

WEST VIRGINIA

SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #3

FILED
1990 NOV -1 11 2 11

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: West Virginia Division of Energy TITLE NUMBER: 38

CITE AUTHORITY W. Va. Code 22-1-15 and 22A-3-4

AMENDMENT TO AN EXISTING RULE: YES X NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 2

TITLE OF RULE BEING AMENDED: West Virginia Surface Mining and
Reclamation Regulations

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: N/A

TITLE OF RULE BEING PROPOSED: N/A

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Stephen C. Keen
Stephen C. Keen
Director, Mines and Minerals
Section



STATE OF WEST VIRGINIA
DEPARTMENT OF ENERGY
1615 WASHINGTON STREET, EAST
CHARLESTON, WEST VIRGINIA 25311
TELEPHONE 348-3500

FILE

GASTON CAPERTON
GOVERNOR

Larry W. George
Commissioner

September 5, 1990

Mr. John Ranson
Secretary
Department of Commerce, Labor
and Environmental Resources
R-151 Capitol Complex
Charleston, West Virginia 25301

Dear Mr. Ranson:

The Division of Energy (DOE) was authorized by the 1990 Legislature to promulgate amendments to its rules and regulations governing surface mining and reclamation operations (CSR 38-2). All such amendments are subject to review and approval by the federal Office of Surface Mining Reclamation and Enforcement (OSMRE), as provided in federal regulations 30 CFR 732.17. These provisions also require DOE to update its regulations to conform to recent amendments to federal regulations. As a result of OSMRE's review, and in response to recent changes in federal regulations, the DOE is required to revise the subject amendment to more fully comply with federal provisions. Also, DOE wishes to amend its regulations to incorporate a number of administrative policies.

Therefore, it will be necessary for DOE to amend the existing legislatively-approved regulations in a manner indicated in the attached proposal.

Your approval of this action is respectfully requested pursuant to Chapter 5F of the Code of West Virginia.

Sincerely,
Larry W. George
Larry W. George
Commissioner

LWG:cc

Attachment

Approved:
John M. Ranson
9/6/90

FISCAL NOTE FOR PROPOSED RULES

Rule Title: West Virginia Surface Mining and Reclamation Regulations

Type of Rule: Legislative Interpretive Procedural

Agency WV Division of Energy Address 1615 Washington St., East
Charleston, WV 25311

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$ -0-	\$ -0-	\$ -0-	\$ -0-	\$ -0-
Personal Services					
Current Expense					
Repairs and Alterations					
Equipment					
Other					

2. Explanation of above estimates.

The proposed legislative rule will not result in increased or decreased revenue to the State

3. Objectives of these rules:

See attached Summary

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None

B. Economic Impact on Political Subdivisions; Specific Industries;
Specific groups of citizens.

None

C. Economic Impact on Citizens/Public at Large.

None

Date September 6, 1990

Signature of Agency Head or Authorized Representative

Stephen C. Keen

Stephen C. Keen
Director, Mines & Minerals Section

DATE: November 1, 1990

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: West Virginia Division of Energy

LEGISLATIVE RULE TITLE: West Virginia Surface Mining and Reclamation
Regulations Title 38, Series 2

1. Authorizing statute(s) citation West Virginia Code 22-1-15 and
22A-3-4

2. a. Date filed in State Register with Notice of Hearing:
September 6, 1990

b. What other notice, including advertising, did you
give of the hearing?

See attached listing

c. Date of hearing(s): October 10, 1990

d. Attach list of persons who appeared at hearing, comments
received, amendments, reasons for amendments.

Attached X No comments received

e. Date you filed in State Register the agency approved
proposed Legislative Rule following public hearing:
(be exact)

November 1, 1990

f. Name and phone number of agency person to contact
for additional information:

Stephen C. Keen, Director, Mines and Minerals Section

348-3500

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing: N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

SUMMARY

West Virginia Surface Mining and Reclamation Regulations
West Virginia Division of Energy
Title 38 Series 2
September 6, 1990

The proposed legislative rule amends the existing regulations in response to oversight review comments prepared by the federal Office of Surface Mining Reclamation and Enforcement (OSMRE). In accordance with federal regulations at 30 CFR 732.17 and 30 CFR 948.16, the Division of Energy (DOE) is required to amend its regulations to more fully conform to federal provisions and further amendments as are required to update the DOE regulations to conform to recent amendments to federal provisions. Also, the DOE wishes to incorporate into its regulations a number of administrative policies.

FILED

NOV -1 PM 2:42

LEGISLATIVE RULES
DEPARTMENT OF ENERGY
SERIES 2
WEST VIRGINIA SURFACE MINING
RECLAMATION REGULATIONS

INDEX

	<u>Page No.</u>
SECTION 1	
<u>General</u>	1
1.1 Scope	1
1.2 Applicability	1
1.3 Authority	2
1.4 Filing Date	2
1.5 Effective Date	2
SECTION 2	
<u>Definitions</u>	3
SECTION 3	
<u>Permit Application Requirements and Contents</u>	21
3.1 Applicant Information	21
3.2 Advertisement	24
3.3 Occupied Dwellings	28
3.4 Maps ..	28
3.5 Cross Sections and Profiles	33
3.6 Operation Plans and Specifications	33
3.7 Disposal of Excess Spoil	35
3.8 Existing Structures and Facilities	37

3.9	Operation(s) Near Public Road	38
3.10	Experimental Practices	38
3.11	In Situ Mining	39
3.12	Subsidence Control Plan	40
3.13	Underground Mine Abandonment Plan	43
3.14	Removal of Abandoned Coal Refuse Disposal Piles ..	43
3.15	Approved Persons	48
3.16	Fish and Wildlife Resources Information	48
3.17	Parks and Historic Lands	50
3.18	Endangered Species	51
3.19	Effect on Historic Places and Archaeological Sites	51
3.20	Prime Farmlands	51
3.21	Prohibitions and Limitations on Mining	52
3.22	Hydrologic Information	53
3.23	Geology	57
3.24	Protection of Adjacent Operations	59
3.25	Transfer, Assignment or Sale of Permit Rights and Obtaining Approval; Sale Conveyance or Assumption of Control or Ownership of an Operation	59
3.26	Permit Renewals and Permit Extensions	62
3.27	Permit Revisions	64
3.28	Incidental Boundary Revisions (IBR)	65
3.29	Variance	67
3.30	Federal or State Highway or Other Construction Exemption	69
3.31	Findings - Permit Issuance	70

3.32	Permit Conditions	75
3.33	Improviently Issued Permits:	77
	General Procedures	

SECTION 4

	<u>Haulageways or Access Roads</u>	80
4.1	Road Classification System	85
4.2	Plans and Specification	86
4.3	Stream Crossings	88
4.4	Existing Haulageways or Access Road	88
4.5	Infrequently Used Access Roads	88
4.6	Construction	89
4.7	Drainage Design	89
4.8	Performance Standards	91
4.9	Maintenance	92
4.10	Reclamation	92
4.11	Primary Roads	93
4.12	Other Transportation Facilities	94
4.13	Certification	95

SECTION 5

	<u>Drainage and Sediment Control Systems</u>	96
5.1	Natural Drainways	96
5.2	Intermittent or Perennial Stream	96
5.3	Stream Channel Diversions and Diversion	96
	Ditches	
5.4	Sediment Control	98

5.5 Permanent Impoundments 106

SECTION 6

Blasting 108

6.1 General Requirements 108

6.2 Blasting Plan 108

6.3 Public Notice of Blasting Operations 108

6.4 Blast Record 109

6.5 Blasting Procedures 111

6.6 Blasting Control for Other Structures 114

6.7 Certified Blasting Personnel 115

6.8 Preblast Survey 115

SECTION 7

Premining and Postmining Land Use 117

7.1 General 117

7.2 Land Use Categories 117

7.3 Criteria for Approving Alternative Postmining
Use of Land 119

SECTION 8

Fish and Wildlife Considerations 120

8.1 Protection of Fish, Wildlife and Related
Environmental Values 120

8.2 Habitat Development 121

SECTION 9

Revegetation 123

9.1 General Requirements 123

9.2 Revegetation Plan 123

9.3 Standards for Evaluating Vegetative Cover 126

SECTION 10

Prime Farmlands 130

10.1 Identification of Prime Farmlands 130

10.2 Negative Determination of Prime Farmland 130

10.3 Plan for Restoration of Prime Farmland 131

10.4 Special Requirements 132

10.5 Revegetation 134

10.6 Revegetation and Restoration of Soil Productivity 134

SECTION 11

Insurance and Bonding 137

11.1 Insurance 137

11.2 Performance Bonds 137

11.3 Surety Bonds 138

11.4 Collateral Bonds 138

11.5 Escrow Bonding 143

11.6 Self-Bonding 143

11.7 Combined Surety/Escrow Bonding 147

11.8	Incremental Bonding	149
11.9	Period of Liability	150

SECTION 12

	<u>Replacement, Release, and Forfeiture of Bonds</u>	151
12.1	Replacement of Bonds	151
12.2	Requirement to Release Performance Bonds	151
12.3	Bond Adjustments	154
12.4	Forfeiture of Bonds	155

SECTION 13

	<u>Requirements of a Notice of Intent to Prospect</u> ...	157
13.1	Notice of Intent to Prospect - Two hundred fifty (250) tons or less	157
13.2	Notice of Intent to Prospect - Greater than two .. hundred fifty (250) tons ..	159
13.3	Approval of Notice of Intent to Prospect - Greater than two hundred fifty (250) tons	161
13.4	Performance Standards	163
13.5	Expiration	165
13.6	Bond Release	165
13.7	Notice on Site	165
13.8	Public Roads	165
13.9	Lands Unsuitable Designation	165

SECTION 14

	<u>Performance Standards</u>	167
--	------------------------------------	-----

14.1	Signs and Markers	167
14.2	Casing and Sealing of Holes and Exposed Underground Openings	168
14.3	Topsoil	169
14.4	Diversions	170
14.5	Hydrologic Balance	170
14.6	Acid Producing and Toxic Materials	173
14.7	Monitoring Requirements	174
14.8	Steep Slope Mining	175
14.9	Auger Operations	178
14.10	Mountaintop Removal	180
14.11	Procedures to Obtain Inactive Status	181
14.12	Variance From Approximate Original Contour Requirements	183
14.13	MSHA Approval	184
14.14	Disposal of Excess Spoil	184
14.15	Backfilling and Regrading	195
14.16	Backfilling and Grading. Previously Mined Areas	197
14.17	Control of Fugitive Dust	199

SECTION 15

	<u>Performance Standards Applicable Only to</u> <u>Underground Mining Operations</u>	200
15.1	Site Development	200
15.2	Backfilling and Regrading	201
15.3	In situ Processing: Performance Standards	203
15.4	In situ Processing: Monitoring	204

SECTION 16

Subsidence Control 205

16.1 Public Notice 205

16.2 Surface Owner Protection 205

SECTION 17

Small Operator Assistance Program 207

17.1 General 207

17.2 Program Services 207

17.3 Eligibility for Assistance 207

17.4 Request for Assistance 208

17.5 Application Approval and Notice 210

17.6 Qualified Laboratories 210

17.7 Liability of Operators 211

SECTION 18

Citizen's Actions 212

18.1 Notice of Citizen's Suits 212

18.2 Citizen's Request for State Inspections 213

18.3 Review of Decision Not to Inspect or Enforce 214

18.4 Public Record 215

SECTION 19

Designation of Areas Unsuitable for Mining 217

LEGISLATIVE RULES
DEPARTMENT OF ENERGY
SERIES 2
WEST VIRGINIA SURFACE MINING
RECLAMATION REGULATIONS

38-2-1 General.

1.1 Scope. These regulations establish general and specific rules for permit application requirements and contents; haulageways or access roads; drainage and sediment control systems; blasting; premining and postmining land use; fish and wildlife considerations; revegetation; prime farmlands; insurance and bonding; replacement, release, and forfeiture of bonds; requirements of a notice of intent to prospect; performance standards; performance standards applicable to underground mining operations; subsidence control; small operator assistance program; citizen's actions; designation of areas unsuitable for mining; inspection and enforcement; Reclamation Board of Review; and Coal Refuse.

1.2 Applicability

(a) These rules and regulations apply to all prospecting and surface mining operations in the State of West Virginia, except the applicable subsections in Section 26, Article 3, Chapter 22A of the Act. The provisions of this paragraph do not constitute the issuance of a new permit for purposes of permit renewal or mid-term review of existing permits.

~~----- (b) -- For applications for new operations which have received an SMA number prior to the effective date of these regulations, the applicant shall acknowledge the applicability of these regulations to his proposed operation, in writing, to the Commissioner prior to issuance of the permit. -- Such acknowledgement shall be deemed sufficient to make the application complete for any new permit requirements contained in these regulations and shall become a part of the permit.~~

(eb) Permits issued after the effective date of these regulations ~~for existing or new operations not covered in (b)~~ shall incorporate in the application all of the requirements of these regulations.

Title 38
CSR 2
Section 1

1.3 Authority These rules and regulations are promulgated under the authority of the West Virginia Energy Act as provided in Section 15, Article 1, Chapter 22 of the Code of West Virginia, 1931, as amended and West Virginia Surface Coal Mining and Reclamation Act as provided in Section 4, Article 3, Chapter 22A of the Code of West Virginia, 1931, as amended.

1.4 Filing Date.

1.5 Effective Date.

19.1	Right to Petition	217
19.2	Initial Processing, Record-Keeping, and Notification Requirements	218
19.3	Hearing Requirements	220
19.4	Decision	221
19.5	Data Base and Inventory System Requirements	222
19.6	Public Information	222
19.7	Criteria for Designating Lands as Unsuitable	223
19.8	Commissioner's Responsibility for Implementation	223
19.9	Land Exempt From Designation as Unsuitable for ... Surface Coal Mining Operations	224

SECTION 20

	<u>Inspection and Enforcement</u>	225
20.1	Inspection Frequencies	225
20.2	Notice of Violations	226
20.3	Cessation Orders	229
20.4	Show Cause Orders	231
20.5	Civil Penalty Determinations	234
20.6	Procedure for Assessing Civil Penalties	235
20.7	Assessment Rates	237
20.8	When an Individual Civil Penalty May be Assessed	241
20.9	Amount of Individual Civil Penalty	241
20.10	Procedure for Assessment for Individual Civil Penalty	242
20.11	Payment of Penalty	242

20.12	Fees and Costs of Administrative Proceedings	243
-------	--	-----

SECTION 21

	<u>Reclamation Board of Review</u>	245
21.1	Open Meetings	245
21.2	Appeals to the Reclamation Board of Review	245
21.3	Ex parte Communication	245

SECTION 22

	<u>Coal Refuse</u>	246
22.1	Applicability	246
22.2	Certification	246
22.3	Permit Requirements - General	246
22.4	Permit Requirements - Impounding Structures	253
22.5	Performance Standards	258
22.6	Inspections	262
22.7	Impounding Structures	263

Title 38
CSR 2
Section 2

38-2-2 Definitions: As used in these regulations, unless used in a context that clearly requires a different meaning, the term:

2.1 Abandoned Coal Waste Disposal Area means any coal refuse disposal area which is not part of an active surface mining operation. This definition does not relieve any operator from his reclamation responsibility for the abandoned coal waste disposal area.

2.2 Acidity means the quantitative capacity of an aqueous medium to donate protons in a reaction with hydroxyl ions.

2.3 Acid Mine Drainage means water discharged from an active, inactive, or abandoned surface mine and reclamation operations or from areas affected by surface mining and reclamation operations with said water having a pH of less than six (6.0) in which total acidity exceeds total alkalinity.

2.4 Acid-Producing Coal Seam means coal seams commonly associated with other minerals which create acid mine drainage. Coal seams commonly associated with such minerals may include, but are not limited to Waynesburg, Washington, Freeport, Sewickley, Redstone, Pittsburgh, Kittanning, Elk Lick, Peerless, No.2 Gas, Upper Eagle, No. 5 Block and Stockton Lewiston. Site specific data may, on a case-by-case basis, be accepted as an affirmative demonstration that these seams are not acid producing.

2.5 Acid-Producing Overburden means overburden which upon appropriate analysis shows a potential for producing acid mine drainage.

2.6 Acid-Test Ratio means the relation of quick assets to current liabilities.

2.7 Act means the West Virginia Surface Coal Mining and Reclamation Act, Chapter 22A, Article 3 of the Code of West Virginia, 1931, as amended.

2.8 Active Surface Mining Operation means, for the purpose of permit renewal as provided in subsection 3.276 of these regulations, an operation where a Phase I bond reduction has not been approved.

2.9 Administratively Complete Application means an application for permit approval or approval for prospecting, which the Commissioner determines to contain information

Title 38
CSR 2
Section 2

addressing each application requirement of the regulatory program and to contain all information necessary to initiate processing and public review.

2.10 Affected Area means, when used in the context of surface-mining activities, all land and water resources within the permit area which are disturbed or utilized during the term of the permit in the course of surface-mining and reclamation activities. Affected area means, when used in the context of underground mining activities, all surface land and water resources affected during the term of the permit (1) by surface operations or facilities incident to underground mining activities or (2) by underground operations. The term also includes other lands the use of which is incidental to surface coal mining and reclamation operations; all areas covered by new or existing roads used to gain access to, or for hauling coal to or from, surface coal mining and reclamation operations; any areas covered by surface excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, shipping areas; any areas upon which are sited structures, facilities, or other property; material on the surface resulting from, or incident to, surface coal mining and reclamation operations; and the area located above underground workings.

2.11 Asset Ratio means the relation of total assets to total liabilities.

2.12 Auger Mining means a method of mining coal at the surface by drilling or cutting horizontally into an exposed coal seam at the highwall.

2.13 Bearing Capacity means a measure, as determined by standard engineering evaluation, of the ability of a foundation material to carry loads imposed by an embankment or other structure.

~~-----2.14 Bench Control System means a series of elongated basins with a holding capacity of less than five (5) acre-feet which are located along the toe of the backfill on haulback-type mining operations.~~

2.14 Best Technology Currently Available means equipment, devices, systems, methods or techniques which will:

(a) prevent, to the extent possible, additional contributions of suspended solids to stream flow or runoff

outside the permit area, but in no event result in contributions of suspended solids in excess of requirements set by applicable State or Federal laws and rules and regulations; and

(b) minimize, to the extent possible, disturbances and adverse impacts on fish, wildlife, and related environmental values and achieve enhancement of those resources where practicable.

2.15 Buffer Zone means an undisturbed border along or around an intermittent or perennial stream.

2.16 Capital Assets means those assets such as land, buildings and equipment held for use in the production or sale of other assets or services.

2.17 Cash means:

(a) all cash items except cash (1) restricted by an agreement, or (2) described as earmarked for a particular purpose; and

(b) short-term investment such as stocks, bonds, notes, and certificates of deposit, where the intent and ability to sell them in the near future is established by the operator.

2.18 Cemetery means any area of land where human bodies are interred.

2.19 Channel Protection means any measures taken to prevent or control erosion, scouring, or other deteriorating processes in channels such as diversion ditches and spillways.

2.20 Coal Preparation means chemical or physical processing and the cleaning, concentrating, or other processing or preparation of coal.

2.21 Coal Preparation Plant means a facility operated in connection with a mine where coal is subjected to chemical or physical processing or cleaning, crushing (by any means) concentrating, screening or sizing, or other processing or preparation. It includes facilities associated with coal preparation activities, including, but not limited to the following: loading facilities; storage and stockpile facilities; sheds; shops, and other buildings; water-treatment and water-storage facilities; settling basins and impoundments; and coal processing and other waste disposal areas.

Title 38
CSR 2
Section 2

2.22 Coal Processing Waste means materials which are separated and wasted from the product coal during its physical or chemical processing, cleaning or concentrating.

2.23 Coal Refuse Site means a deposit of coal processing waste or underground development waste.

2.24 Coal Remining Operation means a coal mining operation which begins at a site where previous coal mining was conducted before the effective date (August 3, 1977) of the federal Surface Mining Control and Reclamation Act of 1977 (PL 95-87).

2.25 Coarse Coal Refuse means coal processing waste predominantly within a size range greater than the number twenty-eight (#28) sieve size.

2.26 Collateral Bond means an indemnity agreement in sum certain executed by the permittee and supported by one or more of the following:

(a) The deposit of cash in one or more federally insured accounts, payable only to the Commissioner upon demand;

(b) Negotiable bonds of the United States, a State, or a municipality, endorsed to the order of, and in the possession of, the Commissioner;

(c) Negotiable certificates of deposit, payable only to the Commissioner, and in his possession;

(d) An irrevocable letter of credit of any bank organized or authorized to transact business in the State of West Virginia, payable only upon presentation by the Commissioner;

(e) A perfected, first-lien security interest in real property, in favor of the Commissioner;

(f) Investment-grade rated securities, having the highest rating issued by a nationally recognized securities rating service, endorsed to the order of, and in the possession of, the Commissioner, excluding all issues of the type traded on a commodity exchange such as contracts for future delivery of goods; or

(g) A whole life insurance policy assigned to the DepartmentDivision of Energy and in the possession of the Commissioner, said policy having been issued by only those companies with an independent financial rating of A+, Aaa, or the

Title 38
CSR 2
Section 2

equivalent authorized to do business in the State of West Virginia and are member insurers of the West Virginia Life and Health Insurance Guaranty Association.

2.27 Combined Coal Refuse means a mixture of coarse coal refuse and dewatered fine coal refuse.

2.28 Combustible Materials means organic materials that are capable of burning by fire or through oxidation, accompanied by the evolution of heat and a significant temperature rise.

2.29 Commissioner means the Commissioner of the DepartmentDivision of Energy or his authorized agent.

2.30 Common Size Comparative Balance Sheet means item amounts from a number of the permittee's or applicant's successive yearly balance sheets arranged side by side in a single statement followed by common size percentages whereby:

(a) the asset total is assigned a value of one hundred percent (100%);

(b) the total of liabilities and owner equity is also assigned a value of one hundred percent (100%); and

(c) each individual asset, liability, and owner equity item is shown as a fraction of one of the one hundred percent (100%) totals.

2.31 Common Size Comparative Income Statement means an operator's income statement amounts for a number of successive yearly periods arranged side by side in a single statement followed by common size percentages whereby net sales are assigned a one hundred percent (100%) value, and then each statement item is shown as a percentage of net sales.

2.32 Community or Institutional Building means any structure, other than a public building or an occupied dwelling, which is used primarily for meetings, gatherings or functions of local civic organizations or other community groups; functions as an educational, cultural, historic, religious, scientific, correctional, mental health or physical health care facility; or is used for public services, including, but not limited to, water supply, power generation or sewage treatment.

2.33 Compaction means the densification of a soil or soil-like material by means of mechanical manipulation.

2.34 Complete and Accurate Application means an application for a surface mining permit or prospecting approval which, immediately prior to issuance, contains all maps, plans, designs and other application materials required by the Act and these rules and regulations, excluding bond, which are necessary for the Commissioner to make a decision on approval or denial.

2.35 Completion of Reclamation means that all terms and conditions of the permit have been satisfied, the final inspection report has been approved by the Commissioner, that all applicable effluent and applicable water quality standards are met, and the total bond has been released.

2.36 Construction Pore Pressures means water pressures generated in foundation soils or embankments due to compression by loads imposed by construction of an embankment or other structure.

2.37 Cumulative Impact means the hydrologic impact that results from the cumulation of flows from all coal mining sites to common channels or aquifers in a cumulative impact area. Individual mines within a given cumulative impact area may be in full compliance with effluent standards and all other regulatory requirements, but as a result of the co-mingling of their off-site flows, there is a cumulative impact. The Act does not prohibit cumulative impacts but does emphasize that they be minimized. When the magnitude of cumulative impact exceeds threshold limits or ranges as predetermined by the Department, they constitute material damage.

2.38 Cumulative Impact Area means the area, including the permit area, within which impacts resulting from the proposed operation may interact with the impacts of all anticipated mining on surface and groundwater systems. Anticipated mining shall include the entire projected lives through bond releases of:

- (a) the proposed operation;
- (b) all existing operations;
- (c) any operation for which a permit application has been submitted to the Commissioner, and;
- (d) all operations required to meet diligent development requirements for leased Federal coal for which there is actual mine development information available.

2.39 Current Ratio means the relation of current assets to current liabilities.

2.40 Density means the weight of soil or soil-like solids per unit of total volume of soil or similar mass.

2.41 Design Storm means predicted precipitation of given intensity, frequency and duration based on United States Weather Bureau data.

2.42 Downslope means the land surface between the projected outcrop of the lowest coal seam permitted-to-be-being mined along each highwall, or any mining-related construction, and the valley floor.

2.43 Embankment means a man made deposit of earth or waste materials of five (5) feet or greater in height as measured from the upstream toe, usually exhibiting at least one sloping face, that is raised above the natural surface of the land.

2.44 Embankment Stability means the degree of safety relative to a structural failure of the embankment.

2.45 Emergency Spillway means a hydraulic structure designed to pass water in excess of that which an impoundment is designed to store or which cannot be passed through a principal spillway.

2.46 Excess Spoil means overburden material disposed of in a location other than the pit.

2.47 Existing Coal Refuse Area means a refuse disposal area that is part of an active surface mining operation.

2.48 Existing Structure means a structure or facility used with or to facilitate surface coal mining and reclamation operations for which construction began prior to January 18, 1981.

2.49 Face-Up means the result of an excavation where a vertical or near vertical highwall is created that exposes the overburden and the mineral face.

2.50 Fine Coal Refuse means coal processing waste which may be disposed of in a slurry form or in a dewatered or treated state.

2.51 Foundation means soil, bedrock, or other earth material on or against which an embankment or other structure is placed.

2.52 Fragile Lands means geographic areas containing natural, ecologic, scientific or aesthetic resources that could be significantly damaged or destroyed by surface coal mining operations. Examples of fragile lands include valuable habitats for fish or wildlife, critical habitats for endangered or threatened species of animals or plants, uncommon geologic formations, national natural landmark sites, areas where mining may result in flooding, environmental corridors containing a concentration of ecologic and aesthetic features, and areas of recreational value due to high environmental quality.

2.53 Freeboard means:

(a) the vertical distance between the lowest point of the crest of the embankment and the reservoir water surface; or

(b) the vertical distance between the top of a ditch or channel and the water surface during the design flow.

2.54 Gravity Discharge means, with respect to underground mining activities, mine drainage that flows freely down gradient in an open channel. Mine drainage that occurs as a result of flooding a mine to the level of the discharge is not gravity discharge.

2.55 Groundwater means subsurface water in the zone of saturation.

2.56 Growing Season means one (1) year.

2.57 Handbook means the Technical Handbook of Standards and Specifications for Mining Operations in West Virginia.

2.58 Haulageway or Access Road means a surface right-of-way for purposes of travel by land vehicles used in surface mining and reclamation or prospecting operations. A road consists of the entire area within the right-of-way, including the roadbed, shoulders, parking and side areas, approaches, ditches, and other related structures. The term includes access and haulroads constructed, used, reconstructed, improved, or maintained for use in surface mining and reclamation or prospecting operations, including use by coal hauling vehicles to and from transfer, processing, or storage areas. The term does not include ramps and routes of travel within the immediate mining area or within spoil or coal mine waste disposal areas.

2.59 Hazard Potential means a classification rating assigned to a structure based on engineering evaluations and judgment

Title 38
CSR 2
Section 2

predicting the potential damage to human life, property and environment should a failure of the structure occur.

2.60 Highwall means the face of exposed overburden or coal in an open cut of a surface mining operation or for entry to an underground mining operation.

2.61 Historic Lands means historic, archaeological, cultural, and scientific areas. Examples of historic lands include archaeological sites, sites listed on or eligible for listing on a state or national register of historic places, national historic landmarks, sites having cultural significance to native Americans, or religious significance to religious groups, and sites for which historic designation is pending.

2.62 Hydrologic Balance means the relationship between the quality and quantity of water inflow to, water outflow from a hydrologic unit including water stored in the unit. It encompasses the dynamic relationships among precipitation, runoff, evaporation and changes in ground and surface water levels and storage capacity.

2.63 Hydrological Isolated Operations means a surface mining operation where hydrologic impacts are negligible or are dissipated before reaching points in the system where they are additive to hydrologic impacts of other surface mining operations.

2.64 Hydrologic Regime means the entire state of water movement in a given area.

2.65 Impoundment or Impounding Structure means a closed basin constructed for the retention of water, sediment, slurry, or other liquid or semi-liquid material or waste, -and-which consists-in-part-of-an-embankment,-dike-or-other-constructed barrier.

2.66 Infiltration means the flow or movement of water through the surface of soil or soil like material into the ground.

2.67 Inspection means a visual review of prospecting, surface or other mining operations to assure compliance with applicable laws, rules, regulations or permit conditions under jurisdiction of the Commissioner.

2.68 Intermittent Stream means:

(a) a stream or reach of a stream that drains a watershed of at least one square mile; or

(b) a stream or reach of a stream that is below the local water table for at least some part of the year, and obtains its flow from both surface runoff and ground water discharge.

2.69 Irreparable Damage to the Environment means any damage to the environment in violation of the Act and these regulations which cannot be corrected by activities of the responsible person.

2.70 Knowingly means that an individual knew or had reason to know in authorizing, ordering or carrying out an act or omission on the part of a corporate permittee that such act or omission constituted a violation, failure or refusal.

2.71 Leachate means a liquid that has percolated through soil, rock or waste and has extracted dissolved or suspended materials.

2.72 Lightly Buffered Stream means any stream or its tributaries that contains less than fifteen (15) PPM methyl orange alkalinity (to pH 4.5) and a conductivity of less than fifty (50) micro MHO.

2.73 Liquefaction means a phenomenon wherein a saturated granular soil or soil like material loses strength and flows in a manner resembling a liquid.

2.74 Liquidity Ratio means the relation of cash to current liabilities.

2.75 Mineral Face means the exposed vertical cross-section of the natural coal seam or mineral deposit.

2.76 Natural Drainway means any natural water course which may carry water to the tributaries and rivers of the watershed.

2.77 Natural Hazard Lands means geographic areas in which natural conditions exist which pose or, as a result of surface coal mining operations, may pose a threat to the health, safety or welfare of people, property or the environment, including areas subject to landslides, cave-ins, severe wind or soil erosion, frequent flooding and areas of unstable geology.

Title 38
CSR 2
Section 2

2.78 Net Profit means the bottom line of the income statement after taxes, including taxes based on income, adjustments, all extraordinary income and expense, but before preferred and common stock dividends.

2.79 Occupied Dwelling means any building that is currently being used on a regular or temporary basis for human habitation.

2.80 Operator means any person who is granted or who should obtain a permit to engage in any activity covered by the Act or these regulations, or anyone who engages in surface mining and/or surface mining and reclamation operations. Further, the term shall be construed in a manner consistent with the federal program pursuant to Public Law 95-87.

2.81 Outer Spoil or Outer Slope means a disturbed area extending from the outer point of the bench to the extreme lower limit of the disturbed land.

2.82 Overburden means consolidated or unconsolidated material of any nature which overlies a mineral deposit, excluding topsoil.

2.83 Owned or Controlled and Owns or Controls means any one or a combination of the relationships specified in paragraphs (a) and (b) of this definition:

(a)(1) Being a permittee of a surface coal mining operation; (2) Based on instrument of ownership or voting securities, owning of record in excess of fifty (50) percent of an entity; or (3) Having any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface mining operations.

(b) The following relationships are presumed to constitute ownership or control unless a person can demonstrate that the person subject to the presumption does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface mining operation is conducted:

- (1) Being an officer or director of an entity;
- (2) Being the operator of a surface mining operation;
- (3) Having the ability to commit the financial or real property assets or working resources of an entity;

Title 38
CSR 2
Section 2

(4) Being a general partner in a partnership;

(5) Based on the instruments of ownership or the voting securities of a corporate entity, owning of record ten (10) through fifty (50) percent of the entity; or

(6) Owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface mining operation.

2.84 Peak Runoff means the maximum flow in a specified geographic location resulting from a given design storm.

2.85 Perennial Stream means a stream or portion of a stream that flows continuously.

2.86 Person having an interest which is or may be adversely affected or person with a valid legal interest means any person:

(a) Who uses any resource of economic, recreational, aesthetic, or environmental value that may be adversely affected by prospecting or surface mining and reclamation operations or any related action of the Commissioner; or

(b) Whose property is or may be adversely affected by prospecting or surface mining and reclamation operations or any related action of the Commissioner.

2.87 Piping means a process of internal erosion which occurs when water transports soil or soil like materials through unprotected exits, developing unseen channels or pipes through an embankment or its foundation.

2.88 Pit means that part of the surface mining operation from which the mineral is being actively removed or where the mineral has been removed and the area has not been backfilled.

2.89 Pre-Existing Discharge means any water discharge from the proposed permitted disturbed area prior to disturbance as approved in a permit or a prospecting approval and-at-the-time-of-permit-application-under-this-subsection.

2.90 Preplan means the total application submitted to the Commissioner including the application forms, mining and reclamation plan, drainage plan, blasting plan, planting plan,

Title 38
CSR 2
Section 2

maps, drawings, data, cross-sections, bonds and other information as may be required to obtain a permit.

2.91 Principal Shareholder means any person who is the record or beneficial owner of ten percent (10%) or more of any class of voting stock.

2.92 Principal Spillway means a hydraulic structure which passes water at levels between normal pool and the emergency spillway invert elevations.

2.93 Probable Maximum Precipitation means the depth-duration-area rainfall for a particular area that represents the maximizing of meteorological conditions.

2.94 Prospecting means the field gathering of surface or subsurface geologic, physical, or chemical data by trenching, drilling, geophysical, or other techniques necessary to determine the quality and quantity of overburden and coal of an area; or the gathering of environmental data to establish the conditions of an area before beginning surface mining and reclamation operations, where such activity may cause any disturbance of the land surface or may cause any appreciable effect on land, air, water, or other environmental resources. Regardless whether or not any disturbance is anticipated, the gathering of environmental data on lands designated unsuitable pursuant to Section 22 of the Act shall be considered prospecting and subject to the requirements of Section 13 of these regulations.

2.95 Protected Structures means for purposes of blasting, dwellings, public buildings, schools, churches, or community or institutional buildings.

2.96 Public Building means any structure that is owned or leased by a public agency or used primarily for public business or meetings.

2.97 Quick Assets means cash and current assets that can be quickly turned into cash.

2.98 Reasonably Available Spoil means spoil and suitable coal mine waste material generated by the remaining operation or other spoil or suitable coal mine waste material located in the permit area that is accessible and available for use and that when rehandled will not cause a hazard to public safety or significant damage to the environment.

2.99 Recharge Capacity means the ability of the soils and underlying materials to allow precipitation to infiltrate and reach the zone of saturation.

2.100 Reclamation means those actions taken to restore mined land to the approved post mining land use.

2.101 Remined Area means only that area of any coal remaining operation on which coal mining was conducted before the effective date of the federal Surface Mining Control and Reclamation Act of 1977 (PL-95-87).

2.102 Renewable Resource Lands means aquifers and areas for the recharge of aquifers and other underground waters, areas for agricultural or silvicultural production of food and fiber, and grazing lands.

2.103 Retained Earnings means stockholder's equity that has arisen from retained assets from earnings in the business. This shall include only earnings from normal operations and not gains from such transactions as the sale of plant assets or investments.

2.104 Return On Investment means the relation of net profit for the last yearly period to ending net worth.

2.105 Safety Factor means the ratio of the sum of the resisting forces to the sum of the loading forces in a constructed valley fill, backfill, dam, or refuse pile.

2.106 Sediment means solid material that is either in suspension, is being transported, or has been moved from its site of origin and has come to rest on the earth's surface.

2.107 Sediment Control Structure or Sediment Pond means an impoundment designed, constructed, and maintained in accordance with these regulations for the purpose of removing solids from water in order to meet applicable water quality standards or effluent limitations before the water is discharged into the receiving stream.

2.108 Self-Bond means an indemnity agreement in a sum certain payable to the Commissioner, executed by the permittee and by each individual and business organization capable of influencing or controlling the investment or financial practices of the permittee by virtue of his authority as an officer or ownership of all or a significant part of the permittee, and supported by agreements granting the Commissioner a security

interest in real or personal property pledged to secure performance by the permittee.

2.109 Significant Aquifer means a stratum or group of strata that can store and transmit water in significant quantities for a specific use.

2.110 Slope Protection means measures taken to control erosion on slopes.

2.111 Slope Stability means the relative degree of safety from the development of a landslide in a slope, as defined by one or more standard engineering methods of analysis.

2.112 Spoil means overburden that has been removed during surface mining operations.

2.113 Stabilize means to control movement of soil, spoil piles or areas of disturbed earth.

~~-----2.114--Stoniness means a characterization of earth, overburden or spoil which describes the relative proportion of its content of boulders and stone and rock aggregate as compared to its sand, silt, clay or rock fragment content.~~

2.114 Strength Parameters mean those engineering values obtained from standard engineering shear strength tests of soil or soil like material.

2.115 Structure means, except as used in the context of subsection 3.8 of these regulations, any man-made structures within or outside the permit areas which include, but is not limited to: dwellings, outbuildings, commercial buildings, public buildings, community buildings, institutional buildings, gas lines, water lines, towers, airports, underground mines, tunnels and dams. The term does not include structures built and/or utilized for the purpose of carrying out the surface mining operation.

2.116 Sub-Drainage System means a designed and constructed system provided for the conveyance of subsurface water.

2.117 Subsidence means, as it relates to underground mining operations or auger mining, a sinking, collapsing or cracking of a portion of the earth's surface caused by voids beneath the surface created by mining.

2.118 Substantial Legal and Financial Commitments in a Surface Coal Mining Operation means that significant investments and legal commitments have been made in activities and facilities such as power plants, railroads, coal handling, preparation, extraction or storage facilities and other capital-intensive activities on the basis of a long term coal contract.

2.119 Substantially Disturb means, for purposes of prospecting, to significantly impact land or water resources by blasting; by removal of vegetation, topsoil, or overburden; by construction of roads or other access routes; by placement of excavated earth or waste material on the natural land surface or by other such activities; or to remove more than 250 tons of coal.

2.120 Successor in Interest means any person who succeeds to rights granted under a permit by transfer, assignment or sale of those rights.

2.121 Surety Bond means an indemnity agreement in a sum certain payable to the Commissioner executed by the permittee which is supported by the performance guarantee of a corporation licensed to do business as a surety in the State of West Virginia.

2.122 Surface Mining and Reclamation Operation means surface coal mining operations and all activities necessary or incidental to the reclamation of such operations.

2.123 Surface Water means water on the surface of the earth.

2.124 Topsoil means the A and E-horizon soil layer of the four (4) major soil horizons.

2.125 Toxic-Forming Materials means earth materials or wastes which, if acted upon by air, water, weathering or microbiological processes, are likely to produce chemical or physical conditions in soils, air or water that are detrimental to the environment.

2.126 Toxic Mine Drainage means water that is discharged from active or abandoned mines or other areas affected by surface mining operations, reclamation operations, or prospecting operations which contains a substance which through chemical action or physical effects, is likely to kill, injure or impair biota commonly present in the area that might be exposed to it.

2.127 Transfer, Assignment or Sale of Rights means a change in ownership pursuant to subsection 2.83 or other effective control over the right granted in a permit or approval to conduct surface mining operations.

2.128 Underground Development Waste means waste rock mixtures of coal, shale, claystone, siltstone or other related materials that are brought to the surface for disposal.

2.129 Valid Existing Rights exists, except for haulroads, in each case in which a person demonstrates that the limitation provided for in the Act would result in the unconstitutional taking of that person's rights. For haulroads, valid existing rights means a road or recorded right-of-way or easement for a road which was in existence prior to August 3, 1977. A person possesses valid existing rights if he can demonstrate that the coal is immediately adjacent to an ongoing mining operation which existed on August 3, 1977 and is needed to make the operation as a whole economically viable. Valid existing rights shall also be found for an area where a person can demonstrate that an SMA number had been issued prior to the time when the structure, road, cemetery or other entity came into existence.

2.130 Valley or Head-of-Hollow Fill means a fill structure consisting of any material, other than organic material, placed in a valley where side slopes of the existing valley measured at the steepest point are greater than twenty (20) degrees or the average slope of the profile of the hollow from the toe of the fill to the top of the fill is greater than ten (10) degrees. In head-of-hollow fills the top surface of the fill, when completed, is at approximately the same elevation as the adjacent ridge line, and no significant area of natural drainage occurs above the fill draining into the fill area.

2.131 Violation, Failure or Refusal means a violation of a condition of a permit issued pursuant to the Act or these rules and regulations; or a failure or refusal to comply with any order issued under Sections 15, 16, or 17 of the Act, or any order incorporated in a final decision issued by the Commissioner under the Act, except an order incorporated in a decision issued under paragraph (1), subsection (d), Section 17 of the Act.

2.132 Willfully means that an individual acted:

- (a) Either intentionally, voluntarily or consciously; and
- (b) With intentional disregard or plain indifference to legal requirements in authorizing, ordering or carrying out a

Title 38
CSR 2
Section 2

corporate permittee's action or omission that constituted a violation, failure or refusal.

2.133 Woodlands means commercial woodlands where the post-mining land use would result in the development of a commercial product where flat or gently rolling land is essential for the operation of mechanical harvesting equipment.

2.134 Working Capital means the excess of the operator's current assets over its current liabilities.

2.135 Zone of Saturation means the zone below the piezometric surface in which all voids are filled with groundwater.

38-2-3. Permit Application Requirements and Contents

3.1 Applicant Information. All information provided by an applicant in an application for a surface mining permit shall be clear and concise and shall be provided in a format prescribed by the Commissioner and/or a format required by the federal Office of Surface Mining Reclamation and Enforcement. In addition to the information requirements of Section 9 of the Act, each application for a permit shall contain the following information except that submittal of a social security number is at the option of the applicant:

(a) A statement as to whether the applicant is a corporation, partnership, sole proprietorship, association, or other business entity.

(b) The name, address, telephone number and, as applicable, social security number and employer identification number of the:

- (1) Applicant;
- (2) Applicant's resident agent; and
- (3) Person who will pay the abandoned mine land reclamation fee.

(c) List, for each person who owns or controls the applicant under the definition of "owned or controlled" and "owns and controls" in subsection 2.83 of these regulations (as applicable):

(1) The person's name, address, social security number, and employer identification number;

(2) The person's ownership or control relationship to the applicant, including percentage of ownership and location in organizational structure;

(3) The title of the person's position, date position was assumed, and when submitted under paragraph (h), subsection 3.332 of these regulations, date of departure from the position;

(4) Each additional name and identifying number, including employer identification number, federal or state permit number, and MSHA number with date of issuance, under which the person owns or controls, or previously owned or controlled, a surface coal mining and reclamation operation in the United

Title 38
CSR 2
Section 3

States within the five years preceding the date of the application; and

(5) The application number or other identifier of, and the regulatory authority for, any other pending surface coal mining operation permit application filed by the person in any state in the United States.

(d) List, for any surface coal mining operation owned or controlled by either the applicant or by any person who owns or controls the applicant under the definition of "owned or controlled" and "owns or controls" in subsection 2.83 of these regulations, the operation's:

(1) Name, address, identifying numbers, including employer identification number, federal or state permit number and MSHA number, the date of issuance of the MSHA number, and the regulatory authority; and

(2) Ownership or control relationship to the applicant, including percentage of ownership and location in organizational structure.

(e) The name and address of each legal or equitable owner of record of the surface and mineral property to be mined, each holder of record of any leasehold interest in the property to be mined, and any purchaser of record under a real estate contract for the property to be mined.

(f) The name and address of each owner of record of all property (surface and subsurface) within one hundred (100) feet of any part of the proposed permit area.

(g) The Mine Safety and Health Administration (MSHA) numbers for all mine-associated structures identified in the permit that require MSHA approval.

(h) A statement of all lands, interest in lands, options, or pending bids on interests held or made by the applicant for lands contiguous to the area described in the permit application. If requested by the applicant, any information required by this paragraph which is not on public file pursuant to the Act shall be held in confidence.

(i) A statement of whether the applicant or any subsidiary, affiliate, or persons owned or controlled or under control or ownership with the applicant has:

Title 38
CSR 2
Section 3

(1) Had a Federal or State coal mining permit suspended or revoked in the five (5) years preceding the date of submission of the application; or

(2) Forfeited a performance bond or similar security deposited in lieu of bond.

(j) A brief explanation of the facts involved if any such suspension, revocation, or forfeiture referred to in parts (1) and (2) of paragraphs (e*l*) of this subsection has occurred, including:

(1) Identification number and date of issuance of the permit, and the date and amount of bond or similar security;

(2) Identification of the authority that suspended or revoked the permit or forfeited the bond and the stated reasons for the action;

(3) The current status of the permit and bond, or similar security involved;

(4) The date, location, and type of any administrative or judicial proceedings initiated concerning the suspension, revocation, or forfeiture; and

(5) The current status of any administrative or judicial proceedings.

(k) A list for any violation of a provision of the Act or these regulations and any other federal or state laws, rules and regulations pertaining to air or water environmental protection incurred in connection with any surface mining operation received by the applicant during the three (3) year period preceding the application date, and a list of all unabated cessation orders, and unabated air and water quality violation notices received prior to the date of the application by any surface mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant. For each violation notice or cessation order reported, the lists shall include the following information as applicable:

(1) Any identifying numbers for the operation, including the federal or state permit number and MSHA number, the dates of issuance of the violation notice and MSHA number, the name of the person to whom the violation notice was issued, and the name of the issuing regulatory authority, department or agency;

Title 38
CSR 2
Section 3

(2) A brief description of the violation alleged in the notice;

(3) The date, location, and type of any administrative or judicial proceedings initiated concerning the violation, including, but not limited to, proceedings initiated by any person to obtain administrative or judicial review of the violation;

(4) The current status of both the proceedings and the violation notice; and

(5) The actions, if any, taken by any person to abate the violation.

(l) Each application for a permit shall contain a sworn statement as follows: "The information contained in this application is true and correct to the best of my knowledge and belief." Such statement shall be signed by an accountable official of the applicant and shall be notarized.

(m) The applicant for a permit or a revision of a permit shall have the burden of establishing that his application is in compliance with all the requirements of the Act and these rules and regulations.

(n) After an applicant is notified that the application is approved, but before the permit is issued, the applicant shall update and correct the information previously submitted under this subsection or indicate that no change in such information has occurred.

3.2 Advertisement.

(a) SMA File Number. Prior to the publication of an advertisement for a surface mining permit in accordance with paragraph (6), subsection (a), Section 9 of the Act, the applicant shall submit an administratively complete surface mining permit application and obtain a surface mining application (SMA) file number. Each SMA number shall be valid for one year; provided, that the Commissioner may extend an SMA number beyond one year, if the application has been diligently pursued by the applicant throughout the life of the SMA number. In order for an SMA number to be extended, the applicant must submit to the Commissioner a written request, which shall state the reason(s) and which shall demonstrate good cause for the extension.

(b) Advertisement Information. Each advertisement will contain at a minimum:

- (1) The surface mining application (SMA) file number;
- (2) A clear and accurate location map of a scale and detail found in the West Virginia General Highway Map. The map size will be at a minimum four inches (4") x four inches (4"). Longitude and latitude lines and north arrow will be indicated on the map and such lines will cross at or near the center of the proposed permit area;
- (3) The names and business address of the applicant to include a street address or route number;
- (4) A narrative description clearly describing the location of the proposed permit area;
- (5) The name(s) of the coal seam(s) to be mined;
- (6) The name(s) of the receiving stream(s) into which drainage from the permit area will be discharged;
- (7) The location where a copy of the application is available for public review;
- (8) The name and address of the Department of Energy Office where written comments or requests for informal conferences on the application may be submitted;
- (9) The type of operation;
- (10) Surface and mineral ownership of the tract(s) to be permitted;
- (11) Surface and mineral ownership of property owners within one hundred (100) feet of the coal-removal permit area;
- (12) ~~Surface-and-mineral-ownership-of-property-owners within-one-hundred-(100)-feet-of-the-coal-removal-area.--~~Where the permit application reflects that mining will occur within one-hundred feet (100') of the outside right-of-way of a public road (except where mine access roads or haulage roads join such right-of-way), the applicant may choose one of the following procedures to satisfy the additional public notice requirement:
 - (A) Include in the advertisement required in this section a concise statement:

Title 38
CSR 2
Section 3

(i) Identifying the road to be affected;
(ii) Identifying the affected segment; and
(iii) Advising that a public hearing may be requested; or

(B) A separate public notice may be published, prior to issuance of a permit, which:

(i) Identifies the road to be affected;
(ii) Identifies the affected segment; and
(iii) Advisinges that a public hearing may be requested.

(13) Where the permit applicant proposes to relocate or close a public road, the advertisement shall include a concise statement which-describes:

(A) Describes ~~the~~ identification number and geographic location of the road;

(B) Describes ~~the~~ particular segment to be relocated or closed;

(C) Describes ~~where~~ the relocated segment is to be sited;

(D) Describes ~~the~~ approximate time and duration of the relocation or closure; and

(E) Advises that a public hearing may be requested.

(14) Where an alternative land use is proposed, indicate the premining land use and the proposed postmining land use; and

(15) Where an experimental practice is proposed, the advertisement shall contain a statement indicating such and identifying applicable provisions for which a variance is requested.

(c) Notice to Governmental Agencies. Upon receipt of an administratively complete application for a surface mining and reclamation permit, a permit revision or a permit renewal, the

Title 38
CSR 2
Section 3

Commissioner shall notify all federal or state government agencies with authority to issue permits and licenses applicable to the proposed surface mining and reclamation operation or those agencies with an interest in the proposed operation, including the U. S. Department of Agriculture Soil Conservation Service district office, the local U. S. Army Corps of Engineers district engineer, the National Park Service, State and Federal fish and wildlife agencies, and the historic preservation officer.

(d) Availability of Comments. The Commissioner shall place on file at the regional office in which a permit, permit revision or renewal of a permit is filed, a copy of all public comments received as a result of the advertisement and shall provide the applicant with such comments. When a permit, permit revision or renewal of a permit is issued or approved, the Commissioner shall notify within ten (10) days each person who filed comments or objections to the application, each party to an informal conference, and the appropriate local governmental agencies including the clerk of the county commission. The Commissioner shall also cause to be published at least monthly a listing of all permits issued, which listing shall include a description of the location of the land to be affected. The listing shall also be forwarded to the Clerk of the County Commission.

(e) Readvertisement. After a Surface Mine Application (SMA) has been advertised once a week for four successive weeks, and is determined by the Commissioner to have had a limited number of minor changes which do not significantly affect the method of operation, the reclamation plan, and/or the original advertisement, he may require one (1) additional advertisement to be published with a ten (10) day public comment period. Permits which are being renewed or significantly revised and permit applications which are being significantly revised must be advertised in accordance with paragraph (b) of this subsection and paragraph (6), subsection (a), section 9 of the Act.

(f) Renotification. A renotification letter shall be sent to all commentors of a surface mine application (SMA) when a determination has been made by the Commissioner that readvertisement is required in accordance with paragraph (e) of this subsection.

(g) Certification of Publication. The advertisement and publication dates for all permit applications, permit renewal applications, applications for revision of a permit, and transfer assignment and sale of permits, shall be certified and notarized by the publishing newspaper. The certificate of publication

shall be made a part of the approved application no later than four (4) weeks after the last date of publication.

3.3. Occupied Dwellings.

(a) Valid Existing Rights. Where the proposed surface coal mining operations would be conducted within three hundred (300) feet, measured horizontally, of any occupied dwelling, the permit applicant shall submit with the application a notarized written waiver by lease, deed, or other conveyance from the owner of the dwelling, clarifying that the owner and signator had the legal right to deny mining and knowingly waived that right. The waiver shall act as consent to such operations within a closer distance of the dwelling as specified.

(b) Waiver. Where the applicant for a permit had obtained a valid waiver prior to August 3, 1977, from the owner of an occupied dwelling to mine within three hundred (300) feet of such dwelling, a new waiver shall not be required:

(1) Where the applicant for a permit had obtained a valid waiver from the owner of an occupied dwelling, that waiver shall remain effective against subsequent purchasers who had actual or constructive knowledge of the existing waiver at the time of purchase.

(2) A subsequent purchaser shall be deemed to have constructive knowledge if the waiver has been properly filed in public property records pursuant to State laws or if the mining has proceeded to within the three hundred (300) foot limit prior to the date of purchase.

3.4 Maps.

(a) Scale for Maps. Except as otherwise noted in these rules and regulations, the scale required for all maps shall be as follows:

(1) The preferred scale of maps prepared from United States Geological Survey topographic maps on 7.5 minute quadrangle shall be five hundred foot (500') to the inch;

(2) The preferred scale for maps associated with underground coal mining operations and facilities incidental to coal mining shall be two hundred foot (200') to the inch; and

(3) Other scales may be used where improved clarity and accuracy are achieved.

(b) Map Size. All maps and plans shall be submitted on print paper, thirty inches (30") by forty-two inches (42") or less. If supplementary maps or plans are attached, match lines shall be used.

(c) Color Code. A color code shall be used in preparing all maps to indicate critical features of the permit area as follows; provided, that drafted or computer generated graphic symbols or shading may be used in place of a color code, if a separate, uniquely identifiable, and clearly discernable symbol or shading is provided in place of each color as specified below, and if the symbols or shading are clearly defined on map legends and used consistently throughout the permit application, and in any subsequent permit revisions, progress maps, or other submittals relating to the permit:

- (1) Red shall indicate mineral to be removed;
- (2) Blue shall indicate water and drainage patterns;
- (3) Green shall indicate areas regraded;
- (4) Yellow shall indicate all other areas within the permit boundary; and
- (5) Purple shall be used to outline adjacent mining permits.

(d) Preplan. In addition to the requirements of (12) and (13) of subsection (a) Section 9 and Section 10 of the Act, the application shall include as applicable the following information:

- (1) The location and current use of all structures within one thousand feet (1000') of the proposed permit area;
- (2) All public roads located on or within one hundred feet (100') of the proposed permit area;
- (3) The boundaries of any public park or historic lands within or adjacent to the permit area;
- (4) All cemeteries located on or within one hundred feet (100') of the proposed permit area;
- (5) Any portion of a unit of the National System of Trails or the Wild and Scenic River System, including study rivers designated under Section 5(a) of the Wild and Scenic

Title 38
CSR 2
Section 3

Rivers Act which are located within or adjacent to the proposed permit area;

(6) The current use and land use classifications of the area of land and adjacent lands upon which the permit is sited and adjacent lands;

(7) The location of all existing ~~owned-or-leased~~ structures to be used for surface mining operations which are to be exempt from design standards;

(8) The date the map was prepared, a north arrow, quadrangle name and location map;

(9) Where the natural slope of the land below the coal outcrop is less than twenty (20) degrees and downslope placement of overburden or spoil is proposed, the map shall indicate percent slope of the land at two hundred foot (200') intervals along the cropline;

(10) The location of each facility to be used to protect or enhance fish and wildlife and related environmental values;

(11) Where the proposed permit area has been previously mined and to the extent that such information is available, list the type of mining used, the coal seam or other mineral mined, the extent of mineral removed, and the approximate date of mining;

(12) Extent of proposed auger operations;

(13) Surface and mineral owners and property lines within the permit area and within one hundred (100) feet of any point of the permit area;

(14) Location of water supply intakes for current users of surface water;

(15) Location and identification of sub areas if incremental bonding is to be used;

(16) Location and extent of subsurface water, if encountered, within the proposed permit or adjacent areas, including, but not limited to, areal and vertical distribution of aquifers, and portrayal of seasonal differences of head in different aquifers on cross sections and contour maps;

Title 38
CSR 2
Section 3

(17) The location of all oil and gas wells and other utilities within the proposed permit area are to be shown;

(18) The location and extent of topsoil borrow areas, and the location of topsoil storage areas;

(19) Air pollution monitoring and control facility and subsidence monitoring location;

(20) Any permanent facility to remain after mining; and

(21) All coal storage, cleaning, loading, and refuse disposal areas;

(22) The location of any non-coal waste storage areas;

(23) The location of any fixed explosive storage and handling facility; and

(24) The area of land to be affected within the proposed permit area according to the sequence of mining and reclamation.

(e) Drainage Map. Unless the information required by this paragraph can be shown on the preplan map in a clear and legible fashion, a separate drainage map of the same size scale and detail of the preplan map shall be made a part of the permit application and shall contain the following:

(1) The directional flow of water on and away from the permit area;

(2) Location of all monitoring sites used to develop surface and groundwater base line information;

(3) Location of all surface and ground water monitoring sites to be used for satisfying reporting requirements during the mining operation;

(4) Location of all erosion and sedimentation control structures; and

(5) The extent and boundaries of each component drainage area.

(f) Supplemental maps for underground coal mining permit applications. In addition to other maps required in this

Title 38
CSR 2
Section 3

Section, each permit application for underground mining operations shall include supplemental maps as follows:

(1) A U.S.G.S. topographic map of the area extending beyond the proposed mining limits and showing the following:

- (A) Name and series of the sheet;
- (B) Scale, latitude, and longitude;
- (C) Limits of underground mining operation proposed;
- (D) Surface area to be permitted;
- (E) Cropline of the coal seam to be mined;
- (F) Location and identification of all mine openings for the proposed mine including shafts, slopes, drifts, boreholes, etc; and
- (G) Location of all surface structures not owned by the applicant over the area to be mined.

(2) A mine development map drawn to scale showing:

- (A) Boundaries of underground mining operation and any adjacent active or abandoned mines in the same seam;
- (B) All owners of property and all residents within the area above the proposed underground workings. The area above the underground works shall mean within the angle of critical deformation but at least 15° from any coal removal;
- (C) Present extent of underground mining as well as projected headings;
- (D) Date, scale, north arrow, dip, strike, and average dip of the coal seam to be mined;
- (E) All gas wells, oil wells, water wells, and test drill holes;
- (F) Location of all known faults;
- (G) Area and extent of previous or proposed auger or strip mining in the same seam;

(H) Location and thickness of outcrop barriers;
and

(I) Elevation of all entries, fanways and
boreholes.

3.5 Cross Sections and Profiles. The application shall contain cross-sections and/or profiles which accurately depict:

(a) The existing premining surface configuration and the final surface configuration that will be achieved. Cross sections shall be developed from sufficient slope measurements to adequately represent the existing land surface configuration of the proposed permit area. Slope measurements shall take into account natural variations in slope, to provide accurate representation of the range of natural slopes and reflect geomorphic differences of the area to be disturbed. The Commissioner may require additional slope measurements at specified intervals and locations on a site-by-site basis;

(b) The vertical distribution of aquifers showing seasonal differences in head, if available, for the proposed permit area;

(c) Cross sectional area and profiles of excess spoil disposal areas with all appurtenances shown including rock cores, subsurface drains, surface drainage structures, foundations, etc;

(d) Cross sectional areas and profiles of all drainage and sediment control structures including ponds, impoundments, diversions, sumps, etc; and

(e) Cross sectional areas and profiles of all roads.

3.6 Operation Plans and Specifications. Each application shall contain in addition to other plans, specifications, and descriptions required by the Act and these regulations a description of the mining operations proposed to be conducted during the life of the mine within the proposed permit area, including, at a minimum, the following:

(a) A narrative description of the type and method of coal mining procedures and proposed engineering techniques, anticipated annual and total production of coal, by tonnage, and the major equipment to be used for all aspects of those operations; and

(b) A narrative explaining the construction, modification, use, maintenance, and unless retention of such facilities is

Title 38
CSR 2
Section 3

necessary for postmining land use, removal of the following facilities:

- (1) Dams, embankments, and other impoundments;
- (2) Overburden and topsoil handling and storage areas and structures;
- (3) Coal removal, handling, storage, cleaning, and transportation areas and structures;
- (4) Spoil, coal processing waste, and non-coal waste removal, handling, storage, transportation, and disposal areas and structures;
- (5) Mine facilities; and
- (6) Water and air pollution control facilities.

(c) A description of how the applicant will case, seal or otherwise manage augerholes, boreholes, shafts, wells and other openings;

(d) A description of how the applicant will remove, store and redistribute topsoil, subsoil or topsoil substitutes, and other materials. When topsoil substitutes are proposed, the suitability determination, analytical data, and laboratory certification required in paragraph (c), subsection 14.3, of these regulations shall be made a part of the permit application;

(e) Where topsoil borrow areas are proposed, the applicant shall submit a reclamation plan for such areas;

(f) A description of how the applicant will handle acid forming and toxic forming materials and materials constituting a fire hazard;

(g) The design and construction of excess spoil disposal areas; and

(h) The design and construction of a drainage and sediment control system to include:

- (1) A description, map, and cross section of the structure and its location;

- (2) Preliminary hydrologic and geologic information required to assess the hydrologic impact of the structure;

(3) A survey describing the potential effect on the structure from subsidence of the subsurface strata resulting from past underground mining operation if underground mining has occurred;

(4) A certification statement which includes a schedule for the submitting of any detailed design plans for structures that are not submitted with the general plan. The Commissioner shall have approved, in writing, the detailed design plan for a structure before construction begins;

(5) Each structure design plan that is of such size or storage capacity that it is a dam as defined in Article 5D of Chapter 20, Code of West Virginia, shall be prepared by, or under direction of, and certified by a qualified registered professional engineer;

(6) The design shall include any geotechnical investigation and construction requirements for the structure;

(7) A description of the operation and maintenance requirements for each structure; and

(8) A timetable and plans to remove each structure, if appropriate.

(i) The design and construction of all roads; and

(j) A vegetation plan.

(k) A plan for fugitive dust control practices as required in subsection 14.17 of these regulations.

(l) For area mining operations, as referenced in subparagraph (b)(4) of subsection 14.15, mountaintop removal operations as referenced in subparagraph (b)(5) of subsection 14.15, and for multiple seam mining operations, the applicant shall include a site specific and detailed plan showing the sequence and schedule for backfilling and regrading.

3.7 Disposal of Excess Spoil.

(a) Each application shall contain descriptions, including appropriate maps, cross sections, drawings, and design of the excess spoil disposal structures which will comply with the standards of subsection 14.14 of these regulations. These plans shall describe the design, construction, operation, maintenance, and if appropriate, removal of the site and structures. Where

Title 38
CSR 2
Section 3

~~alternative designs will achieve equivalent stability and meet all applicable requirements of the Act, these regulations, and the terms and conditions of the permit, the Commissioner may approve such alternative design.~~

(b) Each application shall contain the results of a geotechnical investigation of the proposed disposal site, including the following:

(1) The character of bedrock and any adverse geologic conditions in the disposal area;

(2) A survey identifying all springs, seepage, and ground water flow observed or anticipated during wet periods in the area of the disposal site;

(3) A survey of the potential effects of subsidence of the subsurface strata due to past and future mining operations;

(4) A technical description of the rock materials to be utilized in the construction of those disposal structures containing rock chimney cores or underlain using a rock drainage blanket; and

(5) A stability analysis including, but not limited to, strength parameters, pore pressures and long-term seepage conditions. These data shall be accompanied by a description of all engineering design assumptions and calculations and the alternatives considered in selecting the specific design specifications and methods; and

(6) An explicit identification, by narrative and by mapping, of the critical foundation area(s) for the structure, as the term is applied in subsection 14.14. The selection of the critical foundation area(s) shall be based on the results of the geotechnical investigation, shall be certified as a part of the design by a registered professional engineer, and shall be subject to review and approval by the Commissioner.

(c) If rock-toe buttresses or key-way cuts are required, the application shall include the following:

(1) The number, location, and depth of borings or test pits which shall be determined with respect to the size of the spoil disposal structure and subsurface conditions; and

(2) Engineering specifications utilized to design the rock-toe buttress or key-way cuts which shall be determined in

accordance with subparagraph (5), paragraph (b) of this subsection.

3.8 Existing Structures and Facilities:

(a) Each application shall contain a description of each existing structure or facilitiesy proposed to be used in connection with or to facilitate the surface mining and reclamation operation. The description shall include:

(1) Location;

(2) Plans of the structure which describe its current condition;

(3) Approximate dates on which construction of the existing structure was begun and completed;

(4) A showing, including relevant monitoring data or other evidence, as to whether or not the structure meets the performance standards of the Act and these regulations; and

(5) A compliance plan for each existing structure proposed to be modified or reconstructed for use in connection with or to facilitate the surface coal mining and reclamation operation. The compliance plan shall include:

(A) Design specifications required for the modification or reconstruction of the structure to bring it into compliance with current design requirements and performance standards of the Act and these rules and regulations.

(B) A construction schedule which shows dates for beginning and completing interim steps and final construction.

(C) Provisions for monitoring the structure during and after modification or reconstruction to ensure that the performance standards of the Act and these regulations are met.

(D) A showing that the risk of harm to the environment or to public health or safety is not significant during the period of modification or reconstruction.

(b) Structures and facilities designed, constructed or in use pursuant to an approved surface mining permit or prospecting approval prior to the effective date of these regulations may be subject to revision or reconstruction where the Commissioner determines that such revision or reconstruction is necessary to

comply with the performance standards set forth in the Act and these regulations; provided, that the Commissioner will notify the permittee that such revision or reconstruction is necessary and shall provide a reasonable time for compliance.

3.9 Operation(s) Near Public Road.

(a) Where the proposed mining operation is to be conducted within one hundred feet (100') (measured horizontally) of the outside right-of-way of any public road (except where mine access roads or haulage roads join such right-of-way) or where the applicant proposes to relocate or close any public road, the Commissioner shall:

(1) Where the public road is to be closed or relocated, require the applicant to obtain necessary permission from the authority with jurisdiction over the public road.

(2) Provide an opportunity for a public hearing in the locality of the proposed mining operation for the purpose of determining that the interests of the public and affected landowners will be protected.

(3) Upon request for a public hearing by any person, require the applicant to hold a public hearing and give notice of the date, time, and place of the hearing in a newspaper of general circulation in the area of the proposed mining operation at least two (2) weeks in advance of the hearing date.

(4) Make a written finding within thirty (30) days following the hearing or after the close of the comment period as to whether or not the interests of the public and the affected landowners will be protected. Each participant of record at the public hearing shall be notified of the Commissioner's findings.

3.10 Experimental Practices:

(a) Each permit application or permit revision shall contain plans and specifications of any proposed experimental practices to be employed as a part of the mining and reclamation operation. All experimental practices shall have prior approval of the Commissioner and the director of the federal Office of Surface Mining Reclamation and Enforcement before a permit or revision can be issued. An application for an experimental practice shall contain descriptions, maps, plans, and data which show:

Title 38
CSR 2
Section 3

(1) The nature of the experimental practice, including a description of any performance standards for which variances are requested, the duration of the experimental practice, and any special monitoring which will be conducted;

(2) How use of the experimental practice encourages advances in mining and reclamation technology or allows a postmining land use for industrial, commercial, residential, or public use (including recreation facilities) on an experimental basis;

(3) The experimental practice:

(A) Is potentially more, or at least as, environmentally protective, during and after mining operations, as would otherwise be required by the Act and these regulations.

(B) Will not reduce the protection afforded public health and safety below that provided by the requirements of the regulations.

(4) That the applicant will conduct monitoring of the effects of the experimental practice. The monitoring program shall ensure the collection, analysis, and reporting of reliable data that are sufficient to enable the Commissioner and the director of the federal Office of Surface Mining Reclamation and Enforcement to:

(A) Evaluate the effectiveness of the experimental practice; and

(B) Identify, at the earliest possible time, potential risk to the environment and public health and safety which may be caused by the experimental practice during and after mining.

(5) That the applications for experimental practice under this section will comply with the public notice requirements of the Act and these regulations.

(b) Each permit approved for experimental practices shall be reviewed by the Commissioner at least annually following date of issuance. The Commissioner may on the basis of this review, require modifications to the experimental practice.

3.11 In Situ Mining. Any application for a permit for operations covered by this subsection shall be made according to all requirements of this section applicable to underground mining

activities. In addition, the mining and reclamation operations plan for operations involving in situ processing activities shall contain information establishing how those operations will be conducted in compliance with the requirements of Section 15 of these regulations, including:

- (a) Delineation of proposed holes and wells and production zone for approval of the Commissioner;
- (b) Specifications of drill holes and casings proposed to be used;
- (c) A plan for treatment, confinement or disposal of all acid-forming, toxic-forming or radioactive gases, solids, or liquids constituting a fire, health, safety or environmental hazard caused by the mining and recovery process; and
- (d) Plans for monitoring surface and ground water and air quality, as required by the Commissioner.

3.12 Subsidence Control Plan.

(a) Each application for an underground coal mining permit shall contain a subsidence control plan which includes the following:

- (1) A survey that identifies, on a topographic map of a scale of 1" = 1,000' or less, structures, perennial and intermittent streams or renewable resource lands and whether or not subsidence could cause material damage or diminution of value or use of such structures or renewable resource lands both on the permit area and adjacent areas within a critical angle of deformation of at least 15°;
- (2) A general description of the technique of coal removal, such as longwall, room and pillar, pillar removal, hydraulic mining or other extraction methods and the size, sequence, and timing of underground development of the mine;
- (3) An isopach map or other map showing surface contours and bottom of coal contours and the location and extent of areas in which planned subsidence is projected, including anticipated effects, and all areas in which measures described in subparagraphs (7) and (8) of this paragraph will be taken to prevent or minimize subsidence and related damage and where appropriate to correct subsidence related damage;

Title 38
CSR 2
Section 3

(4) A description of the physical conditions, such as depth of cover, seam thickness, strike and dip, lithology, and other geologic and hydrologic conditions, which affect the likelihood or extent of subsidence and subsidence-related damage;

(5) A description of the measures to be taken, in accordance with paragraphs (a), (c) and (bd) of subsection 16.2 of these regulations, to mitigate or remedy any material damage or diminution in value or foreseeable use that may occur to surface lands, structures, or facilities due to subsidence;

(6) An acknowledgement that if subsidence causes material damage or reduces the value or reasonably foreseeable use of the surface lands, then the operator shall restore the land to a condition capable of supporting uses it was capable of supporting before subsidence regardless of the right to subside;

(7) Except for those areas where planned subsidence is projected to be used, a detailed description of the subsidence control measures that will be taken to prevent or minimize subsidence and subsidence-related damage, including, but not limited to:

(A) Backstowing or backfilling of voids;

(B) Leaving support pillars of coal;

(C) Leaving areas in which no coal is removed, including a description of the overlying area to be protected by leaving the coal in place; and

(D) Taking measures on the surface to prevent material damage or lessening of the value or reasonably foreseeable use of the surface.

(8) A description of monitoring plans, if any, to determine the commencement and degree of subsidence so that other appropriate measures can be taken to prevent, reduce, or correct material damage.

(b) The Commissioner may waive the remainder of the requirements for a subsidence control plan if the survey required by paragraph (a)(1) of this subsection demonstrates, and the Commissioner determines, that no material damage or diminution of value or foreseeable use of the land or structures could be caused by subsidence.

Title 38
CSR 2
Section 3

(c) When an applicant feels it has the right to subside, it will provide adequate documentation of same.

(d) Where longwall mining or room and pillar mining with 80% recovery or greater is proposed, the following information shall be made a part of the plan:

(1) Typical predicted subsidence profile(s) for areas of planned subsidence. Specify from what source information was obtained to develop the predicted profile(s) including an explanation of the method and calculations used to develop prediction.

(2) For all areas identified by the survey, indicate what measures will be taken to minimize material damage or reduction in value or reasonably foreseeable use. Indicate those areas in which measures are to be taken (~~for structures this need not be addressed when the applicant demonstrates the right to subside without liability~~). Such measures may include, but not be limited to, relocating panels, mining without interruption, exposing gas lines, supporting foundations of structures, and insuring that any damage is repaired.

(3) Specify anticipated effects of planned subsidence.

(e) Where room and pillar mining with less than 80% coal extraction is proposed, the following information shall be made a part of the plan:

(1) On the development map, show all first mining and areas of planned pillar extraction.

(2) Describe anticipated secondary mining plans including percent extraction.

(3) Under all structures and renewable resource lands, demonstrate what methods will be used to protect that structure or lands (i. e., leaving solid coal or limited extraction). Under structures and perennial streams, the area addressed must extend to the angle of critical deformation, but not less than 15° unless otherwise approved. If mining is planned under or adjacent to a structure or perennial stream (for structures this need not be addressed when the applicant demonstrates the right to subside without liability), it must be demonstrated to the extent technologically and economically feasible that the pillar design will support the overburden. If it is not technologically and economically feasible, a detailed explanation must be included.

3.13 Underground Mine Abandonment Plan. Each application for an underground coal mine operation shall contain an abandonment plan which complies with the requirements of federal Mine Health Administration regulations at 30 CFR 75.1711. The abandonment plan shall also contain the following specifications:

- (a) The width of outcrop barriers;
- (b) The type and number of permanent seals proposed, their design details, and the proposed materials to be used for construction;
- (c) The maximum head of water expected on the outcrop barriers and mine seals; and
- (d) The type and design details of seals for boreholes.

3.14 Removal of Abandoned Coal Refuse Disposal Piles.

(a) In accordance with subsection (d) Section 28 of the Act, the Commissioner may when not in conflict with the purposes and findings of the Act, issue a special permit solely for the removal of existing abandoned coal processing waste piles; provided that, if the average quality of the refuse material meets the minimum BTU value standards to be classified as coal, as set forth in ASTM standard D 388-88, a permit application which meets all applicable requirements of this section shall be required. The criteria for issuing such special permits are as follows:

- (1) The removal of the existing abandoned coal processing waste pile will bring about a more desirable land use or;
- (2) The removal of the existing abandoned coal processing waste pile will result in greater protection of the safety and welfare of the public; or
- (3) The removal or-reprocessing-of the existing abandoned coal processing waste pile will result in greater protection of the environment.

(b) Permit Application Requirements. An application for a special permit for the removal of existing abandoned coal processing waste piles shall be submitted on forms prescribed by the Commissioner containing the following information:

Title 38
CSR 2
Section 3

(1) All information required by subsection 3.1 of these regulations;

(2) A public notice containing the same information required by paragraph (b) of subsection 3.2 of these regulations excluding sub-paragraphs ~~(4)~~ and (5). The notice shall be published in a newspaper of general circulation in the county in which the removal operation is located. The notice shall be published once and provide for a thirty (30) day comment period. A certification of publication will be made a part of the permit application;

(3) A statement in accordance with paragraph (9), subsection (a), Section 9 of the Act and where applicable subsection 3.3 of these regulations;

(4) A project narrative which describes:

(A) Existing site conditions;

(B) How the removal operation will meet the criteria of paragraph (a) of this subsection;

(C) The design life of the operation;

(D) Type and quantity of material to be removed;
and

(E) The post mining land use.

(5) A plan for emergency procedures as required in paragraph (e) subsection 22.4 of these regulations.

(6) A description and results of sampling and analysis procedures used to develop a representative assay of the physical and chemical properties of the existing abandoned coal processing material;

(7) A PHC in accordance with paragraph (a) of subsection 3.22 of these regulations except that development of base line water quality data will not be required;

(8) A hydrologic reclamation plan as described in paragraph (f) of subsection 3.22 of these regulations;

(9) A surface water monitoring plan as described in paragraph (g) of subsection 3.22 of these regulations;

Title 38
CSR 2
Section 3

(10) A revegetation plan which conforms to the requirements of paragraph (e)(m), subsection 14.16, of these regulations;

(11) A fire control plan which conforms to the requirements of paragraph (m) of subsection 22.5 of these regulations;

(12) A procedure for inspections and certifications which conforms to the applicable requirements of subsection 22.6 of these regulations;

(13) A map of the scale, size and color code as described in paragraphs (a), (b), and (c) of subsection 3.4 of these regulations which contains the following information:

(A) All types of information set forth on topographical maps of the United States Geological Survey including all manmade features;

(B) The area of land to be affected by the removal operation, including any coal storage and topsoil borrow and storage areas;

(C) The property boundaries of all surface owners within one hundred (100) feet of any part of the proposed permit area;

(D) The location and direction of flow of the drainage patterns both within and outside the proposed permit area and the outline of each component drainage area;

(E) The location of all drainage and sediment control structures and monitoring sites for water sampling and analysis;

(F) A location map; and

(G) A signed, notarized, and dated statement as follows: "The information contained herein is true and correct to the best of my knowledge and belief."

(14) Cross-sections plans and specifications prepared by or under the direction of a registered professional engineer as follows:

Title 38
CSR 2
Section 3

(A) Cross-sections and profile of the existing surface configuration and the final surface configuration of all areas to be affected by the removal operation;

(B) Cross-sections, plans, and specifications for all drainage and sediment control structures;

(C) Cross-sections, profiles and design specifications for any roads to be utilized for the removal operation;

(D) Specifications for the removal of the existing coal processing refuse by either excavating the material in successive horizontal lifts with a maximum elevation differential between working benches of twelve (12) feet or excavation down the face of the existing slope from top to toe, provided that the slope is no steeper than 2H:1V, provided further that no material will be removed from the toe in advance of upper level material in a manner which reduces stability of the working face; and

(E) A stability analysis of the existing abandoned coal processing waste pile.

(15) Where the existing coal processing refuse pile will only be partially removed, the permit application will contain additional information and specifications which include:

(A) Design and configuration of the final graded area which reflects that no water will be impounded above the remaining material and that final graded slopes are no steeper than 21H:1V;

(B) Plans, cross-sections, and design specifications for a diversion ditch above and around the remaining material which will carry the peak runoff from a 100 year 24 hour precipitation event; provided that upon an effective demonstration by the operator that such diversion is not required to provide protection to the environment or the health, welfare and safety of the public, the Commissioner may approve a lesser design;

(C) Procedure for performing stability analysis of the remaining material to assure mass stability; and

(D) A plan for long range prevention of combustion of the remaining material.

(E) Baseline water quality data.

(16) Where the existing coal processing refuse pile does impound water, or has the capacity to impound water, the permit application will contain the additional plans, design data, and specifications:

(A) A plan for drawing down the water behind the impoundment to a level and in a manner which assures the protection of the environment and the safety of operation personal and the public prior to any removal operations;

(B) Plans, design data and specifications for the construction of a spillway which will pass the peak runoff from a 100 year 24 hour precipitation event and how such structure will be functionally maintained throughout the life of the operation;

(C) A description of how the existing coal processing material will be removed maintaining a five (5) foot elevation differential between the breach invert elevation of the excavated embankment and the elevation of any slurry which may be impounded behind the embankment; and

(D) Provide plans, design data, and specifications for the regrading of any remaining refuse material such that the regraded area blends into the surrounding drainage pattern and will not impound water.

(17) A reclamation plan which conforms to the requirements of paragraphs ~~(b)~~, ~~(c)~~, ~~(d)~~, ~~(f)~~, ~~(g)~~, and ~~(h)~~ (d), (e), (f), (h), (i), and (j) of subsection 3.6 of these regulations.

(c) Where a coal reprocessing operation involves disposal of coal processing refuse generated either on site or off site, the design, construction, and maintenance of the new structure will be subject to all the requirements of Section 22 of these regulations and will be subject to all the permitting requirements of the Act and these regulations.

(d) A bond and insurance in accordance with Section 11 of the Act and Section 11 of these regulations shall be provided by the applicant prior to the issuance of a special permit.

(e) Performance Standards. Removal operations permitted under this subsection shall be subject to paragraph (1), subsection 22.5 and all other applicable performance standards of the Act and these regulations.

3.15 Approved Persons.

(a) Any person approved by the Commissioner, unless otherwise provided in the Act and these regulations, may prepare, sign, or certify permit applications, maps, plans, and design specifications or other similar materials necessary to complete an application. Provided however, that for purposes of Sections 9(a)(13) and 12(b)(10) of the Act an approved person shall be a registered professional engineer or licensed land surveyor.

(b) The Commissioner's approval shall be in writing and shall be granted on the basis of the following:

(1) A resume of the persons prior experience and training relating to the preparation of permit application materials, provided, that registered professional engineers, registered mining or civil engineers and licensed land surveyors currently registered or licensed in the State of West Virginia shall submit a copy of their registration or license in lieu of a resume; and

(2) Any person seeking an approval must demonstrate that he possesses adequate knowledge of the Act and rules and regulations and possess such other skills and qualifications as may be necessary to prepare an application by successfully passing an examination administered by the Commissioner. Examinations will be given upon request.

(c) All technical data in the application shall bear the name of the person collecting and analyzing the data, dates of collection and analysis, and description of the methodology used to collect and analyze the data. Any referenced materials not included in the application shall be made available to the Commissioner upon request.

(d) Technical analysis shall be planned by, or under the direction of, a professional person qualified in the subject to be analyzed.

3.16 Fish and Wildlife Resources Information.

(a) Each application shall include fish and wildlife resource information for the permit area and adjacent area.

(1) The scope and level of detail for such information shall be determined by the Commissioner in consultation with State and Federal agencies with responsibilities for fish and wildlife resources and shall be sufficient to develop the

Title 38
CSR 2
Section 3

protection and enhancement plan required under paragraph (b) of this subsection.

(2) The Commissioner shall provide for coordination of review and approval of surface mining and reclamation permits where such coordination is appropriate pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq).

(3) Site-specific resource information necessary to address the respective species or habitats shall be required when the permit area or adjacent area is likely to include:

(A) Listed or proposed endangered or threatened species of plants or animals or their critical habitats listed by the Secretary under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.), or those species or habitats protected by similar state statutes;

(B) Habitats of unusually high value for fish and wildlife such as important streams, wetlands, riparian areas, cliffs supporting raptors, areas offering special shelter or protection, migration routes, or reproduction and wintering areas; or

(C) Other species or habitats identified through agency consultation as requiring special protection under State or Federal Law to include the Migratory Bird Treaty Act of 1918 (16 U.S.C. 703 et seq) and the Bald Eagle Protection Act (16 U.S.C. 668 et seq.).

(b) Each application shall include a description of how, to the extent possible using the best technology currently available, the operator will minimize disturbances and adverse impacts on fish and wildlife and related environmental values, including compliance with the Endangered Species Act, during the surface mining and reclamation operations and how enhancement of these resources will be achieved where practicable. This description shall:

(1) Be consistent with the requirements of Section 8 of these regulations;

(2) Apply, at a minimum, to species and habitats identified under paragraph (a) of this subsection; and

(3) Include:

(A) Protective measures that will be used during the active mining phase of operation. Such measures may include the establishment of buffer zones, the selective location and special design of haul roads and power lines, and the monitoring of surface water quality and quantity; and

(B) Enhancement measures that will be used during the reclamation and postmining phase of operation to develop aquatic and terrestrial habitat. Such measures may include restoration of streams and other wetlands, retention of ponds and impoundments, establishment of vegetation for wildlife food and cover, and the replacement of perches and nest boxes. Where the plan does not include enhancement measures, a statement shall be given explaining why enhancement is not practicable.

(c) Upon request, the Commissioner shall provide the resource information required under paragraph (a) of this subsection and the protection and enhancement plan required under paragraph (b) of this subsection to the appropriate State and/or Federal Fish and Wildlife agencies for their review. This information shall be provided within ten (10) days of receipt of the request.

3.17 Parks and Historic Lands.

(a) Each permit application shall contain a description of the nature of cultural, historic and archaeological resources listed or eligible for listing on the National Register of Historic Places and known archaeological sites within the proposed permit and adjacent areas. The description shall be based on all available information, including, but not limited to, information from the State Historic Preservation Officer and from local archaeological, historical, and cultural preservation agencies.

(b) The Commissioner may require the applicant to identify and evaluate important historic and archaeological resources within the proposed permit and adjacent areas that may be eligible for listing on the National Register of Historic Places, through the collection of additional information by conducting field investigations or other appropriate analysis.

(c) Adverse impacts to any publicly owned park and any place listed on the National Register of Historic Places shall be prohibited unless the permit applicant has valid existing rights or unless joint agency approval is obtained in accordance with subsection 3.19 of this section. In either case all adverse impacts must be minimized.

(d) The Commissioner may require the applicant to protect historic or archaeological properties listed on or eligible for listing on the National Register of Historic Places through appropriate mitigation and treatment measures. Appropriate mitigation and treatment measures may be required to be taken after permit issuance provided that the required measures are completed before the properties are affected by any mining operation.

