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## STATE OF WEST VIRGINIA

### SECRETARY OF STATE

Charleston 25305

THE ATTACHED EMERGENCY RULE FOR SERIES 2  
WAS EFFECTIVE FROM MAY 29, 1987 UNTIL  
OCTOBER 20, 1987.

A handwritten signature in cursive script, appearing to read "Rich O. Hartman".

RICH O. HARTMAN, DIR.

TITLE 38  
LEGISLATIVE RULES  
DEPARTMENT OF ENERGY

SERIES 2  
WEST VIRGINIA SURFACE MINING  
RECLAMATION  
REGULATIONS

**Ed. Note:** The Department of Energy inherited this rule from the Department of Natural Resources when this program was transferred from DNR to DOE. Where reference is to DNR please read DOE.

**§38-2-1. General.**

1.1. These regulations establish general and specific rules for general permit requirements, transportation facilities, drainage systems, blasting, post mining land use, fish and wildlife considerations, revegetation, prime farmlands, bonding, prospecting, additional permit requirements and performance standards for surface mining operations, additional permit requirements and performance standards for surface effects of underground mining operations, subsidence control, additional permit requirements and performance standards for facilities incidental to coal mining, additional permit requirements and performance standards for coal removal incidental to development, NPDES transfer, exemptions, additional permit requirements and small operators assistance program, notice of citizen's suits, citizens' inspections, designation of areas unsuitable for coal mining, inspections, enforcement, open meetings and Reclamation Board of Review appeals.

1.2. **Applicability.** These rules and regulations shall apply to all surface coal mining and reclamation operations in this state as specified in accordance with Chapter 20, Article 6.

(a) For all existing operations which have submitted permanent program modifications and/or addenda for existing permits or applications for permanent program permits, these regulations shall apply upon notification from the director of their applicabil-

ity. Such notification shall occur within forty-five (45) days of the effective date of these regulations. Within thirty (30) days of the receipt of that notification, the permittee shall acknowledge, in writing, to the director the applicability of these regulations to his operation. Such acknowledgement shall be deemed sufficient to make the permit or application complete for any new permit requirements contained in these regulations and shall become a part of the permit.

(b) These regulations apply immediately to all existing operations not covered in (a)

(c) For applications for new operations which have received an SMA number within thirty (30) days of the effective date of these regulations, the applicant shall acknowledge the applicability of these regulations to his proposed operation, in writing, to the director prior to issuance of the permit. Such acknowledgement shall be deemed sufficient to make the application complete for any new permit requirements contained in these regulations and shall become a part of the permit.

(d) Permits issued after the effective date of these regulations for existing or new operations not covered in (a) or (c) shall incorporate all of the requirements of these regulations. These requirements shall be addressed in the application.

(e) All existing and new operations shall comply with the notice requirements of 4C 7 and 7C.1 within seventy-five (75) days of the applicability of these regulations as specified in (a), or (b) of this subsection. Such notice shall be deemed sufficient to allow continued operation during the period specified in these regulations for prenotification (thirty (30) days for right

to a preblast survey and six (6) months for the extension of underground workings). Operations continuing beyond those time periods must be in full compliance with these regulations.

1.3. Authority. - WV Code §20-6

1.4. Filing Date. -

1.5. Effective Date. -

**§38-2-2. DEFINITIONS:** Unless the context in which used clearly requires a different meaning, as used in these regulations or as referred to in Article 6, Chapter 20, Code of West Virginia, as amended:

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 coal refuse 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 mine and from areas affected by surface mining with a pH of less than six (6.0) in which total acidity exceeds total alkalinity.

2.4. Acid-Producing Coal Seam means seams commonly associated with sulfides or other minerals which create acid mine drainage. Seams commonly associated with such material 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. However, specific on-site data may, on a case by case basis, demonstrate that these seams are not acid producing in specific areas.

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

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

2.7. Act means West Virginia Code, Chapter 20, Article 6.

2.8. Active Surface Mining Operation means an operation where land is being disturbed or mineral is being removed and where a Phase 1 Bond Reduction has not been approved unless inactive status has been granted.

2.9. Administratively Complete Application means an application for a permit approval or approval for coal exploration where required, which the Commissioner determines to contain information addressing each application requirement of the regulatory program and to contain all information necessary to initiate processing and public review.

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

2.11. Auger Mining means a method of mining coal at a cliff or highwall by drilling or cutting holes into an exposed coal seam

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

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

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

2.16. 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.

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

2.18. Channel Protection means any measures taken to prevent or control erosion, scour, or other destructive processes in channels such as diversion ditches and spillways.

2.19. Coal Processing Plant means a collection of facilities where run-of-the-mine coal is subjected to cleaning, concentrating or other processing or preparation in order to separate coal from its impurities. The processing plant may consist of, but is 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; coal processing and other waste disposal areas; roads, railroads and other transportation facilities.

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

2.21. Coal Refuse Disposal Area means a deposit of coal processing waste or underground development waste.

2.22. Coal Remining Operation means a coal mining operation which begins at a site on which coal mining was conducted before the effective date of the Surface Mining Control and Reclamation Act of 1977.

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

2.24. Collateral Bond means an indemnity agreement in sum certain deposited with the director executed by the permittee and supported by one or more of the Following:

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

(2) Negotiable bonds of the United States, a

State, or a municipality, endorsed to the order of, and in the possession of, the director;

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

(4) 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 director;

(5) A perfected, first-lien security interest in real or personal property, in favor of the director; or

(6) 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 director, excluding all issues of the type traded on a commodity exchange such as contracts for future delivery of goods.

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

2.26. 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.

2.27. 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: (1) the asset total is assigned a value of one hundred percent (100%); (2) the total of liabilities and owner equity is also assigned a value of one hundred percent (100%); and (3) each individual asset, liability, and owner equity item is shown as a fraction of one of the one hundred percent (100%) totals.

2.28. 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.

2.29. 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

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

2.31. Completion of Reclamation means that the total bond has been released after approval of the final inspection report provided for in these regulations.

2.32. 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.

2.33. 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 comingling of their off-site flows, there is a cumulative impact. The Act does not prohibit cumulative impacts but does emphasize that they be minimized. When the magnitude of cumulative impact exceeds threshold limits or ranges as predetermined by the Department, they constitute material damage.

2.34. 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, at a minimum, the entire projected lives through Phase II bond release 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.

2.35. Current Assets means cash and assets that are reasonably expected to be realized in cash or sold or consumed within one year.

2.36. Current Liabilities means debts or other obli-

gations that must be paid or liquidated within a short period of time, usually a year. This shall also include dividends payable on preferred stock within one year

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

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

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

2.40. Director and/or His Authorized Agent means the director of the department of natural resources, deputy directors, the chief of the division of reclamation, the assistant chiefs of the division of reclamation, all duly authorized surface mining reclamation supervisors, inspectors and inspectors-in-training

2.41. Downslope means the land surface between the projected outcrop of the lowest coal seam being mined or any mining related construction and the valley floor.

2.42. Embankment means a man made deposit of earth or waste materials, usually exhibiting at least one sloping face.

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

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

2.45. Excess Spoil means spoil material disposed of in a location other than the mined-out area.

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

2.47. 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.

2.48. Face-Up means the result of an excavation where a vertical or near vertical highwall is created

that exposes the overburden and/or the mineral face.

2.49. **Fine Coal Refuse** means coal processing waste predominately within a size range less than the number twenty-eight (#28) sieve which may be disposed of in a slurry form or in a dewatered or treated state.

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

2.51. **Fragile lands** means geographic areas containing natural, ecologic, scientific or esthetic resources that could be irreparably damaged or destroyed by surface coal mining operations. Examples of fragile lands include valuable habitats for fish or wildlife, critical habitats for endangered or threatened species of animals or plants, uncommon geologic formations, national natural landmark sites, areas where mining may result in flooding, environmental corridors containing a concentration of ecologic and esthetic features, areas of recreational value due to high environmental quality, and buffer zones adjacent to the boundaries of areas where surface coal mining operations are prohibited under Section 22(d) of the Act and Section 13 of these regulations.

2.52. **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.

2.53. **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.

2.54. **Growing Season** means one (1) year.

2.55. **Groundwater** means subsurface water in the zone of saturation.

2.56. **Handbook** means the Technical Handbook of Standards and Specifications for Mining Operations in West Virginia prepared by the director of the West Virginia Department of Natural Resources.

2.57. **Haulageway or Access Road** means any road constructed, improved, maintained or used by the operator with the exception of state maintained roads.

2.58. **Hazard Potential** means a classification rating assigned to a structure based on engineering evaluations and judgment predicting the damage to human life, property and environment should a failure of the structure occur.

2.59. **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

2.60. **Historic Lands** means important historical, cultural and scientific areas that could be irreparably damaged or destroyed by surface mining operations. Examples of historic lands include sites that have been listed on the national register of historic places, national historic landmarks and sites for which historic designation is pending.

2.61. **Hydrologic Balance** means the relationship between the quality and quantity of water inflow to, water outflow from, and water storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the dynamic relationships among precipitation, runoff, evaporation and changes in ground and surface water levels and storage

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

2.63. **Hydrological Isolated Operation** 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. **Impoundment** means a closed basin constructed for the retention of water, sediment or waste.

2.65. **Incidental Boundary Revision** means (a) an extension of the permit area that is necessary for reasons unforeseen at the time the original permit application was prepared and which is necessary for the continuance of that permitted operation; or (b) the deletion of bonded acreage which is double-bonded by a valid permit and for which full liability is assumed in writing by the successive permittee.

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** shall mean a visual review of

prospecting, surface or other mining operations to insure complete compliance with any applicable law, rule, regulation or permit conditions under jurisdiction of the director.

2.68. Intermittent Stream means a stream or portion of a stream that flows continuously for at least one month of the calendar year as a result of ground water discharge or surface runoff.

2.69. Irreparable Damage to the Environment means any damage to the environment that cannot be corrected by actions of the operator.

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

2.71. 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.

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

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

2.74. Mine means the shaft, slopes, drifts or inclines connected with excavations penetrating coal seams or strata and the surface structures or equipment connected therewith which contributes directly or indirectly to the mining, preparation or handling of coal.

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. Net worth means preferred and common stock, all surplus accounts, and retained earnings

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

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 material of any nature, consolidated or unconsolidated, that overlies a mineral deposit, excluding topsoil.

2.83. Peak Runoff means the maximum flow at a specified location resulting from a design storm

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

2.85. 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.

2.86. 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.

2.87. Potential Hazard means the existence of any condition or practice or any violation of a permit or other requirements of the Act in an operating or an abandoned refused area which might reasonably be expected to cause physical harm to persons, property, or the environment inside or outside the permit area.

2.88. Preplan means the total application submitted to the director 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.

2.89. **Pre-existing Discharge** means any discharge at the time of permit application under this subsection.

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

2.91. **Principal Spillway** means the hydraulic structure designed to discharge water stored between normal pool and the emergency spillway invert elevations.

2.92. **Probable Maximum Precipitation** means the depth-duration-area rainfall for a particular area that represents the maximizing of the most critical meteorological conditions that are considered possible.

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

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

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

2.96. **Reclamation** means the process of converting disturbed land to a stable form for productive use.

2.97. **Remined Area** means only that area of any coal remining operation on which coal mining was conducted before the effective date of the Surface Mining Control and Reclamation Act of 1977.

2.98. **Renewable Resource Lands** means geographical areas which contribute significantly to the long range productivity of a water supply, or food or fiber products.

2.99. **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.

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

2.101. **Safety Factor** means the Ratio of the available shear strength to the developed shear stress, or the ratio of the sum of the resisting forces to the sum of the loading or driving forces, as determined by accepted engineering practices.

2.102. **Sediment** means solid material, both mineral and organic, that is in suspension, is being transported or has been moved from its site of origin by air, water gravity or ice and has come to rest on the earth's surface.

2.103. **Sediment Control Structure** means a structure designed, constructed and maintained in accordance with Section 4B.5 of these regulations.

2.104. **Self-Bond** means an indemnity agreement in a sum certain payable to the director, executed by the permittee and by each individual and business organization capable of influencing or controlling the investment or financial practices of the permitted 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 director a security interest in real or personal property pledged to secure performance by the permittee.

2.105. **Significant Aquifer** means a zone, stratum or group of strata that can store and transmit water in sufficient quantities for a specific use (or uses).

2.106. **Slope Protection** means any measures taken to control erosion on slopes.

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

2.108. **Spoil** means overburden that has been removed during surface coal mining operations.

2.109. **Stabilize** means to control movement of soil, spoil piles or areas of disturbed earth by modifying physical or chemical properties.

2.110. **Standard Engineering** means sound engineering practice based upon the technology currently available to the engineering profession.

2.111. **Stoniness** means a characteristic of earth, overburden or spoil reflecting its relative proportion of sizable aggregate content as opposed to its sand,

silt, clay or rock fragment content.

2.112. **Structure** means, but is not limited to, gas lines, water lines, towers, airports and dams. This shall not include operational facilities of the surface mining operation for purposes of Section 4C.5(f)

2.113. **Strength Parameters** mean those engineering values obtained from standard engineering shear

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

2.115. **Subsidence** means a sinking, collapsing or cracking of a portion of the earth's surface caused by voids beneath the surface created by mining

2.116. **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.

2.117. **Substantially Disturb** means, for purposes of prospecting, to impact significantly upon land, air or water resources by such activities as blasting, mechanical excavation, drilling or augering coal or water exploratory holes or wells, construction of roads and other access routes, and the placement of structures, excavated earth or other debris on the surface of land

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

2.119. **Surety Bond** means an indemnity agreement in a sum certain payable to the director 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.

2.120. **Surface Water** means water on the surface of the earth.

2.121. **Topsoil** means the A-horizon soil layer of the three major soil horizons.

2.122. **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.

2.123. **Transfer, Assignment or Sale of Rights** means a change in ownership or other effective control over the right to conduct surface coal mining operations in the soil issued by the director.

2.124. **Toxic Mine Drainage** means water that is discharged from active or abandoned mines or other areas affected by surface mining 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.

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

2.126. **Valid Existing Rights** exists, except for haulroads, in each case in which a person demonstrates that the limitation provided for in Section 22(d) of 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 activity listed in Section 22(d) of the Act came into existence.

2.127. **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 hollow 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.

2.128. **Woodlands** means commercial woodlands where the post-mining land use would be a commercial product where flat or gently rolling land is essen-

tial for operation and mechanical harvesting

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

2.130. Zone of Saturation means the zone below the piezometric surface in which all voids are filled with groundwater. Piezometric surface means the surface to which the water from a given aquifer will rise under its full head.

### §38-2-3A. Permit Application.

3A.1. General Requirements for Format and Contents - Applications for permits to conduct surface mining operations shall be filed in the format required by the director.

(a) All technical data submitted in the application shall be accompanied by the names of persons or organizations that collected and analyzed the data, dates of the collection and analysis of the data and description of the methodology used to collect and analyze the data. Any referenced materials not included in the application shall be readily available to the director

(b) If the application is for a period in excess of the normal five (5) years, the application shall:

1. Be complete for the specified longer term

2. Show that the specified longer term is reasonably needed to allow the applicant to obtain necessary financing of equipment and the opening of the operation and that the need is confirmed in writing by the applicant's proposed source of financing; and

3. Such permits shall be reviewed by mid-term or every five (5) years, whichever is more frequent.

(c) The application shall contain the telephone numbers of the applicant, operator or applicants resident agent.

### §38-2-3B. Advertisement.

3B.1. Surface Mine Application Number. Prior to the publication of the advertisement for a surface mining permit, the applicant shall submit an administratively complete surface mining permit applica-

tion and obtain a surface mining application (SMA) file number. Each such SMA number shall be valid for three hundred sixty (360) days.

### 3B.2. Contents of Advertisements.

(a) The surface mining application (SMA) file number shall be made a part of the advertisement

(b) A clear and accurate location map shall be made a part of the advertisement. A map of a scale and detail found in the West Virginia General Highway Map will be the minimum standard for acceptance. The map size will be at a minimum two inches (2") x two inches (2"). Longitude and latitude lines and north arrow shall be indicated on the map and such lines will cross at or near the center of the proposed permit area.

(c) At a minimum, the advertisement shall contain:

1. The name and business address of the applicant;

2. A narrative description which clearly describes the location of the proposed permit area to include the name of the coal seam to be mined and the receiving stream;

3. The location where a copy of the application is available for public review;

4. The name and address of the regulatory authority where written comments or requests for informal conferences on the application may be submitted;

5. The type of operation; and

6. Surface and mineral ownership of the tract to be permitted.

(d) The advertisement and publication dates shall be certified and notarized by the publishing newspaper. The certificate of publication shall be made a part of the permit application.

(e) If an applicant seeks a permit to mine within one hundred feet (100') of the outside right-of-way of a state maintained road or to relocate a state maintained road, the advertisement may include a concise statement describing the road and, if applicable, the

particular part to be relocated, where the relocation is to occur, the duration of the relocation and that a public hearing can be requested. If mining within one hundred feet (100') of a public road is proposed and not addressed in this advertisement, a separate public notice, with an opportunity for a public hearing, must be provided for prior to permit issuance

(f) If an alternative land use is proposed, an indication of the premining land use and the proposed postmining land use.

(g) If an experimental practice is proposed, a statement indicating such and identifying regulatory provisions for which a variance is requested.

**3B.3. Availability of comments.** The director shall file a copy of comments for public review at the same office where the permit is filed.

#### **3B.4. Readvertisement**

(a) When a Surface Mine Application (SMA), which has been advertised once a week for four (4) successive weeks, has been determined by the commissioner to have had changes effecting the method of operation, the reclamation plan, and/or the original advertisement, then he shall cause a new advertisement to be published one time with a ten (10) day public comment period in accordance with 3B.2(a), (b), and (c) of these regulations.

(b) Permits which are being renewed or significantly revised must be advertised in accordance with 3B.2 of the regulations and with section §22A-3-9(a)(6) of the Code of West Virginia.

**3B 5. Renotification.** A renotification letter shall be sent to all commentors for a surface mine application (SMA) when a determination has been made by the commissioner that readvertisement is required under regulation 3B.4.

#### **§38-2-3C. Maps.**

**3C.1. Scale for Maps.** Except as otherwise noted in these rules and regulations, the scale required for all maps shall be as follows:

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

(b) The preferred scale for maps associated with facilities subject to Sections 7 and 8 of these regulations shall be two hundred foot (200') to the inch; and

(c) Lesser scales may be used where improved clarity and accuracy are necessary.

**3C.2. 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.

**3C.3. Color Code.** A color code shall be used in preparing all maps to indicate critical features of the permit area as follows:

(a) Red shall indicate mineral to be removed,

(b) Blue shall indicate water and drainage patterns;

(c) Green shall indicate areas regraded;

(d) Yellow shall indicate all other areas within the permit boundary; and

(e) Purple shall be used to outline adjacent mining permits

#### **§38-2-3D. Insurance.**

The minimum amount of insurance coverage for bodily injury shall be three hundred thousand dollars (\$300,000) for each occurrence and five hundred thousand dollars (\$500,000) aggregate; and minimum insurance for property damage shall be three hundred thousand dollars (\$300,000) for each occurrence and five hundred thousand dollars (\$500,000) aggregate with no exclusion for landslides and water loss; provided, that blasting insurance will continue as long as blasting activities occur. Provided further, that the policy shall include a rider requiring the insurer notify the director whenever substantive changes are made in the policy including any termination or failure to renew.

#### **§38-2-3E. Approved Persons.**

**3E.1 Function.** Any person may upon approval by the director, unless otherwise provided in the Act and these regulations, prepare, sign or certify all permit applications, maps, plans and design specifications or other similar materials necessary to complete an ap-

plication and preplan. Provided however, that for purposes of Sections 10(a)(13) and 13(b)(10) of the Act an approved person shall be a registered professional engineer or licensed land surveyor who may be assisted by experts in related fields such as geology, land surveying and landscape architecture.

3E.2. Qualifications. The Director's approval shall be in writing and shall be based on the following:

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

(b) Any person seeking an approval must demonstrate that he possesses adequate knowledge of the Act and rules and regulations promulgated thereunder and possess such other skills and qualifications as may be necessary to complete an application and preplan by successfully passing an examination administered by the director. Those persons who have been approved to date need no make said demonstration. Such examinations will be given upon request by the person seeking approval.

taining to air or water environmental protection.

3F.2. Determination by the director. If the Director determines, from either the schedule submitted as part of the application or from other available information, that any surface mining operation owned or controlled by the applicant is currently in violation of any law, rule or regulation of the United States, or of any state law, rule or regulation enacted pursuant to federal law, rule or regulation pertaining to air or water environmental protection, or of any provision of the Act, the director shall require the applicant, before the issuance of the permit, to either:

(a) Submit to the director proof which is satisfactory to the regulatory authority, department or agency which has jurisdiction over such violation, that the violation:

1. Has been corrected; or
2. Is in the process of being corrected.

(b) Establish to the director reviewing such application that the applicant has filed and is presently pursuing, in good faith, a direct administrative or judicial appeal to contest the validity of that violation. If the administrative or judicial hearing authority either denies a stay applied for in the appeal or affirms the violation, then any surface coal mining operations being conducted under a permit issued according to this paragraph shall be immediately terminated, unless and until the provisions of the above paragraph are satisfied.

3F.3. Identification Number. The name of the proposed mine and the Mine Safety and Health Administration identification number for the surface or underground mine, if issued, shall be included in the application.

3F.4. Federal Fees. The applicant shall submit proof that all Federal Reclamation fees are paid.

#### §38-2-3F. Compliance Information.

3F.1. Past Violations. In addition to the compliance and permit information required by the Act, each application shall contain a listing of any current or previous permits or pending applications in the United States and a listing of each violation notice received by the applicant in connection with any surface coal mining operation during the three (3) year period before the application date for violations of any environmental law, rule or regulation of any state and of regulation enacted pursuant to federal law per-

**§38-2-3G. Operation Plans, Maps and Cross Sections.**

3G.1. Operation Plans. In addition to other plans required by the Act, the application shall contain plans describing:

(a) How the applicant will case, seal or otherwise manage augerholes, boreholes, shafts, wells and open holes;

(b) How the applicant will remove, store and redistribute topsoil, subsoil and other materials or topsoil substitutes as provided for in the Topsoil Per-

formance Standards of Sections 6, 7, and 8; and

(c) How the applicant will handle acid forming and toxic forming materials and materials constituting a fire hazard.

**3G.2. Maps.** The preplan map shall be developed in accordance with the requirements of Sections 20-6-10(a) (12) and (13) and 20-6-11 of the Act and Subsection 3C of these regulations and shall include the following:

(a) The location and current use of all structures within one thousand feet (1000') of the proposed permit area;

(b) Each state maintained road located in or within one hundred feet (100') of the proposed permit area;

(c) The boundaries of any public park and locations of historic lands within or adjacent to the permit area;

(d) Each cemetery located in or within one hundred feet (100') of the proposed permit area;

(e) 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 Rivers Act which is located within or adjacent to the proposed permit area;

(f) The location of all existing structures to be used for surface mining operations which are to be exempt from design standards;

(g) The date on which the map was prepared, a north arrow, quadrangle name and location map,

(h) 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 crop line;

(i) The location of sampling points for the collection of base line data and monitoring sites to be used during operation;

(j) The location of each facility to be used to protect or enhance fish and wildlife and related envi-

ronmental values;

(k) Extent of proposed auger operations;

(l) Surface and mineral owners and property lines within and contiguous to the permit area;

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

(n) Location and identification of sub areas if incremental bonding is to be used.

(o) the areal distribution of aquifers for the proposed permit and adjacent areas.

(p) the location and depth of all oil and gas wells within the proposed permit area must be shown for both surface and underground mines.

**3G.3 Cross-sections.** The application shall contain cross-sections which accurately depict:

(a) the existing premining surface configuration and the final surface configuration that will be achieved as proposed in the reclamation plan and/or as required by these regulations.

(b) vertical distribution of aquifers with seasonal differences in head shown if available for the proposed permit area.

**§38-2-3H. General Environmental Resources Information.**

**3H.1.** The application shall contain a description of any historic lands shown on the preplan map within or adjacent to the proposed permit area. A statement as to the timing and sequence of mining and a description of the measures to be used to minimize or prevent adverse impacts in relation to such historical lands shall be included in the application.

**3H.2. Existing Structures and Facilities.** The applicant shall submit necessary plans and specifications for the modification of any existing structures or facilities which do not meet the performance standards contained in these regulations.

**3H.3. Experimental Practices.** All experimental practices shall have the prior approval of the director of OSM before the beginning of operation and permits including such shall be reviewed at least every two

and one-half (2 1/2) years from date of issuance.

**§38-2-3I. Endangered Species.**

The applicant shall describe all control measures, management techniques and monitoring methods to be used to protect or enhance threatened or endangered species of plants or animals listed by the Secretary of the Interior under the Endangered Species Act of 1973, as amended (16 U.S.C 1531 et seq.) and their critical habitats if they are to be affected by the proposed activities.

**§38-2-3J. Occupied Dwellings.**

Where the proposed surface coal mining operation would be conducted within three hundred feet (300') (measured horizontally) of any occupied dwelling, the applicant shall submit with the application a written waiver from the owner of the dwelling or a demonstration of valid existing rights; provided, that if a waiver was obtained prior to August 3, 1977, a new waiver need not be obtained; provided further, that valid waivers shall remain in any subsequent transfer, sale or reassignment of the permit.

