

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: W. Va. Division of Environmental Protection TITLE NUMBER: 30

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 Virgini 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.

Roger T. Hall
Roger T. Hall
Special Assistant

28.30



DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES
OFFICE OF THE SECRETARY

State Capitol, Room R-151
Charleston, West Virginia 25305-0310
Telephone: (304) 558-3255
Fax No.: (304) 558-4983

GASTON CAPERTON
Governor

JOHN M. RANSON
Cabinet Secretary

August 17, 1992

Mr. David C. Callaghan, Director
Division of Environmental Protection
#10 McJunkin Road
Nitro, West Virginia 25143-2506

RE: Proposed Rule - Title 38, Series 2 (West Virginia
Surface Mining and Reclamation Regulations)

Dear Dave:

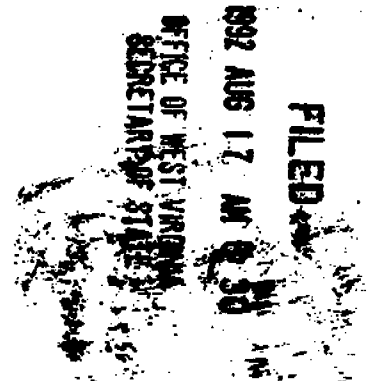
Pursuant to West Virginia Code 5F-2-2(a)(12), I hereby
consent to the proposal of the rule specified above.

You may attach a copy of this letter to your filing
with the Secretary of State as evidence of my consent.

Sincerely yours,

John M. Ranson
Cabinet Secretary

JMR:mcl



FISCAL NOTE FOR PROPOSED RULES

Rule Title: West Virginia Surface Mining & Reclamation Regulations

Type of Rule: Legislative X Interpretive Procedural

Agency WV Div. Env. Protection Address 10 McJunkin Road
Nitro, West Virginia

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

2. Explanation of above estimates.

The proposed amendments to the rule will not result in any increase or decrease in 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 August 17, 1992

Signature of Agency Head or Authorized Representative

Roger T. Hall

Roger T. Hall
Special Assistant to Director

DATE: September 18, 1992

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: W.Va. Division of Environmental Protection

LEGISLATIVE RULE TITLE: W.Va. Surface Mining and Reclamation Regulations

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SECRETARY OF STATE

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

2. a. Date filed in State Register with Notice of Hearing:

August 17, 1992

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

None

c. Date of hearing(s): September 18, 1992

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)

September 18, 1992

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

Roger T. Hall - Special Assistant (304)759-0515

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

The primary purpose of the proposed amendments to the West Virginia Surface Mining and Reclamation Regulations is to address required amendments to the State reclamation program imposed by the federal Office of Surface Mining Reclamation and Enforcement. The substantive amendments relate to sediment control or other water retention structures, prospecting, civil penalties, coal refuse disposal sites, and termination of jurisdiction.

To a lesser extent these proposed amendments address issues which the Division of Environmental Protection deems appropriate to give direction and clarity to its reclamation program. The substantive amendments include approved person requalifications, inactive status, incidental boundary revisions to a permit, agency findings, and transfer assignment or sale of permits.

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LEGISLATIVE RULES
DIVISION 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) Permits issued after the effective date of these regulations shall incorporate in the application all of the requirements of these regulations.

(c) The Commissioner may terminate jurisdiction over a reclaimed site of a completed surface mining and reclamation operation, or increment thereof, when:

(1) The Commissioner determines in writing that under the initial program all applicable requirements imposed by the Act, these regulations, and the terms and conditions of the permit have been successfully complied with; or

(2) The Commissioner determines in writing that under the permanent program, all requirements imposed under the Act, these rules and regulations, and the terms and conditions of the permit have been successfully complied with or, where a performance bond was required, the Commissioner has made a final decision to release the performance bond fully.

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(d) Following termination under paragraph (c) of this subsection, the Commissioner shall reassert jurisdiction over a site if it is demonstrated that the bond release or written determination referred to in paragraph (c) of this subsection was based upon fraud, collusion, or misrepresentation of a material fact.

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. September 18, 1992

1.5 Effective Date.

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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 3.26 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

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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 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

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(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.

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.

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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 Division 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 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.

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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 Division 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 Division, 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.

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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 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, 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

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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 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 either naturally formed or artificially built for the retention of water, sediment, slurry, or other liquid or semi-liquid material .

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.

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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.

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.

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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;
- (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 disturbed area prior to disturbance as approved in a permit or a prospecting approval.

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, 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 of 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 remining 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 remining 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 or Other Water Retention Structure, Sediment Control or Other Water Retention System, 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.

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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 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 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 3.32 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

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States within the five (5) 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:

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(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 (1) 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;

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(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 Division 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 within one hundred (100) feet of the permit area;
- (12) 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:

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(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) Advises 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:

(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

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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) feet 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 feet (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 feet (200') to the inch; and

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

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(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 discernible 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

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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 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;

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(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;

(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

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

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 submission 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.

(1) 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.

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(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;
- (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 buttresses 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 facility 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:

(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;

(4) A description of the physical conditions, such as depth of cover, seam thickness, strike and dip, lithology, and

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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 (d) 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 acknowledgment 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.

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

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(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. 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), 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 of the existing abandoned coal processing waste pile will result in greater protection of the environment.

(b) 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:

(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-paragraph (5). The notice shall be published in a

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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 postmining 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;

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

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(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:

(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;

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(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 2H: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:

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(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 personnel 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 (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) 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

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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 and certification of associated facilities; 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~~ in addition to 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 and certify facilities 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.

(e) The Director may at any given time require any approved person to retest and regualify for cause, including but not limited to the following:

(1) Submittal of erroneous information in a manner that indicates lack of reasonable care or diligence in its preparation or review;

(2) Repeated failure to timely respond to a request from the Director for information in support of certifications made by the approved person;

(3) Omissions of required data of such nature and extent as to indicate a lack of reasonable care or diligence;

(4) Certification of the work of others without adequate review or control thereof by the approved person;

(5) Certification by the approved person of any document or information which the Director has shown to be false;

(6) Certification by the approved person of the work of others in which the approved person played no role other than to affix the certification;

(7) Loss by the approved person, through suspension or revocation, of the person's professional engineering registration or land surveying license; and

(8) Repeated errors or omissions of such nature and frequency, and which have caused or may cause harm to the environment or to the public interest.

(f) The Director may order the temporary suspension or permanent withdrawal of the approved-person status of any person who has retested and regualified and continues to carry out the practices set forth in paragraph (e) of this subsection.

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

(2) The Commissioner shall provide for coordination of review 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

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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;
- (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 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

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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 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)

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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. 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 postmining 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 postmining 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:

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- (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, aerial 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

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(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

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(6) An applicant may be granted a waiver for the requirements of parts (1) and (3) of this 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 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.

(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 paragraphs (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

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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 (b) and (c) of subsection 3.31 of these regulations, has submitted a performance bond or other guarantee or will be covered by the bond 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. Such approval may be granted in advance of the close of the public comment period Provided; That where information is made available to the Director as a result of public comment that would preclude approval, such approval shall be immediately withdrawn.

(5) The Commissioner shall notify the permittee, the successor, all commentors, and the Charleston field office 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 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.

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(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.

3.26 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;

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(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 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

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advertisement required under subparagraph (7) of paragraph (a) of this subsection.

(2) Except as provided in paragraph 3 of this subsection, 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) A 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.

3.27 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) 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 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) 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 the Commissioner shall notify the permittee that such revisions are necessary and shall provide a reasonable time for compliance.

3.28 Incidental Boundary Revisions (IBRs).

(a) ~~All~~ Incidental Boundary Revisions (IBRs) 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 minor shifts or extensions of the permit boundary into non-coal areas where any coal extraction is incidental to or of only secondary consideration to the intended purpose of the IBR. 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. Incidental Boundary Revisions shall not be granted for any prospecting operations, or to abate a violation where encroachment beyond the permit boundary is involved, unless an equal amount of acreage covered under the IBR for encroachment is deleted from the permitted area and transferred to the encroachment area.

~~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.~~

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

(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)

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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; Provided, That the Director may grant a waiver specifying larger acre limits for underground operations where the size and complexity clearly requires more than fifty (50) acres for development of air shafts, fanways, vent holes, etc.

(3) The application shall be accompanied by adequate bond.

(4) The application shall be accompanied by a map showing the existing permit area and the areas covered by the IBR.

(5) The application shall be accompanied by a reclamation plan for the area of the IBR which is consistent with the existing reclamation plan.

(36) All-IBR's-for-a-permit-willThe application shall be subject to review and approval by the Commissioner.

(4c) NoAn IBR-to-a-permit may not be implemented by any operator until written approval of the Commissioner has been granted.

(5d) 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.

~~----- (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.~~

(ce) 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.

3.29 Variance.

(a) Approximate Original Contour. All permits approved with variances from approximate original contour 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 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) 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;

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

(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;

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(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.

3.30 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.

3.31 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 thirty (30) 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 (c) of subsection 3.1 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.

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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: 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 use 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

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issued, the Commissioner shall initiate the procedures set forth in subsection 3.33 of this section.

(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 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.

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(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 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 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;

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

(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

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Commissioner has determined that no additional protection measures are necessary.

(12) For a proposed remining operation where the applicant intends to reclaim in accordance with the requirements of 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 paragraph (n) of subsection 3.1 of these regulations. Permit revisions and permit renewals are not subject to the provisions of this paragraph.

3.32 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:

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

(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 non-compliance with any term or condition of the permit, including, but not limited to:

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

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

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

(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 (30) 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 paragraph (c), subsection 3.1 of these regulations; or

(2) If not previously submitted, the information required from a permit applicant by paragraph (c), 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.

3.33 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

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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.

(c) 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

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(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 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.

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(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.

detail: (4) Construction specifications which explain in

- (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 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%).

4.7 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:

(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, 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 impractical or unnecessary; 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 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.

4.8 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:

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(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:

Percent Grade of Haulageway or Access Road	Spacing of Water Bars in Lineal 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.

(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.

(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;

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, 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

(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.

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.

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 or other water retention structures 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/or other water retaining structures used in association with the mining operation shall be designed, constructed, located, maintained, and used in accordance with 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/or other water retention structures used in association with the mining operation shall:

(1) 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 shall be certified in accordance with the requirement of paragraph (d) of this subsection.

(2) 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) Comply with applicable State and Federal water quality standards and meet effluent limitations as specified in an NPDES permit for all discharges.

(4) 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) 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) Be designed, constructed and maintained to prevent short-circuiting.

(7) 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) 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) AProvided that 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 static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions;.

(11) Discharge-Structures--BControl 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;.

(12) Foundations-and-abutments-for-all-sediment-control structures-shall-be-stableProvide for stable foundations during all phases of construction and operation and shall-be designed based on adequate and accurate information on the foundation conditions. For structures meeting the criteria of subparagraph

10 of this paragraph, provide foundation investigations and any necessary laboratory testing; and.

~~(13) Prior to construction of any sediment control structure, the general and detailed design plans shall~~Prior to construction, all such structures shall be certified to be in accordance with design requirements of the Act, these regulations, and other design criteria established by the Commissioner.

(c) In addition to the requirements of subsection (b) of this section, all embankment type sediment control or other water retention structures and water retention structures shall be designed, constructed and maintained to meet the following safety standards:

(1) 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;

(2) All embankment type sediment control and/or water retention structures shall be properly stabilized and revegetated upon completion of construction and regrading of the embankment and surrounding areas;

(3) In constructing the embankment, the operator shall remove all organic matter from the foundation, install cutoff trenches where necessary to ensure stability, provide for proper compaction and ensure against excessive settlement by excluding sod, roots, frozen soil or coal processing wastes from the embankment;

(4) If an inspection or examination discloses that a potential hazard exists, the person who inspected or examined the embankment shall promptly inform the Division 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 Division 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.

(6) 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:

(A) 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;

(B) The embankment shall be designed, 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

(C) Appropriate barriers to control seepage shall be installed along the conduits that extend through the embankments; and

(D) The detailed design plan shall include a stability analysis which includes but is not limited to strength parameters, pore pressures, and long-term seepage conditions.

(d) Certification.

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(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 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 or other water retention structures system-is-used are constructed in sequence with the advance of the mining operation to allow for on-bench construction, 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.

(e) Inspections.

Inspection by the operator of impoundments, including sediment control or other water retention structures, shall be in accordance with the following:

(1) A qualified registered professional engineer or other qualified professional specialist, under the direction of the professional engineer, shall inspect each impoundment or sediment control structure provided, that a licensed land surveyor may inspect those impoundments or sediment control or other water retention 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 impoundments and sediment control structures.

(2) 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.

(3) The qualified registered professional engineer or licensed land surveyor shall promptly, after each inspection, provide to the Commissioner a certified report that the impoundment 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.

(4) A copy of the report shall be retained at or near the mine site.

(f) 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.

(g) 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.

(h) Abandonment Procedures. Abandonment and/or removal of sediment control or other water retention 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 or other water retention structures prior to full bond release are as follows:

(1) Unless otherwise approved in the reclamation plan, dugout-type sediment control or other water retention structures, diversion ditches, and other non-impounding sediment control or

other water retention 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 or other water retention 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 channels banks. The riprap requirement may be waived where the bottom and sides of the channel consist of bedrock.

(3) All areas disturbed during abandonment of a sediment control or other water retention structures shall be seeded and mulched immediately to stabilize the area.

(4) 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. Those sediment control or other water retention 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:

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(a) A request to leave the structure will be made on forms prescribed by the Commissioner and submitted as a permit revision;

(b) The request will contain a statement as to the present conditions of the structure;

(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;

(d) The size and configuration of such permanent structure will be adequate for its intended purposes;

(e) The quality of 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 will meet applicable effluent limitations and will not degrade the quality of receiving water below applicable State and Federal water quality standards;

(f) The water level will be sufficiently stable and be capable of supporting the intended use;

(g) Final grading will provide for adequate safety and access for proposed water users;

(h) The permanent 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; and

(i) The permanent structure will be suitable for the approved postmining land use.

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 Division 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 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;

(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;
- (12) Maximum weight of explosives detonated within any eight (8) millisecond period;
- (13) Method of firing and type of circuit;
- (14) Type and length of stemming;
- (15) If mats or other protections were used;
- (16) Type of delay detonator used and delay periods used;
- (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

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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.

Lower frequency limit of measuring system in Hz (⁺ 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

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(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, 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:

(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 Division 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:

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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 Blasting Control for Other Structures

(a) All other structures in the vicinity of the blasting area which are not defined as protected structures at subsection 2.95 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 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. 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 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 3.27 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;

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(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

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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.

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(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

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(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	
Genaqua 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,

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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.

(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:

(1) For areas to be developed for industrial or residential use less than two (2) years after regrading is

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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 four hundred fifty (450) trees per acre and there is seventy

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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:

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(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 operations, 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:

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(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 Division 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 Division 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

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(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 Division 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

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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 Division 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

(7) The bond shall provide that:

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(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 (5) 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.

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(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:

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(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

(3) The amount, duration, form, conditions and terms of the performance bond shall conform to subsections 11.2 through 11.7 of this Section.

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11.9 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 Division 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

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 NPDES 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) For permits issued after the effective date of these regulations, notwithstanding any other provisions of this section or these regulations, 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

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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, 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.

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(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) 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 (180) 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 Without Land Disturbance. Where prospecting operations are proposed without surface disturbance and without appreciable impacts on land, air, water, or other environmental resources, the requirements of this section and the bonding requirements in Section 7 of the Act may be waived by the Director subject to the following:

(a) At least fifteen (15) days prior to commencement of any prospecting activities, the operator shall file with the Director a written notice of intent to prospect, which notice will include a description of the activities to be conducted and a USGS topographic map showing the area to be prospected.

(b) The Director may approve the notice of intent subject to the findings required in paragraph (b) of subsection 13.4 of this section.

13.2 Notice of Intent to Prospect - 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 subsection.

(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;

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(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;

(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);

(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.

13.23. Notice of Intent to Prospect - Greater than two hundred fifty (250) Tons. 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 13.12 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 merchandisable 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:

(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 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 Division 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.

13.34. Approval of Notice of Intent to Prospect - Greater than two hundred fifty (250) Tons.

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(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:

(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 commentors 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 Division 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.

13.45. 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.

(l) 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.

13.56 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.

13.67. 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.

13.78. 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.

13.89. Public Records. All information submitted to the Division 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 Division 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.

13.910 Lands Unsuitable Designation. ~~Regardless-of-the number-of-tons-of-coal-to-be-removed~~ Notwithstanding any other provision of this section, 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 subsection 13.23 of this Section. Approval of the notice of intent shall be in accordance with subsection 13.34 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 granted by a landowner as provided in subsection (b) of Section 24 of the Act shall 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) 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.

(3) 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 12 and 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.

(4) 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 will not deteriorate the future stability 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.

(5) 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. Where the applicant documents in the application for inactive status that the operations will become inactive for more than thirty (30) days, but will be reactivated on an intermittent and/or irregular basis during the one-year approval period, such operations are not required to reapply for inactive status except annually.

(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 Division'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, 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 reducing pollutants, environmental impacts, or

flood hazards; provided that, the watershed will be deemed improved only if 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

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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;

(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 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

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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 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, grading may drain surface water away from the outslope 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.

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(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 rock shall not consist of acid-producing or toxic-forming material, 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.

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(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) The underdrain system 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 (1), paragraph (e), of this subsection.

(8) 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 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.

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(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 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

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(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) 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 Division 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

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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

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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 9 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 Division 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 Division of Energy.

17.7 Liability of Operators.

(a) The applicant shall reimburse the Division 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 Division 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 division 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:

(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

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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 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

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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:

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(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

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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.

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(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 Division 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 Division 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.

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19.9 Land Exempt From Designation as Unsuitable 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 (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 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,

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, a notice of violation 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;

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(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 pursued all rights of appeal and as to which there is no other effective legal remedy;

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(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.

(c) All cessation orders shall be issued as follows:

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(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, 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) Permittee 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 intervenor 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 Division 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 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 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 any 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), (e), (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

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 Division 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 the 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 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 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 assessment officer shall either:

(1) Settle the issue, in which case a settlement agreement shall be prepared and signed by the 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.

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 dollar amount to be assessed shall be determined by multiplying the number of violations by a factor of one hundred (100).

(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.
- 9-10 Violation extends beyond the permit area and results in a significant degree of environmental harm or danger to the public.

Rating	0	1	2	3	4	5	6	7	8	9	10
Dollar Amount	-	100	200	400	600	900	1200	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 to prevent the problem.
- 5-6 The operator failed to adequately respond to previous 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.

Rating	0	1	2	3	4	5	6	7	8
Dollar Amount	0	100	225	350	475	600	725	875	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 remedial action. Violation was has been modified to a cessation order.
- 1-2 Operator took minimal prompt, but insufficient remedial action to correctly abate the violation within the required abatement period. Violation Abatement period was extended due to the operator taking some corrective action, but the operator showed a lack of diligence in abatement for just cause. Remedial action was completed prior to the end of the extended abatement period.
- 3-4 Operator started took prompt remedial action promptly on remedial measures and worked diligently to correct abate the violation. Operator was hampered in abatement by conditions beyond his the operator's control prevented full abatement

and violations-had--to-be-required that the abatement period be extended for just cause. Abatement of the violation was accomplished before the end of the extended abatement period.

5-6 Operator started/initiated remedial action immediately and expended all reasonable efforts to correct/abate the violation. Violation was abated by/before the end of the original abatement date period, and was not extended.

7-8 Operator was already working-on/taking remedial measures/action at the time the violation was noted, and expended extreme exemplary effort in correcting/abating the violation. Violation was abated in less time than/before the end of the original abatement date period.

Rating	0	1	2	3	4	5	6	7	8
%	0%	5%	10%	15%	20%	25%	30%	35%	40%

(e) Determination of Penalty Amount

Seriousness of Violations	\$ _____
Operator Negligence	+\$ _____
Subtotal	\$ _____
Less Good Faith %	-\$ _____
Sub Total	\$ _____
History of Violations	+\$ _____
Total	\$ _____

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

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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 Division 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 Division of Energy when the violator demonstrates that the Division 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 Division of Energy prevails upon the issue of a violation;

(4) To a violator from any participating party other than the Division 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 Division of Energy from any participating party where the Division of Energy demonstrates that any such party participating in such proceeding in bad faith and for the purpose of harassing or embarrassing the Division of Energy. 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 dissipaters 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

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 both a minimum static safety factor of 1.5 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 requirements 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.

(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 plus three feet of freeboard.

(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-erodable 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 constructed of non-erodable material where sustained flows are expected, or may be of earth or grass lined construction where short term infrequent flows at nonerosive velocities, are expected.

(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.

(1) 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.

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 all phases of construction and be constructed and maintained in such a manner so as to attain a minimum long-term safety factor of 1.5 provided that structures which have the capacity to impound water shall also attain a seismic safety factor of 1.2;

(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) 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.

(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.

Title 38
CSR 2
Section 22

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.

Current DEP regulations

Title 38
CSR 2
Section 22

(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.~~

(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, plus three feet of freeboard.~~

(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.

Replace this wording.

Current Dam Control regulations

§47-34-7. Design Requirements.

7.1. Hydrologic Considerations.

7.1.1. General Hydrologic Requirements.

7.1.1.a. Hydrologic Investigation.

7.1.1.a.A. A survey shall be conducted to evaluate soil types, land use, land slope, watershed area, runoff curve number, and any other factors needed to establish watershed characteristics. A summary of all hydrologic and hydraulic data compiled in the initial site investigation and used in the analysis shall be included in table or figure form in the plan package.

7.1.1.a.B. A stream flow analysis shall be conducted to evaluate stream flow quantity and quality as it affects the dam and its appurtenances.

7.1.1.b. Design Storm Requirements. All dams shall be designed to meet the following minimum hydrologic criteria based upon hazard classification:

7.1.1.b.A. Class A Dams. Class A dams shall be designed for a minimum of $P_{100} + 0.12(PMP - P_{100})$ inches of rainfall in six (6) hours.

7.1.1.b.B. Class B Dams. Class B dams shall be designed for a minimum of $P_{100} + 0.40(PMP - P_{100})$ inches of rainfall in six (6) hours.

7.1.1.b.C. Class C Dams. Class C dams shall be designed for the probable maximum precipitation of six (6) hours in duration.

7.1.1.c. Antecedent Moisture Conditions. Where applicable to the development of a hydrograph, Antecedent Moisture Condition II (AMC II) may be used unless a different condition class is required by the director.

7.1.1.d. Flood Routings. An analysis shall be performed for the reservoir and spillways which includes inflow hydrographs, stage storage curves, stage discharge curves, and routings. The spillways must be able to safely discharge that portion of the design storm that is not stored in the reservoir. If a computer analysis is used, the input data and output results must be clearly labeled and identified. Trial calculations or intermediate results not relevant to the final results may be omitted from the plan package.

use this wording.

TERRA ENGINEERS, INC.
1624½ Kanawha Blvd. E.
CHARLESTON, WV 25311
(304) 346-7035

JOB _____
SHEET NO. _____ OF _____
CALCULATED BY _____ DATE _____
CHECKED BY _____ DATE _____
SCALE _____

CLASS OF DAM	HAZARD POTENTIAL	PRECIPITATION* FOR USE IN DESIGN	
		CURRENT DEP REGS (6/1/91)	CURRENT DAM CONTROL REGS
A	LOW	27.9"	7.0"
B	MEDIUM	27.9" + FREEBOARD	13.7"
C	HIGH	27.9" + FREEBOARD	27.9"

* USING KANAWHA COUNTY AS AN EXAMPLE —
PMP (PROBABLE MAXIMUM PRECIPITATION) = 27.9"
IN 6 HRS; PIDO (100 YR PRECIPITATION EVENT)
= 4.2" IN 6 HRS.

JACKSON & KELLY

ATTORNEYS AT LAW

1800 LAIDLEY TOWER

P. O. BOX 553

CHARLESTON, WEST VIRGINIA 25322

TELEPHONE 304-340-1000

TELECOPIER 304-340-1130

WRITER'S DIRECT DIAL NO.

340-1085

July 31, 1992

Rec'd
7/31/92

300 FOXCROFT AVENUE
MARTINSBURG, WEST VIRGINIA 25401
TELEPHONE 304-263-8800

8000 HAMPTON CENTER
MORGANTOWN, WEST VIRGINIA 26505
TELEPHONE 304-599-3000

256 RUSSELL AVENUE
NEW MARTINSVILLE, WEST VIRGINIA 26155
TELEPHONE 304-456-1751

250 CHARLES STREET
SISTERSVILLE, WEST VIRGINIA 26175
TELEPHONE 304-852-5541

175 EAST MAIN STREET
LEXINGTON, KENTUCKY 40585
TELEPHONE 606-255-9500

202 WEST MAIN STREET
FRANKFORT, KENTUCKY 40601
TELEPHONE 502-227-4000

1701 PENNSYLVANIA AVENUE N.W.
WASHINGTON, D.C. 20006
TELEPHONE 202-956-7890

700 EAST WASHINGTON STREET
CHARLES TOWN, WEST VIRGINIA 25414
TELEPHONE 304-728-8088

William B. Raney, President
West Virginia Coal Association
1301 Laidley Tower
Charleston, West Virginia 25301

Re: DEP 38 CSR 2 (Proposed Changes to
Surface Mining Regulations) and
Water Resource Board Water Quality
Standards Rules, Series I

Dear Bill:

I have recently reviewed the proposed revisions to the above referenced regulations, and there are, at least, two issues that would definitely have an adverse impact on coal mining operations.

There is a public hearing scheduled for August 14, 1992, at 9:00 a.m. on the surface mining regulations at the Division of Environmental Protection office in Nitro. Most of the changes in the regulation involve bonding requirements for reclamation and water treatment, plus ongoing reclamation efforts. In my opinion, the sleeper in these regulations is found in Section 3.19, Effect on Historic Places and Archeological Sites (see attached). This section provides that approval or disapproval must be obtained for the coal operation where the proposed surface coal mining will adversely affect any publicly owned park, any place listed or eligible to be listed on the National Register of Historic Places or archeological sites. This approval or disapproval is to come from the federal, state or local agencies with jurisdiction over the park, historic place, etc. It is interesting to note that neither the National Historic Preservation Act, the Army Corps of Engineers Permitting Authority, the West Virginia State Historic Preservation Agency nor the National Park Service have, in and of themselves, approval or disapproval authority over contemplated coal operations. ~~At these agencies only have the authority to make comments as to the effect a coal mining operation may have on the parks, historic places or those places eligible to be listed on the National Register.~~ DEP should not be giving these agencies approval or disapproval of the coal operation. It is my

JACKSON & KELLY

July 31, 1992

Page Two

understanding from Roger Hall that this language was pushed by the State Historic Preservation Officer and Larry George. You might want to consider having this language changed to properly reflect the authority of the various national and state agencies that might be involved with this section.

The second sleeper issue involves the Water Resource Board, Series I, water quality standards, specifically Section 4.1.a (see attached). At Jerry Ray's insistence, the Water Resource Board inserted the following language: "Existing uses are those uses actually obtained in the water body on or after November 28, 1975, whether or not they are included as designated uses within these water quality standards." This language is in and has been in the federal regulations for some time. Previously, the Board would never adopt this language specifically because of the ambiguities and the unfairness of the November 28, 1975, date. The rationale for the Board's refusing to incorporate this date in previous years has been that the Board has not nor has the Water Resource Section done an extensive inventory of all the streams and water bodies in West Virginia to determine what, in fact, is the existing use. Rather, they have relied on the fact that if a person wants a permit that might effect the stream or water body, then they determine at that point in time what the existing uses are and proceed with the permitting process. When a certain date, such as the November 28, 1975, date, is inserted in the regulations, then it means that if you are going to affect a stream and you want a permit, you cannot go out and determine what the existing use of the stream is at the time. Environmentalist undoubtedly, if it is to their benefit, will argue that you must determine the existing use in 1975 and protect that use.

It is important to keep in mind that the state cannot change an existing use once it is established. The state can only change or modify designated uses of streams. The small change in the Series I regulation will play right into the hands of anyone who wants to delay a permitting process or to reopen an existing permit by using the argument that they are violating the existing use of the stream as of November 1975. This language should be stricken from the regulations as it offers no more protection to the environment, and it will merely cause confusion and uncertainty in both the enforcement of the regulations and in the permitting process.

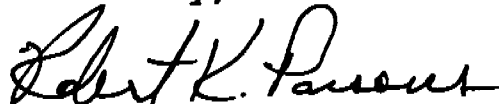
If you have any questions, please contact me.

JACKSON & KELLY

July 31, 1992
Page Three

Best regards.

Sincerely,


ROBERT K. PARSONS

RKP/tmb
Enclosures

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;
- (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

*this should read
"Comments on
the operation
Rationale.
There is no
authority for
"approval"
disapproval
by Nat. Hist.
Act or U.S. 541P
or Nat. Park Serv.*

WQS

Leg. Rule, 20-5 & 20-5A
Series I, Sec. 4.1.a

4.1.a Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. Existing uses are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included as designated uses within these water quality standards. Waste assimilation and transport are not recognized as designated uses. The classification of the waters must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial and other purposes including navigation. Subcategories of a use may be adopted and appropriate criteria set to reflect varying needs of such subcategories of uses, for example to differentiate between trout water and other waters. (See 4.1.d).

4.1.b At a minimum, uses are deemed attainable if they can be achieved by the imposition of effluent limits required under Sections 301(b) and 306 of the Federal Clean Water Act and use of cost-effective and reasonable best management practices for non-point source control. Seasonal uses may be adopted as an alternative to reclassifying a water body or segment thereof to uses requiring less stringent water quality criteria. If seasonal uses are adopted, water quality criteria will be adjusted to reflect the seasonal uses; however, such criteria shall not preclude the attainment and maintenance of a more protective use in another season. A designated use which is not an existing use may be removed, or subcategories of a use may be established if it can be demonstrated that attaining the designated use is not feasible because:

4.1.b.1 Application of effluent limitations for existing sources more stringent than those required pursuant to Section 301(b) and Section 306 of the Federal Act in order to attain the existing designated use would result in substantial and widespread adverse economic and social impact; or

4.1.b.2 Naturally-occurring pollutant concentrations prevent the attainment of the use; or

4.1.b.3 Natural, ephemeral, intermittent or low flow conditions of water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges to enable uses to be met; or

4.1.b.4 Human-caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; or

8.5.92

CANNELTON INDUSTRIES INC

INTER-COMPANY MEMO

August 4, 1992

TO: W. Raney & C. Hamilton
FROM: Ron McAhron 
RE: WV Rule Revisions "Slagel Draft"

I offer the following for your consideration on the rules Mr. Hall indicated an interest in changing. Unless noted below we support Mr. Slagel's draft.