3.18 Endangered Species. When the proposed mining operation will affect threatened or endangered species of plants or animals or their critical habitats, the application shall describe control measures, management techniques, and monitoring methods to be employed in order to protect or enhance such species and habitats. Endangered or threatened species are as listed by the Secretary of Interior under the Endangered Species Act of 1973 (16 U.S.C. 1521 et seq.).

3.19 Effect on Historic Places and Archaeological Sites. Where the proposed surface coal mining operation will adversely affect any publicly owned park, any place listed on the national register of historic places or archaeological sites, the Commissioner shall transmit to the Federal, State or local agencies with jurisdiction over the park or historic place the applicable parts of the permit application, together with a request for the agency's approval or disapproval of the operation. Consideration and coordination of the permit review shall be in accordance with the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq) and the Archaeological Resource Protection Act of 1979 (16 U.S.C. 470 et seq). The agency shall have thirty (30) days from receipt of the request within which to respond unless an additional thirty (30) day extension is requested and granted by the Commissioner. A permit for such operation shall have joint approval of all affected agencies. Failure of the agency to respond to the Commissioner's request within the prescribed time period shall constitute approval.

3.20 Prime Farmlands. Prior to issuing a permit which involves prime farmland, the Commissioner shall consult with the U.S. Soil Conservation Service. On the basis of this consultation and other information available to him, the Commissioner shall make a written finding that:

- (a) The approved postmining land use will be cropland;
- (b) The permit incorporates the prime farmland reconstruction plan as a permit condition;

Title 38
CSR 2
Section 3

(c) The applicant has the technological capability to restore the land within a reasonable time period to conditions capable of producing levels of yield equivalent to or higher than those of non-mined prime farmland in the surrounding area under equivalent levels of management; and

(d) Mining will be conducted in accordance with prime farmland performance standards and all other applicable environmental protection performance standards of the Act and these regulations.

3.21 Prohibitions and Limitations on Mining. Upon receipt of a complete application for a surface mining permit, the Commissioner shall review the application to determine whether the surface coal mining operation is limited or prohibited under Section 22 of the Act including any study rivers or corridors thereof as established in any official guidelines issued pursuant to the Wild and Scenic Rivers Act.

(a) If the Commissioner is unable to determine whether the proposed operation is located within the boundaries of any of the lands described in paragraph (1), subsection (d), Section 22 of the Act, or closer than the limits provided in paragraph (4), subsection (d), Section 22 of the Act, the Commissioner shall transmit a copy of the relevant portions of the permit application to the appropriate Federal, State or local government agency for a determination or clarification of the relevant boundaries or distances. The agency shall make such determinations within thirty (30) days of receipt of the Commissioner's request. The Commissioner may extend the response period by thirty (30) days upon written request.

(b) When the Commissioner receives any request for determination of valid existing rights on lands within the area of jurisdiction of the National Park Service or the U. S. Fish and Wildlife Service, a notification shall be made to the appropriate agency, and they shall have thirty (30) days in which to respond. The Commissioner may, upon written request, extend the response period by an additional thirty (30) days.

(c) Where the proposed operation would include federal lands within the boundaries of any national forest when the applicant seeks a determination that mining is permissible under paragraph (5), subsection (d), Section 22 of the Act, the applicant shall submit a permit application to the field office of the federal Office of Surface Mine Reclamation and Enforcement with a request that such determinations be made.

3.22 Hydrologic Information.

(a) PHC. Each permit application shall, in addition to the requirements of the Act, contain a statement describing the probable hydrologic consequences (PHC) of the proposed mining operation, with respect to the hydrologic balance, on both the permit area and adjacent areas. The statement shall be based on base line information developed from sampling and analysis of surface and groundwater at monitoring sites established both on the permit area and adjacent areas. Sampling and analysis shall be performed in accordance with methods approved by the Office of Surface Mining Reclamation and Enforcement. The longitude, latitude and elevation shall be given for each of the monitoring sites. Mathematical modeling techniques may be used to aid in the development of the required information. The PHC determination shall include findings on: whether adverse impacts may occur to the hydrologic balance; whether acid-forming or toxic-forming materials are present that could result in the contamination of surface or ground-water, and whether the proposed operation may proximately result in contamination, diminution or interruption of an underground or surface source of water within the proposed permit or adjacent areas which is used for domestic, agricultural, industrial, or other legitimate purpose; and what impact the proposed operation will have on:

- (1) Sediment yield from the disturbed area;
- (2) Acidity, total suspended and dissolved solids, and other important water quality parameters;
- (3) Flooding or streamflow alteration;
- (4) Ground-water and surface-water availability; and
- (5) Other characteristics as required by the Commissioner.

(b) Base Line Ground Water Information. Each application for a permit shall contain:

- (1) The location, ownership, and use (if any) of known existing wells, springs, and other groundwater resources including discharges from other active or abandoned mines on the proposed permit area and adjacent areas in sufficient numbers to allow the applicant to make a reasonable approximation of the base line groundwater conditions and use;

(2) Water quality analysis including, at a minimum, total dissolved solids, alkalinity, acidity, sulfates, specific conductance, pH, total iron and total manganese. Correlation data from other monitoring sites within the general area of the proposed mining operations may be accepted; provided, that a limited number of validation samples from the permit area may be required; provided further, that in areas where prior mining experience has shown acid production to be a possibility, or in acid producing seams in areas with no prior mining history, site specific data-on-water sampling and analysis data shall be required;

(3) For significant aquifers, groundwater quantity descriptions including discharge rates or usage and depth to water under seasonal conditions in each water-bearing stratum above the coal seam and each potentially impacted stratum below the coal seam. Where deemed appropriate and feasible by the Commissioner the operator may calculate water usage for water status discharge determinations; and

(4) If the determination of the probable hydrologic consequences (PHC) indicates that a currently used or significant groundwater resources is likely to be contaminated, diminished, or interrupted, additional information shall be provided as necessary to fully evaluate such probable hydrologic consequences as water availability and suitability for both the premining and postmining land use in order to plan remedial and reclamation activities such as alternative water sources.

(c) Base Line Surface Water Information. Each application for a permit shall contain:

(1) The name, location, ownership, and description of all surface water bodies on the permit area and adjacent areas;

(2) Water quality descriptions including information on total suspended solids, total dissolved solids, specific conductance, pH, acidity, alkalinity, sulfates, total iron and total manganese sufficient to demonstrate seasonal variations; provided, that correlation data from other monitoring which does not include one or more of the above parameters may be accepted; provided further, that a limited number of validation samples may be required. In areas where prior mining experience has shown acid production to be a possibility, or in acid producing seams in areas with no prior mining history, site specific data-on water sampling and analysis data shall be required;

(3) Water quantity descriptions including information on seasonal flow rates, variation, and usage; and

(4) If the determination of the probable hydrologic consequences (PHC) indicates that a currently used or significant surface water resource (including all lightly buffered streams) is likely to be contaminated, diminished, or interrupted, additional information shall be provided on the flood flows, base flows, and other characteristics or information as necessary to fully evaluate such probable hydrologic consequences as water availability and suitability for both the premining and postmining land use in order to plan remedial and reclamation activities such as alternative water sources.

(d) The applicant shall submit with the application all available data and analysis described in paragraphs (b) and (c) of this subsection for use in preparing the cumulative hydrologic impact assessment (CHIA).

(e) The Commissioner shall perform a separate CHIA for the cumulative impact area of each permit application. This evaluation shall be sufficient to determine whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

(f) Each permit application shall contain a hydrologic reclamation plan. The plan shall be specific to the local hydrologic conditions. It shall contain in the form of maps and descriptions the steps to be taken during mining and reclamation through bond release to minimize disturbances to the hydrologic balance within the permit and adjacent areas; to prevent material damage outside the permit area; to meet applicable Federal and State water quality laws and regulations; and to protect the rights of present water users. The plan shall include the measures to be taken to:

- (1) Avoid acid or toxic drainage;
- (2) Prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow;
- (3) Provide water treatment facilities when needed;
- (4) Control drainage;
- (5) Restore, protect, or replace water supply of present water users in accordance with Section 24 of the Act.

Title 38
CSR 2
Section 3

The plan shall specifically address the potential adverse hydrologic consequences identified in the PHC determination and shall include preventive and remedial measures; and

(6) Restore approximate premining recharge capacity provided that underground mining operations are exempt from this requirement.

(g) Each application for a permit shall contain a surface water monitoring plans based on the PHC determination and base line hydrologic and geologic information. These plans shall identify monitoring site locations, quantity and quality parameters, sampling frequency, and describe how the data will be used to determine the impact of the operation on the hydrologic balance both on the permit area and adjacent areas. Monitoring sites shall be located in the surface water bodies such as streams, lakes, and impoundments that are potentially impacted or into which water will be discharged at both upstream and downstream locations from the discharge. Monitoring parameters shall include but are not limited to total dissolved solids or specific conductance corrected at 25°C, total suspended solids, flow measurements, pH, acidity, alkalinity, total iron and total manganese. The selection of these parameters must be based on current and approved post mining land uses and all hydrologic balance protection objectives.

(h) Each application for a permit shall contain a ground water monitoring plan for all significant groundwater resources provided that monitoring shall not be required if the applicant can demonstrate that the aquifer is not one which significantly ensures the hydrologic balance within the cumulative impact area as provided in paragraph (c), subsection 14.7 of these regulations. The decision of need will be based on the PHC determination and base line hydrologic and geologic information gathered both on and off the mine site. These plans shall identify monitoring site locations (latitude, longitude, and ground level elevations), quantity and quality parameters to be monitored, sampling frequency and duration, and describe how the data will be used to determine the impact of the operation on the hydrologic balance both on and off the mine site. Monitoring parameters shall include, but are not limited to, total dissolved solids or specific conductance corrected at 25°C, pH, acidity, alkalinity, total iron, total manganese, and water levels or discharge rates. The selection of these parameters must be based on current and approved post mining land uses and all hydrologic balance protection objectives.

(i) If the PHC indicates that adverse impact may occur to the hydrologic balance or that acid forming or toxic forming material is present that may result in contamination of surface or groundwater supplies, then additional information supplemental to that required in paragraphs (b) and (c) of this subsection shall be provided to evaluate such probable hydrologic consequences and to plan remedial and reclamation activities.

3.23 Geology. Each application for a permit shall contain the following geologic and related information:

(a) Geologic cross sections, maps or plans of the proposed permit area and adjacent areas, prepared by or under the direction of and certified by a person approved by the Commissioner. When required by the Commissioner, test borings or core samplings shall be analyzed to determine the following information:

(1) The locations (latitude and longitude) and elevations of all bore holes;

(2) The nature and depth of the various strata or overburden including geologic formation names and/or geologic members;

(3) The elevation location of subsurface water, if encountered, and its quality;

(4) The nature and thickness of any coal or rider seams above the seam to be mined;

(5) The nature of the stratum immediately beneath the coal seam to be mined;

(6) All mineral crop lines and the strike and dip of the coal to be mined, within the area of land to be affected;

(7) Existing or previous surface mining limits; and

(8) The location and extent of known workings of any underground mines, including mine openings to the surface.

(b) Information concerning the areal and structural geology of both the proposed permit and adjacent areas, down to the deeper of either the stratum immediately below the lowest coal seam to be mined or any aquifer which may be adversely impacted below the lowest coal seam to be mined. Areal geology may include information such as mapped outcrop locations shown on a

7 1/2 minute United State Geological Survey (U.S.G.S.) topographic map, areaaerial photographs, and published geologic reports for the area of concern. Structural geology may include mapped lineament traces from aerial photography or topographic maps and any published structural geologic reports for the area of concern;

(c) Areal and vertical distribution of aquifers with seasonal differences in head and the name(s) of the stratum (or strata) in which the water is found;

(d) Location and depth of all oil and gas wells within the proposed permit area for both surface and underground mines;

(e) For underground mining operations, indicate whether or not there will be a gravity discharge; and

(f) A statement of the result of test borings or core samples from the permit and adjacent areas including:

(1) The results of test borings including the lithologic logs of the drill holes displaying the physical properties and thickness of each stratum encountered which the applicant has made at the area to be covered by the permit, or other equivalent information and data in a form satisfactory to the Commissioner including the structural geology, thickness of the coal seam to be mined, location of subsurface water, if encountered, and an analysis of the chemical and physical properties, including but not limited to the sulfur content of any coal seam, the chemical analysis of potentially acid or toxic-forming sections of the overburden, and the chemical analysis of the stratum lying immediately underneath the coal to be mined: Provided, that information which pertains only to the analysis of the chemical and physical properties of the coal, except information regarding such mineral or elemental contents which are potentially toxic in the environment, shall be kept confidential and not a matter of public record;

(2) Premining overburden sampling and analysis or previous experience and correlation data, shall be made a part of each permit application for all acid-producing seams. Overburden sampling and analysis is to be performed in accordance with standard procedures set forth in Environmental Protection Agency Manual No. 600/2-78-054 (Field and Laboratory Methods Applicable to Overburdens and Minesoils) or other methods approved by the Commissioner;

(3) For standard room and pillar mining operations, the thickness and engineering properties of clays or soft rock such as clay shale, if any, in the stratum immediately above and below each coal seam to be mined;

(4) Cross sectional or areal maps illustrating faults, crop lines, dip/strike, synclines, anticlines and other known geologic structural features which have a bearing on the extraction of the coal and/or the hydrologic regime. The maps shall be accompanied by a detailed description of the illustrated data including a brief description of the degree of fracturing and weathering, noted during the exploration drilling if it is believed to have a potential influence on the extraction of the coal and/or the hydrologic regime;

(5) An explanation of the anticipated potential impacts of the proposed mining operation on the hydrology and geology of the area; and

(6) An applicant may be granted a waiver for the requirements of parts (1) and (3) of paragraph (f) of this subsection only after the Commissioner finds in writing that the collection and analysis of such data is unnecessary because other equivalent information exists and is available to the Commissioner; provided, that in areas where mining history has shown acid production to be a possibility, or in acid producing seams in areas with no prior mining history, site specific data on overburden sampling and analysis data shall be required.

3.24 Protection of Adjacent Operations. Surface mining activities shall be designed to protect disturbed surface areas, including spoil disposal sites, so as not to endanger any present or future operations of either surface or underground mining activities.

3.25 Transfer, Assignment or Sale of Permit Rights and Obtaining Approval; Sale, Conveyance or Assumption of Control or Ownership of an Operation.

(a) The Commissioner may grant written approval of the transfer, assignment or sale of a permit under the following terms and conditions:

(1) The applicant shall affirmatively demonstrate to the Commissioner that a bond in the full amount of that required for the permit will be kept in full force and effect before, during, and after the transfer, assignment, or sale.

Title 38
CSR 2
Section 3

(2) The application, for transfer, assignment, or sale, shall set forth on forms prescribed by the Commissioner, the information required in paragraphs (1) through (6), subsection (a), Section 9 and paragraph 9 subsection (a) of Section 9, subsections (d) and (f) of Section 9, paragraph (10), subsection (a) of Section 10, and paragraph (5) subsection (b) of Section 18 of the Act and paragraph (a), (b), (c), (d), (i), (j), and (k) of Subsection 3.1 of these regulations.

(3) The applicant for transfer, assignment or sale of a permit shall, upon filing of the application with the Commissioner, give notice of the filing in a newspaper of general circulation in the locality of the operation. The notice shall be in the form of a legal advertisement containing information as set forth on forms provided by the Commissioner, the name and address of the original permittee and the permit number and shall provide for a thirty (30) day comment period. Any person whose interests are or may be adversely affected, may submit written comments to the Commissioner within thirty (30) days of the date of publication.

(4) Approval of the application for transfer, assignment, or sale of a permit may be granted upon a written finding by the Commissioner that the applicant is eligible to receive a permit in accordance with paragraphs ~~(e)~~-(b) and ~~(d)~~ (c) of subsection 3.321 of these regulations, has submitted a performance bond or other guarantee or ~~has-obtained-will be covered by the bond coverage-~~of the original permittee, and will conduct mining operations in accordance with the purposes and intent of the Act, these rules and regulations, and the terms and conditions of the permit. Such findings will be based on information set forth in the application for transfer, assignment, or sale and any other information made available to the Commissioner.

(5) The Commissioner shall notify the permittee, the successor, all commentors, and the Charleston field offices of the Office of Surface Mining Reclamation and Enforcement of his findings.

(6) The successor shall immediately notify the Commissioner upon consummation of the transfer, assignment, or sale.

(7) Each application for a transfer, assignment or sale of a permit shall contain a sworn statement as follows: "The information contained in this application is true and correct to the best of my knowledge and belief." Such statement shall be

Title 38
CSR 2
Section 3

signed by an accountable official of the applicant and shall be notarized.

(b) Any person who, through whatever means, assumes ownership or control directly or indirectly of a surface mining and reclamation operation shall become responsible for the correction of all outstanding unabated violations. The payment of all delinquent civil penalties and unpaid reclamation fees for the operation remain the responsibility of the prior permittee, unless it is determined by the commissioner pursuant to subsection 2.83 of these regulations that the person assuming control owned or controlled the operation at the time such penalties or fees were incurred.

~~3-26-Agreement.~~(c) A permittee who wishes to assign the mining operation through an agreement, contract, job contract, etc., to another person, but retain the permit must:

(1) request prior written approval of such assignment on forms prescribed by the Commissioner. Under this arrangement the permittee remains subject to all provisions of the Act, these rules and regulations, and the terms and conditions of the permit;

(2) Advertise the application pursuant to subparagraph (3), paragraph (a) of this subsection; and

(3) Provide, with respect to the assignee, the ownership and control information required by paragraphs (a), (b), (c), (d), (i), (j), and (k) of subsection 3.1 of these regulations.

(d) Each assignee who will function as an operator pursuant to the provisions of paragraph (c) of this subsection, shall be subject to the eligibility requirements of paragraphs (c) and (d) of subsection 3.31 of these regulations.

(e) The sale or other conveyance of a surface coal mining and reclamation operation which has outstanding violation(s), outstanding civil penalties, or reclamation fees, or the sale or other conveyance of any interest in any entity with outstanding violations, penalties, or fees, or the sale or conveyance of an entity which owns or controls an entity, or is owned or controlled by an entity which owns or controls a surface coal mining and reclamation operation with an outstanding violation, penalties or fees shall not in any way affect the application of the permit block sanction set forth in these regulations.

3-273.26 Permit Renewals and Permit Extensions.

(a) All active surface mining operations shall be subject to the renewal requirements, and provisions for issuance of the renewal, of Section 19 of the Act. Those operations which have been granted inactive status in accordance with Subsection 14.11 of these regulations, shall also be subject to the renewal requirements of Section 19 of the Act. Applications shall be filed on forms provided by the Commissioner and shall contain at a minimum the following information:

(1) The name and address of the permittee, location of the permit area including the county, the magisterial district, the nearest post office and the permit number;

(2) A statement that the terms and conditions of the preplan are being satisfactorily met;

(3) A statement that the operation is in compliance with the applicable environmental protection standards of the Act and these rules and regulations;

(4) A statement that the performance bond and insurance policy for the operation will continue in effect;

(5) A progress map of an approved size and scale as the proposal maps for all operations except those operations which have obtained a bond release or those operations with no disturbance and which have not started into operation;

(6) Each application for a permit renewal shall contain a sworn statement as follows: "The information contained in this application is true and correct to the best of my knowledge and belief." Such statement shall be signed by an accountable official of the applicant and shall be notarized; and

(7) A copy of the proposed newspaper advertisement in accordance with subsection (a) Section 20 of the Act and subsection 3.2 of these regulations.

(b) Each application for renewal of a permit shall be administratively complete prior to public notice. The Commissioner shall notify the appropriate agencies of the application for renewal as required in subsection (a) of Section 20 of the Act.

(c) Any person having an interest which is or may be adversely affected by the decision on the application, or an

Title 38
CSR 2
Section 3

officer or a head of a Federal, State, or local government agency, may request in writing that the Commissioner hold an informal conference on the application for a permit renewal.

(1) The request shall:

(A) Briefly summarize the issues to be raised by the requestor at the conference;

(B) State whether the requestor desires to have the conference conducted in the locality of the proposed operation; and

(C) Be filed with the Commissioner no later than thirty (30) days after the last publication of the newspaper advertisement required under subparagraph (7) of paragraph (a) of this subsection.

(2) Except as provided in paragraph 3 of this paragraph, if any informal conference is requested the Commissioner shall hold an informal conference within a reasonable time following the receipt of the request. The informal conference shall be conducted as follows:

(A) If requested, it shall be held in the locality of the proposed surface mining and reclamation operation.

(B) The date, time, and location of the informal conference shall be sent to the applicant and other parties to the conference and advertised by the Commissioner in a newspaper of general circulation in the locality of the proposed surface mining and reclamation operation at least two (2) weeks before the scheduled conference.

(C) If requested in writing by a conference requestor at a reasonable time before the conference, the Commissioner may arrange with the applicant to grant parties to the conference access to the proposed permit area and, to the extent that the applicant has the right to grant access to it, to the adjacent area prior to the established date of the conference for the purpose of gathering information relevant to the conference.

(D) The conference shall be conducted by the Commissioner, who may accept oral or written statements and any other relevant information from any party to the conference. An electronic or stenographic record shall be made of the

conference, unless waived by all the parties. The record shall be maintained and shall be accessible to the parties of the conference until final release of the applicant's performance bond or other equivalent guarantee.

(3) If all parties requesting the informal conference withdraw their request before the conference is held, the informal conference may be cancelled.

(d) Time extension of sixty (60) days may be granted by the Commissioner for permit renewal which has been submitted but is logistically impractical to process before the expiration date.

(e) Extensions of time for a permit as provided in paragraph (e) of Section 8 of the Act shall be specifically set forth in a written approval and made part of the permit. Such extension shall be made public by the Commissioner.

(f) Extensions of the initial permit term in excess of five (5) years as provided in paragraph (c) of Section 8 of the Act may be granted upon written request by the applicant. Such request shall be accompanied by a written verification. Any permit extension which is approved under this paragraph shall be reviewed by the Commissioner at its mid-term or every five (5) years, whichever is more frequent.

3-283.27 Permit Revisions.

(a) Each request for a permit revision will be submitted on forms prescribed by the Commissioner which shall be signed by the accountable official of the applicant and shall be notarized.

(b) Each application for a permit revision shall be subject to review and approval by the Commissioner. Each application shall be reviewed by the Commissioner to determine if an updated probable hydrologic consequences determination or cumulative hydrologic impact assessment is required. The Commissioner shall make a determination, on the basis of information provided in the permit revision application, whether or not the revision is of a significant or non-significant nature. The following criteria shall provide guidance for making such a determination.

(1) Significant Permit Revisions. Where the permit revision constitutes a significant departure from the terms and conditions of the existing permit which may result in a significant impact in any of the following areas, it shall be deemed to be a significant revision and be subject to the public

Title 38
CSR 2
Section 3

notice requirements of paragraphs (a) and (b) of subsection 3.2 of these regulations:

- (A) The health, safety, or welfare of the public;
- (B) The hydrologic balance in the area of operation;
- (C) The postmining land use;
- (D) Areas prohibited from mining pursuant to the provisions of subsection (d) Section 22 of the Act; and
- (E) An individual's legal right to receive notice, as prescribed by the provisions of these rules and regulations.

(2) Non-significant Revisions. Where the permit revision constitutes only an insignificant departure from the terms and conditions of the approved permit, it shall be deemed to be a non-significant revision requiring no public notice.

(c) The Commissioner may require reasonable revisions to surface mining permits or prospecting approvals where such revisions are necessary to assure compliance with the Act and these regulations. ~~Provided that where such permits and approvals were granted prior to the effective date of these regulations, such revision shall be required only where compliance with these regulations are necessary to assure adequate protection of the environment or public health and safety.~~ ; provided, that the Commissioner shall notify the permittee that such revisions are necessary and shall provide a reasonable time for compliance.

3-293.28 Incidental Boundary Revisions (IBR).

(a) All Incidental Boundary Revisions (IBR) shall be granted in accordance with paragraph (2) subsection (a) Section 19 of the Act and shall be limited to additional areas of disturbance resulting from shifts in permit boundaries or extensions of the permit boundary where any coal extraction is incidental to or of only secondary consideration. Incidental Boundary Revisions shall not be granted for any prospecting operations.

IBRs shall also include the deletion of bonded acreage which is overbonded by another valid permit and for which full liability is assumed in writing by the successive permittee.

Title 38
CSR 2
Section 3

(b) General. In addition to the information required by paragraph (2) subsection (a) Section 19 of the Act the following requirements shall be met:

(1) The application shall be filed on forms provided by the Commissioner.

(2) For purposes of surface mining operations, the maximum total acreage to be permitted under one or more IBR(s) shall not exceed twenty (20) percent of the original permitted acreage or a maximum of fifty (50) acres, whichever is less, throughout the life of the permit. Acreage limitation for IBR(s) on underground mining operations shall be limited to one hundred fifty (150) percent of the original permitted acreage or a maximum of fifty (50) acres, whichever is less, throughout the life of the permit.

(3) All IBR's for a permit will be subject to review and approval by the Commissioner.

(4) No IBR to a permit may be implemented by any operator until written approval of the Commissioner has been granted.

(5) The Commissioner shall make the following findings prior to approval of an IBR:

(A) The IBR does not constitute a change in the postmining land use.

(B) The IBR will only involve lands for which the approved PHC is applicable.

(C) The IBR does not constitute a change in the method of mining.

(D) The IBR will not result in adverse environmental impacts of a larger scope or different nature from those described in the approved permit.

(E) The IBR will facilitate the orderly and continuous conduct of mining and reclamation operations.

(F) Except for underground operations, an area permitted under an IBR must be contiguous to the original permitted area.

Title 38
CSR 2
Section 3

(6) All provisions of the IBR which differ from the original permit shall meet the requirements of the Act and regulations, except as provided in this subsection.

(c) Upon review of an application for an incidental boundary revision, the Commissioner may require an advertisement to be published which provides for a ten (10) day public comment period. The advertisement shall contain such information as set forth on a form prescribed by the Commissioner.

3-303.29 Variance.

(a) Approximate Original Contour. All permits approved with variances from approximate original countercontour shall be reviewed by the Commissioner two and one-half (2 1/2) years after issuance to determine whether or not the operation is proceeding in accordance with the terms of the variance.

(b) Contemporaneous Reclamation. The Commissioner may grant a request for variance from contemporaneous reclamation in accordance with paragraph (16), subsection (b), Section 12 of the Act, if such request is made a part of the surface mining permit application or a subsequent revision to a permit, and if the area reserved for the underground mining operation is permitted under a separate permit. If the underground mining operation is not activated within three (3) years of the date of issuance of the permit, ~~the permittee shall apply for inactive status in accordance with subsection 14.11 of these regulations~~ the permit shall terminate, unless extended as provided for in subsection (e), Section 8 of the Act. Upon termination of the permit, the mine site shall be reclaimed in accordance with the Act, these regulations, and the reclamation plan approved in the permit.

(c) Application contents for variances. Any person desiring a variance under paragraph (b) of this subsection shall file with the Commissioner complete applications for both the surface mining activities and underground mining activities which are to be combined. The reclamation and operation plans for these permits shall contain appropriate narratives, maps, and plans which:

(1) Show why the proposed underground mining activities are necessary or desirable to assure maximum practical recovery of the coal;

(2) Show how multiple future disturbances of surface lands or waters will be avoided;

Title 38
CSR 2
Section 3

(3) Identify the specific surface areas for which a variance is sought and the sections of the Act or these regulations from which a variance is being sought;

(4) Show how the activities will comply with subsections 3.24 and 14.13 of these regulations;

(5) Show why the variance sought is necessary for the implementation of the proposed underground mining activities;

(6) Provide an assessment of the adverse environmental consequences and damages, if any, that will result if the reclamation of surface mining activities is delayed; and

(7) Show how offsite storage of spoil will be conducted to comply with the requirements of the Act and subsection 14.14 of these regulations.

(d) Issuance of Permit. A permit incorporating a variance granted under paragraph (b) of this subsection may be issued by the Commissioner if it is first determined, in writing, upon the basis of a complete application filed in accordance with this subsection, that:

(1) The applicant has presented, as part of the permit application, specific, feasible plans for the proposed underground mining activities;

(2) The proposed underground mining activities are necessary or desirable to assure maximum practical recovery of the mineral resources and will avoid multiple future disturbances of surface land or waters;

(3) The applicant has satisfactorily demonstrated that the applications for the surface mining activities and underground mining activities conform to the requirements of the Act and these regulations and that all other permits necessary for the underground mining activities have been issued by the appropriate authority;

(4) The surface area of surface mining activities proposed for the variance has been shown by the applicant to be necessary for implementing the proposed underground mining activities;

(5) No substantial adverse environmental damage, either onsite or offsite, will result from the delay in completion of reclamation;

(6) The operations will, insofar as a variance is authorized, be conducted in compliance with the requirements of subsections 3.24 and 14.13 of these regulations;

(7) Provisions for offsite storage of spoil will comply with the requirements of the Act and subsection 14.14 of these regulations.

(8) Liability under the performance bond required to be filed by the applicant will be for the duration of the underground mining activities and until all requirements of the Act and these regulations have been complied with.

(9) The permit for the surface mining activities contains specific conditions:

(A) Delineating the particular surface areas for which a variance is authorized;

(B) Identifying the applicable provisions of the Act and these regulations;

(C) Providing a detailed schedule for compliance with the provisions of this subsection.

(e) Variances granted under paragraph (b) of this subsection shall be reviewed by the Commissioner no later than three (3) years from the dates of issuance of the permit and any permit renewals.

3-313.30 Federal or State Highway or Other Construction Exemption.

(a) To qualify as a federal or state highway or other construction project, the construction must be funded fifty percent (50%) or more by the federal or state government and once the exemption is granted, the person doing the construction must have on-site available for inspection, the following:

(1) Descriptions of the project to include, but not be limited to, the exact location of the limits of all of the area to be affected by the construction; and

(2) Authorization from the agency or agencies providing the funding and, if different, the agency or agencies responsible for the construction, giving permission to proceed

and the amount of funding provided as a percent of the total project cost.

(b) The extraction of coal shall be limited to areas within the highway right-of-way or within the boundaries of the area directly affected by other construction activities.

3-323.31 Findings - Permit Issuance.

(a) The Commissioner shall review an application for a permit, a permit revision, or a permit renewal, written comments and objections submitted relative to the application, records of any informal conference or hearing held relative to the application, and issue a written decision either granting, requiring modification of, or denying the application. If an informal conference is held, the decision shall be made within sixty (60) days of the close of the conference, unless a later time is necessary to provide an opportunity for an appeal. The applicant for a permit or revision of a permit shall have the burden of establishing that his application is in compliance with all the requirements of the Act and these regulations.

(b) Based on the information provided by applicants for surface mining permits pursuant to paragraphs (a), (b), (c), (d), (i), (j), and (k) of subsection 3.1 of these regulations and any other reasonably available information, the Commissioner will compile and maintain an accurate and up-to-date computerized listing of all persons who own or control surface mining operations with outstanding unabated cessation orders, delinquent civil penalties, delinquent reclamation fees, and bond forfeitures of record in the state since May 3, 1978. The listing will include, to the extent reasonably possible, all owners and controllers of the violator(s), described in paragraph (m) of subsection 3.126 of these regulations. The Commissioner will make reasonable efforts to determine the owners and controllers of the permittee, the operator if different from the permittee, and the lessor or mineral owner, where a contract mining situation exists. The procedures and listings described in this paragraph do not apply to notices of violations and are subject to rights of rebuttable presumption. The Commissioner is not obligated to use this information to conduct a systematic review of all existing permits for the purpose of identifying and subsequently suspending those, if any, which may have been improvidently issued.

The Commissioner will systematically prioritize the data collection and data compilation effort required by this paragraph on the ownership and control of violators in the following order:

Title 38
CSR 2
Section 3

bond forfeitures, outstanding unabated cessation orders, delinquent civil penalties, and delinquent reclamation fees.

To accomplish this objective, the Commissioner will utilize the data in the federal Applicant Violator System, the Surface Mining Information System, the Mine Safety and Health Administration R.31 Data Base, and the Energy information Administration Data Base together with such other information as may be readily available. In addition, the Commissioner will make reasonable efforts to identify and include the Mine Safety and Health Administration identification number for sites on the violation listing.

The Commissioner will, using the computerized data bases, review prior to permit issuance all applications received after the effective date of these regulations and make all reasonable efforts to determine at a minimum in each case whether outstanding violations (except for notices of violations), unabated cessation orders, delinquent civil penalties, and/or bond forfeitures exist on the part of the applicant, the owners or controllers of the operator, and the lessor and entities controlled by the lessor, (if the lessor retains rights to the coal after extraction) and, if so, withhold approval of the application until all violations are abated or otherwise resolved in accordance with the requirements of the Act and these regulations.

The Commissioner will verify by letter-withuse of information, updated at least quarterly, provided by all bordering states which produce coal (Ohio, Maryland, Virginia, Kentucky, and Pennsylvania) whether any of the owners/controllers of the applicant and/or operator and the lessor have unabated cessation orders, delinquent civil penalties, and/or bond forfeitures in those states and withhold approval of the application until all known violations are abated or otherwise resolved.

Where the information in the subject data bases is incomplete and where the information is not available or has not been made available to the Commissioner prior to issuance of the permit, the Commissioner shall not be held in violation of any of the requirements of the Act and these regulations. However, where it is later determined that permits were improvidently issued as a result of inadequate information in the subject data bases or other sources available at the time the permit is issued, the Commissioner shall initiate the procedures set forth in subsection 3.343 of this section.

Title 38
CSR 2
Section 3

(c) Based on reasonably available information concerning federal and state failure-to-abate cessation orders, unabated federal and state imminent harm cessation orders, delinquent civil penalties, bond forfeitures where violations upon which the forfeitures were based have not been corrected, delinquent abandoned mine reclamation fees, and unabated violations of federal and state laws, rules and regulations pertaining to air or water environmental protection incurred in connection with any surface mining operation, the Commissioner shall not issue the permit if any surface mining and reclamation operations owned or controlled by either the applicant or by any person who owns or controls the applicant is known-to-be-currently in violation of the Act or any other law, rule or regulation referred to in this paragraph. In the absence of a failure-to-abate cessation order, the Commissioner may presume that a notice of violation has been or is being corrected to the satisfaction of the agency with jurisdiction over the violation, except where evidence to the contrary is set forth in the permit application, or where the notice of violation is issued for nonpayment of abandoned mine reclamation fees or civil penalties. If a current violation exists, the Commissioner shall require the applicant or person who owns or controls the applicant, before the issuance of the permit, to either:

(1) Submit proof that the current violation has been or is in the process of being corrected to the satisfaction of the agency that has jurisdiction over the violation; or

(2) Establish that the applicant or any person owned or controlled by either the applicant or any person who owns or controls the applicant, has filed and is presently pursuing, in good faith, a direct administrative or judicial appeal to contest the validity of the current violation. If the initial judicial review authority either denies a stay applied for in the appeal or affirms the violation, then the applicant shall within thirty (30) days submit the proof required under subparagraph (1) of this paragraph.

(3) Any permit that is issued on the basis of proof submitted under subparagraph (1) of this paragraph that a violation is in the process of being corrected, or pending the outcome of an appeal described in subparagraph (2) of this paragraph, shall be conditionally issued.

(4) If the Commissioner makes a finding that the applicant, or any person who owns or controls the applicant, or the operator specified in the application, controls or has controlled surface coal mining and reclamation operations with a

Title 38
CSR 2
Section 3

demonstrated pattern of willful violations of the Act and these regulations of such nature and duration and with such resulting irreparable damage to the environment as to indicate an intent not to comply with the Act, or these regulations, the permit shall not be granted. Before such a finding becomes final, the applicant or operator shall be afforded an opportunity for an adjudicatory hearing.

(d) No permit application, ~~application for renewal of a permit~~, or application for a significant revision of a permit shall be approved unless the application affirmatively demonstrates and the Commissioner finds, in writing, on the basis of information set forth in the application or from information otherwise available that is documented in the approval, the following:

(1) The application is complete and accurate and the applicant has complied with all requirements of the Act and these regulations.

(2) The applicant has demonstrated that reclamation as required by the Act and these regulations can be accomplished under the reclamation plan contained in the permit application.

(3) The proposed permit area is:

(A) Not within an area under study or administrative proceedings under a petition, filed, to have an area designated as unsuitable for surface coal mining operations, unless the applicant demonstrates that before January 4, 1977, he had made substantial legal and financial commitments in relation to the operation covered by the permit application; or

(B) Not within an area designated as unsuitable for mining and subject to the prohibitions or limitations of subsection (d), Section 22, of the Act.

(4) Where the private mineral estate to be mined has been severed from the private surface estate, an applicant shall also submit:

(A) A copy of the written consent of the surface owner for the extraction of coal by surface mining methods;

(B) A copy of the conveyance that expressly grants or reserves the right to extract coal by surface mining methods; or

Title 38
CSR 2
Section 3

(C) If the conveyance does not expressly grant the right to extract the coal by surface mining methods, documentation that under state law, the applicant has the legal authority to extract the coal by those methods.

(5) The Commissioner has made an assessment of the probable cumulative impacts of all anticipated coal mining on the hydrologic balance in the cumulative impact area and has determined that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

(6) The applicant has demonstrated that any existing structure will comply with subsection (b), Section 29 of the Act, and subsection 3.8 and Section 14 of these regulations.

(7) The applicant has paid all reclamation fees from previous and existing operations.

(8) The applicant has satisfied the applicable requirements for experimental practices, steep slope mining, mountaintop removal mining, variances from approximate original contour, variances for delay in contemporaneous reclamation, prime farmland, auger mining, in situ processing, and coal preparation plants not located within the permit area of a mine, when such are proposed in the application.

(9) The applicant has, if applicable, satisfied the requirements for approval of a long-term intensive agricultural postmining land use.

(10) The operation would not affect the continued existence of endangered or threatened species or result in destruction or adverse modification of their critical habitats, as determined under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

(11) The Commissioner has taken into account the effect of the proposed permitting action on properties listed on and eligible for listing on the National Register of Historic Places. This finding may be supported in part by inclusion of appropriate permit conditions or changes in the operation plan protecting historic resources, or a documented decision that the Commissioner has determined that no additional protection measures are necessary.

(12) For a proposed remaining operation where the applicant intends to reclaim in accordance with the requirements

Title 38
CSR 2
Section 3

of paragraph-(i)-subsection 14.16 of these regulations, the site of the proposed operation is an area which was previously mined prior to August 3, 1977.

(13) The applicant has provided evidence that liability insurance in accordance with subsection 11.1 of these regulations is in effect.

(e) If the application is approved, the Commissioner shall require that the applicant file a performance bond as provided in Section 11 of the Act and Section 11 of these regulations.

(f) After an application is approved, but before a surface mining permit is issued, the Commissioner shall reconsider his decision to approve the application, based on the compliance review required by paragraph (c) of this subsection in light of any new information submitted under paragraphs (n) of subsection 3.1 of these regulations. Permit revisions and permit renewals are not subject to the provisions of this paragraph.

3-333.32 Permit Conditions. Each permit issued by the Commissioner shall be subject to the following conditions:

(a) The permittee shall conduct surface coal mining and reclamation operations only on those lands that are specifically designated as the permit area on the maps submitted with the application and authorized for the term of the permit and that are subject to the performance bond or other equivalent guarantee in effect pursuant to Section 11 of the Act and Section 11 of these regulations.

(b) The permittee shall conduct all surface coal mining and reclamation operations only as described in the approved application, except to the extent that the Commissioner otherwise directs in the permit.

(c) The permittee shall comply with the terms and conditions of the permit, all applicable performance standards of the Act, and these regulations.

(d) Without advance notice, delay, or a search warrant, upon presentation of appropriate credentials, the permittee shall allow the Commissioner to:

(1) Have the right of entry provided for in subsection (a), Section 15 of the Act; and

Title 38
CSR 2
Section 3

(2) Be accompanied by private persons for the purpose of conducting an inspection in accordance with subsection 18.2 of these regulations when the inspection is in response to an alleged violation reported to the Commissioner by the private person.

(e) The permittee shall take all possible steps to minimize any adverse impact to the environment or public health and safety resulting from noncompliance with any term or condition or of the permit, including, but not limited to:

(1) Any accelerated or additional monitoring necessary to determine the nature and extent of noncompliance and the results of the noncompliance;

(2) Immediate implementation of measures necessary to comply; and

(3) Warning, as soon as possible after learning of such noncompliance, any person whose health and safety is in imminent danger due to the noncompliance.

(f) As applicable, the permittee shall comply with subsection 3.8 of these regulations and all applicable performance standards for compliance, modification, or abandonment of existing structures.

(g) The operator shall pay all reclamation fees for coal produced under the permit for sale, transfer or use.

(h) Within thirty days after a cessation order is issued for operations conducted under the permit, except where a stay of the cessation order is granted and remains in effect, the permittee shall either submit to the Commissioner the following information, current to the date the cessation order was issued, or notify the Commissioner in writing that there has been no change since the immediately preceding submittal of such information:

(1) Any new information needed to correct or update the information previously submitted to the Commissioner by the permittee under paragraphs (c)-and-(d), subsection 3.1 of these regulations; or

(2) If not previously submitted, the information required from a permit applicant by paragraph (c)-and-(d), subsection 3.1 of these regulations.

(i) The permittee shall update and furnish the Commissioner on an annual basis the information required by paragraphs (b), (c) and (d) of subsection 3.1 of this section.

(j) The obligations established under the permit, the Act, and these regulations shall continue regardless of whether the permit has expired, or has been terminated, suspended, or revoked. The performance bond and liability insurance shall remain in effect throughout the life of the permit, any renewal thereof, and the liability period necessary to ensure completion of reclamation.

3-343.33 Improvidently issued permits: General procedures.

(a) Where the Commissioner has reason to believe that an improvidently issued surface coal mining and reclamation permit exists, he shall review the circumstances under which the permit was issued. If, using the criteria set forth in paragraph (b) of this subsection, the Commissioner finds that the permit was improvidently issued, he shall take action in accordance with paragraph (c) of this subsection.

(b) A surface coal mining and reclamation permit shall be determined to have been improvidently issued if under the violations review criteria of the regulatory program at the time the permit was issued:

(1) The permit should not have been issued because of an unabated violation or a delinquent penalty or fee and the violation, penalty or fee remains unabated or delinquent and is not the subject of a good faith appeal, or an abatement plan or payment schedule with which the permittee or other person responsible is complying to the satisfaction of the responsible agency;

(2) The permit was issued on the presumption that a notice of violation was in the process of being corrected to the satisfaction of the agency with jurisdiction over the violation, but a cessation order subsequently was issued; or

(3) The permittee was linked to a violation, penalty or fee through ownership or control, under the violation review criteria of the regulatory program at the time the permit was issued and an ownership or control link between the permittee and the person responsible for the violation, penalty or fee still exists, or when the link was severed the permittee continues to be responsible for the violation, penalty or fee.

Title 38
CSR 2
Section 3

(c) Remedial measures. When the Commissioner finds, under paragraph (b) of this subsection, that because of an unabated violation or a delinquent penalty or fee, a permit was improvidently issued, he shall take one or more of the following remedial measures:

(1) Implement, with the cooperation of the permittee or other person responsible, and the responsible agency, a plan for abatement of the violation or a schedule for payment of the penalty or fee;

(2) Impose on the permit a condition requiring that in a reasonable period of time the permittee or other person responsible abate the violation or pay the penalty or fee;

(3) Suspend the permit until the violation is abated or the penalty or fee is paid; or

(4) Rescind the permit in accordance with paragraph (d) of this subsection.

(d) When the Commissioner elects to rescind an improvidently issued permit, he shall serve on the permittee a notice of proposed suspension and rescission which includes the reasons for the finding and states that:

(1) After a specified period of time not to exceed ninety (90) days, the permit automatically will become suspended, and not to exceed ninety (90) days thereafter rescinded, unless within those periods the permittee submits proof, and the regulatory authority finds, that:

(A) The finding of the Commissioner under paragraph (b) of this subsection was erroneous;

(B) The permittee or other person responsible has abated the violation on which the finding was based, or paid the penalty or fee, to the satisfaction of the Commissioner;

(C) The violation, penalty or fee is the subject of a good faith appeal, or of an abatement plan or payment schedule with which the permittee or other person responsible is complying to the satisfaction of the responsible agency; or

(D) Since the finding was made, the permittee has severed any ownership or control link with the person responsible for, and does not continue to be responsible for, the violation, penalty, or fee.

(e) Cessation of Operations. After permit suspension or rescission, the permittee shall cease all surface mining operations under the permit, except for violation abatement and for reclamation and other environmental protection measures as required by the Act and these regulations and the terms and conditions of the permit.

(f) The permittee may file an appeal for administrative review of the notice in accordance with the provisions of paragraph (3), subsection (d), Section 17 of the Act.

38-2-4. Haulageways or Access Roads.

-----4.1--Location.--The center line of the proposed haulageways or access roads shall be visibly marked on the site at one hundred-foot (100') intervals at the time of preinspection. Preexisting haulageways or access roads shall be exempt from this requirement.

-----4.2--Construction.

----- (a) --Construction of haulageways or access roads shall be done in accordance with the following provisions:

----- (1) --The overall grade shall not exceed ten percent (10%);

----- (2) --The maximum pitch grade shall not exceed fifteen percent (15%) for three hundred feet (300') in each one thousand feet (1,000');

----- (3) --The surface shall pitch toward the ditch line at the minimum slope of one-half inch (1/2") per foot of surface width or shall be crowned at the minimum slope of one-half inch (1/2") per foot of surface width as measured from the center line;

----- (4) --The grade on switchback curves shall be reduced to less than the approach grade and should not be greater than ten percent (10%); and

----- (5) --Cut slopes shall not be steeper than 1:1 in soils or 1/4:1 in rock.

----- (b) --All grade measurements and linear measurements in this section shall be subject to a tolerance of two percent (2%). All angles in this section shall be measured from the horizontal and shall be subject to a tolerance of five percent (5%).

-----4.3--Drainage Design.

----- (a) --All drainage designs of haulageways or access roads shall be in accordance with the following:

----- (1) --A ditch shall be provided on both sides of a throughout and on the inside shoulder of a cut-fill section, with ditch relief culverts being spaced according to grade. Water shall be intercepted or directed around and away from a switchback. All ditch lines shall be capable of passing the peak discharge of a one (1)-year, twenty-four (24)-hour precipitation

event.--Where super-elevation to the inside of a curve will improve the safety of a haulroad such as in the head of a hollow, a ditch line may be located on the outside shoulder of cut-fill section if the ditch line is designed so that it will remain stable and that drainage control is also provided for water on the outside of the curve.

------(2)---Ditch relief culverts shall be installed wherever necessary to insure proper drainage of runoff water beneath or through the haulageway or access road, according to the following specifications:

------(A):

-----Road Grade in Percent-----	-----Spacing of Culverts in Feet-----
-----0-5-----	-----300-800-----
-----6-10-----	-----200-300-----
-----11-15-----	-----100-200-----

------(B)---The culvert shall cross the haulageway or access road at a thirty-(30°)-degree horizontal angle downgrade with a minimum grade of three percent-(3%) from inlet to outlet, except in intermittent or perennial streams where the pipe shall be straight and coincide with the normal flow;

------(C)---The inlet end shall be protected by a headwall of durable material and the slope at the outlet end shall be protected with an apron of rock riprap, an energy dissipator or other similar structure;

------(D)---The culvert shall be covered by compacted fill to a depth of one foot-(1') or half the culvert diameter, whichever is greater;

------(E)---Alternative design criteria for culverts may be proposed where the design criteria of this section is not practical or necessary; and

------(F)---The cross-sectional area of all culverts installed on haulageways and access roads shall be adequate to pass the peak discharge storm runoff from a one-(1)-year twenty-four-(24)-hour precipitation event from the contributing watershed, but in no event shall the cross-sectional area be less than one hundred square inches.

------(3)---Culverts, bridges or other structures shall be used to cross intermittent or perennial streams.--During construction, consideration shall be given to such factors as

weather conditions, season of the year, time period for construction, etc., in order to minimize adverse impacts on the water quality and to the stream channel. In no event shall the sediment load of the stream be significantly increased or the water quality be significantly decreased during the construction period. These structures shall be capable of passing the peak flow for a ten (10) year, twenty-four (24) hour precipitation event from the contributing watershed. Structures of a lesser design capacity may be approved by the Commissioner if the flow through capacity of the structure itself is at least equal to or greater than the flow capacity of the stream channel as measured immediately upstream and downstream of the crossing, provided that the structure shall pass the peak of a one (1) year, twenty-four (24) hour precipitation event.

-----4.4--Sediment Control.--All sediment control structures shall have an adequate sediment storage volume and detention time. The optimum design factors for achieving this criteria is 0.125 acre/feet for each acre of disturbed area within the watershed of the structure, however, lesser storage values may be approved by the Commissioner. During construction of these structures, temporary sediment control measures, as described in the Handbook, shall be used.

-----4.5--Erosion Control.--Except for road surfaces, all disturbed area including fill and cut slopes along haulageways and access roads, shall be seeded and mulched immediately after construction and a vegetative cover shall be maintained thereafter as necessary to control erosion.

-----4.6--Surfacing.--Haulageways or access roads shall not be surfaced with any acid-producing or toxic-forming material and the surface shall be maintained in a manner that will control or prevent erosion and siltation.

-----4.7--Dust Control.--All reasonable means shall be employed to control dust from the surface of haulageways and access roads. The permit application shall include a plan for fugitive dust control practices. All exposed haulageway surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion.

-----4.8--Removal of Drainage Structures.--Bridges, culverts, stream crossings, etc., necessary to provide access to the operation, shall not be removed unless approved by the Commissioner. The same precautions as to water quality are to be taken during removal of drainage structures as those taken during construction and use.

-----4.9--Existing Haulageways or Access Roads---Where existing roads are to be used for access or haulage and it can be demonstrated that reconstruction to meet the above requirements would result in greater environmental harm and the drainage and sediment control requirements of this section can otherwise be met, subparagraphs (1) and (2), paragraph (a), of Subsection 4.2 and subparagraph (2)-(A) and (B) paragraph (a) of subsection 4.3 of this Section will not apply.

-----4.10-Infrequently Used Access Roads---Access roads constructed for and used only to provide infrequent service to surface facilities such as ventilators, monitoring devices and fans may be exempt from the requirements of this section with the exception of Subsections 4.5 and 4.11.

-----4.11-Abandonment of Haulageways or Access Roads---

----- (a) ---Haulageways or access roads shall be abandoned in accordance with the following:

----- (i) ---Prior to abandonment of haulageways or access roads, efforts shall be made to prevent erosion by the use of culverts, water bars or other devices. Water bars or earth berms shall be installed according to the following table of spacings:

----- Percent Grade of Haulageway -----	----- Spacing of Water Bars -----
	----- in Linear Feet -----
----- 2 -----	----- 250 -----
----- 5 -----	----- 135 -----
----- 10 -----	----- 80 -----
----- 15 -----	----- 60 -----
----- 20 -----	----- 45 -----
----- Above 20 -----	----- 25 -----

----- (2) ---Upon abandonment, all areas of haulageways or access roads shall be immediately seeded and mulched.

-----4.12-Plans, Design Data and Construction Specifications---

----- (a) ---Each permit application for operations in which haulageways and/or access roads are proposed shall contain the following information:

----- (i) ---A plan view of the road drawn to scale showing:

----- (A) ---The station base line;

Title 38
CSR 2
Section 4

- (B) -- Location of culverts;
- (C) -- Flow directions;
- (D) -- Location of intermittent or perennial streams; and
- (E) -- Other pertinent data as required by the Commissioner;
- (2) -- A surveyed profile drawn to scale showing:
 - (A) -- Profile of finished road surfaces;
 - (B) -- Location and size of culverts;
 - (C) -- Station elevations;
 - (D) -- Profile of original ground; and
 - (E) -- Percent grades.
- (3) -- A typical cross-section of haulroad showing:
 - (A) -- Culvert placement;
 - (B) -- Slope of culvert;
 - (C) -- Fill material;
 - (D) -- Original ground;
 - (E) -- Ditches; and
 - (F) -- Sediment control devices.
- (4) -- Each permit application for operations which propose intermittent or perennial stream crossings shall contain the following:
 - (A) -- Structure computation sheets; and
 - (B) -- Cross sections.
- (5) -- Construction specifications shall address:
 - (A) -- Excavation;

- (B)--Selection-and-placement-of-materials;
- (C)--Vegetative-protection-against-erosion;
- (B)--Road-surfacing;-and
- (E)--Drainage-and-sediment-control-measures.

-----4.13-Other-Transportation-Facilities:

------(a)--Railroad-loops,-spurs,-sidings,-surface-conveyor systems,-chutes,-aerial-tramways-or-other-transportation facilities-shall-be-designed,-constructed,-maintained-and abandoned-so-as-to-comply-with-the-following:

------(1)--Control-or-prevent-erosion,-siltation-and-the-air pollution-attendant-to-erosion;

------(2)--Control-or-prevent-damage-to-fish,-wildlife-or their-habitat-and-related-environmental-values;

------(3)--Control-or-prevent-additional-contributions-of suspended-solids-to-stream-flow-or-runoff-outside-the-permit area;

------(4)--Neither-cause-nor-contribute,-directly-or indirectly,-to-the-violation-of-state-or-federal-water-quality standards-applicable-to-receiving-waters;-and

------(5)--Prevent-or-control-damage-to-public-or-private property.--The-Handbook-contains-design-criteria-generally appropriate-for-environmental-protection-and-safety.

-----4.14-Certification:--Upon-completion-of-construction,-all roads-for-which-design-criteria-were-approved-as-part-of-the permit-shall-be-certified.--Such-certification-shall-affirm-that construction-was-done-in-accordance-with-the-approved-criteria except-as-otherwise-noted-in-the-certification-statement.--The certification-shall-be-on-forms-prescribed-by-the-Commissioner and-signed-by-an-approved-person.--Where-minor-changes-in-design are-implemented-during-construction,-such-changes-shall-be reflected-in-"as-built"-plans-which-accompany-the-certification.

4.1 Road Classification System.

(a) Each road, as defined in subsection 2.58 of these regulations shall be classified as either a primary road or an infrequently used access road.

(1) A primary road is any road which is:

(i) Used for transporting coal or spoil;

(ii) Frequently used for access or other purposes for a period in excess of six months; or

(iii) To be retained for an approved postmining land use.

(2) An infrequently used access road is any road not classified as a primary road.

4.2 Plans and Specifications.

(a) Each application for a surface coal mining and reclamation permit shall contain plans and specifications for each road to be constructed, used, or maintained within the proposed permit area. The plans and specifications shall include a map, appropriate cross sections, design drawings and specifications for road widths, gradients, surfacing materials, cuts, fill embankments, culverts, bridges, drainage ditches, low-water crossings, and drainage structures. These shall include at a minimum:

(1) A plan view of the road drawn to scale showing:

(A) The station base line;

(B) Location of culverts;

(C) Flow directions;

(D) Location of intermittent or perennial streams; and

(E) Other pertinent data as required by the Commissioner.

(2) A surveyed profile or a profile drawing drawn to scale developed from a topographic contour map of sufficient scale and detail to provide the necessary level of accuracy showing:

(A) Profile of finished road surfaces;

(B) Location and size of culverts;

- (C) Station elevations;
- (D) Profile of original ground; and
- (E) Percent grades.
- (3) A typical cross-section or sections showing:
 - (A) Culvert placement;
 - (B) Slope of culvert;
 - (C) Fill material;
 - (D) Original ground;
 - (E) Ditches; and
 - (F) Sediment control devices.
- (4) Construction specifications which explain in detail:
 - (A) Excavation;
 - (B) Selection and placement of materials;
 - (C) Vegetative protection against erosion;
 - (D) Road surfacing; and
 - (E) Drainage and sediment control measures.
- (5) A description of the plans to remove, reclaim, and abandon each road that would not be retained under an approved postmining land use, and the schedule for removal, reclamation, and abandonment.
- (6) The center line of the proposed haulageways or access roads shall be visibly marked or delineated by visible offset markings on the site at one hundred feet (100') intervals at the time of preinspection. Preexisting haulageways or access roads shall be exempt from this requirement.
- (7) The plans, drawings, and design specifications for roads shall be prepared and certified by, or under the direction of, a qualified registered professional engineer or a qualified

licensed land surveyor with experience in design and construction of roads. The engineer or land surveyor shall certify that the design and construction of the road meets requirements of the Act, these rules and regulations, current prudent engineering practices, and any other design criteria established by the Commissioner.

4.3 Stream Crossings.

(a) No part of any road shall be located in the channel of an intermittent or perennial stream unless specifically approved by the Commissioner in accordance with the following:

(1) Roads shall be located to minimize downstream sedimentation and flooding.

(2) Drawings and specifications must be provided for each proposed road crossing of an intermittent or perennial stream, as necessary for approval of the road by the Commissioner in accordance with subsection 4.2 of this section.

(3) A description must be provided indicating measures to be taken to obtain approval of the Commissioner for alteration or relocation of a natural stream channel under subsection 5.2 of these regulations.

(4) The drawings and specifications for low-water crossings of perennial or intermittent stream channels must indicate measures to be taken so as to maximize the protection of the stream in accordance with subsection 5.3 of these regulations.

4.4 Existing Haulageways or Access Roads. Where existing roads are to be used for access or haulage and it can be demonstrated that reconstruction to meet the design and construction requirements of this section would result in greater environmental harm and the drainage and sediment control requirements of Section 5 of these regulations can otherwise be met, subparagraphs (1) and (2), paragraph (a), of subsection 4.6 and subparagraphs (2) (A) and (B) paragraph (a) of subsection 4.7 of this section will not apply.

4.5 Infrequently Used Access Roads. Access roads constructed for and used only to provide infrequent service to facilities used in support of mining and reclamation operations may be exempt from the requirements of this section with the exception of the requirements of subsections 4.1, 4.8(a), 4.9 and 4.10.

4.6 Construction.

(a) Construction of haulageways or access roads shall be done in accordance with the following:

(1) The overall grade shall not exceed ten percent (10%).

(2) The maximum pitch grade shall not exceed fifteen percent (15%) for three hundred feet (300') in each one thousand feet (1,000');

(3) The surface shall pitch toward the ditch line at the minimum slope of one-half inch (1/2") per feet of surface width or shall be crowned at the minimum slope of one-half inch (1/2") per foot of surface width as measured from the center line;

(4) The grade on switchback curves shall be reduced to less than the approach grade and should not be greater than ten percent (10%); and

(5) Cut slopes shall not be steeper than 1:1 in soils or 1/4:1 in rock.

(b) All grade measurements and linear measurements in this section shall be subject to a tolerance of two percent (2%). All angles in this section shall be measured from the horizontal and shall be subject to a tolerance of five percent (5%).

4.7 Drainage Design.

(a) All drainage designs of haulageways or access roads shall be in accordance with the following:

(1) A ditch shall be provided on both sides of a throughcut and on the inside shoulder of a cut-fill section, with ditch relief culverts being spaced according to grade. Water shall be intercepted or directed around and away from a switchback. All ditch lines shall be capable of passing the peak discharge of a ten (10) year, twenty-four (24) hour precipitation event. Where super elevation to the inside of a curve will improve the safety of a haulroad such as in the head of a hollow, a ditch line may be located on the outside shoulder of cut fill section if the ditch line is designed so that it will remain stable and that drainage control is also provided for water on the outside of the curve.

(2) Ditch relief culverts shall be installed wherever necessary to insure proper drainage of runoff water beneath or through the haulageways or access road, according to the following specifications:

<u>(A) Road Grade in Percent:</u>	<u>Spacing of Culverts in Feet</u>
<u>0-5</u>	<u>300-800</u>
<u>6-10</u>	<u>200-300</u>
<u>11-15</u>	<u>100-200</u>

(B) The culvert shall cross the haulageway or access road at a thirty (30) degree horizontal angle downgrade with a minimum grade of three percent (3%) from inlet to outlet, except in intermittent or perennial streams where the pipe shall be straight and coincide with the normal flow;

(C) The inlet end shall be protected by a headwall of durable material and the slope at the outlet end shall be protected with an apron of rock riprap, an energy dissipator or other similar structure;

(D) The culvert shall be covered by compacted fill to a depth of one foot (1') or half the culvert diameter, whichever is greater, unless heavy duty pipe requiring less cover is used, and the applicant provides details of the alternate design, with supporting documentation, to the Commissioner and receives approval thereof;

(E) Alternative design criteria for culverts may be approved by the Commissioner where the design criteria of this section is demonstrated to be practical or necessary; and

(F) The cross sectional area of all culverts installed on haulageways and access roads shall be adequate to pass the peak discharge storm runoff from a one (1) year twenty-four (24) hour precipitation event from the contributing watershed, but in no event shall the cross sectional area be less than one hundred square inches.

(b) Culverts, bridges or other structures shall be used to cross intermittent or perennial streams. During construction, consideration shall be given to such factors as weather conditions, season of the year, time period for construction, etc., in order to minimize adverse impacts on the water quality and to the stream channel. These structures shall be capable of passing the peak flow for a ten (10) year, twenty-four (24) hour

precipitation event from the contributing watershed. Structures of a lesser design capacity may be approved by the Commissioner if the low through capacity of the structure itself is at least equal to or greater than the flow capacity of the stream channel as measured immediately upstream and downstream of the crossing; provided that the structure shall pass the peak of a one (1) year, twenty-four (24) hour precipitation event.

4.8 Performance Standards.

(a) Each road shall be located, designed, constructed, reconstructed, used, maintained, and reclaimed so as to:

(1) Control or prevent erosion, siltation, and the air pollution attendant to erosion, including road dust as well as dust occurring on other exposed surfaces, by measures such as vegetating, watering, using chemical or other dust suppressants, or otherwise stabilizing all exposed surfaces in accordance with current, prudent engineering practices;

(2) Control or prevent damages to fish, wildlife, or their habitat and related environmental values;

(3) Control or prevent additional contributions of suspended solids to stream flow or runoff outside the permit area;

(4) Neither cause nor contribute to, directly or indirectly, the violation of State or Federal water quality standards applicable to receiving waters;

(5) Refrain from seriously altering the normal flow of water in streambeds or drainage channels;

(6) Prevent or control damage to public or private property, including the prevention or mitigation of adverse effects on lands within the boundaries of units of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including designated study rivers and National Recreation Areas designated by Act of Congress;

(7) Use non-acid and non-toxic forming substances in road surfacing.

(b) All sediment control structures shall have an adequate sediment storage volume and detention time. The optimum design

factor for achieving this criteria is 0.125 acre/feet for each acre of disturbed area within the watershed of the structure; however, lesser storage values may be approved by the Commissioner.

4.9 Maintenance.

(a) A road shall be maintained to meet the performance standards of this part and any additional criteria specified by the Commissioner.

(b) A road damaged by a catastrophic event, such as a flood or earthquake, shall be repaired as soon as is practicable after the damage has occurred.

4.10 Reclamation. A road not to be retained under an approved postmining land use shall be reclaimed in accordance with the approved reclamation plan as soon as practicable after it is no longer needed for mining and reclamation operations. This reclamation shall include:

(a) Closing the road to traffic;

(b) Removing all bridges and culverts unless approved as part of the postmining land use;

(c) Removing or otherwise disposing of road-surfacing materials that are incompatible with the postmining land use and revegetation requirements;

(d) Reshaping cut and fill slopes as necessary to be compatible with the postmining land use and to complement the natural drainage pattern of the surrounding terrain;

(e) Haulageways or access roads shall be abandoned in accordance with the following:

(1) Prior to abandonment of haulageways or access roads, efforts shall be made to prevent erosion by the use of culverts, water bars or other devices. Water bars or earth berms shall be installed according to the following table of spacings:

<u>Percent Grade of Haulageway or Access Road</u>	<u>Spacing of Water Bars in Lineal Feet</u>
2	250
5	135
10	80
15	60
20	45
Above 20	25

(2) Upon abandonment, all areas of haulageways or access roads shall be immediately seeded and mulched.

(f) Scarifying or ripping the roadbed; replacing topsoil or substitute material, and revegetating disturbed surfaces in accordance with Section 9 of these regulations.

4.11 Primary Roads.

(a) Primary roads shall meet the requirements of this section and the following additional requirements:

(1) The construction or reconstruction of primary roads shall be certified in a report to the Commissioner by a qualified registered professional engineer, or a licensed land surveyor with experience in the design and construction of roads. The report shall indicate that the primary road has been constructed or reconstructed as designed and in accordance with the approved plan.

(2) Each primary road embankment shall have a minimum static factor of 1.3 or meet the requirements established under the applicable requirements of subsections 5.4 and 5.5 of these regulations.

(3) To minimize erosion, a primary road shall be located, insofar as is practicable, on the most stable available surface.

(4) Fords of perennial or intermittent streams by primary roads are prohibited unless they are specifically approved by the Commissioner as temporary routes during periods of road construction.

(5) Each primary road shall be constructed or reconstructed and maintained to have adequate drainage control, using structures such as, but not limited to, bridges, ditches, cross drains, and ditch relief drains. The drainage control

system shall be designed to safely pass the peak runoff from a ten (10) year, twenty-four (24) hour precipitation event.

(6) Drainage pipes and culverts shall be installed as designed, and maintained in a free and operating condition and to prevent or control erosion at inlets and outlets;

(7) Drainage ditches shall be constructed and maintained to prevent uncontrolled drainage over the road surface and embankment;

(8) Culverts shall be installed and maintained to sustain the vertical soil pressure, the passive resistance of the foundation, and the weight of vehicles using the road;

(9) Natural stream channels shall not be altered or relocated without the prior approval of the Commissioner; and

(b) Except as provided in subsection 4.3 of this section, structures for perennial or intermittent stream channel crossings shall be made using bridges, culverts, low-water crossings, or other structures designed, constructed, and maintained using current, prudent engineering practices. The Commissioner shall ensure that low-water crossings are designed, constructed, and maintained to prevent erosion of the structure or stream bed and additional contributions of suspended solids to stream flow.

(c) Primary roads shall be surfaced with material approved by the Commissioner as being sufficiently durable for the anticipated volume of traffic and the weight and speed of vehicles using the road.

4.12 Other Transportation Facilities.

(a) Railroad loops, spurs, sidings, surface conveyor systems, chutes, aerial tramways or other transportation facilities which are under the control of the permittee shall be designed, constructed, maintained and abandoned so as to comply with the following:

(1) Control or prevent erosion, siltation, and the air pollution attendant to erosion;

(2) Control or prevent damage to fish, wildlife or their habitat and related environmental values;

(3) Control or prevent additional contributions to suspended solids to stream flow or runoff outside the permit area;

(4) Neither cause nor contribute, directly or indirectly, to the violation of State or Federal water quality standards applicable to receiving waters; and

(5) Prevent or control damage to public or private property.

4.13 Certification. Upon completion of construction, all primary roads for which design criteria were approved as part of the permit shall be certified. Such certification shall affirm that construction was done in accordance with the approved criteria except as otherwise noted in the certification statement. The certification shall be on forms approved by the Commissioner and signed by an approved licensed engineer or an approved licensed land surveyor with experience in design and construction of roads. All roads used for transportation of coal or spoil, and which are constructed outside the permitted coal extraction area, shall be certified before they are used for such transportation. Any road which lies within the coal extraction area, and which is therefore constructed concurrent with progress of mining activities, shall be certified in sections of one thousand (1,000) linear feet or less as measured from the active pit.

38-2-5. Drainage and Sediment Control Systems

5.1 Natural Drainways. Natural drainways in the permit area shall be kept free of overburden except where overburden placement has been approved. Overburden placement and haulageways constructed across natural drainways shall not materially increase the sediment load, or materially affect stream quality.

5.2 Intermittent or Perennial Stream.

(a) Intermittent or Perennial Stream. No land within one hundred feet (100') of an intermittent or perennial stream shall be disturbed by surface mining operations including roads unless specifically authorized by the Commissioner. The Commissioner will authorize such operations only upon finding that surface mining activities will not adversely affect the normal flow or gradient of the stream, adversely affect fish migration or related environmental values, or materially damage the water quantity or quality of the stream, or will not cause or contribute to violations of applicable state or federal water quality standards. The area not to be disturbed shall be designated a buffer zone and marked accordingly.

5.3 Stream Channel Diversions and Diversion Ditches.

(a) All stream channel diversions and diversion ditches shall be designed for safety and stability, shall be constructed in such a manner so as to avoid additional contributions of suspended solids to streams, and shall provide protection against flooding and resulting damage to life and property. The design and construction shall be certified by a registered professional engineer.

(b) Stream Channel Diversions:

(1) Temporary and permanent stream channel diversions shall be designed so as to have at a minimum the capacity to carry the flow of the existing stream channel. The maximum flow carrying capacity of the existing stream channel shall be determined on the basis of cross-sectional area of the stream channel at points immediately upstream and downstream of the segment to be diverted. A combination of the cross-sectional area of the stream channel diversion, the stream bank, and the flood-plain configuration shall be adequate to pass safely the peak runoff of a ten (10) year, twenty-four (24) hour precipitation event for a temporary stream channel diversion and

Title 38
CSR 2
Section 5

a one hundred (100) year, twenty-four (24) hour precipitation event for a permanent stream channel diversion.

(2) The following information shall be made a part of the permit application when stream channel diversions are proposed:

(A) A "stream channel design computation sheet" for each proposed temporary or permanent stream channel diversion;

(B) Construction plans which contain:

(i) A plan view of the area showing center line profiles of the existing stream channel and proposed location of the temporary or permanent stream channel;

(ii) A profile along the center line of the existing stream channel showing gradient of the stream bottom and top of channel;

(iii) A profile along the center line of the proposed temporary or permanent stream channel diversion showing gradient of the stream bottom and top of channel;

(iv) A cross-section showing original ground limits, bottom width, side slopes, depth of flow, floodplain configuration; and

(v) A detailed description of the sequence of installation of temporary or permanent stream channel diversion.

(C) Construction specifications; and

(D) Maintenance schedule and procedures for maintenance.

(c) Diversion Ditches:

(1) Diversions shall have the capacity to pass safely the peak discharge from a ten (10) year, twenty-four (24) hour precipitation event.

(2) Plans, Design Data and Specifications. Where the permit application proposes the use of diversion ditches, the drainage plan shall contain the following:

(A) A "Diversion Design Computation Sheet" for each proposed diversion;

(B) Construction plans showing:

(i) A surveyed profile along the center line of the diversion showing the original ground line and proposed depth of the diversion;

(ii) A cross-section showing the original ground line, bottom width, side slopes, depth of flow, freeboard and other pertinent information;

(iii) The type of soil in which the diversion will be excavated. The soil shall be sampled and classified at five hundred feet (500') intervals along the center line of the diversion;

(iv) The type and design of the outlet proposed for each diversion;

(v) A maintenance schedule and procedures for maintenance;

(vi) Construction specifications; and

(vii) A vegetation plan.

5.4 Sediment Control.

(a) General.

Sediment control structures-and-bench-control-systems shall be constructed in appropriate locations for the purposes of controlling sedimentation. All runoff from the disturbed area shall pass through a sedimentation control system. All such systems and other water retaining structures used in association with the mining operation shall be designed, constructed, located, maintained, and used in accordance with the-criteria-set forth-in-the-Handbook-or-other-approved-criteria-these regulations and in such a manner as to minimize adverse hydrologic impacts in the permit and adjacent areas to prevent material damage outside the permit area and to assure safety to the public.

(b) Design and Construction Requirements. All sediment control structures and other water retention structures used in association with the mining operation shall:

(1) ~~Sediment-control-structures-and-bench-control systems-shall-b~~Be constructed in accordance with the plans, design criteria, and specifications set forth in the preplan. Any deviations from the approved preplan which result from unforeseen site specific circumstances arising during construction, shall be reflected in as-built plans submitted by the operator and approved by the Commissioner immediately following construction. The as-built plans shall indicate the original design, the extent of changes, and reference points. ~~Sediment control structures and-bench-control-systems-shall be~~ certified in accordance with the requirement of paragraph (c) of this subsection.

(2) ~~All-structures-shall-b~~Be located as near as possible to the disturbed area and out of perennial streams unless the applicant demonstrates and the Commissioner finds that there is no other suitable location for such structures.

(3) ~~Discharges-from-sediment-control-structures-and bench-control-systems-shall-c~~Comply with applicable state and federal water quality standards and shall-meet effluent limitations as specified in an NPDES permit for all discharges.

(4) ~~All-structures-shall-h~~Have the capacity to store 0.125 Acre/ft. of sediment for each acre of disturbed area in the structures watershed; provided, that consideration may be given for reduced storage volume where the preplan and site conditions reflect controlled placement, concurrent reclamation practices, or use of on-bench sediment control structures-; provided further, that reduced storage volume will be approved only where the operator demonstrates that the effluent limitations of paragraph (b), subsection 14.5 of these regulations will be met. The disturbed area for which the structure is to be designed will include all land affected by previous surface mining operations that are not presently stabilized and all land that will be disturbed throughout the life of the permit.

(5) ~~All-structures-and-bench-control-systems-shall-b~~Be equipped with a nonclogging dewatering device of an adequate design and size to maintain the storage requirements of subparagraph (4) of this paragraph.

(6) ~~All-structures-and-bench-control-systems-shall-b~~Be designed, constructed and maintained to prevent short-circuiting.

(7) ~~All-structures-and-bench-control-systems-shall-b~~Be cleaned out when the sediment accumulation reaches sixty percent (60%) of design capacity. Clean-out elevation shall be indicated

on plans submitted for each structure. Sediment removal and disposal shall be done in a manner and at a frequency that minimizes adverse impacts on surface and groundwater quality.

(8) Where sediment control structures such as excavated ponds or bench control systems are utilized, these structures must be designed to safely pass a twenty-five (25) year, twenty-four (24) hour precipitation event. The combination of both principal and/or emergency spillway of the structures shall be designed to safely pass the peak discharge of a twenty-five (25) year, twenty-four (24) hour precipitation event, provided, that a single open channel spillway may be used only if it is of non-erodable construction and designed to carry sustained flows; or earth or grass-lined and designed to carry short term, infrequent flows at non-erosive velocities where sustained flows are not expected; provided, however, that excavated sediment control structures which are at ground level and which have an open exit channel constructed of non-erodible material may be designed to pass the peak discharge of a ten (10) year twenty-four (24) hour precipitation event.;

(9) Provide adequate freeboard to resist overtopping by waves or sudden increases in volume and adequate slope protection against surface erosion and sudden drawdown;

(10) An impoundment meeting the size or other criteria of 30 CFR 77.216(a) or Chapter 20, Article 5D, of the Code of West Virginia, or located where failure would be expected to cause loss of life or serious property damage shall have a minimum static safety factor of 1.5 for a normal pool with steady state seepage saturation conditions, and a seismic safety factor of at least 1.2. Impoundments not meeting the size or other criteria of 30 CFR 77.216 (a) or Chapter 20, Article 5D, of the Code of West Virginia, except for a coal mine waste impounding structure, and located where failure would not be expected to cause loss of life or serious property damage shall have a minimum safety factor of 1.3 for a normal pool with steady state seepage saturation conditions.

(11) Discharge Structures. Discharge from sediment control structures, diversions, stream channel diversions, etc., shall be controlled by use of energy dissipators, riprap channels or other devices to reduce erosion, to prevent deepening or enlargement of stream channels and to minimize disturbance of the hydrologic balance. Discharge structures shall be designed using standard engineering procedures; and

(12) Foundations and abutments for all sediment control structures shall be stable during all phases of construction and operation and shall be designed based on adequate and accurate information on the foundation conditions.

(13) Prior to construction of any sediment control structure, the general and detailed design plans shall be certified to be in accordance with design requirements of the Act, these regulations, and other design criteria established by the Commissioner.

(9)(c) In addition to the requirements of subsection (b) of this section, all embankment type sediment control structures and water retention structures shall be designed, constructed and maintained to meet the following safety standards:

-----(A1) Embankment type sediment control and water retention structures shall be designed with a combination of principal and/or emergency spillways that will safely pass a twenty-five (25) year, twenty-four (24) hour precipitation event. The principal spillway requirements may be waived if the emergency spillway is an open channel constructed of nonerodable material, is capable of maintaining sustained flows, and is designed to safely pass the peak discharge of a twenty-five (25) year, twenty-four (24) hour precipitation event;

~~(B)--All-embankment-type-structures-shall-provide a-minimum-difference-in-elevation-between-principal-spillway-and emergency-spillway-of-1.5-feet-and-a-minimum-difference-in elevation-between-the-maximum-design-flow-elevation-in-the emergency-spillway-and/or-exit-channel-and-top-of-settled embankment-of-1.0-feet;~~

-----(E2) All embankment type sediment control and water retention structures shall be properly stabilized and revegetated upon completion of construction and regrading of the embankment and surrounding areas;

~~(D)--All-structures-shall-provide-adequate freeboard-to-resist-overtopping-by-waves-or-sudden-increases-in volume-and-adequate-slope-protection-against-surface-erosion-and sudden-drawdown;~~

-----(E3) In constructing the embankment, the operator shall remove all organic matter from the foundation, provide for proper compaction and ensure against excessive settlement by excluding sod, roots, frozen soil or coal processing wastes from the embankment;

----- (F4) If an inspection discloses that a potential hazard exists, the person who examined the embankment shall promptly inform the Department of Energy of the findings and of the emergency procedures formulated for public protection and remedial action. If adequate procedures cannot be formulated or implemented, the Department of Energy shall be notified immediately and then notify the appropriate agencies that other emergency procedures are required to protect the public;

(5) A sediment control structure or water retention structure which is constructed in such a manner that it: (1) Rises twenty-five (25) feet or more above the natural bed of a stream or watercourse as measured from the downstream toe of the embankment and which does or can impound fifteen (15) acre-feet or more of water; or, (2) Rises six (6) feet or more above the natural bed of a stream or watercourse as measured from the downstream toe of the embankment and which does or can impound fifty (50) acre-feet or more of water, is by definition a dam and is thereby subject to the provisions of the West Virginia Dam Control Act set forth in Chapter 20, Article 5D of the Code of West Virginia.

----- (G6) Embankment type sediment control or water retention structures which impound water at an elevation of five feet (5') or more above the upstream toe of the structure and can have a storage volume of twenty (20) acre-feet or more; which impound water at an elevation of twenty feet (20') or more above the upstream toe of the structure; or which present a hazard to coal miners as determined by an MSHA District Manager; shall be designed, constructed, inspected, and abandoned in accordance with federal regulations set forth in 30 CFR 77.216. All design plans, and specifications shall be made a part of the permit application. In addition to these requirements, the following minimum standards shall be met:

----- (iA) An appropriate combination of principal and emergency spillways shall be provided to pass safely the runoff resulting from a one hundred (100) year, twenty-four (24) hour precipitation event, or a larger event as specified by the Commissioner;

----- (iB) The embankment shall be designed, and constructed, and maintained with a static safety factor of at least 1.5 or a specified higher safety factor as required to ensure long-term stability and a seismic factor of safety of 1.2; and

----- (iiiC) Appropriate barriers to control seepage shall be installed along the conduits that extend through the embankments.

----- (i0) All engineering inspection reports and approvals shall be submitted to the Commissioner with copies maintained at, or in the vicinity of, the mine site; and

----- (ii) Discharge Structures:-- Discharge from sediment control structures, diversions, stream channel diversions, etc., shall be controlled by use of energy dissipators, riprap channels or other devices to reduce erosion, to prevent deepening or enlargement of stream channels and to minimize disturbance of the hydrologic balance.-- Discharge structures shall be designed using standard engineering procedures.

(ed) Certification.

(1) Prior to any surface mining activities in the component drainage area of a permit controlled by a sediment control structure, that specific structure shall be certified as to the design and construction in accordance with the plans, designs, and specifications set forth in the preplan, or in accordance with as-built plans. If as-built plans are submitted, the certification shall describe how and to what extent the construction deviates from the proposed design, and shall explain how and certify that the structure will meet performance standards. Such certification shall be submitted on forms prescribed by the Commissioner. Where an on-bench sediment control system is the primary system for the sediment control operation used, such systems shall be constructed and certified in sections of one thousand (1,000) linear feet or less as measured from the active pit. This certification shall include a map showing the exact location of the section being certified.

(2) Design and construction certification of non-embankment type sediment control structures may be performed by a registered professional engineer or a licensed land surveyor.

(3) Design and construction certification of embankment type sediment control structures may be performed only by a registered professional engineer or licensed land surveyor experienced in construction of embankments.

(4) Design and construction certification of coal refuse impoundments and embankment type impoundments meeting or exceeding the size requirements or other criteria of federal MSHA regulations at 30 CFR 77.216 (a) may be performed only by a

registered professional engineer experienced in the design and construction of impoundments.

(de) Inspections.

Inspection by the operator of impoundments, including sediment control structures, shall be in accordance with the following:

~~{1}--Non-embankment-type-structures-shall-be-inspected upon-completion-of-construction-and-are-otherwise-exempt-from required-inspections;-however;-should-be-examined-and/or inspected-periodically-~~

(21) A qualified registered professional engineer or other qualified professional specialist, under the direction of the professional engineer, shall inspect each embankment-type impoundment or sediment control structure; provided, that a licensed land surveyor may inspect those impoundments or sediment control structures which do not meet the size or other criteria of 30 CFR 77.216(a) or Chapter 20, Article 5D, of the Code of West Virginia, and which are not constructed of coal processing waste or coal refuse. The professional engineer, licensed land surveyor, or specialist shall be experienced in the construction of embankmentssediment control structures.

(A) Inspections shall be made regularly but not less than quarterly during construction, upon completion of construction, and at least yearly until removal of the structure or release of the performance bond.

(B) The qualified registered professional engineer or licensed land surveyor shall promptly, after each inspection, provide to the Commissioner a certified report that the embankmentsimpoundment or sediment control structure has been constructed and maintained as designed and in accordance with the approved preplan. The report shall include discussion of any appearances of instability, structural weakness or other hazardous conditions, depth and elevation of any impounded waters, existing storage capacity, any existing or required monitoring procedures and instrumentation and any other aspects of the structure affecting stability.

(C) A copy of the report shall be retained at or near the mine site.

(ef) Examinations. Embankments subject to federal MSHA regulations at 30 CFR 77.216 must be examined in accordance with

77.216-3 of said regulations. Other embankments shall be examined at least quarterly by a qualified person designated by the operator for appearance of structural weakness and other hazardous conditions. Examination reports shall be retained for review at or near the operation.

(fg) Maintenance. Prior to Phase 1 bond release, all sediment control structures shall be cleaned out so as to meet design storage capacity in all areas not revegetated and stabilized.

(gh) Abandonment Procedures. Abandonment and/or removal of sediment control structures shall not occur until two (2) years after the last augmented seeding nor less than two (2) years before final bond release. Minimum requirements for abandoning sediment control structures prior to full bond release are as follows:

(1) Unless otherwise approved in the reclamation plan, dugout-type sediment control structures, diversion ditches, and other non-impounding sediment control structures shall be removed and the land upon which they are situated shall be regraded and revegetated in accordance with the reclamation plan. Sediment control structures approved by the Commissioner as permanent structures are exempt from these requirements.

(2) Embankment type sediment dams, embankment type excavated sediment dams and crib and gabion dams, and all accumulated sediment behind the dam shall be removed from the natural drainway. The natural drainway shall be returned as nearly as practicable to its original profile and cross-section with the channel sides and bottom rock ripraped up to the top of the channel banks. The riprap requirement may be waived where the bottom and sides of the channel consist of bedrock.

~~(3) -- Those structures to be left in place after final bond release shall be considered permanent and shall be left in accordance with the following requirements:~~

~~----- (A) -- A request to leave the structure will be made on forms prescribed by the Commissioner;~~

~~----- (B) -- The request will contain a statement as to the present conditions of the impoundment;~~

~~----- (C) -- The request will contain a statement signed by the landowner and the operator asserting that the landowner~~

~~assumes all liability for the structure and will inspect it periodically and maintain it in a safe condition; and~~

~~----- (D) -- Any embankment type structure shall have been designed and constructed in accordance with subsection 5.5 of this section.~~

(43) All areas disturbed during abandonment of a sediment control structure shall be seeded and mulched immediately to stabilize the area.

