.Va. Code 22-3-10(a)(3)(A), a requirement that the postmining land use proposed in any reclamation plan must comport with the land use that is specified in the master land use plan approved by OCCD. West Virginia has proposed to add, at W.Va. Code 22-3-10(a)(3)(C), a provision stating that a postmining land use complying with a master land use plan approved in accordance with W.Va. Code 5B-2A-1 *et seq.*, satisfies the requirements for an alternative postmining land use and also satisfies the variance requirements at W.Va. Code 22-3-13, if applicable to the proposed use. This scheme could arguably allow OCCD to approve a proposed postmining land use that does not meet the applicable reclamation and postmining land use requirements set forth in W.Va. Code 22-3-10 and W.Va. Code 22-3-13. While West Virginia has added new provisions that require a master land use plan to be submitted to WVDEP and OCCD for review at W.Va. Code 5B-2A-9(f), this section does not contain any further mention of WVDEP's oversight over such plans or describe a consequence if WVDEP finds that the plan fails to comply with WVSCMRA.

However, the proposed changes have made master land use plans a required part of the reclamation plan proposed at the permit application or permit revision stage. WVDEP still retains oversight over permitting actions and must ensure that the reclamation plan, including the master land use plan, complies with WVSCMRA, including reclamation plan requirements at W.Va. Code 22-3-10 and performance standards at W.Va. Code 22-3-13. Approval of a master land use plan by OCCD does not create a safe harbor allowing a postmining land use that is inconsistent with West Virginia's reclamation plan, an alternative postmining land use, or the AOC requirements at W.Va. Code 22-3-1 *et seq*.

We are approving these changes with the understanding that WVDEP will continue to ensure compliance of the reclamation plan, including any master land use plan, with WVSCMRA. WVDEP must review any such plan to ensure they meet the requirements of the reclamation plan, the alternative postmining land use, and the AOC variance requirements of the approved program to ensure that WVSCMRA continues to accord with sections 508 and 515 of SMCRA. If we determine, in the future, that West Virginia is implementing this provision differently, we may require West Virginia to submit a program amendment to revise their program to reflect our understanding of this provision.

18. W.Va. Code 22-3-11. Bonds.

The prior version of W.Va. Code 22-3-11(h)(1) contained a two-stage special reclamation tax on each ton of coal extracted. The tax was to be initially assessed at seven and four-tenths cents per ton for the first 12 months after the tax was established, increasing an additional seven cents per ton effective July 1, 2009. We approved West Virginia's alternative bonding provisions on an interim basis in the July 22, 2009, *Federal Register* (74 FR 36113), and in the same notice provided for a public comment period and an opportunity for a public hearing. We subsequently

approved an increase in the tax to twenty-seven and nine-tenths cent, per actuarial recommendations, in the July 11, 2012, *Federal Register* (77 FR 40793), and provided an opportunity for public comment. West Virginia has proposed to amend W.Va. Code 22-3-11(h)(1) by removing obsolete references to the expired, lesser rate, and reorganizing W.Va. Code 22-3-11(h)(1) for clarity. In addition, the prior language of this subsection required the additional seven cent tax to be reviewed and, if necessary, adjusted annually by the legislature on recommendation of the Special Reclamation Fund Advisory Council. West Virginia has proposed to replace this with a requirement that the legislature review the tax rate every 2 years to determine whether it should be continued. The existing requirement that the special reclamation tax cannot be reduced "until the Special Reclamation Fund and Special Reclamation Water Trust Fund have sufficient moneys to meet the reclamation responsibilities of the state" is left intact.

Pursuant to the Administrative Procedure Act at 5 U.S.C. 553(b)(3)(B), we found that good cause existed to approve the revisions on an interim basis, without notice and the opportunity for comment, which would have delayed collection of the increased special reclamation tax, contrary to the public interest.

In addition, as provided by W.Va. Code 22-1-17(g), the Special Reclamation Fund Advisory Council is required to submit annually to the legislature and the governor a report on the adequacy of the special reclamation tax and the fiscal condition of the special reclamation fund. The report is to include a recommendation on whether any adjustments to the special reclamation tax should be made.

Therefore, we find the proposed State revisions to W.Va. Code 22-3-11(h)(1), when read in combination with existing W.Va. Code 22-1-17(g), to be consistent with the Federal alternative bonding requirements at section 509(c) of SMCRA (30 U.S.C. 1259) and no less effective than the Federal alternative bonding requirements at 30

CFR 800.11(e). Accordingly, we approve the changes.

West Virginia's proposed alternative bonding provisions, as discussed above, are approved on a permanent basis.