3.15 Approved Persons - This rule is archaic and should be replaced with RPE certification requirements for appropriate sections of the application. Since that won't be done we agree with Gary's language.

3.17/3.19 Archaeology - This has been the subject of much debate in the mid-west. They could probably help the problem if they hired an archaeologist to help determine the likelihood of sites as a prerequisite for requiring a survey. Illinois has recently revised their rules in this area and ~~JOE~~ Spivey of the Illinois Coal Association may be helpful.

3.22 Hydrologic Information -

(c)(2) We may want to preempt OSM criticism by including from 784.14 (b)(2) provisions for alkalinity/acidity monitoring. The last sentence of 3.22 (c)(2) could be modified as follows:
In areas where.....data, including acidity and alkalinity shall be required;

(h) Acidity and alkalinity could be dropped from the mandatory parameter list.

(i) We believe (i) corresponds to 784.14(b)(3) and OSM would resist its deletion.

3.28 Incidental Boundary Revisions - We would like to see the "incidental or secondary" limitation on coal removal deleted but suspect that won't happen. We support Gary's approach and hope it be sold. As a fall back we at least need provisions for the Director to waive the acreage limitations. Modifying Indiana's approved provision to fit the WV rules would yield: The Director may waive the aggregate limitation, if he finds all of the provisions of 3.28 (b)(5) are met and the interests of the public will not be adversely affected.

3.31 Findings - Permit Issuance - We support DEP's intent to copy the appropriate federal rules in the place of the existing 3.31.

20.6 Civil Penalties - Instead of adding a redundant provision to issue NOV's for unpaid civil penalties, they should use their existing tools. They could and should alleviate some of the assessment backlog by following the provisions of 20.5 (a) and waiving some of the penalties.

I hope we can work with them to flesh out the "Environmental Security Account, to replace the "groin" ditch requirement, and to rework the Inactive status requirements, but I don't see those issues being resolved in time for this rule effort.

CONSOL INC.

Interoffice Memorandum

To: W. Raney, C. Hamilton

Date: 7/21/92

From: G. E. Slagel

Location:

Subject: WV Rule Revisions

Pursuant to our July 17 meeting with Roger Hall, below are suggested revisions to those rules we felt capable of addressing. Deletions are bracketed, additions are underlined.

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.]

Note: This eliminates the absolute requirement that one must be a PE or LLS to be approved, but still retains the option to grant approval based on one's license.

3.22 Hydrologic Information

(b)(2) Water quality analysis including, at a minimum, total dissolved solids [, alkalinity, acidity, sulfates,] or specific conductance, pH

Note: This makes the WV language somewhat consistent with the federal language in 784.14(b)(1).

(c)(2) Water quality descriptions including information of total suspended solids, total dissolved solids [,] or specific conductance, pH, [acidity, alkalinity, sulfates,] total iron, and total manganese

Note: This makes the WV rules more consistent with the federal language in 784.14(b)(2).

3.22 Hydrologic Information

(g) ... 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 and locations shall [include but are not] be limited to those contained in the NPDES discharge permits for the facility. [total dissolved solids or specific conductance ... balance protection objectives.]

Note: This will make the WV rule more consistent with the federal language in 784.14(i) and provide for upstream and downstream monitoring waivers based on NPDES determinations.

(i) [If the PHC indicates remedial and reclamation activities.] ~~DELETE (i) IN ITS ENTIRETY.~~

Note: There is no comparable section in the federal rules at section.

3.28 Incidental Boundary Revisions

(a) All Incidental Boundary Revisions (IBRs) shall be granted in accordance with paragraph (2) subsection (a) Section 19 of the Act, [and] IBRs for surface mining operations 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.]

(b)(2) For purposes of surface mining operations, the maximum total acreage to be permitted under one or more IBR, for which coal extraction is proposed, 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 limitations for IBRs on underground mining operations.... throughout the life of the permit.]

(b)(5)(A) The IBR does not constitute a change in the postmining land use unless approved by the Commissioner and properly advertised.

(b)(5)(B) For surface mining operations where coal extraction is proposed, the IBR will only involve lands for which the approved PHC is applicable.

(b)(5)(C) For surface mining operations, the IBR does not constitute a change in the method of mining.

Note: All of the above changes will eliminate any IBR limitations for underground mines and will make the restrictions for surface mines applicable only to coal extraction areas.

16.2 Surface Owner Protection

(c)(2) 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. For purposes of this subsection, the phrase "structures and facilities" is limited in meaning to structures and facilities of a domestic or agricultural nature, and excludes all commercial or industrial structures and facilities. Repair of damage premium-prepaid insurance policy.

Note: This addition is needed to assure that the rules do not usurp state law as it pertains to superior rights.

13.1 Notice of Intent to Prospect - two hundred fifty (250) tons or less

DELETE THIS SECTION IN ITS ENTIRETY AND REPLACE WITH FEDERAL LANGUAGE IN 772.11 (a) AND (b)

Note: The insertion of the federal requirements will significantly simplify these procedures. Mining coal under a prospecting approval should no longer be an issue in WV.

BUFFALO COAL COMPANY, INC.

Main Office Phone
(304) 693-7642
Fax (304) 693-7374

P.O. Box 282
BAYARD, WEST VIRGINIA 26707



September 17, 1992

Mr. Roger T. Hall
Division of Environmental Protection
10 McJunkin Road
Nitro, WV 25143-2506

RE: Proposed Rule - WV Surface Mining & Reclamation Regs

Dear Sir:

In response to the opportunity to submit written comments on the Proposed Rules as referenced above, Buffalo Coal Company wishes to submit a brief comment on Section 14.11(e) as it relates to a procedure to obtain Inactive Status for "preparation plants or load-out facilities".

Buffalo asserts that it would be practical and beneficial in situations where such facilities are inactive, reclaimed and all aspects of same are in compliance with performance standards, to allow the submittal of a written request for an extension of Inactive Status where there has been no change or modification to the site since the initial or previous approval of Inactive Status.

It is costly and burdensome to repeat the procedures as set forth in Section 14.11(a)(7) each time a request for Inactive Status is submitted even though nothing has changed at the site. A simple letter from the operator with a written confirmation from the inspector seems more appropriate in such instances.

The opportunity to submit this brief comment is appreciated. Please advise should you have any questions regarding this matter.

Respectfully,

Steve Shaffer

Steve Shaffer

RECEIVED
Director's Office
SEPT 1 92
WV Division of
Environmental Protection



RECEIVED

Director's Office

SEPT 18 92

WV Division of
Environmental Protection

Consolidation Coal Company
Northern West Virginia Region
Vista Del-Rio
P.O. Box 1314
Morgantown, West Virginia 26507-1314

September 17, 1992

David C. Callaghan
Director of Commerce, Labor & Environmental Resources
10 McJunkin Road
Nitro, WV 25143-2506

RE: Comments to Proposed Rules
WV Division of Environmental Protection
Title 38

Dear Mr. Callaghan:

Thank you for your recognition that changes are needed to our current surface mining regulations. I appreciate the effort made by you and your staff to change those regulations that burden our coal industry while maintaining a balance to insure the integrity of our natural environment.

I would like to voice my opinion on two of the proposed regulation changes:

Section 3.15 Approved Persons

I object to the requirement that a registered professional engineer be required to pass an examination to be considered an approved person. A permit application involves many areas of expertise. Professional mining engineers, civil engineers, geologists and a permit preparer (or coordinator), in a combined effort, provide the necessary detailed design, plans and information required in an application. All have their own area of expertise and professional responsibility. The proposed regulation is unfair to single out and require a R.P.E. to take an examination containing information that might be out of his or her area of expertise in order to be considered an approved person. Current regulations stipulate that an approved person must be either a registered professional engineer or a licensed land surveyor. No provision is made for anyone else to become qualified as an approved person. This in turn has left the R.P.E. no alternative but to certify all information contained in the application. To eliminate many concerns I would suggest including a provision for persons other than R.P.E.'s and L.L.S.'s to become approved persons and eliminate the required testing of professional engineers.

Section 3.28 Incidental Boundary Revisions (I.B.R.'s)

In my opinion, few regulations have had more negative impact on underground mining operations than this particular regulation. I am grateful that you have recognized our concerns and have proposed to ease this burdensome regulation. I do, however, have the following comments:

(a) A provision has been made to delete bonded acreage if overbonded by another valid permit. No mention is made as to whether or not the deleted acreage is subtracted from the permit's original maximum bonded acreage limit. If the area is covered by a new bond then the acreage should be subtracted from the original permit acreage limit so as not to create a "double jeopardy".

A provision is made stipulating that an I.B.R. cannot abate a violation unless equal acreage is deleted from the permit area. This raises some concern with surface facilities for an underground operation in which I.B.R. sites are not contiguous and the bonded acreage associated with each site is minimal to begin with. The only recourse would be to obtain a full new permit on a very small disturbance and this would not be in the best interest of either the state or the coal operator.

(b)(2) A provision has been made providing the director opportunity to grant a waiver for underground operations to exceed the 20% or 50 acre limitation. One concern is that a waiver is solely at the discretion of the director. Will all types of surface support facilities be eligible for a waiver? How will this be decided- by state wide policy or on a site by site basis? How will future directors interpret and respond to this provision?

Another approach to the I.B.R. issue for underground operations would be an acreage limitation based on the current 5-year mine plan. If a percentage of 20% were used for example (the same as surface mining), then the I.B.R. acreage would be proportional to the size of the 5-year mine plan. The larger the operation, the more surface support facilities that are needed, the more acres available for the I.B.R. permit process. Each new 5-year mine plan would have its own I.B.R. acreage limitation. The language for a waiver request could remain for those infrequently required I.B.R.'s for disturbances outside the 5-year mine plan boundary. I feel that this approach would meet many of the underground operators concerns.

I appreciate this opportunity to share with you my concerns and suggestions. If you have any questions or wish to have further discussions please feel free to contact me at 304 285-1235 or at the

Callaghan letter
September 17, 1992
Page three

address above.

Sincerely,

A handwritten signature in cursive script, reading "Sheirl L. Fletcher".

Sheirl L. Fletcher
Environmental Permit Coordinator
Northern West Virginia Region
Consolidation Coal Company

cc: V. Pitman
G. Slagel
J. Ailes
R. Hall

Fax Transmittal Memo

7872		No. of Pages	2	Today's Date	9/14/92	Time	9:45
To	David C. Callaghan			From	Tony Di Rico		
Company	W. V. D. E. P.			Company	HOWV		
Location				Location			
Fax #				Dept. Charge			
Telephone #				Telephone #			
Comments	Letter is being mailed "overnight" to your office.			Original Disposition:	☐ Destroy	☐ Return	☐ Call for pickup

William A. DiRico, Jr.
President

ARCH OF WEST VIRGINIA, INC.

P. O. BOX 156
MOLYN. WEST VIRGINIA 25054

September 18, 1992

TELEPHONE
792-8200

David C. Callaghan, Director
Division of Environmental Protection
W. Va. Department of Commerce, Labor
and Environmental Resources
10 McJunkin Road
Nitro, West Virginia 25143-2506

RECEIVED
Director's Office
SEPT 21 92
WV Division of
Environmental Protection

RE: Comments on Proposed Amendments to W. Va.
Surface Mining and Reclamation Regulations

Dear Director Callaghan:

On behalf of Arch of West Virginia, Inc., this is to notify you that we have reviewed the Division of Environmental Protection's proposed amendments to the West Virginia Surface Mining and Reclamation regulations filed with the Secretary of State on August 17, 1992. Because our comments and suggestions are limited to one specific provision, I would like to simply describe that in this letter instead of filing a more formal separate document.

Specifically, we are concerned with the Division's proposed amendments to subsections 3.28(a) and (b)(2) of the regulations, involving Incidental Boundary Revisions (IBRs) and the Director's authority to grant a waiver from the acreage limits. As the proposed amendments now read, an IBR shall not be granted to abate a violation where encroachment beyond the permit boundary is involved, unless an equal amount of acreage covered under the IBR for encroachment is deleted from the permitted area and transferred to the encroachment area. We believe this language would prevent the granting of an IBR in cases where a violation is issued when the mining operation is near completion or in grade release with no undisturbed acreage available and the additional disturbance was not caused by negligence of the operator. Also, the Director may only grant a waiver from the 50-acre limitation on IBRs for underground

granting of an IBR in cases where a violation is issued when the mining operation is near completion or in grade release with no undisturbed acreage available and the additional disturbance was not caused by negligence of the operator. Also, the Director may only grant a waiver from the 50-acre limitation on IBRs for underground operations where the size and complexity of the operations requires it. We can discern no reason for not providing the same flexibility with respect to surface mining operation, so that in those unique circumstances where the Director deems it to be appropriate, the waiver from the 50-acre limitation on IBRs may be granted for those operations also.

Experience demonstrates that in some instances an IBR will involve deletion of all or a significant portions of the same size area as is intended to be added to the permit pursuant to an IBR. Indeed, in some instances a permittee may propose to delete more acreage than it wishes to add through the IBR process.

Surface Mining
and Reclamation Regulations
Page Two

Where the size and complexity of the surface mining operation justifies it, such as where operational and reclamation plans are revised in such a way that they are more environmentally protective, and particularly where a similar amount of acreage is deleted from other parts of the original permit area, the Director should have the flexibility to approve this type of IBR even if it exceeds the 50-acre limitation.

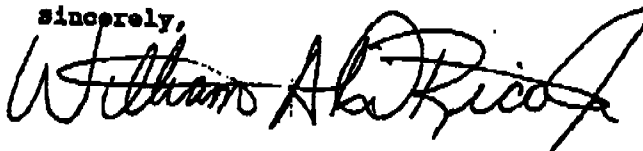
Of course, any such IBR would also be subject to the detailed bond, a reclamation plan consistent with the existing plan, and the need for specific findings of fact with respect to the effect of the IBR (including a finding that it would not result in adverse environmental impacts of a larger scope or different in nature from those described in the approved permit. Given that the specific requirements would have to be satisfied, the Director should at least have the discretion to grant IBRs for areas greater than 50 acres for surface mining operations, where justified. (Arch also notes that the Director may require an advertisement and ten day public comment period on an application for an IBR in his discretion.)

Accordingly, we would suggest that the proposed language in 38 W. Va. C.S.R. § 2-3.28(b) (2) (at the end of the paragraph) be revised to read as follows:

Provided, That the Director may grant a waiver specifying larger acre limits for surface mining operations or underground mining operations where the size and complexity of such operations clearly require that an IBR of greater than 50 acres be approved.

Thank you for affording Arch of West Virginia, Inc. the opportunity to comment on these proposed amendments. Please contact me at your convenience should you wish to discuss any of these comments.

Sincerely,



William A. DiRico, Jr.
President

WADJ:esh

William A. DiRico, Jr.
President

ARCH OF WEST VIRGINIA, INC.

P. O. BOX 156
YOLYN, WEST VIRGINIA 25654

September 18, 1992

TELEPHONE
792-8200

David C. Callaghan, Director
Division of Environmental Protection
W. Va. Department of Commerce, Labor
and Environmental Resources
10 McJunkin Road
Nitro, West Virginia 25143-2506

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SEPT 22 92
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Environmental Protection

RE: Comments on Proposed Amendments to W. Va.
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Surface Mining
and Reclamation Regulations
Page Two

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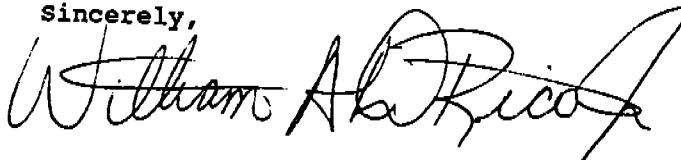
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Accordingly, we would suggest that the proposed language in 38 W. Va. C.S.R. S 2-3.28(b) (2) (at the end of the paragraph) be revised to read as follows:

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Thank you for affording Arch of West Virginia, Inc. the opportunity to comment on these proposed amendments. Please contact me at your convenience should you wish to discuss any of these comments.

Sincerely,

A handwritten signature in dark ink, appearing to read "William A. DiRico, Jr.", with a stylized, cursive script.

William A. DiRico, Jr.
President



WEST VIRGINIA COAL ASSOCIATION

September 18, 1992

Mr. Roger Hall
Division of Environmental Protection
10 McJunkin Road
Nitro, West Virginia 25143

Dear Roger:

On behalf of our Association and the West Virginia Mining & Reclamation Association, the attached comments are offered to the proposed DEP regulations pertaining to surface mining and reclamation.

In addition, to these specific recommendations for language change, we have detailed supporting explanations and justifications, to include direct references to applicable federal regulations. We will be happy to discuss them with you or provide them on request.

If you have any questions, do not hesitate to notify me.

Sincerely,

William B. Raney
President

WBR/sjd
Enclosures

RECEIVED

Director's Office

SEPT 18 92

WV Division of
Environmental Protection

1301 Laidley Tower • Charleston, West Virginia 25301 • Telephone (304) 342-4153

WEST VIRGINIA COAL: MORE IMPORTANT THAN EVER
We've Got A Job To Do!

WEST VIRGINIA COAL ASSOCIATION AND WEST VIRGINIA MINING &
RECLAMATION ASSOCIATION
COMMENTS - FILED SEPTEMBER 18, 1992
TO PROPOSED DEP REGULATIONS

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) However, any reference to "regulations" in this subsection should be changed to "appropriate regulations under which the permit was issued and subsequent changes which had been incorporated into the permit."

Change the subsection to read as follows:

2.8 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.

2.10 Affected Area. Delete the phrase "and the area located above underground workings?"

2.35 Remove phrase "that all applicable effluent and applicable water quality standards are met"

2.65 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".

2.94 Prospecting should have the term "substantial" inserted in the definition on the seventh line between the words "any" and "disturbance".

2.102 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.

2.117 Change word "or" to "and" on second line of definition.

3.2(a) Add the phrase "The Director shall issue an SMA number within the time specified by the Act" at the end of this subsection.

3.2(e) 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.

3.10(a) Delete "Commissioner", replace with "Director".

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."

3.15(a) Delete the semi-colon after the word "application" and replace with a period. Delete the remaining language.

3.15(e) and (f) Must be qualified to indicate that sanctions and penalties do not apply to RPE's and LLS's as certification Boards are in place to remedy problematic cases.

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 Director in consultation with State or Federal agencies with responsibilities for fish and wildlife resources in the area of the operation. This 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, and delete language "together with a request for the agency's approval or disapproval of the operation."

3.22 (b)(2) Delete words "alkalinity, acidity, sulfates"

3.22(c)(2) Add word "or" between "solids and "specific", then delete the comma. Delete words "alkalinity, acidity, sulfates". In last sentence, add the words "industry alkalinity and acidity" after the word "data".

3.22(g) Delete all after "adjacent areas." Replace with "monitoring parameters and locations shall be limited to those contained in the NPDES discharge permit(s) for the facility."

3.22(i) Delete subsection entirely.

3.25 This section should have a subsection which would provide for the Director to simply be notified without requirement of application, notices, advertisements, etc. when only the officers of a permittee are change, but there are no other changes to the ownership and control.

3.28(b)(2) Insert language "for which coal extraction is proposed" after the word "IBR(s)". (Insert in two places) Delete language "or a maximum of fifty (50) acres, whichever is less, throughout the life of the permit." (Delete in two places)

3.28(d)(A) Insert words "unless approved by the Director and properly advertised" at the end of the sub-item.

3.28(d)(B) Insert the phrase "For surface mining operations where coal extraction is proposed" at the beginning of the sub-item.

3.28(d)(C) Insert the phrase "For surface mining operations" at the beginning of the sub-item.

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".

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,"

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".

5.4(h)(2) At the beginning of the subsection, insert the phrase "Unless otherwise approved in the reclamation plan".

The following comments for Section 11 are actually directed to the Division's proposed regulations regarding site-specific bonding. Those proposals were previously filed separate from these proposal.

11.2(d) An operator should not be subject to a violation if the surety company and/or other third party provider of bond should go out of business. The operator has no control over such situations. The operator is expected to provide bond and should be given time to provide such bond in instances where the operator has no control over the surety. To immediately write a violation is inappropriate, particularly when considering the effect it has on the history of an operator's performance.

11.3 The deletion of certain forms of bond, i.e., real property, whole life insurance policies and letters of credit, is inappropriate and not authorized. These forms of bonding are accepted by OSM and other states. No explanation is provided as to why such bonds are considered to be unacceptable.

11.5 Remove the words "and vegetated" (line #12) and the words "and the provisions of subsection 14.15 of these regulations" (line #13-14).

The restriction of requiring vegetation is unclear and should not be included in this newly devised process, since the basic bonding amount will more than adequately cover the costs of vegetation. The true test which needs to be addressed is the backfilling and regrading, before the bond is shifted.

The second phrase should be taken care of with an approved reclamation plan. It is unnecessary to reference this section (14.15) of the regulations and also refer to an approved reclamation plan. If a reclamation plan is approved, it certainly seems likely it will be done within the parameters of existing regulations.

11.6 The new site specific bonding rates should not be applicable to existing permits. This was agreed to during the deliberations and discussions surrounding passage of the House Bill 217. This must be clearly stated.

11.6(c)...

(2)(A)(iii) Remove the word "predominantly". The meaning is unclear and it is ambiguous.

(4)(A) "Contemporaneous" is not defined and unclear. It should be removed.

(5)(A) This subsection must include consideration of the appeal process and the final disposition of violations. As currently written, consideration is only given to the writing of violations. Violations under appeal should not be considered.

(5)(B)(i)/(ii)/(iii) "contemporaneous" is not defined and is unclear. It should be removed.

(6)(A) "remining" must be defined in practical terms, based on site specific conditions of existing and previously conducted operations. The elusive definition of a "remining" operation, as now being permitted must not be used here. This is particularly true since there have been so few permitted.

(6)(A)(ii) "Improved water quality" must be defined in accordance with state law and it must reference the premining condition of water. As written, it has no point of reference. Also, to require "total" elimination of highwalls in every case is inappropriate with the law regarding previously mined areas. As written, "total" elimination must occur if consideration is to be given in this category.

(6)(A)(iii) Again, the reference to "remining" is not definitionally clear. It must be clarified in terms more appropriate than the official "remining" now being pursued. The reference to "water quality meets effluent limits and water quality standards" is not accurate as the two requirements could be exclusive of one another. The discharge should meet the effluent limits as determined for the "remining" permit!

11.6(d)...

...(1)(A)/(B)/(C)

...(2)(B) Proposed maximum amount for slope and vertical shaft mines is unjustified. The reclamation effort for these type facilities is much less than other mines.

11.6(d) (3) This language should exclude roads and ponds.

11.6(d) (4) Clarify the language as to how the matrix would apply to a separate operation and/or a surface operation.

11.6(d) (5) (A) This subsection must include consideration of the appeal process and the final disposition of violations. As currently written, consideration is only given to the writing of violations. Violations under appeal should not be considered.

11.6(d) (5) (B) (i)/(ii)/(iii) "contemporaneous" is not defined and is unclear. It should be removed.

11.6(d) (6) (A) The word "gratuitous" must be defined so as to clarify exactly what constitutes such reclamation. Must it be bonded?

11.6(e) How does this criteria correspond to the criteria shown for preparation plants on underground mining operations? Is it duplicative? If so, it should be clarified to indicate that prep plants would be considered only once.

11.6(e)(1)(B)/(iii) The word "existing" should be removed from both of these sub-sections. These new regulations are not to be applicable to existing mining operations.

11.6(e)(2) The word "existing" should be removed from this sub-section. These new regulations are not to be applicable to existing mining operations.

11.6(e)(4)(A) This subsection must include consideration of the appeal process and the final disposition of violations. As currently written, consideration is only given to the writing of violations. Violations under appeal should not be considered.

11.6(e)(4)(B) (i)/(ii)/(iii) "contemporaneous" is not defined and is unclear. It should be removed.

11.6(f) This section must distinguish between stand-alone disposal sites and operations which are disposing of coal refuse in a pit.

11.6(f)(2)(B) Is acid/base accounting appropriate for coal refuse? If not, then a more appropriate testing procedure must be established.

11.6(f)(4)(A) This subsection must include consideration of the appeal process and the final disposition of violations. As currently written, consideration is only given to the writing of violations. Violations under appeal should not be considered.

11.6(f)(4)(B)(i)/(ii)/(iii) "contemporaneous" is not defined and is unclear. It should be removed. Language in two of the sub-sections contains the word "concurrent", which is not defined and should be removed.

11.7 This section must include a process by which the historical performance of an operator is recognized, despite what the testing and analysis for potential acidic conditions might indicate. Simply put, there are many operators who have performed in acid potential conditions without affecting water quality, or who have improved water quality.

This section must also recognize Section 23 of Chapter 22A, Article 3 of the Code of West Virginia. The pre-mining condition of water quality must be recognized and used as a basis of comparison for whether the true intent of the law has been satisfied.

12.2(d) Does this section sufficiently provide for the incremental release of bonds? Such incremental release is authorized by the federal law regulations as well as numerous other state's programs.

12.2(c)(4) Delete this sub-section in its entirety.

The language 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 DEP, 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 changed, 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 DEP, 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 operations, which had to equal or improve the quality of existing water or the bond was never 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 actions 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 DEP'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. 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 existing and proposed 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.

12.4(d)(2) Delete the phrase "Notwithstanding efforts by the Commissioner" and delete the word "shall" on line two and insert the word "may".

12.4(e) Deleted section in this proposal. This sub-section should be reestablished for purposes of time limitation regarding new standards.

12.4(e) This is the newly proposed sub-section (e). The word "may" should be changed to "shall" in the second sentence of this sub-section.

13.1 - 13.10 Delete these sections in their entirety and replace with the language of 30 CFR Part 772.

14.5 After the word "supplies" on line 6, insert the following language: "in accordance with Section 24 of the Act".

14.5(b) The proposed language should be deleted and the original language reinserted.

14.5(c) The proposed language should be deleted and the original language reinserted.

The following subsection should be changed to read as follows:

14.8 (a) (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 or 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. Casting of spoil from a higher seam to a lower seam in multiple seam contour operations may only occur where: the highwall of the lower seam intersects the outcrop of the upper seam; the lowest seam is mined first or in advance of the upper seams; and minimum bench widths based on slopes are established on the lower bench sufficient to accommodate both spoil placement from the upper seam and bench drainage structures.

14.9(b)(1) Remove the word "collectively" on line 5.

14.11 Delete the section in its entirety and insert the provisions of 30 CFR 816.131 and 817.131.

14.15 Delete the proposed section in its entirety and replace with the following language.

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 of 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. All spoil must be placed in such a manner that the final surface is mechanically stabilized using track equipment or other equivalent means.

(b) Time Limits. Grading, backfilling, and water management practices shall be kept current as follows:

(1) Where the operation consists of single seam contour mining only (no augering), grading and backfilling shall follow the mineral removal by a period not to exceed one hundred twenty (120) days or a distance of one thousand five hundred (1,500) linear feet. For the purposes of Section 14.15 (b) (1, 2, and 3) the term "augering" shall include all means of mechanical highwall mining, such as but not limited to conventional augers, thin seam miners, and highwall miners.

(2) Where the operation consists of single seam contour mining and augering, the augering shall follow the mining by a period not to exceed one hundred twenty (120) days, and the grading and backfilling shall follow the augering by a period not more than one hundred twenty (120) 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 sixty (60) days or a distance of one thousand (1,000) linear feet.

(4) Where the operation consists of area mining only, on slopes which are less than 20 degrees, the backfilling and grading shall not be more than two spoil ridges or mining cuts behind the pit being worked. The maximum linear feet of open pit, per spread of equipment, shall not exceed three thousand (3,000) feet at any time and backfilling and grading must follow mineral removal within one hundred eighty (180) days.

(5) After the effective date of this subparagraph, for existing or proposed surface mining operations on steep slopes which remove the entire coal seam(s) running through the upper fraction of a mountain, hill or ridge, or which partially remove multiple seams along the topographic contour, and where such operations utilize excess spoil disposal sites, subject to the provisions of 14.15 (d) and (j) the following contemporaneous reclamation requirements apply:

(A) Disturbed and unreclaimed acreage, including excess spoil disposal sites, shall not exceed at any given time five hundred (500) acres. The ratio of disturbed acreage versus reclaimed or undisturbed acreage shall be shown on progress maps, or by other equivalent means, submitted to the Director annually, or as otherwise required by the Director. The subject ratios shall be verified by the Director on the next regular inspection following receipt of the progress map. Reclaimed acreage shall be that portion which has been fully regraded to meet the standards for Phase I bond release, provided, that unreclaimed and undisturbed acreage shall not include semi-permanent ancillary facilities, drainage control systems, primary access and haulage roads, and areas which are cleared but not grubbed, provided, however, that such areas have appropriate drainage control systems in place.

(B) On operations which utilize draglines, stripping shovels or equipment with an aggregated bucket capacity of greater than forty (40) cubic yards, and on which the operator has demonstrated in the approved reclamation plan that the contemporaneous reclamation provisions of subparagraph (5)(A) of this paragraph are infeasible, the following standards for contemporaneous reclamation apply:

(i) Prestripping or benching operations will not be more than twenty four (24) months in advance of the dragline or shovel operations or exceed five hundred (500) acres for any single permit, provided, that areas cleared but not grubbed are excluded from this determination, provided, however, that such areas have appropriate drainage control systems in place; and

(ii) Backfilling and regrading will not be more than four (4) spoil ridges behind the pit being worked, or more than one hundred eighty (180) days following mineral removal.

(C) Excess spoil disposal fills will be excluded from the calculation of disturbed acreage in subparts (A) and (B) of this subparagraph provided the fills are not inactive for periods exceeding one hundred twenty (120) days. Activity means the placement of material and/or reclamation operations within the fill area.

(D) Permit applications for these types of operations which are pending, but had received an SMA number before July 1, 1992 shall be revised within 12 months of permit issuance, or of the effective date of this subparagraph, whichever is sooner, to contain a reclamation plan which requires compliance with the provisions of subpart (A) or (B), whichever is applicable, of this subparagraph.

(E) Existing permits for these types of operations containing a reclamation plan which does not conform to the provisions of subpart (A) or (B), whichever is applicable, of this subparagraph, must be revised within twelve (12) months after the effective date of this subparagraph. Such revisions will reflect full compliance with the subject provisions and will be subject to approval by the Director. Full compliance with the revised reclamation plan will be required within twelve (12) months after approval.

(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) Alternative. Alternative time, distance and/or area limitations may be approved by the Director where the permittee demonstrates in the site specific mining and reclamation plan that site conditions and/or operational requirements, justify alternative limitations.

NOTE: (j) is proposed as a new paragraph. No changes are proposed to paragraphs (e), (f), (g), (h), or (i).

(j) Exclusion. The Director may approve deviations from the approved time, distance, and/or area limitations when conditions beyond the operator's control make adherence to the established guidelines impractical.