(54) Waste material shall be spread over an area within the permit boundaries in accordance with the following specifications:

(A) Provisions shall be made for the diversion or safe passage of surface water, concentrating on the land side of the waste bank.

(B) The waste shall be placed so as not to endanger the stability of the stream bank and shall not exceed three feet (3') in height above the natural ground surface, except by special design. Special designs shall be submitted with the drainage plan. The finished surface shall slope away from the edge of the stream or drainway insofar as feasible.

(C) Surface of waste shall not be steeper than two (2) horizontal to one (1) vertical. If the waste is spread to the edge of the stream bank, the stream side slope of the waste shall be shaped to join the side slope of the stream bank.

5.5 Permanent Impoundments. A permanent impoundment of water may be created, if authorized by the Commissioner, in the approved permit based upon the following demonstration: Those sediment control structures or impounding structures to be left in place after final bond release shall be considered permanent and, if authorized by the Commissioner, may be left in accordance with the following requirements; provided, that a structure which is subject to the requirements of either 30 CFR 77.216 or Chapter 20, Article 5D of the Code of West Virginia, may not be retained as a permanent impoundment, but shall be reclaimed:

(a) A request to leave the structure will be made on forms prescribed by the Commissioner;

(b) The request will contain a statement as to the present conditions of the structure;

Title 38
CSR 2
Section 5

(c) The request will contain a statement signed by the landowner and the operator asserting that the landowner assumes liability for the structure to the extent provided by state law, and will maintain it in a safe condition;

(ad) The size and configuration of such impoundmentpermanent structure will be adequate for its intended purposes.

(be) The quality of impoundment-water will be suitable on a permanent basis for its intended use and, after reclamation, will meet applicable State and Federal water quality standards, and discharges-from-the-impoundment will meet applicable effluent limitations and will not degrade the quality of receiving water below applicable State and Federal water quality standards.

(ef) The water level will be sufficiently stable and be capable of supporting the intended use.

(dg) Final grading will provide for adequate safety and access for proposed water users.

(eh) The impoundmentpermanent structure will not result in the diminution of the quality and quantity of water utilized by adjacent or surrounding landowners or agricultural, industrial, recreational, or domestic use.

(fi) The impoundmentpermanent structure will be suitable for the approved postmining land use.

~~----- (g) -- The design precipitation event for the spillways for a permanent impoundment will be a fifty-year, twenty-four (24)-hour precipitation event, or such larger event as the Commissioner may require.~~

38-2-6 Blasting.

6.1 General Requirements. Each operator shall comply with all applicable state and federal laws in the use of explosives. A blaster certified by the Department of Energy shall be responsible for all blasting operations including the transportation, storage and use of explosives within the permit area in accordance with the blasting plan.

6.2 Blasting Plan. Each application for a permit, where blasting is anticipated, shall include a blasting plan. The blasting plan shall explain how the applicant will comply with the blasting requirements of the Act, these regulations, and the terms and conditions of the permit. This plan shall include, at a minimum, information setting forth the limitations the operator will meet with regard to ground vibration and airblast, the basis for those limitations, and the methods to be applied in controlling the adverse effects of blasting operations.

6.3 Public Notice of Blasting Operations.

(a) At least ten (10) days, but not more than thirty (30) days, prior to any blasting operations which detonate five (5) pounds or more of explosives at any given time, the operator shall publish, a blasting schedule in a newspaper of general circulation in the county of the proposed permit area. Copies of the schedule shall be distributed by certified mail to local governments, public utilities and each resident within one-half (1/2) mile of the blasting site. Unless blasting will occur on drainage structures and roads, such structures will be exempt from the one-half (1/2) mile notification area. The operator shall republish and redistribute the schedule at least every twelve (12) months and revise and republish the schedule at least ten (10) days, but not more than thirty (30) days, prior to blasting whenever the area covered by the schedule changes or actual time periods for blasting significantly differ from that set forth in the prior schedule. The schedule shall contain at a minimum:

- (1) Name, address and telephone number of the operator;
- (2) Identification of the specific areas in which blasting will take place;
- (3) Dates and times when explosives are to be detonated;

(4) Methods to be used to control access to the blasting area; and

(5) Types and patterns of audible warning and all clear signals to be used before and after blasting.

~~(b) Surface-blasting-activities-incident-to-underground coal-mining-are-not-subject-to-the-requirements-of-paragraph-(a) of-this-subsection-so-long-as-all-local-governments-and-residents or-owners-of-dwellings-or-structures-located-within-one-half (1/2)-mile-of-the-blasting-area-are-notified-in-writing-by-the operator-approximately-twenty-four-(24)-hours-prior-to-any surface-blast~~
Surface blasting activities incident to underground coal mining are not subject to the requirements of paragraph (a) of this subsection so long as all local governments and residents or owners of dwellings or structures located within one-half (1/2) mile of the blast site are notified in writing by the operator of proposed times and locations of the blasting operation. Such notice of times that blasting is to be conducted may be announced weekly, but in no case less than twenty-four (24) hours before the blasting will occur.

6.4 Blast Record.

(a) A blasting log book formatted in a manner prescribed by the Commissioner shall be kept current daily and made available for inspection at the site by the Commissioner and upon written request by the public.

(b) The blasting log shall be retained by the operator for three (3) years.

(c) The blasting log shall, at a minimum, contain the following information:

(1) Name of permittee, operator or other person conducting the blast;

(2) Location, date and time of blast;

(3) Name, signature and certification number of blaster-in-charge;

(4) Identification of nearest structure not owned or leased by the operator and direction and distance, in feet, to such structure;

(5) Weather conditions;

Title 38
CSR 2
Section 6

- (6) Type of material blasted;
- (7) Number of holes, burden and spacing;
- (8) Diameter and depth of holes;
- (9) Types of explosives used;
- (10) Weight of explosives used per hole;
- (11) Total weight of explosives used;
- eight (8) (12) Maximum weight of explosives detonated within any millisecond period;
- (13) Method of firing and type of circuit;
- (14) Type and length of stemming;
- (15) If mats or other protections were used;
- used; (16) Type of delay detonator used and delay periods
- (17) Seismograph records and air blast records shall include but not be limited to:
 - (A) Seismograph and air blast reading, including exact location, date, and time of reading and its distance from the blast;
 - (B) Name of person and firm taking the readings;
 - (C) Name of person and firm analyzing the record, where analysis is necessary;
 - (D) Type of instrument, sensitivity and calibration signal or certification of annual calibration;
- (18) Shot location;
- (19) Sketch of delay pattern to include the entire blast pattern and all decks; and
- (20) Reasons and conditions for unscheduled blasts.

6.5 Blasting Procedures.

(a) All blasting shall be conducted during daytime hours, between sunrise and sunset; provided, that the Commissioner may specify more restrictive time periods based on public requests or other consideration, including the proximity to residential areas. No blasting shall be conducted on Sunday. Blasting shall not be conducted at times different from those announced in the blasting schedule except in emergency situations where rain, lightning or other atmospheric conditions, or operator or public safety requires unscheduled detonations. Blasting shall be conducted in such a way so as to prevent injury to persons, damage to public or private property outside the permit area, adverse impacts on any underground mine, and change in the course channel, or availability of surface or groundwater outside the permit area.

(b) Safety precautions:

(1) Three (3) minutes prior to blasting, a warning signal audible to a range of one-half (1/2) mile from the blast site will be given. This preblast warning shall consist of three (3) short warning signals of five (5) seconds duration with five (5) seconds between each signal. One (1) long warning signal of twenty (20) seconds duration shall be the "all clear" signal. Each person in the permit area, and each person who resides or regularly works within one-half (1/2) mile of the permit area shall be notified of the meaning of these signals;

(2) All approaches to the blast area shall be guarded against unauthorized entry prior to and immediately after blasting;

(3) All charged holes shall be guarded and posted against unauthorized entry; and

(4) The certified blaster shall be accompanied by at least one other person at the time of firing of the blast.

(c) Airblast Limits:

(1) Airblast shall not exceed the maximum limits listed below at the location of any dwelling, public buildings, school, church, or community or institutional building outside the permit area, ~~except operational facilities of the mine.~~

Lower frequency limit of measuring system in Hz (\pm 3 dB)	maximum level, in db
0.1 Hz or lower --flat response ¹	134 peak.
2 Hz or lower -- flat response	133 peak.
6 Hz or lower ---flat response	129 peak.
C-weighted--slow response ¹	105 peak dBC.

¹ Only when approved by the Commissioner

(2) If necessary to prevent damage, the Commissioner may specify lower maximum allowable airblast levels for use in the vicinity of a specific blasting operation.

(3) Monitoring. The operator shall conduct periodic monitoring to ensure compliance with the airblast standards. The Commissioner may require airblast measurement of any or all blasts and may specify the locations at which such measurements are taken. The air blast measuring systems used shall have an upper-end flat-frequency response of at least 200 Hz.

(d) Flyrock, including blasted material, shall not be cast from the blasting site more than half way to the nearest dwelling or other occupied structure, beyond the area of control specified in paragraph (e) of this subsection, and/or in no case beyond the bounds of the permit area.

(e) Access to the blast area shall be controlled against the entrance of livestock or unauthorized personnel during blasting and for a period thereafter until an authorized person has reasonably determined:

(1) That no unusual circumstances exist such as imminent slides or undetonated charges, etc.; and

(2) That access to and travel in or through the area can be safely resumed.

(f) At the request of the Commissioner, the operator shall monitor air blast levels using an instrument with an upper-end flat-frequency response of at least 200 Hz.

(g) Blast design.

(1) An anticipated blast design shall be submitted if blasting operations will be conducted within:

Title 38
CSR 2
Section 6

(A) 1,000 feet of any building used as a dwelling, public building, school, church, or community or institutional building outside the permit area; or

(B) 500 feet of an active or abandoned underground mine.

(2) The blast design may be presented as part of a permit application or at a time, before the blast as approved by the Commissioner.

(3) The blast design shall contain sketches of the drill patterns, delay periods, and decking and shall indicate the type and amount of explosives to be used, critical dimensions, and the location and general description of structures, including protected structures, to be protected, as well as a discussion of design factors to be used, which protect the public and meet the applicable airblast, flyrock, and ground-vibration standards.

(4) The blast design shall be prepared and signed by a certified blaster.

(5) The Commissioner may require changes to the design submitted.

(h) No blasting within five hundred (500) feet of an underground mine not totally abandoned shall be permitted except with the concurrence of the Department of Energy, the operator of the underground mine and MSHA. The Commissioner may prohibit blasting on specific areas where it is deemed necessary for the protection of public or private property or the general welfare and safety of the public.

(i) The operator may use the following scaled distance formulas to determine the allowable maximum weight of explosives (lbs) to be detonated in any eight millisecond period without seismic monitoring:

Formula	Distance in Feet from the Blasting Site to the Nearest Protected Structure
$W = (D/50)^2$	0 - 300 feet
$W = (D/55)^2$	301 - 5,000 feet
$W = (D/65)^2$	5,001 feet or greater

W = Weight of explosives in pounds
D = Distance to the nearest structure

(j) The scaled distance formulas need not be used if a seismograph measurement at the nearest protected structure is recorded and maintained for every blast. The peak particle velocity in inches per second in any one of the three mutually perpendicular directions shall not exceed the following values at any protected structure:

Seismograph Measurement	Distance to the Nearest Protected Structure
1.25	0 - 300 feet
1.0	301 - 5,000 feet
0.75	5,001 feet or greater

(k) The Commissioner may require a seismograph recording of any or all blasts based on the physical conditions of the site in order to prevent injury to persons or damage to property.

(l) The maximum allowable ground vibration as provided in paragraphs (i) and (j) of this subsection shall be reduced by the Commissioner, if determined necessary to provide damage protection.

(m) The maximum airblast and ground-vibration standards of Paragraphs (c) and (j) of this Section shall not apply at the following locations:

(1) At structures owned by the permittee and not leased to another person.

(2) At structures owned by the permittee and leased to another person, if a written waiver by the lessee is submitted to the Commissioner before blasting.

6.6 Variance Blasting Control for Other Structures

~~(a) The Commissioner may grant a written variance from paragraphs (i) and (j) of Subsection 6.5 of this Section for all structures other than protected structures provided all of the following criteria are met:~~

~~----- (1) --- The Permittee obtains a waiver from the owner and when appropriate the operator of said structure.~~

~~----- (2) --- The Permittee submits a blasting plan detailing maximum limits for ground vibrations to be used for those~~

~~structures with supporting documentation demonstrating such structures are protected:~~

~~----- (3) -- The permittee shall obtain the approval of the protective measures by the owner of the structure.~~

~~----- (4) -- The permittee shall obtain approval of the blasting plan by the Commissioner. All other structures in the vicinity of the blasting area which are not defined as protected structures at subsection 2.87 of these regulations shall be protected from damage by establishment of a maximum allowable limit on ground vibration, specified by the operator in the blasting plan and approved by the Commissioner.~~

(b) The ~~variance granted~~ plan submitted under this subsection shall not reduce the level of protection for other structures otherwise provided for in these regulations.

6.7 Certified Blasting Personnel. Each person responsible for blasting operations shall be certified. Each certified blaster shall have proof of certification either on his person or on file at the permit area during blasting operations. Certified blasters shall be familiar with the blasting plan and blasting related performance standards for the operation at which they are working.

6.8 Preblast Survey.

(a) At least thirty (30) days prior to beginning of blasting operations, the operator shall inform in writing all residents or owners of manmade dwellings or structures located within one-half (1/2) mile of the permit area on how to request a preblast survey. ~~For purposes of this section, drainage structures, haulroads and access roads are not considered part of the permit area unless blasting is necessary for construction.~~ Requirements for a preblasting survey shall be the following:

(1) Upon a written request to the Commissioner by a resident or owner of a manmade dwelling or structure that is located within one-half (1/2) mile of the permit area, the operator shall conduct a preblast survey of the dwelling or structure and submit a report of the survey to the Commissioner. If a structure is added to or renovated subsequent to a preblast survey, a survey of such additions and/or renovation shall be performed upon request of the resident or owner.

(2) The operator shall conduct the preblast survey in such a manner which will determine the condition of the dwelling

Title 38
CSR 2
Section 6

or structure, and to document any preblasting damage and to document other physical factors that could reasonably be affected by the blasting. Assessments of the preblasting condition of structures such as pipes, cables, transmission lines, wells and water systems shall be based on the exterior or ground surface conditions and other readily available data. Special attention shall be given to the preblasting condition of wells and other water systems.

(3) A written report of the survey shall be prepared and signed by the person or persons approved by the Commissioner who conducted the survey. Copies of the report shall be provided to the person requesting the survey and to the Commissioner.

(4) Surveys requested more than ten (10) days before the planned initiation of blasting shall be completed before blasting operations begin.

(5) Any person who requests a survey who disagrees with the results of the survey may submit a detailed description of the specific areas of disagreement.

38-2-7. Premining and Postmining Land Use.

7.1 General. In addition to the requirements of Section 10 of the Act, the following requirements for postmining land use shall be applicable:

(a) All areas disturbed by surface mining operations shall be restored in a timely manner to conditions that are capable of supporting those land uses which they were capable of supporting prior to any mining.

(b) The premining uses of land to which the postmining land use is to be compared shall be those uses which the land previously supported where the land has not been previously mined and has been properly managed.

(c) The appropriate postmining land use for land that has been previously mined and not reclaimed shall be determined on the basis of the land use that existed prior to any mining. If the land cannot be reclaimed to the land use that existed prior to any mining, the appropriate postmining land use shall be determined on the basis of the highest and best use that can be achieved and which is compatible with surrounding undisturbed areas.

(d) The postmining land use for land that has received improper management shall be determined on the basis of the premining use of surrounding lands that have received proper management.

(e) If the premining use of the land was changed within five (5) years of the beginning of mining, the comparison of postmining use to premining use shall include a comparison with the historic use of the land as well as its use immediately preceding mining.

(f) An application for a permit shall contain a narrative description of land capability and productivity which analyzes the premining land-use description required in 22A-3-10(a)(2) of the Act. Productivity shall be determined by yield data or estimates from similar sites based on current data from USDA or state agricultural universities or state agricultural agencies.

7.2 Land Use Categories. Land use is categorized in the following groups:

(a) Heavy Industry. Manufacturing facilities, power plants, airports or similar facilities;

(b) Light Industry and Commercial Services. Office buildings, stores, parking facilities, apartment houses, motels, hotels or similar facilities;

(c) Public Services. Schools, hospitals, churches, libraries, water treatment facilities, solid waste disposal facilities, public parks and recreation facilities, major transmission lines, major pipelines, highways, underground and surface utilities and other servicing structures and appurtenances;

(d) Residential. Single and multiple-family housing (other than apartment houses) with necessary support facilities. Support facilities may include commercial services incorporated in and comprising less than five percent (5%) of the total land area of housing capacity, associated open space and minor vehicle parking and recreation facilities supporting the housing;

(e) Cropland. Land used primarily for the production of cultivated and close-growing crops for harvest alone or in association with sod crops. Land used for facilities in support of farming operations are included;

(f) Rangeland. Includes rangelands and forestlands which support a cover of herbaceous or scrubby vegetation suitable for grazing or browsing use;

(g) Hayland or pasture. Land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or cut and cured for livestock feed;

(h) Forestland. Land with at least a twenty-five percent (25%) tree canopy or land at least ten percent (10%) stocked by forest trees of any size, including land formerly having had such tree cover and that will be naturally or artificially reforested;

(i) Commercial Woodland. Where forest cover is managed for commercial production of timber products;

(j) Impoundments of water. Land used for storing water for beneficial uses such as stock ponds, irrigation, fire protection, recreation or water supply;

(k) Fish and wildlife habitat and recreation lands. Wetlands, fish and wildlife habitat, and areas managed primarily for fish and wildlife or recreation; or

(1) Combined uses. Any appropriate combination of land uses where one land use is designated as the primary land use and one or more other land uses are designated as secondary land uses.

7.3 Criteria for Approving Alternative Postmining Use of Land.

(a) Changing from one land use category before mining to another category after mining constitutes an alternative postmining land use. An alternative postmining land use may be approved by the Commissioner after consultation with the landowner or the land management agency having jurisdiction over state or federal lands if the following criteria are met:

(1) There is a reasonable likelihood for achievement of the proposed use;

(2) The use does not present any actual or probable hazard to the public health or safety or threat of water diminution or pollution; and

(3) The proposed postmining use is not:

(A) Impractical or unreasonable;

(B) Inconsistent with applicable land use policies or plans;

(C) Going to involve unreasonable delays in implementation; or

(D) In violation of any applicable law.

(b) A change in postmining land use during mining shall be done in accordance with paragraph (a) of this subsection and in accordance with subsection 3.287 of these regulations.

38-2-8. Fish and Wildlife Considerations.

8.1 Protection of Fish, Wildlife and Related Environmental Values.

(a) The operator shall, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and shall achieve enhancement of such resources where practicable.

(b) No surface mining activity shall be conducted which is likely to jeopardize the continued existence of endangered or threatened species or which are likely to result in the destruction or adverse modification of designated critical habitats of such species in violation of the Endangered Species Act (16 U.S.C. 1531 et seq.). The operator shall promptly report to the Commissioner any state or federally listed endangered or threatened species within the permit area of which the operator becomes aware. Upon notification, the Commissioner shall consult with appropriate State and Federal fish and wildlife agencies and, after consultation, shall identify whether, and under what conditions, the operator may proceed.

(c) No surface mining activity shall be conducted in a manner which would result in the unlawful taking of a bald or golden eagle, its nest, or any of its eggs. The operator shall promptly report to the Commissioner any golden or bald eagle nest within the permit area of which the operator becomes aware. Upon notification, the Commissioner shall consult with the U. S. Fish and Wildlife Service and also, where appropriate, the State fish and wildlife agency and, after consultation, shall identify whether, and under what conditions the operator may proceed.

(d) Nothing in this chapter shall authorize the taking of an endangered or threatened species or a bald or golden eagle, its nest, or any of its eggs in violation, of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 et seq., or the Bald Eagle Protection Act, as amended, 16 U.S.C. 668 et seq.

(e) Each operator shall, to the extent possible using the best technology currently available:

(1) Ensure that electric powerlines and other transmission facilities used for, or incidental to, surface mining activities on the permit area are designed and constructed to minimize electrocution hazards to raptors, except where the Commissioner determines that such requirements are unnecessary;

(2) Locate and operate haul and access roads so as to avoid or minimize impacts on important fish and wildlife species or other species protected by State or Federal law;

(3) Design fences, overland conveyors, and other potential barriers to permit passage for large mammals, except where the Commissioner determines that such requirements are unnecessary; and

(4) Fence, cover, or use other appropriate methods to exclude wildlife from ponds which contain hazardous concentrations of toxic-forming materials.

8.2 Habitat Development:

(a) The operator shall avoid disturbances to, enhance where practicable, restore, or replace, wetlands, and riparian vegetation along rivers and streams and bordering ponds and lakes. Surface mining activities shall avoid disturbances to, enhance where practicable, or restore, habitats of unusually high value for fish and wildlife.

(b) Where fish and wildlife habitat is to be a postmining land use, the plant species to be used on reclaimed areas shall be selected on the basis of the following criteria:

(1) Their proven nutritional value for fish or wildlife.

(2) Their use as cover for fish or wildlife.

(3) Their ability to support and enhance fish or wildlife habitat after the release of performance bonds. The selected plants shall be grouped and distributed in a manner which optimizes edge effect, cover, and other benefits to fish and wildlife.

(c) Where cropland is to be the postmining land use, and where appropriate for wildlife and crop-management practices, the operator shall intersperse the fields with trees, hedges, or fence rows throughout the harvested area to break up large blocks of monoculture and to diversify habitat types for birds and other animals.

(d) Where residential, public service, or industrial uses are to be the postmining land use, and where consistent with the approved postmining land use, the operator shall intersperse

Title 38
CSR 2
Section 8

reclaimed lands with greenbelts utilizing species of grass,
shrubs, and trees useful as food and cover for wildlife.

38-2-9. Revegetation.

9.1 General Requirements.

(a) Each surface mine operator shall establish on all regraded areas and all other disturbed areas a diverse, effective and permanent vegetative cover of the same seasonal variety native to the area of disturbed land, or introduced species that are compatible with the approved postmining land use.

(b) The established vegetative cover shall be capable of stabilizing the soil from erosion.

(c) The established vegetative cover shall be capable of regeneration and plant succession.

(d) Revegetation efforts will be kept concurrent with the mining operation as mining and backfilling progresses and shall be carried out in a manner that encourages a prompt vegetative cover and rapid recovery of productivity levels compatible with the approved postmining land use.

(e) A temporary vegetative cover shall be established as contemporaneously as practicable with backfilling and grading until a permanent vegetative cover can be established. At a minimum, a temporary or permanent vegetative cover shall be established by the end of the first growing season and a permanent vegetative cover shall be established by the end of the second growing season.

9.2. Revegetation Plan. A complete revegetation plan shall be made a part of each permit application. The revegetation plan shall be developed in a manner which is compatible with the following requirements:

(a) Plant species and seed mixtures that will give a quick, permanent vegetative cover and enrich the soil will be given priority. Plant species and seed mixtures shall be considered of the same seasonal variety when they consist of a mixture of species of equal or superior utility as compared with the seasonal utility of naturally-occurring vegetation. All revegetation mixtures must include at least one herbaceous legume species.

(b) All species shall be compatible with the plant and animal species of the region and the approved post mining land use.

Title 38
CSR 2
Section 9

(c) All species shall comply with state and federal seed, poisonous and noxious plant, and introduced species, laws and rules and regulations.

(d) If both the premining and postmining land uses are cropland, planting of the crops normally grown will meet the requirements of paragraph (a) of this subsection.

(e) The revegetation plan shall contain a statement asserting that rills and gullies which form in areas that have been regraded and topsoiled and which disrupt the approved postmining land use, interfere with the reestablishment of the vegetation cover, or cause or contribute to a violation of applicable water quality standards will be filled, regraded, stabilized, topsoiled, and reseeded or replanted.

(f) The revegetation plan shall specify that the operator will rapidly establish temporary vegetation cover on disturbed and regraded areas around sediment control structures, haulage ways, stockpiles, storage areas, and other areas where excessive erosion is likely to occur. Immediate seeding of approved annuals and biennials on such areas shall be considered as a means for achieving temporary vegetative cover only.

(g) A planting plan shall be made a part of the revegetation plan and shall contain the following:

(1) A prediction of the minesoil character based on overburden analysis, soil analysis, and other available information;

(2) The proposed treatment to neutralize acidity;

(3) The method of mechanical seed bed preparation;

(4) The application rates and analysis of fertilization;

(5) The application rates and types of mulch;

(6) The application rates and species of perennial vegetation including herbaceous and woody plants in accordance with the Handbook or other appropriate sources;

(7) The areas to be planted or seeded to trees and shrubs;

(8) The land use objective; and

(9) A maintenance schedule.

(h) Alternative species of trees, shrubs, grasses, legumes, or vines may be substituted for native species if approved by the Commissioner. Use of substitute species may be approved on the basis of the following:

(1) The species are compatible with the plant and animal species of the region and are necessary to and compatible with achieving the approved postmining land use; and

(2) The species meet the requirements of applicable state and federal seed, poisonous and noxious plant, or introduced species laws and regulations.

(i) The vegetation plan shall contain a plan for soil treatment and amendments which meet the following minimum standards:

(1) 600 lbs/ac of 10-20-10 or 10-20-20 fertilizer. Alternative rates and fertilizer analysis based on soil analysis performed by a qualified soils laboratory may be substituted.

(2) Lime shall be required where soil pH is less than 5.5. Lime rates shall be such that a uniform soil pH of 6.0 will be achieved.

(3) Mulch Specifications: Mulch shall be used on all disturbed areas. Approved materials and minimum rates to be applied are as follows:

Material	Rate/Acre
Straw or hay	1 1/2-2 tons materials may be anchored with asphalt emulsion or other techniques approved by the Commissioner.
Wood Fiber or Wood Cellulose	1,000 lbs.
Shredded Bark	50 cubic yards

Adhesives or tackifiers may be used with wood fiber or wood cellulose at the rates indicated in the following table:

Minimum Rate/Acre for Wood Fiber or Wood Cellulose

Material	Rate/Acre	
Genagua 743	25 gallons	500 lbs.
Curasol AK or HA	25 gallons	500 lbs.
Aerospray 70	25 gallons	500 lbs.

(j) In implementing the revegetation plan, the operator shall take into consideration the character of the minesoil. Factors to be considered are the following:

- (1) Fertility;
 - (2) Stoniness;
 - (3) Texture;
 - (4) Steepness of slope;
 - (5) Standard field and laboratory overburden analysis;
- and
- (6) Premining overburden analysis.

(k) Minesoils which have a demonstrated history of acidity or other chemical parameters which may limit vegetative success shall be analyzed by a qualified soils laboratory. The results of such analysis shall be made a part of the final planting plan.

9.3. Standards for Evaluating Vegetative Cover.

(a) The planting plan may be amended or modified prior to implementation to reflect the results of analyses of mine soils and to make minor adjustments to application rates and species composition. Any amendments or modifications which reflect major changes in seeding or planting rates and species composition shall be submitted as a permit revision.

(b) Final Planting Report. A final planting plan report shall be submitted to the Commissioner within sixty (60) days after Phase 1 bond reductions. The report shall contain the actual acreage planted, application rates of soil amendments,

seed and seedlings mixtures and rates. Where tree plantings are a part of the revegetation plan, the report may reflect only grasses and legumes with a subsequent and separate report to be filed after the tree plantings are completed during the appropriate planting season.

(c) Time for Inspection. Prior to the recognized spring and fall planting seasons, the operator shall review all areas which were seeded and/or planted during previous planting seasons. The operator shall then cause those areas deficient in vegetative cover to be retreated (graded, seeded, planted, mulched, limed, etc.) to establish the required level of vegetation success. ~~Where tree plantings are a part of the revegetation plan, the report may reflect only grasses and legumes with a subsequent and separate report to be filed after the tree plantings are completed during the appropriate planting season.~~

(d) Not less than two (2) years following the last date of augmented seeding, the Commissioner shall conduct a vegetative inspection to determine that applicable standards for vegetative success have been met. In evaluating vegetative success, the Commissioner shall use a statistically valid sampling technique with a ninety (90) percent statistical confidence interval from the Handbook. An inspection report shall be filed for each inspection and when the standard is met, the Commissioner shall execute a Phase II bond release.

(e) After five (5) growing seasons following the last augmented seeding, planting, fertilization, revegetation, or other work, the operator may request a final inspection and final bond release. Upon receipt of such request, the Commissioner shall conduct a final vegetative evaluation using approved, statistically valid sampling techniques. A final report shall be filed and if the applicable standards have been met, the Commissioner shall release the remainder of the bond. Ground cover, production, or stocking shall be considered equal to the approved success standard when they are not less than 90 (ninety) percent of the success standard.

(f) Where the post mining land use requires legumes and perennial grasses, the operator shall achieve at least a ninety (90) percent ground cover and a productivity level as set forth in the Handbook during any two years of the responsibility period except for the first year. Substandard areas shall not exceed one-fourth (1/4) acre in size nor total more than ten (10) percent of the area seeded. Exceptions to this standard may be authorized by the Commissioner based on the following:

Title 38
CSR 2
Section 9

(1) For areas to be developed for industrial or residential use less than two (2) years after regrading is completed, the ground cover of living plants shall not be less than required to control erosion.

(2) For areas to be used for cropland, the success of crop production from the mined area shall be equal to or greater than that of the approved standard for the crop being grown over last two (2) consecutive growing seasons of the five growing season liability period. The applicable five growing season period of responsibility for revegetation shall commence at the date of initial planting of the crop being grown.

(g) On areas to be developed for forestland and/or wildlife use, success of vegetation shall be determined on the basis of tree and shrub survival and ground cover. Minimum standards for woody plants shall be seventy percent (70%) ground cover of legumes and perennial grasses, and four hundred fifty (450) trees (including volunteer tree species) and/or planted shrubs per acre for the growing season of the last year of the responsibility period.

Substandard areas shall not exceed one-fourth (1/4) acre in size nor total more than twenty percent (20%) of the area seeded or planted. Provided, that where a wildlife planting plan has been approved by a professional wildlife biologist and proposes a stocking rate of less than four hundred fifty (450) trees or shrubs per acre the standard for grasses and legumes shall meet those standards contained in paragraph (f) of this Subsection. At the time of final bond release, at least eighty (80) percent of all trees and shrubs used to determine revegetation success must have been in place for at least sixty (60) percent of the applicable minimum period of responsibility. Trees and shrubs counted in determining such success shall be healthy and shall have been in place for not less than two (2) growing seasons.

(h) Forest resource conservation standards for commercial reforestation operations are as follows:

(1) The area shall have a minimum stocking of six hundred (600) trees per acre;

(2) A minimum of seventy-five percent (75%) of countable trees shall be commercial tree species as reflected in the approved planting plan;

(3) A request for bond release shall be approved by the Commissioner if the tree survival is equal to or greater than

Title 38
CSR 2
Section 9

four hundred fifty (450) trees per acre and there is seventy percent (70%) herbaceous cover during the growing season of the last year of the responsibility period; and

(4) At the time of final bond release, at least eighty (80) percent of all trees and shrubs used to determine revegetation success must have been in place for at least sixty (60) percent of the applicable minimum period of responsibility. Trees and shrubs counted in determining such success shall be healthy and shall have been in place for not less than two (2) growing seasons.

38-2-10 Prime Farmlands.

10.1. Identification of Prime Farmlands.

(a) Each permit application shall include the results of a reconnaissance inspection to determine whether or not all or part of the permit area is prime farmland. All or any part of a proposed permit area may be designated by the Commissioner as prime farmland on the basis of a reconnaissance inspection, soil surveys, and other required information submitted as part of a permit application. For the purposes of this section, said surveys shall mean surveys developed in accordance with standards of the National Cooperative Soil Survey which includes the procedures set forth in the U. S. Department of Agriculture Handbook 436 (Soil Taxonomy) and 18 (Soil Survey).

(b) The requirements for said surveys may be waived by the Commissioner if the applicant can demonstrate that a basis exists for making a negative determination of prime farmland.

10.2. Negative Determination of Prime Farmland.

(a) Land within the proposed permit area shall not be considered as prime farmland where the applicant can demonstrate one or more of the following situations:

(1) No land within the proposed permit boundaries have been historically used for cropland. For purposes of prime farmland determinations, historically used for cropland means:

(A) Lands that have been used for cropland for any five (5) years or more out of the ten (10) years immediately preceding the acquisition, including purchase, lease, or option, of the land for the purpose of conducting or allowing through resale, lease or option the conduct of surface coal mining and reclamation operations;

(B) Lands that the Commissioner determines, on the basis of additional cropland history of the surrounding lands and the lands under consideration, that the permit area is clearly cropland but falls outside the specific five (5) years in ten (10) criterion, in which case the regulations for prime farmland may be applied to include more years to cropland history only to increase the prime farmland acreage to be preserved; or

(C) Lands that would likely have been used as cropland for any five (5) out of the last ten (10) years, immediately preceding such acquisition but for the same fact of

ownership or control of the land unrelated to the productivity of the land.

(2) The slope of all land within the permit area is ten percent (10%) or greater;

(3) Other factors exist, such as a very rocky surface, or the land is frequently flooded during the spring or fall season more often than once in two (2) years, which clearly places all land within the area outside the purview of prime farmland; or

(4) A written determination based on soil surveys and other scientific findings made by a qualified person other than the applicant that land within the proposed mining area does not meet the requirements for prime farmlands. The soil survey shall be of the detail used by the U. S. Soil Conservation Service for operational conservation planning and shall contain at a minimum a description of soil mapping units, pH, soil horizon depths and soil densities.

10.3. Plan for Restoration of Prime Farmland.

(a) The applicant shall propose a plan for the mining and restoration of any prime farmland within the proposed permit area. This plan shall be made a part of the permit application and shall be the basis for determining the technological capability of the applicant to restore prime farmlands. The plan shall include:

(1) A soil survey of the original undisturbed soil profile showing the depth and thickness of each of the soil horizons that collectively constitute the root zone. The soil survey shall be of the detail used by the U. S. Soil Conservation Service for operational conservation planning and shall contain, at a minimum, a description of soil mapping units, pH, soil density, and the depth and thickness of each soil horizon;

(2) The proposed types of equipment and methodology to be used for removal, storage, and replacement of the soil in accordance with Subsection 10.4 of this section;

(3) The location of areas to be used for the separate stockpiling of the soil horizons and plans for soil stabilization before redistribution;

(4) The use of topsoil substitutes may be approved by the Commissioner on the basis of scientific information provided

by the applicant that the substitute material is suitable for the proposed postmining land use. Such information shall be made a part of the permit application;

(5) Plans for seeding and/or planting the regraded area and the conservation practices proposed to control erosion and sedimentation during the first twelve (12) months after regrading is completed;

(6) Scientific data from comparable areas that demonstrate that the applicant will achieve, within a reasonable period of time, equivalent or higher levels of yield after mining as existed before mining; and

(7) Information regarding productivity prior to mining, including the average yield of food, fiber, forage or wood products obtained under a high level of management.

10.4. Special Requirements.

(a) For all proposed mining operations on prime farmlands, the applicant shall meet the following special requirements:

(1) All soil horizons to be used in the reconstruction of the soil shall be removed and stockpiled before drilling, blasting, or mining. Where removal of soil horizons result in erosion that may cause air and water pollution, the application shall specify methods or treatment to control erosion of exposed overburden. The application shall describe procedures to be used to:

(A) Remove separately the entire A horizon or other suitable soil materials which will be used to create a final soil having a greater productive capacity than that which existed prior to mining. Such operations will be carried out in a manner that prevents mixing or contamination with other material before replacement;

(B) Remove separately the B horizon of the natural soil or a combination of B horizon and underlying C horizon or other suitable soil material that will create a reconstructed root zone of greater productive capacity than that which existed prior to mining. Such operations shall be carried out in a manner that prevents mixing or contamination with other material; and

(C) Remove separately the underlying C horizons or other strata, or a combination of such horizons or other

strata to be used instead of the B horizon that are of greater thickness and that can be shown to be more favorable for plant growth than the B horizon, and that when replaced will create in the reconstructed soil a final root zone of greater depth and quality to that which existed in the natural soil.

(b) If stockpiling of soil horizons is necessary, the A horizon and B horizon shall be stored separately from each other. The stockpiles shall be sited within the permit area at a suitable location where they will not be disturbed or exposed to excessive erosion by water or wind before the stockpiled horizons can be redistributed on the regraded surface. Stockpiles in place for more than thirty (30) days shall be protected from erosion.

(c) Soil Replacement.

(1) Soil reconstruction specifications established by the U. S. Soil Conservation Service shall be based upon the standards of the National Cooperative Soil Survey and shall include, as a minimum, physical and chemical characteristics of reconstructed soils and soil descriptions containing soil-horizon depths, soil densities, soil pH, and other specifications such that constructed soils will have the capability of achieving levels of yield equal to, or higher than, those of nonmined prime farmland in the surrounding area.

(2) The minimum depth of soil and substitute soil material to be reconstructed shall be forty-eight (48) inches, or a lesser depth equal to the depth to a subsurface horizon in the natural soil that inhibits or prevents root penetration, or a greater depth if determined necessary to restore the original soil productivity capacity. Soil horizons shall be considered as inhibiting or preventing root penetration if their physical or chemical properties or water-supplying capacities cause them to restrict or prevent penetration by roots of plants common to the vicinity of the permit area and if these properties or capacities have little or no beneficial effect on soil productive capacity.

(3) The operator shall replace and regrade the soil horizons or other root-zone material with proper compaction and uniform depth.

(4) The operator shall replace the B horizon, C horizon, or other approved substitute material to the thickness needed to meet the requirements of subparagraph (2) of paragraph (c) of this subsection.

(5) The operator shall replace the topsoil or other approved substitute materials as the final surface soil layer. This surface soil layer shall equal or exceed the thickness of the original surface soil layer, as determined by the soil survey.

(d) Apply nutrients and soil amendments as needed to establish quick vegetative growth.

(e) In those areas where the B or C horizons were not removed but may have been compacted or otherwise damaged during the mining operation, the operator shall engage in deep tilling or other appropriate means to restore premining capabilities.

10.5. Revegetation. Each person who conducts surface coal mining and reclamation operations on prime farmland shall meet the following revegetation requirements during reclamation:

(a) Following soil replacement, the operator shall establish a vegetative cover of the type and in the manner set forth in the approved permit. Seeding and/or planting shall be accomplished during the next period for favorable planting conditions. Suitable mulch and other soil stabilizing practices shall be used on all areas; and

(b) Within the time period specified in the permit, but not more than ten (10) years after completion of backfilling and rough grading, any portion of the permit area which is prime farmland must be used for crops. The crops may be grown in rotation with hay or pasture crops. The Commissioner may approve the use of perennial plants for hay where this is a common long term use of prime farmland soils in the surrounding area.

10.6 Revegetation and Restoration of Soil Productivity.

(a) Following prime farmland soil replacement, the soil surface shall be stabilized with a vegetative cover or other means that effectively controls soil loss by wind and water erosion.

(b) Prime farmland soil productivity shall be restored in accordance with the following provisions:

(1) Measurement of soil productivity shall be initiated within ten (10) years after completion of soil replacement.

(2) Soil productivity shall be measured on a representative sample or on all of the mined and reclaimed prime farmland area using the reference crop determined under paragraph (b)(6) of this subsection. A statistically valid sampling technique at a ninety (90) percent or greater statistical confidence level shall be used as set forth in the Handbook and in consultation with the U. S. Soil Conservation Service.

(3) The measurement period for determining average annual crop production (yield) shall be a minimum of three (3) crop years prior to release of the performance bond.

(4) The level of management applied during the measurement period shall be the same as the level of management used on nonmined prime farmland in the surrounding area.

(5) Restoration of soil productivity shall be considered achieved when the average yield during the measurement period equals or exceeds the average yield of the reference crop established for the same period for nonmined soils of the same or similar texture or slope phase of the soil series in the surrounding area under equivalent management practices.

(6) The reference crop on which restoration of soil productivity is proven shall be selected from the crops most commonly produced on the surrounding prime farmland. Where row crops are the dominant crops grown on prime farmland in the area, the row crop requiring the greatest rooting depth shall be chosen as one of the reference crops.

(7) Reference crop yields for a given crop season are to be determined from:

(A) The current yield records of representative local farms in the surrounding area, with concurrence by the U. S. Soil Conservation Service; or

(B) The average county yields recognized by the U. S. Department of Agriculture, which have been adjusted by the U. S. Soil Conservation Service for local yield variation within the county that is associated with differences between nonmined prime farmland soil and all other soils that produce the reference crop.

(8) Under either procedure in paragraph (b)(7) of this subsection, the average reference crop yield may be adjusted, with the concurrence of the U. S. Soil Conservation Service, for:

Title 38
CSR 2
Section 10

(A) Disease, pest, and weather-induced seasonal variations; or

(B) Differences in specific management practices where the overall management practices of the crops being compared are equivalent.

38-2-11 Insurance and Bonding.

11.1 Insurance.

(a) The applicant shall provide liability insurance for each surface mining and reclamation operation and maintain such insurance throughout the life of the permit or any renewal thereof, and the liability period necessary to complete all reclamation obligations, in the following minimum amounts:

(1) For bodily injury \$300,000 for each occurrence and \$500,000 aggregate.

(2) For property damage \$300,000 for each occurrence and \$500,000 aggregate with no exclusions for landslides or water loss.

(b) A statement shall be affixed to each certificate of insurance affirming that the insurer will promptly notify the Commissioner of any substantive change in policy including cancellations, termination, or failure to renew.

(c) Insurance coverage for blasting damage may be terminated prior to final bond release but not before blasting activities have ceased provided that full amount of liability coverage shall continue as required by the Act and these regulations.

11.2 Performance Bonds. Prior to issuance of a permit and prior to initiation of surface mining operations, the operator shall provide a performance bond in accordance with Section 11 of the Act and in accordance with this section.

(a) All performance bonds shall provide a mechanism for a bank or surety company to give prompt notice to the Commissioner and the permittee of any action filed alleging the insolvency or bankruptcy of the surety company, the bank, or the permittee; or alleging any violations which would result in suspension or revocation of the surety's license or bank's charter to do business.

(b) Upon incapacity of the bank or surety company by reason of bankruptcy, insolvency, or suspension or revocation of a charter or license, the permittee shall be deemed to be without bond coverage and shall promptly notify the Commissioner.

(c) The Commissioner, upon notification received in accordance with the procedures of paragraph (a) of this

subsection, or from the permittee shall in writing notify the operator who is without bond coverage and specify a reasonable period not to exceed ninety (90) days to replace bond coverage. If an adequate bond is not posted by the end of the period allowed, the operator shall cease mining operations and shall immediately begin to conduct the reclamation operations in accordance with the approved reclamation plan. Mining operations shall not resume until the Commissioner has determined that an acceptable bond has been posted.

(d) The Commissioner shall issue a notice of violation against any operator who is without bond coverage. The notice shall specify a reasonable period to replace bond coverage not to exceed ninety (90) days. During this period the Commissioner shall conduct weekly inspections to ensure continuing compliance with permit requirements, the regulations and the Act. Such notice of violation, if abated within the period allowed, shall not be counted as a notice of violation for purposes of civil or criminal penalties determining a "pattern of willful violations" and need not be reported as a past violation in permit applications. If such a notice of violation is not abated in accordance with the schedule, a cessation order shall be issued, at which time the operator shall initiate and complete as contemporaneously as possible total reclamation of the area.

11.3 Surety Bonds.

(a) The surety shall be subject to the following conditions:

(1) A surety bond shall be executed by the operator and a corporate surety licensed to do business in the State of West Virginia.

(2) Surety bonds shall be noncancelable during their term except that surety bond coverage may be adjusted in accordance with the provisions of subsection 12.3 of these regulations. The Commissioner shall advise the surety within thirty (30) days after the receipt of a request for bond adjustment whether the bond may be adjusted.

11.4 Collateral bonds.

(a) Except for letters of credit, collateral bonds shall be subject to the following conditions:

Title 38
CSR 2
Section 11

- (1) The Commissioner shall obtain possession of and keep in custody all collateral deposited by the applicant, until authorized for release or replacement;
- (2) The Commissioner shall value collateral at their current market value, not face value;
- (3) The Commissioner shall require that certificates of deposit be assigned to the Department of Energy, in writing, and reflect this assignment upon the books of the bank issuing such certificates;
- (4) The Commissioner shall not accept an individual certificate for a denomination in excess of maximum insurable amount as determined by F.D.I.C. and F.S.L.I.C.;
- (5) The Commissioner shall require the banks issuing these certificates to waive all rights of setoff or liens which it has or might have against those certificates;
- (6) The Commissioner shall only accept certificates of deposit in a bank in this state;
- (7) The Commissioner shall require the applicant to deposit sufficient amounts of certificates of deposit, to assure that he will be able to liquidate those certificates prior to maturity, upon forfeiture, for the amount of the bond required;
- (8) Real property posted as a collateral bond shall meet the following conditions:
 - (A) The applicant shall grant the Department of Energy a first mortgage, first deed of trust, or perfected first-lien security interest in real property with a right to sell or otherwise dispose of the property in the event of forfeiture.
 - (B) In order for the Commissioner to evaluate the adequacy of the real property offered to satisfy collateral requirements, the applicant shall submit a schedule of the real property which shall be mortgaged or pledged to secure the obligations under the indemnity agreement. The list shall include:
 - (i) A description of the property;
 - (ii) The fair market value as determined by an independent appraisal conducted by a certified appraiser; and

(iii) Proof of possession and title to the real property.

(C) The property may include land which is part of the permit area; however, land pledged as collateral for a bond under this section shall not be disturbed under any permit while it is serving as security.

(9) Whole Life insurance policies posted as a collateral bond shall meet the following conditions:

(A) The corporation, partnership, or sole proprietorship applying for the permit shall own the said policy;

(B) The Commissioner shall obtain possession of and keep in custody all policies assigned by the applicant, until authorized for release or replacement;

(C) The Commissioner shall, at a minimum, value this collateral at Net Cash Surrender Value so as to ensure that such policies less all penalties and administrative expenses incurred at the time of redemption shall equal or exceed the amounts of the bond required to be posted;

(D) The Net Cash Surrender value of the Whole Life insurance policy shall not exceed \$300,000.00;

(E) The Commissioner shall accept only Whole Life policies which are not interest sensitive and have a guaranteed rate of interest;

(F) The Commissioner shall require that Whole Life policies be assigned to the Department of Energy, in writing, and reflect this assignment upon the books of the company issuing such policies and be recorded by the applicant as required by the Commissioner;

(G) Upon and during the assignment, such policies shall bear no liens, loans or encumbrances, and none shall become effective without the prior written consent of the Commissioner, with the exception of allowing future dividends distributed to such policies to offset annual premiums, so long as the Net Cash Surrender Value meets or exceeds the amounts of the bond required; and

(H) The Commissioner shall only accept those policies issued by companies licensed to conduct business in the State of West Virginia. Furthermore, such companies shall be

Title 38
CSR 2
Section 11

member insurers of the West Virginia Life and Health Insurance Guaranty Association and have an independent financial rating by A. M. Best Company of A+ (Superior), Aaa by Moody's Investor Service, or the equivalent.

(10) Persons with an interest in collateral posted as a bond, and who desire notification of actions pursuant to the bond, shall request the notification in writing to the Commissioner at the time collateral is offered.

(b) Letters of credit shall be subject to the following conditions:

(1) The letter may only be issued by a bank organized or authorized to do business in the State of West Virginia;

(2) Letters of credit shall be irrevocable during their terms. The Commissioner may approve the use of letters of credit as security in accordance with a schedule approved with the permit. Any bank issuing a letter of credit for the purposes of this paragraph shall notify the Commissioner in writing at least ninety (90) days prior to the maturity date of such letter of credit or the expiration of the letter of credit agreement. Letters of credit utilized as securities in areas requiring continuous bond coverage shall be forfeited and collected by the Office of Attorney General, if not replaced by other suitable evidence of financial responsibility at least thirty (30) days before the expiration date of the letter of credit agreement;

(3) The letter must be payable to the Department of Energy in part or in full upon demand and receipt from the Commissioner of a notice of forfeiture;

(4) The Commissioner shall not accept a letter of credit in excess of ten percent (10%) of the bank's capital surplus account as shown on a balance sheet certified by a Certified Public Accountant;

(5) The Commissioner shall not accept letters of credit from a bank for any person, on all permits held by that person, in excess of three times the company's maximum single obligation as provided by State law;

(6) The Commissioner shall provide in the indemnity agreement that the amount shall be confessed to judgment upon forfeiture; and

Title 38
CSR 2
Section 11

(7) The bond shall provide that:

(A) The bank will give prompt notice to the permittee and the Commissioner of any notice received or action filed alleging the insolvency or bankruptcy of the bank, or alleging any violations of regulatory requirements which could result in suspension or revocation of the bank's charter of license to do business;

(B) In the event the bank becomes unable to fulfill its obligations under the letter of credit for any reason, notice shall be given immediately to the permittee and the Commissioner; and

(C) Upon the incapacity of a bank by reason of bankruptcy, insolvency or suspension or revocation of its charter or license, the permittee shall be deemed to be without bond coverage in violation of section 11 of the Act. The Commissioner shall issue a notice of violation against any operator who is without bond coverage. The notice shall specify a reasonable period to replace bond coverage, not to exceed ninety (90) days. During this period the Commissioner shall conduct weekly inspections to ensure continuing compliance with other permit requirements, the regulatory program and the Code of West Virginia. Such notice of violation, if abated within the period allowed, shall not be counted as a notice of violation for purposes of determining a "pattern of willful violations" and need not be reported as a past violation in permit applications. If such a notice of violation is not abated in accordance with the schedule, a cessation order shall be issued, at which time the operator shall begin and complete, as contemporaneously as possible, total reclamation of the area.

(8) Persons with an interest in letters of credit posted as a bond, and who desire notification of actions pursuant to the bond, shall request the notification in writing to the Commissioner at the time collateral is offered.

(c) The estimated bond value of all collateral posted as bond assurance under paragraph (a) and (b) of this subsection shall be subject to a margin which is a ratio of bond value to market value as determined by the Commissioner. This margin shall reflect legal and liquidation fees, as well as value depreciation, marketability and fluctuations which might affect the net cash available to the Commissioner in performing reclamation. The bond value of collateral may be evaluated at any time, but shall be evaluated as part of permit renewal and if

necessary the bond value increased or decreased. In no case shall the bond value exceed the market value.

11.5 Escrow Bonding.

(a) The Commissioner may authorize the operator to supplement a bonding program through the establishment of an escrow account deposited in one or more federally insured accounts payable on demand only to the Commissioner or deposited with the Commissioner directly. Contributions to the account may be based on acres affected or tons of coal produced or any other rate approved by the Commissioner. In all cases, the total bond including the escrow amount, as determined by the Commissioner in the bonding schedule, shall not be less than the amount required under Section 11 of the Act.

(b) Escrow funds deposited in federally insured accounts shall not exceed the maximum insured amount under applicable Federal insurance programs such as by F.D.I.C. or F.S.L.I.C.

(c) Interest paid on an escrow account shall be retained in the escrow account and applied to the bond value of the escrow account unless the Commissioner has approved that the interest be paid to the operator. In order to qualify for interest payment, the operator shall request such action in writing during the permit application process.

(d) Certificates of deposit may be substituted for escrow accounts upon approval of the Commissioner.

11.6 Self-Bonding.

(a) Definitions. For the purposes of this subsection only:

(1) Current assets means cash or other assets or resources which are reasonably expected to be converted to cash or sold or consumed within one (1) year or within the normal operating cycle of the business.

(2) Current liabilities means obligations which are reasonably expected to be paid or liquidated within one (1) year or within the normal operating cycle of the business.

(3) Fixed assets means plants and equipment, but does not include land or coal in place.

(4) Liabilities means obligations to transfer assets or provide services to other entities in the future as a result of past transactions.

(5) Net worth means total assets minus total liabilities and is equivalent to owners equity.

(6) Parent corporation means corporation which owns or controls the applicant.

(7) Tangible net worth means net worth minus intangibles such as goodwill and rights to patents or royalties.

(b) The Commissioner may accept a self-bond from an applicant for a permit if all of the following conditions are met by the applicant or its parent corporation guarantor:

(1) The applicant designates a suitable agent to receive service of process in the State where the proposed surface coal mining operation is to be conducted.

(2) The applicant has been in continuous operation as a business entity for a period of not less than five (5) years. Continuous operation shall mean that business was conducted over a period of five (5) years immediately preceding the time of application.

(A) The Commissioner may allow a joint venture or syndicate with less than five years of continuous operation to qualify under this requirement, if each member of the joint venture or syndicate has been in continuous operation for at least five (5) years immediately preceding the time of application.

(B) When calculating the period of continuous operation, the Commissioner may exclude past periods of interruption to the operation of the business entity that were beyond the applicant's control and that do not affect the applicant's likelihood of remaining in business during the proposed surface coal mining and reclamation operations.

(3) The applicant submits financial information in sufficient detail to show that the applicant meets one of the following criteria:

(A) The applicant has a current rating for its most recent bond issuance of "A" or higher as issued by either Moody's Investor Service or Standard and Poor's Corporation;

(B) The applicant has a tangible net worth of at least ten (10) million dollars, a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater; or

(C) The applicant's fixed assets in the United State total at least twenty (20) million dollars, and the applicant has a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater.

(4) The applicant submits:

(A) Financial statements for the most recently completed fiscal year accompanied by a report prepared by an independent certified public accountant in conformity with generally accepted accounting principles and containing the accountant's audit opinion or review opinion of the financial statements with no adverse opinion;

(B) Unaudited financial statements for completed quarters in the current fiscal year; and

(C) Additional unaudited information as requested by the Commissioner.

(c) The Commissioner may accept a written guarantee for an applicant's self-bond from a parent corporation guarantor, if the guarantor meets the conditions of subparagraphs (1) through (4) of paragraph (b) of this subsection as if it were the applicant. Such a written guarantee shall be referred to as a "corporate guarantee". The terms of the corporate guarantee shall provide for the following:

(1) If the applicant fails to complete the reclamation plan, the guarantor shall do so or the guarantor shall be liable under the indemnity agreement to provide funds to the Commissioner sufficient to complete the reclamation plan, but not to exceed the bond amount.

(2) The corporate guarantee shall remain in force unless the guarantor sends notice of cancellation by certified mail to the applicant and to the Commissioner at least ninety (90) days in advance of the cancellation date, and the Commissioner accepts the cancellation.

(3) The cancellation may be accepted by the Commissioner if the applicant obtains suitable replacement bond

before the cancellation date or if the lands for which the self-bond, or portion thereof, was accepted have not been disturbed.

(d) For the Commissioner to accept an applicant's self-bond, the total amount of the outstanding and proposed self-bonds of the applicant for surface coal mining and reclamation operations shall not exceed twenty-five (25) percent of the applicant's tangible net worth in the United States. For the Commissioner to accept a corporate guarantee, the total amount of the parent corporation guarantor's present and proposed self-bonds and guaranteed self-bonds for surface coal mining and reclamation operations shall not exceed twenty-five (25) percent of the guarantor's tangible net worth in the United States.

(e) If the Commissioner accepts an applicant's self-bond, an indemnity agreement shall be submitted subject to the following requirements:

(1) The indemnity agreement shall be executed by all persons and parties who are to be bound by it, including the parent corporation guarantor, and shall bind each jointly and severally.

(2) The indemnity agreement shall be accompanied by an affidavit certifying that the agreement is valid under all applicable State and Federal laws.

(3) Corporations applying for a self-bond or parent corporations guaranteeing a subsidiary's self-bond shall submit an indemnity agreement signed by two (2) corporate officers who are authorized to bind the corporation. A copy of such authorization shall be provided to the Commissioner. The guarantor shall provide a copy of the corporate authorization demonstrating that the corporation may guarantee the self-bond and execute the indemnity agreement.

(4) If the applicant is a partnership, joint venture or syndicate, the agreement shall bind each partner or party who has a beneficial interest, directly or indirectly, in the applicant.

(5) Pursuant to subsection (b) of Section 17 of the Act, the applicant or parent corporation guarantor shall be required to complete the approved reclamation plan for the lands in default or to pay to the Commissioner an amount necessary to complete the approved reclamation plan, not to exceed the bond amount. If permitted under State law, the indemnity agreement

when under forfeiture shall operate as a judgment against those parties liable under the indemnity agreement.

(f) The Commissioner may require self-bonded applicants and parent guarantors to submit an update of the information required under subparagraphs (3) and (4) of paragraphs (b) of this subsection within ninety (90) days after the close of each fiscal year following the issuance of the self-bond or corporate guarantee.

(g) If at any time during the period when a self-bond is posted, the financial conditions of the applicant or the parent corporation guarantor change so that the criteria of subparagraph (3) paragraph (b) and paragraph (d) of this subsection are not satisfied, the permittee shall notify the Commissioner immediately and shall within ninety (90) days post an alternate form of bond in the same amount as the self-bond.

(h) The Commissioner shall issue a notice of violation against any operator who is without bond coverage. The notice shall specify a reasonable period to replace bond coverage not to exceed ninety (90) days. During this period the Commissioner shall conduct weekly inspections to ensure continuing compliance with permit requirements, the regulations, and the Act. Such notice of violation, if abated within the period allowed, shall not be counted as a notice of violation for purposes of civil or criminal penalties determining a "pattern of willful violations" and need not be reported as a past violation in permit applications. If such a notice of violation is not abated in accordance with the schedule, a cessation order shall be issued, at which time the operator shall initiate and complete as contemporaneously as possible total reclamation of the area.

11.7 Combined Surety/Escrow Bonding.

(a) The Commissioner may accept a combined surety/escrow bonding schedule provided that:

(1) A surety bond payable to the Commissioner is posted in the amount determined under Section 11 of the Act for reclamation of each successive increment; and

(2) An interest-bearing escrow account, payable to the Commissioner with a predetermined deposit amount and frequency, is established.

(b) Conditions of the combined surety/escrow bonding method shall be as follows:

(1) Surety bond:

(A) The term of the surety bond shall be not less than two (2) years.

(B) The amount of the surety bond shall always be sufficient to cover the difference between the escrow balance and the total reclamation cost.

(C) The surety bond may be reduced in amount, but the liability remaining shall depend on the escrow-deposit rate which shall be subject to the requirements of Subsections 11.4 and 11.5 of this section.

(D) The surety bond shall be noncancelable by the surety during the bond term.

(E) Surety bond coverage may be released by the Commissioner without applying the bond-release criteria of the Act and Section 12 of these regulations, at any time during the bond term, provided provisions of subparagraph (2) (E) of paragraph (b) of this subsection are met or are in accordance with the provisions of bond replacement under Subsection 12.1 of this section.

(F) The surety bond is subject to the conditions of bond forfeiture including noncompliance with the escrow-account provisions of subparagraph (2) paragraph (b) of this subsection.

(2) Escrow account:

(A) The terms and conditions of the escrow account shall be developed jointly by the operator, surety and Commissioner. For the purposes of this section, the development of the escrow account shall be based on a production basis in an amount not less than that required to make the escrow account equal to or greater than the bond requirement within the term of the surety bond as agreed on jointly by the operator, the surety and the Commissioner. Deposits to the escrow account by the operator shall be made monthly and so reported to the Commissioner. Failure to make deposits on schedule shall be just cause for action by the Commissioner.

(B) A certified escrow-account balance statement shall be provided quarterly to the surety and the Commissioner.

(C) Provisions of the escrow account shall be in accordance with Subsection 11.4 of this section.

(D) The escrow account shall be subject to bond-forfeiture.

(E) The escrow-account balance shall equal the initial bond amount, plus any adjustments required by paragraph (b)(2)(A), of this subsection one hundred twenty (120) days prior to surety-bond termination, unless the total bond amount required has been previously reduced through the bond-release procedures.

(c) Provisions of the Act and Section 12 of these regulations may be applied to both surety and escrow-bond coverage during the bond term.

(d) The surety-escrow combination may be repeated successively or amended during the term by replacing the escrow account with a surety bond, and reestablishing the escrow terms and deposit rate, subject to Commissioner approval.

11.8 Incremental Bonding.

(a) When the applicant elects to bond in increments as specified in subsection (a), Section 11, of the Act, the following conditions shall apply:

(1) A cumulative bond schedule shall be submitted listing the areas covered by the initial bond and for the addition of other acreage as it is affected. The amount of bond required to obtain a permit shall include the full reclamation cost of the initial area being affected;

(2) When the applicant elects to "increment" the amount of the performance bond during the term of the permit, he shall identify the initial and successive incremental disturbed areas which shall be indicated on the proposal map and made part of the permit application and shall specify the proportion of the total bond amount required for the term of the permit which will be filed prior to commencing operations on each incremental area. The scheduled amount of each performance bond increment shall be filed in the sequence approved in the permit, and shall be filed with the Commissioner at least thirty (30) days prior to the commencement of surface coal mining and reclamation operations in the next incremental area; and

Title 38
CSR 2
Section 11

(3) The amount, duration, form, conditions and terms of the performance bond shall conform to Subsections 11.2 through 11.7 of this section.

11.9 Period of Liability. The Commissioner may approve selective husbandry practices, excluding augmented seeding, fertilization or irrigation, without extending the period of bond liability if the permittee can demonstrate that discontinuance of such measures after the liability period expires will not reduce the probability of permanent revegetation success.

Approved husbandry practices shall be limited to pest and vermin control, pruning and any reseeding and/or transplanting specifically necessitated by such actions, but shall be normal conservation practices within the region for unmined lands having land uses similar to the approved postmining land use of the area covered by the bond.

38-2-12. Replacement, Release, and Forfeiture of Bonds.

12.1 Replacement of Bonds.

(a) The Commissioner may approve the replacement of existing bonds with other equivalent bonds.

(b) Existing performance bonds shall not be released until the permittee has submitted, and the Commissioner has approved, acceptable replacement performance bonds. Replacement of a performance bond pursuant to this section shall not constitute a release of bond.

12.2 Requirement to Release Performance Bonds.

(a) In addition to the requirements of Section 23 of the Act, the following bond release procedures shall be observed:

(1) The permittee may file an application with the Commissioner for the release of all or part of a performance bond. Applications may be filed only at times or during seasons established by the Commissioner which allow proper evaluation of the completed reclamation operations.

(2) A certification of publication of the advertisement shall be made a part of any bond release application file. In addition to the requirement of Section 23 of the Act, the advertisement shall indicate the name of the permittee, the type of bond filed, the address of the nearest regional office of the Department of Energy to which written comments or requests for public hearings and informal conferences on the specific bond release may be submitted, and the closing date for receipt of comments or requests. In addition, as part of any bond release application, the applicant shall submit copies of letters which have been sent to adjoining property owners, local governmental bodies, planning agencies, sewage and water treatment authorities, and water companies in the locality in which the surface coal mining and reclamation operation took place, notifying them of the intention to seek release from the bond.

(b) Inspection by regulatory authority.

(1) Upon receipt of the bond release application, the Commissioner shall, within thirty (30) days, or as soon thereafter as weather conditions permit, conduct an inspection and evaluation of the reclamation work involved. The surface

Title 38
CSR 2
Section 12

owner, agent, or lessee shall be given notice of such inspection and may participate in making the bond release inspection.

(2) Within sixty (60) days from the filing of the bond release application, if no public hearing is held, or within thirty (30) days after a public hearing or informal conference has been held, the Commissioner shall notify in writing the permittee, the surety or other persons with an interest in bond collateral who have requested notification, and the persons who either filed objections in writing or objectors who were a party to the hearing proceedings, if any, of his decision to release or not to release all or part of the performance bond.

(c) The Commissioner may release all or part of the bond if no violations exist relative to the permitted site, and if reclamation covered by the bond or portion thereof has been accomplished in accordance with the following schedules:

(1) After the operator completes the back-filling, regrading (which may include the replacement of topsoil) and drainage control of a bonded area in accordance with the Act, these rules and regulations, and the terms and conditions of the permit to include the provisions of subsection 14.5 of these regulations, Phase I reclamation shall be considered complete, and sixty (60) percent of the bond or collateral for the applicable area may be released.

(2) After revegetation has been established on the regraded mined lands in accordance with the approved reclamation plan to include the provisions of paragraph (d) of subsection 14.7 of these regulations as it relates to chemical treatment, Phase II reclamation shall be considered complete and an additional twenty-five (25) percent of the original bond amount may be released, provided that:

(A) Not less than two years after the last augmented seeding, standards for revegetation success have been met.

(B) The lands are not contributing suspended solids to stream flow or runoff outside the permit area in excess of the requirements of the Act, these rules and regulations, and the terms and conditions of the permit.

(C) With respect to prime farmland, soil productivity has been returned to the level of yield as required

by the Act, these rules and regulations, and the terms and conditions of the permit.

(D) The provisions of a plan approved by the Commissioner for the sound future management of any permanent impoundment by the permittee or landowner have been implemented.

(E) The amount of the remaining bond shall be sufficient to cover the estimated cost of reestablishing vegetation and drainage control structures.

(3) Upon successful completion of the reclamation requirements of the Act, these rules and regulations, and the terms and conditions of the permit, Phase III reclamation shall be considered completed and the Commissioner may release the remainder of the bond.

(4) Notwithstanding any other provisions of this section, these regulations, or the Act, no bond release or reduction will be granted if, at the time, water discharged from or affected by the operation requires chemical treatment in order to comply with applicable effluent limitations or water quality standards; provided, that the Commissioner may approve a request for Phase I or Phase II, but not Phase III, release if the applicant demonstrates to the satisfaction of the Commissioner that either:

(A) The remaining bond is adequate to assure long term treatment of the drainage; or

(B) The operator has irrevocably committed other financial resources which are adequate to assure long term treatment of the drainage; provided, that the alternate financial resources must be in acceptable form, and meet the standards set forth in Section 11 of the Act and Section 11 of these regulations; provided, however, that the alternate financial arrangements shall provide a mechanism whereby the Commissioner can assume management of the resources and treatment work in the event that the operator defaults for any reason; provided, further, that default on a treatment obligation under this paragraph shall be considered equivalent to a bond forfeiture, and the operator will be subject to penalties and sanctions, including permit blocking, as if a bond forfeiture had occurred.

In order to make such demonstration as referenced above, the applicant shall address, at a minimum, the current and projected quantity and quality of drainage to be treated, the anticipated duration of treatment, the estimated capital and

operating cost of the treatment facility, and the calculations which demonstrate the adequacy of the remaining bond or of the alternate financial resources.

(d) If the Commissioner disapproves the application for release of the bond or portion thereof, he shall notify the permittee, the surety, and any person with an interest in collateral, in writing, stating the reasons for disapproval and recommending corrective actions necessary to secure the release and allowing an opportunity for a public hearing.

(e) Any person with a valid legal interest which might be adversely affected by release of the bond, or the responsible officer or head of any Federal, State, or local governmental agency which has jurisdiction by law or special expertise with respect to any environmental, social, or economic impact involved in the operation or which is authorized to develop and enforce environmental standards with respect to such operations, shall have the right to file written objections to the proposed release of bond with the Commission within thirty (30) days after the last publication of the notice required by paragraph (a) (2), subsection 12.2 of this section. If written objections are filed and a hearing is requested, the Commissioner shall inform all the interested parties of the time and place of the hearing, and shall hold a public hearing, or informal conference, within thirty (30) days after receipt of the request for the hearing. The date, time, and location of the public hearing, or informal conference, shall be advertised by the Commissioner in a newspaper of general circulation in the locality for two (2) consecutive weeks. The public hearing, or informal conference, shall be held in the locality of the surface coal mining operation from which bond release is sought.

(f) Without prejudice to the right of an objector or the applicant, and when all parties agree, the Commissioner may hold an informal conference in lieu of a public hearing to resolve such written objections. Unless waived by all parties, the Commissioner shall make a record of the informal conference which shall be accessible to all parties. The Commissioner shall also furnish all parties of the informal conference with written findings based on the informal conference, and the reasons for said findings.

12.3 Bond Adjustments. Where the permittee demonstrates on the basis of a sworn statement or progress map that a portion of the permit area will remain undisturbed, the Commissioner may release the amount of the bond corresponding to the number of undisturbed acres, provided that a minimum of \$10,000.00 bond

remains for the permit. Prior to approval of the request for bond adjustment, the Commissioner shall notify the permittee, the surety, and any person with a property interest in collateral who has requested notification, be notified of the requested adjustment to the bond amount. The Commissioner shall provide the permittee with an opportunity for an informal conference on the adjustment. The provisions of this subsection are not subject to the provisions of subsection 12.2.

12.4 Forfeiture of Bonds.

(a) If an operator refuses or is unable to conduct reclamation of an unabated violation, if the terms of the permit are not met, or if the operator defaults on the conditions under which the bond was accepted, the Commissioner shall take the following action to forfeit the bond:

(1) Send written notification by certified mail, return receipt requested, to the permittee and the surety on the bond, if any, informing them of the decision to forfeit all or part of the bond, including the reasons for the forfeiture and the amount to be forfeited. The amount shall be based on the estimated total cost of achieving the reclamation plan requirements; however, bond liability shall extend to the entire permit area.

(2) Advise the permittee and surety, if applicable, of the conditions under which forfeiture may be avoided. Such conditions may include, but are not limited to:

(A) Agreement by the permittee or another party to perform reclamation operations in accordance with a compliance schedule which meets the conditions of the permit, the reclamation plan, and the regulatory program and a demonstration that such party has the ability to satisfy the conditions; or

(B) The Commissioner may allow a surety to complete the reclamation plan, or the portion of the reclamation plan applicable to the bonded phase or increment, if the surety can demonstrate an ability to complete the reclamation in accordance with the approved reclamation plan. No surety liability shall be released until successful completion of all reclamation under the terms of the permit including the applicable period of liability.

(b) In the event forfeiture of the bond is required by this section, the Commissioner shall proceed to collect the forfeiture amount as provided for in Section 17(b) of the Act.

Title 38
CSR 2
Section 12

(c) Where the bond is forfeited, the proceeds shall be used by the Commissioner to accomplish the completion of reclamation, including the requirements of Section 23 of the Act and Subsection 14.5 of these regulations governing water quality.

(d) Where the proceeds of bond forfeiture used by the Commissioner to complete reclamation are less than the actual cost of reclamation:

(1) The permittee shall be liable for all reclamation costs, and the Commissioner shall collect from the permittee all costs in excess of the amount forfeited ; or

(2) ~~In-the-event-the-Commissioner-is~~ unable Notwithstanding efforts by the Commissioner to collect the costs from the permittee, the Commissioner shall in a timely manner but not later than one hundred eighty days after forfeiture of the site-specific bond utilize monies in the Special Reclamation Fund created by Subsection (g), Section 11 of the Act, to accomplish the completion of reclamation, including the requirements of Section 23 of the Act and Subsection 14.5 of these regulations governing water quality.

(e) Notwithstanding any other provisions of the Act and these regulations, the effective date of those provisions of paragraphs (c) and (d) of this subsection relating to water quality shall be December 15, 1989.

38-2-13. Requirements of a Notice of Intent to Prospect.

13.1. Notice of Intent to Prospect - Less-than-Two hundred fifty (250) tons or less. Any person who intends to commercially sell or use coal extracted pursuant to this subsection in any quantity for reasons other than test purposes shall first obtain a surface mining permit. In addition to the requirements of Section 7 of the Act, all prospecting operations shall be subject to the requirements of this section.

(a) Application. The Notice of Intent shall be filed in triplicate, in clasp-type binders, on forms prescribed by the Commissioner, and shall contain the following information:

(1) The name, street address or route number, and telephone number of the operator;

(2) Indicate if the operator is a corporation, partnership, or individual;

(3) The name, address, and telephone number of the person who will have responsibility for conducting prospecting;

(4) The name and address of all owners of surface land and mineral rights;

(5) The location of the operation (county, magisterial district and nearest post office);

(6) The anticipated date of commencement and completion of operations;

(7) Indicate whether or not the operator or any person, partnership, or corporation associated with the operator has on file, or has ever had on file, in the State of West Virginia a prospect permit and bond or an intent to prospect. If so, list all prospect permits and Notices of Intent to Prospect, together with an indication of their current reclamation status;

(8) The operator's source of legal right to enter and conduct operations;

(9) The notarized signature of a principal officer of the operator affixed to a statement declaring that the information contained in the Notice is true and correct to the best of his knowledge;

(10) The name, address, and telephone number of the applicant's representative who will have on-site responsibility for conducting the operation;

(11) A narrative description of the proposed operation including an estimated timetable for conducting and completing each phase of the operation to include reclamation;

(12) A description of how the applicant will conduct prospecting operations so as to protect habitats of unique or unusually high value for fish, wildlife, and other related environmental values and critical habitats of threatened or endangered species identified pursuant to the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq); and

(13) A description of cultural or historical resources listed or known to be eligible for listing on the National Register of historic places and all known archaeological sites located within the proposed prospecting area.

(b) Reclamation Plan. A reclamation plan which includes the following:

- (1) The method of prospecting;
- (2) The method for controlling runoff and sedimentation;
- (3) The method of regrading;
- (4) A plan for revegetation;
- (5) The method for sealing, casing or otherwise managing prospecting holes, bore holes, wells or other exposed underground openings created during the prospecting; and
- (6) The method of constructing and/or utilizing roads.

(c) Maps. A map showing topographic features, streams, bodies of water, manmade structures, utility lines, etc. equivalent to that of a United States geological survey topographic quadrangle map (scale 1" = 2,000'). The following additional information shall also be shown:

- (1) The surface and mineral owners of the tract(s) and property lines within the area to be prospected, including occupied dwellings not otherwise shown on the map;

Title 38
CSR 2
Section 13

- (2) The quadrangle title with a north arrow;
- (3) Clearly indicate the name(s) of the receiving stream(s);
- (4) Show by proper markings the approximate location of the cropline(s) and name of the seam(s);-and
- (5) Show the area(s) to be disturbed and the approximate location of excavations, trenches, drill holes, proposed and existing roads, and list the number of disturbed acres and;
- (6) Show the location of critical habitats of any threatened or endangered species identified within the proposed prospecting area.

13.2. Notice of Intent to Prospect - Greater than two hundred fifty (250) Tons. Any person who intends to commercially use or sell coal extracted under this subsection for reasons other than test purposes shall first obtain a surface mining permit. Any person who intends to commercially sell or use coal extracted pursuant to this subsection in any quantity for reasons other than test purposes shall first obtain a surface mining permit. If prospecting will remove more than 250 tons of coal, the Notice of Intent to Prospect shall include, in addition to the requirements of Subsection 13.1 of this Section, the following:

(a) The applicant shall prepare a narrative discussion of a feasibility study for the site, including the specific reasons for extraction of the amount of tonnage for which permission is requested. The narrative shall be of sufficient detail to enable the Commissioner to make a determination that the proposed extraction and sale of the coal is incidental to testing of the coal to determine if it is of a mineable and merchandiseable quality, so as to make it possible to conduct surface mining and reclamation operations on the site for which a permit application can be submitted at a later date. The narrative shall explain in detail why other means of prospecting/exploration, such as core drilling, involving extraction of less than 250 tons of coal, are not adequate to determine the quality of the coal and the feasibility of future surface mining and reclamation operations on the site. Form, generic or general statements by the applicant of a need for quality testing of more than 250 tons shall not be adequate grounds for the Commissioner's approval of removal of greater than 250 tons. The narrative shall contain at a minimum:

Title 38
CSR 2
Section 13

(1) A demonstration that the amount of coal to be removed under the notice of intent to prospect application is not the total reserve of coal but is a random sampling of a larger reserve.

(2) Demonstrates that the coal testing is necessary for the development of a surface coal mining and reclamation operation for which a surface coal mining operation permit application is to be submitted in the near future, and that the proposed commercial use or sale of coal extracted during prospecting operations is solely for the purpose of testing the coal.

(3) A demonstration that the application is for prospecting and is not surface mining or an "early start-up" for a surface mining operation.

(4) A statement that reclamation will be completed within three (3) months of initial disturbance of each site to be disturbed under the notice of intent to prospect.

(5) A description of any endangered or threatened species identified within the prospecting area.

(6) The location of cultural or historical resources listed or known to be eligible for listing on the National Register of historic places and all known archaeological sites located within the proposed prospecting area.

(7) Any other information required by the Commissioner regarding known or unknown historic or archaeological resources.

(8) A narrative description of the methods and equipment to be used to conduct prospecting and reclamation.

(b) The name of the company that will receive the tonnage for test burning or other testing purposes and further identify with specificity the precise tests that will be conducted on the coal and the location of the test site. Furthermore, the applicant shall state that the testing proposed in the application has already been agreed to by the applicant and the company that will receive the coal.

(c) The intended end user and/or agent or broker shall provide a statement to be made a part of the application which will set forth the specific reasons for the test, including why the coal may be so different from the intended user's other coal supplies as to require testing; the amount of coal necessary for

the test and why a lesser amount is not sufficient; and a description of the specific tests that will be conducted.

(d) A map which contains all information required in Subsection 13.1 ~~and 13.4~~ of this section and which additionally shows the location of critical habitats of threatened or endangered species identified within the proposed prospecting area.

(e) A copy of a legal notice to be published in a newspaper of general circulation in the county where prospecting will occur. The ad shall contain the following:

- (1) The name and business address of the operator;
- (2) The date the application was filed and the date of close of a public comment period which date shall not be less than fifteen (15) days after the date of publication;
- (3) The address of the office of the Department of Energy where any person whose interest is or may be adversely affected shall have the right to submit written comments;
- (4) A description of the general area where prospecting will occur;
- (5) A statement that an excess of two hundred fifty (250) tons of coal will be removed;
- (6) The purpose for removing more than two hundred fifty (250) tons; and
- (7) An estimate of the total tonnage to be removed.

13.3. Approval of Notice of Intent to Prospect -- Greater than two hundred fifty (250) Tons.

(a) The Commissioner shall act upon an administratively complete application for a prospecting approval and any written comments within a reasonable period of time, but in no event shall action be taken prior to the close of the public comment period.

(b) The Commissioner shall approve a complete and accurate application for a prospecting approval filed in accordance with this section if he finds, in writing, that the applicant has demonstrated that the prospecting and reclamation operation described in the application will:

Title 38
CSR 2
Section 13

(1) Be conducted in accordance with this section, and other applicable provisions of these regulations, the Act, and the application;

(2) Not jeopardize the continued existence of an endangered or threatened species listed pursuant to Section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533) or result in the destruction or adverse modification of critical habitat of those species; and

(3) Not adversely affect any cultural or historical resources listed on the National Register of Historic Places, pursuant to the National Historic Preservation Act, as amended (16 U.S.C. Sec. 470 et seq., 1976, Supp V), unless the proposed prospecting has been approved by both the Commissioner and the agency with jurisdiction over such matters.

(c) Terms of approval issued by the Commissioner shall contain conditions necessary to ensure that the prospecting and reclamation operations will be conducted in compliance with these regulations, the Act and the application.

(d) The Commissioner shall notify the applicant, the appropriate local government officials, and other commentators on the application, in writing, of his decision on the application. If the application is disapproved, the notice to the applicant shall include a statement of the reason for disapproval. Public notice of the decision on each application shall be posted by the Commissioner at the nearest Department of Energy office in the vicinity of the proposed prospecting operations.

(e) Any person having an interest which is or may be adversely affected by a decision of the Commissioner pursuant to paragraph (d) of this subsection shall have the opportunity for administrative and judicial review.

(f) The Commissioner shall not approve the extraction of more than 250 tons for any reason other than that the coal will be tested for quality and combustibility.

(g) The Commissioner shall monitor the operation of each and every prospecting approval granted for total compliance with the provisions of the Act, these rules and regulations, and the terms and conditions of the approval application.

(h) The operator shall submit a sworn statement to the local surface mining reclamation inspector prior to the completion of coal removal which will verify that the coal was

used for the purpose for which the notice of intent to prospect was originally granted.

(i) If the Commissioner determines that, or suspects on the basis of information made available to him that, a prospecting operation is not being conducted in the precise manner set forth in the notice of intent to prospect and/or the accompanying narrative, the Commissioner shall take immediate steps to compel compliance or to establish that violations have occurred. Such steps may include, but would not be limited to, checking weight tickets and the inspection of end-user records.

13.4. Performance Standards.

(a) This subsection establishes minimum performance standards applicable to prospecting operations provided that upon an affirmative demonstration that drilling operations that do not substantially disturb the land and are to be conducted solely for establishing property values for purposes of taxation or highway construction purposes, such drilling shall be exempted from this section. The commercial sale or use of coal extracted under an approval pursuant to subsection 13.1 or 13.2 of this section except for test purposes as provided therein is prohibited.

(b) Prospecting Roads.

(1) All roads shall be utilized or constructed in a manner that will control or prevent erosion and siltation or damage to fish or wildlife or their habitat or public or private property.

(2) All roads must be reclaimed or rehabilitated to a condition equal to or better than their preprospecting condition. Where a road will permanently remain after prospecting activities, the construction, maintenance and stabilization shall be governed by Section 4 of these rules and regulations.

(3) Vehicular travel on other than established graded and surfaced roads shall be limited by the person who conducts prospecting to that absolutely necessary to conduct the prospecting. Travel shall be confined to graded and surfaced roads during periods when excessive erosion, damage to vegetation or rutting of the land surface could result.

(c) Blasting. Blasting is prohibited on prospecting operations unless otherwise approved by the Commissioner. Any blasting approved must be conducted in accordance with Section 6 of these regulations.

(d) Drainage. All disturbances created by prospecting operations shall be conducted in such a manner as to prevent or control erosion, siltation, pollution of water, and to minimize disturbance to the prevailing hydrologic balance. Such operations shall be exempt from specific design and construction criteria for sediment control structures only if stabilization to control erosion is achieved through alternative measures. Any operation which will substantially disturb the natural land surface shall be required by the Commissioner to install drainage control structures in accordance with Section 5 of these regulations.

(e) All prospecting operations carried out in steep slope conditions shall be conducted in a manner consistent with the steep slope requirements provided for in subsection (d) of Section 12 of the Act and subsection 14.8 of these regulations.

(f) The Commissioner may limit prospecting operations from encroaching nearer than one hundred feet (100') of a perennial or intermittent stream, provided that roads or access ways may be located within one hundred feet (100') of an intermittent or perennial stream. Roads shall not be constructed up a stream bed or drainage channel or in close proximity to such channel so as to significantly alter the normal flow of water.

(g) Each prospecting hole, borehole, well or other exposed underground opening created during prospecting shall be cased, sealed, or otherwise managed to prevent acid or toxic drainage from entering ground or surface water, or substantial degradation of ground water quality or quantity. All such holes or openings shall be sealed, plugged, or otherwise managed to insure the safety of people, livestock, fish and wildlife, machinery, etc during prospecting. When no longer needed, such holes or openings shall be permanently closed.

(h) All toxic or acid-forming materials encountered while prospecting shall be handled in accordance with the requirements of Subsections 14.5 and 14.6 of these regulations.

(i) All facilities and equipment shall be removed from the prospecting area when they are no longer needed.

(j) Topsoil shall be removed, stored and redistributed on disturbed areas as necessary to assure successful revegetation.

(k) All areas disturbed during prospecting operations shall be regraded to approximate original contour within three months of initial disturbance unless reclamation has been waived

pursuant to receipt of an appropriate surface mine application number (SMA); provided, that reclamation cannot be delayed more than one (1) year from receipt of a surface mine application number.

(1) All disturbed areas must be revegetated in a manner consistent with Section 9 of these regulations.

(m) The operation shall be conducted so as to provide protection of endangered and threatened species and their critical habitats as determined by the Endangered Species Act of 1973 (16 U.S.C. 1531, et seq.) or habitats of unique or unusual high value for fish or wildlife.

13.5 Expiration. A notice of intent to prospect shall be valid only for the time period indicated in the application, which period shall not exceed two (2) years. The Commissioner may approve an extension of the time period upon a request by the operator subject to the reclamation requirements of paragraph (h), Section 7 of the Act.

13.6. Bond Release. The performance bond or other securities accompanying a notice of intent shall be released upon satisfactory regrading and establishment of a permanent vegetative cover. All applications for bond release shall be accompanied by a final map showing the total disturbed area of the prospecting operation.