IV. Summary and Disposition of Comments

Public Comments

On July 22, 2009, we published a *Federal Register* notice (74 FR 36113) announcing our approval on an interim basis of West Virginia's alternative bonding revisions enacted in SB 436 and SB 600 and submitted by letter dated May 22, 2009 (Administrative Record No. WV 1521). The July 22 notice requested public comments on the revisions (Administrative Record No. WV 1528).

On October 21, 2009, we published a *Federal Register* notice (74 FR 53972) (Administrative Record No. WV 1533) and asked for public comments on additional program amendments, as submitted by WVDEP in letters dated May 11, 2009, and July 6, 2009 (Administrative Record Nos. WV 1522 and WV 1523). Several of the revisions were enacted in SB 153 and SB 1011 and the remainder were the result of WVDEP rulemaking under existing statutory authority. On November 20, 2009, the West Virginia Highlands Conservancy (WVHC) requested an extension of the comment period (Administrative Record No. WV 1542). An extension was granted, and the comment period closed on December 18, 2009 (Administrative Record No. WV 1542).

On February 7, 2011, we published another *Federal Register* notice (76 FR 6589) concerning one of the revisions proposed in the October 21, 2009, notice, in particular, a provision authorizing postmining use of cropland for bio-fuel production. We also reopened the comment period on this one revision (Administrative Record No. WV 1554). The comment period closed on February 22, 2011.

By letter dated December 17, 2009, WVHC submitted written comments on the

October 21, 2009, notice (Administrative Record No. WV 1541). No other public comments were received.

1. WVHC explained that the unchanged original language of subsection 3.29.a establishes a generally positive limitation on the use of IBRs. However, WVHC stated that the proposed deletion in subsection 3.29.a of the prohibition on use of IBRs to address unauthorized mining outside of the original permit areas is unexplained. According to WVHC, an unexplained amendment that expands the use of IBRs to circumstances where such use is now unauthorized is arbitrary and capricious. WVHC contends that West Virginia has a legal obligation to justify every expansion in the use of IBRs in lieu of permit revisions.

OSMRE Response: WVDEP proposed to delete language prohibiting the use of IBRs to abate a violation where encroachment beyond the permit area is involved, unless an equal amount of acreage is deleted from the permit area. As discussed above in Finding 6, the Federal regulations do not specifically provide for the use of IBRs to abate violations. It could be argued that the proposed deletion at subsection 3.29.a is meant to allow an operator to conduct an operation outside the permit area without obtaining a new permit or to obtain an IBR to abate a violation without requiring the acreage to be deleted from the permitted area and transferred to the encroachment area. However, there is no positive grant of any such right to conduct mining operations outside the permitted area. While the rule with its proposed deletion is still no less stringent than SMCRA and no less effective than the Federal regulations, we will continue to monitor the implementation of IBR provisions in West Virginia to ensure that WVDEP continues to require operators whose primary purpose is coal removal to delete acreage from the permitted area and transfer it to the encroachment area.

2. WVHC also stated that the authority in subsection 3.29.b.2 allowing use of IBRs to expand the permit areas of other mining operations, including but not limited to

loadout operations, coal refuse disposal operations and coal preparation operations, is unexplained and, therefore, arbitrary and capricious. According to WVHC, WVDEP has a legal obligation to justify every expansion in the use of IBRs in lieu of permit revisions. In addition, WVHC commented that all the other (mining) operations are conducted primarily or exclusively on the surface and, therefore, logically should be subject to the same limitations on IBR use as surface mining operations,

OSMRE Response: As discussed above in Finding 7, WVDEP proposes to increase its IBR acreage limitation and apply its waiver provisions for underground mining operations to certain surface activities associated with underground mining operations, including, but not limited to, loadout operations, coal refuse disposal operations, and coal preparation operations. In the 1990s, we initially approved West Virginia's 50-acre limitation on IBR waivers for underground mining because of the distinct differences between underground and surface coal mining operations. West Virginia's waiver provision, allowing expansion up to 50 acres, was limited to underground mining operations. This would not be the case under the proposed amendment, which effectively ignores the distinction between surface and underground mining operations in the IBR context, and West Virginia would be free to grant waivers that could allow unlimited acreage under an IBR for surface mining operations. Therefore, as explained in Finding 7, we are not approving the language proposed in WVDEP's revision that states "and other mining operations including but not limited to loadout operations, coal refuse disposal operations and coal preparation operations." As a result, West Virginia's rationale for the proposed language need not be explained.

3. WVHC further stated that the proposed deletion of four of six required findings in subsection 3.29.d that the Secretary must make before approving an IBR is unexplained and, thus, arbitrary and capricious. According to WVHC, the removal of these required findings is inconsistent with SMCRA and the applicable Federal

requirements.