**§38-2-3K. Verification of Application.**

An application for a permit shall contain a notarized signature by a principal officer verifying that the information contained in the application is true and correct to the best of the official's information and belief.

**§38-2-3L. Transfer, Assignment or Sale of Permit Rights and Obtaining Approval.**

3L.1. Requirements. The director shall not grant approval of the transfer, assignment or sale of the rights granted under any permit unless and until the following conditions are met:

(a) It shall be affirmatively demonstrated to the director 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 of the permit rights; and

(b) The application shall set forth on forms prescribed by the director and verified in accordance with 3K, the information required in the following sections of the Act: 10(a)(1) through 10(a)(6) and 10(a)(9), 10(d), 10(f), 11(a)(10), and 18(b)(5).

3L.2. Findings. If the director finds, based on the information set forth in 3L.1. and other information made available to him, that the person to whom the permit rights are being assigned, transferred or sold will conduct mining operations in accordance with the purpose and intent of the Act, these regulations and the terms and conditions of the permit, the approval of the assignment, transfer or sale of the permit rights may be granted.

3L.3. Agreement. A permittee who wishes to assign the mining operation through an agreement, contract, job contract, etc., to another party but retain the permit must request prior written approval on forms prescribed by the director. 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.

3L.4. Successor by Transfer, Assignment or Sale. Any person seeking to succeed by transfer, assignment or sale to the rights granted by a permit issued under the Act shall, prior to the date of such transfer, assignment or sale, comply with the following:

(a) Obtain the performance bond coverage of the original permittee by:

1. Transfer or replacement of the original bond;

2. A written agreement with the original permittee and all subsequent successors in interest (if any) that the bond posted by the original permittee and all successors shall continue in force on all areas affected by the original permittee and all successors and supplementing such previous bonding with such additional bond as may be required by the regulatory authority. If such an agreement is reached, the director may authorize for each previous successor and the original permittee the release of any remaining amount of bond in excess of that required by the agreement; and

3. Providing sufficient bond to cover the original permit in its entirety from inception to completion of reclamation operations or by such other methods as would provide that reclamation of all areas affected by the original permittee is assured under bonding coverage at least equal to that of the original permittee

(b) Provide the director with an application for

approval of such proposed transfer, assignment or sale, including:

1. Name and address of the existing permittee and permit number; and
2. Name and address of the person proposing to succeed by such transfer, assignment or sale and the name and address of that person's resident agent.

### 3L.5. Advertisement.

(a) The person applying for approval of such transfer, assignment or sale of rights granted by a permit shall advertise the filing of the application in a newspaper of general circulation in the locality of the operations involved, indicating the name and address of the applicant, the original permittee, the number and particular geographic location of the permit and the address to which written comments may be sent under this paragraph.

(b) Any person whose interest are or may be adversely affected, including but not limited to, the head of any local, state or federal government agency, may submit written comments on the application for approval to the director within thirty (30) days of the day of publication.

3L.6. Approval. The director may, upon the basis of the applicant's compliance with the requirements of paragraphs (1) and (2) of this Subsection, grant written approval for the transfer, sale or assignment of rights under a permit, if he first finds that.

(a) The person seeking approval will conduct the operations covered by the permit in accordance with the requirements of law;

(b) The applicant has submitted a performance bond or other guarantee at least equivalent to the bond or other guarantee of the original permittee; and

(c) The applicant will continue to conduct the operations involved in full compliance with the terms and conditions of the original permit, unless and until a new permit is obtained.

### §38-2-3M. Renewals.

3M.1. Application. Application for renewal shall be on forms prescribed by the director, shall be filed in accordance with 20-6-10(c) of the Act, and shall

contain the following:

(a) 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;

(b) A statement that the terms and conditions of the preplan are being satisfactorily met,

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

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

(e) A progress map of the same size and scale as the proposal maps for all operations except those in phase I, II, or III release or those with no disturbance and not started into operation

(f) A statement that the information set forth in the form and progress map is true and accurate;

(g) A notarized signature of the principal officer of the permittee in accordance with section 3K, and

(h) A copy of the proposed newspaper advertisement in accordance with section 20 of the Act and section 3B.2 of these regulations.

3M.2 Notification The director shall notify appropriate agencies in accordance with 20-6-20(a) of the Act.

3M.3. Response. Informal conferences shall be available in accordance with Section 20-6-20(b) of the Act and the director shall send copies of his decision to the applicant, any persons who filed objections or comments to the renewal and to any persons who were parties to any informal conference held on the permit renewal.

3M.4. Time extension. 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

### §38-2-3N. Revisions.

#### 3N.1 General

(a) Any revision to a permit will be subject to review and approval by the director and if deemed to be a significant revision must meet all requirements of the Act and these rules and regulations. A revision will not be deemed to be significant unless it is determined that the environmental impact or the welfare and safety of the public may be altered from that reflected in the approved preplan

(b) No significant revision to a permit may be implemented by any operator until the written approval of the director has been granted.

### **§38-2-30. Findings.**

**30.1. Effect on Public Places.** Where the proposed surface coal mining operation will adversely affect any public park or any publicly owned place listed on the national register of historic places, the director shall transmit to the Federal, State or local agencies with jurisdiction over the park or historic place a copy of the complete permit application and request that the agency approve or disapprove the operations

**30.2. Written Determinations.** Along with other written determinations required by the Act and these regulations, the director shall make a written determination that the proposed surface mining 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.)

**30.3. Operation(s) Near State Road.** Where the proposed mining operation is to be conducted within one hundred feet (100') (measured horizontally) of the outside right-of-way line of any public road (except where mine access roads or haulage roads join such right-of-way line) or where the applicant proposes to relocate any public road, the director shall:

(a) Require the applicant to obtain necessary permission from the authority with jurisdiction over state maintained roads;

(b) Provide an opportunity for a public hearing at which any member of the public may participate in the locality of the proposed mining operations for the purpose of determining whether the interest of the public and affected landowners will be protected;

(c) If a hearing is held, require the applicant to

provide notice in a newspaper of general circulation in the affected locale of a public hearing at least two (2) weeks before the hearing; and

(d) Make a written finding based upon information received at the public hearing within thirty (30) days after completion of the hearing as to whether the interests of the public and affected landowners will be protected from the proposed mining operations.

**30.4. Designation of Lands Unsuitable.** Upon receipt of a complete application for a surface mining permit, the director shall review the application to determine whether the surface coal mining operation is limited or prohibited under Section 22 of the Act on the lands which would be disturbed by the proposed operation.

(a) If the director is unable to determine whether the proposed operation is located within the boundaries of any of the lands in Section 22(d)(1) of the Act, or closer than the limits provided in Section 22(d)(4) of the Act, the director 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, with a notice to the appropriate agency that it must respond within thirty (30) days of receipt of the request.

(b) Where the proposed operation would include federal lands within the boundaries of any national forest and the applicant seeks a determination that mining is permissible under Section 22(d)(5) of the Act, the applicant shall submit a permit application to the OSM State director.

**30.5. Notification.** When a permit is issued, the director shall notify each person who files comments or objections to the permit application, each party to the informal conference, and the appropriate local agencies including the clerk of the county commission in the area of the land to be affected. The director shall also cause to be published at least monthly a listing of all permits issued in the area.

Ed. Note: Section 4A through 4I govern general mining and reclamation plan requirements and bonding.

### **§38-2-4A. Haulageways or Access Roads.**

**4A.1. Location.** The approximate center line loca-

tion of the proposed haulageways or access roads shall be identified on the site by visible markings at one hundred foot (100') intervals, which are in place at the time of preinspection, provided, that preexisting haulageways or access roads shall be exempt from this requirement.

4A.2. Construction. All construction of haulageways or access roads shall be in accordance with the following provisions.

(a) The grading of the haulageway or access roads shall be such that:

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 (1,000') of road construction; and

3. The surface shall pitch toward the ditch line at the minimum rate of one-half inch (1/2") per foot of surface width or crowned at the minimum rate of one-half inch (1/2) per foot of surface width as measured from the center line of the haulageway or access road.

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

(c) Cut Slopes. Cut slopes should not be steeper more than 1:1 in soils or 1/4:1 in rock.

(d) Tolerance. All grades referred to in this section shall be subject to a tolerance of two percent (2%). All linear measurements referred to in this section shall be subject to a tolerance of ten percent (10%). All angles referred to in this section shall be measured from the horizontal and shall be subject to a tolerance of five percent (5%).

4A.3. Drainage Design. All drainage designs of haulageways or access roads shall be in accordance with the following provisions:

(a) Ditches. 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 one (1) year, twenty-four (24) hour precipitation event. Where super elevation to the inside of a curve will improve the safety of a haulroad such as in the head of a hollow, a ditch line may be located on the outside shoulder of cut fill section, provided, that the ditch line is designed so that it will remain stable and that drainage control in accordance with the Act is also provided for water on the outside of the curve

(b) Culverts. Ditch relief culverts shall be installed wherever necessary to insure proper drainage of surface water beneath or through the haulageway or access road, according to the following provisions:

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

2. The culvert shall cross the haulageway or access road at a thirty (30) degree 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;

3. The inlet end shall be protected by a head-wall of stable material as approved by the director and the slope at the outlet end shall be protected with an apron of rock riprap, energy dissipator or other material approved by the director;

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

5. Design of culverts may be submitted where the aforementioned design criteria is not practical or necessary.

(c) Culvert Openings. Culvert openings installed on haulageways or access roads shall not be less than one hundred (100") square inches in area, but, in any event, all culvert openings shall be adequate to carry storm runoff of a peak discharge capacity of a one (1) year, twenty-four (24) hour precipitation event from the contributing watershed and shall receive necessary maintenance to function properly at all times; and

(d) **Intermittent or Perennial Stream Crossing.** Culverts, bridges or other drainage structures shall be used to cross intermittent or perennial streams. Consideration shall be given to such factors as weather conditions, season of the year, time period for construction, etc., with regard to using measures to minimize adverse effects to the water quality and stream channel. In no event shall the sediment load of the stream be significantly increased or the water quality be significantly decreased during the construction period. Water control structures shall be designed with a discharge capacity capable of passing the runoff for a ten (10) year, twenty-four (24) hour precipitation event from the contributing watershed; provided, if approved by the director, the capacity of the water control structure itself can be at least equal to or greater than stream channel discharge capacity immediately upstream and downstream of the crossing; provided further, that the structure shall pass at least a one (1) year, twenty-four (24) hour storm.

4A.4. **Sediment Control.** A sediment storage volume must be provided equal to 0.125 acre/foot for each acre of disturbed area or a lesser value as approved by the director. Temporary erosion and sedimentation control measures such as outlined in Chapter 19 of the Handbook shall be implemented during construction until permanent control can be established.

4A.5. **Seeding of Slopes.** All disturbed area including fill and cut slopes, shall be seeded and mulched immediately after the construction of a haulageway or access road and maintained thereafter as necessary to control erosion.

4A.6. **Surfacing.** Haulageways or access roads shall not be surfaced with any acid-producing or toxic material and the surface shall be maintained to control or prevent erosion and siltation.

4A.7. **Dust Control.** All reasonable means shall be employed to control dust from the surface of haulageways or access roads.

4A.8. **Removal of Drainage Structures.** Bridges, culverts, stream crossings, etc., necessary to provide access to the operation, shall not be removed until reclamation is completed and approved by the director. The same precautions as to water quality are to be taken during removal of drainage structures as those taken during construction and use.

4A.9. **Existing Haulageways or Access Roads.**

Where existing roads are to be used for access or haulage and it can be demonstrated that reconstruction to meet the above requirements would result in greater environmental harm and the drainage and sediment control requirements of this section can otherwise be met, 4A.2 (a)1 and 2 4A.2 (c); 4A.2 (d) and 4A.3 (b)1 and 2; will not apply.

4A.10. **Infrequently Used Access Roads.** Access roads constructed for and used only to provide infrequent service to surface facilities such as ventilators, monitoring devices and fans may be exempt from the requirements of the above sections with the exception of 4A.5. and 4A.11.

4A.11. **Abandonment of Haulageways or Access Roads.** Haulageways or access roads shall be abandoned in accordance with the rules and regulations in addition to the following requirements:

(a) Upon abandonment of haulageways or access roads, every effort 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 in terms of percent of haulageway or access road grade, prior to the abandonment. (See Table 38-2A found at the end of this regulation.)

(b) Upon abandonment of haulageways or access roads, they shall be seeded and mulched immediately in accordance with subsection 4F.

4A.12 **Plans, Design Data and Construction Specifications.**

(a) A plan view drawn to scale showing haulroad station base line, location of culverts, flow directions, intermittent or perennial streams, and other pertinent data.

(b) A surveyed profile drawn to scale (scale should be no greater than 1" = 100' horizontal, 1" = 50' vertical) showing but not limited to road surface, location and size of culverts, station, elevations, original ground, and percent grades.

(c) Typical cross-section of haulroad showing culvert, slope of culvert, fill material, original ground, ditches and sediment control devices, if applicable.

(d) Intermittent or perennial stream crossings,

submit the following:

1. Structure computation sheet; and
2. Cross-section showing all pertinent information.

(e) Construction specifications should include excavation, selection and placement of materials, vegetative protection against erosion, road surfacing, drainage and sediment control.

**4A.13. Other Transportation Facilities.** Railroad loops, spurs, sidings, surface conveyor systems, chutes, aerial tramways or other transportation facilities shall be designed, constructed, maintained and abandoned so as to comply with the following:

(a) Control or prevent erosion, siltation and the air pollution attendant to erosion,

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

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

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

(e) Prevent or control damage to public or private property.

The Handbook contains design criteria generally appropriate for environmental protection and safety.

**4A.14. Certification.** All roads and haulageways for which design criteria have been submitted for technical review and approval shall be certified that construction was in accordance with the approved plan except as noted in the certification after construction and/or installation is complete.

(a) A certification form shall be submitted to the Department of Natural Resources, Division of Reclamation which has been signed by a person approved by the director prior to coal haulage or general use of such road.

(b) Any minor changes implemented during

construction which equals or exceeds the approved system shall be indicated on "As-built" plans showing approved design, amount of minor change, and included as a part of the certification.

#### **§38-2-4B. Drainage System.**

##### **4B 1. Drainage Plan.**

(a) A drainage map shall be included in the application which shall indicate or contain the following:

1. The directional flow of water on and away from the land to be affected;

2. Location of all surface and groundwater base line test sites;

3. Location of all proposed surface and groundwater monitoring sites,

4. Location of all erosion and sedimentation control structures,

5. Component drainage area together with a table showing total acreage and disturbed acreage within each component; and

6. A sediment structure table showing; type of sediment control structure, total contributing drainage area (acres), disturbed acreage controlled by total disturbance in drainage area (acres) and storage capacity (AC FT).

(b) The design shall be in accordance with the Handbook unless otherwise approved.

**4B 2 Natural Drainways.** Natural drainways in the area of land disturbed by surface mining and prospecting operations shall be kept free of overburden except where overburden placement has been approved. Overburden placement and haulageways across natural drainways shall be constructed so as not to affect the flow of the stream or materially increase the sediment load and concentrations of toxic materials in the stream.

**4B.3. Intermittent or Perennial Stream.** No land within one hundred feet (100') of an intermittent or perennial stream shall be disturbed by surface mining operations unless specifically authorized by the director. The director will authorize such operations

only upon finding that surface mining activities will not adversely affect the normal flow or gradient of the stream, adversely affect fish migration or related environmental values or materially damage the water quantity or quality of the stream. The area not to be disturbed shall be designated a buffer zone and marked accordingly.

**4B.4. Stream Channel Diversion and Diversions.** All stream channel diversion and diversions within the permit area shall be designed to be stable, provide protection against flooding and resultant damage to life and property, prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to stream flow outside the permit area and comply with all local, State, and Federal laws and regulations.

(a) Stream Channel Diversions.

1. Design Capacity

A. The design capacity of channels for temporary and permanent channel diversions shall be at least equal to the capacity of the unmodified stream channel immediately upstream and downstream for the diversion.

B. Temporary and permanent channel diversions designed so that the combination of channel, bank and flood-plain configuration is adequate to pass safely the peak runoff of a ten (10) year, twenty-four (24) hour precipitation event for a temporary channel diversion and a one hundred (100) year, twenty-four (24) hour precipitation event for a permanent channel diversion.

2. Removal of Temporary Diversions. Temporary channel 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.

3. Plans, Design Data and Specifications

A. A "stream channel design computation sheet" to be completed for each proposed temporary or permanent stream channel diversion.

B. Construction plans showing:

(1) A plan view of the area showing

center line profiles of existing stream channel and proposed location of the temporary or permanent stream channel (drawn to scale);

(2) Profiles along the center line of the existing and temporary or permanent stream channel showing original ground, proposed and existing stream bottom (drawn to scale);

(3) A cross-section showing original ground limits, bottom width, side slopes, depth of flow, floodplain configuration; and

(4) Show detailed sequence of installation of temporary or permanent stream channel diversion

C. Construction specifications.

D. Maintenance schedule and procedures for maintenance.

(b) Diversions.

1. Design Capacity. Diversions shall have the capacity to pass safely the peak discharge from the contributing watershed from a ten (10) year, twenty-four (24) hour precipitation event.

2 Plans, Design Data and Specifications. In addition to the "Proposed Drainage Plan", there shall also be submitted the following items concerning diversions:

A. A "Diversion Design Computation Sheet" to be completed for each proposed diversion

B. Construction plans showing:

(1) A surveyed profile along the center line of the diversion showing original ground line and proposed diversion bottom;

(2) Channel cross-section showing the original ground line, bottom width, side slopes, depth of flow, freeboard and other pertinent information drawn to scale;

(3) Type soil in which diversion will be excavated. The soil shall be sampled and classified at intervals five hundred feet (500'); and

(4) Type and design, if applicable, of

the outlet proposed for each diversion.

C. Maintenance schedule and procedures for maintenance; and

D. Construction and vegetation specifications.

4B 5. Sediment Control. Sediment control structures shall be constructed in appropriate locations in order to control sedimentation. All runoff from the disturbed area shall pass through a sedimentation pond(s) such as, but not limited to, earth embankment, excavated ponds, gabions, cribs and bench control systems. In addition to the requirements of this subsection all such structures shall be designed, constructed and maintained in accordance with the Handbook unless otherwise approved.

(a) Design and Construction Requirements.

1. All sediment control structures shall be constructed and certified before beginning of any surface mining activities as provided for in paragraph (b) of this subsection.

2. All structures shall be located as near as possible to the disturbed area and out of perennial streams unless the applicant demonstrates and the director finds that there is no other suitable location for such structures.

3. All structures shall 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 site sediment control measures. 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.

4. All discharges from sediment control structures shall not cause a violation of state and federal water quality standards and shall meet effluent limitations.

5. All structures shall be designed, constructed and maintained to prevent short-circuiting.

6. All structures shall be cleaned out when the sediment accumulation reaches sixty percent (60%) of this design capacity. Clean-out elevation shall be indicated on plans submitted for the structure. Sediment removal and disposal shall be done in a manner that minimizes adverse effects on surface and groundwater quality.

7. All structures shall be designed, constructed and maintained to meet the following safety standards:

A. Provide a combination of principal and emergency spillways on embankment structures that will safely discharge a minimum twenty-five (25) year, twenty-four (24) hour precipitation event. The principal spillway requirements may be waived by the director if the emergency spillway is designed at a minimum to safely bypass the peak rate of discharge of a twenty-five (25) year, twenty-four (24) hour frequency storm in an open channel constructed of non-erodible material and capable of maintaining sustained flows. If alternate sediment control structures such as excavated ponds or bench control structures are utilized in place of embankment structures, these structures will safely discharge a ten (10) year, twenty-four (24) hour precipitation event. The emergency spillway or exit channel shall at least handle a ten (10) year, twenty-four (24) hour precipitation event;

B. Provide a minimum difference in elevation between principal spillway and emergency spillway of 1.5 feet and a minimum difference in elevation between the maximum design flow elevation in the emergency spillway and/or exit channel and top of settled embankment of 1.0 foot;

C. Provide proper stabilization and re-vegetation of the embankment; and

D. Avoid organic matter in the foundation and provide for proper compaction and ensure against excessive settlement by excluding sod, roots, frozen soil or coal processing wastes from the embankment

8. Sediment control structures which impounds water to 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; or impounds water to an elevation of twenty feet (20') or more above the upstream toe of the structure shall be constructed, inspected and abandoned in accordance

to 30 CFR 77.216. In addition to those requirements, the following minimum standards shall be adhered to:

A. An appropriate combination of principal and emergency spillways shall be provided to discharge safely the runoff resulting from a one hundred (100) year, six (6) hour precipitation event, or a large event specified by the Department of Natural Resources;

B. The embankment shall be designed and constructed with a static safety factor of at least 1.5 or higher safety factor as designated by the Department of Natural Resources to ensure long-term stability;

C. Appropriate barriers shall be provided to control seepage along the conduits that extend through the embankment, and

D. All inspection reports and approvals shall be provided to the Director of the Department of Natural Resources.

9. Discharge Structures. Discharge from temporary or permanent sediment control structures, diversions, stream channel diversions, etc., shall be controlled by energy dissipators, riprap channels or other devices approved by the director to reduce erosion, to prevent deepening or enlargement of stream channels and to minimize disturbance of the hydrologic balance. Discharge structures shall be designed according to standard engineering procedures.

(b) Certification. A certification form shall be submitted to the Department of Natural Resources, Division of Reclamation, for each component drainage area system as it is completed and prior to any disturbance in that component drainage area; provided, that if a bench control system is the primary sediment control structure for the operation and the system is constructed progressively with the mining operation, then the system shall be constructed and certified in sections of one thousand (1,000) linear feet (maximum) measured from the active mineral removal area. This certification must include a map showing exact location of certified section.

The certification form shall be certified by a person approved by the director of the Department of Natural Resources stating that the erosion and sediment control system(s) is (are) constructed and installed in accordance with the technical aspects of

the approved preplan and any modifications thereto, as approved by the Department of Natural Resources

Any minor change which equals or exceeds the approved system occurring during construction shall be indicated on "As-built" plans showing approved design, amount of minor change and reference points are to be submitted along with the form.

(c) Inspection. A qualified person designated by the director shall examine the impoundment at least quarterly.

(d) Prior to Phase 1 bond release, all sediment control structures shall be cleaned out so as to meet design storage capacity for all areas not revegetated and stabilized as approved by the director.

(e) Abandonment Procedures. Minimum requirements for abandoning sediment control structures prior to total release of bond are as follows:

1. Excavated Sediment Pond, Dugout Type. There is no required abandonment procedure for excavated ponds unless they have an embankment. If they have an embankment, they shall follow the abandonment procedures outlined in subparagraph 2. below.

2. Embankment type sediment dams, embankment type excavated sediment dams and crib and gabion control structures. Sediment dams and all accumulated sediment above the dam shall be removed from the natural drainway if they are built across it. Dams adjacent to natural drainways shall be abandoned by diverting the entrance channel to the natural drainways, thus preventing any future surface runoff from entering the impoundment.

When sediment dams are removed, the natural drainway shall be returned to its original profile and cross-section as near as practical. An original profile and cross-section view for the channel shall be submitted with the drainage plan. The channel sides and bottom shall be rock riprap. The riprap shall extend up to the top of the channel. The riprap requirement may be waived where the bottom and sides of the channel consist of bedrock. Those structures to be left in place after final release of surface mining shall be considered permanent impoundments and shall be left in accordance with the following requirements:

A. The request to leave the structure will

be made on forms prescribed by the director;

B. The request will contain a statement as to the conditions of the impoundment; and

C. The request will contain a statement signed by the landowner and the operator asserting that the landowner assumes all liability for the structure and will inspect it periodically and maintain it in a safe condition.

3. Bench Control Systems. There is no required abandonment procedure for bench control systems.

4. Revegetation of Disturbed Areas. All areas disturbed during abandonment of a sediment control structure shall be seeded and mulched immediately to stabilize the area.

5. Disposal of Waste Material. Waste material shall be spread over an area designated on the drainage plan in accordance with these specifications.

A. Provisions shall be made for the diversion or safe passage of surface water concentrating on the land side of the spoil bank

B. The spoil 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 spoil shall not be steeper than two (2) horizontal to one (1) vertical. If the spoil is spread to the edge of the stream bank, the stream side slope of the spoil shall be shaped to join the side slope of the stream bank so loose spoil will not slide or erode into the channel.

#### **§38-2-4C. Blasting.**

4C.1. General Requirements. Each operator shall comply with all applicable state and federal laws in the use of explosives. A blaster certified by the Department of Energy shall be responsible for all blasting operations including the transportation, storage and use of explosives within the permit area. Only blasts that use more than five (5) pounds of explosive or blasting agent shall be conducted in accordance

with the blasting schedule required under section 4C.3

4C.2 Blasting Plan. Each application for an operation subject to section 6 of these regulations shall include a blasting plan. The blasting plan shall explain how the applicant will comply with the requirements of this subsection.