13.7. Notice on Site. All operators conducting prospecting activities shall, while in the prospecting areas, have in their possession, a copy of the written approval of notice of intent for such activities issued by or submitted to the Commissioner.

13.8. Public Records. All information submitted to the Department of Energy as a part of the notice of intent to prospect, as required in the Act and this section, shall be made available for public inspection and copying at the nearest Department of Energy office; provided, that information submitted to the Commissioner pursuant to this subsection which contains trade secrets or privileged commercial or financial information which relates to the competitive rights of the person filing such information or other persons who may be affected, is certified information and shall not be available for public examination.

13.9 Lands Unsuitable Designation. Regardless of the number of tons of coal to be removed, any person who proposes to conduct prospecting operations on lands which have been designated as unsuitable for surface mining pursuant to Section 22 of the Act, shall prepare and file a notice of intent in accordance with

Title 38
CSR 2
Section 13

Subsection 13.2 of this Section. Approval of the notice of intent shall be in accordance with Subsection 13.3 of this Section.

38-2-14. Performance Standards. In addition to the requirements of the Act, the following performance standards shall be applicable to both surface and underground mining operations.

14.1 Signs and Markers. Signs and markers as required in this subsection shall be erected and maintained throughout the life of the permit or term of the specified activities for which they are intended.

(a) Permanent Monument. A permanent monument shall be posted at primary points of ingress and egress on the permit area from public roads and highways. The monument shall consist of a sign constructed of wood, metal or other suitable material measuring two feet by three feet (2' x 3') and mounted on a two-inch (2") diameter pipe driven three feet (3') into the ground with four feet (4') exposed. Any suitable substitute may be approved. The sign shall clearly indicate the company name, permit number, business address and telephone number.

(b) Perimeter Marker. Prior to initial disturbance, suitable markers made of durable material shall be established to permanently mark the perimeter of the area under permit. The assigned permit number shall be affixed to the permanent perimeter marker. Other markers may be used to delineate the boundaries of the proposed permit area.

(c) Buffer Zone Markers. Appropriate markers will be established along a buffer zone. Markers shall consist of metal or wooden stakes or other suitable devices or methods.

(d) Topsoil Markers. When topsoil or topsoil substitute material is segregated and stockpiled, the stockpiled material shall be marked. Markers shall remain in place until the materials are removed.

(e) Blasting Signs. If blasting is necessary to conduct surface mining operations, the following signs and markers shall be required:

(1) Warning signs shall be conspicuously displayed at all approaches to the blasting site, along haulageways and access roads to the mining operation and at all entrances to the permit area. The sign shall at a minimum be two feet by three feet (2' x 3') reading "WARNING! Explosives in Use" and explaining the blasting warning and the all clear signals and the marking of blasting areas and charged holes; and

(2) Where blasting operations will be conducted within one hundred (100) feet of the outside right-of-way of a public road, signs reading "Blasting Area", shall be conspicuously placed along the perimeter of the blasting area.

14.2 Casing and sealing of holes and exposed underground openings.

(a) General requirements. Each prospecting hole, other drillhole or borehole, shaft, well, or other exposed underground opening shall be cased, lined, sealed or otherwise managed as approved by the Commissioner to prevent acid or other toxic drainage from entering ground and surface waters, to minimize disturbance to the prevailing hydrologic balance and to ensure the safety of people, livestock, fish and wildlife, and machinery in the permit and adjacent area. Each prospecting hole, drill hole or borehole well or opening that is uncovered or exposed by mining activities within the permit area shall be permanently closed, unless approved for water monitoring or otherwise managed in a manner approved by the Commissioner. However, at the time of final release of bond, exploratory or monitoring wells must either be sealed in a safe and environmentally sound manner or with the prior approval of the Commissioner, be transferred to another party for further use. The conditions of the transfer shall comply with State and local laws, regulations, and other requirements.

(b) Temporary seals:

(1) Each mine entry which is temporarily inactive, but has a further projected useful service under the approved permit, shall be protected by barricades or other covering devices, fenced, and posted with signs, to prevent access into the entry and to identify the hazardous nature of the opening. These devices shall be periodically inspected and maintained in good operating condition by the person who conducts the underground mining activities.

(2) Each prospecting hole, other drill hole or borehole, shaft, well, and other exposed underground opening which has been identified in the approved permit for use to return underground development waste, coal processing waste or water to underground workings, or to be used to monitor ground water conditions, shall be temporarily sealed until actual use and protected during use by fences, barricades, or other protective devices.

(c) Permanent seals. When no longer needed for monitoring or other use approved by the Commissioner upon a finding of no adverse environmental or health and safety effects, each shaft, drift, adit, tunnel, prospecting hole, entryway or other opening to the surface from underground shall be capped, sealed, backfilled, or otherwise properly managed in accordance with paragraph (a) of this subsection and in accordance with MSHA regulations at 30 CFR 75.1711. Permanent closure measures shall be designed to prevent access to the mine workings by people, livestock, fish and wildlife, machinery and to keep acid or other toxic drainage from entering ground or surface waters.

14.3 Topsoil.

(a) Removal. Prior to disturbance of an area, topsoil shall be removed from the area to be disturbed in a separate layer and if not immediately redistributed, it shall be segregated and stockpiled in a separate stable location as specified in the preplan. Stockpiled topsoil shall remain in place until used for redistribution unless otherwise approved by the Commissioner. Stockpiled topsoil shall be protected from excessive compaction. Where the removal of vegetative material, topsoil or other materials may result in erosion, the Commissioner may limit the size of the area from which these materials are removed at any one time.

(b) Redistribution. Prior to redistribution of topsoil, the regraded land shall be treated, if necessary, to reduce the potential for slippage of the redistributed material and/or to enhance root penetration. Topsoil and other materials shall be redistributed in a manner that prevents excess compaction and that achieves an approximate uniform, stable thickness, consistent with the approved postmining land uses, contours, soil density, and surface water drainage system. Immediately after redistribution all topsoil areas shall be protected from wind and water erosion.

(c) Top Soil Substitutes. Any substitute material used for topsoiling must be capable of supporting and maintaining the approved postmining land use. This determination of capability shall be based on the results of appropriate chemical and physical analysis of overburden and topsoil. These analyses shall include at a minimum depth, thickness, and areal extent of the substitute structure or soil horizon, pH, texture class, percent coarse fragments and nutrient content. A certification of analysis shall be made by a qualified laboratory stating that:

(1) The proposed substitute material is equally suitable for sustaining vegetation as the existing topsoil;

(2) The resulting soil medium is the best available in the permit area to support vegetation; and

(3) The analyses were conducted using standard testing procedures.

(d) Soil Amendments. Nutrients and soil amendments in the amounts determined by soil tests shall be applied to the redistributed surface soil layer so that it supports the approved postmining land use and meets the revegetation requirements of Section 9 of these regulations. These tests shall include nutrient analysis and lime requirement tests. Results of these tests shall be submitted to the Commissioner with the final planting report as required by these regulations.

14.4 Diversions.

(a) Stream Channel Diversions. Stream channel diversions and stream channels reclaimed after the removal of temporary diversions, shall be designed and constructed so as to restore or approximate the premining characteristics of the original stream channel, including the natural riparian vegetation, to promote recovery and enhancement of the aquatic habitat.

(b) Temporary Diversions. Temporary diversions shall be removed when they are no longer needed to achieve the purpose for which they were approved as long as downstream facilities which were being protected are modified or removed.

(c) Reclamation of Diversions. All temporary diversions shall be removed and reclaimed prior to permit abandonment and all permanent diversions shall comply with the approved reclamation plan and be renovated if necessary prior to abandonment.

14.5 Hydrologic Balance. All surface mining and reclamation activities shall be conducted to minimize the disturbance of the hydrologic balance within the permit and adjacent areas, to prevent material damage to the hydrologic balance outside the permit area, to assure the protection or replacement of water supplies, and to support the approved post mining land use.

(a) Water Quality Control. All water accumulation into the pit shall be removed at least once in a twenty-four (24) hour

period whenever water quality or spoil stability may be adversely affected.

(b) Effluent Limitations. Discharge from areas disturbed by surface mining shall not violate effluent limitations or cause a violation of applicable water quality standards. The monitoring frequency and effluent limitations shall be governed by the standards set forth in the NPDES Program under the Federal Water Pollution Control Act as amended, 33 U.S.C. 1251 et. seq. and the rules and regulations promulgated thereunder. Effluent limitations are those contained in federal regulations at 40 CFR Part 434.

(c) Treatment Facilities. Adequate facilities shall be installed, operated and maintained using the best technology currently available in accordance with the approved preplan to treat any water discharged from the permit area so that it complies with all federal and state laws and regulations and the limitations of this section. Nonmechanical treatment systems may be utilized if flow is infrequent or small and timely and consistent treatment is assured.

(d) Breakthrough. Any surface breakthrough of water caused by the operator during the course of his operations shall be sampled immediately and analyzed for total iron, total suspended solids and pH and if requested by the Commissioner, any other parameter which is characteristic of the discharge. Such analysis shall be made by a competent water analyst or chemist. The original and at least one copy of such analysis shall be retained by the operator, and two (2) copies shall be submitted to the Commissioner. Should said analysis indicate the water quality to be less than the applicable effluent limitations, seals shall be immediately constructed. These seals shall:

(1) Prevent any air from entering the underground mine by way of the breakthrough;

(2) Prevent any air from entering the breakthrough while allowing the water to flow from the breakthrough;

(3) Seal the breakthrough of water so that it cannot flow. Such seals shall be constructed of stone, brick, block, earth or other impervious materials which are acid resistant; or

(4) Alternate methods of handling discharges from breakthroughs may be employed where it can be established that applicable effluent limitations can be met.

(e) Discharges Into Underground Workings.

(1) On active underground mining operations, all reasonable measures shall be taken to intercept all surface water by the use of diversions, culverts, drainage ditches or other approved methods to prevent water from entering the working area. All surface drainage from the disturbed area must pass through a sediment pond or series of sediment ponds so that discharges from such areas will not cause a violation of water quality standards.

(2) Discharges into underground mine workings, are prohibited, nor shall water be discharged from one underground working to another, unless the operator demonstrates to the Commissioner that such activities will:

(A) Not cause, result in, or contribute to a violation of water quality standards and effluent limitations both on or outside the permit area;

(B) Not be discharged without MSHA approval;

(C) Minimize disturbance to the hydrologic balance on the permit area and prevent material damage outside the permit area; and

(D) Be discharged at specified rates as a controlled flow meeting applicable effluent limitations for pH and total suspended solids, except that the pH and total suspended limitations may be exceeded if approved by the Commissioner, and is limited to:

(i) Coal processing waste;

(ii) Fly ash from a coal-fired facility;

(iii) Inert materials used for stabilizing underground mines;

(iv) Underground mine development wastes;

(v) Sludge from an acid mine drainage treatment facility or flue-gas desulfurization; or

(vi) Water.

(f) Co-mingling of Waters. Unless otherwise approved by the Commissioner, water from underground works shall not be co-mingled with surface drainage. When separate treatment

facilities are used for discharges from underground works, they shall be designed to adequately treat the anticipated quantity and quality of the raw discharge.

(g) Gravity Flows. No person shall locate openings for new drift mines working in acid or iron producing coal seams in such a manner that the mine will have a gravity discharge. If there will be a gravity discharge and the seam to be mined is listed in Subsection 2.4 of these regulations, site specific data must be submitted demonstrating that this seam is not an acid or iron producing seam at this location.

(h) A waiver of water supply replacement rights-granted by a landowner as provided in subsection (b) of Section 24 of the Act shall ~~not constitute a waiver of the operator's responsibility for maintaining water quality~~ apply only to underground mining operations, provided that a waiver shall not exempt any operator from the responsibility of maintaining water quality.

14.6 Acid Producing and Toxic Materials.

(a) Acid and Toxic Soils. Drainage from acid-forming and toxic-forming materials into ground and surface water shall be avoided by identifying, burying, blending, segregating, and/or treating spoil or other materials that will be toxic to vegetation or that will adversely affect water quality. Such materials shall be handled and treated in accordance with methods set forth in the approved preplan within thirty (30) days after initial exposure or a lesser period if required by the Commissioner.

(b) Burying Acid and Toxic Materials. Acid-forming or toxic-forming material shall not be buried or stored in proximity to a drainage course or groundwater system.

(c) Treatment of Toxic Material. All exposed coal seams remaining after mining and any acid-forming, toxic-forming, or combustible materials or any other waste materials shall be covered with a minimum of four feet (4') of nontoxic and noncombustible material. Where necessary to protect against upward migration of salts, exposure by erosion, or to provide adequate depth for plant growth, the Commissioner shall specify thicker amounts of cover.

14.7 Monitoring Requirements.

(a) Surface Water. All surface water shall be sampled and analyzed and otherwise monitored in accordance with the approved surface water monitoring plan. Monitoring and analysis shall occur at each monitoring site no less frequently than quarterly. All measurements shall be submitted to the Commissioner and all violations of applicable effluent limitations shall be reported to the Commissioner within five (5) days of receipt of analytical results. The operator shall immediately implement remedial measures described in the hydrologic reclamation plan. Monitoring shall continue until bond release unless the operator demonstrates that continued monitoring is unnecessary to achieve the purpose of the monitoring plan.

(b) Groundwater. Where adverse impacts to a significant groundwater resource are identified as provided in paragraph (h) of Subsection 3.22 of these regulations, the groundwater resources shall be monitored in accordance with the groundwater monitoring plan. Monitoring and analysis shall occur no less frequently than quarterly. All measurements shall be submitted to the Commissioner and all violations of standards established under Section 24 of the Act shall be reported to the Commissioner within five (5) days of receipt of analytical results. The operator shall immediately implement remedial measures described in the hydrologic reclamation plan. Monitoring shall continue until bond release unless the operator demonstrates that continued monitoring is unnecessary to achieve the purposes of the monitoring plan.

(c) Ground Water Monitoring Waivers. - If an applicant can demonstrate by the use of the PHC determination and other available base line hydrologic and geologic information that a particular water-bearing stratum in the proposed permit and adjacent area is not one which serves or may potentially serve as a significant aquifer or ensure the hydrologic balance within the cumulative impact area, monitoring of the stratum may be waived by the Commissioner. Waivers will be considered and granted separately and exclusively for each individual water-bearing stratum unless it is shown by the use of the PHC determination and base line hydrologic and geologic information that all individual water-bearing strata of concern are hydraulically interconnected and can be waived as a complete unit.

(d) Water Treatment. Where any discharge from the permit area requires treatment during the mining operation in order to meet the applicable effluent limitations, water monitoring of such discharges shall continue following grading approval. If it

is established on the basis of such monitoring that the hydrologic balance is being preserved without treatment, the treatment facilities may be removed. A one (1) year history of meeting the applicable effluent limitations shall be adequate to establish that the hydrologic balance is being preserved.

(e) Monitoring Equipment. Monitoring equipment located both at the permit area and at off-site areas shall be properly installed, operated, and maintained during the required monitoring period and removed when no longer required.

14.8 Steep Slope Mining.

(a) Backfilling and Spoil Placement. In addition to other applicable performance standards set forth in the Act and these regulations, the following standards shall apply where the natural slope of the land within the permit area exceeds an average of twenty (20) degrees as measured from the horizontal. These standards except the variance provisions of subsection 14.12 shall also apply to slopes of lesser steepness where the Commissioner has determined, on the basis of soils, climates, method of operation, geology, and other site-specific characteristics, that special measures are required to protect the area below the mining operations from landslides or other hazards. The provisions of this section do not apply when mining is conducted on a flat or gently rolling terrain with an occasional steep slope through which the mining proceeds and leaves a plain or predominantly flat area.

(1) Spoil, debris, or abandoned or disabled equipment shall not be placed on the downslope except as provided in subsection (d) of Section 12 of the Act. Excess spoil may be placed in specified areas designed in the permit application for such placement, if such placement is done in accordance with the provisions of subsection 14.14 of these regulations. Nothing in this section shall prohibit the placement of materials in haulroad or access road fills on slopes steeper than twenty (20) degrees so long as the fills are constructed in accordance with construction specifications set forth in Subsection 14.14 of this section.

(2) In multiple seam mining operations on steep slopes, spoil may be transported by gravity from a mining bench or benches to an approved backfill on a lower bench being mined, or to an approved excess spoil disposal area, provided that such gravity transport occurs only where and as provided for in the approved mining and reclamation plan, and the approved plan:

(A) Includes measures to minimize adverse environmental impacts and to ensure safety of the public and of mining personnel during such gravity transport;

(B) Provides, if the transport is to an approved excess spoil disposal area downslope of the mining operation:

(i) For a waiver of the outcrop barrier requirements of paragraph (25), subsection (b), Section 12 of the Act; and

(ii) The lowest coal seam to be mined is to become part of the approved fill area; or

(C) Provides, if the transport is to approved backfill on a lower mining bench or benches:

(i) For either a natural or constructed outcrop barrier on the lowest bench as per paragraph (25), subsection (b), Section 12 of the Act;

(ii) That the amount of spoil so transported is limited to that which can be safely retained on the lower bench(es); and

(iii) That, except where and to the extent authorized by subparagraph (7), paragraph (d), subsection 14.14 of these regulations, each successive highwall will intersect the next upper bench, with no intervening natural outslope between successive benches;

(D) Describes the sequence of mining that will occur to ensure minimal disturbance of outslope areas during the operation;

(E) Provides that all areas over or across which spoil is so transported are first properly prepared by, at a minimum:

(i) Clearing of trees, brush, and other vegetation;

(ii) Removal and salvaging of topsoil, unless an approved topsoil substitute is to be used for reclamation and the topsoil will not affect the stability of the fill; and

(iii) If the spoil is to be incorporated into a durable rock fill, removal of the topsoil, subsoils, and other unconsolidated material from the areas across which spoil is to be transported, so as to avoid contamination of the durable rock fill with excess fines;

(F) Provides that all spoil so transported will be incorporated into a properly designed and approved bench backfill or excess spoil disposal area, and no spoil other than that required for revegetation will be allowed to remain after completion of mining on the areas between benches, or between the lowest bench and the surface of a fill;

(G) Provides that the spoil will be handled or rehandled as necessary to ensure that any fill so created meets the requirements of subparagraph 5 of this paragraph and/or subsection 14.14 as applicable;

(H) Provides that, if the spoil is to be incorporated into a durable rock fill with an underdrain system which is to be formed by natural segregation of dumped materials, the transport method will insure that the natural segregation will in fact occur, and further provides that spoil transportation or placement methods which will not insure successful underdrain construction will not be utilized; and

(I) Provides that all areas disturbed during spoil handling will be reclaimed and revegetated in accordance with the Act, these regulations, and the approved plan.

(23) The highwall shall be eliminated and the disturbed area graded to the approximate original contour. Spoil material in excess of that required for the reconstruction of the approximate original contour shall be permanently stored in areas designated in the permit for such use and designed and constructed in accordance with Subsection 14.14 of this section.

(34) Land above the highwall shall not be disturbed unless the disturbance is necessary to facilitate compliance with the environmental protection standards of this section and Section 14 of the Act. Standards to be considered which justify such disturbance are the following:

- (A) Achieve the approximate original contour;
- (B) Control erosion, sedimentation, and water runoff;

(C) Provide access to the area above the highwall for revegetation purposes; or

(D) Comply with safety standards.

(45) The material used to backfill and eliminate the highwall shall be sufficiently compacted or otherwise mechanically stabilized so as to insure stability of the backfill with a static safety factor of 1.3. Placement of Woody materials in the fill shall be prohibited unless the Commissioner first determines that the method of placement of woody material buried-in-such-a-manner-that-it-will not deteriorate the future stability condition-of the backfilled area. The operator shall at a minimum retain all overburden and spoil on the solid portion of the existing or new benches and backfill and grade the area to the most moderate slope possible.

(56) When mining through natural watercourses or when water is to be directed across or through the backfill, a drainage channel, flumes, culvert, or french drain shall be constructed across or through the backfill in order to insure stability and to prevent erosion. Such drainage channels, flumes, culvert or french drains shall be constructed of nontoxic durable rock, asphalt, pipe, concrete or other similar material. Channels, flumes, culvert, and drains shall be constructed in accordance with the applicable criteria set forth in the applicable requirements of these regulations.

14.9 Auger Operations.

(a) Prohibition and Variance. Augering shall be prohibited by the Commissioner if it is determined that such operations pose a potential hazard to the environment, to the public welfare and safety, to water quality, or to structures or buildings as a result of subsidence.

(b) All auger holes, except as provided in paragraph (c) of this subsection, shall be:

(1) Sealed within seventy-two (72) hours after coal extraction with an impervious and noncombustible material, if the holes are discharging water containing acid-or toxic-forming material. If sealing is not possible within seventy-two (72) hours, the discharge shall be collectively treated commencing within seventy-two (72) hours after completion to meet applicable effluent limitations and water-quality standards until the holes are sealed; and

(2) Sealed with an impervious non-combustible material, as contemporaneously as practicable with the augering operation, if the holes are not discharging water containing acid-or toxic-forming material.

(c) Auger holes need not be sealed with an impervious material so as to prevent drainage if the Commissioner determines that:

(1) The resulting impoundment of water may create a hazard to the environment or public health or safety, and

(2) The drainage from the auger holes will:

(A) Not pose a threat of pollution to surface water, and

(B) Comply with applicable effluent limitations and water quality standards.

(d) Spacing. Auger mining operations shall be conducted in a manner which maximizes recoverability of mineral reserves remaining after augering. The operator shall, at a minimum, leave areas of undisturbed coal to provide access for future underground mining activities, unless it is established by the operator that the coal reserves have been depleted or are so limited in thickness or extent that it would not be practicable to attempt further recovery.

(e) Subsidence. Auger mining operations shall be conducted in such a manner so as to prevent or minimize subsidence and where material damage occurs the operator shall correct such damage in accordance with the requirements of paragraph (c) subsection 16.2 of these regulations.

(f) Previously Mined Areas. Where auger mining operations affect previously mined areas and the volume of all reasonably available spoil is demonstrated in writing to the Commissioner to be insufficient to completely backfill the highwall, the highwall shall be eliminated to the maximum extent technically practical in accordance with the following criteria:

(1) The person who conducts the auger mining operation shall demonstrate to the Commissioner that the backfill, designed by a qualified registered professional engineer, has a minimum static safety factor for the stability of the backfill of at least 1.3.

(2) All spoil generated by the auger mining operation and any associated surface coal mining and reclamation operation, and any other reasonably available spoil, shall be used to backfill the area. Reasonably available spoil shall include spoil generated by the mining operation and other spoil located in the permit area that is accessible and available for use and that when rehandled will not cause a hazard to the public safety or significant damage to the environment. For this purpose, the permit area shall include spoil in the immediate vicinity of the auger mining operation.

(3) The coal seam mined shall be covered with a minimum of four (4) feet of nonacid, nontoxic-forming material and the backfill graded to a slope which is compatible with the approved postmining land use and which provides adequate drainage and long-term stability.

(4) Any remnant of the highwall shall be stable and not pose a hazard to the public health and safety or to the environment.

(5) Spoil placed on the outslope during previous mining operations shall not be disturbed if such disturbances will cause instability of the remaining spoil or otherwise increase the hazard to the public health and safety or to the environment.

(6) Auger holes shall not extend closer than five hundred (500) feet to any abandoned or active underground mine workings except as approved in Section 14.13.

14.10. Mountaintop Removal.

(a) Backfilling and Regrading. In addition to the other performance standards set forth in these regulations, the following performance standards will apply where the mountaintop removal method of mining is used:

(1) The final graded top plateau slopes on the mined area shall be less than five (5) horizontal to one (1) vertical so as to create a level plateau or gently rolling configuration. The outslopes of the plateau shall be no steeper than two (2) horizontal to one (1) vertical.

(2) The resulting level or gently rolling contour shall be graded so that water will drain inward from the outslope except at specific points where it is released over the outslope in constructed channels. Such channels shall be protected from

erosion and constructed in accordance with paragraph (c) subsection 5.3 of these regulations.

14.11 Procedures to Obtain Inactive Status.

(a) A permittee may not cease mining and reclamation operations for a period of thirty (30) days or more unless the Commissioner finds in writing that all the following requirements have been fully satisfied:

(1) The site is in full compliance with all standards of the program and permit, including but not limited to contemporaneous reclamation, no outstanding violations or penalties exist, and adequate pictorial and narrative description of site conditions to date has been placed in the file;

(2) Where the permit involves the extraction of coal, significant coal reserves for the mine remain;

(3) All disturbed acreage is bonded in accordance with Section 11 of the Act and Section 11 of these regulations;

(4) All required and necessary backfilling, regrading, revegetation, environmental monitoring, and water treatment activities will continue on the mine site, and adequate provisions for other required and necessary maintenance work for the time period for which the application to cease operations has been made;

(5) The site must be adequately secured to guard against hazards to the public;

(6) A finding based on a detailed showing by the permittee that the cessation is necessary because of temporary market conditions which are likely to change in the period for which the temporarily inactive status is sought;

(7) A color coded mine/progress map accurately depicting the extent and location of all disturbed area, the remaining undisturbed area, and the remaining coal reserves, if any, on the permit at the time of the request. The mine/progress map shall contain a legend which lists the respective acreages and/or tonnages for each of the above-described categories;

(8) Each request for inactive status shall be submitted on forms prescribed by the Commissioner and shall contain a sworn statement as follows: "The information contained in this application is true and correct to the best of my

knowledge and belief." Such statement shall be signed by an accountable official of the applicant and shall be notarized; and

(9) Inactive status shall not relieve the operator of any responsibility for complying with the Act, these rules and regulations, or the terms and conditions of the permit.

(b) The Commissioner may grant inactive status for a period of up to one (1) year if he determines that the application contains sufficient information to meet all requirements of paragraph (a) of this subsection.

(c) The Commissioner shall within five (5) days of receipt of a request for inactive status, post the application and supporting documentation in an appropriate public office in the area of the permit, and shall notify any persons who have requested notification of a request for inactive status on the relevant permit, that a request has been received. The Commissioner shall provide for public comment and an opportunity for an informal conference. If a request for an informal conference is received within thirty (30) days of the Department's receipt of the request, the Commissioner shall schedule the conference in the area of the permit.

(d) Within thirty (30) days preceding the expiration of the initial time period granted for inactive status, the permittee may request an extension of the approved inactive period, and at that time must submit current information meeting the requirements of paragraph (a). The Commissioner shall make the same findings and provide for the same public review process before granting a request for extension. In no event may the total time granted for inactive status for any given surface coal extraction permit be in excess of three (3) years, provided, That further extensions may be granted on the basis of a showing by the permittee that such extension is necessary by reason of:

- (1) Litigation precluding reactivation of the site;
- (2) Labor strikes; or
- (3) Substantial equipment necessary for extraction, e.g. draglines, shovels, etc., remain on the site and are being maintained in working order.

(e) The three (3) year limitation on inactive status for surface mines shall not apply to preparation plants or load-out facilities if, whether or not they are associated with a surface coal extraction permit.

(f) The provisions set forth in this subsection shall be applicable to all surface mining and reclamation operations which currently have approved inactive status on the effective date of these regulations.

14.12 Variance From Approximate Original Contour Requirements.

(a) Procedures to Obtain a Variance. The Commissioner may grant a variance from the requirements for restoring the mined land in steep slope areas to approximate original contour under the following terms and conditions:

(1) The permit area is located on steep slopes as defined in paragraph (a) of Subsection 14.8 of these regulations;

(2) The alternative postmining land use requirements of Subsection 7.3 of these regulations are met;

(3) All other applicable requirements of the Act and these regulations, except for those relating to approximate original contour, are met;

(4) All highwalls are completely backfilled in a manner which results in a static safety factor of 1.3;

(5) Only spoil not necessary to achieve the postmining land use may be removed from the mine bench;

(6) The watershed of the permit and adjacent area will be improved by: ~~(A)-Reducing pollutants, environmental impacts, or flood hazards; and provided that, the watershed will be deemed improved only if-~~(B)~~--Volume-of-seasonal-flows-do-not-adversely affect-the-environment~~ changes in seasonal flow volumes from the proposed permit area will not adversely affect surface water ecology or any existing or planned use of the surface or ground water.

(7) Appropriate Federal, State and local government agencies have an opportunity to review and comment on the proposed postmining land use to determine that the potential use is shown to constitute an equal or better economic or public use;

(8) The proposed use is designed and certified by a qualified registered professional engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site; and

(9) The surface land owner(s) of the permit area has requested in writing that a variance be granted to achieve the approved alternative postmining land use.

14.13 MSHA Approval. No mining shall occur within five hundred (500) feet of an underground mine not totally abandoned without approval by the Federal Mine Safety and Health Administration.

14.14 Disposal of Excess Spoil.

(a) General.

(1) Spoil not required to achieve the approximate original contour shall be transported to and placed on designated disposal sites within the permit area;

(2) All excess spoil shall be placed in a controlled manner so as to minimize the adverse effects of leachate and surface water runoff from the fill on surface and groundwater;

(3) Coal processing wastes and underground development waste shall not be placed in such fills unless the waste is placed in accordance with Section 22 of these regulations, contains no acid producing or toxic forming materials and is of the proper characteristics so as to assure the design stability of the fill;

(4) Any excess spoil disposal in an underground mine shall be done in accordance with a plan approved by the Mine Safety and Health Administration in accordance with design standards of paragraph (s), subsection 22.3 of these regulations;

(5) Excess spoil that is acid- or toxic-forming or combustible shall be adequately covered with nonacid, nontoxic and noncombustible material, or treated, to control the impact on surface and ground water in accordance with subsection 14.6 and 14.7 of this section, to prevent sustained combustion, and to minimize adverse effects on plant growth and the approved postmining land use;

(6) Slope protection shall be provided to minimize surface erosion at the site. All disturbed areas, including diversion channels that are not riprapped or otherwise protected, shall be revegetated upon completion of construction; and

(7) The final configuration of the fill shall be suitable for the approved post mining land use.

(b) Certification - Inspections and Reporting.

Certification of all excess spoil fills shall be required as follows:

(1) The fill and appurtenant structures shall be designed in accordance with professional design standards, which meet the requirements of this subsection, and certified by a registered professional engineer experienced in the design of earth and rock fill embankments;

(2) During construction, the fill shall be inspected quarterly for stability by a registered professional engineer experienced in the construction of earth or rock fills or other qualified professional specialist working under the direction of a professional engineer experienced in the construction of earth or rock fills. Regular inspections are also required during placement and compaction of fill materials and during critical construction periods such as foundation preparation, underdrain placement, installation of surface drainage systems, and construction of rock toe buttresses. Within two (2) weeks following completion of the inspections, a report certified by the registered professional engineer shall be submitted to the Commissioner. The certified report shall contain a statement that the fill is being constructed and maintained as designed in accordance with the approved plan and these regulations. The report will also note any instances of apparent instability, structural weaknesses, and other hazards. The report on the drainage system and protective filters shall include color photographs taken during and after construction, but before the underdrains are covered with excess spoil. Color photographs shall be of sufficient size and number to provide a relative scale and to clearly identify the site. If the underdrains are constructed in phases, each phase must be certified separately. If excess durable rock spoil is placed such that the underdrain system is constructed simultaneously with excess spoil placement by the natural segregation of dumped materials, color photographs of the underdrains must be taken as they are formed. All color photographs shall be of adequate size and number to provide a relative scale and to clearly identify the site. A copy of the certified report shall be maintained at the mine site; and

(3) After total completion of the fill, a certification form shall be completed and submitted to the Commissioner by the registered professional engineer overseeing construction of the fill; and

(4) In addition to the requirements of subparagraph (3) of this paragraph, certification forms for durable rock fills shall be accompanied by the following:

(A) A statement attesting that the fill contains no more than twenty-percent (20%) non-durable material;

(B) A statement attesting that foundation preparation is proceeding in accordance with the design plans;

(C) A statement that prohibited materials are not being placed, deposited, or disposed of into the fill area; and

(D) A statement that sediment control measures are constructed and being maintained in accordance with the approved design plans and the terms and conditions of the permit.

(c) Location. Excess spoil not required to achieve the approximate original contour on the permit areas may be deposited outside the permit area if the following conditions are met:

(1) The excess spoil is deposited on another permit area; or

(2) The excess spoil is placed on an abandoned mine land project conducted under the Abandoned Mine Land Program where:

(A) A reclamation contract is in effect;

(B) The project will result in improved environmental, aesthetic, or safety conditions; and

(C) The project is designed and constructed in accordance with the Act and these regulations.

(d) Disposal of Excess Spoil on Existing Benches. Spoil material not required to return the area to the approximate original contour may be placed on an existing bench if the following conditions are met:

(1) Sufficient foundation investigations and laboratory analysis of foundation materials which include the effects of underground workings below the solid bench, shall be performed. Based on information obtained from such investigations and analysis, the Commissioner may require modification of design requirements from the spill. Fills which are proposed on pre-existing benches where the slope of the solid

Title 38
Series 2
Section 14

bench exceeds ten percent (10%) toward the outslope shall meet the design requirements of paragraph (f), subsection 14.14, of this section.

(2) All vegetation and organic material shall be removed from the disposal area prior to placement of excess spoil. All topsoil shall be removed and redistributed or stockpiled in accordance with Subsection 14.3 of this section. All excess spoil shall be transported and placed only on the solid portion of the bench in a controlled manner in horizontal lifts not exceeding four (4) feet in thickness. The spoil must be compacted or otherwise mechanically stabilized to achieve a static safety factor of 1.3. The area shall be backfilled and graded to achieve the most moderate slope possible which does not exceed the angle of repose. The final graded configuration shall be such that the surface and subsurface drainage is compatible with the natural surroundings and the approved postmining land use. Terraces may be constructed on the outslope if required for stability, control of erosion, or to conserve soil moisture. The grade of the outslopes between terraces shall not be steeper than two (2) horizontal to one (1) vertical (50 percent).

(3) No permanent impoundments are allowed on the completed fill. Small depressions may be allowed if they are needed to retain moisture, minimize erosion, create and enhance wildlife habitat, or assist revegetation; and if they are not incompatible with the stability of the fill.

(4) If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, the fill design shall include diversions and underdrains as necessary to control erosion, prevent water infiltration into the fill, and ensure stability. Diversions shall comply with the requirements of paragraph (c) Subsection 5.3 and Subsection 14.4 of these regulations. Underdrains shall be designed and constructed in accordance with subparagraph (1), paragraph (e), subsection 14.14 of these regulations.

(5) Underdrains shall consist of durable rock or pipe, be designed and constructed using current, prudent engineering practices and meet any design criteria established by the Act, these regulations, and the terms and conditions of the permit.

(6) The existing highwall shall be eliminated to the maximum extent technically practicable.

(7) Disposal of excess spoil from an upper actively mined bench to a lower pre-existing bench by means of gravity transport may be approved by the Commissioner provided that:

(A) The gravity transport courses are determined on a site-specific basis by the operator as part of the permit application and approved by the Commissioner to minimize hazards to health and safety and to ensure that damage will be minimized between the benches, outside the set course, and downslope of the lower bench should excess spoil accidentally move;

(B) All gravity transported excess spoil, including that excess spoil immediately below the gravity transport courses and any pre-existing spoil that is disturbed, is rehandled and placed in horizontal lifts in a controlled manner, concurrently compacted as necessary to ensure mass stability and to prevent mass movement, and graded to allow surface and subsurface drainage to be compatible with the natural surroundings and to ensure a minimum long-term static safety factor of 1.3. Excess spoil on the bench prior to the current mining operation that is not disturbed need not be rehandled except where necessary to ensure stability of the fill;

(C) A safety berm is constructed on the solid portion of the lower bench prior to gravity transport of the excess spoil. Where there is insufficient material on the lower bench to construct a safety berm, only that amount of excess spoil necessary for the construction of the berm may be gravity transported to the lower bench prior to construction of the berm; and

(D) Excess spoil shall not be allowed on the downslope below the upper bench except on designated gravity transport courses properly prepared in accordance with Subsection 14.3 of this section. Upon completion of the fill, no excess spoil shall be allowed to remain on the designated gravity transport course between the two benches and each transport course shall be reclaimed in accordance with the requirements of the Act, these regulations, and the approved permit.

(e) Valley Fills. Where the excess spoil disposal site is located in a valley, the following criteria shall be met:

(1) If the fill area contains springs, natural water courses, or wet weather seeps, lateral underdrains shall be constructed from the wet areas to the rock core in such a manner that infiltration and entrapment of water within the fill will be prevented. Underdrains shall consist of durable rock or pipe, be

designed and constructed using current, prudent engineering practices which will meet any design criteria established by the Commissioner. The underdrain system and the rock core shall be designed to carry the anticipated seepage of water due to rainfall away from the excess spoil fill and from seeps and springs in the foundation of the disposal area and shall be protected from piping and contamination by an adequate filter. Rock underdrains shall be constructed of durable, nonacid, nontoxic-forming rock (e.g., natural sand and gravel, sandstone, limestone, or other durable rock) that does not slake in water or degrade to soil material, and which is free of coal, clay or other nondurable material. Perforated pipe underdrains shall be corrosion resistant and shall have characteristics consistent with the long-term life of the fill.

(2) The foundation-of-the-fill shall be designed to assure a long-term static safety factor of 1.5 or greater.

(3) The outer slope or face of the valley fill shall be no steeper than two (2) horizontal to one (1) vertical with terraces constructed at a maximum of each fifty (50) feet vertical rise above the toe of the fill. The bench width of each terrace shall be no less than twenty (20) feet with a three (3) to five (5) percent slope toward the face and a one (1) percent slope toward the rock core located near the center of the valley fill.

(4) A rock core chimney drain may be utilized for fills that will come to the level of the ridge line with no natural drainage area above the fill. A rock core chimney drain may also be used for fills that do not come to the ridge line provided that the fill does not contain more than two hundred and fifty thousand (250,000) cubic yards of material unless located in an area where the valley floor is always above the local water table. Runoff from areas above and adjacent to the fill shall not be allowed to flow onto the fill surface, and shall be diverted into stabilized diversion channels, designed and constructed to safely pass the peak runoff from a 100-year, 24-hour precipitation event.

(5) The central rock core or "chimney drain" shall lie in the apex of the valley and extends throughout the depth and length of the fill. The rock core shall be designed and constructed in accordance with the following criteria:

(A) The rock core shall consist of durable non-acid producing or toxic forming rock of a minimum average diameter of twelve (12) inches with no more than ten (10) percent

of the core material consisting of fines, and which is free of coal, clay or other non-durable material.

(B) The minimum width of the rock core shall be sixteen feet, and shall be protected by a filter system to ensure proper long-term functioning which is designed and constructed using current, prudent engineering practices. If no filter is designed for the underdrains, a rock core of sufficient capacity shall be provided to allow for partial plugging of the drain and/or rock core.

(C) The core shall be constructed progressively and concurrently with each lift of the valley fill.

(D) The finished surface of the rock core shall form a trapezoidal channel capable of permitting the peak runoff of a one-hundred (100) year twenty-four (24) hour precipitation event.

(6) Where valley fills are designed for construction without a rock core, an underdrain shall be used. The underdrain shall be designed and constructed in accordance with standards set forth in Subparagraph (1) of this paragraph. Surface runoff from above and across the surface of the fill shall be carried through a surface diversion system capable of handling the peak runoff from a one-hundred (100) year twenty-four (24) hour precipitation event.

(7) Sufficient foundation investigations and laboratory analysis of foundation materials which include the effects of underground workings, shall be performed in order to develop the necessary plans, design specifications, and standards set forth in the approved permit. Based on information obtained from such investigations and analysis, the Commissioner may require modification of the design requirements of the fill.

(8) Areas upon which a valley fill is to be constructed shall first be progressively cleared of all trees, brush, shrubs, and other organic material which is above ground level; provided that, in critical foundation areas, including, but not limited to, the toe of the fill, seepage or underdrain areas, and downstream portions of the fill that provide a resisting force against massive slope failure, all organic material both above and below the ground surface must be removed. This material shall be disposed of outside the fill area. No more than three (3) acres, excluding roadways, shall be cleared until the first lift of the valley fill is completed.

(9) The valley fill shall be constructed in lifts not exceeding four (4) feet in thickness beginning at the toe of the fill. Where fills are designed and constructed using lifts exceeding four (4) feet in thickness, the design plans and specifications shall specify the thickness of the lifts. The operator shall demonstrate how and the engineer shall certify that such thickness will insure stability and meet all safety and environmental protection standards.

(10) During and after construction, ~~the top of the fill shall be graded to drain to the head of the fill on a slope not greater than three (3) percent~~ grading may drain surface water away from the upslope of the fill and toward the rock core. A drainage pocket shall be maintained at the head of the fill at all times to intercept and direct surface runoff to the rock core. In no case shall this pocket have a potential for impounding more than ten thousand (10,000) cubic feet of water. No other impoundments may be constructed on the fill.

(11) Where the toe of the spoil rests on a downslope which is in excess of thirty-six (36) percent, keyway cuts or rock toe buttresses shall be constructed of sufficient size so as to ensure stability of the fill as determined by stability analysis.

(f) Side Hill Fills.

(1) Side hill fills shall be constructed on the most stable and moderate slopes available with the natural downslope at the toe of the fill not to exceed thirty-six (36) percent. Where possible, the toe of the fill shall rest on or above a natural terrace, bench or berm in a manner which will provide additional stability and prevent mass movement.

(2) Each design shall be based on the results of sufficient geotechnical investigation of the construction site. The investigations shall include such factors as geologic conditions, soil characteristics, depth of bedrock, springs, seeps and groundwater flow, and a description of materials to be placed in the fill.

(3) The design and construction of all side hill fills must be certified by a registered professional engineer.

(4) If the fill area contains springs, natural water courses or wet weather seeps, lateral drains shall be constructed from the wet areas in the same manner as set forth in

subparagraph (1) paragraph (e) of Subsection 14.14 of these regulations.

(5) All areas upon which the fill is to be constructed shall be progressively cleared of all trees, brush, shrubs, and other organic material which is above ground level; provided that, in critical foundation areas, including, but not limited to, the toe of the fill, seepage or underdrain areas, and downstream portions of the fill that provide a resisting force against massive slope failure, all organic material both above and below the ground surface must be removed. This material shall be disposed of outside the fill area.

(6) The fill shall be constructed in concurrently compacted lifts not exceeding four (4) feet in thickness.

(7) The fill shall be designed and constructed to assure a static safety factor of at least 1.5.

(8) The outer slope or face of the fill shall be no steeper than two (2) horizontal to one (1) vertical. Terraces shall be constructed on the face of the fill at each fifty (50) feet vertical rise above the toe of the fill. The terraces shall be a minimum of twenty (20) feet wide and shall slope three (3) to five (5) percent toward the face with a lateral slope of one (1) percent to a discharge channel capable of passing a one hundred (100) year twenty-four (24) hour precipitation event.

(9) Surface water runoff from the fill and from surrounding areas shall be diverted away from the fill and into stabilized channels designed to pass safely the runoff from a one-hundred (100) year, twenty-four (24) hour precipitation event.

(10) No permanent impoundments may be constructed on the completed fill except that small depressions may be allowed if they are needed to retain moisture, minimize erosion, create and enhance wildlife habitat, or assist revegetation; and if they are not incompatible with the stability of the fill.

(g) Durable Rock Fills.

(1) The Commissioner may approve the design, construction, and use of a single lift fill consisting of at least eighty (80) percent durable rock if it can be determined, based on information provided by the operator, that the following conditions exist:

(A) Examination of core borings and the geologic column show that the overburden consists of durable sandstone, limestone, or other durable material in sufficient thickness and amounts to generate spoil material that is eighty (80) percent or greater durable rock. Where the fill will contain non-cemented clay shale, clay spoil, or other nondurable material, such material must be mixed with the durable rock in a controlled manner such that no more than twenty (20) percent of the fill volume is not durable rock. Tests shall be performed by a Registered Professional Engineer and approved by the Commissioner to demonstrate that no more than twenty (20) percent of the fill volume is not durable rock.

(B) The durable material rock shall not consist of acid-producing or toxic-forming material, and will not slake in water, and will not degrade to soil material. For purposes of this paragraph only, soil material means material of which at least fifty (50) percent is finer than 0.074 mm, which exhibits plasticity, and which meets the criteria for group symbol ML, CL, OL, MH, CH, or OH, as determined by the Unified Soil Classification System (ASTM D-2487).

(C) The toe of the fill will rest on natural slopes no steeper than twenty (20) percent.

(2) The fill shall be designed based on the results of sufficient geotechnical investigations of the construction site. The investigation shall include such factors as geologic conditions, soil characteristics, depth to bedrock, location of springs, seeps and groundwater flow, potential effects of subsidence and a description of materials to be placed in rock cores and drains.

(3) The design and construction of all durable rock fills must be certified by a registered professional engineer experienced in design and construction of earth and rock embankments.

(4) The foundation of the fill and the fill shall be designed to assure a long-term static safety factor of 1.5 or greater, and meet an earthquake safety factor of 1.1.

(5) The outer slope or face of the fill shall be no steeper than two (2) horizontal or one (1) vertical (2:1). Terraces shall be constructed on the fill at a maximum of every fifty (50) feet in vertical rise above the toe of the fill. The terraces shall be no less than twenty (20) feet in width and slope toward the fill at a three (3) to five (5) percent grade

and slope laterally at one (1) percent grade to discharge channels capable of passing the peak runoff for a one-hundred (100) year twenty-four (24) hour precipitation event.

(6) All areas upon which the fill is to be placed shall first be progressively cleared of all trees, brush, shrubs and other organic material which is above ground level; provided that, in critical foundation areas, including, but not limited to, the toe of the fill, seepage or underdrain areas, and downstream portions of the fill that provide a resisting force against massive slope failure, all organic material both above and below the ground surface must be removed. This material shall be disposed of outside the fill area.

~~(7) If the fill area contains springs, natural water courses or wet weather seeps, lateral drains shall be constructed in the same manner as set forth in subparagraph (i) paragraph (e) of this Subsection.~~ If the underdrain system is may be constructed simultaneously with excess spoil placement by the natural segregation of dumped materials; provided, that the resulting underdrain system shall be capable of carrying anticipated seepage of water due to rainfall away from the excess spoil fill and from seeps and springs in the foundation of the disposal area and the other requirements for drainage control shall be met. If the underdrain system is not constructed by natural segregation of dumped material, it shall be designed and constructed in accordance with subparagraph (l), paragraph (e), of this subsection.

~~(8) Drainage channels capable of passing the peak discharge from a one-hundred (100) year, twenty-four (24) hour precipitation event shall be constructed to direct water around or through the fill in such a manner as to prevent zones of saturation within the fill.~~ Runoff from areas above and adjacent to the fill shall not be allowed to flow onto the fill, and shall be diverted into stabilized diversion channels, designed and constructed to safely pass the peak runoff from a 100-year, 24-hour precipitation event.

(9) The grade of the top surface of the completed fill shall not exceed five (5) percent and shall slope toward the drainage channel.

(10) No permanent impoundments may be constructed on the completed fill except that small depressions may be allowed if they are needed to retain moisture, minimize erosion, create and enhance wildlife habitat, or assist revegetation; and if they are not incompatible with the stability of the fill.

(11) Notwithstanding any other provisions of these regulations, the Act, or the terms and conditions of a permit to the contrary, additional storage capacity or sediment control measures may be required through permit revision if sediment removal performance of the structure(s) during operation and construction of the fill is found to be deficient to the point that significant non-compliance with applicable effluent limits or water quality standards results.

(12) The following materials are hereby prohibited from being placed, deposited, or disposed of into a durable rock fill or durable rock fill area:

(A) Surface soils, provided that such soils used to establish vegetation on the surface of the fill are not prohibited; provided, however, that such soils may be placed in the fill if accounted for in design and construction as nondurable material and such soils are not deposited in critical zones of the fill;

(B) Mud, silt, or sediment cleaned or removed from mining pits, roadways, sediment control structures and/or other areas of the operation;

(C) Vegetative or organic materials cleared or grubbed from the permit or other areas;

(D) Non-coal wastes; and

(E) Coal refuse.

14.15 Backfilling and Regrading.

(a) General. Spoil returned to the mined-out area shall be backfilled and graded to the approximate original contour with all highwalls eliminated. Where approval for placing coal processing waste in the backfill has been granted, such placement shall be done in accordance with the compaction requirements of paragraph (p) subsection 22.3 of these regulations. The final graded slope shall not exceed either the angle or repose or such other lesser slope as is necessary to achieve a minimum long-term static safety factor of 1.3 and to prevent slides.

(b) Time Limits. Grading, backfilling, and water management practices shall be kept current as follows:

(1) Where the operation consists of contour mining only, (no augering), grading and backfilling shall follow the

mineral removal by a period not to exceed sixty (60) days or a distance one thousand five hundred (1,500) linear feet.

(2) Where the operation consists of contour mining and augering, the augering shall follow the mining by a period not to exceed sixty (60) days, and the grading and backfilling shall follow the augering by a period not more than thirty (30) days or a distance of one thousand five hundred (1,500) linear feet, but in no event shall more than three thousand (3,000) linear feet of pit be exposed at any time.

(3) Where the operation consists of augering only, the grading and backfilling shall follow the augering by a period not to exceed thirty (30) days or a distance of one thousand (1,000) linear feet.

(4) Should the operation consist of area mining only, the backfilling and grading shall not be more than two spoil ridges behind the pit being worked. The maximum linear feet of open pit shall not exceed three thousand (3,000) feet at any time.

(5) When the operations remove the entire coal seams running through the upper fraction of a mountain, hill, or ridge, backfilling and regrading shall follow the same guidelines established for area and contour mining. The outer perimeter and drainage area shall be stabilized, regraded, seeded, and mulched immediately upon construction. Where more than one component spread of equipment is being utilized on the same permit area, the backfilling and regrading shall be considered current when each area meets the requirements of paragraph (4) of this subsection.

(c) Revegetation. Revegetation shall be kept current by establishing a temporary or permanent vegetative cover on regraded areas by the end of the first growing season and a permanent cover by the end of the second growing season.

(d) Extensions. The time period or the distance set forth in this subsection may be reasonably extended where the permittee affirmatively demonstrates that site conditions, including legitimate operational requirements, or weather changes make adherence to these guidelines impractical. A written waiver must be obtained from the Commissioner for such extension. The Commissioner will by directive establish standards for determining what site conditions or weather changes will justify an extension.

(e) Reclamation Equipment. Operable regrading equipment shall be kept on the permit area until satisfactory completion of grading unless otherwise approved.

(f) Exemptions. Backfilling and grading may be postponed on a permit where surface mining operations and underground mining operations are proposed on the same area; provided that all requirements set forth in paragraph 16, Subsection (b), Section 12 of the Act are met. Where the underground mining permit is terminated or revoked, backfilling, regrading, and reclamation shall commence and proceed in accordance with the provisions of paragraph (b), subsection 15.2 of these regulations.

(g) Grading Outer Spoil. All outer spoil shall be graded so as to blend into the adjoining undisturbed lands.

(h) Erosion Control. All disturbed areas shall be regraded and stabilized in a manner which effectively controls erosion.

(i) Regraded Drainage Control. Drainage control on regraded areas shall prevent excessive erosion or additional contributions of suspended solids to the receiving stream, ensure safety and conserve soil moisture. Drainage control measures may include, but are not limited to, constructed drainways, flumes and riprap channels, tracking in, small depressions or other devices.

14.16 Backfilling and Grading. Previously mined areas.

(a) Remining operations on previously mined areas that contain a pre-existing highwall shall comply with the applicable performance standards of the Act and these regulations unless otherwise exempted in accordance with the provisions of this subsection.

(b) The requirement of highwall elimination shall not apply to remining operations where the operator can demonstrate in writing that the volume of all reasonably available spoil located in the vicinity of the remining operation is insufficient to completely backfill the reaffected or enlarged highwall. The highwall shall be reduced to the maximum extent technically practical. All spoil generated by the remining operation and any other reasonably available spoil in the vicinity of the operation shall be included in the permit area. For purposes of this paragraph, the term reasonably available spoil means spoil and suitable coal mine waste material generated by the remining operation or other spoil or suitable coal mine waste material

Title 38
Series 2
Section 14

located in the permit area that is accessible and available for use and that when rehandled will not cause a hazard to public safety or significant damage to the environment.

(c) Achieve a postmining slope that does not exceed either the angle of repose or such lesser slope as is necessary to achieve a minimum long-term static safety factor of 1.3 and to prevent slides.

(d) Minimize erosion and water pollution both on and off the site.

(e) Support the approved postmining land use.

(f) Spoil and waste materials shall be compacted where advisable to ensure stability or to prevent leaching of toxic materials.

(g) Disposal of coal processing waste and underground development waste in the mined-out area shall be in accordance with Section 22 of these regulations, except that a long-term static safety factor of 1.3 shall be achieved.

(h) Exposed coal seams, acid- and toxic-forming materials, and combustible materials exposed, used, or produced during mining shall be adequately covered with nontoxic and noncombustible material, or treated, to control the impact on surface and ground water in accordance with subsection 14.5 of this section, to prevent sustained combustion, and to minimize adverse effects on plant growth and the approved postmining land use.

(i) Cut-and-fill terraces may be allowed where:

(1) Needed to conserve soil moisture, ensure stability, and control erosion on final-graded slopes, if the terraces are compatible with the approved postmining land use; or

(2) Specialized grading, foundation conditions, or roads are required for the approved postmining land use, in which case the final grading may include a terrace of adequate width to ensure the safety, stability, and erosion control necessary to implement the postmining land use plan.

(j) Small depressions may be constructed if they are needed to retain moisture, minimize erosion, create and enhance wildlife habitat, or assist revegetation.

(k) Spoil placed on the outslope during previous mining operations shall not be disturbed if such disturbance will cause instability of the remaining spoil or otherwise increase the hazard to the public health and safety or to the environment.

(l) Any highwall remnant left after remining must be demonstrated by the operator to be stable and not pose a hazard to the public health and safety or the environment.

(m) All revegetation shall be carried out in a manner that encourages a prompt vegetative cover which, at a minimum, shall be adequate to control erosion and is consistent with the reclamation plan. The ground cover requirements for revegetation set forth in Section 9 of these regulations may be modified on a case-by-case basis, by the Commissioner, except that at a minimum the vegetative ground cover shall be no less than that which existed before remining and shall be adequate to control erosion. Determination of premining ground cover success and productivity shall be made using sampling techniques described in the Handbook.

(n) A coal remining operation which began after February 4, 1987, and on a site which ~~was~~ mined prior to August 3, 1977, may qualify for the water quality exemptions set forth in subsection (p), Section 301 of the federal Clean Water Act, as amended.

14.17 Control of Fugitive Dust. All exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion.

38-2-15 Performance Standards Applicable Only to Underground Mining Operations

15.1 Site Development.

(a) Time Schedule for Site Excavation. The time schedule for site excavation shall be consistent with the approved preplan and shall provide for minimum exposure of disturbed area over a given time frame in a manner consistent with environmentally sound procedures. Regrading and stabilization of all areas disturbed in the development of the mine site shall proceed as contemporaneously as practicable. In any event, all required drainage system components and roads necessary for site construction shall be installed in accordance with the approved preplan prior to any disturbance for site development.

(b) Temporary Storage of Overburden to be Used for Backfilling and Regrading. All material to be used in final regrading must be placed within the permit area as specified in the approved plan in a manner which will insure mass stability in accordance with these regulations and revegetated to prevent erosion.

(c) Temporary Revegetation. All topsoil and spoil storage areas which will be in place for more than six (6) months but less than one (1) year shall at a minimum be seeded and mulched so as to establish a satisfactory stand of temporary vegetative cover. This seeding and mulching must be done promptly.

(d) Permanent Revegetation. All topsoil, spoil storage and other disturbed areas which will be in place for longer than one (1) year shall be mulched promptly, seeded, and/or planted during the first seeding season following disturbance so as to establish a satisfactory permanent vegetative cover. Trees shall be required only on those areas that:

(1) Will not be redisturbed by future reclamation activities; or

(2) Are necessary in order to meet the approved postmining land use.

(e) Mine Site Organization and Aesthetics. Indiscriminate dumping or discarding of materials, litter, junked equipment, containers, or other waste materials such as lubricants, paints, flammable liquids, garbage, lumber or other combustible material generated or used shall be prohibited. These materials shall be

properly placed in areas specifically designated for their storage or disposal or removed from the area. Regrading and revegetation of the disposal areas shall be planned and carried out where possible in a manner which results in the covering or screening of offensive and unsightly areas.

(f) Noncoal waste disposal sites shall:

(1) Be designed and constructed so as not to degrade surface or ground waters;

(2) Not be located within eight (8) feet of any coal outcrop or coal storage area;

(3) Not be deposited in a refuse pile or impounding structure;

(4) Be compacted; and

(5) Be covered with at least two (2) feet of soil, stabilized, and revegetated after completion.

15.2 Backfilling and Regrading.

(a) General. Spoil returned to the mined-out area shall be backfilled and graded to approximate original contour with all highwalls eliminated and a postmining slope that does not exceed either the angle of repose or such lesser slope as is necessary to achieve a minimum long-term static safety factor of 1.3 and prevent slides.

(b) Time Schedule for Regrading and Backfilling. Regrading and backfilling will be completed as contemporaneously as practicable with mining operations and as reflected on the approved mining and reclamation plan; provided, however, that reclamation activities shall be initiated within thirty (30) days, and final backfilling and regrading shall be initiated within one hundred eighty (180) days of completion of underground operations. Should particular site conditions or weather make adherence to these guidelines impractical, the period of time required to be current may be reasonably extended.

(c) Revegetation. Revegetation shall be kept current by establishing a temporary or permanent vegetative cover on regraded areas by the end of the first growing season and a permanent vegetative cover by the end of the second growing season. Standards and procedures for establishing a satisfactory

vegetative cover and guidelines for species selection and application rates are found in Section 9 of these regulations.

(d) Variances From Highwall Elimination. All underground mining operations which were in existence and which created highwalls prior to August 3, 1977, and which highwalls were not reaffected, may not be required to eliminate the highwall if the operator can demonstrate that it is technologically infeasible, by virtue of the fact that there is an insufficient amount of spoil material within the proximity of the mine site. The operator shall utilize all available material to eliminate as much of the highwall as possible or to achieve highwall elimination. At a minimum, the operator shall be required to seal all underground openings and to cover the exposed coal seam with a minimum of four (4) feet of nonacid producing materials. This paragraph does not constitute a variance from the requirement for highwall elimination except on previously mined areas (prior to May 3, 1978) which would involve exposing one area of highwall completely eliminated during the installation of the deep mine in order to eliminate another area of highwall.

(e) All underground mining operations which were in existence and which created a highwall prior to August 3, 1977, and which were reaffected by those operations during the remaining lives of their operations shall comply with the provisions of subsection 14.16 of these regulations.

(f) Rehandling of Excess Spoil Piles. Rehandling of settled and revegetated fills to achieve approximate original contour at the conclusion of underground mining activities shall not be required if the following conditions are met:

(1) The fill is not located so as to be detrimental to the environment or to the health and safety of the public and is compatible with the approved post mining land use;

(2) Stability of the fill shall be demonstrated through standard geotechnical analysis to be consistent with the backfilling and grading requirements; and maintain a static safety factor of 1.3 on solid benches and 1.5 on slopes;

(3) Surface runoff around, through, and from the fill is controlled by drainage structures (diversions, rock cores, etc.), which are designed and constructed in accordance with the approved plans and design specifications;

(4) Any underground development wastes used in the fill are non-toxic and non-acid producing; and

(5) The surface of the fill has been vegetated in accordance with Section 9 of these regulations.

15.3 In situ processing: Performance standards.

(a) General. Any person who conducts in situ processing activities shall comply with the applicable performance standards of the Act, these rules and regulations, and the terms and conditions of a permit.

(b) Protection of Hydrologic Balance. In situ processing activities shall be planned and conducted to minimize disturbance to the prevailing hydrologic balance by:

(1) Avoiding discharge of fluids into holes or wells, other than as approved by the Commissioner;

(2) Injecting process recovery fluids only into geologic zones or intervals approved as production zones by the Commissioner and in accordance with applicable state and federal underground injection control regulations;

(3) Avoiding annular injection between the wall of the drill hole and the casing; and

(4) Preventing discharge of process fluid into surface waters.

(c) Control of Toxics. Each person who conducts in situ processing activities shall submit for approval as part of the application for a permit a plan that ensures that all acid-forming, toxic-forming, or radioactive gases, solids, or liquids constituting a fire, health, safety, or environmental hazard and caused by the mining and recovery process are promptly treated, confined, or disposed of, in a manner that prevents contamination of ground and surface waters, damage to fish, wildlife and related environmental values, and threats to the public health and safety.

(d) Process Recovery Fluids. Each person who conducts in situ processing activities shall prevent flow of the process recovery fluid:

(1) Horizontally beyond the affected area identified in the permit; and

(2) Vertically into overlying or underlying aquifers.

(e) Restoration of Groundwater Quality. Each person who conducts in situ processing activities shall restore the quality of affected ground water in the permit area and adjacent area, including ground water above and below the production zone, to the approximate premining levels or better, to ensure that the potential for use of the ground water is not diminished.

15.4 In situ processing: Monitoring.

(a) Monitoring Requirements. Each person who conducts in situ processing activities shall monitor the quality and quantity of surface and ground water and the subsurface flow and storage characteristics, in a manner approved by the Commissioner, to measure changes in the quantity and quality of water in surface and ground water systems in the permit area and in adjacent areas.

(b) Water Quality Standards. Air and water quality monitoring shall be conducted in accordance with monitoring programs approved by the Commissioner as necessary according to appropriate Federal and State air and water quality standards.

38-2-16. Subsidence Control.

16.1 Public Notice.

(a) Notification Requirements. A notification shall be distributed by mail to all owners of property and residents within the area above the underground workings. Each such person shall be notified by certified mail (return receipt requested) at least six (6) months prior to mining, or other time period if approved by the Commissioner, beneath his or her property or residence. The return receipt shall be kept at the mine office. The notification shall contain, at a minimum:

- (1) Company name, permit number and address;
- (2) Identification of specific areas in which mining will take place and the date specific areas will be undermined;
- (3) Dates of mining activities that could cause subsidence and affect specific structures; and
- (4) The location or locations where the subsidence control plan may be examined.

16.2 Surface Owner Protection.

(a) General. Each person who conducts underground mining activities shall either adopt measures consistent with known technology which prevent subsidence from causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of surface lands; or adopt mining technology which provides for planned subsidence in a predictable and controlled manner. Nothing in this part shall be construed to prohibit the standard method of room-and-pillar mining.

(b) Plan Requirements. The operator shall comply with all provisions of the approved subsidence control plan prepared pursuant to Subsection 3.12 of these regulations.

(c) Material Damage. The operator shall:

- (1) Correct any material damage resulting from subsidence caused to surface lands, to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses which it was capable of supporting before subsidence; and

(2) ~~To the extent required under applicable provisions of State law,~~ ~~either~~ correct material damage resulting from subsidence caused to any structures or facilities by repairing the damage or compensate the owner of such structures or facilities in the full amount of the diminution in value resulting from the subsidence. Repair of damage includes rehabilitation, restoration, or replacement of damaged structures or facilities. Compensation may be accomplished by the purchase prior to mining of a non-cancelable premium-prepaid insurance policy.

(d) Protection of Public Buildings and Dams. Underground mining activities shall not be conducted beneath or adjacent to public buildings and facilities, churches, schools, hospitals, or impoundments with a storage capacity of, or bodies of water containing, twenty (20) acre-feet or more, unless the Commissioner finds that mining will not cause material damage or reduce the foreseeable use. The Commissioner may, if necessary to minimize the potential for damage, limit the percent of coal extraction underneath or adjacent to such features or facilities. If subsidence causes material damage to such features or facilities, the Commissioner may suspend mining under or adjacent to such features or facilities until the subsidence control plan is modified.

(e) Progress Maps. Updated maps of underground workings as required in Section 1, Article 2, Chapter 22A of the Act shall be made available to the Commissioner for determining compliance with the subsidence control plans required in Subsection 3.12 of these regulations, and projected location of potential subsidence. The maps and accompanying descriptions, as appropriate, shall identify significant features of the underground mine, including the size, configuration, and approximate location of pillars and entries, extraction ratios, measures taken to prevent or minimize subsidence and related damage, areas of full extraction, and other information required by the Commissioner. Upon request of the operator, information submitted with the detailed plan may be held as confidential.

38-2-17. Small Operator Assistance Program.

17.1 General. This section comprises the Small Operator Assistance Program and governs the procedures for providing assistance to qualified small operators for the determination of the probable hydrologic consequences of mining and reclamation and the statement of physical and chemical analyses of test borings or core samples.

Data collected under this program shall be made available to all interested persons, except information related to the chemical and physical properties of coal; provided, that information which pertains only to the analysis of the chemical and physical properties of coal, except information regarding such mineral or elemental content which is potentially toxic to the environment, shall be kept confidential.

17.2 Program Services. Where a qualified small operator requests assistance, the Department of Energy shall select and pay a qualified laboratory to determine the probable hydrologic consequences of mining and reclamation operations in the permit and adjacent areas and potentially impacted offsite areas. The probable hydrologic consequences shall be in accordance with Section 9 paragraphs (7), (8), (10), (11), (12), (13) and (16) through (19) subsection (a) of the Act, paragraph (a) of subsection 3.22 of these regulations, and subsection 3.23 of these regulations.

17.3 Eligibility for Assistance. Applicants are eligible for assistance if they:

- (a) Intend to apply for a permit pursuant to the Act; and
- (b) Establish that their probable total actual and attributed coal production from all locations during any consecutive twelve (12) month period either during the term of the permit or during the first five (5) years after issuance of the permit, whichever period is shorter, will not exceed one hundred thousand (100,000) tons. Production from the following operations shall be attributed to the applicant:
 - (1) The pro rata share, based upon percentage of ownership of applicant, of coal produced by operations in which the applicant owns more than a five percent (5%) interest;
 - (2) The pro rata share, based upon percentage of ownership of applicant, of coal produced in other operations by

Title 38
CSR 2
Section 17

persons who own more than five percent (5%) of the applicant's operation;

(3) All coal produced by operations which are owned by members of the applicant's family and relatives unless there is no direct or indirect business relationship between or among them; and

(4) All coal produced by operations owned or controlled by the applicant, or by persons who directly or indirectly control the applicant by reason of direction of management.

(c) Persons who are prohibited from receiving a permit for any reason, and persons who organize or reorganize a company for the sole purpose of obtaining assistance from SOAP, shall be deemed ineligible.

17.4 Request for Assistance. Each applicant requesting assistance shall complete an application on forms prescribed by the Commissioner. The application shall include the following items:

- (a) A statement of intent to file a permit application;
- (b) The names, addresses, and phone numbers of the applicant and the operator, if different from this applicant;
- (c) Location of the operation (County, Magisterial District and Nearest Post Office);
- (d) Name of Tract;
- (e) The method of surface coal mining operations proposed;
- (f) The geological title, depth, and thickness of coal seam to be mined and a general statement as to the calculated coal reserves in the proposed permit area, and the method for calculating such reserves;
- (g) An indication of whether or not the operator or any person, partnership, or corporation associated with the operator has ever been denied assistance. If yes, attach a full explanation of the circumstances and reasons for denial;
- (h) A schedule of the estimated total production of coal from the proposed permit area and all other locations from which

Title 38
CSR 2
Section 17

production is attributed to the applicant under subsection 17.3 of this section. The schedule shall include the following:

- (1) Name of company;
- (2) What state this permit was issued in and the permit number;
- (3) Mining Safety and Health Administration Identification Number;
- (4) Actual production of coal from the preceding year and production which may be attributable to the applicant pursuant to subsection 17.3 of this section; and
- (5) Estimated future yearly production to include any production which may be attributable to the applicant for each year of the permit.
 - (i) The names and addresses of owners of record of the property, surface and mineral, to be mined, and owners of record of the property contiguous to the proposed permit area;
 - (j) Copies of documents showing that the applicant has a legal right to enter and conduct operations on lands to be covered by this permit;
 - (k) The number of acres of land to be affected;
 - (l) The anticipated starting and termination dates of mining operations;
 - (m) The name, title and address of every officer, partner, resident agent, director or person performing a function similar to a director, together with the names and addresses of any persons owning of record ten percent (10%) or more of any class of voting stock of the applicant;
 - (n) A U.S. Geological Survey topographic map prepared in accordance with Subsection 3.4 of these regulations and paragraphs (12), 13(E), (13)(F), (13)(G), and (13)(J) subsection (a), Section 79 of the Act including the location and extent of known workings of underground mines and any existing or proposed test borings; and
 - (o) A notarized signature of a principal officer of the applicant indicating that the information contained in the application is true and correct to the best of his knowledge.

17.5 Application Approval and Notice.

(a) The applicant shall be notified if the application requesting assistance has been approved or denied, and if denied, the reasons shall be attached.

(b) If application requesting assistance has been approved, then one or more qualified laboratory will be selected to perform this work. A copy of the contract or other appropriate work order and the final report shall be provided to the applicant.

(c) The applicant shall arrange for any necessary right-of-entry for state personnel and the selected laboratory's personnel to gain access to data collection and monitoring sites on the proposed permit area and adjacent areas and shall provide written agreements of such to the Commissioner prior to entry.

17.6 Qualified Laboratories.

(a) General. A qualified laboratory means a designated public agency, private consulting firm or analytical laboratory approved by the Department of Energy.

(b) Basic Qualifications. To qualify for designation, the laboratory must demonstrate that it:

(1) Is staffed with experienced, professional personnel in the field of hydrology, mining engineering, aquatic biology, geology, or chemistry applicable to the work to be performed;

(2) Is capable of collecting necessary field data and samples;

(3) Has adequate space for material preparation, cleaning and sterilizing necessary equipment, stationary equipment, storage, and space to accommodate periods of peak work loads;

(4) Meets the requirements of the Occupational Safety and Health Act or the equivalent state safety and health program;

(5) Has the financial capability and business organization necessary to perform the work required;

(6) Has analytical, monitoring and measuring equipment capable of meeting the applicable standards and methods contained in the most current edition of the Standard Methods for the

Examination of Water and Waste Water; Methods for Chemical Analysis of Water and Wastes; and EPA Manual 600/2-78-054 Field and Laboratory Methods Applicable to Overburden Minesoils; and

(7) Has the capability of making hydrologic field measurements and analytical laboratory determinations by acceptable hydrologic engineering or analytical methods.

(c) The qualified laboratory shall be capable of performing the determination and statement. Subcontractors may be used to provide the services required provided their use is defined in the application for designation and approval is granted by the Department of Energy.

17.7 Liability of Operators.

(a) The applicant shall reimburse the Department of Energy for the cost of the program services performed if the applicant:

- (1) Submits false information on the application;
- (2) Fails to submit a surface mining permit application within one (1) year from the date of receipt of the approved probable hydrologic consequences report;
- (3) Fails to mine after obtaining a surface mining permit;
- (4) Has an actual and attributed annual production of coal for all locations exceeding one hundred thousand (100,000) tons during any consecutive twelve (12) month period either during the term of the permit for which assistance is provided or during the first five (5) years after issuance of the permit whichever is shorter; or
- (5) Sells, transfers, or assigns the permit to another person and the transferee's total actual and attributed production exceeds the 100,000 ton annual production limit during any consecutive twelve (12) month period of the remaining term of the permit. Under this paragraph, the applicant and its successor are jointly and severally obligated to reimburse the Commissioner.

(b) The Department can waive the reimbursement obligation if it finds that the applicant at all times acted in good faith.

38-2-18. Citizen's Actions.

18.1 Notice of Citizen's Suits. A person who intends to initiate a civil action on his own behalf under section 25 of the Act shall give notice of intent in accordance with the following:

(a) Notice shall, in all cases, be given by certified mail to the Commissioner. A copy of the notice shall also be sent by first class mail to the Office of Surface Mining Field Office Director;

(b) In legal actions brought against any person, the State of West Virginia or any other governmental instrumentality, agency or agent thereof, notice shall be given by certified mail to the alleged violator, if the complaint alleges a violation of the Act or any regulation, order or permit issued under the Act;

(c) Service of notice under this section is complete upon mailing to the last known address of the person being notified;

(d) A person giving notice regarding an alleged violation shall state to the extent known:

(1) Sufficient information to identify the provision of the Act, regulation or permit allegedly violated;

(2) The act or omission alleged to constitute a violation;

(3) The name, address and telephone numbers of the person or persons responsible for the alleged violation;

(4) The date, time and location of the alleged violation(s);

(5) The name, address and telephone number of the person giving notice; and

(6) The name, address and telephone number of legal counsel, if any.

(e) A person giving notice of an alleged failure by the Commissioner, reclamation board of review, or appropriate department employee, to perform a mandatory act or duty under the Act, shall state to the extent known:

(1) The provision of the Act containing the mandatory act or duty allegedly not performed;

(2) Sufficient information to identify the omission alleged to constitute the failure to perform a mandatory act or duty under the Act;

(3) The name, address and telephone number of the person giving notice; and

(4) The name, address and telephone number of legal counsel, if any, of the person giving notice.

18.2 Citizen's Request for State Inspections.

(a) Any person may request a State inspection by furnishing to the Commissioner a signed, written statement (or an oral report followed by a signed, written statement) giving the Commissioner reason to believe that a violation exists or that a condition or practice which creates an imminent danger to the health or safety of the public or is causing or can reasonably be expected to cause a significant, imminent environmental harm to land, air, or water resources exists. The statement shall contain a phone number and address where the person can be contacted.

(b) The identity of any person supplying information to the Commissioner relating to a possible violation or imminent danger or harm shall remain confidential, if requested by that person, unless that person elects to accompany the inspector on the inspection.

(c) If an inspection is conducted as a result of information provided to the Commissioner by a person as described in paragraph (a) of this Subsection, the person shall be notified as far in advance as practicable when the inspection is to occur and shall be allowed to accompany the State inspector during the inspection. Such person has a right of entry to, upon and through the coal exploration or surface coal mining and reclamation operation about which he or she supplied information, but only if he or she is in the presence of and is under the control, direction and supervision of a State inspector while on the mine property. Such right of entry does not include a right to enter buildings without consent of the person in control of the buildings or without a search warrant.

(d) Within ten (10) days of the inspection or, if there is no inspection within fifteen (15) days of receipt of the person's written statement, the Commissioner shall respond in writing as follows:

Title 38
CSR 2
Section 18

(1) If an inspection was made, a description of the enforcement action taken, which may consist of copies of the State inspection report and all notices of violation and cessation orders;

(2) If no State inspection was conducted or enforcement action taken, an explanation of the reason why;

(3) An explanation of the person's right to informal review of the action or inaction of the Commissioner; and

(4) Copies of all materials in subparts (1) and (2) of this paragraph within the time limits specified to the person alleged to be in violation, except that the name of the person shall be removed unless disclosure of the person's identity is permitted under paragraph (b) of this subsection.

(e) Any person who is or may be adversely affected by a prospecting or surface coal mining operation may notify the Commissioner in writing of any alleged failure to make adequate and complete inspections as required by law and regulation. The notification shall include sufficient information to create a reasonable belief that the law and regulations regarding inspections are not being complied with and to demonstrate how the person is or may be adversely affected. The Commissioner shall, within fifteen (15) days of receipt of the notice, determine whether or not the statutes or regulations concerning inspections are being complied with and if not, shall order an inspection. The Commissioner shall furnish the complainant with a written decision of the reasons for his determination and actions, if any, he has taken.

18.3 Review of Decision Not to Inspect or Enforce.

(a) Any person who is or may be adversely affected by a surface coal mining or prospecting operation may ask the Commissioner to informally review an authorized representative's decision not to inspect or take appropriate enforcement action with respect to any violation alleged by that person in a request for inspection under section 15 of the Act. The request for review shall be in writing and shall include a statement of how the person is or may be adversely affected and why the decision merits review. The Commissioner shall conduct the review within thirty (30) days of his receipt of the request and inform the person of the results. The person alleged to be in violation shall be given a copy of the results of the review, except that the name of the person who is or may be adversely affected by a prospecting or surface mining operation shall not be disclosed

unless confidentiality has been waived or disclosure is required under the Freedom of Information Act or other State or Federal laws.

(b) Any person who is or may be adversely affected by the decision of the Commissioner may appeal a decision pursuant to this subsection may appeal such decision to the Reclamation Board of Review pursuant to Section 2, Article 4, Chapter 22 of the Code of West Virginia.

(c) Informal review under this section shall not affect any right to formal review or to a citizen's suit.

18.4 Public Record:

(a) Availability of public records shall be in accordance with 29B-1-1 et. seq. of the Code of West Virginia. Copies of all records, reports, inspection materials or information obtained under the Act, except information in paragraph (b), Subsection 18.2 of this section, and paragraph (c) of this subsection, shall be made immediately available to the public at regional offices in the area of mining so that they are conveniently available. Such information shall include copies of all documents relating to applications for and approvals of existing, new or revised prospecting approvals or surface coal mining and reclamation permits, including the revision, renewal, transfer, assignment or sale thereof, and all documents relating to inspection and enforcement actions.

(b) All records will be maintained and preserved for a period of not less than five (5) years. Relative to prospecting approvals and surface mining permits, the five year period applies after final bond release.

(c) Information as to coal seams, test borings, core samplings or soil samples pertaining to the analysis of the chemical and physical properties of the coal, except information regarding mineral or element content which is potentially toxic to the environment, shall be kept confidential and shall not be made a matter of public record.

(d) Information on the nature and location of archaeological resources shall be kept confidential to the extent required by the Archaeological Resources Protection Act of 1979.

(e) Permit applications and other related materials requiring public notices shall be made immediately available in the county courthouse or other available public office approved

Title 38
CSR 2
Section 18

by the Commissioner, in the county in which the proposed mining operation is located.

(f) The Commissioner shall provide procedures, including notice and opportunity to be heard for persons both seeking and opposing disclosure, to ensure confidentiality of qualified confidential information, which shall be clearly identified by the applicant and submitted separately from the remainder of the application. Confidential information is limited to that information identified in subparagraph (1), paragraph (f), subsection 3.23 of these regulations, paragraph (b) of subsection 18.2 of this Section, paragraph (c) of this subsection, and information relating to the nature and location of archeological resources on public land as required under the Archeological Resources Protection Act of 1979.

38-2-19 Designation of Areas Unsuitable for Mining.

19.1 Right to Petition.

(a) Any person having an interest which is or may be adversely affected, or the Commissioner, has the right to petition to have an area designated as unsuitable for surface coal mining operations, or to have an existing designation terminated. Such petition shall be filed in the Office of the Commissioner.

(b) Designation. The petitioner shall provide the following information:

(1) A U.S.G.S. topographic map on which is noted the location and size of the area covered by the petition;

(2) Allegations of facts and supporting evidence which would tend to establish that the area is unsuitable for all or certain types of surface coal mining operations;

(3) A description of how mining of the area has affected or may adversely affect people, land, air, water or other resources;

(4) The petitioner's name, notarized signature, address and telephone number; and

(5) A statement which identifies the petitioner's interest which is or may be adversely affected, including how the petitioner meets an "injury in fact" test by describing the injury to his or her specific affected interests and demonstrates how he or she is among the injured.

(c) Termination of the Designation. A petitioner requesting to terminate a designation shall provide the following information:

(1). A U.S.G.S. topographic map on which is noted the location and size of the area covered by the petition;

(2) Allegations of facts with supporting evidence not contained in the record of the proceeding in which the area was designated unsuitable, which would tend to establish the statements or allegations, and which statements or allegations indicate that the designation should be terminated based on:

Title 38
CSR 2
Section 19

(A) The nature or abundance of the protected resource or condition or other basis of the designation if the designation was based on criteria found in paragraph (b), Subsection 19.7 of this section;

(B) Reclamation now being technologically and economically feasible, if the designation was based on the criteria found in paragraph (a), Subsection 19.7 of this section; or

(C) The resources or condition not being affected by surface coal mining operations, or in the case of land use plans, not being incompatible with surface coal mining operations during and after mining, if the designation was based on the criteria found in paragraph (b), Subsection 19.7 of this section.

(3) The petitioner's name, notarized signature, address and telephone number;

(4) A statement which identifies the petitioner's interest which is or may be adversely affected by the continuation of the designation including how the petitioner meets an "injury in fact" test by describing the injury to his or her specific affected interests and demonstrating how he or she is among the injured; and

(5) For areas previously and unsuccessfully proposed for termination, significantly new allegations of facts and supporting evidence must be presented in the petition.

19.2 Initial Processing, Record-keeping, and Notification Requirements.

(a) Within thirty (30) days of receipt of a petition, the Commissioner shall notify the petitioner by certified mail whether or not the petition is complete in accordance with paragraph (b) or (c), Subsection 19.1 of this section.

(b) The Commissioner shall determine whether any identified coal resources exist in the area covered by the petition, without requiring any showing from the petitioner. If the Commissioner finds there are not any identified coal resources in that area, he shall return the petition to the petitioner with a statement of the findings.

(c) The Commissioner may reject petitions for designations or terminations of designations which are frivolous. Each petitioner must, at a minimum, satisfy the requirements of

Title 38
CSR 2
Section 19

paragraph (b) or (c), Subsection 19.1, of this section. No party shall bear any burden of proof, and each accepted petition shall be considered and acted upon by the Commissioner pursuant to the procedures of this Section.

(d) When considering a petition for an area which was previously and unsuccessfully proposed for designation, the Commissioner shall determine if the new petition presents new allegations of facts. If the petition does not contain new allegations of facts, the Commissioner shall not consider the petition and shall return the petition to the petitioner, with a statement of its findings and a reference to the record of the previous designation proceedings where the facts were considered.

(e) If the Commissioner determines that the petition is incomplete or frivolous, he shall return the petition to the petitioner, with a written statement of the reasons for the determination and the categories of information needed to make the petition complete.

(f) The Commissioner shall notify the person who submits a petition of any application for a permit received which proposes to include any area covered by the petition.

(g) Any petitions received after the first advertisement has been published on a permit application relating to the same mine plan area shall not prevent the Commissioner from issuing a decision on that permit application. The Commissioner may return any petition received thereafter to the petitioner with a statement why the petition cannot be considered. For the purposes of this section, close of the public comment period shall mean at the close of any informal conference or if no conference is requested, at the close of the period for filing written comments and objections.

(h) Promptly after a petition is received, the Commissioner shall notify the general public of the receipt of the petition by a conspicuous newspaper advertisement placed in the locale of the area covered by the petition, in the newspaper providing broadest circulation in the region of the petitioned area, and in the State Register. The Commissioner shall also make copies of the petition available to the public and provide copies of the petition to other interested governmental agencies, interveners, persons with an ownership interest of record in the property, and other persons known to the Commissioner to have an interest in the property. Notice to those persons with ownership interests in the property of record shall be in accordance with applicable state law.

(i) Within three (3) weeks after the determination that a petition is complete, the Commissioner shall make copies of the petition available to the public and other agencies and shall notify the general public of the receipt of the petition and request submissions of relevant information by a newspaper advertisement placed once a week for two (2) consecutive weeks in the locale of the area covered by the petition in the newspaper of largest circulation in the state and in any Official State register of public notices.

(j) Until three (3) days before the Commissioner holds a hearing under Subsection 19.3 of this section, any person may intervene in the proceeding by filing allegations of facts, supporting evidence, a short statement identifying the petition to which the allegations pertain and the intervener's name, address, and telephone number.

(k) Beginning immediately after a petition is filed, the Commissioner shall compile and maintain a record consisting of the petition and all documents relating to the petition filed with or prepared by the Department of Energy. The Commissioner shall make the record available for public inspection, free of charge, and copying, at reasonable cost, during all normal business hours at a central location of the county or multi-county area in which the land petitioned is located, and at the main office of the Department of Energy.

19.3 Hearing Requirements.

(a) Within ten (10) months after receipt of a complete petition, the Commissioner shall hold a public hearing in the locality of the area covered by the petition. If all petitioners and interveners agree, the hearing need not be held. The Commissioner shall make a verbatim transcript of the hearing.