OSMRE Response: As explained above in Finding 8, the language that West Virginia is proposing to delete sets forth criteria that are used by the Secretary to determine whether an IBR should be approved. In their place, West Virginia has adopted similar criteria in new subsection 3.29.e, as discussed in Finding 9. We are approving West Virginia's proposal for subsection 3.29.e, with the caution that the use of the new criteria may result in internal program inconsistency. The Federal regulations are silent about the difference between a significant and an insignificant IBR. However, because West Virginia will require that significant IBRs be subject to the notice and comment procedures applicable to significant permit revisions except as discussed above and because the Federal regulations provide wide discretion to the regulatory authority to establish guidelines for determining what constitutes a significant revision, we determined that West Virginia's proposed deletion and the remaining required findings for IBRs at subdivision 3.29.d are as stringent as the Federal IBR requirements in section 511(a)(3) of SMCRA and are no less effective than either 30 CFR 774.13(d) or the permit revision requirements at 30 CFR 774.13(b)(2). In addition, we are requiring proof of advertisement of all significant IBRs in accordance with CSR 38-2-3.2.g. and 30 CFR 778.21.

4. In addition, WVHC stated that the proposed requirement at subsection 3.29.e, which provides that the Secretary will review each IBR application to determine if an updated PHC determination or cumulative hydrologic impact assessment (CHIA) is required, is arbitrary and capricious because the proposed requirement fails to incorporate existing reasonable, science-based criteria for making the required determination; instead, according to WVHC this provision makes the determination entirely discretionary with the Secretary. WVHC also stated the proposed requirement that the Secretary determine the significance of each IBR based only on the information provided in the IBR application is also arbitrary and capricious. The WVHC commented that the use of the

word “significant” in establishing criteria for determining the significant nature of a proposed IBR creates a circular unenforceable definition that will effectively allow the Secretary to dispense with public participation. According to WVHC, in the approval of any IBR, WVDEP must establish and apply specific, reasonable, and non-discretionary criteria for dispensing with the public participation requirements. Finally, WVHC noted that rulemaking and IBR approvals by WVDEP have increasingly allowed changes that are no longer incidental but rather substantial alterations to active permits. The latest proposal, according to the WVHC, takes that abuse one step further and should be denied.

OSMRE Response: WVHC expresses concerns with the standards imposed by the proposed amendment in two instances: (1) when the agency determines whether an IBR is significant, such that public comment is required before approving it; and (2) when the agency determines whether an IBR requires an updated PHC or CHIA. We do not agree that either concern demands a change in the proposed rule.

As to the first point (whether an IBR is significant), we agree with the WVHC that use of the term “significant” in the proposed amendment provides little guidance to the agency beyond applying its technical expertise and exercising sound professional judgment in assessing significance. But we believe the guidelines can be implemented successfully because the agency must construe the word “significant” in a manner consistent with its commonly understood meaning and in a manner that is reasonable under the factual circumstances present. Importantly, the regulation guides the agency in this task by identifying seven circumstances in which significance should be considered, as set out in subsections 3.29.e.1.A through 3.29.e.1.G. WVHC construes the proposed amendment as providing that an application is the “only” basis for determining significance. We do not read the regulation to provide such an exclusive limitation. It is incumbent upon the agency to use any available information to determine whether an

IBR is significant instead of limiting itself solely to the information contained in the IBR application.

As to the second point (whether an updated PHC or CHIA is required), WVHC has contended that that the absence of a standard (or "science-based criteria") for making the first determination required in subsection 3.29.e (i.e., whether an updated PHC or CHIA is required when approving an IBR) makes the proposed amendment entirely discretionary and subject to "agency whim." We agree the IBR provision vests the agency with very broad discretion in making the update determination, but it establishes the same authority as is provided in the context of permit revisions. *See* CSR 38-2-3.28.b.1. That subsection states, in almost identical language, that each permit revision "shall be reviewed . . . to determine if an [updated PHC or CHIA] is required", and does so, like the provision in in subsection 3.29.e, without specifying any standards. WVHC does not identify any principle of law that prohibits a broad grant of discretionary authority, and we are unaware of any. We further note that statutes and regulations frequently make broad grants of authority and vest considerable discretion in administrative agencies, just as WVDEP has done in the case of permit revisions in subsection 3.28.b.1. The agency, nonetheless, is not unbounded in making its update on a PHC determination. It must apply its technical expertise and exercise sound professional judgment, reaching a conclusion that is rational, supported by the record, and based on a consideration of all relevant factors.