4C.3 Public Notice of Blasting Operations. At least ten (10) days, but not more than thirty (30) days, prior to any blasting operations, the operator shall publish on a form prescribed by the Commissioner, 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 permit area, excluding drainage structures, haulroads and access roads unless there will be blasting on or near such structures or roads. 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 the prior announcement. The schedule shall contain at a minimum.

(a) Name, address and telephone number of the operator;

(b) Identification of the specific areas in which blasting will take place;

(c) Dates and times when explosives are to be detonated;

(d) Methods to be used to control access to the blasting area; and

(e) Types of audible warning and all clear signals to be used before and after blasting.

Surface blasting activities incident to underground coal mining are not subject to the requirements of this paragraph so long as all residents or owners of dwellings or structures located within one-half (1/2) mile of the blasting area is notified by the operator approximately twenty-four (24) hours prior to any surface blast.

4C.4. Blast Record. The format for the arrange-

ment and the recording of items in the blasting log book is to be on forms approved by the Commissioner. A blasting log book shall be kept current daily and is to be made available at the operation for inspection by the Commissioner and upon written request by the public. The blasting log shall include any seismograph reports and shall be retained for three (3) years and shall include at a minimum the following data:

(a) Name of permittee, operator or other person conducting the blast;

(b) Location, date and time of blast;

(c) Name, signature and certification number of blaster-in-charge;

(d) Identification of nearest structure not owned or leased by the operator and direction and distance, in feet, to such structures;

(e) Weather conditions;

(f) Type of material blasted;

(g) Number of holes, burden and spacing;

(h) Diameter and depth of holes;

(i) Types of explosives used;

(j) Total weight of explosives used;

(k) Maximum weight of explosives detonated within any eight (8) millisecond period;

(l) Method of firing and type of circuit;

(m) Type and length of stemming;

(n) If mats or other protections were used;

(o) Type of delay detonator used and delay periods used;

(p) Seismograph records shall include but not be limited to:

1. Seismograph reading, including exact location of seismograph and its distance from the blast;

2. Name of person taking the seismograph

reading,

3. Name of person and firm analyzing the seismograph record;

4. Type of instrument, sensitivity and calibration signal or certification of annual calibration

(q) Shot location;

(r) Sketch of delay pattern; and

(s) Reasons and conditions for unscheduled blasts.

#### 4C.5. Blasting Procedures.

(a) All blasting shall be conducted only during daytime hours, between sunrise and sunset; provided, that based on public requests or other consideration, including the proximity to residential areas, the Commissioner may specify more restrictive time periods. No blasting shall be conducted on Sunday. Blasting may not be conducted at times different from those announced in the blasting schedule except in emergency situations where rain, lightning or other atmospheric conditions, or operator or public safety requires unscheduled detonations.

(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;

2. All approaches to the blast area shall be guarded against unauthorized entry prior to and immediately after blasting; and

3. All charged holes shall be guarded and posted against unauthorized entry.

(c) A maximum air blast level of one hundred twenty-eight (128) decibel linear peak shall not be exceeded at any residence or occupied structure within one-half (1/2) mile of the blasting site other than operational facilities of the mine.

(d) Use of explosives: Surface blasting requirements. Flyrock, including blasted material traveling along the ground, shall not be cast from the blasting vicinity more than half the distance to the nearest dwelling or other occupied structure and in no case beyond the bounds of the area under permit, or beyond the area of regulated access required under paragraph (b) of this section.

Access to the area shall be controlled to prevent the presence of livestock or unauthorized personnel during blasting and until an authorized representative of the person who conducts the surface mining activities 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.

(e) If required by the Commissioner, air blast levels will be measured by an instrument with a linear frequency response range of 6Hz to 200 Hz or greater.

(f) No blasting within five hundred (500) feet of an underground mine not totally abandoned shall be permitted except with the concurrence of the West Virginia Department of Energy, the operator of the underground mine and MSHA. The Commissioner may prohibit blasting on specific areas where it is deemed necessary for the protection of public or private property or the general welfare and safety of the public.

(g) The operator may use the following scaled distance formulas to determine the allowable maximum weight of explosives to be detonated in any eight millisecond period without seismic monitoring:  $W = D/50^2$  if the nearest structure is within three hundred (300) feet,  $W = (D/55)^2$  if the nearest structure is between three hundred (300) and five thousand (5,000) feet, or  $W = (D/65)^2$  if the nearest structure is greater than five thousand (5,000) feet from the blast. "W" represents the maximum weight of explosives in pounds that can be detonated in any eight (8) millisecond period and "D" represents the distance in feet from the nearest protected structure.

(h) The scaled distance formulas need not be used if a seismograph record at the nearest protected structure is obtained 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. 1.25 if the structure is within three hundred (300) feet, 1.0 if the structure is between three hundred (300) and five thousand (5,000) feet, and 0.75 if the structure is greater than five thousand (5,000) feet from the blast site.

(i) The Commissioner, based on the physical conditions of the site and in order to prevent injury to persons or damage to property, may require a seismograph recording of any or all blasts.

(j) Protected structures include any dwellings, public buildings, schools, churches or community or institutional buildings outside the permit area in addition to those identified in 2.105 unless they are owned by the permittee. Structures owned by the permittee and leased to another person without a written waiver by the lessee are also protected.

(k) The Commissioner may waive the provisions of 4C.5.(g) and 4C.5 (h) of the Rules and Regulations in regard to the protection of gas or oil wells, liquid or gas transmission lines, and other utility transmission structures provided all of the following criteria are met:

(1) The Permittee obtains a statement from the owner and when appropriate the operator of said structure, waiving the provisions of 4C.5.(g) and (h).

(2) The Permittee submits a blasting plan detailing the protective measures to be taken in lieu of 4C.5.(g) and 4C.5.(h) and supporting documentation for those protective measures.

(3) Permittee shall submit an approval by the owner of the structure of alternative protective measures.

(4) Approval for the use of such alternative measures is obtained from the Commissioner prior to the use of those measures in lieu of 4C.5.(g) or (h).

(l) Alternative measures taken under 4C.5.(k) shall not reduce the level of protection for other structures below the levels provided for in 4C.5.(g) and (h).

4C.6. Certified Blasting Personnel. Each person responsible for blasting operations shall possess a

valid certification from the Commissioner of the West Virginia Department of Energy.

4C.7. **Preblast Survey.** The operator shall inform 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 at least thirty (30) days prior to initiation of blasting. For purposes of this section, drainage structures, haulroads and access roads are not considered part of the permit area unless blasting is necessary for construction. Requirements for a preblasting survey shall be governed by the following:

(a) 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, then upon request, a survey of such additions and/or renovation shall be performed in accordance with this section;

(b) The applicant or permittee shall conduct the survey to 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; and

(c) 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.

(d) Surveys requested more than ten (10) days before the planned initiation of blasting shall be completed before blasting is initiated.

(e) 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.

#### **§38-2-4D. Postmining Land Use.**

4D.1. **General.** All disturbed areas shall be restored in a timely manner to conditions that are capable of supporting the uses which they were capable of supporting before any mining or higher or better uses achievable under the criteria and procedures of this subsection.

4D.2. **Determining Premining Use of Land.** The premining uses of land to which the postmining land use is compared shall be those uses which the land previously supported if the land had not been previously mined and had been properly managed. The postmining land use for land that has been previously mined and not reclaimed shall be judged on the basis of the land use that existed prior to any mining; provided, that if the land cannot be reclaimed to the land use that existed prior to any mining, the postmining land use shall be judged on the basis of the highest and best use that can be achieved which is compatible with surrounding areas and does not require the disturbance of areas previously unaffected by mining.

The postmining land use for land that has received improper management shall be judged on the basis of the premining use of surrounding lands that have received proper management. 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.

The applicant shall submit a narrative of land capability and productivity, which analyzes the premining land-use description in accordance with 20-6-11(a)2 of the Act.

4D.3. **Land Use Categories.** Change from one land use category to another in premining to postmining constitute an alternate land use and the operator shall meet the requirements of section 4D.4. and all other applicable sections of these rules and regulations. 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

(l) **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.

**4D.4. Criteria for Approving Alternative Postmining Use of Land.** An alternative postmining land use may be approved by the director after consultation with the landowner or the land management agency having jurisdiction over state or federal lands if the criteria contained in this paragraph for higher or better uses are met:

(a) There is a reasonable likelihood for achievement of the proposed use;

(b) The use does not present any actual or probable hazard to the public health or safety or threat of water diminution or pollution; and

(c) The proposed postmining use is not impractical or unreasonable, inconsistent with applicable land use policies or plans, going to involve unreasonable delays in implementation or is in violation of any applicable law.

#### **§38-2-4E. Fish and Wildlife Considerations.**

**4E.1. Lands Inquiry.** Prior to the issuance of an SMA number and as a part of the lands unsuitable inquiry, the director, after consultation with other appropriate agencies, shall make a determination as to the necessity for a study of the potential impacts of the proposed operation on the fish and wildlife resources of the affected area. If such a study is determined to be necessary, the Reclamation Division in consultation with the Wildlife Division and such other agencies as deemed necessary, shall determine the level of detail and area of such studies.

**4E.2. Protection of Fish, Wildlife and Related Environmental Values.**

(a) A person who conducts surface mining activities shall promptly report to the director the presence in the permit area of any critical habitat of a threatened or endangered species listed by the Secretary of the Interior, any plant or animal listed as threatened or endangered by the State, or any bald or golden eagle, of which that person becomes aware and which was not previously reported to the director by that person.

(b) Each person who conducts surface mining activities to the extent possible using the best technology currently available shall:

1. Restore, enhance where practicable or maintain natural riparian vegetation on the banks or stream, lakes and other wetland areas;

2. Afford protection to aquatic communities by avoiding stream channels as required or restore stream channels as required;

3. Restore, enhance where practicable or avoid disturbance of habitats of unusually high value for fish and wildlife;

4. Ensure the electric power lines on the permit area and incidental to surface mining activities are designed and constructed to minimize electrocution hazards to raptors unless the director determines that such requirements are unnecessary;

5. Design fences, overland conveyors and other potential barriers to permit passage of large mammals unless the director determines that such requirements are unnecessary;

6. 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 or 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, and

7. 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 reclaimed lands with greenbelts utilizing species of grass, shrubs and trees useful as food and cover for wildlife.

**4E.3. Habitat Development.** Where fish and wildlife habitats are proposed as the postmining land use, the following will be required:

(a) All applicable requirements of these regulations shall be met with regard to adequate vegetation cover for bond release purposes:

(b) Plant species shall be selected on the basis of the following;

1. Nutritional value for fish and wildlife;
2. Uses for cover value for fish and wildlife;

3. Ability to support and enhance habitat after bond release; and

4. Distribute plant groupings to maximize habitat improvement such as edge effect and cover or such other benefits that may be desired.

(c) Experimental wildlife planting may be conducted in lieu of the above when approved by the director and conducted under the guidance of an approved wildlife biologist.

**§38-2-4F. Revegetation.**

(a) **Objective.** To quickly establish a vegetative cover on all disturbed areas to minimize erosion, provide economic benefits and restore aesthetic appeal. Revegetation will be concurrent with the operation as mining and backfilling progresses and be carried out in a manner that encourages a prompt vegetative cover and recovery of productivity levels compatible with the approved postmining land use.

(b) **Achievement** Plants that will give a quick permanent cover and enrich the soil shall be given priority. A temporary cover shall be established as contemporaneously as practicable with backfilling and grading until a permanent cover is established in accordance with the Act and these rules and regulations. A temporary or permanent cover shall be established by the end of the first growing season and a permanent cover shall be established by the end of the second growing season.

(c) **General Requirements.** Each operator shall establish on all affected land a diverse, effective and permanent vegetation cover of the same seasonal variety native to the area of disturbed land or species that supports the approved postmining land use. The vegetative cover shall be capable of stabilizing the soil surface from erosion.

(d) All revegetation shall be in accordance with the preplan and carried out in a manner that encourages a prompt vegetative cover and recovery of productivity levels compatible with the approved postmining land use and in accordance with the Handbook or other technical guides as approved by the director.

(e) Vegetative cover shall be considered of the appropriate seasonal variety when it consists of a mixture of species of equal or superior utility for the

approved postmining land use when compared with the utility of naturally-occurring vegetation during each season of the year. All revegetation mixtures must include at least one herbaceous legume species.

(f) If both the premining and postmining land uses are cropland, planting of the crops normally grown will meet the requirements of paragraph 4F.1.(a).

(g) Rills and gullies which form in areas that have been regraded and topsoiled and which either (1) disrupt the approved postmining land use or the reestablishment of the vegetative cover; or (2) cause or contribute to a violation of water quality standards for receiving stream; shall be filled, regraded, or otherwise stabilized, topsoil shall be replaced, and the areas shall be reseeded or replanted.

4F.2. Minesoil Characteristics. Fertility, acidity and stoniness, together with steepness of slope, shall be used in the characterization of minesoils for the purpose of establishing vegetation. Premining overburden sampling and analysis or previous experience and correlation data, shall be submitted with the preplan for all acid-producing seams. The plan shall identify toxic strata and provide planned handling and final placement for acid strata.

Overburden analysis is to be in accordance with standard procedures outlined 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 Director

4F.3. Function of Annual and Biennial Cover Crops. On areas where excessive erosion is likely to occur, rapid establishment of vegetative cover shall be required. Immediate seeding of approved annuals and biennials on such areas shall be considered as a means for achieving temporary vegetative cover only.

4F.4. Development of Planting Plan. Planting plans will be a part of the premining and reclamation plan and shall contain the following:

(a) A prediction of the minesoil character and the basis for the same;

(b) Treatment to neutralize acidity;

(c) Mechanical seed bed preparation;

(d) Rate and analysis of fertilization;

(e) Rates and types of mulch;

(f) Perennial vegetation including herbaceous and woody plants where appropriate, rate and species;

(g) Areas to be planted or seeded to trees and shrubs;

(h) Land use objective; and

(i) Maintenance schedule if appropriate.

4F.5. Substitute species. Other species of trees, shrubs, grasses, legumes or vines may be substituted for native species if approved by the director and meet the following conditions:

(a) The species are necessary to achieve a quick, temporary, and stabilizing cover that aids in controlling erosion and measures to establish permanent vegetation are included in the approved plan,

(b) The species are compatible with the plant and animal species of the region and will achieve the approved postmining land use; and

(c) The species meet the requirements of applicable state and federal seed or introduced species statutes.

4F.6. Postmining Soil Analysis. Tests for minesoil acidity, expressed as pH, shall be made after final grading and before seeding or planting. Minesoil tests shall be conducted in a representative manner utilizing accepted field indicators or other approved techniques. Minesoils which have a past history of or the potential of producing acidic chemical characteristics that could restrict vegetation establishment shall be analyzed by a qualified soil laboratory. The results of these tests shall be filed with the final planting plan along with any determination which would promote establishment of vegetation.

4F.7. Minimum Requirements of Soil Amendments.

(a) 600 lbs/ac 10-20-10 or 10-20-20 fertilizer or equivalent.

Fertilizer rates based on soil analysis conducted

by a qualified lab may be substituted for the minimum fertilizer rates.

(b) Lime shall be required where soil pH is less than 5.5. Lime rates shall be such that a standard soil pH of 6.0 will be achieved.

(c) **Mulch Specifications:** Mulch shall be used on all disturbed areas. Approved materials and minimum rates to be applied are as follows: (See Table 38-2B found at the end of this regulation.)

#### 4F.8. Standards for Evaluating Vegetative Cover

(a) **Final Planting Report.** The report shall be submitted to the director within sixty days (60) after Phase 1 bond reduction and contain the actual acreage planted including application rates of soil amendments, seed and seedlings. Minimum rates of fertilizer shall apply unless substitute rates are approved and supported by soil tests from a qualified laboratory.

(b) A variance on a limited basis of the rate and species of seed and seedlings from those proposed in the reclamation plan may be granted upon prior approval by the director.

(c) **Time for Inspection.** Prior to the recognized spring and fall planting seasons, the operator shall review all disturbed areas. The operator shall then cause those areas deficient of vegetative cover to be retreated (graded, seeded, planted, mulched, limed, etc.) to establish a satisfactory stand of vegetation

(d) **Standards for Perennials.** Standards for legumes and perennial grasses shall require at least a ninety percent (90%) ground cover. Substandard areas shall not exceed one-fourth (1/4) acre in size nor total more than ten percent (10%) of the area seeded. The period of extended responsibility under the performance bond requirements starts after the last year of augmented seeding, fertilizing, irrigation or other work and continues for not less than five (5) growing seasons; provided, that exceptions may be authorized by the director under the following standards:

1. For areas to be developed for industrial or residential use less than two (2) years after regrading is completed, the ground cover of living plants shall not be less than required to control erosion; and

2. For areas to be used for cropland, success

in revegetation of cropland shall be determined on the basis of crop production from the mined area. Crop production from the mined area shall be equal to or greater than that of the approved standard for the 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.

(e) **Standards for Forestland and/or Wildlife.** 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. Standards for woody plants shall require a seventy percent (70%) establishment of ground cover of legumes and perennial grasses, and four hundred fifty (450) trees (including volunteer tree species) and/or planted shrubs per acre, comprising a satisfactory vegetation ground cover sufficient to control erosion. 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 revegetation shall meet those standards contained in 4F.8.(d).

(f) **Standards for Commercial Woodland.** This subsection sets forth forest resource conservation standards for reforestation operations to ensure that a cover of commercial tree species, sufficient for adequate use of the available growing space, is established after surface mining activities.

1. Stocking, i.e. the number of stems per unit area, will be used to determine the degree to which space is occupied by well-distributed, countable trees

2. The following are the minimum performance standards for areas where commercial woodland is the approved postmining land use;

A. The area shall have a minimum stocking of six hundred (600) trees per acre;

B. A minimum of seventy-five percent (75%) of countable trees shall be commercial tree species as reflected in the approved planting plan; and

C. Upon request for bond release, the number of trees and the ground cover shall be deter-

mined approved by the director when the survival is equal to or greater than four hundred fifty (450) trees per acre and there is seventy percent (70%) herba-ceous cover.

(g) Standards for success shall be based on sta-tistically valid sampling techniques found in the handbook to evaluate ground cover and stocking. The success standard is ninety percent (90%) statistical confidence.

**4F.9. Vegetation Inspection Report.** In no instance shall the director conduct an official vegetative cover evaluation until the planting and seeding concerned has survived two (2) years after the last augmented seeding.

A vegetation inspection report shall be prepared by the director and filed following the inspection to determine that the above evaluative standards have been complied with. If acceptable, the director shall then release an additional twenty-five percent (25%) of the bond or collateral.

**4F.10. Final Inspection Report.** Upon expiration of five (5) growing seasons following the date of the last augmented seeding or planting and upon request by the operator for final bond release, a final vegetation evaluation shall be made by the inspector. If it is determined at that time that the provisions of these regulations have been met, a final inspection report shall be filed by the inspector and remainder of the bond released.

### **§38-2-4G. Prime Farmlands.**

**4G.1. Applicability.** Surface operations conducted on prime farmlands shall comply with all require-ments set forth in the Act and these regulations.

**4G.2. Identification of Prime Farmland.** Prime farmland shall be identified on the basis of soil sur-veys submitted by the applicant. The director also may require data on drainage, flood control and sub-surface water management.

The requirement for submission of soil surveys may be waived by the director if the applicant can demonstrate according to the procedure outlined in 4G.3. of this section that no prime farmlands are in-volved. Soil surveys shall be conducted according to standards of the National Cooperative Soil survey, which includes the procedures set forth in the United

States Department of Agriculture Handbooks 436 (Soil Taxonomy) and 18 (Soil Survey).

**4G.3. Negative Determination of Prime Farmland.** The land shall not be considered as prime farmland where the applicant can demonstrate one or more of the following situations:

(a) Lands within the proposed permit boundar-ies have been used for production of cultivated crops for less than five (5) years out of twenty (20) years preceding the date of the permit application; provid-ed, that for lands obtained after passage of the Act (PL 9587) and retired from farming, the twenty (20) years shall precede the date of acquisition, including purchase, lease or option, of lands, for the purpose of mining.

(b) The slope of a land within the permit area is ten percent (10%) or greater;

(c) 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

(d) A written notification based on scientific findings and soil surveys that land within the pro-posed mining area does not meet the applicability re-quirements for prime farmlands and is submitted to the director by a qualified person other than the ap-plicant, and is approved by the director.

**4G.4. Plan for Restoration of Prime Farmland.** The applicant shall submit to the director a plan for the mining and restoration of any prime farmland within the proposed permit boundaries. This plan shall be used by the director in judging the technolog-ical capability of the applicant to restore prime farmlands. This plan shall include:

(a) A description of the original undisturbed soil profile, as determined from a soil survey, showing the depth and thickness of each of the soil horizons that collectively constitute the root zone of the locally adapted crops and are to be removed, stored and re-placed;

(b) The proposed method and type of equipment to be used for removal, storage and replacement of the soil in accordance with Section 4G.5. of these regula-tions;

(c) The location of areas to be used for the separate stockpiling of the soil and plans for soil stabilization before redistribution;

(d) If applicable, documentation such as agricultural school studies or other scientific data from comparable areas that supports the use of other suitable material;

(e) Plans for seeding or cropping the final graded mine land and the conservation practices to control erosion and sedimentation during the first twelve (12) months after regrading is completed; and

(f) Available agricultural school studies, company data or other scientific data for comparable areas that demonstrate that the applicant using his proposed method of reclamation will achieve, within a reasonable time, equivalent or higher levels of yield after mining as existed before mining.

4G.5. Special Requirements. For all prime farmlands to be mined and reclaimed, the applicant shall meet the following special requirements:

(a) All soil horizons to be used in the reconstruction of the soil shall be removed before drilling, blasting or mining to prevent contaminating the soil horizons with undesirable materials. Where removal of soil horizons result in erosion that may cause air and water pollution, the director shall specify methods of treatment to control erosion of exposed overburden the operator shall:

1. Remove separately the entire A horizon or other suitable soil materials which will create a final soil having an equal or greater productive capacity than that which existed prior to mining in a manner that prevents mixing or contamination with other material before replacement:

2. 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 equal or greater productive capacity than that which existed prior to mining in a manner that prevents mixing or contamination with other material; and

3. 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 equal or greater thickness and that can be

shown to be equal or more favorable for plant growth than the B horizon, and that when replaced will create in the reconstructed soil a final root zone of comparable depth and quality to that which existed in the natural soil.

(b) If stockpiling of soil horizons is allowed by the Director in lieu of immediate replacement, the A horizon and B horizon must be stored separately from each other. The stockpiles must be placed within the permit area and where they will not be disturbed or exposed to excessive erosion by water or wind before the stockpiled horizons can be redistributed on terrain graded to final contour. Stockpiles in place for more than thirty (30) days shall be protected from erosion;

(c) Replace the material from the B horizon or other suitable material specified in these regulations;

(d) Replace the A horizon or other suitable soil materials which will create a final soil having an equal or greater productive capacity than existed prior to mining, and

(e) Apply nutrients and soil amendments as needed to establish quick vegetative growth.

4G.6. 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, that person shall establish a vegetative cover capable of stabilizing the soil surface with respect to erosion. All vegetation shall be in compliance with the plan approved pursuant to section 4F and carried out in a manner that encourages prompt vegetative cover and recovery of productive capacity. Seeding and planting of disturbed areas shall be conducted during the first normal period for favorable planting conditions after final preparation. Suitable mulch and other soil stabilizing practices shall be used on all regraded and topsoiled areas;

(b) Within a time period specified in the permit, but not to exceed 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 commonly grown such as corn, soybeans, cotton, grain, hay, sorghum, wheat, oats, barley or other crops on surrounding prime farmland. The crops may

be grown in rotation with hay or pasture crops as defined for cropland. The director may approve a crop use of perennial plants for hay where this is a common long term use of prime farmland soils in the surrounding area. The level of management shall be equivalent to that on which the target yields are based; and

(c) Measurement of success in prime farmland revegetation will be determined based upon the techniques approved in the permit. As a minimum, the following standards shall be met:

1. Average annual crop production shall be determined based upon a minimum of three (3) years data. Crop production shall be measured for the three (3) years immediately prior to release of bond;

2. Revegetation on prime farmland shall be considered a success when the adjusted three (3) year average annual crop production is equivalent to, or higher than, the predetermined target level of crop production specified in the permit; and

3. Adjustment for weather induced variability in the annual mean crop production may be permitted by the director.

#### **§38-2-4H. Bonding.**

4H.1. Requirements. An operator shall not conduct surface mining operations which result in disturbed area prior to such area being bonded in accordance with section 12 of the Act and this section.

4H.2. Period of Liability. The director 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 practices may include pest and vermin control, pruning and repair of any rills and gullies and any reseeded 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.

#### 4H.3. Terms and Conditions of the Bond.

(a) The surety shall be subject to the following

conditions.

1. The surety will give prompt notice to the permittee and the director of any notice received or action filed alleging the insolvency or bankruptcy of the surety, or alleging any violations of regulatory requirements which could result in suspension or revocation of the surety's license to do business;

2. In the event the surety becomes unable to fulfill its obligations under the bond for any reason, notice shall be given immediately to the permittee and the director; and

3. Upon the incapacity of a surety by reason of bankruptcy, insolvency or suspension or revocation of its license, the permittee shall be deemed to be without bond coverage in violation of Section 12 of the Act. The Director 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 director shall conduct weekly inspections to ensure continuing compliance with other 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.

