WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

Do Not Mark In this Box

1987 DEC -9

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

AGENCY: West Virginia Department of Energy TITLE NUMBER: 38

CITE AUTHORITY 22-1-15

AMENDMENT TO AN EXISTING RULE: YES___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: N/A

TITLE OF RULE BEING AMENDED: N/A

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: Series 2

TITLE OF RULE BEING PROPOSED: West Virginia Surface Mining Reclamation Regulations

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

Roger T. Hall
Roger T. Hall
Administrator

FISCAL NOTE FOR PROPOSED RULES

Rule Title: West Virginia Surface Mining Reclamation Regulations

Type of Rule: X Legislative _____ Interpretive _____ Procedural

Agency WV Department of Energy Address 1615 Washington Street, E.
Charleston, WV 25311

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

2. Explanation of above estimates.

This proposed rule will not result in any increase or decrease in revenues or expenditures to the State.

3. Objectives of these rules:

This proposed rule will repeal and repromulgate existing regulations in order to bring the State program into conformity with federal programs.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

N/A

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

N/A

C. Economic Impact on Citizens/Public at Large.

N/A

Repairs and Alterations

Equipment

Date October 22, 1987

Signature of Agency Head or Authorized Representative

Roger T Hall

Administrator

3. Objectives of these rules:

DATE: December 9, 1987

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: West Virginia Department of Energy

LEGISLATIVE RULE TITLE: West Virginia Surface Mining Reclamation Regulations

1. Authorizing statute(s) citation West Virginia Code 22-1-15

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

October 22, 1987

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

See attached listing

c. Date of hearing(s): November 25, 1987

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

Attached Yes No comments received ____

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

December 9, 1987

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

Roger T. Hall - Administrator

West Virginia Department of Energy

348-3500

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

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

   N/A

   b. Date of hearing: N/A

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

   N/A

   d. Attach findings and determinations and reasons:

   Attached N/A

RESPONSE TO COMMENTS

PROPOSED LEGISLATIVE RULES

WEST VIRGINIA SURFACE MINING RECLAMATION REGULATIONS
TITLE 38 SERIES 2

DECEMBER 9, 1987

Attached are copies of written comments received relative to the above captioned regulations. Oral comments were also received at the public hearing held November 25, 1987.

During the comment period, meetings were held with various individuals and interest groups, and the regulations were carefully reviewed by Department staff.

An itemized listing of all amendments made to the regulations is attached with a brief explanation for the change. These amendments are reflected in the proposed regulations, complete with strikethroughs and underscoring.

Numerous comments were not directly addressed, but are made a part of the official record with this filing.

2.20 The definition of "Coal Preparation Plant" has been amended to make it more consistent with the federal definition, and to further clarify the types of coal preparation activities covered by these regulations.

2.36 The definition of "Cumulative Impact" has been deleted. The intent of the definition was primarily to clarify the term "material damage" as it relates to hydrologic impacts.

2.45 The definition of "excess spoil" has been modified by replacing the word "placed" by the term "disposed of". The new term is more appropriate because spoil not used to backfill the pit is "excess spoil" which must be disposed of in some manner.

2.49 The size description of "fine refuse" is deleted because most operations now dewater and mechanically compact fine refuse into filter cake which results in particles larger than 28 mesh.

2.60 The definition of "Historic Lands" has been modified by deleting the phrase "that could be damaged or destroyed by surface coal mining" because this phrase is limiting and is not pertinent in describing which sites are covered by these regulations. Also, the word "paleontological" is deleted since there is no similar federal term and because the definition covers such sites in a broader sense.

2.61 The examples cited as being descriptive of the hydrologic balance have been deleted because they add nothing to the definition and are descriptively limiting.

2.64 The definition of "Impoundment or Impounding Structure" is deleted because the term is self-descriptive. Also, it is used in various contexts throughout these regulations and the context in which it is used may imply a slightly different meaning.

2.67 The definition of the term inspection is amended to make it clear that inspections are conducted to assure compliance with only those provisions under jurisdiction of the Commissioner.

2.68 The definition of "Intermittent Streams" is deleted and replaced by the federal definition which more accuately describes the term.

2.87 The definition of "potential hazard" is deleted because the term is self-explanatory. Also, since the term is used in various contexts, the context in which it is used requires a slightly different meaning.

2.93 The definition of the term "Prospecting" is amended by deleting part (b). Although gathering of environmental data is required for some prospecting approval applications, the primary objective is coal exploration.

2.114 The definition of "subsidence" is amended by clarifying that its use as defined applies only to underground mining operations.

2.122 It was suggested that the word "commonly" and the phrase "that might be exposed to it" be deleted. In considering this suggestion, the deletions would broaden the definition to include all biota whether or not they are affected. This is more stringent than the federal definition and is, therefore, prohibited by the Act.

3.1 This subsection has been entitled "Application Information" for clarity and structural consistency.

3.1(c)(1) A typographical error has been corrected by deletion of a repeated phrase.

3.2(d) A typographical error has been corrected by underscoring the subtitle.

3.3(b) The waiver provision has been deleted and replaced with federal language to assure consistency. Also the federal language is more concise.

3.4(a)(3) The word "lesser" has been replaced by the word "other" to make it clear that the preferred scale for maps is one which maximizes clarity and detail.

3.4(e)(6) The requirement for a table in the legend of a drainage map has been deleted. Since such tables are required in the design data for drainage structures, the table on the map is superfluous.

3.8(a)(1) The phrase "where the public road is to be closed or relocated" precedes this provision to make it clear that permission from authorizing agencies is only required for closure or relocation.

3.12(a) The term "mine plan area" is replaced by "permit area". The mine plan concept has long been abandoned by all state and federal agencies.

3.12(d)(2) A typographical error is corrected by replacing the word "Commission" by the word "Commissioner".

3.13(b)(2)(A)(iii) The specification for duration of a precipitation event has been changed from six (6) hours to twenty-four (24) hours. Although the derivation procedure is different, the end value is equivalent for both values. Since

the West Virginia practice has been to use the twenty-four (24) hour value, the change is made in the interest of consistency. This change appears in other parts of the regulations as well.

3.13(b)(2)(13)(i) and (iv) See 3.13(b)(2)(A)(iii)

3.16(f)(5) The word "rights" has been replaced by the term "water supply", in order to correct a semantical error. Since a person's rights cannot be removed, it is not appropriate to indicate that they should be replaced.

3.16(g) and (h) The word "may" is changed to "shall" in both paragraphs to correct a semantical error. The word "may" implied an option although in this context the words are effectively interchangeable.

3.16(i) This paragraph has been moved to paragraph (c) of subsection of 14.7. Its application is more appropriate as a performance standard.

3.21(a) This paragraph has been amended by deleting the first sentence and replacing it with the sentences "all active surface mining operations shall be subject to the renewal requirements of Section 19 of the Act. Those operations which have been granted inactive status shall complete renewal prior to resuming active operations." This amendment makes it clear that on operations where all mining and reclamation is completed and bond has been reduced, renewal requirements do not apply.

3.21(e) This paragraph has been deleted because there is no statutory authority to support it.

3.23(b)(3) This subparagraph is amended by adding the phrase "or is not contiguous and is determined to be insignificant" to describe a class of incidental boundary revisions (IBR). Addition of this phrase distinguishes this class of IBR from that described in 2.23(b)(3).

3.25(b) This paragraph is deleted because it repeats language found in Section 15(g) of the Act and subsection 18.2 of these regulations.

4.8 This subsection is amended by deleting the phrase "until reclamation is complete and" and inserting the word "unless". Since reclamation cannot be complete until the drainage structure is removed, completion of reclamation cannot be a precondition of removal, however, the approval by the Commissioner remains a precondition.

5.2 This subsection is being deleted and replaced by federal language. The federal language is more concise and sets forth criteria which the Commissioner must follow to approve stream encroachment.

5.4(b) Clarifying phrases have been added to this paragraph to make it understood that clarification of drainage structures within a component drainage area is required prior to disturbance in that component, but that certification of all structures within the permit area is not a prerequisite for initiating operations.

5.4(b)(3) This subparagraph is amended to more emphatically state that the construction of sediment control facilities in stream channels is specifically prohibited without prior approval by the Commissioner. Criteria for approving such activities is currently under development at the state and federal level. Therefore, these regulations are silent on such criteria at the present time.

5.4(b)(5) This paragraph is deleted and rewritten to be more consistent with federal provisions and to require retention time to be considered in designing sediment control structures.

5.4(b)(8)(A) This subparagraph is amended to correct an inconsistency with other design criteria in these regulations.

5.4(b)(8)(G)(i) See 3.13(b)(2)(A)(iii)

5.6(g) See 3.13(b)(2)(A)(iii)

6.1 This subsection is amended by adding the phrase "in accordance with the blasting plan" to make it clear that the certified blaster must be familiar with the blasting plan required in subsection 6.2.

6.2 This subsection has been amended to make it clear that the blasting plan must contain elements which address all aspects of blasting operations covered by the Act, these regulations, and the terms and conditions of the permit" and is not limited to the elements listed in paragraphs (a) through (e) which have been deleted.

6.3(b) This paragraph was amended by specifying that underground mining operations are exempt only from paragraph (a) and then only if they comply with paragraph (b) of this subsection.

6.4(c)(17)(C) This subparagraph was amended by adding the phrase "whenever analysis is necessary" in recognition of the fact that costly analysis of a seismograph record is not always necessary.

6.5(c)(2) This subparagraph is amended by striking the word "shall" and using the word "may" to be consistent with federal language. The word "shall" is more stringent which is prohibited by state statute.

9.2(e) This paragraph is amended by inserting the word "applicable" before "water quality standards" to make it clear that only water quality standards relative to mining operations are to be met.

11.1(a) This paragraph is amended by adding the phrase "for active mining operations" making it clear that insurance is not required for operations where mining and reclamation is completed and bond is reduced.

12.2(a)(2) This subparagraph is amended by deleting the word "objections". Since public comments relative to bond release may take the form of objections the deleted term is redundant.

13.1(a)(11) and (12) These two subparagraphs are being moved to subparagraph (4) and (5) of paragraph (a),subsection 3.2. The provisions of the two subparagraphs are required only for prospecting operations which propose to remove coal in excess of 250 tons.

A new subparagraph (11) is added to this paragraph which sets forth minimum requirements for protection of wildlife resources.

14 The introduction of this section is amended to make it clear that its provisions apply to both surface and underground mining operations.

14.1(e)(3) This subparagraph has been deleted. Additional blasting signs beyond those required in subparagraph (1) and (2) would serve no useful purpose.

14.5(b) This paragraph has been amended by adding the word "applicable" before the phrase "water quality standards" to make it clear that only water quality standards relative to mining operations are considered.

14.5(g) Two typographical errors are corrected in this paragraph.

14.5(h)(2) and (i) These two paragraphs are deleted and similar provisions of existing regulations substituted. The existing regulations are more specific and were accidently omitted from this proposal.

14.7 This entire subsection has been revised. The initial attempt was to combine monitoring requirements for both surface and groundwater. It became obvious that each must be treated differently due to the physical, chemical, geologic, and hydrologic differences between them.

14.9(c) See 14.5(b)

14.11(c) The word "before" is replaced by the word "beyond" to correct a typographical error.

14.13 This subsection is being entitled "MSHA Approval".

14.14(a) This subsection is being amended by deleting the phrase "the fill is designed" and inserting the phrase "the waste is placed" to make it clear that when coal mine waste is disposed of in an excess fill structure the "waste" and not the fill itself must be handled in a manner consistent with Section 22 of these regulations.

14.14(d)(2) The word "not" is inserted before exceed to correct an omission.

14.14(e)(7) This subparagraph is amended by adding the phrase "that may affect stability" after the words organic material to clarify that not all organic materials left in the fill will affect stability. For example, tree stumps left in place may enhance stability.

14.14(e)(8) This subparagraph is being amended by adding the phrase "except where fills are designed and constructed using lifts not exceeding four feet in thickness." at the end. This clarifies that demonstrations of stability and certification are not necessary where fills are built in compacted lifts of four feet or less. It is only fills built with lifts of greater thickness that stability becomes a matter of concern.

14.14(e)(9) This subparagraph is amended by deleting the last three sentences. If the criteria of the preceding sentences are met, the requirement for a drainage pocket and the limitation of impoundment size are assured. Also, the prohibition of impoundments is unnecessary.

14.14(f)(5) See 14.14(e)(7)

14.14(f)(10) See 14.14(e)(9)

14.14(g)(6) See 14.14(e)(7)

14.14(g)(10) See 14.14(e)(9)

15.1(c) This paragraph is amended by deleting the specific time requirement of thirty days for seeding and substituting the next consecutive seeding period. The thirty day requirement may be impossible to meet during winter months and dry seasons.

15.2(a) This paragraph is amended by striking the word "proceed" and replacing it with "be completed" to make it clear that contemporaneous reclamation is of primary consideration.

The word "completed" is replaced by "initiated" in recognition that sealing and backfilling on surface areas for underground mines is a more complex procedure than backfilling on a surface mine operation. This provision would then require a 180 day start up of the sealing and backfilling with completion as contemporaneously as practicable.

The term "mining" is replaced by "operations" to encompass all activities including coal removal.

16.1 This subsection is being amended to require a notification to surface owners of advancement of mining instead of a mining schedule. Also provisions are made to allow the Commissioner to approve other time schedules instead of 6 months.

16.2 Paragraphs (a), (b), and (c) are being deleted and replaced by federal language. The federal provision is more concise and covers the same points.

20.2(k) This paragraph is amended by striking the word "shall" and inserting the word "may" to be consistent with federal language. Shall is more stringent which is prohibited by state statute.

20.4(c)(2) The word "different" replaces the word "difference" to correct a typographical error.

20.5(b) A new paragraph is added to preserve language from the existing regulations which was inadvertently omitted.

20.5(d) The word "continued" replaces the word "was", the word "the" replaces the word "that", the phrase "after the initial abatement period" follows the phrase "two or more days", and the word "separate" precedes "day" all for the sake of clarity.

22.3(n) This paragraph is amended by striking the word "progressively". Also the ending phrase "the area upon which the refuse is to be deposited" is stricken and replaced by the phrase "to the extent required".

This change recognizes the differences in types of refuse disposal facilities and the various methods which may be employed for clearing and grubbing. It does however, preserve the requirement for describing in the application, a procedure for clearing and grubbing.

22.3(r) The phrase "and who have an understanding of the procedure to be used" is stricken. Although it can be assumed that the operator would employ experienced persons in this hazardous exercise, there is no way to verify in advance that such experience is adequate. Therefore, such a requirement is unenforceable.

22.3(t)(1) This amendment removes the precondition of final bond release for abandonment of a refuse facility, and requires instead approval by the Commissioner. This would allow the Commissioner to require remedial action prior to abandonment even though the land is reclaimed.

22.3(t)(4) This amendment makes it clear that the impoundment pool is the primary area of concern regarding stabilization of fine refuse and that other stabilizing materials may be used in place of or in addition to coarse refuse.

22.4(g)(3)(A) and (B) This change corrects an error and makes the provision consistent with federal MSHA requirements.

22.5(d) The first sentence in this paragraph is deleted and replaced by language which more specifically describes the requirements for clearing and grubbing.

22.5(j)(2) The design specification requirements for spillways is deleted from this subparagraph and replaced with references to other sections of these regulations which give more appropriate design requirements

22.5(m)(1) This amendment removes the requirement for Commissioner's approval of extinguishment plans and preserves approval by MSHA personnel who are more qualified in this area.

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

38-2-1 General.

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

1.2 Applicability.

These rules and regulations apply to all surface mining operations in the State of West Virginia except as provided in Section 26, Article 3, Chapter 22A of the Act.

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

1.4 Filing Date. December 9, 1987

1.5 Effective Date.

1.6 Repeal of Former Rule. This legislative rule repeals West Virginia Surface Mine Reclamation Regulations Title 38, Series 2, filed with the Secretary of State's office June 13, 1985 and Title 38, Series 2A Coal Refuse Disposal Regulations, filed with the Secretary of State's office June 13, 1985.

Title 38
CSR 2
Section 2

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

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

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

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

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

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

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

2.8 Active Surface Mining Operation means an operation where land is being disturbed or mineral is being removed and or reclamation operations are not complete where bond reduction has not been approved unless inactive status has been granted.

2.9 Administratively Complete Application means an application for permit approval or approval for prospecting, 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 the surface by drilling or cutting horizontally into an exposed coal seam.

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

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

(a) prevent, to the extent possible, additional contributions of suspended solids to stream flow or runoff outside the permit area, but in no event result in contributions of suspended solids in excess of requirements set by applicable State or Federal laws and rules and regulations; and

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

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

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, scouring, or other deteriorating processes in channels such as diversion ditches and spillways.

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

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

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

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

2.23 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 federal Surface Mining Control and Reclamation Act of 1977 (PL 95-87).

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

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

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

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

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

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

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

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

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

2.27 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.

2.28 Commissioner means the Commissioner of the Department of Energy or his authorized agent.

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

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

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

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

2.30 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.

2.31 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.

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

2.33 Complete Application means an application which, immediately prior to issuance, contains all maps, plans, designs and other application materials required by the Act and those rules and regulations excluding bond.

2.34 Completion of Reclamation means that all terms and conditions of the permit has been satisfied, the final inspection report has been approved by the Commissioner, and the total bond has been released.

2.35 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.

~~2.36 Cumulative Impact means the hydrologic impact that results from the cumulation of flows from all coal mining sites to common channels or aquifers in a cumulative impact area. Individual mines within a given cumulative impact area may be in full compliance with effluent standards and all other regulatory requirements, but as a result of the co-mingling of their off-site flows, there is a cumulative impact. The Act does not prohibit cumulative impacts but does emphasize that they be minimized. When the magnitude of cumulative impact exceeds threshold limits or ranges as predetermined by the Department, they constitute material damage.~~

~~2.37~~2.36 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.

2.37~~2~~.38 Current Ratio means the relation of current assets to current liabilities.

2.38~~2~~.39 Density means the weight of soil or soil-like solids per unit of total volume of soil or similar mass.

2.39~~2~~.40 Design Storm means predicted precipitation of given intensity, frequency and duration based on United States Weather Bureau data.

2.40~~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.

2.41~~2~~.42 Embankment means a man made deposit of earth or waste materials, usually exhibiting at least one sloping face.

2.42~~2~~.43 Embankment Stability means the degree of safety relative to a structural failure of the embankment.

2.43~~2~~.44 Emergency Spillway means a hydraulic structure designed to pass water in excess of that which an impoundment is designed to store or which cannot be passed through a principal spillway.

2.44~~2~~.45 Excess Spoil means overburden material ~~placed~~ disposed of in a location other than the pit.

2.45~~2~~.46 Existing Coal Refuse Area means a refuse disposal area that is part of an active surface mining operation.

2.46~~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.

2.47~~2~~.48 Face-Up means the result of an excavation where a vertical or near vertical highwall is created that exposes the overburden and the mineral face.

2.48~~2.49~~ Fine Coal Refuse means coal processing waste ~~predominately within a size range less than number twenty eight (#28) sieve~~ which may be disposed of in a slurry form or in a dewatered or treated state.

2.49~~2.50~~ Foundation means soil, bedrock, or other earth material on or against which an embankment or other structure is placed.

2.50~~2.51~~ Fragile lands means geographic areas containing natural, ecologic, scientific or aesthetic resources that could be significantly damaged or destroyed by surface coal mining operations. Examples of fragile lands include valuable habitats for fish or wildlife, critical habitats for endangered or threatened species of animals or plants, uncommon geologic formations, national natural landmark sites, areas where mining may result in flooding, environmental corridors containing a concentration of ecologic and aesthetic features, and areas of recreational value due to high environmental quality.

2.51~~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.

2.52~~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.

2.53~~2.54~~ Groundwater means subsurface water in the zone of saturation.

2.54~~2.55~~ Growing Season means one (1) year.

2.55~~2.56~~ Handbook means the Technical Handbook of Standards and Specifications for Mining Operations in West Virginia.

2.56~~2.57~~ Haulageway or Access Road means any road constructed, improved, maintained or used by the operator with the exception of state maintained roads.

2.57~~2.58~~ Hazard Potential means a classification rating assigned to a structure based on engineering evaluations and

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

2.582.59 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.

2.592.60 Historic Lands means historic, cultural, and scientific areas ~~that could be damaged or destroyed by surface coal mining operations~~. Examples of historic lands include archeological ~~and paleontological~~ sites, sites listed on or eligible for listing on a State or ~~National~~ National Register of Historic Places, National Historic Landmark sites, sites having cultural significance to native Americans, and sites for which historic designation is pending.

2.602.61 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.

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

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

~~2.64 Impoundment or Impounding Structure means a closed basin constructed for the retention of water, sediment or waste.~~

2.632.65 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.

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

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

~~2.68 Intermittent Stream means a stream or portion of a stream that flows continuously for at least one (1) month of the calendar year as a result of groundwater discharge or surface runoff.~~

2.66 Intermittent Stream means (a) a stream or reach of a stream that drains a watershed of at least one square mile or (b) a stream or reach of a stream that is below the local water table for at least some part of the year, and obtains its flow from both surface runoff and ground water discharge.

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

2.682.70 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.

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

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

2.712.73 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.

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

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

2.742.76 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.

2.752.77 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.

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

2.772.79 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.

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

2.792.81 Owned or Controlled and Owns or Controls means any relationship which gives one person authority to determine the manner in which an applicant, or an operator, if other than an applicant, conducts surface coal mining operations, and includes but is not limited to the following:

(a) Being a chief executive officer, chief operating officer, or chairman of the board of an entity constitutes control of the entity.

(b) Being an officer, director, or operator of an entity, or having the ability to commit the financial or real property assets of an entity creates an presumption of control.

(c) Based on the instruments of ownership or the voting securities of an entity:

(1) Ownership in excess of fifty (50) percent constitutes control;

(2) Ownership of twenty (20) through fifty (50) percent creates a presumption of control; and

(3) Ownership of less than twenty (20) percent creates a presumption of noncontrol.

2.80~~2.82~~ Peak Runoff means the maximum flow in a specified geographic location resulting from a given design storm.

2.81~~2.83~~ Perennial Stream means a stream or portion of a stream that flows continuously.

2.82~~2.84~~ Person having an interest which is or may be adversely affected or person with a valid legal interest means any person:

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

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

2.83~~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.

2.84~~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, with respect to abandoned refuse area, the existence of any condition or practice or the occurrence of a violation of a permit condition of these rules and regulations, or of the Act which might reasonably be expected to cause physical harm to a person, property, or the environment.~~

2.85~~2.88~~ Pre-Existing Discharge means any discharge at the time of permit application under this subsection.

2.86~~2.89~~ Preplan means the total application submitted to the Commissioner including the application forms, mining and reclamation plan, drainage plan, blasting plan, planting plan, maps, drawings, data, cross-sections, bonds and other information as may be required to obtain a permit.

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

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

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

2.902.93 Prospecting means the field gathering of:~~-(a)~~ surface or subsurface geologic, physical, or chemical data by mapping, trenching, drilling, geophysical, or other techniques necessary to determine the quality and quantity of overburden and coal of an area;~~-or~~

~~(b)--the-gathering-of-environmental-data-to-establish-the conditions-of-an-area-before-beginning-surface-coal-mining-and reclamation-operations.~~

2.912.94 Protected Structures means for purposes of blasting, any structures the distance to which is used to calculate maximum weight of explosives to be used.

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

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

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

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

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

2.972.100 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.

2.98~~2.101~~ Return On Investment means the relation of net profit for the last yearly period to ending net worth.

2.99~~2.102~~ Safety Factor means the ratio of the sum of the resisting forces to the sum of the loading forces in a constructed valley fill, backfill, dam, or refuse pile.

2.100~~2.103~~ Sediment means solid material that is either in suspension, is being transported, or has been moved from its site of origin and has come to rest on the earth's surface.

2.101~~2.104~~ Self-Bond means an indemnity agreement in a sum certain payable to the Commissioner, executed by the permittee and by each individual and business organization capable of influencing or controlling the investment or financial practices of the 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.

2.102~~2.105~~ Significant Aquifer means a ~~zone,~~ stratum or group of strata that can store and transmit water in significant quantities for a specific use.

2.103~~2.106~~ Slope Protection means measures taken to control erosion on slopes.

2.104~~2.107~~ Slope Stability means the relative degree of safety from the development of a landslide in a slope, as defined by one or more standard engineering methods of analysis.

2.105~~2.108~~ Spoil means overburden that has been removed during surface mining operations.

2.106~~2.109~~ Stabilize means to control movement of soil, spoil piles or areas of disturbed earth.

2.107~~2.110~~ Stoniness means a characterization of earth, overburden or spoil which describes the relative proportion of its content of boulders and stone and rock aggregate as compared to its sand, silt, clay or rock fragment content.

2.108~~2.111~~ Strength Parameters mean those engineering values obtained from standard engineering shear strength tests of soil or soil like material.

2.109~~2.112~~ Structure means, as they relate to blasting, man-made structures within or in the proximity of surface mining permit areas such as, but not limited to: gas lines, water lines, towers, airports, and dams. Structures built and/or utilized for the purpose of carrying out the surface mining operation are not included in this definition.

2.110~~2.113~~ Sub-Drainage System means a designed and constructed system provided for the conveyance of subsurface water.

2.111~~2.114~~ Subsidence means, as it relates to underground mining operations, a sinking, collapsing ~~or~~ and cracking of a portion of the earth's surface caused by voids beneath the surface created by mining.

2.112~~2.115~~ 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.

2.113~~2.116~~ Substantially Disturb means, for purposes of prospecting, to significantly impact land or water resources by lasting; by removal of vegetation, topsoil, or overburden; by construction of roads or other access routes; by placement of excavated earth or waste material on the natural land surface or by other such activities; or to remove more than 250 tons of coal.

2.114~~2.117~~ Successor in Interest means any person who succeeds to rights granted under a permit by transfer, assignment or sale of those rights.

2.115~~2.118~~ Surety Bond means an indemnity agreement in a sum certain payable to the Commissioner executed by the permittee which is supported by the performance guarantee of a corporation licensed to do business as a surety in the State of West Virginia.

2.116~~2.119~~ Surface Water means water on the surface of the earth.

2.1172.120 Topsoil means the A-horizon soil layer of the three major soil horizons.

2.1182.121 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.

2.1192.122 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.

2.1202.123 Transfer, Assignment or Sale of Rights means a change in ownership or other effective control over the right to conduct surface coal mining operations under a permit.

2.1212.124 Underground Development Waste means waste rock mixtures of coal, shale, claystone, siltstone or other related materials that are brought to the surface for disposal.

2.1222.125 Valid Existing Rights exists, except for haulroads, in each case in which a person demonstrates that the limitation provided for in the Act would result in the unconstitutional taking of that person's rights. For haulroads, valid existing rights means a road or recorded right-of-way or easement for a road which was in existence prior to August 3, 1977. A person possesses valid existing rights if he can demonstrate that the coal is immediately adjacent to an ongoing mining operation which existed on August 3, 1977 and is needed to make the operation as a whole economically viable. Valid existing rights shall also be found for an area where a person can demonstrate that an SMA number had been issued prior to the time when the structure, road, cemetery or other entity came into existence.

2.1232.125 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.

2.124~~2.126~~ Woodlands means commercial woodlands where the post-mining land use would result in the development of a commercial product.

2.125~~2.127~~ Working Capital means the excess of the operator's current assets over its current liabilities.

2.126~~2.128~~ Zone of Saturation means the zone below the piezometric surface in which all voids are filled with groundwater.

Title 38
CSR 2
Section 3

38-2-3. Permit Application Requirements and Contents

3.1 Applicant Information. In addition to the requirements of Section 9 of the Act, each application for a permit shall contain the following:

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

(b) Name, address, telephone number, and social security number or taxpayer identification number of the applicant, the operator (if different from the applicant), the applicant's resident agent who will accept service of process, the person who will pay the abandoned mine land reclamation fees, and any contractor who will conduct the surface coal mining and reclamation operations.

(c) Where applicable:

(1) Name, title, address and social security number or taxpayer identification number of every person who controls the applicant, including every officer, partner and director of the applicant and the operator, and the name of any other person who performs a function similar to a director of the applicant or the operator, the date of assuming that position, and when appropriate in the annual report required by paragraph (e) of Subsection 3.25 of this section, the date of leaving that position.

(2) Name, address, social security number or taxpayer identification number, and percent of ownership of each person who owns a ten (10) percent or greater interest in the permit applicant either directly or indirectly through one or more intermediary companies. If ownership is indirect, the relationship between intermediary companies must be furnished.

(3) Name, title, address and social security number or taxpayer identification number of each officer and director of any entity owning a ten (10) percent or greater interest in the permit applicant, either directly or indirectly through one or more intermediary companies, the date of assuming that position, and when appropriate in the annual report required by paragraph (e) of Subsection 3.25 of this section, the date of leaving that position.

(4) Name, address, social security number or taxpayer identification number and percentage of ownership of each

subsidiary in which the applicant directly or indirectly owns a ten (10) percent or greater interest. If ownership is indirect, the relationship between intermediary companies must be furnished.

(5) Any name, including that of any subsidiary, and social security number or taxpayer identification number under which the applicant, partner or anyone who owns a ten (10) percent or greater interest in the applicant, either directly or indirectly through one or more intermediary companies, now operates or previously operated a surface coal mining and reclamation operation in the United States within the five (5) years preceding the date of application.

(d) A statement of any pending surface coal mining and reclamation operation permit applications in the United States, and of all current and previous coal mining permits in the United States held during the five (5) years preceding the date of the application by any person identified in Subsection 3.1(c)(5) of this section. Such statement shall provide permit or application numbers or other identifiers and the identity of the State regulatory authority for each operation listed.

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

(f) The name and address of each owner of record of all property (surface and subsurface) contiguous to any part of the proposed permit area.

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

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

(i) When the taxpayer identification number required by Subsections 3.1 (b) and (c) of this section is a social security number, the submission is not mandatory.

(j) A statement of whether the applicant or any subsidiary, affiliate, or persons controlled by or under common control with the applicant has:

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

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

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

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

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

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

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

(5) The current status of judicial proceedings.

(l) A list of all violation notices received by the applicant or any subsidiary, affiliate, or person controlled by or under common control with the applicant in connection with any surface coal mining operation during the three (3) year period preceding the application date, for a violation of any provision of the Act, or 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, water, or environmental protection. The application shall also contain the following information about each violation notice:

(1) The date of issuance, the name of the person to who the violation notice was issued, and the issuing regulatory authority, department or agency;

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

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

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

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

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

3.2 Advertisement.

(a) SMA File Number. Prior to the publication of an advertisement for a surface mining permit, the applicant shall submit an administratively complete surface mining permit application and obtain a surface mining application (SMA) file number. Each SMA number shall be valid for one year.

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

(1) The surface mining application (SMA) file number;

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

(3) The names and business address of the applicant;

(4) A narrative description clearly describing the location of the proposed permit area;

(5) The name(s) of the coal seam(s) to be mined;

(6) The name(s) of the receiving stream(s) into which drainage from the permit area will be discharged;

(7) The location where a copy of the application is available for public review;

(8) The name and address of the Department of Energy Office where written comments or requests for informal conferences on the application may be submitted;

(9) The type of operation;

(10) Surface and mineral ownership of the tract(s) to be permitted;

(11) Where the permit application reflects that mining will occur within one-hundred feet (100') of the outside right-of-way of a public road, the applicant may choose one of the following procedures to satisfy the additional public notice requirement:

(A) Include in the advertisement required in this section a concise statement:

(i) Identifying the road to be affected;

(ii) Identifying the affected segment; and

(iii) Advising that a public hearing may be requested; or

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

(i) Identifies the road to be affected;

(ii) Identifies the affected segment; and

(iii) Advising that a public hearing may be requested.

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

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

(B) The particular segment to be relocated or closed;

(C) Where the relocated segment is to be sited;

(D) The duration of the relocation or closure; and

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

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

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

(c) Availability of Comments: Notices The Commissioner shall place on file at the regional office in which the permit is filed a copy of all public comments received as a result of the advertisement and shall provide the applicant with such comments. When a permit is issued, the Commissioner shall notify each person who filed comments or objections to the permit application, each party to an informal conference, and the appropriate local governmental agencies including the clerk of the county commission. The Commissioner shall also cause to be published at least monthly a listing of all permits issued.

(d) Readvertisement. Where a Surface Mine Application (SMA) has been advertised once a week for four successive weeks, and is determined by the Commissioner to have had changes affecting the method of operation, the reclamation plan, and/or the original advertisement, he shall require one (1) additional advertisement to be published with a ten (10) day public comment period. Permits which are being renewed or significantly revised must be advertised in accordance with paragraph (b) of this subsection and Section 9(a)(6) of the Act.

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

(f) Certification of Publication. 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.

3.3. Occupied Dwellings.

(a) Valid Existing Rights. Where the proposed surface coal mining operation lies within three hundred feet (300') (measured horizontally) of any occupied dwelling, the applicant shall submit with the application either a written waiver from the owner of the dwelling or a demonstration of valid existing rights.