As discussed above in Finding 9, because of the internal program inconsistency that could result due to the change, we are approving this part of the amendment with the understanding that West Virginia's proposal that the criteria set forth in subsection 3.29.e for determining whether a permit revision is significant be used only as guidance. With this caveat, we are approving West Virginia's proposed changes at subdivision 3.29.e when determining what constitutes a significant and non-significant IBR. In addition, we

are approving subsection 3.29.e with the understanding that WVDEP will require proof of publication of the advertisement for a significant IBR as required by subdivision 3.2.g.

Therefore, our partial approval of subdivision 3.29.e is contingent on our understanding as set forth in Finding 9.

5. WVHC also commented that the special reclamation tax of 14.4 cents per ton of prepared coal at 22-3-11(h)(1) continues to be insufficient to assure the long-term viability of the Special Reclamation Fund to provide sufficient moneys for West Virginia to meet its reclamation responsibilities under the law.

OSMRE Response: As described in Finding 18 and in the interim rule as published in the July 22, 2009, *Federal Register* (74 FR 36113), West Virginia consolidated and increased its special reclamation and additional taxes, into a special reclamation tax with a rate of 14.4 cents per ton of clean coal mined, reviewable every 2 years by the Legislature, instead of annually. This statutory revision was adopted by the Legislature and approved by the Governor upon the recommendation of the Special Reclamation Fund Advisory Council (Advisory Council). Subsequently, we approved in the July 11, 2012 *Federal Register* (77 FR 40794) an increase of the rate of the special reclamation tax to twenty-seven and nine-tenths cents per ton of clean coal mined. This rate increase was based on actuarial recommendations relating to the continued fiscal viability of the Fund. The Advisory Council's purpose is "to ensure the effective, efficient and financially stable operation of the special reclamation fund." *See* W.VA. Code 22-1-17. Despite this, WVHC claims that the tax rate will be "insufficient to assure the long-term viability of the Special Reclamation Fund," but the commenter neither offers any basis for this statement nor offers any or data to support it, which leaves the assertion conclusory.

In addition, the law provides that the tax may not be reduced until the Special Reclamation Fund and the Special Reclamation Water Trust Fund have sufficient moneys

to meet the reclamation responsibilities of West Virginia established in this section. West Virginia's 2021 actuarial report, assuming a funding rate of twenty-seven and nine-tenths cents per ton and new permits at current bond values, the Special Reclamation Fund and the Special Reclamation Water Trust Fund are projected to have sufficient revenue to last through 2039. Given that land and water reclamation costs, water treatment standards, and economic conditions are constantly changing, it is difficult to say for certain how much money these Funds will need to assure their long-term viability. Thus, it is a matter that West Virginia is obligated to closely monitor. West Virginia has made significant progress in completing land reclamation at its backlog of bond forfeiture sites, including treating pollutional discharges at those sites that needed it. Furthermore, as provided by 22-1-17(g), the Advisory Council is continuing to use its technical expertise to monitor these Funds and recommend adjustments in their revenue rates to ensure their financial solvency. We will continue to monitor the Advisory Council's progress in ensuring the long-term financial stability of these Funds.

6. WVHC indicated that the proposed changes in section 22-3-10 of the West Virginia Code lend undue weight to master land use plans that are often approved with little input from people living in small, somewhat isolated communities in hollows where most large mining operations occur. WVHC also stated that the proposed changes add "renewable and alternative energy uses" to the mix of acceptable postmining land uses. WVHC questioned why West Virginia defined these uses at 5B-2A-3 if they are already acceptable under State law.

OSMRE Response: As discussed in Findings 14 through 17 above, we determined that the revised provisions are intended to require that surface mine reclamation plans conform with master land use plans and to authorize surface mine reclamation plans to contain alternative, non-conforming postmining land uses under certain circumstances. Although there are no specific requirements governing master land use plans in SMCRA,

we determined, except as discussed below, that the proposed revisions are no less stringent than SMCRA and no less effective than the Federal regulations.

We made this determination, in part, based on 5B-2A-9 which provides that "no provision of this section may be construed as modifying the requirements of" WVSCMRA. However, compliance with a master land use plan, as described in the discussion of subsection 10(a)(3)(C) above, will not necessarily ensure that the approved postmining land use will satisfy West Virginia's alternative postmining land use and AOC variance provisions. Nothing in the master land use plan can be inconsistent with or supersede any reclamation plan, alternative postmining land use, or AOC variance requirements of West Virginia's approved regulatory program.