16.2 Surface Owner Protection

(c)(2) 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. For purposes of this subsection, the phrase "structures and facilities" is limited in meaning to structures and facilities of a domestic or agricultural nature, and excludes all commercial or industrial structures and facilities. Repair of damage . . . premium-prepaid insurance policy.

20.6 Civil Penalties. Instead of adding a redundant provision to issue NOV's for unpaid civil penalties, they should use their existing tools. They could and should alleviate some of the assessment backlog by following the provisions of 20.5 (a) and waiving some of the penalties.



WEST VIRGINIA COAL ASSOCIATION

September 18, 1992

Mr. Roger Hall
Division of Environmental Protection
10 McJunkin Road
Nitro, West Virginia 25143

Dear Roger:

Attached are two additional sets of comments received from member companies after our comments had been prepared. Please consider them part of our submission.

Your consideration is appreciated.

Sincerely,

William B. Raney
President

WBR/sjd
Enclosures

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Director's Office

SEPT 18 92

WV Division of
Environmental Protection

Comments on
Proposed Rules
WV Division of Environmental Protection
Title 38

Sec. 3.15 Approved Persons

- (b) We object to this requirement that registered professional engineers and registered mining and civil engineers must submit a resume and pass an examination administered by the Commissioner.

Registered professional engineers have already complied with national and state standards attesting to their educational and technical competency and their work experience. The code of ethics for professional engineers requires that they have a working knowledge of any work they certify or directly supervise those doing the work.

Some of West Virginia's arguments for having an approved persons requirement have been that a small number of engineers are lax relative to meeting these ethical standards and that disciplining does not occur by the WV Board of Registration. If this is indeed the case then it seems that the Division's concerns should be directed towards the Board and their ability to police their own ranks or to respond to complaints about unethical conduct. Overall, we believe most professional engineers comply with the ethical standards established by the Board of Registration and consequently

these approved persons testing requirements are totally unnecessary.

We also feel this approved person concept is a carryover from the past when the state regulatory agency was understaffed and undertrained and was perhaps incapable of adequate technical reviews. Certainly, this situation does not exist today within the Division of Environmental Protection. In fact, it is hard to imagine, with the permit review steps currently required, how any technically inadequate application could be even considered. We also understand that past practice was to also allow engineers and surveyors to become approved persons after taking a state administered test. If it is the Division's desire to continue this practice, then it should not be done at the expense of registered engineers and surveyors.

3.28 Incidental Boundary Revisions (IBRs)

We appreciate the positive changes proposed throughout this subsection. A simple process to add non-coal removal acres to a permit area is an absolute necessity. This is particularly true given that no simple process exists for adding acres through a permit revision or amendment process. Since coal mining is a dynamic activity, it is imperative that operators have some flexibility and latitude in adding non-coal removal acres. Our comments on specific paragraphs follow:

- 24
- (a) Proposed language states that acres cannot be added to abate an NOV unless equivalent permitted acres are deleted and transferred. We feel this requirement to transfer acres may not be possible in many situations, thus eliminating this as an option to abate NOVs for non-coal removal infractions. Given the time and effort needed to otherwise revise a permit, it seems the Division is needlessly complicating this process for both themselves and the industry.

We suggest the IBR provision be extended to cover all non-coal removal acres without the acre transfer requirement.

- (b)(2) The proposed language gives the Director the ability to waive the 50 acre limit for surface facilities associated with underground mines. Considering the nature and size of many underground mining operations, a 50 acre limit is grossly undersized. We believe the proposed new language acknowledges this problem by establishing a waiver system. However, we are concerned that any increase in the IBR amount for underground mines will be solely at the discretion of the Director. Under what conditions will the Director grant a waiver? If an operator asks for a waiver and is denied, will enough time remain to revise a permit?

How will succeeding Directors interpret this provision?

We suggest the 50 acre limit be increased for underground mines, perhaps based on the amount of underground acres projected in a five year mine plan area. The amount of non-coal removal surface acres needed to support the mining activity may be somewhat proportional to the amount of underground acres disturbed, consequently, large mines would get more IBR acres while small mines could be limited to 50 acres. This acreage amount should be reset to zero at the start of each five year permit period while making allowances for any IBR acres that obtain final bond release.

Section 16 Subsidence Control

The Director has not proposed any changes to this Section. We urge the Director to consider adopting a definition of structures and facilities that makes a clear distinction between private, public and agricultural structures (which should be covered) and commercial and industrial facilities where state case law should determine the coverage, if any, that should be provided.

Cannelton Inc.

A Subsidiary of AMAX Coal Industries, Inc.



September 17, 1992

Mr. Roger Hall
Division of Environmental Protection
10 McJunkin Road
Nitro, West Virginia 25143

**RE: West Virginia Surface Mining and Reclamation Regulations
Proposed Revisions Filed August 17, 1992**

Dear Mr. Hall:

On behalf of Cannelton Industries Inc. we would like to offer the following comments on the above referenced proposed rules:

1.2 Applicability - We support the concept of the rule. At (c) we would suggest the substitution of shall or will for may. Technically the use of the term may implies that the termination of jurisdiction is conditional but the rule as proposed does not identify any additional conditions. At (c)(2) it would seem that only full and final bond release would be necessary to trigger termination of jurisdiction.

2.65 Impoundment or Impounding Structure - We believe these are not synonymous terms and should have separate definitions as per 30 CFR 701.5.

3.15 Approved Persons - We believe this proposed rule has serious flaws. At (a) the existing rule indicates that "approved persons" may sign applications. We believe this is incorrect in that an officer/owner must sign applications. Our chief criticism of this rule is that it has mixed permit preparation together with design and construction certifications. As the rule is proposed, only Registered Professional Engineers or Licensed Land Surveyors can be "approved persons". At (b)(1) and (b)(2) the proposed insertion of "and certification of associated facilities"; and "and certify facilities" respectively, adds qualifying tests that only those individuals can satisfy. Also R.P.E.'s or L.L.S.'s can effectively be subject to disqualification from the utilization of their license for design and certification of facilities, if they fail the subjective permit competency criteria of (e)(1) or (3) for example. We strongly believe that either of these situations is wrong. The permit applications contain many areas that have no relevance to engineering or surveying. Non-engineers can and should continue to be able to coordinate the preparation of applications and serve as contact people with the agency during review. The agency certainly has non engineers involved in the review and approval process. While we have no problem with competency testing for this permit handling function we do believe that it should be distinctly separated from certification of structures. We would also suggest that the agency would do all concerned a great service if an update of standard policies and procedures could be completed and distributed before embarking on the testing program.

Mr. Roger Hall
September 17, 1992
Page 2

We also believe that an engineer's ability or lack thereof to address the large variety of non engineering items in the permit application has no bearing on his or her ability to design and certify facilities. The proposed criteria for being subject to retesting are highly subjective and provide no mechanism for a person to seek relief from the requirement to be retested or even worse suspended under (f). We believe that the P.E.'s or L.L.S.'s ability to certify structures comes from the Registration Board and certainly should not be impacted by real or perceived permit preparation deficiencies.

3.28 Incidental Boundary Revisions - We do not see why there is an instance on seeking to use permitting as a punitive force in permit boundary encroachment. The agency has broad powers in the civil penalty section to address egregious permit boundary encroachment without artificially complicating an already overloaded permitting process. We also continue to believe that an IBR should be a relatively quick mechanism to add minor acreage to a permit for any legitimate permittable purpose; provided certain safeguards are in place. We would suggest a two tiered approach for surface mines. In addition to the current 20%/50 ac. limit, we would suggest that mineral removal acreage be limited to 10% or 25 acres, whichever is less over the life of the permit. If this suggestion is accepted we would suggest and expect that these caps would not be subject to waiver. We would suggest that the acreage limits for non coal removal be subject to waiver by the Director when circumstances warrant.

We propose the following:

3.28 Incidental Boundary Revisions (IBRs)

(a) Incidental Boundary Revisions (IBRs) shall be limited to minor shifts or extensions of the permit boundary. Notwithstanding the acreage limitations contained in this subsection IBRs may be used to delete bonded acreage from a permit when such acreage is overbonded by another valid permit and for which full liability is assumed in writing by the successive permittee.

(b) General Applications for an IBR shall be as follows:

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

(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 limitations 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. The Director may waive the aggregate limitations, if he finds all of the other provisions of this subsection are met and the interests of the public will not be adversely affected.

Mr. Roger Hall
September 17, 1992
Page 3

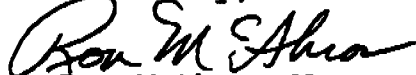
Addition of acreage for the purpose of mineral removal shall be limited to ten (10) percent of the original permitted acreage or a maximum of twenty (25) acres, whichever is less, throughout the life of the permit. The acreage limitations for mineral removal acreage shall not be waived.

We would propose to include all the remaining language as it is proposed in the August 17, 1992 revision [(b)(3) through (e)]. We believe these provisions provide adequate safeguards to insure that areas that should not be added through the IBR process are excluded.

13.1 Notice of Intent to Prospect Without Land Disturbance - We support this proposed rule change. It would seem preferable to include approval procedures in this section instead of cross-referencing to 13.4 (b).

We appreciate this opportunity to provide these comments on the proposed regulations. If you have any questions or wish to discuss any of these issues in more detail please contact me at 926-2249.

Sincerely,



Ron McAhron Manager
Environmental Affairs

cc: B. Greene
W. Raney



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SEPT 18 92

WV Division of
Environmental Protection

Consolidation Coal Company
Northern West Virginia Region
Vista Del-Rio
P.O. Box 1314
Morgantown, West Virginia 26507-1314

September 17, 1992

Roger Hall
WV Division of Environmental Protection
10 McJunkin Road
Nitro, WV 25143-2506

RE: Comments to Proposed Rules
WV Division of Environmental Protection
Title 38

Dear Mr. Hall:

Thank you for your recognition that changes are needed to our current surface mining regulations. I appreciate the effort made by you and your staff to change those regulations that burden our coal industry while maintaining a balance to insure the integrity of our natural environment.

I would like to voice my opinion on two of the proposed regulation changes:

Section 3.15 Approved Persons

I object to the requirement that a registered professional engineer be required to pass an examination to be considered an approved person. A permit application involves many areas of expertise. Professional mining engineers, civil engineers, geologists and a permit preparer (or coordinator), in a combined effort, provide the necessary detailed design, plans and information required in an application. All have their own area of expertise and professional responsibility. The proposed regulation is unfair to single out and require a R.P.E. to take an examination containing information that might be out of his or her area of expertise in order to be considered an approved person. Current regulations stipulate that an approved person must be either a registered professional engineer or a licensed land surveyor. No provision is made for anyone else to become qualified as an approved person. This in turn has left the R.P.E. no alternative but to certify all information contained in the application. To eliminate many concerns I would suggest including a provision for persons other than R.P.E.'s and L.L.S.'s to become approved persons and eliminate the required testing of professional engineers.

Section 3.28 Incidental Boundary Revisions (I.B.R.'s)

In my opinion, few regulations have had more negative impact on underground mining operations than this particular regulation. I am grateful that you have recognized our concerns and have proposed to ease this burdensome regulation. I do, however, have the following comments:

(a) A provision has been made to delete bonded acreage if overbonded by another valid permit. No mention is made as to whether or not the deleted acreage is subtracted from the permit's original maximum bonded acreage limit. If the area is covered by a new bond then the acreage should be subtracted from the original permit acreage limit so as not to create a "double jeopardy".

A provision is made stipulating that an I.B.R. cannot abate a violation unless equal acreage is deleted from the permit area. This raises some concern with surface facilities for an underground operation in which I.B.R. sites are not contiguous and the bonded acreage associated with each site is minimal to begin with. The only recourse would be to obtain a full new permit on a very small disturbance and this would not be in the best interest of either the state or the coal operator.

(b)(2) A provision has been made providing the director opportunity to grant a waiver for underground operations to exceed the 20% or 50 acre limitation. One concern is that a waiver is solely at the discretion of the director. Will all types of surface support facilities be eligible for a waiver? How will this be decided- by state wide policy or on a site by site basis? How will future directors interpret and respond to this provision?

Another approach to the I.B.R. issue for underground operations would be an acreage limitation based on the current 5-year mine plan. If a percentage of 20% were used for example (the same as surface mining), then the I.B.R. acreage would be proportional to the size of the 5-year mine plan. The larger the operation, the more surface support facilities that are needed, the more acres available for the I.B.R. permit process. Each new 5-year mine plan would have its own I.B.R. acreage limitation. The language for a waiver request could remain for those infrequently required I.B.R.'s for disturbances outside the 5-year mine plan boundary. I feel that this approach would meet many of the underground operators concerns.

I appreciate this opportunity to share with you my concerns and suggestions. If you have any questions or wish to have further discussions please feel free to contact me at 304 285-1235 or at the

Hall letter
Page three
September 17, 1992

address above.

Sincerely,

A handwritten signature in cursive script that reads "Sheirl L. Fletcher".

Sheirl L. Fletcher
Environmental Permit Coordinator
Northern West Virginia Region
Consolidation Coal Company

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Director's Office

SEPT 18 92

WV Division of
Environmental Protection



CONSOL Inc.

Consol Plaza
1800 Washington Road
Pittsburgh, PA 15241-1421
412-831-4000
FAX: 412-831-4916

September 17, 1992

Mr. Roger T. Hall
WV Division of Environmental Protection
10 McJunkin Road
Nitro, West Virginia 25143-2506

Dear Mr. Hall:

Consol Inc. submits the following comments on the Division of Environmental Protection's proposed rules under Title 38, Series 2. These proposed rules were filed with the Secretary of State's Office on August 17, 1992.

Sec. 3.15 Approved Persons

(b) We object to this requirement that registered professional engineers and registered mining and civil engineers must submit a resume and pass an examination administered by the Commissioner.

Registered professional engineers have already complied with national and state standards attesting to their educational and technical competency and their work experience. The code of ethics for professional engineers requires that they have a working knowledge of any work they certify or directly supervise those doing the work.

Some of West Virginia's arguments for having an approved persons requirement have been that a small number of engineers are lax relative to meeting these ethical standards and that disciplining does not occur by the WV Board of Registration. If this is indeed the case, then it seems that the Division's concerns should be directed towards the Board and their ability to police their own ranks or to respond to complaints about unethical conduct. Overall, we believe most professional engineers comply with the ethical standards established by the Board of Registration and consequently these approved persons testing requirements are totally unnecessary.

We also feel this approved person concept is a carryover from the past when the state regulatory agency was understaffed and undertrained and was perhaps incapable of adequate technical reviews. Certainly, this situation does not exist today within the Division of Environmental Protection. In fact, it is hard to imagine, with the permit review steps currently required, how any technically inadequate application could be even considered.

Mr. Roger T. Hall
Sept. 17, 1992
Page 2

We also understand that past practice was to also allow non-engineers and surveyors to become approved persons after taking a state administered test. If it is the Division's desire to continue this practice, then it should not be done at the expense of registered engineers and surveyors.

3.28 Incidental Boundary Revisions (IBRs)

We appreciate the positive changes proposed throughout this subsection. A simple process to add non-coal removal acres to a permit area is an absolute necessity. This is particularly true given that no simple process exists for adding acres through a permit revision or amendment process. Since coal mining is a dynamic activity, it is imperative that operators have some flexibility and latitude in adding non-coal removal acres. Our comments on specific paragraphs follow:

- (a) Proposed language states that acres cannot be added to abate an NOV unless equivalent permitted acres are deleted and transferred. We feel this requirement to transfer acres may not be possible in many situations, thus eliminating this as an option to abate NOVs for non-coal removal infractions. Given the time and effort needed to otherwise revise a permit, it seems the Division is needlessly complicating this process for both themselves and the industry.

We suggest the IBR provision be extended to cover all non-coal removal acres without the acre transfer requirement.

- (b)(2) The proposed language gives the Director the ability to waive the 50 acre limit for surface facilities associated with underground mines. Considering the nature and size of many underground mining operations, a 50 acre limit is grossly undersized. We believe the proposed new language acknowledges this problem by establishing a waiver system. However, we are concerned that the decision to waive the IBR amount for underground mines will be at the sole discretion of the Director. Under what conditions will the Director grant a waiver? If an operator asks for a waiver and is denied, will enough time remain to revise a permit?

How will succeeding Directors interpret this provision?

We suggest the 50 acre limit be increased for underground mines, perhaps based on the amount of underground acres projected in a five year mine plan area. The amount of non-coal removal surface acres needed to support the mining

Mr. Roger T. Hall
Sept. 17, 1992
Page 3

activity may be somewhat proportional to the amount of underground acres disturbed, consequently, large mines would get more IBR acres while small mines could be limited to 50 acres. This acreage amount should be reset to zero at the start of each five year permit period while making allowances for any IBR acres that obtain final bond release.

Section 16 Subsidence Control

The Director has not proposed any changes to this Section. We urge the Director to consider adopting a definition of structures and facilities that makes a clear distinction between private, public and agricultural structures (which should be covered) and commercial and industrial facilities where state case law should determine the coverage, if any, that should be provided.

We also endorse the comments submitted by Sheirl Fletcher of Consol Inc., Northern West Virginia Region dated 9/17/92 and those submitted by the West Virginia Coal Association. Thank you for your time.

Sincerely,



Gary E. Slagel
Director, Environmental
Regulatory Activities

GES2.31a:jk

Date: September 18, 1992

[illegible]

**PUBLIC HEARING RECORD
SITE SPECIFIC BONDING
WEST VIRGINIA SURFACE MINING RECLAMATION REGULATIONS
CSR 38-2**

A public hearing was held on August 14, 1992, beginning at 9 a.m. in the West Virginia Division of Environmental Protection's conference room, located at 10 McJunkin Road, Nitro, West Virginia. The purpose of the hearing was to receive comments on proposed regulations relating to site specific bonding. A list of attendees and a summary of oral comments follows.

A number of commenters objected to proposed amendments to the regulations at sections 12 and 14. They contend that these amendments exceed the authority granted to the director under Section 11a, Article 3, Chapter 22A of the West Virginia Code.

A number of commenters raised concerns about the implementation of subsection 11.6 of the regulations (site specific bonding). It was their position that the increased bonding requirements should be "phased-in" to reduce the economic impact on the mining industry and the surety industry. A few commenters contended that the rates were arbitrary.

Several commenters objected to the amendments to subsection 14.15 of the regulations, saying that the contemporaneous reclamation standards were unreasonable, too restrictive, and overly burdensome to the mining industry. It was proposed that no standards be imposed, and that the bonding rate be dramatically increased to cover all reclamation costs.

Several commenters objected to the proposed amendments to subsection 12.4 of the regulations because they felt it was a breach of faith, a softening of the State's obligations, and a weakening of standards for dealing with water quality problems resulting from bond forfeiture sites in the State.

A few commenters objected to the bonding rates, some saying they were too high, and others saying they were too low.

Some commenters objected to the proposed amendments at subsection 11.7 (Environmental Security Account) on the basis that it was unmanageable and that it would encourage mining in acid prone areas of the State.

Concerns were raised about proposed amendments at subsection 11.5 of the regulations (Open Acre Limit). It was felt that such an arrangement would weaken the effect of bond increases as a result of site specific bonding.

Two commenters objected to the deletion of some types of bonding instruments at subsection 11.2 of the regulations.

FAX TRANSMISSIONTO: David CallaghanDATE: 10/22/92 TIME: _____

PAGES

5LOCATION: WV Div. of EnvironmentalFROM: Blair GardnerFAX #: ProtectionLOCATION: Arch Mineral Corp.MESSAGE: 304-759-2526

FAX #: _____

PHONE #: 314-994-2721

STOCK # 84088

ALIGN ARROWS
WITH TOP OF
DOCUMENT**ARCH
MINERAL
CORPORATION**CITYPLACE ONE
ST. LOUIS, MISSOURI 63141-7058
(314) 994-2700

October 21, 1992

Mr. David Callaghan
Director
West Virginia Division of Environmental Protection
10 McJunkin Road
Nitro, West Virginia 25141-2506

Dear Dave:

I am writing to thank you and John Ailes for meeting with me and personnel from our West Virginia operations last Friday. You were very generous with your time, and I am most appreciative of your willingness to meet on such short notice.

As we explained on Friday, we are quite concerned about the effect of your proposed regulation on large scale, dragline operations. As our figures demonstrate (see Table attached) both Arch of West Virginia's Ruffner Mine and Catenary's Red Warrior operation will exceed the allowable maximum disturbance under your proposed regulations. I strongly suspect that each of the other dragline operations in West Virginia, Ashland Coal's Hobet operations and Amax's Cannelton subsidiary, will also exceed the 400-acre limitation proposed in the regulation.

I am appreciative that your agency may consider a variance procedure to authorize larger operations. Nevertheless, I am puzzled why a regulation would be proposed with a standard that cannot be attained. The consequence is that all dragline operations will have to submit modified permits. This can only lead to an additional burden to an already overworked agency. This is particularly true in an area in which, by your own admission, your staff lacks technical competence. That the proposed acreage limitation (400 acres) was selected, not as an empirical matter, but on a purely subjective basis, is even more disturbing.

Although we did not raise the issue, I hope you would agree that large scale mountaintop mining operations have not been the source of your agency's reclamation problems. Accordingly, your resolve to promulgate the proposed regulation is confusing. I hope you will reconsider your position.

If you remain convinced that an acreage limitation is necessary, I hope you will favorably consider the enclosed variance regulation. M-11-1-11

reclamation problems. Accordingly, your resolve to promulgate the proposed regulation is confusing. I hope you will reconsider your position.

If you remain convinced that an acreage limitation is necessary, I hope you will favorably consider the enclosed variance regulation. We believe it addresses the issue we raised with you. Should you wish to discuss it further, please contact Blair Gardner (314-994-2725) in St. Louis.

West Virginia Division of Environmental Protection
October 21, 1992
Page 2

Finally, I appreciate the opportunity to discuss with you the status of the current coal market. While you are, of course, correct in your view that the market ultimately reflects changes in regulatory policies, the market will not necessarily absorb all costs. Given the fact that coal competes inter-regionally and intra-regionally, and with other fuels, it is misleading to believe that coal companies simply can pass higher compliance costs along to utility customers. Even companies with long-term contracts having "pass through" provisions may not be able to get their purchasers to bear higher costs. The economic effect may be to lower the overall consumption of coal.

I know you are interested in the coal market. If it would be useful, I would be happy to ask our marketing group to prepare a presentation for you and other interested persons in your department.

Once again, many thanks for your time.

Very truly yours,

Walter Mueller, Jr.
Walter Mueller, Jr.
Executive Vice President-Operations

WM:ro

cc: K. Woodring - Ashland Coal, Inc. P.O. Box 6300, Huntington, WV 25771
Ron McAhron, Cannelton Coal Co., 315 70th St., Charleston, WV 25304
Benjamin C. Greene - WV Mining Reclamation Assn. 1624 Kanawha Blvd. East,
Charleston, WV 25311
William B. Raney - WV Coal Assn, 1301 Laidley Tower, Charleston, WV 25301
M. Ude - Catenary Coal Company
A. DiRico - Arch of West Virginia, Inc.

Table

<u>Operation</u>	<u>Projected Disturbed Acres</u>	<u>With Valley Fills</u>
Arch of West Virginia Ruffner	500	700
Catenary Coal Company Red Warrior	441	541

New Regulation

(b)(7)(A) For operations described under this subsection, the permittee may apply for a temporary variance to exceed the acreage or distance standards specified for the permitted operation. The Director may grant the variance upon a demonstration by the permittee that the following criteria will be achieved:

(i) the maximum excess disturbance under a permit will be either the lesser of fifty percent (50%) of the permitted area or seventy-five percent (75%) of the acreages authorized to be disturbed under this subsection;

(ii) the permittee provides a detailed, site specific description of the timing, sequence and areal extent of each progressive phase of the mining and reclamation plan to verify the amount of disturbance during each each six months that acreage in excess of the amount authorized under this section will remain disturbed and unreclaimed; and

(iii) the permittee provides an estimated cost of reclamation of the site for each six months during which the acreage disturbed exceeds the amount authorized under this subsection, and the cost per acre of reclaiming the permitted and disturbed acreage in the event that such cost exceeds the amount of bond which the Director is authorized by law to require as a condition of the permit.

(B) In the event that the cost of reclamation for acreage exceeds the amount of bond posted by the permittee, the Director may demand additional financial or commercial assurances of the permittee that the mining and reclamation operation occurs under circumstances sufficient to allow the permittee to complete the mining and reclamation plan as approved. Such

assurances may include the existence of a contract with a purchaser of the coal for a term sufficient to generate funds to complete reclamation, or that the permittee has secured all equipment necessary to complete mining and reclamation as proposed.

(C) As a condition of granting the variance authorized by this paragraph, the Director shall require the permittee to undertake the reclamation of abandoned mined lands equivalent to the projected reclamation bond of the acreage which exceeds the amount of acreage authorized to be disturbed under this subsection. In requiring this reclamation, the Director shall authorize the reclamation under the following conditions:

(i) sites eligible for reclamation shall be those which do not qualify for expenditure under West Virginia's share of Abandoned Mined Lands funds, which were abandoned after May 3, 1978, on which a forfeiture of bond has occurred, and against the operator of which the Director has no remaining legal remedies to compel reclamation;

(ii) the Director will provide lawful access to such properties during the course of reclamation;

(iii) the environmental performance standards applicable to the reclamation of qualifying sites shall be those applied to lands which qualify for the expenditure of Abandoned Mined Lands funds; and

(iv) the permittee must present a plan and schedule for the reclamation of such lands, or in lieu thereof, a schedule of payments to the Director to complete such reclamation, prior to the issuance of the Director's variance or permit.

MINGO LOGAN

COAL COMPANY

1000 MINGO LOGAN AVENUE
WHARNCLIFFE, WEST VIRGINIA 25651
TELEPHONE: 304-664-3873
FAX: 304-664-8930

Director
W.V.D.E.P.
10 McJunkin Road
Nitro, W.Va. 25143-2506

August 17, 1992

Public Hearing - August 14, 1992
RE: Proposed Regs. - Site Specific Bonding Requirements
of House Bill 217 (WV Code 22A-3-11a).

Dear Sir,

I would like to submit the following comments on the Proposed Regulations referenced above. There are several policy proposals which will jeopardize the profitability of our Multiple Seam Mining Operations as well as increase our cost of compliance.

Please accept the following comments for consideration prior to promulgating the proposed regulations:

SITE SPECIFIC BONDING

- * An applicant without a record of performance, a new company or out-of-state corporations looking to invest in West Virginia are penalized to the maximum with the highest conversion factor. This would be discriminatory to new businesses looking to invest into the industry and perhaps existing companies which need to expand with new corporations. Those entities would be penalized for not having previous histories with which to gauge their performances. These proposed regulations would further deter new businesses which this state needs to sustain a desirable tax base.
- * These proposed changes should not become retroactive for the existing active operations. This would create additional expenses for existing operations to comply with when they have been planned and designed under current regulations for profitability.
- * The differences proposed in the conversion factors on excess spoil between controlled placement (0.6) and durable rock fills (1.0) should be reconsidered due to the economics of construction realized with durable rock fills over the controlled placement fills. These conversion factors would need to be reversed in order to be realistic.

- * The amount of acres proposed should not be a factor within the bond table. The amount of acres to be disturbed would be subject to the ratio and limits proposed by these regulations.
- * Provisions should be made which allow the Director to extend the ratio/limit by waiver requests for operations in regard to multiple seam mining, multiple unit and draglines.
- * The proposed increase in bonding should be initiated in Phases to allow the industry to slowly absorb the additional costs which if imposed all at one time would result in failure to maintain competitiveness with current market conditions.

The proposed regulations in accordance with H.B 217 seems to have been exceeded by the Director in original intention. However, should the additional proposed changes endure the public comments and suggestions, please consider the following:

CONTEMPORANEOUS RECLAMATION

- * End-dump Durable Rock Fills should also be included in the exclusion of the 35%/250 Acre Ratio. Our common method employed, allows for the first and second lift installation through end-dumping a haulroad down to the toe area with care taken to achieve material segregation for proper drainage blanket construction. This method reduces sediments controlled by the pond. It results in compliance with discharge limitations.
- * There should be allowance for waiver requests to exceed the 35%/250 Acre Ratio with approval of plans. Multiple Seam Mining, especially using multiple units, require disturbance of larger acreages for development of working areas and to maintain a given level of production. The reclamation of the mined areas are kept within the limitations of reclamation if appropriate time and distant variances are approved in the use of multiple unit operations.

If an operator has demonstrated conscientious mining practices, approval of waiver requests should be considered when appropriate and viable planning is submitted and approved by WVDEP. This approval would be contingent to the Inspector's recommendations.

DOWNSLOPE PLACEMENT

- * Disturbances from "downslope placement", off permitted area, should be allowed to be incorporated under an Incidental Boundary Revision and not a new permit.
- * Two (2) consecutive downslope violations should not constitute permit suspension. The operator should not be treated as a violator who is knowingly and willfully placing materials "downslope".

MULTIPLE SEAM CONTOUR MINING

- * The verbiage for contour mining with multiple seams would be applied to first-cut-contouring during Mountaintop and Area Mining. The concept of casting spoil from a higher seam should only apply to a total contour operation. This casting concept needs addressed in reference to Mountaintop and Area Mining where the lowest seam is first contoured in advance of the upper horizon removals. This cut provides an effective safety bench and a more efficient temporary, "on-bench" drainage control system. Once this initial contour is advanced sufficiently, the upper horizons of the mountain or ridge are developed by dozing. The spoils are cast down (over several seam outcrops) to the lowest seam bench level which provides economical and effective mining of higher ratio areas while maintaining compliance standards.

Current regulation terminology does not address this advanced method of multiple seam, multiple unit Mountaintop or Area Mining concept. The Inspector is left to enforce or apply the contour mining concept when the lower seam highwall does not intersect the outcrop of the upper seam. This concept of intersecting highwalls undermines the efficiency of casting spoils from higher seams to the lower seam level when there is sufficient room on the lower seam level to maintain the placement and drainage control.

We appreciate the opportunity to comment and hope our comments will help to provide an effective implementation of the proposed regulations under which industry can maintain effective and economic mining while achieving the desired reclamation of the land.

Yours truly,

Raymond L. Maynard
Environmental Engineer

cc: Markus J. Ladd, President
Gid W. Maynard, Dir. of Engineering

**ARCH
MINERAL
CORPORATION**

CITYPLACE ONE
ST. LOUIS, MISSOURI 63141-7056
(314) 994-2700

October 21, 1992

Mr. David Callaghan
Director
West Virginia Division of Environmental Protection
10 McJunkin Road
Nitro, West Virginia 25141-2506

Dear Dave:

I am writing to thank you and John Ailes for meeting with me and personnel from our West Virginia operations last Friday. You were very generous with your time, and I am most appreciative of your willingness to meet on such short notice.