(b) Collateral bonds, except for letters of credit, shall be subject to the following conditions:

1. The director shall obtain possession of and keep in custody all collateral deposited by the applicant, until authorized for release or replacement;

2. The director shall value collateral at their current market value, not face value;

3. The director shall require that certificates of deposit be assigned to the Department of Natural Resources, in writing, and reflect this assignment upon the books of the bank issuing such certificates;

4. The director shall not accept an individu-

al 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 director 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 director shall only accept certificates of deposit in a bank in this state; and

7. The director 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.

(c) 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 director 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 director in writing at least ninety (90) days prior to the maturity date of such letter of credit or the expiration of the letter of credit agreement. Letters of credit utilized as securities in areas requiring continuous bond coverage shall be forfeited and collected by the Office of Attorney General, if not replaced by other suitable evidence of financial responsibility at least thirty (30) days before the expiration date of the letter of credit agreement;

3. The letter must be payable to the Department of Natural Resources in part or in full upon demand and receipt from the director of a notice of forfeiture;

4. The director 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 director 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 director shall provide in the indemnity agreement that the amount shall be confessed to judgment upon forfeiture; and

7. The bond shall provide that:

A. The bank will give prompt notice to the permittee and the director 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 director; 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 12 of the Act. The director 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 director 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.

(d) The estimated bond value of all collateral posted as bond assurance under 4H.3.(b)(c) and (d) shall be subject to a margin bond value to market value ratio as determined by the director. 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 director in performing reclamation. The bond value of collateral may be evaluated at any time, but shall be evaluated as part of permit renewal. In no case shall the bond value exceed the market value

4H.4. Escrow Bonding.

(a) The director 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 director or deposited with the director directly. Contributions to the account may be based on acres affected or tons of coal produced or any other rate approved by the director. In all cases, the total bond including the escrow amount, as determined by the director in the bonding schedule, shall not be less than the amount required under section 12 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 director 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 director.

#### 4H.5. Self-Bonding.

(a) Definitions. For the purposes of this section 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 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 propose 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.

(i) 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.

(ii) 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 or 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:

(i) 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;

(ii) The applicant has a tangible net worth of at least ten million dollars (\$10,000,000), a ratio of total liabilities to net worth of two and five tenths (2.5) times or less, and a ratio of current assets to current liabilities of one and two tenths (1.2) times or greater; or

(iii) The applicant's fixed assets in the United States total at least twenty million dollars (\$20,000,000), and the applicant has a ratio of total liabilities to net worth of two and five tenths (2 5) times or less, and a ratio of current assets to current liabilities of one and two tenths (1 2) times or greater.

4. The applicant submits;

(i) 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;

(ii) Unaudited financial statements for completed quarters in the current fiscal year; and

(iii) 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 paragraphs (b)(1) through (b)(4) of this section 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 percent (25%) 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 percent (25%) 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 bonded by it, including the parent corporation guarantor, and shall bind each jointly and severally.

2. Corporations applying for a self-bond or parent corporations guaranteeing a subsidiary's self-bond shall submit an indemnity agreement signed by two corporate officers who are authorized to bind the corporation. A copy of such authorization shall be provided to the commissioner.

3. 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.

4. Pursuant to the West Virginia Energy Act, §22A-3-17(b), the applicant or parent corporation guarantor shall be required to complete the approved reclamation plan for the lands in default or to pay to the commissioner an amount necessary to complete the approved reclamation plan, not to exceed the bond amount. If permitted under State law, the indemnity agreement when under forfeiture shall operate as a judgment against those parties liable under the indemnity agreement.

(f) The commissioner may require self-bonded applicants and parent guarantors to submit an update of the information required under paragraphs (b)(3) and (b)(4) of this section 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 paragraphs (b)(3) and (d) of this section 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.

#### 4H.6. Combined Surety/Escrow Bonding.

(a) The director may accept a combined surety/escrow bonding schedule provided that:

1. A surety bond payable to the director is posted in the amount determined under Chapter 20, Article 6, Section 12 of the Code of West Virginia for reclamation of each successive increment; and

2. An interest-bearing escrow account, payable to the director with a predetermined deposit amount and frequency, is established.

(b) Conditions of the combined surety/escrow bonding method shall be as follows:

##### 1. Surety bond

A. The term of the surety bond shall be not less than two (2) years.

B. The amount of the surety bond shall always be sufficient to cover the difference between the escrow balance and the total reclamation cost.

C. The surety bond may be reduced in amount, but the liability remaining shall depend on the escrow-deposit rate which shall be subject to provisions of 4H.4. and 4H.5.

D. The surety bond shall be noncancelable by the surety during the bond term.

E. Surety bond coverage may be released by the director without applying the bond-release criteria of the Act and Section 4I of these regulations, at any time during the bond term, provided provisions of paragraph (b)(2)(E) of this subsection are met or are in accordance with the provisions of bond replacement under 4H.4.

F. The surety bond is subject to the conditions of bond forfeiture including noncompliance with the escrow-account provisions of paragraph (b)(2) of

this subsection

##### 2. Escrow account.

A. The terms and conditions of the escrow account shall be developed jointly by the operator, surety and director. 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 director. Deposits to the escrow account by the operator shall be made monthly and so reported to the director. Failure to make deposits on schedule shall be just cause for action by the director.

B. A certified escrow-account balance statement shall be provided quarterly to the surety and the director.

C. Provisions of the escrow account shall be in accordance with subsection 4H.4. of these regulations.

D. The escrow account shall be subject to the 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 4I 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 director approval.

#### 4H.7. Incremental Bonding.

(a) When the applicant elects to bond in increments as specified in the Act, the following conditions shall apply:

1. A cumulative bond schedule listing the areas covered by the bond and the sequence for release of acreage as it progresses through varying reclamation phases 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 preplan 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 director 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 sections 4H.3 and 4H 4. of these regulations.

**§38-2-4I. Procedures, Criteria and Schedule for Release of Performance Bond.**

4I.1. Procedures for Seeking Release or Adjustment of Performance Bond. Bond release application and contents. The permittee or any person authorized to act on his behalf, may file an application with the director for release of all or part of the performance bond liability applicable to a particular permit after all reclamation restoration and abatement work in a reclamation phase as defined in subsection 4I.2.(c) has been completed on the entire permit area.

(a) Applications may only be filed at times or seasons that allow the director to evaluate properly the reclamation operations alleged to have been completed.

(b) The application shall include copies of letters sent to adjoining property owners, surface owners, local government bodies, planning agencies and sewage and water treatment facilities or water companies in the locality of the permit area, notifying them of the permittee's intention to seek release of performance bond(s). These letters shall be sent before the permittee files the application for release

(c) Within thirty (30) days after filing the application for release, the permittee shall submit proof of publication of the advertisement required by section 20-6-26(a) of the Act. Such proof of publication shall be considered part of the bond release application.

**4I.2. Criteria and Schedule for Release of Performance Bond.**

(a) The director may release portions of the liability under performance bonds applicable to the permit area following the completion of reclamation phases as defined in paragraph (c) of this subsection and after giving notice to the surface owner, or agent, or lessee of the bond release inspection and an opportunity to participate therein.

(b) The maximum liability of performance bonds applicable to the permit area which may be released shall be calculated on the following basis:

1. Release of an amount not to exceed sixty percent (60%) of the total bond amount on the increment or permit area upon completion of phase 1 reclamation;

2. Release of an additional amount not to exceed twenty-five percent (25%) of the total original bond amount on the permit area upon completion of phase 2 reclamation, but in all cases the amount remaining shall be sufficient to establish vegetation and reconstruct any drainage structures; and

3. Release of the remaining portion of the total performance bond on the permit area after standards of phase 3 reclamation have been attained and final inspection and procedures of 4I.1. have been satisfied

(c) For the purpose of this Part.

1. Reclamation phase 1 shall be deemed to have been completed when the permittee completes backfilling, topsoil replacement, regrading and drainage control in accordance with the approved reclamation plan.

2. Reclamation phase 2 shall be deemed to have been completed when:

A Revegetation has been established in accordance with the approved reclamation plan and the standards for the success of revegetation are 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 regulations and the preplan;

C. The quality of untreated water discharge is equal to or better than the premining water quality discharged from the mining site.

D. With respect to prime farmlands, soil productivity has been returned to the level of yield as required by the Act, these regulations and the preplan; and

E. The provisions of a plan approved by the director for the sound future management of any permanent impoundment by the permittee or landowner have been implemented to the satisfaction of the director;

3. Phase 3 reclamation shall be deemed to have been completed when:

A. The permittee has successfully completed all surface coal mining and reclamation operations in accordance with the approved reclamation plan so that the land is capable of supporting any postmining land use approved;

B. The permittee has achieved compliance with the requirements of the Act, these regulations and the preplan; and

C. The applicable liability period under Chapter 20, Article 6, Section 13 (b)(20) of the Act has expired.

4I.3. Bond Release Procedures, Criteria and Schedule. For operations where coal removal or processing was completed prior to September 22, 1982 and a permanent program permit not issued pursuant to the provisions of 20-6-9;

(a) Upon satisfactory completion of backfilling and grading requirements, bond amounts not in excess of seventy-five percent (75%) of the total bond may be released upon approval of the director. Provided, that a minimum of two hundred fifty dollars (\$250) per disturbed acre or five thousand dollars (\$5,000), whichever is greater, shall be retained until satisfactory establishment of vegetation.

(b) Release of the remaining bond may be obtained upon completion of a minimum eighteen (18) months waiting period after final planting and satisfactory establishment of a permanent vegetative cover, provided that the quality of the untreated water discharge is equal to or better than the premining water quality discharged from the mining site.

Ed. Note: Section 5A through 5B governs prospecting.

### **§38-2-5A Requirements of a Notice of Intent to Prospect.**

5A.1. Notice of Intent to Prospect - Less than two hundred fifty (250) tons The Notice of Intent shall be filed in triplicate using forms prescribed by the director in clasp-type binders and shall contain the following:

(a) A map equivalent to a United States geological survey topographic quadrangle map (scale 1" = 2,000') showing the following information:

1. The surface and mineral owners of the tract(s) and property lines within the area to be prospected;
2. The quadrangle title with a north arrow;
3. Clearly indicate the name(s) of the receiving stream(s);
4. Show by proper markings the approximate location of the cropline(s) and name of the seam(s); and
5. Show the number of acres to be disturbed and their approximate location.

(b) In addition to the map the Notice shall include the following information:

1. Name, address and telephone number of the operator filing the Notice of Intent and an indication of whether or not the operator is a corporation, partnership, or individual;
2. Name, address and telephone number of the person who will be present and responsible for conducting prospecting;

3. Location of the operation (county, magisterial district and nearest post office);

4. Anticipated date of commencement and completion of any disturbance;

5. An indication of whether or not the operator or any person, partnership or corporation associated with the operator now have on file or have ever had on file a prospect bond associated with a prospect permit or Notice of Intent to Prospect in West Virginia. If yes, then a list of all prospect permits and Notices of Intent to Prospect must be included, together with an indication of their current reclamation status;

6. Source of legal right to enter and conduct operations;

7. An indication of whether or not the applicant or any subsidiary, affiliate, person, partnership, association, trust, or corporation controlled by or under common control with the operator has ever had a prospect bond or surface mine bond forfeited in West Virginia. If yes, an explanation should be attached,

8. The name, title, and address of every office, partner, or director of the operator, together with all persons owning ten percent (10%) or more of any class of stock of the operator; and

9. A reclamation plan which includes the following;

A. The method of prospecting;

B. The method for controlling runoff and sedimentation;

C. The method of regrading;

D. A plan for revegetation;

E. The method for sealing, casing or otherwise managing prospecting holes, bore holes, wells or other exposed underground openings created during the prospecting;

F. The method of constructing and/or utilizing roads;

G. A performance bond in the amount of

five hundred dollars (\$500) per acre or fraction thereof, in accordance with Section 4H of these regulations; and

H. A notarized signature of a principal officer of the operator indicating that the information contained in the Notice is true and correct to the best of his knowledge.

5A.2. Notice of Intent to Prospect - Greater than two hundred fifty (250) Tons. If prospecting will remove 250 tons or more of coal, then the Notice of Intent to Prospect shall include the following in addition to the requirements of 5A.1.

(a) The estimated amount of coal to be removed and a description of the method to be used to determine these amounts;

(b) The reason why more than two hundred fifty (250) tons is necessary in assessing the coal resources or making feasibility studies and a statement of how the coal removed will be used. Commercial sale of coal under this subsection is allowed for test purposes only;

(c) A map in accordance with paragraph 3G.2. of these regulations. The map required under 5A.1.(a) may be deleted as long as all required information of that paragraph is shown on the map proposed in accordance with 3G.2.;

(d) A copy of the legal ad published once 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 of the filing;

3. The address of the regulatory authority where those whose interest is or may be adversely effected may submit written comments;

4. The closing date of the comment period;

5. A description of the general area of exploration;

6. A statement that an excess of two hundred fifty (250) tons will be removed;

7. The purpose for removing more than two hundred fifty (250) tons; and

8. An estimate of the total tonnage to be removed.

The public comment period shall be not less than fifteen (15) days and the director shall not give his approval to this operation until after the close of the public comment period.

(e) The name, address, and telephone number of the applicant's representative who will be present and responsible for conducting the exploration activities;

(f) An estimated timetable for conducting and completing each phase of the exploration and reclamation;

(g) A description of any endangered or threatened species identified within the prospecting area.

(h) A description of cultural or historical resources listed or known to be eligible for listing on the National Register of historic places and known archaeological sites.

#### 5A.3. Approval of Notice of Intent to Prospect - Greater than two hundred fifty (250) Tons.

(a) the director shall approve a complete and accurate application for coal exploration filed in accordance with this part if he finds in writing that the applicant has demonstrated that the exploration and reclamation described in the application will be completed in accordance with this section and not jeopardize or adversely effect any environmental resources to be described in the application.

(b) The director shall provide notification in accordance with 30.5.

(c) The director shall provide for review in accordance with section 20-6-24 and 20-6-25 of the Act.

#### §38-2-5B. Performance Standards.

5B.1. Applicability. This section governs the use of drilling or excavating equipment in an area not covered by a surface mining permit for the purpose of

removing the overburden or to determine the location, quantity or quality of a natural coal deposit, or to make feasibility studies, or for any other purpose; provided, however, that upon an affirmative demonstration that drilling operations are to be conducted solely for taxation or highway construction purposes, such drilling shall be exempted from this section by the director.

#### 5B.2. Prospecting Roads.

(a) 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.

(b) 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 4A of these rules and regulations.

(c) 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.

5B.3. Blasting. Blasting is prohibited on prospecting operations unless otherwise approved by the director. Any blasting approved must be conducted in accordance with Section 4C.

5B.4. Drainage. All disturbances created by prospecting operations shall be conducted in such a manner to prevent or control erosion and siltation or pollution of water. Disturbances shall be exempt from specific design and construction criteria only if stabilization to control erosion is achieved through alternative measures. Any excavations which will disturb more than one (1) acre on any site may be required to provide drainage control in accordance with section 4B of these regulations.

#### 5B.5. Method of Operation.

(a) All prospecting operations in steep slope conditions shall be conducted in a manner consistent with the steep slope requirements provided for in

section 13 of the Act.

(b) The director may limit prospecting operations within one hundred feet (100') of a perennial or intermittent stream, provided, however, 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 streambed or drainage channel or in such proximity to such channel so as to significantly alter the normal flow of water.

(c) 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.

(d) All toxic or acid-forming materials encountered while prospecting shall be handled in accordance with the requirements of section 6B.5.(b) of these regulations.

(e) All facilities and equipment shall be removed from the prospecting area when they are no longer needed.

(f) Topsoil shall be removed, stored and redistributed on disturbed areas as necessary to assure successful revegetation.

(g) 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, however, that reclamation cannot be delayed more than one (1) year from receipt of a surface mine application number.

(h) All disturbed areas must be revegetated in a manner consistent with Section 4F.1. of these regulations.

5B.6. Bond Release. The performance bond or other securities accompanying a notice of intent shall be released upon satisfactory regrading and establishment of a permanent species vegetative cover. All applications for bond release shall be accompanied by a final map in accordance with subsection 3C showing the total disturbed area of the prospecting operation.

5B.7. Notice on Site. All operators conducting prospecting activities shall, while in the prospecting areas, have in their possession, a copy of the written approval or notice of intent for such activities issued by or submitted to the director.

5B.8. Public Records. All information submitted to the Department of Natural Resources as a part of the notice of intent to prospect as required in the Act and this section of the rules and regulations shall be made available for public inspection and copying at the nearest Reclamation Division filed office; provided, that information submitted to the director pursuant to this subsection as confidential concerning trade secrets or privileged commercial or financial information which relates to the competitive rights of the person or entity intended to prospect the described area shall not be available for public examination

5B.9. Endangered or Threatened Species. 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.

**Ed. Note: Sections 6A through 6B govern standards for surface mining operations.**

**§38-2-6A. Permit Requirements.**

6A.1. General. In addition to information required by Section 10 of the Act and that necessary to meet the determinations required by Section 18(b)(5) of the Act, the following general information shall be included with an application filed on forms provided by the director:

(a) Return receipts of notification to residents residing on property contiguous to proposed permit area;

(b) A true copy of the notarized affidavit of publication and a copy of the advertisement setting forth the dates the advertisement appeared,

(c) The location of the operation (county, magisterial district, nearest post office and longitude and latitude),

(d) The name of the coal seam or seams to be

mined; and

(e) Information on the type of bond to be filed and whether or not incremental bonding will be used.

**6A.2. Hydrologic Information and Analysis** The application shall contain a statement describing the probable hydrologic consequences of the mining operations, both the permit and adjacent areas with respect to the hydrologic balance. Modeling techniques may be included as part of the application. The latitude, longitude and elevation should be shown for each surface or groundwater sampling point for base line information. Water sampling and analysis shall be in accordance with OSM approved methods. All applications for permit revisions must be reviewed by the commissioner to determine whether a new or updated PHC determination or cumulative hydrologic impact assessment (CHIA) should be prepared.

(a) Base line Ground Water Information.

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 within the proposed permit 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 descriptions including total dissolved solids, alkalinity, acidity, sulfates, specific conductance, pH, total iron and total manganese; provided, that correlation data from other monitoring which does not include one or more of the above parameters may be accepted; provided further, that limited validation samples may be required;

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

4. If the determination of the probable hydrologic consequences (PHC) indicates that a currently used or significant groundwater resource is likely to be adversely impacted, additional information shall be provided on the base line properties of the

groundwater system as necessary to evaluate such probable hydrologic consequences or to plan remedial or reclamation activities.

(b) Base Line Surface Water Information.

1. The name, location, ownership and description of all surface water bodies in the permit 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 variation; provided, that correlation data from other monitoring which does not include one or more of the above parameters may be accepted; provided further, that limited validation samples may be required;

3. Water quantity descriptions including information on seasonal flow rates, variation and water useage, 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 or to plan remedial and reclamation activities such as water availability, alternative water sources and evaluation of suitability for both the premining and the approved post mining land uses.

(c) Probable hydrologic consequences assessment. The application shall include a determination of the probable hydrologic consequences (PHC) of the proposed mining and reclamation upon the quality and quantity of ground and surface water under seasonal flow conditions in the proposed permit area and potentially impacted off-site areas. The PHC determination shall be based on base line data (including the geologic description contained in 6A.3.) collected at or near the site of the proposed operation, data representative of the site or a combination of both. The PHC determination shall include estimates of the impact of the proposed operation upon water quality, flooding or streamflow alteration and ground and surface water availability. Remedial measures for potential water quality or water quantity problems of

local impact revealed by the PHC determinations shall be described or referenced.

(d) The applicant shall submit all available data and analysis described in 6A.2(b)(4)(c) for the cumulative hydrologic impact assessment with the application.

(e) In some cases, the PHC may serve as the CHIA if there is no previously existing mining within that particular hydrologic regime's impact area. Otherwise, the regulatory authority shall perform a separate cumulative hydrologic impact assessment and evaluation of the PHC for the permit area and PHC's found within the cumulative impact area. This evaluation shall be sufficient to determine, for purposes of permit approval, whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

6A.3. Geology. The application shall contain the following geologic and related information:

(a) Geologic cross sections, maps or plans of the proposed affected area, including the actual area to be mined, prepared by or under the direction of and certified by a person approved by the commissioner, showing pertinent elevation and location (latitude and longitude) of test borings or core samplings, where required by the commissioner, and depicting the following information: (A) the nature and depth of the various strata or overburden including geologic formation names and/or geologic members; (B) the elevation location of subsurface water, if encountered, and its quality; (C) the nature and thickness of any coal or rider seams above the seam to be mined; (D) the nature of the stratum immediately beneath the coal seam to be mined; (E) all mineral crop lines and the strike and dip of the coal to be mined, within the area of land to be affected; (F) existing or previous surface mining limits; (G) the location and extent of known workings of any underground mines, including mine openings to the surface; (H) 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, will be included in the permit application. Areal geology may include information such as mapped outcrop locations shown on a seven and one-half (7 1/2) minute United States Geological Survey (U.S.G.S.) topographic map, areal photographs, and

published geologic reports for the area of concern. Structural geology may include mapped lineament traces from areal photography or topographic maps and any published structural geologic reports for the area of concern; (I) areal and vertical distribution of aquifers with seasonal differences in head and the name(s) of the stratum (or strata) which the water is found; (J) location and depth of all oil and gas wells within the proposed permit area for both surface and underground mines.

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

1. The results of test borings 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 exclusive 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. Lithologic logs of the drill holes,

3. A detailed discussion and mapped illustration (cross sections and/or aerial) of 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 and should explain the potential impact, if any, is anticipated. Also, within this discussion, a brief description of the degree of fracturing and weathering, if any, noted during the exploration drilling should be included if it is believed to have a potential influence on the extraction of the coal and/or the hydrologic regime.

6A.4. 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.

### §38-2-6B. Performance Standards.

#### 6B.1. Signs and Markers.

(a) **Permanent Monument.** A permanent monument shall be posted at the entrances from public roads and highways and at other suitable locations. The monument shall consist of a sign constructed of wood, metal or other suitable material two feet by three feet (2' x 3') mounted on a two-inch (2") diameter pipe driven three feet (3') into the ground with four feet (4') exposed. Any suitable equivalent substitute may be approved. The sign shall clearly indicate the company name, permit number, business address and telephone number.

(b) **Perimeter Marker.** A two-inch (2") diameter pipe or suitable substitute shall be driven into the earth with a minimum of three feet (3') exposed to permanently mark the beginning and ending points of the area under permit. It shall be identified by painting the exposed portion of the pipe red. 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, signs reading "Blasting Area" 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 be two feet by three feet (2' x 3') reading "Blasting Area" and explaining the blasting warning and the all clear signals. Once blasting operations are completed on this area, the blasting sign may be removed.

6B.2. **Casing and Sealing of Holes.** All boreholes, shafts, wells and auger holes shall be cased, sealed or otherwise managed to prevent pollution of surface or

groundwater and to prevent mixing of groundwaters of significantly different quality in accordance with the approved preplan. All boreholes within the permit area which extend beneath the coal seam to be mined and into water bearing strata shall be permanently plugged unless the boreholes have been approved for use in Section 6A.2. for monitoring. Prior to sealing, such holes shall be managed to insure the safety of people, livestock and wildlife; however, before 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 Director, be transferred to another party for further use. The conditions of the transfer shall comply with State and local laws, regulations, and other requirements

#### 6B.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. Where the removal of vegetative material, topsoil or other materials may result in erosion, the director 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 enhance root penetration. Topsoil and other materials shall be redistributed in a manner that achieves an approximate uniform, stable thickness, consistent with the approved postmining land uses, contours and surface water drainage system.

(c) **Top Soil Substitutes.** Any material used for topsoiling must be capable of supporting and maintaining the approved postmining land use. This determination shall be based on the results of appropriate chemical and physical analysis of overburden and topsoil. These analyses shall include:

1. The determination shall include at a minimum pH, texture class and nutrient content, and

2. A certification of analysis shall be made by a qualified laboratory stating that (A) the proposed substitute material is suitable for sustaining vegetation, and (B) the analyses were conducted using stan-

dard testing procedures.

(d) 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 4F. These tests shall include nutrient analysis and lime requirement tests. Results of these tests shall be submitted to the director with the final planting report as required by these regulations.

**6B.4. Water Quality.** Surface and groundwater quality and quantity and the hydrologic balance shall be protected from material damage by handling and managing earthen materials, groundwater discharges and runoff in such a manner that minimizes the formation of acid or toxic drainage or infiltration and restores the approximate premining water availability.

(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. All surface drainage from the disturbed area must pass through a sediment pond or series of sediment ponds.

(b) **Effluent Limitations.** Discharge from the permit area shall not violate effluent limitations or cause a violation of 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 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.**

1. 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 director, any other parameter characteristics 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, two (2) copies shall be submitted to the director.

