§ 165.45 Standard for administrative review.

CBP will apply a de novo standard of review and will render a determination appropriate under law according to the specific facts and circumstances on the record. For that purpose, CBP will review the entire administrative record upon which the determination as to evasion was made, the timely and properly filed request(s) for review and responses, and any additional information that was received in response to a request by CBP pursuant to § 165.44. The administrative review will be completed within 60 business days of the commencement of the review.

■ 23. Section § 165.46 is amended by:
■ a. Removing in paragraph (a) the acronym ''EAPA'' and adding in its place the acronym ''TFTEA''; and
■ b. Revising paragraph (b).

The revision reads as follows:

§ 165.46 Final administrative determination.

* * * * *

(b) *Effect of the administrative review.* If the administrative review affirms the determination as to evasion, then no further CBP action is needed. If the administrative review reverses the determination as to evasion, then CBP will take appropriate actions consistent with the administrative review.

Robert F. Altneu,

Director, Regulations & Disclosure Law Division, Regulations & Rulings, Office of Trade, U.S. Customs and Border Protection.

Aviva R. Aron-Dine,

Acting Assistant Secretary of the Treasury for Tax Policy.

[FR Doc. 2024–04713 Filed 3–15–24; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 948

[SATS No. WV–118–FOR (partial); Docket ID: OSM–2011–0009; SATS No. WV–126–FOR; Docket ID: OSM–2019–0012; S1D1S SS08011000 SX064A000 220S180110;S2D2S SS08011000 SX064A000 220XS501520]

West Virginia Regulatory Program

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

ACTION: Final rule; approval of amendment in part, disapproval of amendment in part.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are approving amendments to the West Virginia regulatory program (the West Virginia program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). These amendments make changes to the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA), the Code of West Virginia (W.Va. Code), and the West Virginia Code of State Rules (CSR).

DATES: This rule is effective April 17, 2024.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Castle, Acting Director, Charleston Field Office, Telephone: (859) 260–3900. Email: *osm-chfo@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the West Virginia Program

Subject to OSMRE's oversight, section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, State laws and regulations that govern surface coal mining and reclamation operations in accordance with the Act and consistent with the Federal regulations. *See* 30 U.S.C. 1253(a)(1) and (7). Based on these criteria, the Secretary of the Interior conditionally approved the West Virginia program on January 21, 1981. You can find background information on the West Virginia program, including the Secretary's finding, the disposition of comments, and conditions of approval of the West Virginia program in the January 21, 1981, **Federal Register** (46 FR 5915). You can also find later actions concerning West Virginia's program and program amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

II. Submission of the Amendment

WV–118–FOR

By letter dated April 25, 2011, received by us on May 2, 2011 (Administrative Record Number WV–1561), the West Virginia Department of Environmental Protection (WVDEP) submitted an amendment to its program under SMCRA, docketed as WV–118–FOR. The proposed amendment consists of regulatory revisions to the West Virginia Surface Mining Reclamation Regulations at CSR Title 38, Series 2, as contained in Committee Substitute for Senate Bill 121 of 2011. *See* 2011 W.Va. Acts ch. 109. As is discussed more fully below, because West Virginia has made multiple submissions with respect to the same or similar provisions of statue and regulations, only a portion of the original submission from West Virginia will be addressed in this final rule. The remaining portion of WV–118 will be addressed in a subsequent final rule.

Relevant to this Notice, Senate Bill 121 authorizes regulatory revisions codifying an emergency rule issued on December 16, 2009, which amend the existing West Virginia coal mining regulations by adding trust funds and annuities as approved forms of financial assurance instruments.

We announced receipt of the proposed amendment in the November 2, 2011, **Federal Register** (76 FR 67637). In the same notice, we opened a public comment period and provided an opportunity for a public hearing on these provisions (Administrative Record Number WV–1573). The public comment period closed on December 2, 2011. We received responses from three Federal agencies stating that they had no comments.