As we explained on Friday, we are quite concerned about the effect of your proposed regulation on large scale, dragline operations. As our figures demonstrate (see Table attached) both Arch of West Virginia's Ruffner Mine and Catenary's Red Warrior operation will exceed the allowable maximum disturbance under your proposed regulations. I strongly suspect that each of the other dragline operations in West Virginia, Ashland Coal's Hobet operations and Amax's Cannelton subsidiary, will also exceed the 400-acre limitation proposed in the regulation.

I am appreciative that your agency may consider a variance procedure to authorize larger operations. Nevertheless, I am puzzled why a regulation would be proposed with a standard that cannot be attained. The consequence is that all dragline operations will have to submit modified permits. This can only lead to an additional burden to an already overworked agency. This is particularly true in an area in which, by your own admission, your staff lacks technical competence. That the proposed acreage limitation (400 acres) was selected, not as an empirical matter, but on a purely subjective basis, is even more disturbing.

Although we did not raise the issue, I hope you would agree that large scale mountaintop mining operations have not been the source of your agency's reclamation problems. Accordingly, your resolve to promulgate the proposed regulation is confusing. I hope you will reconsider your position.

If you remain convinced that an acreage limitation is necessary, I hope you will favorably consider the enclosed variance regulation. We believe it addresses the issue we raised with you. Should you wish to discuss it further, please contact Blair Gardner (314-994-2725) in St. Louis.

Finally, I appreciate the opportunity to discuss with you the status of the current coal market. While you are, of course, correct in your view that the market ultimately reflects changes in regulatory policies, the market will not necessarily absorb all costs. Given the fact that coal competes inter-regionally and intra-regionally, and with other fuels, it is misleading to believe that coal companies simply can pass higher compliance costs along to utility customers. Even companies with long-term contracts having "pass through" provisions may not be able to get their purchasers to bear higher costs. The economic effect may be to lower the overall consumption of coal.

I know you are interested in the coal market. If it would be useful, I would be happy to ask our marketing group to prepare a presentation for you and other interested persons in your department.

Once again, many thanks for your time.

Very truly yours,

Walter Mueller, Jr. /bmj
Walter Mueller, Jr.
Executive Vice President-Operations

WM:ro

cc: K. Woodring - Ashland Coal, Inc. P.O. Box 6300, Huntington, WV 25771
Ron McAhrn, Cannelton Coal Co., 315 70th St., Charleston, WV 25304
Benjamin C. Greene - WV Mining Reclamation Assn, 1624 Kanawha Blvd. East,
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(iii) the permittee provides an estimated cost of reclamation of the site for each six months during which the acreage disturbed exceeds the amount authorized under this subsection, and the cost per acre of reclaiming the permitted and disturbed acreage in the event that such cost exceeds the amount of bond which the Director is authorized by law to require as a condition of the permit.

(B) In the event that the cost of reclamation for acreage exceeds the amount of bond posted by the permittee, the Director may demand additional financial or commercial assurances of the permittee that the mining and reclamation operation occurs under circumstances sufficient to allow the permittee to complete the mining and reclamation plan as approved. Such

assurances may include the existence of a contract with a purchaser of the coal for a term sufficient to generate funds to complete reclamation, or that the permittee has secured all equipment necessary to complete mining and reclamation as proposed.

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(iv) the permittee must present a plan and schedule for the reclamation of such lands, or in lieu thereof, a schedule of payments to the Director to complete such reclamation, prior to the issuance of the Director's variance or permit.

William A. DiRico, Jr.
President

ARCH OF WEST VIRGINIA, INC.
P. O. BOX 156
YOLYN, WEST VIRGINIA 25654

RECEIVED

Director's Office

TELEPHONE

792-8200

SEPT 0 1 92

WV Division of
Environmental Protection

September 1, 1992

Hand-Delivered

David C. Callaghan, Director
Division of Environmental Protection
W. Va. Department of Commerce, Labor
and Environmental Resources
10 McJunkin Road
Nitro, West Virginia 25143-2506

RE: Comments on Proposed Amendments to W. Va. Surface Mining and Reclamation
Regulations

Dear Director Callaghan:

Enclosed please find for filing the comments of Arch of West Virginia, Inc.
regarding the Division of Environmental Protection's proposed amendments to
the W. Va. Surface mining and Reclamation regulations, filed June 30, 1992.

Thank you for affording Arch of West Virginia, Inc. the opportunity to comment
on these proposed amendments. Please contact me at your convenience should
you wish to discuss any of these comments.

Sincerely,



William A. DiRico, Jr.
President

WADJr:esb
Enclosures

**COMMENTS OF ARCH OF WEST VIRGINIA, INC.
REGARDING PROPOSED AMENDMENTS TO THE
WEST VIRGINIA SURFACE MINING AND RECLAMATION REGULATIONS**

I. INTRODUCTION.

On June 30, 1992, the West Virginia Division of Environmental Protection ("DEP") filed with the Secretary of State proposed legislative rules amending the West Virginia Surface Mining and Reclamation Regulations, Title 38, Code of State Regulations, Series 2. The Fiscal Note accompanying the proposed amendments states that the objective of these rules is to establish a site-specific bonding program for surface mining operations in compliance with W. Va. Code § 22A-3-11a (H.B. 217, enacted October 16, 1991).

Arch of West Virginia, Inc. ("Arch") is a wholly-owned and independent operating subsidiary of St. Louis, Missouri-based Arch Mineral Corporation. Arch has two surface mining operations in Logan County, West Virginia, including our Ruffner Mine, which is one of the largest surface mines in West Virginia and uses a dragline to engage in a form of mining known as mountaintop removal.

Arch commends the DEP for its efforts in obtaining the necessary legislative authority and for proposing these regulatory amendments which will reform the bonding system in West Virginia. Based on several reclamation failures which have occurred in recent years, it is now clear that the alternative (flat-rate) bonding system employed in West Virginia has allowed bonds to be posted which are far from adequate to fund the performance of reclamation to current standards in the event of forfeiture. While (as

described below) Arch believes they may be improved upon in certain respects, the proposed regulations with respect to site-specific bonding are obviously the result of considerable study. Arch believes they represent a good framework for this new system, which the Legislature intended to be both flexible enough to allow for the consideration of site-specific factors and yet sufficiently structured to limit the subjectivity and discretion of the Division in determining the amount of the bond.

Arch does have some significant concerns, however, with respect to the scope of the proposed amendments. Specifically, we believe the proposed rules exceed the authority granted to the Division under W. Va. Code § 22A-3-11a(b) to the extent that they attempt to amend 38 W. Va. C.S.R. §§ 14.8 (steep slope mining) and 14.15 (backfilling and regrading). The legislation which authorized the Division to promulgate these site-specific bonding regulations provided for a special exception from the normal rulemaking procedure (allowing the Division to proceed to final adoption without submission to the Legislature) specifically for the purpose of implementing this new bonding system. The statute does not contemplate that any amendments to Section 14 of the regulations (performance standards) would be undertaken pursuant to this expedited grant of authority, and the proposed rules, in this respect, find no support in the law. While we obviously reserve our right to challenge these regulations in the future, for the convenience of the Division Arch outlines below its major

substantive concerns with respect to this portion of the proposed legislative rules.

Where possible, in the commentary that follows we have included both specific discussions of subsections which are proposed to be amended, as well as suggestions as to how these provisions might be re-written to satisfy Arch's concerns. It is our hope that this format will be helpful to the Division as it considers amendments to the proposed rules prior to final adoption.

Because certain of Arch's proposed changes alter DEP's language, we have set forth certain of these changes in two appendices. Appendix 1 incorporates Arch's changes to DEP's proposed regulations at subsection 14.15(b), discussed beginning on page 10. Appendix 2 sets forth an alternative proposal to the same portion of the regulations. Because these changes may be difficult to follow, we have struck words to be excluded, and underlined words to be included. We hope these appendices, in conjunction with the text, clarify our proposals.

II. COMMENTS REGARDING PROPOSED AMENDMENTS TO SECTION 11 (INSURANCE AND BONDING).

A. SUBSECTION 11.2(a)

Arch notes that in order to read correctly, the word "for" should be inserted at the beginning of the single sentence which comprises this subsection, and a comma should be inserted after the word "liabilities" in the fourth line. The purpose of this provision is apparently to allow for the re-adjustment of bond

amounts for permits which are transferred or assigned under 38 W. Va. C.S.R. § 3.25. However, the regulation does not specifically allow for an increase over existing bonds in order to address any deficiency which might be found by the Director. As proposed, the only recourse for a proposed transferee or assignee in the event that the Director finds the existing bond to be insufficient is to demonstrate to the Director that the new permit holder would have "the financial resources and capability to assume the liability."

The phrase "long-term environmental liabilities" is undefined. In addition, this provision should not apply to permits which are assigned pursuant to 38 W. Va. C.S.R. § 3.25(c), since liability under the bond and permit under such an arrangement remains with the original permittee. Finally, bonds are not always transferred or sold whenever a permit is transferred. The customary practice is for a bond to be replaced with a new bond. Moreover, a bond is not transferred or sold unless a permit has been transferred. The suggestion that bonds, in themselves, can be transferred is misleading and inconsistent with other provisions in the regulations.

Arch suggests that this provision be rewritten as follows:

For permits which are to be transferred or sold under the provisions of subsection 3.25 of these regulations and which have significant long-term environmental liabilities, the Director may require an adjustment of the bond amount such that the bond is sufficient to cover the liability or that the transferee demonstrate that it has the financial resources and capability to assume the liability.

B. SUBSECTION 11.6 (SITE-SPECIFIC BONDING)

As noted, Arch generally supports the Division's efforts to implement site-specific bonding in order to improve West Virginia's surface mining regulatory program. However, certain aspects of this proposed new section (most particularly, the factoring and criteria to be applied to surface mining operations) seem to reflect an unwarranted bias against modern, large-scale mountaintop removal operations, which is also reflected in the proposed changes to Section 14 of the regulations discussed below. In addition, the regulation should more clearly identify how the bonding changes will be implemented and administered.

- **Subsection 11.6(a).** This provision simply indicates that the site-specific bonding requirements will apply "After the effective date of this subsection. . ." This needs to be clarified, and Arch suggests that for purposes of both fairness and administrative simplicity, this subsection should be revised to specify that the site-specific bonding requirements will only apply to permit applications for which SMA Numbers are issued after the effective date of this subsection.

In addition, Arch suggests including an additional subparagraph following the currently proposed language in this subsection to confirm the procedure to be followed in the event that a particular area is included as a part of more than one permit. In this situation, it is important to recognize and incorporate the restriction found in W. Va. Code § 22A-3-11a(c)(1), that the amount of performance bond "shall not be...more than five

thousand dollars per acre or fraction thereof." Arch proposes the following language for this purpose:

When the same area is a part of more than one permit or proposed permit area, then the per-acre bond amount required for such area encompassed by more than one permit shall be only the higher amount calculated hereunder for any one permit including that area.

• Subsections 11.6(c), (d), (e), (f). A general concern with respect to all of the subsection 11.6 tables is that the factors of 0.2, 0.6, and 1.0 produce too many extreme and inequitable results, thereby distorting the significance of some criteria. For example, under subsection 11.6(c)(1)(B), a plan to use three excess spoil disposal fills results in a factoring which is three times higher than a plan to use two fills (0.6 versus 0.2); however, an applicant can plan to use up to three additional fills (for a total of six) and still have the proposed operation factored at 0.6.¹

Similarly, at subsection 11.6(c)(2)(C)(ii) and (iii), there is no valid reason for differentiating between conventional and highwall augers. The cost to reclaim the highwall is the same per linear foot. At subsection 11.6(d)(1)(A), a shaft or slope entry is penalized with a factor of 1.0, even though backfill material

¹ Arch notes that the text of § 11.6(c)(1)(B)(ii) incorrectly refers to a factor of "0.5" while the referenced table identifies a factor of "0.6." Arch also notes that § 11.6(c)(1)(B)(ii) should be revised to read "three to six fills. . ."; otherwise a plan calling for two fills is covered by both subparts (i) and (ii) of this subparagraph. Similarly, § 11.6(c)(2)(B)(i) and (ii) both apply to mining plans where two seams of coal are to be mined; (ii) should be revised to read "three or four seams of coal..."

may be in the immediate vicinity. The haulage distance (A) and the volume (B) are inappropriately weighted.

These and other subcriteria could be more fairly evaluated using linear factoring, as opposed to the currently proposed scheme.

- **Subsection 11.6(c)(5)(A).** In considering the violation history of the applicant as one of the subcriteria for assessing the historical performance of the applicant, the term "active permit" is undefined. We assume that the DEP means, by this phrase, "current permits not under approved inactive status." If this is not DEP's intent, this should be stated, or a definition of "active permit" should be provided.

In addition, the phrase "last full calendar year" is ambiguous. This should be replaced with ". . .the violation history period shall be the twelve (12) month period prior to the date the SMA number is issued. . ."

Consistent with similar exceptions found elsewhere in the program, we believe an additional proviso should be added to this subsection to the effect that "notices of violations and cessation orders which are the subject of currently pending reviews or appeals shall not be considered in determining the violation history of an applicant."

- **Subsection 11.6(c)(5)(B).** The concepts of "100%," "90%," and "70%" contemporaneous reclamation are not defined and are thus wholly discretionary measures. In addition, it does not seem appropriate to limit such an assessment of an operation's

"contemporaneous reclamation" status only to the public notice period, as opposed to some larger increment of time.

- **Subsection 11.6(c)(5)(B)(ii), (iii).** The phrase "negligence. . .in abatement. . ." in these subsections should read "delinquency. . .in abatement. . ." These provisions were apparently not meant to require an assessment of the operator's negligence in causing the violation, but rather, the operator's good faith in abating the violation.

- **Subsection 11.6(c)(6)(B).** Whether or not an applicant has received national or local awards for reclamation often depends upon the amount of effort expended in applying for, seeking out, and actively pursuing such recognition, as well as political factors unrelated to the relative success of reclamation as compared to an operator who does not seek out or have the ability to pursue such recognition. Therefore, Arch proposes that instead of receipt of awards, DEP should factor in a measure such as the amount of disturbed land reclaimed in the previous twenty-four (24) month period.

- **Subsection 11.6(g).** Subparagraph (2) should be revised to require that the Director hold an informal conference on an applicant's challenge to the per-acre amount derived under this subsection "unless the Director agrees that the amount proposed by the applicant is appropriate." Subparagraph (4) contains a typographical error; the reference presumably should be to W. Va.

Code § 22A-3-21, dealing with appeals to the Reclamation Board of Review.²

C. SECTION 12 (REPLACEMENT, RELEASE AND FORFEITURE OF BONDS).

Subsection 11.5(a)(1) of these proposed rules states that a general bond in the amount of seven hundred fifty dollars (\$750) per acre will serve as sufficient financial assurance that the revegetation requirements of Section 9 of the regulations will be satisfied. Consistent with this statement, Arch believes that 38 W. Va. C.S.R. § 12.2(c)(1) should be modified so that upon meeting the requirements for a Phase I bond release, a site-specific reassessment should be conducted. Assuming these requirements are met, the bond amount should be reduced to \$750 per acre, as specified in Subsection 11.5(a)(1), instead of the minimum 60% bond release now in effect.

In addition, permits should be assessed no less frequently than annually for the possibility of receiving credit (a reduction in required bonding level) for reclamation of areas or features previously counted in determining site-specific bond amounts. This would particularly be appropriate in cases in which supplemental bond had been posted for areas subsequently reclaimed.

² Arch questions whether this appeal route can be provided without an amendment to the statute governing the Reclamation Board of Review's jurisdiction. See W. Va. Code § 22-4-2.

D. SUBSECTION 14.8(a)(1).

Consistent with the expressed intent of DEP in promulgating this regulation, Arch proposes that the phrase "multiple seam operations" in the proposed new language of this subsection be replaced with "multiple seam contour operations (other than those subject to subsection 14.15(b)(5) of these regulations)." This would clarify that which is logically implied by the existing proposal, but would nonetheless avoid any unnecessary confusion during future enforcement efforts.

E. SUBSECTION 14.15(b).

As noted, Arch believes that the proposal to amend this subsection exceeds the authority granted to the Director under W. Va. Code § 22A-3-11a. The clear intent of that statute was to allow for the promulgation of a legislative rule implementing a site-specific bonding system. This does not require changes to the contemporaneous reclamation performance standards.

While preserving these objections, Arch does appreciate the Director's request for specific comments on this proposed rule and alternative proposals with respect to the application of these limits on dragline operations. Arch recognizes that changes in the regulation which establishes when an operation is deemed to be reclaiming contemporaneously with mining will be implemented either pursuant to these proposals or in the future. Arch agrees that some clarification is appropriate in order to provide both the inspection force and operators with greater certainty in knowing when a steep slope, multi-seam, mountaintop removal operation is

deemed to be in compliance. The existing regulations neither appropriately nor adequately address this type of operation.

- **Subsection 14.15(b) (introductory language):**

In order to confirm what has long been DEP policy, and avoid any misunderstandings in the future, Arch suggests that the following phrase be added at the end of the introductory paragraph to this subsection: "provided that where an operation consists of multiple seam mining, the time and distance limits established by this section shall start with removal of coal within the last seam mined. . ."

- **Subsection 14.15(b) (5) (A).**

The restriction of disturbed and unreclaimed acreage to 35% of the total permit acreage or 300 acres essentially precludes the development of any modern, multi-seam mountaintop removal projects in West Virginia. These types of operations must necessarily disturb different areas under a permit at various times, because different seams must be mined in order to meet multiple blending requirements imposed by customers. This results in a complex mining and reclamation plan which is carefully prepared and continuously revised as conditions warrant. The use of larger, more productive equipment (such as draglines and large shovels) in such operations must result in larger areas of disturbance than those allowed under the currently-proposed limits, particularly during the early phases of these operations.

These types of operations, however, are among the most well-planned and competitive in the State. These unduly burdensome

ratio and acreage limits on land disturbance are not rationally related to the probability of reclamation failure or the relevant potential cost of reclamation. As stated earlier, it appears that these limitations are not part of an attempt to implement site-specific bonding, but reflect a general misunderstanding of (and therefore bias against) large-scale multiple-seam or mountaintop removal operations. Contrary to DEP's "Summary and Statement of Purpose," any concerns with respect to the extent of reclamation liability associated with such operations is thoroughly addressed in subsection 11.6 of the proposed rules (under which multiple-seam and mountaintop removal operations are severely penalized as compared to the bond amount calculations for other types of mining operations).

Considering the site-specific bond which will be required for any such operation and the phased manner in which mountaintop removal operations must necessarily be completed, Arch would request that if the currently proposed limitations are retained then the language of this subsection should be modified to allow these ratio and acreage limits to be exceeded on the condition that the acreage which exceeds these limits would be bonded at the maximum per acre rate of \$5,000. (Arch also understands that, consistent with other subparagraphs, these limitations apply to single permits, and incorporates language that would clarify this.) Under this proposal the first sentence in subsection 14.5(b)(5)(A) would read as follows:

Disturbed and unreclaimed acreage, including excess spoil disposal sites, shall not exceed, on any single permit,

at any given time, thirty-five (35) percent of the total permit acreage, or three hundred (300) acres, whichever is less; provided, however, that a permittee which proposes to disturb acreage in excess of these limits will be required to bond this excess acreage at the maximum per acre rate of five thousand (5000) dollars.

Inadequacy of total bonding during mining appears to be the DEP's principal concern in this rulemaking. This proposal would certainly provide DEP with more than adequate assurance that the total amount of bond which exists at any given time in the operation would be sufficient to complete reclamation in the event of an operator's failure to do so, and would serve as a strong incentive for operators to (whenever possible) keep the amount of disturbance within the established limits. In connection with this change, Arch also proposes that during the semi-annual review of the ratio of disturbed acreage versus reclaimed or undisturbed acreage, any such "supplemental bond" should be released if the operation has returned to a ratio which is within the specified limits.

In the alternative, and at the very least, Arch proposes that the first sentence in subsection 14.5(b)(5)(A) be revised to read as follows:

Disturbed and unreclaimed acreage, including excess spoil disposal sites, shall not exceed, on any single permit, at any given time, the greater of fifty (50) percent of the total permit acreage, or five hundred (500) acres.

This alternative would recognize the greater amount of disturbance which is required during the initial phases of a mountaintop removal operation but still incorporates specific limits and the administrative simplicity of the currently proposed rule.

To our knowledge, the State has never experienced a reclamation failure at the type of large-scale operations to which this contemporaneous reclamation standard would apply. As indicated, Arch would submit that this is a result of the careful planning which is a necessary prerequisite to initiating any such operation and the fact that such operations are among the most productive and competitive in the State. It is, therefore, imperative that some modification to the currently proposed limits be undertaken; otherwise, the DEP would be in a position of discouraging (and in all probability, completely prohibiting) the very type of mining which is most productive and which, as has been demonstrated at Arch's operations in Logan County and by others, can be accomplished in full compliance with the environmental protection goals of the West Virginia program.³

• Subsection 14.15(b)(5)(B).

With respect to subsection 14.15(b)(5)(B), we do not believe it is reasonable to restrict this exemption only to certain types of excavation equipment (i.e., draglines), and would also propose that the capacity which should trigger this exemption should be forty (40) cubic yards, instead of fifty (50) cubic yards. Accordingly, Arch would suggest that the first phrase in this subsection be replaced with the following language: "On operations

³ Arch also suggests that the phrase "unreclaimed and undisturbed acreage" with respect to the exclusion for semi-permanent facilities should be "disturbed and unreclaimed acreage," consistent with immediately preceding language.

which utilize draglines, shovels or loaders with productivity rates exceeding the equivalent of a forty (40) cubic yard dragline. . ."

In subparagraph (i), it appears that the 400 acre restriction is meant to be applied to all disturbed and unreclaimed acreage (as defined in subsection 14.15(b)(5)(A)), rather than to only prestripping or benching acreage. To minimize repetition, the disturbed and unreclaimed acreage as defined in subpart (A) should be incorporated by reference in subpart (B)(i), and therefore "That areas cleared...systems in place" should be deleted. In addition, for the reasons described in the immediately preceding paragraphs with respect to § 14.15(b)(5)(A), Arch believes the twelve month and 400 acre limitations are unduly restrictive and would have a significantly detrimental effect on covered operations. Arch proposes that this subparagraph be revised as follows:

Prestripping or benching operations will not be more than twenty-four (24) months in advance of the dragline, shovel or loader operations. Disturbed and unreclaimed acreage (as defined in subpart (A) of this paragraph) may not exceed four hundred (400) acres for any single permit; provided, however, that a permittee which proposes to disturb acreage in excess of this limit will be required to bond this excess acreage at the maximum per acre rate of five thousand (5,000) dollars; and

In the alternative, and at the very least, Arch proposes that subparagraph (i) be revised to read as follows:

Prestripping or benching operations will not be more than twenty-four (24) months in advance of the dragline, shovel or loader operations and the disturbed, unreclaimed acreage, as qualified in subpart (A) of this paragraph, may not exceed five hundred (500) acres for any single permit; and

With respect to subparagraph (ii), Arch suggests (consistent with § 14.15(b)(4)) that the time limit for backfilling and regrading should be from coal removal, not from the initiation of excavations. Incorporating this and the other changes discussed above, Arch suggests that this subparagraph should be rewritten as follows:

Final backfilling and regrading will not be more than four (4) spoil ridges behind the dragline, shovel or loader pit or more than one hundred eighty (180) days after coal removal, whichever is less.

• Subsection 14.15(b)(5)(C). Considering that subsections 11.6(c)(1)(A) and (B) of the site specific bonding proposals already penalize single-lift fills, there should be no distinction made in this subparagraph. Additionally, because subsection 11.6(c)(1) penalizes any type of off-bench fill, Arch believes that further restriction here is unwarranted. However, Arch recognizes DEP's concerns with prolonged periods of inactivity on excess spoil fills. Therefore, conditioned on DEP's adoption of supplemental bonding on excess acreage in subparts (A) and (B) as proposed above, Arch proposes that subsection 14.15(b)(5)(C) be revised to read as follows:

Excess spoil disposal fills will be excluded from the calculation of disturbed acreage in subparts (A) and (B) of this subparagraph; provided, the fills are not inactive for periods exceeding sixty (60) days. Activity shall mean the placement of material and/or reclamation operations within the fill area.

In the alternative, and at the very least, Arch proposes that subsection 14.15(b)(5)(C) be revised to read as follows:

Excess spoil disposal fills will be excluded from the calculation of disturbed acreage in subparts (A) and (B) of this subparagraph; provided, the fills are not inactive for periods exceeding one hundred and twenty (120) days. Activity shall mean the placement of material and/or reclamation operations within the fill area.

Finally, the language of this provision needs to be revised to specify more precisely how it will be implemented. In the first paragraph of subsection 14.15(b)(5), Arch suggests that the phrase "after the effective date of this subparagraph, for existing or proposed" be deleted, as it is inconsistent with subparagraphs (D) and (E), and that it read "For surface mining operations on steep slopes..." In addition, subparagraph (D) should be revised to read that: "Permit applications for these types of operations which are pending, but had received an SMA number before July 1, 1992, shall be revised within 12 months of permit issuance, or of the effective date of this subparagraph, whichever is sooner, to contain a reclamation plan. . ." This would help clarify how existing operations need to come into compliance with this new rule, and which permit applications would need to be revised.

III. CONCLUSION.

Arch appreciates this opportunity to offer comments on the DEP's proposed amendments to the Surface Mining and Reclamation Regulations. Arch hopes that its comments will be carefully considered, and most particularly those addressing our very serious concerns with respect to the contemporaneous reclamation requirements for multiple seam or mountaintop removal operations.

Respectfully submitted this 1st day of September, 1992.

ARCH OF WEST VIRGINIA, INC.
P. O. Box 156
Yolyn, West Virginia 25654
(304) 792-8200

Appendix 1

Arch's proposed changes to WVDEP's Contemporaneous Reclamation Regulations

Alternate 1 - use of supplemental bonding

~~(5) After the effective date of this subparagraph, for existing or proposed~~ For surface mining operations on steep slopes which remove the entire coal seam(s) running through the upper fraction of a mountain, hill or ridge, or which partially remove multiple seams along the topographic contour, and where such operations utilize excess spoil disposal sites, the following contemporaneous reclamation requirements apply:

(A) Disturbed and unreclaimed acreage, including excess spoil disposal sites, shall not exceed, on any single permit, at any given time thirty-five (35) percent of the total permit acreage, or three hundred (300) acres, whichever is less; provided, however, that a permittee which proposes to disturb acreage in excess of these limits will be required to bond this excess acreage at the maximum per acre rate of five thousand (5000) dollars. The ratio of disturbed acreage versus reclaimed or undisturbed acreage shall be shown on progress maps submitted to the Director semi-annually or as otherwise required by the Director. The subject ratios shall be verified by the Director on the next regular inspection following receipt of the progress map. Reclaimed acreage shall be that portion which has been fully regraded to meet the standards for Phase I bond release, provided, that disturbed and unreclaimed and undisturbed acreage shall not include semi-permanent ancillary facilities, drainage control systems, primary access and haulage roads, and areas which are cleared but not grubbed, provided, however, that such areas have appropriate drainage control systems in place.

(B) On operations which utilize draglines, shovels or loaders with productivity rates exceeding the equivalent of a forty (40) cubic yard dragline bucket capacity of greater than fifty (50) cubic yards, and on which the operator permittee has demonstrated in the approved reclamation plan that the contemporaneous reclamation provisions of subparagraph 5 of this paragraph are infeasible, the following standards for contemporaneous reclamation apply:

(i) Prestripping or benching operations will not be more than ~~twelve (12)~~ twenty-four (24) months in advance of the dragline, shovel or loader operations. Disturbed, unreclaimed acreage as defined in subpart (A) of this paragraph, may not exceed four hundred (400) acres for any single permit, provided that areas cleared but not grubbed are excluded from this determination, provided, however, that such areas have appropriate drainage control systems in place; provided however, that a permittee which proposes to disturb acreage in excess of this limit will be

required to bond this excess acreage at the maximum per acre rate of five thousand (5000) dollars; and

(ii) Final backfilling and regarding will not be more than four (4) spoil ridges behind the dragline, shovel or loader pit or more than one hundred eighty (180) days after initial dragline excavations, coal removal, whichever is less.

(C) ~~Excess spoil disposal fills which are constructed in a controlled placement manner (conventional fills with rock core chimney drains, or fills utilizing underdrain rock blankets and placed in fifty (50) foot lifts).~~ will be excluded from the calculation of disturbed acreage in subparagraphs (A) and (B) of this paragraph, after the first and succeeding lifts are regraded, mechanically stabilized, and vegetated provided the fills are not inactive for periods exceeding sixty (60) days. Activity shall mean the placement of material and/or reclamation operations within the fill area.

(D) ~~Permit applications for these types of operations which are pending as of the effective date of this subparagraph but had received an SMA number before July 1, 1992, shall be revised within twelve (12) months of permit issuance, or of the effective date of this subparagraph, whichever is sooner, to contain a reclamation plan which requires compliance with the provisions of subpart (A) or (B), whichever is applicable, of this subparagraph.~~

(E) Existing permits for these types of operations containing a reclamation plan which does not conform to the provisions of subpart (A) or (B), whichever is applicable, of this subparagraph, must be revised within twelve (12) months after the effective date of this subparagraph. Such revisions will reflect full compliance with the subject provisions and will be subject to approval by the Director. Full compliance with the revised reclamation plan will be required within twelve (12) months after approval.

Appendix 2

Arch's proposed changes to WVDEP's Contemporaneous Reclamation Regulations

Alternate 2 - no provision for use of supplemental bonding

(5) ~~After the effective date of this subparagraph, for existing or proposed~~ For surface mining operations on steep slopes which remove the entire coal seam(s) running through the upper fraction of a mountain, hill or ridge, or which partially remove multiple seams along the topographic contour, and where such operations utilize excess spoil disposal sites, the following contemporaneous reclamation requirements apply:

(A) Disturbed and unreclaimed acreage, including excess spoil disposal sites, shall not exceed, on any single permit, at any given time thirty-five (35) percent of the total permit acreage, or three hundred (300) acres, whichever is less, the greater of fifty (50) percent of the total permit acreage, or five hundred (500) acres. The ratio of disturbed acreage versus reclaimed or undisturbed acreage shall be shown on progress maps submitted to the Director semi-annually or as otherwise required by the Director. The subject ratios shall be verified by the Director on the next regular inspection following receipt of the progress map. Reclaimed acreage shall be that portion which has been fully regraded to meet the standards for Phase I bond release, provided, that disturbed and unreclaimed and undisturbed acreage shall not include semi-permanent ancillary facilities, drainage control systems, primary access and haulage roads, and areas which are cleared but not grubbed, provided, however, that such areas have appropriate drainage control systems in place.