In response to WVHC's specific comments, we agree that master land use plans should neither be given undue weight nor supersede an approved reclamation plan. The proposed changes have made master land use plans a required part of the reclamation plan proposed at the permit application or permit revision stage. WVDEP still retains oversight over permitting actions and is still required to ensure that the reclamation plan, including the master land use plan, complies with WVSCMRA, including reclamation plan requirements at W.Va. Code 22-3-10 and performance standards at W.Va. Code 22-3-13. We have approved these changes with the understanding that WVDEP will still exercise its authority to ensure compliance of the master land use plan with WVSCMRA, particularly regarding other requirements of the reclamation plan, the alternative postmining land use, and the AOC variance requirements of the approved program to ensure that WVSCMRA continues to accord with sections 508 and 515 of SMCRA.

Federal Agency Comments

On June 17, 2009, in accordance with 30 CFR 732.17.17(h)(11)(i) and 503(b) of SMCRA, we requested comments from various Federal agencies on West Virginia's proposed changes to its alternative bonding system submitted by letter dated May 22,

2009 (Administrative Record No. WV 1524).

In response, OSMRE received responses from the Natural Resources Conservation Service (NRCS), the Mine Safety and Health Administration (MSHA), the U.S. Department of Energy (DOE), and the Bureau of Land Management (BLM); each stated that they had no comments. *See* Administrative Record No. WV 1525 (NRCS), Administrative Record No. WV 1526 (MSHA), Administrative Record No. WV 1527 (DOE), and Administrative Record No. WV 1531 (BLM).

On October 27, 2009, we again wrote various State and Federal agencies with an actual or potential interest in the West Virginia program and requested comments concerning the proposed State amendments submitted by letters dated May 11, 2009, and July 6, 2009. Those amendments related to changes in West Virginia's surface mining reclamation regulations and in reclamation plan requirements (Administrative Record No. WV 1535).

NRCS, DOE, and MSHA each responded that they had no comments. *See* Administrative Record No. WV 1534 (NRCS), Administrative Record No. WV 1539 (DOE), and Administrative Record No. WV 1540 (MSHA).

On December 9, 2010, we requested comments from various State and Federal agencies on WVDEP's proposal to change the term bio-oil cropland to bio-fuel cropland (Administrative Record No. WV 1549).

On January 7, 2011, the NRCS (Administrative Record No. WV 1551) responded with concerns that WVDEP, in consultation with the West Virginia Department of Agriculture, may release the performance bond based solely upon the performance of converting the land use to cropland for the purpose of bio-fuel production. The NRCS suggested that language should be included to allow for a postmining land use for bio-fuel cropland or grasslands that includes adequate rotations to prevent erosion, such as cover crops, permanent close-grown grasses, or vegetation, before bond release.

States are required to encourage operators to establish diverse, non-invasive native vegetative species as part of the postmining land use of a surface mining reclamation operation. While it is West Virginia's practice to do so, West Virginia cannot restrict the use of non-native plants if they are grown as a bio-fuel source as long as they are not considered invasive, toxic or noxious under State or Federal law. Under West Virginia's approved program, operators who choose biofuel as an alternative postmining land use will have to demonstrate that their reclamation plans control erosion and prevent the degradation of the soil resource and nearby water resources.

As set forth in Finding 10, West Virginia has acknowledged that WVDEP will not authorize bio-fuel as a postmining land use on sites requesting a mountaintop AOC variance unless the plans, financial commitment, and construction schedule for a plant facility to convert the cellulose, plant, or algae to bio-fuel are approved before permit issuance and reaffirmed at the time of final bond release, and the plant is located on-site or within a reasonable driving distance of the area. In addition, West Virginia will require the operator to comply with revegetation standards and use approved statistical sampling methods for assessing revegetation success prior to approving final bond release for any site that has a postmining land use of bio-fuel cropland.

On January 7, 2011, the MSHA's Office of Standards, Regulations and Variances (OSRV) (Administrative Record No. WV 1552) responded to our request for comments on the bio-oil/bio-fuel change. The OSRV responded that they disagree with WVDEP's statement: "Biofuels cover a wide range of fuels which are derived from biomass. The term covers solid biomass while bio-oil was limited to biodiesel." OSRV considers bio-oil to not be limited to biodiesel because bio-oil can be upgraded to gasoline and aviation fuel. OSRV feels that the two terms are interchangeable and opines that West Virginia's change was non-substantive. In contrast, on January 14, 2011, the DOE (Administrative Record No. WV 1553) responded to our request for comments on the bio-oil/bio-fuel

change. The DOE agreed with WVDEP that changing the term from "Bio-fuel" from "Bio-oil" is a useful change. According to DOE, the term bio-fuel covers a wide range of fuels derived from biomass that includes solid biomass, liquid fuels, and gaseous fuels such as synthetic natural gas, syngas, hydrogen, and various bio-gases while bio-oil is limited in scope to mostly biodiesel.