WV–126–FOR

By letters dated May 2, 2018 (Administrative Record Nos. WV–1613A, in part, and WV–1613B), WVDEP submitted an amendment to its program under SMCRA, docketed as WV–126–FOR. The amendment contains revisions to the WVSCMRA and the West Virginia Surface Mining Reclamation Regulations at CSR 38–2–1 *et seq.,* as contained in Committee Substitutes for Senate Bills 163 and 626 of 2018. *See* 2018 W.Va. Acts chs. 141, 152.

Senate Bill 163 seeks to revise regulatory provisions involving definitions, reclamation, the environmental security account for water quality, water quality enhancement and modifying sections on incremental bonding, release of bonds, forfeiture of bonds, effluent limitations, and blasting.

Senate Bill 626 seeks to revise statutory provisions about the method in which permit applications, permit revisions, and informal conferences are advertised under WVSCMRA and make several editorial corrections about items such as position titles and agency names.

We announced the receipt of the proposed amendment in the February 14, 2020, **Federal Register** (85 FR 8497). In the same document, we opened the public comment period and provided an

opportunity for a public hearing or meeting on the adequacy of the amendment. The public comment period ended on March 16, 2020. We did not hold a public hearing or meeting because one was not requested. We received one public comment that is addressed below in the Public Comments section of part IV, Summary and Disposition of Comments.

When announcing the proposed amendment, we removed the blasting portion of Senate Bill 163 from the proposed rule and subsequently announced it on February 10, 2020, (85 FR 7476), as a part of the West Virginia program amendment WV–123–FOR. West Virginia had previously submitted an amendment to its blasting regulations that had not been approved; therefore, in order to keep all changes to the blasting regulations together, we consolidated them into WV–123–FOR.

WVDEP-Division of Mining and Reclamation (DMR) sent a letter to the Regional Director, Interior Regions 1 and 2, dated February 3, 2020. In its letter, West Virginia asked us to prioritize part of the WV–118–FOR submission, in particular changes to CSR 38–2–11.3.f pertaining to financial assurance requirements, which also relates to requirements to release bonds and forfeiture of bonds. These changes are discussed in detail below.

III. OSMRE's Findings

We are approving in part and disapproving in part the revisions proposed in WV–118 and WV–126 as described below. We made the following findings concerning West Virginia's amendment as provided under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. Any revisions that we do not specifically discuss below concerning non-substantive wording or editorial changes can be found in the full text of the program amendment available at *www.regulations.gov,* searchable by the Docket ID Numbers referenced at the top of this notice.

Statutory Revisions

The following describes the substantive statutory revisions that WVDEP submitted to OSMRE for approval on May 2, 2018 (Administrative Record WV–1613–B) (WV–126).

1. W.Va. Code 22–3–9(a)(6). Permit Application Requirements and Contents

West Virginia submitted a revision to this statutory provision that would remove the requirement that an applicant's advertisement of its permit application must be published in a newspaper of general circulation in the locality of the proposed permit area at least once a week for four successive weeks and add in its place a requirement that an applicant's advertisement must be on a form and in a manner prescribed by the Secretary, which manner may be electronic.

OSMRE Finding: We are not approving this section of the amendment as it is less stringent than sections 507(b)(6) and 513(a) of SMCRA (30 U.S.C. 1257(b)(6) and 1263(a)) and less effective than the Federal regulations at 30 CFR 773.6. Updating the public notification process to include electronic means is desirable. However, SMCRA specifically requires that permit applications, significant revisions, or renewal of a permit must be announced with an advertisement in a local newspaper of general circulation in the locality of the mining and reclamation operation at least once a week for four consecutive weeks. As one of the commenters notes, West Virginia cannot ensure that electronic public notice will reach the same audience contemplated by SMCRA's newspaper requirement. Therefore, while adding electronic means is encouraged, the elimination of the newspaper requirement renders the proposal less stringent and less effective than the Federal requirements.