(b) Not less than thirty (30) days prior to a hearing, the Commissioner shall give notice by certified mail of the date, time, and location of the hearing to:

(1) Local, State, and Federal agencies which may have an interest in the decision on the petition;

(2) The petitioner and the interveners; and

(3) Any person with an ownership or other interest known to the Commissioner in the area covered by the petition.

(c) The Commissioner shall notify the general public of the date, time and location of the hearing by placing a conspicuous newspaper advertisement once a week for two (2) consecutive weeks in the locale of the area covered by the petition and once during the week prior to the scheduled date of the public hearing. The consecutive weekly advertisement must begin between four (4) and five (5) weeks before the scheduled date of the public hearing.

(d) The Commissioner may consolidate in a single hearing the hearings required for each of several petitions which relate to areas in the same locale.

(e) Prior to designating any land areas as unsuitable for surface coal mining operations, the Commissioner shall prepare a detailed statement, using existing and available information, on the potential coal resources of the area, the demand for coal resources and the impact of such designation on the environment, the economy and the supply of coal.

(f) In the event that all petitioners and interveners stipulate agreement prior to the hearing, the petition may be withdrawn from consideration.

19.4 Decision.

(a) In reaching a decision, the Commissioner shall use:

(1) The relevant information contained in the data base and inventory system;

(2) Information provided through public comment or by other governmental agencies;

(3) The detailed statement prepared under paragraph (e), Subsection 19.3, of this section; and

(4) Any other relevant information submitted during the comment period.

(b) A final written decision shall be issued by the Commissioner including a statement of reasons, within sixty (60) days of completion of the public hearing, or if no public hearing is held, then within twelve (12) months after receipt of the complete petition. The Commissioner shall simultaneously send the decision by certified mail to the petitioner, every other party to the proceeding, and to the Field Office Director of the Office of Surface Mining.

(c) The decision of the Commissioner with respect to a petition, or the Commissioner's failure to act within the time limits set forth herein shall be subject to judicial review by a court of competent jurisdiction in accordance with State law.

19.5 Data Base and Inventory System Requirements.

(a) The Commissioner shall develop a data base and inventory system which will permit evaluation of whether reclamation is feasible in areas covered by petitions.

(b) The Commissioner shall include in the system information relevant to the criteria in paragraph (b), Subsection 19.7, of this section, including but not limited to, information received from the United States Fish and Wildlife Service, the State Historic Preservation Officer and the Air Pollution Control Commission.

(c) The Commissioner shall add to the data base and inventory system information:

(1) On potential coal resources of the state, demand for those resources, the environment, the economy and the supply of coal, sufficient to enable the Commissioner to prepare the statements required by paragraph (e), Subsection 19.3, of this section; and

(2) That which becomes available from petitions, publications, experiments, permit applications, mining and reclamation operations and other sources.

19.6 Public Information. The Commissioner shall:

(a) Make the information and data base system developed available to the public for inspection free of charge and for copying at a reasonable cost except that areas proposed for or included in the National Register of Historic Places may not be disclosed if the Commissioner determines that such disclosure might risk destruction or harm to these resources.

(b) Provide information to the public on the petition procedures necessary to have an area designated as unsuitable for all or certain types of surface coal mining operations or to have designations terminated and describe how the inventory and data base system can be used.

19.7 Criteria for Designating Lands as Unsuitable.

(a) Upon petition, an area shall be designated as unsuitable for all or certain types of surface mining operations, if the Commissioner determines that reclamation is not technologically or economically feasible under the Act and these rules and regulations.

(b) Upon petition, an area may be (but is not required to be) designated as unsuitable for all or certain types of surface mining operations, if the operations will:

(1) Be incompatible with existing State or local land use plans or programs;

(2) Affect fragile or historic lands in which the operations could result in significant damage to important historic, cultural, scientific or aesthetic values or natural systems;

(3) Affect renewable resource lands in which the operations could result in a substantial loss or reduction of long range productivity of water supply or of food or fiber products (For the purposes of this section, the term "renewable resource lands" means geographical areas which contribute significantly to the long range productivity of a water supply, or food or fiber products); or

(4) Affect natural hazard lands in which the operations could substantially endanger life and property. Such lands include areas subject to frequent flooding and areas of unstable geology.

19.8 Commissioner's Responsibility for Implementation.

(a) The Commissioner shall not issue permits which are inconsistent with designations made pursuant to Section 22 of the Act.

(b) The Commissioner shall maintain a cumulative map of areas designated as unsuitable for all or certain types of surface coal mining operations.

(c) The Commissioner shall make available to any person any information within his control regarding designations, including mineral or elemental content which is potentially toxic in the environment but excepting proprietary information on the chemical and physical properties of the coal.

19.9 Land Exempt From Designation as Unsuited for Surface Coal Mining Operations.

(a) The requirements of this section do not apply to:

(1) Lands on which surface coal mining operations were being conducted prior to August 3, 1977;

(2) Lands covered by a permit issued after August 3, 1977; and

(3) Lands where substantial legal and financial commitments in surface coal mining operations were in existence prior to January 4, 1977.

38-2-20 Inspection and Enforcement. In addition to the requirements set forth in Section 15, 16, and 17 of the Act, the following requirements shall be met.

20.1 Inspection Frequencies.

(a) Scheduling. In addition to the requirements of subsection (a) of Section 15 of the Act, the Commissioner shall have a right of entry to, upon, and through any prospecting operation or surface coal mining and reclamation operation without advance notice upon presentation of appropriate credentials. No search warrant shall be required, except with respect to entry into a building. The Commissioner shall conduct:

(1) An average of at least one partial inspection per month of each active surface mining operation.

(2) One complete inspection per calendar quarter of each active and inactive surface mining operation. An inactive operation is one which has requested and received approval to temporarily cease operations as provided in subsection 14.11 of these regulations, or one that has been granted Phase I bond release, and the revegetation on the surface coal mining and reclamation operation has been successfully established at the end of the first growing season with a minimum ground cover of sixty (60%) percent and the operation is in compliance with the requirements set by subparagraph (B), paragraph 10, subsection (b) of Section 12 of the Act or until soil productivity for prime farmlands has returned to the equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices as determined by the soil survey performed pursuant to paragraph ~~(13)~~(15) subsection (a) of Section 9 of the Act and subsection 10.3 and Section 10 of these regulations.

(3) Prospecting operations shall be inspected quarterly as necessary to assure compliance with the Act and these rules and regulations.

(4) At least one partial inspection monthly and one complete inspection quarterly for each prospecting operation for which approval has been granted for coal removal in excess of 250 tons.

(5) More frequent inspections shall be made on any prospecting, active surface mining operation, or inactive surface mining operation as necessary to assure compliance with the Act,

Title 38
CSR 2
Section 20

these rules and regulations, and the terms and conditions of the permit.

(b) Partial Inspection. For purposes of this section, a partial inspection is an on-site or aerial review of a person's compliance with some of the provisions of the Act, these regulations, and the terms and conditions of the permit.

(c) Complete Inspection. For purposes of this section, a complete inspection is an on-site review of a person's compliance with all the provisions of the Act, these regulations, and the terms and conditions of the permit within the entire area disturbed or affected by the surface coal mining and reclamation operations.

(d) Aerial Inspection. Aerial inspections shall be conducted in a manner which reasonably insures the identification and documentation of conditions at each surface coal mining and reclamation site inspected.

Any potential violation observed during an aerial inspection shall be investigated on-site within three days: provided, that any indication of a condition, practice or violation constituting cause for the issuance of a cessation order shall be investigated on-site immediately. An on-site investigation of a potential violation observed during an aerial inspection shall not be considered to be an additional partial or complete inspection for the purposes of paragraph (a) of this subsection.

20.2 Notice of Violations.

(a) When, on the basis of an inspection carried out pursuant to subsection 20.1 of this section, the Commissioner determines that the surface mining and reclamation operation or prospecting operation is in violation of any of the requirements of the Act, these regulations, and the terms and conditions of the permit or prospecting approval, ~~the procedure for issuing a notice of violation as described in subsection (a), Section 17 of the Act, shall be initiated immediately~~ shall be issued. Such notice of violation shall comply with all requirements and provisions of this subsection.

(b) Notice Procedures. A notice of violation shall be in writing signed by the Commissioner and shall set forth with reasonable specificity:

- (1) The nature of the violation;

(2) The remedial action required, which may include interim steps;

(3) A reasonable time for abatement, which may include time for accomplishment of interim steps, but in no case shall the initial abatement period be in excess of fifteen (15) days; and

(4) A reasonable description of the portion of the prospecting or surface coal mining and reclamation operation to which it applies.

(c) Abatement. The Commissioner may extend the time set for abatement or for accomplishment of an interim step, if the failure to meet the time previously set was not caused by lack of diligence on the part of the operator. The total time for abatement under a notice of violation, including all extensions, shall not exceed 90 days from the date of issuance, except upon a showing by the operator that it is not feasible to abate the violation within 90 calendar days due to one or more of the circumstances in paragraph (e) of this subsection. An extended abatement date pursuant to this subsection shall not be granted when the operator's failure to abate within 90 days has been caused by a lack of diligence or intentional delay by the operator in completing the required remedial action.

(d) Termination. The Commissioner shall terminate a notice of violation by written notice to the permittee when he determines that all violations listed in the notice of violation have been abated. Notices of violations shall not be terminated or vacated because of the operator's inability to comply with the terms of abatement.

(e) Criteria for Extensions of Abatement Period.
Circumstances which may qualify an operator for an abatement period of more than 90 days are:

(1) Where the operator of a permitted operation has made timely application for and diligently pursued a permit renewal or other necessary approval of designs or plans but such permit renewal or other approval has not been or will not be issued within 90 days after the time required for reasons not within the control of the operator;

(2) Where there is a valid judicial order precluding abatement within 90 days as to which the operator has diligently

Title 38
CSR 2
Section 20

pursued all rights of appeal and as to which there is no other effective legal remedy;

(3) Where the operator cannot abate within 90 days due to a labor strike;

(4) Where climatic conditions preclude abatement within 90 days, or where, due to climatic conditions, abatement within 90 days clearly would cause more environmental harm than it would prevent; or

(5) Where abatement within 90 days requires action that would violate safety standards established by statute or regulation under the Mine Health and Safety Act of 1977.

(f) Interim Procedures. Whenever an abatement time in excess of 90 days is permitted, interim abatement measures shall be imposed to the extent necessary to minimize harm to the public or the environment.

(g) Grant of Extension. If any of the conditions in paragraph (e) of this subsection exist, the operator may request that the Commissioner grant an abatement period exceeding 90 days. An authorized representative of the Commissioner shall grant the extension only with the concurrence of his immediate supervisor. The abatement period granted shall not exceed the shortest possible time necessary to abate the violation. The operator shall have the burden of establishing by clear and convincing proof that he is entitled to an extension. The authorized representative of the Commissioner who grants or denies the extension shall promptly and fully document in the file the reasons for granting or denying the request. The immediate supervisor shall review this document before concurring in or disapproving the extended abatement date and shall promptly and fully document the reasons for concurrence or disapproval in the file.

(h) Appeals. Any determination made under paragraph (g) of this subsection shall carry with it a right of appeal.

(i) Extension Period. No extension granted under paragraph (g) of this subsection may exceed 90 days in length. Where the condition or circumstance which prevented abatement within 90 days exists at the expiration date of any such extension, the operator may request and the Commissioner may grant a further extension pursuant to the procedures of paragraph (g) of this subsection.

20.3 Cessation Orders.

(a) Imminent Harm.

(1) When the Commissioner finds that a prospecting or surface mine operation creates an imminent danger to the health or safety of the public or is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, a cessation order shall be issued forthwith.

(2) Any cessation order issued under the provisions of subsection (a) of Section 16 of the Act, shall remain in effect until the violation has been abated or until modified, vacated, or terminated by the Commissioner or the Reclamation Board of Review or by a court.

(3) In any cessation order, the Commissioner shall determine the appropriate remedial measures to be taken to abate the violation in the most expeditious manner possible and shall set forth these measures and the time by which abatement shall be accomplished in the order.

(4) Mining operations conducted by any person without a valid surface mining permit, or approval for prospecting, constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, unless such operations are an integral, uninterrupted extension of previously permitted operations, and the person conducting such operations has filed a timely and complete application for a permit or approval to conduct such operations.

(b) Failure to Abate.

(1) If the operator fails to meet the time set for abatement of a notice of violation issued pursuant to subsection 20.2 of this section, the Commissioner shall issue a cessation order; or

(2) If the operator fails to meet the time set for accomplishment of any interim step of a notice of violation issued pursuant to subsection 20.2 of this section, the Commissioner may issue a cessation order.

Title 38
CSR 2
Section 20

(c) All cessation orders shall be issued as follows:

(1) A cessation order shall set forth in writing with reasonable specificity:

(A) The nature of the condition, practice or violation for which the order was issued;

(B) The remedial action or affirmative obligation required by the operator, if any, including any interim steps;

(C) The time established for abatement, if appropriate; and

(D) A reasonable description of the portion of the prospecting or surface mining and reclamation operation to which it applies.

(2) Reclamation operations and other activities intended to protect public health and safety and the environment shall continue during the period of any cessation order unless otherwise provided in the order.

(3) The Commissioner may modify, terminate or vacate a cessation order for good cause, and may extend the time for abatement if the failure to abate within the time previously set was not caused by lack of diligence on the part of the operator. A cessation order shall not be terminated or vacated because of the operator's inability to comply with the terms of abatement.

(4) The Commissioner shall terminate a cessation order by written notice when it is determined that all conditions, practices, or violations listed in the order have been abated. The termination notice must be in writing and shall not affect the right of the Commissioner to assess civil penalties for the violation.

(d) Notice of Informal Conference. Notices of informal conferences held as a result of a cessation order issued pursuant to the provisions of subsection (a), Section 16 of the Act shall be posted at the nearest regional office and sent by mail or communicated verbally, whichever is more practicable, to any person who filed a report which led to a cessation order for which the informal conference is to be held. The results of the informal conference shall be provided to any person who filed a report which led to the order within five (5) days after the close of the informal conference.

(e) Within sixty (60) days after issuing a cessation order, the Commissioner shall notify in writing any person identified as owning or controlling the permittee, that the cessation order was issued and that the person has been identified as an owner or controller.

20.4 Show Cause Orders.

(a) General. Where the Commissioner determines that a pattern of violations of the Act, these regulations or the terms and conditions of a permit exists or has existed, and that the violations were caused willfully or through an unwarranted failure to comply, the Commissioner shall issue an order requiring the permittee to show cause why the permit and the permittee's right to mine under the Act should not be suspended or revoked. For purposes of this subsection a willfully caused violation is a violation resulting from an intentional act or omission, and an unwarranted failure to comply means the failure of the permittee to prevent the occurrence of any violation or the failure to abate any violation of the Act, these rules and regulations, or the terms and conditions of the permit due to indifference, lack of diligence or lack of reasonable care.

(b) Criteria for Establishing a Pattern of Violations. The Commissioner may determine that a pattern of violations exists or has existed, based where violations were cited on two or more inspections of the permit area within any twelve (12) month period. In making such a determination, the Commissioner shall take into consideration the following circumstances:

(1) The number of previous violations cited on more than one occasion for the same or related requirements of the Act, these rules and regulations, or the terms and conditions of the permit;

(2) The number of previous violations, cited on more than one occasion, of different requirements of the Act, these regulations or the terms and conditions of the permit; and

(3) The extent to which the violations were isolated departures from lawful conduct.

(c) Duplicate or Similar Violations. The Commissioner shall promptly review the history of violations of any permittee who has been cited for violations of the same or related requirements of the Act, these regulations or the terms and conditions of the permit during three (3) or more inspections of the permit area within any twelve (12) month period. After such

review, the Commissioner shall determine whether or not a pattern of violations exists.

(d) Permittingee Responsibility. Violations by any persons conducting surface coal mining operations on behalf of the permittee shall be attributed to the permittee, unless the permittee establishes that they were acts of deliberate sabotage.

(e) Hearings and Appeals. If the permittee files an answer to the show cause order and requests a hearing, a public hearing shall be held. The Commissioner shall give thirty (30) days advance written notice to the permittee and any interested party who requests intervener status of the date, time, and place of the hearing. The Commissioner shall publish the notice if practicable, in a newspaper of general circulation in the area of the operations, and shall also post the notice in the regional office of the Department of Energy nearest the operation.

(f) Consent Agreement. When the permittee demonstrates that sufficient resources are available to him to abate the violation(s), the Commissioner may enter into a consent agreement.

(g) Hearing Record and Decisions. Within sixty (60) days following the hearing, the Commissioner shall issue a written determination as to whether a pattern of violations exists, and furnish to the operator and all other parties to the hearing a written decision or consent order and the reason therefor, concerning suspension or revocation of the permit.

(h) Revocation and Suspension. If the Commissioner revokes or suspends the permit and the permittees right to mine under the Act, the permittee shall immediately cease surface coal mining operations in the subject permit area, and initiate the appropriate remedial action as follows:

(1) If the permit and the right to mine under the Act are revoked, the operator shall complete reclamation within the time specified in the revocation order; or

(2) If the permit and right to mine under the Act are suspended, the operator shall complete all affirmative obligations to abate all conditions, practices, or violations, as specified in the suspension order.

(i) Failure to Abate. Whenever a permittee fails to abate a violation contained in a notice of violation or cessation order within the abatement period set in the notice or order or as

subsequently extended, the Commissioner shall review the permittee's history of violations to determine whether a pattern of violations exists and shall issue an order to show cause where appropriate.

(j) Consent Agreement. If, at any point in the enforcement process following the issuance of a notice of violation, a consent cessation order or a show cause order, a consent agreement is reached between the Commissioner and a permittee and/or operator, the following standards shall apply to that consent order:

(1) The Commissioner will require all abatement work mandated in the consent agreement to be performed in the most expeditious manner physically possible. In no event shall the time period in which remedial action must be completed exceed one (1) year, nor can extensions to abatement times in consent orders total more than one year; provided however, that for sites permitted before the effective date of these regulations September 5, 1989, the Commissioner may grant a future extension if he finds in writing that exceptional circumstances exist which preclude abatement in the twelve-month period.

(2) Violation of any term in a consent agreement shall result in immediate forfeiture of the bond for the site, unless the Commissioner finds in writing that:

(A) The operator and/or permittee have shown good faith in taking remedial actions required by the consent agreement; and

(B) No environmental harm has resulted, or will result, from the subject violation.

(3) No consent agreement shall be agreed to if the permittee, and/or operator or any entity owned or controlled by the permittee and/or the operator, has violated or is in violation of a previous consent agreement; provided however, that the Commissioner is required to make only best efforts to determine if said violation or ownership and control ties exist.

(4) No consent agreement can be reached on a site if the permittee and/or operator have previously entered into two consent orders on the same site.

The standards set forth in (1) through (4) above shall apply to any extension, modification, or other change in any existing consent agreement.

20.5 Civil Penalty Determinations.

(a) Notice of Violation Assessments. The Commissioner shall review each notice of violation and determine whether or not a civil penalty will be assessed and the amount of the penalty. The Commissioner for each notice of violation, may assess a separate civil penalty for each day of the violation, beginning with the date of issuance of a notice of violation to the date of abatement of the violation. In determining whether or not to assess a separate daily civil penalty and determine the amount of the civil penalty, the Commissioner shall consider those factors specified in subsection (c), Section 17, of the Act, and subsection 20.7 of these regulations, and may consider the extent to which the operator may have gained any economic benefit as a result of a failure to comply. Any notice of violation which continued unabated for two or more days after the initial abatement period, and received a civil penalty assessment of \$3,500 or more, shall be assessed the penalty amount for a minimum of two separate days. The determination as to whether or not to assess a civil penalty if the amount is less than one thousand dollars (\$1,000) will be at the discretion of the Commissioner. Notices of violations with a seriousness rating of 4 or greater shall be assessed regardless of the amount. Termination of a notice of violation shall not affect the right of the Commissioner to assess a civil penalty for those violations.

(b) Cessation Order Assessments. The Commissioner shall, for each cessation order, assess a civil penalty in accordance with subsection (a), Section 17, of the Act for each day of continuing violation, except that such penalty shall not be assessed for more than thirty (30) days. Each imminent harm cessation order shall have an initial assessment in accordance with subsection 20.7 of these regulations. If the cessation order has not been abated or modified within the thirty (30) day period, the Commissioner shall initiate action pursuant to subsections (b), (f), or (h), Section 17, of the Act as appropriate. If the order is suspended in a temporary relief proceeding, the period specified for the abatement shall not end until the date on which the Commissioner issues a final order with respect to the violation in question. If judicial review proceedings are initiated in which the order is suspended by court, the daily assessment of the civil penalty shall not be made for any period before entry of a final order by the court.

20.6 Procedure for Assessing Civil Penalties.

(a) Assessment Officer - Duties. For the purposes of this section, the assessment officer shall not determine the proposed penalty assessment until such time as the Commissioner has caused an inspection of the violation to be conducted and the findings of that inspection are submitted to the assessment officer in writing. The Commissioner must conduct the inspection of the violation within the first fifteen (15) days after the notice or order was served. The assessment officer may continue conferences, conduct investigations, and interview witnesses as necessary.

(b) Determination of Civil Penalty Amounts. Civil penalty amounts for notices of violation shall be determined in accordance with the factors specified in paragraph (c), Section 17, of the Act and the numerical point system in subsection 20.7 of this section. Within fifteen (15) days of service of a notice of violation or cessation order, the person to whom it was issued may submit written information about the violation to the Commissioner and to the inspector who issued the notice of violation or cessation order.

(c) Notice of Assessment. The Commissioner shall provide a copy of the proposed assessment and the accompanying worksheet to the operator by certified mail, within thirty (30) days of the date of the issuance of a notice or order. If the mail is tendered at the address of the person set forth in the sign required under paragraph (a), subsection 14.1 of these regulations, or at any address at which that person is in fact located, and he or she refuses to accept delivery of or to collect such mail, the requirements of this paragraph shall be deemed to have been complied with upon such tender. Failure by the Commissioner to serve any proposed assessment within thirty (30) days shall not be grounds for dismissal of all or part of such assessment unless the person against whom the proposed penalty has been assessed: (1) proves actual prejudice as a result of the delay; and (2) makes a timely objection to the delay. An objection shall be timely only if made in the normal course of administrative review. The Commissioner shall also give notice including any worksheet, in person or by certified mail, to the operator of any penalty adjustment as a result of an informal conference within thirty (30) days following the date of the conference. The reasons for reassessment shall be documented in the file by the assessment officer. The Commissioner shall consider any information submitted pursuant to paragraph (b) of this subsection in determining the facts surrounding the violation and the amount of the penalty. Unless a conference has

Title 38
CSR 2
Section 20

been requested, the Commissioner shall review and if necessary reassess any penalty considering facts which were not reasonably available on the date of issuance of the proposed assessment because of the length of the abatement period. The Commissioner shall serve a copy of any such reassessment and of the worksheet showing the computation of the reassessment within thirty (30) days after the date the violation is abated.

(d) Notice of Informal Assessment Conference. The time and place of an informal assessment conference shall be posted at the nearest Department of Energy regional office to the operation, at least five days prior to the conference date. Any person shall have the right to attend and participate in the conference. Any person, other than operator and Division of Energy representatives, may submit in writing at the time of the conference a request to present evidence concerning only the violation(s) being conferenced. Such request shall be granted by the assessment officer only for the specific violation(s) in question. Should problems arise due to scheduling, the assessment officer may continue the conference to a later time and/or date as the assessment officer deems necessary to honor other scheduled conferences.

(e) Informal Conference. An informal conference on the assessment or reassessment must be scheduled within 60 days of the receipt of a request, pursuant to paragraph (1) subsection (d) of Section 17, of the Act. ~~Failure to serve a proposed assessment notice pursuant to paragraph (c) of this subsection or~~ hold an informal conference in the time limits specified in this subsection will not be considered as grounds for dismissal of the assessment, unless the operator proves actual prejudice and makes timely objection to the delay. The ~~conference~~assessment officer shall consider all relevant information on the violation including information which may be provided pursuant to paragraphs (b) and (d) of this subsection. Within thirty (30) days after the conference is held the ~~conference~~assessment officer shall either:

(1) Settle the issue, in which case a settlement agreement shall be prepared and signed by the ~~conference~~assessment officer on behalf of the Commissioner and by the person assessed;

(2) Affirm, raise, lower, or vacate the penalty; or

(3) Terminate the conference when it is determined that the issues cannot be resolved or that the person assessed is not diligently working toward resolution of the issues.

(f) Settlement Agreement. If a settlement agreement is entered into, the person assessed will be deemed to have waived all rights to further review of the violation or penalty in question, except as otherwise expressly provided for in the settlement agreement. The settlement agreement shall contain a clause to this effect. If full payment of the amount specified in the settlement agreement is not received by the Commissioner within thirty (30) days after the date of signing, the Commissioner may enforce the agreement or rescind it and affirm, raise, lower or vacate the penalty within thirty (30) days from the date of the rescission.

(g) Rules of Evidence. At formal review proceedings pursuant to sections 2 and 17 of the Act, no evidence as to any statement made or evidence produced by one party at a conference shall be introduced as evidence by another party, or may be used to impeach a witness.

(h) Fact of Violation. The fact of violation may not be contested in a civil penalty review proceeding, if it has already been decided in a formal review proceeding under paragraphs (3) or (4) subsection (d) of section 17 of the Act.

(i) Escrow. If a person requests judicial review of a proposed assessment, the proposed penalty assessment shall continue to be held in escrow until completion of the judicial review.

(j) Penalty Adjustment. When an administrative or judicial review of a civil penalty order results in an order increasing the penalty, the person to whom the notice or order was issued shall pay the amount of the increase within fifteen (15) days after the order is mailed to each person.

(k) Mitigation. Unless caused by lack of diligence, inability to comply may be considered in mitigation of the amount of civil penalty-and-in-establishing-a-time-period-of-the suspension-of-a-permit.

20.7 Assessment Rates.

(a) History of Violations. History of previous violations is an accounting of all Notices of Violation and Cessation Orders that were written on the subject operation in the previous twelve (12) months. Notices of Violation and Cessation Orders which were withdrawn or vacated shall not be included in the accounting. The amount to be assessed shall be determined by

multiplying the number of violations by a factor of one hundred (100).

<u>(1) Previous violation</u>	<u>Rate Per Violation</u>
1-2	None
3-5	\$20.00
6-10	\$40.00
over 10	\$60.00

-----Number of Violations x Rate = Amount-----

(b) Seriousness of the violation.

1-2 Violation is of an administrative nature resulting in no harm or danger to the environment or public; or the standard is violated to such a minor degree that environmental harm or public danger will not result.

3-4 Violation results in potential or actual harm or danger remaining in the permit area; or in the case where the impact extends beyond the permit area; can be demonstrated that potential danger or harm or will not result.

5-6 Violation extends beyond the permit area and results in a minor degree of potential or actual harm or impact on the public.

7-8 Violation can reasonably be expected to result in significant imminent environmental harm or create an imminent danger to the health and safety of the public. A violation which initially has a seriousness rating of 7 or higher is one which must be an imminent harm cessation order, as set forth in paragraph (a), subsection 20.3 of these regulations.

-----7-8-9-10 Violation extends beyond the permit area and results in a significant degree of environmental harm or danger to the public.

-----9-10 Violation is or can be reasonably be expected to result in significant imminent environmental harm or create an imminent danger to the health or safety of the public.

Seriousness- Rating	0	1	2	3	4	5	6	7	8	9	10
Amount	-	100	230	396	608	875	1206	1600	2100	2700	3500

(c) Operator Negligence.

- 0 This violation is considered beyond the control of the operator or his employees and no negligence can be attributed to this violation.
- 1-2 This violation was a result of an oversight on the part of the operator and may have been avoided if more conscientious effort and/or reasonable care were given.
- 3-4 This violation was obvious and/or no action was taken by the operator ~~correct~~ to prevent the problem.
- 5-6 The operator failed to adequately respond to previous enforcement-action written instructions of the inspector to prevent this event.
- 7-8 The operator had been officially notified, in writing, of this problem and did not make any effort at correcting the problem.

-----Civil-Penalty-Rate-Schedule---Operator-Negligence

Negligence Rating	0	1	2	3	4	5	6	7	8
Amount	0	25	62	120	200	315	474	693	1000

(d) Operator's Good Faith

Good faith percentage shall not include a history of violations in the amount. Good faith percentage shall be rounded to the nearest dollar amount.

- 0 Operator failed to take appropriate action. Violation was modified to a cessation order.
- 1-2 Operator took prompt-but-minimal action to correct the violation. Violation was extended due to the operator taking some corrective action, but the operator showed a lack of diligence in abatement. Violation was-----
-----abated-before-required-date.
- 3-4 Operator started promptly on remedial measures and worked diligently to correct the violation. Operator was hampered in abatement by conditions beyond his control and violations had to be extended. Violation was abated-----
-----before-required-date.
- 5-6 Operator started immediately and expended all reasonable efforts to correct the violation. Violation was abated beforeby the original abatement required-date, and was not-----
-----extended.
- 7-8 Operator was already working on remedial measures and expended extreme effort in correcting the violation. Violation was abated in less time than the original abatement required date.

Good-Faith Rating	0	1	2	3	4	5	6	7	8
Amount	0	88	206	363	564	825	1158	1582	2120
%	0%	5%	10%	15%	20%	25%	30%	35%	40%

(e) Determination of Penalty Amount

-----No. Previous Violations-----	_____
Seriousness of Violations	_____
Operator Negligence	_____
Subtotal	_____
Less Good Faith %	- _____
<u>Sub Total</u>	_____
<u>History of Violations</u>	+ _____
<u>Total</u>	_____

20.8 When an Individual Civil Penalty May be Assessed:

(a) Except as provided in paragraph (b) of this subsection, the Commissioner may assess an individual civil penalty against any corporate director, officer or agent of a corporate permittee who knowingly and willfully authorized, ordered, or carried out a violation, failure or refusal.

(b) The Commissioner shall not assess an individual civil penalty in situations resulting from a permit violation by a corporate permittee until a cessation order has been issued by the Commissioner to the corporate permittee for the violation and the cessation order has remained unabated for thirty (30) days.

20.9 Amount of Individual Civil Penalty.

(a) In determining the amount of an individual civil penalty assessed under subsection 20.8 of these regulations, the Commissioner shall consider the criteria specified in subsection (c) of Section 17 of the Act.

(b) The penalty shall not exceed \$5,000 for each violation. Each day of a continuing violation may be deemed a separate violation and the Commissioner may assess a separate individual civil penalty for each day the violation, failure or refusal continues, from the date of service of the underlying notice of violation, cessation order or other order incorporated in a final decision issued by the Commissioner until abatement or compliance is achieved.

20.10 Procedure for Assessment for Individual Civil Penalty.

(a) The Commissioner shall serve on each individual to be assessed an individual civil penalty a notice of proposed individual civil penalty assessment, including a narrative explanation of the reasons for the penalty, the amount to be assessed, and a copy of an underlying notice of violation and cessation order.

(b) The notice of proposed individual civil penalty assessment shall become a final order of the Commissioner thirty (30) days after service upon the individual unless:

(1) The individual files within thirty (30) days of service of the notice of proposed individual civil penalty assessment a petition for review with the Reclamation Board of Review; or

(2) The Commissioner and the individual or responsible corporate permittee agree within thirty (30) days of service of the notice of proposed individual civil penalty assessment to a schedule or plan for the abatement or correction of the violation, failure, or refusal.

(c) For purposes of this subsection, service is sufficient if it would satisfy state requirements for service of a summons and complaint.

20.11 Payment of Penalty

(a) If a notice of proposed individual civil penalty assessment becomes a final order in the absence of a petition for review or abatement agreement, the penalty shall be due upon issuance of the final order.

(b) If an individual named in a notice of proposed individual civil penalty assessment files a petition for review in accordance with subparagraph (1), paragraph (b), subsection 20.10 of this section, the penalty shall be due upon issuance of a final administrative order affirming, increasing, or decreasing the proposed penalty.

(c) Where the Commissioner and the corporate permittee or individual have agreed in writing on a plan for the abatement of or compliance with the unabated order, an individual named in a notice of proposed individual civil penalty assessment may postpone payment until receiving either a final order from the

Commissioner stating that the penalty is due on the date of such final order, or written notice that abatement or compliance is satisfactory and the penalty has been withdrawn.

20.12 Fees and Costs of Administrative Proceedings.

(a) Request for Fees. Any person may on request be awarded by the appropriate board or court a sum equal to costs and expenses including attorneys' fees and expert witness fees as determined to have been reasonably incurred. Such request must be filed within forty-five (45) days of date of entry of judgment.

The request shall include an affidavit setting forth costs and expenses and an itemized statement of attorneys' fees. The request shall be served upon all parties who shall have thirty (30) days to answer the request. Cost and expenses including attorneys' fees may be awarded to:

(1) Any participating party against the violator upon a finding that there is a violation of the Act, the regulations or the permit has occurred, and there is a determination that the party made a significant contribution to the full and fair determination of the issues;

(2) To any participating party other than the violator or his representative from the Department of Energy upon a determination that the party made a significant contribution to a full and fair determination of the issues;

(3) To a violator from the Department of Energy when the violator demonstrates that the Department of Energy issues cessation order, a show cause order or notice of violation in bad faith and for the purpose of harassing or embarrassing the violator, provided that no award shall be made under this subsection if the Department of Energy prevails upon the issue of a violation;

(4) To a violator from any participating party other than the Department of Energy where such participating parties initiated or participated in the magistrate proceeding in bad faith and for the purpose of harassing or embarrassing the violator; and

(5) To the Department of Energy from any participating party where the Department of Energy demonstrates that any such party participating in such proceeding in bad faith and for the purpose of harassing or embarrassing the Department of Energy.

Title 38
CSR 2
Section 20

An award may also include attorneys' fees and expert witness fees expended in obtaining an award of costs, expenses and attorneys' fees. Decisions on such awards may be appealed as other cases under the Act.

38-2-21 Reclamation Board of Review.

21.1 Open Meetings.

(a) General. All meetings of the Reclamation Board of Review, pursuant to the provisions of the Act shall be open to the public.

(b) Public Notice. The time, and place of all regularly scheduled meetings and the time, place and purpose of all special meetings shall be made available to the public and the news media by publishing a notice containing at least the above information in a newspaper of general circulation in the county where the site or environmental concern exists, or if the matter under consideration is of general interest to the people of the State in a newspaper of general circulation in the State.

(c) Emergency Meetings. In the event of any emergency requiring immediate official action such efforts to notify the public shall be taken as circumstances allow.

21.2 Appeals to the Reclamation Board of Review.

(a) Site Visits. The board may visit the site of the activity or proposed activity which is the subject of the hearing and take such additional evidence as it deems necessary provided that all parties and interveners be given notice of the visit and are given an opportunity to accompany the Board.

(b) Final Orders. On all appeals to the Board, the Board shall issue a final decision thirty (30) days after the hearing or within thirty (30) days after the testimony presented at the hearing has been transcribed and checked for accuracy.

(c) Burden of Proof. The burden of proof shall be on the party seeking to reverse the decision of the Commissioner.

21.3 Ex parte Communication.

(a) Prohibition. Ex parte contacts between representatives of the parties appearing before the Board and members or representatives of the Board shall be prohibited.

38-2-22 Coal Refuse

22.1 Applicability - Any surface coal mining operation which involves the construction, operation, enlargement, modification, removal and/or abandonment of a coal refuse site shall be subject to the special provisions of this section in addition to other applicable permitting requirements, performance standards, and enforcement provisions of these regulations, the Act, and other state and federal laws and regulations.

22.2 Certification - For purposes of permitting, the applicant shall submit a separate set of maps, plans, design data, and specifications for the refuse disposal facility, in addition to those contained in the permit application.

The disposal facility shall be designed using current, prudent engineering practices. A qualified registered professional engineer, experienced in the design of similar earth and refuse structures, shall certify the design of the disposal facility. The disposal facility shall be designed to attain a minimum long-term static safety factor of 1.5 and a seismic factor of safety of 1.2. The stability of all foundations and abutments must be maintained during all phases of construction.

22.3 Permit Requirements - General - In addition to the other permitting requirements of the Act, these regulations, and the requirements of 30 CFR 77.214 and 30 CFR 77.215, each permit application which involves a coal refuse site shall contain the following materials:

(a) Narrative. A general narrative and discussion of the project to include at a minimum a discussion of existing site conditions, the design life of the facility, quantity and type of coal refuse to be placed on the site, subsidence potential method of operation to include clearing and grubbing, topsoil stockpiling, construction of surface and subsurface drainage facilities, phases of construction, method and location of coal refuse placement or removal, coal refuse placement during inclement weather, routine inspection and maintenance, procedure to be followed in the event the site is abandoned prior to the planned design life, and a sequence for construction of drainage facilities, critical construction phases, reclamation and final abandonment procedures. In addition, include a description of the duties, responsibilities and lines of communication of those persons responsible for the design and construction of the coal refuse disposal site. All data, graphs, curves, etc., which provide the basis for hydrologic and hydraulic design of coal refuse embankments and impoundments shall accompany other design

data, plans, and specifications, submitted as part of the permit application.

(b) Plan View. A plan view of the site showing detailed contours, limits of the coal refuse disposal site, all drainage facilities, location of springs, seeps, mine drainage and/or openings, location of the subdrain system, project stationing, location of cross sections, location of borings, test pits and instrumentation and other pertinent data required for project control.

(c) Cross Sections. Cross sections of the coal refuse disposal site transversely and longitudinally showing original ground, finished elevations, final configuration of refuse material, subdrains, diversion details, spillways, and other pertinent features of the site. Cross section shall be of sufficient accuracy and detail so as to provide a basis for stability computations at critical locations.

(d) Sediment Control Plan. A sediment control plan designed in accordance with Subsection 5.4 of these regulations.

(e) Diversions. Each application shall contain plans and specifications for a diversion channel above the coal refuse site to direct surface water runoff from the contributing watershed around the facility. Such diversion channel shall be designed in accordance with subsection 5.3 of these regulations except as follows:

(1) Design storm. All diversion ditches and stream channel diversions shall be designed to carry the peak runoff from a one-hundred (100) year frequency, twenty-four (24) hour duration rainfall.

(2) A freeboard equal to or greater than $1 + .025vd^{1/3}$ shall be added to the design flow depth to obtain the total depth of the diversion ditch.

(3) Each diversion ditch must be designed to carry the peak flow with freeboard from the contributing watershed area.

(4) Diversions shall be designed, constructed, and maintained in a manner which prevents additional contributions of suspended solids to streamflow and to runoff outside the permit area to the fullest extent possible.

(5) Excess excavated material not required for construction or maintenance of the diversion ditch must be properly disposed of in the permit area.

(6) Topsoil removed from the channel excavation shall either be redistributed on another part of the permit area or stockpiled for a later use.

(7) All diversion systems shall exit safely beyond the toe of the embankment in a natural drainway capable of carrying the design flow without excessive erosion.

(8) All stream channel diversions must be designed to carry the design flow around the disturbed area. The diversions must outlet into the original channel or a natural channel of equal cross section.

(9) Diversions in refuse must be lined with soil or a suitable substitute unless other erosion protection is provided.

(10) Permanent diversion systems designed to convey water under a coal refuse embankment by means of a pipe or conduit are unacceptable. However, diversion by means of a pipe or conduit may be permitted during active operation, provided that (1) height or storage limits for impoundments are not exceeded, (2) the pipe or conduit is used in conjunction with surface ditches to meet applicable design storm requirements, and (3) the design of the pipe or conduit accounts for durability and design life, load limits, joint sealing, trash rack protection, and maintenance requirements throughout the operational life of the structure.

(f) Design and Specifications for Hydraulic Structures. Such structures shall be designed to safely control excessive erosion by using energy dissipators and/or channel protection, as necessary, based upon design flow velocity. Seepage control devices shall be used to prevent undercutting of nonflexible linings. The potential for landslides or slope failures shall be considered in the location of all hydraulic structures. Channels shall not be located on or near an existing landslide. No surface runoff or slurry may be diverted into underground mines unless approved by the Commissioner in accordance with paragraph (e) subsection 14.5 of these regulations.

(g) Computations. The application shall include all design data and calculation results. If a computer analysis is used, only the input data and results used specifically in the design need be submitted. If graphical flood routing techniques are

used, all charts and graphs shall be included. Adequate cross sections and profiles shall be given for all hydraulic structures.

(h) All coal refuse impoundments must be analyzed and/or designed in accordance with this subsection. Non-impounding coal refuse embankments must be designed in accordance with this subsection unless any proposed modifications to the design standards of this subsection are justified through appropriate stability analysis. The following structural analysis and/or design data of coal refuse embankments and impoundments shall be presented in graphical or tabular form:

(1) A sufficient subsurface investigation shall be performed by a registered professional engineer or engineering geologist. The number, location, and depth of borings, test pits, and/or trenches shall be reasonable for the size, purpose, soils present, and foundation type of the structure. The investigation shall consider depth of soil to bedrock, field classification of soils, character of bedrock, in situ testing, soil sampling, determination of groundwater flow and location of seeps and springs, and a soil profile for critical locations in the structure, hydraulic structures and other pertinent locations which may affect the safety of the structure. The number, depth, and location of boreholes shall be based on the quantity of material to be impounded and subsurface conditions. A geologic study shall also be conducted for impounding structures to evaluate landslides into the impoundment, bedrock discontinuities such as soft seams, joints, joint systems, bedding planes, and fault zones which may adversely affect the structure's performance. Past and future mining to include height of seam, depth and cover rock of the seam, and previous subsidence problems shall be considered where subsidence may affect the safety of the structure.

(2) Laboratory tests shall be conducted on all foundation and embankment materials to include soil classification through hydrometer analysis, density, water content, compaction tests, shear strength, consolidation, and permeability unless the scope, characteristics, or design concept of the site make one or more of these requirements unnecessary.

(i) Safety Factors. A description including plans, design data, specifications, and computations of how safety conditions will be achieved. The disposal facility shall be designed, constructed, and maintained to attain a minimum long-term safety factor of 1.5; provided further that a coal refuse site which has

the capability to impound water shall also attain a seismic safety factor of at least 1.2.

(j) Liquefaction. Describe the potential for liquefaction and provide safeguards against the development of this condition.

(k) Instrumentation. A description of installation of instrumentation such as piezometers, settlement markers, slope indicators, and similar monitoring devices shall be included in the plan to monitor present hazardous conditions, construction conditions, and to verify design assumptions. A plan for monitoring these devices shall also be provided.

(l) Stability Analysis. All stability analyses shall be done using standard engineering techniques. The submittal shall include cross sections at critical locations in the facility showing the materials profile, location of critical potential failure surfaces and their factors of safety, estimated or measured phreatic surfaces for construction and/or long term seepage conditions, and a tabulated listing of strength parameters used. If a computer analysis is used, only the input data and results used specifically in the design shall be submitted.

(m) Underdrains. If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, the application shall include diversions and underdrains as necessary to control erosion, prevent water infiltration into the disposal facility and ensure stability. Diversions and underdrains shall be designed as follows:

(1) Runoff from the areas above the refuse pile and runoff from the surface of the refuse pile shall be diverted into stabilized diversion channels designed in accordance with paragraph (e) of this subsection and subsection 5.3 of these regulations to safely pass the runoff from a one hundred (100) year, twenty-four (24) hour precipitation event. Runoff diverted from undisturbed areas need not be commingled with runoff from the surface of the refuse pile. Uncontrolled surface drainage may not be diverted over the outslope of the refuse piles.

(2) Underdrains shall consist of durable rock or pipe, and be designed and constructed using current, prudent engineering practices. The underdrain system shall be designed to carry the anticipated seepage of water due to rainfall and from seeps and springs in the foundation of the disposal area away from the site, and shall be protected from piping and contamination by an adequate filter. Rock underdrains shall be

Title 38
CSR 2
Section 22

constructed of durable, nonacid, nontoxic-forming rock (e.g., natural sand and gravel, sandstone, limestone, or other durable rock) that does not slake in water or degrade to soil material, and which is free of coal, clay or other nondurable material. Perforated pipe underdrains shall be corrosion resistant and shall have characteristics consistent with the long-term life of the fill.

(n) Site Preparation. Procedures for clearing and grubbing.

(o) Excess Material. Procedures for disposal of excess material resulting from clearing, grubbing, and other site preparation activities.

(p) Compaction Requirements. Procedures for spreading and compaction of refuse material during placement. The material shall be compacted in layers not exceeding two (2) feet in thickness and shall not have any slope exceeding two horizontal to one vertical, except that the Commissioner may approve construction of a refuse pile in compacted layers exceeding two (2) feet in thickness and with slopes exceeding two (2) horizontal to one (1) vertical, where engineering data substantiates that, -and both a minimum static safety factor of 1.5 will be attained and a minimum seismic safety factor of 1.2 will be attained; provided, that the operator shall submit plans for the Commissioner's approval, and shall also provide documentation showing prior approval by MSHA pursuant to federal regulations at 30 CFR 77.215(h) for the alternate construction, without which documentation the plans will not be approved.

(q) Sealing Abandoned Openings. Plans in accordance with 30 CFR 75.1711 for sealing abandoned openings and covering the seal with four feet of an impermeable non-toxic material. Such plans shall consider prevention of water buildup behind the seals, toxicity of the refuse and mine strata, gradient of the opening, hydrologic balance and passage of any acid water to a treatment facility. If a mine seal is in the impoundment area of an impounding coal refuse disposal site, the seal shall be designed to safely withstand full hydrostatic head with a factor of safety of at least 1.5 against blowout. Higher factors of safety may be required where dictated by the consequences of failure. Calculations and cross sections used in the analyses shall be submitted.

(r) Extinguishment of Burning Areas. Plans approved by MSHA for the extinguishment of burning areas which contain, at a minimum, method of extinguishment, safety measures for equipment

operators and persons working or living in the vicinity of the site, and a provision that only those persons authorized by the operator, shall be involved in the extinguishing operation.

(s) Underground Disposal. Plans for underground refuse disposal shall be submitted to and approved by the Commissioner and the Mine Safety and Health Administration. All plans must include:

(1) Method of disposal including a description of the source of the transport medium;

(2) Maps of mines where coal refuse materials are to be disposed with a description of the percent of mine void to be filled;

(3) Description of location of active workings including plans, specifications, and methods of constructing underground retaining walls;

(4) Potential areas of breakout in active mine workings and on the surface of the ground;

(5) Effects of subsidence on the plan;

(6) The effects on the hydrologic regime including the location and description of permanent monitoring wells or monitoring stations;

(7) Gradient of the mine from the backfill area;

(8) Description of the stratum underlying the mined coal;

(9) Source and quality of the refuse;

(10) The method of treatment of water if released to surface streams;

(11) A contingency plan formulated to alleviate or correct any hazardous conditions which may result from a blowout; and

(12) A description of the surface area to be supported by the refuse backfill, the anticipated surface effects following backfilling, and the method for dewatering the backfill.

(t) Abandonment Plan. An abandonment plan which addresses the following requirements and include a schedule for their implementation:

(1) No refuse embankment or impoundment may be abandoned until approved by the Commissioner.

(2) The final top elevation of the refuse embankment must be higher than, and sloped into, the diversion ditch. Maximum slope of the top of the embankment to the diversion ditch shall be five (5) percent unless otherwise approved by the Commissioner.

(3) All pipes under refuse areas left as non-impounding fills shall be sealed with concrete at the upstream end prior to abandonment.

(4) At abandonment all fine refuse in the impoundment pool shall be covered with a minimum three foot layer of coarse refuse or other fill material prior to topsoiling unless otherwise approved by the Commissioner.

(5) At abandonment all coal refuse shall be covered with a minimum of four (4) feet of the best available non-toxic and non-combustible material in a manner that does not impede flow from sub-drainage systems. The Commissioner may allow less than four (4) feet of cover material where it can be demonstrated on the basis of physical and chemical analyses of the growth medium that the vegetation requirements of Section 9 of these regulations will be met.

(6) A certificate of approval for completion of construction shall be issued upon completion of the above requirements.

22.4 Permit Requirements - Impounding Structures. In addition to the requests of the Act and these regulations, coal refuse disposal sites which have the capability of impounding water shall be subject to the special requirements of this subsection and may be subject to other state and federal laws and rules and regulations, depending on their embankment size and holding capacity.

(a) Dam Control Act. A coal refuse site which is constructed in such a manner that it: (1) Rises twenty-five (25) feet or more above the natural bed of a stream or watercourse as measured from the downstream toe of the embankment and which does or can impound fifteen (15) acre-feet or more of

water, or; (2) Rises six (6) feet or more above the natural bed of a stream or watercourse as measured from the downstream toe of the embankment and which does or can impound fifty (50) acre-feet or more of water is by definition a dam and is thereby subject to the provisions of the West Virginia Dam Control Act set forth in Chapter 20, Article 5D of the Code of West Virginia.

(b) Mine Safety and Health Administration (MSHA) Impoundments. A coal refuse site which is constructed in such a manner that it can impound water, sediment, or slurry to an elevation of: (1) Five (5) feet or more above the upstream toe of the structure and can have a storage volume of twenty (20) acres/feet or more, or; (2) Twenty (20) feet or more above the upstream toe of the structure, or; (3) Presents a hazard to coal miners as determined by the District Manager of the Federal Mine Safety and Health Administration, shall be subject to the requirements of 30 CFR 77.215 and 77.216 of the Federal Mine Safety and Health Administration Regulations.

(c) Small Impoundments. Coal refuse sites which result in impoundments which are not subject to the Dam Control Act or the Federal Mine Health and Safety Act shall be designed, constructed, and maintained subject to the requirements of this subsection and subsections 5.4 and 22.5 (j)(6) of these rules and regulations.

(d) Hazard Potential. The hazard potential of coal refuse sites which have the capability of impounding water shall be determined by the applicant based on the potential loss of life that would result due to a failure and the classification determined on the basis of the following criteria:

(1) Class A. Impoundments located in rural or agricultural areas where failure may damage farm buildings, agricultural land, or secondary highways. Failure of the structure would cause only loss of the structure and loss of property use such as related roads, but with little additional damage to adjacent property. Any impoundment exceeding twenty-five (25) feet in height measured at the downstream toe or two-hundred (200) acre-feet storage volume or having a watershed exceeding five hundred (500) acres shall not be a Class A structure.

(2) Class B. Impoundments located in predominantly rural agricultural areas where failure may damage isolated homes, primary highways or minor railroads or cause interruption of relatively important public utilities. Failure of the structure may cause great damage to property and project operations.

(3) Class C. Impoundments located where failure may cause loss of life, serious damage to homes, industrial and commercial buildings, important public utilities, primary highways, or main railroads. This classification must be used if failure would cause possible loss of human life.

(e) Emergency Planning. For a Class C structure or if a dangerous condition exists, notification and action procedures shall be formulated by the operator or owner, for public protection and remedial action in the event of an emergency. All emergency procedures must be submitted and become part of the approved plan. If adequate emergency procedures cannot, for whatever reason, be formulated by the owner or operator, then he must so notify the Commissioner in writing. The Commissioner may then notify the Office of Emergency Services and request that emergency procedures be developed for the coal refuse site.

(f) Design Storm Specifications. All refuse impoundments and dams shall be designed to meet the following design storm criteria based upon hazard classification.

(1) Class A impoundments shall be designed for a probable maximum precipitation (PMP) of a six (6) hour or greater event plus three feet of freeboard. ~~If-the-storage-times effective-height-is-less-than-3,000-(acre-feet)(feet), Soil Conservation Service Pond Standard-378-may-be-substituted.~~

(2) Class B impoundments shall be designed for a probable maximum precipitation (PMP) of a six (6) hour or greater event plus three (3) feet of freeboard.

(3) Class C impoundments shall be designed for a probable maximum precipitation (PMP) of a six (6) hour or greater event.

(g) Primary and Emergency Spillway Design. All impoundments must be capable of passing through a spillway or outlet works or a combination thereof, that portion of the design storm that cannot be safely stored in the impoundment and to draw down the stored portion of the design storm within the specified terms in accordance with the following:

(1) Class A impoundments must be designed with an open channel spillway unless otherwise approved by the Commissioner, Ninety (90) percent of the stored portion of the design storm must be discharged or removed within ten (10) days after the storm event.

(2) Class B impoundments shall be designed with either an open channel spillway only, or with an emergency spillway and a principal spillway together. Ninety (90) percent of the stored portion of the design storm shall be discharged or removed within ten days after the storm event.

(3) Class C dams may be designed in one of three ways:

(A) An impoundment designed without discharge structures shall be capable of storing a minimum of two (2) six (6) hour duration probable maximum storms. Water shall be removed from the impoundment to its lowest practical level within ten (10) days after the storm event by pumping or by other means if storm water reduces the storage capacity to one probable maximum storm or less.

(B) An impoundment designed with a decant or principal spillway only shall be capable of storing at least one (1) six (6) hour duration probable maximum storm. Ninety (90) percent of the stored portion of the storm shall be discharged or removed within ten (10) days after the storm event.

(C) An impoundment designed with either an open channel spillway only, or with an emergency spillway and principal spillway together shall be capable of discharging that portion of the six (6) hour duration probable maximum storm that cannot be safely stored in the impoundment. Ninety (90) percent of the stored portion of the storm shall be discharged or removed within ten (10) days after the storm event.

(4) A single open channel spillway may be used only if it is:

(A) Of non-erodible construction and designed to carry sustained flows; or

(B) Earth or grass-lined and designed to carry short term, infrequent flows at non-erosive velocities where sustained flows are not expected.

(h) Open Channel Spillways. All open channel spillways must comply with the design standards of this section and the following additional standards:

(1) Any open channel spillway designed for less than one hundred (100) percent probable maximum precipitation shall be

provided with freeboard above the maximum water surface as determined by the equation $1+.025vd^{1/3}$.

(2) All open channel spillways shall be designed to carry-constructed of non-erodable material where sustained flows where-use-of-non-erodable-materials-is-proposed-for-construction are expected, or designed-to-carry-may be of earth or grass lined construction where short term infrequent flows at nonerosive velocities, when-sustained-flows are not-expected-where-earth-or-grass-lined-construction-is-proposed.

(3) Excess excavated material not needed to construct and maintain the spillway channel must be properly disposed of in the permit area.

(4) Topsoil removed from channel excavation shall either be redistributed on another part of the permit area or stockpiled for future use.

(i) Pipe Spillways. All pipe spillways must comply with the requirements of this section and the following additional requirements:

(1) The pipe spillway inlet must be protected by a designed trash rack.

(2) All riser-type spillways must be designed to prevent vortexing.

(3) A skimming device is required where floating pollutants exist or are anticipated.

(4) An adequate foundation and bedding shall be designed for all pipes and risers.

(5) All pipe spillways shall be designed to provide seepage control along the conduit.

(6) The pipe spillway shall be of sufficient strength to withstand the maximum load of the fill above it.

(7) All pipe spillways shall be constructed of suitable material to resist deterioration for the design life of the facility.

(8) The outlet of all pipes, where blockage by animals can occur, must be protected by an animal guard.

~~----- (j) -- Emergency Drawdown Devices. -- All impoundments meeting the size requirements of paragraphs (a), (b), or (c) of this subsection constructed after the effective date of the Act must be designed with a gated drainpipe or principal spillway gate for draining the impoundment. -- All drain pipes must meet the requirements for pipe spillways.~~

22.5 Performance Standards. The following performance standards shall be met for all coal refuse disposal sites.

(a) Controlled Placement. All coal refuse sites shall be placed in new or existing disposal areas within a permit area designated for this purpose. Coal mine refuse shall be placed in a controlled manner to:

(1) Minimize adverse effects of leachate and surface-water runoff on surface and ground water quality and quantity;

(2) Ensure mass stability and prevent mass movement during and after construction;

(3) Ensure that the final disposal facility is suitable for reclamation and revegetation compatible with the natural surroundings and the approved postmining land use;

(4) Not create a public hazard; and

(5) Prevent combustion.

(b) Extraneous Refuse. Coal mine refuse material from activities located outside a permit area may be disposed of in the permit area only if approved by the Commissioner. Approval shall be based upon a showing that such disposal will be in accordance with the standards of this section.

(c) Slope Protection. Slope protection shall be provided to minimize surface erosion at the site. All disturbed areas, including diversion channels that are not riprapped or otherwise protected, shall be revegetated upon completion of construction.

(d) Site Development. Clearing and grubbing shall be performed in the disposal area prior to placement of refuse material. Topsoil shall be removed, segregated, and stored or redistributed in accordance with Subsection 14.3 of these regulations. If approved by the Commissioner, organic material may be used as mulch, or may be included in the topsoil to control erosion, promote growth of vegetation, or increase the moisture retention of the soil.

(e) Final Configuration. The final configuration of the refuse pile shall be suitable for the approved postmining land use. Terraces may be constructed on the outslope of the refuse pile if required for stability, control or erosion, conservation of soil moisture, or facilitation of the approved postmining land use. The grade of the outslope between terrace benches shall not be steeper than 2h:1v (50 percent).

(f) Impoundment Within Fill Areas. No permanent impoundments shall be allowed on the completed refuse pile. Small depressions may be allowed if they are needed to retain moisture, minimize erosion, create and enhance wildlife habitat, or assist revegetation, and if they are not incompatible with stability of the refuse pile.

(g) Topsoiling. Following final grading of the refuse pile, the coal mine refuse shall be covered with a minimum of four (4) feet of the best available, nontoxic and noncombustible material, in a manner that does not impede drainage from the underdrains. The Commissioner may allow less than four (4) feet of cover material based on physical and chemical analyses which show that the revegetation requirements of Section 9 of these regulations will be met.

(h) Notification of Hazardous Conditions. If any examination or inspection discloses that a potential hazard exists, the Commissioner shall be informed promptly of the finding and of the emergency procedures formulated for public protection and remedial action. If adequate procedures cannot be formulated or implemented, the Commissioner shall be notified immediately. The Commissioner shall then notify the appropriate agencies that other emergency procedures are required to protect the public.

(i) Disposal in Underground Workings. Coal mine refuse may be disposed of in underground mine workings in accordance with the provisions of paragraph (s) of subsection 22.3 of this section.

(j) Construction Specifications. New and existing impounding structures constructed of coal mine refuse or intended to impound coal mine refuse shall meet the following requirements:

(1) Coal mine refuse shall not be used for construction of an embankment which impounds water unless it has been demonstrated to the Commissioner that the stability of such

a structure conforms to the requirements of this section and the use of coal mine refuse will not have a detrimental effect on downstream water quality or the environment due to acid seepage through the impounding structure. The stability of the structure and the potential impact of acid mine seepage through the impounding structure shall be discussed in detail in the design plan.

(2) If an impounding structure constructed of coal mine refuse or intended to impound coal mine refuse meets the criteria of paragraph (c) of Subsection 22.4 of this section, the combination of principal and emergency spillways shall be designed and constructed in accordance with paragraphs (g) and (h) of Subsection 22.4 of this section.

(3) Spillways and outlet works shall be designed to provide adequate protection against erosion and corrosion. Inlets shall be protected against blockage.

(4) Runoff from areas above the disposal facility or runoff from surface of the facility that may cause instability or erosion of the impounding structure shall be diverted into stabilized diversion channels designed to safely pass the runoff from a one hundred (100) year, twenty-four (24) hour precipitation event.

(5) Impounding structures constructed of or impounding coal mine refuse shall be designed so that at least ninety (90) percent of the water stored during the design precipitation event can be removed within a ten (10) day period.

(6) No coal refuse impoundments shall remain as permanent impoundments. Upon completion of reclamation, such structures shall not be capable of storing or impounding water.

(7) Slope protection shall be provided to protect against erosion and sudden drawdown. Embankment faces shall be vegetated or otherwise stabilized in accordance with approved procedures.

(k) Drainage and Sediment Control. Drainage control measures shall meet the requirements of Section 5 of these regulations. After grade release, discharges from the permit area shall not lower the water quality of receiving streams.

(l) Removal of Abandoned Coal Refuse Piles. Where coal refuse is to be removed from an abandoned coal refuse disposal area under a special permit issued pursuant to subsection (d)

Title 38
CSR 2
Section 22

Section 28 of the Act and subsection 3.14 of these regulations, the following standards shall be met:

(1) Removal of refuse shall be complete when possible and shall be accomplished in successive horizontal lifts with a maximum elevation difference between working benches of twelve (12) feet or may be removed down a slope from the top to the toe provided that the slope is no steeper than 2H:1V. No refuse may be removed from the toe of the original embankment until the final removal process.

(2) At all times during removal operations, care shall be exercised to protect the operating personnel, the public, and to insure long-term stability in accordance with the approved plan.

(3) Where partial removal is approved, the final graded slopes of the remaining refuse shall be no steeper than 2H:1V and have at least one bench for every fifty (50) feet of change in elevation.

(4) Should burning areas be encountered, the fires shall be extinguished in accordance with paragraph (m) of this subsection, and removal of refuse shall be done in a safe manner. The final graded slopes of the coal refuse pile shall result in a stable configuration having a static safety factor of 1.5 as demonstrated by a stability analysis.

(5) The total disturbed area shall be regraded in such a manner as to be compatible with the natural surroundings and shall be revegetated in accordance with Section 9 of these regulations. Such regrading and revegetation shall occur as contemporaneously as practicable with removal operations as reflected in the reclamation plan.

(6) All remaining refuse materials disturbed by the operation shall be covered with a minimum of four feet of cover of non-toxic and non-combustible material sufficient to establish adequate vegetation except that a lesser cover may be used based on chemical and physical analysis in accordance with paragraph (k), subsection 9.2, of these regulations.

(7) Regrading drainage control shall be provided in accordance with the approved reclamation plan.

(m) Burning Refuse Piles. Where burning or burned refuse is encountered in the construction of a new structure or the

reconstruction or removal of an existing structure, the following standards shall be met:

(1) Coal mine refuse fires shall be extinguished by the person who conducts the surface mining activities, in accordance with a plan approved by the Mine Safety and Health Administration. The plan shall contain, at a minimum, provisions to ensure that only those persons authorized by the operator, and who have an understanding of the procedures to be used, shall be involved in the extinguishing operations.

(2) No burning or burned coal mine refuse shall be removed from a permitted disposal area without a removal plan approved by the Commissioner. Consideration shall be given to potential hazards to persons working or living in the vicinity of the structure.

22.6 Inspections. A qualified registered professional engineer, or other qualified professional specialist under the direction of the professional engineer, shall inspect the refuse pile during construction. The professional engineer or specialist shall be experienced in the construction of similar earth and refuse structures. Inspection reports shall be retained for review at or near the site.

(a) Non-impounding Structures. Inspections of non-impounding refuse piles shall be made at least quarterly throughout construction and during critical construction periods, which shall include at a minimum:

(1) Foundation preparation including the removal of all organic material and topsoil;

(2) Placement of underdrains and protective filter systems;

(3) Installation of final surface drainage systems;
and

(4) The final graded and revegetated facility.

(b) Unscheduled Inspections. Regular inspections by the engineer or specialist shall also be conducted during placement and compaction of coal mine refuse materials. More frequent inspections shall be conducted if a potential danger or harm exists to the public health and safety or the environment. Inspections shall continue until the refuse pile has been finally

graded and revegetated or until a later time if required by the Commissioner.

(c) Reporting Requirements. The following reporting requirements shall be met:

(1) The qualified registered professional engineer shall provide a certified report to the Commissioner promptly after each inspection, that the refuse pile has been constructed and maintained as designed and in accordance with the approved plan, the Act, and these regulations. The report shall include any appearances of instability, structural weakness, and other hazardous conditions; and

(2) The certified report on the drainage system and protective filters shall include color photographs taken during and after construction, but before underdrains are covered with coal mine refuse. If the underdrain system is constructed in phases, each phase shall be certified separately. The photographs accompanying each certified report shall be taken in adequate size and number with enough terrain or other physical features of the site shown to provide a relative scale to the photographs and to specifically and clearly identify the site.

22.7 Impounding Structures. Inspection of impounding refuse piles shall be made by a qualified registered engineer or other qualified professional specialist under the direction of the professional engineer. The professional engineer or specialist shall be experienced in the construction of impoundments.

(a) Inspection Frequencies. Inspection shall be made regularly but not less than quarterly during construction, upon completion of construction, and at least yearly until removal of the structure or release of the performance bond. ~~All impoundments shall be examined at least quarterly by a qualified person designated by the operator for appearances of structural weaknesses or other hazardous conditions.~~

(b) Reporting Requirements. The qualified professional registered engineer shall promptly, after each inspection, provide to the Commissioner a certified report that the impoundment has been constructed and maintained as designed and in accordance with the approved plan and these regulations. The report shall include discussions of any appearances of any instability, structural weakness, or other hazardous condition, depth and elevation of any impounded waters existing storage capacity, and existing or required monitoring procedures and

instrumentation, and any aspects of the structure affecting stability.

(c) Examinations. Examination of impoundments meeting or exceeding the size specification or other criteria set forth in the federal Mine Safety and Health Administration regulations at 30 CFR 77.216 shall, in addition to meeting the inspection requirements of paragraphs (a) and (b) of this section, comply with the MSHA requirements of 30 CFR 77.216-3.

Other impoundments shall be examined at least quarterly by a qualified person designated by the operator for appearances of structural weaknesses and other hazardous conditions.

(d) Filing of Reports. A copy of each inspection or examination report shall be retained at or near the mine site.

PUBLIC HEARING RECORD

RESPONSE TO COMMENTS

West Virginia Surface Mining and Reclamation Regulations

CSR 38-2

October 10, 1990

On October 10, 1990, the West Virginia Division of Energy (DOE) held public hearings on proposed amendments to the above-captioned regulations in the Air Pollution Control Commission Conference Room at 1558 Washington Street, East, Charleston, West Virginia. The hearing record was opened at 10:00 a.m. by Stephen Keen, Director of Mines and Minerals and Roger T. Hall, Energy Administrator.

It was announced at the outset of the hearing that, in response to a number of requests, the comment period was being extended to October 19, 1990 to allow additional time for formal written comments to be prepared. It was also announced that an open meeting would be held on October 24, 1990 to further discuss the substance and rationale for the proposed amendments. (See State Register, October 12, 1990.)

As a matter of clarification, it was pointed out that the majority of the proposed amendments which are the subject of the public hearing were made in response to a list of required revisions received from Federal Office of Surface Mining Reclamation and Enforcement (OSMRE) in a letter dated May 23, 1990. Other proposed amendments are a result of changes in federal regulations listed in a March 6, 1990 document identified as Regulation Reform Review III. Some further proposed amendments are a result of DOE incorporating into the regulations a number of long-standing policies, or to correct editorial and clerical errors.

The attendees at the public hearing are as indicated on the attached attendance sheet. Oral comments were received from Ben Greene, President, West Virginia Mining and Reclamation Association and Mike Burdiss, Staff Coordinator, Coal Miners Political Action Committee. A number of written comments were filed at the hearing with additional written comments filed prior to the close of the extended comment period. The public hearing record was closed at 10:40 a.m.

The following is a discussion and response to all comments received arranged in chronological order by subsections of the proposed amended regulations filed for public review with the Secretary of State September 6, 1990.

- 1.2 Two commentors suggest additional language to paragraph (a) of this subsection which would in effect "grandfather" existing permits. DOE proposed similar language in earlier amendments to the regulations which were found to be inconsistent with federal regulations. It is likely that the suggested language would be similarly rejected; therefore, DOE declines to make the suggested changes.
- One commentor requested that paragraph (c) of this subsection be deleted on the basis of a recent federal court ruling which "struck down" the federal counterpart. The DOE has received notice from OSMRE that this provision would not now be approved, and has therefore deleted it (see attached letter dated October 26, 1990).
- Another commentor suggested alternate language for this paragraph; however, in view of the deletion it appears that the same purpose is served.
- 2.2 One commentor requires the deletion of this subsection on the basis of a federal court order which "strikes down" the federal counterpart. Nevertheless, the DOE has deleted this paragraph (see 1.2 above).
- 2.9 Three commentors suggest that this subsection be revised to reflect federal language wherein operations are considered to be inactive when coal extraction is completed, and thereby not subject to permit renewal requirements. Under the state approved program, both OSMRE and DOE consider reclamation as an ongoing part of mining operations. Therefore, until final backfilling and regrading activities are completed and Phase I bond release is approved, the operation is viewed to be active and subject to all provisions of the Act, these regulations, and the terms and conditions of the permit, including renewal requirements.
- 2.15 Three commentors suggested changes to this subsection; however, DOE has determined that the term "Bench Control Systems" is not used in the text of the regulations and therefore is deleted.

Another commentor maintains that certain parts of this paragraph has no counterpart in federal regulations. In view of the deletion, the comment is satisfied.

- 2.16 Two commentors suggested that qualifying language be developed to clarify terms used in the context of this definition "Best Technology Currently Available". DOE has considered the comment, but has determined that there exists a vast array of currently available technologies which could be applicable. Qualifying the terms would limit use of existing and developing technology and therefore declines to adopt the suggestion.
- 2.38 One commentor suggests that this subsection be expanded to specifically determine what constitutes threshold limits or ranges on the basis that such determination is a requirement under the Save Our Mountains, et al., v Dials settlement agreement. The DOE recognizes its obligations to develop an administrative policy under the agreement and has advised the commentor of the status of this issue. Meanwhile, the DOE is under no obligation by OSMRE, or the agreement, to define these limits or ranges in the regulations. Also, this issue is a subject of federal litigation in which the commentor has an interest. Therefore, the DOE declines to adopt the suggested revision.
- 2.45 Two commentors suggest adding the phrase "that is raised above the natural surface of the land" to this definition of "Embankment" to make it conform to the federal definition. DOE agrees and the language has been added.
- 2.63 One commentor states that the content of this definition of "Historic Lands" is different and less stringent than the comparable federal provision. While DOE agrees that the language is a modification of the federal rule, the existing definition has been reviewed by OSMRE and found to be consistent and is thereby approved as part of the state program. Similar suggested revisions by the commentor were submitted to OSMRE during federal review of the state regulatory program and were rejected at that time also. Therefore DOE declines to amend the existing language as suggested.

- 2.67 Two commentors suggested replacing deleted language from this definition. DOE deleted this language in direct response to OSMRE disapproval of May 23, 1990. Therefore, DOE declines to adopt the commentors' suggestion.
- 2.85 Three commentors suggested a new subparagraph to paragraph (b) of this subsection which would clarify the types of activities which would require sanctions relative to ownership and control. The DOE maintains that this definition merely intends to describe the kinds of individual or corporate links which establish level or degrees of associations between business entities. The criteria for permit block sanctions to which the commentor refers are found in paragraphs (b) and (c) of subsection 3.31.
- 2.96 Four commentors suggested that the qualifying term "substantially" be applied to the term "disturbance" in this subsection on the basis that it is consistent with language in the federal Act. While the DOE understands the concern, the state program in the area of prospecting operations has always required careful control and monitoring. The federal program conceptually would contemplate virtually no land disturbance as a result of prospecting operations. DOE, however, recognizes that land disturbance is frequently necessary to determine the location, quality, and quantity of coal deposits and in some instances the gathering of technical or environmental data. Therefore, the intent of DOE is not to place unjustified burdens on the mining industry relative to prospecting approval, but by the same token, past experience has demonstrated that careful controls are necessary. DOE currently has under review an alternative procedure for obtaining approval of and carrying out prospecting operations where only collection of environmental resource data is involved which may address the concerns raised here providing that federal approval is obtained.
- 2.104 Two commentors suggest qualifying terms be applied to aquifers and water. Although no explanation was given, the DOE believes that the objective here is to limit application of the

term to only significant aquifers which have a demonstrated use. This term is applied within the text of the regulations in various contexts. It is in these contexts where the qualifying terminology has been applied. Adoption of the commentors suggestion would be too limiting and inconsistent with federal provisions. Therefore, DOE declines to adopt the commentors' suggestion.

- 2.114 Two commentors suggest that a definition of "soil material" be added to clarify its meaning as it relates to durable rock fills. DOE agrees and the term is defined at 14.14 (g) (1), (B) of these regulations.
- 2.116 Two commentors suggest that the term "stoniness" be deleted because it is not used in the context of the regulations. The DOE agrees and the term is deleted.
- 2.118 Two commentors seek to insert qualifying language which would limit the application of the term "structure" to its location relative to the mining operation and to impoundments of a certain size classification. In previous drafts of the regulations, such action has been found by OSMRE to be inconsistent with federal provisions. Further, the qualifications as to the application of the term is found in the text of the regulations in the context of which it is used. Therefore, the DOE declines to adopt the commentors' suggestions.
- 2.120 Two commentors suggest the use of an alternative conjunctive term, i.e., "and" in place of "or" making the terms "sinking, collapsing, and cracking" inclusive instead of exclusive relative to subsidence from underground workings. This revision would clearly be inconsistent with federal provisions and limit the surface owners rights to replacement or restoration of damaged resources. Therefore, the DOE declines to adopt the commentors' suggestion.
- 2.133 One commentor suggests alternative language for this definition of "Valid Existing Rights". While the agency recognizes the concern, it is noted that this issue is currently a subject of litigation in federal court in which the

commentor has an interest. Also, the agency has not proposed to amend this subsection bringing into question whether or not the comment is valid and should be considered particularly in view of the fact that the existing provision has been a part of the DOE's federally-approved program for several years. Pending the outcome of the litigation and at the direction of OSMRE, the DOE may wish to address the issue in future rulemaking actions.

3.1 One commentor suggests additional language to be placed in paragraph (d) of this subsection that will make it clear that all permit applications will contain all information relating to contract mining relationships. The DOE maintains that such a requirement clearly exists in the present regulations. Also, amendments to subsection 3.25 (b) and (d) address this issue fully. Therefore, adding the suggested language would be redundant and the suggestion will not be adopted.

3.2 Three commentors suggest the deletion of subparagraph (11), paragraph (b) of this subsection on the basis that it is inconsistent with federal provisions. DOE recognizes that the requirement for notification of 100 feet surface and mineral owners has no federal counterpart. This in itself does not render the provision inconsistent with federal provisions since it is believed to be more stringent than federal. The intent of the more stringent provision is to qualify the term "contiguous" which terms ambiguity has been the subject of much controversy. The DOE believes that the provision resolves the controversy and therefore declines to adopt the commentors suggestion.

Three commentors suggest revisions to paragraph (a) of this subsection, which would in part correct an editorial error and in part require the Commissioner to act on SMA applications in accordance with the Act. DOE has corrected the editorial error; however, find the latter suggestion to be duplicative and therefore declines to adopt the suggestion.

Two commentors point out an editorial error in 3.2 (b) (13) (E). DOE has revised the language appropriately.

Two commentors suggest that paragraph (f) of this subsection be revised so as to exempt permit applications from the requirements of renotification of permit application revisions which are "significant". The DOE maintains that the statute requires such notices regardless of the significance of the application revisions and therefore declines to adopt the suggestion.

- 3.3 One commentor suggests alternative language for paragraph (e) of this subsection. While the DOE recognizes that "Valid Existing Rights" is a major issue, it should be noted that this matter is a subject of continuing litigation in federal court in which the commentor has an interest. Also, the DOE has not proposed amendments to this paragraph, which brings into question whether or not the comment is valid and should be considered particularly in view of the fact that the existing provision has long been a part of the DOE's approved program. Furthermore, the suggested language would seek to extend the applicability of this provisions to things other than occupied dwellings to which it is currently limited by both state and federal law. Therefore, the agency declines to adopt the suggested language.

Two commentors request that a readvertisement of a permit application as required in paragraph (e) of this subsection be limited to only those situations in which a person files an objection or request. The DOE maintains that unless an affected person is made aware of the pending application, he is denied the right to file objections or requests for information; therefore, where significant changes to an application are required subsequent to the original advertisement, an additional one-time ad with a ten-day comment period affords notice to persons who may wish to file objections or requests who would otherwise be denied the opportunity. Therefore, the DOE declines to adopt this suggestion.

- 3.4 Two commentors suggest revisions to paragraph (c) of this subsection which would allow for markings other than color coding to designate permit features of a map. The DOE agrees and will make appropriate revisions.

Two commentors suggest the addition of the qualifying phrase "as applicable" in paragraph (d) for consistency with similar provisions in the regulations. The DOE agrees and will insert the language.

Three commentors seek an explanation of the meaning of subparagraph (24) of paragraph (d) of this subsection and its derivation in federal regulations. The provisions contemplates that with each surface mining application, the applicant will submit graphic descriptions of the sequence of mining cuts and how they will progress throughout the active mining operations. The emphasis here is on how the coal extraction and backfilling and regrading operations will be coordinated so as to keep reclamation current with coal extraction. The federal counterpart is found at 30 CFR 779.24 (c).

- 3.6 Two commentors suggest that paragraph (k) of this subsection be deleted in that it is superfluous in view of the language in subsection 14.17. DOE would point out that the language in 14.17 requires only that fugitive dust be controlled, while this paragraph requires a plan for such control to be included in the application. Therefore, there is a distinctive difference and additionally the plan is, in fact, required by OSMRE at 30 CFR 816.95.

One commentor suggests that paragraph (l) of this subsection be replaced by federal language at 30 CFR 816.101. The commentor also questions if DOE is aware of West Virginia dragline operations and further inquires as to the need for this provision. DOE finds not federal counterpart provision and is indeed aware of dragline operations. The reason for the proposed amendment is to impose controls and require planning of large dragline-type operations.

- 3.7 Four commentors suggest that the strike-through language in paragraph (a) of this subsection be reinstated so as to provide for flexibility on the part of design engineering personnel who through professional creativity may wish to propose alternative designs. The DOE is

sympathetic to this concern and has repeatedly petitioned OSMRE to allow the language to remain, but to no avail. Under the federal provision, this practice can only be employed through an experimental practice. Therefore, the DOE must decline from adopting the suggestion.

Three commentors suggest deletion of subparagraph (6), paragraph (b) of this subsection requiring location of critical foundation areas in excess spoil disposal sites on the basis that there is no federal counterpart. It is also pointed out that the DOE staff lacks competency in reviewing the work of registered professional engineers (RPE). The construction of durable rock fills is a major issue in this state and this provision seeks to clarify that in the permit application the critical foundation areas must be clearly identified. Any competent engineer (RPE) should have no difficulty in ascertaining and properly locating critical areas of a fill. Perhaps even DOE engineers could rise to this level of competency. DOE recognizes that this provision is another example of more stringent criteria than required under the federal program; however, this is not inconsistent with federal provisions.

- 3.8 Two commentors suggest revisions to paragraph (b) of this subsection to provide for a notice to the operator and a reasonable time for response. The DOE agrees and will make the appropriate revisions.
- 3.12 Two commentors suggest that paragraph (b) of this subsection be revised to allow an angle of deformation of less than fifteen degrees where it can be documented that such lesser angle can provide the same level of protection relative to subsidence from underground workings. The DOE established the minimum angle of fifteen degrees based on technical data which indicates that any lesser angle would in fact not provide adequate protection. In the absence of technical data in support of the commentors suggestions, the DOE must decline to adopt the proposed revision.
- 3.14 Two commentors inquire as to the meaning of "Average Quality" in paragraph (a) of this

subsection. DOE intends that the applicant for a special permit to remove existing refuse piles to perform adequate sampling and analysis of the refuse to establish the overall quality of the pile relative to the ASTM standard set forth in this paragraph.

One commentor raises questions about the validity of the ASTM standard. DOE agrees and has revised the language to clarify the proper standard and its application.

Three commentors inquire as to the meaning of the term "baseline water quality" in subparagraph (15) of paragraph (b) of this subsection. DOE intends that where only partial removal of the refuse pile is proposed that sampling and analysis of water quality be performed to establish premining water quality in the same manner as is required for a surface mining permit.

- 3.16 Two commentors suggest alternative language in subparagraph (1) of paragraph (a) to allow the Commissioner discretion as to which state or federal wildlife agencies are consulted with relative to wildlife planning for a surface mining permit application. Although the DOE recognizes that consultation with agencies or agency staff in the area of the proposed mine site would tend to assure familiarity with site specific conditions, the Commissioner is not at liberty to exclude other agencies or staff more removed from the area of the proposed site an opportunity to participate. Therefore, DOE must decline to adopt the suggestion.
- 3.19 Two commentors seek to have the term "Archaeological Sites" removed from this subsection on the basis that there is no federal counterpart. While this term is not specifically used in federal regulations, the Register of Historic Sites does list Archaeological sites. Therefore, for the sake of clarity, DOE includes the term in this subsection.
- 3.22 Two commentors suggest inserting language in subparagraph (6) of paragraph (f) which would tie the requirement for restoring water recharge capacity to Section 24 of the Act. DOE points

out that Section 24 of the Act addresses water replacement rights while this paragraph derives its origin from paragraph (10), subsection (b), Section 12, of the Act. Therefore, DOE declines to adopt the change on the basis that it is not germane.

Two commentors suggest the deletion of the phrase in paragraph (g) which requires upstream and downstream monitoring sites on the basis that such monitoring is not required to establish compliance with effluent limits and that such monitoring sites are more appropriately established under an NPDES permit. While the DOE agrees that such monitoring is not necessarily required to establish compliance with effluent standards, state water quality standards are based on in-stream standards, the compliance of which can only be ascertained through upstream and downstream monitoring. DOE therefore declines to adopt the suggestion.

3.25

One commentor remarked that the DOE had erroneously placed paragraphs (l) and (m), subsection 3.1 from a previous regulation (CSR 38-2 effective September 5, 1989) in this subsection; thereby changing its applicability. The paragraphs in question are in actuality paragraphs (m) and (n) of the September 5, 1990 regulations which are being repropounded as amendments to this subsection because they apply specifically to transfer assignment or sale of permit rights. This action did inadvertently limit the scope of the applicability of these provisions, therefore the DOE is revising the title of the subsection to include those permit actions which would have otherwise not been covered. The subject provisions now appear as paragraphs (b) and (e) of the amended subsection, the title of which now includes "Sale, Conveyance, and Assumption of Control or Ownership of an Operation".

Three commentors suggest that the underscored language in paragraph (b) be deleted on the basis that there is no federal counterpart provision. The DOE acknowledges that no federal counterpart exists; however, the provision is necessary to make it clear that the payment of penalties and fees are the responsibility of the entity who incurred such penalties and fees, and

that such responsibility cannot be transferred through conveyance of mining rights under a permit. The DOE believes that this provision is more stringent than federal regulations and is therefore not inconsistent. OSMRE has not yet rendered a finding on this issue, therefore, the DOE declines to adopt the suggestion at this time.

Two commentors suggest that the language in paragraph (e) of this subsection be deleted since there is no comparable standard in federal law or regulations or the state Act. While the DOE agrees that no comparable provisions exist, it is clear that subsection (c) of Section 18 of the Act intends to block persons having outstanding unabated violations from receiving mining rights under a permit. The underscored language in paragraph (e) of this subsection seeks to make it clear that transfer or other conveyance of mining rights under a permit through what is commonly referred to as "corporate shell games" will not allow owners or controllers of a mining operation to escape its abatement responsibilities for violations. Therefore, DOE declines to adopt the suggestion.

Two commentors pose the question of the derivation of subparagraphs (2) and (3) of paragraph (c) of this subsection relative to federal regulations. DOE has determined that there is no such comparable provision.

Two commentors suggest that an additional paragraph be added to this subsection that would allow only that notices be given to the Commissioner when changes in corporate officers occur without an actual transfer or other conveyance of mining rights under a permit. DOE does not interpret this subsection to do otherwise. Unless an actual transfer or other conveyance is intended, the operator or controller of the mining operation is at liberty to make staffing changes at the corporate level without need of an application under this subsection or public notice thereof. However, in order for the owners or controllers to avoid future potential permit blocks due to inaccurate information, the ownership/control information in a permit application must be updated where corporate level staffing changes are made.

Two commentors inquire as to the use of the term "subcontractor" in paragraph (d) of this subsection. For the sake of clarity, DOE has deleted this term and replaced it with the term "assignee".

One commentor questions the rationale and validity of paragraph (b) of this subsection and its basis in federal provisions. This is a required change mandated by OSMRE. The federal cite is 30 CFR 774.11 (b).

One commentor questions the applications of paragraph (e) of this subsection and asks for the federal site. The intent of the provision is to prevent a violator to avoid permit block by selling the operation. There is no federal counterpart provision.