It is not necessary for us to weigh in on the proper scope of the terms "bio-oil" and "bio-fuel." For purposes of our consideration of this proposed amendment, because West Virginia considers bio-fuel to be broader and covering a wider range of fuels than bio-oil, we have considered this change to be substantive. As a result, we solicited additional public comments.

U. S. Environmental Protection Agency (EPA) Comments

Under Federal regulations at 30 CFR 732.17(h)(11)(i) and (ii), we are required to solicit comments and 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 (CWA) (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (CAA) (42 U.S.C. 7401 *et seq.*). As we determined that none of the proposed State revisions pertained to air or water quality standards, EPA's concurrence was not requested. However, OSMRE solicited comments from EPA, along with the other Federal agencies, on the three occasions mentioned above.

On July 28, 2009 (Administrative Record No. WV 1530), the EPA responded to our June 17, 2009, request, (Administrative Record No. WV 1524) concerning West Virginia's alternative bonding system, commonly referred to as the Special Reclamation Fund. The EPA stated that it did not have any specific comments/proposed edits at this time. In addition, EPA noted that implementation of West Virginia's regulations, including the proposed amendments, must comply with the CWA, the regulations implementing the National Pollutant Discharge Elimination System (NPDES), and other

relevant environmental statutes and regulations. EPA also noted that, pursuant to 30 U.S.C. 1292, SMCRA and its implementing regulations, including WVDEP's proposed amendments, do not supersede, modify, amend or repeal the CWA and its implementing regulations. In other words, any discharges associated with surface mining operations must comply with the CWA.

On June 22, 2010 (Administrative Record No. WV 1543), in response to our letter dated October 27, 2009 (Administrative Record No. WV 1522), the EPA responded to our request for comments on proposed revisions to West Virginia's permanent surface coal mining regulatory program. The EPA stated that, whereas subsection 3.29.d.4, proposed for deletion, required a finding that an IBR "will not result in adverse environmental impacts of a larger scope or different nature from those described in the approved permit," this same criterion set forth in proposed 3.29.e. would serve only as "guidance" in determining whether an IBR is significant. EPA also stated that approval of an IBR may "require a major modification of the applicable NPDES permit *(see* 40 C.F.R. 122.62(a)(1)) before an approved IBR could be implemented. In addition, an IBR may encompass activities that trigger the new source provisions of the NPDES regulations."

In response, we note that the proposed amendment includes criteria that are to be used as guidance by WVDEP for making a determination as to whether an IBR is significant or insignificant. As noted above in Finding 9, we have cautioned that West Virginia's proposal may result in internal program inconsistency. We agree that the new IBR provisions must be implemented in accordance with all SMCRA, CWA, and regulatory provisions cited by the EPA. Finally, we agree that there may be occasions when approval of an IBR may require a major modification of the applicable NPDES permit before the IBR can be implemented, and that an IBR may encompass activities that trigger the NPDES new source regulations.

EPA also noted a concern that the changes to West Virginia's NPDES Rule for Coal Mining Facilities in SB 153, 47 CSR, series 30, could have the potential to affect water quality, citing, for instance, the adverse water quality effects associated with the placement of valley fills in streams; degraded water quality by alkaline mine drainage; and impaired aquatic life.

In response, we acknowledge that decisions on changes to West Virginia's NPDES regulations for coal mining facilities are solely within EPA's purview.

The EPA noted its concern that, if SB 1011 is implemented in its current form, it may have adverse water quality impacts because it legislates a preference for postmining land use that does not encourage consideration of environmental impacts arising from the postmining land use and may be at odds with current science that suggests a need for revised mine design to increase postmining slopes to avoid infiltration. In addition, the bill makes no provision for any site-specific determination about the water quality impacts associated with a dual project purpose.

Noting that the list of renewable and alternative energy uses in SB 1011 is not all-encompassing, EPA points out that the list does not encourage localities to consider reforestation or returning the land to its previous natural conditions.

An operator must include a master land use plan developed by the county or by a development or redevelopment authority and approved by OCCD in the reclamation plan that accompanies a permit application. Infrastructure component standards must be in place before the county or other relevant authority can accept ownership of property donated pursuant to a master land use plan. No provision therein may be misconstrued as modifying the requirements of WVSCMRA.

Operators must not only develop community impact statements but provide an acknowledgement of the recommendations of any approved master land use plan that pertains to the land to be mined and any infrastructure components needed to accomplish

the postmining land use required by the plan.

The EPA also indicated that SB 1011 encourages mining projects to create flat-top lands instead of slopes, citing a growing body of science pointing to the slope's ability to prevent infiltration and the discharge of total dissolved solids. The effort of SB 1011, according to the EPA, does not encourage slopes in connection with master land use plans or their incorporation in reclamation plans and site-specific projects, which would avoid the infiltration of the dissolved solids. The EPA recognizes that the PHC and CHIA may partially address this concern but notes that, historically, issues related to water budget have been addressed more often than not.