~~(b) Waiver. If a waiver was obtained prior to August 3, 1977, a new waiver need not be obtained. Valid waivers shall remain in effect for any subsequent transfer, sale or reassignment of the permit. A waiver is valid only if it contains the following:~~

~~(1) A statement that establishes the owner's right to grant the waiver;~~

~~(2) A statement that the owner is aware that he has the legal right to prevent mining and knowingly waives that right; and~~

~~(3) A statement specifying a new distance within which mining is prohibited.~~

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

3.4 Maps.

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

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

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

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

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

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

(1) Red shall indicate mineral to be removed;

(2) Blue shall indicate water and drainage patterns;

(3) Green shall indicate areas regraded;

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

(5) Purple shall be used to outline adjacent mining permits.

(d) Preplan. In addition to the requirements of Sections 9(a)(12)(13) and Section 10 of the Act, the preplan map shall include the following information:

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

(2) All public roads located on or within one hundred feet (100') of the proposed permit area;

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

(4) All cemeteries located on or within one hundred feet (100') of the proposed permit area;

(5) Any portion of a unit of the National System of Trails or the Wild and Scenic River System, including study rivers designated under Section 5(a) of the Wild and Scenic Rivers Act which are located within or adjacent to the proposed permit area;

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

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

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

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

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

(11) Extent of proposed auger operations;

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

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

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

(15) The areal distribution of aquifers for the proposed permit and adjacent areas;

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

(17) The location and extent of topsoil borrow areas;

(18) Explosive storage and handling facility;

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

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

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

(e) Drainage Map. Unless the information required by this paragraph can be shown on the preplan map in a clear and legible fashion, a separate drainage map of the same size scale and

detail of the preplan map shall be made a part of the permit application and shall contain the following:

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

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

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

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

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

~~(6)--A-table-listing:~~

~~(A)--All-erosion-and-sedimentation-control structures-by-type;~~

~~(B)--Total-contributing-drainage-area(s)-for-each structure;~~

~~(C)--Total-disturbed-area(s)-within-each-drainage area-controlled-by-the-structure;~~

~~(D)--Sediment-storage-capacity-(Ac/ft)-of-each structure;-and~~

~~(E)--Each-water-diversion,-collection,-conveyance, treatment,-storage-and-discharge-facility-to-be-used.~~

(f) Supplemental maps for underground coal mining permit applications. In addition to other maps required in this Section, each permit application for underground mining operations shall include supplemental maps as follows:

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

(A) Name and series of the sheet;

(B) Scale, latitude, and longitude;

(C) Limits of underground mining operation proposed;

(D) Surface area to be permitted;

(E) Cropline of the coal seam to be mined;

(F) Location and identification of all mine openings for the proposed mine including shafts, slopes, drifts, boreholes, etc; and

(G) Location of all surface structures not owned by the applicant over the area to be mined.

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

(A) Boundaries of underground mining operation and any adjacent active or abandoned mines in the same seam;

(B) Present extent of underground mining as well as projected headings;

(C) Date, scale, north arrow, dip, strike, and average dip of the coal seam to be mined;

(D) All gas wells, oil wells, water wells, and test drill holes;

(E) Location of all known faults;

(F) Area and extent of previous or proposed auger or strip mining in the same seam;

(G) Location and thickness of outcrop barriers; and

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

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

(a) The existing premining surface configuration and the final surface configuration that will be achieved. Cross sections shall be developed from sufficient slope measurements to adequately represent the existing land surface configuration of the proposed permit area. Slope measurements shall take into account natural variations in slope, to provide accurate

representation of the range of natural slopes and reflect geomorphic differences of the area to be disturbed. The Commissioner may require additional slope measurements at specified intervals and locations on a site-by-site basis;

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

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

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

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

3.6 Operation Plans and Specifications. In addition to other plans required by the Act, the application shall contain plans and specifications describing:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(g) The design and construction of all roads.

(h) A vegetation plan.

3.7 Existing Structures and Facilities:

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

(1) Location;

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

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

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

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

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

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

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

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

3.8 Operation(s) Near Public Road.

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

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

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

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

(4) Make a written finding within thirty (30) days following the hearing date as to whether or not the interests of the public will be protected.

3.9 Experimental Practices:

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

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

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

(3) The experimental practice:

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

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

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

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

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

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

3.10 Subsidence Control Plan.

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

(1) A survey that identifies 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 both on the permit area and adjacent areas within the critical angle of deformation;

(2) A general description of the technique of coal removal, such as longwall, room and pillar, pillar removal, hydraulic mining or other extraction methods and the size, sequence, and timing of underground development of the mine;

(3) 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 section 16.2(b) of these regulations, to mitigate or remedy any material damage or diminution in value or foreseeable use that may occur to surface lands due to subsidence.

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

(A) Backstowing or backfilling of voids;

(B) Leaving support pillars of coal;

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

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

(E) Monitoring, if any, to determine the commencement and degree of subsidence so that other appropriate measures can be taken to prevent or reduce material damage.

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

3.11 Underground Mine Abandonment Plan. Each application for an underground coal mining operation shall contain an abandonment plan which contains the following:

(a) 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;

(b) The maximum head of water expected on the outcrop barriers and mine seals; and

(c) The type of seals for boreholes and their design details.

3.12 Fish and Wildlife Resources Information.

(a) Each application shall include a study of fish and wildlife and their habitats within the proposed ~~mine plan area~~ permit area and the portions of the adjacent areas where effects on such resources may reasonably be expected to occur.

(b) Upon the issuance of an SMA number, and as part of the lands unsuitable inquiry, the Commissioner shall determine what fish and wildlife resources information will be required.

(c) The Commissioner, in consultation with the appropriate State and Federal fish and wildlife management, conservation, or land management agencies shall determine the level of detail and scope of the study on the basis of the following:

(1) Published data and other information;

(2) Site-specific information obtained by the applicant; and

(3) Written guidance obtained from agencies consulted.

(d) A Fish and Wildlife plan, if required, shall contain:

(1) A statement of how the plan will minimize disturbances and adverse impacts on fish and wildlife and related environmental values during surface coal mining and reclamation operations, and how enhancement of these resources will be achieved, where practicable. The plan shall cover the mine plan area and portions of adjacent areas as determined by the study required in paragraph (c) of this subsection.

(2) If the applicant states that it will not be practicable to achieve a condition which clearly shows a trend toward enhancement of fish and wildlife resources at the time revegetation has been successfully completed, a statement shall be provided which establishes, to the satisfaction of the Commissioner, why it is not practicable to achieve such a condition.

(3) A statement explaining how the applicant will utilize impact control measures, management techniques, and monitoring methods to protect or enhance the following, if they are to be affected by the proposed activities:

(A) Threatened or endangered species of plants or animals listed by the Secretary under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.) and their critical habitats;

(B) Species such as eagles, migratory birds or other animals protected by State or Federal law, and their habitats: or other species identified through the consultation process; or

(C) Habitats of unusually high value for fish and wildlife, such as wetlands, riparian areas, cliffs supporting

raptors, areas offering special shelter or protection, reproduction and nursery areas, and wintering area.

3.13 Reprocessing or Removal of Abandoned Coal Refuse Disposal Piles.

Where the Commissioner determines that a higher or better land use will result, or where the safety and welfare of the public is improved or when the enhancement of the environment will result, he may issue a special permit for reprocessing or removal of an abandoned coal refuse disposal area. An application for a special permit for removal of an abandoned refuse disposal area shall be submitted to the Commissioner for review.

(a) The application shall include plans and specifications for reprocessing or removal of the coal refuse and reclamation restoration of the site which have been prepared by or under the direct supervision of an engineer or licensed land surveyor including two sets of maps and plans on standard 24" by 36" size plan sheets and seven copies of a submittal containing a project narrative, reclamation plan, specifications, supporting data, reduced maps and plans. Details of the submittal are as follows:

(1) The project narrative shall include at a minimum a discussion of existing site conditions, how the operation will protect the public or environment or accomplish a more desirable land use, the design life of the operation, quantity and type of material to be removed, method of operation to include phases of removal, sequence of critical construction phases, and a description of the duties, responsibilities, and lines of communication of those persons responsible for management of the operation.

(2) The reclamation plan shall include as a minimum the location and capacity of the sediment control facilities, and reclamation procedures and specifications for the revegetation and grading of the site.

(3) Supporting data shall include as a minimum the assumptions and parameters used in the design of the operation, the calculations used in the operation design, and the results of any necessary design calculations for sediment control facilities, removal of materials, diversion ditches, spillways, stability analysis, fire control and revegetation.

(4) Maps and plans shall be provided to show the following information with the scale designated on the drawing:

(A) A location map showing the site in relation to major highways, nearest post office, and major drainage. County highway maps may be used for this purpose.

(B) A map showing the limits of the watershed with respect to the site. The minimum requirements shall be a U.S.G.S. 7 1/2 minute map with the site plotted on it.

(C) A plan view of the site showing contours, limits, and acreage of the permit area, location of cross sections, and other pertinent data for project control.

(D) Cross sections and profiles of drainage facilities, sediment control devices, and any stability analysis cross sections.

(E) A plot of inflow hydrographs and stage-storage curves as necessary for refuse impoundment and one hundred (100) year frequency, six (6) hour duration diversion design only.

(b) Design Requirements:

(1) General Requirements - All reprocessing or removal operations must be designed to:

(A) Provide sediment control facilities in accordance with the Handbook requirements. Variances may be granted where the operator can show that there is insufficient space for conventional structures and that existing or proposed sediment structures will meet effluent standards.

(B) Provide diversion or discharge facilities in accordance with the requirements of this section.

(C) Provide for removal of refuse in successive horizontal lifts with a maximum elevation difference between working benches of twelve (12) feet or removal down to a maximum 2H:1V slope from the top to the toe. No refuse may be removed from the toe of the original embankment until the final removal process.

(D) Provide a plan for fire control in present or unforeseen burning areas.

(E) Provide, wherever possible, a final graded refuse slope no steeper than 2H:1V and a twenty (20) foot wide bench for every fifty (50) feet of change in elevation at

completion of the operation. Natural slopes shall be stabilized as necessary.

(F) Provide adequate revegetation of refuse and natural ground slopes in accordance with Section 9 of these regulations. All refuse materials disturbed by the operation shall be provided with a minimum cover of non-toxic and non-combustible material sufficient to establish adequate vegetation.

(2) Specific Requirements:

(A) Non-impounding Refuse Areas:

(i) Working surface ditches shall be designed, where necessary, based on the one (1) year, twenty-four (24) hour duration storm event as a minimum during the operation.

(ii) Removal operations shall not create any impoundment of water through the life of the project.

(iii) For partial removal within the permit area, a one hundred (100) year, ~~six (6)~~ twenty-four (24) hour duration diversion ditch shall be provided for that part of the pile where refuse will remain. A stability analysis shall be performed as deemed necessary by the Commissioner to demonstrate an adequate factor of safety in critical areas where refuse will remain.

(B) Impounding Refuse Areas:

(i) Sufficient storage and spillway capacity for a one hundred (100) year, six (6) twenty-four (24) hour design storm shall be provided through the removal operation. .

(ii) A maximum five (5) foot elevation difference is permitted between the elevation of slurry and the breach invert elevation unless otherwise approved by the Commissioner.

(iii) Pumps, or pumps with ditches, must be provided to maintain the lowest possible water level in the impoundment.

(iv) For partial removal within the permit area, the site shall be converted to a non-impounding fill at completion of the operation. A stability analysis shall be performed if deemed necessary by the Commissioner to demonstrate an adequate factor of safety in critical areas for the remaining

refuse embankment. A one hundred (100) year, ~~six-(6)~~ twenty-four (24) hour duration diversion ditch shall be constructed to divert water around the embankment.

(3) Disposal of Reprocessing Coal Refuse Materials. If reprocessing coal refuse materials are to be disposed of in the special permit area, the refuse disposal area must, in addition to other requirements, be designed to:

(A) Provide compaction of refuse in accordance with Section 22 of these regulations.

(B) Disposal of reprocessing coal refuse materials from outside the special permit area shall be done in accordance with Section 22 of these regulations.

3.14 Approved Persons.

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

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

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

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

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

included in the application shall be made available to the Commissioner upon request.

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

3.15 General Environmental Resources Information.

(a) Historic Lands. The application shall contain a description of any historic lands shown on the preplan map and a statement as to the timing and sequence of mining and other measures to be used to minimize or prevent adverse impacts to such historical lands.

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

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

(1) The approved postmining land use will be cropland;

(2) The permit incorporates the prime farmland reconstruction plan as a permit condition;

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

(4) Mining will be conducted in accordance with prime farmland performance standards.

(d) Designation of Lands Unsuitable. Upon receipt of a complete application for a surface mining permit, the Commissioner shall review the application to determine whether

the surface coal mining operation is limited or prohibited under Section 22 of the Act.

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

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

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

(e) Effect on Public Places. Where the proposed surface coal mining operation will adversely affect any public park or any privately owned place listed on the national register of historic places, the Commissioner shall transmit to the Federal, State or local agencies with jurisdiction over the park or historic place a description and location of the site to be affected. The agency will have thirty (30) days to request a joint review of the permit application.

3.16 Hydrologic Information.

(a) PHC. Each permit application shall contain a statement describing the probable hydrologic consequences (PHC) of the proposed mining operation, with respect to the hydrologic balance, on both the permit area and adjacent areas. The statement shall be based on base line information developed from sampling and analysis of surface and groundwater at monitoring

sites established both on the permit area and adjacent areas. The longitude, latitude and elevation shall be given for each of the monitoring sites. Mathematical modeling techniques may be used to aid in the development of the required information.

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

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

(2) Water quality analysis including, at a minimum, total dissolved solids, alkalinity, acidity, sulfates, specific conductance, pH, total iron and total manganese. Correlation data from other monitoring sites within the general area of the proposed mining operations may be accepted; provided, that a limited number of validation samples from the permit area may be required;

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

(4) If the determination of the probable hydrologic consequences (PHC) indicates that a currently used or significant groundwater resources is likely to be adversely impacted, additional base line information shall be provided as necessary to evaluate such probable hydrologic consequences or to plan remedial or reclamation activities.

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

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

(2) Water quality descriptions including information on total suspended solids, total dissolved solids, specific conductance, pH, acidity, alkalinity, sulfates, total iron and total manganese sufficient to demonstrate seasonal variations;

provided, that correlation data from other monitoring which does not include one or more of the above parameters may be accepted; provided further, that a limited number of validation samples may be required;

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

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

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

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

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

(1) Avoid acid or toxic drainage;

(2) Prevent, to the extend possible using the best technology currently available, additional contributions of suspended solids to streamflow;

(3) Provide water treatment facilities when needed;

(4) Control drainage; and

(5) Restore approximate premining recharge capacity and protect or replace ~~rights~~ water supply of present water users. The plan shall specifically address the potential adverse hydrologic consequences identified in the PHC determination and shall include preventive and remedial measures.

(g) Each application for a permit shall contain a surface water monitoring plans based on the PHC determination and base line hydrologic and geologic information. These plans shall identify monitoring site locations, quantity and quality parameters, sampling frequency, and describe how the data ~~may~~ will be used to determine the impact of the operation on the hydrologic balance both on the permit area and adjacent areas. Monitoring parameters should include but not be limited to total dissolved solids or specific conductance corrected at 25^{0}C, total suspended solids, flow measurements, pH, acidity, alkalinity, total iron and total manganese. The selection of these parameters must be based on current and approved post mining land uses and all hydrologic balance protection objectives.

(h) Each application for a permit shall contain a ground water monitoring plan if adverse impacts to a significant groundwater resource are anticipated. The decision of need will be based on the PHC determination and base line hydrologic and geologic information gathered both on and off the mine site. These plans shall identify monitoring site locations (latitude, longitude and ground level elevations), quantity and quality parameters to be monitored, sampling frequency and duration, and describe how the data ~~may~~ will be used to determine the impact of the operation on the hydrologic balance both on and off the mine site. Monitoring parameters should include, but not be limited to, total dissolved solids or specific conductance corrected at 25^{0}C, 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.

~~(i)--Ground-Water-Monitoring-Waivers---if-an-applicant-can demonstrate-by-the-use-of-the-PHC-determination-and-other available-base-line-hydrologic-and-geologic-information-that-a particular-water-bearing-stratum-in-the-proposed-permit-and adjacent-area-is-not-one-which-serves-or-may-potentially-serve-as a-significant-aquifer-or-ensure-the-hydrologic-balance-within-the permit-and-adjacent-area,-monitoring-of-the-stratum-may-be-waived~~

~~by-the-Commissioner.--Waivers-will-be-considered-and-granted separately-and-exclusively-for-each-individual-water-bearing stratum-unless-it-is-shown-by-the-use-of-the-PHC-determination and-base-line-hydrologic-and-geologic-information-that-all individual-water-bearing-stratums-of-concern-are-hydraulically interconnected-and-can-be-waived-as-a-complete-unit.~~

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

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

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

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

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

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

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

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

(7) Existing or previous surface mining limits;

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

(9) 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. Area geology may include information such as mapped outcrop locations shown on a 7 1/2 minute United State Geological Survey (U.S.G.S.)

topographic map, area photographs, and published geologic reports for the area of concern. Structural geology may include mapped lineament traces from area photography or topographic maps and any published structural geologic reports for the area of concern;

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

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

(12) For underground mining operations, indicate whether or not there will be a gravity discharge.

(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 limited to the sulfur content of any coal seam, the chemical analysis of potentially acid or toxic-forming sections of the overburden, and the chemical analysis of the stratum lying immediately underneath the coal to be mined: Provided, that information which pertains only to the analysis of the chemical and physical properties of the coal, except information regarding such mineral or elemental contents which are potentially toxic in the environment, shall be kept confidential and not a matter of public record;

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

(3) Lithologic logs of the drill holes;

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

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

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

3.19 Transfer, Assignment or Sale of Permit Rights and Obtaining Approval.

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

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

(2) The application, for transfer assignment or sale, shall set forth on forms prescribed by the Commissioner, the information required in Sections 9(a)(1) through 9(a)(6) and Sections 9(a)(9), 9(d), 9(f), 10(a)(10), and 18(b)(5) of the Act.

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

(4) Approval of the application for transfer assignment or sale of a permit may be granted upon a finding by the Commissioner that the applicant is eligible to receive a permit and will conduct mining operations in accordance with the purposes and intent of the Act, these rules and regulations and the terms and conditions of the permit. Such findings will be based on information set forth in the application for transfer assignment or sale and any other information made available to the Commissioner.

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

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

3.20 Agreement. A permittee who wishes to assign the mining operation through an agreement, contract, job contract, etc., to another person, but retain the permit, must request prior written approval of such assignment on forms prescribed by the Commissioner. Under this arrangement, the permittee remains subject to all provisions of the Act, these rules and regulations and the terms and conditions of the permit.

3.21 Permit Renewals.

(a) ~~Application for renewal shall be filed in accordance with Section 19 of the Act.~~ All active surface mining operations shall be subject to the renewal requirements of Section 19 of the Act. Those operations which have been granted inactive status shall complete renewal prior to resuming active operations. Applications shall be filed on forms provided by the Commissioner and shall contain at a minimum the following information:

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

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

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

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

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

(6) A statement, both on the forms and the progress map, that the information set forth is true and accurate;

(7) A notarized signature of the principal officer of the permittee; and

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

(b) The Commissioner shall notify the appropriate agencies of the application for renewal as required in Section 20(a) of the Act.

~~(c)--Informal-conferences-shall-be-held-as-required-in Section-20(b)-of-the-Act-and-the-Commissioner-shall-send-copies of-his-decision-on-the-application-for-renewal-to-the-applicant, any-persons-who-filed-objections-or-comments-to-the-renewal,-and to-any-persons-who-were-parties-to-the-informal-conference.~~

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

3.22 Permit Revisions.

(a) Any revision to a permit will be subject to review and approval by the Commissioner and if deemed to be a significant revision must meet all applicable 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 permit.

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

3.23 Incidental Boundary Revisions (IBR).

(a) 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.

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

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

(2) For purposes of surface operations, the maximum total acreage to be permitted on one or more IBR's shall be no more than sixty (60) percent of the acreage on the original permit or a maximum of one hundred fifty (150) acres. No limitations shall be imposed on underground operations.

(3) If the IBR is contiguous to the mining area of the original permitted area and is an insignificant IBR, or is not contiguous and is determined to be insignificant, a legal advertisement shall be published one time in accordance with Subsection 3.2(d) 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.

(4) If the IBR is not contiguous to the mining area, or is a significant IBR, a legal ad in accordance with Subsection 3.2 of these rules and regulations and paragraph (a)(6) of Section 9 of the Act will be required.

(5) 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.

(c) An IBR will be deemed to be significant if it is determined that the environmental impact or welfare and safety of the public may be altered from that reflected in the approved permit.

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

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

3.24 Variance.

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

(b) Contemporaneous Reclamation. The Commissioner shall review all permits for which a variance from contemporaneous reclamation is approved no later than three (3) years after initial coal removal.

3.25 Permit Conditions. Each permit shall be subject to the following conditions:

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

~~(b)--Without-advance-notice,-delay,-or-a-search-warrant,-upon-presentation-of-appropriate-credentials,-the-permittee-shall-allow-the-authorized-representatives-of-the-Commission-to:~~

~~(1)--Have-the-right-to-entry;-and~~

~~(2)--Be-accompanied-by-private-persons-for-the-purpose-of-conducting-an-inspection-when-the-inspection-is-in-response-to-an-alleged-violation-reported-to-the-Commissioner-by-the-private-person.~~

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

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

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

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

~~(d)~~(c) The operator shall pay all reclamation fees.

~~(e)~~(d) The permittee shall update and furnish the Commissioner on an annual basis the information required by paragraphs 3.1(c)(1) and (3) of subsection 3.1 of this Section.

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Section 4

38-2-4. Haulageways or Access Roads.

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

4.2 Construction.

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

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

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

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

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

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

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

4.3 Drainage Design.

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

(1) 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 if the ditch line is designed so that it will remain stable and that drainage control is also provided for water on the outside of the curve.

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

(A):

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

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

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

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

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

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

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

4.4 Sediment Control. All sediment control structures shall have a sediment storage volume equal to 0.125 acre/feet for each acre of disturbed area within the watershed of the structure unless lesser storage values are approved by the Commissioner. During construction of these structures, temporary sediment control measures, as described in Chapter 19 of the Handbook, shall be used.

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

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

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

4.8 Removal of Drainage Structures. Bridges, culverts, stream crossings, etc., necessary to provide access to the operation, shall not be removed ~~until reclamation is completed~~

and unless approved by the Commissioner. The same precautions as to water quality are to be taken during removal of drainage structures as those taken during construction and use.

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

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

4.11 Abandonment of Haulageways or Access Roads.

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

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

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

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

4.12 Plans, Design Data and Construction Specifications.

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

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

(A) The station base line;

(B) Location of culverts;

(C) Flow directions;

(D) Location of intermittent or perennial streams; and

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

(2) A surveyed profile drawn to scale showing:

(A) Profile of finished road surfaces;

(B) Location and size of culverts;

(C) Station elevations;

(D) Profile of original ground; and

(E) Percent grades.

(3) A typical cross-section of haulroad showing:

(A) Culvert placement;

(B) Slope of culvert;

(C) Fill material;

(D) Original ground;

(E) Ditches; and

(F) Sediment control devices.

(4) Each permit application for operations which propose intermittent or perennial stream crossings shall contain the following:

(A) Structure computation sheets; and

(B) Cross-sections.

(5) Construction specifications should address:

(A) Excavation;

(B) Selection and placement of materials;

(C) Vegetative protection against erosion;

(D) Road surfacing;and

(E) Drainage and sediment control measures.

4.13 Other Transportation Facilities.

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

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

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

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

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

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

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

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Section 5

38-2-5. Drainage Systems

5.1 Natural Drainways. Natural drainways in the permit area shall be kept free of overburden except where overburden placement has been approved. Overburden placement and haulageways constructed across natural drainways shall not ~~affect the flow of the stream,~~ materially increase the sediment load, or materially affect stream quality.

5.2 Intermittent or Perennial Stream.

~~(a) 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 Commissioner. The Commissioner may authorize such disturbances if he finds, based on information set forth in the permit application or other information made available to him, that surface mining operations will not adversely affect the normal flow or gradient of the stream, adversely affect fish populations or their related environmental values or cause or contribute to any violation of State or Federal water quality standards.~~

~~(b) The area not to be disturbed shall be designated a buffer zone and marked accordingly.~~

(a) No land within one hundred (100) feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities, unless the Commissioner specifically authorizes surface mining activities closer to, or through, such a stream. The Commissioner may authorize such activities only upon finding that:

(1) Surface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream; and

(2) If there will be a temporary or permanent stream-channel diversion, it will comply with Subsection 5.3 of these regulations.

5.3 Stream Channel Diversions and Diversion Ditches

(a) All stream channel diversions and diversion ditches shall be designed for safety and stability and shall be constructed in such a manner so as to avoid additional contributions of suspended solids to streams. The design and

construction shall be certified by a registered professional engineer or licensed land surveyor.

(b) Stream Channel Diversions:

(1) Design. Temporary and permanent stream channel diversions shall be designed so as to have at a minimum the capacity to carry the flow of the existing stream channel. The maximum flow carrying capacity of the existing stream channel shall be determined on the basis of cross-sectional area of the stream channel at points immediately upstream and downstream of the segment to be diverted. A combination of the cross-sectional area of the stream channel diversion, the stream bank, and the flood-plain configuration shall be adequate to pass safely the peak runoff of a ten (10) year, twenty-four (24) hour precipitation event for a temporary stream channel diversion and a one hundred (100) year, twenty-four (24) hour precipitation event for a permanent stream channel diversion.

(2) Plans, Design Data and Specifications. The following information shall be made a part of the permit application when stream channel diversions are proposed:

(A) A "stream channel design computation sheet" for each proposed temporary or permanent stream channel diversion.

(B) Construction plans which contain:

(i) A plan view of the area showing center line profiles of the existing stream channel and proposed location of the temporary or permanent stream channel;

(ii) A profile along the center line of the existing stream channel showing gradient of the stream bottom and top of channel;

(iii) A profile along the center line of the proposed temporary or permanent stream channel diversion showing gradient of the stream bottom and top of channel;

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

(v) A detailed description of the sequence of installation of temporary or permanent stream channel diversion.

(C) Construction specifications;

(D) Maintenance schedule and procedures for maintenance.

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

(2) Plans, Design Data and Specifications. Where the permit application proposes the use of division ditches, the drainage plan shall contain the following:

(A) A "Diversion Design Computation Sheet" for each proposed diversion;

(B) Construction plans showing:

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

(ii) A cross-section showing the original ground line, bottom width, side slopes, depth of flow, freeboard and other pertinent information;

(iii) The type of soil in which the diversion will be excavated. The soil shall be sampled and classified at five hundred feet (500') intervals along the center line of the diversion;

(iv) The type and design of the outlet proposed for each diversion;

(v) A maintenance schedule and procedures for maintenance;

(vi) Construction specifications; and

(vii) A vegetation plan.

5.4 Sediment Control.

(a) Sediment control structures shall be constructed in appropriate locations for the purposes of controlling sedimentation. All runoff from the disturbed area shall pass through a sedimentation control system. All such systems shall be designed, constructed, located, maintained, and used in

accordance with the criteria set forth in the Handbook or other approved criteria and in such a manner as to minimize adverse hydrologic impacts in the permit and adjacent areas to prevent material damage outside the permit area and to assure safety to the public.

(b) Design and Construction Requirements.

(1) All sediment control structures for an area of the permit shall be certified by a registered professional engineer or licensed land surveyor as provided for in paragraph (c) of this subsection before any surface mining activities begin in the component drainage area of that specific structure.

(2) All structures shall be located as near as possible to the disturbed area.

(3) Sediment control structures shall not be constructed in perennial streams unless ~~the applicant demonstrates and the Commissioner finds that there is no other suitable location for such structures.~~ approved by the Commissioner.

(4) All sediment control structures shall be designed, constructed, and maintained to adequately control runoff and sediment yields from their component disturbed area and the contributing watershed such that the discharge from the structures will meet all State and Federal effluent limitations.

~~(5) The optimum design criteria for meeting applicable effluent limits are a storage capacity of 0.125 acre/feet of storage for each acre disturbed and a detention time adequate to contain a ten (10) year, twenty four (24) hour precipitation event. Site specific factors such as climate, topography, groundcover on site sediment control, concurrent reclamation practices, controlled spoil placement, etc., shall provide a basis for a finding by the Commissioner that lesser designs may be approved. Where such lesser designs are proposed, the applicant shall, as part of the permit application, demonstrate that such factors exist and that effluent limits will be met.~~

(5) The optimum design criteria for sediment control structures are a storage capacity of 0.125 acre feet of storage for each acre disturbed which shall include adequate detention time 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.

(6) All structures shall be designed, constructed and maintained to prevent short-circuiting.

(7) 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 each structure. Sediment removal and disposal shall be done in a manner and at a frequency that minimizes adverse impacts on surface and groundwater quality.

(8) All embankment-type structures shall be designed, constructed and maintained to meet the following safety standards:

(A) Embankment structures shall be designed with ~~a combination of~~ principal and/or emergency spillways that will safely pass a twenty-five (25) year, twenty-four (24) hour precipitation event. The principal spillway requirements may be waived if the emergency spillway is an open channel constructed of nonerodable material, is capable of maintaining sustained flows, and is designed to safely pass the peak discharge of a twenty-five (25) year, twenty-four (24) hour precipitation event. If alternative sediment control structures such as excavated ponds or bench control structures are utilized in lieu of embankment structures, these structures must be designed to safely pass a ten (10) year, twenty-four (24) hour precipitation event. The emergency spillway or exit channel of the alternative structures shall be designed to safely pass the peak discharge of a ten (10) year, twenty-four (24) hour precipitation event.

(B) All embankment-type structures shall provide a minimum difference in elevation between principal spillway and emergency spillway of 1.5 feet and a minimum difference in elevation between the maximum design flow elevation in the emergency spillway and/or exit channel and top of settled embankment of 1.0 foot;

(C) All embankment-type structures shall provide proper stabilization and revegetation of the embankment and surrounding areas;

(D) All structures shall provide adequate freeboard to resist overtopping by waves or sudden increases in

volume and adequate slope protection against surface erosion and sudden drawdown;

(E) In constructing the embankment, the operator shall remove all organic matter from the foundation, provide for proper compaction and ensure against excessive settlement by excluding sod, roots, frozen soil or coal processing wastes from the embankment; and

(F) If an inspection discloses that a potential hazard exists, the person who examined the impoundment shall promptly inform the Department of Energy of the findings and of the emergency procedures formulated for public protection and remedial action. If adequate procedures cannot be formulated or implemented, the Department of Energy shall then notify the appropriate agencies that emergency procedures are required to protect the public.

(G) Embankment-type sediment control structures which impound water at an elevation of five feet (5') or more above the upstream toe of the structure and can have a storage volume of twenty (20) acre-feet or more; or which impound water at an elevation of twenty feet (20') or more above the upstream toe of the structure, shall be designed, constructed, inspected, and abandoned in accordance with federal regulations set forth in 30 CFR 77.216. All design, plans, and specifications shall be made a part of the permit application. In addition to these requirements, the following minimum standards shall be met:

(i) An appropriate combination of principal and emergency spillways shall be provided to pass safely the runoff resulting from a one hundred (100) year, ~~six-(6)~~ twenty-four (24) hour precipitation event, or a larger event as specified by the Commissioner;

(ii) The embankment shall be designed and constructed with a static safety factor of at least 1.5 or a specified higher safety factor as required to ensure long-term stability;

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

(9) All engineering inspection reports and approvals shall be submitted to the Commissioner with copies maintained at, or in the vicinity of, the mine site.

(10) Discharge Structures. Discharge from sediment control structures, diversions, stream channel diversions, etc., shall be controlled by use of energy dissipators, riprap channels or other devices to reduce erosion, to prevent deepening or enlargement of stream channels and to minimize disturbance of the hydrologic balance. Discharge structures shall be designed using standard engineering procedures.

(c) Certification. A certification form shall be completed for each structure within a component drainage area prior to any other disturbance in that component; 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 or less as measured from the active mineral removal area. This certification must include a map showing the exact location of the certified section.

The form shall contain a statement that the erosion and sediment control system(s) is (are) constructed and installed in accordance with current prudent engineering practices and the approved preplan or any modifications thereto.

Any minor change from the approved pre-plan which is made during construction shall be indicated on "as-built" plans showing the approved design, the extent of the change, and reference points.

(d) Inspection. A qualified person shall examine the impoundment at least quarterly.

(e) Prior to Phase 1 bond release, all sediment control structures shall be cleaned out so as to meet design storage capacity in all areas not revegetated and stabilized.

(f) Abandonment Procedures. Abandonment and/or removal of sediment control structures shall not occur until two (2) years after the last augmented seeding. Minimum requirements for abandoning sediment control structures prior to full bond release are as follows:

(1) Excavated Sediment Pond, Dugout Type. Structures of this type have no required abandonment procedures unless an embankment is involved. Where an embankment is used in this type of structure, the abandonment procedures are as described in part (2) of this paragraph.