2. Should said analysis indicate the water quality to be less than applicable effluent limitations, seals shall be immediately constructed. These seals shall:

A. Prevent any air from entering the underground mine by way of the breakthrough; or

B. Prevent any air from entering the breakthrough while allowing the water to flow from the breakthrough; or

C. 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.

3. Alternate methods of handling discharges from breakthroughs may be employed where it can be established that applicable effluent limitations can be met.

(e) Surface water shall not be diverted or otherwise discharged into underground mine workings, unless the person who conducts the surface mining activities demonstrates to the director that this will:

1. Abate water pollution or otherwise eliminate public hazards resulting from surface mining activities;

2. Be discharged as a controlled flow, meeting applicable effluent limitations for pH and total suspended solids, except that the pH and total suspended solid limitations may be exceeded, if approved by the director, and is limited to:

A. Coal processing waste;

B. Fly ash from a coal-fired facility;

C. Inert materials used for stabilizing underground mines,

D. Underground mine development

wastes; or

E. Sludge;

3. Not cause, result in or contribute to a violation of applicable water quality standards or effluent limitations;

4. Minimizes disturbance to the hydrologic balance; and

5. Not discharge without MSHA approval.

6B.5. Acid Producing and Toxic Materials.

(a) Drainage from acid-forming and toxic-forming materials into ground and surface water shall be avoided by:

1. Identifying, burying, blending, segregating, and/or treating where necessary, within thirty (30) days after it is first exposed or a lesser period if required by the director, spoil or other materials that will be toxic to vegetation or that will adversely affect water quality. Such materials shall be handled in accordance with methods set forth in the approved preplan; and

2. Acid-forming or toxic-forming material shall not be buried or stored in proximity to a drainage course or groundwater system so as to cause a threat of water pollution.

(b) Treatment of Toxic Material. All exposed coal seams remaining after mining and any acid-forming, toxic-forming, combustible materials or any other waste materials that are exposed, shall be covered with a minimum of four feet (4') of nontoxic and noncombustible material or test, treat and blend material to provide materials suitable to prevent water pollution. If necessary, this material shall be treated to neutralize toxicity in order to prevent water pollution, sustained combustion and/or to minimize adverse effects on plant growth and land uses. Where necessary to protect against upward migration of salts or exposure by erosion, to provide adequate depth for plant growth or to otherwise meet local conditions, the director shall specify thicker amounts of cover using nontoxic material.

6B.6. Monitoring Requirements.

(a) Surface Water Monitoring.

1. Surface water monitoring plans are to be included in the permit application and will be based on the PHC determination and baseline hydrologic and geologic information. These plans shall identify monitoring site locations, quantity and quality parameters, sampling frequency, and describe how the data may be used to determine the impact, if any, of the operation on the hydrologic balance both the permit and adjacent areas. Monitoring quality parameters should include but not exclusive to total dissolved solids or specific conductance corrected at 25°C, total suspended solids, flow measurements, pH, acidity, alkalinity, total iron and total manganese. The selection of these parameters must be based on current and approved post mining land uses and all hydrologic balance protection objectives.

2. All water discharged from the permit area shall be sampled and analyzed and otherwise monitored in accordance with the Clean Water Act of 1977 and all applicable standards of the NPDES program and a monthly report of all measurements shall be reported to the commissioner; provided, that all violations of effluent standards shall be reported to the commissioner within five (5) days of receipt of analytical analysis.

3. Where any discharge from the permit area requires treatment during the mining operation in order to meet the water quality standards set forth in the NPDES regulations, surface 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 water quality standards shall be adequate to establish that the hydrologic balance is being preserved.

(b) Ground Water Monitoring. Ground water monitoring plans are to be included in the permit application if adverse impacts to a significant groundwater resource are anticipated. This decision will be based on the PHC determination and baseline hydrologic and geologic information gathered for both on and off the minesite. These plans shall identify monitoring site locations (latitude, longitude and ground level elevation), quantity and quality parameters to be monitored, sampling frequency and duration, and describe how the data may be used to determine the impact, if any, of the operation on the hydrologic balance both on and off the minesite. Monitoring quality parameters should include, but not exclusive

to, total dissolved solids or specific conductance corrected at 25°C, pH, acidity, alkalinity, total iron, total manganese, 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. Results shall be submitted to the commissioner at least every three (3) months.

(c) Ground Water Monitoring Waivers. If an applicant can demonstrate by the use of the PHC determination and other available baseline 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 endure the hydrologic balance within the permit and adjacent area, then 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 baseline hydrologic and geologic information that all individual water-bearing strata of concern are hydraulically interconnected and can be waived as a complete unit.

#### 6B.7. Method of Operation.

##### (a) Steep Slope Mining.

1. Applicability. On surface mining operations where the natural slope exceeds twenty (20) degrees, the provisions of this section in addition to other applicable provisions of these regulations shall apply. On lesser slopes that require measures to protect the area below the operation from landslides or other similar disturbances as determined by the director on the basis of soils, climate, method of operation, geology and other regional characteristics, the provisions of this section, in addition to other applicable provisions of these regulations, shall also apply. These provisions do not apply where mining is done on a flat or gently rolling terrain with an occasional steep slope through which the mining proceeds and leaves a plain or predominately flat area

2. Downslope Placement. Spoil or debris shall not be placed on the downslope except in specified fill areas designed for such placement. 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 these regulations

3. Highwall Elimination. The highwall shall be eliminated and 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 accordance with these regulations. Land above the highwall shall not be disturbed unless the director finds that the disturbance is necessary to:

- A. Blend the solid highwall and the backfilled material;
- B. Control surface runoff;
- C. Provide access to the area above the highwall; or
- D. Comply with applicable health and safety laws.

4. Stabilization. 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. The method and design specifications of compacting material shall be approved by the director. Woody materials shall not be buried in the backfilled area unless the director determines that the proposed method for placing woody material beneath the highwall will not deteriorate the stable condition of the backfilled area. The operation shall at a minimum retain all overburden and spoil on the solid portion of existing or new benches and backfill and grade to the most moderate slope possible.

5. Drainage Channels and Flumes. When mining through natural watercourses or when water is to be directed across or through the backfill, a drainage channel, flumes or french drains shall be constructed across or through the backfill in order to insure stability and to prevent erosion. Such drainage channels, flumes or french drains shall be constructed of nontoxic durable rock, asphalt, concrete or any other material approved by the director. Channels, flumes and drains shall be constructed in accordance with criteria contained in the Handbook unless otherwise approved.

##### (b) Auger Operations

1. Augering may be prohibited if the director determines that such augering poses a potential hazard to the environment, public welfare and safety or

to protect against adverse water quality impacts or if subsidence resulting from auger mining may damage structures or buildings.

2. Auger holes shall be sealed within seventy-two (72) hours after completion with an impervious and noncombustible material, if the holes are discharging water containing acid or toxic-forming material.

3. Variance from Sealing Auger Holes. An auger hole need not be sealed if the director finds that an impoundment of the Water resulting from sealing would create a hazard to the environment or public welfare and safety; provided, that any discharge from unsealed auger holes shall not cause a violation of water quality standards. Adequate drainage through the backfill from any unsealed auger holes shall be constructed as shown in the approved preplan

4. Auger mining shall be conducted so as to maximize the utilization and conservation of the coal

A. Auger mining shall be conducted so as to maximize recoverability of mineral reserves remaining after mining and reclamation are complete.

B. Each person who conducts auger mining operations shall leave areas of undisturbed coal, as approved by the director, to provide access for future underground mining activities to coal reserves remaining after augering is completed, unless it is established that the coal reserves have been depleted or are so limited in thickness or extent that it will not be practicable to recover the remaining coal. This determination shall be made by the director upon presentation of appropriate technical evidence by the operator.

(c) Mountaintop Removal.

1. Applicability. Where the mountaintop removal technique is applied, the provisions of this section, in addition to other applicable provisions of these regulations, shall apply.

2. The Final Graded Slopes. 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 and the outslopes of the plateau shall not exceed two (2) horizontal to one (1) vertical.

3. Drainage. The resulting level or gently rolling contour shall be graded to drain inward from the outslope except at specific points where it drains over the outslope in constructed channels. Such channels shall be protected from erosion and constructed using design criteria similar to that found in the Handbook.

(d) Inactive Status. Inactive operations status will be considered for a period not to exceed one (1) year from date of approval, provided, that prior written approval is obtained from the director; provided further, that inactive status shall not be approved unless the operator demonstrates that reclamation is current and all water management practices will be maintained during the inactive period and all exposed coal is covered with nontoxic material. The director may also require progress maps prior to approval. Where it can be adequately demonstrated by the permittee that inactive status to exceed one (1) year is necessary, the director may extend inactive status beyond the one (1) year limitation in increments not to exceed six (6) months.

(e) Requirements for Special Land Use Purposes. Operations that meet the requirements of this paragraph may be conducted under a variance from the requirement to restore affected areas to the approximate original contour if the following requirements are satisfied:

1. The alternative postmining land use requirements of Paragraph 4D.4. are met;

2. All applicable requirements of the Act and regulatory program other than the requirement to restore affected areas to their approximate original contour are met;

3. After consultation with appropriate land use planning agencies, if any, the potential use is shown to constitute and equal or better economic or public use;

4. The proposed use is designed and certified by an approved person in accordance with professional standards established to assure the stability, drainage and configuration necessary for the intended use of the site;

5. The highwall is completely backfilled with spoil material in a manner which results in a static safety factor of 1.3 using standard geotechnical

analysis;

6. Only spoil not necessary to achieve the postmining land use shall be removed from the mine bench; and

7. The surface land owner of the permit area has requested in writing that a variance be granted so as to render the land after reclamation suitable for an alternative land use as defined in Paragraph 4D.3

8. The watershed of the permit and adjacent area will be deemed improved if

A. There is reduction in the amount of pollutants or reduced flood hazards;

B. Volume of seasonal flows do not adversely affect the environment; and

C. Appropriate state agency approves the plan.

9. Federal, State and local government agencies with an interest in the proposed land use have a maximum of sixty (60) days in which to review and comment on the proposed use.

(f) No mining within five hundred (500) feet of an underground mine not totally abandoned without approval by MSHA

6B.8. Disposal of Excess Spoil. Spoil not required to achieve the approximate original contour shall be transported to and placed in a controlled manner in designated disposal areas within the permit area which have been designed in accordance with this subsection. Coal processing wastes and/or toxic material shall not be disposed of in such fills unless they are designed in accordance with the refuse disposal regulations. Where environmental benefits will occur, spoil not needed to restore the approximate original contour of the land and reclaim land within the permit area may, in a manner consistent with the Act and these regulations, be deposited on another area under a permit issued pursuant to the Act or on abandoned mine lands under a contract for reclamation conducted pursuant to the provisions of the Act and these rules and regulations.

(a) Disposal of Excess Spoil on Existing Benches. Spoil material not required to return the area to the approximate original contour may be

placed on a bench if the following conditions are met:

1. All excess spoil must be hauled, placed and retained on the solid portion of the existing bench; and

2. The spoil must be compacted or otherwise mechanically stabilized and the existing highwall eliminated to the extent possible with the available spoil to achieve a static safety factor of 1.3.

(b) Valley Fills. The spoil shall be transported and placed in a controlled manner, concurrently compacted as necessary to insure long-term mass stability and prevent mass movement.

1. Minimum design and construction requirements. The design and construction of all valley fills must be certified by a registered professional engineer.

A. If the fill area contains springs, natural watercourses or wet weather seeps, lateral drains shall be constructed from the wet areas to the rock core in such a manner that infiltration of the water into the fill will be prevented. If springs, natural watercourses or wet weather seeps are encountered, a system of underdrains shall be constructed from each spring or seepage area as lateral drains to the rock core. If no filter is designed for the underdrain or rock core, sufficient capacity shall be provided to allow for partial plugging of the drain and/or rock core.

B. The foundation of the fill shall be designed to assure that the valley fill shall have a long-term static safety factor of 1.5 or greater.

C. The outer slope of the fill shall be no steeper than two (2) horizontal to one (1) vertical (2:1). A minimum of twenty foot (20') wide bench shall be installed at a maximum of every fifty feet (50') in vertical height with a three percent (3%) to five percent (5%) slope toward the fill and a one percent (1%) slope toward the rock core.

D. 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 fifty thousand (250,000) cubic yards of material unless located in an

area where the valley floor is always above the local water table. If a rock core chimney drain is not used, an underdrain designed and constructed using accepted engineering practices approved by the Director and a surface diversion system capable of handling a one hundred (100) year, twenty-four (24) hour precipitation event are required. A rock core shall be designed with a minimum width of sixteen feet (16") and shall be comprised of durable rock with a minimum dimension of twelve inches (12"). The rock core shall consist of no more than ten percent (10%) fines. This core shall be progressively constructed as the layers are brought up through the valley fill. The top of the rock core shall form a trapezoidal channel for possible flows over the core instead of through it in the event the pores of the core become blocked by debris or sediment over time. This channel shall be sufficient to pass a one hundred (100) year, twenty-four (24) hour precipitation event.

E. All areas upon which the valley fill is to be placed shall first be cleared progressively of all trees, brush, shrubs and other organic material. This material shall be removed from the fill area. No more than three (3) acres, excluding roadway for construction of the fill, shall be cleared in the valley fill site until the first lift is completed

F. The fill shall be constructed in compacted layers beginning at the toe of the valley fill. The layers shall be constructed approximately parallel in thicknesses not to exceed four feet (4') and compacted unless otherwise approved by the director

G. During and after construction, the top of the fill shall be graded to drain back to the head of the fill on a slope not greater than three percent (3%). A drainage pocket shall be maintained at the head of the fill at all times to intercept surface runoff and direct it into the core.

H. Other than the drainage pocket provided for in G. above, no impoundments shall be constructed on completed fills. In no case shall this pocket have a potential for impounding more than ten thousand (10,000) cubic feet of water.

I. Where the toe of the spoil rests on a downslope in excess of thirty-six percent (36%), keyway cuts or rock toe buttresses shall be constructed of sufficient size to ensure stability of the fill as determined in a stability analysis.

2. Plans, design data and construction specifications. The following material must be included in the application:

A. A profile view of the valley fill showing the original ground line and proposed construction limits;

B. A cross-section located through the intersection of the top and the face of the proposed valley fill showing the original ground line, the proposed construction limits and the rock core;

C. A plan view and cross-sections of designed rock toe buttresses, if applicable;

D. Engineering calculations demonstrating the static safety factor for the proposed design; and

E. Details of foundation preparations, keyways, etc., if applicable.

(c) Side Hill Fills. Side hill fills shall be located on the most moderate slopes and naturally stable areas available with a downslope at the toe of the fill not to exceed thirty-six percent (36%). Where possible, fill materials suitable for disposal shall be placed upon or above a natural terrace, bench or berm if such placement provides additional stability and prevents mass movement.

1. Geotechnical investigation. Each application shall contain the results of a geotechnical investigation of the proposed disposal area. The investigation shall include such factors as adverse geologic conditions, soil characteristics and depth of bedrock, springs, seeps and groundwater flow and a description of materials to be placed in the fill and drains. The level of such geotechnical investigation shall be determined by a registered professional engineer based upon specific site conditions, available site information and the history of similar fills in nearby areas, and additional engineering data required for design

2. Design and construction requirements. The design and construction of all side hill fills must be certified by a registered professional engineer. The following minimum design and construction requirements must be met:

A. If the fill area contains springs, natu-

ral watercourses or wet weather seeps, lateral drains shall be constructed from the wet areas in such a manner that infiltration of the water into the fill will be minimized. The drains shall be designed and constructed of course, durable rock. No single rock utilized in the underdrain may occupy more than twenty-five percent (25%) of the width of the drain.

B. All areas upon which the fill is to be placed shall first be cleared progressively of all trees, brush, shrubs and other organic material. This material shall be removed from the fill area.

C. The fill shall be constructed in concurrently compacted layers not exceeding four feet (4') in thickness.

D. The foundation of the fill shall be designed to assure that it shall have a static safety factor of at least 1.5.

E. The outer slope of the fill shall be no steeper than two (2) horizontal to one (1) vertical (2:1). A minimum twenty foot (20') wide bench shall be installed at a maximum of every fifty feet (50') in vertical height of the fill with a three percent (3%) to five percent (5%) slope towards the fill and a one percent (1%) slope towards a stabilized channel capable of passing a one hundred (100) year, twenty-four (24) hour precipitation event.

F. Surface water runoff from and around the side hill fill 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.

G. A subsurface drainage system shall be provided to safely collect and transport water from springs and seeps to the surface where it cannot affect the stability of the fill. Underdrains shall be constructed of durable rock and shall be provided with a filter unless the drain is designed of a sufficient capacity to allow for partial plugging.

H. No impoundments shall be constructed on completed fills.

3. Plans, design data and construction specifications. The application shall contain at a minimum the following information:

A. A cross-section of the side hill fill

showing the original ground and the proposed finish grade at two hundred foot (200') stations.

B. Plans, design data and construction specifications for any diversions;

C. A plan view and cross-section of designed rock toe buttresses;

D. Engineering calculations demonstrating the static safety factor of the proposed fill design; and

E. Details of foundation preparations, keyways, etc., if applicable.

(d) Durable Rock Fills. Special excess spoil fill placement by dumping in a single lift may be approved based upon the specific site conditions provided that the excess spoil consists of at least eighty percent (80%) by volume sandstone, limestone or other durable rocks that do not slake in water and that the slope at the toe of the fill is less than twenty percent (20%). Loads of nondurable spoil in the fill shall be mixed with hard rock spoil in a manner to limit on a unit basis concentrations of noncemented clay or shale in the fill. Such materials shall comprise no more than twenty percent (20%) of the fill volume. Any such fill must be designed by a registered professional engineer experienced in the design and construction of earth and rock fill embankments.

1. Geotechnical investigation. Each application shall contain the results of a geotechnical investigation of the proposed disposal site. The investigation shall include such factors as adverse geologic conditions, soil characteristics and depth in foundation zones, bedrock, springs, seeps and groundwater flow, potential effects of subsidence and a description of materials to be placed in rock cores and drains. The extent of such geotechnical investigation shall be determined by a registered professional engineer based upon specific site conditions, available site information and an additional engineering data required for design.

2. Minimum design and construction requirements. The design and construction of all durable rock fills must be certified by a registered professional engineer. The following minimum design and construction requirements must be met:

A. The foundation of 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;

B. The final outer slope of the fill shall be no steeper than two horizontal to one vertical (2:1). A minimum twenty foot (20') wide bench shall be installed at a maximum of every fifty feet (50') in vertical height of the fill with a three (3%) to five (5%) percent slope towards the fill and a one percent (1%) slope toward the drainage channel;

C. All areas upon which the valley fill is to be placed shall first be cleared progressively of all trees, brush, shrubs and other organic material. This material shall be removed from the fill area;

D. If the fill area contains springs, natural watercourses or wet weather seeps, lateral drains shall be provided in such a manner that infiltration of the water into the fill will be prevented;

E. Drainage channels sufficient to carry a one hundred (100) year, twenty-four (24) hour, precipitation event shall be constructed to channel water around or through the fill in such a manner as to prevent zones of saturation within the fill provided that drainage from above the fill shall not be routed through the fill; and

F. The grade of the top surface of the completed fill shall not exceed five percent (5%) and shall slope toward the properly designed drainage channel with no impoundments.

3. Plans, design data and construction specifications. The following material must be included in the application:

A. A profile view of the valley fill showing the original ground and proposed construction limits;

B. A cross-section located through the intersection of the top of the face of the proposed fill showing the original ground and proposed construction limits;

C. Plan view, cross section, and design criteria for drainage channels or rock cores;

D. Plan view and cross-section of designed rock toe buttresses, if applicable;

E. Engineering calculations demonstrating the static safety factor of the proposed design; and

F. Details of foundation preparations, keyways, etc., if applicable.

(e) Certification. Certification of all excess spoil fills shall be as follows:

1. The fill and appurtenant structures shall be designed using recognized professional standards and certified by a registered professional engineer experienced in the design of earth and rockfill embankments; and

2. The fill shall be inspected for stability by a registered professional engineer or other qualified professional specialist under the direction of the professional engineer, quarterly throughout construction and during critical construction periods such as foundation preparation, underdrain placement, installation of surface drainage systems, and construction of rock toe buttresses. After completion of the inspection, a report certified by the registered professional engineer shall be submitted to the director within two (2) weeks. A copy of the certified report shall be maintained at the mine site; and

3. After total completion of the valley fill, a certification form shall be completed and submitted to the director by the registered professional engineer overseeing construction of the fill.

6B.9. Backfilling and Regrading. 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.

(a) Keeping Operation Current. Grading, backfilling and water management practices as approved in the preplans shall be kept current as follows:

1. Where the operation includes only contour mining (no augering) the grading and backfilling shall follow the mineral removal by a period not to exceed sixty (60) days or one thousand five hundred (1,500) linear feet;

2. Where the operation includes contour mining and augering, the augering shall follow the min-

ing by a period not to exceed sixty (60) days, and the grading and backfilling shall follow the augering by not more than thirty (30) days or 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 includes only augering, the grading and backfilling shall follow the augering by a period not to exceed thirty (30) days or one thousand (1,000) linear feet;

4. Area Mining. Should the operation include only area mining, the backfilling and grading shall not be more than two spoil ridges behind the pit being worked. Maximum linear feet of open pit shall not exceed three thousand (3,000) feet at any time;

5. Mountaintop Removal. For surface mine operations that remove entire coal seams running through the upper fraction of a mountain, hill or ridge (by removing all the overburden, backfilling and regrading) shall follow the same guidelines for area and contour mining as found in this section. 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;

6. 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;

7. The period of time or the distance required to be current may be reasonably extended where the permittee affirmatively demonstrates that site conditions or weather changes make adherence to these guidelines impractical. A written waiver must be obtained from the director for such extension;

8. Removal of Regrading Equipment. Operable regrading equipment shall be kept on the permit area until satisfactory completion of grading unless otherwise approved; and

9. Variance from Reclamation Requirements. Reclamation requirements may be postponed on a surface mining permit where surface mining op-

erations and underground mining operations are proposed on the same area; provided that all requirements set forth in Section 13 of the Act are met.

(b) Grading Outer Spoil. All outer spoil shall be graded so as to blend into the adjoining undisturbed lands.

(c) Erosion Control. All disturbed areas shall be regraded, protected and stabilized in a manner which effectively controls erosion.

(d) Reaffecting Previously Mined Areas.

1. Operations proposing to remine existing benches permitted prior to July 1, 1977 and not proposing to substantially reffect the existing highwall, shall at a minimum completely eliminate the newly created highwall and utilize the excess spoil material to eliminate as much of the preexisting highwall as possible. This regulation applies only to those situations where mining is proposed in order to remove coal seams lying below the seam originally mined prior to July 1, 1977.

2. Auger operations proposing to affect previously mined areas that were not reclaimed to the standards of this section shall demonstrate in writing that if the volume of all reasonably available spoil is insufficient to completely backfill the highwall, the highwall shall be eliminated to the maximum extent technically practical in accordance with the following criteria:

A. The backfill has a minimum static safety factor of at least 1.3:

B. All spoil generated by the auger mining operation and any associated surface coal mining and reclamation operation and any other reasonably available spoil, that when rehandled will not cause a hazard to the public safety or significant damage to the environment, shall be used to backfill the area,

C. The coal seam mined shall be covered with a minimum of four (4) feet of nonacid, nontoxic forming material;

D. Any remnant of the highwall shall be stable and not pose a hazard to the public health and safety or to the environment; and

E. 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

(e) **Regraded Drainage Control.** Drainage control on regraded areas shall be provided to 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 that may be approved by the director.

**6B.10. Backfilling and Grading: Previously mined areas.**

Remining operations on previously mined areas that contain a pre-existing highwall shall comply with 6B.9 or 8B.9. of these regulations, except as provided in this section.

(a) The requirement of highwall elimination shall not apply to remining operations here the volume of all reasonably available spoil located in the permit area is insufficient to completely backfill the reaffected or enlarged highwall as demonstrated in writing by the applicant. The highwall shall be reduced to the maximum extent technically practical.

(b) Spoil placed on the outslope during previous mining operations shall not be disturbed if such disturbance will cause instability of the remining spoil or otherwise increase the hazard to the public health and safety or to the environment.

(c) Where the applicant proposes to use selected overburden materials as a supplement or substitute for topsoil, the application shall provide results of analyses, trials, and tests indicating a more suitable soil medium.

(d) 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 requirements of 4F.8 of the regulations may be modified on a case-by-case basis, by the commissioner, using information set forth in the approved reclamation plan.

(e) A modified permit may be issued which mod-

ifies the requirements under section 402(a)(1) of the Clean Water Act of 1987 with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron manganese in any pre-existing discharge affected by the remining operation. Such modified requirements shall apply the best available technology (BAT) economically achievable on a case-by-case basis, using best professional judgment (BPJ), to set specific numerical effluent limitations in each permit.

(f) The State may issue a permit pursuant to paragraph (e), if the applicant has demonstrated to the satisfaction of the State that the coal remining operation will result in the potential for improved water quality from the remining operation but in no event shall such a permit allow the pH level of any discharge, or in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the remined area before the coal remining operation begins. During remining operations, no discharge from, or affected by, the operation shall exceed State water quality standards in the receiving stream established under section 303 of the Clean Water Act.