The amendment requires that surface mine reclamation plans conform with master land use plans and authorizes surface mine reclamation plans to contain alternative, non-conforming postmining land uses under certain circumstances. Revisions were approved with the understanding that postmining land uses involving "renewable and alternative energy" for mountaintop removal mining operations with variances from AOC and in accordance with revegetative success standards provided that they meet the regulatory requirements in SMCRA and Federal regulations and that the plans include a financial commitment to build a bio-fuel plant. Master land use plans and postmining land uses authorized under this section must comply with the reclamation and other postmining land use requirements of West Virginia's approved program.

In addition, any water quality impacts associated with such postmining land uses are expected to be addressed in the reclamation plans and must comply with the approved State program. However, we agree that compliance with a master land use plan may not necessarily ensure that the approved postmining land use will satisfy West Virginia's alternative postmining land use and AOC variance provisions of its approved program. Therefore, we have approved W.Va. Code 22-3-10(a)(3)(C) with the understanding that WVDEP retains the ability to ensure compliance of the master land use plan with

WVSCMRA, particularly regarding other requirements of the reclamation plan, the alternative postmining land use, and the AOC variance requirements of the approved program to ensure that WVSCMRA continues to accord with sections 508 and 515 of SMCRA, as discussed above in Finding 17.

V. OSMRE's Decision

Based on the above findings, we partially approve, with exceptions, West Virginia's program amendments submitted by letters dated May 11, 2009 (Administrative Record No. WV 1522), May 22, 2009 (Administrative Record No. WV 1521), and July 6, 2009 (Administrative Record No. WV 1523).

As discussed in Finding 5, we approve West Virginia's permit revision requirements at subparagraph 3.28.b.1 with the understanding that WVDEP will require proof of publication of the advertisement for permit revisions as provided by subdivision 3.2.g and 30 CFR 778.21.

As discussed in Finding 6, we approve the proposed deletion of the IBR language regarding the abatement of a violation at subdivision 3.29.a with the understanding that the primary purpose of an IBR cannot be to provide for coal removal. In a situation where coal removal is intentional and the primary purpose for operations conducted outside of the existing permit area, we expect WVDEP to require an operator to delete acreage from the permitted area and transfer it to the encroachment area.

As discussed in Finding 7, we do not approve the proposed IBR revision at subparagraph 3.29.b.2 which reads, "and other mining operations including but not limited to loadout operations, coal refuse disposal operations and coal preparation operations."

As discussed in Finding 9, we approve new subsection 3.29.e with the understanding that West Virginia will require proof of publication of the advertisement for a significant IBR as required by subdivision 3.2.g.

As discussed in Finding 10, we approve West Virginia's bio-fuel cropland requirements at subsection 7.8 with the understanding that they be implemented in the manner described therein.

As discussed in Finding 17, we approve the changes to W.Va. Code 22-3-10(a)(3)(C) with the understanding that WVDEP retains the ability to ensure compliance of the master land use plan with WVSCMRA, particularly regarding other requirements of the reclamation plan, the alternative postmining land use, and AOC variance requirements of the approved program to ensure that WVSCMRA continues to accord with sections 508 and 515 of SMCRA.

To implement this decision, we amend the Federal regulations at 30 CFR part 948 that codify decisions concerning the West Virginia program. In accordance with the Administrative Procedure Act, this rule will take effect 30 days after the date of publication. Section 503(a) of SMCRA requires that West Virginia's program demonstrate that West Virginia has the capability of carrying out the provisions of the Act and meeting its purposes. SMCRA requires consistency of State and Federal standards.

VI. Statutory and Executive Order Review

Executive Order 12630 – Government Actions and Interference with Constitutionally Protected Property Rights

This rule would not effect a taking of private property or otherwise have taking implications that would result in public property being taken for government use without just compensation under the law. Therefore, a takings implication assessment is not required. This determination is based on an analysis of the corresponding Federal regulations.

Executive Orders 12866—Regulatory Planning and Review and 13563—Improving Regulation and Regulatory Review

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB) will review all significant rules. Pursuant to OMB guidance dated October 12, 1993, the approval of State program amendments is exempted from OMB review under Executive Order 12866.

Executive Order 13771—Reducing Regulation and Controlling Regulatory Costs

State program amendments are not regulatory actions under Executive Order 13771 because they are exempt from review under Executive Order 12866.