(2) Embankment type sediment dams, embankment type excavated sediment dams and crib and gabion structures. Sediment dams and all accumulated sediment behind the dam shall be removed from the natural drainway. Dams adjacent to natural drainways shall be abandoned by diverting the entrance channel to the natural drainways.

When sediment dams are removed, the natural drainway shall be returned as nearly as practicable to its original profile and cross-section. The channel sides and bottom shall be rock ripraped. The riprap shall extend up to the top of the channels banks. The riprap requirement may be waived where the bottom and sides of the channel consist of bedrock. Those structures to be left in place after final bond release shall be considered permanent impoundments and shall be left in accordance with the following requirements:

(A) A request to leave the structure will be made on forms prescribed by the Commissioner;

(B) The request will contain a statement as to the present conditions of the impoundment; 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 the following 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.

5.5 Postmining rehabilitation of sedimentation ponds, diversions, impoundments, and treatment facilities.

(a) Before abandoning a permit area or seeking bond release, the operator shall ensure that all structures are removed and reclaimed in accordance with the Act, these rules and regulations, and the terms and conditions of the permit. Permanent sedimentation ponds, diversions, impoundments, and treatment facilities shall meet the requirements of the Act, these rules and regulations, and the terms and conditions of the permit for permanent structures.

5.6 Permanent Impoundments. A permanent impoundment of water may be created, if authorized by the Commissioner, in the approved permit based upon the following demonstration:

(a) The size and configuration of such impoundment will be adequate for its intended purposes.

(b) The quality of impoundment water will be suitable on a permanent basis for its intended use and, after reclamation, will meet applicable State and Federal water quality standards, and discharges from the impoundment will meet applicable effluent limitations and will not degrade the quality of receiving water below applicable State and Federal water quality standards.

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

(d) Final grading will provide for adequate safety and access for proposed water users.

(e) The impoundment will not result in the diminution of the quality and quantity of water utilized by adjacent or surrounding landowners or agricultural, industrial, recreational, or domestic use.

(f) The impoundment will be suitable for the approved postmining land use.

(g) The design precipitation event for the spillways for a permanent impoundment will be a fifty-year, ~~six-~~ twenty-four (24) hour precipitation event, or such larger event as the Commissioner may require.

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38-2-6 Blasting.

6.1 General Requirements. Each operator shall comply with all applicable state and federal laws in the use of explosives. A blaster certified by the Department of Energy shall be responsible for all blasting operations including the transportation, storage and use of explosives within the permit area in accordance with the blasting plan.

6.2 Blasting Plan. Each application for a permit, where blasting is anticipated, shall include a blasting plan. Certified blasters shall be familiar with the blasting plan and all site-specific performance standards for the operation at which they are working. The blasting plan shall explain how the applicant will comply with the requirements of ~~this subsection and shall include at a minimum:~~ the Act, these regulations, and the terms and conditions of the permit.

~~(a) Limitations the operator will meet with respect to ground vibrations and air blast.~~

~~(b) The basis for these limitations.~~

~~(c) The methods to be applied in controlling the adverse effects of blasting operations.~~

~~(d) A description of the type, capability, and sensitivity of any blast monitoring equipment.~~

~~(e) The proposed monitoring locations and procedures.~~

6.3 Public Notice of Blasting Operations.

(a) At least ten (10) days, but not more than thirty (30) days, prior to any blasting operations which use five (5) pounds or more of explosives, the operator shall publish, a blasting schedule in a newspaper of general circulation in the county of the proposed permit area. Copies of the schedule shall be distributed by certified mail to local governments, public utilities and each resident within one-half (1/2) mile of the permit area. Unless blasting will occur on drainage structures and roads, such structures will be exempt from the one-half (1/2) mile notification area. The operator shall republish and redistribute the schedule at least every twelve (12) months and revise and republish the schedule at least ten (10) days, but not more than thirty (30) days, prior to blasting whenever the area covered by the schedule changes or actual time periods for

blasting significantly differ from that set forth in the prior schedule. The schedule shall contain at a minimum:

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

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

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

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

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

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

6.4 Blast Record.

(a) A blasting log book formatted in a manner prescribed by the Commissioner shall be kept current daily and made available for inspection at the site by the Commissioner and upon written request by the public.

(b) The blasting log shall be retained by the operator for three (3) years.

(c) The blasting log shall, at a minimum, contain the following information:

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

(2) Location, date and time of blast;

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

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

(5) Weather conditions;

(6) Type of material blasted;

(7) Number of holes, burden and spacing;

(8) Diameter and depth of holes;

(9) Types of explosives used;

(10) Weight of explosives used per hole;

(11) Total weight of explosives used;

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

(13) Method of firing and type of circuit;

(14) Type and length of stemming;

(15) If mats or other protections were used;

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

(17) Seismograph records and air blast shall include but not be limited to:

(A) Seismograph and air blast reading, including exact location, date, and time of reading and its distance from the blast;

(B) Name of person taking the readings;

(C) Name of person and firm analyzing the record, where analysis is necessary ;

(D) Type of instrument, sensitivity and calibration signal or certification of annual calibration.

(18) Shot location;

(19) Sketch of delay pattern to include the entire blast pattern and all decks; and

(20) Reasons and conditions for unscheduled blasts.

6.5 Blasting Procedures.

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

(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;

(3) All charged holes shall be guarded and posted against unauthorized entry; and

(4) The certified blaster shall be accompanied by at least one other person at the time of firing of the blast.

(c) Airblast Limits:

(1) Airblast shall not exceed the maximum limits listed below at the location of any dwelling, public buildings, school, church, or community or institutional building outside the permit area, except operational facilities of the mine.

Lower frequency limit of measuring system in Hz ($\pm$ 3 dB)	maximum level, in db
0.1 Hz or lower --flat response [1]	134 peak.
2 Hz or lower -- flat response	133 peak.
6 Hz or lower -- flat response	129 peak.
C-weighted--slow response [1]	105 peak dBC.

[1] Only when approved by the Commissioner

(2) If necessary to prevent damage, the Commissioner ~~shall~~ may specify lower maximum allowable airblast levels for use in the vicinity of a specific blasting operation.

(3) Monitoring. The operator shall conduct periodic monitoring to ensure compliance with the airblast standards. The Commissioner may require airblast measurement of any or all blasts and may specify the locations at which such measurements are taken.

(d) Flyrock, including blasted material, shall not be cast from the blasting site more than half way to the nearest dwelling or other occupied structure and in no case beyond the bounds of the area, or beyond the area of regulated access as required under paragraph (b)(2) of Subsection (c)5 of this section.

(e) Access to the blast area shall be controlled against the entrance of livestock or unauthorized personnel during blasting and for a period thereafter until an authorized person has reasonably determined:

(1) That no unusual circumstances exist such as imminent slides or undetonated charges, etc.; and

(2) That access to and travel in or through the area can be safely resumed.

(f) At the request of the Commissioner,the operator shall monitor air blast levels using an instrument with a linear frequency response range of 6Hz to 200 Hz or greater.

(g) Blast design.

(1) An anticipated blast design shall be submitted if blasting operations will be conducted within:

(A) 1,000 feet of any building used as a dwelling, public building, school, church, or community or institutional building outside the permit area; or

(B) 500 feet of an active or abandoned underground mine.

(2) The blast design may be presented as part of a permit application or at a time, before the blast.

(3) The blast design shall contain sketches of the drill patterns, delay periods, and decking and shall indicate the type and amount of explosives to be used, critical dimensions, and the location and general description of structures to be protected, as well as a discussion of design factors to be used, which protect the public and meet the applicable airblast, flyrock, and ground-vibration standards.

(4) The blast design shall be prepared and signed by a certified blaster.

(5) The Commissioner may require changes to the design submitted

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

(i) The operator may use the following scaled distance formulas to determine the allowable maximum weight of explosives to be detonated in any eight millisecond period without seismic monitoring:

Formula	Distance to the Nearest Structure
$W = (D/50)^2$	0 - 300 feet
$W = (D/55)^2$	300 - 5,000 feet
$W = (D/65)^2$	5,000 feet or greater

W = Weight of explosives
D = Distance to the nearest structure

(j) The scaled distance formulas need not be used if a seismograph measurement at the nearest protected structure is

recorded and maintained for every blast. The peak particle velocity in inches per second in any one of the three mutually perpendicular directions shall not exceed the following values at any protected structure:

Seismograph Measurement	Distance to the Nearest Structure
1.25	0 - 300 feet
1.0	300 - 5,000 feet
0.75	5,000 feet or greater

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

(l) The maximum allowable ground vibration shall be reduced by the Commissioner beyond the limits otherwise provided by this section, if determined necessary to provide damage protection.

6.6 Waivers

(a) The Commissioner may waive the provisions of paragraph (g) of Subsection 6.5 of this Section for 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 waiver from the owner and when appropriate the operator of said structure.

(2) The Permittee submits a blasting plan detailing the protective measures to be taken for those measures with supporting documentation.

(3) Permittee shall obtain the approval of the protective measures by the owner of the structure.

(4) Obtain approval of the Commissioner for the use of such protective measures.

(b) Protective measures taken under this subsection shall not reduce the level of protection for other structures otherwise provided for in these regulations.

6.7 Certified Blasting Personnel. Each person responsible for blasting operations shall be certified. Each certified blaster shall have proof of certification either on his person or on file at the permit area during blasting operations.

6.8 Preblast Survey.

(a) At least thirty (30) days prior to beginning of blasting operations, the operator shall inform in writing all residents or owners of manmade dwellings or structures located within one-half (1/2) mile of the proposed permit area or permit area on how to request a preblast survey. For purposes of this section, drainage structures, haulroads and access roads are not considered part of the permit area unless blasting is necessary for construction. Requirements for a preblasting survey shall be the following:

(1) Upon a written request to the Commissioner by a resident or owner of a manmade dwelling or structure that is located within one-half (1/2) mile of the permit area, the operator shall conduct a preblast survey of the dwelling or structure and submit a report of the survey to the Commissioner. If a structure is added to or renovated subsequent to a preblast survey, a survey of such additions and/or renovation shall be performed upon request of the resident or owner.

(2) The operator shall conduct the preblast survey in such a manner which will determine the condition of the dwelling or structure, and to document any preblasting damage and to document other physical factors that could reasonably be affected by the blasting. Assessments of the preblasting condition of structures such as pipes, cables, transmission lines, wells and water systems shall be based on the exterior or ground surface conditions and other readily available data. Special attention shall be given to the preblasting condition of wells and other water systems.

(3) A written report of the survey shall be prepared and signed by the person or persons approved by the Commissioner who conducted the survey. Copies of the report shall be provided to the person requesting the survey and to the Commissioner.

(4) Surveys requested more than ten (10) days before the planned initiation of blasting shall be completed before blasting operations begin.

(5) Any person who requests a survey who disagrees with the results of the survey may submit a detailed description of the specific areas of disagreement.

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38-2-7. Postmining Land Use.

7.1 General. In addition to the requirements of Section 10 of the Act, the following requirements for postmining land use shall be applicable:

(a) All areas disturbed by surface mining operations shall be restored in a timely manner to conditions that are capable of supporting those land uses which they were capable of supporting prior any mining.

(b) The premining uses of land to which the postmining land use is to be compared shall be those uses which the land previously supported where the land has not been previously mined and has been properly managed.

(c) The appropriate postmining land use for land that has been previously mined and not reclaimed shall be determined on the basis of the land use that existed prior to any mining. If the land cannot be reclaimed to the land use that existed prior to any mining, the appropriate postmining land use shall be determined on the basis of the highest and best use that can be achieved and which is compatible with surrounding undisturbed areas.

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

(e) An application for a permit shall contain a narrative description of land capability and productivity which analyzes the premining land-use description required in 22A-3-10(a)(2) of the Act.

7.2 Land Use Categories. Land use is categorized in the following groups:

(a) Heavy Industry. Manufacturing facilities, power plants, airports or similar facilities;

(b) Light Industry and Commercial Services. Office buildings, stores, parking facilities, apartment houses, motels, hotels or similar facilities;

(c) Public Services. Schools, hospitals, churches, libraries, water treatment facilities, solid waste disposal facilities, public parks and recreation facilities, major transmission lines, major pipelines, highways, underground and surface utilities and other servicing structures and appurtenances;

(d) Residential. Single and multiple-family housing (other than apartment houses) with necessary support facilities. Support facilities may include commercial services incorporated in and comprising less than five percent (5%) of the total land area of housing capacity, associated open space and minor vehicle parking and recreation facilities supporting the housing;

(e) Cropland. Land used primarily for the production of cultivated and close-growing crops for harvest alone or in association with sod crops. Land used for facilities in support of farming operations are included;

(f) Rangeland. Includes rangelands and forestlands which support a cover of herbaceous or scrubby vegetation suitable for grazing or browsing use;

(g) Hayland or pasture. Land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or cut and cured for livestock feed;

(h) Forestland. Land with at least a twenty-five percent (25%) tree canopy or land at least ten percent (10%) stocked by forest trees of any size, including land formerly having had such tree cover and that will be naturally or artificially reforested;

(i) Commercial Woodland. Where forest cover is managed for commercial production of timber products;

(j) Impoundments of water. Land used for storing water for beneficial uses such as stock ponds, irrigation, fire protection, recreation or water supply;

(k) Fish and wildlife habitat and recreation lands. Wetlands, fish and wildlife habitat, and areas managed primarily for fish and wildlife or recreation; or

(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.

7.3 Criteria for Approving Alternative Postmining Use of Land.

(a) Changing from one land use category before mining to another category after mining constitutes and alternative postmining land use. An alternative postmining land use may be approved by the Commissioner after consultation with the landowner or the land management agency having jurisdiction over state or federal lands if the following criteria are met:

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

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

(3) The proposed postmining use is not:

(A) Impractical or unreasonable;

(B) Inconsistent with applicable land use policies or plans;

(C) Will not involve unreasonable delays in implementation; or

(D) Is in violation of any applicable law.

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38-2-8. Fish and Wildlife Considerations.

8.1 Protection of Fish, Wildlife and Related Environmental Values.

(a) The operator shall, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and shall achieve enhancement of such resources where practicable.

(b) No surface mining activity shall be conducted which will jeopardize the continued existence of endangered or threatened species or which will result in the destruction or adverse modification of designated critical habitats of such species in violation of the Endangered Species Act (16 U.S.C. 1531 et seq.). The operator shall promptly report to the Commissioner any endangered or threatened species within the permit area of which the operator becomes aware. Upon notification, the Commissioner shall consult with appropriate State and Federal fish and wildlife agencies and, after consultation, shall identify whether, and under what conditions, the operator may proceed.

(c) No surface mining activity shall be conducted in a manner which would result in the unlawful taking of a bald or golden eagle, its nest, or any of its eggs. The operator shall promptly report to the Commissioner any golden or bald eagle nest within the permit area of which the operator becomes aware. Upon notification, the Commissioner shall consult with the U. S. Fish and Wildlife Service and also, where appropriate, the State fish and wildlife agency and, after consultation, shall identify whether, and under what conditions the operator may proceed.

(d) Nothing in this chapter shall authorize the taking of an endangered or threatened species or a bald or golden eagle, its nest, or any of its eggs in violation, of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 et seq., or the Bald Eagle Protection Act, as amended, 16 U.S.C. 668 et seq.

(e) Each operator shall, to the extent possible using the best technology currently available:

(1) Ensure that electric powerlines and other transmission facilities used for, or incidental to, surface mining activities on the permit area are designed and constructed to minimize electrocution hazards to raptors.

(2) Locate and operate haul and access roads so as to avoid or minimize impacts on important fish and wildlife species protected by State or Federal law; and

(3) Design fences, overland conveyors, and other potential barriers to permit passage for large mammals.

8.2 Habitat Development: ~~Enhancement~~.

(a) The operator shall avoid disturbances to, enhance where practicable, restore, or replace, wetlands, and riparian vegetation along rivers and streams and bordering ponds and lakes. Surface mining activities shall avoid disturbances to, enhance where practicable, or restore, habitats of unusually high value for fish and wildlife.

(b) Where fish and wildlife habitat is to be a postmining land use, the plant species to be used on reclaimed areas shall be selected on the basis of the following criteria:

(1) Their proven nutritional value for fish or wildlife.

(2) Their use as cover for fish or wildlife.

(3) Their ability to support and enhance fish or wildlife habitat after the release of performance bonds. The selected plants shall be grouped and distributed in a manner which optimizes edge effect, cover, and other benefits to fish and wildlife.

(c) Where cropland is to be the postmining land use, and where appropriate for wildlife and corp-management practices, the operator shall intersperse the fields with trees, hedges, or fence rows throughout the harvested area to break up large blocks of monoculture and to diversify habitat types for bird and other animals.

(d) Where residential, public service, or industrial uses are to be the postmining land use, and where consistent with the approved postmining land use, the operator shall intersperse reclaimed lands with greenbelts utilizing species of grass, shrubs, and trees useful as food and cover for wildlife.

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38-2-9. Revegetation.

9.1 General Requirements.

(a) Each surface mine operator shall establish on all regraded areas and all other disturbed areas a diverse, effective and permanent vegetation cover of the same seasonal variety native to the area of disturbed land, or introduced species that are compatible with the approved postmining land use.

(b) The established vegetation cover shall be capable of stabilizing the soil from erosion.

(c) The established vegetation cover shall be capable of regeneration and plant succession.

(d) Revegetation efforts will be kept concurrent with the mining operation as mining and backfilling progresses and shall be carried out in a manner that encourages a prompt vegetative cover and rapid recovery of productivity levels compatible with the approved postmining land use.

(e) A temporary cover shall be established as contemporaneously as practicable with backfilling and grading until a permanent cover can be established. At a minimum, 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.

9.2. Revegetation Plan. A complete revegetation plan shall be made a part of each permit application. The revegetation plan shall be developed in a manner which is compatible with the following requirements:

(a) Plant species and seed mixtures that will give a quick, permanent cover and enrich the soil will be given priority. Plant species and seed mixtures shall be considered of the same seasonal variety when they consist of a mixture of species of equal or superior utility as compared with the seasonal utility of naturally-occurring vegetation. All revegetation mixtures must include at least one herbaceous legume species.

(b) Species composition shall be compatible with the plant and animal species of the region and the approved post mining land use.

(c) Species compositions shall comply with state and federal seed, poisonous and noxious plant, and introduced species, laws and rules and regulations.

(d) If both the premining and postmining land uses are cropland, planting of the crops normally grown will meet the requirements of paragraph (a) of this subsection.

(e) The revegetation plan shall contain a statement asserting that rills and gullies which form in areas that have been regraded and topsoiled and which disrupt the approved postmining land use, interfere with the reestablishment of the vegetation cover, or interference with, cause or contribute to a violation of applicable water quality standards will be filled, regraded, stabilized, topsoiled, and reseeded or replanted.

(f) The revegetation plan shall specify that the operator will rapidly establish temporary vegetation cover on disturbed and regraded areas around sediment control structures, haulage ways, stockpiles, storage areas, and other areas where excessive erosion is likely to occur. Immediate seeding of approved annuals and biennials on such areas shall be considered as a means for achieving temporary vegetative cover only.

(g) A planting plan shall be made a part of the revegetation plan and shall contain the following:

(1) A prediction of the minesoil character based on overburden analysis, soil analysis, and other available information;

(2) The proposed treatment to neutralize acidity;

(3) The method of mechanical seed bed preparation;

(4) The application rates and analysis of fertilization;

(5) The application rates and types of mulch;

(6) The application rates and species of perennial vegetation including herbaceous and woody plants in accordance with the Handbook or other appropriate sources;

(7) The areas to be planted or seeded to trees and shrubs;

(8) The land use objective; and

(9) A maintenance schedule.

(h) Alternative species of trees, shrubs, grasses, legumes, or vines may be substituted for native species if approved by the Commissioner. Use of substitute species may be approved on the basis of the following:

(1) The species are compatible with the plant and animal species of the region and are necessary to and compatible with achieving the approved postmining land use; and

(2) The species meet the requirements of applicable state and federal seed, poisonous and noxious plant, or introduced species laws and regulations.

(i) The vegetation plan shall contain a plan for soil treatment and amendments which meet the following minimum standards:

(1) 600 lbs/ac of 10-20-10 or 10-20-20 fertilizer. Alternative rates and fertilizer analysis based on soil analysis performed by a qualified soils laboratory may be substituted.

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

(3) Mulch Specifications: Mulch shall be used on all disturbed areas. Approved materials and minimum rates to be applied are as follows:

Material	Rate/Acre
Straw or hay	1 1/2-2 tons materials may be anchored with asphalt emulsion or other techniques approved by the Commissioner.
Wood Fiber or Wood Cellulose	1,000 lbs.
Shredded Bark	50 cubic yards

Adhesives or tackifiers may be used with wood fiber or wood cellulose at the rates indicated in the following table:

Minimum Rate/Acre for Wood Fiber or Wood Cellulose

Material	Rate/Acre	
Genaqua 743	25 gallons	500 lbs.
Curasol AK or HA	25 gallons	500 lbs.
Aerospray 70	25 gallons	500 lbs.

(j) In implementing the revegetation plan, the operator shall take into consideration the character of the minesoil. Factors to be considered are the following:

(1) Fertility

(2) Stoniness

(3) Texture

(4) Steepness of slope

(5) Standard field and laboratory overburden analysis

(6) Premining overburden analysis

(k) Minesoils which have a demonstrated history of acidity or other chemical parameters which may limit vegetative success shall be analyzed by a qualified soils laboratory. The results of such analysis shall be made a part of the final planting plan.

9.3. Standards for Evaluating Vegetative Cover.

(a) The planting plan may be amended or modified prior to implementation to reflect the results of analyses of mine soils and to make minor adjustments to application rates and species composition. Any amendments or modifications which reflect major changes in seeding or planting rates and species composition shall be submitted as a permit revision.

(b) Final Planting Report. A final planting plan report shall be submitted to the Commissioner within sixty (60) days after Phase 1 bond reductions. The report shall contain the actual acreage planted, application rates of soil amendments, seed and seedlings mixtures and rates.

(c) Time for Inspection. Prior to the recognized spring and fall planting seasons, the operator shall review all areas which were seeded and/or planted during previous planting seasons. The operator shall then cause those areas deficient in vegetative cover to be retreated (graded, seeded, planted, mulched, limed, etc.) to establish the required level of vegetation success.

(d) Not less than two (2) years following the last date of augmented seeding, the Commissioner shall conduct a vegetative inspection to determine that applicable standards for vegetative success have been met. In evaluating vegetative success, the Commissioner shall use a statistically valid sampling technique with a ninety (90) percent statistical confidence interval from the Handbook. An inspection report shall be filed for each inspection and when the standard is met, the Commissioner shall execute a Phase II bond release.

(e) After five (5) growing seasons following the last augmented seeding, planting, fertilization, revegetation, or other work, as provided in Sections 12 and 14 of these regulations, the operator may request a final inspection and final bond release. Upon receipt of such request, the Commissioner shall conduct a final vegetative evaluation. A final report shall be filed and if the applicable standards have been met, the Commissioner shall release the remainder of the bond.

(f) Where the post mining land use requires legumes and perennial grasses, the operator shall achieve at least a ninety (90) percent ground cover. Substandard areas shall not exceed one-fourth (1/4) acre in size nor total more than ten (10) percent of the area seeded. Exceptions to this standard may be authorized by the Commissioner based on the following:

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

(2) For areas to be used for cropland, the success of crop production from the mined area shall be equal to or greater than that of the approved standard for the crop being grown over last two (2) consecutive growing seasons of the five growing season liability period. The applicable five growing season period of responsibility for revegetation shall commence at the date of initial planting of the crop being grown.

(g) On areas to be developed for forestland and/or wildlife use, success of vegetation shall be determined on the basis of tree and shrub survival and ground cover. Minimum standards for woody plants shall be seventy percent (70%) ground cover of legumes and perennial grasses, and four hundred fifty (450) trees (including volunteer tree species) and/or planted shrubs per acre, comprising a satisfactory vegetation ground cover sufficient to control erosion. Other standards more appropriate for site specific conditions and land use which require an equal or better ground cover may be approved by the Commissioner based on consideration with appropriate state agencies.

Substandard areas shall not exceed one-fourth (1/4) acre in size nor total more than twenty percent (20%) of the area seeded or planted. Provided, that where a wildlife planting plan has been approved by a professional wildlife biologist and proposes a stocking rate of less than four hundred fifty (450) trees or shrubs per acre the standard for grasses and legumes shall meet those standards contained in paragraph (f) of Subsection 9.3 of this section.

(h) Forest resource conservation standards for reforestation operations are as follows:

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

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

(3) A request for bond release shall be approved by the Commissioner if the tree survival is equal to or greater than four hundred fifty (450) trees per acre and there is seventy percent (70%) herbaceous cover.

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38-2-10 Prime Farmlands.

10.1. Identification of Prime Farmlands.

(a) All or any part of a proposed permit area may be designated by the Commissioner as prime farmland on the basis of soil surveys and other required information submitted as part of a permit application. For the purposes of this section, said surveys shall mean surveys developed in accordance with standards of the National Cooperative Soil Survey which includes the procedures set forth in the U. S. Department of Agriculture Handbook 436 (Soil Taxonomy) and 18 (Soil Survey).

(b) The requirements for said surveys may be waived by the Commissioner if the applicant can demonstrate that a basis exists for making a negative determination of prime farmland.

10.2. Negative Determination of Prime Farmland.

(a) Land within the proposed permit area shall not be considered as prime farmland where the applicant can demonstrate one or more of the following situations:

(1) No land within the proposed permit boundaries have been historically used for cropland. For purposes of prime farmland determinations, historically used for cropland means:

(A) Lands that have been used for cropland for any five (5) years or more out of the ten (10) years immediately preceding the acquisition, including purchase, lease, or option, of the land for the purpose of conducting or allowing through resale, lease or option the conduct of surface coal mining and reclamation operations;

(B) Lands that the Commissioner determines, on the basis of additional cropland history of the surrounding lands and the lands under consideration, that the permit area is clearly cropland but falls outside the specific five (5) years in ten (10) criterion, in which case the regulations for prime farmland may be applied to include more years to cropland history only to increase the prime farmland acreage to be preserved: or

(C) Lands that would likely have been used as cropland for any five (5) out of the last ten (10) years, immediately preceding such acquisition but for the same fact of ownership or control of the land unrelated to the productivity of the land.

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

(3) Other factors exist, such as a very rocky surface, or the land is frequently flooded during the spring or fall season more often than once in two (2) years, which clearly places all land within the area outside the purview of prime farmland; or

(4) A written determination based on soil surveys and other scientific findings made by a qualified person other than the applicant that land within the proposed mining area does not meet the requirements for prime farmlands. The soil survey shall be of the detail used by the U. S. Soil Conservation Service for operational conservation planning and shall contain at a minimum a description of soil mapping units, pH, and soil densities.

10.3. Plan for Restoration of Prime Farmland.

(a) The applicant shall propose a plan for the mining and restoration of any prime farmland within the proposed permit area. This plan shall be made a part of the permit application and shall be the basis for determining the technological capability of the applicant to restore prime farmlands. The plan shall include:

(1) A soil survey of the original undisturbed soil profile showing the depth and thickness of each of the soil horizons that collectively constitute the root zone. The soil survey shall be of the detail used by the U. S. Soil Conservation Service for operational conservation planning and shall contain, at a minimum, a description of soil mapping units, pH, soil density, and the depth and thickness of each soil horizon;

(2) The proposed types of equipment and methodology to be used for removal, storage, and replacement of the soil in accordance with Subsection 10.4 of this section;

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

(4) The use of topsoil substitutes may be approved by the Commissioner on the basis of scientific information provided by the applicant that the substitute material is suitable for the proposed postmining land use. Such information shall be made a part of the permit application;

(5) Plans for seeding and/or planting the regraded area and the conservation practices proposed to control erosion and sedimentation during the first twelve (12) months after regrading is completed; and

(6) Scientific data from comparable areas that demonstrate that the applicant will achieve, within a reasonable period of time, equivalent or higher levels of yield after mining as existed before mining.

10.4. Special Requirements.

(a) For all proposed mining operations on prime farmlands, the applicant shall meet the following special requirements:

(1) All soil horizons to be used in the reconstruction of the soil shall be removed and stockpiled before drilling, blasting, or mining. Where removal of soil horizons result in erosion that may cause air and water pollution, the application shall specify methods or treatment to control erosion of exposed overburden. The application shall describe procedures to be used to:

(A) Remove separately the entire A horizon or other suitable soil materials which will be used to create a final soil having a greater productive capacity than that which existed prior to mining. Such operations will be carried out in a manner that prevents mixing or contamination with other material before replacement;

(B) Remove separately the B horizon of the natural soil or a combination of B horizon and underlying C horizon or other suitable soil material that will create a reconstructed root zone of greater productive capacity than that which existed prior to mining. Such operations shall be carried out in a manner that prevents mixing or contamination with other material; and

(C) Remove separately the underlying C horizons or other strata, or a combination of such horizons or other strata to be used instead of the B horizon that are of greater thickness and that can be shown to be more favorable for plant growth than the B horizon, and that when replaced will create in the reconstructed soil a final root zone of greater depth and quality to that which existed in the natural soil.

(b) If stockpiling of soil horizons is necessary, the A horizon and B horizon shall be stored separately from each other.

The stockpiles shall be sited within the permit area at a suitable location where they will not be disturbed or exposed to excessive erosion by water or wind before the stockpiled horizons can be redistributed on the regraded surface. Stockpiles in place for more than thirty (30) days shall be protected from erosion.

(c) Soil Replacement.

(1) Soil reconstruction specifications established by the U. S. Soil Conservation Service shall be based upon the standards of the National Cooperative Soil Survey and shall include, as a minimum, physical and chemical characteristics of reconstructed soils and soil descriptions containing soil-horizon depths, soil densities, soil pH, and other specifications such that constructed soils will have the capability of achieving levels of yield equal to, or higher than, those of nonmined prime farmland in the surrounding area.

(2) The minimum depth of soil and substitute soil material to be reconstructed shall be forty-eight (48) inches, or a lesser depth equal to the depth to a subsurface horizon in the natural soil that inhibits or prevents root penetration , or a greater depth if determined necessary to restore the original soil productivity capacity. Soil horizons shall be considered as inhibiting or preventing root penetration if their physical or chemical properties or water-supplying capacities cause them to restrict or prevent penetration by roots of plants common to the vicinity of the permit area and if these properties or capacities have little or no beneficial effect on soil productive capacity.

(3) The operator shall replace and regrade the soil horizons or other root-zone material with proper compaction and uniform depth.

(4) The operator shall replace the B horizon, C horizon, or other approved substitute material to the thickness needed to meet the requirements of paragraph (b) (2) of this subsection.

(5) The operator shall replace the topsoil or other approved substitute materials as the final surface soil layer. This surface soil layer shall equal or exceed the thickness of the original surface soil layer, as determined by the soil survey.

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

10.5. Revegetation. Each person who conducts surface coal mining and reclamation operations on prime farmland shall meet the following revegetation requirements during reclamation:

(a) Following soil replacement, the operator shall establish a vegetative cover of the type and in the manner set forth in the approved permit. Seeding and/or planting shall be accomplished during the next period for favorable planting conditions. Suitable mulch and other soil stabilizing practices shall be used on all areas; and

(b) Within the time period specified in the permit, but not more than ten (10) years after completion of backfilling and rough grading, any portion of the permit area which is prime farmland must be used for crops. The crops may be grown in rotation with hay or pasture crops. The Commissioner may approve the use of perennial plants for hay where this is a common long term use of prime farmland soils in the surrounding area.

10.6 Revegetation and Restoration of Soil Productivity.

(a) Following prime farmland soil replacement, the soil surface shall be stabilized with a vegetative cover or other means that effectively controls soil loss by wind and water erosion.

(b) Prime farmland soil productivity shall be restored in accordance with the following provisions:

(1) Measurement of soil productivity shall be initiated within ten (10) years after completion of soil replacement.

(2) Soil productivity shall be measured on a representative sample or on all of the mined and reclaimed prime farmland area using the reference crop determined under paragraph (b)(6) of this subsection. A statistically valid sampling technique at a ninety (90) percent or greater statistical confidence level shall be used as set forth in the Handbook and in consultation with the U. S. Soil Conservation Service.

(3) The measurement period for determining average annual crop production (yield) shall be a minimum of three (3) crop years prior to release of the performance bond.

(4) The level of management applied during the measurement period shall be the same as the level of management used on nonmined prime farmland in the surrounding area.

(5) Restoration of soil productivity shall be considered achieved when the average yield during the measurement period equals or exceeds the average yield of the reference crop established for the same period for nonmined soils of the same or similar texture or slope phase of the soil series in the surrounding area under equivalent management practices.

(6) The reference crop on which restoration of soil productivity is proven shall be selected from the crops most commonly produced on the surrounding prime farmland. Where row crops are the dominant crops grown on prime farmland in the area, the row crop requiring the greatest rooting depth shall be chosen as one of the reference crops.

(7) Reference crop yields for a given crop season are to be determined from:

(A) The current yield records of representative local farms in the surrounding area, with concurrence by the U. S. Soil Conservation Service; or

(B) The average county yields recognized by the U. S. Department of Agriculture, which have been adjusted by the U. S. Soil Conservation Service for local yield variation within the county that is associated with differences between nonmined prime farmland soil and all other soils that produce the reference crop.