(B) On operations which utilize draglines, shovels or loaders with productivity rates exceeding the equivalent of a forty (40) cubic yard dragline bucket capacity of greater than fifty (50) cubic yards, and on which the operator permittee has demonstrated in the approved reclamation plan that the contemporaneous reclamation provisions of a subparagraph 5 of this paragraph are infeasible, the following standards for contemporaneous reclamation apply:

(i) Prestripping or benching operations will not be more than ~~twelve (12)~~ twenty-four (24) months in advance of the dragline, shovel or loader operations. Disturbed, unreclaimed acreage as defined in subpart (A) of this paragraph, may not exceed four hundred (400), five hundred (500) acres for any single permit, provided that areas cleared but not grubbed are excluded from this determination, provided, however, that such areas have appropriate drainage control systems in place; and

(ii) Final backfilling and regrading will not be more than four (4) spoil ridges behind the dragline, shovel or

loader pit or more than one hundred eighty (180) days after initial dragline excavations, coal removal, whichever is less.

(C) ~~Excess spoil disposal fills which are constructed in a controlled placement manner (conventional fills with rock core chimney drains, or fills utilizing underdrain rock blankets and placed in fifty (50) foot lifts)~~ will be excluded from the calculation of disturbed acreage in subparagraphs (A) and (B) of this paragraph, ~~after the first and succeeding lifts are regraded, mechanically stabilized, and vegetated~~ provided the fills are not inactive for periods exceeding one hundred twenty (120) days. Activity shall mean the placement of material and/or reclamation operations within the fill area.

(D) Permit applications for these types of operations which are pending ~~as of the effective date of this subparagraph, but had received an SMA number before July 1, 1992, shall be revised within twelve (12) months of permit issuance, or of the effective date of this subparagraph, whichever is sooner, to contain a reclamation plan which requires compliance with the provisions of subpart (A) or (B), whichever is applicable, of this subparagraph.~~

(E) Existing permits for these types of operations containing a reclamation plan which does not conform to the provisions of subpart (A) or (B), whichever is applicable, of this subparagraph, must be revised within twelve (12) months after the effective date of this subparagraph. Such revisions will reflect full compliance with the subject provisions and will be subject to approval by the Director. Full compliance with the revised reclamation plan will be required within twelve (12) months after approval.

Mr. Tom Martin
1008 Valley Rd.
Charleston, WV 25302

Mr. Roger Hall
WVDEP
10 McJunkin Rd.
Nitro, WV 25143-2506

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WV Division of
Environmental Protection

COMMENTS RELATING TO PROPOSED REGULATIONS

Section 11.3(a)(1)-Given the current level of concern regarding the solvency of insurance companies in the country, I'd suggest that specific approval criteria be established for the acceptance of a Surety company in the bonding program. Financial soundness is best determined by those who are in the rating business, i.e. A.M. Best, Moody's, S&P and Duff & Phelps. Specific rating ranges (AA or better) should be included in the Regulations to insure that the State will have reasonable assurances that funds will be available when called for.

Section 11.3(b)(1)(A) & (B)-These two sections are excellent as copied from the WV Code. However they are also somewhat restrictive. I would suggest that the scope of these vehicles be expanded, allowing the operator to use "a pooled fund consisting entirely of the same", i.e. a mutual fund.

DEP will find that there are many advantages to the use of these funds. First, it will greatly reduce the paperwork tracking performed by DEP. It is a more flexible vehicle for adding money to a bond. It is much easier and faster to obtain the cash if need be. It is more secure than an individual government bond. And it avoids the confusion associated with multiple bonds or CDs posted by an operator both at DEP and with the operator. All in all, it is the same vehicle as stated in the Reg's. but much easier and more convenient to work with.

Section 11.3(b)(1)(B)-"Full faith and credit general obligation bonds" should be modified to read "Municipal bonds". This would allow the operator to purchase both general obligation and revenue municipal bonds; both of which are issued by the State and municipalities.

Section 11.3(c)(1)-This section should again be made less restrictive by rewording the opening sentence to read "The Director may authorize...through the establishment of an escrow account payable on demand only to the Director..." By doing this, Section 11.3(c)(4) can be deleted. In its place, the wording of Section 11.3(e)(2)(A)(iii) should be used("Provisions of the escrow account shall be in accordance with paragraph (b) of this subsection.")

Thank-you

Tom Martin

8/19/92



HOBET MINING, INC.

P. O. BOX 305 • MADISON, WEST VIRGINIA 25130 • PHONE (304) 369-6780

September 1, 1992

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WV Division of
Environmental Protection

David Callaghan, Director
WV Division of Environmental Protection
10 McJunkin Road
Nitro, West Virginia 25143-2506

Dear Director:

Hobet Mining would like to submit the following comments on the proposed rule changes for Title 38 Series 2, WV Surface Mining and Reclamation Regulations.

The specific intent of the Legislature in the enactment of HB217 was to establish and implement a site-specific bonding system that directed a conclusive amount of bond only. It is therefore the opinion of Hobet Mining that any proposed rule change other than site specific bonding or more specifically Section 11.6 of the current regulations is outside the intent of HB217. Any language or proposed regulations other than Section 11.6 should be withdrawn from the amendment to the rule.

The following comments are offered for the entire proposed rule 38.2 as follows.

Section 11.2 (d)

The original language regarding "reasonable period" should be reinstated. The proposed 15 day time period is completely unrealistic. The original time period of 90 days was a reasonable realistic time period.

It is not clear as to whether an operation can continue mining under the 15 or 90 day period of time specified earlier in this sub-paragraph. The last sentence of this paragraph is not clear as to when the mining operations are not to resume, and how will this relates to an issue that is following course of due process.

11.2(e)

The submittal of equivalent bond amount should be the only criteria to meet in selling or assuming an operation. This section allows too much discretion to the Director in evaluating an issue that is not related to bonding. If the bond amount is sufficient then the test should be met. If an assignee can supply an equivalent bond amount, there should be no further requirements.

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11.4

I would suggest a sub-section (b) that would allow for an applicant to incrementally release portions of a permit that was fully bonded for the entire proposed disturbed area. This would allow an operator to reduce the bond on a permit that is reclaimed and has completed final vegetation on the majority of the proposed permit. Also, this would help on existing permits that must be phased in to the new bonding limits. Incremental release would be very simple to administrate on a permit that bonded for full disturbance.

11.5

Reclamation should be deemed complete if, backfilling and regrading are completed in accordance with the approved reclamation plan. The applicant is already posting a fixed rate general bond for the entire permit area, in the amount of \$750.00/acre which would more than cover revegetation costs the permit area. The regraded area is also required in other sections to be temporarily seeded to prevent erosion.

11.5(b)(1) & (C)(1)

I suggest the word overlay be struck. This proposes a transparent mylar sheet that cannot be folded. The same purpose could be served with a phase map outlining the proposed permit area.

11.6

It appears that large surface mines have been unfairly targeted by these regulations, without any history of forfeiture or failure to reclaim. This section as it is written has the effect of being punitive rather than performance related.

11.6 (b)(2)

Statistically reviewing past forfeitures, what has the higher degree of risk for probable bond forfeiture a large mountaintop or area mine or a permit less than 200 acres? How does this result figure into the factors and matrix?

11.6(C)(1)(A)(ii) and (iii)

Side hill fill are more costly and have high potentials for failure than durable rock fills. It appears that they are rated incorrectly. A true head of hollow end-dump durable rockfill would be cheaper to reclaim than a multiple lift valley fill.

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11.6(C)(4)(A)(i), (ii) and (iii)

Is it possible to propose a reclamation plan "without" any specific time and distance criteria? Hobet recommends the DEP maintain the current regulatory time and distance standards. Can a reclamation plan be non-specific or "vague" and opt for the higher conversion factor of 1.0.

How is the use of durable rockfills or the mining methods a function of the sequence and timing of reclamation? Could you have a reclamation variance and still receive a factor 0.2?

11.6(C)(4)(B)

Is the size of the proposed permit area a function of the potential risk of bond forfeiture, and how is this supported by the historical data.

11.6(C)(4)(C)

How is the type, size, and number of earth moving equipment a measure of potential risk of bond forfeiture. It appears that this is a punitive category targeted at large shovels or draglines. The larger the equipment or the larger spreads of equipment, the greater the potential to reclaim in a more expedient manner.

11.6(C)(5)(A)

Violation history should reflect the violations per permit acre. This would be a more equitable assessment of performance. By not equating the size of the permit into the formula, then this category is biased and has a punitive effect toward large permit areas, which are typical of large surface operations.

11.6(C)(5)(B)

How can you equate the level of contemporaneous reclamation as a percentage? If a permittee is not 100% current with the approved reclamation plan then the permittee is obviously not complying with the terms and conditions of the permit and therefore should be assigned a notice of violation. This is very vague and it is unclear as to how DEP could quantify contemporaneous reclamation as a percentage.

11.6(C)(6)(a) .

The value of -800 appears too low to reflect the environmental improvements of a remining operation. It appears that having completed a remining operation at sometime in the past would qualify an operator for that credit on all future permits even if those permits do not specifically involve remining. Hobet recommends that the credit be applied only to the permit application that specifically contemplates remining as specific permit.

12.2(d)

This section appears to conflict with section 11.5, since in effect portions of the bond are being released as the "Open-Acre" area moves from a reclaimed area to a new mining area on the same permit. Suggest use of term "general bond" here.

12.2(e)

This section has the effect of attaching the reclamation bond to water quality.

There are no other primacy states nor is it required by OSM in states under their regulatory authority to require bonding of water. This is inconsistent with the intent and language of P.L. 95-87. Presently, there is little or no criteria establishing the water quality necessary to release a permit. If baseline water quality is met, can the permit be released? Hobet Mining opposes the bonding of water quality.

12.5

Hobet opposes the expenditure of the Special Reclamation Fund for the treatment of water or for the improvement of water quality sites. The Special Reclamation Fund should only be used for reclamation of mine sites that were forfeited after August 3, 1977. The act only contemplates "on the ground" reclamation such as backfilling, regrading, and revegetation. This proposed regulation exceeds the intent and language of the act. Further, it should be clear that these monies in the Special Reclamation Fund cannot be expended on sights that were forfeited prior to August 3, 1977.

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14.8(a)(1)

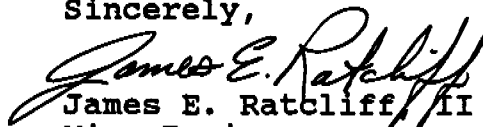
How will this new language effect the fill section of a temporary drainage bench or the fill section of a haulroad? Is this going to effect the areas within a permitted valley fill or will they be exempt? This exceeds the federal regulations which consider downslope placement a problem below the lowest permitted coal seam. What is the basis for this proposed change?

14.15(b)

Hobet Mining finds the proposed time and distance standards excessive in that they have a punitive effect rather than being performance related. These proposed regulations exceed the federal regulations and will put operations in West Virginia at a severe disadvantage when compared to border states which are not under this excessive operational constraint. What wre the facts and findings of the Division of Environmental Protection in arriving at this proposed regulation?

Thank you for this opportunity to comment on these proposed regulations. If you have any questions, please feel free to call me.

Sincerely,


James E. Ratcliff, II
Mine Engineer

/jlb



WEST VIRGINIA COAL ASSOCIATION

September 1, 1992

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SEPT 01 92

WV Division of
Environmental Protection

Roger T. Hall
WV Division of Environmental Protection
10 McJunkin Road
Nitro, WV 25143

SUBJECT: Comments to regulations regarding site specific bonding and other matters

Dear Mr. Hall:

In addition to the specific items mentioned in our testimony at the public hearing held on these regulations on August 14, 1992, the following comments are provided for consideration and action.

First, to reemphasize a point made at the public hearing. We strongly feel the changes proposed in Section 12 relative to water quality as a bonding requirement and those in Section 14 regarding requirements for contemporaneous reclamation are beyond the scope of House Bill 217, specifically, and the remainder of Chapter 22A, Article 3. These proposed changes are also beyond any requirement of federal law or regulation.

We contend that all contemporaneous reclamation regulations should be deleted from this set of proposals. However, in the event these sections of the proposals are not deleted, we advance comments as to changes which must be made to DEP's proposals. Our recommended changes are necessary if the regulations are to be workable and if compliance is expected from current operations in the state. These changes are contained in the following presentation.

SPECIFIC COMMENTS:

11.2(d) An operator should not be subject to a violation if the surety company and/or other third party provider of bond should go out of business. The operator has no control over such situations. The operator is expected to provide bond and should be given time to provide such bond in instances where the operator has no control over the surety. To immediately write a violation is inappropriate, particularly when considering the effect it has on the history of an operator's performance.

11.3 The deletion of certain forms of bond, i.e., real property, whole life insurance policies and letters of credit, is inappropriate and not authorized. These forms of bonding are accepted by OSM and other states. No explanation is provided as to why such bonds are considered to be unacceptable.

11.5 Remove the words "and vegetated" (line #12) and the words "and the provisions of subsection 14.15 of these regulations" (line #13-14).

The restriction of requiring vegetation is unclear and should not be included in this newly devised process, since the basic bonding amount will more than adequately cover the costs of vegetation. The true test which needs to be addressed is the backfilling and regrading, before the bond is shifted.

The second phrase should be taken care of with an approved reclamation plan. It is unnecessary to reference this section (14.15) of the regulations and also refer to an approved reclamation plan. If a reclamation plan is approved, it certainly seems likely it will be done within the parameters of existing regulations.

11.6 The new site specific bonding rates should not be applicable to existing permits. This was agreed to during the deliberations and discussions surrounding passage of the House Bill 217. This must be clearly stated.

11.6(c)...

(2)(A)(iii) Remove the word "predominantly". The meaning is unclear and it is ambiguous.

(4)(A) "Contemporaneous" is not defined and unclear. It should be removed.

(5)(A) This subsection must include consideration of the appeal process and the final disposition of violations. As currently written, consideration is only given to the writing of violations. Violations under appeal should not be considered.

(5)(B)(i)/(ii)/(iii) "contemporaneous" is not defined and is unclear. It should be removed.

(6)(A) "remining" must be defined in practical terms, based on site specific conditions of existing and previously conducted operations. The elusive definition of a "remining" operation, as now being permitted must not be used here. This is particularly true since there have been so few permitted.

(6)(A)(ii) "improved water quality" must be defined in accordance with state law and it must reference the premining condition of water. As written, it has no point of reference. Also, to require "total" elimination of highwalls in every case is inappropriate with the law regarding previously mined areas. As written, "total" elimination must occur if consideration is to be given in this category.

(6)(A)(iii) Again, the reference to "remining" is not definitionally clear. It must be clarified in terms more appropriate than the official "remining" now being pursued. The reference to "water quality meets effluent limits and water quality standards" is not accurate as the two requirements could be exclusive of one another. The discharge should meet the effluent limits as determined for the "remining" permit!

11.6(d)...

...(1)(A)/(B)/(C)

...(2)(B) Proposed maximum amount for slope and vertical shaft mines is unjustified. The reclamation effort for these type facilities is much less than other mines.

11.6(d) (3) This language should exclude roads and ponds.

11.6(d) (4) Clarify the language as to how the matrix would apply to a separate operation and/or a surface operation.

11.6(d) (5) (A) This subsection must include consideration of the appeal process and the final disposition of violations. As currently written, consideration is only given to the writing of violations. Violations under appeal should not be considered.

11.6(d) (5) (B) (i)/(ii)/(iii) "contemporaneous" is not defined and is unclear. It should be removed.

11.6(d) (6) (A) The word "gratuitous" must be defined so as to clarify exactly what constitutes such reclamation. Must it be bonded?

11.6(e) How does this criteria correspond to the criteria shown for preparation plants on underground mining operations? Is it duplicative? If so, it should be clarified to indicate that prep plants would be considered only once.

11.6(e)(1)(B)/(iii) The word "existing" should be removed from both of these sub-sections. These new regulations are not to be applicable to existing mining operations.

11.6(e)(2) The word "existing" should be removed from this sub-section. These new regulations are not to be applicable to existing mining operations.

11.6(e)(4)(A) This subsection must include consideration of the appeal process and the final disposition of violations. As currently written, consideration is only given to the writing of violations. Violations under appeal should not be considered.

11.6(e)(4)(B) (i)/(ii)/(iii) "contemporaneous" is not defined and is unclear. It should be removed.

11.6(f) This section must distinguish between stand-alone disposal sites and operations which are disposing of coal refuse in a pit.

11.6(f)(2)(B) Is acid/base accounting appropriate for coal refuse? If not, then a more appropriate testing procedure must be established.

11.6(f)(4)(A) This subsection must include consideration of the appeal process and the final disposition of violations. As currently written, consideration is only given to the writing of violations. Violations under appeal should not be considered.

11.6(f)(4)(B)(i)/(ii)/(iii) "contemporaneous" is not defined and is unclear. It should be removed. Language in two of the sub-sections contains the word "concurrent", which is not defined and should be removed.

11.7 This section must include a process by which the historical performance of an operator is recognized, despite what the testing and analysis for potential acidic conditions might indicate. Simply put, there are many operators who have performed in acid potential conditions without affecting water quality, or who have improved water quality.

This section must also recognize Section 23 of Chapter 22A, Article 3 of the Code of West Virginia. The pre-mining condition of water quality must be recognized and used as a basis of comparison for whether the true intent of the law has been satisfied.

12.2(d) Does this section sufficiently provide for the incremental release of bonds? Such incremental release is authorized by the federal law regulations as well as numerous other state's programs.

12.2(c) Delete this sub-section in its entirety.

The language 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 DEP, 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 changed, 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 DEP, 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 operations, which had to equal or improve the quality of existing water or the bond was never 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 actions 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 DEP'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. 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 existing and proposed proposals are arbitrary, capricious and totally ignore existing state and federal law and regulations.

12.4(e) Deleted section in this proposal. This sub-section should be reestablished for purposes of time limitation regarding new standards.

12.4(e) This is the newly proposed sub-section (e). The word "may" should be changed to "shall" in the second sentence of this sub-section.

14.5(b) The proposed language should be deleted and the original language reinserted.

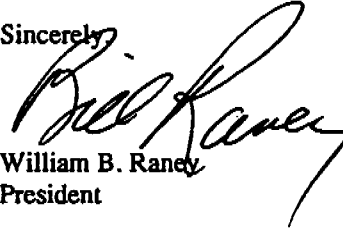
14.5(c) The proposed language should be deleted and the original language reinserted.

14.8(a)(1) The new language must be specifically clarified to indicate that it applies only to multiple seam "contour" operations. Backfilling to a standard of a particular static safety factor should be the only objective of the regulations.

14.11 Delete this section in its entirety and replace with the language contained in 30.CFR 816.131 and 817.131.

14.15 Delete the proposed section in its entirety and replace with the language attached and reflected as Exhibit 1.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Rancey", written in a cursive style.

William B. Rancey
President

WBR/sjd
Enclosure

ALTERNATIVE PROPOSAL

Title 38
Series 2
Section 14

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 of 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. All spoil must be placed in such a manner that the final surface is mechanically stabilized using track equipment or other equivalent means.

(b) Time Limits. Grading, backfilling, and water management practices shall be kept current as follows:

(1) Where the operation consists of single seam 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 of one thousand five hundred (1,500) linear feet. For the purposes of Section 14.15 (b) (1, 2, and 3) the term "augering" shall include all means of mechanical highwall mining, such as but not limited to conventional augers, thin seam miners, and highwall miners.

(2) Where the operation consists of single seam 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) Where the operation consists of area mining only, on slopes which are less than 20 degrees, the backfilling and grading shall not be more than two spoil ridges or mining cuts behind the pit being worked. The maximum linear feet of open pit shall not exceed three thousand (3,000) feet at any time and backfilling and grading must follow mineral removal within one hundred eighty (180) days.

ALTERNATIVE PROPOSAL

Title 38
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Section 14

(5) After the effective date of this subparagraph, for existing or proposed surface mining operations on steep slopes which remove the entire coal seam(s) running through the upper fraction of a mountain, hill or ridge, or which partially remove multiple seams along the topographic contour, and where such operations utilize excess spoil disposal sites, subject to the provisions of 14.15 (d) and (j) the following contemporaneous reclamation requirements apply:

(A) Disturbed and unreclaimed acreage, including excess spoil disposal sites, shall not exceed at any given time five hundred (500) acres. The ratio of disturbed acreage versus reclaimed or undisturbed acreage shall be shown on progress maps, or by other equivalent means, submitted to the Director annually, or as otherwise required by the Director. The subject ratios shall be verified by the Director on the next regular inspection following receipt of the progress map. Reclaimed acreage shall be that portion which has been fully regraded to meet the standards for Phase I bond release, provided, that unreclaimed and undisturbed acreage shall not include semi-permanent ancillary facilities, drainage control systems, primary access and haulage roads, and areas which are cleared but not grubbed, provided, however, that such areas have appropriate drainage control systems in place.

(B) On operations which utilize draglines or stripping shovels with a bucket capacity of greater than forty (40) cubic yards, and on which the operator has demonstrated in the approved reclamation plan that the contemporaneous reclamation provisions of subparagraph (5)(A) of this paragraph are infeasible, the following standards for contemporaneous reclamation apply:

(i) Prestripping or benching operations will not be more than twenty four (24) months in advance of the dragline or shovel operations or exceed five hundred (500) acres for any single permit, provided, that areas cleared but not grubbed are excluded from this determination, provided, however, that such areas have appropriate drainage control systems in place; and

(ii) Backfilling and regrading will not be more than four (4) spoil ridges behind the pit being worked, or more than one hundred eighty (180) days following mineral removal.

ALTERNATIVE PROPOSAL

Title 38
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Section 14

(C) Excess spoil disposal fills will be excluded from the calculation of disturbed acreage in subparts (A) and (B) of this subparagraph provided the fills are not inactive for periods exceeding one hundred twenty (120) days. Activity means the placement of material and/or reclamation operations within the fill area.

(D) Permit applications for these types of operations which are pending, but had received an SMA number before July 1, 1992 shall be revised within 12 months of permit issuance, or of the effective date of this subparagraph, whichever is sooner, to contain a reclamation plan which requires compliance with the provisions of subpart (A) or (B), whichever is applicable, of this subparagraph.

(E) Existing permits for these types of operations containing a reclamation plan which does not conform to the provisions of subpart (A) or (B), whichever is applicable, of this subparagraph, must be revised within twelve (12) months after the effective date of this subparagraph. Such revisions will reflect full compliance with the subject provisions and will be subject to approval by the Director. Full compliance with the revised reclamation plan will be required within twelve (12) months after approval.

(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) Alternative . Alternative time, distance and/or area limitations may be approved by the Director where the permittee demonstrates in the site specific mining and reclamation plan that site conditions and/or operational requirements, justify alternative limitations.

(j) Exclusion . The Director may approve deviations from the approved time, distance, and/or area limitations when conditions beyond the operator's control make adherence to the established guidelines impractical. NOTE: (j) is proposed as a new paragraph. No changes are proposed to paragraphs (e), (f), (g), (h), or (i).

ALTERNATIVE PROPOSAL

14.8 (a)(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. Casting of spoil from a higher seam to a lower seam in multiple seam contour operations may only occur where: the highwall of the lower seam intersects the outcrop of the upper seam; the lowest seam is mined first or in advance of the upper seams; and minimum bench widths based on slopes are established on the lower bench sufficient to accommodate both spoil placement from the upper seam and bench drainage structures.



WEST VIRGINIA MINING
AND RECLAMATION ASSOCIATION

1624 KANAWHA BOULEVARD, EAST • CHARLESTON, WEST VIRGINIA 25311 • (304) 344-5318

RECEIVED

Director's Office

SEPT 01 92

WV Division of
Environmental Protection

September 1, 1992

Mr. Roger T. Hall
WV Division of Environmental Protection
10 McJunkin Road
Nitro, West Virginia 25143

RE: TITLE 38 - PROPOSED WEST VIRGINIA SURFACE MINING AND
RECLAMATION REGULATIONS

Dear Roger:

On behalf of our more than 350 member companies, both directly and indirectly involved in the mining of coal, we are pleased to provide written comment to the above-referenced regulations that were filed with the Office of the Secretary of State on or about June 30, 1992.

38-2-11.2(d) - A change from 90 days to 15 days is an unreasonable reduction in the amount of time and, in fact, would prohibit obtaining bond coverage which could result in suspension or revocation of a permit. If it is necessary to shorten this time period, I would suggest 60 days as a reasonable period.

38-2-11.2(e) - This paragraph should be deleted in its entirety as there is no statutory or other requirement that gives the director authority to interfere in a private business transaction. If there is to be a transfer or permits are sold, the same environmental liabilities must apply to either party.

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Benjamin C. Greene
President

William B. Raney
Vice-President

Mr. Roger T. Hall
September 1, 1992
Page 2

11.3(a)(1) - Delete - The surety bond form is prepared by the Division, is approved by the chief legal officer of the State of West Virginia - Attorney General - and should not require any additional approval by the director. Any corporate surety licensed to do business in West Virginia should not undergo an arbitrary, additional step requiring approval by the director of the West Virginia Division of Environmental Protection. DEP does not possess the statutory or professional expertise to evaluate the surety industry.

11.3(b)(1)A) - The word "load" appears to be a typographical error.

11.3(b)(1)(C)(2) - Stricken - Based on a long history of accepted certificates of deposit, this statement should not be deleted as any collateral bond substitute has to be valued on its current market value when deposited with the agency.

11.3(b)(1)(C)(9) - This new paragraph needs to be reworded or deleted as there is nothing specified in this paragraph which would have any affect.

11.84(a)(2) - There is absolutely no reason why the original submitted form of bonding must continue for incremental permits. The only statutory test is to furnish the performance bonding. It may be in the form of surety, certificates of deposit, treasury notes, etc. With all of the Division of Environmental Protection computer sophistication, there should be no problem with accepting any form of bonding for any incremental permits.

11.6 - Site Specific Bonding - There are several instances where "cessation orders" need to be removed in the discussion text for site specific bonding where notice of violation is the only enforcement history that should be used for the evaluation.

11.6 - Site Specific Bonding - In the text and matrix values for environmental enhancement, higher consideration has to be given to categories of remining, reclamation awards, wetlands and water quality improvement. The bonding program is performance in nature and must recognize and reward companies for their higher levels of environmental adherence. In addition, the operator performance category of violation history and the status of existing operations need more positive credit consideration where they are practicing concurrent reclamation, have no major environmental violations and have a minimum of five years of that kind of corporate performance.

12.2(c) - The reference to paragraph D & E need to be deleted as there is no statutory requirement that an entire permit area must have all work completed before any bond release may be given.

Mr. Roger T. Hall
September 1, 1992
Page 3

12.2(d) - Delete - See above.

12.2(e) - Delete - This deletion is critical to the future of surety performance bonds as the proposed regulation, as written, guarantees future water quality. The surety industry and all major bonding companies authorized to do business in West Virginia have unequivocally stated that performance bonds will not be written to cover future long-term water quality.

West Virginia Code 22A-3-23(c)(3) provides, in part,...that such a release may be made where the quality of the untreated post-mining water discharge is better than or equal to the pre-mining water quality discharge from the mining site. In addition, an operator shall not contribute additional suspended solids to stream flow or runoff outside the bond area. This provision of the West Virginia law is the only provision governing water quality for final bond release and must be recognized as such. Any proposed regulation to the contrary must be resisted by the full forces of our West Virginia coal community.

12.4(c) - The new language for bond forfeiture now meets the statutory scheme as spelled out in the federal Surface Mining Control and Reclamation Act of 1977 and the West Virginia Surface Coal Mine and Reclamation Act currently in effect. A previous requirement dictating mandatory water quality compliance exceeds the authority granted by the above-mentioned acts, as well as the Clean Water Act, as amended through 1987. No states, including Tennessee, which has an OSM federally administered program, provide for bond forfeiture water quality performance.

12.5 - The water quality enhancement section is a positive step to provide a mechanism for proper water quality on a long-term basis, should the same ever be necessary. We are reluctant to comment further on this proposed change until more detail is given, however, it seems to establish a reasonable and practical state policy for water quality enhancement, is now within state law and will provide flexible alternatives for future management consideration.

In keeping with the "summary and state of purpose," we are most pleased to include an alternative proposal covering contemporaneous reclamation, which we believe will enhance the reclamation process, keep the ongoing operations current and provide the Division with ample authority to regulate the varied and unusual conditions that exist throughout the State. These contemporaneous reclamation alternatives have been developed by a committee of industry professionals, included a number of site visits, operational evaluation of ongoing operations and climaxes more than 60 days of concentrated effort. We stand ready to defend the proposals as submitted and would be most happy to provide any

Mr. Roger T. Hall
September 1, 1992
Page 4

further documentation or records and support data needed.

In summary, we recommend the following administrative considerations:

1. When promulgated on December 1, 1992, the regulations apply only to new permit applications.
2. A select group of senior Division professionals be selected to create a permitting and enforcement function that would concentrate on the large mountaintop removal and durable rock fill - valley fill - operations.

This group would consist of mixed professional disciplines and would focus on such operations with a high level of professional and technical assistance. It is not fair nor professionally desirable to review and inspect large complex mining operations with inexperienced, untrained and unseasoned permitting and inspection personnel. We believe the team concept, as proposed, merits serious consideration and would truly bring about the most workable program.

We have attached several comments from member companies and do appreciate the work of the Division in proposing these regulations for a most complex and complicated range of conditions. If we can be of assistance, in any way, in completing this work, please feel free to be in touch.

Sincerely,

A handwritten signature in dark ink, appearing to read "Ben", is written over the typed name.

Benjamin C. Greene
President

ALTERNATIVE PROPOSAL

Title 38
Series 2
Section 14

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 of 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. All spoil must be placed in such a manner that the final surface is mechanically stabilized using track equipment or other equivalent means.

(b) Time Limits. Grading, backfilling, and water management practices shall be kept current as follows:

(1) Where the operation consists of single seam 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 of one thousand five hundred (1,500) linear feet. For the purposes of Section 14.15 (b) (1,2, and 3) the term "augering" shall include all means of mechanical highwall mining, such as but not limited to conventional augers, thin seam miners, and highwall miners.

(2) Where the operation consists of single seam 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) Where the operation consists of area mining only, on slopes which are less than 20 degrees, the backfilling and grading shall not be more than two spoil ridges or mining cuts behind the pit being worked. The maximum linear feet of open pit shall not exceed three thousand (3,000) feet at any time and backfilling and grading must follow mineral removal within one hundred eighty (180) days.