2. W.Va. Code 22–3–20. Public Notice; Written Objections; Public Hearings; Informal Conferences

West Virginia submitted two revisions to this statutory provision consistent with its proposed revision to section 22–3–9(a)(6), above. The first revision, concerning subsection (a), would remove the requirement that, at the time of submission, the applicant must place the advertisement of its permit application or permit revision in a local newspaper of general circulation in the county of the proposed surface mining operation at least once a week for four consecutive weeks and add in its place a requirement that the applicant must submit to WVDEP a copy of the required advertisement for public notice on a form and in a manner prescribed by the Secretary, which manner may be electronic. The second revision, concerning subsection (b), would remove the requirement that the Secretary of WVDEP must advertise the date, time, and location of the informal conference in a newspaper of general circulation in the locality of the operation at least two weeks before the scheduled informal conference date and add in its place that the advertisement be on a form and in a manner prescribed by the Secretary, which manner may be electronic.

OSMRE Finding: We are not approving the proposed revision to section 22–3–20(a) as it is less stringent than sections 507(b)(6) and 513(a) of SMCRA (30 U.S.C. 1257(b)(6) and 1263(a)) and less effective than the Federal regulations at 30 CFR 773.6, which require that permit applications, significant revisions, or renewal of a permit must be announced with an advertisement in a local newspaper of general circulation in the locality of the mining and reclamation operation at least once a week for four consecutive weeks. As noted above, while updating the public notification process to include electronic means is desirable, the elimination of the newspaper requirement renders the proposal less stringent and less effective than the Federal requirements. For these same reasons, we are also not approving the proposed revision to W.Va. Code 22–3–20(b) amending the notice requirement, as doing so would render the provision less stringent than section 513(b) of SMCRA (30 U.S.C. 1263(b)) and less effective than the Federal regulations at 30 CFR 773.6(c)(2)(ii), which require the regulatory authority to advertise the date, time, and location of informal conferences in a newspaper of general circulation in the locality of the proposed operation.

Regulatory Revisions

The following describes substantive regulatory revisions that WVDEP submitted to us for approval on April 25, 2011 (Administrative Record WV–1561) (WV–118) and May 2, 2018 (Administrative Record WV 1613–A) (WV–126).

1. CSR 38–2–2. Definitions

West Virginia proposes to remove the following definitions for lack of Federal counterpart:

a. CSR 38–2–2.6. Acid Test Ratio means the relation of quick assets to current liabilities.

b. CSR 38–2–2.37. Completion of Reclamation means that all terms and conditions of the permit have been satisfied, the final inspection report has been approved by the Secretary, that all applicable effluent and applicable water quality standards are met, and the total bond has been released.

OSMRE Findings: The term ''acid test ratio'' has no Federal counterpart and is not used in the existing West Virginia regulations; the CSR defines other terms, including ''asset ratio'' and ''current ratio'' under CSR 38–2–2 (relating to definitions); and ''current assets'' and ''current liabilities,'' as

defined and used under CSR 38–2–11.3.d (relating to self-bonding), make up the definition of ''acid test ratio.'' As such, we have determined that the proposed deletion does not render the West Virginia statute or regulations either less stringent than SMCRA or less effective than the Federal regulations found at 30 CFR 701.5, and we approve of its removal.

There is no direct counterpart in the Federal regulations for the West Virginia defined term ''completion of reclamation.'' This term follows the WVSCMRA requirements that an operator must faithfully and fully perform all requirements of the statute and of the permit before a bond is fully released and reclamation is determined to be complete. *See* W.Va. Code 22–3–11; 22–3–23(c)(3).

While the Federal regulations do not define the term ''completion of reclamation'' they do define ''reclamation'' at 30 CFR 701.5 as ''those actions taken to restore mined land *as required by this chapter* to a postmining land use approved by the regulatory authority'' (emphasis added). In addition to the term ''completion of reclamation,'' the CSR contains a stand-alone term ''reclamation'' defined as ''those actions taken to restore mined land to the approved postmining land use.'' Notably missing from the West Virginia definition is the reminder of the obligation to take all actions required by the regulations including those not solely focused on restoring mined land to its approved postmining land use approved by the regulatory authority.