(8) Under either procedure in paragraph (b)(7) of this subsection, the average reference crop yield may be adjusted, with the concurrence of the U. S. Soil Conservation Service, for:

(A) Disease, pest, and weather-induced seasonal variations; or

(B) Differences in specific management practices where the overall management practices of the crops being compared are equivalent.

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Section 11

38-2-11 Insurance and Bonding.

11.1 Insurance.

(a) The applicant shall provide liability insurance for active surface mining operations in the following minimum amounts:

(1) For bodily injury $300,000 for each occurrence and $500,000 aggregate.

(2) For property damage $300,000 for each occurrence and $500,000 aggregate with no exclusions for landslides or water loss.

(b) A statement shall be affixed to each certificate of insurance affirming that the insurer will promptly notify the Commissioner of any substantive change in policy including cancellations, termination, or failure to renew.

(c) Insurance coverage for blasting damage may be terminated prior to final bond release but not before blasting activities have ceased.

11.2 Bonding. Prior to issuance of a permit and prior to initiation of surface mining operations, the operator shall provide a performance bond in accordance with Section 11 of the Act and in accordance with these rules and regulations.

11.3 Surety and Operator Liability - Loss of Bond.

(a) The surety shall be subject to the following conditions:

(1) The surety will give prompt notice to the permittee and the Commissioner 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 Commissioner; 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.

(b) The Commissioner shall issue a notice of violation against any operator who is without bond coverage. The notice shall specify a reasonable period to replace bond coverage not to exceed ninety (90) days. During this period the Commissioner shall conduct weekly inspections to ensure continuing compliance with permit requirements, the regulations and the Act. Such notice of violation, if abated within the period allowed, shall not be counted as a notice of violation for purposes of civil or criminal penalties determining a "pattern of willful violations" and need not be reported as a past violation in permit applications. If such a notice of violation is not abated in accordance with the schedule, a cessation order shall be issued, at which time the operator shall initiate and complete as contemporaneously as possible total reclamation of the area.

11.4 Collateral bonds.

(a) Except for letters of credit,collateral bonds shall be subject to the following conditions:

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

(2) The Commissioner shall value collateral at their current market value, not face value;

(3) The Commissioner shall require that certificates of deposit be assigned to the Department of Energy, in writing, and reflect this assignment upon the books of the bank issuing such certificates;

(4) The Commissioner shall not accept an individual certificate for a denomination in excess of maximum insurable amount as determined by F.D.I.C. and F.S.L.I.C.;

(5) The Commissioner shall require the banks issuing these certificates to waive all rights of setoff or liens which it has or might have against those certificates;

(6) The Commissioner shall only accept certificates of deposit in a bank in this state;

(7) The Commissioner shall require the applicant to deposit sufficient amounts of certificates of deposit, to assure

that he will be able to liquidate those certificates prior to maturity, upon forfeiture, for the amount of the bond required;

(8) Real property posted as a collateral bond shall meet the following conditions:

(A) The applicant shall grant the Department of Energy a first mortgage, first deed of trust, or perfected first-lien security interest in real property with a right to sell or otherwise dispose of the property in the event of forfeiture.

(B) In order for the Commissioner to evaluate the adequacy of the real property offered to satisfy collateral requirements, the applicant shall submit a schedule of the real property which shall be mortgaged or pledged to secure the obligations under the indemnity agreement. The list shall include:

(i) A description of the property;

(ii) The fair market value as determined by an independent appraisal conducted by a certified appraiser; and

(iii) Proof of possession and title to the real property.

(C) The property may include land which is part of the permit area; however, land pledged as collateral for a bond under this section shall not be disturbed under any permit while it is serving as security.

(9) Persons with an interest in collateral posted as a bond, and who desire notification of actions pursuant to the bond, shall request the notification in writing to the Commissioner at the time collateral is offered.

(b) Letters of credit shall be subject to the following conditions:

(1) The letter may only be issued by a bank organized or authorized to do business in the State of West Virginia;

(2) Letters of credit shall be irrevocable during their terms. The Commissioner may approve the use of letters of credit as security in accordance with a schedule approved with the permit. Any bank issuing a letter of credit for the purposes of this paragraph shall notify the Commissioner in writing at least ninety (90) days prior to the maturity date of such letter

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

(3) The letter must be payable to the Department of Energy in part or in full upon demand and receipt from the Commissioner of a notice of forfeiture;

(4) The Commissioner shall not accept a letter of credit in excess of ten percent (10%) of the bank's capital surplus account as shown on a balance sheet certified by a Certified Public Accountant;

(5) The Commissioner shall not accept letters of credit from a bank for any person, on all permits held by that person, in excess of three times the company's maximum single obligation as provided by State law;

(6) The Commissioner shall provide in the indemnity agreement that the amount shall be confessed to judgment upon forfeiture; and

(7) The bond shall provide that:

(A) The bank will give prompt notice to the permittee and the Commissioner of any notice received or action filed alleging the insolvency or bankruptcy of the bank, or alleging any violations of regulatory requirements which could result in suspension or revocation of the bank's charter of license to do business;

(B) In the event the bank becomes unable to fulfill its obligations under the letter of credit for any reason, notice shall be given immediately to the permittee and the Commissioner; and

(C) Upon the incapacity of a bank by reason of bankruptcy, insolvency or suspension or revocation of its charter or license, the permittee shall be deemed to be without bond coverage in violation of section 11 of the Act. The Commissioner shall issue a notice of violation against any operator who is without bond coverage. The notice shall specify a reasonable period to replace bond coverage, not to exceed ninety (90) days. During this period the Commissioner shall conduct weekly inspections to ensure continuing compliance with other permit

requirements, the regulatory program and the Code of West Virginia. Such notice of violation, if abated within the period allowed, shall not be counted as a notice of violation for purposes of determining a "pattern of willful violations" and need not be reported as a past violation in permit applications. If such a notice of violation is not abated in accordance with the schedule, a cessation order shall be issued, at which time the operator shall begin and complete, as contemporaneously as possible, total reclamation of the area.

(c) The estimated bond value of all collateral posted as bond assurance under paragraph (a), (b), and (c) of this subsection shall be subject to a margin bond value to market value ratio as determined by the Commissioner. This margin shall reflect legal and liquidation fees, as well as value depreciation, marketability and fluctuations which might affect the net cash available to the Commissioner in performing reclamation. The bond value of collateral may be evaluated at any time, but shall be evaluated as part of permit renewal. In no case shall the bond value exceed the market value.

11.5 Escrow Bonding.

(a) The Commissioner may authorize the operator to supplement a bonding program through the establishment of an escrow account deposited in one or more federally insured accounts payable on demand only to the Commissioner or deposited with the Commissioner directly. Contributions to the account may be based on acres affected or tons of coal produced or any other rate approved by the Commissioner. In all cases, the total bond including the escrow amount, as determined by the Commissioner in the bonding schedule, shall not be less than the amount required under Section 11 of the Act.

(b) Escrow funds deposited in federally insured accounts shall not exceed the maximum insured amount under applicable Federal insurance programs such as by F.D.I.C. or F.S.L.I.C.

(c) Interest paid on an escrow account shall be retained in the escrow account and applied to the bond value of the escrow account unless the Commissioner has approved that the interest be paid to the operator. In order to qualify for interest payment, the operator shall request such action in writing during the permit application process.

(d) Certificates of deposit may be substituted for escrow accounts upon approval of the Commissioner.

11.6 Self-Bonding.

(a) Definitions. For the purposes of this 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 (1) year or within the normal operating cycle of the business.

(2) Current liabilities means obligations which are reasonably expected to be paid or liquidated within one (1) year or within the normal operating cycle of the business.

(3) Fixed assets means plants and equipment, but does not include land or coal in place.

(4) Liabilities means obligations to transfer assets or provide services to other entities in the future as a result of past transactions.

(5) Net worth means total assets minus total liabilities and is equivalent to owners equity.

(6) Parent corporation means corporation which owns or controls the applicant.

(7) Tangible net worth means net worth minus intangibles such as goodwill and rights to patents or royalties.

(b) The Commissioner may accept a self-bond from an applicant for a permit if all of the following conditions are met by the applicant or its parent corporation guarantor:

(1) The applicant designates a suitable agent to receive service of process in the State where the proposed surface coal mining operation is to be conducted.

(2) The applicant has been in continuous operation as a business entity for a period of not less than five (5) years. Continuous operation shall mean that business was conducted over a period of five (5) years immediately preceding the time of application.

(A) The Commissioner may allow a joint venture or syndicate with less than five years of continuous operation to qualify under this requirement, if each member of the joint venture or syndicate has been in continuous operation for at

least five (5) years immediately preceding the time of application.

(B) When calculating the period of continuous operation, the Commissioner may exclude past periods of interruption to the operation of the business entity that were beyond the applicant's control and that do not affect the applicant's likelihood 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:

(A) The applicant has a current rating for its most recent bond issuance of "A" or higher as issued by either Moody's Investor Service or Standard and Poor's Corporation;

(B) The applicant has a tangible net worth of at least ten (10) million, a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets or current liabilities of 1.2 times or greater; or

(C) The applicant's fixed assets in the United State total at least twenty (20) million, and the applicant has a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater.

(4) The applicant submits:

(A) Financial statements for the most recently completed fiscal year accompanied by a report prepared by an independent certified public accountant in conformity with generally accepted accounting principles and containing the accountant's audit opinion or review opinion of the financial statements with no adverse opinion;

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

(C) Additional unaudited information as requested by the Commissioner.

(c) The Commissioner may accept a written guarantee for an applicant's self-bond from a parent corporation guarantor, if the guarantor meets the conditions of paragraphs (b)(1) through (b)(4) of this subsection as if it were the applicant. Such a

written guarantee shall be referred to as a "corporate guarantee". The terms of the corporate guarantee shall provide for the following:

(1) If the applicant fails to complete the reclamation plan, the guarantor shall do so or the guarantor shall be liable under the indemnity agreement to provide funds to the Commissioner sufficient to complete the reclamation plan, but not to exceed the bond amount.

(2) The corporate guarantee shall remain in force unless the guarantor sends notice of cancellation by certified mail to the applicant and to the Commissioner at least ninety (90) days in advance of the cancellation date, and the Commissioner accepts the cancellation.

(3) The cancellation may be accepted by the Commissioner if the applicant obtains suitable replacement bond before the cancellation date or if the lands for which the self-bond, or portion thereof, was accepted have not been disturbed.

(d) For the Commissioner to accept an applicant's self-bond, the total amount of the outstanding and proposed self-bonds of the applicant for surface coal mining and reclamation operations shall not exceed twenty-five (25) percent of the applicant's tangible net worth in the United States. For the Commissioner to accept a corporate guarantee, the total amount of the parent corporation guarantor's present and proposed self-bonds and guaranteed self-bonds for surface coal mining and reclamation operations shall not exceed twenty-five (25) percent of the guarantor's tangible net worth in the United States.

(e) If the Commissioner accepts an applicant's self-bond, an indemnity agreement shall be submitted subject to the following requirements:

(1) The indemnity agreement shall be executed by all persons and parties who are to be bound by it, including the parent corporation guarantor, and shall bind each jointly and severally.

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

(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 Section 17(b) of the Act, the applicant or parent corporation guarantor shall be required to complete the approved reclamation plan for the lands in default or to pay to the Commissioner an amount necessary to complete the approved reclamation plan, not to exceed the bond amount. If permitted under State law, the indemnity agreement when under forfeiture shall operate as a judgment against those parties liable under the indemnity agreement.

(f) The Commissioner may require self-bonded applicants and parent guarantors to submit an update of the information required under paragraphs (b)(3) and (b)(4) of this subsection within ninety (90) days after the close of each fiscal year following the issuance of the self-bond or corporate guarantee.

(g) If at any time during the period when a self-bond is posted, the financial conditions of the applicant or the parent corporation guarantor change so that the criteria of paragraphs (b)(3) and (d) of this subsection are not satisfied, the permittee shall notify the Commissioner immediately and shall within ninety (90) days post an alternate form of bond in the same amount as the self-bond.

11.7 Combined Surety/Escrow Bonding.

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

(1) A surety bond payable to the Commissioner is posted in the amount determined under Section 11 of the Act for reclamation of each successive increment; and

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

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

(1) Surety bond:

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

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

(C) The surety bond may be reduced in amount, but the liability remaining shall depend on the escrow-deposit rate which shall be subject to Subsections 11.4 and 11.5 of this section.

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

(E) Surety bond coverage may be released by the Commissioner without applying the bond-release criteria of the Act and Section 12 of these regulations, at any time during the bond term, provided provisions of paragraph (b)(2)(E) of this subsection are met or are in accordance with the provisions of bond replacement under Subsection 11.4 of this section.

(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 Commissioner. For the purposes of this section, the development of the escrow account shall be based on a production basis in an amount not less than that required to make the escrow account equal to or greater than the bond requirement within the term of the surety bond as agreed on jointly by the operator, the surety and the Commissioner. Deposits to the escrow account by the operator shall be made monthly and so reported to the Commissioner. Failure to make deposits on schedule shall be just cause for action by the Commissioner.

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

(C) Provisions of the escrow account shall be in accordance with Subsection 11.4 of this section.

(D) The escrow account shall be subject to bond-forfeiture.

(E) The escrow-account balance shall equal the initial bond amount, plus any adjustments required by paragraph

(b)(2)(A), of this subsection one hundred twenty (120) days prior to surety-bond termination, unless the total bond amount required has been previously reduced through the bond-release procedures.

(c) Provisions of the Act and Section 12 of these regulations may be applied to both surety and escrow-bond coverage during the bond term.

(d) The surety-escrow combination may be repeated successively or amended during the term by replacing the escrow account with a surety bond, and reestablishing the escrow terms and deposit rate, subject to Commissioner approval.

11.8 Incremental Bonding.

(a) When the applicant elects to bond in increments as specified in 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 permit application and shall specify the proportion of the total bond amount required for the term of the permit which will be filed prior to commencing operations on each incremental area. The scheduled amount of each performance bond increment shall be filed in the sequence approved in the permit, and shall be filed with the Commissioner at least thirty (30) days prior to the commencement of surface coal mining and reclamation operations in the next incremental area; and

(3) The amount, duration, form, conditions and terms of the performance bond shall conform to Subsections 11.3 and 11.4 of this section.

11.9 Period of Liability. The Commissioner may approve selective husbandry practices, excluding augmented seeding, fertilization or irrigation, without extending the period of bond liability if the permittee can demonstrate that discontinuance of such measures after the liability period expires will not reduce the probability of permanent revegetation success.

Approved practices may include pest and vermin control, pruning and repair of any rills and gullies and any reseeding and/or transplanting specifically necessitated by such actions, but shall be normal conservation practices within the region for unmined lands having land uses similar to the approved postmining land use of the area covered by the bond.

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38-2-12. Replacement, Release, and Forfeiture of Bonds.

12.1 Replacement of Bonds.

(a) The Commissioner may approve the replacement of existing bonds with other equivalent bonds.

(b) Existing performance bonds shall not be released until the permittee has submitted, and the Commissioner has approved, acceptable replacement performance bonds. Replacement of a performance bond pursuant to this section shall not constitute a release of bond.

12.2 Requirement to Release Performance Bonds.

(a) In addition to the requirements of Section 23 of the Act, the following bond release procedures shall be observed:

(1) The permittee may file an application with the Commissioner for the release of all or part of a performance bond. Applications may be filed only at times or during seasons established by the Commissioner which allow proper evaluation of the completed reclamation operations.

(2) A certification of publication of the advertisement shall be made a part of any bond release application file. In addition to the requirement of section 23 of the Act, the advertisement shall indicate the address of the nearest regional office of the Department of Energy to which written comments~~, objections,~~ or requests for public hearings and informal conferences on the specific bond release may be submitted. In addition, as part of any bond release application, the applicant shall submit copies of letters which have been sent to adjoining property owners, local governmental bodies, planning agencies, sewage and water treatment authorities, and water companies in the locality in which the surface coal mining and reclamation operation took place, notifying them of the intention to seek release from the bond.

(b) Inspection by regulatory authority.

(1) Upon receipt of the bond release application, the Commissioner shall, within thirty (30) days, or as soon thereafter as weather conditions permit, conduct an inspection and evaluation of the reclamation work involved. The surface owner, agent, or lessee shall be given notice of such inspection and may participate in making the bond release inspection.

(2) Within sixty (60) days from the filing of the bond release application, if no public hearing is held, or within thirty (30) days after a public hearing or informal conference has been held, the Commissioner shall notify in writing the permittee, the surety or other persons with an interest in bond collateral who have requested notification, and the persons who either filed objections in writing or objectors who were a party to the hearing proceedings, if any, of his decision to release or not to release all or part of the performance bond.

(c) The Commissioner may release all or part of the bond if reclamation covered by the bond or portion thereof has been accomplished in accordance with the following schedules:

(1) After the operator completes the back-filling, regrading (which may include the replacement of topsoil) and drainage control of a bonded area in accordance with the Act, these rules and regulations, and the terms and conditions of the permit, Phase I reclamation shall be considered complete, and sixty (60) percent of the bond or collateral for the applicable area may be released.

(2) After revegetation has been established on the regraded mined lands in accordance with the approved reclamation plan, Phase II reclamation shall be considered complete and an additional twenty-five (25) percent of the original bond amount may be released, provided that:

(A) Not less than two years after the last augmented seeding, standards for revegetation success have been met.

(B) The lands are not contributing suspended solids to stream flow or runoff outside the permit area in excess of the requirements of the Act, these rules and regulations, and the terms and conditions of the permit.

(C) The quality of untreated water discharge is equal to, or better than, the premining water quality discharged from the permit area.

(D) With respect to prime farmland, soil productivity has been returned to the level of yield as required by the Act, these rules and regulations, and the terms and conditions of the permit.

(E) The provisions of a plan approved by the Commissioner for the sound future management of any permanent impoundment by the permittee or landowner have been implemented.

(F) The amount of the remaining bond shall be sufficient to cover the estimated cost of reestablishing vegetation and drainage control structures.

(3) Upon successful completion of the reclamation requirements of the Act, these rules and regulations, and the terms and conditions of the permit, Phase III reclamation shall be considered completed and the Commissioner may release the remainder of the bond.

(d) If the Commissioner disapproves the application for release of the bond or portion thereof, he shall notify the permittee, the surety, and any person with an interest in collateral, in writing, stating the reasons for disapproval and recommending corrective actions necessary to secure the release and allowing an opportunity for a public hearing.

(e) Any person with a valid legal interest which might be adversely affected by release of the bond, or the responsible officer or head of any Federal, State, or local governmental agency which has jurisdiction by law or special expertise with respect to any environmental, social, or economic impact involved in the operation or which is authorized to develop and enforce environmental standards with respect to such operations, shall have the right to file written objections to the proposed release of bond with the Commission within thirty (30) days after the last publication of the notice required by paragraph (a) (2), subsection 12.2 of this section. If written objections are filed and a hearing is requested, the Commissioner shall inform all the interested parties of the time and place of the hearing, and shall hold a public hearing, or informal conference, within thirty (30) days after receipt of the request for the hearing. The date, time, and location of the public hearing, or informal conference, shall be advertised by the Commissioner in a newspaper of general circulation in the locality for two (2) consecutive weeks. The public hearing, or informal conference, shall be held in the locality of the surface coal mining operation from which bond release is sought.

(f) Without prejudice to the right of an objector or the applicant, and when all parties agree, the Commissioner may hold an informal conference in lieu of a public hearing to resolve such written objections. Unless waived by all parties, the Commissioner shall make a record of the informal conference which

shall be accessible to all parties. The Commissioner shall also furnish all parties of the informal conference with written findings based on the informal conference, and the reasons for said findings.

12.3 Forfeiture of Bonds.

(a) If an operator refuses or is unable to conduct reclamation of an unabated violation, if the terms of the permit are not met, or if the operator defaults on the conditions under which the bond was accepted, the Commissioner shall take the following action to forfeit the bond:

(1) Send written notification by certified mail, return receipt requested, to the permittee and the surety on the bond, if any, informing them of the decision to forfeit all or part of the bond, including the reasons for the forfeiture and the amount to be forfeited. The amount shall be based on the estimated total cost of achieving the reclamation plan requirements; however, bond liability shall extend to the entire permit area.

(2) Advise the permittee and surety, if applicable, of the conditions under which forfeiture may be avoided. Such conditions may include, but are not limited to:

(A) Agreement by the permittee or another party to perform reclamation operations in accordance with a compliance schedule which meets the conditions of the permit, the reclamation plan, and the regulatory program and a demonstration that such part has the ability to satisfy the conditions; or

(B) The Commissioner may allow a surety to complete the reclamation plan, or the portion of the reclamation plan applicable to the bonded phase or increment, if the surety can demonstrate an ability to complete the reclamation in accordance with the approved reclamation plan. No surety liability shall be released until successful completion of all reclamation under the terms of the permit.

(b) In the event forfeiture of the bond is required by this section, the Commissioner shall proceed to collect the forfeiture amount as provided for in Section 17(b) of the Act.

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38-2-13. Requirements of a Notice of Intent to Prospect.

13.1. Notice of Intent to Prospect - Less than two hundred fifty (250) tons.

(a) Application. The Notice of Intent shall be filed in triplicate, in clasp-type binders, on forms prescribed by the Commissioner, and shall contain the following information:

(1) The name, address, and telephone number of the operator;

(2) Indicate if the operator is a corporation, partnership, or individual;

(3) The name, address, and telephone number of the person who will have responsibility for conducting prospecting;

(4) The location of the operation (county, magisterial district and nearest post office);

(5) The anticipated date of commencement and completion of operations;

(6) Indicate whether or not the operator or any person, partnership, or corporation associated with the operator has on file, or has ever had on file, in the State of West Virginia a prospect permit and bond or an intent to prospect. If so, list all prospect permits and Notices of Intent to Prospect, together with an indication of their current reclamation status;

(7) The operator's source of legal right to enter and conduct operations;

(8) The notarized signature of a principal officer of the operator affixed to a statement declaring that the information contained in the Notice is true and correct to the best of his knowledge.

(9) The name, address, and telephone number of the applicant's representative who will have on-site responsibility for conducting the operation.

(10) An estimated timetable for conducting and completing each phase of the operation to include reclamation.

(11) A description of how the applicant will conduct prospecting operations so as to protect habitats of unique or

unusually high value for fish, wildlife, and other related environmental values and critical habitats of threatened or endangered species identified pursuant to the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq).

(b) Reclamation Plan. A reclamation plan which includes the following:

(1) The method of prospecting;

(2) The method for controlling runoff and sedimentation;

(3) The method of regrading;

(4) A plan for revegetation;

(5) The method for sealing, casing or otherwise managing prospecting holes, bore holes, wells or other exposed underground openings created during the prospecting; and

(6) The method of constructing and/or utilizing roads.

(c) Maps. A map equivalent to a United State 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.

13.2. Notice of Intent to Prospect - Greater than two hundred fifty (250) Tons. If prospecting will remove more than 250 tons of coal, the Notice of Intent to Prospect shall include, in addition to the requirements of Subsection 13.1 of this Section, the following:

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(a) The applicant, in addition to complying with the provisions imposed under the Act and the Rules and Regulations promulgated thereunder, shall prepare a narrative discussion of a feasibility study for the site, including the specific reasons for extraction of the amount of tonnage for which permission is requested. The narrative shall be of sufficient detail to enable the Commissioner to make a determination that the proposed extraction and sale of the coal is incidental to testing of the coal to determine if it is of a mineable and merchandiseable quality, so as to make it possible to conduct surface mining and reclamation operations on the site for which a permit application can be submitted at a later date. The narrative shall explain in detail why other means of prospecting/exploration, such as core drilling, involving extraction of less than 250 tons of coal, are not adequate to determine the quality of the coal and the feasibility of future surface mining and reclamation operations on the site. Form, generic or general statements by the applicant of a need for quality testing of more than 250 tons shall not be adequate grounds for the Commissioner's approval of removal of greater than 250 tons. The narrative shall contain at a minimum:

(1) A demonstration that the amount of coal to be removed under the notice of intent to prospect application is not the total reserve of coal but is a random sampling of a larger reserve.

(2) A demonstration that the application is for prospecting and is not surface mining or an "early start-up" for a surface mining operation.

(3) A statement that reclamation will be completed within three (3) months of initial disturbance of each site to be disturbed under the notice of intent to prospect.

(4) The location of any endangered or threatened species identified within the prospecting area.

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

(b) The name of the company that will receive the tonnage for test burning or other testing purposes, and further identify with specificity the precise tests that will be conducted on the coal. Furthermore, the applicant shall state that the testing proposed in the application has already been agreed to by the applicant and the company that will receive the coal;

(c) A map in accordance with Section 3.4 of these regulations which contains all information required in Subsection 13.1 of this section and the following additional information:

(1) If known, the location of critical habitats of any threatened or endangered species listed pursuant to the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

(d) A copy of a legal notice to be published in a newspaper of general circulation in the county where prospecting will occur. The ad shall contain the following:

(1) The name and business address of the operator;

(2) The date of publication and the date of close of a public comment period which date shall not be less than fifteen (15) days after the date of publication;

(3) The address of the office of the Department of Energy where any person whose interest is or may be adversely affected may submit written comments;

(4) A description of the general area where prospecting will occur;

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

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

(7) An estimate of the total tonnage to be removed.

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

(a) The Commissioner shall act upon an administratively complete application for a prospecting approval and any written comments within a reasonable period of time, but in no event shall action be taken prior to the close of the public comment period.

(b) The Commissioner shall approve a complete and accurate application for a prospecting approval filed in accordance with this section if he finds, in writing, that the applicant has demonstrated that the prospecting and reclamation operation described in the application will:

(1) Be conducted in accordance with this section, and other applicable provisions of these regulations, the Act, and the application;

(2) Not jeopardize the continued existence of an endangered or threatened species listed pursuant to Section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533) or result in the destruction or adverse modification of critical habitat of those species; and

(3) Not adversely affect any cultural or historical resources listed on the National Register of Historic Places, pursuant to the National Historic Preservation Act, as amended (16 U.S.C. Sec. 470 et seq., 1976, Supp V), unless the proposed prospecting has been approved by both the Commissioner and the agency with jurisdiction over such matters.

(c) Terms of approval issued by the Commissioner shall contain conditions necessary to ensure that the prospecting and reclamation operations will be conducted in compliance with these regulations, the Act and the application.

(d) The Commissioner shall notify the applicant, the appropriate local government officials, and other commentors on the application, in writing, of his decision on the application. If the application is disapproved, the notice to the applicant shall include a statement of the reason for disapproval. Public notice of the decision on each application shall be posted by the Commissioner at the nearest Department of Energy office in the vicinity of the proposed prospecting operations.

(e) Any person having an interest which is or may be adversely affected by a decision of the Commissioner pursuant to paragraph (d) of this subsection shall have the opportunity for administrative and judicial review.

(f) The Commissioner shall not approve the extraction of more than 250 tons for any reason other than that the coal will be tested for quality and combustibility.

(g) The Commissioner shall monitor the operation of each and every prospecting approval granted for total compliance with the provisions of the Act, these rules and regulations, and the terms and conditions of the approval application.

(h) The operator shall submit a sworn statement to the local Surface Mining Reclamation Inspector prior to the completion of coal removal which will verify that the coal was

used for the purpose for which the notice of intent to prospect was originally granted.

(i) If the Commissioner determines that, or suspects on the basis of information made available to him that, a prospecting operation is not being conducted in the precise manner set forth in the notice of intent to prospect and/or the accompanying narrative, the Commissioner shall take immediate steps to compel compliance or to establish that violations have occurred. Such steps may include, but would not be limited to, checking weight tickets and the inspection of end-user records.

13.4. Performance Standards.

(a) This section establishes minimum performance standards applied to prospecting operations provided that upon an affirmative demonstration that drilling operations are to be conducted solely for establishing property values for purposes of taxation or highway construction purposes, such drilling shall be exempted from this section.

(b) Prospecting Roads.

(1) All roads shall be utilized or constructed in a manner that will control or prevent erosion and siltation or damage to fish or wildlife or their habitat or public or private property.

(2) All roads must be reclaimed or rehabilitated to a condition equal to or better than their preprospecting condition. Where a road will permanently remain after prospecting activities, the construction, maintenance and stabilization shall be governed by Section 4 of these rules and regulations.

(3) Vehicular travel on other than established graded and surfaced roads shall be limited by the person who conducts prospecting to that absolutely necessary to conduct the prospecting. Travel shall be confined to graded and surfaced roads during periods when excessive erosion, damage to vegetation or rutting of the land surface could result.

(c) Blasting. Blasting is prohibited on prospecting operations unless otherwise approved by the Commissioner. Any blasting approved must be conducted in accordance with Section 6 of these regulations.

(d) Drainage. All disturbances created by prospecting operations shall be conducted in such a manner as to prevent or

control erosion, siltation, pollution of water, and to minimize disturbance to the prevailing hydrologic balance. Such operations shall be exempt from specific design and construction criteria for sediment control structures only if stabilization to control erosion is achieved through alternative measures. Any operation which will disturb more than one (1) acre on any single site may be required by the Commissioner to install drainage control structures in accordance with Section 5 of these regulations.

(e) All prospecting operations carried out in steep slope conditions shall be conducted in a manner consistent with the steep slope requirements provided for in Section 12 of the Act.

(f) The Commissioner may limit prospecting operations from encroaching nearer than one hundred feet (100') of a perennial or intermittent stream, provided that roads or access ways may be located within one hundred feet (100') of an intermittent or perennial stream. Roads shall not be constructed up a stream bed or drainage channel or in close proximity to such channel so as to significantly alter the normal flow of water.

(g) Each prospecting hole, borehole, well or other exposed underground opening created during prospecting shall be cased, sealed, or otherwise managed to prevent acid or toxic drainage from entering ground or surface water, or substantial degradation of ground water quality or quantity.

(h) All toxic or acid-forming materials encountered while prospecting shall be handled in accordance with the requirements of Subsections 14.5 and 14.6 of these regulations.

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

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

(k) All areas disturbed during prospecting operations shall be regraded to approximate original contour within three months of initial disturbance unless reclamation has been waived pursuant to receipt of an appropriate surface mine application number (SMA); provided, that reclamation cannot be delayed more than one (1) year from receipt of a surface mine application number.

(l) All disturbed areas must be revegetated in a manner consistent with Section 9 of these regulations.

13.5. 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 showing the total disturbed area of the prospecting operation.

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

13.7. Public Records. All information submitted to the Department of Energy as a part of the notice of intent to prospect, as required in the Act and this Section of the rules and regulations, shall be made available for public inspection and copying at the nearest Department of Energy office; provided, that information submitted to the Commissioner pursuant to this subsection which contains trade secrets or privileged commercial or financial information which relates to the competitive rights of the person filing such information or other persons who may be affected, is certified information and shall not be available for public examination.

13.8 Lands Unsuitable Designation. If prospecting operations are to be conditional on lands which have been designated as unsuitable for surface mining, a notice of intent prepared and filed in accordance with Subsection 13.2 of this Section, shall be required. Approval of the notice of intent shall be in accordance with Subsection 13.3 of this Section.

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38-2-14. Performance Standards. In addition to the requirements of the Act, the following performance standards shall be ~~met~~ applicable to both surface and underground mining operations.

14.1 Signs and Markers.

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

(b) Perimeter Marker. 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, the following signs and markers shall be required:

(1) 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;

(2) Where blasting operations will be conducted within one hundred (100) feet of the outside right-of-way of a public road, signs reading "Blasting Area", shall be conspicuously placed along the perimeter of the blasting area; and

~~(3)--Signs-which-read-"warning-Explosives-in-Use"-shall be-placed-at-all-approaches-to-the-blasting-site.--The-signs shall-carry-an-explanation-of-the-markings-used-to-identify-the blasting-area-and-charged-holes.~~

14.2 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 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 Commissioner, be transferred to another party for further use. The conditions of the transfer shall comply with State and local laws, regulations, and other requirements.

14.3 Topsoil.

(a) Removal. Prior to disturbance of an area, topsoil shall be removed from the area to be disturbed in a separate layer and if not immediately redistributed, it shall be segregated and stockpiled in a separate stable location as specified in the preplan. Stockpiled topsoil shall remain in place until used for redistribution unless otherwise approved by the Commissioner. Stockpiled topsoil shall be protected from excessive compaction. Where the removal of vegetative material, topsoil or other materials may result in erosion, the Commissioner may limit the size of the area from which these materials are removed at any one time.

(b) Redistribution. Prior to redistribution of topsoil, the regraded land shall be treated, if necessary, to reduce the potential for slippage of the redistributed material and/or to enhance root penetration. Topsoil and other materials shall be redistributed in a manner that achieves an approximate uniform, stable thickness, consistent with the approved postmining land uses, contours, soil density, and surface water drainage system.