- 3.26 Two commentors suggest that the language of subparagraph (4) of paragraph (a) is superfluous. DOE does not agree. Past experience indicates that insurance policies are frequently allowed to expire.
- 3.27 Two commentors suggest that when the Commissioner requires revisions to permits as provided in paragraph (c) of this subsection, that permittee be given advance notice and a reasonable time to respond. The DOE agrees and has revised the language accordingly. Two additional commentors suggestion that such revisions be approved by the Commissioner upon receipt is inconsistent with other provisions of the regulations and is therefore declined.
- One commentor requested a federal cite. DOE directs the commentor to 30 CFR 774.11 (b).
- 3.28 One commentor objects to the proposed amendment of paragraph (c) of this subsection on the basis that it seeks to expand the DOE's authority to approve boundary revisions to a permit. The DOE acknowledges that the proposed language could be misinterpreted in the suggested manner and therefore proposes revision to this paragraph which seeks to clarify the DOE's intent. Through experience, the DOE has found that in some instances IBRs revise a permit in such a way that compliance with public notice

requirement of the Act and regulations is in order. The proposed language sought to achieve this requirement and has been further revised to make the intent clear.

Two commentors suggest alternative language in subparagraph (20) of paragraph (b) of this subsection to remove unreasonable limitations on acreage expansions under IBRs. The DOE recognizes the inequity but is pursuing an alternative approach to resolving this matter. Therefore, DOE declines to adopt the suggestion at this time.

- 3.29 Two commentors contend that the language in paragraph (b) of this subsection is contradictory to federal provisions and suggest alternative language providing for advance notice of termination and a reasonable time for response by the permittee. DOE maintains that it is the responsibility of the permittee to be aware of the three-year termination requirement of the Act. Any request by the operator to extend the three-year "not started" status should be done in a timely manner well in advance of the termination date. Therefore, the DOE declines to adopt the suggestion.

One commentor questions the applicability of the variance granted in paragraph (c) to surface-type mining operations. DOE responds that there is no relevance since this provision applies only where underground mining is anticipated. Performance standards in Section 14 address variances for surface mining.

- 3.30 Three commentors seek to insert alternative language in paragraph (a) of this subsection. While the DOE understand the rationale for the suggested change, the commentor overlooks the requirement that exempted federal and state projects be at least fifty percent government funded. Such projects as proposed by the commentor would not meet this criteria; therefore, DOE must decline to accept the suggestion.

Two commentors pose the question as to why local governments, public service districts, etc., are not granted the exclusion. DOE acknowledges that this is an oversight in the program and is

seeking to remedy the problem through statutory amendments.

- 3.31 One commentor objected to the use of the phrase "known to be" in paragraphs (c) of this subsection. Although this phrase has been in the regulations since September 5, 1990, and was not a part of the current proposed amendments, the DOE agrees that the requested change brings the current regulations into closer conformity with federal provisions and therefore is deleting the phrase.

Two commentors suggest that the entire paragraph (b) of this subsection be deleted on the basis that there is no federal counterpart, that it codifies the Save Our Mountains settlement agreement of this issue and that it is arbitrary and capricious. The DOE has amended the language in this provision in response to another comment; however, total deletion is not a consideration. The provision is consistent with the permit block requirement of the federal regulations, and although some of the requirements are an outgrowth of the settlement agreement, the DOE fully intends as a matter of policy to carry them out throughout the foreseeable life of the program. Therefore, codifying the language in whatever final form is adopted is appropriate and not arbitrary or capricious.

- 3.33 Two commentors inquire as to the meaning of the term in paragraph (b) of this subsection "Violation Review Criteria". The term if taken in the context within which it is used seems self-explanatory. To wit: when the DOE determines that at the time a permit was issued the applicant was in violation either directly or through an ownership/control link, the Commissioner will review such information and determine whether or not the permit was improvidently issued. The federal counterpart is 30 CFR 773.20 (b)(1).

- 4.1 Two commentors seek to amend the language in paragraph (a) (1) (i) of this subsection to exclude roads inside the coal and spoil perimeter of a permit area from classification as a primary road. The DOE maintains that the intent of both federal and state regulations is

to include these roads except as correctly described in the commentors explanation section. Therefore, the DOE declines to adopt the suggested language.

One commentor inquired as to the impact of this provision on infrequently used access roads. As indicated above, the DOE intends that these standards apply only to primary roads.

- 4.2 Three commentors suggest that subparagraph (6) of paragraph (a) be amended to include offset lines for surveying and marking road locations. The DOE agrees and makes the appropriate revision.

One commentor asked for the federal counterpart provision. DOE responds that this provision is a carry-over from existing state regulations.

- 4.3 Two commentors suggest deletion or revision of subparagraph (2) of paragraph (a) of this subsection. The DOE agrees that the provision as written may be misleading and has revised the language to make it clear that the provision applies only to road crossing of intermittent or perennial springs.

- 4.5 Three commentors request to know the derivation of this subsection in federal regulations. DOE acknowledges that the federal regulations use a somewhat different classification system for roads and the criteria for design and construction. It should be noted, however, that the class of road and the design criteria thereof of this subsection are tailored specifically to the topographic features associated with mining operations in the state. This provision seeks to make it clear that roads in this classification are justifiably exempt from many of the more detailed design criteria of roads used for coal haulage or transportation.

- 4.7 Two commentors inquire as to whether the term "wherever necessary" in subparagraph (2), paragraph (a), leaves to the design engineer the discretionary judgment of the placement of cross culverts. Without the qualifying phrase, this provision would require culverts to be installed at all locations on all roads at the designated

intervals. The DOE recognizes that in some situations roads may not intercept sufficient runoff to warrant installation of culverts at the frequency intervals specified. Alternative spacing configurations are not judgment calls, but are sound engineering practices based upon empirical data which must be provided to support the alternative configuration. The DOE will accept such alternatives which are adequately supported with empirical data.

One commentor questions the rationale for subparagraph 2 (B) of paragraph (a) of this subsection. DOE has amended the language to allow for substitution of alternative design criteria.

- 4.8 Two commentors imply that paragraph (b) of this subsection excludes the use of sumps on roads and suggests the use of alternative design criteria. DOE maintains that the proposed rule has sufficient flexibility to allow for alternative design standards.
- 4.10 Two commentors suggest the deletion of subparagraph (1) of paragraph (e) and replace it with federal language. This provision has been a part of the state approved program for several years and has been found to be more consistent with federal provisions by OSMRE. Therefore, DOE declines to adopt the suggestion.
- 4.11 Two commentors suggest that in subparagraph (5) of paragraph (a) of this subsection that the design precipitation event be made consistent with subsection 4.7. In reviewing this suggestion, DOE has determined that it is subsection 4.7 which is inconsistent with state and federal standards. Therefore, the 1 year 24 hour precipitation event in 4.7 has been changed to a 10 year 24 hour event.

One commentor questions the applicability of subparagraph (2), paragraph (a), of this subsection to subsection 5.4, subsections 5.4 and 5.5 of these regulations and to the federal regulations. DOE responds that this provision is applicable where road embankments, which are in effect, structures as described in subsection 5.4 and 5.5 of these regulations and are subject to the same design criteria. The subject

provision is a requirement under federal regulations.

One commentor questions subparagraph (3), paragraph (a) of this subsection as being arbitrary. DOE's intent of this provision is a common-sense guideline for location of roads.

One commentor questions the validity of paragraph (c) of this subsection. DOE responds that this provision is derived from federal regulations at 30 CFR 816.151 (d) (e).

4.12 Two commentors suggest that revisions be made to paragraph (a) of this subsection to clarify that operators or permittees are not responsible for environmental controls on support facilities such as railroad spurs, which are not within their control. DOE agrees and has made the appropriate revision.

4.13 Two commentors suggest a number of revisions to this subsection.

DOE agrees that certification should apply, by and large, only to primary roads and has revised the language to reflect this approach.

The correct professional title has been assigned to land surveyors.

DOE disagrees that the last two sentences should be stricken because they are inconsistent with the definition of road and with state and federal provisions. These two sentences were in fact included to make it clear that certification requirements apply to primary roads which are progressively constructed at the trailing edge of coal extraction and spoil placement operations.

DOE maintains that "as built plans" have been addressed in the term "certification statement" which allows for modifications of original design criteria. It should be understood, however, that sound engineering practices would dictate that the development of original design criteria and specifications should be sufficiently accurate such that modifications are not frequently necessary.

5.2

Two commentors suggest that the phrase "including roads" be removed from paragraph (a) of this subsection on the basis that it is inconsistent with other state and federal provisions. DOE maintains that both state and federal regulations clearly intend for buffer zones to apply to roads, however, there are exemptions where the permit applications contain sufficient documentation that the environmental integrity of the stream is adequately protected. DOE does not view this as a significant diversion from established practice.

One commentor questions the practicality of applying subparagraph (11) and (12) of paragraph (b) of this subsection. DOE recognizes that there are always site specific exceptions, however, the rule has practical application in most situations. The word "stable" is used in its normal engineering context. The federal cite is 30 CFR 816.49 (a) (5) (i).

One commentor questions the use of the term "non-erodable" in subparagraph (1) of paragraph (c) of this subsection. The term is used in its usual context. Grass is not considered within the scope of this term.

5.4

Two commentors suggest deletion of the phrase "nor less than two years before final bond release" in paragraph (h) of this subsection on the basis that it is not consistent with federal provisions. DOE acknowledges that the language does not appear in federal provisions; however, it believes that this provision is necessary to make it clear that prior to final bond release, all disturbed areas must support vegetation which is adequate to control erosion. Two years (two growing seasons) is the accepted standard for making this determination. This provision has been found to be consistent with federal provisions; therefore, DOE declines to adopt the suggestion.

Two commentors suggest that in subparagraph (3) of paragraph (b) the qualifying term "applicable" be used relative to water quality criteria. DOE agrees and has inserted the term.

Three commentors inquire as whether subparagraph (4) of paragraph (b) provides the same

flexibility as 30 CFR 816.46 (c) (iii) (A). Taken in conjunction with the other design criteria of the federal provision, DOE would consider whatever flexibility is provided therein.

Two commentors seek revision to subparagraph (10) of paragraph (b) of this subsection which would limit its applicability to MSHA size structures to be consistent with federal provisions. DOE agrees and will correct this oversight.

Three commentors suggest that paragraph (e) of this subsection is inconsistent with federal provisions at 30 CFR 816.49. DOE does not agree. The federal provision references the inspection criteria of MSHA size impoundments to 30 CFR 77.216, but uses identical language for inspections as found in this paragraph.

Two commentors suggest that licensed land surveyors be authorized to inspect impoundments in paragraph (e) (1) (B) of this subsection. DOE maintains that 5.4 (e) (1) authorizes other qualified specialists which may include licensed land surveyors.

- 5.5 Three commentors request that paragraph (c) of this subsection recognize the provisions of West Virginia Code 19-25-2. DOE has revised the language to reflect this provision with the exception of MSHA size structures.

One commentor questions DOE's authority to inspect privately-owned structures. DOE agrees and the language has been amended to correct this oversight. In conjunction with the agreed limitation on landowner liability, DOE has amended the proposed rule to require the operator to reclaim any impoundment which is subject to either 30 CFR 77.216 or Chapter 20, Article 5D, of the Code of West Virginia. DOE believes that although such structures may be built to facilitate mining operations, it is not in the public interest, especially with a limit on landowner liability, to allow them to remain in place beyond reclamation of the site.

- 6.8 Three commentors suggest that the deleted language in paragraph (a) be reinstated on the

basis that it is inconsistent with 30 CFR 816.62(c). DOE would point out that the language is deleted to make this provision consistent with 30 CFR 816.62 (a).

Two commentors suggest that a new subparagraph (6) be added to paragraph (a) of this subsection which would exempt a permit applicant from giving notice to residents within one-half mile of the proposed permit area if those residents had been given a previous notice by the permit applicant under an existing permit. The DOE recognizes that notice of rights for preblasting surveys can be a burdensome and costly process particularly where no blasting will occur on some areas of the permit. However, the proposal could result in some residents who may as a result of the new permit be closer to blasting activities without being given prior notice to which they are entitled. Therefore, the DOE must decline to adopt the suggestion.

Two commentors suggest adding a new subparagraph (7) to paragraph (a) of this subsection which would provide that refusal by residents or property owners to grant the operator entry for purposes of preblast surveys constitutes a waiver of rights to claim damage from blasting. The DOE believes that such a provision would constitute a denial of due process under the law and therefore declines to adopt the suggestion.

- 11.1 Three commentors request that language be added to paragraph (a) of this subsection to clarify the liability period for the required insurance. DOE has revised the paragraph to clarify that the liability period is for the term of the reclamation obligation in accordance with federal provisions.
- 12.2 Two commentors suggest adding a new paragraph (g) to this subsection which would provide for incremental bond release. It must be pointed out to the commentors that the current bonding structure contemplates that the full amount of the bond remain in effect during the active mining and reclamation period. To allow incremental bond release would require a complete restructuring of bonding, bond release, bond forfeiture, and the special reclamation tax. DOE believes that such a restructuring

would result in prohibitive economic burdens on a large segment of the mining industry; thereby negatively impacting state revenues in a significant way. Therefore, DOE must decline to adopt the suggestion.

Three commentors request that subparagraph (4) of paragraph (c) be deleted in its entirety. DOE recognizes the controversial nature of this provision and has under review alternative approaches to insuring long-term compliance with water quality relative to acid-producing operations. However, contrary to the commentors opinion, the language as proposed is consistent with current state and federal laws and regulations; therefore, the DOE declines to adopt the commentors suggestions at this time.

12.4 One commentor suggests amending this subsection by adding a new paragraph (f) to incorporate into the regulations a procedure required under the Save Our Mountain et al., v. Dials settlement agreement. The proposed amendment is not one which is a required revision by OSMRE nor is it required under the federal program. Therefore, the DOE declines to adopt the suggestion, although it fully intends to carry out its administrative policy obligations under the agreement.

Two commentors suggested that subparagraph (2) of paragraph (d) of this subsection be revised to give discretionary authority to the Commissioner in determining when or if bond forfeited sites are to be reclaimed. The DOE maintains that subsection (g) of Section 11 of the Act supersedes this provision and although it does not grant full discretionary authority to the Commissioner, it established the requirement for a planning process for reclamation of such sites and expenditures of monies in the Special Reclamation Fund. Furthermore, the bond forfeiture and special reclamation program is currently undergoing intensive review by DOE and OSMRE. Therefore, DOE declines to adopt the suggestion at this time.

13.1-9 Two commentors suggest that these subsections be stricken or otherwise modified to reflect varying degrees of complexity of prospecting

operations. The DOE understands the concerns raised by the commentors and currently has under review alternative approaches to address this matter. Therefore, DOE must decline to adopt the suggestions at this time.

- 13.1 Two commentors suggest that subparagraph (6) of paragraph (c) be revised to limit the requirement for identifying critical habitats to only those in the prospecting area. The DOE has corrected this oversight, both here and in paragraph (d) of subsection 13.2.

One commentor inquires as to the federal cite to paragraph (d) of this subsection. The federal cite is 30 CFR 772.12 (b) (12).

- 14.5 Two commentors request that language be inserted in this subsection to reflect the water supply replacement rights provisions of Section 24 of the Act. The commentors are directed to the language contained in paragraph (h) of this subsection.

- 14.7 One commentor suggests alternative language for paragraph (d) of this subsection relating to water treatment. This provision has been a long-standing part of the DOE's approved program and is not included as part of the proposed amendments. The DOE feels that adoption of the proposed language may place at risk the existing OSMRE approval.

- 14.8 Two commentors object to DOE's proposed amendment of subparagraph (2) paragraph (a) of this subsection on the basis that technical and legal support is not provided and has not been subjected to public review and comment. The DOE has had the issue of contemporaneous reclamation of multiple seam mining operations under review for several months. It has exhausted a large number of potential sources of guidance and finds that very little legal or technical information is available. As this issue is of primary concern to both DOE and OSMRE, it is appropriate that the DOE proposed amendment, although original in nature, be advanced in its present context. While the DOE understands the concerns expressed by the commentor, the objections raised lack sound basis.

Two commentors suggest amending paragraph (a) (2) (E) (iii) of this subsection to allow for the incorporation of topsoil and other soils in the transport zone for durable rock fills into the 20% fines calculations. DOE intends that these transport zones be properly cleared and prepared prior to dumping of durable rock across them. Therefore, the suggestion is not adopted.

Two commentors suggest that revisions to subparagraph (5) of paragraph (a) provide for the commissioner to approve placement of woody material in the backfill after determining that it will not affect the stability. DOE declines to adopt the suggestion because it is incumbent upon the operator to establish to the satisfaction of the Commissioner that adequate stability can be attained. The comparable federal cite is 30 CFR 816.107 (d).

- 14.9 Two commentors suggest that the word "collectively" be removed from subparagraph (1) of paragraph (b) of this subsection. DOE believes that the alternative to collective treatment is treatment at each auger hole where discharges are evident. This would seem to be unworkable; therefore, DOE declines to adopt the suggested change.
- 14.11 Two commentors suggest that this entire subsection be deleted and replaced with federal provisions relating to temporary cessation of mining operations. OSMRE has approved this subsection as being consistent with the federal provision. DOE believes that although the state provision is more descriptive and procedurally precise it is not more stringent than federal its intent is more clearly stated which is desirable. Therefore, DOE declines to adopt the suggestion.
- 14.12 One commentor required as to the federal counterpart of this subsection. The federal cite is 30 CFR 783.16 (a) (3).
- 14.14 One commentor objected to proposed amendments of paragraph (g) of this subsection citing technical data previously provided to the DOE which suggests alternative criteria. The DOE has reviewed and given consideration to the technical data, but declines to revise the

proposed language in that it conforms to or exceeds federal regulatory provisions.

One commentor inquires as to federal reference for subparagraph (4) of paragraph (b) of this subsection. This provision has no federal counterpart. With regard to subpart (D) of this subparagraph, the commentor suggests this provision is misplaced and should be in Section 5 of the regulations. DOE maintains that the provision is specific to durable rock fills and is appropriately placed.

Two commentors inquire as to whether or not paragraph (c) is the "no cost reclamation provision". DOE responds that it is.

Two commentors suggest that subparagraph (3) of paragraph (e) be deleted and replaced with federal language at 30 CFR 816.71 (e)(3). This subparagraph is derived from 30 CFR 816.71 (e) (4) and is verbatim.

Three commentors suggest that subparagraphs (8), (5) and (6) be deleted from paragraphs (e), (f) and (g) respectively and replaced with language from 30 CFR 816.71. DOE acknowledges that the language in these subparagraphs more specifically describe the requirements for removal of organic material from excess spoil sites. However, this more descriptive language is an outgrowth of directives from OSMRE regarding this subject and represents a compromise position between the two agencies. Therefore, DOE must decline to adopt the suggestion unless agreed to by OSMRE.

One commentor inquires as to the definition of the term "stabilize" in subparagraph (4) (A) of paragraph (e) of this subsection. Stabilize in the context of this provision means to prevent erosion or other failure.

Two commentors suggest that the requirements for terraces of specified size criteria be deleted from subparagraph (8) of paragraph (f) of this subsection. DOE maintains that this requirement has been a long-standing provision of the approved state program and finds no compelling reason to delete these criteria.

Two commentors suggest that subparagraph (5) of paragraph (g) be deleted and replaced with federal language. DOE maintains that specifications for slopes and terraces on the face of fill has been a long-standing provision of the approved state program and finds no compelling reason to delete these criteria.

Three commentors suggest that subparagraph (11) of paragraph (g) of this subsection be deleted on the basis that there is no federal counterpart, and that the term "significant non-compliance" has no basis. DOE maintains that both state and federal law requires sediment control measures to meet water quality standards and effluent limits set by the NPDES program. Often the ponds installed to control sediment are sized for the disturbed area of the finished face of the fill only. DOE finds that these ponds in some instances are inadequate. The alternative to this provision, therefore, would be to require sizing of the ponds for the entire disturbed area of the fill. The term "significant non-compliance" is derived for the Clean Water Act which is applicable in this instance. The DOE declines to adopt the commentors suggestion.

Four commentors seek to have the term "soil material" in subparagraph (1) (B) paragraph (g) of this subsection defined. DOE has amended this paragraph to clarify the term.

Three commentors inquire as to the nature of subparagraph (12), paragraph (g), of this subsection and its derivation in federal regulations. Although there is no federal counterpart, the DOE believes that this provision is necessary for purposes of clarification as to what types of materials are prohibited from placement in a durable rock fill.

14.16

Two commentors inquire as to the significance of the date "February 4, 1987" in paragraph (n) of this subsection. The date is the effective date of the "Rahall Amendment" to the federal Clean Water Act. The context in which the date is used in this paragraph makes its application to remaining operations prospectively and not retroactively.

- 14.17 One commentor inquires as to the applicable standards for "fugitive dust" relative to this subsection. Fugitive dust standards are those which are set by the West Virginia Air Pollution Control Commission.
- 15.2 Two commentors suggest that the underscored language in paragraph (b) be deleted. DOE has inserted this language to clarify a misinterpretation of the existing provision. The existing provision has been interpreted by operators to mean that reclamation on surface disturbance from underground mining operation need not be initiated for six months after the mine is closed. DOE seeks by inserting the subject language that once coal extraction is completed at an underground mine, reclamation efforts must begin within thirty days and that within six months sealing of the portals and backfilling of highwalls must commence. DOE believes that this clarification is necessary and therefore declines to adopt the suggestion.
- 16.2 One commentor suggests that as a result of recent federal court decisions, this subsection should be amended to apply the same standards for subsidence prevention and other considerations to longwall mining as are currently applied to room and pillar mining. While the DOE is aware of the court ruling and has proposed amendments to paragraph (2) of this subsection to conform to federal requirements, it is the DOE's understanding that the judge declined to rule specifically on the issue of longwall mining. Therefore, the DOE proposed at this time to limit its amendment of this subsection to that reflected in paragraph (b) in accordance with federal requirements. The change in this subsection was made at the specific direction of OSMRE, and is in full satisfaction of that directive. The DOE feels that further amendments proposed by the commentor may place at risk the DOE's approved program status (see attached OSMRE letter dated June 22, 1990).
- 16.2 (c) See response to 6.8 (a) (7).
- 20.1 One commentor proposes new language as paragraph (e) of this subsection on the basis that bond-

forfeited sites should be inspected and the status documented because DOE has failed to adequately reclaim forfeited sites. The DOE maintains that such sites are being adequately reclaimed; however, the DOE and OSMRE are currently engaged in a review of this matter. Since the objective of the DOE proposed amendments is to satisfy federal requirements, it seems prudent for the DOE to await the outcome of the joint review before proposing further regulatory amendments to address the issue. Therefore, the DOE declines to adopt the suggested language.

20.3 One commentor suggests addition of a new paragraph (f) which would place into regulations a provision of the Save Our Mountains et al., v. Dials settlement agreement. Although DOE fully intends to fulfill its obligations under the settlement agreement, the proposed amendment is not a required revision by OSMRE and is not a requirement of the federal program. Therefore, DOE declines to adopt the suggested language.

20.5 Four commentors suggest that the strike-through language should be reinstated in paragraph (a) of this subsection to allow the Commissioner the discretionary authority to waive payment of civil penalties in amounts of less than one thousand dollars (\$1,000). DOE agrees that the Commissioner should have such discretionary authority and the language of this provision has been restored, in that it is consistent with both the Act and with the federal program.

20.6 Two commentors inquire as to the nature and intent of paragraph (d) of this subsection and its derivation in federal regulations. DOE acknowledges that there is no federal counterpart; however, experience dictates that during informal conferences issues totally unrelated to the matters being considered are frequently raised. DOE intends that this provision grant authority to the conference officer to limit discussion to the issue at hand.

With regard to the question on "standing", DOE views this term to be of only minimal limitation with regard to whom may participate.

- 20.7 Two commentors question the validity of subparagraph (7-8) paragraph (b) of this subsection. DOE maintains that a seriousness rating of this magnitude is an "imminent harm" violation and thereby requires a cessation order be issued in accordance with subsection 20.3 of the regulation.
- 22.3 Two commentors take issue with paragraph (p) of this subsection as it relates to compaction of refuse material. DOE recognizes the concern and has adopted alternative language to correct this oversight. The proposed revision is now fully consistent with federal rules and with MSHA standards for refuse compaction.
- 22.5 Two commentors suggest alternative language for paragraph (d) of this subsection relative to clearing and grubbing the fill area. DOE fails to understand the rationale for this suggestion unless the commentors anticipate that tree stumps and root balls would not be removed under their suggested language. DOE clearly intends that all tree stumps and root balls be removed from the entire fill area for refuse piles to eliminate combustion hazards and potential fill instability. Such a requirement has been applied to refuse piles since 1976, by MSHA.
- 22.7 Two commentors suggest that paragraph (a) of this subsection be made consistent with federal provisions. DOE has assured that the proposed language is in fact consistent with federal provisions.



United States Department of the Interior
OFFICE OF SURFACE MINING
Reclamation and Enforcement
WASHINGTON, D.C. 20240



JUN 22 1990

Mr. Larry George
Commissioner, Department of Energy
1615 Washington Street East
Charleston, West Virginia 25311

JUN 28 90

COMMISSIONER'S OFFICE
DEPARTMENT OF ENERGY
CHARLESTON, WV 25311

Dear Mr. George:

In National Wildlife Federation v. Lujan (Civil Actions 87-1051, 87-1814 and 88-2788, D.D.C. February 12, 1990), the U.S. District Court for the District of Columbia remanded the Federal rule at 30 CFR 817.121(c)(2) to the Secretary with instructions to revise it by striking the reference to State law. Because sections 102(b) and 516(b)(1) of the Surface Mining Control and Reclamation Act (SMCRA) require that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto be fully protected and that the operator maintain the value and reasonably foreseeable use of surface lands underlain by underground mining operations, the court ruled that the Secretary's limitation on an operator's duty to correct or compensate the owner for material damage to structures caused by subsidence is contrary to SMCRA. The court found that an operator has the obligation to repair or compensate the owner for subsidence-caused material damage to structures without regard to any limitations placed on this liability by State law.

The court did not expressly address 30 CFR 784.20(g)(2), which uses similar language in requiring that each subsidence control plan include a description of the measures to be taken to mitigate or remedy any subsidence-related material damage to structures or facilities. However, since the language and intended use of this rule are essentially identical to those of 30 CFR 817.121(c)(2), the Office of Surface Mining Reclamation and Enforcement (OSM) has determined that this rule should be changed to remove the phrase "to the extent required under State law". An applicant's subsidence control plan should be prepared without regard to any liability limitations imposed by State law.

Under 30 CFR 732.17(d), OSM is required to notify State regulatory authorities of all changes in Federal regulations that may require the State to modify its regulatory program to remain consistent with all Federal provisions. Because the Federal rules have been altered by the court's decision, the provisions of 30 CFR 732.17(d) are applicable.

Mr. Larry George

2

In keeping with the court's decision, OSM, in acting upon a recent State program amendment, did not approve that portion of Subsection 38-2-16.2(c)(2) of the West Virginia Surface Mining Reclamation Regulations containing language similar to the provision that caused the remand of 30 CFR 817.121(c)(2). See 55 FR 21338, May 23, 1990. Since 30 CFR 732.17(g) provides that no State laws or regulations shall take effect for purposes of a State program until approved by OSM, there appears to be no inconsistency between the court's decision and the approved West Virginia program. Unless the State determines and notifies OSM that other State laws or regulations limit its authority to require an operator to repair or compensate the owner for subsidence-related material damage to structures, no further action by the State will be necessary. However, to avoid confusion, I recommend that you amend the rule in question to remove the disapproved language.

Should you have any questions or if OSM can be of additional assistance, please do not hesitate to contact James C. Blankenship, Jr., Director of the Charleston Field Office.

Sincerely,



Deputy Director, Operations and
Technical Services



United States Department of the Interior

OFFICE OF SURFACE MINING

Reclamation and Enforcement
603 Morris Street
Charleston, WV 25301

OCT 26 1990

TAKE
PRIDE IN
AMERICA

RECEIVED 1

OCT 26 90

COMMISSIONER'S OFFICE
DEPARTMENT OF ENERGY
CHARLESTON, WV 25311

Mr. Larry W. George, Commissioner
West Virginia Department of Energy
1615 Washington Street, East
Charleston, West Virginia 25311

Dear Mr. George:

On March 6, 1990, the Office of Surface Mining Reclamation and Enforcement (OSM) informed the Department of Energy that certain provisions of the State's permanent regulatory program were inconsistent with revisions to Federal regulations that were published in the Federal Register between June 8, 1988, and August 30, 1989 (Administrative Record No. WV 834).

In that letter, OSM advised the State of changes that it would have to make in its program in order to comply with new Federal rules relating to reduced inspection frequencies for abandoned sites and the termination of jurisdiction over initial or permanent program and coal exploration sites (53 FR 24872, June 30, 1988, and 53 FR 44356, November 2, 1988).

On August 30, 1990, U. S. District Court Judge Thomas Flannery remanded these rules to the Secretary of the Interior for further action (National Wildlife Federation v. Manuel Lujan). In view of Judge Flannery's decision, issues A-1 (abandoned sites) and D-1 (termination of jurisdiction) in OSM's March 6, 1990, letter are no longer valid. Therefore, West Virginia does not have to amend its program to comply with these requirements at this time. Furthermore, if the State elects to propose such provisions, OSM will be unable to approve them. We will notify you if the circumstances surrounding these rules change.

If you have questions concerning this matter, please notify us.

Sincerely,

James C. Blankenship, Jr.
Director, Charleston Field Office

PUBLIC NOTICE MAILING LIST

1. Clarksburg Publishing Company
Clarksburg Exponent and Telegram
324-326 Hewes Avenue
Clarksburg, West Virginia 26301
2. Inter-Mountain
Post Office Box 1339
Elkins, West Virginia 26241
3. Herald Dispatch
946 Fifth Avenue
Huntington, West Virginia 25720
4. Beckley Newspapers, Inc.
Raleigh Register and Beckley Post-Herald
Post Office Drawer P or R
Beckley, West Virginia 25801
5. The Dominion Post
Greer Building
Morgantown, West Virginia 26505
6. The Ogden Newspapers, Inc.
Wheeling News Register and Intelligencer
1500 Main Street
Wheeling, West Virginia 26003
7. The Charleston Gazette
Post Office Box 2993
Charleston, West Virginia 25330

REGULATION COMMITTEE MEMBERSHIP

Mr. Roger T. Hall
West Virginia Department of Energy
1615 Washington Street, East
Charleston, West Virginia 25311

Mr. Bill Raney
West Virginia Mining and Reclamation Association
1624 Kanawha Boulevard, East
Charleston, West Virginia 25311

Mr. Steve Shaffer
Buffalo Coal Company
P. O. Box 282
Bayard, West Virginia 26707

Mr. Jim Ratcliff
Hobet Mining, Inc.
P. O. Box 305
Madison, West Virginia 25130

Mr. Gary Slagel
Consolidation Coal Company
1800 Washington Road
Pittsburgh, Pennsylvania 15241

Mr. Tom Galloway
Galloway & Greenberg
1835 K. Street, N. W.
Suite 801
Washington, DC 20005

Joshua I. Barrett, Esq.
DiTrapano & Johnson
604 Virginia Street, East
Charleston, West Virginia 25301

Ms. Cindy Rank
West Virginia Highlands Conservancy
Route 1, Box 227
Rock Cave, West Virginia 26234

Mr. Robert Shostak
39 College Street
Athens, Ohio 45701

John McFerrin, Esq.
1105 Tinder Avenue
Charleston, West Virginia 25302

Mr. Norm Steenstrab
West Virginia Citizens Action Group
1324 Virginia Street, East
Charleston, West Virginia 25301

Mr. Brent Wahlquist
Office of Surface Mining
1951 Constitution Avenue
Room 228
Washington, DC 20240

Mr. James C. Blankenship, Director
Office of Surface Mining
603 Morris Street
Charleston, West Virginia 25301

Mr. Mike Burdiss
UMWA
4500 MacCorkle Avenue, S.E.
Charleston, West Virginia 25304

REGISTRATION FOR PUBLIC HEARINGS
WEST VIRGINIA DIVISION OF ENERGY

Meeting: W.Va. Surface Mining Reclamation Regulations CSR 38-2
Date: October 10, 1990

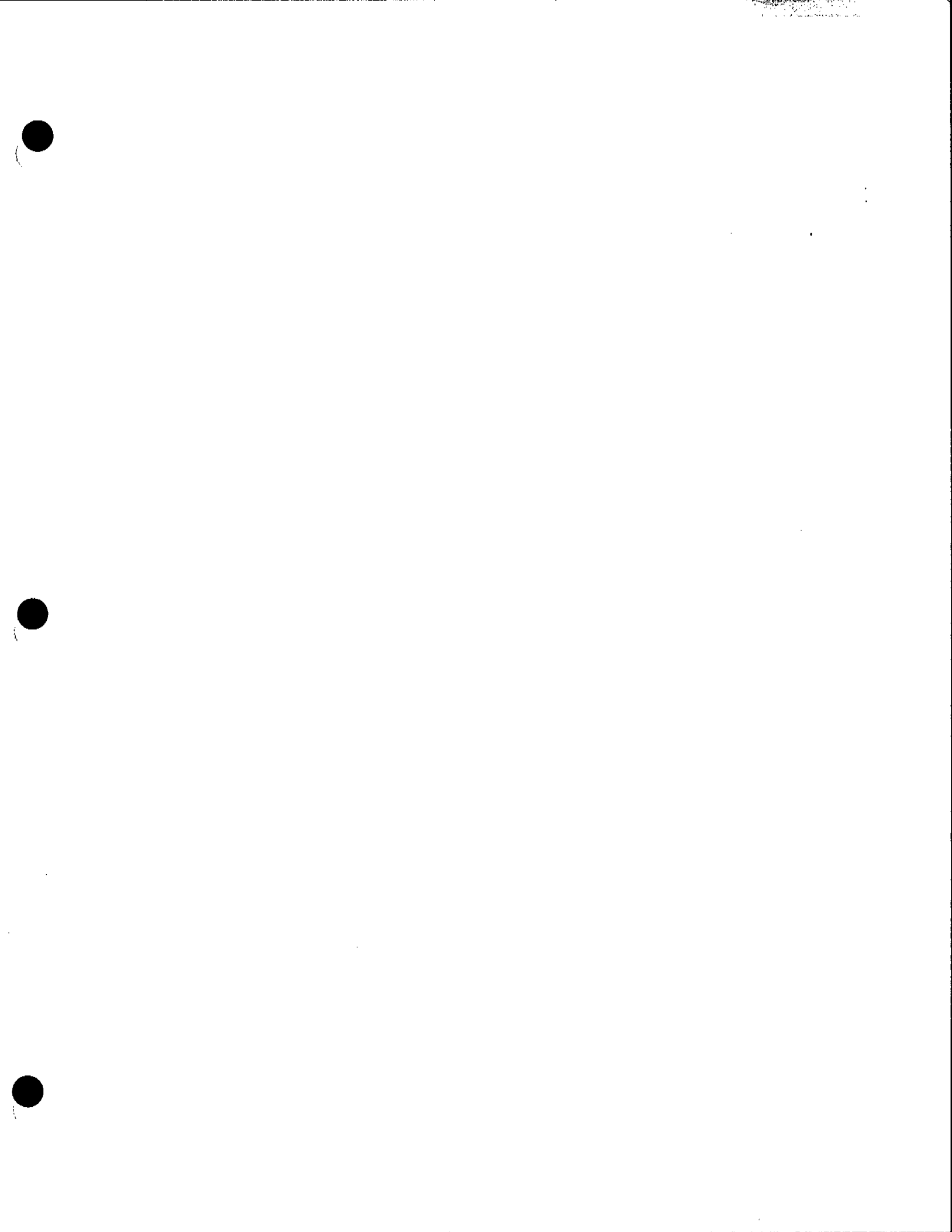
<u>NAME</u>	<u>ADDRESS</u>	<u>REPRESENTING</u>
Bill Raney	1624 Kanawha Boulevard, East	W.V.M.R.A.
Ernest Hays	P.O. Box 1517, Bluefield, WV	Pocahontas Land Corp.
D. K. Moore	P.O. Box 1517, Bluefield, WV	Pocahontas Land Corp.
D. D. Smith	P.O. Box 1517, Bluefield, WV	Pocahontas Land Corp.
R. A. Wilkerson	P.O. Box 1517, Bluefield, WV	Pocahontas Land Corp.
Ronald Crites	P.O. Box 259, Kingwood, WV	Tri-State Coal Oper. Assoc.
Missy Woolverton	1324 Virginia St., E., Charleston	WV Citizen Action Group
Sheila McEntee	1324 Virginia St., E., Charleston	WV Citizen Action Group
R. Hunter	State Capitol Bldg., Charleston	Attorney General's Office
J. Lazell	State Capitol Bldg., Charleston	Attorney General's Office
J. Meeks	1615 Washington St., E.	Division of Energy
J. Ailes	1615 Washington St., E.	Division of Energy
Gloria Beattie	Box 169, Cannelton, WV 25036	Kanawha Mining Co.
Mark March, Jr.	45 McCorkle Ave., Charleston	U.M.W.A.
Mike Burdiss	1502 Ravinia Road	U.M.W.A.
Mike Reese	6512 McCorkle Ave., SE	Division of Energy
Charles Sturey	1615 Washington St., E.	Division of Energy
Stan Johnson	420 Buckhannon Pike, Clarksburg	LaRosa Fuel Co.
Dennis Boyles	603 Morris Street	O.S.M
Ben Greene	1624 Kanawha Blvd., E. Chas.	W.V.M.R.A.
Chris R. Hamilton	1301 Laidley Tower, Charleston	WV Coal Association

ORIGINAL

SURFACE MINING RECLAMATION REGULATIONS

PUBLIC HEARING

OCTOBER 10, 1990



I N D E X

Steve Keen, Director of Mines And Minerals	2
Mike Burdiss, Staff Coordinator, United Mine Workers	12
Ben Greene, West Virginia Mining and Reclamation Association, West Virginia Coal Association, and Tri-State Coal Operators.	15

DIRECTOR KEEN: We want to welcome everyone. We do appreciate your coming.

I'm Steve Keen. I'm Director of the Mines and Minerals Section of the Department of Energy.

Commissioner Larry George is up here at the table with me, and Roger Hall, administrative assistant in our division who is and has been involved in regulations drafting and in drafting this package, as have I.

We have several other Division of Energy people in the audience, both for purposes of their own knowledge of the regulation package and what is in it since they are key players in our organizational structure.

We do welcome comments by anyone. I assume that all of you will take this opportunity to give both verbal comments, if you like, and the opportunity to follow up with written comments if you haven't already submitted them.

The regulation package we are here to discuss and receive comment on is a package of

proposed legislative rules that was filed with the secretary of state's office on September 6th of this year with a comment period running for now in excess of thirty days. This was the date we scheduled for the public hearing.

We had scheduled close of written comment to be concurrent with this hearing or at the close of business today. We are extending that. We'll discuss that more later. But we are extending the opportunity for written comments through Friday, the 19th, to give as much opportunity as we can within the time frame we have available to us.

I want to give you a little idea of the development history of these proposals. In October, 1989, West Virginia's program was reviewed comprehensively by the Office of Surface Mining. And at that point there were over three-hundred-and-twenty comments pointing out deficiencies in the West Virginia regulations and the statute in combination. Those three-hundred-and-twenty comments actually encompass quite a bit more than that in deficiencies because some of those comments indicated deficiencies

in multiple areas of the regulations.

There was quite a bit of work done, a lot of input by a lot of people, including some in this audience, over a several-month period prior to, for that matter, October, '89, but after that point also.

Out of that process the state successfully, the Division of Energy, I should say more correctly, successfully completed drafting, received legislative approval of, and received OSM approval with some exceptions, disapprovals, and additional requirements of the package of regulations that went into effect June 1, 1990. And that's what we have out in the form of the blue book. Those are current regulations.

As OSM reviewed those regulations, the current regulations, they on May 23, 1990, published a series of comments, again comprehensively reviewing our package and our program. And they identified at that point, if I counted correctly, thirty-nine remaining corrections, some of which had not been resolved in the June rules and some of which were new

comments resulting from something put into the June rules.

So at this point we are faced with a required amendment process, again required by OSM, to correct those remaining thirty-nine deficiencies in our regulations. Several of those amendments we were required to approve or, rather, to propose to OSM by June 29, 1990. And we did that by filing with OSM a package of draft regulation revisions addressing those seven rules or those seven items.

We also in that package that we submitted on June 29, '90, addressed some other issues of concern to the state, as well as simply some clerical and editorial cleanup items that we had discussed with OSM that were not of substance but needed to be recorded for official rule-making purposes with OSM.

On July 5, '90, we sent copies of that June 29th regulation package to members of what is known as the regulation committee. That's a committee that was formed by the Division of Energy, by the plaintiffs in the Save Our Mountains lawsuit that was

settled last, last July, I believe it was. And that committee also includes industry people and has participation by the Office of Surface Mining.

So those June 29th rules went out for comment both by official filing with the secretary of state's office and opening of a comment period and by virtue of being delivered to the people on the regulations committee to invite their input.

We held a public hearing on the June 29th package of draft rules on September 3, 1990. We did receive comments on that day. Then on September 6, '90, that was the day we filed the more comprehensive package that you have before you today, we did several things in that package. It addresses the remaining thirty-two items I believe with two exceptions, and I'll describe them, that OSM indicates required amendments and we tried to address them basically exactly as OSM indicated we needed to. And we hope we accomplished that. In many cases we simply adopted the federal language verbatim in those areas.

The two items that we did not have incorporated are an item on revegetation success

standards and another item that rather than rule making actually required a correspondence with the Soil Conservation Service on our methods of identifying and dealing with prime farmland. In both those areas we need some external input and some further technical input from revegetation specialists in drafting that particular item. And we expect to work with OSM as well as with some, hopefully some experts on the revegetation success standards.

Secondly, the current package incorporated all of the June 29th proposals. We did that for two reasons. One was to offer a second opportunity for comment on them, which it did, because those are now opened up for comment again, along with all the other contents of these rules. The other reason for incorporating the June 29th rules in this package was so that everyone could read them coherently and have a coherent package before them. We didn't want you to have to go from one package that was filed June 29th to another package that was partial and try to put the two together. So it gave the opportunity for everyone to see one package that

includes all of the proposed rule revisions and all the current rules in here.

The revisions are, as I expect all of you know, indicated by strike-throughs where existing language out of this rule has been proposed for deletion and underlined where new text has been proposed to be added.

Another thing that was done in the current draft rules besides the OSM May 23rd comments and the thirty-nine items is that we have also attempted to address most, if not all, and I believe we got all, if not all of them, very close, of the changes that the state has received notice of from OSM which are required as a result of OSM's third round of regulatory reform review called reg reform three in shorthand. Reg reform three is, as the nomenclature indicates, the third time that OSM has done a mass review basically nationwide, as I understand it, of all state programs to see where those state programs need upgraded or modified to correspond to federal rules which have changed since the initial adoption of state programs in the initial action by OSM.

We have already gone through reg reform one and two. All of the reg reform one and two items were incorporated in the October comments issued by OSM and have been addressed except for the remaining thirty-nine items in the current rules. So we have finished reg reform one and two. And quite a few other states are, frankly, somewhat behind us there. That's not taking a shot at other states; just kind of a little self pat on the back for what we believe is significant progress.

By incorporating reg reform three we also feel that we have advanced West Virginia's regulations to a degree that is further along and in conformance with the federal program than is the norm nationwide. Quite a few states are still beginning to work on reg reform three or in fact still working on reg reform one and two. What West Virginia intends to do by incorporating all these things is try to get our program stabilized, get to the point that we stop changing our rules drastically and massively to correspond to OSM change. We're going to get them all behind us so that all of you who are affected by the

rules will know what the program is, be able to know what to expect tomorrow as well as today.

That's not to say that there won't be future changes, because there does continue to be a process wherein federal rules change. And each time the federal rules change substantively, we may receive, usually will receive, or will receive at some point in time, it might be at that point in time or later in another mass review, but we will at some point be required by OSM to modify our rules to correspond with future changes in federal rules.

And, finally, I think finally, what else is in this package are some amendments that we crafted within the Division of Energy, with Roger and I working on them primarily, to try to address what were perceived both internally, with some discussion with our own staff, by people outside the agency, by parties who were in the meetings we had earlier on the June 1 rules. We had-- For instance, in the early part of this year as we talked about the June 1 proposal we identified a number of items that were of concern to people from all interest groups. We came

to near consensus on several of those items but were not able to get them incorporated into the June 1 package as passed by the legislature. We incorporated several of those in this package to try to go ahead and complete the action on things that people have generally agreed to earlier in the year.

The changes we tried to make in here, have tried to make in here, have proposed in here, I should say, were intended in all cases to either fix a deficiency in our program, to address in more detail something that is addressed in very little detail in the federal rules. We have some items that are much more comprehensive than the federal, and if some perceive them as more stringent then, yes, I'd have to say in some areas they are more stringent than federal. But each state does have the obligation to try to fit its program to its state's needs and also the authority, or at least West Virginia, to be more stringent where we believe it is appropriate. We have tried to do that only where we believe it is appropriate. In no case do we intend to nor by law are we allowed to be less effective than federal. Our

rules must be consistent with the federal regulations and no less effective than the program mandated by the Federal Surface Mine Control and Reclamation Act. And that's what we have tried to do in all instances.

We filed these rules on September 6. Continuing with a history here and sort of letting you know what we have done and where we are. On September 21st we sent copies of these rules again to all of the members of the regulation committee again asking for input and inviting meetings and discussions.

So that brings us basically to this hearing. We have gotten a few informal comments at this point and we have already begun to deal with concerns raised and see what rewarding revisions we can make to address some of those concerns.

Today we will receive your official comments. Again you will have the opportunity through October 19th to file written comments. After we receive your official comments, in the interest of trying to keep this communication process as open as possible, we are offering and will stay here as long as anyone wants to talk. After we officially receive

your comments and close the record and the hearing, in order to try to understand your concerns better and you to understand our position and what we propose better, if you want to stay and talk, any or all of you, I will stay as long as you want to and we'll talk as long as you want to talk about it and discuss anything you want to discuss on these rules.

We have later this week agreed along those same lines of trying to have some very open and very direct communication and try to come to understand all the concerns so that we can properly address them, we have agreed to meet at the request of the Coal Association and Mining Reclamation Association with their regulations committees on Friday morning. We have agreed to meet with Mr. Robert Shostak and whomever else he has come with him on Friday afternoon.

We are also planning and have already scheduled a meeting of the regulation committee, as I previously mentioned, on October 24th. That will be a public meeting. An announcement will go out through the secretary of state's office announcing that is a

public meeting as was agreed in the regulations committee as it functioned last winter and spring.

And, finally, after we hope hearing enough detail of everyone's concerns to address those concerns as best as we can. And we also hope after having reached an understanding on the regulations to the point that even if you don't all agree with everything that is in there you will at least understand what it is and understand the effort we're making to improve the program.

Then we do need to and intend to file these regulations no later than October 31st with the legislative rule making review committee. They have given us an extension with some limitations on their willingness to review regulations submitted at that date. But they did officially give us until November 1st and no later to file these rules. And that's the deadline we feel we must meet and we do intend to meet. Of course, once they are filed with the legislative rule making review committee, a review process does begin there. And I believe in that process it will obviously be up to the committee at

that point, the legislative rule making review committee, but I believe they can also receive input and I would assume will do so.

Now again I mention that we have already worked on addressing some of the concerns we have heard expressed since we sent out this package. I have here with me and will offer, not as a mass handout because they may or may not be of interest to everyone, but I brought what might be enough copies, if not, we'll come close to covering the audience if you all want them, some revisions, again draft revisions, mind you, these are proposed rules, draft rules. So you might characterize my draft revisions as proposed drafts. But they are available. I think that is in the interest of open communication by letting you see, as we have been hearing some of the concerns, how we think we might address those by further wording changes in this package. So I'll make those available to you today if anyone is interested in them. And we will continue with the communications meetings as I described.

With that, unless the Commissioner or

Roger feel any other preface is necessary--

Anything else you know of we need to cover procedurally?

A VOICE: No.

DIRECTOR KEEN: Okay.

We will open it up to comment. Do we have a sign-up sheet that indicates who wishes to make a verbal comment?

A VOICE: I have indicated here that Mike Burdiss wishes to make a comment.

Mike, if you would come to the podium and state your name and your affiliation.

MR. BURDISS: Commissioner, fellow West Virginians, my name is Mike Burdiss. I'm the staff coordinator for the United Mine Workers Political Action Committee, compact.

I come here today wanting to advise the Commissioner that the mine workers are quite concerned over the proposed regulations that were received September 24th from Steve Keen. Once again we find ourselves asking the question of why the language contained within the regulations have been

capriciously and arbitrarily changed without consultation with your staff.

I will only point out pages fourteen and fifteen to the Commissioner and ask why on those changes there is word omissions and word changes without, as Mr. Keen pointed out in his remarks, underlining and strike-throughs are not there. And I think you will find that that was an area that was codified into these regulations through a tremendous lot of work through a lot of people. And the word that is missing under A, section one, under two-five, two-point-eight-five, coal mining. Coal is omitted and you just have surface mining.

Also in section four, being general partner, in is inserted without a strike-through or an underline and it was changed from is.

Coal again is omitted in section six of these regulations.

Another page that we find some concern is page sixty-six. There was a tremendous amount of debate over IBRs by the environmentalists, by the Coal Association and by the mine workers, and by the

Department. And we find that twenty percent is inserted in lieu of ten, which was agreed to, no identifying mark to state that that was added. And we see the term a hundred and fifty percent of the permitted area can be an IBR. Now, when in Cabin Creek they're asking for a two-thousand-acre permit, it doesn't take a rocket scientist to figure out that that's a lot of property that can be mined through an IBR if they can go up to a hundred-and-fifty percent.

Because of these changes we have found through an arduous task of comparative analysis to the previous proposed rules and adopted rules, it begs the question of determining who has the task of capriciously and arbitrarily changing the language as agreed to in a fair and equitable debate.

The United Mine Works feels that it is the duty and responsibility of this Department to the legislators and to the citizens of the state to mandate a comparative sheet to present it as to who recommended the changes, whether it be OSM, departmental, coal companies, or the union, or the environmentalists.

We find it again totally unacceptable that the legislative rule making committee, the citizens, and the companies, and the union are faced with two-hundred-and-sixty-two pages of regulations without a synopsis of the proposed rules.

Thank you.

A VOICE: Mike, will you have written comments to file in addition to--

MR. BURDISS: They are there.

A VOICE: Okay. Thank you.

The next person I have on the list is Ben Greene.

MR. GREENE: Commissioner George, Director Keen, staff assistant Roger Hall, my name is Ben Greene. This morning I am representing the West Virginia Mining and Reclamation Association, the West Virginia Coal Association, and the Tri-State Coal Operators, northern part of West Virginia, in hopefully what will be a time savings presentation.

I would like for the record to note that all three associations were represented at the September 3rd and September 10th hearings. We have

participated in the process since the regulations were filed, the initial filing being in July. And we will continue to participate as we reach a conclusion with what might be termed regulation ninety.

We will file a lengthy and straightforward document by the 19th which will summarize our key items of concern. I will highlight those just briefly here this morning.

We note a lack of definition on the word soil material which has played a large part in the durable rock fill controversy of the last several months, soil material which comes directly out of the federal surface mining and reclamation statute is not defined as a matter of the West Virginia program.

We take exception to your chemical water treatment regulations both as it relates to bond release and the failure to recognize flocculation and a lot of other treatment processes that are done in the preparation of coal. It would seem that we would be precluded from ever having an operation terminated if that current definition would stand.

There is also a failure to recognize

wetlands as a means of water quality treatment whether it relates to sediment or to the chemical aspects.

And we further note an absence of any of those requirements as they might apply to the abandoned mine land program.

Fugitive dust is a new requirement whose jurisdiction is generally vested in the Air Pollution Control Commission. It does not seem to be, in our brief research, mandated by anything under the Federal Surface Mining Act. And I believe if you will go back and note the record of about a year ago, the Air Pollution Control Commission is on record that fugitive dust from surface mining and coal mining operations is not a major problem in West Virginia.

The ownership and control as they relate to the applicator/violator system has also been changed. We think that is in conflict with Judge Flannery's round three decision and the normal intent and purpose of the ownership and control direction which is a very thorough and very refined process.

Certification of roads, particularly as they relate to the pit area or being internal to the

mountaintop removal and a certification of said road seems to be inconsistent with our history and past practice as to where the operation actually begins and the road ends. In fact, we have found a total lack of federal support for that particular requirement when you review the Federal Office of Surface Mining Regulations.

There is a strike-through on the flexibility for engineers to design durable rock fills. I hope that is an oversight because federal regulations do provide for that flexibility to be recognized and hopefully encouraged. And with the continuation of jurisdiction decision by Judge Flannery it would seem that the state's position would be to allow as much flexibility in that particular design. Otherwise, the state would find itself in the position of having dictated the methods. They also then share in the responsibility should there be some catastrophic failure on down the line.

I would like for the record to show that this association, being the West Virginia Mining and Reclamation Association, has initiated a freedom of

information request to the Federal Office of Surface Mining to list all of the failures of valley fills, durable rock fills, and any other kinds of fills across the country. We have not received that reply to date but we are told that in the State of West Virginia there are absolutely none.

Two other areas of conflict that would seem to be simple, straightforward corrections in that both impoundments and the coal refuse area conflicts with MSHA requirements as it relates to height of impoundments and the amount of acre feet of water that may be impounded before you get to a higher and more professional classification. The same thing with coal refuse in compacting in layers of two feet, there is some additional flexibility that is recognized by MSHA. We find it hard to take exception with MSHA and their expertise in both of those areas.

Those are just a few of the concerns that we have. Our lengthy and complete discussion of all those issues will be forthcoming for the official record by the October 19th deadline.

And as always we will stand ready to

provide any support information, additional documentation backup or scientific evidence that might support either this testimony this morning or our documents that will be filed at a later date.

Thank you.

A VOICE: Looking at the list, I see that no one else has indicated they wish to make remarks.

Is there anyone who has changed their mind and would like to come forward and give any sort of verbal testimony?

Seeing none, we will then close the record at ten-forty.

DIRECTOR KEEN: My offer still stands. I really had hoped to hear more but--

WEST VIRGINIA

DIVISION OF ENERGY

COMMENTS RECEIVED

ON

PROPOSED

WEST VIRGINIA SURFACE MINING RECLAMATION REGULATIONS

(CSR-38-2)

AS FILED SEPTEMBER 6, 1990

Steve Keen

GALLOWAY & GREENBERG

ATTORNEYS AT LAW
1835 K STREET, N. W.
SUITE 801

WASHINGTON, D. C. 20006



L. THOMAS GALLOWAY
ELDON V. C. GREENBERG

RECEIVED

WV Department of Energy

OCT 19 90

TELEPHONE (202) 833-9084

Division of Mines and Minerals (202) 785-6704

[**RECEIVED**]

OCT 19 90

COMMISSIONER'S OFFICE
DEPARTMENT OF ENERGY
CHARLESTON, WV 25311

FAX MEMORANDUM

Fax No. 202-785-6784

TO: Commissioner

FAX NO.: 304-348-2452

FROM: National Wildlife Federation WV Highlands Conservancy

DATE: 10-19-90

RE: Comments on Proposed Regulation

COMMENTS: Please file Comments in Public Record of Rulemaking.

Thank you.

22 page(s) follow this transmittal sheet.

COMMENTS OF THE WEST VIRGINIA
HIGHLANDS CONSERVANCY, NATIONAL WILDLIFE FEDERATION
AND FRIENDS OF THE EARTH
ON THE PROPOSED SURFACE MINING REGULATIONS

October 19, 1990

- 2 -

The West Virginia Highlands Conservancy, the National Wildlife Federation, and the Friends of the Earth (hereinafter "Commenters") offer the following comments on the regulations proposed by the Division of Energy to regulate the environmental impacts from coal mining in the state of West Virginia.

In offering comments on the substance of the proposed regulations, the Commenters would like to express their strong displeasure with the process that the Division of Energy has followed over the past three years in attempting, thus far unsuccessfully, to promulgate regulations which are consistent with the federal regulations and therefore approvable under the standards of Title V of the Surface Mining Control & Reclamation Act of 1977, 30 U.S.C. 1201 et seq.

Both the Commenters and other national and state citizen and environmental groups have participated in good faith in interminable discussions with DOE, as well as the industry in an attempt to work out a reasonable set of surface mining regulations. Difficult as this process may be, those problems pale beside those created by a DOE bureaucracy that evidently feels that it has the independent right to make fundamental changes in the state's regulations at any stage without alerting the Commissioner and without his approval. Consequently, each year when the regulations enter a new cycle, major deletions appear in the proposed regulations or are inserted after the public comment period closes and without explanation. When DOE management is confronted with the changes by the public, they

- 3 -

profess no knowledge of the even the most damaging and important alterations in the regulations. Examples of such actions over the past three years include efforts to restrict mandatory use of the Special Reclamation Fund, efforts to undercut mandatory enforcement, and efforts to limit the responsibility of the purchaser in the transfer and sale of a mine.

In other instances, illegal provisions which gut major regulatory provisions are slipped in after public input. For example, a provision restricting the scope of the permit block sanction to currently outstanding violations "known" to the state as opposed to all currently outstanding violations was inserted into the regulations despite the fact that both the state and federal statute as well as the federal regulations are absolutely explicit on the matter. This "word" change has the effect of gutting the most critical enforcement sanction in the Act by limiting the sanction to violations "known" to DOE. The change creates an incentive for DOE to do nothing to gather information on violators for if DOE fails to do so it will not violate the law because the violation would not be "known" to DOE. Thus by a simple "word" change, incompetence, nonenforcement, mismanagement, and sloth are made lawful.

In still other situations, DOE has failed to live up to commitments to propose and then implement critical performance standards. For example in Save Our Mountains, Inc. et al v. Dials, the DOE bound itself to set threshold limits to determine material damage to the hydrologic balance. This requirement

- 4 -

could have been met through regulations or guidelines. However, DOE has neither proposed regulations which offer threshold standards or issue guidelines.

In short, the many substantive problems with the regulations, a number of which are set forth below, should not be allowed to obscure the fundamental process flaws that taint both the existing and the proposed regulations. Indeed, it is in large part the inability of DOE to develop a creditable regulatory process that has prevented DOE after nine years of effort from obtaining approval of its regulations. That is, without question, the worst record in the United States, and it is likely to continue unless serious attention is paid to and improvements made in the rulemaking process.

1. Section 3.1

The previous regulations approved by the legislature contained critically important provisions regarding responsibility for violations when a sale or transfer of a mine, or an interest in a mine.

The previous regulations stated as follows:

(l) The sale or other conveyance of a surface coal mining and reclamation operation which has outstanding violation(s), outstanding civil penalties, or reclamation fees, or the sale or other conveyance of any interest in an entity with outstanding violations, penalties or fees, or the sale or conveyance of an entity which owns or controls an entity, or is owned or controlled by an entity which owns or controls a surface coal mining and reclamation operation with an outstanding violation, penalties or fees shall not in any way affect the application of the permit block sanction set forth in these regulations.

(m) Any person who, through whatever means, assumes ownership or control directly or indirectly of a surface coal mining and reclamation operation shall become responsible for the

- 5 -

correction of all outstanding violations and payment of all outstanding penalties and fees for the operation.

Subsection (l) above was deleted in its entirety in 1989 and subsection (m) was rewritten to remove responsibility for penalties and fees from the person assuming control.

In the proposed rules for 1990, DOE has continued the restriction on the reach of what was subsection (m) in the earlier regulations. Subsection (l) now appears in section 3.25 which by its express terms is limited to the sale or transfer of permits. By moving the provision to 3.25, DOE either inadvertently or intentionally has drastically limited the scope of the provision, i.e., by not covering the transfer of interests in a permittee or parent.

DOE should reinsert (l) & (m) as they originally appeared so that the scope of the provision is as the legislature intended in insisting on the provision in the first place.

2. Section 3(b)

The proposed regulation provide that the permit block sanction shall not apply unless an entity applying for a person "is known to be" currently in violation of the Act or other relevant law. As noted above, the federal statute, the federal regulations, and the state statute all require an entity which "is currently in violation" not receive a new permit.

There is no better example of a breakdown in the integrity of the rulemaking process than this issue. The change which guts a major enforcement sanction is patently illegal. Despite

- 6 -

repeated requests to DOE asking that the provision be deleted, the illegal provision remains both in the existing and the proposed regulations.

The "is known to be" restriction on the scope of the permit block sanction should be removed.

3. Section 14(g)

The Commenters propose major changes in the manner in which applicants qualify for the use of durable rock fills. Proposed language is attached. (Attachment A).

The Commenters have previously provided DOE with the technical support for the proposed changes. If DOE has misplaced that data or wishes other copies, please inform us and we will provide the information promptly.

4. Section 1.2(C)

The provisions of Section 1.2(c) concerning termination of jurisdiction should be deleted in their entirety. These provisions have their origin in the federal permanent program surface mining regulations, and as a result undoubtedly were added to the state's proposed regulations at the request of OSM. However, the United States Federal District Court in an August 30, 1990 decision struck down the regulation as illegal and plainly in conflict with the intent of Congress. No stay of the effect of this decision has been sought or granted.

In lieu of this regulation, a provision should be added stating that a Notice of Violation must be issued or other

- 7 -

appropriate enforcement action must be taken whenever a violation is observed, without regard to the bond has been partially or completely released.

5. Section 2.2

This proposed regulation would lessen the inspection frequency at so-called abandoned sites. The federal regulation on which the state counterpart is modelled was struck down as illegal by the United States District Court for the District of Columbia in an August 30 Memorandum Opinion and Order. No stay of the Court's Order has been sought or obtained. The proposed regulation must therefore be deleted.

6. Section 2.133

The definition of valid existing rights should be revised as set forth in Attachment B.

7. Section 3.3(a)

The definition of valid existing rights as it applies to subsidence and the requirements for a valid waiver from the owner of an occupied dwelling should be changed as set forth in Attachment C hereto.

8. Section 14.7(d)

The current section 14.7(d) should be deleted and replaced with the provision set forth in Attachment D.

The need for such a provision was discussed extensively during the last cycle of review of the surface mining regulations. The intent of both the state and federal Acts is to avoid acid mine drainage; treatment is simply a remedial measure

- 8 -

aimed at correcting a violation of the law. While simply stated, the impact of these basic principles is extremely important to the administration of the mining program in northern and central West Virginia.

The state's regulations have long prohibited Phase 3, or total bond release, unless and until a mine site could meet all water quality and effluent limitation standards for one year without treatment. Thus the regulations plainly accept the basic principle that treatment is not a permanent solution, i.e., it does not constitute "reclamation" of a site and satisfy the performance standards necessary for final bond release. (See also Attachment F). Unfortunately, DOE's administration of the provision has resulted in the placement of mines that treat acid drainage into a "limbo" category. That is, DOE properly will not allow a mine to obtain final bond release while water treatment is occurring; however, DOE does not require the permittee to take the necessary steps to meet all applicable water quality and effluent standards within a reasonable time. Evidently, there is currently no time limit on this "limbo" status for mines which treat water; the treatment could presumably continue for 100 years with no bond release and without reclamation which meets all performance standards as we submit the law requires.

Commenters' proposed change accepts the current regulations and then establishes a reasonable time limit for treatment, after which time if acid drainage is still occurring, bond forfeiture proceedings would begin and be carried forward to conclusion.

- 9 -

In essence, the proposed change implements the principle that treatment is an interim step which allows the permittee a reasonable period of time to bring his site into compliance without treatment. Treatment is not an end unto itself; the proposed change recognizes this.

The major effect of this change would be to bring both existing and future mine sites out of their current "limbo" status and place them once again within the fabric of the law. No other type of violation allows an unlimited abatement period; acid drainage with all its major adverse environmental impacts should not be the exception.

A secondary impact of this change would be to put all prospective operators in acid-producing areas on notice that they must meet all standards for water quality and effluent standards without treatment after a reasonable period. If they cannot they should not apply for a permit in the first place.

9. Amend 16.2 Mining Using Planned Subsidence

Currently, proposed and existing 16.2 tracks the corresponding federal regulation. However adequate this may or may not have been in the past, it is no longer an acceptable approach to the regulation of planned subsidence in West Virginia, or for that matter anywhere else in the United States, as a result of the litigation over the corresponding federal regulation.

On February 12, 1990 Judge Thomas Flannery issued an opinion responding to a lawsuit brought by the National Wildlife

- 10 -

Federation over the Secretary of the Interior's construction of the regulation at issue. NWF et al. had claimed that Congress intended that no exemption was intended for longwall mining in section 516 of the Act, and that all operations had to maintain the value and reasonably foreseeable use of the land and prevent material damage to the extent technologically and economically feasible. Judge Flannery found this construction of the law "compelling" but did not strike the regulation down as it was the construction of the regulation and not the regulation itself that was objectionable. The Court noted, however, that should the Secretary ever implement the construction of the regulation advanced by the Secretary, NWF could immediately bring suit, and presumably would prevail given the Court's finding that NWF's contention that no exemption was intended was "compelling".

DOE should make it clear in the regulations that no exemption is afforded longwall mining. DOE should accomplish this by deleting the entire phrase after the semi-colon in the first sentence of 16.2, and replacing the semi-colon with a period.

10. 3.28 Incidental Boundary Revisions

This section represents DOE's longstanding efforts to rewrite the permitting requirements of both the state and federal statutes and make what is in fact a permit revision into a boundary revision.

Both OSM and the Commenters over the past three

- 11 -

years have repeatedly pointed out to DOE that the sole purpose of incidental boundary revisions is to allow for small adjustments in the boundaries of a permit without going through the full permit revision process. DOE, however, has persistently attempted to expand the concept to cover what are, in effect, significant revisions to a permit and therefore subject to the permitting requirements of the state program. Much abuse of the IBR concept has not surprisingly occurred as a result of the state's lax approach.

The entire concept of significant incidental boundary revisions should be deleted from the regulations. It is illegal. IBR's should be limited to minor boundary revisions. To ensure that such revisions are in fact minor, Commenters propose revised language for subsection(a)(2). See Attachment E.

11. Add a new subsection(e) to 20.1- Inspection Frequency

A long neglected problem at the DOE has been the failure to reclaim bond forfeited sites as required by law. Commenters propose a regulation requiring DOE to inspect and document the status of all sites that have been forfeited and on which bond monies have been expended. Under the proposed regulation, DOE would determine whether the site has been fully reclaimed, and if not make a second determination on the cost of full reclamation of the site, including compliance with all water quality and effluent limitation standards.

- 12 -

DOE would also inspect the currently pending sites on which forfeiture has occurred or is in process, document the conditions at the site, and determine the projected cost of reclamation.

Such a program is the only practical way to determine the status of bond forfeited sites, whether they are being reclaimed as the law requires, and whether the special reclamation fund and site specific bond provide adequate monies for full reclamation.

The proposed language is as follows:

(e) The Commissioner shall within one hundred eighty days of the effective date of these regulations accomplish the following:

(1) Inspect and document through photographs and narrative reports the site conditions at a) all sites at which special reclamation fund and/site-specific bond monies have been expended since the state assumed primacy under the permanent program of the Surface Mining Control and Reclamation Act of 1977; and b) all sites which are at any stage of the forfeiture process but on which no monies have as yet been expended.

2) The Commissioner shall determine for each site identified in subsection 1 above whether the site has been reclaimed fully in accord with all applicable performance standards, including without limitation water quality and effluent limitation standards, and if any site(s) have not been fully reclaimed, what failures exist and the cost of full reclamation. If no reclamation has yet occurred, the Commissioner shall document what reclamation work is required and the estimated cost of such work.

3) All information collected and determinations made shall be public. In addition, the Commissioner shall prepare a report within 240 days of the effective date of these regulations containing at a minimum the number of sites involved, the estimated total reclamation costs, whether additional funding is necessary, and if so, what level of additional funding is required to fully reclaim all sites.

12. 3.1(d)- Contract Mine Information

The Commenters propose adding language to current section 3.1(d) to make it unmistakably clear that permit applicants must

- 13 -

provide information on all contract mine relationships, i.e., those that meet the standard set forth in 2.85(b)(6). The language of current 3.1(d) appears inclusive of (b)(6), but because compliance has been at best spotty to date in terms of providing data on contract mining relationships, an explicit directive is called for so that there can be no doubt whatsoever such information is required in order for a permit application to be deemed complete.

Commenters propose adding the phrase "including but not limited to all contract mining relationships as defined in section 2.85(b)(6)," after the word "regulation" in 3.1(d).

13. Amend 2.38 Threshold Limits for Material Damage

The current and proposed regulations require the Department to "predetermine" certain "threshold limits or ranges" in determining the magnitude of cumulative hydrologic impacts. Unfortunately, despite the fact that this requirement has been in force for years, the Department has never "predetermined" any threshold limits or ranges.

To cure this problem, plaintiffs in Save Our Mountains, Inc. et al v. Dials insisted upon and DOE agreed to define such limits. Despite this agreement DOE has failed to do so and is therefore in violation of both existing law and its obligations under the Settlement Agreement.

DOE is approaching bad faith in carrying out its responsibilities on this issue. As a show of good faith and to comply with the law, Commenters propose to add an additional

- 14 -

sentence to 2.89 which requires the Department to make the determinations on threshold limits within 180 days of the effective date of the regulations.

14. Amend 12.4 by adding a new subsection (f)

The Settlement Agreement in Save Our Mountains, Inc. et al. requires the State to initiate bond forfeiture in circumstances in which a Cessation order remains unabated for a period of 60 days, and that in no event shall more than 12 months pass between initiation of bond forfeiture proceedings and forfeiture.

This is a sound provision and is essential to ensure that the enforcement system functions efficiently and even-handedly from the initial action through final forfeiture. The State of Kentucky follows a similar procedure.

The Settlement Agreement is time-limited; therefore this provision should be included in the regulations and become a permanent part of the West Virginia regulatory program.

Subsection (e) would read as follows:

(e) In all cases in which a Cessation Order remains unabated or has remained unabated for a period of sixty days from issuance, the Commissioner will initiate bond forfeiture action pursuant to this section and will pursue the action to final forfeiture in a diligent manner; provided however, that in no event, shall more than one year pass between initiation of a bond forfeiture proceeding and final administrative action by the Commission unless a lawful and binding Consent Order with explicit time limits for abatement has been approved by the Commissioner.

15. Amend 20.3 to add a new subsection (f).

- 15 -

One of the major abuses of the West Virginia regulatory program over the past several years has been the misuse of the Consent Order to blunt the effectiveness of the remedial provisions of the Cessation Order sanction and the permit block sanction. To end this abuse the state agreed in the Save Our Mountains Inc. v. Dials Settlement Agreement to several basic standards which would govern the use of the Consent Order. Because these standards are sound and are necessary to ensure appropriate use of the Consent Order, they should be contained in the regulations, and not simply in the Settlement Agreement which is time-limited.

Thus, a new subsection (f) should be added to read as follows:

(f)(1) All abatement work required in any consent Order agreed to by the Commissioner shall require all abatement work to be completed in the most expeditious manner physically possible, but in no event will the time allowed for abatement extend for more than one year, taken cumulatively and including all extensions; provided however that the Commissioner may grant a further extension if he finds in writing that exceptional circumstances exist which preclude abatement in a twelve month period. Violation of a Consent Order will result in immediate initiation of bond forfeiture proceedings unless the Commissioner finds in writing that the permittee has shown good faith in taking remedial actions under the Consent Order; that no environmental harm has resulted; and that the violation is abated within five days after service of the notice required by CSR 38-2-12.3(a)(1).

(2) The Commissioner will at all times maintain an accurate listing of all outstanding Consent Orders which is available to the public.

(3) No Consent Order can be agreed to at a surface coal mining and reclamation operation if the permittee or operator has previously entered into two Consent Orders at the site.

- 16 -

(4) The standards set forth in this subsection shall apply to any extension, modification, or other change in any existing Consent Order.

16. 14.8(a)(2) Multiple Seam Mining

The Department is proposing major changes in the manner in which multiple seam mining is conducted in the state of West Virginia. Commenters are unaware of any material in the record which support such major changes in the approach to multiple seam mining. DOE should not act in such a major area without first offering both technical and legal support for the changes to allow the public to evaluate the support for the suggested actions.

Consequently, Commenters suggest that DOE place whatever support they have, both technical and legal, in the public record and allow a short time for commenters to review and offer their views on the support if any DOE has for its rather far reaching proposal on multiple seam mining.

17. Inactive Sites 14.11 (f)

14.11(f) which states that the provisions for inactive sites will become effective on the effective date of the regulations should be deleted in its entirety. This provision was necessary when the changes on inactive sites were initially made; it is no longer relevant as the provisions are now in effect and have been in effect for some time.

Amendment to Regulations
on Durable Rock Fills

Amend Title 38; CSR 2; Section 14(g) as follows:

Additional language underlined. Deletions are marked through.

(g) Durable Rock Fills.

(1) The Commissioner may approve the design construction, and use of a single lift fill consisting of at least eighty (80) percent durable rock if it can be determined, based on information provided by the operator, that the following conditions exist:

(A) Examination of core borings and the geologic column show that the overburden consists of durable sandstone, limestone, or other durable material in sufficient thickness and amounts to generate spoil material that is eighty (80) percent or greater durable rock. Where the fill will contain non-cemented clay shale, clay spoil, or other nondurable material, such material must be mixed with the durable rock in a controlled manner such that no more than twenty (20) percent of the fill volume is not durable rock. Tests shall be performed by a Registered Professional Engineer and approved by the Commissioner to demonstrate that no more than twenty (20) percent of the fill volume is not durable rock. The testing shall be conducted both during the application process and periodically during construction of the fill if the permit is granted and shall include both slake durability testing and tests capable of determining whether the material will degrade to soil-like material. In testing performed during construction, the Commissioner shall not consider as durable rock any rock less than six inches in diameter.

(B) The durable material shall not consist of acid-producing or toxic-forming material and will not slake in water or degrade to soil material. A material shall not be considered "durable" if it meets only the slake durability portion of the required testing.

(C) The Commissioner shall within ninety (90) days of the effective date of this provision determine the tests and/or combination of tests he will accept to meet the requirements of subsection (B) above. The Commissioner shall consider the use of the Olivier durability testing system and the Morgenstern and Eisenbrod testing system to meet the requirements of this section.

(D) The Commissioner shall require the core borings required by (A) above, to be sufficient in number to provide a representative sample of overburden characteristics of all areas of the proposed permit from which overburden material which will be placed in the fill originates.

Amendment to Regulation Defining
Valid Existing Rights

Delete in its entirety Title 38, CSR 2; Section 2.131, and substitute the following:

Additions are underlined.

"Valid existing rights" means --

"(A) those property rights of the applicant in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorizes the applicant, any subsidiary, affiliate or persons controlled by or under common control with the applicant to produce coal by a surface coal mining operation; and

"(B) the person proposed to conduct surface coal mining operations on such lands either:

"(i) had been validly issued, on or before August 3, 1977, all state and federal permits necessary to conduct such operations on those lands; or

"(ii) can demonstrate that the coal is both needed for, and immediately adjacent to, an ongoing surface coal mining operation for which all mine plan approvals and permits were obtained prior to August 3, 1977;

except with respect to haul roads the term "valid existing rights" means a recorded right-of-way, a recorded easement or a permit for a coal haul road recorded on or before August 3, 1977; and

"(C) Valid existing rights shall not be subject to sale or transfer in any form.

Amendment to Regulations
on Validity of Waivers

Amend Title 38, CSR 2, Section 3 as follows:

(a) Valid Existing Rights. Where the proposed surface coal mining operations would be conducted within three hundred (300) feet, measured horizontally, of any occupied dwelling, the permit applicant shall submit with the application a written waiver by lease, deed, or other conveyance from the owner of the dwelling, clarifying stating that the owner and signator had the legal right to bar mining under Section 522 of the federal Surface Mining Control and Reclamation Act and knowingly waived that specific right. The waiver shall act as consent to such operations within a closer distance of the dwelling as specified.

(b) Waiver. Where the applicant for a permit had obtained a valid waiver prior to after August 3, 1977, from the owner of an occupied dwelling to mine within three hundred (300) feet of such dwelling, a new waiver shall not be required:

(1) Where the applicant for a permit had obtained a valid waiver from the owner of an occupied dwelling pursuant to (a) above, that waiver shall remain effective against subsequent purchasers who had actual or constructive knowledge of the existing waiver at the time of purchase.

(2) A subsequent purchaser shall be deemed to have constructive knowledge if the waiver has been properly filed in public property records pursuant to State laws or if the mining has proceeded to within the three hundred (300) foot limit prior to the date of purchase.

Amendment to Regulation
on Treatment of Acid Mine Drainage

Amend Section 14.7(d) as follows:

(d) Water Treatment. Where any discharge from the permit area requires treatment during the mining operation in order to meet the applicable effluent limitations, water monitoring of such discharge shall continue following grading approval. If it is established on the basis of such monitoring that the hydrologic balance is being preserved without treatment, the treatment facilities may be removed. A one (1) year history of meeting the applicable effluent limitations shall be adequate to establish that the hydrologic balance is being preserved.; provided however that the commissioner shall not allow treatment to continue for an unreasonable period of time not to exceed four years before triggering the requirement that the permittee comply with all effluent limitations. If the permittee cannot comply with all applicable effluent limitations and water quality standards without utilizing treatment at this time, the Commissioner shall initiate bond forfeiture proceedings pursuant to 12.34 of this Chapter. The Commissioner shall require treatment to be continued until forfeiture proceedings are completed.

Incidental Boundary Division

Amend (a)(2) as follows:

Additions are underlined; deletions are marked through.

For purposes of surface mining operations, the maximum total acreage to be permitted under one or more IBR(s) shall not exceed twenty (20) ~~ten (10)~~ percent of the original permitted acreage or a maximum of fifty (50) ~~five (5)~~ acres, whichever is less, throughout the life of the permit. Any incidental boundary provision for a surface mine must be contiguous to the existing permitted area. Acreage limitation for IBR(s) on underground mining operations shall be limited to one hundred fifty (150) ~~fifty (50)~~ percent of the original permitted acreage or a maximum of fifty (50) ~~fifteen (15)~~ acres, whichever is less, throughout the life of the permit.

ATTACHMENT F

COLLY
TAKE PRIDE IN AMERICA

RECEIVED

OCT 31 1989

Kentucky Resources Council



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

IN REPLY REFER TO:

RITH ENERGY, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 89-393

Decided October 24, 1989

Petition for discretionary review of a decision by Administrative Law Judge David Torbett sustaining agency denial of a permit revision.
NX 89-1-PR.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Revisions--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Acid and Toxic Materials

OSMRE properly denies an application for permit revision when the applicant does not provide sufficient operational data to demonstrate that reclamation, as required by SMCRA and the Tennessee Federal program, can be accomplished under the permit plan, or that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Under 30 U.S.C. § 1265(b)(10)(A) (1982) and 30 CFR 816.41(f), OSMRE is required to avoid acid or other toxic mine drainage so as to minimize disturbance to the prevailing hydrologic balance.

APPEARANCES: Michael W. Boehm, Esq., Chattanooga, Tennessee, for petitioner; Tom FitzGerald, Esq., Frankfort, Kentucky, for Save Our Cumberland Mountains, Inc., Intervenor; and Nicklas Holt, Esq., Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

By order of June 1, 1989, this Board granted a petition for discretionary review filed by Rith Energy, Inc. (Rith). Petitioner sought review of a decision by Administrative Law Judge David Torbett, dated March 28, 1989, sustaining a denial by the Knoxville Field Office (KFO), Office of Surface Mining Reclamation and Enforcement (OSMRE), of Rith's application for Significant Revision No. 10.

IBLA 89-393

mining and reclamation. The operations plan should include a description of the Whitwell shale blasting and excavation techniques assuring the minimum particle size is attained; contingencies made for the material segregation and temporary storage provisions; and material balances showing estimated swell and recompaction volumes of toxic material, non-toxic Whitwell shale, and Newton sandstone on an individual cut basis. * * *

Provide, on an individual cut basis, a detailed description of pod construction techniques, and describe how positive drainage from the pod surface will be ensured. Engineering drawings should be prepared * * * to depict plan views of each pod, and should provide individual pod dimensions and areal positioning relative to the mine site.

* * * * *

A demonstration must be provided to show the capability to perform the exacting compaction and selective materials handling practice that would result in the required permeabilities. * * *

fn. 3 (continued)

groundwater from contamination by acid-mine drainage. The pod plan addressed by EPA below was initially devised by EFO:

"Conceptually we feel that the proposed isolation of toxic spoils in relatively impermeable pods on the mine site is feasible. However, problems associated with the use of on-site shale for pod liner material and site-specific hydrologic conditions will seriously limit the effectiveness of the proposed plan in preventing the formation of acid leachate that could degrade ground and/or surface waters.

"Our main concern at present is the assertion that the proposed waste handling plan will prevent saturation of the encapsulated toxic materials. Our evaluation of the hydrologic modeling presented in the assessment indicates that the hydraulic capacity of the sandstone underdrain and the shale backfill material around the pods will not be adequate to convey surface and groundwater infiltration and ensure that saturated conditions will not occur. We believe it is likely that execution of the plan as proposed will result in saturation of the pods at least some of the time with the possibility that they will remain in a saturated condition. Under such conditions, toxic leachates will be generated since the liner material will not be totally impermeable.

"After evaluating the pod construction design, we do not believe that the permeability test results support the use of shale liners as a practical means of controlling leachate from toxic materials. Although the tests indicated that acceptably low permeabilities can be achieved with compacted, minus 1/4-inch shale particles, the tightly controlled laboratory conditions are unlikely to be duplicated in the field, especially with shale fragments as large as 6 inches. The proposed on-site test pad demonstration should provide better information on which to draw conclusions but only if test methods are altered to reflect actual pod construction conditions as noted in our technical comments."

IBLA 89-393

The pods will be constructed essentially as spherical segments to insure positive drainage from the compacted surface. The diameter of segments will vary depending upon the quantity of acid material to be stored. The number and placement of segments will be determined from advanced drilling of each cut prior to mining.

(Exh. R-19 at item 67.c).

Rith also reviewed the probable hydrologic consequences of its TMAP and responded to KFO's deficiency letter in this manner:

The concept of minimizing contact of water with acid material disposed in compacted pods over a sandstone underdrain depends upon differential permeabilities between the areas around the pods and the compacted pods. To document the compactibility of the shale and the resulting impermeable nature of a compacted pod, laboratory determinations of permeability were conducted on the shale from the RITH ENERGY mine. * * *

The laboratory studies indicated that the shale material available from the mine site can be compacted to achieve permeability values that will minimize contact of water with acid material resulting in no anticipated impact on the hydrologic balance [5/] due to the disturbing of potentially acid forming material during mining. The test results indicated that field compaction of acid material to a Proctor density that would result in a hydraulic conductivity of 5×10^{-5} cm/sec or less should be the goal. To achieve the desired differential permeability around the pods, the resulting hydraulic conductivity around the pods should be greater than 1×10^{-3} cm/sec.

(Exh. R-19 at item 77.b.5).

As noted above, KFO's Maddox found that Rith's TMAP lacked the detail necessary to find that regulations 30 CFR 942.774.13(c) and 30 CFR 942.773.15(c) had been satisfied. At the hearing before Judge Torbett, OSMRE also presented evidence that Rith underestimated the volume of acid-forming material (Tr. 436-45). Such underestimation caused OSMRE to conclude that Rith's pods would be 58 percent undersized and, therefore, incapable of housing the toxic material (Tr. 445-46). Additional testimony was offered by OSMRE that temporary storage of toxic material would be necessary at certain cuts in the mining plan (Tr. 437-38).

5/ "Hydrologic balance" is the relationship between the quality and quantity of inflow to, outflow from, and storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the quantity and quality relationships between precipitation, runoff, evaporation, and the change in ground and surface water storage. 30 CFR 710.5.

IBLA 89-393

Testimony was also received at the hearing in support of Rith's argument that undue influence was brought to bear upon OSMRE by the involvement of the Environmental Protection Agency, various political figures, and intervenor Save Our Cumberland Mountains, Inc. (SOCM), in the administrative process. Judge Torbett found that petitioner had failed to provide substantial evidence of any undue influence in the decisionmaking process.