The Federal regulations at 30 CFR 732.15 clarify that the State's laws and regulations, collectively, must be in accordance with SMCRA and consistent with the Federal regulations. We have previously found the CSR definition of ''reclamation'' to be no less effective than the Federal requirements when the regulations are ''viewed in their entirety with WVSCMRA,'' despite its deviation from the Federal definition. *See* 55 FR 21304, 21306 (May 23, 1990) (explaining that any provisions not specifically discussed in this notice were ''substantively identical to the corresponding Federal regulations in effect on June 9, 1988, with minor changes to improve clarity and specificity and to incorporate State references and terms were deemed necessary or useful''). While nothing in the approved West Virginia stand-alone definition of ''reclamation'' permits operators to deviate from the statutory and regulatory requirements, the term ''completion of reclamation'' offers clarity and an unambiguous reminder of the obligation, similar to that in the Federal definition of ''reclamation,'' to take all actions required by the regulations, not just those necessary to achieve the approved postmining land use as approved by the regulatory authority. Specifically, it requires that ''all terms and conditions of the permit have been satisfied, the final inspection report has been approved by the Secretary, that all applicable effluent and applicable water quality standards are met, and the total bond has been released.'' The additional protections incorporated in the term ''completion of reclamation'' are now proposed to be removed. When taken together, the two approved terms ''reclamation'' and ''completion of reclamation'' made the West Virginia program no less effective than the Federal regulations. The current proposal to remove one of the two terms would make the West Virginia program collectively less effective than the Federal regulations in that it would create an ambiguity in the requirement to take all actions required by the regulations beyond those immediately necessary to restore mined land to a postmining land use approved by the regulatory authority.

For example, we first relied upon the definition of the term ''completion of reclamation'' when we approved the definition of the term ''disturbed area'' currently in W.Va. Code 22–3–3(j). *See* 46 FR 5915, 5920 (Jan. 21, 1981). In that approval, we explained that even though West Virginia's definition of ''disturbed area'' lacked language from the Federal definition prescribing that an area is considered disturbed until the bond is released, the definition of ''completion of reclamation'' made that clear. Later, we relied upon the definition of the term ''completion of reclamation'' to remove required amendments of the West Virginia program with respect to its financial assurance requirements and obligations. West Virginia uses an approved alternative bond system that is designed to achieve the objectives and purposes of section 509 of SMCRA as implemented in 30 CFR 800.11(e)(1). Historically, West Virginia's alternative bond system, commonly referred to as the Special Reclamation Fund, has been the subject of amendments, some required by us to address inadequacies of the system, eliminate the deficit in the State's alternative bonding system, and ensure that sufficient money will be available to complete reclamation. Those obligations included the treatment of polluted water discharged from all bond forfeiture sites and a requirement that moneys from the Special Reclamation Fund must be used, where needed, to pay for water treatment on bond forfeiture sites. These required amendments were removed, in part, based upon the existing definition at CSR 38–2–2.37 and its role in supporting the mandatory requirement that bond forfeiture monies be used, where needed, for acid mine drainage treatment. *See* 60 FR 51900 *(*October 4, 1995); 66 FR 67446 *(*December 28, 2001); and 67 FR 37610, 37613–14 (May 29, 2002).

In view of the statutory and regulatory framework and history discussed, we conclude that the removal of the definition ''completion of reclamation'' would render the West Virginia program less effective than the Federal regulations, and we are not approving its removal.

2. CSR 38–2–9. Revegetation

CSR 38–2–9.3.d Standards for Evaluating Vegetative Cover. West Virginia proposes to amend this section to remove the minimum two-year waiting period for WVDEP to conduct a vegetative inspection, a precondition to a Phase II bond release. The proposal will remove the phrase ''Not less than two (2) years following the last date of augmented seeding'' while retaining the requirement: ''the Secretary shall conduct a vegetative inspection to verify that applicable standards for vegetative success have been met.''