(c) Top Soil Substitutes. Any substitute material used for topsoiling must be capable of supporting and maintaining the approved postmining land use. This determination of capability shall be based on the results of appropriate chemical and physical analysis of overburden and topsoil. These analyses shall include at a minimum depth, thickness, and areal extent of

the substitute structure or soil horizon, pH, texture class, percent, coarse fragments.and nutrient content. A certification of analysis shall be made by a qualified laboratory stating that

(1) The proposed substitute material is equally suitable for sustaining vegetation as the existing topsoil; and

(2) 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 revegetation requirements of Section 9 of these regulations. These tests shall include nutrient analysis and lime requirement tests. Results of these tests shall be submitted to the Commissioner with the final planting report as required by these regulations.

14.4 Diversions.

(a) Stream channel diversions and stream channels reclaimed after the removal of temporary diversions, shall be designed and constructed so as to restore or approximate the premining characteristics of the original stream channel, including the natural riparian vegetation, to promote recovery and enhancement of the aquatic habitat.

(b) Temporary diversions shall be removed when they are no longer needed to achieve the purpose for which they were approved as long as downstream facilities which were being protected are modified or removed.

(c) All temporary diversions shall be removed and reclaimed prior to permit abandonment and all permanent diversions shall comply with the approved reclamation plan and be renovated if necessary prior to abandonment.

14.5 Water Quality. Surface and groundwater quality and quantity and the hydrologic balance, ~~both within and~~ outside the permit area, 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.

(b) Effluent Limitations. Discharge from areas disturbed by surface mining shall not violate effluent limitations or cause a violation of applicable water quality standards. The monitoring frequency and effluent limitations shall be governed by the standards set forth in the NPDES Program under the Federal Water Pollution Control Act as amended, 33 U.S.C. 1251 et. seq. and the rules and regulations promulgated thereunder. Effluent limitations are those contained in federal regulations at 40 CFR Part 434.

(c) Treatment Facilities. Adequate facilities shall be installed,operated and maintained using the best technology currently available in accordance with the approved preplan to treat any water discharged from the permit area so that it complies with all federal and state laws and regulations and the limitations of this section. Nonmechanical treatment systems may be utilized if flow is infrequent or small and timely and consistent treatment is assured.

(d) Breakthrough. Any surface breakthrough of water caused by the operator during the course of his operations shall be sampled immediately and analyzed for total iron, total suspended solids and pH and if requested by the Commissioner, any other parameter which is 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, and two (2) copies shall be submitted to the Commissioner. Should said analysis indicate the water quality to be less than the applicable effluent limitations, seals shall be immediately constructed. These seals shall:

(1) Prevent any air from entering the underground mine by way of the breakthrough; or

(2) Prevent any air from entering the breakthrough while allowing the water to flow from the breakthrough; or

(3) Seal the breakthrough of water so that it cannot flow. Such seals shall be constructed of stone, brick, block, earth or other impervious materials which are acid resistant.

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

(e) On active underground mining operations, all reasonable measures shall be taken to intercept all surface water by the use

of diversions, culverts, drainage ditches or other approved methods to prevent water from entering the working area. All surface drainage from the disturbed area must pass through a sediment pond or series of sediment ponds so that discharges from such areas will not cause a violation of water quality standards.

(f) Unless otherwise approved by the Commissioner, water from underground works shall not be co-mingled with surface drainage. When separate treatment facilities are used for discharges from underground works, they shall be designed to adequately treat the anticipated quantity and quality of the raw discharge.

(g) No person shall locate openings for new drift mines 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 Subsection 2.4 of these regulations, site specific data must be submitted demonstrating that this seam is not an acid or iron producing seam at this location.

(h) Surface water shall not be diverted or otherwise discharged into abandoned underground mine workings, nor shall water be discharged from one underground working to another unless the operator demonstrates to the Commissioner that such activities will:

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

~~(2)--Not-cause,-result-in-or-contribute-to-a-violation of-applicable-water-quality-standards-and-effluent-limitations both-on-or-outside-the-permit-area;-or~~

~~(3)~~(2) Constitute a hazard to the public health, safety and welfare or to miners working underground; and

~~(4)~~(3) Minimizes disturbance to the hydrologic balance ~~both-on-or~~ outside the permit area.

(4) 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 Commissioner, 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;

(5) 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;

(6) Minimizes disturbance to the hydrologic balance; and

(7) Not discharge without MSHA approval.

~~(i)--Only-sludges-which-result-from-acid-mine-drainage treatment-or-from-flue-gas-desulfurization-may-be-discharged-into underground-workings.~~

14.6 Acid Producing and Toxic Materials.

(a) Drainage from acid-forming and toxic-forming materials into ground and surface water shall be avoided by identifying, burying, blending, segregating, and/or treating spoil or other materials that will be toxic to vegetation or that will adversely affect water quality. Such materials shall be handled and treated in accordance with methods set forth in the approved preplan within thirty (30) days after initial exposure or a lesser period if required by the Commissioner.

(b) 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.

(c) Treatment of Toxic Material. All exposed coal seams remaining after mining and any acid-forming, toxic-forming, or combustible materials or any other waste materials shall be covered with a minimum of four feet (4') of nontoxic and noncombustible material. Where necessary to protect against upward migration of salts, exposure by erosion, or to provide adequate depth for plant growth, the Commissioner shall specify thicker amounts of cover.

14.7 Monitoring Requirements.

(a) All surface water ~~and-groundwater~~ shall be sampled and analyzed and otherwise monitored in accordance with the approved

surface water monitoring plan~~,-and-a-monthly-report-of-a~~All measurements shall be submitted to the Commissioner~~,-provided,~~ and~~-that~~ all violations of applicable effluent ~~standards~~ limitations shall be reported to the Commissioner within five (5) days of receipt of analytical results.~~-and-t~~The operator shall immediately implement remedial measures described in the hydrologic reclamation plan. Monitoring shall continue until the operator demonstrates that continued monitoring is unnecessary to achieve the purpose of the monitoring plan.

(b) Where adverse impacts to a significant groundwater resource are identified as provided in paragraph (h) of Subsection 3.16 of these regulations, the groundwater resources shall be monitored in accordance with the groundwater monitoring plan. All measurements shall be submitted to the Commissioner and all violations of standards established under Section 24 of the Act shall be reported to the Commissioner within five (5) days of receipt of analytical results. The operator shall immediately implement remedial measures described in the hydrologic reclamation plan. Monitoring shall continue until the operator demonstrates that continued monitoring is unnecessary to achieve the purposes of the monitoring plan.

(c) Ground Water Monitoring Waivers - if an applicant can demonstrate by the use of the PHC determination and other available base line hydrologic and geologic information that a particular water-bearing stratum in the proposed permit and adjacent area is not one which serves or may potentially serve as a significant aquifer or ensure the hydrologic balance within the permit and adjacent area, monitoring of the stratum may be waived by the Commissioner. Waivers will be considered and granted separately and exclusively for each individual water-bearing stratum unless it is shown by the use of the PHC determination and base line hydrologic and geologic information that all individual water-bearing stratums of concern are hydraulically interconnected and can be waived as a complete unit.

~~(b)~~(d) 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~~ applicable effluent limitations. wWater 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~~ applicable effluent limitations shall be adequate to establish that the hydrologic balance is being preserved.

~~(c)~~(e) Monitoring equipment located both at the permit

area and at off-site areas shall be properly, installed, operated, and maintained during the required monitoring period and removed when no longer required.

14.8 Steep Slope Mining

(a) In addition to other applicable performance standards set forth in the Act and these regulations, the following standards shall apply where the natural slope of the land within the permit area exceeds an average of twenty (20) degrees as measured perpendicular to the coal seam or where the natural slope of the land within the permit area is less than an average of twenty (20) degrees, but the Commissioner has determined, on the basis of soils, climates, method of operation, geology, and other site-specific characteristics, that special measures are required to protect the area below the mining operations from landslides or other hazards.

(1) Spoil or debris shall not be placed on the downslope except in specified fill areas designed in the permit application for such placement. Nothing in this section shall prohibit the placement of materials in haulroad or access road files on slopes steeper than twenty (20) degrees so long as the fills are constructed in accordance with construction specifications set forth in Subsection 14.14 of this section.

(2) The highwall shall be eliminated and the disturbed area graded to the approximate original contour. Spoil material in excess of that required for the reconstruction of the approximate original contour shall be permanently stored in areas designated in the permit for such use and designed and constructed in accordance with Subsection 14.14 of this section.

(3) Land above the highwall shall not be disturbed unless the disturbance is necessary to facilitate compliance with the environmental protection standards of this section and Section 14 of the Act. Standards to be considered which justify such disturbance are the following::

(A) Achieve the approximate original contour;

(B) Control erosion, sedimentation, and water runoff;

(C) Provide access to the area above the highwall for revegetation purposes; or

(D) Comply with safety standards.

(4) The material used to backfill and eliminate the highwall shall be sufficiently compacted or otherwise mechanically stabilized so as to insure stability of the backfill with a static safety factor of 1.3. Woody materials shall be buried in such a manner that it will not deteriorate the stable condition of the backfilled area. The operator shall at a minimum retain all overburden and spoil on the solid portion of the existing or new benches and backfill and grade the area to the most moderate slope possible.

(5) When mining through natural watercourses or when water is to be directed across or through the backfill, a drainage channel, flumes, or french drain 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 other similar material. Channels, flumes, and drains shall be constructed in accordance with criteria set forth in the Handbook or other approved criteria.

14.9 Auger Operations.

(a) Augering shall be prohibited by the Commissioner if it is determined that such operations pose a potential hazard to the environment, to the public welfare and safety, to water quality, or to structures or buildings as a result of subsidence.

(b) Auger holes shall be sealed with an impervious and noncombustible material, if the holes are discharging acid or toxic water. Sealing of each hole shall occur within seventy-two (72) hours following coal removal.

(c) An auger hole shall not be sealed if impoundment of 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 applicable water quality standards. Adequate drainage through the backfill from any unsealed auger holes shall be constructed in accordance with specifications set forth in the permit application.

(d) Auger mining operations shall be conducted in a manner which maximizes recoverability of mineral reserves remaining after augering. The operator shall, at a minimum, leave areas of undisturbed coal to provide access for future underground mining activities, unless it is established by the operator that the coal reserves have been depleted or are so limited in thickness or extent that it would not be practicable to attempt further recovery.

14.10 Mountaintop Removal.

(a) In addition to the other performance standards set forth in these regulations, the following performance standards will apply where the mountaintop removal method of mining is used:

(1) The final graded top plateau slopes on the mined area shall be less than five (5) horizontal to one (1) vertical so as to create a level plateau or gently rolling configuration. The outslopes of the plateau shall ~~not exceed~~ be no steeper than two (2) horizontal to one (1) vertical.

(2) The resulting level or gently rolling contour shall be graded so that water will drain inward from the outslope except at specific points where it is released over the outslope in constructed channels. Such channels shall be protected from erosion and constructed using design criteria similar to that set forth in the Handbook

14.11 Inactive Status.

(a) Where the operator requests to temporarily cease mining and reclamation operations for an extended period of time, the Commissioner may grant inactive status for a period of up to one (1) year if it has been determined that the following conditions

will be met:

(1) Reclamation is current;

(2) Water management practices will be maintained throughout the inactive period; and

(3) All exposed coal is covered with a non-toxic material;

(b) Progress maps may be required by the Commissioner as a condition for granting inactive status.

(c) The Commissioner may extend the inactive status in six (6) months increments ~~before~~ beyond the one (1) year period upon a demonstration of need by the operator.

14.12 Variance From Approximate Original Contour Requirements.

(a) The Commissioner may grant a variance from the requirements for restoring the mined land to approximate original contour under the following terms and conditions:

(1) The alternative postmining land use requirements of Subsection 7.3 of these regulations are met;

(2) All other applicable requirements of the Act and these regulations, except for those relating to approximate original contour, are met;

(3) All highwalls are completely backfilled in a manner which results in a static safety factor of 1.3;

(4) Only spoil not necessary to achieve the postmining land use may be removed from the mine bench;

(5) The drainage pattern of the permit and adjacent area will be improved by:

(A) Reducing environmental impacts or flood hazards; and

(B) Controlling environmental impacts from increased seasonal flow volumes.

(6) Appropriate Federal, State and local government agencies have an opportunity to review and comment on the proposed postmining land; and

(7) The surface land owner(s) of the permit area has requested in writing that a variance be granted to achieve the approved alternative postmining land use.

14.13 MSHA Approval. No mining shall occur within five hundred (500) feet of an underground mine not totally abandoned without approval by the Federal Mine Health and Safety Administration.

14.14 Disposal of Excess Spoil.

(a) Spoil not required to achieve the approximate original contour shall be transported to and placed on designated disposal sites within the permit area. Coal processing wastes and underground development waste shall not be placed in such fills unless ~~the fill is designed~~ the waste is placed in accordance with Section 22 of these regulations and contains no acid producing or toxic forming materials. Any excess spoil disposal in an underground mine shall be done in accordance with a plan approved by the Mine Safety and Health Administration.

(b) Excess spoil may be deposited in fills outside the permit area if the following conditions are met:

(1) The fill is located on another permit area;

(2 The fill is located on an abandoned mine site where:

(A) A reclamation contract is in effect;

(B) The fill will result in improved environmental, aesthetic, or safety conditions; and

(C) The fill is designed and constructed in accordance with the Act and these regulations.

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

(1) The fill and appurtenant structures shall be designed in accordance with the Handbook or other recognized professional design standards and certified by a registered professional engineer experienced in the design of earth and rock fill embankments; and

(2) During construction, the fill shall be inspected quarterly for stability by a registered professional engineer or other qualified professional specialist working under the

direction of a professional engineer. Regular inspections are also required during critical construction periods such as foundation preparation, underdrain placement, installation of surface drainage systems, and construction of rock toe buttresses. Within two (2) weeks following completing of the inspections, a report certified by the registered professional engineer shall be submitted to the Commissioner. The report on the drainage system and protective filters shall include color photographs taken during and after construction, but before the underdrains are covered with excess spoil. Color photographs shall be of sufficient size and number to provide a relative scale and to clearly identify the site. If the underdrains are constructed in phases, each phase must be certified separately. If excess durable rock spoil is placed such that the underdrain system is constructed simultaneously with excess spoil placement by the natural segregation of dumped materials, color photographs of the underdrains must be taken as they are formed. All color photographs shall be of adequate size and number to provide a relative scale and to clearly identify the site. A copy of the certified report shall be maintained at the mine site; and

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

(d) Disposal of Excess Spoil on Existing Benches. Spoil material not required to return the area to the approximate original contour may be placed on an existing bench if the following conditions are met:

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

(2) The spoil must be compacted or otherwise mechanically stabilized to achieve a static safety factor of 1.3 and the area backfilled and graded to achieve the most moderate slope possible which does not exceed the angle of repose; and

(3) The existing highwall shall be eliminated to the fullest extent possible.

(e) Valley Fills. Where the excess spoil disposal site is located in a valley, the following criteria shall be met:

(1) If the fill area contains springs, natural water courses, or wet weather seeps, lateral drains shall be constructed from the wet areas to the rock core in such a manner that infiltration and entrapment of water within the fill will be

prevented.

(2) The foundation of the fill shall be designed to assure a long-term static safety factor of 1.5 or greater.

(3) The outer slope or face of the valley fill shall be no steeper than two (2) horizontal to one (1) vertical with terraces constructed at a maximum of each fifty (50) feet vertical rise above the toe of the fill. The bench width of each terrace shall be no less than twenty (20) feet with a three (3) to five (5) percent slope toward the face and a one (1) percent slope toward the rock core located near the center of the valley fill.

(4) A valley fill shall not contain more than two hundred fifty thousand (250,000) cubic yards of material unless the uppermost portion of the fill extends up the valley to the ridgeline, or unless the toe of the valley fill lies above the flood plain of the valley floor.

(5) Unless an alternative design is approved, each valley fill shall have a central rock core or "chimney drain" which lies in the apex of the valley and extends throughout the depth and length of the fill. The rock core shall be designed and constructed in accordance with the following criteria:

(A) The rock core shall consist of durable rock of a minimum average diameter of twelve (12) inches with no more than ten (10) percent of the core material consisting of fines.

(B) The minimum width of the rock core shall be sixteen feet.

(C) The core shall be constructed progressively and concurrently with each lift of the valley fill.

(D) The finished surface of the rock core shall form a trapezoidal channel capable of permitting the peak runoff of a one-hundred (100) year twenty-four (24) hour precipitation event.

(6) Where valley fills are designed for construction without a rock core, an underdrain shall be used. The underdrain shall be designed and constructed using standard professional engineering practices and such design must have the approval of the Commissioner. Surface runoff from the top of the fill shall be carried through a surface diversion system capable of handling the peak runoff from a one-hundred (100) year twenty-four (24) hour precipitation event.

(7) Areas upon which a valley fill is to be constructed shall first be progressively cleared of all trees, brush, shrubs, and other organic material that may affect stability. This material shall be disposed of outside the fill area. No more than three (3) acres, excluding roadways, shall be cleared until the first lift of the valley fill is completed.

(8) The valley fill shall be constructed in lifts beginning at the toe of the fill. The design plans and specifications shall specify the thickness of the lifts. The operator shall demonstrate how and the engineer shall certify that such thickness will insure stability and meet all safety and environmental protection standards where fills are designed and constructed using lifts not exceeding four (4) feet in thickness.

(9) During and after construction, the top of the fill shall be graded to drain to the head of the fill on a slope not greater than three (3) percent. ~~A drainage pocket shall be maintained at the head of the fill at all times to intercept and direct surface runoff to the rock core. In no case shall this pocket have a potential for impounding more than ten thousand (10,000) cubic feet of water. No other impoundments may be constructed on the fill.~~

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

(f) Side Hill Fills.

(1) Side hill fills shall be constructed on the most stable and moderate slopes available with the natural downslope at the toe of the fill not to exceed thirty-six (36) percent. Where possible, the toe of the fill shall rest on or above a natural terrace, bench or berm in a manner which will provide additional stability and prevent mass movement.

(2) Each design shall be based on the results of a geotechnical investigation of the construction site. The investigation shall include such factors as geologic conditions, soil characteristics, depth of bedrock, springs, seeps and groundwater flow, and a description of materials to be placed in the fill. The level of detail required for such geotechnical investigation shall be determined by a registered professional engineer.

(3) The design and construction of all side hill fills must be certified by a registered professional engineer.

(4) If the fill area contains springs, natural water courses or wet weather seeps, lateral drains shall be constructed from the wet areas in such a manner that infiltration of the water into the fill will be minimized. The drains shall be designed and constructed of coarse, durable rock with no single rock occupying more than twenty-five (25) percent of the width of the drain.

(5) All areas upon which the fill is to be constructed shall be progressively cleared of all trees, brush, shrubs, and other organic material which may affect the stability. This material shall be disposed of outside the fill area.

(6) The fill shall be constructed in concurrently compacted lifts not exceeding four (4) feet in thickness.

(7) The fill shall be designed and constructed to assure a static safety factor of at least 1.5

(8) The outer slope or face of the fill shall be no steeper than two (2) horizontal to one (1) vertical. Terraces shall be constructed on the face of the fill at each fifty (50) feet vertical rise above the toe of the fill. The terraces shall be a minimum of twenty (20) feet wide and shall slope three (3) to five (5) percent toward the face with a lateral slope of one (1) percent to a discharge channel capable of passing a one hundred (100) year twenty-four (24) hour precipitation event.

(9) Surface water runoff from the fill and from surrounding areas shall be diverted away from the fill and into stabilized channels designed to pass safely the runoff from a one-hundred (100) year, twenty-four (24) hour precipitation event.

~~----------(10) No impoundments may be constructed on fill.~~

(g) Durable Rock Fills.

(1) The Commissioner may approve the design, construction, and use of a single lift fill consisting of at least eighty (80) percent durable rock if it can be determined, based on information provided by the operator, that the following conditions exist:

(A) Examination of core borings and the geologic column show that the overburden consists of durable sandstone, limestone, or other durable material in sufficient thickness and mounts to generate spoil material that is eighty (80) percent or greater durable rock.

(B) The durable material will not slake in water.

(C) The toe of the fill will rest on natural slopes no steeper than twenty (20) percent.

(2) The fill shall be designed based on the results of a geotechnical investigation of the construction site. The investigation shall include such factors as geologic conditions, soil characteristics, depth to bedrock, location of springs, seeps and groundwater flow, potential effects of subsidence and a description of materials to be placed in rock cores and drains. The level of detail required for such geotechnical investigation shall be determined by a registered professional engineer.

(3) The design and construction of all durable rock fills must be certified by a registered professional engineer experienced in design and construction of earth and rock embankments.

(4) The foundation of the fill shall be designed to assure a long-term static safety factor of 1.5 or greater, and meet an earthquake safety factor of 1.1.

(5) The outer slope or face of the fill shall be no steeper than two (2) horizontal or one (1) vertical (2:1). Terraces shall be constructed on the fill at a maximum of every fifty (50) feet in vertical rise above the toe of the fill. The terraces shall be no less than twenty (20) feet in width and slope toward the fill at a three (3) to five (5) percent grade and slope laterally at one (1) percent grade to discharge channels capable of passing the peak runoff for a one-hundred (100) year twenty-four (24) hour precipitation event.

(6) All areas upon which the valley fill is to be placed shall first be progressively cleared of all trees, brush, shrubs and other organic material which may affect the stability. This material shall be disposed of outside the fill area.

(7) If the fill area contains springs, natural water courses or wet weather seeps, lateral drains shall be constructed in such a manner that infiltration and entrapment of water in the fill will be prevented.

(8) Drainage channels capable of passing the peak discharge from a one-hundred (100) year, twenty-four (24) hour, precipitation event shall be constructed to direct water around or through the fill in such a manner as to prevent zones of saturation within the fill. Drainage from above the fill shall not be directed through the fill.

(9) The grade of the top surface of the completed fill shall not exceed five (5) percent and shall slope toward the drainage channel.

~~----------(10)-No-impoundments-may-be-constructed-on-the-fill.~~

14.15 Backfilling and Regrading.

(a) Spoil returned to the mined-out area shall be backfilled and graded to the approximate original contour with all highwalls eliminated. Coal processing waste shall not be placed in the backfill unless the design requirements of Section 22 of these regulations are met. The final graded slope shall not exceed either the angle or repose or such other lesser slope as is necessary to achieve a minimum long-term static safety factor of 1.3 and to prevent slides.

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

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

(2) Where the operation consists of contour mining and augering, the augering shall follow the mining by a period not to exceed sixty (60) days, and the grading and backfilling shall follow the augering by a period not more than thirty (30) days or a distance of one thousand five hundred (1,500) linear feet, but in no event shall more than three thousand (3,000) linear feet of pit be exposed at any time.

(3) Where the operation consists of augering, only the grading and backfilling shall follow the augering by a period not to exceed thirty (30) days or a distance of one thousand (1,000) linear feet.

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

(5) Mountaintop Removal. When the operations remove the entire coal seams running through the upper fraction of a mountain, hill, or ridge, backfilling and regrading shall follow the same guidelines established for area and contour mining. The outer perimeter and drainage area shall be stabilized, regraded,

seeded, and mulched immediately upon construction.

(c) Revegetation shall be kept current by establishing a temporary or permanent vegetative cover on regraded areas by the end of the first growing season and a permanent cover by the end of the second growing season.

(d) The time period or the distance set forth in this subsection 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 Commissioner for such extension.

(e) Operable regrading equipment shall be kept on the permit area until satisfactory completion of grading unless otherwise approved.

(f) Backfilling and grading may be postponed on a permit where surface mining operations and underground mining operations are proposed on the same area; provided that all requirements set forth in Section 13 of the Act are met.

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

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

(i) Backfilling and Grading. Previously mined areas.

(1) Remining operations on previously mined areas that contain a pre-existing highwall shall comply with the performance standards of the Act and these regulations, except as provided in this paragraph.

(2) The requirement of highwall elimination shall not apply to remining operations where the operator can demonstrate that the volume of all reasonably available spoil located in the permit area is insufficient to completely backfill the reaffected or enlarged highwall. The highwall shall be reduced to the maximum extent technically practical. For purposes of this paragraph, the term reasonably available spoil means spoil and suitable coal mine waste material generated by the remining operation or other spoil or suitable coal mine waste material located in the permit area that is accessible and available for use and that when rehandled will not cause a hazard to public safety or significant damage to the environment

(3) The backfill shall be graded to a slope which is

compatible with the approved postmining land use and shall provide adequate drainage and long-term stability.

(4) 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.

(5) 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.

(6) 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 for revegetation set forth in Section 9 of these regulations may be modified on a case-by-case basis, by the Commissioner, using information set forth in the approved reclamation plan.

(7) A modified permit may be issued which modifies the requirements under Section 402(a)(1) of the federal 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 or iron or 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.

(8) The Commissioner may issue a permit pursuant to this paragraph if the applicant has demonstrated to the satisfaction of the Commissioner 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, and 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 water quality standards in the receiving stream established under Section 303 of the federal Clean Water Act.

(j) Regraded Drainage Control. Drainage control on regraded areas shall prevent excessive erosion or additional

contributions of suspended solids to the receiving stream, ensure safety and conserve soil moisture. Drainage control measures may include, but are not limited to, constructed drainways, flumes and riprap channels, tracking in, small depressions or other devices.

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Section 15

38-2-15 Performance Standards Applicable to Underground Mining Operations

15.1 Site Development

(a) Time Schedule for Site Excavation. The time schedule for site excavation shall be consistent with the approved preplan and shall provide for minimum exposure of disturbed area over a given time frame in a manner consistent with environmentally sound procedures. Regrading and stabilization of all areas disturbed in the development of the mine site shall proceed as contemporaneously as practicable. In any event, all required drainage system components and roads necessary for site construction shall be installed in accordance with the approved preplan prior to any disturbance for site development.

(b) Temporary Storage of Overburden to be Used for Backfilling and Regrading. All material to be used in final regrading must be placed within the permit area as specified in the approved plan in a manner which will insure mass stability in accordance with these regulations and revegetated to prevent erosion.

(c) Temporary Revegetation. All topsoil and spoil storage areas which will be in place for more than six (6) months but less than one (1) year shall at a minimum be seeded and mulched so as to establish a satisfactory stand of temporary vegetative cover. This seeding and mulching must be done ~~within thirty (30) days of completion of the storage area~~ during the next consecutive seeding season.

(d) 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/or planted and mulched during the first seeding season following disturbance so as to establish a satisfactory permanent vegetative cover. Trees shall be required only on those areas that:

(1) Will not be redisturbed by future reclamation activities; or

(2) Are necessary in order to meet the approved postmining land use.

(e) Mine Site Organization and Aesthetics. Indiscriminate dumping or discarding of materials, litter, junked equipment, containers, or other 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. Regarding 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.

15.2 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 or 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~~ be completed 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~~ initiated within one hundred eighty (180) days of completion of underground ~~mining~~ operations. Should particular site conditions or weather make adherence to these guidelines impractical, the period of time required to be current may be reasonably extended.

(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 land application rates are found in Section 9 of these regulations.

(c) Variances From Highwall Elimination. All underground mining operations which were in existence and which created highwalls prior to August 3, 1977, may 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 or to achieve highwall elimination. At a minimum, the operator shall be required to seal all underground openings and to cover the exposed coal seam with a minimum of four (4) feet of nonacid producing materials.

(d) Rehandling of settled and revegetated fills to achieve approximate original contour at the conclusion of underground mining activities shall not be required if the following conditions are met:

(1) The fill is not located so as to be detrimental to the environment or to the health and safety of the public and is compatible with the approved post mining land use.;

(2) Stability of the fill shall be demonstrated through standard geotechnical analysis to be consistent with the backfilling and grading requirements; and maintain a static safety factor of 1.3 on solid benches and 1.5 on slopes;

(3) Surface runoff around, through, and from the fill is controlled by drainage structures (diversions, rock cores, etc.), which are designed and constructed in accordance with the approved plans and design specifications;

(4) Any underground development wastes used in the fill are non-toxic and non-acid producing.

(5) The surface of the fill has been vegetated in accordance with Section 9 of these regulations.

(e) The approximate original contour variance contained in paragraph (c) of this subsection 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.

15.3 In situ processing: Performance standards.

(a) Any person who conducts in situ processing activities shall comply with the applicable performance standards of the Act, these rules and regulations, and the terms and conditions of a permit.

(b) In situ processing activities shall be planned and conducted to minimize disturbance to the prevailing hydrologic balance by:

(1) Avoiding discharge of fluids into holes or wells, other than as approved by the Commissioner;

(2) Injecting process recovery fluids only into geologic zones or intervals approved as production zones by the Commissioner;

(3) Avoiding annular injection between the wall of the drill hole and the casing; and

(4) Preventing discharge of process fluid into surface waters.

(c) Each person who conducts in situ processing activities shall submit for approval as part of the application for a permit a plan that ensures that all acid-forming, toxic-forming, or radioactive gases, solids, or liquids constituting a fire, health, safety, or environmental hazard and caused by the mining and recovery process are promptly treated, confined, or disposed of, in a manner that prevents contamination of ground and surface waters, damage to fish, wildlife and related environmental values, and threats to the public health and safety.

(d) Each person who conducts in situ processing activities shall prevent flow of the process recovery fluid:

(1) Horizontally beyond the affected area identified in the permit; and

(2) Vertically into overlying or underlying aquifers.

(e) Each person who conducts in situ processing activities shall restore the quality of affected ground water in the permit area and adjacent area, including ground water above and below the production zone, to the approximate premining levels or better, to ensure that the potential for use of the ground water is not diminished.

15.4 In situ processing: Monitoring.

(a) Each person who conducts in situ processing activities shall monitor the quality and quantity of surface and ground water and the subsurface flow and storage characteristics, in a manner approved by the Commissioner, to measure changes in the quantity and quality of water in surface and ground water systems in the permit area and in adjacent areas.

(b) Air and water quality monitoring shall be conducted in accordance with monitoring programs approved by the Commissioner as necessary according to appropriate Federal and State air and water quality standards.

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Section 16

38-2-16. Subsidence Control.

16.1 Public Notice. A ~~mining schedule~~ notification shall be distributed by mail to all owners of property and residents within the area above the underground workings. Each such person shall be notified by certified mail (return receipt requested) at least six (6) months prior to mining, or other time period if approved by the Commissioner, beneath his or her property or residence. The return receipt shall be kept at the mine office. The notification shall contain, at a minimum:

(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.~~

16.2 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.~~

~~(e)--Before mining begins, noncancelable premium prepaid insurance or other means approved by the Commissioner 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.~~

(a) Each person who conducts underground mining activities shall either adopt measures consistent with known technology which prevent subsidence from causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of surface lands; or adopt mining technology which provides for planned subsidence in a predictable and controlled manner. Nothing in this part shall be construed to prohibit the standard method of room-and-pillar mining.

(b) The operator shall comply with all provisions of the approved subsidence control plan prepared pursuant to Subsection 3.10 of these regulations.

(c) The operator shall:

(1) Correct any material damage resulting from subsidence caused to surface lands, to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses which it was capable of supporting before subsidence; and

(2) To the extend required under applicable provisions of State law, either correct material damage resulting from subsidence caused to any structures or facilities by repairing the damage or compensate the owner of such structures or facilities in the full amount of the diminution in value resulting from the subsidence. Repair of damage includes rehabilitation, restoration, or replacement of damaged structures or facilities. Compensation may be accomplished by the purchase prior to mining of a non-cancelable premium-prepaid insurance policy.

(d) Underground mining activities shall not be conducted beneath or adjacent to public buildings and facilities, churches, schools, hospitals, or impoundments with a storage capacity of, or bodies of water containing, twenty (20) acre-feet or more, unless the Commissioner finds that mining will not cause material

damage or reduce the foreseeable use. The Commissioner may, if necessary to minimize the potential for damage, limit the percent of coal extraction underneath or adjacent to such features or facilities. If subsidence causes material damage to such features or facilities, the Commissioner may suspend mining under or adjacent to such features or facilities until the subsidence control plan is modified.

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Section 17

38-2-17. Small Operator Assistance Program.

17.1 General. This section comprises the Small Operator Assistance Program and governs the procedures for providing assistance to qualified small operators for the determination of the probable hydrologic consequences of mining and reclamation and the statement of physical and chemical analyses of test borings or core samples.

(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.

17.2 Program Services. Where a qualified small operator requests assistance, the Department of Energy 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 9(a), (7), (8), (10), (11), (12), (13), and (15) through (19) of the Act.

17.3 Eligibility for Assistance. Applicants are eligible for assistance if they:

(a) Intend to apply for a permit pursuant to the Act; and

(b) Establish that their probable total actual and attributed coal production from all locations during any consecutive twelve (12) month period either during the term of the permit or during the first five (5) years after issuance of the permit, whichever period is shorter, will not exceed one hundred thousand (100,000) tons. Production from the following operations shall be attributed to the applicant:

(1) The pro rata share, based upon percentage of ownership of applicant, of coal produced by operations in which the applicant owns more than a five percent (5%) interest;

(2) The pro rata share, based upon percentage of ownership of applicant, of coal produced in other operations by persons who own more than five percent (5%) of the applicant's operation; and

(3) The pro rata share, based upon percentage of ownership by the applicant, of coal produced by operations which are owned by members of the applicant's family and relatives unless there is no direct or indirect business relationship between or among them.

(4) All coal produced by operations owned by persons who directly or indirectly control the applicant by reason by direction of the management.