Executive Order 12988 - Civil Justice Reform

The Department of the Interior has reviewed this rule as required by section 3 of Executive Order 12988. The Department determined that this *Federal Register* notice meets the criteria of section 3 of Executive Order 12988, which is intended to ensure that the agency review its legislation and proposed regulations to eliminate drafting errors and ambiguity; that the agency write its legislation and regulations to minimize litigation; and that the agency's legislation and regulations provide a clear legal standard for affected conduct rather than a general standard, and promote simplification and burden reduction. Because section 3 focuses on the quality of Federal legislation and regulations, the Department limited its review under this Executive order to the quality of this *Federal Register* document and to changes to the Federal regulations. The review under this Executive order did not extend to the language of West Virginia regulatory program or amendment that West Virginia drafted.

Executive Order 13132 - Federalism

This rule has potential federalism implications as defined under section 1(a) of Executive Order 13132. Executive Order 13132 directs agencies to "grant the States the maximum administrative discretion possible" with respect to Federal statutes and regulations administered by the States. West Virginia, through its approved regulatory program, implements and administers SMCRA and its implementing regulations at the

State level. This rule approves an amendment to the West Virginia program submitted and drafted by the State, and thus is consistent with the direction to provide maximum administrative discretion to States.

Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments

The Department of the Interior strives to strengthen its government-to-government relationship with Tribes through a commitment to consultation with Tribes and recognition of Tribal right to self-governance and sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it has no substantial direct effects on the distribution of power and responsibilities between the Federal Government and Tribes.

The basis for this determination is that our decision on the West Virginia program does not include Indian lands as defined by SMCRA or other Tribal lands, and it does not affect the regulation of activities on Indian lands or other Tribal lands. Indian lands under SMCRA are regulated independently under the applicable Federal Indian program. The Department's consultation policy also acknowledges that our rules may have Tribal implications where the State proposing the amendment encompasses ancestral lands in areas with mineable coal. We are currently working to identify and engage appropriate Tribal stakeholders to devise a constructive approach for consulting on these amendments.

Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Executive Order 13211 requires agencies to prepare a statement of energy effects for a rulemaking 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 a significant energy action under the definition in Executive Order 13211, a statement of

energy effects is not required.

Executive Order 13045—Protection of Children from Environmental Health Risks and Safety Risks

This rule is not subject to Executive Order 13045 because this is not an economically significant regulatory action as defined by Executive Order 12866; and this action does not address environmental health or safety risks disproportionately affecting children.

National Environmental Policy Act

Consistent with sections 501(a) and 702(d) of SMCRA (30 U.S.C. 1251(a) and 1292(d), respectively) and the Department of the Interior Departmental Manual, part 516, section 13.5(A), State program amendments are not major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C).

National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 3701 et seq.) directs OSMRE to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. (OMB Circular A-119 at p. 14). This action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with SMCRA.

Paperwork Reduction Act

This rule does not include requests and requirements of an individual, partnership, or corporation to obtain information and report it to a Federal agency. As this rule does not contain information collection requirements, a submission to OMB under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.) is not required.

Regulatory Flexibility Act

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 corresponding 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 corresponding Federal regulations.

Congressional Review Act

This rule is not a major rule under 5 U.S.C. 804(2). 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 on an analysis of the corresponding Federal regulations, which were determined not to constitute a major rule.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments, or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. This determination is based on an analysis of the corresponding Federal regulations, which were determined not to impose an unfunded mandate. Therefore, a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.) is not required.

List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Ben H. Owens,
Acting Regional Director,
North Atlantic – Appalachian Region.

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

PART 948 - WEST VIRGINIA

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

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

2. Section 948.12 is amended by adding paragraph (k) to read as follows:

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

* * * * *

(k) We are not approving the proposed incidental boundary revision (IBR) regulation clause at subparagraph 3.29.b.2 which reads, "and other mining operations including but not limited to loadout operations, coal refuse disposal operations and coal preparation operations" that was submitted in the State program amendment dated May 11, 2009.

* * * * *

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 dates	Date of publication of final rule	Citation/description

*******		
May 11, 2009, May 22, 2009, July 6, 2009	[Insert date of publication in the *Federal Register*]	CSR 38-2-3.15 (approved); 38-2-3.28.b.1 (qualified approval); 38-2-3.29.a (qualified approval); 38-2-3.29.b.2 (not approved); 38-2-3.29.d. (approved); 38-2-3.29.e. (qualified approval); 38-2-7.8. (qualified approval); 38-2-9.3.f. (approved); 38-2-11 (approved); W.Va. Code 5B-2A-3 (approved); 5B-2A-5 (approved); 5B-2A-6 (approved); 5B-2A-9 (approved); 22-3-10(a)(3) (qualified approval); 22-3-11 (approved).

[FR Doc. 2025-21782 Filed: 12/2/2025 8:45 am; Publication Date: 12/3/2025]