Based on our review of the record we find that the evidence supports Judge Torbett's decision that OSMRE properly denied Rith's application for permit revision.

In its statement of reasons on appeal, Rith stresses that OSMRE's concern for the high potential acidity of shales near the Sewanee seam is belied by the fact that "during the entire time Rith mined the Richland and Sewanee coal seams on the south side of its permit and through the 2-1/2 to 3 years since that portion of this site has been reclaimed there has been no acid mine drainage problem nor any evidence of any acid mine drainage problem" (Statement of Reasons, July 10, 1989, at 18). The potential for acid-mine drainage has not developed, Rith contends, because its originally approved manner of handling overburden and potentially acid-forming material, as used on the south side of the permit, has worked. Id. at 19.

Rith also contends that OSMRE has disregarded its own geologic conclusions concerning the impact of mining on groundwater. Even conceding that the geochemical data about the overburden of the Sewanee coal seam shows a greater potential for the development of acid water than first determined, 7/ petitioner states, the conclusions regarding the physical geology of the site remain unchanged. In two environmental assessments (EA's) prepared by the agency, one prior to permit suspension and one after, OSMRE determined that vertical movement of groundwater was "restricted by an impermeable strata," Rith notes (Exh. A-9 at 8). Quoting from the later EA, petitioner states,

The low transmissivity of the Pennsylvanian strata results in a low recharge rate to bedrock aquifers and minimizes or prevents circulation of ground water from the site with that in the bedrock aquifer. Thus, the impact of the proposed operation upon underlying Pennsylvanian aquifers would be small.

* * * Further elevation of iron and manganese concentrations because of the proposed mining operation is unlikely since underlying aquifers are protected from impact by a layer of impermeable shale.

Id. at 8-9.

7/ As explained *infra*, Rith's permit application contained geochemical data that OSMRE found to be "diametrically opposed" to its own. Testing the shale zone above the Sewanee coal seam, OSMRE found potential acidity to be higher (250 percent difference) and neutralization lower (500 percent difference) (Exh. R-1). This disparity provoked an investigation by the Office of the Inspector General, U.S. Department of the Interior, who found no evidence of fraudulent analysis (Tr. 121).

IBLA 89-393

other harmful infiltration to ground-water systems and by managing excavations and other disturbances to prevent or control the discharge of pollutants into the ground water.

* * * * *

(d) Surface-water protection.

(1) Surface-water quality shall be protected by handling earth materials, ground-water discharges, and runoff in a manner that minimizes the formation of acidic or toxic drainage; prevents, to the extent possible using the best technology currently available, additional contribution of suspended solids to stream-flow outside the permit area; and otherwise prevents water pollution. [Emphasis supplied.]

Rith argues that the criteria by which a TMAP should be judged is not the absolute prevention of leachates or the absolute prevention of adverse impacts, but rather a minimization of disturbance to the hydrologic balance and no substantial adverse impact (Statement of Reasons at 24).

Petitioner's first argument, addressing the absence of acid-mine drainage in the south side of the permit, is answered by the testimony of Willis Gainer, Chief, Branch of Southern Coal Fields, KFO. When questioned whether such drainage would be apparent if there was a handling problem, Gainer replied:

A We have seen, in the typical mining situations in Tennessee, where acid problems have developed. It takes two to three years following mining, sometimes up to five years, for an acid seep to develop.

It depends on the rainfall and the saturation process of the backfill how soon it fills up and seeps out through the fill itself.

* * * * *

* * * We believe that there is a limited amount of toxic material, acid forming material disturbed on the south side.

Our geologists indicated that in some -- at least, one of them did -- he saw the toxic material actually pinched out above the coal seam, which would mean a reduced amount of toxic material or acid forming material was there to be disturbed.

(Tr. 174, 219).

Alfred Whitehouse, Deputy Assistant Director of Program and Technical Support, OSMRE, also testified to the likely effect that drought conditions had on the south side, stating that no discharge had occurred anywhere from the site (Tr. 610). The testimony of Gainer and Whitehouse suggest that it

IRLA 89-393

A careful reading of the applicable statutory and regulatory language reveals that OSMRE is directed to "minimize the disturbances to the prevailing hydrologic balance" by taking a variety of actions. One of these actions is "by avoiding acid or other toxic mine drainage." 30 U.S.C. § 1265(b)(10)(A) (1982) (emphasis added). Measures of avoidance are set forth by statute, and the first of these is achieved by "preventing or removing water from contact with toxic producing deposits." (Emphasis added.) *Id.* Thus, the statute, as properly read, requires the agency to minimize disturbance to the prevailing hydrologic balance by avoiding acid or toxic mine drainage. Minimizing the contact of water and toxic-producing deposits, as argued by petitioner, is not the standard. See also 30 U.S.C. § 1265(b)(14) (1982) and H.R. Rep. No. 218, 85th Cong., 1st Sess. 114, 174 (1977).

Petitioner finds some support for its position in 30 CFR 816.41(b) and (d), quoted *supra*, but overlooks 30 CFR 816.41(f), the regulation specifically addressing acid- and toxic-forming materials. This regulation states in part:

(f) Acid- and toxic-forming materials. (1) Drainage from acid- and toxic-forming materials into surface water and ground water shall be avoided by--

(i) Identifying and burying and/or treating, when necessary, materials which may adversely affect water quality, or be detrimental to vegetation or to public health and safety if not buried and/or treated, and

(ii) Storing materials in a manner that will protect surface water and ground water by preventing erosion, the formation of polluted runoff, and the infiltration of polluted water.
[Emphasis added.]

Further support for OSMRE's action in this case is set forth in the preamble to this regulation, which states in part:

The final rule requires that the drainage from acid- and toxic-forming material be avoided by identifying, treating or burying, and, when necessary, burying and treating such materials

fn. 10 (continued)

extent that Rith is asserting that SOCM acted improperly in doing so, there is no evidence in the record to support such an assertion. As Willis Gainer testified:

"Under the public review process, they have the opportunity to comment. We are required to take all public comments received into consideration.

"So, from the standpoint that they have provided comments, a lot of them in technical areas, we do look at them and address them and make sure that if a regulations [sic] require them that the plan covers them."
(Tr. 181).

IBLA 89-393

By its application, petitioner sought to revise permit 2583, which was issued to Rith on January 3, 1986, for an 89-acre surface coal mining operation in Bledsoe County, Tennessee. Shortly after issuance of the permit, OSMRE suspended Rith's operations on a portion of this permit until Rith had submitted and OSMRE had approved an adequate toxic materials handling plan (TMHP). Rith submitted such a plan as Significant Revision No. 10 on January 15, 1988, and subsequently amended it following a series of technical reviews by OSMRE.

KFO denied Rith's application for Significant Revision No. 10 because it found that the application did not satisfy 30 CFR 942.774.13(c). 1/ This regulation requires that an application for permit revision demonstrate, inter alia, that applicable requirements under 30 CFR 942.773.15(c) "which are pertinent to the revision" are met. Regulation 30 CFR 942.773.15(c) requires that an application affirmatively demonstrate, and the regulatory authority find, inter alia, that the application is complete and accurate and that reclamation, as required by the Act and the regulatory program, can be accomplished under the reclamation plan contained in the permit application. 2/ In its decision, dated September 6, 1988, KFO expressly stated that it could make no such findings.

Immediately prior to issuing this decision of September 6, 1988, KFO had received from Tare, Inc., petitioner's consulting engineer, the last of three responses prepared by Tare, each addressing a deficiency letter issued by KFO. It was the consensus of the KFO technical review team that Rith remained unresponsive to the earlier deficiencies and that its TMHP remained a general plan. Joe B. Maddox, Chief, Division of Tennessee Permitting, KFO, testified, "We didn't have the level of detail that we would need in order to make that finding [under 30 CFR 942.774.13(c) and 30 CFR 942.773.15(c)]" (Tr. 566).

The deficiencies that KFO found to be unaddressed in Rith's TMHP are set forth in KFO's final deficiency letter of July 25, 1988 (Exh. R-15). The deficiencies focus upon a plan to isolate potentially acidic shales in pods that would be compacted to minimize infiltration (Exh. R-3 at 4). KFO's letter relied heavily upon a report by the Eastern Field Operations (EFO) office, OSMRE, and noted the following deficiencies, 3/ inter alia:

Provide a detailed description of the operations plan showing how the conceptual model can be successfully implemented during

1/ KFO's decision of Sept. 6, 1988, referred to regulations under the Tennessee Federal program. See 30 CFR Part 942.

2/ The Act referred to is the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1201 (1982). Requirements similar to 30 CFR 773.15(c) are set forth at 30 U.S.C. § 1260 (1982).

3/ Concern was also voiced by the Environmental Protection Agency (EPA), who commented upon the TMHP by letter of Aug. 9, 1988 (Exh. R-18). EPA explained that its interest was the protection of surface water and

IBLA 89-393

* * * * *

Field observations of the current mine status indicate that a correction of the Sewanee coal seam cropline on your mining operations map is needed. * * * This incorrect cropline significantly affects the volumes of potentially acid forming shale * * *.

Provide a narrative with appropriate cross-references that discusses how the Newton Sandstone will be removed and stored; how the potentially acid-forming materials [4/] will be removed and stored; how the Richland overburden will be removed and stored and then replaced to obtain a positive drain; how the Newton Sandstone will then be replaced as an underdrain; how and what material will be used for construction of the pads for the placement of the compacted pods of potentially acid-forming material; how the potentially acid-forming material will be placed in pods and compacted; and where and what material will be used for four feet of non-toxic and non-combustible cover. Cut-by-cut descriptions should be provided * * * along with material balances for each type of spoil.

(Exh. R-15 at 3, 4).

In its response to KFO's deficiency letter of July 25, 1988, Rith acknowledged the presence of approximately 235,000 cubic yards of potentially acid-forming shale immediately above and below the Sewanee coal seam (Exh. R-19 at item 67.c). To prevent the formation of acid drainage, petitioner selected "an isolation and treatment approach." Id. Its TMAP, responding to KFO's deficiency letter, states in part:

The shale layer under the Newton sandstone and approximately about 3 feet below the Sewanee seam will be removed by dozers with rippers, loaders, trucks or scrapers. This potentially acid forming shale may have to be loosened by careful blasting to facilitate handling. The removal of the acid shale shall be accomplished in a manner that promotes break up of the shale into as fine a particle size as possible. If the shale is ripped, it is to be cross ripped and tracked over several times to break the shale into particles with a maximum size of 4 to 6 inches. If blasting is necessary, a shot pattern that produces a minimum size particle will be utilized. It is recognized that the minimum sized shale particles produced will promote compaction to the desired standard.

4/ "Acid-forming materials" are earth materials that contain sulfide mineral or other materials which, if exposed to air, water, or weathering processes, will cause acids that may create acid drainage. "Acid drainage" is water with a pH of less than 6.0 discharged from active or abandoned mines and from areas affected by coal mining operations. 30 CFR 710.5.

IBLA 89-393

In his decision, Judge Torbett found that "the clear weight of the evidence" showed that Rith significantly underestimated the volume of toxic material on-site. This fact and the further finding that a plan for temporary storage was necessary, but lacking, caused Judge Torbett to conclude that serious doubts existed that Rith could reclaim the site as required by law. The Judge also concluded that without a detailed operational plan it would be impossible for OSMRE to make a rational judgment as to whether Rith was in fact reclaiming the site as required.

Judge Torbett also focused on Rith's duty to demonstrate that its operation was designed to prevent material damage to the hydrologic balance outside the permit area, when considered with the probable cumulative impacts of all anticipated coal mining on the hydrologic balance in the cumulative impact area. 30 CFR 942.773.15(c)(5). The Judge quoted from James Hughes, a physical scientist employed by OSMRE, who testified that Significant Revision No. 10 contained data "inadequate to make a complete determination of whether the proposed acid materials handling plan would adequately protect water quality" (Tr. 372).

OSMRE's concerns focused on the size, compaction, and permeability of shale particles that would be used to isolate potentially acid-forming materials from the Sewanee Conglomerate aquifer below. Specifically, OSMRE doubted whether a small enough particle could be achieved on-site and compacted to form an impermeable buffer between the toxic materials and percolating groundwater.

Judge Torbett found undisputed the presence of a highly acidic overburden above and below the Sewanee coal seam that Rith intended to mine. ^{6/} Also undisputed, the Judge found, was OSMRE's evidence of the potential acidity of the north side of the minesite. This finding was clear, the Judge noted, even though Rith argued that it had mined the Sewanee seam on the south side without evidence of acid mine drainage.

Regarding Rith's duty to prevent material damage to the hydrologic balance, 30 CFR 773.15(c)(5), Judge Torbett summarized his findings at page 26 of his decision:

The undersigned finds that the overburden on the north side of Applicant's permit was undeniably of a highly acidic nature. Unless Applicant could demonstrate that the pod concept would work, there would have been a high probability that there would be acid mine drainage into the Sewanee Conglomerate aquifer. Given the importance of particle size to the issue of permeability of the pods, the undersigned finds that [OSMRE's] concerns for damage to the hydrology from Applicant's proposed toxic material handling plan were legitimate.

^{6/} In addition to the Sewanee, Rith intended to mine the Richland coal seam.

IBLA 89-393

Finally, petitioner argues that KFO incorrectly required a plan that was "designed to prevent leachates [8/] from entering the surface and ground water" and that would allow KFO "to make a finding that there will be no adverse impact to the hydrologic balance" (Statement of Reasons at 22, quoting from Exhs. A-2 and A-3 (emphasis added by Rith)). 9/ Both SMCRA and the regulations clearly recognize that the standards demanded by KFO are impossible of achievement for any coal mine, Rith contends.

In support of this argument, petitioner cites 30 U.S.C. § 1265(b)(10) (1982), which states:

(b) General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation as a minimum to--

* * * * *

(10) minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation by--

(A) avoiding acid or other toxic mine drainage by such measures as, but not limited to--

(i) preventing or removing water from contact with toxic producing deposits;

(ii) treating drainage to reduce toxic content which adversely affects downstream water upon being released to water courses;

(iii) casing, sealing, or otherwise managing boreholes, shafts, and wells and keep acid or other toxic drainage from entering ground and surface waters * * *. [Emphasis added.]

Petitioner also points to 30 CFR 816.41(b) and (d), which state:

(b) Ground-water protection.

(1) Ground-water quality shall be protected by handling earth materials and runoff in a manner that minimizes acidic, toxic, or

8/ "Leachate" is a liquid that has percolated through soil, rock, or waste and has extracted dissolved or suspended materials. 30 CFR 710.5.

9/ These exhibits are letters from KFO to William Ring of Rith Energy, Inc., dated June 20 and 27, 1986, respectively.

IBLA 89-393

may be too soon to conclude that petitioner was successful in avoiding acid drainage on the south side of the permit. We find that OSMRE's concerns are well founded. The absence of any present acid mine drainage does not mean that acid mine drainage will not occur in the future. Moreover, the record shows that a larger amount of toxic material has been identified on the north side of the permit area, which is the subject of the revised plan. Petitioner's first argument is, accordingly, rejected.

Rith's second argument, *i.e.*, that OSMRE's decision contradicts two prior EA's regarding the vertical movement of groundwater, is similarly unpersuasive. When questioned about the original EA, KFO's Maddox testified that it was based on data submitted by Rith, which data was later determined to be unrepresentative of the actual geology of the minesite. The effect of this unrepresentative data "rendered the original environmental assessment as it relates to the toxic material invalid because it was based upon information that was not representative" (Tr. 533-34; see also Exh. R-1).

With respect to the second EA, which Rith correctly notes was issued after its permit was suspended, Gainer testified that this EA (and accompanying finding of no significant impact (FONSI)) addressed only Rith's plan to relocate a county road on the minesite and mine the Richland coal seam underneath (Tr. 224). Maddox agreed, stating that the EA was limited to the impacts of relocating the road (Tr. 533).

As OSMRE examined more closely the geology of the minesite, its views of the permeability of rock overlying the Sewanee Conglomerate aquifer changed. Thus, James Hughes testified, when asked about the shale stratum immediately above the aquifer, "As far as the Whitwell Shale beneath the Richland coal [is concerned], in the course of mining [and] blasting that is necessary during mining we tend to fracture that, and as a result that would facilitate the vertical percolation of water through the shale unit (Tr. 947).

The testimony of Maddox and Gainer offers plausible reasons for the contradictory conclusions reached by the EA's and KFO's denial of Significant Revision No. 10. Additional testing necessitated by the agency's inquiry into the permeability of the Whitwell Shale is a further plausible reason. OSMRE must be free to correct statements in its EA's when new data requires it; to do otherwise is to perpetuate error. Petitioner's showing of inconsistency does not demonstrate error in the agency's final course of action.

[1] Petitioner's ultimate argument challenges the standard that OSMRE used in evaluating Rith's TMHP. As noted above, Rith contends that OSMRE used too stringent a standard and should instead have sought to minimize disturbance to the prevailing hydrologic balance, as set forth at 30 U.S.C. § 1265(b)(10) (1982) and 30 CFR 816.41(b) and (d). 10/

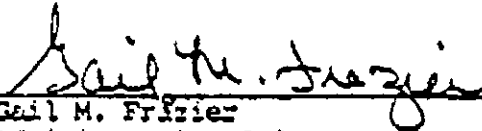
10/ In its statement of reasons at 2, Rith charges that OSMRE adopted such a standard and required a much more complex TMHP because of "pressure from SCYM." While it is clear that SCYM opposed approval of Rith's TMHP, to the

IBLA 89-393

in order to prevent adverse effects to water quality, to vegetation, or to public health.

See 48 FR 43956, 43979 (Sept. 26, 1983).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Torbett is affirmed as modified. 11/


Gail M. Frazier
Administrative Judge

I concur:


Bruce R. Harris
Administrative Judge

11/ Judge Torbett incorrectly stated at page 23 of his decision that the burden of persuasion shifted to Rith when OSMRE made out its prima facie case. Regulation 43 CFR 4.1376 provides that the ultimate burden of persuasion rests with the applicant for a permit revision, i.e., Rith. The burden of persuasion does not shift from party to party. McCormick on Evidence § 336 (3d ed. 1984). The evidence is such that this error does not alter the result in this case; the Judge's decision may be affirmed, but as modified in this regard.



west
virginia
highlands
conservancy

MAILING ADDRESS • P.O. Box 306 • Charleston, West Virginia 25321

Publishers of the Highlands Voice and the Monongahela National Forest Hiking Guide

RECEIVED
WV Department of Energy

OCT 11 90

Division of Mines and Minerals

(Hand Delivered)

October 9, 1990

Stephen C. Keen, Director
Mines and Minerals Section
W.V. Department of Energy
1615 Washington Steet, East
Charleston, W.V. 25311

Dear Mr. Keen,

I received your transmittal of proposed amendments to the W.V. Surface Mine Regulations (CSR-38-2) on September 24th.

As I told Roger Hall in a telephone conversation early the following week, due to previous commitments I would be unable to attend the public hearing on October 10th, but would see that comments on behalf of the plaintiffs in the Save Our Mountains lawsuit would be submitted before the close of the comment period.

Roger and I also discussed in general terms some of the changes being proposed, and I expressed my dismay at several of the sections that seemed to alter language arrived at during the committee/lawsuit/legislative process these past two years. Roger informed me that this package incorporated not only OSM required changes but also some other changes DOE thought were needed. Perhaps these are the same changes you referred to in your Memo of 9/21/90 as "some of the existing DOE policies" that were also incorporated.

As I told Roger on the phone, i DO think a meeting of the Regulation Committee is in order, especially in light of the confusion about many of the changes. If there is to be a meeting on the 24th of October as you indicated in your letter of October 5th, I will make every effort to attend.

I only regret that we find ourselves in the same sort of time crunch that we've experienced these past two years. I don't understand why the Regulation Committee wasn't notified of the proposed amendment package until 3 weeks after it was submitted to the Secretary of State's Office, but trust that we can all work toward an acceptable and timely resolution of these matters.

Sincerely,

Cindy Rank

Cindy Rank, President

Working for the Nature of Tomorrow,



NATIONAL WILDLIFE FEDERATION

1400 Sixteenth Street, N.W., Washington, D.C. 20036-2266 (202) 797-6800

RECEIVED
WV Department of Energy

OCT 19 90

Division of Mines and Minerals

October 18, 1990

Mr. Steve Keen
West Virginia Department of Energy
1615 Washington Street, East
Charleston, WV 25311

Dear Mr. Keen:

As a supplement to comments on the proposed West Virginia Surface Mining Reclamation Regulations that will be filed by the attorneys for the National Wildlife Federation and other conservation organizations, I respectfully submit the following:

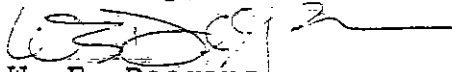
The proposed definition of Historic Lands at Section 2.63 on Page 12 is different and less stringent than the federal definition at 30 C.F.R. § 762.5. West Virginia's definition provides an example of sites "having cultural significance to native Americans; or religious significance to religious groups..." These examples are more restrictive than the examples provided in the federal regulations that include "properties having religious or cultural significance to Native Americans or religious groups..." (emphasis added)

We recommend that the proposed state definition be changed to agree with the federal regulations. Because changes have been made over the course of the past three or so sets of regulations that affect the protection afforded historic areas, we recommend that the West Virginia DOE consult with representatives of the West Virginia Department of History, particularly their archeologist, historian, architectural historian, and preservation officer, and West Virginia preservation activists to draft regulations and

Mr. Seve Keen
October 18, 1990
Page 2 of 2

policies that will protect West Virginia's rich cultural resources.

Sincerely,



W. E. Deegans
Coordinator
Surface Mining Project

cc: Larry W. George, Commissioner
James Blankenship, Jr., OSM
James Bloenker, Dept. of History and Culture
Elizabeth Merritt, National Trust for Historic Preservation



Coal Miners Political Action Committee

Charleston, W. Va. 25304

4500 MacCorkle Ave., S. E.

(304) 925-6977
925-6978

Chairman: Richard Trumka

Vice Chairman: Cecil Roberts

Secretary - Treasurer: John J. Banovic

TO: Commissioner, WV Department of Energy

FROM: Mike Burdiss *Mike Burdiss*

DATE: October 10, 1990

RE: PROPOSED CHANGES TO THE WEST VIRGINIA SURFACE MINING
AND RECLAMATION REGULATIONS (CSE-38-2)

Please be advised that the United Mine Workers of America is quite concerned over the proposed regulations that were received September 24th from Steve King.

Once again, we find ourselves asking the question of why language contained within the regulations have been capriciously and arbitrarily changed without consultation with your staff.

On pages 14 and 15 there has been word omissions and work changes. On page 66 the scope and intent of this section has been totally rewritten.

I raise these points because the specific areas were agreed to and inserted into the last set of legislative rules submitted after the 1989 Legislative Session.

Because these changes have been found through the argus task of a comparative analysis of previous proposed rules and adopted rules, it begs the question of determining whom has the task of capriciously and arbitrarily changing the language that has been agreed to in a fair and equitable manner.

The United Mine Workers feels that it is a duty and a responsibility of this department, to the legislators and to the citizens of this state to mandate a comparative sheet to be presented as to who recommended the changes, whether it be OSM, Departmental, Coal Companies or Union.

We find it again totally unexceptable that the Legislative Rule Making Committee, the citizens, the companies and the Union are faced with a 262 pages of regulations without a synopsis of the proposed changes.



Coal Miners Political Action Committee

Charleston, W. Va. 25304

4500 MacCorkle Ave., S. E.

Steve Lee

RECEIVED
OCT 19 1990
WV Department of Energy

RECEIVED

OCT 18 90

COMMISSIONER'S OFFICE
DEPARTMENT OF ENERGY
CHARLESTON, WV 25301

Division of Mines and Minerals

Chairman: Richard Trumka
Vice Chairman: Cecil Roberts
Secretary - Treasurer: John J. Banovic

October 17, 1990

Mr. Larry George, Commissioner
W.Va. Department of Energy
1615 Washington Street, East
Charleston, West Virginia 25311

Dear Commissioner George:

My review of the proposed DOE regulations have revealed approximately 107 changes from existing language. I have enclosed a copy of each change for your convenience. Please provide me with a detailed explanation as to the purpose and effect of each of these changes.

Very truly yours,

Michael P. Burdiss

Michael P. Burdiss
Staff Coordinator
West Virginia COMPAC

MPB:kd
Enclosure

cc: Bill Samuels
Matt Miller

PROPOSED CHANGES

WEST VIRGINIA SURFACE MINING REGULATIONS

<u>Page No.</u>	<u>Section</u>	<u>Comment</u>
1	1.2(b)	Deleted. Was this an OSM recommendation?
2	1.2(c)(d)	New sections. Are these OSM or DOE?
3	2.2	New abandoned site. Is this OSM or DOE?
4	2.8	New language OSM or DOE?
5	2.15	Bench Control System language stricken. New language added.
10	2.44	Downslope. Is this OSM or DOE?
10	2.45	Is change OSM or DOE?
12	2.67	Dropped language. Is this OSM or DOE?
14	2.82	New language. OSM or DOE?
15	2.91	Dropped language. Is new language OSM or DOE?
16	2.96	New language. OSM or DOE?
25	3.2	New language. OSM or DOE?
25-26	3.2(b)(11)(12)	Language stricken and added. OSM or DOE?
27	3.2(b)(12)(B)(iii)	Language changed.
27	3.2(b)(13)(E)	Language added. OSM or DOE?
30	3.4(d)(7)	Dropped language. OSM or DOE?
31	3.4(d)(18)	New language. OSM or DOE?

<u>Page No.</u>	<u>Section</u>	<u>Comment</u>
32	3.4(d)(22), (23), (24)	An amendment which would add the applicant shall submit a plan for the top soil storage area.
36	3.4(k)(1)	New language
36	3.7(a)	Dropped language. OSM or DOE?
37	3.7(b)(4)	Dropped language. OSM or DOE?
37	3.7(b)(5)	New language. OSM or DOE?
37	3.7(b)(6)	New language. OSM or DOE?
41	3.12(a)(5)	New letter & change of letter?
44	3.14(a)	New language.
44	3.14(a)(3)	Dropped language.
44	3.14(b)(2)	Deletion of: (1) and.
47	3.14(b)(15)	New language.
47	3.14(b)(15)(E)	New language.
49	3.16(a)(2)	Dropped language.
54	3.22(b)(2)	Word change.
55	3.22(c)(2)	Word change.
58	3.23(b)	Word change.
60	3.25(a)(2)	
60	3.25(a)(2)	Section dropped, sub-section marked as new.
61	3.25(4)	(c) and (d) omitted "obtained" and "coverage". (b) added.
61	3.26	Agreement dropped - new language in sub-section 2-3.
65	3.27(b)	New language.

<u>Page No.</u>	<u>Section</u>	<u>Comment</u>
66	3.27(b)(2)(c)	Dropped language.
67	3.28(c)	(A)(B)(C)(D) new language.
68	3.28(c)	(D)(E) new language.
68-69	3.29(c)(1)-(7)	New language.
69-70	3.29(d)(1)-(9)	New language.
70	3.29(d)	(A)(B)&(C)(e) new language.
71	3.30(c)	New language.
71	3.31(b)	Old language totally eliminated.
77	3.32(h)(1)	Deleted "and (d)".
77	3.32(h)(2)	Deleted "(p) and (d)"
81-86		Total drop of 4.1; 4.2; 4.3; 4.4; 4.5; 4.6; 4.7; 4.8; 4.9; 4.10; 4.11; 4.12; 4.13; and 4.14.
97	5.2(a)	New language and "or" dropped.
99	5.4(b)	New language.
100	5.4	Rewrite of Sediment Control.
106	5.5	Rewrite of Permanent Impoundments.
109	6.3(b)	Rewrite of subsection (b).
114	6.5(m)	New language.
114	6.6	New language.
114-115	6.6(a)(1)-(3)	Deleted language.
115	6.6(a)(4)	Deleted and new language.
115	6.6(b)	Deleted and new language.
115	6.8(a)	Deleted language.

<u>Page No.</u>	<u>Section</u>	<u>Comment</u>
120	8.1(e) (1)	New language.
126	9.3 (b)	New language.
126	9.3 (b)	Deleted language.
136	11.1(a)	Deleted and new language.
152	12.2(c) (4) (A) & (B)	New language.
156	13.1	New language.
158	13.1(c) (6)	New language.
158	13.2	Deleted and new language.
160	13.2(d)	New language.
162	13.4(a)	New reference.
172	14.5(g)	New reference.
172	14.5(h)	New language.
174	14.8(2)	New language.
176	14.8(G) & (H)	New language.
176	14.8(5)	Deleted and new language.
181	14.11(e)	Deleted and new language.
182	14.12(a) (6) (A)	New language.
182	14.12(a) (6) (B)	Sub-section renamed.
184	14.14(b) (4)	New sub-section (4) (A) - (D)
188	14.14(e) (2)	Dropped language.
188	14.14(e) (4) (A) & (B)	New language.
189	14.14(e) (8)	New language.
191	14.14(f) (5)	New language.

<u>Page No.</u>	<u>Section</u>	<u>Comment</u>
192	14.14(g)(1)(B)	Deleted and new language.
192-193	14.14(g)(6)	New language.
193	14.14(g)(7)	Deleted language.
193	14.14(g)(8)	Deleted and new language.
193-194	14.14(g)(11)&(12)	New subsections.
198	14.17	New language.
205	16.2(c)(2)	Deleted language.
208	17.4(n)	Deleted and new language.
224	20.1(a)(3)	Deleted and new language.
225	20.1(a)(6)(A)&(B)	New language.
226	20.2(a)	Deleted and new language.
230	20.4(b)	Deleted and new language.
232	20.4(j)	Deleted and new language.
233	20.5(a)	Deleted language.
233-234	20.5(b)	New language.
234	20.6(a)&(b)	New language.
235-235	20.6(c),(d),(e)	Deleted and new language.
236	20.6(k)	Deleted language.
237-240	20.7(a),(b),(c),(e)	Deleted and new language.
245	22.2	New language.
248	22.3(i)	New language.
250	22.3(p)	Deleted language.
254	22.4(f)(1)	Deleted language.
256	22.4(j)	Deleted subsection.

REGISTRATION FOR PUBLIC HEARINGS
WEST VIRGINIA DEPARTMENT OF ENERGY

Meeting: W Va Surface Mining Reclamation Regulators CSR 38-1 Date: 05

DOE

Name

Address

Representing

XXXXXXXXXXXX	PLEASE PRINT OR WRITE PLAINLY	XXXXXXXXXXXX
Bill Kahlert	1621 Kennedy Blvd, E. CHAS	LOVELL
Robert Hays	PO Box 1517, Bluefield, WV	Peabody Coal Corp
John Hays	CHAS	DOE
John Small	CHAS	DOE
1251111111	CHAS	DOE
Raymond Armitage	PO Box 859, Kinross, WV	TRISTARS GAR OF ASSOCIATION
1111111111	1001 Logansport St. E. CHAS	WV Electric Utility Company
1111111111	1001 Logansport St. E. CHAS	WV Regulation Group
1111111111	Attn: Dept. Bldg. Charleston WV	Alloy Research
1111111111	CHAS	DOE
1111111111	1115 Washington St E	DOE
1111111111	1615 Chesapeake St. S.	DOE
1111111111	Box 169, Canneltown 25036	Kanawha Mining Co.
1111111111	45 17th Center Ave. Charleston	UNION
1111111111	1502 Main St. Rd	UNION
1111111111	4512 McCaskey Ave SE, Charleston, WV 25304	UNION
1111111111	490 S. Main St. Charleston WV 25301	UNION FUEL CO
1111111111	603 Myers St Charleston WV 25301	OSM
1111111111	1424 Kanawha Blvd F, Charleston WV 25311	WV M.R.A.
1111111111	1301 Kanawha Terrace, Charleston WV 25301	WV Coal Association



Coal Miners Political Action Committee

Charleston, W. Va. 25304

4500 MacCorkle Ave., S. E.

(304) 925-6977
925-6978

Chairman: Richard Trumka
Vice Chairman: Cecil Roberts
Secretary - Treasurer: John J. Banovic

TO: Commissioner, WV Department of Energy

FROM: Mike Burdiss *Mike Burdiss*

DATE: October 10, 1990

RE: PROPOSED CHANGES TO THE WEST VIRGINIA SURFACE MINING
AND RECLAMATION REGULATIONS (CSE-38-2)

Please be advised that the United Mine Workers of America is quite concerned over the proposed regulations that were received September 24th from Steve King.

Once again, we find ourselves asking the question of why language contained within the regulations have been capriciously and arbitrarily changed without consultation with your staff.

On pages 14 and 15 there has been word omissions and work changes. On page 66 the scope and intent of this section has been totally rewritten.

I raise these points because the specific areas were agreed to and inserted into the last set of legislative rules submitted after the 1989 Legislative Session.

Because these changes have been found through the argus task of a comparative analysis of previous proposed rules and adopted rules, it begs the question of determining whom has the task of capriciously and arbitrarily changing the language that has been agreed to in a fair and equitable manner.

The United Mine Workers feels that it is a duty and a responsibility of this department, to the legislators and to the citizens of this state to mandate a comparative sheet to be presented as to who recommended the changes, whether it be OSM, Departmental, Coal Companies or Union.

We find it again totally unexceptable that the Legislative Rule Making Committee, the citizens, the companies and the Union are faced with a 262 pages of regulations without a synopsis of the proposed changes.



CYPRUS
Kanawha Corporation

Cyrus Kanawha Corporation
Post Office Box 130
Mt. Carbon, WV 25139
304-442-4572

October 10, 1990

Stephen C. Keen
Director, Mines & Minerals
West Virginia Department of Energy
1615 Washington Street, East
Charleston, WV 25311

Re: Proposed Surface Mining Reclamation Regulations Amendments

Gentlemen:

The following comments are offered for consideration during the Public Hearing on Proposed Rule Amendments to the West Virginia Surface Mining Reclamation Regulations:

Page 16, 2.96 Prospecting: As currently defined, a prospecting permit would be required to gather baseline data. This requirement would further increase the time and paperwork required to obtain a mining permit. The revision may create a Catch 22 type conflict with Sections 13.1(a), (12.13) and 13.1(c)(6) by requiring a permit to collect data that is required to obtain the permit in question. The definition should not include the gathering of environmental data.

Page 36, 3.7 Disposal of Excess Spoil: Why are alternative designs being deleted from this section? We interpret 816.71 (e)(2) of the Federal Regulation to allow alternative designs.

Page 66 (c) permit revisions: Compared with Page 115, 774.11 of the federal regulations, the Commissioner could require revisions to permits at any time. We suggest that the statement be reworded to correspond with the federal regs.

Page 92, 2-4 Haulageways or Access Roads (7)(b): Compared with Federal regulations 817.150 and 817.151, Pages 250 and 251, the state regs are excessively harsh. Federal regulations do not require sediment control for primary or secondary roads. To our knowledge Kentucky, Colorado, nor Utah require sediment control structures for their roadways. We recommend that this requirement be deleted to become consistent with federal regulations and less onerous to West Virginia operations.

Page 100, 5.4 Sediment Control (4): Compared with Page 196, 816.46 (b)(6)(A) of the Federal Regulations, WV regulations are more stringent by specifically requiring 0.125 ac-ft for each acre disturbed. Suggest that the reg be reworded to state "... adequate sediment volume."

Page 104 (e) Inspections: Compare with Page 197 616.49 Impoundments of the Federal Regs. The federal regs definition of impoundments pertaining to the requirements of this sections refers to the MSHA definition of impoundment, 77.216(a), 5' of embankment and 20 ac-ft of storage or a 20' embankment. The state's requirement would require inspection and certification of all sediment structures. We recommend that impoundments be defined in this section similar to the MSHA definition and that sediment control structures be deleted from the certification requirement.

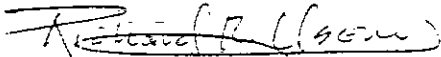
Page 192 (B) " ... and will not degrade into soil material." This statement is not consistent with the definition. Further, OSM has concluded that particle size is not an indication of durability or lack of durability. Recommend that the phrase be struck or reworded.

Page 189, 191, 192 " ... all organic material both above ground and below the ground be removed.": Compare with 816.71 of the federal regulations. Federal regs do not explicitly require removal of organic material below ground. We request that provisions be made allowing interpretation and recommendations of the specific sites by a qualified personnel.

Page 233, 20.5 Civil Penalties Determinations (a) "... beginning with the date of violation ...": Compare with Page 289, 845.15 of the federal regulations and revise to match their wording, "... date of issuance ...".

Cyprus Kanawha encourages and concurs with the proposed amendments to the West Virginia program that will satisfy and emulate federal requirements. However, we strongly disagree with measures that are more restrictive than federal standards. We believe that such requirements are detrimental to the industry and to the State of West Virginia.

Respectfully,



Richard R. Usery
Manager Technical Services



WEST VIRGINIA MINING AND RECLAMATION ASSOCIATION 1624 KANAWHA BOULEVARD, EAST • CHARLESTON, WEST VIRGINIA 25311 • (304) 346-5313

October 10, 1990

Mr. Stephen C. Keen, Director
Division of Mines & Minerals
WV Department of Energy
1615 Washington Street, East
Charleston, West Virginia 25311

Dear Director Keen:

I am pleased to appear before the Department of Energy today on behalf of the 350 member companies of the Association, as well as those companies which are members of the WV Coal Association. Today's testimony will be incorporated into our written comments which will be submitted to you on Friday, October 12, 1990.

While these comments are specifically directed to the proposed regulations received on September 10, 1990, the Associations feel strongly that review and discussion of these issues must continue beyond today. Many of the matters addressed in these proposals, as well as existing regulations, are so complex and technically oriented that a short verbal discussion or hearing is not adequate to insure their practical effectiveness, from either an enforcement standpoint or an industry perspective. Justification and proof of reliability for practices being currently used in the mining industry are on going among member companies' operations. Each day brings new evidence that successful coal mining and effective environmental protection are only possible when the text of regulations is tailored to such proven practices, as opposed to attempting the reverse -- making operations fit the words!

OFFICERS

Kenneth G. Woodring Chairman	Donald K. Cooper Secretary
R. Donald Cussins First Vice-Chairman	Gerald W. Ramsburg Treasurer
James J. LaRosa Second Vice-Chairman	Edward F. Surgeon Chairman-Associate Division

MEMBERS

J. W. Anderson—Princeton	J. H. Harless—Gilbert	R. L. Raines—Bluefield
T. J. Brisky—Eighty-Four, PA	D. E. Huffman—Bridgeport	L. A. Streets—Mt. Storm
J. R. Bryan—Lebanon, VA	J. E. Hull—Charleston	J. C. Williamson—Charleston
D. P. Cartwright—Naugatuck	P. F. Hutchins—Columbus, OH	G. D. Woodward—Morgantown
J. M. Compton—Clarksburg	T. W. Hylton—Beckley	S. R. Young, III—Gilbert
B. H. Daud—Yclyn	C. T. Jones—Charleston	HONORARY MEMBERS
B. E. Dearth, Jr.—Bridgeport	J. C. Justice—Beckley	C. E. Compton—Clarksburg
D. R. Donnell—Weirton	R. G. Lockard—Weston	L. W. Hamilton, Jr.—Hansford
J. J. Faltis—Morgantown	J. W. Mullen—Bluefield	F. B. Nutter, Sr.—Pompano Beach
P. C. Graney, III—Charleston		

Benjamin C. Greens
President

William B. Raney
Vice-President

Mr. Stephen C. Keen
October 10, 1990
Page Two

In the text of our recommendations and comments you will find a number of questions regarding the basis for specific changes to the regulations. We feel answers to such inquiries are deserved and important. We have also included recommended language changes for some proposed or existing rules.

Should you have any questions regarding these comments, please do not hesitate to notify me immediately.

Respectfully submitted,



Benjamin C. Greene
President

attachments



HOBET MINING, INC.

P O. BOX 305 • MADISON, WEST VIRGINIA 25130 • PHONE (304) 369-6780

October 16, 1990

RECEIVED
WV Department of Energy

OCT 19 90

Division of Mines and Minerals

Mr. Steve Keen, Director
Mines and Minerals Section
WV Division of Energy
1615 Washington Street, East
Charleston, WV 25311

Dear Steve:

Please find enclosed comments on the September 7, 1990 and October 8, 1990 proposed draft for the WV Surface Mining Reclamation Regulations (CSR-38-2). Also attached on the behalf of Hobet are comments by Dirk Casagrande of Casagrande Consultants. Hobet wishes to reserve the right to elaborate on or add clarification on the proposed draft regulations as the development progresses.

Again, Hobet welcomes the opportunity to provide comments on the WV Surface Mining Regulations. Should you have any questions, please advise.

Sincerely,

A handwritten signature in cursive script that reads "James E. Ratcliff".

James E. Ratcliff
Mine Engineer

ag

Enclosure

COMMENTS ON PROPOSED SEPTEMBER 7, 1990 DOE REGULATION CHANGES

2.15

Bench Control System is a sediment control system above the projected outcrop of the mining area, as opposed to sediment structures in the valley floors. By defining "on the mining bench", does this mean on the coal pavement. This could cause toxicity problems in some cases. If not, what is an acceptable thickness of cover. On some mountaintop mining operations, there may be several feet to 100 feet of backstack material above the mining bench (i.e. coal pavement) where some sediment or bench control devices may be placed.

Possibly change "on mining bench" to "on or above the mining bench".

2.9

Due to the long permitting process and backlog common to DOE for the past 3 years, it is recommended that this language be changed to "except where inactive status has been applied for or granted...."

2.96

There is a problem with applying the OSM definition while the WV prospect permitting process is much more stringent than OSM. Therefore, WV should modify the prospect permitting process to meet the language of OSM. It was never the intent of the Act to require a permit be obtained to gather environmental data.

3.2(a)

Due to the delay in the DOE permitting process, it is inconceivable that an approval must be obtained due to constant changes (i.e. corrections) or diligent pursuit. WV has severely complicated the process and are backlogged to the point of standstill. Perhaps WV DOE should adhere to the OSM reg 774.13(b)(1) as to the establishment of a time period for review of permits.

3.2(b)(11)

How and where is this required by OSM regulations.

3.4(d)(24)

Where is this required by OSM regs. Requirement is very vague - please for the record discuss as to the need, basis and application of this request.

3.6(k)

Is DOE regulating fugitive dust and what are the standards. Please indicate comparison language in OSM regulations.

3.6(l)

WV DOE needs to adopt the OSM regs 816.101 for backfilling and grading. WV has failed to update its long standing time and distance requirements, which were derived from small contour haulback operations. Is DOE aware there are several large dragline operations operating in WV.

This current proposed change must indicate that a general conceptual plan be included to obtain approval. Is this for the variance of time and distance requirements and should it not be in accordance with 14.12.

To require a specific cut sequence and timing (schedule) is not rational for a large operation where the plan could change from day to day.

What is the reason for these requirements.

3.7(a)

Why does WV DOE want to require stringent engineering certifications of DOE designs. Since DOE is designing these fills why require an engineer to certify the design, it is not the engineers design it is DOE's.

DOE is not allowing engineers to be engineers. Deviations in a permit from the cook book criteria established in the regulations should be approved using prudent engineering techniques.

3.7.(b)(6)

Upon what criteria will the commissioner review and approve or disapprove an engineers certification. Does this have basis in the act or the current federal regulations. What will be expertise and credentials of the individuals approving or disapproving an RPE's certification.

3.14(a)

This is not a current ASTM standard. A majority of European countries have removed coal refuse and utilized the material for making concrete and cinder blocks. How will this effect the opportunity to pursue this new technology in recycling of materials.

Page 3

Page 62 - 3.14(b)(15)

Define baseline water quality as prior to reprocessing not prior to the original waste pile construction.

3.25(c)(2)

Is advertisement of this consistent with the act and current federal regulations - please site language. What is purpose of this?

3.25(c)(3)

Is this consistent with current federal regulations, please site language.

3.25(d)

In sections above there is reference made to contractors. Define what constitutes a subcontractor and why this is used instead of contractor.

3.25(e)

Please define the intent of this paragraph and site reference in the current federal regulations. Does this mean that if an operator who sales an operation is still liable for the violation (s) which existed at the time of the sale. Will this be applied to past operations that were sold prior to this regulation change.

3.27(b)

If no update is required of the PHC or CHIA, is this one of the tests for determining a non-significant nature.

Page 66 3.27(c)

Why was this provision changed to exclude the necessity to assure protection of environment or public health and safety, is this not a concern anymore?

This is a very broad statement, open for several interpretations. What is comparison language in the current federal regulations?

3.29(c)

There is no mention of a variance from AOC nor from Contemporaneous Reclamation stated here for surface mines where no underground mining is anticipated. Is this exclusion of surface mines consistent with the federal regulations and if so, site regs.

3.30

There should be a statement that no permit is required if no coal is encountered or removed. How would other construction be defined and applied to a coal company doing community development, building a road or reconstructing a wildlife habitat and etc....

4.1(1)

Items i, ii and iii should be followed by the conjunction "and". How will this effect the thousands of existing access roads which are used for monitoring and maintaining sediment ponds and deep mine airway openings.

4.2

Where is the comparison language in the current federal regs for this - please site regs section.

4.2(6)

Roadway baselines are not normally set in the center - at times it can cause difficulty in maintain construction control. Off set baselines and flagging should be understood as possible considerations.

4.5

Requires sediment control for infrequently used access roads. This requirement is an example of overkill on these types of roads. Please site comparison federal regulation.

4.8(b)

WV has long demonstrated the possible attributes of using 80 cubic feet sumps on haulroads. What does the current federal regulations require for design of sediment structures. "SEDIMOT" and "SED-CAD" are approved in other states and should be allowed in WV without any specific approval from commissioner.

4.13

Why would infrequently used access roads need to be certified especially if existing - What would the RPE be certifying.

In large surface operations, roads are constructed in large segments. Why would requirements be placed on the lengths of sections to be certified.

4.7(a)(2)(D) Page 91

Why require 1 foot of cover or $\frac{1}{2}$ the culvert diameter for road culverts. What if thick wall pipe culverts are used. Is this consistent with Fed Regs - please site comparison language - change to or other acceptable design.

4.11(a)(2) Page 94

What is requirements in subsections 5.4 and 5.5 that would be applicable to this section.

There is no comparison language for 780.37(c) in OSM federal regs.

The requirement for 1.3 factor of safety has the potential to eliminate haulroads in steep slope areas.

4.11(a)(3)

Who will make this determination. Does management have the opportunity to consider the cost in location of the primary road.

4.11(c)

What is the practical application of this requirement. What about the considerations that management has for road surface material. The Regulatory Authority has no purpose involving itself in this area of mine management.

5.4(b)(11)

It is not practical to require a dissipator or to prevent enlargement of stream channels when you have a 10 ft. wide exit channel discharging into 3 ft. wide stream. You may minimize this effect but you will not prevent it.

5.4(b)(12)

Define stable and how this requirement would be applied. What is comparison OSM reg.

5.4(c)(1)

Non-erodable is not defined in these regulations. Is it correct to assume that grass channels or rock rip-rapped channels with design flow velocities are adequate to prevent erosion.

5.5(e)

How can the WV DOE enforce or require inspection of a pond which is privately owned. What is comparison OSM reg cite.

6.8(a)

What if permit has no blasting associated with the operation. What is basis for eliminating drainage structures, haulroads, or access roads from this provision of the regulations.

11.1(a)

Under this provision, would an operator be required to maintain a liability policy past the release of the permit.

12.2(c)(4)

What is the basis of this change - is it consistent with federal regulations, if so cite.

12.2(c)(4)(b)

Change treatment facility to chemical treatment so as to be consistent with (c)(4) above.

13.2(d)

Cite comparative federal language. Recommend addition of "if known or within permit area".

14.8(a)(2)

Cite comparative OSM federal regulation.

This is not clear that it only applies to storage of or placement of spoil on existing benches.

14.8(a)(2)(e)(iii)

This is not consistent with current federal regulations. Also that minimal amount of topsoil that may be encountered can be considered in the 20% of material.

14.8(a)(5)

Please cite comparative language - OSM federal language that prohibits wood material in the backfill.

Page 8

14.12(a)(6) Page 182

What is comparison federal language. How is this change necessary from current regulations.

14.14(b)(4) Page 184

Is this consistent with OSM Regs, if so, cite. Why would DOE mandate certification forms.

14.14.(b)(4)(D) Page 184

Why are sediment control certifications included under Excess Spoil Disposal.

14.14(e)(A) Page 187

What is definition of stabilized. Does this section apply to Durable Rockfill.

If these are conventional fills with designed underdrains, why require that organic material be removed below surface. What is DOE definition of organic material. Is DOE required to adopt OSM policies or regulations.

14.14(g)(1)(B) Page 192

Durable rock - will not degrade to soil material. Webster's "degrade" - to wear down by erosion - you have wind and water, which is intended? Does DOE realize that gravel and sand are durable rock and also soil materials.

14.14(g)(6) Page 192

Organic material was not intended by original OSM testimony to include soils. This is not consistent with stability concerns. The WV Department of Highways does not require this. Please cite comparison OSM language. Also attached is testimony from original expert upon which current federal language is based.

Page 9

14.14(g)(8) Page 193

Stabilized should be changed to designed anticipated flows (i.e. velocities). Rock riprap should be defined as a stabilizing technique.

Add "adverse" to water infiltration. Some infiltration can be expected and impossible to prevent.

14.14(g)(11) Page 193

This regulation is not clear. Please define intent and purpose. Is it correct that sediment removal performance is allowed and accepted by use of durable rockfills. Can this treatment capacity be considered in the sediment control design.

14.14(g)(12) Page 193

What is comparative federal regulations. Soils could be included in critical zones if considered in the design.

Define non-coal wastes

14.17 Page 198

What are standards for fugitive dust - what is comparative OSM language - Is this not already regulated by the APCC.

20.5(c) Page 233

This must be changed to the date of issuance of NOV. How can you ascertain when the violation occurred.

20.5(c) Page 234

Please define initial inspection of a NOV.

20.6(d) Page 235

Please cite comparative federal regulations.

CASAGRANDE CONSULTANTS

FOUNDATIONS & EARTHWORKS

40 Massachusetts Avenue, Arlington, Massachusetts 02174-8621

Tel. (617) 648-3630

October 18, 1990

Hobet Mining Co.
P.O. Box 305
Madison, W.Va. 25130

Attention: Mr. James Ratcliff

RE: W.Va. DOE Regulations Concerning
Durable Rock Spoil Valley Fills

Dear Mr. Ratcliff:

I confirm herewith and supplement some of the preliminary comments I provided during my visit to your offices on October 9-10, 1990. The comments concern items contained in Title 38, Series 2 of the West Virginia Surface Mining and Reclaim Regulations, submitted by the Department of Energy for comments on September 21, 1990.

The intent of this letter is not to present an in-depth evaluation of the regulations from an engineering standpoint, but rather to address those items that are vague or unnecessarily restrictive from the standpoint of constructing safe "durable rock fills".

DEFINITION OF "DURABLE ROCK"

The definition of durable rock is given on p.192 of the proposed Regulations as rock that

"...shall not consist of acid-producing or toxic-forming material, will not slake in water, and will not degrade to soil material."

The last stipulation is a suggested addition to the existing regulations. It is not clear what the DOE had in mind when it included this restriction. The term "degrade" has the following definitions, as pertaining to the breakdown of material:

Webster's New Collegiate Dictionary, 8th Ed.:

degrade \ .3 : to impair in respect to some physical property 4 : to wear down by erosion 5 : to reduce the complexity of (a chemical compound) : DECOMPOSE

...

Glossary of Selected Geologic Terms, W.L.Stokes and D.J.Varnes:

degrade, v. To wear down by erosion, especially through stream action.

In the geologic sense, the term "degrade" or "degradation" clearly means the decrease in particle size or removal of material by erosion. Since there will be no wearing down of particles by erosion on the interior of a rock fill, the use of this term is inappropriate.

Many shales will gradually break down into smaller particles when left exposed to the elements for extended periods. Freeze-thaw cycles are particularly destructive; but also the cyclic heating and cooling during summer months, and wetting-drying due to precipitation can gradually break down weakly cemented shales. Such weathering can develop along the face of a dumped durable rock fill under active construction, but not to any noticeable degree because of the relatively brief time for which material is left exposed. On the interior of a fill, however, it must be emphasized that weathering does not occur below the limit of frost penetration.

If construction of a fill is interrupted for any considerable length of time, surface and near-surface shale particles may break down into smaller particles by weathering. Cemented shales would to a large degree retain their granular nature, even if weathered into sand-size particles. If the material in such a weathered zone develops a lower strength than the rock on the interior of the fill, the consequence may be a temporary adjustment of the angle of repose as additional spoil is dumped.

Indurated clay (sometimes called claystone, clay rock or clay shale), on the other hand, is an uncemented material that is subject to disintegration into smaller particles and into clay soil by slaking. This process develops due to an internal build-up of compressive stresses as an air-dried particle of the material is immersed in water or is merely wetted. Because this type of rock is relatively weak, it can break down into small particles already during blasting and excavation of the coal overburden. This increases the potential for further disintegration by slaking, and depending on the rate of fill construction and weather conditions, a significant fraction of the particles could slake by the time they get buried in the fill.

In most instances, a simple slake test would be adequate to determine what fraction of the coal overburden consists of non-durable rock. This test would be acceptable even to ensure the durability of materials placed for an internal drainage system, including filters. There is no need for tests to determine whether a rock to be placed on the interior of a fill is resistant to other disintegration, decomposition or erosion processes. Rock that is to be used for riprap or for other drainage purposes where it will be exposed to weathering, also need not be subjected to any weathering tests unless there is a reason to suspect that it will not remain in sound condition (e.g., one would test a shale, but not a well-cemented sandstone).

In its simplest form, the slake test is performed by simply immersing a piece of air-dry rock in water and observing its reaction. The susceptibility of the rock to slaking is judged by the rate and degree of disintegration. It can be considered non-slaking if after a period of 12 hours the specimen shows no signs of disintegration, except for separation along fracture planes.

More complex slake tests have been developed, including tests on oven-dried material and tests that agitate the specimen, but these are not suitable for judging the durability of rock to be disposed of in dumped spoil fills. One particularly severe slake durability test is ASTM D 4644-87, which subjects a specimen to two cycles of oven drying and rotation in a partially submerged drum. This test has absolutely no similarity to real world conditions.

COMMENTS CONCERNING THE STABILITY OF DUMPED ROCK FILLS

When analyzing the factor of safety of a dumped rockfill with its outslope at the angle of repose, and which is properly drained and resting on a satisfactory foundation, one finds by using a conventional "infinite slope analysis" that the critical shear surface coincides with the outslope, and that this minimum factor of safety is 1.0. This does not mean that the fill is unstable, but rather that any attempt at steepening the slope will result in material sliding or rolling to the base of the slope. Stability analyses of assumed failure surfaces passing through the interior of the fill will give factors of safety greater than 1.0.

When failures do occur in dumped rock fills, they are usually the result of one or more of the following factors:

1. Weak foundation.
2. Excessive concentrations of weak rock fill (e.g. indurated clay) and/or clay, producing zones of weakness in the fill.
3. Inadequate drainage.

The weight of a fill will act to consolidate foundation soils and thus increase their strength with time. Therefore, a weak foundation for a fill created by dumping in a single lift would generally result in failure already during construction. Likewise, excessive concentrations of weak rock fill and/or clay would lead to failure of the fill during construction, while the outslope is at the angle of repose.

Inadequate drainage at the base of a dumped rock fill could lead to a gradual build-up of the water level in the fill. However, since it could take a year or longer to complete a valley fill, this condition will probably develop already during construction if drainage is not adequate. Impairment of free drainage could result from an accumulation of fines at the toe, or due to improper extension of the toe drain during regrading of the slope. If there is no relief by drainage through the foundation, the rising phreatic surface in the fill will result in discharge from the outslope and possibly to localized sloughing of the slope, especially during periods of thaw. Such evidence is usually clearly visible during even a superficial inspection, and appropriate corrective measures can be taken.

Cracks due to settlement of the fill can occasionally be seen in the top surface of dumped rock fills standing at the angle of repose, particularly if the top surface has been made relatively smooth by traffic and grading. Such cracks develop roughly parallel to the slope and at various distances back from the crest. They are the result of differential settlements rather than instability, and the top portion of the cracks may open and develop a slight vertical offset.

When the outslope of a durable rock spoil fill is regraded from the angle of repose to the final profile required by the regulations, i.e. with a terrace bench every 50 ft in height and with a slope of 1v on 2h between benches,

the stability of the fill is increased substantially beyond what is necessary for this type of fill. In most cases, an adequate factor of safety could be ensured by final outslopes significantly steeper than the average of 1v on 2.4h currently required. The flatter slopes are, of course, beneficial from the standpoint that they facilitate reclamation and limit the potential for erosion and superficial sloughing.

CRITICAL FOUNDATION AREA

Item (6) on p.37 of the proposed regulations, requires that an application include:

"An explicit identification, by narrative and by mapping, of the critical foundation area(s) for the structure, as the term is applied in subsection 14.14. The selection of the critical foundation area(s) shall be based on the results of the geotechnical investigation, shall be certified as part of the design by a registered professional engineer, and shall be subject to review and approval by the Commissioner."

Delineation of such areas may be difficult unless an extensive and thorough subsurface investigation is made. Such investigations are common practice in the design of embankment dams, but are usually not warranted for spoil fills unless intended to serve as a dam.

Factors of safety are generally carried out using two-dimensional stability analyses, assuming average and conservative strength values for the foundation and embankment materials. If the results of such analyses provide a shear surface with the lowest factor of safety that passes through or along the foundation, it can be said that this is the critical foundation area. The third dimension, the width of the critical foundation area parallel to the slope of the embankment, would have to be estimated unless three-dimensional analyses are made. 3-D slope analyses generally provide higher factors of safety.

Weak foundation materials are not likely to be found on steep slopes of a valley in West Virginia. But even if localized areas of relatively weak soils or rock were to exist on the slopes, this would not result in a failure condition for a dumped rock fill that spans the full width of the valley.

Hobet Mining Co.

- 6 -

October 18, 1990

FOUNDATION PREPARATION

Item (8) on p.189, Item (5) at the bottom of p.190, and Item (6) at the bottom of p.192 of the proposed regulations require that:

"All areas upon which the fill is to be placed shall first be progressively cleared of all trees, brush, shrubs and other organic material which is above ground level; provided that in critical foundation areas including but not limited to the toe of the fill, seepage or underdrain areas, and downstream portions of the fill that provide a resisting force against massive slope failure, all organic material both above and below ground surface must be removed."

This requirement presumably includes the removal of not only soft and weak organic deposits from below ground surface (e.g. deposits of humus, peat, etc.), but also the removal of the remaining portion of tree stumps, all topsoil and the roots of all vegetation. In other words, "critical areas" of the foundation would have to be stripped to a depth of at least one to two feet.

It is curious that the regulations include such a requirement, but apparently do not specifically require the removal of soft non-organic soils from the foundation area. Such soils could potentially have a much greater impact on fill stability than stump remnants and roots. However, even soft inorganic soils will not necessarily result in instability, depending on their strength, consolidation characteristics, distribution and thickness.

Tree stumps and roots decay very slowly when exposed to the atmosphere. But when buried in a fill, they will decay at a much slower rate; and if the conditions are such that they will remain submerged, they will for all practical purposes not deteriorate.

Since the clearing requirement states that vegetation must be cut essentially at ground surface, there should be very little of a stump left above ground. Furthermore, the roots in at least the portion of the foundation along the bottom of a valley, i.e. in the critical area from the standpoint of stability, will most likely be submerged below the higher groundwater level that will naturally develop as

Hobet Mining Co.

- 7 -

October 18, 1990

the fill is constructed. Therefore, in my opinion, there is no sound basis for the requirement that all subgrade organic material be removed, including stump remnants and roots.

Even topsoil could be left in place, unless it is a relatively thick layer consisting principally of soft, highly compressible organic matter. Because the ground surface in the steep-sided valleys of West Virginia is generally uneven, a relatively thin layer of topsoil could not form a continuous shear plane along which a failure could develop. Furthermore, the boulders that roll or slide to the base of a dumped rockfill slope standing at the angle of repose will impart such energy upon impact that a topsoil layer will be displaced and/or compacted to a large degree.

If a layer of topsoil or other relatively weak foundation material were to result in or contribute to instability of a dumped fill, that condition would already develop during construction. In that event, appropriate corrective measures could be taken; e.g., the slope could be flattened or a berm could be constructed. Any weak materials will become stronger as they are compressed under the weight of the fill. If there is no instability during construction, there should be no post-construction instability unless possibly as a result of changes in the loading condition.

UNDERDRAIN

The underdrain requirements for durable rock fills, Item (7) on p.193 of the regulations, state that:

"If the fill area contains springs, natural water courses or wet weather seeps, lateral drains shall be constructed. If the underdrain system is constructed simultaneously with excess spoil placement by the natural segregation of dumped materials, the resulting underdrain system shall be capable of carrying anticipated seepage of water due to rainfall away from the excess spoil fill and from seeps and springs in the foundation of the disposal area and the other requirements for drainage control shall be met."

The end-dumping method of construction being used by Hobet for disposal of their durable rock spoil in valleys creates a fill with desirable internal drainage

Hobet Mining Co.

- 8 -

October 18, 1990

characteristics. The process of dumping results in a relatively high permeability in the direction parallel to the dumping slopes. In addition, the coarser particles roll to the base of these slopes and form a highly pervious drainage zone at the bottom of the rock fill. This greatly facilitates complete drainage of the fill.

Seeps and minor springs discharging from the slopes and/or the bottom of a valley would not lead to the build-up of a phreatic surface in a durable rock fill placed by dumping. However, special precautions may be required for those sites where springs with high rates of seepage exist, or where the normal rate of flow in the bottom of the valley is significant (e.g., greater than 1 to 2 CFM). Increased rates of discharge from seeps and springs during extended periods of precipitation, may result in a temporary rise of the phreatic surface, but this will not cause instability if the fill is normally free-draining.

The rate of infiltration through the surface of a dumped rock fill is usually lower than the rate of percolation in the fill. The reason is that during construction, the top surface of the fill is subjected to heavy traffic loads from the haul trucks and dozers. This results in the formation of a well-graded and compacted zone of material that is less pervious than the underlying fill. Furthermore, during reclamation the top surface and outslope of the fill are seeded, which further reduces the rate of infiltration. The rate of infiltration from diversion or drainage ditches and channels, on the other hand, may be significant depending on their location and design.

RUNOFF DIVERSION CHANNELS

In item (8) on p. 193, the proposed regulations for durable rock fills require that:

"Runoff from areas above and adjacent to the fill shall not be allowed to flow in an uncontrolled manner onto the fill surface, and shall be diverted into stabilized diversion channels around or across the fill, designed and constructed to safely pass the peak runoff from a 100-year, 24-hour precipitation event. The design of such channels shall take into account site specific conditions, and they shall be designed and constructed so

as to ensure that they will not compromise the stability of the fill through water infiltration or channel erosion."

The preferred location for drainage ditches is along the perimeter of a completed fill surface. In that manner, runoff from the surrounding watershed will not flow over the fill. Such flow is normally of concern more from the standpoint of infiltration than erosion. Since, as already mentioned, a compacted zone with a finer gradation develops at the top of dumped spoil fills during construction, and vegetation will develop on this surface, the rate of infiltration is lower than the rate of internal drainage and the question of infiltration becomes less important. If erosion can be controlled, it should be acceptable to permit runoff to flow across the top surface of such fills. Runoff should not be allowed, however, to flow randomly down the outslope of the fill, since that face is not as well compacted and objectionable erosion can eventually develop.

Runoff to ditches extending across the top surface of a fill may initially result in some surface erosion until vegetation develops and/or a natural armor forms as fines are eroded from between larger particles of rock. If more serious erosion develops, it can usually be remedied by regrading, construction of additional drainage ditches, or by the addition of coarse rock fill.

Runoff should normally not be discharged into a core zone of coarse rock fill or a chimney drain in a fill. The reason is that fines can migrate down through the voids in such coarse material and eventually impair free drainage. However, a core drain formed by natural segregation in a durable rock fill constructed by dumping contains an increasing percentage of fines with increasing height in the fill and, therefore, has a built-in filter that should prevent the migration of fines.

To be on the safe side, where a drainage or diversion ditch is formed along the top of a chimney drain or core zone of a dumped rock fill, the bottom and sides of the ditch should be lined with durable rock fill of a size sufficiently small to choke the exposed voids in the drain. This will reduce the rate of infiltration. If such a layer consists of well-graded material, it will also act as a filter.

Construction could perhaps be most easily accomplished by breaking up a layer of select rock fill using the tracks of a large dozer. If the streamflow resulting from the 100-year design storm will be such that boulders are required to prevent erosion, they should be placed on top of the layer of choke material.

LIQUEFACTION POTENTIAL OF DURABLE ROCK FILL

The West Virginia DOE regulations raise the question of liquefaction only in connection with the stability of mine refuse. You mentioned during our meeting on Oct. 9-10, that OSM has voiced concern that durable rock fills consisting of spoil dumped at the head of a valley may also be subject to failure by liquefaction.

Deposits with the highest potential for liquefaction consist of saturated, relatively clean sand with reasonably uniform gradation, and with relative densities of less than 40 to 50 percent, i.e. in loose condition. Such a combination of factors may exist, for example, in deltaic deposits or in sand fill dumped into standing water or in sluiced granular material such as tailings; but not in dumped spoil rock fills.

Liquefaction has been known to develop in masses of talus in the Alps of eastern Europe, with resulting flow slides called "Muren". In his paper titled "Liquefaction and Cyclic Deformation of Sands - A Critical Review" (5th Panamerican Conference on Soil Mechanics and Foundation Engineering, 1975), A. Casagrande states that it is well documented that just prior to such liquefaction, the mountain brook that normally flows from the toe of the talus slope stops flowing. He believes it is possible that heavy rainfall or snow melt, perhaps in combination with a thick zone of still frozen and relatively impervious talus adjacent to the slope, can raise the water level in the talus mass and create large shear stresses which cause strong dilation, i.e. a substantial increase in volume which soaks up large quantities of water. The consequent loss in strength leads to failure, and the water carries the failed mass for great distances. But such a special set of conditions would not develop in the valley fills being constructed in West Virginia.

Hobet Mining Co.

- 11 -

October 18, 1990

As a final note, I would like to add that the intent of the regulations, to ensure that spoil and refuse from strip mining is disposed of in a safe and environmentally acceptable manner, cannot be faulted. However, the same end can be achieved with less specific regulations concerning the method to be used to achieve the desired result. Given the requirement that a spoil fill must be designed by a professional engineer with experience in the design of earth and rock fills, it should not also be necessary to specify all design details of the fill in order to ensure long-term stability. That is the task of the engineer. The permitting agency has the authority to reject any design it considers unsafe or environmentally unsound. In those instances where a design is questionable, the agency could request testing or other information to support the design. In this manner, a permit could be granted on the basis of state-of-the-art knowledge and site-specific design.

Sincerely yours,



Dirk R. Casagrande, P.E.



CYPRUS
Kanawha Corporation

Cyrus Kanawha Corporation
Post Office Box 130
Mt. Carbon, WV 25139
304-442-4572

October 10, 1990

Stephen C. Keen
Director, Mines & Minerals
West Virginia Department of Energy
1615 Washington Street, East
Charleston, WV 25311

Re: Proposed Surface Mining Reclamation Regulations Amendments

Gentlemen:

The following comments are offered for consideration during the Public Hearing on Proposed Rule Amendments to the West Virginia Surface Mining Reclamation Regulations:

Page 16, 2.96 Prospecting: As currently defined, a prospecting permit would be required to gather baseline data. This requirement would further increase the time and paperwork required to obtain a mining permit. The revision may create a Catch 22 type conflict with Sections 13.1(a), (12.13) and 13.1(c)(6) by requiring a permit to collect data that is required to obtain the permit in question. The definition should not include the gathering of environmental data.

Page 36, 3.7 Disposal of Excess Spoil: Why are alternative designs being deleted from this section? We interpret 816.71 (e)(2) of the Federal Regulation to allow alternative designs.

Page 66 (c) permit revisions: Compared with Page 115, 774.11 of the federal regulations, the Commissioner could require revisions to permits at any time. We suggest that the statement be reworded to correspond with the federal regs.

Page 92, 2-4 Haulageways or Access Roads (7)(b): Compared with Federal regulations 817.150 and 817.151, Pages 250 and 251, the state regs are excessively harsh. Federal regulations do not require sediment control for primary or secondary roads. To our knowledge Kentucky, Colorado, nor Utah require sediment control structures for their roadways. We recommend that this requirement be deleted to become consistent with federal regulations and less onerous to West Virginia operations.

Page 100, 5.4 Sediment Control (4): Compared with Page 196, 816.46 (b)(6)(A) of the Federal Regulations, WV regulations are more stringent by specifically requiring 0.125 ac-ft for each acre disturbed. Suggest that the reg be reworded to state "... adequate sediment volume."

Page 104 (e) Inspections: Compare with Page 197 616.49 Impoundments of the Federal Regs. The federal regs definition of impoundments pertaining to the requirements of this sections refers to the MSHA definition of impoundment, 77.216(a), 5' of embankment and 20 ac-ft of storage or a 20' embankment. The state's requirement would require inspection and certification of all sediment structures. We recommend that impoundments be defined in this section similar to the MSHA definition and that sediment control structures be deleted from the certification requirement.

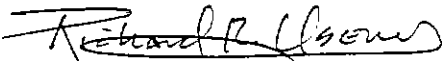
Page 192 (B) " ... and will not degrade into soil material." This statement is not consistent with the definition. Further, OSM has concluded that particle size is not an indication of durability or lack of durability. Recommend that the phrase be struck or reworded.

Page 189, 191, 192 " ... all organic material both above ground and below the ground be removed.": Compare with 816.71 of the federal regulations. Federal regs do not explicitly require removal of organic material below ground. We request that provisions be made allowing interpretation and recommendations of the specific sites by a qualified personnel.

Page 233, 20.5 Civil Penalties Determinations (a) "... beginning with the date of violation ...": Compare with Page 289, 845.15 of the federal regulations and revise to match their wording, "... date of issuance ...".

Cyprus Kanawha encourages and concurs with the proposed amendments to the West Virginia program that will satisfy and emulate federal requirements. However, we strongly disagree with measures that are more restrictive than federal standards. We believe that such requirements are detrimental to the industry and to the State of West Virginia.

Respectfully,



Richard R. Usery
Manager Technical Services



WEST VIRGINIA MINING
AND RECLAMATION ASSOCIATION

1624 KANAWHA BOULEVARD, EAST • CHARLESTON, WEST VIRGINIA 25311 • (304) 346-5318

October 10, 1990

Mr. Stephen C. Keen, Director
Division of Mines & Minerals
WV Department of Energy
1615 Washington Street, East
Charleston, West Virginia 25311

Dear Director Keen:

The attached comments are offered on behalf of the 350 member companies of the Association, as well as those companies which are members of the WV Coal Association. With today's appearance at the public hearing we have submitted part of our comments. The remainder will be provided within the written comment period, ending Friday, October 12, 1990.

While these comments are specifically directed to the proposed regulations received on September 10, 1990, the Associations feel strongly that review and discussion of these issues must continue beyond today. Many of the matters addressed in these proposals, as well as existing regulations are so complex and technically oriented that a short verbal discussion or hearing is not adequate to insure their practical effectiveness, from either an enforcement standpoint or an industry perspective. Justification and proof of reliability for practices being currently used in the mining industry is on going among member companies' operations. Each day brings new evidence that successful coal mining and effective environmental protection are only possible when the text of regulations is tailored to such proven practices, as opposed to attempting the reverse -- making operations fit the words!

In the text of our recommendations and comments you will find a number of questions regarding the basis for specific changes to the regulations. We feel answers to such inquiries are deserved and important. We have also included recommended language changes for some proposed or existing rules.

OFFICERS

Kenneth G. Woodring Chairman	Donald K. Cooper Secretary
R. Donald Cussins First Vice-Chairman	Gerald W. Ramsburg Treasurer
James J. LaRosa Second Vice-Chairman	Edward F. Surgeon Chairman-Associate Division

MEMBERS

J. W. Anderson—Princeton	J. H. Harless—Gilbert	R. L. Raines—Bluefield
T. J. Brisky—Eighty-Four, PA	D. E. Huffman—Bridgeport	L. A. Streets—Mt. Storm
J. R. Bryan—Lebanon, VA	J. E. Hull—Charleston	J. C. Williamson—Charleston
D. P. Cartwright—Naugatuck	P. F. Hutchins—Columbus, OH	G. D. Woodward—Morgantown
J. M. Compton—Clarksburg	T. W. Hylton—Beckley	S. R. Young, III—Gilbert
B. H. Daud—Yolyn	C. T. Jones—Charleston	HONORARY MEMBERS
B. E. Dearth, Jr.—Bridgeport	J. C. Justice—Beckley	C. E. Compton—Clarksburg
D. R. Donell—Weirton	R. G. Lockard—Weston	L. W. Hamilton, Jr.—Hansford
J. J. Fallis—Morgantown	J. W. Mullen—Bluefield	F. B. Nutter, Sr.—Pompano Beach, FL
P. C. Graney, III—Charleston		

Benjamin C. Greene
President
William B. Raney
Vice-President

Letter to Stephen C. Keen
October 10, 1990
Page Two

Should you have any questions regarding these comments,
please do not hesitate to notify me immediately.

Respectfully submitted,



Benjamin C. Greene
President

attachments

WEST VIRGINIA MINING AND
RECLAMATION ASSOCIATION
1624 Kanawha Blvd., E.
Charleston, West Virginia 25311
304-346-5318

Change subsection to read as follows:

1.2(a) These rules and regulations apply to all prospecting and surface mining operations in the State of West Virginia, except the applicable subsections in Section 26, Article 3, Chapter 22A of the Act. However, where existing operations are being carried out under valid permits or prospecting approvals and are in compliance with applicable performance standards, no change in operations will be necessary or, no written revisions, amendments, or modifications of such permits shall be required as a result of promulgation of these regulations except as required by the Commissioner. The provisions of this paragraph do not constitute the issuance of a new permit for purposes of permit renewal or mid-term review of existing permits. Operations permitted prior to the effective date of these regulations are exempt from any new requirements resulting from changes as long as the operation is in compliance with the conditions of the permit and the requirements of the Act.

1.2(c) Any proposed change addressing this subject will likely be invalid as the recent decision in the U.S. District Court for the District of Columbia is under appeal or consideration for appeal. No specific action should be taken until the matter is finally resolved. However, any reference to "regulations" in this subsection should be changed to "appropriate regulations under which the permit was issued and subsequent changes which been incorporated into the permit."

2.2 "Abandoned Site" definition must incorporate the actual collection of bond as the determining factor for such abandoned status. There is no counterpart in 30 CFR 701.5.

Change the subsection to read as follows:

2.9 Active Surface Mining Operation means, except where inactive status has been granted in accordance with Subsection 14.11 of these regulations, an operation where a Phase I bond reduction has not been approved. For purpose of permit renewal as provided by subsection 3.26(a) of these regulations, an operation shall not be considered active if no further surface coal extraction will be conducted under the permit and only reclamation activities remain.

EXPLANATION: In the 5/23/90 Federal Register, DSM found this language to be consistent with 30 CFR 773.11(a) and 800.60(b).

2.11 Affected Area. What is the effect of the phrase "and the area located above underground workings?"

2.15 The proposed definition for "bench control systems" should be returned to the existing language, except for removing the limitation of use only "on haulback type mining operation".

EXPLANATION: In the 5/23/90 Federal Register, OSM approved the existing definition. OSM did not make a comment on changing the definition. Use of these systems should not be restricted to a mining bench. Use of the systems should be permitted on mountain top and area mining operations. There are numerous situations in which the concept of bench control systems are used immediately below the actual mining bench, where such location has proven more effective as it can control drainage much closer to the source, during all aspects of the operation, from clearing and site preparation through the actual mining process.

2.16 Best Technology Currently Available. This definition should contain qualifying language to indicate "reasonable availability" of such equipment, devices, systems, methods or techniques.

2.45 Embankment should be changed to read as the federal regulation at 30 CFR 816.49. Insert the language, "that is raised above the natural surface of the land", after the word "materials".

2.67 Impoundment or Impounding Structure should have the following language added to the end of the current definition: ... which is five feet or greater in height as measured from the upstream toe and which results in a basin of twenty acre feet or more. Provided, however, this definition shall not include excavated ponds, bench control systems, haulageway sumps, or temporary drainage structures approved as part of the permit".

EXPLANATION: This is consistent with the long-standing policy of the Department, in effect since 1986, as well as the comments of OSM regarding such structures in the 5/23/90 Federal Register, as well as definitions of the Mine Health & Safety Administration, at 30 CFR 77.216. Further, the Department policy was implemented as part of the federal statute changes to provide that approved persons can inspect drainage structures.

2.85(b)(6) At the end of the subsection add the following language: "pursuant to the performance standards of the WV Energy Act, these regulations, P.L. 95-87 and the federal rules".

EXPLANATION: This language clearly establishes compliance or the lack of compliance with the performance standards of this Act and regulations as the cause for action to initiate ownership and control sanctions. The phrase "manner ... conducts..." covers an extremely broad spectrum of activities, many of which have nothing whatsoever to do with this Act, these regulations or the environmental aspects of an operation. If to be associated with ownership and control sanctions pursuant to this Act and the P.L. 95-87, such a broad phrase must be limited to these statutes and pertinent regulations.

2.96 Prospecting should have the term "substantial" inserted in the definition, on the seventh line between the words "any" and "disturbance".

EXPLANATION: The term should qualify the need for a prospecting approval, as set forth in 2.122 of the proposed regulations. The term comes directly from section 512 of P.L. 95-87. It must distinguish the routine collection of data for application requirements from that which is necessary to determine the location, quality and quantity of coal seams. It is not appropriate for the simple collection of data, without excavation, which is mandated by other sections of the Act and these regulations, to require a prospecting approval. Would placing a weir in the stream for background water sampling require this approval? Would using a rock hammer to get a highwall sample require prospecting approval? As proposed, the regulation creates a mandatory "catch-22" situation with other requirements of the Act and these regulations, such as section 13.1(a)(12)&(13).

The federal requirements for prospecting approval, at 30 CFR Part 772 are **less effective** than the extensive requirements for prospecting approval in the West Virginia program. If West Virginia is to follow the definitional purpose of coal exploration set forth by the federal government in 30 CFR 701.5, the state program should adopt consistent requirements for approval of prospecting set out in 30 CFR Part 772. Establishing three categories or levels of prospecting is a possible solution to this problem. That is, as long as the requirements for these different levels are appropriate for the varying degrees of complexity and purpose and the simple collection of mandated environmental data is not included in the approval requirements.

An example of this concern is the requirement that each application be approved by the SHPO. Since SHPO does not have a comprehensive list of historical or archeological places for coal bearing regions of the state, they (SHPO) require such research be conducted by the permittee. That research, or survey as it is called, must be done by recognized experts, approved by the

Department of Culture and History, and usually involves excavation. Therefore, a prospecting approval will be necessary each time the SHPO does not have records and requires the applicant to conduct a survey. However, according to these regulations an approval for prospecting can not be approved with a description of such cultural, historical or archeological sites, which, in many cases, requires the SHPO's mandated survey!

2.104 Renewable Resource Lands - should have the word "significant" inserted before the words "aquifer" on line one and line two. Also, change the word "waters" to "water" and insert the word "supply" following the word "water" on line two.

At 2.114 insert new definition as follows:

2.114 Soil Material means material of which at least fifty percent is finer than 0.074 mm and exhibits plasticity and meets the criteria for CL, CH, OL and OH, as determined by the unified engineering soil classification system.

2.116 Stoniness: This entire definition should be deleted as it has no federal counterpart and serves no purpose to the performance standards.

Change to read as follows:

2.118 Structure means, except as used in the context of subsection 3.8 of these regulations, any man-made structures within or in the proximity of surface mining permit areas which include, but is not limited to: dwellings, outbuildings, commercial buildings, gas lines, water lines, towers, airports, and impoundments or bodies of water with a storage capacity or volume of 20 acre-feet or more. The term does not include structures built and/or utilized for the purpose of carrying out the surface mining operation. For blasting purposes, structure shall also mean underground mines and tunnels.

Change to read as follows:

2.120 Subsidence means, as it relates to underground mining operations or auger mining, a sinking, collapsing and cracking of a portion of the earth's surface caused by voids, beneath the surface created by mining.

3.2(a) What is meant by the phrase "receive approval of a written request" on line four? Delete the words "and obtain" on line 5, and insert the phrase, "and the Commissioner shall act within the time periods specified in the Act so as to issue".

3.2(b)(11) Delete this subsection in its entirety so as to be consistent with 30 CFR 773.13(a).

3.2(b)(13)(E) Wording is improper.

3.2(e) What is meant by "he may require one (1) additional advertisement"? After the word "period" on line 7, insert the following: "only if a protest or inquiry had been filed by a person with a valid legal interest within the comment period for the original advertisement".

3.2(f) Insert "because of significant revisions" after the word "required" on line four, and strike the remainder of the sentence.

3.4(c) Add a new item as follows: "(6) In lieu of color coding, maps may be marked with computer generated markings to distinguish the features noted in (1) through (5) of this subsection. Such markings and the features they represent shall be shown in the legend of the map."

3.4(d) Insert "as applicable" between the word "information" and the colon ":" at the end of the subsection heading.

EXPLANATION: Present wording indicates such information will be required whether the permittee plans to include such activities in the permit or not, i.e., augering limits, topsoil borrow areas.

3.4(d)(24) What is meant by this requirement? What is the purpose of this requirement? What is the federal rule counterpart to this requirement?

3.6(k) Delete this item in its entirety. Section 14.17 covers the matter in accordance with the comments of OSM in the May 23, 1990 Federal Register and 30 CFR 816.95 and 817.95.

3.7(a) Reinsert the language shown as deleted. Upon reinstatement, at the end of that language following the word "design", insert the following language "upon a demonstration that it is as effective in protecting the environment, public health and safety as the design techniques specified in the federal rules".

EXPLANATION: (1) This additional language was mandated by OSM's comments in the 5/23/90 Federal Register. (2) It is consistent with the language of 30 CFR 816.71(e)(2). (3) The EXPLANATION for subsection 3.7(b)(6) also has relevance to this recommendation. (4) This opportunity in design approach, without any change in design criteria, is critical to the industry. Engineers responsible for certifying excess spoil disposal structures must be provided design flexibility, as long as the stability criteria of federal rules are achieved. This is particularly important in light of the recent decision of the U.S. District Court of Washington, D.C. regarding termination of jurisdiction. If the only designs accepted will be those dictated by OSM and state regulatory authorities, without industry engineers having any flexibility, then the structures should be certified by these agencies and the responsibility for the structure's long term stability must be assumed by the designing agencies of the federal and state governments. (5) With this language being reinserted, as part of the state program amendment, we are not asking for approval of alternative designs, **only consideration!** Without such language, the industry does not have an opportunity to even submit an alternative design for consideration. We are simply asking for that opportunity! (6) The answer of "experimental practices" is not appropriate since it is such an extended, complicated process. That complication defeats the innovation, initiative and, thereby, the opportunity for improving the design and construction of such fills. Also, it is not a state program consideration, experimental practices is completely under the authority of OSM. If that (experimental practices) is the only approach, can we submit, for consideration of approval, the plans and designs for fills already installed and certified, which were different from federal requirements, but in compliance with state regulations, at the time of construction, and these fills have proven to be stable, safe and functional?

3.7(b)(6): Delete this subsection entirely.

EXPLANATION: In the 5/23/90 Federal Register, DSM found the current section 3.7 to "be no less effective than the corresponding Federal rules ..." and did not recommend any changes. Thereby, any additional language to this subsection 3.7 is not necessary. This new language clearly provides for a layman's review and approval of a registered engineer's plans and proposals. While the current Commissioner is a trained engineer, there may be future Commissioners not having such training. It is not appropriate for someone not registered as a professional engineer to review and pass judgement on plans prepared by RPE's.