### **§38-2-6C. Incidental Boundary Revisions (IBR).**

All incidental boundary revisions shall be granted in accordance with section 19(a)(2) of the Act and shall be limited to additional areas of disturbance directly related to surface mining. Incidental boundary revisions shall not be granted for any Notice of Intent to Prospect.

**6C.1. General.** In addition to the information required by Section 19(a)(2) of the Act the following requirements shall be met:

(a) The application shall be filed on forms provided by the commissioner.

(b) The maximum total acreage to be permitted on one or more IBR's shall be no more than sixty percent (60%) of the acreage on the original permit or a maximum of 150 Acres.

(c) If the IBR is contiguous to the mining area of the original permitted area and is an insignificant IBR, a legal advertisement shall be published one time in accordance with section 3B.4 of these regula-

tions. The legal advertisement shall state that written protests will be accepted by the commissioner until a certain date which shall be at least ten (10) days after the publication of the applicant's advertisement.

(d) If the IBR is not contiguous to the mining area, or is a significant IBR, a legal ad in accordance with section 3B.2 of the rules and regulations and section 3-9(a)(6) of the Act will be required.

(e) 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 section.

6C.2. An IBR will not be deemed to be significant unless it is determined that the environmental impact or welfare and safety of the public may be altered from that reflected in the approved permit.

6C.3. All IBR's for a permit will be subject to review and approval by the commissioner.

6C.4. No IBR to a permit may be implemented by any operator until written approval of the commissioner has been granted

**Ed. Note: Sections 7A through 7D governs standards for surface effects of underground mining.**

**§38-2-7A. Permit Requirements.**

7A.1. General. In addition to information required by Sections 10 and 18 (b)(5) of the Act, the following general information shall be included with an application filed on forms provided by the director.

(a) Return receipts of notification to residents residing on property contiguous to proposed permit area.

(b) A true copy of the notarized affidavit of publication and a copy of the advertisement setting forth the dates the advertisement appeared.

(c) The location of the operation (county, magisterial district, nearest post office and longitude and latitude).

(d) The name of the coal seam or seams to be mined.

(e) Information on the type of bond to be filed

and whether or not incremental bonding will be used.

(f) An indication of whether or not there will be a gravity discharge.

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

1. Name and series of the sheet;
2. Scale, latitude and longitude;
3. Limits of underground mining operation proposed;
4. Surface area to be permitted;
5. Cropline of the mineral;
6. Location and identification of all mine openings for the proposed mine shafts, slopes and drifts, and boreholes; and
7. Location of all surface residents of structures not owned by the applicant over the area to be mined

(h) Attach a copy of a mine development map drawn to scale showing:

1. Boundaries of underground mining operation and any adjacent active or abandoned mines in the same seam;
2. Present extent of underground mining as well as projected headings;
3. Date, scale, north arrow, dip and strike arrow and average dip;
4. All gas, oil and water wells;
5. Location of all known faults and test drill holes,
6. Area and extent of previous or proposed auger or strip mining in the same seam;
7. Location and thickness of barriers; and
8. Elevation of all entries, fanways and boreholes.

7A.2. Hydrologic Information and Analysis. The application shall contain a statement describing the probable hydrologic consequences (PHC) of the mining operations, both the permit and adjacent areas with respect to the hydrologic balance. Modeling techniques may be included as part of the application. The latitude, longitude and elevation should be shown for each surface or groundwater sampling point for base line information. Water sampling and analysis shall be in accordance with OSM approved methods. All applications for permit revisions must be reviewed by the commissioner to determine whether a new or updated PHC determination or cumulative hydrologic impact assessment (CHIA) should be prepared.

(a) Base line Groundwater Information

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 within the proposed permit 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 descriptions including total dissolved solids, alkalinity, acidity, sulfates, specific conductance, pH, total iron, total manganese, provided, that correlation data from other monitoring which does not include one or more of the above parameters may be accepted; provided further, that limited validation samples may be required.

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

4. If the determination of the probable hydrologic consequences (PHC) indicates that a currently used or significant groundwater resource is likely to be adversely impacted, additional information shall be provided on the base line properties of the groundwater system as necessary to evaluate such probable hydrologic consequences (PHC) or to plan remedial or reclamation activities.

(b) Baseline Surface Water Information

1. The name, location, ownership and descriptions of all surface water bodies in the permit 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 variation; provided, that correlation data from other monitoring which does not include one or more of the above parameters may be accepted; provided further, that limited validation samples may be required

3. Water quantity descriptions including information on seasonal flow rates, variation and water 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 (PHC) or to plan remedial and reclamation activities such as water availability, alternative water sources and evaluation of suitability for both the premining and the approved post mining land uses

(c) Probable hydrologic consequences assessment. The application shall include a determination of the probable hydrologic consequences (PHC) of the proposed mining and reclamation upon the quality and quantity of ground and surface water under seasonal flow conditions in the proposed permit area and potentially impacted offsite areas. The PHC determination shall be based on base line data (including the geologic description provided in accordance with 7A.3.) collected at or near the site of the proposed operation, data representative of the site, or a combination of both. The PHC determination shall include estimates of the impact of the proposed operation upon water quality, flooding or streamflow alteration and ground and surface water availability. Remedial measures for potential water quality or water quantity problems of local impact revealed by the PHC determinations shall be described or referenced.

(d) The applicant shall submit all available data and analysis described in 6A.2(b)(4)(c) the cumulative hydrologic impact assessment with the applica-

tion.

(e) In some cases, the PHC may serve as the CHIA if there is no previously existing mining within that particular hydrologic regime's impact area. Otherwise, the regulatory authority shall perform a separate cumulative hydrologic impact assessment and evaluation of the PHC for the permit area and PHC's found within the cumulative impact area. This evaluation shall be sufficient to determine, for purposes of permit approval, whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

7A.3. Geology. The application shall contain the following geologic and related information:

(a) Geologic cross sections, maps or plans of the proposed affected area, including the actual area to be mined, prepared by or under the direction of and certified by a person approved by the commissioner, showing pertinent elevation and location (latitude and longitude) of test borings or core samplings, where required by the commissioner, and depicting the following information: (A) the nature and depth of the various strata or overburden including geologic formation names and/or geologic members; (B) the elevation location of subsurface water, if encountered, and its quality; (C) the nature and thickness of any coal or rider seams above the seam to be mined; (D) the nature of the stratum immediately beneath the coal seam to be mined; (E) all mineral crop lines and the strike and dip of the coal to be mined, within the area of land to be affected; (F) existing or previous surface mining limits; (G) the location and extent of known workings of any underground mines, including mine openings to the surface; (H) 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 will be included in the permit application. Areal geology may include information such as mapped outcrop locations shown on a 7 1/2 minute United States Geological Survey (U.S.G.S.) topographic map, areal photographs, and published geologic reports for the area of concern. Structural geology may include mapped lineament traces from areal photography or topographic maps and any published structural geologic reports for the area of concern; (I) areal and vertical distribution of aquifers with seasonal differences in head and the name(s) of the stratum (or strata) which the water is found; (J) location and depth of all oil and gas wells within the

proposed permit area for both surface and underground mines.

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

1. The results of test borings 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 exclusive 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. Lithologic logs of the drill holes;

3. A detailed discussion and mapped illustration (cross sections and/or aerial) of 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 and should explain the potential impact, if any, is anticipated. Also, within this discussion, a brief description of the degree of fracturing and weathering, if any, noted during the exploration drilling should be included if it is believed to have a potential influence on the extraction of the coal and/or the hydrologic regime.

(c) The clay content of the stratum immediately below the coal seam and the pyrite content and potential alkalinity of the stratum immediately below the coal seam shall be analyzed.

7A.4. Mine Abandonment. A plan shall be included in the application and shall contain the following information:

- (a) The maximum head of water expected on the barrier and mine seals;

(b) The width of barriers and the type and number of permanent seals proposed, their design details and drawings and the proposed materials to be used for construction; and

(c) The type of seals and their design details for boreholes.

### §38-2-7B. Performance Standards.

#### 7B.1. Signs and Markers.

(a) Permanent Monument. A permanent monument shall be posted at the entrances from public roads and highways and at other suitable locations. The monument shall consist of a sign constructed of wood, metal or other suitable material two feet by three feet (2' x 3') mounted on a two inch (2") diameter pipe driven three feet (3') into the ground with four feet (4') exposed. Any suitable equivalent substitute may be approved. The sign shall clearly indicate the company name, permit numbers, business address and telephone number.

(b) Perimeter Marker. A two-inch (2") diameter pipe or suitable substitute shall be driven into the earth with a minimum of three feet (3') exposed to permanently mark the beginning and ending points of the area under permit. It shall be identified by painting the exposed portion of the pipe red. 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 operations on the surface, signs reading "Blasting Area" shall be conspicuously displayed at the mining operation and at all entrances to the permit area. The sign shall be two feet by three feet (2' x 3') reading "Blasting Area" and explaining the blasting warning and the all clear signals. Once blasting operations are completed on this area the

blasting sign may be removed.

(f) Slope Measurements. Slope measurements shall be clearly marked prior to preinspection at each two hundred feet (200') interval perpendicular to the cropline, where applicable.

7B.2. Casing and Sealing of Holes. All boreholes, shafts, auger holes and wells shall be cased, sealed or otherwise managed to prevent pollution of surface or groundwater and to prevent mixing of groundwaters of significantly different quality. All boreholes within the permit area which extend beneath the coal to be mined and into water bearing strata shall be permanently plugged unless the boreholes have been approved for use in monitoring. Prior to sealing, such holes shall be managed to insure the safety of people, livestock, and wildlife; however, before 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 Director, be transferred to another party for further use. The conditions of the transfer shall comply with State and local laws, regulations, and other requirements.

7B.3. Topsoil. If a borrow site is to be used for topsoil, it must be shown on the proposal map accompanied by appropriate reclamation plan.

(a) Removal. If no borrow area is provided, then 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. Where the removal of vegetative material, topsoil or other materials may result in erosion, the director may limit the size of the area from which these materials are removed at any one time.

(b) Redistribution. Topsoil and other materials shall be redistributed in a manner that achieves an approximate uniform, stable thickness, consistent with the approved postmining land uses, contours and surface water drainage system.

(c) Topsoil Substitutes. Any material used for topsoiling must be capable of supporting and maintaining the approved postmining land use. This determination shall be based on the results of appropriate chemical and physical analysis of overburden and topsoil. These analyses shall include:

1. The determination shall include at a minimum pH, texture class, and nutrient content; and

2. A certification of analysis shall be made by a qualified laboratory stating that (A) the proposed substitute material is suitable for sustaining vegetation, and (B) the analyses were conducted using standard testing procedures

(d) 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 re-vegetation requirements of section 4F. These tests shall include nutrient analysis and lime requirement tests. Results of these tests shall be submitted to the director with the final planting report as required by these regulations.

7B.4. Water Quality. Surface and ground water quality and quantity and the hydrologic balance shall be protected from material damage by handling and managing earthen materials, groundwater discharges and runoff in a manner that minimizes the formation of acid or toxic drainage or infiltration and restores the approximate premining water availability.

(a) Water Quality Control. 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 until discharges from such areas will not cause a violation of water quality standards.

(b) Effluent Limitations. Discharge from the permit area shall not violate effluent limitations or cause a violation of 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 40 CFR Part 434.

(c) Unless otherwise approved by the director, water from underground works shall not be commingled 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.

(d) 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.

(e) Breakthrough.

1. Any surface or underground breakthrough of water which may affect a surface discharge and is 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 director, any other parameter characteristics of the discharge. Such analysis shall be made by a competent water analyst or chemist. The original and at least one copy of the analysis shall be retained by the operator, two copies shall be submitted to the director.

2. Should said analysis indicate the water quality to be less than applicable effluent limitations, seals shall be immediately constructed. These seals shall:

A. Prevent any air from entering the underground mine by way of the breakthrough; or

B. Prevent any air from entering the breakthrough while allowing the water to flow from the breakthrough; or

C. 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.

3. Alternate methods of handling discharges from breakthroughs may be employed where it can be established that applicable effluent limitations can be met.

(f) Surface water shall not be diverted or otherwise discharged into underground mine workings, unless the person who conducts the mining activities

demonstrates to the director that this will:

1. Abate water pollution or otherwise eliminate public hazards resulting from mining activities;

2. Be discharged as a controlled flow, meeting applicable effluent limitations for pH and total suspended solids, except that the pH and total suspended solid limitations may be exceeded if approved by the director, and is limited to:

A. Coal processing waste;

B. Fly ash from a coal-fired facility;

C. Inert materials used for stabilizing underground mines,

D. Underground mine development wastes; or

E. Sludge;

3. In any event, the discharge into underground mines of surface waters will not cause, result in or contribute to a violation of applicable water quality standards or effluent limitations;

4. Minimizes disturbance to the hydrologic balance; and

5. Not discharge without MSHA approval.

7B.5. Discharge from Underground Operations. No person shall locate openings for new drift mine workings 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 2.4. of these regulations, then site specific data must be submitted demonstrating that this is not an acid or iron producing seam in this location.

7B.6. Acid Producing and Toxic Materials. All exposed coal seams remaining after mining and any acid-forming, toxic-forming, combustible materials, or any other waste materials that are exposed, shall be covered with a minimum of four feet (4') of nontoxic and noncombustible material or tested, treated and blended to provide materials suitable to prevent water pollution. If necessary, this material shall be treated to neutralize toxicity in order to prevent water pollution and sustained combustion and/or to min-

imize adverse effects on plant growth and land uses. Where necessary to protect against upward migration of salts, exposure by erosion, to provide an adequate depth for plant growth or to otherwise meet local conditions, the director shall specify thicker amounts of cover using nontoxic material.

#### 7B.7. Monitoring Requirements.

##### (a) Surface Water Monitoring

1. Surface water monitoring plans are to be included in the permit application and will be based on the PHC determination and baseline hydrologic and geologic information. These plans shall identify monitoring site locations, quantity and quality parameters, sampling frequency, and describe how the data may be used to determine the impact, if any, of the operation on the hydrologic balance both the permit and adjacent areas. Monitoring quality parameters should include but not exclusive to total dissolved solids or specific conductance corrected at 25°C, total suspended solids, flow measurements, pH, acidity, alkalinity, total iron and total manganese. The selection of these parameters must be based on current and approved post mining land uses and all hydrologic balance protection objectives.

2. All water discharged from the permit area shall be sampled, analyzed and otherwise monitored in accordance with the Clean Water Act of 1977 and all applicable standards of the NPDES program, and a monthly report of all measurements shall be submitted to the director; provided, that all violations of effluent standards shall be reported to the director within five (5) days of receipt of analytical analyses; and

3. Where any discharge from the permit area requires treatment during the mining operation in order to meet the water quality standards set forth in the NPDES regulations, surface 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 water quality standards shall be adequate to establish that the hydrologic balance is being preserved.

(b) Groundwater Monitoring. Ground water monitoring plans are to be included in the permit application if adverse impacts to a significant ground-

water resource are anticipated. This decision will be based on the PHC determination and baseline hydrologic and geologic information gathered for both on and off the minesite. These plans shall identify monitoring site locations (latitude, longitude and ground level elevation), quantity and quality parameters to be monitored, sampling frequency and duration, and describe how the data may be used to determine the impact, if any, of the operation on the hydrologic balance both on and off the minesite. Monitoring quality parameters should include, but not exclusive to, total dissolved solids or specific conductance corrected at 25°C, pH, acidity, alkalinity, total iron, total manganese, 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. Results shall be submitted to the commissioner at least every three (3) months.

(c) Ground Water Monitoring Waivers. If an applicant can demonstrate by the use of the PHC determination and other available baseline 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 permit and adjacent area, then 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 baseline hydrologic and geologic information that all individual water-bearing strata of concern are hydraulically interconnected and can be waived as a complete unit.

(a) Steep Slope Mining.

1. Applicability. On mining operations where the natural slope exceeds twenty (20) degrees, the provisions of this section in addition to other applicable provisions of these regulations, shall apply. On lesser slopes that require measures to protect the area below the mining operation from disturbance as determined by the director on the basis of consideration of soils, climate, method of operation, geology and other regional characteristics, the provisions of this section, in addition to other applicable provisions of these regulations, shall also apply.

2. Downslope Placement. Spoil or debris shall not be placed on the downslope except in

specified fill areas designed for such placement. 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 these regulations

3. Highwall Elimination. The highwall shall be eliminated and the disturbed area graded to the approximate original contour in accordance with the provisions of this paragraph and subsection 7B.11.

4. Stabilization. The material used to backfill and eliminate the highwall shall be sufficiently compacted or otherwise mechanically stabilized so as to ensure stability of the backfill with a static safety factor of 1.3. The method and design specifications of compacting material shall be approved by the director. Woody materials shall not be buried in the backfilled area unless the director determines that the proposed method for placing woody material beneath the highwall will not deteriorate the stable condition of the backfilled area. The operation shall at a minimum retain all overburden and spoil on the solid portion of existing or new benches and backfill and grade to the most moderate slope possible.

5. Drainage Channels and Flumes. When mining through natural watercourses or when water is to be directed across or through the backfill, a drainage channel, flumes or french drains shall be constructed across or through the backfill in order to ensure stability and to prevent erosion. Such drainage channels, flumes or french drains shall be constructed of nontoxic durable rock, asphalt, concrete or any other material approved by the director. Channels, flumes and drains shall be constructed in accordance with criteria contained in the Handbook unless otherwise approved.

(b) Inactive Status. Inactive operation status will be considered for a period not to exceed one (1) year from date of approval; provided, that prior written approval is obtained from the director; provided further, that inactive status shall not be approved unless the operator demonstrates that reclamation is current and all water management practices will be maintained during the inactive period. The director may also require progress maps prior to approval.

Where it can be adequately demonstrated by the permittee that inactive status to exceed one (1) year is necessary, the director may extend inactive status be-

yond the one (1) year limitation in increments not to exceed six (6) months.

(c) **Requirements for Special Land Use Purposes.** Operations that meet the requirements of this paragraph may be conducted under a variance from the requirement to restore affected areas to the approximate original contour if the following requirements are satisfied:

1. The alternative postmining land use requirements of paragraph 4D.4. are met;

2. All applicable requirements of the Act and regulatory program other than the requirement to restore affected areas to their approximate original contour are met;

3. After consultation with appropriate land use planning agencies, if any, the potential use is shown to constitute an equal or better economic or public use;

4. The proposed use is designed and certified by an approved person in conformance with professional standards established to assure the stability, drainage and configuration necessary for the intended use of the site;

5. The highwall is completely backfilled with spoil material in a manner which results in a static safety factor of 1.3. using standard geotechnical analysis; and

6. The surface land owner of the permit area has requested in writing that a variance be granted so as to render the land after reclamation suitable for an alternative land use as defined in paragraph 4D.3.

**7B.9. Disposal of Excess Spoil.** Spoil not required to achieve the approximate original contour shall be transported to and placed in a controlled manner in designated disposal areas within the permit area in accordance with the criteria and specifications found in section 6B of these regulations and in the Handbook or other appropriate design as approved in the preplan. Coal processing wastes and/or toxic material shall not be disposed of in such fills unless they are designed in accordance with the refuse disposal regulations. Where environmental benefits will occur, spoil not needed to restore the approximate original contour of the land and reclaim land within the permit area may, in a manner consistent with the Act

and these regulations, be deposited on another area under a permit issued pursuant to the Act or on abandoned mine lands under a contract for reclamation conducted pursuant to the provisions of the Act and these rules and regulations.

(a) **Disposal of Excess Spoil on Existing Benches.** Spoil material not required to return the area to the approximate original contour may be placed on a preexisting bench if the following conditions are met:

1. All excess spoil must be hauled, placed and retained on the solid portion of the bench; and

2. The spoil must be compacted or otherwise mechanically stabilized and the existing highwall eliminated to the extent possible with the available spoil to achieve a static safety factor of 1.3.

(b) **Disturbance Within Fill Site.** At no time shall the disturbance in the valley fill area be greater than the sediment storage requirement provided by the sediment structures until two or more lifts of the valley fill have been installed.

(c) **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.

#### 7B.10. 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 disturbance at any one time 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.

1. **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 within thirty (30) days of completion of the storage area.

2. Permanent Revegetation. All topsoil, spoil storage and other disturbed areas which will be in place for longer than one (1) year shall be seeded and mulched so as to establish a satisfactory permanent vegetative cover. Trees shall be required only on those areas that:

A. Will not be redisturbed by future reclamation activities; or

B. Are necessary in order to meet the approved postmining land use. Seeding and planting of these areas shall be conducted during the first seeding season.

(b) Mine Site Organization and Aesthetics. Indiscriminate dumping or discarding of materials, litter, junked equipment, containers, or other noncoal wastes 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.

7B.11. Backfilling and Regrading 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.

(a) Time Schedule for Regrading and Backfilling. Regrading and backfilling will proceed as contemporaneously as practicable with mining operations and as reflected on the approved mining and reclamation plan; provided, however, that final backfilling and regrading shall be completed within one hundred eighty (180) days of completion of underground mining. Should particular site conditions or weather make adherence to these guidelines impractical, the period of time required to be current may be reasonably extended.

(b) 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 these regulations.

(c) Variances from Highwall Elimination. All underground mining operations which were in existence and which created highwalls prior to August 3, 1977 shall not be required to eliminate the highwall if the operator can demonstrate that it is economically or 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 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 feet (4') of nonacid producing materials

(d) Grading Outer Spoil. All outer spoil shall be graded so as to blend into the adjoining undisturbed lands.

(e) Erosion Control. All disturbed areas shall be regraded, protected and stabilized in a manner which effectively controls erosion.

(f) Reaffecting Previously Mined Areas.

1. Mining of seams below existing bench Operations proposing to mine below existing bench and not reaffecting existing highwall shall, at a minimum, completely eliminate newly created highwall and utilize excess spoil material to eliminate as much of the preexisting highwall as possible.

2. Mining of Existing Bench. Operations proposing to mine on the existing bench and not reaffecting existing highwall shall, at a minimum, backfill four feet (4') above the coal seam and eliminate as much of the preexisting highwall as possible.

(g) Regraded Drainage Control. Drainage control on regraded areas shall be provided to prevent excessive erosion or additional contributions of suspended solids to the receiving stream, ensure safety and conserve soil moisture. Drainage control measures include, but are not limited to, diversion ditches, flumes and riprap channels, tracking in, small depressions or other devices that may be approved by the director.

(h)

1. 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:

A. The fill is not located so as to be detrimental to the environment or to the health and safety of the public;

B. Stability of the fill shall be demonstrated through standard geotechnical analysis to be consistent with the backfilling and grading requirements; and

C. The surface of the fill has been vegetated in accordance with section 4F of these regulations.

2. The approximate original contour variance contained in (h) 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.

### §38-2-7C. Subsidence Control.

7C.1. Public Notice. The mining schedule 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 beneath his or her property or residence. The return receipt shall be kept at the mine office. The notification shall contain, at a minimum:

(a) Company name, permit number and address;

(b) Identification of specific areas in which mining will take place;

(c) Dates of mining activities that could cause subsidence and affect specific structures; and

(d) Measures to be taken to prevent or control adverse surface effects.

### 7C.2. Surface Owner Protection.

(a) Each person who conducts underground mining activities shall adopt all measures technologically and economically feasible to prevent subsidence causing material damage or reducing the value or reasonably foreseeable use of surface lands.

(b) Each person who conducts underground mining which results in subsidence that causes material damage or reduces the value or reasonably foreseeable use of the surface lands shall restore the land to a condition capable of supporting uses it was capable of supporting before subsidence. He shall also, where such person does not specifically possess the right to subside without liability to surface owners, at the option of the owner of each such damaged structure:

1. Restore, rehabilitate or remove and replace each damaged structure promptly after the damage is suffered, to the condition it would be in if no subsidence had occurred; or

2. Purchase the damaged structure for its fair market, presubsidence value and shall promptly, after subsidence occurs, insure that it does not constitute a public nuisance or a hazard to health and safety or the environment; or

3. Compensate the owner of any surface structure in the full amount of the diminution in value resulting from subsidence.

(c) Before mining begins, noncancellable premium prepaid insurance or other means approved by the director may be required to assure that every person with an interest in the surface will be indemnified for all damages which they might suffer as a result of subsidence.

(d) 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 director finds that mining will not cause material damage or reduce the foreseeable use. The director 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 director may suspend mining under or adjacent to such features or facilities until the subsidence control plan is modified.

### 7C.3. Subsidence Control Plan.

(a) Each application shall include a subsidence control plan which includes the following:

1. A survey that identifies structures 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.

2. A general description of the technique of coal removal, such as longwall, room and pillar, pillar removal, hydraulic mining or other extraction methods;

3. The location and extent of areas in which planned subsidence is projected, including anticipated effects, and those areas in which measures will be taken to prevent or minimize subsidence and related damage;

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

5. A description of the measures to be taken, in accordance with 7C.2, to mitigate or remedy any material damage or diminution in value or foreseeable use that may occur due to expected subsidence, except where the person conducting underground mining activities possess the right to subside without liability to surface owners.

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

### §38-2-7D. Incidental Boundary Revisions.

All incidental boundary revisions shall be granted in accordance with section 19(a)(2) of the Act and shall be limited to additional areas of disturbance directly related to underground mining.