ALTERNATIVE PROPOSAL

Title 38
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Section 14

(5) After the effective date of this subparagraph, for existing or proposed surface mining operations on steep slopes which remove the entire coal seam(s) running through the upper fraction of a mountain, hill or ridge, or which partially remove multiple seams along the topographic contour, and where such operations utilize excess spoil disposal sites, subject to the provisions of 14.15 (d) and (j) the following contemporaneous reclamation requirements apply:

(A) Disturbed and unreclaimed acreage, including excess spoil disposal sites, shall not exceed at any given time five hundred (500) acres. The ratio of disturbed acreage versus reclaimed or undisturbed acreage shall be shown on progress maps, or by other equivalent means, submitted to the Director annually, or as otherwise required by the Director. The subject ratios shall be verified by the Director on the next regular inspection following receipt of the progress map. Reclaimed acreage shall be that portion which has been fully regraded to meet the standards for Phase I bond release, provided, that unreclaimed and undisturbed acreage shall not include semi-permanent ancillary facilities, drainage control systems, primary access and haulage roads, and areas which are cleared but not grubbed, provided, however, that such areas have appropriate drainage control systems in place.

(B) On operations which utilize draglines or stripping shovels with a bucket capacity of greater than forty (40) cubic yards, and on which the operator has demonstrated in the approved reclamation plan that the contemporaneous reclamation provisions of subparagraph (5)(A) of this paragraph are infeasible, the following standards for contemporaneous reclamation apply:

(i) Prestripping or benching operations will not be more than twenty four (24) months in advance of the dragline or shovel operations or exceed five hundred (500) acres for any single permit, provided, that areas cleared but not grubbed are excluded from this determination, provided, however, that such areas have appropriate drainage control systems in place; and

(ii) Backfilling and regrading will not be more than four (4) spoil ridges behind the pit being worked, or more than one hundred eighty (180) days following mineral removal.

ALTERNATIVE PROPOSAL

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Section 14

(C) Excess spoil disposal fills will be excluded from the calculation of disturbed acreage in subparts (A) and (B) of this subparagraph provided the fills are not inactive for periods exceeding one hundred twenty (120) days. Activity means the placement of material and/or reclamation operations within the fill area.

(D) Permit applications for these types of operations which are pending, but had received an SMA number before July 1, 1992 shall be revised within 12 months of permit issuance, or of the effective date of this subparagraph, whichever is sooner, to contain a reclamation plan which requires compliance with the provisions of subpart (A) or (B), whichever is applicable, of this subparagraph.

(E) Existing permits for these types of operations containing a reclamation plan which does not conform to the provisions of subpart (A) or (B), whichever is applicable, of this subparagraph, must be revised within twelve (12) months after the effective date of this subparagraph. Such revisions will reflect full compliance with the subject provisions and will be subject to approval by the Director. Full compliance with the revised reclamation plan will be required within twelve (12) months after approval.

(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) Alternative . Alternative time, distance and/or area limitations may be approved by the Director where the permittee demonstrates in the site specific mining and reclamation plan that site conditions and/or operational requirements, justify alternative limitations.

(j) Exclusion . The Director may approve deviations from the approved time, distance, and/or area limitations when conditions beyond the operator's control make adherence to the established guidelines impractical. NOTE: (j) is proposed as a new paragraph. No changes are proposed to paragraphs (e), (f), (g), (h), or (i).

ALTERNATIVE PROPOSAL

14.8 (a)(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. Casting of spoil from a higher seam to a lower seam in multiple seam contour operations may only occur where: the highwall of the lower seam intersects the outcrop of the upper seam; the lowest seam is mined first or in advance of the upper seams; and minimum bench widths based on slopes are established on the lower bench sufficient to accommodate both spoil placement from the upper seam and bench drainage structures.

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BUFFALO COAL COMPANY, INC.

P.O. Box 282
BAYARD, WEST VIRGINIA 26707



COMMENTS TO PROPOSED REGULATIONS BEING PROMULGATED IN ACCORDANCE
WITH PROVISIONS OF WV CODE 22A-3-11a (H. B. 217)

SECTION 11.6 - SITE SPECIFIC BONDING - Language should be added to protect existing permits that exhibit current reclamation as set forth forth in Section 14.15(b)(1)(2)(3) & (4) of the Regulations and Section 12(b)(16) of the Act from any increase in a per acre bond amount. Even though the Director has indicated that no increase should be expected for permits where reclamation is current, specific wording must be incorporated to assure this in the event the present Director would be dismissed or otherwise instructed to enforce the new site specific bonding guidelines on existing permits.

SECTION 12.2(d) - REQUIREMENT TO RELEASE PERFORMANCE BONDS - Under current DEP policy, sediment structures must remain "in-place" until Phase II Bond Reduction is approved; as written, Section 12.2(d) states ".....and the entire permit area has been completely backfilled and regraded". Even though this refers to subsection 11.5 (Open Acre Limit Bonding), it is believed that the technicality of being required to leave sediment ponds until after Phase II Bond Reduction is approved could interfere with receiving Phase I Reduction. This language appears to conflict with that in Section 11.5. Perhaps the word "ENTIRE" in referring to the permit area should be reviewed.

SECTION 12.2(e) - It was our understanding that this entire concept was to be deleted; It was tough to accept this even on permits issued after the effective date of the regulations as originally set forth, however, it now would apply to all permits - future and existing - as written; this could now be interpreted as a requirement for a financial assurance on existing permits as well as future permits; this could be good or bad, depending upon the outcome of the proposed regulations with respect to the establishment of the provisions as proposed in Section 11.7. If Section 11.7 is stricken, this could then be devastating relative to existing permits.

** TOTAL PAGE.01 **



ASHLAND COAL, INC.

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KENNETH G. WOODRING
Senior Vice President, Operations
Phone: (304) 526-3674

TWX: 710-931-1907

August 31, 1992

Mr. Roger T. Hall
West Virginia Division of
Environmental Protection
10 McJunkin Road
Nitro, West Virginia 25143-2506

Dear Mr. Hall:

I have attached Ashland Coal's comments to 38-2-14.8(a)(1); 38-2-14.15(b)(5)(A), (B) and (C); and 38-2-14.15(d) of the West Virginia Surface Mining and Reclamation Regulations related to the proposed sites specific bonding program for surface mining operations.

Sincerely,

A handwritten signature in cursive script that reads "Kenneth G. Woodring".

/kd

enclosure

Ashland Coal, Inc.

Amendment to 38-2-14.8 (a) (1)

(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. Casting of spoil from a higher seam to a lower seam in multiple seam ~~contour~~ operations may only occur where: the highwall of the lower seam intersects the outcrop of the upper seam; the lowest seam is mined first or in advance of the upper seams; and minimum bench widths based on slopes are established on the lower bench sufficient to accommodate both spoil placement from the upper seam and bench drainage structures.

Ashland Coal, Inc.

Amendments to 38-2-14.15 (b) (c) and (d)

(5) After the effective date of this subparagraph, for existing or proposed surface mining operations on steep slopes which remove the entire coal seam(s) running through the upper fraction of a mountain, hill or ridge, or which partially remove multiple seams along the topographic contour, and where such operations utilize excess spoil disposal sites, the following contemporaneous reclamation requirements apply:

(A) Disturbed and unreclaimed acreage, including excess spoil disposal sites, shall not exceed at any given time five hundred (500) acres. The disturbed and unreclaimed acreage, including excess spoil disposal sites, shall not exceed at any given time ~~thirty-five (35)~~ fifty percent (50) percent of the total permit acreage, ~~or three hundred (300) acres, whichever is less.~~ unless the acreage in excess of fifty percent (50%) of the total permit acreage is bonded at the maximum per acre rate of five thousand (5,000) dollars. The excess acreage covered by the maximum bond rate will be subject to adjustment based on the semi-annual status determination in accordance with the procedures set forth in this section. The ratio of disturbed acreage versus reclaimed or undisturbed acreage shall be shown on progress maps submitted to the Director semi-annually or as otherwise required by the Director. The subject ratios shall be verified by the Director on the next regular inspection following receipt of the progress map. Reclaimed acreage shall be that portion which has been fully regraded to meet the standards for Phase I bond release, provided, That unreclaimed and undisturbed acreage shall not include semi-permanent ancillary facilities, drainage control systems, primary access and haulage roads, and areas which are cleared but not grubbed, provided, however, That such areas have appropriate drainage control systems in place.

(B) On operations which utilize draglines with a bucket capacity of greater than ~~fifty (50)~~ forty (40) cubic yards, and on which the operator has demonstrated in the approved reclamation plan that the contemporaneous reclamation provisions of subparagraph 5 of this paragraph are infeasible, the following standards for contemporaneous reclamation apply:

(i) Prestripping or benching operations will not be more than ~~twelve (12)~~ twenty-four (24) months in advance of the dragline operations or exceed ~~four~~ five hundred ~~(400)~~ (500) acres for any single permit, provided, that areas cleared but not grubbed are excluded from this determination, provided, that such areas have the appropriate drainage control systems in place; and

(ii) Final backfilling and regrading will not be more than four (4) spoil ridges behind the dragline pit or more than

Ashland Coal, Inc.

one hundred eighty (180) days after ^{mineral removal} ~~initial dragline excavations~~, whichever is less.

(C) Excess spoil disposal fills which are constructed in a controlled placement manner (conventional fills with rock core chimney drains, or fills utilizing underdrain rock blankets and placed in fifty (50) foot lifts) will be excluded from the calculation of disturbed acreage in subparagraphs (A) and (B) of this paragraph, after the first and succeeding lifts are regraded, mechanically stabilized, and vegetated. Durable rock fills will be excluded from the calculation of disturbed acreage in subparagraphs (A) and (B) of this section, provided that they are not left inactive for periods exceeding one hundred twenty (120) days.

(D) Permit applications for these types of operations which are pending as of the effective date of this subparagraph shall contain a reclamation plan which requires compliance with the provisions of subpart (A) or (B), whichever is applicable, of this subparagraph.

(E) Existing permits for these types of operations containing a reclamation plan which does not conform to the provisions of subpart (A) or (B), whichever is applicable, of this subparagraph, must be revised within twelve (12) months after the effective date of this subparagraph. Such revisions will reflect full compliance with the subject provisions and will be subject to approval by the Director. Full compliance with the revised reclamation plan will be required within twelve (12) months after approval.

(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. ~~This time period, or the distance, set forth in this subsection may be reasonably extended where the permittee affirmatively demonstrates that site conditions, including legitimate operations requirements, or weather changes make adherence to these guidelines impractical. A written waiver must be obtained from the Director for such extension. The Director will by directive establish standards for determining what site conditions or weather changes will justify an extension.~~

(d) Alternative. Alternative time, distance and/or area limitations may be approved by the Director where the permittee demonstrates that site conditions, including operational requirements, or weather conditions make adherence to the guidelines shown in this subsection impractical.

COMMENTS OFFERED AT THE PUBLIC HEARING BEFORE THE
WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION
AUGUST 14, 1992

Mr. Chairman, my name is William A. "Tony" DiRico. I am the President of Arch of West Virginia. My company is a wholly-owned and independent operating subsidiary of St. Louis-based Arch Mineral Corporation. My company operates one of the largest surface mines in West Virginia. In Logan County, we have two surface operations. One of these, our Ruffner Mine, is a large-scale operation utilizing a dragline and engaged in a form of mining known as mountaintop removal.

At the outset this morning I wish to indicate that my company fully supports the effort of the DEP to revise and modernize the bonding and reclamation regulations. We believe that additional mining will be occurring in West Virginia in this decade. Now is the time for the State to impose changes in its bonding formula to be sure that the type of reclamation failures that have occurred historically are not repeated. We believe that, at a minimum, increases in the amount of bonds are necessary. We also recognize that some changes in the regulation which establishes when an operation is deemed to be reclaiming contemporaneously with mining may also be appropriate.

Notwithstanding our support of these principles, we are concerned with the regulations as proposed. Our concern arises from the fact that these regulations, if promulgated in their current form, will have the effect of discouraging the very form of mining in which we are engaged in Logan County. At the very least, they might seriously jeopardize the completion of current projects

which were planned some time ago, resulting in greater fluctuations in employment patterns and ultimately fewer jobs. Moreover, they may not adequately address the current problem which the State is experiencing of companies abandoning smaller-scale sites.

The introduction of large-scale surface mining in West Virginia is relatively new. Although other subsidiaries of Arch Mineral Corporation have been mining in a variety of conditions, such as the relatively flat areas of the Midwest and a rolling terrain in southern Wyoming for many years, our dragline operation at Arch of West Virginia is a first for our company. In the two years since our dragline has been fully operational, we have successfully demonstrated that draglines can be utilized in the very mountainous terrain of the southern part of our State.

West Virginia has experienced numerous reclamation failures over the last fifteen years. Most of these failures have occurred on contour mines. These early, relatively small-scale operations remove coal at the outcrop of a ridge. After a cut is taken to remove this coal, it is sometimes followed by augering, which extracts more coal from the seam without removing any further overburden.

Abandonment has occurred at these sites when the cost of reclamation has exceeded the value of the bond which must be posted in order to guarantee that reclamation will occur. Generally, a coal operator can only afford to abandon a site if it has no other active coal operations and it does not intend to remain in the business of mining coal. This is because the use of the federal (OSM) applicant violator system and the ability of the West

Virginia DEP or other agencies to deny permits and take other enforcement actions against companies which abandon sites act as strong deterrents for any company which attempts to engage in such practices. Nevertheless, for some companies which are engaged in single site mining, abandonment is apparently seen as an option if the bond which has been posted with the State is in a lesser amount than the money which the operator would have to spend on reclamation.

Such reclamation failures have occurred primarily as the result of poor, or no, planning. In other words, such operations have failed at the outset to calculate the cost of reclamation together with the cost of mining as part of the overall operational cost of the mine. I might add, however, that such operational practices are no longer the norm in our industry. For reasons already explained, no company which intends to be in the coal business over the long term can engage in such practices.

Nevertheless, the phenomenon which I have described explains the agency's fears. The current leadership of DEP anticipates that a reclamation failure could occur on a mountaintop removal operation. If this did occur, a reclamation failure on a scale many times that already experienced by the State would exist. The State might be unable to complete reclamation on such a site, particularly if it were bonded at today's unrealistically low rates. Even the use of the State's Special Reclamation Fund might be inadequate to reclaim the site according to the standards now set by the agency and contained in an operator's permit.

Mountaintop removal mining is unlike other form of surface mining. As a general matter, it is the removal of seams which extend laterally across the top or along the ridge of a mountain. Normally in this type of mining, more than one seam of coal is removed. At our Ruffner operation at Arch of West Virginia, we currently mine between 11 and 14 seams or splits of seams of coal. This particular mine is one of the most complex in North America. It requires a highly coordinated operation which means that equipment may be operating at different areas of the site at any given time. It has required several years of engineering and as we continue to mine, we constantly find ways to improve the performance and efficiency of the large-scale equipment utilized.

As we remove each seam, we encounter the intervening strata of soil. This overburden, as it is called, is deposited in one or more sites in the valleys between the ridges. These deposit sites, known as valley fills, make it possible to undertake the large-scale movement of material. These valley fills are constructed in such a way that upon completion water which falls or flows across the surface of these fills is passed into a rock lined drainage channel which then removes the water from the fill into natural water courses. This avoids the problem of saturation of the valley fills which in turn could lead to instability and eventual sliding. The valley fills, as with the entire operation, are based on a highly engineered design.

As you might expect, mountaintop removal mining is capital intensive. It uses large-scale equipment such as a dragline. A dragline is nothing more than a large excavation bucket which is

suspended from a boom by cables. In other situations, large shovels--which are again excavation buckets suspended from a fixed ridge and arm--may be utilized. Such equipment acts as stripping machines to remove overburden from the seams of coal which are then removed by smaller-scale equipment. Whether draglines or shovels, this equipment represents the investment of millions of dollars of capital. It works in close coordination with other equipment such as frontend loaders, large trucks and bulldozers.

Mountaintop removal mining normally is undertaken as a long-term venture. Our Ruffner Mine, for example, is designed to have a fifteen year life. The reason for this is that the cost of capital involved cannot be recovered adequately in a smaller-scale operation. The size of the operation is a function of the amount of land controlled by the operator under lease or in fee. In addition, it will also depend upon the number of seams and the amount of coal which is contained in the property that can be economically and profitably removed over the life of the operation.

The number of acres of disturbance will depend essentially on four factors. This includes: (1) the number of acres to be mined; (2) the configuration of the land which will be mined; (3) the number of seams of coal that exist in the mountain and which can be mined over the project; and (4) the type of equipment that will be utilized in the operation.

The number of acres which will be disturbed at any given time in the mine life is dependent on all of these factors that I have previously described. Early in the life of a project, virtually all of the area utilized by the mine will be disturbed. As mining

progresses, valley fills are established. Valley fills are completed as the mining progresses. The final rolling-like plateau that exists upon the completion of a mountaintop removal operation requires very little final reclamation except the establishment of vegetation. The expense in the case of a failure of a mountaintop removal job would occur in the cost of removing any remaining highwall as well as completing a valley fill.

The proposed bonding regulations generally are successful in enumerating those factors which express the true cost of reclamation. For that reason, we generally support the bonding proposal which is before us today. Nevertheless, because of the unique conditions which exist for any mountaintop removal operation, we strongly believe that the contemporaneous reclamation provisions which are part of these bonding regulations must remain flexible, not rigid. As I have explained, each site is unique and variable depending upon the number of acres involved, the configuration of the site, the seams that will be mined as well as the equipment that will be utilized in the mining. Because of this variability, it is improper to impose a standard which limits disturbance either to a specific number of acres or a percentage of the total area to be mined.

A better approach in our view would be to set a variable standard that is tailored to each mountaintop operation permitted by the State. Such an approach could establish the average amount of disturbance over the term of a permit or the life of the operation. Under this system of bonding, if at any time during the operation the amount of disturbance exceeded this average figure,

then the operator would be required to post a bond at the maximum authorized amount to cover the incremental disturbance over the average.

Such a regulation would have two benefits. First, and most important, it would give DEP sufficient assurance that the total amount of bond which existed at any given point in the operation would be sufficient to complete reclamation if there was a failure in the operation at that point. Second, such a regulation would have a self-enforcing effect. By this I mean that an operation which is required to post a maximum amount of bond on a site is going to prepare its mine plan with a high degree of care. The additional cost of bonding over an average amount could be sufficient incentive for a company to redesign its mine plan for the purpose of minimizing the amount of disturbance at any given time. In addition, it would encourage the operator to speed up reclamation in areas, such as the establishment of vegetation or possibly the completion of valley fills. By increasing the time at which such reclamation was accomplished, this would reduce the overall amount of disturbance and thus keep the average bond costs for the operation lower. From our standpoint, having a flexible standard of bonding which imposes maximum bonding when the average disturbed area measure is exceeded, is much preferable to the rigid standards for contemporaneous reclamation now proposed in these regulations.

In conclusion, I wish to thank the agency for the opportunity to express these remarks today. Again, I wish to repeat our support for the improved bonding regulations which the State has

proposed. Moreover, although the regulation on contemporaneous reclamation is flawed as I have explained, a good contemporaneous reclamation standard is important as it will allow an operator greater certainty in knowing that the operation is deemed to be in compliance with the regulations. Arch of West Virginia intends to expand its comments for inclusion in the final public record.

Thank you very much.



State of West Virginia
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Gaston Caperton
Governor

M E M O R A N D U M

David C. Callaghan
Director

TO: Rick Clark
FROM: Brenda Zickefoose
DATE: July 28, 1992
SUBJECT: IBR Regulations Revisions

In response to your memorandum of July 8, 1992 concerning changes in the Rules and Regulations pertaining to Incidental Boundary Revisions, I have the following suggestions:

1. Incorporate language that deals specifically with significant IBR's.
2. Provide provision for updating PHC with a significant IBR (eg. air shaft outside of approved PHC area).
3. Section 3.2(c) deals with government agency notification. Reword this to state that agency notification is only required for significant revisions. (We presently are doing this by a policy memo.)
4. Under revisions (3.27), one of the reasons to declare a revision significant is "an individual's legal right to receive notice...". Does a new landowner or a new 100' surface property owner make the IBR/revision significant?
5. There is currently a provision in regs where we can require a one-time, 10 day advertisement for an insignificant IBR (3.28(5)(c)). What are we using this for? Most of the IBR's in this region are either significant (4-time, 30 day ad) or non-significant (no ad).
6. Section 3.28(b)(3) - change "Commissioner" to "Director".

Additionally, I feel that the items listed below need some clarification or change. Perhaps these can be addressed in the permitting handbook.

1. When is a Lands Inquiry and SHPO required? Are they required for additional disturbance?

Memorandum - Rick Clark
Page 2
July 28, 1992

2. Acreage calculation -

Surface Mine - Do we count from beginning of permit issuance and then count add/deletes after 4/24/91?

Underground - Does all additional acreage count after 6/1/90 and add/deletes count after 4/24/91?

3. Are forfeitures, civil penalties, cessation orders, etc. considered as a block to issuance of an IBR? What blocks an IBR?

4. On permits for preparation plants or haulroads, is acreage counted as on underground permits, if they are associated with an underground opening?



State of West Virginia
DIVISION OF ENVIRONMENTAL PROTECTION

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Gaston Caperton
Governor

David C. Callaghan
Director

M E M O R A N D U M

TO: Rick Clark
FROM: Charles R. Grafton
DATE: July 28, 1992
SUBJECT: Revisions to IBR Regulations

Attached are the proposed changes to clarify the IBR regulations as presented by the Region III Permit Review Staff.

While there are several proposals, it is the consensus of the Region III Engineering Staff that the methodology of IBR acreage calculations should be included in the regulations along with the effective date(s) of calculating the acreage.

Proposal 1.A

Only those IBR's issued after 6-1-91 shall count toward 20% or 50 Ac. limitation for a surface mine. IBR acreage shall be counted on a gross acreage basis. Any deleted acreage shall not be considered in calculating gross acreage amounts.

1.B

For any IBR issued prior to April 1, 1992, only the net acreage increase shall be counted toward the 20% or 50 Ac. limitation for a surface mine. For any IBR issued after April 1, 1991, the gross acreage increase shall be counted toward the 20% or 50 Ac. limitation for a surface mine, and any deleted acreage will not be counted when determining the increase.

1.C

Effective from the issuance date of all surface mining permits the acreage and/or percentage limitations shall be based on the net acreage increase of all add and add/delete IBR's.

Proposal 2

38-2-3.28(a)

Add the following:

When geologic variations occur, an IBR may be approved to add acreage for mineral removal after submittal of additional site-specific geologic information.

Proposal 3

38-2-3.28(b)(2)

All to the last sentence:

.....life of the permit. Effective June 1, 1991, acreage limitations for IBR's on underground mining operations.....

MEMORANDUM TO: RICK CLARK
FROM: RON STURM
DATE: 28 JULY 1992
SUBJECT: IBR REGULATION CHANGES

Attached is my recommended version of the IBR Regulations. My recommended changes are underlined. I think these changes are necessary in order to clarify some currently contradictory regulations.

I have good reasons for all these changes. If you need any more information, please call.

Proposed Changes to the Incidental Boundary Revision Section
(38-2-3.28) of the WV Surface Mining Reclamation Regulations

3.28 Incidental Boundary Revision (IBR).

(a) All Incidental Boundary Revisions (IBRs) 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. Upon approval of the IBR, performance bond shall be released for all deleted acreage, provided that the minimum \$10,000 bond shall be retained until final bond release of the permit.

(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 Director.

(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 50 acres, whichever is less, throughout the life of the permit, provided that acreage which has been deleted from the permit by an IBR will not count against the total acreage. There shall be no acreage limitation for IBRs on underground mining operations. Underground mining operations shall include refuse sites, prep plants, or other facilities directly associated with an underground mine.

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

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

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

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(A) The IBR does not constitute a change in the post-mining land use as compared to the premining land use on the IBR site.

(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.

(6) Any IBR not meeting the requirements of 5.A., 5.B., or 5.C. above shall be deemed a Significant IBR and shall be subject to the requirements of Regulation 3.27(b).

(7) 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.



CYPRUS
Kanawha Corporation

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August 8, 1992

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Director's Office

AUG 10 92

WV Division of
Environmental Protection

David C. Callaghan, Director
WV Division of Environmental Protection
10 McJunkin Road
Nitro, WV 25143-2506

Re: Comments on Contemporaneous Reclamation Regulation Revisions

Dear Mr. Callaghan:

As requested during the Technical Committee Meeting held on July 31, 1992, we are submitting the following comments on contemporaneous reclamation for consideration.

As you observed during your visits to Appalachian Mining, Arch of West Virginia, Cyprus Kanawha, Hobet and other operations, the proposed 35% and 300 acres disturbance limits are exceeded or have been exceeded at some time frame at each operation.

The acreage and percentage of disturbance at these operations are dictated by a variety of factors. Safety, pit blending, ratio balancing, tonnage requirements, and dragline/shovel scheduling requires complex and diverse mine plans for a successful operation. The orientation of the cuts to the direction of the ridgeline, number of coal seams, size of equipment, number of equipment spreads, and the total depth of cut will vary with each operation. In general, the disturbance will increase to a worst case percentage that could approach 70-100% depending on the operation and the previously mentioned factors. At our operation, we are at year 2.5 with 80% disturbance. Temporary haul roads for backfilling to approximately 240' above the lowest coal seam requires a minimum distance of 3000' horizontal feet to achieve a safe and operable 8% slope. The 80% disturbance will decrease from this point forward, but is specific to this permit and would certainly vary for any other permit or operation.

For these reasons, we believe that the contemporaneous reclamation requirements should be site specific for the multiple seam and large operations. Each permit should require a detailed reclamation plan with time limits and worst case reclamation scenarios. The bond amount would be based on the worst case scenario.

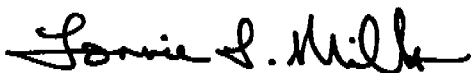
If acreage and percentage limits are established and the allowance for variances removed, the limits will discriminate against the larger operations by restricting their activities, yet allow the smaller operations to disturb more area than necessary. Additional enforcement problems and reclamation liabilities for DEP would be created since historically, smaller operations have been susceptible to depressed coal markets and more prone to failure.

Page 2

Under the proposed regulations, prestrip, highwalls, open pits, backfill and hollow fills are treated identically. We are backstacking over 240' feet vertically, which can take up to a year to reach Phase I status. Under the proposed definition of reclaimed acreage (area not to Phase I status) the backfill area is indistinguishable from the open pit. We recommend that credit be given to areas being actively reclaimed. The reclamation liability is exaggerated and the reclamation is not properly credited if the areas are not distinguished.

In summary, we believe site specific reclamation plans and additional bonding requirements will adequately address contemporaneous reclamation. However, if acreage and percentage limits must be established, we recommend that the limits be segregated by either tonnage, number of seams being mined, total vertical cut, or a similar method. For companies that meet the lesser limits, a significantly lower bond amount would be required and conversely, higher bond amounts would be required for higher limits. We strongly recommend that language allowing variances be included for all types of operations, not just dragline.

Respectfully,



Lonnie L. Mills,
Environmental Coordinator

cc: B. Doss
WVMRA



STATE OF WEST VIRGINIA
DEPARTMENT OF COMMERCE, LABOR AND ENVIRONMENTAL RESOURCES
DIVISION OF NATURAL RESOURCES

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J. EDWARD HAMRICK III
Director

GASTON CAPERTON
Governor

JOHN M. RANSON
Cabinet Secretary

September 4, 1992

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Director's Office

SEPT 16 92

WV Division of
Environmental Protection

Mr. Roger T. Hall
WV Division of Environmental Protection
10 McJunkin Road
Nitro, WV 25143-2506

Dear Mr. Hall:

The West Virginia Division of Natural Resources (DNR) has completed its review of the proposed amendments to the existing Legislative Rules found in Title 38; Series 2; Sections 11, 12, and 14 and offers the following comments.

The DNR agrees that a need exists for changing the site specific bond provisions in the law. The purpose of the performance bond as stated in Public Law 95-87, Surface Mining Control and Reclamation Act (SMCRA), is to provide a bonding mechanism "... sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture ..." Too many streams in West Virginia have been destroyed by untreated coal mine drainage, and too many acres of land lay unreclaimed as a result of bond forfeiture. During 1990, 78 permits for surface mining were issued. During that same period, 55 permits had bond forfeitures. The present bonding requirement of \$1000/acre with phase reductions leaves only 15% or \$150/acre to treat mine drainage after a phase II bond release. Even if the regulations associated with Title 38 CSR 2 Section 12.2 (c)(4) are enforced and result in no bond release when water treatment is required, there is usually not enough money to sustain long-term water treatment.

The DNR reiterates its long-standing contention that coal mining permits should be denied when mine drainage of poor quality is predicted to occur. Perpetual treatment of mine drainage is not included in our list of

Mr. Roger T. Hall
Page 2
September 4, 1992

potential solutions relative to mining acid producing coal seams. We are concerned that the proposed bonding regulation might liberalize the permitting system to allow mining in additional areas where perpetual environmentally toxic mine drainage might occur.

When monetary penalties assessed against a violator do not result in corrective action, SMCRA provides the regulatory authority with several "alternative enforcement techniques" to induce compliance with SMCRA's mining standards. These enforcement techniques, which may be employed at any time and at the discretion of the regulatory authority, are: 1) civil suits and injunctions, 2) fines against individual corporate officials, 3) criminal prosecution of individual operators or corporate officials, and finally, 4) permit suspension or revocation. A 1987 US General Accounting Office report found that state laws, including West Virginia's, demonstrated a statutory authority to use SMCRA's alternative enforcement techniques. However, the states did not have the enforcement systems, including policies and procedures, to guide the regulatory authority. We question whether these alternative enforcement techniques could be used in lieu of revamping the bonding system.

Specific comments.

Section 11

1. Page 13, Section 11.3 (e)(2)(ii), and Page 14, Section 11.4 (a)(3) "reclamation cost" -- The definition of Reclamation in Title 38 Section 2.100 reads ". . . those actions taken to restore mined land to the approved post-mining land use." With the exception of post-mine land uses of "Fish and Wildlife" or "Impoundment," no other land use category would require water quality to be considered for achievement. Although water quality considerations are addressed in Title 38 Section 12.2 (e), we request that text be included that would insure that all reclamation costs and all post-mine land use requirements include provisions for water quality protection.
2. Page 15, Section 11.5, "Open-Acre Limit Bonding" -- The DNR questions the feasibility of this type of bonding to achieve the primary purpose of the bond. The amount of open-acre limit

bond would be derived from a Section 11.6 Site Specific Bonding. This section calls for bonds in the amount of \$1000-\$5000 per acre based on cost factors, risk of bond forfeiture, operator history, and environmental enhancement potential. If the maximum bond of \$5000 is assessed, by phase II only \$750/acre would remain for water treatment. Furthermore, we believe that the criteria used for calculating bond strength should be evaluated in the overall permitting process and followed by appropriate action. For example, if an applicant has a poor regulatory compliance history and risk of bond forfeiture is high, then the permit should not be issued rather than approved at an increased bond amount and allowing the mining to proceed. We are concerned, in this instance, that this approach to bonding will result in permitted mines that are an environmental risk.