3.8(b) At the end of the subsection, add the following:
"Provided, however, that the Commissioner will notify the permittee that such revisions or reconstructions are necessary and shall provide a reasonable time for compliance".

3.12(a)(1) At the end of the subsection, insert the following:

"Where the angle of critical deformation is less than 15 degrees, the applicant must provide supporting documentation establishing that such lesser angle provides equal protection."

EXPLANATION: The following language should be reinserted in this subsection as it is not limited in 30 CFR 784.20. As proposed the limitation restricts prudent engineering design and planning.

3.14(a) What is meant by "average quality"? What will be acceptable tests and procedures for determining average quality? Are there counterpart federal rules regarding these activities? Since DSM states in the 5/23/90 Federal Register that coal refuse piles not meeting the definition of coal in 30 CFR 700.5 is not subject to regulation, it is accurate to conclude that any pile not having an "average quality", as noted in this proposed subsection, would not be regulated. Is that true?

3.14(b)(15) What is meant by "baseline water quality"? Is it the quality of water before the pile was ever constructed? Or, is it the existing quality immediately prior to new activity?

Change subsection 3.16(a)(1) to read as follows:

3.16(a)(1) The scope and level of detail for such information shall be determined by the Commissioner in consultation with State or Federal agencies with responsibilities for fish and wildlife resources in the area of the operation shall be sufficient to develop the protection and enhancement plan required under paragraph (b) of this subsection.

3.19 Remove the phrase "or archeological sites" on line 4.

EXPLANATION: This requirement is not consistent with 30 CFR 761.11(c), 761.12(f) or 773.12. These sections of 30 CFR are limited to publically owned parks and sites listed on the National Register of Historic Places. There is not any reference to archeological sites, except for federal programs only, as contained in 30 CFR 773.12.

Change subsection 3.22(f)(6) to read as follows:

3.22(f)(6) Restore approximate premining recharge capacity in accordance with section 24 of the Act, provided that underground mining operations are exempt from this requirement.

3.22(g) Remove the following language "Monitoring sites shall be located in the surface water bodies such as streams, lakes, and impoundments that are potentially impacted or into which water will be discharged at both upstream and downstream locations from the discharge".

EXPLANATION: This language is not consistent with 30 CFR 784.14 (i), which requires the monitoring sites to be shown on the surface water monitoring plan, but does not mandate these be located at specific places. In addition, the discharge monitoring points are a mandate of the issued NPDES permit, which are based on the maintenance of quality of the receiving stream, lake, or impoundment.

3.25 This section should have a subsection which would provide for the Commissioner to simply be notified without requirement of application, notices, advertisements, etc. when only the officers of a permittee are changed, but there are no other changes to the ownership and control.

To the proposed revisions to the Draft of 9/6/90 (dated 8/8/90)

3.25(b) Remove the newly proposed language (underlined in draft).

EXPLANATION: The existing language was found by DSM, to be consistent with federal rule. There was no suggestion or comment that it needed to be changed. This new proposed addition goes beyond federal law, rule, state law and rule. (See attached comments for further clarification).

3.25(c)(2)&(3) Is this required by federal rule? If so, what section of 30 CFR applies to these provisions?

3.25(d) What is the definition of "subcontractor"? Does federal rule define "subcontractor"? Is this provision required by federal rule? If so, which section of 30 CFR?

3.25(e) Entire subsection should be deleted.

EXPLANATION: As written, the subsection literally reverses the concept of the Applicant Violator System in that violations, permit blocks, fines and penalties can be sold! This subsection has no counterpart in 30 CFR 773.15(b) & (c) or 774.17(d)(1)(iii) and appears to be contrary to the findings of DSM in the May 23, 1990 Federal Register.

3.26(a)(4) Is this not already required by other sections of these regulations and section 11 of the Act?

3.27(c) Insert the following language at the end of the subsection:

"Provided, the Commissioner shall notify the permittee that such revisions are necessary and shall provide a reasonable time for compliance. The Commissioner shall approve such requested revisions upon receipt."

EXPLANATION: 30 CFR 774.11 discusses a thorough review of the permits and the issuance of orders, with written findings, which mandate revisions for this purpose. While such formality is not necessary, it is appropriate that a permittee be given notice and a reasonable time to submit such revisions, and such revisions should be approved if requested.

Change subsection 3.28(b)(2) in the following manner:

3.28(b)(2) Replace the word "life" with "term" in the first sentence. Delete "throughout the life of the permit" at the end of the subsection. Insert the following language at the end of the subsection: "Provided, however, that any increase in acreage permitted under one or more Incidental Boundary Revisions, that does not involve coal extraction, shall not be subject to the acreage limitations set out in this subsection."

EXPLANATION: The use of IBR's for non-extractive activities is critical to continued compliance. The federal regulations do not discuss IBR's, and as long as appropriate investigations are conducted, as specified in the 5/23/90 Federal Register, OSM finds no inconsistency with IBR's. Permit term is also more accurate since the mid-term reviews and renewals are literally a reissuance of the permit at which time the appropriateness of an IBR can be reviewed. A much needed example of this requested change is the uphill expansion of refuse areas.

To the proposed revisions to the Draft of 9/6/90 (dated ^{10/8/90} ~~8/8/90~~)

3.28(c)(D) What is meant by this item? Is it required by federal rule? If so, what section of 30 CFR?

To the proposed revision to the Draft of 9/6/90 (dated ^{10/8/90} ~~8/8/90~~)

3.29(b) Delete the proposed additional language as it is contradictory to 30 CFR 785.18(d), which provides for such variances to "be reviewed no later than 3 years after issuance". If the proposed language is adopted, it should include the following phrase, after the word "terminate": "upon appropriate notice giving the permittee at least thirty (30) days to respond".

Also, this section should provide for the reverse situation of surface mining following underground mining, under separate permits, whereby the reclamation of the underground mine can be delayed because of the progressing surface operation.

3.30(a) Following the word "government" on line three, insert the following: "or be required by federal or state law or regulation as mitigation structures or facilities".

EXPLANATION: The use of structures for mitigation have been authorized under Section 404 & 402 permit considerations, recognized by EPA and encouraged by the Wildlife Resources Division and Public Land Corporation of the DNR. The location of these structures is usually of great emphasis so as to encourage public utility. Thereby, that siting is usually dictated by a state agency. When that occurs, it should be recognized by DcE in this section of the regulations.

3.30(c) Why are municipalities, local public service districts, soil conservation districts, etc. excluded?

To the proposed revisions to the Draft of 9/6/90 (dated ^{10/8/90} ~~8/8/90~~)

3.31(b) Delete subsection in its entirety.

The changes are not consistent with federal law or regulations nor the WV Act or regulations. The entire language of this subsection is duplicated from the NWF, et. al. agreement document and should not be a formal part of the regulations. Most particularly, the Commissioner should not be bound by the administrative activities of surrounding states in waiting for a response (paragraph 5) to an ownership and control inquiry. That simply duplicates the national AVS system, and is an unnecessary delay to permit issuance. Also, see comments attached for this subsection and subsection (c).

3.31(c) Including "application for renewal" is contrary to section 19 of the WV Energy Act, since the burden of proof is with opponents to the successive renewal of the permit.

3.33(b) What is meant by "violations review criteria"? Is there a federal rule counterpart to this term?

4.1(a)(1)(i) At the end of the subsection, after the word "spoil", insert the following language "for which design criteria has been approved and, on an active operation, is outside the perimeter of the coal and/or spoil area; and,"

EXPLANATION: This language will clarify that roads used for coal and spoil haulage within the operational pit/area of the permit are not primary roads. These type roads are constantly changing as the operation progresses and are not used for any length of time. Thereby, these type roads should not be considered "primary roads". This clarifying language is consistent with the description of primary roads requiring certification pursuant to 30 CFR 780.37. It is also consistent with the definition of "roads" in 30 CFR 701.5 and section 2.60 of these regulations which state, in part, "... does not include ramps and routes of travel within the immediate mining area or within spoil or coal mine waste disposal areas." If the definition remains unchanged, as proposed, is it true that in order to be classified as "primary", a road must meet both standards set forth in 4.1(a)(1)(i) and (ii)?

4.2(a)(6) After the word "line" on line 1, insert the following language: "or offset baselines".

4.3(a)(2) Delete this subsection in its entirety or change the language to be consistent with 30 CFR 780.37(a)(2).

EXPLANATION: 30 CFR 780.37(a)(2) requires such plans and drawings for roads located in the stream channel, not crossings!

4.5 Are these extensive requirements for infrequently used access roads mandated by federal rule? If so, what section of 30 CFR?

4.7(a)(2) Is the phrase "wherever necessary" a judgement to be made by the designing engineer? Will it be accepted by the regulatory agency?

4.8(b) The requirements of this subsection should be changed to be consistent with the provisions of 30 CFR 816.150/817.150/816.151/817.151.

4.10(e)(1) Should be deleted in its entirety and replaced with the language of 30 CFR 816.150(f)(5) and 817.150(f)(5).

4.11(a)(1) Delete words "qualified registered professional" on lines 3-4, replace with "licensed". This is consistent with existing West Virginia law and practice regarding land surveyors qualified to perform the tasks described.

4.11(a)(5) The design precipitation event should be changed to be consistent with subsection 4.7 of these regulations. Also, it is inconsistent with the requirements of 30 CFR 816.151(d)(1) and 817.151(d)(1).

4.12(a) After the word "facilities", on line 3, insert the phrase "which are under the control of the permittee".

EXPLANATION: It is impossible for a permittee to control the operation of support facilities over which the permittee has no control. This is consistent with 30 CFR 816.180 / 816.181/ 817.180 / 817.181.

4.13 On line 1, delete the word "all" so as not to include infrequently used access roads.

On line 8, remove the phrase "approved registered professional" and replace with "licensed" so as to be consistent with WV law and practices.

Delete the last two sentences as these are inconsistent with the definition of "roads" as set forth in 30 CFR 701.5 and section 2.60 of these regulations; inconsistent with the definition of "primary roads" set forth in 30 CFR 816.150 and 817.150, as well as section 4.1(a)(1)(i) & (ii). These two sentences are also inconsistent with 30 CFR 780.37(b) and 784.24(b).

Is it accurate to interpret the language of the current definition as providing for the acceptance of "as-built" plans as a supplement to the certification of roads? If so, why are these not provided for in the proposed definition?

5.2(a) Delete the phrase "including roads" from line 3.

EXPLANATION: The inclusion of this phrase is inconsistent with 30 CFR 816.151(d)(6) and 817.151(d)(6) which authorize the crossing of streams with certain structures without a specific finding. Also, the only change required by DSM in the May 23, 1990 Federal Register is the additional language regarding water quality standards. That addressed the only exception to DSM's finding that this section was "identical to ... 30 CFR 816.57 and 817.57.

5.4(b)(3) Insert the word "applicable" before "state and federal water quality standards".

5.4(b)(4) Does the language of this subsection permit the same design flexibility as provided for in 30 CFR 816.46(c)(iii)(A)?

5.4(b)(10) At the beginning of the subsection, add the following language: "An impoundment meeting the size or criteria of 30 CFR 77.216 and"

EXPLANATION: This is consistent with 30 CFR 816.49(a)(3) and 817.49(a)(3).

5.4(d)(1) At the beginning of the subsection, add the following language: "Except for temporary sediment control structures approved as part of the permit".

EXPLANATION: As the time requirement for certification in this regulation is not consistent with 30 CFR 780.25, providing that temporary sediment control structures do not have to be certified "prior to any surface mining activity" makes compliance with this rule possible. While the proposed provisions of this section are appropriate for permanent drainage control certification, the installation of certain types of such permanent control is impossible until mining is completed. Temporary drainage control is an interim solution to this problem. However, as written, this section will be impossible to comply with in many situations.

5.4(e) After the word "structures", insert the following language: "meeting the criteria of 30 CFR 77.216" so as to be consistent with 30 CFR 816.49.

5.4(e)(1)(B) Insert the following language between the words "engineer" and "shall" on line 2: "or licensed land surveyor".

EXPLANATION: 30 CFR 816.49(a)(10)(ii) and 817.49(a)(10)(ii) provide that surveyors, as well as engineers, can complete the certified report.

5.4(h) Delete the phrase "nor less than two (2) years before final bond release" on lines 3 and 4.

EXPLANATION: This language is not consistent with 30 CFR 816.46(b)(5) and 817.46(b)(5).

5.4(h)(2) At the beginning of the subsection, insert the phrase "Unless otherwise approved in the reclamation plan" so as to be consistent with 30 CFR 816.49 and 817.49, as well as section 5.5 of these rules.

5.5(c) At the end of the subsection add the following language: "provided, however, this shall not apply to impoundments left in place pursuant to Chapter 19, Article 25, Section 2 of the Code of West Virginia".

6.8(a) Reinsert the deleted language.

EXPLANATION: Since one-half mile has been established as the limit for survey notice, removing the language in question is not consistent with 30 CFR 816.62(c) and 817.62(c) as these subsections require that structures "that could reasonably be affected by the blasting" be surveyed to determine preblasting condition. Removal of the language is contradictory to the expressed intent of these subsections. In addition, surveying structures beyond one-half mile from the "blasting" site will cause unnecessary concern and alarm of those residents.

6.8(a)(6) Add a new subsection, as follows:

6.8 (a)(6) In the event residents or owners of manmade dwellings were notified, in accordance with paragraph (a) of this section, as a result of a previous permit application by the same operator, it will not be necessary to renotify those residents of a preblast survey on subsequent application which are within one-half mile of those residents.

6.8(a)(7) Add a new subsection, as follows:

6.8(a)(7) Any person who, after verified notice, refuses entry to property for purposes of conducting a survey pursuant to subsection (a)(2) of this section, shall waive any right to damage claims which use pre-blasting conditions as a basis for such damage.

11.1 (a) Delete the underlined language which has been added to the proposed rule and replace it with the following language: "the life of the permit or any renewal thereof and the liability period necessary to complete all reclamation operations under Chapter 22A, Article 3 of the Code of West Virginia"

EXPLANATION: This change makes the language consistent with 30 CFR 800.60 (b). In addition, as proposed the term "reclamation obligations" is not defined in state or federal statute or regulation.

To the draft filed 9/10/90, and
To the proposed revisions to the Draft of 9/6/90 (date ^{10/8/90} ~~8/8/90~~)

12.2(c)(4) Delete this subsection in its entirety.

EXPLANATION: This new language contains the phrase "Notwithstanding any other provisions ...of the Act", which indicates that this rule simply disregards existing state statute and the provisions it establishes for bond reduction and release. This proposed language arbitrarily ignores the fact that numerous permits have been approved by DoE, pursuant to the provisions of existing law and regulations in effect at the time of issuance. It ignores the fact that permits have been operated in compliance with those laws and regulations. Most importantly, these permits have been operated pursuant to the provisions of Chapter 22A, Article 3, Section 23 of the Code of West Virginia with the

reasonable expectation that since the statute is in effect, reclamation could be achieved by insuring that untreated post mining water discharges were as good as or better than what was there before mining. These permittees now find themselves in a situation where the requirements for final release have been suddenly changed by these proposed rules, despite the fact that 22A-3-23 remains valid. And, this rule is proposed without any request or interest from the federal Office of Surface Mining. There is no federal law or rule similar to this proposal.

Neither does this new provision recognize the provisions of the state's water quality regulations, under which the standards for coal permits are established. In September of 1989, rules were promulgated, by DoE, which stated that bond forfeited sites would have reclamation defined to include water quality. That provision was to take effect for any permits revoked and bonds forfeited after December 15, 1989. This new proposal disregards such a prospective approach and will apply the new water quality standards retroactively to dates uncertain, as it relates to the time such permits were operated. There have been hundreds of permits issued and completed in compliance with all laws and regulations in effect at time of issuance and during operation, which had to equal or improve the quality of existing water or the bond was never have been released. Now, with this change, the bond will never be released even though these operations have improved the quality of existing water.

This proposal disregards other sections of the state Act and these regulations pertaining to the establishment of background water quality prior to beginning mining. For the past eighteen years every permit application has had to have water quality analyses performed prior to mining to indicate the status of discharges from proposed mining areas, as well as the existing quality of receiving streams. For the past ten years, that background water information has become extremely sophisticated and comprehensive. The findings of these investigations were intended to serve as the basis of comparison for the quality of water that had to be achieved upon completion of mining. Since this proposal ignores the findings of any background water quality investigation and establishes effluent limitations and water quality standards as the goal to achieve, the Act and these regulations, at section 3.22(b)&(c), must be amended to terminate the requirement for performing such background water quality investigations. The cumulative hydrologic impact analysis (CHIA) and probable hydrologic consequence (PHC) review can be performed using these effluent limitations and water quality standards as the presumed impact, thus no investigation that would result in other qualitative findings is necessary, if this proposal is accepted.

Even though the recent decision of the D.C. Circuit Court regarding the termination of jurisdiction is still in a pending appeal status, the impact of Judge Flannery's ruling must be assessed using this proposal as a revised standard for

accomplishment of reclamation. Preliminary interpretations indicate that any permit, anywhere, mined at anytime in the past would be subject to recall using this new definition. The impact on the industry and the agencies, both federal and state, is unprecedented and endlessly indeterminate. While the decision is contrary to that desired by the industry and agencies, that decision is not the concern in this matter. Rather, it is the state's adjustment of the definition in this proposal that causes the target to drop out of sight!

While this proposal brings drastic changes to the water quality objective of reclamation, it is a worthy concept. However, when applied retroactively, in the sense of impacting mining operations which were conducted under a different set of standards, it is economically and, in some cases, technologically impossible to achieve effluent limitations and water quality standards. Many of the sites did not meet these standards before any mining was conducted. The devastating impact of this proposal can be verified by OSM and DoE's very own Abandoned Mined Land (AML) program and its lack of emphasis on water quality. The agencies administer the AML program, using money paid totally by the industry as a tax on current production, to correct problems from past mining practices. That program has spent hundreds of millions of dollars reclaiming old mining sites. However, no emphasis has been placed on quality of water from these sites. It does not even have to meet what the background water quality investigations or presumptions were, much less effluent limitations or water quality standards. While DoE proposes that the industry, on sites mined under different rules, suddenly meet these standards, their very own AML program does not have the same requirements! The bond forfeiture program now includes such considerations, but it is tied to background by simple fact that it does not mention water quality standards or effluent limitations as an objective. But that was a prospective program, not started until December 15, 1989.

What is the definition of "chemical treatment"? Does it include the use of flocculent? Does it include wetlands? These proposals are also contradictory to section 14.7 of these regulations which uses "hydrologic balance" as the basis for discharge quality. "Hydrologic balance" recognizes the quality of premining discharges and receiving streams.

These proposals are arbitrary, capricious and totally ignore existing state and federal law and regulations.

12.2(g) Add a new section to read as follows:

12.2(g) Notwithstanding any other provisions of this section, these regulations, or the Act, a permittee may apply for release of bonds posted in accordance with Section 11(a)(2) of the Act and section 11.8 of these regulations. Each increment shall be considered, for purposes of this subsection, as a separate permit pursuant to the requirements of section 12.2 of these regulations.

EXPLANATION: This proposal is consistent with several other approved state programs which authorize and recognize the release of bonds provided on an incremental method, i.e. section 1501:13-7-05 of the State of Ohio regulations. Also, there is no prohibition of this release procedure in either federal or state law and regulation.

To the proposed revisions to the Draft of 9/6/90 (dated 10/8/90)

12.4(d)(2) Delete the newly added phrase "Notwithstanding efforts by the Commissioner" and delete the word "shall" on line two and insert the word "may".

EXPLANATION: As opposed to a mandatory requirement, this section should be flexible so as to include considerations for weather, and other conditions over which the Commissioner has no control and which would serve to delay the initiation of physical work. It should also provide recognition of delays involved in the legal procedures leading to collection to insure that a purposeful delay, by the bonding or mining company, would not cause a mandatory shift of liability from them to the Special Reclamation Fund. In addition, collection efforts should not terminate if unable to collect after 180 days. There is not a federal regulation similar to this which precludes OSM from having any concern with the requirements.

13.1 - 13.9 Delete these sections in their entirety and replace with the language of 30 CFR Part 772.

13.1 - 13.9 If the proposal to insert 30 CFR Part 772, in its entirety, is not accepted, then the language of these sections should be changed to provide for three categories of prospecting approvals, which requirements will be reflective of the varying degrees of complexity and purpose. (See the EXPLANATION for section 2.96. in these comments.)

13.1(c)(6)

13.2(d) At the end of each subsection, insert the following language: "identified within the proposed prospecting area".

EXPLANATION: This language is consistent with 30 CFR 772.12(b)(9).

14.5 After the word "supplies" on line 6, insert the following language: "in accordance with Section 24 of the Act", so as to be consistent with 30 CFR 780.21(e) and 816.41(h).

14.8(a)(2)(E)(iii) Delete the words "so as" on line 4, insert the words "if necessary"; and, insert the following language at the end of the subsection, "provided that this material may be included in the computation of the 20% non-durable material if shown not to affect fill stability".

EXPLANATION: This is an engineering consideration which must be addressed by the permittee in compliance with the objective of achieving the required static safety factor and preventing any chance of clogging the underdrain. The means of achieving those objectives is not appropriately dictated by agency rules. This is consistent with 30 CFR 816.73(b), 817.73(b) and section 14.14(g)(1)(A) of these regulations.

14.8(a)(5) Delete the words "prohibited unless" on line 5, insert in its place the following: "approved after".

EXPLANATION: This is consistent with 30 CFR 816.107(d) and 817.107(d).

14.9(b)(1) Remove the word "collectively" on line 5, so as to be consistent with 30 CFR 819.15(b)(1).

14.11 Delete the section in its entirety and insert the provisions of 30 CFR 816.131 and 817.131.

14.14(c) In accordance with the statement of DSM contained in the May 23, 1990 Federal Register, at finding 14.14(b), is this the section which initiates the no-cost reclamation program?

14.14(e)(3) Delete this subsection in its entirety and insert the provisions of 30 CFR 816.71(e)(3) and 817.71(e)(3).

14.14(e)(8)

14.14(f)(5)

14.14(g)(6) Delete proposed language so as to be consistent with 30 CFR 816.71 and 817.71.

14.14(f)(8) Delete the second and third sentences and insert the provisions of 30 CFR 816.71(e)(3) and 817.71(e)(3).

14.14(g)(1)(B) While the phrase "will not degrade to soil material" is consistent with 30 CFR 816.73(b) and 817.73(b), it emphasizes the importance of defining "soil material" as proposed at section 2.114 of these comments.

14.14(g)(5) Delete the subsection in its entirety and insert the provisions of 30 CFR 816.71(e)(3) and 817.71(e)(3).

14.14(g)(11) Remove this subsection in its entirety as no similar provision or requirement is found in federal rules. There is no definition of "significant non-compliance" in these rules or the federal rules. Also, this subsection uses the language "notwithstanding and in addition to any other provisions of...the Act", which is arbitrary and capricious expansion of authority.

14.14(g)(12) What is the purpose of this change? What federal rule is similar to this proposal?

14.15(d) After the word "including" on line 3, insert the following language: "multiple seam operations and".

EXPLANATION: There is no federal rule relating to the backfilling and regrading of operations mining multiple seams, which create more than one bench. The nature of such operations mandates they be addressed in a manner different than the strict time/distance requirements established for one-bench contour operations in section 14.15(b)(1)(2)(3).

14.16(n) Why is this subsection specific with a date of 2/4/87 as it relates to "remining"? Is the intent to limit "remining" operations? Is this date specified in law or is it simply the date such legislation was passed?

15.2(b) Delete the newly proposed language on line 5 & 6.

EXPLANATION: In the May 23, 1990 Federal Register, DSM found this existing section "no less effective than 30 CFR 817.100" (finding 15.2b). What is the purpose of accelerating the initiation of reclamation on an underground mining site? The existing language was developed with the characteristics and problems usually incurred with the closing an underground operation in mind.

16.2(c) See attached comments. And, at the end of the subsection, add the following language: "Provided that any person who, after verified notice and request to conduct a premining survey of their property and facilities by the applicant, refuses entry to said property, shall waive any right to damage claims which use premining conditions as a basis for such damage."

20.5(a) Reinsert the following language: "issuance of a notice of" so as to be consistent with 30 CFR 845.15(a).

20.5(a) Reinsert the proposed deleted language regarding assessment of civil penalties of less than one thousand dollars (\$1,000), as it is consistent with the provisions of 30 CFR 845.12.

20.6(d) What is the origin or basis for the proposed additional language? Does it have a basis in federal rule? If so, what is the section? Is this not an overextension of authority being granted to persons without standing?

20.7(b)(7-8) Delete "A violation with a seriousness of rating of 7 or higher shall be a cessation order."

EXPLANATION: There is no counterpart rule in 30 CFR regarding a cessation order being issued based on a subjective prediction and/or opinion that a violation "can reasonably be expected to result in significant imminent environmental harm or create an imminent danger to the health and safety of the public". Do not have to deliver the assessment notices for 30 days.

To the proposed revisions to Draft of 9/6/90 (dated 10/8/90)

22.3(p) After the word "vertical" on line 5, insert the following language: "except when placed behind a slurry impoundment embankment structure constructed by the downstream technique for abandonment purposes and".

22.5 (d) Change to read as 30 CFR 817.83(c) by adding the following: "All vegetative and organic materials shall be removed from the disposal area prior to the placement of refuse material. Topsoil shall be removed, segregated, and stored or redistributed in accordance with Subsection 14.3 of these regulations. If approved by the Commissioner, organic material may be used as mulch, or may be included in the topsoil to control erosion, promote growth of vegetation, or increase the moisture retention of the soil.

To the proposed changes to the draft of 9/10/90 (dated 10/8/90)

22.7(a) Change the subsection to read consistent with the provisions of 30 CFR 817.83(d)(1).

JACKSON & KELLY

ATTORNEYS AT LAW

1800 LAIDLEY TOWER

P. O. BOX 553

CHARLESTON, WEST VIRGINIA 25322

TELEPHONE 304-340-1000 TELECOPIER 304-340-1100

176 EAST MAIN STREET
LEONINGTON, KENTUCKY 40506
TELEPHONE 606-255-9600202 WEST MAIN STREET
FRANKFORT, KENTUCKY 40601
TELEPHONE 502-227-40001701 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20006
TELEPHONE 202-858-7880

WRITERS DIRECT DIAL NO

340-1381

115 WEST KING STREET
MARTINSBURG, WEST VIRGINIA 26401
TELEPHONE 304-283-08086000 HAMILTON CENTER
MORGANTOWN, WEST VIRGINIA 26505
TELEPHONE 304-588-0000265 RUSSELL AVENUE
NEW MARTINSVILLE, WEST VIRGINIA 26155
TELEPHONE 304-456-1751250 CHARLES STREET
SISTERSVILLE, WEST VIRGINIA 26175
TELEPHONE 304-622-0641

October 18, 1990

Bill Raney, Vice President
West Virginia Surface Mining
and Reclamation Association
1624 Kanawha Boulevard, East
Charleston, West Virginia 25311

Gary White, President
West Virginia Coal Association
1301 Laidley Towers
Charleston, West Virginia 25301

Re: Proposed West Virginia Surface Mining
Reclamation Regulations

Gentlemen:

Below we have set forth some of the concerns with the various permit packages being proposed by DOE:

I. October 8, 1990 Draft-Proposed Revision to Draft of 9/06/90

A. Applicant Violator System

1. §3.25(b). This proposed regulation makes it clear that a transfer of a permit transfers responsibility for unabated on-the-ground violations, but does not generally transfer liability for civil penalties and unpaid reclamation fees incurred by the transferor. This portion of the regulation is appropriate and has already been found by OSM to be consistent with the federal regulations. The new proposal, however, goes further and provides that the payment of delinquent civil penalties and unpaid reclamation fees remain the responsibility of the prior permittee, unless it is determined by the Commissioner that there was an ownership or control

JACKSON & KELLY

relationship between the parties prior to the transfer of control of the operation." This language is both unnecessary and overly broad.

First, the language is entirely unnecessary. If the permit transferee in fact owned or controlled the transferor with respect to the operation being transferred when the transferor incurred liability for penalties or reclamation fees, then the transferee is permit blocked, and cannot assume the permit until either it or someone else pays the delinquent penalties or reclamation fees. Therefore, there is no need to transfer liability for these penalties or fees. Second, the language of the regulation goes beyond what DOE obviously intends.

It appears that DOE wishes to avoid the situation in which a company that has incurred substantial liability for penalties and fees attempts to transfer the permit to another operator that the original permittee owns or controls, thereby allowing the transferee to continue mining under the same ownership but without having to pay the transferor's penalties or fees. As set forth above, this problem is already taken care of by the applicant violator system. In addition, though, the language as written could have unintended effects. For instance, assume that Company A hired Operator B as a contractor at Site No. 1 (and was presumed to control Operator B at Site No. 1) five years ago but terminated the relationship two years ago. Then assume that Company A wished to succeed to a permit for an entirely different operation at Site No. 2 currently owned and operated by Operator B, but on which Operator B had allowed five cessation orders to run the full thirty days. Here, Operator B (which holds the permit, too) would have incurred over \$100,000.00 in civil penalties. Under the terms of DOE's proposed regulation, because Company A and Operator B had enjoyed a control relationship at Site No. 1 "prior to the transfer of control" of the permit for Site No. 2, Company A would be liable for Operator B's civil penalties at Site No. 2 even though Company A never controlled Operator B with respect to operations at Site No. 2. This is clearly not intended by either SMCRA or DOE. To the

JACKSON & KELLY

extent that DOE still insists on some limiting language, we suggest that it read as follows:

. . . unless it is determined by the Commissioner that there was an ownership or control relationship between the parties with respect to the operation or permit being transferred at the time that the party transferring control incurred liability for the delinquent civil penalties or unpaid reclamation fees.

2. §3.31(b), (c). These sections require that the Commissioner will verify by letter with all bordering states which produce coal whether any of the owners or controllers of the applicant or operator have unabated CO's, delinquent civil penalties or bond forfeitures in those states. This requirement stems from the Consent Agreement entered into between DOE and Save Our Mountains, but should be written in such a fashion that the permitting process is not slowed by this requirement. That is, letters to the neighboring states should be written by DOE as soon as a permit application is received in the Regional Office and the neighboring states should be given a definitive deadline by which its failure to respond will be deemed to mean that the applicant is not permit blocked in that state. Otherwise, DOE, which has no leverage over the agencies of adjoining states to force timely responses, will forever be waiting the response of dilatory neighboring states.

The third and fourth full paragraphs on page three of this regulatory proposal require checks on the "applicant, the owners or controllers of the operator, and the lessor and entities controlled by the Lessor, (if the Lessor retains rights to the coal after extraction). . ." the language with respect to the Lessor is surplusage as any Lessor which retains the right to the coal after mining is already deemed presumed to control the applicant. This language will serve only to confuse applicants.

JACKSON & KELLY

B. Bond Release

1. This regulation would prohibit Phase I bond release where chemical treatment of water is occurring except in very limited circumstances. Unfortunately, the West Virginia statute on bond release (W.Va. Code §22A-3-23) appears to make the phased bond release schedule to which we have all grown accustomed merely discretionary with the Commissioner, and does not mandate that the release bonds in a phased approach. Accordingly, there may be little that the coal industry can do to challenge the Commissioner's regulatory decision to limit his discretion. The industry could, however, request that the regulation apply only to permits issued after the effective date of the regulation but are likely not to like the answer they'll receive.

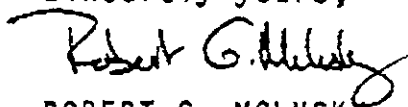
II. June 29 Regulatory PackageA. Surface Owner Protection §16.2(c)(2)

1. This regulation formerly provided that operators had a duty to correct material damage resulting from subsidence to structures "to the extent required under applicable provisions of the State law." The federal regulation, which provided that the duty to correct damage to structures was subject to applicable State law was struck down in Judge Flannery's February, 1990 decision. Since then, OSM has required that state regulatory provisions no longer allow operators to avoid the duty to correct material damage to structures even where they have specific deed rights to do so.

The coal industry should request that DOE specify that this regulation shall apply prospectively only and not to mining which has already occurred under a different set of rules. In addition, the United States Constitution and the West Virginia Constitution prohibit any law which impairs contractual obligations, see, U. S. Const. art. I, §10; W.Va. Const. art. 3, §4, unless the law is a reasonable means of protecting a public interest. The interests protected by DOE's proposed revisions are strictly

JACKSON & KELLY

private and, accordingly, the contractual waivers previously obtained by an operator cannot be voided by DOE.

Sincerely yours,

ROBERT G. MCLUSKY

RGM/dd

POCAHONTAS LAND CORPORATION POCAHONTAS DEVELOPMENT CORPORATION

100 Princeton Avenue
P.O. Box 1517
Bluefield, West Virginia 24701
(304) 325-8289
(304) 325-8836
(304) 325-2054 - Telecopier

October 16, 1990

LAW DEPARTMENT
Thomas L. Linkous
Ernest F. Hays, II.
David K. Moore
Stephen M. Hopta

Mr. Stephen C. Keen, Director
Division of Mines and Minerals
West Virginia Department of Energy
1615 Washington Street, East
Charleston, West Virginia 25311

Re: West Virginia Department of Energy - Proposed legislative regulations for West Virginia Surface Mining and Reclamation

Dear Mr. Keen:

Pocahontas Land Corporation offers the following written comments relative to the proposed regulations filed on September 6, 1990, and subsequent changes dated October 8, 1990. It is the purpose of these comments to seek clarification of the intent of these proposed regulations.

Section 2.835 - This proposed regulation defines ownership and control in Paragraph (a)(3) as a person who directly or indirectly determines the manner in which an applicant, operator or other entity conducts surface mining operations, and, further in Paragraph (b)(6) presumes a relationship of ownership or control if an entity has authority to determine the manner in which a person or other persons conducts a surface mining operation. These definitions as submitted do provide concern to any landowner/lessor because of the broad ambiguity of this definition.

The standard coal mining lease provides that the landowner/lessor has the right to approve the projected mining plans of the lessee, and in many instances the lessee is not the operator nor the applicant for a permit. These mining plans are not as detailed as the mining plans the operator submits to the Department of Energy with its permit application. These mining plans are approved to maximum recovery of reserves. This standard lease clause is used to allow a landowner/lessor to protect itself against waste being committed on its property. It is a common law right that a landowner/lessor be protected from a lessee committing waste thereby diminishing the value of the leasehold. A landowner/lessor does not control the day-to-day mining operations by simply having the right to approve these mining plans. Generally all leases provide that the operator or lessor is acting on its own behalf and not an agent for the lessor and that it will comply with all state and federal laws applicable to mining.

In the meeting of October 12, 1990, with the West Virginia Coal Association and West Virginia Mining and Reclamation Association, you stated that the intent of regulations was to exclude a landowner/lessor where there was an arm's length transaction whereby the landowner/lessor only receives a royalty for the coal mined. You further stated the intent of the regulations is to include those landowners/lessors who have the right to purchase or to sell the coal that is mined. The test for ownership and control should revolve around the ownership of the coal when severed by mining. However, the regulations contain no language to clearly show that this is the intent and, therefore, are subject to numerous interpretations. The representative from OSM, for example, stated that requirement for submission of mining plans should be excluded from leases to avoid the question of ownership and control. This clearly shows misinterpretation of the regulatory intent.

The standard mining lease also provides the landowner/lessor has the right to inspect operations to insure maximum recovery of coal reserves and also provides language whereby the lessee covenants to mine coal in the most effectual, workmanlike and proper manner according to approved suitable methods of modern mining. Again, this is language to protect the landowner/lessor from waste. There are numerous examples of landowners/lessors losing thousands of tons of reserves because operators would high-grade a coal seam or even suspend mining where the production costs would be increased due to geology of the seam. Without strong language in a coal mining lease, valuable reserves would be lost resulting in not only a loss of income to the landowner/lessor but also the state and federal governments in taxes that would be paid on this coal and the loss of energy and jobs to the population of this country. Therefore, more specific language should be included in this section to clearly show the intent of the regulation and avoid future litigation over misinterpretation of this section.

Section 3.25(b) - It is obvious from this language that the Department of Energy is seeking to make those operators who have delinquent penalties and unpaid reclamation fees responsible for all of their outstanding violations or they will be blocked from ever receiving a permit. A new purchaser of such an operation that has violations must correct those violations but knows before closing the transaction of the liability. However, once again the definition of ownership and control in Section 2.835 comes into play. Certainly, if the intent of the regulation is that a landowner/lessor having only a royalty interest in an arm's length coal mining lease shall not be held accountable for the acts of an unscrupulous operator or not be blocked from having any of its other properties permitted, then the definition of ownership and control in Section 2.835 must be further clarified.

Section 5.5 - Sediment control structures that are in place after final bond release that become the responsibility of the landowner to inspect and maintain in a safe condition places an undue burden on a landowner. This section appears to be in direct conflict with Section 8.1 whereby regulations seek to achieve the enhancement of fish and wildlife. With the cooperation of the Department of Energy four years

Mr. Stephen C. Keen
October 16, 1990
Page 3

ago, some sediment control ponds were not removed in order to provide habitat for fish and wildlife. These sediment ponds are excavated and there is no built-up dam or dike to contain large impoundments of water nor are they constructed in stream beds within the meaning of the West Virginia Dam Control Act. There is no difference in these sediment control ponds and the farm ponds excluded under West Virginia Code §20-5D-3(e). These sediment control ponds are left only after they have been inspected and designated as a benefit to wildlife by the West Virginia Department of Energy and as having no potential to cause loss of human life in the event of embankment failure. The West Virginia Legislature, in West Virginia Code §19-25-3, provides that a landowner cannot be held liable for any injuries arising out of the public's use of these sediment ponds designated for wildlife enhancement for which there is no charge. Therefore, the Department of Energy should closely scrutinize its conflicting regulations if its goal is to provide for fish and wildlife propagation after reclamation has occurred and the bond released. Unless landowners/lessors are relieved of the responsibility of this regulation, landowners/lessors will have no other choice but to have these sediment control ponds removed even though the removal will cause a detrimental effect on wildlife.

I appreciate the opportunity to submit these comments, and if you have any further questions or need additional information, please feel free to contact me.

Very truly yours,



Ernest F. Hays, II
General Land and Tax Attorney

EFH.II:mm

2.4:8/

xc: RLR
DDS
REG



LaRosa Fuel Co., Inc.

Coal Producers - Shippers

420 BUCKHANNON PIKE • CLARKSBURG, WV 26301 • (304) 623-6751

October 8, 1990

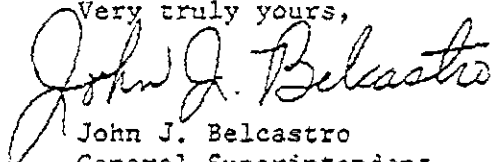
Department of Energy
1615 Washington Street East
Charleston, WV 25311

Dear Sirs;

On behalf of LaRosa Fuel Company, Inc., we are offering the following comments and considerations in regard to Title 38, Series II, Proposed Regulations:

We will be happy to meet with representatives from the Department of Energy to discuss changes to the regulations which will make the regulations more practical and workable, so as to enhance the mining of coal and protect the environment.

If you need to contact us, we can be reached at the letter head address and phone number.

Very truly yours,

John J. Belcastro
General Superintendent

JJB:pas

WEST VIRGINIA MINING AND
RECLAMATION ASSOCIATION
1624 Kanawha Blvd., E.
Charleston, West Virginia 25311
304-346-5318

Change subsection to read as follows:

1.2(a) These rules and regulations apply to all prospecting and surface mining operations in the State of West Virginia, except the applicable subsections in Section 26, Article 3, Chapter 22A of the Act. However, where existing operations are being carried out under valid permits or prospecting approvals and are in compliance with applicable performance standards, no change in operations will be necessary or, no written revisions, amendments, or modifications of such permits shall be required as a result of promulgation of these regulations except as required by the Commissioner. The provisions of this paragraph do not constitute the issuance of a new permit for purposes of permit renewal or mid-term review of existing permits. Operations permitted prior to the effective date of these regulations are exempt from any new requirements resulting from changes as long as the operation is in compliance with the conditions of the permit and the requirements of the Act.

1.2(c) Any proposed change addressing this subject will likely be invalid as the recent decision in the U.S. District Court for the District of Columbia is under appeal or consideration for appeal. No specific action should be taken until the matter is finally resolved. However, any reference to "regulations" in this subsection should be changed to "appropriate regulations under which the permit was issued and subsequent changes which been incorporated into the permit."

2.2 "Abandoned Site" definition must incorporate the actual collection of bond as the determining factor for such abandoned status. There is no counterpart in 30 CFR 701.5.

Change the subsection to read as follows:

2.9 Active Surface Mining Operation means, except where inactive status has been granted in accordance with Subsection 14.11 of these regulations, an operation where a Phase I bond reduction has not been approved. For purpose of permit renewal as provided by subsection 3.26(a) of these regulations, an operation shall not be considered active if no further surface coal extraction will be conducted under the permit and only reclamation activities remain.

EXPLANATION: In the 5/23/90 Federal Register, DSM found this language to be consistent with 30 CFR 773.11(a) and 800.60(b).

2

2.11 Affected Area. What is the effect of the phrase "and the area located above underground workings?"

2.15 The proposed definition for "bench control systems" should be returned to the existing language, except for removing the limitation of use only "on haulback type mining operation".

EXPLANATION: In the 5/23/90 Federal Register, DSM approved the existing definition. DSM did not make a comment on changing the definition. Use of these systems should not be restricted to a mining bench. Use of the systems should be permitted on mountain top and area mining operations. There are numerous situations in which the concept of bench control systems are used immediately below the actual mining bench, where such location has proven more effective as it can control drainage much closer to the source, during all aspects of the operation, from clearing and site preparation through the actual mining process.

2.16 Best Technology Currently Available. This definition should contain qualifying language to indicate "reasonable availability" of such equipment, devices, systems, methods or techniques.

2.45 Embankment should be changed to read as the federal regulation at 30 CFR 816.49. Insert the language, "that is raised above the natural surface of the land", after the word "materials".

2.67 Impoundment or Impounding Structure should have the following language added to the end of the current definition: ... which is five feet or greater in height as measured from the upstream toe and which results in a basin of twenty acre feet or more. Provided, however, this definition shall not include excavated ponds, bench control systems, haulageway sumps, or temporary drainage structures approved as part of the permit".

EXPLANATION: This is consistent with the long-standing policy of the Department, in effect since 1986, as well as the comments of DSM regarding such structures in the 5/23/90 Federal Register, as well as definitions of the Mine Health & Safety Administration, at 30 CFR 77.216. Further, the Department policy was implemented as part of the federal statute changes to provide that approved persons can inspect drainage structures.

2.85(b)(6) At the end of the subsection add the following language: "pursuant to the performance standards of the WV Energy Act, these regulations, P.L. 95-87 and the federal rules".

EXPLANATION: This language clearly establishes compliance or the lack of compliance with the performance standards of this Act and regulations as the cause for action to initiate ownership and control sanctions. The phrase "manner ... conducts..." covers an extremely broad spectrum of activities, many of which have nothing whatsoever to do with this Act, these regulations or the environmental aspects of an operation. If to be associated with ownership and control sanctions pursuant to this Act and the P.L. 95-87, such a broad phrase must be limited to these statutes and pertinent regulations.

2.96 Prospecting should have the term "substantial" inserted in the definition, on the seventh line between the words "any" and "disturbance".

EXPLANATION: The term should qualify the need for a prospecting approval, as set forth in 2.122 of the proposed regulations. The term comes directly from section 512 of P.L. 95-87. It must distinguish the routine collection of data for application requirements from that which is necessary to determine the location, quality and quantity of coal seams. It is not appropriate for the simple collection of data, without excavation, which is mandated by other sections of the Act and these regulations, to require a prospecting approval. Would placing a weir in the stream for background water sampling require this approval? Would using a rock hammer to get a highwall sample require prospecting approval? As proposed, the regulation creates a mandatory "catch-22" situation with other requirements of the Act and these regulations, such as section 13.1(a)(12)&(13).

The federal requirements for prospecting approval, at 30 CFR Part 772 are ~~less effective~~ than the extensive requirements for prospecting approval in the West Virginia program. If West Virginia is to follow the definitional purpose of coal exploration set forth by the federal government in 30 CFR 701.5, the state program should adopt consistent requirements for approval of prospecting set out in 30 CFR Part 772. Establishing three categories or levels of prospecting is a possible solution to this problem. That is, as long as the requirements for these different levels are appropriate for the varying degrees of complexity and purpose and the simple collection of mandated environmental data is not included in the approval requirements.

An example of this concern is the requirement that each application be approved by the SHPO. Since SHPO does not have a comprehensive list of historical or archeological places for coal bearing regions of the state, they (SHPO) require such research be conducted by the permittee. That research, or survey as it is called, must be done by recognized experts, approved by the

Department of Culture and History, and usually involves excavation. Therefore, a prospecting approval will be necessary each time the SHPO does not have records and requires the applicant to conduct a survey. However, according to these regulations an approval for prospecting can not be approved with a description of such cultural, historical or archeological sites, which, in many cases, requires the SHPO's mandated survey!

2.104 Renewable Resource Lands - should have the word "significant" inserted before the words "aquifer" on line one and line two. Also, change the word "waters" to "water" and insert the word "supply" following the word "water" on line two.

At 2.114 insert new definition as follows:

2.114 Soil Material means material of which at least fifty percent is finer than 0.074 mm and exhibits plasticity and meets the criteria for CL, CH, OL and OH, as determined by the unified engineering soil classification system.

2.116 Stoniness: This entire definition should be deleted as it has no federal counterpart and serves no purpose to the performance standards.

Change to read as follows:

2.118 Structure means, except as used in the context of subsection 3.8 of these regulations, any man-made structures within or in the proximity of surface mining permit areas which include, but is not limited to: dwellings, outbuildings, commercial buildings, gas lines, water lines, towers, airports, and impoundments or bodies of water with a storage capacity or volume of 20 acre-feet or more. The term does not include structures built and/or utilized for the purpose of carrying out the surface mining operation. For blasting purposes, structure shall also mean underground mines and tunnels.

Change to read as follows:

2.120 Subsidence means, as it relates to underground mining operations or auger mining, a sinking, collapsing and cracking of a portion of the earth's surface caused by voids, beneath the surface created by mining.

3.2(a) What is meant by the phrase "receive approval of a written request" on line four? Delete the words "and obtain" on line 5, and insert the phrase, "and the Commissioner shall act within the time periods specified in the Act so as to issue".

3.2(b)(11) Delete this subsection in its entirety so as to be consistent with 30 CFR 773.13(a).

3.2(b)(13)(E) Wording is improper.

3.2(e) What is meant by "he may require one (1) additional advertisement"? After the word "period" on line 7, insert the following: "only if a protest or inquiry had been filed by a person with a valid legal interest within the comment period for the original advertisement".

3.2(f) Insert "because of significant revisions" after the word "required" on line four, and strike the remainder of the sentence.

3.4(c) Add a new item as follows: "(6) In lieu of color coding, maps may be marked with computer generated markings to distinguish the features noted in (1) through (5) of this subsection. Such markings and the features they represent shall be shown in the legend of the map."

3.4(d) Insert "as applicable" between the word "information" and the colon ":" at the end of the subsection heading.

EXPLANATION: Present wording indicates such information will be required whether the permittee plans to include such activities in the permit or not, i.e., augering limits, topsoil borrow areas.

3.4(d)(24) What is meant by this requirement? What is the purpose of this requirement? What is the federal rule counterpart to this requirement?

6

3.6(k) Delete this item in its entirety. Section 14.17 covers the matter in accordance with the comments of DSM in the May 23, 1990 Federal Register and 30 CFR 816.95 and 817.95.

3.7(a) Reinsert the language shown as deleted. Upon reinstatement, at the end of that language following the word "design", insert the following language "upon a demonstration that it is as effective in protecting the environment, public health and safety as the design techniques specified in the federal rules".

EXPLANATION: (1) This additional language was mandated by DSM's comments in the 5/23/90 Federal Register. (2) It is consistent with the language of 30 CFR 816.71(e)(2). (3) The EXPLANATION for subsection 3.7(b)(6) also has relevance to this recommendation. (4) This opportunity in design approach, without any change in design criteria, is critical to the industry. Engineers responsible for certifying excess spoil disposal structures must be provided design flexibility, as long as the stability criteria of federal rules are achieved. This is particularly important in light of the recent decision of the U.S. District Court of Washington, D.C. regarding termination of jurisdiction. If the only designs accepted will be those dictated by DSM and state regulatory authorities, without industry engineers having any flexibility, then the structures should be certified by these agencies and the responsibility for the structure's long term stability must be assumed by the designing agencies of the federal and state governments. (5) With this language being reinserted, as part of the state program amendment, we are not asking for approval of alternative designs, **only consideration!** Without such language, the industry does not have an opportunity to even submit an alternative design for consideration. We are simply asking for that opportunity! (6) The answer of "experimental practices" is not appropriate since it is such an extended, complicated process. That complication defeats the innovation, initiative and, thereby, the opportunity for improving the design and construction of such fills. Also, it is not a state program consideration, experimental practices is completely under the authority of DSM. If that (experimental practices) is the only approach, can we submit, for consideration of approval, the plans and designs for fills already installed and certified, which were different from federal requirements, but in compliance with state regulations, at the time of construction, and these fills have proven to be stable, safe and functional?

3.7(b)(6): Delete this subsection entirely.

EXPLANATION: In the 5/23/90 Federal Register, DSM found the current section 3.7 to "be no less effective than the corresponding Federal rules ..." and did not recommend any changes. Thereby, any additional language to this subsection 3.7 is not necessary. This new language clearly provides for a layman's review and approval of a registered engineer's plans and proposals. While the current Commissioner is a trained engineer, there may be future Commissioners not having such training. It is not appropriate for someone not registered as a professional engineer to review and pass judgement on plans prepared by RPE's.

3.8(b) At the end of the subsection, add the following:
"Provided, however, that the Commissioner will notify the permittee that such revisions or reconstructions are necessary and shall provide a reasonable time for compliance".

3.12(a)(1) At the end of the subsection, insert the following:

"Where the angle of critical deformation is less than 15 degrees, the applicant must provide supporting documentation establishing that such lesser angle provides equal protection."

EXPLANATION: The following language should be reinserted in this subsection as it is not limited in 30 CFR 784.20. As proposed the limitation restricts prudent engineering design and planning.

3.14(a) What is meant by "average quality"? What will be acceptable tests and procedures for determining average quality? Are there counterpart federal rules regarding these activities? Since DSM states in the 5/23/90 Federal Register that coal refuse piles not meeting the definition of coal in 30 CFR 700.5 is not subject to regulation, it is accurate to conclude that any pile not having an "average quality", as noted in this proposed subsection, would not be regulated. Is that true?

3.14(b)(15) What is meant by "baseline water quality"? Is it the quality of water before the pile was ever constructed? Or, is it the existing quality immediately prior to new activity?

Change subsection 3.16(a)(1) to read as follows:

3.16(a)(1) The scope and level of detail for such information shall be determined by the Commissioner in consultation with State or Federal agencies with responsibilities for fish and wildlife resources in the area of the operation shall be sufficient to develop the protection and enhancement plan required under paragraph (b) of this subsection.

3.19 Remove the phrase "or archeological sites" on line 4.

EXPLANATION: This requirement is not consistent with 30 CFR 761.11(c), 761.12(f) or 773.12. These sections of 30 CFR are limited to publically owned parks and sites listed on the National Register of Historic Places. There is not any reference to archeological sites, except for federal programs only, as contained in 30 CFR 773.12.

Change subsection 3.22(f)(6) to read as follows:

3.22(f)(6) Restore approximate premining recharge capacity in accordance with section 24 of the Act, provided that underground mining operations are exempt from this requirement.

3.22(g) Remove the following language "Monitoring sites shall be located in the surface water bodies such as streams, lakes, and impoundments that are potentially impacted or into which water will be discharged at both upstream and downstream locations from the discharge".

EXPLANATION: This language is not consistent with 30 CFR 784.14 (i), which requires the monitoring sites to be shown on the surface water monitoring plan, but does not mandate these be located at specific places. In addition, the discharge monitoring points are a mandate of the issued NPDES permit, which are based on the maintenance of quality of the receiving stream, lake, or impoundment.

3.25 This section should have a subsection which would provide for the Commissioner to simply be notified without requirement of application, notices, advertisements, etc. when only the officers of a permittee are changed, but there are no other changes to the ownership and control.

To the proposed revisions to the Draft of 9/6/90 (dated 8/8/90)

3.25(b) Remove the newly proposed language (underlined in draft).

EXPLANATION: The existing language was found by DSM, to be consistent with federal rule. There was no suggestion or comment that it needed to be changed. This new proposed addition goes beyond federal law, rule, state law and rule. (See attached comments for further clarification).

3.25(c)(2)&(3) Is this required by federal rule? If so, what section of 30 CFR applies to these provisions?

3.25(d) What is the definition of "subcontractor"? Does federal rule define "subcontractor"? Is this provision required by federal rule? If so, which section of 30 CFR?

3.25(e) Entire subsection should be deleted.

EXPLANATION: As written, the subsection literally reverses the concept of the Applicant Violator System in that violations, permit blocks, fines and penalties can be sold! This subsection has no counterpart in 30 CFR 773.15(b) & (c) or 774.17(d)(1)(iii) and appears to be contrary to the findings of OSM in the May 23, 1990 Federal Register.

3.26(a)(4) Is this not already required by other sections of these regulations and section 11 of the Act?

3.27(c) Insert the following language at the end of the subsection:

"Provided, the Commissioner shall notify the permittee that such revisions are necessary and shall provide a reasonable time for compliance. The Commissioner shall approve such requested revisions upon receipt."

EXPLANATION: 30 CFR 774.11 discusses a thorough review of the permits and the issuance of orders, with written findings, which mandate revisions for this purpose. While such formality is not necessary, it is appropriate that a permittee be given notice and a reasonable time to submit such revisions, and such revisions should be approved if requested.

Change subsection 3.28(b)(2) in the following manner:

3.28(b)(2) Replace the word "life" with "term" in the first sentence. Delete "throughout the life of the permit" at the end of the subsection. Insert the following language at the end of the subsection: "Provided, however, that any increase in acreage permitted under one or more Incidental Boundary Revisions, that does not involve coal extraction, shall not be subject to the acreage limitations set out in this subsection."

EXPLANATION: The use of IBR's for non-extractive activities is critical to continued compliance. The federal regulations do not discuss IBR's, and as long as appropriate investigations are conducted, as specified in the 5/23/90 Federal Register, OSM finds no inconsistency with IBR's. Permit term is also more accurate since the mid-term reviews and renewals are literally a reissuance of the permit at which time the appropriateness of an IBR can be reviewed. A much needed example of this requested change is the uphill expansion of refuse areas.

To the proposed revisions to the Draft of 9/6/90 (dated ^{10/3/90} ~~8/8/90~~)

3.28(c)(D) What is meant by this item? Is it required by federal rule? If so, what section of 30 CFR?

To the proposed revision to the Draft of 9/6/90 (dated ^{10/3/90} ~~8/8/90~~)

3.29(b) Delete the proposed additional language as it is contradictory to 30 CFR 785.18(d), which provides for such variances to "be reviewed no later than 3 years after issuance". If the proposed language is adopted, it should include the following phrase, after the word "terminate": "upon appropriate notice giving the permittee at least thirty (30) days to respond".

Also, this section should provide for the reverse situation of surface mining following underground mining, under separate permits, whereby the reclamation of the underground mine can be delayed because of the progressing surface operation.

3.30(a) Following the word "government" on line three, insert the following: "or be required by federal or state law or regulation as mitigation structures or facilities".

EXPLANATION: The use of structures for mitigation have been authorized under Section 404 & 402 permit considerations, recognized by EPA and encouraged by the Wildlife Resources Division and Public Land Corporation of the DNR. The location of these structures is usually of great emphasis so as to encourage public utility. Thereby, that siting is usually dictated by a state agency. When that occurs, it should be recognized by DoE in this section of the regulations.

3.30(c) Why are municipalities, local public service districts, soil conservation districts, etc. excluded?

To the proposed revisions to the Draft of 9/6/90 (dated ^{10/8/90} 8/8/90)

3.31(b) Delete subsection in its entirety.

The changes are not consistent with federal law or regulations nor the WV Act or regulations. The entire language of this subsection is duplicated from the NWF, et. al. agreement document and should not be a formal part of the regulations. Most particularly, the Commissioner should not be bound by the administrative activities of surrounding states in waiting for a response (paragraph 5) to an ownership and control inquiry. That simply duplicates the national AVS system, and is an unnecessary delay to permit issuance. Also, see comments attached for this subsection and subsection (c).

3.31(c) Including "application for renewal" is contrary to section 19 of the WV Energy Act, since the burden of proof is with opponents to the successive renewal of the permit.

3.33(b) What is meant by "violations review criteria"? Is there a federal rule counterpart to this term?

12

4.1(a)(1)(i) At the end of the subsection, after the word "spoil", insert the following language "for which design criteria has been approved and, on an active operation, is outside the perimeter of the coal and/or spoil area; and,"

EXPLANATION: This language will clarify that roads used for coal and spoil haulage within the operational pit/area of the permit are not primary roads. These type roads are constantly changing as the operation progresses and are not used for any length of time. Thereby, these type roads should not be considered "primary roads". This clarifying language is consistent with the description of primary roads requiring certification pursuant to 30 CFR 780.37. It is also consistent with the definition of "roads" in 30 CFR 701.5 and section 2.60 of these regulations which state, in part, "... does not include ramps and routes of travel within the immediate mining area or within spoil or coal mine waste disposal areas." If the definition remains unchanged, as proposed, is it true that in order to be classified as "primary", a road must meet both standards set forth in 4.1(a)(1)(i) and (ii)?

4.2(a)(6) After the word "line" on line 1, insert the following language: "or offset baselines".

4.3(a)(2) Delete this subsection in its entirety or change the language to be consistent with 30 CFR 780.37(a)(2).

EXPLANATION: 30 CFR 780.37(a)(2) requires such plans and drawings for roads located in the stream channel, not crossings!

4.5 Are these extensive requirements for infrequently used access roads mandated by federal rule? If so, what section of 30 CFR?

4.7(a)(2) Is the phrase "wherever necessary" a judgement to be made by the designing engineer? Will it be accepted by the regulatory agency?

4.8(b) The requirements of this subsection should be changed to be consistent with the provisions of 30 CFR 816.150/817.150/816.151/817.151.

4.10(e)(1) Should be deleted in its entirety and replaced with the language of 30 CFR 816.150(f)(5) and 817.150(f)(5).

4.11(a)(1) Delete words "qualified registered professional" on lines 3-4, replace with "licensed". This is consistent with existing West Virginia law and practice regarding land surveyors qualified to perform the tasks described.

4.11(a)(5) The design precipitation event should be changed to be consistent with subsection 4.7 of these regulations. Also, it is inconsistent with the requirements of 30 CFR 816.151(d)(1) and 817.151(d)(1).

4.12(a) After the word "facilities", on line 3, insert the phrase "which are under the control of the permittee".

EXPLANATION: It is impossible for a permittee to control the operation of support facilities over which the permittee has no control. This is consistent with 30 CFR 816.180 / 816.181/ 817.180 / 817.181.

4.13 On line 1, delete the word "all" so as not to include infrequently used access roads.

On line 8, remove the phrase "approved registered professional" and replace with "licensed" so as to be consistent with WV law and practices.

Delete the last two sentences as these are inconsistent with the definition of "roads" as set forth in 30 CFR 701.5 and section 2.60 of these regulations; inconsistent with the definition of "primary roads" set forth in 30 CFR 816.150 and 817.150, as well as section 4.1(a)(1)(i) & (ii). These two sentences are also inconsistent with 30 CFR 780.37(b) and 784.24(b).

Is it accurate to interpret the language of the current definition as providing for the acceptance of "as-built" plans as a supplement to the certification of roads? If so, why are these not provided for in the proposed definition?

5.2(a) Delete the phrase "including roads" from line 3.

EXPLANATION: The inclusion of this phrase is inconsistent with 30 CFR 816.151(d)(6) and 817.151(d)(6) which authorize the crossing of streams with certain structures without a specific finding. Also, the only change required by DSM in the May 23, 1990 Federal Register is the additional language regarding water quality standards. That addressed the only exception to DSM's finding that this section was "identical to ... 30 CFR 816.57 and 817.57.

5.4(b)(3) Insert the word "applicable" before "state and federal water quality standards".

5.4(b)(4) Does the language of this subsection permit the same design flexibility as provided for in 30 CFR 816.46(c)(iii)(A)?

5.4(b)(10) At the beginning of the subsection, add the following language: "An impoundment meeting the size or criteria of 30 CFR 77.216 and"

EXPLANATION: This is consistent with 30 CFR 816.49(a)(3) and 817.49(a)(3).

5.4(d)(1) At the beginning of the subsection, add the following language: "Except for temporary sediment control structures approved as part of the permit".

EXPLANATION: As the time requirement for certification in this regulation is not consistent with 30 CFR 780.25, providing that temporary sediment control structures do not have to be certified "prior to any surface mining activity" makes compliance with this rule possible. While the proposed provisions of this section are appropriate for permanent drainage control certification, the installation of certain types of such permanent control is impossible until mining is completed. Temporary drainage control is an interim solution to this problem. However, as written, this section will be impossible to comply with in many situations.

5.4(e) After the word "structures", insert the following language: "meeting the criteria of 30 CFR 77.216" so as to be consistent with 30 CFR 816.49.

5.4(e)(1)(B) Insert the following language between the words "engineer" and "shall" on line 2: "or licensed land surveyor".

EXPLANATION: 30 CFR 816.49(a)(10)(ii) and 817.49(a)(10)(ii) provide that surveyors, as well as engineers, can complete the certified report.

5.4(h) Delete the phrase "nor less than two (2) years before final bond release" on lines 3 and 4.

EXPLANATION: This language is not consistent with 30 CFR 816.46(b)(5) and 817.46(b)(5).

5.4(h)(2) At the beginning of the subsection, insert the phrase "Unless otherwise approved in the reclamation plan" so as to be consistent with 30 CFR 816.49 and 817.49, as well as section 5.5 of these rules.

5.5(c) At the end of the subsection add the following language: "provided, however, this shall not apply to impoundments left in place pursuant to Chapter 19, Article 25, Section 2 of the Code of West Virginia".

6.8(a) Reinsert the deleted language.

EXPLANATION: Since one-half mile has been established as the limit for survey notice, removing the language in question is not consistent with 30 CFR 816.62(c) and 817.62(c) as these subsections require that structures "that could reasonably be affected by the blasting" be surveyed to determine preblasting condition. Removal of the language is contradictory to the expressed intent of these subsections. In addition, surveying structures beyond one-half mile from the "blasting" site will cause unnecessary concern and alarm of those residents.

6.8(a)(6) Add a new subsection, as follows:

6.8 (a)(6) In the event residents or owners of manmade dwellings were notified, in accordance with paragraph (a) of this section, as a result of a previous permit application by the same operator, it will not be necessary to renotify those residents of a preblast survey on subsequent application which are within one-half mile of those residents.

6.8(a)(7) Add a new subsection, as follows:

6.8(a)(7) Any person who, after verified notice, refuses entry to property for purposes of conducting a survey pursuant to subsection (a)(2) of this section, shall waive any right to damage claims which use pre-blasting conditions as a basis for such damage.

11.1 (a) Delete the underlined language which has been added to the proposed rule and replace it with the following language:
"the life of the permit or any renewal thereof and the liability period necessary to complete all reclamation operations under Chapter 22A, Article 3 of the Code of West Virginia"

EXPLANATION: This change makes the language consistent with 30 CFR 800.60 (b). In addition, as proposed the term "reclamation obligations" is not defined in state or federal statute or regulation.

To the draft filed 9/10/90, and
To the proposed revisions to the Draft of 9/6/90 (date ^{10/8/90} 8/8/90)

12.2(c)(4) Delete this subsection in its entirety.

EXPLANATION: This new language contains the phrase "Notwithstanding any other provisions ...of the Act", which indicates that this rule simply disregards existing state statute and the provisions it establishes for bond reduction and release. This proposed language arbitrarily ignores the fact that numerous permits have been approved by DoE, pursuant to the provisions of existing law and regulations in effect at the time of issuance. It ignores the fact that permits have been operated in compliance with those laws and regulations. Most importantly, these permits have been operated pursuant to the provisions of Chapter 22A, Article 3, Section 23 of the Code of West Virginia with the

reasonable expectation that since the statute is in effect, reclamation could be achieved by insuring that untreated post mining water discharges were as good as or better than what was there before mining. These permittee now find themselves in a situation where the requirements for final release have been suddenly changed by these proposed rules, despite the fact that 22A-3-23 remains valid. And, this rule is proposed without any request or interest from the federal Office of Surface Mining. There is no federal law or rule similar to this proposal.

Neither does this new provision recognize the provisions of the state's water quality regulations, under which the standards for coal permits are established. In September of 1989, rules were promulgated, by DoE, which stated that bond forfeited sites would have reclamation defined to include water quality. That provision was to take effect for any permits revoked and bonds forfeited after December 15, 1989. This new proposal disregards such a prospective approach and will apply the new water quality standards retroactively to dates uncertain, as it relates to the time such permits were operated. There have been hundreds of permits issued and completed in compliance with all laws and regulations in effect at time of issuance and during operation, which had to equal or improve the quality of existing water or the bond was never have been released. Now, with this change, the bond will never be released even though these operations have improved the quality of existing water.

This proposal disregards other sections of the state Act and these regulations pertaining to the establishment of background water quality prior to beginning mining. For the past eighteen years every permit application has had to have water quality analyses performed prior to mining to indicate the status of discharges from proposed mining areas, as well as the existing quality of receiving streams. For the past ten years, that background water information has become extremely sophisticated and comprehensive. The findings of these investigations were intended to serve as the basis of comparison for the quality of water that had to be achieved upon completion of mining. Since this proposal ignores the findings of any background water quality investigation and establishes effluent limitations and water quality standards as the goal to achieve, the Act and these regulations, at section 3.22(b)&(c), must be amended to terminate the requirement for performing such background water quality investigations. The cumulative hydrologic impact analysis (CHIA) and probable hydrologic consequence (PHC) review can be performed using these effluent limitations and water quality standards as the presumed impact, thus no investigation that would result in other qualitative findings is necessary, if this proposal is accepted.

Even though the recent decision of the D.C. Circuit Court regarding the termination of jurisdiction is still in a pending appeal status, the impact of Judge Flannery's ruling must be assessed using this proposal as a revised standard for

accomplishment of reclamation. Preliminary interpretations indicate that any permit, anywhere, mined at anytime in the past would be subject to recall using this new definition. The impact on the industry and the agencies, both federal and state, is unprecedented and endlessly indeterminate. While the decision is contrary to that desired by the industry and agencies, that decision is not the concern in this matter. Rather, it is the state's adjustment of the definition in this proposal that causes the target to drop out of sight!

While this proposal brings drastic changes to the water quality objective of reclamation, it is a worthy concept. However, when applied retroactively, in the sense of impacting mining operations which were conducted under a different set of standards, it is economically and, in some cases, technologically impossible to achieve effluent limitations and water quality standards. Many of the sites did not meet these standards before any mining was conducted. The devastating impact of this proposal can be verified by DSM and DoE's very own Abandoned Mined Land (AML) program and its lack of emphasis on water quality. The agencies administer the AML program, using money paid totally by the industry as a tax on current production, to correct problems from past mining practices. That program has spent hundreds of millions of dollars reclaiming old mining sites. However, no emphasis has been placed on quality of water from these sites. It does not even have to meet what the background water quality investigations or presumptions were, much less effluent limitations or water quality standards. While DoE proposes that the industry, on sites mined under different rules, suddenly meet these standards, their very own AML program does not have the same requirements! The bond forfeiture program now includes such considerations, but it is tied to background by simple fact that it does not mention water quality standards or effluent limitations as an objective. But that was a prospective program, not started until December 15, 1989.

What is the definition of "chemical treatment"? Does it include the use of flocculent? Does it include wetlands? These proposals are also contradictory to section 14.7 of these regulations which uses "hydrologic balance" as the basis for discharge quality. "Hydrologic balance" recognizes the quality of premining discharges and receiving streams.

These proposals are arbitrary, capricious and totally ignore existing state and federal law and regulations.

12.2(g) Add a new section to read as follows:

12.2(g) Notwithstanding any other provisions of this section, these regulations, or the Act, a permittee may apply for release of bonds posted in accordance with Section 11(a)(2) of the Act and section 11.8 of these regulations. Each increment shall be considered, for purposes of this subsection, as a separate permit pursuant to the requirements of section 12.2 of these regulations.

EXPLANATION: This proposal is consistent with several other approved state programs which authorize and recognize the release of bonds provided on an incremental method, i.e. section 1501:13-7-05 of the State of Ohio regulations. Also, there is no prohibition of this release procedure in either federal or state law and regulation.

To the proposed revisions to the Draft of 9/6/90 (dated 10/8/90)

12.4(d)(2) Delete the newly added phrase "Notwithstanding efforts by the Commissioner" and delete the word "shall" on line two and insert the word "may".

EXPLANATION: As opposed to a mandatory requirement, this section should be flexible so as to include considerations for weather, and other conditions over which the Commissioner has no control and which would serve to delay the initiation of physical work. It should also provide recognition of delays involved in the legal procedures leading to collection to insure that a purposeful delay, by the bonding or mining company, would not cause a mandatory shift of liability from them to the Special Reclamation Fund. In addition, collection efforts should not terminate if unable to collect after 180 days. There is not a federal regulation similar to this which precludes DSM from having any concern with the requirements.

13.1 - 13.9 Delete these sections in their entirety and replace with the language of 30 CFR Part 772.

13.1 - 13.9 If the proposal to insert 30 CFR Part 772, in its entirety, is not accepted, then the language of these sections should be changed to provide for three categories of prospecting approvals, which requirements will be reflective of the varying degrees of complexity and purpose. (See the EXPLANATION for section 2.96. in these comments.)

13.1(c)(6)

13.2(d) At the end of each subsection, insert the following language: "identified within the proposed prospecting area".

EXPLANATION: This language is consistent with 30 CFR 772.12(b)(9).

14.5 After the word "supplies" on line 6, insert the following language: "in accordance with Section 24 of the Act", so as to be consistent with 30 CFR 780.21(e) and 816.41(h).

14.8(a)(2)(E)(iii) Delete the words "so as" on line 4, insert the words "if necessary"; and, insert the following language at the end of the subsection, "provided that this material may be included in the computation of the 20% non-durable material if shown not to affect fill stability".

EXPLANATION: This is an engineering consideration which must be addressed by the permittee in compliance with the objective of achieving the required static safety factor and preventing any chance of clogging the underdrain. The means of achieving those objectives is not appropriately dictated by agency rules. This is consistent with 30 CFR 816.73(b), 817.73(b) and section 14.14(g)(1)(A) of these regulations.

14.8(a)(5) Delete the words "prohibited unless" on line 5, insert in its place the following: "approved after".

EXPLANATION: This is consistent with 30 CFR 816.107(d) and 817.107(d).

14.9(b)(1) Remove the word "collectively" on line 5, so as to be consistent with 30 CFR 819.15(b)(1).

14.11 Delete the section in its entirety and insert the provisions of 30 CFR 816.131 and 817.131.

14.14(c) In accordance with the statement of DSM contained in the May 23, 1990 Federal Register, at finding 14.14(b), is this the section which initiates the no-cost reclamation program?

14.14(e)(3) Delete this subsection in its entirety and insert the provisions of 30 CFR 816.71(e)(3) and 817.71(e)(3).

14.14(e)(8)

14.14(f)(5)

14.14(g)(6) Delete proposed language so as to be consistent with 30 CFR 816.71 and 817.71.

14.14(f)(8) Delete the second and third sentences and insert the provisions of 30 CFR 816.71(e)(3) and 817.71(e)(3).

14.14(g)(1)(B) While the phrase "will not degrade to soil material" is consistent with 30 CFR 816.73(b) and 817.73(b), it emphasizes the importance of defining "soil material" as proposed at section 2.114 of these comments.

14.14(g)(5) Delete the subsection in its entirety and insert the provisions of 30 CFR 816.71(e)(3) and 817.71(e)(3).

14.14(g)(11) Remove this subsection in its entirety as no similar provision or requirement is found in federal rules. There is no definition of "significant non-compliance" in these rules or the federal rules. Also, this subsection uses the language "notwithstanding and in addition to any other provisions of...the Act", which is arbitrary and capricious expansion of authority.

14.14(g)(12) What is the purpose of this change? What federal rule is similar to this proposal?

14.15(d) After the word "including" on line 3, insert the following language: "multiple seam operations and".

EXPLANATION: There is no federal rule relating to the backfilling and regrading of operations mining multiple seams, which create more than one bench. The nature of such operations mandates they be addressed in a manner different than the strict time/distance requirements established for one-bench contour operations in section 14.15(b)(1)(2)(3).

14.16(n) Why is this subsection specific with a date of 2/4/87 as it relates to "remining"? Is the intent to limit "remining" operations? Is this date specified in law or is it simply the date such legislation was passed?

15.2(b) Delete the newly proposed language on line 5 & 6.

EXPLANATION: In the May 23, 1990 Federal Register, DSM found this existing section "no less effective than 30 CFR 817.100" (finding 15.2b). What is the purpose of accelerating the initiation of reclamation on an underground mining site? The existing language was developed with the characteristics and problems usually incurred with the closing an underground operation in mind.

16.2(c) See attached comments. And, at the end of the subsection, add the following language: "Provided that any person who, after verified notice and request to conduct a premining survey of their property and facilities by the applicant, refuses entry to said property, shall waive any right to damage claims which use premining conditions as a basis for such damage."

20.5(a) Reinsert the following language: "issuance of a notice of" so as to be consistent with 30 CFR 845.15(a).

20.5(a) Reinsert the proposed deleted language regarding assessment of civil penalties of less than one thousand dollars (\$1,000), as it is consistent with the provisions of 30 CFR 845.12.

20.6(d) What is the origin or basis for the proposed additional language? Does it have a basis in federal rule? If so, what is the section? Is this not an overextension of authority being granted to persons without standing?

20.7(b)(7-8) Delete "A violation with a seriousness of rating of 7 or higher shall be a cessation order."

EXPLANATION: There is no counterpart rule in 30 CFR regarding a cessation order being issued based on a subjective prediction and/or opinion that a violation "can reasonably be expected to result in significant imminent environmental harm or create an imminent danger to the health and safety of the public". Do not have to deliver the assessment notices for 30 days.

To the proposed revisions to Draft of 9/6/90 (dated 10/8/90)

22.3(p) After the word "vertical" on line 5, insert the following language: "except when placed behind a slurry impoundment embankment structure constructed by the downstream technique for abandonment purposes and".

22.5 (d) Change to read as 30 CFR 817.83(c) by adding the following: "All vegetative and organic materials shall be removed from the disposal area prior to the placement of refuse material. Topsoil shall be removed, segregated, and stored or redistributed in accordance with Subsection 14.3 of these regulations. If approved by the Commissioner, organic material may be used as mulch, or may be included in the topsoil to control erosion, promote growth of vegetation, or increase the moisture retention of the soil."

To the proposed changes to the draft of 9/10/90 (dated 10/8/90)

22.7(a) Change the subsection to read consistent with the provisions of 30 CFR 817.83(d)(1).

**POCAHONTAS LAND CORPORATION
POCAHONTAS DEVELOPMENT CORPORATION**

100 Princeton Avenue
P.O. Box 1517
Bluefield, West Virginia 24701
(304) 325-8289
(304) 325-8836
(304) 325-2054 - Telecopier

October 16, 1990

LAW DEPARTMENT
Thomas L. Linkous
Ernest F. Hays, II.
David K. Moore
Stephen M. Hopta

RECEIVED
WV Department of Energy

OCT 17 90

Division of Mines and Minerals

Mr. Stephen C. Keen, Director
Division of Mines and Minerals
West Virginia Department of Energy
1615 Washington Street, East
Charleston, West Virginia 25311

Re: **West Virginia Department of Energy - Proposed legislative regulations for West Virginia Surface Mining and Reclamation**

Dear Mr. Keen:

Pocahontas Land Corporation offers the following written comments relative to the proposed regulations filed on September 6, 1990, and subsequent changes dated October 8, 1990. It is the purpose of these comments to seek clarification of the intent of these proposed regulations.

Section 2.835 - This proposed regulation defines ownership and control in Paragraph (a)(3) as a person who directly or indirectly determines the manner in which an applicant, operator or other entity conducts surface mining operations, and, further in Paragraph (b)(6) presumes a relationship of ownership or control if an entity has authority to determine the manner in which a person or other persons conducts a surface mining operation. These definitions as submitted do provide concern to any landowner/lessor because of the broad ambiguity of this definition.

The standard coal mining lease provides that the landowner/lessor has the right to approve the projected mining plans of the lessee, and in many instances the lessee is not the operator nor the applicant for a permit. These mining plans are not as detailed as the mining plans the operator submits to the Department of Energy with its permit application. These mining plans are approved to maximum recovery of reserves. This standard lease clause is used to allow a landowner/lessor to protect itself against waste being committed on its property. It is a common law right that a landowner/lessor be protected from a lessee committing waste thereby diminishing the value of the leasehold. A landowner/lessor does not control the day-to-day mining operations by simply having the right to approve these mining plans. Generally all leases provide that the operator or lessor is acting on its own behalf and not an agent for the lessor and that it will comply with all state and federal laws applicable to mining.



**NORFOLK
SOUTHERN**



In the meeting of October 12, 1990, with the West Virginia Coal Association and West Virginia Mining and Reclamation Association, you stated that the intent of regulations was to exclude a landowner/lessor where there was an arm's length transaction whereby the landowner/lessor only receives a royalty for the coal mined. You further stated the intent of the regulations is to include those landowners/lessors who have the right to purchase or to sell the coal that is mined. The test for ownership and control should revolve around the ownership of the coal when severed by mining. However, the regulations contain no language to clearly show that this is the intent and, therefore, are subject to numerous interpretations. The representative from OSM, for example, stated that requirement for submission of mining plans should be excluded from leases to avoid the question of ownership and control. This clearly shows misinterpretation of the regulatory intent.

The standard mining lease also provides the landowner/lessor has the right to inspect operations to insure maximum recovery of coal reserves and also provides language whereby the lessee covenants to mine coal in the most effectual, workmanlike and proper manner according to approved suitable methods of modern mining. Again, this is language to protect the landowner/lessor from waste. There are numerous examples of landowners/lessors losing thousands of tons of reserves because operators would high-grade a coal seam or even suspend mining where the production costs would be increased due to geology of the seam. Without strong language in a coal mining lease, valuable reserves would be lost resulting in not only a loss of income to the landowner/lessor but also the state and federal governments in taxes that would be paid on this coal and the loss of energy and jobs to the population of this country. Therefore, more specific language should be included in this section to clearly show the intent of the regulation and avoid future litigation over misinterpretation of this section.

Section 3.25(b) - It is obvious from this language that the Department of Energy is seeking to make those operators who have delinquent penalties and unpaid reclamation fees responsible for all of their outstanding violations or they will be blocked from ever receiving a permit. A new purchaser of such an operation that has violations must correct those violations but knows before closing the transaction of the liability. However, once again the definition of ownership and control in Section 2.835 comes into play. Certainly, if the intent of the regulation is that a landowner/lessor having only a royalty interest in an arm's length coal mining lease shall not be held accountable for the acts of an unscrupulous operator or not be blocked from having any of its other properties permitted, then the definition of ownership and control in Section 2.835 must be further clarified.


Section 5.5 - Sediment control structures that are in place after final bond release that become the responsibility of the landowner to inspect and maintain in a safe condition places an undue burden on a landowner. This section appears to be in direct conflict with Section 8.1 whereby regulations seek to achieve the enhancement of fish and wildlife. With the cooperation of the Department of Energy four years

Mr. Stephen C. Keen
October 16, 1990
Page 3

ago, some sediment control ponds were not removed in order to provide habitat for fish and wildlife. These sediment ponds are excavated and there is no built-up dam or dike to contain large impoundments of water nor are they constructed in stream beds within the meaning of the West Virginia Dam Control Act. There is no difference in these sediment control ponds and the farm ponds excluded under West Virginia Code §20-5D-3(e). These sediment control ponds are left only after they have been inspected and designated as a benefit to wildlife by the West Virginia Department of Energy and as having no potential to cause loss of human life in the event of embankment failure. The West Virginia Legislature, in West Virginia Code §19-25-3, provides that a landowner cannot be held liable for any injuries arising out of the public's use of these sediment ponds designated for wildlife enhancement for which there is no charge. Therefore, the Department of Energy should closely scrutinize its conflicting regulations if its goal is to provide for fish and wildlife propagation after reclamation has occurred and the bond released. Unless landowners/lessors are relieved of the responsibility of this regulation, landowners/lessors will have no other choice but to have these sediment control ponds removed even though the removal will cause a detrimental effect on wildlife.

I appreciate the opportunity to submit these comments, and if you have any further questions or need additional information, please feel free to contact me.

Very truly yours,


Ernest F. Hays, II
General Land and Tax Attorney

EFH.II:mm
2.4:8/
xc: RLR
DDS
REG



WEST VIRGINIA MINING AND RECLAMATION ASSOCIATION 1624 KANAWHA BOULEVARD, EAST • CHARLESTON, WEST VIRGINIA 25311 • (304) 346-5318

October 10, 1990

Mr. Stephen C. Keen, Director
 Division of Mines & Minerals
 WV Department of Energy
 1615 Washington Street, East
 Charleston, West Virginia 25311

Dear Director Keen:

I am pleased to appear before the Department of Energy today on behalf of the 350 member companies of the Association, as well as those companies which are members of the WV Coal Association. Today's testimony will be incorporated into our written comments which will be submitted to you on Friday, October 12, 1990.

While these comments are specifically directed to the proposed regulations received on September 10, 1990, the Associations feel strongly that review and discussion of these issues must continue beyond today. Many of the matters addressed in these proposals, as well as existing regulations, are so complex and technically oriented that a short verbal discussion or hearing is not adequate to insure their practical effectiveness, from either an enforcement standpoint or an industry perspective. Justification and proof of reliability for practices being currently used in the mining industry are on going among member companies' operations. Each day brings new evidence that successful coal mining and effective environmental protection are only possible when the text of regulations is tailored to such proven practices, as opposed to attempting the reverse -- making operations fit the words!

OFFICERS

Kenneth G. Woodring Chairman	Donald K. Cooper Secretary
R. Donald Cussins First Vice-Chairman	Gerald W. Ramsburg Treasurer
James J. LaRosa Second Vice-Chairman	Edward F. Surgeon Chairman-Associate Division

MEMBERS

J. W. Anderson—Princeton	J. H. Harless—Gilbert	R. L. Raines—Bluefield
T. J. Brisky—Eighty-Four, PA	D. E. Huffman—Bridgeport	L. A. Streets—Mt. Storm
J. R. Bryan—Lebanon, VA	J. E. Hull—Charleston	J. C. Williamson—Charleston
D. P. Cartwright—Naugatuck	P. F. Hutchins—Columbus, OH	G. D. Woodward—Morgantown
J. M. Compton—Clarksburg	T. W. Hyton—Beckley	S. R. Young, III—Gilbert
B. H. Daud—Yolyn	C. T. Jones—Charleston	HONORARY MEMBERS
B. E. Dearth, Jr.—Bridgeport	J. C. Justice—Beckley	C. E. Compton—Clarksburg
D. R. Donell—Weirton	R. G. Lockard—Weston	L. W. Hamilton, Jr.—Hansford
J. J. Faltis—Morgantown	J. W. Mullen—Bluefield	F. B. Nutter, Sr.—Pompano Beach, FL
P. C. Graney, III—Charleston		

Benjamin C. Greene
President

William B. Raney
Vice-President

Mr. Stephen C. Keen
October 10, 1990
Page Two

In the text of our recommendations and comments you will find a number of questions regarding the basis for specific changes to the regulations. We feel answers to such inquiries are deserved and important. We have also included recommended language changes for some proposed or existing rules.

Should you have any questions regarding these comments, please do not hesitate to notify me immediately.

Respectfully submitted,



Benjamin C. Greene
President

attachments