(c) Persons who are prohibited from receiving a permit for any reason, and persons who organize or reorganize a company for the sole purpose of obtaining assistance from SOAP, shall be deemed ineligible.

17.4 Request for Assistance. Each applicant requesting assistance shall complete an application on forms prescribed by the Commissioner. The application shall include the following items:

(a) A statement of intent to file a permit application;

(b) The names, addresses, and phone numbers of the applicant and the operator, if different from this applicant;

(c) Location of the operation (County, Magisterial District and Nearest Post Office);

(d) Name of Tract;

(e) The method of surface coal mining operations proposed;

(f) The geological title, depth, and thickness of coal seam to be mined and a general statement as to the calculated coal reserves in the proposed permit area, and the method for calculating such reserves;

(g) An indication of whether or not the operator or any person, partnership, or corporation associated with the operator has ever been denied assistance. If yes, attach a full explanation of the circumstances and reasons for denial;

(h) A schedule of the estimated total production of coal from the proposed permit area and all other locations from which production is attributed to the applicant under subsection 17.3 of this section. The schedule shall include the following:

(1) Name of company;

(2) What state this permit was issued in and the permit number;

(3) Mining 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 preparedd in accordance with Subsection 3.4 of these regulations and Section 9, (a)(12), 13 (E), 13 (F), and 13 (J) 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.

17.5 Application Approval and Notice.

(a) The applicant shall be notified if the application requesting assistance has been approved or denied, and if denied, the reasons shall be attached.

(b) If application requesting assistance has been approved, then one or more qualified laboratory will be selected to perform this work. A copy of the contract or other appropriate work order and the final report shall be provided to the applicant.

(c) The applicant shall arrange for any necessary right-of-entry for the selected laboratory's personnel to gain access to data collection and monitoring sites and shall provide written agreements of such upon request by the Commissioner.

17.6 Qualified Laboratories.

(a) General. A qualified laboratory means a designated public agency, private consulting firm or analytical laboratory approved by the Department of Energy.

(b) Basic Qualifications. To qualify for designation, the laboratory must demonstrate that it:

(1) Is staffed with experienced, professional personnel in the field of hydrology, mining engineering, aquatic biology, geology, or chemistry applicable to the work to be performed;

(2) Is capable of collecting necessary field data and samples;

(3) Has adequate space for material preparation, cleaning and sterilizing necessary equipment, stationary equipment, storage, and space to accommodate periods of peak work loads;

(4) Meets the requirements of the Occupational Safety and Health Act or the equivalent state safety and health program;

(5) Has the financial capability and business organization necessary to perform the work required;

(6) Has analytical, monitoring and measuring equipment capable of meeting the applicable standards and methods contained in the most current edition of the Standard Methods for the Examination of Water and Waste Water; Methods for Chemical Analysis of Water and Wastes; and EPA Manual 600/2-78-054 Field and Laboratory Methods Applicable to Overburden Minesoils.

(7) Has the capability of making hydrologic field measurements and analytical laboratory determinations by acceptable hydrologic engineering or analytical methods.

(c) The qualified laboratory shall be capable of performing the determination and statement. Subcontractors may be used to provide the services required provided their use is defined in

the application for designation and approval is granted by the Department of Energy.

17.7 Liability of Operators.

(a) The applicant shall reimburse the Department of Energy for the cost of the program services performed if the applicant:

(1) Submits false information on the application;

(2) Fails to submit a surface mining permit application within one (1) year from the date of receipt of the approved probable hydrologic consequences report;

(3) Fails to mine after obtaining a surface mining permit; or

(4) Has an actual and attributed annual production of coal for all locations exceeding one hundred thousand (100,000) tons during any consecutive twelve (12) month period either during the term of the permit for which assistance is provided or during the first five (5) years after issuance of the permit whichever is shorter.

(5) Sells, transfers, or assigns the permit to another person and the transferee's total actual and attributed production exceeds the 100,000 ton annual production limit during any consecutive twelve (12) month period of the remaining term of the permit. Under this paragraph, the applicant and its successor are jointly and severally obligated to reimburse the Commissioner.

(b) The Department can waive the reimbursement obligation if it finds that the applicant at all times acted in good faith.

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Section 18

38-2-18. Citizen's Actions.

18.1 Notice of Citizen's Suits. A person who intends to initiate a civil action on his own behalf under section 25 of the Act shall give notice of intent in accordance with the following:

(a) Notice shall, in all cases, be given by certified mail to the Commissioner. A copy of the notice shall also be sent by first class mail to the Office of Surface Mining Field Office Director;

(b) In legal actions brought against any person, the State of West Virginia or any other governmental instrumentality, agency or agent thereof, notice shall be given by certified mail to the alleged violator, if the complaint alleges a violation of the Act or any regulation, order or permit issued under the Act;

(c) Service of notice under this section is complete upon mailing to the last known address of the person being notified;

(d) A person giving notice regarding an alleged violation shall state to the extent known:

(1) Sufficient information to identify the provision of the Act, regulation or permit allegedly violated;

(2) The act or omission alleged to constitute a violation;

(3) The name, address and telephone numbers of the person or persons responsible for the alleged violation;

(4) The date, time and location of the alleged violation(s);

(5) The name, address and telephone number of the person giving notice; and

(6) The name, address and telephone number of legal counsel, if any.

(e) A person giving notice of an alleged failure by the Commissioner, reclamation board of review, or appropriate department employee, to perform a mandatory act or duty under the Act, shall state to the extent known:

(1) The provision of the Act containing the mandatory act or duty allegedly not performed;

(2) Sufficient information to identify the omission alleged to constitute the failure to perform a mandatory act or duty under the Act;

(3) The name, address and telephone number of the person giving notice; and

(4) The name, address and telephone number of legal counsel, if any, of the person giving notice.

18.2 Citizen's Request for State Inspections.

(a) Any person may request a State inspection by furnishing to the Commissioner a signed, written statement (or an oral report followed by a signed, written statement) giving the Commissioner reason to believe that a violation exists and a phone number and address where the person can be contacted.

(b) The identity of any person supplying information to the Commissioner relating to a possible violation or imminent danger or harm shall remain confidential, if requested by that person, unless that person elects to accompany the inspector on the inspection.

(c) If an inspection is conducted as a result of information provided to the Commissioner by a person as described in paragraph (a) of Subsection 18.2. of this section, the person shall be notified as far in advance as practicable when the inspection is to occur and shall be allowed to accompany the State inspector during the inspection. Such person has a right of entry to, upon and through the coal exploration or surface coal mining and reclamation operation about which he or she supplied information, but only if he or she is in the presence of and is under the control, direction and supervision of a State inspector while on the mine property. Such right of entry does not include a right to enter buildings without consent of the person in control of the buildings or without a search warrant.

(d) Within ten (10) days of the inspection or, if there is no inspection within fifteen (15) days of receipt of the person's written statement, the Commissioner shall respond in writing as follows:

(1) If an inspection was made, a description of the enforcement action taken, which may consist of copies of the State inspection report and all notices of violation and cessation orders;

(2) If no State inspection was conducted, an explanation of the reason why;

(3) An explanation of the person's right to informal review of the action or inaction of the Commissioner; and

(4) Copies of all materials in subparts (1) and (2) of this paragraph within the time limits specified to the person alleged to be in violation, except that the name of the person shall be removed unless disclosure of the person's identity is permitted under paragraph (b) of Subsection 18.2 of this section.

(e) Any person who is or may be adversely affected by a surface coal mining operation may notify the Commissioner in writing of any alleged failure to make adequate and complete inspections as required by law and regulation. The notification shall include sufficient information to create a reasonable belief that the law and regulations regarding inspections are not being complied with and to demonstrate how the person is or may be adversely affected. The Commissioner shall, within fifteen (15) days of receipt of the notice, determine whether or not the statutes or regulations concerning inspections are being complied with and if not, shall order an inspection. The Commissioner shall furnish the complainant with a written decision of the reasons for his determination and actions, if any, he has taken.

18.3 Review of Decision Not to Inspect or Enforce.

(a) Any person who is or may be adversely affected by a surface coal mining operator may ask the Commissioner to informally review an authorized representative's decision not to inspect or take appropriate enforcement action with respect to any violation alleged by that person in a request for inspection under section 15 of the Act. The request for review shall be in writing and shall include a statement of how the person is or may be adversely affected and why the decision merits review. The Commissioner shall conduct the review within thirty (30) days of his receipt of the request and inform the person of the results.

(b) Informal review under this section shall not affect any right to formal review or to a citizen's suit.

18.4 Public Record:

(a) Copies of all records, reports, inspection materials or information obtained under the Act, except information in paragraph (b), Subsection 18.2 of this section, and paragraph (c) of this subsection, shall be made available to the public at

regional, field offices in the area of mining so that they are conveniently available.

(b) All records will be maintained and preserved for a period of not less than five (5) years. Relative to surface mining permits, the five year period applies after bond release.

(c) Information as to coal seams, test borings, core samplings or soil samples pertaining to the analysis of the chemical and physical properties of the coal, except information regarding mineral or element content which is potentially toxic to the environment, shall be kept confidential and shall not be made a matter of public record.

(d) Information on the nature and location of archaeological resources shall be kept confidential to the extent required by the Archaeological Resources Protection Act of 1979.

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Section 19

38-2-19 Designation of Areas Unsuitable for Mining.

19.1 Right to Petition.

(a) Any person having an interest which is or may be adversely affected, or the Commissioner, has the right to petition the to have an area designated as unsuitable for surface coal mining operations, or to have an existing designation terminated.

(b) Designation. The petitioner shall provide the following information:

(1) A U.S.G.S. topographic map on which is noted the location and size of the area covered by the petition;

(2) Allegations of facts and supporting evidence which would tend to establish that the area is unsuitable for all or certain types of surface coal mining operations;

(3) A description of how mining of the area has affected or may adversely affect people, land, air, water or other resources;

(4) The petitioner's name, notarized signature, address and telephone number; and

(5) Identification of the petitioner's interest which is or may be adversely affected.

(c) Termination of the Designation. A petitioner requesting to terminate a designation shall provide the following information:

(1). A U.S.G.S. topographic map on which is noted the location and size of the area covered by the petition;

(2) Allegations of facts with supporting evidence not contained in the record of the proceeding in which the area was designated unsuitable, which would tend to establish the statements or allegations, and which statements or allegations indicate that the designation should be terminated based on:

(A) The nature or abundance of the protected resource or condition or other basis of the designation if the designation was based on criteria found in paragraph (b), Subsection 19.7 of this section; or

(B) Reclamation now being technologically and economically feasible, if the designation was based on the criteria found in paragraph (a), Subsection 19.7 of this section; or

(C) The resources or condition not being affected by surface coal mining operations, or in the case of land use plans, not being incompatible with surface coal mining operations during and after mining, if the designation was based on the criteria found in paragraph (b), Subsection 19.7 of this section.

(3) The petitioner's name, notarized signature, address and telephone number; and

(4) Identification of the petitioner's interest which is or may be adversely affected by the continuation of the designation.

19.2 Initial Processing, Record-keeping, and Notification Requirements.

(a) Within thirty (30) days of receipt of a petition, the Commissioner shall notify the petitioner by certified mail whether or not the petition is complete in accordance with paragraph (b) or (c), Subsection 19.1 of this section.

(b) The Commissioner shall determine whether any identified coal resources exist in the area covered by the petition, without requiring any showing from the petitioner. If the Commissioner finds there are not any identified coal resources in that area, it shall return the petition to the petitioner with a statement of the findings.

(c) The Commissioner may reject petitions for designations or terminations of designations which are frivolous. Each petitioner must, at a minimum, satisfy the requirements of paragraph (b) or (c), Subsection 19.1, of this section. No party shall bear any burden of proof, and each accepted petition shall be considered and acted upon by the Commissioner pursuant to the procedures of this Section.

(d) When considering a petition for an area which was previously and unsuccessfully proposed for designation, the Commissioner shall determine if the new petition presents new allegations of facts. If the petition does not contain new allegations of facts, the Commissioner shall not consider the petition and shall return the petition to the petitioner, with a

statement of its findings and a reference to the record of the previous designation proceedings where the facts were considered.

(e) If the Commissioner determines that the petition is incomplete or frivolous, he shall return the petition to the petitioner, with a written statement of the reasons for the determination and the categories of information needed to make the petition complete.

(f) The Commissioner shall notify the person who submits a petition of any application for a permit received which proposes to include any area covered by the petition.

(g) Any petitions received after the first advertisement has been published on a permit application relating to the same mine plan area shall not prevent the Commissioner from issuing a decision on that permit application. The Commissioner may return any petition received thereafter to the petitioner with a statement why the petition cannot be considered. For the purposes of this section, close of the public comment period shall mean at the close of any informal conference or if no conference is requested, at the close of the period for filing written comments and objections.

(h) Within three (3) weeks after the determination that a petition is complete, the Commissioner shall circulate copies of the petition to, and request submissions of relevant information from, other interested governmental agencies, the petitioner, interveners, persons with an ownership interest of record in the property and other persons known to the Commissioner to have an interest in the property.

(i) Within three (3) weeks after the determination that a petition is complete, the Commissioner shall make copies of the petition available to the public and other agencies and shall notify the general public of the receipt of the petition and request submissions of relevant information by a newspaper advertisement placed once a week for two (2) consecutive weeks in the locale of the area covered by the petition in the newspaper of largest circulation in the state and in any Official State register of public notices.

(j) Until three (3) days before the Commissioner holds a hearing under Subsection 19.3 of this section, any person may intervene in the proceeding by filing allegations of facts, supporting evidence, a short statement identifying the petition to which the allegations pertain and the intervenor's name, address, and telephone number.

(k) Beginning immediately after a petition is filed, the Commissioner shall compile and maintain a record consisting of all documents relating to the petition filed with or prepared by the Department of Energy. The Commissioner shall make the record available for public inspection, free of charge, and copying, at reasonable cost, during all normal business hours at a central location of the county or multi-county area in which the land petitioned is located, and at the main office of the Department of Energy.

19.3 Hearing Requirements.

(a) Within ten (10) months after receipt of a complete petition, the Commissioner shall hold a public hearing in the locality of the area covered by the petition. If all petitioners and interveners agree, the hearing need not be held. The Commissioner shall make a verbatim transcript of the hearing.

(b) Not less than thirty (30) days prior to a hearing, the Commissioner shall give notice by certified mail of the date, time, and location of the hearing to:

(1) Local, State, and Federal agencies which may have an interest in the decision on the petition;

(2) The petitioner and the interveners; and

(3) Any person with an ownership or other interest known to the Commissioner in the area covered by the petition.

(c) The Commissioner shall notify the general public of the date, time and location of the hearing by placing a newspaper advertisement once a week for two (2) consecutive weeks in the locale of the area covered by the petition and once during the week prior to the scheduled date of the public hearing. The consecutive weekly advertisement must begin between four (4) and five (5) weeks before the scheduled date of the public hearing.

(d) The Commissioner may consolidate in a single hearing the hearings required for each of several petitions which relate to areas in the same locale.

(e) Prior to designating any land areas as unsuitable for surface coal mining operations, the Commissioner shall prepare a detailed statement, using existing and available information on the potential coal resources of the area, the demand for coal resources and the impact of such designation on the environment, the economy and the supply of coal.

(f) In the event that all petitioners and interveners stipulate agreement prior to the hearing, the petition may be withdrawn from consideration.

19.4 Decision.

(a) In reaching its decision, the Commissioner 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 paragraph (e), Subsection 19.3, of this section; and

(4) Any other relevant information submitted during the comment period.

(b) A final written decision shall be issued by the Commissioner including a statement of reasons, within sixty (60) days of completion of the public hearing, or if no public hearing is held, then within twelve (12) months after receipt of the complete petition. The Commissioner shall simultaneously send the decision by certified mail to the petitioner, every other party to the proceeding, and to the Field Office Director of the Office of Surface Mining.

(c) The decision of the Commissioner with respect to a petition, shall be subject to judicial review by a court of competent jurisdiction in accordance with State law.

19.5 Data Base and Inventory System Requirements.

(a) The Commissioner shall develop a data base and inventory system which will permit evaluation of whether reclamation is feasible in areas covered by petitions.

(b) The Commissioner shall include in the system information relevant to the criteria in paragraph (b), Subsection 19.7, of this section, including but not limited to, information received from the United States Fish and Wildlife Service, the State Historic Preservation Officer and the Air Pollution Control Commission.

(c) The Commissioner shall add to the data base and inventory system information:

(1) On potential coal resources of the state, demand for those resources, the environment, the economy and the supply of coal, sufficient to enable the Commissioner to prepare the statements required by paragraph (e), Subsection 19.3, of this section; and

(2) That which becomes available from petitions, publications, experiments, permit applications, mining and reclamation operations and other sources.

19.6 Public Information. The Commissioner shall:

(a) Make the information and data base system developed available to the public for inspection free of charge and for copying at a reasonable cost except that areas proposed for or included in the National Register of Historic Places may not be disclosed if the Commissioner determines that such disclosure might risk destruction or harm to these resources.

(b) Provide information to the public on the petition procedures necessary to have an area designated as unsuitable for all or certain types of surface coal mining operations or to have designations terminated and describe how the inventory and data base system can be used.

19.7 Criteria for Designating Lands as Unsuitable.

(a) Upon petition, an area shall be designated as unsuitable for all or certain types of surface mining operations, if the Commissioner determines that reclamation is not technologically or economically feasible under the Act and these rules and regulations.

(b) Upon petition, an area may be (but is not required to be) designated as unsuitable for all or certain types of surface mining operations, if the operations will:

(1) Be incompatible with existing State or local land use plans or programs;

(2) Affect fragile or historic lands in which the operations could result in significant damage to important historic, cultural, scientific or aesthetic values or natural systems;

(3) Affect renewable resource lands in which the operations could result in a substantial loss or reduction of

long range productivity of water supply or of food or fiber products; or

(4) Affect natural hazard lands in which the operations could substantially endanger life and property. Such lands include areas subject to frequent flooding and areas of unstable geology.

19.8 Commissioner's Responsibility for Implementation.

(a) The Commissioner shall not issue permits which are inconsistent with designations made pursuant to section 22 of the Act.

(b) The Commissioner shall maintain a cumulative map of areas designated as unsuitable for all or certain types of surface coal mining operations.

(c) The Commissioner shall make available to any person any information within his control regarding designations, including mineral or elemental content which is potentially toxic in the environment but excepting proprietary information on the chemical and physical properties of the coal.

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Section 20

38-2-20 Inspection and Enforcement. In addition to the requirements set forth in Section 15, 16, and 17 of the Act, the following requirements shall be met.

20.1 Inspection Frequencies.

(a) Each surface mine reclamation inspector, (SMRI) shall conduct inspections of each surface mining operation within his area of jurisdiction, as is necessary to assure compliance with the terms and conditions of the permit, these rules and regulations, and the Act. Each SMRI shall, on the average, maintain a schedule of inspection frequencies as follows:

(1) An average of at least one partial inspection per month of each active surface mining operation.

(2) One inspection per calendar quarter of each active and inactive surface mining operation. An inactive operation is one which has requested and received approval to temporarily cease operations, or one that has been granted Phase I bond release, and has an approved final planting report.

(3) One complete inspection per calendar quarter of each surface mining operation which has received a grading (Phase I) bond release, until receipt of a vegetation (Phase II) bond release.

(4) Prospecting operations shall be inspected as necessary to assure compliance with the Act and these rules and regulations unless a more frequent interval is required by the Commissioner.

(5) At least one partial inspection monthly and one complete inspection quarterly for each prospecting operation for which approval has been granted for coal removal in excess of 250 tons.

(b) For purposes of this section, a partial inspection is an on-site or aerial review of a person's compliance with some of the permit conditions, and requirements imposed by these regulations and the Act.

(c) For purposes of this section, a complete inspection is an on-site review of a person's compliance with all terms and conditions of the permit, and the requirements of these regulations and the Act, within the entire area disturbed or affected by the surface coal mining and reclamation operations.

(d) Aerial inspections shall be conducted in a manner which reasonably insures the identification and documentation of conditions at each surface coal mining and reclamation site inspected.

Any potential violation observed during an aerial inspection shall be investigated on site within three days: provided, that any indication of a condition, practice or violation constituting cause for the issuance of a cessation order shall be investigated on site immediately. An on-site investigation of a potential violation observed during an aerial inspection shall not be considered to be an additional partial or complete inspection for the purposes of paragraph (a) of this subsection.

20.2 Notice of Violations.

(a) Each surface mine reclamation inspector shall note all violations of the operator and shall take an enforcement action for each violation so noted.

(b) A notice of violation shall be in writing signed by the surface mine reclamation inspector or other authorized representative of the Commissioner who issues it, and shall set forth with reasonable specificity:

(1) The nature of the violation;

(2) The remedial action required, which may include interim steps;

(3) A reasonable time for abatement, which may include time for accomplishment of interim steps, but in no case shall the initial abatement period be in excess of fifteen (15) days; and

(4) A reasonable description of the portion of the coal exploration or surface coal mining and reclamation operation to which it applies.

(c) An authorized representative of the Commissioner may extend the time set for abatement or for accomplishment of an interim step, if the failure to meet the time previously set was not caused by lack of diligence on the part of the permittee. The total time for abatement under a notice of violation, including all extensions, shall not exceed 90 days from the date of issuance, except upon showing by the permittee that it is not feasible to abate the violation within 90 calendar days due to

one or more of the circumstances in paragraph (f) of this subsection. An extended abatement date pursuant to this subsection shall not be granted when the permittee's failure to abate within 90 days has been caused by a lack of diligence or intentional delay by the permittee in completing the remedial action required.

(d)(1) If the permittee fails to meet the time set for accomplishment of any interim step, the authorized representative of the Commissioner may issue a cessation order.

(e) An authorized representative of the Commissioner shall terminate a notice of violation by written notice to the permittee when he determines that all violations listed in the notice of violation have been abated. Termination shall not affect the right of the Commissioner to assess civil penalties for those violations.

(f) Circumstances which may qualify a surface coal mining operation for an abatement period of more than 90 days are:

(1) Where the operator of an ongoing permitted operation has made timely application for and diligently pursued a permit renewal or other necessary approval of designs or plans but such permit or approval has not been or will not be issued within 90 days after a valid permit expires or is required, for reasons not within the control of the permittee;

(2) Where there is a valid judicial order precluding abatement within 90 days as to which the permittee has diligently pursued all rights of appeal and as to which he has no other effective legal remedy;

(3) Where the permittee cannot abate within 90 days due to a labor strike;

(4) Where climatic conditions preclude abatement within 90 days, or where, due to climatic conditions, abatement within 90 days clearly would cause more environmental harm than it would prevent; or

(5) Where abatement within 90 days requires action that would violate safety standards established by statute or regulation under the Mine Health and Safety Act of 1977.

(g) Whenever an abatement time in excess of 90 days is permitted, interim abatement measures shall be imposed to the

extent necessary to minimize harm to the public or the environment.

(h) If any of the conditions in paragraph (f) of this subsection exist, the permittee may request that the authorized representative of the Commissioner who issued the notice of violation, grant an abatement period exceeding 90 days. The authorized representative of the Commissioner shall grant the extension, only with the concurrence of his immediate supervisor. The abatement period granted shall not exceed the shortest possible time necessary to abate the violation. The permittee shall have the burden of establishing by clear and convincing proof that he is entitled to an extension. The authorized representative of the Commissioner who grants or denies the extension shall promptly and fully document in the file his reasons for granting or denying the request. The immediate supervisor shall review this document before concurring in or disapproving the extended abatement date and shall promptly and fully document the reasons for his concurrence of disapproval in the file.

(i) Any determination made under paragraph (h) of this subsection shall contain a right of appeal.

(j) No extension granted under paragraph (h) of this subsection may exceed 90 days in length. Where the condition or circumstance which prevented abatement within 90 days exists at the expiration of any such extension, the permittee may request a further extension.

(k) Whenever a permittee fails to abate a violation contained in a notice of violation or cessation order within the abatement period set in the notice or order or as subsequently extended, the Commissioner shall review the permittee's history of violations to determine whether a pattern of violations exists and ~~shall~~ may issue an order to show cause where appropriate.

20.3 Cessation Orders.

(a) When any authorized representative of the Commissioner finds that a surface mine operation creates an imminent danger to the health or safety of the public or is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, he shall forthwith issue a cessation order.

(b) Any cessation order issued under the provisions of paragraph (a) of Section 16 of the Act, shall remain in effect

until the violation has been abated or until modified, vacated, or terminated by the Commissioner or the Reclamation Board of Review or by a court.

(c) In any cessation order issued, the authorized representative of the Commissioner shall determine the appropriate remedial measures to be taken to abate the violation in the most expeditious manner possible and shall set forth these measures in the order.

(d) Surface mining operations conducted by any person without a valid surface mining permit, or approval for prospecting, constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, unless such operations are an integral, uninterrupted extension of previously permitted operations, and the person conducting such operations has filed a timely and complete application for a permit to conduct such operations.

20.4 Pattern of Violations.

(a) Where the Commissioner determines that a pattern of violations exists or has existed, and that the violations were willfully caused or when an unwarranted failure to comply, the Commissioner shall issue an order requiring the permittee to show cause why his permit and right to mine under the Act should not be suspended or revoked. For purposes of this section a willfully caused violation is a violation resulting from an intentional act or omission, and an unwarranted failure to comply means the failure of the permittee to prevent the occurrence of any violation of the permit or any requirement of the Act due to indifference, lack of diligence or lack of reasonable care.

(b) Violations by any persons conducting surface coal mining operations on behalf of the permittee shall be attributed to the permittee, unless the permittee establishes that they were acts of deliberate sabotage.

(c) The Commissioner 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. In making such a determination, the Commissioner shall take into consideration the following circumstances:

(1) The number of previous violations cited on more than one occasion of the same or related requirements of the Act,

these rules and regulations, or the terms and conditions of the permit.

(2) The number of previous violations, cited on more than one occasion, of ~~difference~~ different requirements of the Act, these regulations or the terms and conditions of the permit; and

(3) The extent to which the violations were isolated departures from lawful conduct.

(d) The Commissioner shall promptly review the history of violations of any permittee who has been cited for violations of the same or related requirements of the Act, these regulations or the terms and conditions of the permit during three (3) or more inspections of the permit area within any twelve (12) month period. After such review, the Commissioner shall determine whether or not a pattern of violations exists.

(e) If the permittee files an answer to the show cause order and requests a hearing, a public hearing shall be held. The Commissioner shall give thirty (30) days advance written notice to the permittee and any intervener of the date, time, and place of the hearing. The Commissioner shall publish the notice if practicable, in a newspaper of general circulation in the area of the operations, and shall also post the notice in the regional office of the Department of Energy nearest the operation.

(f) Within sixty (60) days following the hearing, the Commissioner shall issue a written determination as to whether a pattern of violations exists, and issue an appropriate order.

(g) If the Commissioner revokes or suspends the permit and the permitees right to mine under the Act, the permittee shall immediately cease surface coal mining operations in the area of the permit, and initiate the appropriate remedial action as follows:

(1) If the permit and the right to mine under the Act are revoked, the operator shall complete reclamation within the time specified in the revocation order; or

(2) If the permit and right to mine under the Act are suspended, the operator shall abate all conditions, practices, or violations, as specified in the suspension order.

20.5 Civil Penalties.

(a) The Commissioner shall review each notice of violation in order to determine:

(1) Whether a civil penalty will be assessed;

(2) The amount of the penalty;

(3) Whether each day of a continuing violation will be deemed a separate violation; and

(4) The total penalty assessment.

(b) For Notices of Violations, the Commissioner may not assess a civil penalty if the amount is less than one thousand dollars ($1,000).

~~(b)~~(c) The Commissioner shall assess, for each cessation order, a mandatory civil penalty in accordance with paragraph (a), Section 17, of the Act for each day of continuing violation.

~~(c)~~(d) For the purposes of this section, the assessment officer shall not determine the proposed penalty assessment until such time as the Commissioner has caused an inspection of the violation to be conducted. The Commissioner must conduct the inspection of the violation within the first fifteen (15) days after the notice or order was served.

~~(d)~~(e) The Commissioner for each notice of violation, may assess a separate civil penalty for each day of the violation, beginning with the date of issuance of a notice of violation to the date of abatement of the violation. In determining whether or not to assess a separate daily civil penalty and determine the amount of the civil penalty, the Commissioner shall consider those factors specified in paragraph (c), Section 17, of the Act, and subsection 20.7 of this section, and may consider the extent to which the operator may have gained any economic benefit as a result of a failure to comply. Any notice of violation which was continued unabated for two or more days after the initial abatement period, and received a civil penalty assessment of $3,500 or more, shall be assessed ~~that~~ the penalty amount for a minimum of two separate days.

~~(e)~~(f) The Commissioner shall, for each cessation order, assess a civil penalty in accordance with paragraph (a), Section 17, of the Act for each day of continuing violation, except that

such penalty shall not be assessed for more than thirty (30) days. If the cessation order has not been abated or modified within the thirty (30) day period, the Commissioner shall initiate action pursuant to paragraphs (b), (f), or (h), Section 17, of the Act as appropriate.

20.6 Procedure for Assessing Civil Penalties.

(a) Civil penalty amounts for notices of violation shall be determined in accordance with the factors specified in paragraph (c), Section 17, of the Act and the numerical point system in Subsection 20.7 of this section.

(b) Show cause orders, cessation orders, or notices of violation may not be vacated because of inability of the operator to comply.

(c) Unless caused by lack of diligence, inability to comply may be considered in mitigation of the amount of civil penalty and in establishing a time period of the suspension of a permit.

(d) The Commissioner shall provide a copy of the proposed assessment and the accompanying worksheet to the operator by certified mail, within the time limits established by paragraph (d) (1), Section 17, of the Act. The Commissioner shall also give notice, in person or by certified mail, to the operator of any penalty adjustment as a result of an informal conference within the time limits specified above.

(e) Failure to serve a proposed assessment or hold an informal conference in the time limits specified in paragraph (d) (1), Section 17, of the Act, will not be considered as grounds for dismissal of the assessment, unless the operator proves actual prejudice and makes timely objection to the delay.

(f) An informal conference must be scheduled within 60 days of the receipt of a request, pursuant to paragraph (d)(1), Section 17, of the Act.

(g) The time and place of an informal assessment conference shall be posted at the regional office closest to the operation, at least five days prior to the conference date. Any person shall have the right to attend and participate in the conference.

(h) Notices of informal conferences held as a result of the provisions of Section 17 of the Act shall be posted at the nearest regional office and sent by mail or communicated verbally, whichever is more practicable, to any person who filed

a report which led to a notice or order resulting in an informal conference.

(i) At formal review proceedings before the Reclamation Board of Review or the court pursuant to sections 2 and 17 of the Act, no evidence as to statement made or evidence produced by one party at a conference shall be introduced as evidence by another party, or may be used to impeach a witness.

(j) The fact of violation may not be contested in a civil penalty review proceeding, if it has already been decided in a formal review proceeding under paragraphs (d)(3) or (d)(4) section 17 of the Act.

(k) When an administrative or judicial review of a civil penalty order results in an order increasing the penalty, the person to whom the notice or order was issued shall pay the amount of the increase within thirty (30) days after the order is mailed to each person.

20.7 Assessment Rates.

(a) History of Violations. History of previous violations is an accounting of all Notices of Violation and Cessation Orders that were written on the subject operation in the previous twelve (12) months. Notices of Violation and Cessation Orders which were withdrawn or vacated shall not be included in the accounting.

(1) Previous violation	Rate Per Violation
1 - 2	None
3 - 5	$20.00
6 - 10	$40.00
over 10	$60.00

Number of Violations x Rate = Amount

(b) Seriousness of the violation.

1-2 Violation is of an administrative nature resulting in no harm or danger to the environment or public: or the standard is violated to such a minor degree that environmental harm or public danger will not result.

3-4 Violation results in potential or actual harm or danger remaining in the permit area; or in the case where the impact extends beyond the permit area; can be demonstrated that potential danger or harm or will not result.

5-6 Violation extends beyond the permit area and results in a minor degree of potential or actual harm or impact on the public.

7-8 Violation extends beyond the permit area and results in a significant degree of environmental harm or danger to the public.

9-10 Violation is or can be reasonably be expected to result in significant imminent environmental harm or create an imminent danger to the health or safety of the public.

Seriousness Rating	0	1	2	3	4	5	6	7	8	9	10
Amount	-	100	230	396	608	875	1206	1617	2120	2745	3500

(c) Operator Negligence.

0 This violation is considered beyond the control of the operator or his employees an no negligence can be attributed to this violation.

1-2 This violation was a result of an oversight on the part of the operator and may have been avoided if more conscientious effort or reasonable care were given.

3-4 This violation was obvious and no action was taken by the operator correct the problem.

5-6 The operator failed to adequately respond to previous enforcement action.

7-8 The operator had been officially notified of this problem and did not make any effort at correcting the problem.

Civil Penalty Rate Schedule - Operator Negligence

Negligence Rating	0	1	2	3	4	5	6	7	8
Amount	0	25	62	120	200	315	474	693	1000

(d) Operator's Good Faith

0 Operator failed to take appropriate action.

1-2 Operator took prompt but minimal action to correct the violation.