3. Page 19, Section 11.6 (c)(1)(B)(ii) -- We recommend that text be added to clarify the sections between item (i) and item (ii) that explains which conversion factor would apply when two fills are proposed.
4. Page 19 Section 11.6 (c)(2) -- The text should specify that the mining plan is a "criterion" to be consistent with (c)(1).
5. Page 20, Section 11.6 (c)(2)(B)(ii) -- Text should be added to clarify the section between item (i) and item (ii) that explains which conversion factor would apply when the mining plan affects two coal seams. For example, should (ii) read "... three to four seams ..."?
6. Page 20, Section 11.6 (c)(2)(C)(i)(ii) and (iii) -- Since the conversion factors are based on percentage of outcrop to be augured, the impact would be based on the length of the outcrop. Longer outcrops could be augured at the same conversion factor rate as shorter augured outcrops depending on the percentage of outcrop. We suggest that the regulation would better accomplish its purpose by applying a conversion factor based on the lineal footage of auguring.

Mr. Roger T. Hall
Page 4
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7. Page 25, Section 11.6 (c)(6), "History of compliance reward" -- The DNR does not concur with this provision. Since the purpose of the bond is to insure that sufficient money is available for reclamation in the event of a bond forfeiture, we do not agree that the operator's prior performance is relevant to predicting forfeiture or the cost of reclamation at the site. Coal mining history in WV is replete with companies which had acceptable regulatory compliance but were forfeited. Using their records as a criterion to reduce their bonding would have been a mistake.
8. Page 25, Section 11.6 (c)(6)(B), "Local or national awards" -- We oppose this concept for reasons similar to those used to oppose offering rewards for a satisfactory compliance history. For example, during 1991 in Ohio County, Rayle Coal Company received an award for a job on one side of the county and was involved in pending litigation over major NPDES violations in another part of the county at the same time. Bond amounts should be based on the risks of mining, and assumptions should be based on a worst-case scenario for each specific site and each permit.
9. Page 26, Section 11.6 (c)(6)(C), "Wetland enhancement" -- We have two major concerns with this regulation. First, we believe that bonding should be based on site specific criteria that assess risk to the environment, cost of reclamation and cost of water treatment. Past operator performance is irrelevant when assessing the bond. Although we support enhancement and restoration projects that benefit wildlife, we contend that any criteria established to reward the operator must be evaluated in the context of whether any permit should be issued for mines in high risk areas.
10. Page 30-31, Section 11.6 (d)(5), "Underground Mining, Historical Performance" -- As previously explained, we do not believe that past performance has any relevance to site specific considerations where environmental protection and water treatment costs are being considered.

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11. Page 32-33, Section 11.6 (d)(6), "Underground Mining, Successful Mining and Reclamation Operations" -- These actions are not relevant to bonding considerations.
12. Page 34, Section 11.6 (e)(1)(D) -- "D" should be "C."
13. Page 37-38, Section 11.6 (e)(5), "Successful Mining and Reclamation Operations." -- These actions are not relevant to bonding considerations on a site specific basis.
14. Page 41-42, Section 11.6 (f)(5), "Successful Mining and Reclamation Operations" -- These actions are not relevant to bonding considerations on a site specific basis.
15. Table 1, "Excess Spoil" -- Under multiple fills, clarify the factor for two fills. Will the value be 0.2 or 0.6?
16. Table 1, "Mining Plan" -- Under multiple seams, clarify the factor for two seams. Will the value be 0.2 or 0.6?

Section 12

17. Page 3, Section 12.3 (c)(2)(E), "Remaining Bond" -- This provision includes cost of re-establishing vegetation and installing drainage control structures. We suggest this provision should also include water treatment costs.
18. Page 7, Section 12.4 (c) -- We strongly object to the qualifying phrase "... unless the Director finds that the beneficial uses of the receiving stream can be assured with lesser discharge quality." We believe the agency responsible for NPDES enforcement should not have the latitude to permit discharge water of lesser quality than the State Water Quality Standards specify. Further, the proposed regulation does not address cumulative impacts. A stream with a heavy acid load could be further degraded and, consequently, tributaries downstream could be additionally adversely affected under this provision. We question which agency or process would be used to determine the "beneficial uses of the receiving stream." Would

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the "beneficial use" be based on the pre-mining uses or the uses at the time of forfeiture? If a stream was degraded by a mine before bond forfeiture occurred, would this regulation allow the stream to remain untreated and polluted?

19. Page 7, Section 12.5 (c)-(d). "Water Quality Enhancement" -- We believe that water discharged from all forfeited sites should meet appropriate water quality standards. The mechanism to resolve potential problems is by denying permits, not by bond forfeiture.

Section 14.

20. Page 4, Section 14.4. "Stream Diversions" -- We question the ability of an operator to achieve the requirements of this section. For this reason we generally do not approve stream diversions. If this regulation is to be enforced, a pre-mine survey of instream habitat and riparian vegetation should be required and made part of the reclamation plan and permit.

We appreciate the opportunity to comment on these proposed regulations. If you have any questions, please feel free to contact me.

Sincerely,



J. Edward Hamrick III
Director

JEH/maf



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Publishers of The Highlands Voice and the Monongahela National Forest Hiking Guide

September 1, 1992

Roger T. Hall
WV Division of Environmental Protection
10 McJunkin Road
Nitro, W.V. 25143-2506

**RE: PROPOSED SURFACE MINING REGULATIONS
Title 38, Series 2, Sections 11, 12 & 14**

Dear Roger,

In addition to the fact sheet submitted at the public hearing August 14th, and as a followup to my verbal comments at that same hearing, enclosed is a copy of my comments to the legislative oversight committee on DEP concerning the regulations being proposed in part as a result of H.B. 217 which was approved in the Special Session of the Legislature last October. Please include them on behalf of WVHC as part of the record of public comment.

Some of the words keep changing, but the basic message remains the same:

1. All proposed changes other than those in Section 11.6 are not authorized for this fast track promulgation and, hence, are illegal and should be withdrawn.
2. Besides being illegal the provisions of Sections 11.5, 11.7, 12.2, 12.4 and 12.5 are substantively flawed and subvert current federal and state law and hence, are unacceptable.
3. Even though authorized for speedy promulgation, Section 11.6 also contains provisions that are cause for concern and further scrutiny. Comments on this section have been submitted by John McFerrin, WVHC Mining Committee Chair.

Thank you for the opportunity to comment. We look forward to working with you and Director Callaghan in an attempt to arrive at acceptable and realistic approaches to the many questions surrounding the state ABS system during the appropriate rulemaking process.

Sincerely,
Cindy Rank
Cindy Rank, President
HC 78, Box 227
Rock Cave, WV 26234



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September 1, 1992

Senator William Wooten, Co-Chair
Delegate Rick Staton, Co-Chair
Members of the Legislative Committee on DEP

RE: Proposed DEP Regulations

We thank the committee for its continued attention to the matter of West Virginia's Surface Mine Regulatory Program and are grateful for the opportunity to come before you once again to reemphasize the comments we made about the most recent changes proposed for that program that we presented at your August 3rd committee meeting.

H.B. 217, approved in the October 1991 2nd Extraordinary Session of the Legislature, attempted to accomplish two things: 1) to provide additional monies to the WV surface mine regulatory authority so that it could more easily address some of the substantive programmatic deficiencies in the state program that had been cited by the federal Office of Surface Mining (OSM) in several recent annual reports, and 2) to increase the basic \$1,000 per acre bond that is insufficient to guarantee complete reclamation given today's costs of operation and reclamation.

Although increased funding for the state program has at least temporarily warded off imminent takeover by OSM, the regulations that are being proposed allegedly to fulfill the site specific bonding provisions of H.B. 217 clearly show that there is little reason for citizens in the state to breath a sigh of relief or be bouyed with confidence that the state surface mine program is on its way to recovery.

On the contrary, it is difficult to view these regulations as anything but an indication of bad faith on the part of the new Division of Environmental Protection (DEP).

While DEP is correct in relating that the intense deliberations during the fall session centered on several aspects of the bonding program. The resulting legislation, however, was not meant to deal with all the various aspects of bonding, but rather was purposely limited to only one very precisely defined aspect of that program. Because agreement was reached on that one issue the legislation allowed for an abbreviated time frame for implimentation of rules authorized by the bill.

This site specific bonding rule was meant to be only a first step in addressing problems associated with the bonding program. Other aspects of the program were intentionally set aside so that they could be dealt with after further investigation, study and deliberation by all involved.

Ignoring the good faith agreements arrived at during those discussions in the fall, DEP has knowingly gone far beyond the limited intent of H.B.217 to propose changes that effect other portions of the bond program that have been the subject of highly controversial and heated legal, court and legislative actions these past five years.

Using the words of 22A-3-11a (d) that allow for consideration of "other factors" in addition to the minimum requirements set forth in prior section (c), DEP would have us believe that it is only fulfilling the letter of the law in proposing changes to sections dealing with bond release, bond forfeiture, use of the special reclamation fund/bond pool, state liability at forfeited sites, etc. despite the agreements leading up to H.B. 217.

Under the pretense of providing more money for pseudo-bonding for water quality and for limited amounts of reclamation at a limited number of forfeited sites, these regulations seriously undercut current provisions of the law that require protection and restoration of the state's water resources. The regs drastically increase the discretionary authority of the director and the regulatory agency, and they attempt to release the state from its legal responsibility to fully reclaim minesites forfeited after the enactment of the 1977 Surface Mine Act (SMRCA).

We appear before the Committee today with three basic requests:

1. Since Section 11.6 is the only section of the proposed regulations Title 38, Series 2 that is authorized by H.B. 217, and all other sections of the proposal (even the beneficial changes included in Section 14.15 which would provide for needed concurrent reclamation at giant mountain top and multiple seam mine sites) are illegal and should be withdrawn, we appeal to members of this committee and this legislature to take any and all steps within your power to postpone enactment of these illegal provisions until they are brought properly through the normal procedures and timeframes for promulgating such rules.

2. Though authorized by H.B. 217 for this fast track promulgation, Section 11.6 on Site Specific Bonding contains provisions that are cause for concern and further scrutiny both now and after final adoption of a site specific bonding rule. We ask that you seriously consider the comments that follow as well as the more extensive comments that have been submitted by the Mining Committee of the W.V. Highlands Conservancy (WVHC) as you review and finalize your modification and/or approval of this section of the regulations before it expires on May 1, 1993.

3. All sections of the regulations other than 11.6 are not only illegal, but also are substantively flawed: they subvert current federal and state law, and fail to protect the water resources of the state. We urge members of this committee and the legislature to give your utmost consideration to the following comments about the inadequacies of Sections 11.5, 11.7, 12.2, 12.4 and 12.5 and to other comments which will be presented during the normal legislative review process if these regulations are properly deferred to that forum.

COMMENTS ON SPECIFIC SECTIONS OF REGULATIONS TITLE 38, SECTION 2

11.6 Site Specific Bonding

Adjustment of Bonds

It is curious that DEP goes to great lengths to explain it's rationale for including many "other factors" that may well impact the overall bonding mechanism but were intentionally not authorized by H.B. 217, while at the same time the proposed regulations patently ignoring another factor that is explicitly referred to in the bill, i.e., H.B. 217 uses as an example of "other factors" for legitimate consideration the case of permit renewal or revision.

Do these proposed regs address the need for implimenting site specific bonding at these times? No.

Despite the fact that there are permits in existence today where reclamation costs will far exceed the bond amounts in the case of forfeiture, and despite the requirements in federal law that bonding must be "sufficient to assure the completion of the reclamation plan if the work has to be performed by the regulatory agency in the event of forfeiture" (30 CFR 800.14(b)) and that "the amount of the bond...shall be adjusted by the regulatory authority from time to time as the area requiring bond coverage is increased...or where the cost of future reclamation changes" (30 CFR 800.15(a)), and that "in the event that an approved permit is revised...the regulatory authority shall review the bond for adequacy and, if necessary shall require adjustment of the bond..." (30 CFR 800.15(d)), industry is adamantly opposed to any such adjustment and DEP remains silent.

DEP has even proposed changes in Section 12.3 Bond Adjustments that would require the Director to act on an application for bond reduction in a timely fashion, but remains mute on the question of increasing bond when necessary.

Questions Re: the adequacy of the proposed Site Specific Bonding

-See additional comments submitted by WVHC Mining Committee.

Section 11.7: ENVIRONMENTAL SECURITY ACCOUNT FOR WATER QUALITY

Current Law: Authorizes denial of permits where reclamation under the law is not feasible, and requires bonds adequate for complete reclamation.

Problems: - The state continues to issue permits where Acid Mine Drainage (AMD) is a problem and long term, costly and unreliable treatment measures are necessary to protect water quality.

- Existing mine sites where AMD is a problem are not adequately bonded to guarantee long term water treatment. When these sites are forfeited the state's liability increases.

Solution:- Deny new permits where AMD is likely to occur in amounts which without treatment, would violate either effluent limits or water quality standards or both.

- Where AMD may be a possibility, but is not a certainty, issue permits and REQUIRE a water quality bond in an amount sufficient to assure long term treatment and full compliance with effluent limits and water quality standards in the event that AMD occurs.

(In his August 19, 1992 letter to Speaker Chambers, Director Callaghan implies that these two assumptions are a matter of policy in the current permitting process. However, there is no written policy to that effect that would be binding on Director Callaghan or anyone else who happens to inherit his job in the future.)

- For existing sites where AMD is now occurring and bond amounts are insufficient to guarantee long term treatment, etc, REQUIRE an appropriate increase in bonding at any time it is determined that reclamation costs (including treatment if necessary) will exceed current bond amounts.

Proposed Reg: Allows that an applicant MAY (not required) offer financial assurance that water quality will be maintained (standards are not defined) for an adequate period of time (not defined), that the Director MAY (not required) approve the offer, and that the Director will set forth procedures for evaluating potential for AMD, cost of treatment, etc. after these regulations go into effect and with no further input.

Comment: Although at first glance this proposal appears to provide security and additional protection for water resources in and near a permit area, the bonding is not required and the amount is entirely discretionary on the part of the Director and industry. In effect these proposals chart a course for permitting based on the whim of the director even where perpetual acid mine drainage will result.

Section 12.2 BOND RELEASE

Current Law: Ties bond release to water quality standards and to chemical treatment at AMD sites, prohibits Phase III bond release (15% of total) under all circumstances.

Problems: 15% of the bond monies -even 100% of bond amounts- at current sites is not enough to guarantee long term treatment where AMD is occurring.

Solution: - Require up front a bond when permitting sites where AMD is a possibility but not a certainty.

- Increase bond at existing facilities at any time cost of reclamation (including water treatment where necessary) exceeds bond amount.

Proposed Reg: Bonds are tied to land reclamation only and can be released if the company offers other financial assurances "to the satisfaction of the Director" that water quality will be maintained. The proposal does not define what standards are to be maintained nor how long treatment will be required.

SECTION 12.4 FORFEITURE OF BONDS

Current Law: Requires forfeited bond monies to be used to reclaim the forfeited site according to the permit requirements (including water treatment where necessary to maintain effluent limits and water quality standards); requires the permittee to be responsible for total cost of reclamation if bond monies are not enough; requires the state to use the Special Reclamation Fund in a timely manner (not to exceed 180 days) to accomplish the same reclamation required of the permittee where bond monies are not sufficient to complete reclamation, and sets December 15, 1989 as date certain when these requirements were to be in effect in case there was any question about sites forfeited between '77 and '89.

Problems: - In practice, sites are not included on the forfeiture list until after the bond is collected (which can be years in some cases) thus allowing continuing degradation to occur.

- Forfeited bonds are frequently not enough to guarantee complete land reclamation, let alone provide sufficient funds for long term treatment where AMD occurs. (OSM reports reclamation at abandoned mine lands in W.V. averages closer to \$3-4,000/acre rather than the required \$1,000/acre bond amount.)

- The Special Reclamation fund is underfunded and not used as required.

Solution: More selective permitting, increased bonding and special reclamation fund tax, and better enforcement of the law.

Proposed Reg: Blesses current practice of allowing a site to go unreclaimed until after collecting the forfeited bond money; allows the director to wait another 180 days after collecting bond money before even initiating reclamation, allows the director to ignore effluent limits and water quality standards where he so chooses, and makes use of the special reclamation fund totally discretionary where forfeited bonds are inadequate.

SECTION 12.5 WATER QUALITY ENHANCEMENT FUND (i.e. When, where and how to use special reclamation fund/bond pool)

Current Law: Section 12.4 requires use of special reclamation fund 1) in a timely fashion (not to exceed 180 days), 2) to complete reclamation (including meeting effluent limits and water quality standards), 3) at any time the amount of bond forfeited is less than the actual cost of that reclamation.

Problems: The Special Reclamation Fund/Bond Pool has been underfunded and cannot keep up with the increasing liability the state incurs as permits are forfeited at sites that were underbonded.

- Even where reclamation was done using bond monies and the special reclamation fund, only once, to my knowledge, was that money used to support long term treatment costs, and that is to the tune of \$3-500,000 per year at the Alton site in Upshur.

- According to DEP, of 435 forfeiture sites that have been reclaimed by the state some 57 have AMD discharges that are considered "non-benign", i.e. acid that harms an important stream and/or a stream which is not already seriously degraded by previous mining.

- OSM & DEP are conducting an actuarial study of the state bond pool and will be evaluating the cost of water treatment at those 57 forfeited sites already reclaimed by the state and the cost of reclamation at some 175 more forfeited sites where the state has not done the required reclamation or water treatment. Perhaps another 50 of those sites are producing "non-benign" acid discharges.

Proposed Reg: Requires an inventory of forfeited sites including quality & quantity of water being discharged and a priority list based on the severity of the discharge. Sounds good to that point, but then the director has full authority to pick and choose whatever sites will be reclaimed with special reclamation fund monies, what amelioration techniques (alkaline trenches, bogs, etc.) to use, if and what treatment to use based on cost benefit assessments, and what, if any, water quality standards to meet.

Comment: Where efforts to make the special reclamation fund solvent have been focused on raising enough money to fully reclaim all sites forfeited after the 1977 SMRCA as required by law, these regs will redefine the liability of the fund by allowing the Director to pick and choose whichever and however many sites he wishes to reclaim. Consequently, no more money is needed and the bond pool will always be solvent because the state will reclaim only as many sites as available money will allow. Furthermore, where the state agency is now legally bound to abide by the same reclamation standards that are required of industry, these regs will allow the Director of the agency to decide it, when and how those standards apply, and only at those sites the Director chooses to reclaim.

Thank you for the opportunity to comment.

Cindy Rank

Cindy Rank (President) HC 78 Box 227 Rock Cave WV 26234 (924-5802)

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WV Division of
Environmental Protection

114 Beckley Ave.
Beckley, WV 25801
September 1, 1992

West Virginia Division of Environmental Protection
10 McJunkin Road
Nitro, WV 25143-2506

re: Proposed amendments to West Virginia
Surface Mining and Reclamation Regulations

Dear Mr. Hall,

Please accept these comments of the West Virginia Highlands Conservancy upon the proposed amendments to the West Virginia Surface Mining and Reclamation Regulations.

As you may know, the Conservancy has previously submitted comments upon these regulations. These comments are intended to supplement those comments. They are not, of course, intended to replace those comments.

General comment

It remains the Conservancy's position that most of the proposed package goes beyond the authority granted you by House Bill 217. While that bill granted the Division the authority to propose site specific bonding regulations, that is the limit of the Division's authority. Thus, anything in the package of proposed changes other than proposed section 11.6 is beyond your authority. While I will not include in the comment on each specific section that the section exceeds your authority, it should go without saying that all sections other than 11.6 exceed the authority granted you by H.B. 217.

Section 11.5 Open Acre Bonding

Even if the Division had the legal authority to propose such a change, this one is a bad idea. It undercuts any progress which the site specific bonding may make toward solving the problems with the bonding program.

One of the problems which these regulations were designed to correct was the present inadequacy of the bonds to reflect the true costs of reclamation. While the bonds have remained at \$1000 per acre, the cost of reclaiming mine sites has, on average, been closer to triple that figure. In his letter of August 19, 1992, to The Hon. Robert "Chuck" Chambers, Mr. Callaghan gave examples of sites which required expenditures of approximately eight times the amount of the bond to reclaim. While it is unclear whether Mr. Callaghan intends this to be a typical or an extreme example, it

does show that the bonds are inadequate. This inadequacy is present even though the Division of Environmental Protection has been reluctant to use the bonds or the Special Reclamation Fund to correct water quality problems such as acid mine drainage. Were the Division of Environmental Protection completing the legally required task of correcting water pollution problems as well, then the inadequacy of the bonding would be even more striking. If there is any hope of having an adequate bonding program then the bonds must approach the true costs of reclamation.

West Virginia has reached its present insolvency in the Special Reclamation Fund because the bonds posted do not reflect the cost of reclamation. Presumably the site specific bonding provisions are intended to correct this problem by increasing bond amounts in sites where one would expect reclamation to be more expensive. For example, under site specific bonding the sites where the slopes are steeper are bonded at a higher rate than those sites where the slopes are not as steep. Presumably this reflects an assumption that reclamation is more expensive on steeper slopes.

Whatever progress is made toward solvency of the Special Reclamation Fund in the site specific bonding part of the regulations is counterbalanced by the open acre bonding portion of the regulations. Under the open acre bonding portion of the regulations, the bond amounts are reduced for the portion of the mine that is not being actively mined at any given time. Operators are allowed to post a smaller bond (\$750 per acre) for that portion of the mine not being actively mined at any given time while posting a larger bond (\$1750 to \$5000 per acre) for that portion of the mine where there is active mining going on.

The combined net result of these two concepts is that bonds could in some cases be reduced. While this would only happen in the most extreme cases, if we apply these regulations using moderate assumptions the result is only a moderate increase in bonding amounts. It does not result in an increase that reflects the true costs of reclamation.

For example, the maximum per acre bond is \$5000. If an operator is able to manage its operation so that only approximately 6% of the permit is disturbed at any one time, the bond would actually be less than present law. This is because the bond for the 94% that is undisturbed is \$750 per acre instead of the present \$1000 per acre. While the bond on the 6% that is actually disturbed at any one time is more, the increase is balanced by the decrease in the bond on the rest of the property. Thus under these proposed regulations it would be possible for a mine which, according to the Division of Environmental Protection's assumptions about reclamation costs, are the most expensive to reclaim to have a smaller bond than under current law.

Of course, this is an unrealistic assumption. While on the largest surface mines in West Virginia 6% of the operation would be over 120 acres, it would be unrealistic to assume that on a typical surface mine the operator could mine and have no more than 6% of the permit area disturbed at any one time.

Using more moderate assumptions, the bonds would increase although not enough to approach the cost of reclamation. For the sites assumed to be the most expensive to reclaim, the bonding costs would rise from the current \$1000 per acre to approximately \$1800 per acre. This assumes that the company would disturb only 25% of the operation at any one time. While the bond would be \$5000 per acre on the 25% that is disturbed, it would be reduced to \$750 per acre on the remaining 75%. The net effect is that the average bond on the entire operation would be about \$1800 per acre.

Using the middle one of each of the three factors which the Division of Environmental Protection proposes to use to estimate the costs of reclamation, the bonds would increase above present law although still not enough to even approach the cost of reclamation. For the sites assumed to be moderately expensive to reclaim, the bonding costs would rise from the current \$1000 per acre to approximately \$1500 per acre. This assumes that the company would disturb only 25% of the operation at any one time. While the bond would be \$3750 per acre on the 25% that is disturbed, it would be reduced to \$750 per acre on the remaining 75%. The net effect is that the average bond on the entire operation would be about \$1500 per acre.

Thus the net effect of these regulations may be to reduce bond amounts. The more likely result is that they will increase a modest amount. In all likelihood, the increase in bond amounts will be less than bonds would increase were we to simply adjust the flat rate of \$1000 per acre for inflation since it was originally set. While any increase in the bond amounts in a step in the right direction, use of the open acre bonding concept will have such a powerful tendency to reduce bond amounts that the overall result of these regulations will be a paltry increase in the bond amounts. It will certainly not result in bonds that approach the cost of reclamation.

Section 11.7 Environmental Security Account for Water Quality

To paraphrase George Wallace as he stood in the schoolhouse door, this provision is designed to ensure acid mine drainage today, acid mine drainage tomorrow, acid mine drainage forever.

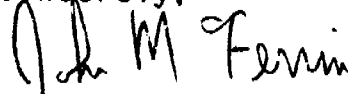
When a proposed mine will produce permanent acid mine drainage then the Director's duty is clear: he must deny the permit. This proposed section attempts to create a way for the Director to allow

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creation of sources of perpetual acid mine drainage, something he is not authorized to do. In all situations in which this regulation would come into play the Director should simply deny the permit. It is folly to enact a regulation which creates a mechanism for the Director to do what he lacks the authority to do.

Thank you for the opportunity of make these comments. I would appreciate you keeping me informed on the future course of these regulations.

Sincerely,

A handwritten signature in dark ink, appearing to read "John M. Ferrin". The signature is fluid and cursive, with the first name "John" and last name "Ferrin" clearly legible, and a middle initial "M" in between.

John McFerrin



WEST VIRGINIA MOUNTAIN STREAM MONITORS
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Director's Office

SEPT 01 92

September 1, 1992

WV Division of
Environmental Protection

COMMENTS ON

Proposed WV Surface Mining and Reclamation Regulations
by Richard S. diPretoro

INTRODUCTION AND OVERVIEW

I make these comments on behalf of the Living Streams Project of WV Mountain Stream Monitors, Inc. I specialize in the environmental effects of coal mining, particularly acid mine drainage (AMD) and mine subsidence. I hold a Masters degree in geology from West Virginia University, where my research focused on premining prediction of acid mine drainage. I have nine years experience consulting on the environmental effects of coal mining in the central Appalachians, and I worked three years underground in a coal mine in Marshall County. Since my main expertise concerns acid mine drainage, most of my comments touch on that subject.

The proposed regulations at issue today attempt to carry out the mandate of the legislature set forth in HB 217 from the fall session of 1991. While they clearly display the results of much hard work and mainly good intentions, they contain several areas which deserve much closer scrutiny. In general these proposed regulations leave far too much discretion to the Director of DEP.

WATER TREATMENT AT BOND FORFEITURE SITES

These proposed regulations would eliminate the current re-

LIVING STREAMS PROJECT

quirement for the DEP to meet effluent limitations on all sites where bonds were forfeited after December, 1989. In our judgment, the DEP should meet effluent limitations on all sites forfeited after the effective date of the surface mining act. The December, 1989, date already represents a compromise. Dropping that cutoff date would allow backsliding on protection of the waters of West Virginia.

Director Callaghan set forth his reasons for wanting this change in his August 19, 1992, letter to Speaker Chambers. Simply put, he doesn't want this to be a non-discretionary duty. Further he says that the duty to comply with effluent limitations is misapplied to the DEP on bond forfeiture sites and applies only during mining operations. [This regulation package contains the language at issue (Sec. 14.5 (b)): Discharge from areas disturbed by surface mining shall not violate effluent limitations or cause violation of applicable water quality standards.]

Director Callaghan says, in his letter, that to require DEP to meet the same standards that mining companies must meet is "fiscally irresponsible." His attitude must make coal operators shake their heads. Does the stream know whether its an operator or DEP dumping acid and metals into it? Director Callaghan's attitude makes a mockery of stream protection requirements imposed on operators. Furthermore, such an attitude weakens the entire regulatory program when DEP argues that standards required of operators do not apply to the State after forfeiture. It also reduces the caution of the State in issuing permits if the State knows they won't have to meet performance standards if the com-

pany forfeits its bond. Hiding behind a charge of fiscal irresponsibility simply says our bonding program is inadequate. If lack of money prevents DEP from meeting effluent limitations and other performance standards on bond forfeiture sites, then DEP should demand more money for the Special Reclamation Fund (SRF), not more "discretion" as to whether to protect our streams and rivers.

Director Callaghan himself has stated,

"Treatment of the acid discharge from the mine prior to release into the receiving stream is the prevailing technology utilized by the industry to address this problem. This technology in its most advanced state is costly. Anything less than the state of the art technology is ineffective and environmentally unacceptable." (from "Overview and Analysis of the WV DOE")

SITE SPECIFIC BONDING

I applaud the attempt in this proposal to quantify the risk of acid mine drainage based upon the chemistry of the overburden. The conversion factors used in Tables 1, 2, and 4 for overburden and materials analysis are fairly reasonable, but upon what are they based? I stay current on scientific literature on acid mine drainage prediction and I know of no literature which confirms those factors, nor do I know of any other state which is using such an approach.

With regard to material analysis for underground mines, this proposal would analyze the coal and four feet below and above the coal. I doubt that all four feet below the coal would be intimately involved in the chemistry of the drainage. Conversely, because of caving, considerably more than four feet of roof can affect the chemistry of underground mine drainage.

PROPOSED ENVIRONMENTAL SECURITY ACCOUNT, NEW SECTION 11.7

This section provides a back-door way for DEP to approve mining in known acid-producing areas. Under this proposal, the Director "...may at his discretion approve..." a plan to predict mine drainage treatment costs and place money into escrow to pay for it. The details would emerge only "after the effective date of this subsection...." In his letter to Speaker Chambers, Director Callaghan says this concept could be used "...where acid mine drainage is possibility but not a certainty...." However, the proposed regulations do not make any such restriction. Furthermore, few regulators and fewer operators would ever concede that acid mine drainage is ever a certainty before mining. Therefore, this provision could be used to approve any mining. Remember, however, that in addition to great expense, treatment is unreliable. Director Callaghan has said this:

Treatment of acid discharges from mining operations prior to their entering receiving streams is not a failsafe technique and is at best a short term abatement method. The applied technology is questionable and the economic feasibility is likewise questionable.... (from "Decision and Policy Recommendations Issued on January 29, 1982")

CONCLUSION

These proposed regulations attempt to deal with a difficult problem, namely the great diversity of risks in various mining operations. However, they leave too much discretion to the Director and too many opportunities for backsliding on critical water quality issues. The future of West Virginia does not depend upon producing the relatively small percentage of our coal which has the awesome power to destroy our rivers. Our future does depend far more upon clean water and healthy rivers.