OSMRE Findings: The Federal regulations at 30 CFR 816.116 and the West Virginia regulations at CSR 38–2–9.3 identify the applicable standards for vegetative success, and 30 CFR 800.40(c) and CSR 38–2–12.2.c describe the regulatory authority's responsibility to verify compliance with revegetation requirements before releasing a commensurate amount of bond. While individual vegetative standards can have timing elements associated with their successful establishment (for example, trees and shrubs counted to determine the success of fish and wildlife habitat must be in place for not less than two growing seasons, *see* 30 CFR 816.116(b)(3)(ii) and CSR 38–2–7.7.f.3 and 9.3.g), neither SMCRA nor the Federal regulations establish a blanket waiting period for the regulatory authority to conduct an evaluation of vegetative success. The two year waiting period for inspection under the successful revegetation standards in CSR 38–2–9.3.d is a companion provision to CSR 38–2–12.2.c.2, which requires for Phase II bond release that ''[n]ot less than two years after the last augmented seeding, standards for revegetation success have been met.'' West Virginia also proposes to delete

CSR 38–2–12.2.c.2, which we discuss and approve below.

When we approved West Virginia's inspection frequency of inactive mines, we explained that West Virginia's two-year requirement under CSR 38–2–12.2.c.2 was more stringent than Federal requirements. The Federal requirements at 30 CFR 800.40(c) ''require only that revegetation be successfully established, with the definition of 'established' left to the discretion of the regulatory authority, provided it includes adequacy to control erosion and compliance with the species composition requirements of the reclamation plan.'' *See* 55 FR 21304 (May 23, 1990). When a regulatory authority proposes to remove a provision that is more stringent than the Federal requirements, we must still ensure the remaining provisions are not rendered less stringent than those requirements. For purposes of the inspection following an application for bond release, the timing of WVDEP's inspection under CSR 9.3.d is not critical to a mining operator's achievement of the relevant vegetative performance standard or to WVDEP's evaluation of whether the standard is met. The proposed amendment to CSR 38–2–9.3.d retains West Virginia's commitment to verify that applicable standards for vegetative success have been met before the relevant portion of bond is released and, therefore, is no less stringent than Sections 505 and 519 of SMCRA (30 U.S.C. 1265 and 1269) or less effective than the Federal regulations at 30 CFR 800.40 and 816.116. Therefore, we are approving the amendment.

3. CSR 38–2–11. Insurance and Bonding

CSR 38–2–11.3.f—Special consideration for sites with long-term postmining pollutional discharges. West Virginia proposes to add a new rule which states that, upon approval of the WVDEP Secretary, a permittee may establish a trust fund, annuity, or both to guarantee treatment of long-term postmining pollutional discharges in lieu of posting one of the other approved forms of bond. The new rule subjects the trust fund or annuity to the following conditions: (1) WVDEP will determine the amount of the trust fund or annuity, and that amount must be adequate to meet all anticipated treatment needs, including capital and operating expenses; (2) it must be in a form approved by WVDEP and contain all terms and conditions required by WVDEP; (3) it must irrevocably establish WVDEP as the beneficiary; (4) WVDEP will specify the investment objectives of the instrument; (5) termination will only occur only as specified by WVDEP upon its determination that no further treatment or other reclamation measures are necessary, that a replacement bond or other financial instrument has been posted, or that the administration of the instrument requires termination in accordance with its purpose; (6) release of money may be made only upon written authorization by WVDEP or according to a schedule established in the trust or annuity agreement; (7) the financial institution or company serving as trustee or issuing the annuity must be a bank or trust company organized or authorized to do business in West Virginia, a national bank chartered by the West Virginia Office of the Comptroller of the Currency, an insurance company licensed or authorized to do business in West Virginia or designated by the West Virginia Insurance Commissioner as an eligible surplus lines insurer, or any other financial institution or company with trust powers and with offices located in West Virginia provided that its activities are examined or regulated by a State or Federal agency; (8) the trust fund or annuity must be established in a manner that guarantees that sufficient money is will be available to pay for the treatment of postmining pollutional discharges (including maintenance, renovation, and replacement of treatment support facilities), the reclamation of sites upon which the treatment facilities are located, and areas used in support of those facilities.