3-4 Operator started promptly on remedial measures and worked diligently to correct the violation.

5-6 Operator started immediately and expended all reasonable efforts to correct the violation. Violation was abated before required date.

7-8 Operator was already working on remedial measures and expended extreme effort in correcting the violation. Violation was abated in minimum possible time.

(e) Determination of Penalty Amount

No. Previous Violations _____

Seriousness of Violations _____

Operator Negligence _____

Subtotal _____

Less Good Faith _____

Total _____

20.8 Fees and Costs of Administrative Proceedings.

(a) Any person may on request be awarded by the appropriate board or court a sum equal to costs and expenses including attorneys' fees and expert witness fees as determined to have been reasonably incurred. Such request must be filed within forty-five (45) days of date of entry of judgment.

The request shall include an affidavit setting forth costs and expenses and an itemized statement of attorneys' fees. The request shall be served upon all parties who shall have thirty (30) days to answer the request. Cost and expenses including attorneys' fees may be awarded to:

(1) Any participating party against the violator upon a finding that there is a violation of the Act, the regulations or the permit has occurred, and there is a determination that the party made a significant contribution to the full and fair determination of the issues;

(2) To any participating party other than the violator or his representative from the Department of Energy upon a determination that the party made a significant contribution to a full and fair determination of the issues;

(3) To a violator from the Department of Energy when the violator demonstrates that the Department of Energy issues cessation order, a show cause order or notice of violation in bad faith and for the purpose of harassing or embarrassing the violator, provided that no award shall be made under this subsection if the Department of Energy prevails upon the issue of a violation;

(4) To a violator from any participating party other than the Department of Energy where such participating parties initiated or participated in the magistrate proceeding in bad faith and for the purpose of harassing or embarrassing the violator; and

GOOD FAITH RATING SCHEDULE

Good Faith Rating	Seriousness Rating 1	2	3	4	5	6	7	8	9	10
0	0	0	0	0	0	0	0	0	0	0
1	4	8	11	17	26	39	58	88	133	200
2	8	20	28	42	64	94	138	206	312	448
3	15	33	51	78	117	171	249	363	546	750
4	24	56	84	128	192	276	396	564	852	1120
5	35	80	130	200	295	420	590	825	1250	1565
6	54	120	192	300	432	612	846	1158	1752	2100
7	70	161	280	427	623	868	1183	1582	2107	2737
8	96	224	392	608	872	1200	1616	2120	2744	3496

(5) To the Department of Energy from any participating party where the Department of Energy demonstrates that any such party participating in such proceeding in bad faith and for the purpose of harassing or embarrassing the Department of Energy. An award may also include attorneys' fees and expert witness fees expended in obtaining an award of costs,expenses and attorneys' fees. Decisions on such awards may be appealed as other cases under the Act.

Title 38
CSR 2
Section 21

38-2-21 Reclamation Board of Review.

21.1 Open Meetings.

(a) All meetings of the Reclamation Board of Review, pursuant to the provisions of the Act shall be open to the public.

(b) The time, and place of all regularly scheduled meetings and the time, place and purpose of all special meetings shall be made available to the public and the news media by publishing a notice containing at least the above information in a newspaper of general circulation in the county where the site or environmental concern exists, or if the matter under consideration is of general interest to the people of the State in a newspaper of general circulation in the State.

(c) In the event of any emergency requiring immediate official action such efforts to notify the public shall be taken as circumstances allow.

21.2 Appeals to the Reclamation Board of Review.

(a) The board may visit the site of the activity or proposed activity which is the subject of the hearing and take such additional evidence as it deems necessary provided that all parties and interveners be given notice of the visit and are given an opportunity to accompany the Board.

(b) On all appeals to the Board, the Board shall issue a final decision thirty (30) days after the hearing or within thirty (30) days after the testimony presented at the hearing has been transcribed and checked for accuracy.

(c) The burden of proof shall be on the party seeking to reverse the decision of the Commissioner.

Title 38
CSR 2
Section 22

38-2-22 Coal Refuse

22.1 Applicability - Any surface coal mining operation which involves the construction, operation, enlargement, modification, removal and/or abandonment of a coal refuse site shall be subject to the special provisions of this section in addition to other applicable permitting requirements, performance standards, and enforcement provisions of these regulations, the Act, and other state and federal laws and regulations.

22.2 For purposes of permitting, the applicant shall submit a separate set of maps, plans, design data, and specifications for the refuse disposal facility, in addition to those contained in the permit application.

The disposal facility shall be designed using current, prudent engineering practices. A qualified registered professional engineer, experienced in the design of similar earth and refuse structures, shall certify the design of the disposal facility. The disposal facility shall be designed to attain a minimum long-term static safety factor of 1.5. The stability of all foundations and abutments must be maintained during all phases of construction.

22.3 Permit Requirements - General - In addition to the other permitting requirements of the Act and these regulations, each permit application which involves a coal refuse site shall contain the following materials:

(a) A general narrative and discussion of the project to include at a minimum a discussion of existing site conditions, the design life of the facility, quantity and type of coal refuse to be placed on the site, subsidence potential method of operation to include clearing and grubbing, topsoil stockpiling, construction of surface and subsurface drainage facilities, phases of construction, method and location of coal refuse placement or removal, coal refuse placement during inclement weather, routine inspection and maintenance, procedure to be followed in the event the site is abandoned prior to the planned design life, and a sequence for construction of drainage facilities, critical construction phases, reclamation and final abandonment procedures. In addition, include a description of the duties, responsibilities and lines of communication of those persons responsible for the design and construction of the coal refuse disposal area. All data, graphs, curves, etc., which provide the basis for hydrologic and hydraulic design of coal refuse embankments and impoundments shall accompany other design

data, plans, and specifications, submitted as part of the permit application.

(b) A plan view of the site showing detailed contours, limits of the coal refuse disposal area, all drainage facilities, location of springs, seeps, mine drainage and/or openings, location of the subdrain system, project stationing, location of cross sections, location of borings, test pits and instrumentation and other pertinent data required for project control.

(c) Cross sections of the coal refuse disposal area transversely and longitudinally showing original ground, finished elevations, final configuration of refuse material, subdrains, diversion details, spillways, and other pertinent features of the site. Cross section shall be of sufficient accuracy and detail so as to provide a basis for stability computations at critical locations.

(d) A sediment control plan designed in accordance with Subsection 5.4 of these regulations.

(e) Unless otherwise approved by the Commissioner, each application shall contain plans and specifications for a diversion channel above the coal refuse facility to direct excess surface water runoff from the contributing wathershed around the facility. Such diversion channel shall be designed as follows:

(1) Design storm. All diversion ditches and stream channel diversions shall be designed to carry the peak runoff from a one-hundred (100) year frequency, twenty-four (24) hour duration rainfall.

(2) Freeboard. A freeboard equal to or greater than $1+.025vd^{1/3}$ shall be added to the design flow depth to obtain the total depth of the diversion ditch.

(3) Additional Requirements. All diversion channels must comply with the Handbook and the following additional requirements:

(A) Each diversion ditch must be designed to carry the peak flow with freeboard from the contributing watershed area.

(B) Diversions shall be designed, constructed, and maintained in a manner which prevents additional

contributions of suspended solids to streamflow and to runoff outside the permit area to the fullest extent possible.

(C) Excess excavated material not required for construction or maintenance of the diversion ditch must be properly disposed of in the permit area unless otherwise approved by the Commissioner.

(D) Topsoil removed from the channel excavation shall either be redistributed on another part of the permit area or stockpiled for a later use.

(E) All diversion systems shall exit safely beyond the toe of the embankment in a natural drainway capable of carrying the design flow without excessive erosion.

(F) All stream channel diversions must be designed to carry the design flow around the disturbed area. The diversions must outlet into the original channel or a natural channel of equal cross section.

(G) Diversions in refuse must be lined with soil or a suitable substitute unless other erosion protection is provided.

(H) Permanent diversion systems designed to convey water under a coal refuse embankment by means of a pipe or conduit are unacceptable. However, diversion by means of a pipe or conduit may be permitted during active operation, provided that (1) height or storage limits for impoundments are not exceeded, (2) the pipe or conduit is used in conjunction with surface ditches to meet applicable design storm requirements, and (3) the design of the pipe or conduit accounts for durability and design life, load limits, joint sealing, trash rack protection, and maintenance requirements throughout the operational life of the structure.

(f) Design and specifications for hydraulic structures. Such structures shall be designed to safely control excessive erosion by using energy dissipators and/or channel protection, as necessary, based upon design flow velocity. Seepage control devices shall be used to prevent undercutting of nonflexible linings. The potential for landslides or slope failures shall be considered in the location of all hydraulic structures. Channels shall not be located on or near an existing landslide unless approved by the Commissioner. No surface runoff or slurry may be diverted into underground mines unless approved by the Commissioner.

(g) The application shall include all design data and calculation results. If a computer analysis is used, only the input data and results used specifically in the design need be submitted. If graphical flood routing techniques are used, all charts and graphs shall be included. Adequate cross sections and profiles shall be given for all hydraulic structures.

(h) All coal refuse impoundments must be analyzed and/or designed in accordance with this subsection. Non-impounding coal refuse embankments must be designed in accordance with this subsection unless any proposed modifications to the design standards of this subsection are justified through appropriate stability analysis. Where obvious site conditions indicate that failure will not occur, the Commissioner may waive the requirement for a stability analysis on non-impounding structures so long as all other applicable design requirements are met. The following structural analysis and/or design data of coal refuse embankments and impoundments shall be presented in graphical or tabular form:

(1) Subsurface Investigation. A subsurface investigation shall be performed unless obvious site conditions preclude the necessity of this requirement. The number, location, and depth of borings, test pits, and/or trenches shall be reasonable for the size, purpose, soils present, and foundation type of the structure. The investigation shall consider depth of soil to bedrock, field classification of soils, character of bedrock, in situ testing, soil sampling, determination of groundwater location, and a soil profile for critical locations in the structure, hydraulic structures and other pertinent locations which may affect the safety of the structure. A geologic study shall also be conducted for impounding structures to evaluate landslides into the impoundment, bedrock discontinuities such a soft seams, joints, joint systems, bedding planes, and fault zones which may adversely affect the structure's performance. Past and future mining to include height of seam, depth and cover rock of the seam, and previous subsidence problems shall be considered where subsidence may affect the safety of the structure.

(2) Laboratory investigation. Laboratory tests shall be conducted on all foundation and embankment materials to include soil classification through hydrometer analysis, density, water content, compaction tests, shear strength, consolidation, and permeability unless the scope, characteristics, or design concept of the site make one or more of these requirements unnecessary.

(i) A description including plans, design data, specifications, and computations of how the following safety conditions will be achieved.

(j) Describe the potential for liquefaction and provide safeguards against the development of this condition.

(k) A description of installation of instrumentation such as piezometers, settlement markers, slope indicators, and similar monitoring devices shall be included in the plan to monitor present hazardous conditions, construction conditions, and to verify design assumptions. A plan for monitoring these devices shall also be provided.

(l) All stability analyses shall be done using standard engineering techniques. The submittal shall include cross sections at critical locations in the facility showing the materials profile, location of critical potential failure surfaces and their factors of safety, estimated or measured phreatic surfaces for construction and/or long term seepage conditions, and a tabulated listing of strength parameters used. If a computer analysis is used, only the input data and results used specifically in the design shall be submitted.

(m) If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, the application shall include diversions and underdrains as necessary to control erosion, prevent water infiltration into the disposal facility and ensure stability. Diversions and underdrains shall be designed as follows.

(1) Runoff from the areas above the refuse pile and runoff from the surface of the refuse pile shall be diverted into stabilized diversion channels designed in accordance with paragraph (e) of Subsection 22.3 and Subsection 5.3 of these regulations to safely pass the runoff from a one hundred (100) year, twenty-four (24) hour precipitation event. Runoff diverted from undisturbed areas need not be commingled with runoff from the surface of the refuse pile. Uncontrolled surface drainage may not be diverted over the outslope of the refuse piles.

(2) Underdrains shall consist of durable rock or pipe, and be designed and constructed using current, prudent engineering practices. The underdrain system shall be designed to carry the anticipated seepage of water due to rainfall and from seeps and springs in the foundation of the disposal area away from the site, and shall be protected from piping and

contamination by an adequate filter. Rock underdrains shall be constructed of durable, nonacid, nontoxic-forming rock (e.g., natural sand and gravel, sandstone, limestone, or other durable rock) that does not slake in water or degrade to soil material, and which is free of coal, clay or other nondurable material. Perforated pipe underdrains shall be corrosion resistant and shall have characteristics consistent with the long-term life of the fill.

(n) Procedures for ~~progressively~~ clearing and grubbing ~~the area upon which the refuse is to be deposited~~ to the extent required.

(o) Procedures for disposal of excess material resulting from clearing, grubbing, and other site preparation activities.

(p) Procedures for spreading and compaction of refuse material during placement. The material shall be compacted in layers not exceeding two (2) feet in thickness and shall not have any slope exceeding two horizontal to one vertical, except that the Commissioner may approve construction using layers exceeding two (2) feet in thickness and slopes exceeding two horizontal to one vertical, where engineering data substantiates that a minimum safety factor of 1.5 will be attained and a minimum seismic safety factor of 1.2 will be attained.

(q) Plans for sealing abandoned openings and covering the seal with four feet of an impermeable non-toxic material. Such plans shall consider prevention of water buildup behind the seals, toxicity of the refuse and mine strata, gradient of the opening, hydrologic balance and passage of any acid water to a treatment facility. If a mine seal is in the impoundment area of an impounding coal refuse disposal area, the seal shall be designed to safely withstand full hydrostatic head with a factor of safety of at least 1.5 against blowout. Higher factors of safety may be required where dictated by the consequences of failure. Calculations and cross sections used in the analyses shall be submitted.

(r) Plans for the extinguishment of burning areas which contain, at a minimum, method of extinguishment, safety measures for equipment operators and persons working or living in the vicinity of the site, and a provision that only those persons authorized by the operator, ~~and who have an understanding of the procedure to be used~~, shall be involved in the extinguishing operation.

(s) Plans for underground refuse disposal shall be submitted to and approved by the Commissioner and the Mine Safety and Health Administration. All plans must include:

(1) Method of disposal including a description of the source of the transport medium;

(2) Maps of mines where coal refuse materials are to be disposed with a description of the percent of mine void to be filled.

(3) Description of location of active workings including plans, specifications, and methods of constructing underground retaining walls;

(4) Potential areas of breakout in active mine workings and on the surface of the ground;

(5) Effects of subsidence on the plan;

(6) The effects on groundwater including a permanent monitoring well or station to be located in the lowest practical elevation of the backfill area;

(7) Gradient of the mine from the backfill area;

(8) Description of stratum underlying the mined coal, source and potential acid or toxic-forming quality of the refuse, and the treatment of water if released to surface streams;

(9) A contingency plan formulated to alleviate or correct any hazardous conditions which may result from a blowout; and

(10) A description of the surface area to be supported by the refuse backfill, the anticipated surface effects following backfilling, and the method for dewatering the backfill.

(t) An abandonment plan which addresses the following requirements and include a schedule for their implementation:

(1) No refuse embankment or impoundment may be abandoned until ~~it has final bond release~~ approved by the Commissioner.

(2) The final top elevation of the refuse embankment must be higher than, and sloped into, the diversion ditch. Maximum slope of the top of the embankment to the diversion ditch

shall be five (5) percent unless otherwise approved by the Commissioner.

(3) All pipes under refuse areas left as non-impounding fills shall be sealed with concrete at the upstream end prior to abandonment.

(4) At abandonment all fine refuse ~~disposal areas~~ in the impoundment pool shall be covered with a minimum three foot layer of coarse refuse or other fill material prior to topsoiling unless otherwise approved by the Commissioner.

(5) At abandonment all coal refuse shall be covered with a minimum of four (4) feet of the best available non-toxic and non-combustible material in a manner that does not impede flow from sub-drainage systems. The Commissioner may allow less than four (4) feet of cover material where it can be demonstrated that the vegetation requirements of Section 9 of the Surface Mining Regulations shall be met.

(6) A certificate of approval for completion of construction shall be issued upon completion of the above requirements.

22.4 Permit Requirements - Impounding Structures In addition to the requests of the Act and these regulations, coal refuse disposal sites which have the capability of impounding water shall be subject to the special requirements of this subsection and may be subject to other state and federal laws and rules and regulations, depending on their embankment size and holding capacity.

(a) A coal refuse site which is constructed in such a manner that it: (1) Rises twenty-five (25) feet or more above the natural bed of a stream or watercourse as measured from the downstream toe of the embankment and which does or can impound fifteen (15) acre-feet or more of water, or; (2) Rises six (6) feet or more above the natural bed of a stream or watercourse as measured from the downstream toe of the embankment and which does or can impound fifty (50) acre-feet or more of water is by definition a dam and is thereby subject to the provisions of the West Virginia Dam Control Act set forth in Chapter 20, Article 5D of the Code of West Virginia.

(b) A coal refuse site which is constructed in such a manner that it can impound water, sediment, or slurry to an elevation of: (1) Five (5) feet or more above the upstream toe of the structure and can have a storage volume of twenty (20)

acres/feet or more, or; (2) Twenty (20) feet or more above the upstream toe of the structure, or; (3) Presents a hazard to coal miners as determined by the District Manager of the Federal Mine Health and Safety Administration, shall be subject to the requirements of 30 CFR 77.215 and 77.216 of the Federal Mine Health and Safety Administration Regulations.

(c) Coal refuse sites which result in impoundments which are not subject to the Dam Control Act or the Federal Mine Health and Safety Act shall be designed, constructed, and maintained subject to the requirements of this section and Subsection 5.4 of these rules and regulations.

(d) The hazard potential of coal refuse sites which have the capability of impounding water shall be determined by the applicant based on the potential loss of life that would result due to a failure and the classification determined on the basis of the following criteria:

(1) Class A. Impoundments located in rural or agricultural areas where failure may damage farm buildings, agricultural land, or secondary highways. Failure of the structure would cause only loss of the structure and loss of property use such as related roads, but with little additional damage to adjacent property. Any impoundment exceeding twenty-five (25) feet in height measured at the downstream toe or two-hundred (200) acre-feet storage volume or having a watershed exceeding five hundred (500) acres shall not be a Class A structure.

(2) Class B. Impoundments located in predominantly rural agricultural areas where failure may damage isolated homes, primary highways or minor railroads or cause interruption of relatively important public utilities. Failure of the structure may cause great damage to property and project operations.

(3) Class C. Impoundments located where failure may cause loss of life, serious damage to homes, industrial and commercial buildings, important public utilities, primary highways, or main railroads. This classification must be used if failure would cause possible loss of human life.

(e) For a Class C structure or if a dangerous condition exists, notification and action procedures shall be formulated by the operator or owner, for public protection and remedial action in the event of an emergency. All emergency procedures must be submitted and become part of the approved plan. If adequate emergency procedures cannot, for whatever reason, be formulated

by the owner or operator, then he must so notify the Commissioner in writing. The Commissioner may then notify the Office of Emergency Services and request that emergency procedures be developed for the coal refuse site.

(f) All refuse impoundments and dams shall be designed to meet the following design storm criteria based upon hazard classification.

(1) Class A impoundments shall be designed for a minimum of P_{100}+0.12 (PMP-P_{100}) inches of rainfall in six (6) hours plus three feet of freeboard. If the storage times effective height is less than 3,000 (acre-feet)(feet), Soil Conservation Service Pond Standard 378 may be substituted.

(2) Class B impoundments shall be designed for a minimum of P_{100}+0.40 (PMP-P_{100}) inches of rainfall in six (6) hours plus three (3) feet of freeboard.

(3) Class C impoundments shall be designed for the probable maximum precipitation of the appropriate duration.

(g) All impoundments must be capable of passing through a spillway or outlet works or a combination thereof, that portion of the design storm that cannot be safely stored in the impoundment and to draw down the stored portion of the design storm within the specified terms in accordance with the following:

(1) Class A impoundments must be designed with an open channel spillway unless otherwise approved by the Commissioner, Ninety (90) percent of the stored portion of the design storm must be discharged or removed within ten (10) days after the storm event.

(2) Class B impoundments shall be designed with either an open channel spillway only, or with an emergency spillway and a principal spillway together. Ninety (90) percent of the stored portion of the design storm shall be discharged or removed within ten days after the storm event.

(3) Class C dams may be designed in one of three ways:

(A) An impoundment designed without discharge structures shall be capable of storing a minimum of two (2) ~~thirty~~-six (36) hour duration probable maximum storms. Water shall be removed from the impoundment to its lowest practical

level by pumping or by other means if storm water reduces the storage capacity to one probable maximum storm or less.

(B) An impoundment designed with a decant or principal spillway only shall be capable of storing at least one (1) ~~thirty~~-six (36) hour duration probable maximum storm. Ninety (90) percent of the stored portion of the storm shall be discharged or removed within ten (10) days after the storm event.

(C) An impoundment designed with either an open channel spillway only, or with an emergency spillway and principal spillway together shall be capable of discharging that portion of the six (6) hour duration probable maximum storm that cannot be safely stored in the impoundment. Ninety (90) percent of the stored portion of the storm shall be discharged or removed within ten (10) days after the storm event.

(h) All open channel spillways must comply with this section, the Handbook, and the following additional requirements:

(1) Any open channel spillway designed for less than one hundred (100) percent probable maximum precipitation shall be provided with freeboard above the maximum water surface as determined by the equation $1+.025vd^{1/3}$.

(2) Excess excavated material not needed to construct and maintain the spillway channel must be properly disposed of in the permit area unless otherwise approved by the Commissioner.

(3) Topsoil removed from channel excavation shall either be redistributed on another part of the permit area or stockpiled for future use.

(i) All pipe spillways must comply with the requirements of this section and the following additional requirements:

(1) The pipe spillway inlet must be protected by a designed trash rack.

(2) All riser-type spillways must be designed to prevent vortexing.

(3) A skimming device is required where floating pollutants exist or are anticipated.

(4) An adequate foundation and bedding shall be designed for all pipes and risers.

(5) All pipe spillways shall be designed to provide seepage control along the conduit.

(6) The pipe spillway shall be of sufficient strength to withstand the maximum load of the fill above it.

(7) All pipe spillways shall be constructed of suitable material to resist deterioration for the design life of the facility.

(8) The outlet of all pipes, where blockage by animals can occur, must be protected by an animal guard.

(j) All impoundments meeting the size requirements of paragraphs (a), (b), or (c) of Subsection 22.4, of these regulations, constructed after the effective date of the Act must be designed with a gated drainpipe or principal spillway gate for draining the impoundment. All drain pipes must meet the requirements for pipe spillways.

22.5 Performance Standards. The following performance standards shall be met for all coal refuse disposal facilities.

(a) All coal refuse disposal facilities shall be placed in new or existing disposal areas within a permit area designated for this purpose. Coal mine refuse shall be placed in a controlled manner to:

(1) Minimize adverse effects of leachate and surface-water runoff on surface and ground water quality and quantity;

(2) Ensure mass stability and prevent mass movement during and after construction;

(3) Ensure that the final disposal facility is suitable for reclamation and revegetation compatible with the natural surroundings and the approved postmining land use;

(4) Not create a public hazard; and

(5) Prevent combustion.

(b) Coal mine refuse material from activities located outside a permit area may be disposed of in the permit area only if approved by the Commissioner. Approval shall be based upon a showing that such disposal will be in accordance with the standards of this section.

(c) Slope protection shall be provided to minimize surface erosion at the site. All disturbed areas, including diversion channels that are not riprapped or otherwise protected, shall be revegetated upon completion of construction.

(d) ~~All vegetative and organic materials shall be removed from the disposal area prior to placement of coal mine refuse.~~ Cleaning and grubbing shall be performed in the foundation, borrow, and soil stockpile areas unless otherwise approved. Topsoil shall be removed, segregated, and stored or redistributed in accordance with Subsection 14.3 of these regulations. If approved by the regulatory authority, organic material may be used as mulch, or may be included in the topsoil to control erosion, promote growth of vegetation, or increase the moisture retention of the soil.

(e) The final configuration of the refuse pile shall be suitable for the approved postmining land use. Terraces may be constructed on the outslope of the refuse pile if required for stability, control or erosion, conservation of soil moisture, or facilitation of the approved postmining land use. The grade of the outslope between terrace benches shall not be steeper than 2h:1v (50 percent).

(f) No permanent impoundments shall be allowed on the completed refuse pile. Small depressions may be allowed if they are needed to retain moisture, minimize erosion, create and enhance wildlife habitat, or assist revegetation, and if they are not incompatible with stability of the refuse pile.

(g) Following final grading of the refuse pile, the coal mine refuse shall be covered with a minimum of four (4) feet of the best available, nontoxic and noncombustible material, in a manner that does not impede drainage from the underdrains. The Commissioner may allow less than four (4) feet of cover material based on physical and chemical analyses which show that the revegetation requirements of Section 9 of these regulations will be met.

(h) If any examination or inspection discloses that a potential hazard exists, the Commissioner shall be informed promptly of the finding and of the emergency procedures formulated for public protection and remedial action. If adequate procedures cannot be formulated or implemented, the Commissioner shall be notified immediately. The Commissioner shall then notify the appropriate agencies that other emergency procedures are required to protect the public.

(i) Coal mine refuse may be disposed of in underground mine workings, but only in accordance with a plan approved by the Commissioner and MSHA.

(j) New and existing impounding structures constructed of coal mine refuse or intended to impound coal mine refuse shall meet the following requirements:

(1) Coal mine refuse shall not be used for construction of impounding structures unless it has been demonstrated to the Commissioner that the stability of such a structure conforms to the requirements of this section and the use of coal mine refuse will not have a detrimental effect on downstream water quality or the environment due to acid seepage through the impounding structure. The stability of the structure and the potential impact of acid mine seepage through the impounding structure shall be discussed in detail in the design plan.

(2) If an impounding structure constructed of coal mine refuse or intended to impound coal mine refuse meets the criteria of paragraph (c) of Subsection 22.4 of this section, the combination of principal and emergency spillways shall be ~~able to safely pass the one hundred (100) year, twenty-four (24) hour precipitation event~~ designed and constructed in accordance with paragraphs (g) and (h) of Subsection 22.4 of these regulations.

(3) Spillways and outlet works shall be designed to provide adequate protection against erosion and corrosion. Inlets shall be protected against blockage.

(4) Runoff from areas above the disposal facility or runoff from surface of the facility that may cause instability or erosion of the impounding structure shall be diverted into stabilized diversion channels designed to safely pass the runoff from a one hundred (100) year, twenty-four (24) hour precipitation event.

(5) Impounding structures constructed of or impounding coal mine refuse shall be designed so that at least ninety (90) percent of the water stored during the design precipitation event can be removed within a ten (10) day period.

(k) Drainage control measures shall meet the requirements of Section 5 of these regulations. After grade release, discharges from the permit area shall not lower the water quality of receiving streams.

(l) Where coal refuse is to be removed from an existing facility for reprocessing or reconstruction, the following standards shall be met:

(1) Removal of refuse shall be accomplished in successive horizontal lifts with a maximum elevation difference between working benches of twelve (12) feet or may be removed down a slope from the top to the toe provided that the slope is no steeper than 2H:1V. No refuse may be removed from the toe of the original embankment until the final removal process.

(2) At all times during removal operations, care shall be exercised to protect the operating personnel, the public, and to insure long-term stability in accordance with the approved plan.

(3) Where possible, the final graded slopes shall be no steeper than 2H:1V and at least one bench for every fifty (50) feet of change in elevation shall be provided.

(4) Should burning areas be encountered, the fires shall be extinguished in accordance with paragraph (j) of this subsection, and removal of refuse shall be done in a safe manner.

(5) The total disturbed area shall be regraded in such a manner as to be compatible with the natural surroundings and shall be revegetated in accordance with Section 9 of these regulations. Such regrading and revegetation shall occur as contemporaneously as practicable with removal operations as reflected in the reclamation plan.

(6) Regarding drainage control shall be provided in accordance with the approved reclamation plan.

(m) Where burning or burned refuse is encountered in the reconstruction or removal of an existing structure, the following standards shall be met:

(1) Coal mine refuse fires shall be extinguished by the person who conducts the surface mining activities, in accordance with a plan approved by ~~the Commissioner and~~ the Mine Safety and Health Administration. The plan shall contain, at a minimum, provisions to ensure that only those persons authorized by the operator, and who have an understanding of the procedures to be used, shall be involved in the extinguishing operations.

(2) No burning or burned coal mine refuse shall be removed from a permitted disposal area without a removal plan

approved by the Commission. Consideration shall be given to potential hazards to persons working or living in the vicinity of the structure.

22.6 Inspections. A qualified registered professional engineer, or other qualified professional specialist under the direction of the professional engineer, shall inspect the refuse pile during construction. The professional engineer or specialist shall be experienced in the construction of similar earth and refuse structures.

(a) Inspections shall be made at least quarterly throughout construction and during critical construction periods, which shall include at a minimum:

(1) Foundation preparation including the removal of all organic material and topsoil;

(2) Placement of underdrains and protective filter systems;

(3) Installation of final surface drainage systems; and

(4) The final graded and revegetated facility.

(b) Regular inspections by the engineer or specialist shall also be conducted during placement and compaction of coal mine refuse materials. More frequent inspections shall be conducted if a potential danger or harm exists to the public health and safety or the environment. Inspections shall continue until the refuse pile has been finally graded and revegetated or until a later time if required by the Commissioner.

(c) The qualified registered professional engineer shall provide a certified report to the regulatory authority promptly after each inspection that the refuse pile has been constructed and maintained as designed and in accordance with the approved plan and this chapter. The report shall include appearances of instability, structural weakness, and other hazardous conditions.

(d) The certified report on the drainage system and protective filters shall include color photographs taken during and after construction, but before underdrains are covered with coal mine refuse. If the underdrain system is constructed in phases, each phase shall be certified separately. The photographs accompanying each certified report shall be taken in adequate size and number with enough terrain or other physical

features of the site shown to provide a relative scale to the photographs and to specifically and clearly identify the site.

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

PUBLIC NOTICE MAILING LIST

1. Clarksburg Publishing Company
   Clarksburg Exponent and Telegram
   324-326 Hewes Avenue
   Clarksburg, West Virginia 26301

2. Inter-Mountain
   Post Office Box 1339
   Elkins, West Virginia 26241

3. Herald Dispatch
   946 Fifth Avenue
   Huntington, West Virginia 25720

4. Beckley Newspapers, Inc.
   Raleigh Register and Beckley Post-Herald
   Post Office Drawer P or R
   Beckley, West Virginia 25801

5. The Dominion Post
   Greer Building
   Morgantown, West Virginia 26505

6. The Ogden Newspapers, Inc.
   Wheeling News Register and Intelligencer
   1500 Main Street
   Wheeling, West Virginia 26003

7. The Charleston Gazette
   Post Office Box 2993
   Charleston, West Virginia 25330

RESPONSE TO COMMENTS

PROPOSED LEGISLATIVE RULES

WEST VIRGINIA SURFACE MINING RECLAMATION REGULATIONS
TITLE 38 SERIES 2

DECEMBER 9, 1987

Attached are copies of written comments received relative to the above captioned regulations. Oral comments were also received at the public hearing held November 25, 1987.

During the comment period, meetings were held with various individuals and interest groups, and the regulations were carefully reviewed by Department staff.

An itemized listing of all amendments made to the regulations is attached with a brief explanation for the change. These amendments are reflected in the proposed regulations, complete with strikethroughs and underscoring.

Numerous comments were not directly addressed, but are made a part of the official record with this filing.

DOE-022

4

REGISTRATION FOR PUBLIC HEARINGS
WEST VIRGINIA DEPARTMENT OF ENERGY

Meeting: West Virginia Surface Mining Reclamation Regulations (Repealer) Date: November 25, 1987

Name	Address	Representing	Please check (x) if you desire to make a statement
XXXXXXXXXXX	PLEASE PRINT OR WRITE PLAINLY	XXXXXXXXXXXXX	
John Purbaugh	2502 Dudden Fork, Kenna 25248	WV Highlands Conservancy	✓ Oral at this time
Ben Greene	1624 Kanawha Blvd E Charleston	W.V.M.R.A	X
[illegible]	Chas	WV Coal Assn	no
[illegible] Smith	Beckley	Glade Creek Coal Co.	NO.

League of Women Voters of West Virginia

December 1, 1987

STATEMENT TO THE WEST VIRGINIA DEPARTMENT OF ENERGY

RE: Legislative Rules, Department of Energy, Series 2, West Virginia Surface Mining Reclamation Regulations

The League of Women Voters of West Virginia believes that surface mining should be rigidly controlled. In the event that such control is not possible, the League believes that the right to engage in surface mining should be abolished.

The League of Women Voters believes the following criteria should govern surface mining regulations: future use of mined lands, aesthetics, protection of wildlife, preservation of land for a stable life system, effect on adjacent land and water, state tax monies, and corporation profits.

The League further holds that surface mining companies should operate under a "no damage, total reclamation" policy; that reclamation should provide maximum protection to watersheds and adjoining properties; and that the state should be responsible for the administrative supervision of the reclamation of orphaned lands. On the question of aesthetics, the League strongly supports the protection of natural scenic areas, pbulic lands, waterways, and neighboring farms and homes from the adverse effects of surface mining.