7D.1. General. In addition to the information required by section 19(a)(2) of the Act, the following

requirements shall be met:

(a) The application shall be filed on forms provided by the commissioner.

(b) If the IBR is contiguous to the mining area of the original permitted area or is connected by projected mining boundaries and is an insignificant IBR, a legal advertisement shall be published one time in accordance with section 3B.4 of these regulations. The legal advertisement shall state that written protests will be accepted by the commissioner until a certain date which shall be at least ten (10) days after the publication of the applicant's advertisement.

(c) If the IBR is not contiguous to the mining area, or is a significant IBR, a legal ad in accordance with section 3B.2 of the rules and regulations and section 3-9(a)(6) of the Act will be required.

(d) 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 section.

7D.2 An incidental boundary revision will not be deemed to be significant unless it is determined that the environmental impact or welfare and safety of the public may be altered from that reflected in the approved permit.

7D.3. All incidental boundary revisions for a permit will be subject to review and approval by the commissioner.

7D.4. No incidental boundary revision to a permit may be implemented by any operator until written approval of the commissioner has been granted.

**Ed. Note:** Sections 8A through 8B govern facilities incidental to coal mining

**§38-2-8A. Permit Requirements.** This section shall apply to facilities required for or used incidentally for operation of the mine such as, but not limited to, mine buildings and coal processing plants not included in a mine permit. This section also applies to coal loading facilities at or near the mine site but not included in the mine permit.

8A.1. General. In addition to information required by sections 10 and 18 (b)(5) of the Act and sections 3 and 4 of these regulations, the following general in-

formation shall be included with an application filed on forms provided by the director:

(a) Return receipts of notification to residents residing on property contiguous to proposed permit area;

(b) A true copy of the notarized affidavit of publication and a copy of the advertisement setting forth the dates the advertisement appeared;

(c) The location of the operation (county, magisterial district, nearest post office and longitude and latitude); and

(d) Information on the type of bond to be filed and whether or not incremental bonding will be used.

8A.2. Hydrologic Information and Analysis. The application shall contain a statement describing the probable hydrologic consequences of the mining operations, both the permit and adjacent areas with respect to the hydrologic balance. Modeling techniques may be included as part of the application. The latitude, longitude and elevation should be shown for each surface or groundwater sampling point for base line information. Water sampling and analysis shall be in accordance with OSM approved methods. All applications for permit revisions must be reviewed by the commissioner to determine whether a new or updated PHC determination or cumulative hydrologic impact assessment (CHIA) should be prepared.

(a) Baseline Groundwater Information.

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 within the proposed permit 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 descriptions including total dissolved solids, alkalinity, acidity, sulfates, specific conductance, pH, total iron and total manganese; provided, that correlation data from other monitoring which does not include one or more of the above parameters may be accepted; provided further, that limited validation samples may be required.

3. For significant aquifers, groundwater quantity descriptions including discharge rates or

usage and depth to water under seasonal conditions in each water-bearing stratum above the coal seam and each potentially impacted water-bearing stratum below the coal seam. Where deemed feasible and appropriate by the commissioner, an operator may calculate water usage for water status discharge determination; and

4. If the determination of the probable hydrologic consequences (PHC) indicates that a correctly used or significant groundwater resource is likely to be adversely impacted, additional information shall be provided on the base line properties of the groundwater system as necessary to evaluate such probable hydrologic consequences or to plan remedial or reclamation activities.

(b) Baseline Surface Water Information.

1. The name, location, ownership and description of all surface water bodies in the permit 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 variation; provided, that correlation data from other monitoring which does not include one or more of the above parameters may be accepted; provided further, that limited validation samples may be required.

3. Water quantity descriptions including information on seasonal flow rates, variation and water 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 base line properties of the surface water system as necessary to fully evaluate such probable hydrologic consequences or to plan remedial and reclamation activities such as water availability, alternative water sources and evaluation of suitability for both the premining and the approved post mining land uses.

(c) Probable hydrologic consequences assessment. The application shall include a determination of the probable hydrologic consequences (PHC) of the

proposed mining and reclamation upon the quality and quantity of ground and surface water under seasonal flow conditions in the proposed permit area and potentially impacted offsite areas. The PHC determination shall be based on base line data collected at or near the site of the proposed operations, data representative of the site, or a combination of both. The PHC determination shall include estimates of the impact of the proposed operation upon water quality, flooding or streamflow alteration and ground and surface water availability. Remedial measures for potential water quality or water quantity problems of local impact revealed by the PHC determinations shall be described or referenced.

(d) The applicant shall submit all available data and analysis relevant to described in 6A.2(b)(4)(c) the cumulative hydrologic impact assessment with the application.

(e) In some cases, the PHC may serve as the CHIA if there is no previously existing mining within that particular hydrologic regime's impact area. Otherwise, the regulatory authority shall perform a separate cumulative hydrologic impact assessment and evaluation of the PHC for the permit area and PHC's found within the cumulative impact area. This evaluation shall be sufficient to determine, for purposes of permit approval, whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

### **§38-2-8B. Performance Standards.**

#### **8B.1. Signs and Markers.**

(a) **Permanent Monument.** A permanent monument shall be posted at the entrance from public roads and highways and at other suitable locations. The monument shall consist of a sign constructed of wood, metal, or other suitable material two feet by three feet (2' x 3') mounted on a two-inch (2") diameter pipe driven three feet (3') into the ground with four feet (4') exposed. Any suitable equivalent substitute may be approved. The sign shall clearly indicate the company name, permit numbers, business address and telephone number.

(b) **Perimeter Marker.** A two-inch (2") diameter pipe or suitable substitute shall be driven into the earth with a minimum of three feet (3') exposed to permanently mark the beginning and ending points of the area under permit. It shall be identified by

painting the exposed portion of the pipe red. 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, signs reading "Blasting Area" shall be displayed conspicuously at all approaches to the blasting site and along haulageways and access roads to the facility and all entrances to the permit area. The sign shall be two feet by three feet (2' x 3') reading "Blasting Area" and explaining the blasting warning and the all clear signals.

**8B.2. Casing and Sealing of Holes.** All boreholes, shafts, auger holes and wells shall be cased, sealed or otherwise managed to prevent pollution of surface or groundwater and to prevent mixing of groundwaters of significantly different quality. All boreholes within the permit area which extend beneath the coal to be mined and into water bearing strata shall be permanently plugged unless the boreholes have been approved for use in monitoring. Prior to sealing, such holes shall be managed to insure the safety of people, livestock, and wildlife; however, before 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 Director, be transferred to another party for further use. The conditions of the transfer shall comply with State and local laws, regulations, and other requirements.

**8B.3. Topsoil.** Procedures for topsoil handling will be in accordance with 6B.3. of these regulations.

**8B.4. Water Quality.** Surface and groundwater quality and quantity and the hydrologic balance shall be protected from material damage by handling and managing earthen materials, groundwater discharges and runoff in a manner that minimized the formation of acid or toxic drainage or infiltration and

restores the approximate premining water availability.

(a) **Water Quality Control** 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 until stabilized to prevent erosion or sedimentation.

(b) **Effluent Limitations.** Discharge from the permit area shall not violate effluent limitations or cause violation of 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 40 CFR Part 434.

(c) **Treatment Facilities.** Adequate facilities shall be installed, operated and maintained using the best technology currently available in accordance to 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) Surface water shall not be diverted or otherwise discharged into underground mine workings, unless the person who conducts the surface mining activities demonstrates to the director that this will

1. Abate water pollution or otherwise eliminate public hazards resulting from surface mining activities;

2. Be discharged as a controlled flow, meeting applicable effluent limitations for pH and total suspended solids, except that the pH and total suspended solid limitations may be exceeded, if approved by the director, and is limited to:

A. Coal processing waste;

B. Fly ash from a coal-fired facility;

C. Inert materials used for stabilizing underground mines;

D. Underground mine development wastes, or

E. Sludge.

3. In any event, the discharge into underground mines of surface waters will not cause, result in or contribute to a violation of applicable water quality standards or effluent limitations;

4. Minimizes disturbance to the hydrologic balance; and

5. Not discharge without MSHA approval.

#### 8B.5. Acid Producing and Toxic Materials.

(a) Drainage from acid-forming and toxic-forming materials into ground and surface water shall be avoided by:

1. Identifying, burying, blending, segregating and/or treating where necessary, spoil or other materials that will be toxic to vegetation or that will adversely affect water quality within thirty (30) days after it is first exposed or a lesser period if required by the director. Such materials shall be handled in accordance with methods set forth in the approved preplan; and

2. Acid-forming or toxic-forming material shall not be buried or stored in proximity to a drainage course or groundwater system so as to cause a threat of water pollution.

(b) **Treatment of Toxic Material.** Any acid-forming, toxic-forming, combustible, or other waste materials that are exposed, shall be surrounded with a minimum of four feet (4') of nontoxic and noncombustible material or test, treat and blend material to provide materials suitable to prevent water pollution

If necessary, this material shall be treated to neutralized toxicity in order to prevent water pollutions and sustained combustion and/or to minimize adverse effects on plant growth and land uses. Where necessary to protect against upward migration of salts, exposure by erosion, to provide an adequate depth for plant growth, or to otherwise meet local conditions, the director shall specify thicker amounts of cover using nontoxic material.

#### 8B.6. Monitoring Requirements.

## (a) Surface Water Monitoring:

1. Surface water monitoring plans are to be included in the permit application and will be based on the PHC determination and baseline hydrologic and geologic information. These plans shall identify monitoring site locations, quantity and quality parameters, sampling frequency, and describe how the data may be used to determine the impact, if any, of the operation on the hydrologic balance both the permit and adjacent areas. Monitoring quality parameters should include but not exclusive to total dissolved solids or specific conductance corrected at 25°C, total suspended solids, flow measurements, pH, acidity, alkalinity, total iron and total manganese. The selection of these parameters must be based on current and approved post mining land uses and all hydrologic balance protection objectives.

2. All water discharged from the permit area shall be sampled and analyzed and otherwise monitored in accordance with the Clean Water Act of 1977 and all applicable standards of the NPDES program and a monthly report of all measurements shall be reported to the commissioner; provided, that all violations of effluent standards shall be reported to the commissioner within five (5) days of receipt of analytical analysis.

3. Where any discharge from the permit area requires treatment during the mining operation in order to meet the water quality standards set forth in the NPDES regulations, surface 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 water quality standards shall be adequate to establish that the hydrologic balance is being preserved.

(b) Groundwater Monitoring. Ground water monitoring plans are to be included in the permit application if adverse impacts to a significant groundwater resource are anticipated. This decision will be based on the PHC determination and baseline hydrologic and geologic information gathered for both on and off the minesite. These plans shall identify monitoring site locations (latitude, longitude and ground level elevation), quantity and quality parameters to be monitored, sampling frequency and duration, and describe how the data may be used to determine the impact, if any, of the operation on the hydro-

logic balance both on and off the minesite. Monitoring quality parameters should include, but not exclusive to, total dissolved solids or specific conductance corrected at 25°C, pH, acidity, alkalinity, total iron, total manganese, 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. Results shall be submitted to the commissioner at least every the (3) months.

(c) Ground Water Monitoring Waivers. If an applicant can demonstrate by the use of the PHC determination and other available baseline 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 permit and adjacent area, then 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 baseline hydrologic and geologic information that all individual water-bearing strata of concern are hydraulically interconnected and can be waived as a complete unit.

## 8B.7. Method of Operation.

## (a) Steep Slope Mining

1. Applicability. On surface mining operations where the natural slope exceeds twenty (20) degrees, the provisions of this section in addition to other applicable provisions of these regulations, shall apply. On lesser slopes that require measures to protect the area below the operation from landslides or other similar disturbances as determined by the director on the basis of soils, climate, method of operation, geology and other regional characteristics, the provisions of this section, in addition to other applicable provisions of these regulations, shall also apply.

2. Downslope Placement. Spoil or debris shall not be placed on the downslope except in specified fill areas designed for such placement. Nothing in this section shall prohibit the placement of materials in haulroad or access road embankments on slopes steeper than twenty (20) degrees so long as the embankments are constructed in accordance with these regulations.

3. **Highwall Elimination.** 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 accordance with these regulations. Land above the highwall shall not be disturbed unless the director finds that the disturbance is necessary to:

- A. Blend the solid highwall and the back-filled material;
- B. Control surface runoff,
- C. Provide access to the area above the highwall; or
- D. Comply with applicable health and safety laws.

4. **Stabilization.** The material used to back-fill 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. The method and design of specifications of compacting material shall be approved by the director. Woody materials shall not be buried in the backfilled area unless the director determines that the proposed method for placing woody material beneath the highwall will not deteriorate the stable condition of the backfilled area. The operation shall at a minimum retain all overburden and spoil on the solid portion of existing or new benches and backfill and grade to the most moderate slope possible.

5. **Drainage Channels and Flumes.** When construction activities progress through natural watercourses, or when water is to be directed across or through the operation or backfill, a drainage channel, flume or french drain shall be constructed across or through the operation or backfill in order to ensure stability and to prevent erosion. Such drainage channels, flumes or french drains shall be constructed of nontoxic durable rock, asphalt, concrete or any other material approved by the director. Channels, flumes and drains shall be constructed in accordance with criteria contained in the Handbook unless otherwise approved.

(b) **Inactive Status.** Inactive operations status will be considered for a period not to exceed one (1) year from date of approval; provided, that prior written approval is obtained from the director; provided

further, that inactive status shall not be approved unless the operator demonstrates that reclamation is current and all water management practices will be maintained during the inactive period and all exposed coal is covered with nontoxic material. The director may also require progress maps prior to approval. Where it can be adequately demonstrated by the permittee that inactive status to exceed one (1) year is necessary, the director may extend inactive status beyond the one (1) year limitation in increments not to exceed six (6) months.

(c) **Requirements for Special Land Use Purposes.** Operations that meet the requirements of this paragraph may be conducted under a variance from the requirement to restore affected areas to the approximate original contour if the following requirements are satisfied:

1. The alternative postmining land use requirements of paragraph 4D.4. are met;

2. All applicable requirements of the Act and regulatory program other than the requirement to restore affected areas to their approximate original contour are met;

3. After consultation with appropriate land use planning agencies, if any, the potential use is shown to constitute an equal or better economic or public use;

4. The proposed use is designed and certified by an approved person in conformance with professional standards established to assure the stability, drainage and configuration necessary for the intended use of the site;

5. The highwall is completely backfilled with spoil material in a manner which results in a static safety factor of 1.3 using standard geotechnical analysis.

6. Only spoil not necessary to achieve the postmining land use shall be removed from the mine bench, and

7. The surface land owner of the permit area has requested in writing that a variance be granted so as to render the land after reclamation suitable for an alternative land use as defined in paragraph 4D.3.

8B 8. **Site Development.**

(a) **Time Schedule for Site Excavation** Time schedule for site excavation and/or construction activities shall be consistent with the approved preplan but shall provide for minimum disturbance at any one time consistent with good environmental procedures; provided, all applicable drainage system components as approved in the preplan shall be installed prior to any disturbance for site development.

1. **Temporary Revegetation.** All topsoil and spoil storage areas which will be in place for less than one (1) year shall be seeded and mulched with a mixture of annual grasses and grains in order to reduce erosion. This seeding and mulching must be done within thirty (30) days of completion of the storage area.

2. **Permanent Revegetation** All topsoil, spoil storage and other disturbed areas which will be in place for longer than one (1) year shall be seeded and mulched with a combination of annual and perennial grasses and legumes. Trees shall be required only on those areas that:

A. Will not be redisturbed by future reclamation activities; or

B. Are necessary in order to meet the approved postmining land use. Seeding and planting of these areas shall be conducted during the first normal seeding season after the completion of the disturbance.

(b) **Disposal of Excess Spoil on Existing Benches.** Excess spoil will be placed in accordance with 6B.8. of these regulations.

8B.9. **Backfilling and Regrading.** Spoil returned to the mined-out area shall be backfilled and graded to approximate original contour with all highwalls eliminated and 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 prevent slides.

(a) **Time Schedule for Regrading and Backfilling.** Regrading, backfilling and revegetation will proceed as contemporaneously as practicable with operations and as reflected on the approved construction and reclamation plan; provided, that final backfilling and regrading shall be completed within sixty (60) days of removal of the facility unless an alternate postmining land use has been approved in which case

backfilling and regrading shall be accomplished as specified in the approved preplan. Should particular site conditions or weather make adherence to these guidelines impractical, the period of time required to be current may be reasonably extended. A written waiver must be obtained from the director for such extension.

(b) **Revegetation** shall be kept current by establishing a temporary or permanent cover on regraded areas by the end of the first growing season and a permanent cover by the end of the second growing season. Standards and procedures for establishing a satisfying vegetative cover and guidelines for species selection and application rates are found in these regulations.

(c) **Grading Outer Spoil.** All outer spoil shall be graded so as to blend into the adjoining undisturbed lands.

(d) **Erosion Control** All disturbed areas shall be regraded, protected and stabilized in a manner which effectively controls erosion.

(e) **Regraded Drainage Control.** Drainage control on regraded areas shall be provided to prevent excessive erosion or additional contribution of suspended solids to the receiving stream, ensure safety and conserve soil moisture. Drainage control measures include, but are not limited to, diversion ditches, flumes and riprap channels, tracking in, small depressions and other devices that may be approved by the director.

8B.10. **Insitu Mining.** Any insitu mining will be conducted in accordance with sections 3, 4, 7. and 8 of these regulations.

8B.11. **Backfilling and grading:** Previously mined areas.

Remining operations on previously mined areas that contain a pre-existing highwall shall comply with 6B.9 or 8B.9 of these regulations, except as provided in this section.

(a) The requirement of highwall elimination shall not apply to remining operations where the volume of all reasonably available spoil located in the permit area is insufficient to completely backfill the reaffected or enlarged highwall as demonstrated in writing by the applicant. The highwall shall be re-

duced to the maximum extent technically practical.

(b) 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.

(c) Where the applicant proposes to use selected overburden materials as a supplement or substitute for topsoil, the application shall provide results of analyses, trials, and tests indicating a more suitable soil medium.

(d) 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 requirements of 4F.8. of the regulations may be modified on a case-by-case basis, by the Commissioner, using information set forth in the approved reclamation plan.

(e) A modified permit may be issued which modifies the requirements under section 402(a)(1) of the Clean Water Act of 1987 with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the mined area of any coal remaining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge affected by the remaining operation. Such modified requirements shall apply the best available technology (BAT) economically achievable on a case-by-case basis, using best professional judgment (BPJ), to set specific numerical effluent limitations in each permit

(f) The State may issue a permit pursuant to paragraph (e), if the applicant has demonstrated to the satisfaction of the State that the coal remaining operation will result in the potential for improved water quality from the remaining operation but in no event shall such a permit allow the pH level of any discharge, and in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the mined area before the coal remaining operation begins. During remaining operations, no discharge from, or affected by, the operation shall exceed State water quality standards in the receiving stream established under section 303 of the Clean Water Act

Ed. Note: Sections 9A through 9D govern coal

removal incidental to development. This section shall apply to all incidental operations in accordance with §20-6-31 of the Code which are two acres or less. Projects with incidental coal removal affecting more than two acres shall comply with Sections 3, 4, and 6 of these regulations.

#### §38-2-9A. Permit Requirements.

9A.1. General. In addition to the requirements of section 31 of the Act and these rules and regulations, an application for an incidental permit shall contain a map in accordance with the following.

(a) Size of map shall be no more than 30" x 42";

(b) Map scale shall be 1" = 200';

(c) A separate drainage map shall be required unless all necessary information can be clearly and legibly reflected on the preplan map;

(d) Show by appropriate markings the boundaries of the area of land to be disturbed for the development and shall differentiate all lands to be disturbed in conjunction with coal removal to include the area of coal to be removed, any necessary spoil area, all drainage structures and haulageways;

(e) The cropline of the seam of coal;

(f) The total number of acres of coal to be removed;

(g) Advertisement in accordance with section 3B of these regulations,

(h) Show the date on which map was prepared, a north arrow, quadrangle name, location map and strike and dip of coal seam,

(i) Show the drainage plan in accordance with 4B of these regulations;

(j) 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 the location and percent slope of the land at each two hundred foot (200') interval along the cropline. Measurements shall be taken downslope and perpendicular to the cropline; and

(k) Insurance in accordance with 3D of the regu-

lations.

9A.2. Application. Application for an incidental permit shall be submitted on forms prescribed by the director and shall contain the following:

(a) The names and addresses of:

1. The permit applicant;
2. The owner of record of the property, surface and mineral, to be mined;
3. The holders of record of any leasehold interest in the property;
4. Any purchaser of record of the property under a real estate contract;
5. The operator, if he is a person different from the applicant; and
6. If any of these are business entities other than a single proprietor, the names and addresses of the principals, officers and resident agent;

(b) Notification to residents residing on property contiguous to the proposed permit area;

(c) A statement of any current surface mining permits held by the applicant in this state and the permit number and each pending application;

(d) If the applicant is a partnership, corporation, association or other business entity, the following where applicable: The names and addresses of every officer, partner, resident agent, director or person performing a function similar to a director, together with the names and addresses of any person owning of record ten percent (10%) or more of any class of voting stock of the applicant and a list of all names under which the applicant, officer, director, partner or principal shareholder previously operated a surface mining operation in the United States within the five (5) year period preceding the date of submission of the application;

(e) A statement of whether the applicant or any officer, partner, director, principal shareholder of the applicant, any subsidiary, affiliate or persons controlled by or under common control with the applicant, has ever been officer, partner, director or principal shareholder in a company which has ever held a

federal or state mining permit which in the five (5) year period prior to the date of submission of the application has been permanently suspended or revoked or has had a mining bond or similar security deposited in lieu of bond forfeited and, if so, a brief explanation of the facts involved;

(f) A description of the type and method of surface mining operation that exists or is proposed, the engineering techniques used or proposed and the equipment used or proposed to be used;

(g) The anticipated starting and termination dates of each phase of the surface mining operation and the number of acres of land to be affected;

(h) A description of the legal documents upon which the applicant bases his legal right to enter and conduct surface mining operations on the proposed permit area and whether that right is the subject of pending court litigation; provided, that nothing in this article may be construed as vesting in the director the jurisdiction of adjudicate property-rights disputes; and

(i) A reasonable estimate of the number of acres of coal that would be mined as a result of the proposed development.

9A.3. Notification. A copy of the notification to all owners of surface contiguous to any part of the proposed mining operation. Such notice shall be accompanied by return receipts.

9A.4. Necessity for Coal Removal. A statement of the necessity for the coal removal as it relates to the development.

9A.5. Permits or Approvals. As necessary from the appropriate land use, planning, or zoning agencies.

9A.6. Utilities. The availability of all necessary utilities or services required for the development.

9A.7. Site Development Plan. A site development plan in accordance with the following:

(a) A time schedule for site development to include all structures, roads, buildings, etc.;

(b) A clear plot of the development area versus coal mining area;

(c) All areas to be regraded and revegetated which will not be redisturbed during development, and

(d) Evidence of financial commitment necessary for the development and the feasibility of the planned development.

9A.8. **Blasting Plan.** Where required, in accordance with section 4C.1. of these regulations with the exception of the following:

(a) All blasting conducted on an incidental permit will conform to the scaled vibration standards required in section 4C.5.(g), (h), and (i) of these regulations, and

(b) Where blasting is to be conducted, all residents or owners of a manmade structure within one thousand feet (1000') of the proposed blasting area shall be notified by certified mail in advance of any blasting.

9A.9. **Vegetation Plan.** Shall be in accordance with 4F of these regulations.

9A.10. **Final Surface Configuration.** The application shall contain cross sections which accurately depict the final surface configuration that will be achieved as proposed in the reclamation plan.

### §38-2-9B. Performance Standards.

9B.1. **Signs and Markers.** Shall be in accordance with section 6B.1. of these regulations.

9B.2. **Topsoil.** Unless otherwise specified in the preplan and for the purposes of this section where topsoil is to be segregated and redistributed, such activities shall be in compliance with section 6B.3.

9B.3. **Water Quality.** Shall be in accordance with section 6B.4.

9B.4. **Acid Producing and Toxic Materials.** Shall be in accordance with section 6B.5. of these regulations.

9B.5. **Monitoring Requirements.** Shall be in accordance with section 6B.6

9B.6. **Method of Operation.** Shall be in accordance with section 6B.7. of these regulations.

9B.7. **Site Development.** Time schedule for site excavation and/or construction activities shall be consistent with the approved preplan but shall provide for minimum disturbance at any one time consistent with good environmental procedures; provided, all applicable drainage system components as approved in the preplan shall be installed prior to any disturbance for site development.

(a) **Temporary Revegetation.** All topsoil and spoil storage areas which will be in place for one (1) year shall be seeded and mulched with a mixture of annual grasses and grains in order to reduce erosion. This seeding and mulching must be done within thirty (30) days of completion of the storage area.

(b) **Permanent Revegetation.** All topsoil, spoil storage and other disturbed areas which will be in place for longer than one (1) year shall be seeded and mulched with a combination of annual and perennial grasses and legumes. Trees shall be required only on those areas that:

1. Will not be redisturbed by future reclamation activities; and

2. Are necessary in order to meet the approved postmining land use. Seeding and planting of these areas shall be conducted during the first normal seeding season after the completion of the disturbance.