FACT SHEET ON MINE REGULATIONS PROPOSED BY DAVID CALLAGHAN,
DIRECTOR OF THE STATE DIVISION OF ENVIRONMENTAL PROTECTION

PREPARED BY CINDY RANK, PRESIDENT, WEST VIRGINIA HIGHLANDS CON-
SERVANCY

INTRODUCTION

Citizen and environmental groups throughout the state continue to fight for an improved bonding system in the West Virginia surface mine program that will 1) enable and require cleanup of scarred land and acidified water left by irresponsible mining practices, and 2) prevent such destruction by future mining operations.

For years these groups have sought remedies through the state regulatory program at individual permit sites, taken legal steps to force state and federal action where the state program or regulatory agency is lacking, worked through the rulemaking process in regular and special sessions of the legislature, etc.

In the October 1991 special legislative session these groups supported the portion of House Bill (H.B.) 217 which authorized the Director of the newly created Division of Environmental Protection (DEP) to increase the flat rate bond of \$1,000/acre to a site-specific bond that could be as high as \$5,000/acre, the exact amount to be determined by clearly defined criteria set out in a legislative rule proposed by the director. The rule was to "direct a conclusion as to the amount of bond" and to "limit subjectivity and discretion by the director and the division."

All parties involved in the negotiations of the legislation, legislative, agency, citizen, and industry representatives alike, agreed that more monies were needed quickly, that this increase would only be the first step in addressing the overall bonding program and that other questions of water bonds, forfeiture, use and liabilities of the special reclamation fund, etc. would be dealt with at a later date. The legislation therefore allowed for an abbreviated time from a for promulgation and enactment of the very limited site-specific bonding provision in H.B. 217.

The regulations now proposed by DEP go far beyond legislative intent and authority granted by H.B. 217. Only thirty percent (30%) of the proposed regulations deal with site-specific bonding as directed by H.B. 217 (i.e. Section 11.6, pp. 17-43 of proposed regulations. The rest of the eighty five (85) page proposal is being swept along on the coattails of the much needed and generally agreed upon notion of site-specific bonding.

Although these additional provisions are related to the state bonding program and may deserve consideration through normal time tables and procedures, NONE ARE AUTHORIZED BY H.B. 217, all increase dramatically the discretionary authority of the Director and most are destructive of current regulations, especially as they apply to mining in acid prone areas of the state.

Only thirty percent (30%) of these regulations were authorized for this fast track promulgation by H.B. 217 in October, 1991. The rest are being promulgated illegally and destroy some of our basic guarantees for protecting the water resources of the state.

Under the pretense of providing more money for water quality bonds and for reclamation at some limited number of forfeited sites, these regulations seriously undercut current provisions of the law, increase drastically the discretionary authority of the Director and release the state regulatory agency from its legal responsibility to fully reclaim forfeited minesites.

Where permitting in acid prone areas has been illegal because full reclamation under the law (including maintaining water quality standards) is not feasible, these proposals chart a course for permitting based on the whim of the director even where perpetual acid mine drainage will result. Bonding to assure water quality at these sites is not required, the amount is entirely discretionary on the part of the Director and will be maintained only for an undefined "adequate" amount of time.

Where efforts to make the special reclamation fund solvent have been focused on raising enough money to fully reclaim all sites forfeited after the 1977 Surface Mine Act as required by law, these regulations will redefine the liability of the fund by allowing the Director to pick and choose whichever and however many sites he wishes to reclaim. Consequently, no more money is needed and the bond pool will always be solvent because the state will reclaim only as many sites as available money will allow.

Where the state agency is now legally bound to abide by the same reclamation standards that are required of industry, these regulations will allow the Director of that agency to decide if, when and how those standards apply at sites the state chooses to reclaim.

Where citizens now have recourse to law in their efforts to hold both industry and the state responsible to restore each minesite to a condition capable of supporting the same or better use which it was capable of supporting prior to any mining, these regulations will force citizens to rely on the integrity and good intentions of industry and the Director of the state agency. (!)

These changes so increase the discretionary authority of the Director that they subvert both federal and state law. The law must clearly define requirements that will adequately direct whoever is head of the regulatory agency, be that Ken Faerber, George Dials, Larry George, Woody Wayland, Dave Callaghan, or (?).

Any and all changes proposed in this package (except for those in new Section 11.6) were not authorized by H.B.217 for approval in this abbreviated process and are illegal if enacted.

SPECIFIC REGULATIONS

Section 11.7: Environmental Security Account for Water Quality

Current Law: Authorizes denial of permits where reclamation under the law is not feasible and requires bonds adequate for complete reclamation.

Proposed: Allows that an applicant MAY offer financial assurance that water quality will be maintained (standards are not defined) for an adequate period of time (not defined), that the Director MAY approve the offer, and that the Director will set forth procedures for conducting audits of sites where potential for Acid Mine Drainage (AMD) exists, for predicting rate and duration of AMD, cost of treatment, etc. after these regulations go into effect and with no further input.

Section 12.2 Bond Release

Current Law: Ties bond release to water quality standards and to chemical treatment for AMD sites, prohibits Phase III bond release (15% of total) under all circumstances.

Proposed: Bonds are tied to land reclamation only and can be released if the company offers other financial assurances "to the satisfaction of the Director" that water quality will be maintained. The proposal does not define what "applicable" standards are or how long treatment will be required.

Section 12.4 Forfeiture of Bonds

Current Law: Requires forfeited bond monies to be used to reclaim the forfeited site according to the permit requirements (including water treatment where necessary to maintain effluent limits and water quality standards); requires the permittee to be responsible for total cost of reclamation if bond monies are not enough; requires the state to use the Special Reclamation Fund in a timely manner (not to exceed 180 days) to accomplish the same reclamation required of the permittee where bond monies are not sufficient to complete reclamation, and sets December 15, 1989 as date certain when these requirements were to be in effect.

Proposed: Allows the director to wait until 180 days after collecting forfeiture money before initiating reclamation, to ignore effluent limits and water quality standards where he so chooses, and makes use of the special reclamation fund totally discretionary.

Section 12.5 Water Quality Enhancement Fund (i.e. How, when and where to use special reclamation fund)

Current Law: Section 12.4 requires use of special reclama-

tion fund 1) in a timely fashion (not to exceed 180 days), 2) to complete reclamation (including meeting effluent limits and water quality standards), 3) at any time the amount of bond forfeited is less than the actual cost of that reclamation.

Proposal: Requires an inventory of forfeited sites including quality and quantity of water being discharged and a priority list based on the severity of the discharge. Sounds good, but when the director has full authority to pick and choose whatever sites will be reclaimed with special reclamation fund monies, what amelioration techniques (alkaline trenches, bogs, etc.) to use, if and what treatment techniques to use based on cost benefit assessments, and what, if any water quality standards to meet.

PRESS RELEASE

For Release: Friday, August 14 (10:30 AM)

For Information: Sol Rodd, 346-5891 or Tom Rodd, 296-8611

A coalition of West Virginia community protection and environmental groups will hold a press conference in Nitro at the Division of Environmental Protection Building, #10 McJunkin Road on Friday, August 14 at 10:30 a.m.

The groups will protest what they call the gutting of environmental protection laws by David Callaghan, director of the State Division of Environmental Protection.

The press conference will premier a new West Virginia tourism poster, "Welcome to Caperton Country". The poster features polluted streams, sexy models, and a picture of West Virginia's Governor (and Callaghan's boss), Gaston Caperton.

Also to be unveiled at the press conference will be colorful collectors' edition commemorative bottles, of 1992 vintage toxic mine drainage. The bottles bear the decorative label, "Chateau Callaghan".

The regulations proposed by Callaghan would allow acid mine drainage to be discharged untreated from mine sites when the state forfeits coal companies' reclamation bonds.

Present mining regulations require the state to treat acid mine drainage, the same as coal companies, using funds from fees on coal production.

Callaghan's proposed regulations are opposed by many leading state environmental groups, including the West Virginia Highlands Conservancy, Mountain Stream Monitors, Mountaineer Chapter of Trout Unlimited, and the West Virginia Environmental Council.

Critics charge Callaghan with a history of causing acid mine drainage, and with protecting big coal companies from paying the cost of environmental protection.

On August 3, House Speaker "Chuck" Chambers asked Callaghan to withdraw the proposed regulations. Chambers stated that the regulations exceeded the statutory authority granted by the Legislature earlier this year.



ROBERT "CHUCK" CHAMBERS
SPEAKER

WEST VIRGINIA HOUSE OF DELEGATES
OFFICE OF THE SPEAKER
CHARLESTON 25305

August 3, 1992

David C. Callaghan, Director
Division of Environmental Protection
10 McGunkin Road
Nitro, West Virginia 25143-2506

Dear Director Callaghan:

I have received the proposed regulations dealing with site specific bonding which DEP has filed pursuant to WV Code §22A-3-11a. You will recall that this provision, adopted in the 1991 2nd Extraordinary Session, contemplated an unusual, unique grant of limited authority to an executive branch regulatory authority. This special procedure for adoption and implementation of a regulation without the otherwise required legislative review was the product of intense deliberations among legislators, the industry and environmental representatives, and the Administration. The exception from the traditional rule-making process was intentionally narrow and express. In my judgment, the agency's proposed regulations exceed the statutory grant of restricted authority and should be modified.

I commend the Division for its sincere efforts to anticipate and resolve issues in addition to site-specific bonding. Recognizing that other areas of the current regulations will be indirectly affected, I believe that all of the interested parties should be involved in re-analysis of the existing program. Since the 1991 act envisions legislative consideration in the 1993 Regular Session, I suggest that the LRMRC, along with the Legislature's DEP interim committee, be used as a forum for the public and the Division to tackle these issues. I pledge the cooperation of the House members in this effort and believe that industry and the environmental community would be willing to support this approach.

Frankly, I believe that the proposed rules will be attacked by both sides if the DEP does not alter its course. Industry is clamoring over the bond changes and the environmental community has its objections. At this point, the substantive issues may not be clearly in focus because of the procedural issue. Further, DEP is a new entity hoping for a fresh start with everyone. To exceed statutory restrictions, even for a worthy cause, when an alternative

David C. Callaghan
August 3, 1992
Page Two

course is reasonably available may be viewed cynically by many. We don't need the initial regs on site-specific bonding to end up in court or appear to be over-reaching by the agency. I respectfully urge you to reconsider the agency's position.

Sincerely



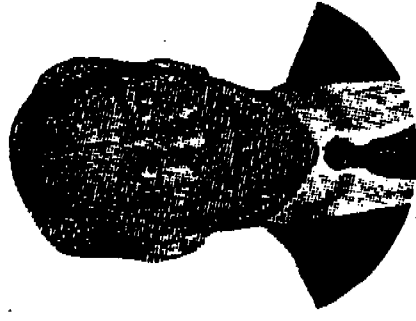
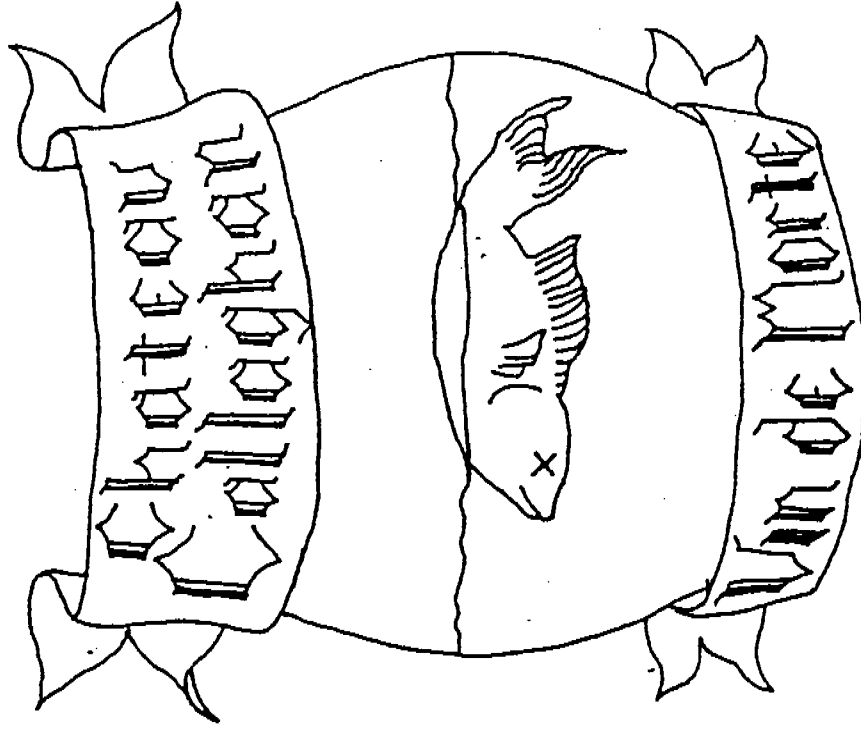
Robert "Chuck" Chambers
Speaker

RCC:bgm

cc: Chairman Rick Staton, DEP Committee
Chairman David Grubb, LRMRC
Tom Heywood, Office of the Governor
President Keith Burdette

This vile
vintage is
pure West
Virginia acid
mine drainage
ph 2.5

CAUTION:
Contents toxic.
for aquatic life



PRODUIT
PAYS
CAPERTON

Caperton Country Coalition

264 High Street Morgantown, West Virginia 26505, 304-296-8611

Dear Lover of West Virginia Tourism and Recreation:



Welcome to West Virginia's land of pollution!



WELCOME TO "CAPERTON COUNTRY!"

★ See mountain streams run bright orange, from toxic acid mine drainage.

★ Smell the rotting flesh of dead fish, killed by mine drainage pollution!

★ Taste "Chateau Callaghan" - a connoisseur's blend of state-approved acid mine waters, loaded with heavy metals for your dining pleasure. (This vile vintage is named for Caperton's chief mining regulator, David Callaghan).

★ Cry with children, who can't fish in their creek.

Yes - welcome to West Virginia's vacation dreamland of orange surf and barren turf!

WELCOME TO "CAPERTON COUNTRY!"

Why do we call this land of pollution "Caperton Country"? Here are the facts:

Fact: Acid mine drainage is killing hundreds of miles of West Virginia streams and rivers.

Fact: West Virginia's Governor Gaston Caperton wants to weaken laws that prevent acid mine drainage pollution. And he's



Friday, August 14, 1992

Division of Environmental Protection
RE: Proposed Regulations for Site-Specific Bonding

The Mountaineer Chapter of Trout Unlimited strongly opposes the illegal provisions contained in regulations now proposed by the Department of Environmental Protection dealing with Site-Specific Bonding on surface mine sites.

Acid mine drainage has destroyed countless miles of otherwise beautiful and fertile streams in West Virginia. Much of that destruction came after the passage of the Surface Mining Control and Reclamation Act, and was authorized through permits granted by governmental regulators like David Callaghan who, from our view, serve as surrogate representatives of the coal industry.

Acid mine drainage continues to be a major threat to the health and existence of the remaining trout waters in our state. For that reason the Mountaineer Chapter has actively participated in the fight to stop acid mine drainage.

The new regulations fall far short of providing adequate bonding for water treatment. The majority of the 85-page proposal now under consideration appears to be totally outside the scope of HB 217, and not authorized at all by the State Legislature. These provisions increase dramatically the discretionary authority of the director and remove current protective regulations, especially as they apply to mining in acid-prone areas of the state. As a result, the state would no longer be required to treat acid mine drainage from abandoned sites. This is against current law.

If we continue to entrust the protection of our remaining natural resources to the political whims of state bureaucrats and "hired guns" with strong ties to industry, the rape of West Virginia will continue. We must have strong regulations which leave little discretion in the hands of the regulators.

Sincerely,

Philip J. Rossano
President
Mountaineer Chapter Trout Unlimited
Rt. 2, Box 375
Buckhannon, WV 26201

Loger
8/10/92

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Director's Office

AUG 13 92

WV Division of
Environmental Protection

Mr. Dave Callaghan
Director, WV DEP
10 McGuintin Avenue
Nitro, WV 25143

Dear Mr. Callaghan,

I am writing to protest any attempt by the DEP and the State of West Virginia to relieve itself of responsibility to treat acid mine drainage from abandoned mining sites where bonds have been forfeited by reckless and environmentally non-caring mining companies. As a member of the Laurel Mountain / Sellersville Area Clean Watershed Association, I hereby give notification that to change the laws to accommodate ruthless men operators and their cronies in state government who disguise themselves as public servants is just another dead creek in the quest to maintain living pollution-free streams in the state of West Virginia.

Strip mining permits should never

have been approved for the three sites for F & M Mining on Laurel Mt. in Preston County. DNR documentation clearly backed this view. And now you are trying to change the rules to allow the state of WV, which agreed in District Court in Wheeling to take over treatment of acid runoff in the Left Fork of Little Sandy Creek, to stop treating.

How can you people who head our Environmental agencies sleep at night, knowing you are contributing ~~to~~ the fulfillment of the script to Richard Carson's Silent Spring? How can you not do what existing law says you must try to do. As in the Logan County School System where the State is going in to oversee the matter, I would like to see the Federal Government intervene in WV and take over the permitting process and see that water quality is maintained according to existing law. It is obvious that state and local government ^(its heads) does not have its priorities straight.

Let it be stated here and now - if the state of WV/DEP tries to litigate/weasel out of or whatever you may wish to disguise it as your obligation to treat the Left Fork of Little Sandy Creek, I will support a lawsuit to the fullest extent against the DEP/state of WV for such actions in regard to our creek and all such streams in WV.

If you allow coal companies to forfeit bonds at strip mine sites, then the state must take on the responsibility to cleanse the water. That's the LAW! You can not pass another law nullifying the first law. Maybe for future mining sites - but not for past sites, especially those in litigation.

Let the record show for your upcoming hearing that I am strongly opposed to any attempt to legislate a new rule which would relieve the state of its obligation to maintain water quality for a mine site abandoned by a coal company and bond allowed to be forfeited by the state of WV/DEP.

Let it be stated here and now -
if the state of WV/DEP tries to
leg.

Sincerely,

David C. Krotter,

Teacher

Route 1, Box 79

Tunnelton, WV 26444

892-3281

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Director's Office

AUG 13 92

WV Division of
Environmental Protection

August 11, 1992
Tunnelton, WV.

Dave Gallagher
Director of D.E.P.
10 McGuintie Ave
Nitro, WV. 25143

~~Rogel~~
~~A~~

Dear Mr Gallagher,

I am writing to ask that the legislature not be allowed to nullify the law to let the State off the hook for treating streams that have been polluted by Coal Companies who have stripped coal from the land and polluted the streams & have now filed for bankruptcy.

I am a member of the Laurel Mountain Clean Water Stream and part of a suit against the F. & M. Coal Co.

Our streams & water has been ruined by this and they should be responsible to clean it up.

Thank you

Yours Truly
Wanda King
Rt 1 Box 67
Tunnelton, WV. 26284

August 25, 1992

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Director's Office

SEPT 11 92

WV Division of
Environmental Protection

The Honorable Gaston Caperton
Capitol Complex
Charleston, WV 25305

Dear Governor Caperton:

Please reject the currently proposed mining regulations from David Callaghan, Director, Division of Environmental Protection. These regulations are NOT authorized under the original bill, House Bill 217. Furthermore, the currently proposed regulations will NOT address our acid mine drainage problem.

We need substantive regulations to address this extremely serious problem. According to Lyle Bennett, head of West Virginia's Non Point Pollution Program, "acid mine drainage has been the most serious water pollution problem plaguing West Virginia during the 20th century." And little progress has been made.

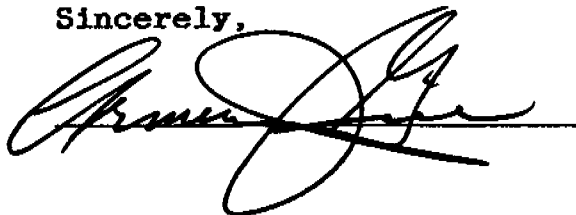
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U.S. Public Health studies from the 1930's sealed open underground mines. The results of this study found that acid loads were reduced from 402,787 tons per year to 261,800 tons per year. And this was based on 1930's technology.

We currently have much cheaper, effective treatment methods: wetland buffers, alkaline recharging zones, water abatement, etc. There's no excuse for ignoring this problem.

After reviewing the proposed regulations, it is apparent that the Division of Environmental Protection is not serious about correcting acid mine drainage. Please make sure the Division of Environmental Protection enacts effective regulations. West Virginia needs to address the acid mine drainage problem once and for all!

Sincerely,



cc: David Callaghan, Division of Environmental Protection
10 McJunkin Rd, Nitro, WV 25143

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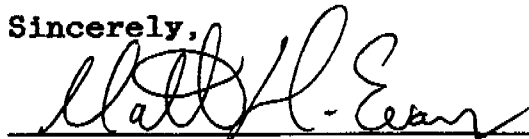
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MATT EVANS

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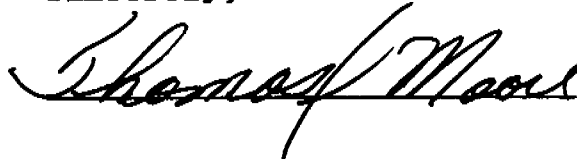
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Sincerely,

Elden R. Lennay

cc: David Callaghan, Division of Environmental Protection
10 McJunkin Rd, Nitro, WV 25143

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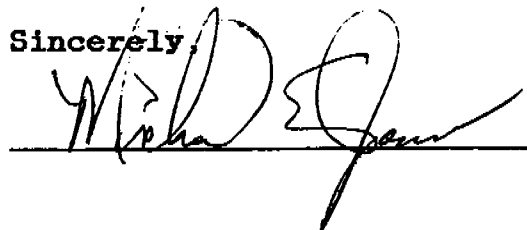
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10 McJunkin Rd, Nitro, WV 25143

Michael Jones
406 Ohio Ave.
Wutter Fort WV
26301

August 25, 1992

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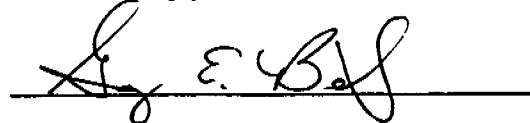
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P.O. Box 436
Buckhannon, WV 26201

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10 McJunkin Rd, Nitro, WV 25143

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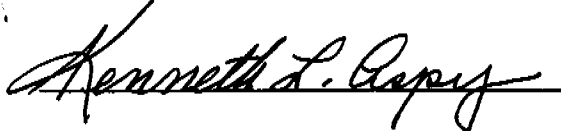
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Sincerely,



cc: David Callaghan, Division of Environmental Protection
10 McJunkin Rd, Nitro, WV 25143

August 25, 1992

RECEIVED

Director's Office

AUG 26 92

WV Division of
Environmental Protection

The Honorable Gaston Caperton
Capitol Complex
Charleston, WV 25305

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Eldridge Small

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10 McJunkin Rd, Nitro, WV 25143

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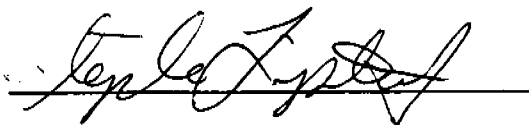
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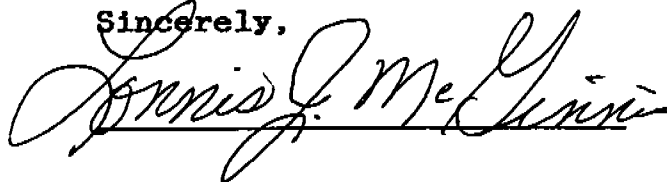
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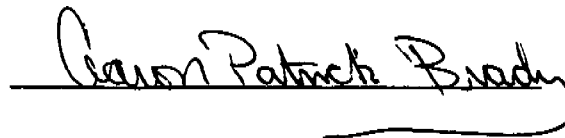
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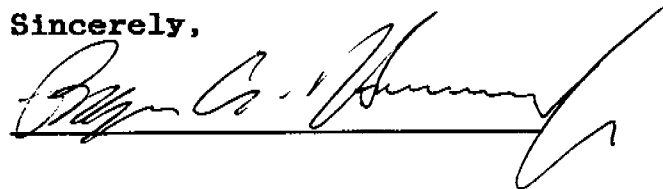
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REC-110
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[Handwritten signature]

August 25, 1992

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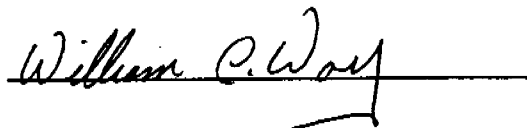
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Henry J. Cane

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10 McJunkin Rd, Nitro, WV 25143

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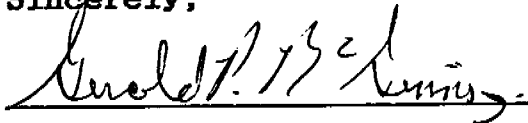
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Sincerely,

L.R. Eddy
1910 Pleasant Vly. Rd.
Fairmont W.V. 26554

cc: David Callaghan, Division of Environmental Protection
10 McJunkin Rd, Nitro, WV 25143

*Indy: don't we have
std rep*
August 27, 1992

Governor Gaston Caperton:

The regulations being proposed by David Callaghan, for the control of acid mine drainage in the State of W. Va., are totally unsatisfactory.

I feel, very strongly, that something must be done regarding this problem, but this proposal seems to be weakening the States bonding and permitting system, not strengthening it.

Please, Governor Caperton, do all you can to eliminate the orange streams in our beautiful State of West Virginia.

Thank You!

Alberta Haught
Alberta Haught
Route #3 - Box 20
Fairmont, W.Va. 26554

cc: David Callaghan, Director
W. Va. DEP
10 McJunkin Road
Nitro, WV 25143

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Director's Office

AUG 28 92

WV Division of
Environmental Protection

August 28, 1992
Stanley Jennings
Route 1, Box 62
Thornton, WV 26440

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Director's Office
SEPT 01 92
WV Division of
Environmental Protection

Governor Gaston Caperton
Capitol Complex
Charleston, WV 25305

Governor Caperton:

I'm A resident of Preston Co. and I'm very disturbed about the proposed revisions of the coal mining AMD control regulations. These proposed regulations are totally unsatisfactory. They need to be replaced with a new set of proposed regulations that will prevent the creation of new sources of AMD and will ensure that all recent AMD producing bond forfeiture sites are treated by the State.

Governor, nearly all the small streams in Preston Co. have been destroyed by AMD. Even Cheat River below Albright is bright orange. It's quite a turn-off to the out of state tourist who visit this area.

The pyritic sandstone over burden on the Pittsburgh and Freeport coal seams will generate new AMD any where the coal is mined in Preston Co.

Sure the operators will tell you different, but I've worked 15 years in deep and strip mines and know better. The bottoms of sediment ponds have been blasted to prevent the ponds from overflowing. When the ponds overflow they have to be treated, this way they don't. The acid water will seep out of the ground below the mine site.

Another example of their common practice is to route the acid drainage via an old mine opening thus not making it their responsibility.

F & M Coal Company abandon strip mines on Laurel Mt. in Preston Co. have practiced good examples of these.

We cannot go on allowing mining activities to destroy our streams and ground water. I'm sure you don't want your name associated with the cause of our bright orange streams. Please make this a priority of yours to protect our water.

Sincerely,


Stanley Jennings

cc: Mr. David Callaghan, Director DEP

1112 Fleming Ave.
Fairmont, WV 26554

RECEIVED, 1992

Director's Office

SEPT 01 92

WV Division of
Environmental Protection

Mr. David Callaghan
Director WV DEP
10 McGunblin Road
Nitro, WV 25143

Dear Sir,

I am angry and saddened at the proposal of DEP to revise the coal mining acid drainage control regulations. They will un-do what we have worked for so long - to clean up our streams and to improve our water quality.

Our streams used to be orange and dead. Now you propose to let this happen again. If we want tourism as an attraction you should be aware that our streams are a strong plus.

You, Mr. Callaghan, are to protect the environment. Not help destroy it. Please set new proposals that will prevent the creation of any new sources of acid mine drainage and ensure that all recent serious AMD producing bond forfeiture sites are treated by the state.

Please don't sell-out to the mine owners.

Sincerely
Elizabeth Davison

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Director's Office

SEPT 01 92

WV Division of
Environmental Protection August 26, 1992

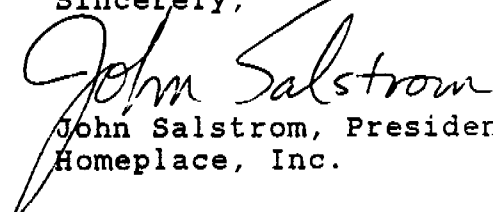
Dear Governor Caperton,

I am writing on behalf of the membership of our organization in Lincoln County and our supporters around the State. I have been witness during the last five years to substantial weakening of the Surface Mining Laws and Regulations here in West Virginia. What is most disturbing is that the agencies West Virginians entrust to protect against violations of the Mining Law seem often to lead the way in the disintegration of the Regulations.

This does not reflect well on your Administration's stated goal of protecting the natural beauty and clean waters of West Virginia. We need strengthening, not weakening, of mining regulations. It has come to our attention that the Director of the West Virginia Department of Environmental Protection, David Callaghan, has proposed major revisions which would weaken regulation of acid mine drainage control.

We ask that you do whatever is necessary as Governor of the State to ensure that no Mining Laws or Regulations are made to be weaker. Indeed, we expect you to do whatever is in your power to see that mining regulations are made to be stronger and that they are properly enforced.

Sincerely,


John Salstrom, President
Homeplace, Inc.

cc: Mr. David Callaghan

717½ Fairmont Avenue
Fairmont, WV 26554
August 26, 1992

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SEPT 0 1 92

WV Division of
Environmental Protection

Mr. David Callaghan, Director
WV DEP
10 McJunkin Road
Nitro, WV 26143

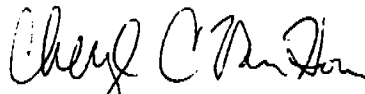
Dear Mr. Callaghan:

I am extremely concerned about relaxing the standards for acid mine drainage. I have seen how horrifying the results of severe acid mine drainage can be. I am aware that the State Department of Environmental Protection has proposed changes in the control regulations that would make it easier to get permits in such areas, and would relax the state's responsibility for long-term management and enforcement. This bears directly in our area on the situation with the Martinka/Tygart Valley mine.

It is not responsible for the state to encourage mining in such areas by relaxing the regulations for bonding and permitting and future AMD control. This will only lower our air AND water quality and destroy the beauty of West Virginia's rivers and streams.

The propped regulations from the DEP should not be enacted, but should be more stringent regulations.

Sincerely,



Cheryl C. Van Horn

RECEIVED

Director's Office

AUG 26 92

WV Division of
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August 25, 1992

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Charleston, WV 25305

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Shawn Brady

cc: David Callaghan, Division of Environmental Protection
10 McJunkin Rd, Nitro, WV 25143

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Philip J. Rossano
Rt. 2, Box 375
Buckhannon, WV 26201

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10 McJunkin Rd, Nitro, WV 25143