Based on this position adopted in 1972 by our members after a comprehensive study, we offer the following questions, comments, and suggestions to the proposed rules and regulations.

1. Title 38, CSR 2, Section 2, 2.54 and 2.128 - It is our understanding these are not new definitions for Groundwater and Zone of Saturation and thus there is no change to current water quality regulations/standards or the ability to require monitoring of the unsaturated zone. Is this understanding correct? If not, what changes have been made and how willthey effect current water quality regulations/standards and monitoring?

2. Title 38, CSR 2, Section 2, 2.122 - We suggest striking the last few words in the definition of Toxic Mine Drainage. We would strike the words "commonly present in the area that might be exposed to it." We believe if the drainage is likely to kill, injure or impair biota, it should be labeled toxic whether or not such biota is "Commonly present in the area that might be exposed to it."

3. Title 38, CSR 2, Section 3, (d) (13) - We suggest the location of water supply intakes for current users of groundwater should also be identified and would add it to this requirement for surface water users. We believe current users of both surface and groundwater should be located to prevent contamination of their water supply.

4. Title 38, CSR 2, Section 3, 3.12 (b) - This section states the Commissioner shall determine what fish and wildlife resources information will be required. We suggest the inclusion of some minimum requirements at least in the regulations. In all fairness to the coal operators, they should have some knowledge of the minimum information required. In several other areas of these regulations, such minimum requirements are listed, and we suggest the same be done here.

5. Title 38, CSR 2, Section 3, 3.11 (d) (1) - This section requires a statement of how the Fish and Wildlife plan will "minimize" disturbances and adverse impacts on fish and wildlife and related environmental values... We suggest changing the word "minimize" to prevent. Surface mining activities should not be allowed to have an "adverse impact" on fish and wildlife. If such impacts cannot be prevented, mining activities should not be permitted.

(d) (3) - requires a statement explaining controlling and monitoring methods to protect or enhance such things as threatened or endangered species, protec ted birds and animals, and habitats of unusually high value (ex. wetlands, riparian areas, etc.), if they are to be affected by the proposed activities. We believe if these very delicate and special plants, animals, and habitats are going to be affected by the proposed mining activities, the proposed activities should be forbidden. We suggest surface mining activities be forbidden if they impact on these special plants, animals, and habitats.

6. Title 38, CSR 2, Section 3, 3.15 (a) - This section requires a statement of measures to be used to minimize or prevent adverse impacts to historical lands. Again, we suggest the elimination of the word "minimize". We believe surface mining activities should not be allowed to have adverse impacts on historic lands. If they cannot be prevented, mining shouldn't be permitted.

7. Title 38, CSR 2, Section 3, 3.15 (e) - This section suggests a review of the permit application where a proposed surface coal mining operation will adversely affect any public park or any privately owned place listed on the national register of historic places. Such parks and places should be protected from any adverse affects of mining activities and if they cannot be protected, surface mining activities should not be permitted. We suggest this section include such restrictions.

8. Title 38, CSR 2, Section 3, 3.16 (b) (2) and 3.16 (c) (2) - These sections allow the use of water quality data from other sites within the general area; provided, that a limited number of validation smaples from the permit area may be required. We

suggest changing the word "may" to shall. A limited number of samples should be required to validate that the data from the other areas is indeed appropriate or relevent to the permit area and truly reflects the needed water quality information for the permit area.

9. Title 38, CSR 2, Section 3, 3.16 (b) (4) - This section states if the determination of the probable hydrologic consequences indicates that a currently used or significant groundwater resource is likely to be adversely impacted, additional base line information shall be provided as necessary to evaluate such probable hydrologic consequences or to plan remedial or reclamation activities. We believe if the surface mining activity is likely to adversely impact groundwater resources, it should be prohibited and suggest this section so state such prohibition. Further, we believe it to be economically unfeasible, if not impossible, to remediate contamination to groundwater resources.

10. Title 38, CSR 2, Section 3, 3.16 (f) (2) - This section suggests measures be taken to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow. We suggest striking the words "to the extent ... currently available." If prevention is not possible, mining activity should not be permitted.

11. Title 38, CSR 2, Section 3, 3.16 (f) (5) - This section reads "Restore approximate premining recharge capacity and protect or replace rights of present water users." The phrase "replace rights" implies one's rights may be taken away if later replaced. We believe the word "replace" should be removed. It is one thing to willing give up one's rights, it is another to have them taken away with a promise to replace them later.

12. Title 38, CSR 2, Section 3, 3.16 (h) and (i) - These sections deal with monitoring plans if adverse impacts to a significant gourndwater resource is anticipated. No adverse impacts should be allowed to groundwater and it should be so stated. Groundwater is an extremely difficult, if not impossible, resource to clean up once it is contaminated. If the mining activity threatens the groundwater resource, the activity should not be permitted.

13. Title 38, CSR 2, Section 4, 4.12 (a) (5) - This section reads "Construction specifications should address." We suggest changing the word "should" to shall. If it should address them, then let's require that it does.

14. Title 38, CSR 2, Section 5, 5.4 (b) (3) - This section forbids sediment control structures in perennial streams unless the Commissioner finds no othersuitable location. We suggest sediment control structures should not be constructed in perennial streams and if thereis no other suitable location, the mining activity should not be permitted.

15. Title 38, CSR 2, Section 6, 6.5 (h) - This section reads "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." We believe in such cases the Commissioner should be required to prohibit blasting and suggest changing the word "may" to shall.

16. Title 38, CSR 2, Section 8, 8.1 (a) - This section again talks about minimizing disruption and adverse impacts on fish, wildlife, and related environmental values. Again, as previously state in Section 3, 3.11 (d), we suggest changing the word "minimize" to prevent.

17. Title 38, CSR 2, Section 8, 8.1 (b) and (c) - These sections require reporting of endangered or threatened species and golden or bald eagle nests withing the permit area. They further state the Commissioner shall identify whether and under what conditions the operator may proceed. We suggest the operator should not be allowed to proceed under any conditions. These are protected animals and should be treated as such.

18. Title 38, CSR 2, Section 8, 8.1 (e) (2) - This section states the location and operation of haul and access roads should avoid or minimize impacts on important fish and wildlife species protected by State and Federal law. We suggest striking the words "avoid or minimize" and replacing them with the word prevent. Again, these are protected species and should be so protected from surface mining activity.

19. Title 38, CSR 2, Section 13, 13.2 - This section appears to allow prospecting for greater than 250 tons of coal. It was our understanding that West Virginia statute limited prospecting to 250 tons. If current statute does limit it to 250 tons, this section is clearly in violation of the statute. If our understanding is incorrect, and the statue does not limit prospecting to 250 tons, these regulations should not leave the tonnage open ended with reference to "greater than 250 tons". Such a blanket variance allows or rather encourages abuse of the concept of prospect permitting since lesser requirements are allowed under prospect permits. If there is a need to increase the tonnage limit, and we see no need since other states seem to manage with such a limit, then the limit should be increased, not done away with entirely as this section does.

20. Title 38, CSR 2, Section 13, 13.3 (b) (3) - This section states - Not adversely affect any cultural or historical resources listed on the National Register, unless approved by both the Commissioner and the agency with jurisdiction. We suggest mining activity should not be allowed to adversely affect such resources and that this section should state so.

21. Title 38, CSR 2, Section 13, 13.8 - This section reads "IF prospecting operations are to be conditional on lands which have been designated as unsuitable for surface mining, a notice

avoiding such practices is not appropriate and that such practices should be prohibited and suggest the regulations state so.

31. Title 38, CSR 2, Section 15, 15.3 (3) - Again this section talks about restoring the quality of affected groundwater. We believe such restoration to be unlikely at best for the reasons given before.

32. Title 38, CSR 2, Section 17, 17.2 (a) - This section provides for payment by the Department of Energy to a qualified laboratory to determine the probable hydrologic consequences of mining and reclamation operations for a qualified small operator. Why is such a provision necessary? The public would be paying for an obligation the operator should pay. The provision is based on size of the operator not on need. Size does not necessarily reflect financial need.

Thank you for the opportunity to comment on the proposed rules and regulations.

Nancy Novak

Nancy Novak, President

Becky Cain

Becky Cain, Immediate Past President

cc: The Honorable Larry Tucker, Legislative Rules
The Honorable Tom Knight, Legislative Rules

west
virginia
highlands
conservancy
ADMINISTRATIVE OFFICES • Suite 201 • 1206 Virginia Street, East • Charleston, West Virginia 25301
Publishers of the Highlands Voice

December 4, 1987

Mr. Roger T. Hall
West Virginia Department of Energy
1615 Washington Street, E.
Charleston, WV 25311

RE: Proposed SMRA Rules, Title 38 CSR Series 2. (The "repealer" package).

Dear Mr. Hall:

These comments are submitted in response to the Notice of Public Hearing for November 25, 1987 on these proposed rules, and upon your announcement on the record at that hearing of the extension, for ten days, of the November 25, 1987 deadline for receipt of written comments on these rules. Because the tenth such day falls on Saturday, December 5, 1987, under W. Va. Code §2-2-2, Monday, December 7, 1987 is deemed to be the day intended. As you know, the Conservancy, by its mining committee and members, monitors the permitting and enforcement activities of DOE governed by these rules, and appreciates the opportunity to comment on them. The ten additional days is of some help in confronting this package, but has not and cannot resolve the problem that arises from your choice to revise your existing regulations by repealing that package and substituting this one. Though this set is organized differently than your existing regulations, this package clearly deals with the same general topics, is promulgated pursuant to the same statutory authorities, and is therefore an amendment or revision to existing regulations even if your choose to call it a "repealer package".

Under W. Va. Code §29A-3-11(a) when you submit this legislature rule to the Legislature, you must submit it "with new language underlined and with language to be deleted from **any** existing rule stricken through but clearly legible . . .". (emphasis added). Because this format has not been followed here, I am unable to state that I have identified or reviewed all the significant changes in this amendment package and therefore do not believe that notice and comment process can be considered as having fulfilled its purpose of offering a meaningful opportunity to be heard. Nevertheless, I offer these comments in a constructive effort to address those concerns we have been able thus far to identify.

Readvertisement

In new section 3.2(d), you provide for only one additional advertisement and a ten day comment period when a significant change is made to a permit application. There are two problems with this time-limited approach to the problem. First, a significant revision affecting the method of operation or the reclamation plan is in my experience one which usually requires a re-examination of the entire permit application. Frequently,

the applicant submits information which addresses, but inadequately so, required items in the application, and the significant revisions are the provision of completely new information filling that gap. Changes in the mining method, reclamation plan, or areas affected by mining usually change to some extent the location or severity of affects on nearby landowners. Second, Zirkle v. Faerber explicitly states that after such revisions to an application "concerned parties must be permitted to comment as envisaged by W. Va. Code §22A-3-20(b)". 350 S.E. 2d 3, 6 (W. Va. 1986). §20(b) provides only one form and length of advertisement: once a week for four successive weeks. In addition to fulfilling the rule of the Zirkle case, such a re-advertisement period may eventually serve to constrain the all too-common practice whereby applicants submit a skeletal application, and supply the meat of data and conclusions on troublesome issues after it has gone to advertisement and comment.

Fish and Wildlife Data

New §3.12 seems to have made optional, or completely discretionary, the provision of fish and wildlife information that use to be required in every case. I understand that WVDNR will be commenting on this section and generally believe that their wildlife division professionals, rather than the DOE commissioner, should determine the scope of the wildlife data and plans required for each site.

PHC Information

§3.16 allows the use of correlation, rather than site specific data for both ground and surface water quantity and quality. For surface water, such correlation data does not even have to include all the pollutants in §3.16(c)(2). The only check on correlation data is "that a limited number of validation samples **may** be required". Great variation in baseline water quality by relatively small areas is a fact of life in West Virginia, where two different sides of the same mountain can have completely different natural and man-made influences on water quality. Correlation data should never be allowed for a mine in a listed, acid-producing seam, and when allowed should **require** in all cases validation samples from the site to be mined. Correlation data which doesn't contain all the parameters listed in §3.16(c)(2) is not reliable, since the relationship between all such parameters characterizing mine drainage is as critical as any one pollutant itself.

Geologic Information

§3.17. For reasons similar to those already discussed, correlation data or previous experience should not be allowed as a substitute for site specific overburden sampling or analysis in acid-producing seams. Prior experience or correlation data cannot ensure that very localized conditions, whether more or less acidic than previously experienced elsewhere in the same seams, will not cause unexpected results. Since this data is a key factor in predicting hydrologic impacts from acid seams, the combination of correlating water quality data plus "prior experience" in lieu of site overburden analysis will make many PHC's and CHIA's into purely abstract documents, without any real relevance to the mine site.

Sediment Control, Structure Placement

§5.1, 5.2, 5.3, 5.4, and 5.5 addresses drainage systems generally. Though protection of water quality and aquatic life is discussed throughout, it is done so in a

general manner that leaves too much room for unguided discretion in judgment. As a start, I suggest the following changes to "tighten up" the discretion in the most critical case, that of instream chemical treatment. Where it is reasonably anticipated that a mine in an acid producing seam or otherwise will require chemical treatment, that treatment should not be allowed to occur in an intermittent or perennial stream (§5.2), or in a sediment control pond (§5.4) located in such a stream course where fish life is found. Obviously, if construction (§5.2) and operation (§5.4) of a pond is permitted under these sections and chemical treatment is allowed to occur there, such treatment will "cause or contribute to any violation of State or federal water quality standards", since the water wouldn't need treatment to begin with if it didn't violate these standards at that location.

Thank you for the opportunity to submit these preliminary, incomplete comments on this "repealer package".

Sincerely,

John Purbaugh
President

JP:jm

cc: John McFerrin
Cindy Rank

WEST VIRGINIA COAL ASSOCIATION

December 4, 1987

Mr. Kenneth R. Faerber, Commissioner
West Virginia Department of Energy
1615 Washington Street, East
Charleston, West Virginia 25311

Dear Commissioner Faerber:

Enclosed please find suggested changes to the proposed departmental regulations revising Series 2 Surface Mining Reclamation regulations. The West Virginia Coal Association respectfully submits these suggestions and hopes they will be seriously considered.

Sincerely,

Gary G. White
President

GGW/sjd
Enclosure

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

General Comments

Section 2 - Definitions

2.36 Cumulative Impact - In the second line of the definition, omit "coal" and insert "anticipated."

2.37 Cumulative Impact Area - Suggestion was made to mirror the federal definition.

2.8 Active Surface Mining Operations - Omit "mineral is being removed and where bond reduction has not been approved" and insert "reclamation operations are not complete and where bond reduction has not been approved."

2.20 It was decided to use the current OSM definition.

2.45 Excess Spoil - Omit "placed" and insert "disposed of."

2.60 Historical Lands - The association should fight the omission of "eligible" at the OSM level.

2.61 Hydrologic Balance - This definition needs to be reworded.

2.64 Impoundment - This definition will be modified to include the size and criteria of impoundments set forth in the October 21, 1987, Federal Register.

2.68 Intermittent Stream - A suggestion was made to mirror the federal definition.

2.81 Submit comments.

2.87 Potential Hazard - This definition has been omitted.

2.93 Prospecting - 2.93(b) was deleted.

2.112 Structure - In the second sentence insert "or." The sentence will read: Structures built and/or utilized for the purpose of carrying out the surface mining operation are not included in this definition.

2.114 Subsidence - Insert "as it relates to underground mining operations." The definition will read: Subsidence means as it relates to underground mining operations a sinking, collapsing, or cracking of a portion of the earth's surface caused by voids beneath the surface created by mining.

Section 3 - Permit Application Requirements and Contents

3.3 Occupied Dwellings

3.3(b)(1)(2)(3) - Mirror the federal regulations.

3.4 Maps

3.4(e)(6) - 3.4(e)(6) was omitted.

3.8(a)(1) - Operation(s) Near Public Road - Insert "where the public road is to be closed or relocated."

3.12 Fish and Wildlife Resources

3.12(a) - Omit "mine planned area" and insert "permit."

3.13 Reprocessing or Removal of Abandon Coal Refuse Disposal Piles

3.13(b)(2)(B)(i) - Page 21. In the second line omit "six (6)" and insert "twenty-four (24)."

3.16 Hydrologic Information

3.16(a) - Submit comments.

3.16(f)(5) - Insert "restore capacity" in the first sentence and omit "rights" in the second sentence.

3.16(g) - Mirror the federal regulations.

3.16(h) - Mirror the federal regulations.

3.21 Permit Renewals

3.21(a) - In the first line insert "active surface mining operations shall file," and omit "shall be filed."

3.23 Incidental Boundary Revisions (IBR)

3.23(3) - In the second line after insignificant IBR insert "or is non-contiguous and has been determined to be an insignificant IBR."

3.24 Variance

3.24(8)(c) - Omit.

3.25 Permit Conditions

3.25(b) - Omit.

3.25(b)(1) - Omit.

3.25(b)(2) - Omit.

The sections which have been omitted 3.25(b), (b)(1), (b)(2) because they are covered in Section 18.2 and Section 15. (840.11).

Section 4 - Haulageways or Access Roads

Submit comments. See November 3, Federal Register.

4.8 Removal of Drainage Structures - In the third line omit "until reclamation is completed and" insert "unless."

Section 5 - Drainage Systems

5.1 Natural Drainways - In the fourth line omit "not affect the flow of the stream."

5.2(a) Intermittent or Perennial Stream - In the last line insert "applicable" before water quality standards.

(816.46(b)(2) - Suspended November 26, 1986 Federal Register. "All runoff from the disturbed area shall pass through a sediment control system."

5.4(b)(1) - In the first line insert "for an area of the permit" and at the end of the paragraph insert "in the component drainage area of that specific structure." The sentence should read: All sediment control structures "for an area of the permit" shall be certified by registered professional engineer or licensed land surveyor as provided for in paragraph (c) of this sub-section before any surface mining activities begin "in the component drainage area of that specific structure."

5.4(3) - Insert "approved by" and omit "the applicant demonstrates," and omit "finds that there is no other suitable location for such structures." The sentence should read: Sediment control structures shall not be constructed in perennial streams unless "approved by" the Commissioner.

5.4(b)(5) - The sentence has been changed to read: The optimum design criteria for "sediment control structures" are a storage capacity of the 0.125 acre/feet of storage for each acre disturbed "which shall include adequate detention time." Also

add 4B.05(3) from old regulations. "Provided that consideration may be given for reduced storage volume where the preplan and site conditions reflect control 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."

In the proposed regulations omit "adequate to contain a ten (10) year, twenty-four (24) precipitation event. Site specific factors as such climate, topography, groundcover, on-site sediment control, concurrent reclamation practices, controlled spoil placement, etc., shall provide a basis for a finding by the Commissioner that lesser designs may be approved. With such lesser designs are proposed, the applicant shall, as part of the permit application demonstrate that such factors exist and that effluent limits will be met."

5.4(b)(8)(A) - (816.49(a)(8)) In the second line omit "a combination of" and insert "or." The first sentence will read: Embankment structures shall be designed with principal and/or emergency spillways that will safely pass a twenty-five (25) year, twenty-four (24) hour precipitation event.

5.4(d) Inspection - Submit comments.

5.4(g)(i) - In the third line, omit "six" and insert "twenty-four."

5.6 Permanent Impoundments

5.6(g) - In the second line omit "six hour" and insert "twenty-four hour."

Section 6 - Blasting

6.1 General Requirements - Insert at the end of the last line "in accordance with the blasting plans."

6.2 Blasting Plan - In the last sentence, omit "this subsection and shall include at a minimum" and insert "the act of these regulations and the terms and conditions of the permit."

6.2(a) - Omit.

6.2(b) - Omit.

6.2(c) - Omit.

6.2(d) - Omit.

6.4 Blast Record

6.4(17)(C) - Insert at the end of the sentence "where necessary."

6.5 Blasting Procedures

6.5(c)(2) - In the second line omit "shall" and insert "may."

6.8 Preblast Survey

Section 8 - Fish and Wildlife Considerations

8.2 Habitat Development - Strike "Enhancement" from the title.

Section 9 - Revegetation

9.2 Revegetation Plan

9.2(e) - In the sixth line insert "applicable" before water quality standards.

Section 11 - Insurance and Bonding

11.1 Insurance

11.1(a) - In the first line after the word insurance insert "for active surface mine operation." This sentence should read: The applicant shall provide liability insurance "for active surface mine operations" in the following minimum amount:

Section 12 - Replacement, Release, and Forfeiture of Bonds

12.2 Requirement To Release Performance Bonds

12.2(a)(2) - In the sixth line the word "objections" should be omitted.

Section 13 - Requirements of a Notice of Intent To Prospect

13.1(a)(11) - Has been moved to 13.2(a)(4).

13.1(a)(12) - Has been moved to 13.2(a)(4).

Section 14 - Performance Standards

38-2-14 - In the last line omit "be met" and insert "be applicable to both surface and underground mining operations." The sentence should read: In addition to the requirements of the Act, the following performance standards shall "be applicable to both surface and underground mining operations."

14.1(e)(3) - Omit.

14.5 Water Quality - In the second line, omit "both within and."

14.5(b) - In the third line insert "applicable" before water quality standards.

14.5(g) - In the first line omit "mine workings" and insert "mines working."

14.5(h)(2) - In the third line omit "both on or."

14.5(h)(4) - In the second line omit "both on or."

14.5(i) - Add the laundry list from 7B.04(f)(2) from the current regulations.

14.7 Monitoring Requirements

14.7(a) - In the fourth line place a period after Commissioner, and omit "provided that." The fifth sentence should begin with "all." In the fifth line insert "surface water discharge" before effluent standards.

14.7(b) - In the third line omit "NPDES regulations" and insert "effluent limitations." In the eighth line omit "water quality standards" and insert "effluent limitations."

General Comments

The surface monitoring requirements and groundwater monitoring requirements will be separated as it was in the current regulations.

14.9 Auger Operations

14.9(c) - In the fifth line insert "applicable" before water quality standards and insert "leaving the permit area" after water quality standards. The sentence should read: Provided, that any discharge from unsealed auger holes shall not cause a violation of "applicable" water quality standards "leaving the permit area."

14.10 Mountaintop Removal

14.10(a)(1) - In the fourth line omit "not exceed" and insert "be no steeper than."

14.11 Inactive Status

14.11(c) - In the second line omit "before" and insert "beyond."

14.14(d)(2) - In the last line insert "not" before exceed the angle of repose.

14.14(e)(9) - In the third line omit "A drainage pocket shall be maintained at the head of the fill at all times to intercept and direct surface run-off to the rock core. In no case shall this pocket have a potential for impounding more than ten thousand (10,000) cubic feet of water. No other impoundments may be constructed on the fill."

14.14(f)(5) - In the third line after other organic material insert "which may affect the stability of the fill shall be removed."

14.14(f)(10) - Omit.

14.14(g)(10) - Omit.

14.15 Backfilling and Regrading

Section 15 - Performance Standards Applicable to Underground Mining Operations.

15.1 Site Development

15.1(c) - In the sixth line after storage area, insert "or the first seeding season following completion."

15.2 Backfilling and Regrading

15.2(a) - In the second line omit "proceed" and insert "completed." In the fifth line omit "completed" and insert

"initiated." In the sixth line omit "mining" and insert "operations."

Section 16 - Subsidence control

16.1 Public Notice - In the first line omit "mining schedule" and insert "notification." In the fourth line omit "at least." In the fifth line after six months prior to mining, insert "or within that period approved by the Commissioner." (817.122)

16.1(d) - Omit (not in federal regulations).

16.2 Surface Owner Protection

16.2(a) - In the second line insert "either" before the word adopt. In the second line omit "all." In the last line after use of surface lands, insert "or adopt a mining technology which provides for planned subsidence in a predictable controlled manner. Nothing in this part shall be construed to prohibit the standard method of room and pillar mining." (817.121)

16.2(b) - In the third line place a comma after surface lands, omit "shall" and insert "to the extent technologically and economically feasible."

16.2(b(1) - Mirror the federal regulations. (817.121(c)(1))

16.2(c) - Omit as written and mirror the federal regulations. 817.121(c)(1)

Section 20 - Inspection and Inforcement

20.2(k) - In the last line omit "shall" and insert "may."

20.5 Civil Penalties

20.5(d) - In the tenth line omit "was" and insert "continued." In the eleventh line after two or more days insert "after the initial abatement period." In the eleventh line omit "a civil" and insert "an initial." This sentence should read: Any notice of violation which "continued" unabated for two or more days "after the initial abatement period", and received "an initial" penalty assessment of $3,500 or more shall be assessed that penalty amount for a minimum of two days. (845.14(a))

20.6 Procedure for Assessing Civil Penalties

Add old language regarding assessment of one thousand dollars ($1,000). (14B.01)(b)) This should become 20.5(a) beginning at the top of page 7. (14B.01(b))

ISLAND CREEK CORPORATION
S.R. 1, Box 48K
Craigsville, WV 26205
Telephone (304) 742-5501

December 4, 1987

Mr. Kenneth R. Faerber, Commissioner
West Virginia Department of Energy
1615 Washington Street, East
Charleston, West Virginia 25311

RE: Comments on Proposed WV Surface Mining Reclamation Regulations, Series 2

Dear Commissioner Faerber:

We appreciate this opportunity to submit our comments on this most important subject. Island Creek Corporation produced approximately eight million tons of coal in West Virginia during 1986, and we expect to equal or exceed that amount in 1987. Needless to say, the draft proposed West Virginia Surface Mining Reclamation Regulations, Series 2, are of great interest to us. We have undertaken a review of the draft rules, which are being referred to as the "Repealer", in that they will repeal and supersede the current West Virginia Surface Mining Regulations, Series VII, as amended, in their entirety.

As we expressed in comments presented at the 11/25/87 public hearing, the fact that the regulations were entirely reorganized and largely rewritten makes the task of review and comment difficult. We have attempted to make a comprehensive review, but still feel that the time available since release of the draft package was inadequate to allow full consideration of the meaning and intended or unintended potential impact of all of the changes from the earlier Series VII regulations.

During the course of our review, a number of problems in the draft package were identified. Based on comments made by WVDOE personnel at public meetings, we understand that the majority of these were typographical errors or errors of omission when translating the old regulations into the new format, and that changes will be made to correct these before the draft regulations are presented to the West Virginia Legislature for rulemaking review. On the basis of that understanding, we are refraining

from submitting written comments covering each of the necessary changes. Certain issues, however, are of importance to the degree that we feel a written record is necessary, and there are also aspects of the current process which may require future correction. For those reasons, we offer for the record the comments contained in this letter.

One general concern we share with many others is based on the fact that the OSM comments to which the current draft responds were made in August, 1986. Since that time, OSM has made many changes in the federal regulations, and a number of regulation sections are at this time in a state of suspension with changes pending, or in fact have already been redrafted and published in proposed form. Further, it is understood that OSM is continuing with review and rewriting which will affect still other sections of the rules.

The federal rule changes have affected or will affect many of the requirements upon which OSM based its August, 1986, comments. It seems inappropriate to revise West Virginia regulations to conform to federal rules which have since been modified or which will or may be modified in the near future. We understand, however, that the Office of Surface Mining is compelling WVDOE to proceed with the state regulation revision, notwithstanding the continuing state of flux of OSM's own rules.

We further understand that WVDOE expects and intends to make future changes in its rules in response to modifications of federal rules as soon as such are finalized. It will be important that such future corrections be acted upon promptly, especially in that some of the pending or anticipated federal regulation changes will act to rectify excesses in the original permanent program.

Another very important point, both for current and for future rulemaking, is that the extent and impact of changes made in the state rules should go no further in imposing additional paperwork and performance burdens upon the coal industry than absolutely required. As mentioned above, we are concerned that in the short time available for review of the current regulations some possible impacts and added burdens may have not yet been recognized, and that some of the new requirements may exceed that mandated by federal law and regulation. Apparently, all that can be done to address these concerns is for our study of the rules to continue and for further input to be provided during the legislative review process.

Comments on WVDOE Surface Mining Rules
December 4, 1987

The comments below address some of the issues of greatest concern which were identified during review to date, and are addressed toward specific sections of the draft regulations.

At Subsection 2.81, the proposed definition of "Owned or Controlled or Owns or Controls" is taken from federal rules proposed in April, 1985, but which have been revised several times since by OSM; the federal rule is still pending at this time. This definition is pertinent to permit application information requirements, permit application processing, and permit issuance as addressed by Section 3 of the proposed rules, and by Subsection 22A-3-18(c) of the West Virginia Surface Coal Mining and Reclamation Act. Considering the fact that the federal rulemaking process on this subject is not yet final, and that the revisions of the rule proposed by OSM since 1985 are less stringent, it is requested that the definition at 2.81 be stricken from the proposed rule and further action withheld until finalization of the federal regulations whereby a nationwide standard will be defined.

In Subsection 3.16, the proposed rules require what could be another significant expansion of permit application requirements for hydrologic information. It is understood that federal rules on this are currently undergoing revision. Again, it is premature for West Virginia to expand its regulations in response to federal rules which are being modified. The same comment and problem applies to the emergency rules filed by WVDOE on May 29, 1987, which included similar provisions and which have been incorporated into the new proposed rules. It is requested that the provisions of West Virginia regulations pertaining to hydrologic information revert at this time to the requirements of the previous Series VII regulations, and so remain until OSM has finalized action on pertinent federal rules.

In Subsection 5.4, the requirements for sediment control structure capacity, design and construction, spillways and outlet structures, inspection, certification, etc., raise several concerns. Firstly, paragraph 5.4(b)(5) has wording problems which could be interpreted to require capacity of structures to be far in excess of that required or intended by federal regulation, and such that structures sized as per the draft wording would be impossible to build in many mining situations, and prohibitively expensive in all cases. It was agreed during public discussions that the proposed wording was an inadvertent error, and would be corrected.

Further in Subsection 5.4, and in Subsections 22.4 and 22.5, as those subsections apply to coal refuse impoundments, the various standards applied to ponds or impoundments fail to take into account the fact that small ponds which do not present a hazard should have lesser standards applied than do major impoundments falling under MSHA impoundment criteria. OSM has come to accept this fact, and has reflected a more reasonable approach in proposed rules published in the October 21, 1987, Federal Register (30 CFR Parts 780, 784, 816, and 817). It is requested that West Virginia rules also reflect the different standards that should apply to small ponds as compared to major impoundments.

Specifically, small non-hazardous ponds should be exempted from many of the geotechnical analysis and design, certification, and inspection requirements applicable to major impoundments. A valid approach might be to specify that small ponds may be designed and constructed in accordance with the provisions of the Technical Handbook, and that if so designed and built they would be considered to meet adequate stability and other technical requirements without unnecessarily detailed and costly analysis, design, and engineering certification exercises.

In addition to our general and specific comments as provided above, we also note for the record our concurrence with and support of the written comments on these rules which are being submitted by the West Virginia Coal Association and by the West Virginia Mining and Reclamation Association. Again, we thank you for the opportunities you have provided for input to these regulations.

Sincerely Yours,

Stephen C. Keen

Stephen C. Keen, PE
Environmental Engineering

xc: J.L. Lombardo
W. Basconi
T. Ball

WEST VIRGINIA MINING AND RECLAMATION ASSOCIATION 1624 KANAWHA BOULEVARD, EAST • CHARLESTON, WEST VIRGINIA 25311 • (304) 346-5318

December 4, 1987

Mr. Roger T. Hall
Natural Resource Administrator
West Virginia Department of Energy
1615 Washington Street, East
Charleston, West Virginia 25311

RE: Supplemental comments to proposed regulations

Dear Mr. Hall:

With the extension of the comment period, as announced at the public hearing on November 25, 1987, I offer the following comments as a supplement to the testimony presented by Mr. Benjamin C. Greene, President of the West Virginia Mining and Reclamation Association at that hearing held in the DoE Kanawha City Office. These are offered on behalf of the 350 member companies of our Association.

Since the proposal of these regulations, we have initiated a number of discussions with you and other Departmental personnel relative to the industry's specific concerns with some requirements set forth. Those concerns are most important to the industry's ability to comply with the relevant mandates of state statute. We are appreciative of the willingness of your agency to discuss these concerns and are hopeful that the recommended changes are made to the final regulations.

As we have also discussed, we remain concerned and emphasize the importance of the fact that federal Office of Surface Mining regulations continue to be unfinished and incomplete in several subject areas, in which OSM is mandating a change of state regulations. We encourage your agency's caution in finalizing regulations in areas such as

hydrology, sediment control, ownership as well as others in which the federal agency has not yet determined the final language. We have noted at least seven (7) Federal Registers, beginning on Ocotober 21, 1987, that contain proposed changes. If OSM expects the state to be "as effective" as federal regulation, then it (OSM) should certainly provide the final pattern prior to making such requirements on West Virginia.

Again, the industry appreciates the opportunities which were afforded during the comment period to specifically set forth our concerns with the proposed regulations. Given the extensive volume and complexity of these proposals, we trust this communication will serve to "keep the door open" to the continuous review and recommendation for improving the regulations and insuring their practicality.

Should there be a need for additional information or should you have any questions, do not hesitate to immediately notify me.

Sincerely,

William B. Raney
Vice-President