### 9B 8. Backfilling and Regrading.

(a) **Operator Responsibility.** In planning and executing operations, the operator shall have, at all times, proper regard for all backfilling and regrading requirements imposed by the Act and all rules and regulations adopted pursuant thereto and all provisions of the approved preplan.

(b) **Time Schedule for Regrading and Backfilling.** Regrading, backfilling and revegetation will proceed as contemporaneously as practicable with operations and as reflected on the approved construction and reclamation plan; provided, final backfilling and regrading in accordance with the site development plan shall be completed within sixty (60) days of completion of coal removal. 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** shall be kept current by establishing a temporary or permanent cover on regraded areas by the end of the first growing season and a permanent cover by the end of the second growing season. Revegetation shall be in accordance with section 4F of these regulations.

(d) **Grading Outer Spoil** All outer spoil shall be graded so as to blend into the adjoining undisturbed lands.

(e) **Erosion Control.** All disturbed areas shall be regraded, protected and stabilized in a manner which effectively controls erosion.

(f) **Reaffecting Previously Mined Areas.** Where operations are reaffecting previously mined lands that have not been restored to the standard of these regulations and sufficient spoil is not available to otherwise comply with these regulations, the permittee shall at a minimum: Retain all overburden and spoil on the solid portion of existing or new benches and backfill and grade to the most moderate slope possible which does not exceed the angle of repose. In all cases, the highwall must be eliminated; provided, if the preexisting highwall has not been reaffecting then elimination of the preexisting highwall will not be required.

(g) **Regraded Drainage Control** Drainage control on regraded areas shall be provided as approved in the preplan to prevent excessive erosion or additional contribution of suspended solids to the receiving stream, ensure safety and conserve soil moisture. Drainage control measures include, but are not limited to, diversion ditches, flumes and riprap channels, tracking in, small depressions and other devices that may be approved by the director.

(h) **Storage of Overburden to be Used for Re-grading.**

1. All material to be used in final regrading must be placed within the permit area as specified in the approved preplan in a manner which will ensure mass stabilization and adhere to all applicable regulations governing excess spoil disposal.

2. Erosion and sediment control shall be maintained in accordance with the approved preplan.

3. Revegetation shall meet the requirements pursuant to section 4F of these rules and regulations.

**9B.9. Landowner Exemption.** Where landowners are engaged in construction which involves coal removal which does not require the disturbance of more than one (1) acre of privately owned land, the following provisions shall be met:

(a) Prior to the removal of coal, a landowner shall submit to the director the following:

1. A plot drawn to scale of the land to be disturbed including the limits of construction, all associated landscaping and all roads or haulroads. Under no circumstances may the total disturbance exceed one (1) acre;

2. Copies of all deeds to the land and deeds or leases showing the right to extract the coal;

3. All building and sewage permits, if required by state or local laws; and

4. A sworn and notarized statement from the landowner that he intends to complete construction.

(b) Clearly visible perimeter markers shall show the boundaries of the area indicated on the plot plan;

(c) Construction must begin within six (6) months of mineral removal;

(d) No landowner may mine coal on this or any additional tract of land unless construction has been completed on the initial tract of land pursuant to this section; and

(e) If the landowner engaged the services of another party for the removal of the coal, the other party must first obtain an incidental permit; provided, if the party engaged is also under contract with the landowner to complete the construction, such a permit shall not be required.

### **§38-2-9C. Federal or State Highway or Other Construction Exemption.**

**9C.1. Exemption Criteria.** 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:

(a) 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

(b) 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.

9C.2. Coal Extraction Limits. 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.

#### **§38-2-9D. Public Inspection.**

All information submitted to the Department of Natural Resources as a part of the application for an incidental permit as required in the Act and this section of the rules and regulations shall be made available for public inspection and copying at the nearest Reclamation Division field office; provided, that information submitted to the director pursuant to this subsection as confidential concerning trade secrets or privileged commercial or financial information which relates to the competitive rights of the person or entity intended to prospect the described area shall not be available for public examination; provided further, that the application for an incidental permit shall be posted at the nearest Reclamation Division field office for seven (7) days prior to the director's decision to grant or deny issuance of a permit for removal of coal incidental to development.

**Ed. Note:** Section 10 of this series governing the NPDES program is under the authority of the Department of Natural Resources and is filed as Series 30 of the DNR Rules. Currently the Department of Natural Resources has a memorandum of agreement with the Department of Energy in which the Department of Energy enforces the Department of Natural Resources NPDES Rules.

#### **§38-2-11. Small Operator Assistance Program.**

11A.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.

(a) 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.

11A.2 Program Services. Where a qualified small operator requests assistance, the Division of Reclamation shall:

(a) Select and pay a qualified laboratory to determine the probable hydrologic consequences of mining and reclamation operations in the permit area and potentially impacted offsite areas. The probable hydrologic consequences shall be in accordance with Section 10 (a) (11) (14) of the Act. The probable hydrologic consequences shall also include the information requested in Section 10 (a) (7) (8) (10) (12) (13) (15) thru (19) inclusive of the act as this information is necessary to properly evaluate the "Determination" and "Statement"

11A.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 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 persons who own more than five percent (5%) of the applicant's operation; and

3. All coal produced by operations owned by persons who directly or indirectly control the applicant by reason by direction of the management.

11A.4. Request for Assistance Each applicant requesting assistance shall complete an application on forms prescribed by the director. 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 and thickness of coal seam to be mined;

(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 production is attributed to the applicant under section 11A.3. The schedule shall include the following:

1. Name of company;

2. What state this permit was issued in and the permit number;

3. Mining Enforcement and Safety Administration Identification Number,

4. Actual production of coal from the preceding year; and

5. Estimated future yearly production;

(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 in accordance with section 3C of these regulations and including the additional information as follows, as stated in section 10, (a)(12), (13E), (13F), (13J) of the Act; 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.

#### 11A.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 the division shall select the services of one or more qualified laboratories to perform this work. A copy of the contract or other appropriate work order and the final report shall be provided to the applicant.

#### 11A.6. Qualified Laboratories.

(a) General. A qualified laboratory means a designated public agency, private consulting firm or analytical laboratory approved by the Division of Reclamation.

(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:

A. Most current edition of the Standard Methods for the Examination of Water and Waste Water;

B. Methods for Chemical Analysis of Water and Wastes; and

C. EPA Manual 600/2-78-054 Field and Laboratory Methods Applicable to Overburden Mine-soils;

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. Sub-contractors 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 Reclamation.

#### 11A.7. Liability of Operators.

(a) The applicant shall reimburse the Division of Reclamation 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; or

4. The applicant's actual and attributed annual production of coal for all locations exceeds 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.

(b) The division can waive the reimbursement obligation if it finds that the applicant at all times acted in good faith.

**Ed. Note: Sections 12A through 12B govern notice of citizen suits and requests for inspection.**

#### §38-2-12A. Notice of Citizen's Suits.

A person who intends to initiate a civil action on his own behalf under section 28 of the Act shall give notice of intent to do so in accordance with the following:

(a) Notice shall be given by certified mail to the director in all cases. A copy of the notice shall also be sent by first class mail to the Office of Surface Mining Field Office Director,

(b) In suits against any person or 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 director, reclamation commission, reclamation board of review, or appropriate department employee, to perform a mandatory act or duty under the Act, shall state to the extent known;

1. The provision of the Act containing the mandatory act or duty allegedly not performed,

2. Sufficient information to identify the omission alleged to constitute the failure to perform a mandatory act or duty under the Act;

3. The name, address and telephone number of the person giving notice; and

4. The name, address and telephone number of legal counsel, if any, of the person giving notice.

#### **§38-2-12B. Citizen's Request for State Inspections.**

**12B.1. Request Procedure.** Any person may request a State inspection by furnishing to the director a signed, written statement (or an oral report followed by a signed, written statement) giving the director reason to believe that a violation exists and setting forth a phone number and address where the person can be contacted.

**12B.2. Confidentiality.** The identity of any person supplying information to the director relating to a possible violation or imminent danger or harm shall remain confidential with the director, if requested by

that person, unless that person elects to accompany the inspector on the inspection.

**12B.3. Inspection Procedure.** If an inspection is conducted as a result of information provided to the director by a person as described in section 12B.1. of these regulations, 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.

**12B.4. Facts and Findings** 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 director shall send the following:

(a) 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;

(b) If no State inspection was conducted, an explanation of the reason why;

(c) An explanation of the person's right to informal review of the action or inaction of the director; and

(d) Copies of all materials in paragraphs (a) and (b) of this section within the time limits specified in those paragraphs 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 section 12B.2. of these regulations.

**12B.5. Review of Inspections.** Any person who is or may be adversely affected by a surface coal mining operation may notify the director 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 ad-

versely affected. The director 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 to remedy the noncompliance. The director shall furnish the complainant with a written decision of the reasons for his determination and actions, if any, he has taken

#### 12B.6. Review of Decision Not to Inspect or Enforce.

(a) Any person who is or may be adversely affected by a surface coal mining operator may ask the director 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 director shall conduct the review within thirty (30) days of his receipt of the request and inform the person of the results

(b) Informal review under this section shall not affect any right to formal review or to a citizen's suit.

#### 12B.7. Public Record.

(a) Copies of all records, reports, inspection materials or information obtained under the West Virginia Surface Mining Act, except information in Paragraph (b) of this section, shall be made available to the public at regional, district or field offices in the area of mining so that they are conveniently available to residents in the area of mining.

(b) 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.

**Ed. Note: Section 13A governs procedures for designating lands unsuitable for mining.**

#### §38-2-13A. Petitions.

##### 13A.1. Right to Petition.

(a) Any person having an interest which is or may be adversely affected, or the director, has the right to petition the Reclamation Commission to have an area designated as unsuitable for surface coal mining operations, or to have an existing designation terminated

(b) Designation The only information that a petitioner need provide is:

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. Identification of the petitioner's interest which is or may be adversely affected.

(c) Termination of the Designation. The only information that a petitioner need provide to terminate a designation is:

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:

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 section 13A.7.(b); or

B. Reclamation now being technologically and economically feasible, if the designation was based on the criteria found in section 13A.7.(a); 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 section 13A.7.(b).

3. The petitioner's name, notarized signature, address and telephone number, and

4. Identification of the petitioner's interest which is or may be adversely affected by the continuation of the designation.

#### 13A.2. Initial Processing, Record-keeping, and Notification Requirements.

(a) Within thirty (30) days of receipt of a petition, the Reclamation Commission shall notify the petitioner by certified mail whether or not the petition is complete under section 13A.1. (b) or (c).

(b) The Reclamation Commission shall determine whether any identified mineable coal resources exist in the area covered by the petition, without requiring any showing from the petitioner. If the regulatory authority finds there are not any identified coal resources in that area, it shall return the petition to the petitioner with a statement of the findings.

(c) The Reclamation Commission may reject petitions for designations or terminations of designations which are frivolous. Once the requirements of section 13A.1. (b) are met, no party shall bear any burden of proof, but each accepted petition shall be considered and acted upon by the Reclamation Commission pursuant to the procedures of this Section.

(d) When considering a petition for an area which was previously and unsuccessfully proposed for designation, the Reclamation Commission shall determine if the new petition presents new allegations of facts. If the petition does not contain new allegations of facts, the Reclamation Commission 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 Reclamation Commission determines that the petition is incomplete or frivolous, it

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 Reclamation commission 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 Reclamation commission from issuing a decision on that permit application. The Reclamation Commission 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) Within three (3) weeks after the determination that a petition is complete, the Reclamation Commission shall circulate copies of the petition to, and request submissions of relevant information from, other interested governmental agencies, the petitioner, intervenors, persons with an ownership interest of record in the property and other persons known to the Reclamation Commission to have an interest in the property.

(i) Within three (3) weeks after the determination that a petition is complete, the Reclamation Commission 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 Reclamation Commission holds a hearing under section 13A.3., 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 intervenor's name, address, and telephone number.

(k) Beginning immediately after a complete petition is filed, the Reclamation Commission shall compile and maintain a record consisting of all documents relating to the petition filed with or prepared by the regulatory authority. The Reclamation Commission 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 regulatory authority.

### 13A.3. Hearing Requirements.

(a) Within ten (10) months after receipt of a complete petition, the Reclamation Commission shall hold a public hearing in the locality of the area covered by the petition. If all petitioners and intervenors agree, the hearing need not be held. The hearing shall be legislative and fact-finding in nature. The Reclamation Commission shall make a verbatim transcript of the hearing.

(b)

1. The Reclamation Commission shall give notice of the date, time, and location of the hearing to:

A. Local, State and Federal agencies which may have an interest in the decision on the petition;

B. The petitioner and the intervenors; and

C. Any person with an ownership or other interest known to the regulatory authority in the area covered by the petition.

2. Notice of the hearing shall be sent by certified mail and postmarked not less than thirty (30) days before the scheduled date of the hearing.

(c) The Reclamation Commission shall notify the general public of the date, time and location of the hearing by placing a 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 Reclamation Commission 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 Reclamation Commission 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 intervenors stipulate agreement prior to the hearing, the petition may be withdrawn from consideration.

### 13A.4. Decision.

(a) In reaching its decision, the Reclamation Commission shall use

1. The information contained in the data base and inventory system;

2. Information provided by other governmental agencies;

3. The detailed statement prepared under section 13A.3.(e); and

4. Any other relevant information submitted during the comment period.

(b) A final written decision shall be issued by the Reclamation Commission 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 Reclamation Commission 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 Reclamation Commission with respect to a petition, or the failure of the Commission to act within the time limits set forth in this section, shall be subject to judicial review by a court of competent jurisdiction in accordance with State law.

**13A.5. Data Base and Inventory System Requirements.**

(a) The Reclamation commission shall develop a data base and inventory system which will permit evaluation of whether reclamation is feasible in areas covered by petitions

(b) The Reclamation Commission shall include in the system information relevant to the criteria in paragraph 13A.7.(b) 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 Reclamation Commission 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 Reclamation Commission to prepare the statements required by section 13A.3.(e); and

2. That which becomes available from petitions, publications, experiments, permit applications, mining and reclamation operations and other sources.

**13A.6. Public Information.** The Reclamation Commission 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 director determines that such disclosure might risk destruction or harm

(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.

**13A.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 Reclamation Commission determines that reclamation is not technologically or eco-

nomically 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, 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

**13A.8. Director's Responsibility for Implementation.**

(a) The Director shall not issue permits which are inconsistent with designations made pursuant to section 22 of the Act.

(b) The director shall maintain a cumulative map of areas designated as unsuitable for all or certain types of surface coal mining operations.

(c) The director 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.

Ed. Note: Sections 14A through 14D govern inspection and enforcement.

**§38-2-14A. Violations.**

14A.1. Notice of Violations. Each surface mining reclamation inspector shall note all violations of the operator and shall initiate an enforcement action for each violation so noted.

#### 14A.2. Cessation Orders.

(a) West Virginia Code §20-6-16(a) provides that a reclamation inspector "shall have the authority to issue a cessation order where the 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..." Any reclamation inspector or supervisor who finds such a condition shall exercise their authority and forthwith issue a cessation order.

(b) Any cessation order issued under the provisions of West Virginia Code §20-6-17 (a) shall remain in effect until the violation has been abated or until modified, vacated or terminated by the director or the Reclamation Board of Review or by a Court.

(c) In any cessation order issued, the reclamation inspector shall determine the steps necessary to abate the violation in the most expeditious manner possible and shall include the necessary measures in the order

#### 14A.3. Pattern of Violations.

(a)

1. Suspension or Revocation of a Permit. If the director determines that a pattern of violations of any requirements of this Chapter, the regulations or any permit condition required by the Act exists or has existed, and that the violations were caused by the permittee willfully or through unwarranted failure to comply with those requirements or conditions, the director shall issue and order to a permittee requiring him to show cause why his permit and right to mine under the Act should not be suspended or revoked. A willful violation is a violation resulting from an intentional act or omission. Unwarranted failure to comply means the failure of the permittee to prevent the occurrence of any violation of the permit or any requirement of the Act due to indifference, lack of diligence or lack of reasonable care. Violations by any person 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.

2. The director may determine that a pattern of violations exists or has existed, based on two or more inspections of the permit area within any

twelve (12) month period, after considering the circumstances, including:

A. The number of violations cited on more than one occasion of the same or related requirements of this Article, the permit or the regulations;

B. The number of violations, cited on more than one occasion, of different requirements of this Article, the regulations or the permit; and

C. The extent to which the violations were isolated departures from lawful conduct.

3. The Director shall promptly review the history of violations of any permittee who has been cited for violations of the same or related requirements of this Article, the regulations or the permit during three (3) or more inspections of the permit area within any twelve (12) month period. After such review, the director shall determine whether or not a pattern of violations exists

(b) The director may decline to issue a show cause order, or may vacate an outstanding show cause order if he finds that, taking into account exceptional factors present in the particular case, it would be demonstrably unjust to issue or to fail to vacate the show cause order. The basis for this finding shall be fully explained and documented in the records of case.

(c) If the permittee files an answer to the show cause order and requests a hearing, a public hearing shall be provided. The director shall give thirty (30) days written notice of the date, time and place of the hearing to the permittee and any intervenor. The director shall publish it, if practicable, in a newspaper of general circulation in the area of the surface coal mining and reclamation operations, and shall post it at the regional, district or field office closest to those operations.

(d) Within sixty (60) days of the hearing, the director shall issue a written determination as to whether a pattern of violations exists and, if appropriate, an order. If the director revokes or suspends the permit and the permittees right to mine under the Act, the permittee shall immediately cease surface coal mining operations on the permit area and shall:

1. If the permit and the right to mine under the Act are revoked, complete reclamation within the

time specified in the order; or

2. If the permit and right to mine under the Act are suspended, complete all affirmative obligations to abate all conditions, practices or violations, as specified in the order.

**§38-2-14B. Civil Penalties.**

14B.1. The director shall review each notice of violation and cessation order in order to determine whether a civil penalty will be assessed, the amount of the penalty, and whether each day of a continuing violation will be deemed a separate violation for purposes of the total penalty assessed.

(a) The director shall assess a civil penalty for each day of continuing violation for each cessation order, except that such penalty shall not be assessed for more than thirty (30) days for each such violation. If the cessation order has not been abated or modified within the thirty (30) day period, the director shall take appropriate action pursuant to §20-6-17(b), §20-6-17(f), or §20-6-17(h) of the Act.

(b) For Notices of Violations, the director may not assess a civil penalty if the amount is less than one thousand dollars (\$1,000)

(c) For the purposes of this section, the assessment officer shall not determine the proposed penalty assessment until such time as the director has caused an inspection of the violation to be conducted. The director must conduct the inspection of the violation within the first fifteen (15) days after the notice or order was served.

14B.2 Procedure for Assessing Civil Penalties. Civil penalty amounts shall be determined on notices of violation in accordance with the factors specified in section 17(c) of the Act and utilizing a numerical system contained in subsection (c) of this paragraph.

(a) Show cause orders, cessation orders or notices of violation may not be vacated because of inability to comply.

(b) Unless caused by lack of diligence, inability to comply may be considered only in mitigation of the amount of civil penalty and of the duration of the suspension of a permit.

(c)

1. History of previous violations is an accounting of each Notice of Violation and Cessation Order that was not withdrawn and was written on a particular operation in the previous twelve (12) months.

Previous Violations Rate Schedule  
Previous Violation Rate Per Violation

3-5	20.00
6-10	40.00
over 10	60.00

2. Seriousness of the violation.

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.

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 will not result.

Violation extends beyond the permit area and results in the minor degree of potential or actual harm or impact on the public.

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

Violation is or can reasonably be expected to result in significant, imminent environmental harm or created an imminent danger to the health or safety of the public.

Proposed penalty rating (1 2), (3 4), (5 6), (7 8) and ( 9 10). (See Table 38-2C found at the end of this regulation.)

**3. Operator Negligence.**

This violation is considered beyond control of the operator or his employees and no negligence can be attributed to this violation.

This violation was a result of an oversight on the part of the operator and may have been avoided if more conscientious effort or reasonable care were given.

This violation was obvious and no action was taken by the operator to correct the problem.

The operator failed to adequately respond to previous enforcement action.

The operator had been officially notified of this problem and did not make any effort at correcting the problem.

Proposed Penalty Rating: (0), (1 2), (3 4), (5 6) and (7 8). (See Table 38-2D found at the end of this regulation.)

#### 4. Operator's Good Faith.

Operator failed to take appropriate action.

Operator took prompt by minimal action to correct the violation.

Operator started promptly on remedial measures and worked diligently to correct the violation.

Operator started immediately and expended all reasonable efforts to correct the violation. Violation was abated before required date.

Operator was already working on remedial measures and expended extreme effort in correcting the violation. Violation was abated in minimum possible time.

Proposed Penalty Rating: (0), (1 2), (3 4), (5 6) and (7 8). (See Table 38-2E found at the end of this regulation.)

5. Determination of Penalty Amount. (See Table 38-2F found at the end of this regulation.)

6. The proposed penalty rating utilized in 14B.2.(c)(2), (3) and (4) are used in these respective sections by the Director to determine the penalty amounts based on selection of a proposed rate to match the indicated situation which best describes the factor being assessed.

### **§38-2-14C. Fees and Costs of Administrative Proceedings**

14C.1. Any party 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:

(a) Any participating party against the violator upon a finding that there is a violation of the Act, the regulations or the permit has occurred, and there is a determination that the party made a significant contribution to the full and fair determination of the issues;

(b) To any participating party other than the violator or his representative from the Department of Natural Resources upon a determination that the party made a significant contribution to a full and fair determination of the issues;

(c) To a violator from the Department of Natural Resources when the violator demonstrates that the Department of Natural Resources issues cessation order, a show cause order or notice of violation in bad faith and for the purpose of harrasing or embarrassing the violator, provided that no award shall be made under this subsection if Department of Natural Resources prevails upon the issue of a violation,

(d) To a violator from any participating party other than the Department of Natural Resources where such participating parties initiated or participated in the magistrate proceeding in bad faith and for the purpose of harrasing or embarrassing the violator; and

(e) To the Department of Natural Resources from any participating party where the Department of Natural Resources demonstrates that any such party participated in such proceeding in bad faith and for the purpose of harrasing or embarrassing the Department of Natural Resources. 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 this Act.

### **§38-2-14D. Inspections and Informal Conferences.**

## 14D 1.

(a) The provisions of section 15 of the Act may be applied to operations conducted under section 8 of the Act.

(b) Inspections conducted under the provisions of section 15 of the Act may be partial inspections, provided, that complete inspections are conducted at least once per quarter.

(c) Notices of informal conferences held as a result of the provisions of section 16 of the Act shall be posted at the nearest DNR field office and sent by mail or communicated verbally, whichever is more practicable, to any person who filed a report which led to a notice or order resulting in an informal conference.

**§38-2-15A. Open Meetings.**

## 15A.1.

(a) Reclamation Commission and Reclamation Board of Review. All meetings of the Reclamation Commission and 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 avail-

able 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) In the event of any emergency requiring immediate official action such efforts to notify the public shall be taken as circumstances allow.

**§38-2-16A. Appeals to the Reclamation Board of Review.**

16A.1 Site Visit. 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 intervenors be given notice of the visit and are given an opportunity to accompany the Board

16A.2 Final Decision. 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

16A.3. Burden of Proof. The burden of proof shall be on the party seeking to reverse the decision of the director.

TABLE 38-2A

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

TABLE 38-2B

Material	Rate
Straw or hay	1 1/2-2 tons materials may be anchored with asphalt emulsion or other techniques approved by the director.
Hydromulch	1,000 lbs.
Shredded Bark	50 cubic yards

The following materials may be used with wood fiber or wood cellulose on a limited basis upon approval by the director.

Material	Minimum Rate/Acre for Wood	
	Rate/Acre	
Fiber or Wood Cellulose		
Genaqua 743	25 gallons	500 lbs.
Curasol AK or HA	25 gallons	500 lbs.
Aerospray 70	25 gallons	500 lbs.

TABLE 38-2C

Rating	0	1	2	3	4	5	6	7	8	9	10
Seriousness	---	100	115	132	152	175	201	231	265	305	350

TABLE 38-2D

Rating	0	1	2	3	4	5	6	7	8	9	10
Negligence	0	25	31	40	50	63	79	99	125	---	---

TABLE 38-2E

Seriousness	1	2	3	4	5	6	7	8	9	10
Good Faith	0	0	0	0	0	0	0	0	0	0
0	0	0	0	0	0	0	0	0	0	0
1	4	8	11	17	26	39	58	88	133	200
2	4	10	14	21	32	47	69	103	156	224
3	5	11	17	26	39	57	83	121	182	250
4	6	14	21	32	48	69	99	141	213	280
5	7	16	26	40	59	84	118	165	250	313
6	9	20	32	50	72	102	141	193	292	350
7	10	23	40	61	89	124	169	226	242	391
8	12	28	49	76	109	150	202	265	343	437

TABLE 38-2F

Factor	Rating	Rating Per Point	Assessment
No Previous Violations		\$	\$
Seriousness of Violation			
Operator Negligence			
Good Faith(-)	(-)		
Total Amount of Penalty Assessment			\$