Finally, West Virginia's new rule specifies that when the trust fund or annuity is in place and fully funded sufficient to treat all discharges and reclaim all areas involved in such treatment, WVDEP may approve the release of conventional bonds posted for the permit or permit increment, provided that apart from the pollutional discharge covered by the trust or annuity, the area fully meets all applicable reclamation requirements. The new rule further specifies that portions of the permit required for treatment must remain bonded, but that the trust or annuity serves as that bond.

OSMRE Findings: SMCRA, WVSCMRA, and their implementing regulations require that performance bonds or approved alternatives be sufficient to cover treatment of long-term postmining pollutional discharges in the event that the permittee fails to do so. *See* 30 U.S.C. 1259(a) and W.Va. Code 22–3–11. W.Va. Code 22–3–11(a) requires that each permittee post a performance bond conditioned upon faithful performance of all the requirements of the WVSCMRA and the permit. W.Va. Code 22–3–11(c)(2) authorizes the Secretary of WVDEP to ''approve an alternative bonding system if it will: (A) Reasonably assure that sufficient funds will be available to complete the reclamation, restoration and abatement provisions for all permit areas which may be in default at any time; and (B) provide a substantial economic incentive for the permittee to comply with all reclamation provisions.'' The statutory requirements for a ''reclamation plan'' include the measures to be taken to assure the protection of water quality. *See* W.Va. Code 22–3–10.

A prudent approach to provide financial assurances for long-term treatment of pollutional discharges is to allow the permittee to establish a dedicated income-producing account, such as a trust fund or annuity or both, that is held by a third party as trustee for the regulatory authority. Neither trust funds nor annuities are specifically defined in WVSCMRA or SMCRA. However, we have previously recognized and approved trust funds as a form of collateral bond, as well as an alternative bonding mechanism. *See* 70 FR 25472 (May 13, 2005), amended at 70 FR 52916 (May 13, 2005); and 75 FR 48526 (August 10, 2010). In addition, trust funds and annuities are approved as options for bonding long-term pollutional discharges in Tennessee under our implemented Federal regulatory program. *See* 30 CFR 942.800(c).

Trust funds and annuities give the permittee a mechanism to generate a revenue stream to fund long-term treatment of pollutional discharges. *See* 72 FR 9615 (March 2, 2007). Under the provisions West Virginia proposes, the income stream from a fully funded trust fund or annuity will be used to fund treatment of postmining pollutional discharges (including maintenance, renovation, and replacement of treatment and support facilities as needed) and the reclamation of the sites upon which treatment facilities are located and areas used in support of those facilities. The trust fund or annuity will be employed in a manner to ensure final bond release is not permitted until all reclamation is completed and all pollutional discharges are eliminated or otherwise cease to exist. The provisions West Virginia has proposed are identical to those we promulgated for the Tennessee program at 30 CFR 942.780(c), with the exception of certain agency names and internal citations consistent with the existence and use of these trusts and annuities in West Virginia under the

approved West Virginia program. We have determined that West Virginia's addition of special consideration for sites with long-term postmining pollutional discharges is in accordance with the provisions of SMCRA and consistent with its implementing Federal regulations, and we approve of its addition.

a. CSR 38–2–11.4—Incremental Bonding. West Virginia proposes to amend this section to reflect the counterpart language found at 30 CFR 800.11.

OSMRE Findings: West Virginia's revised language is substantively identical to the Federal counterpart provisions of 30 CFR 800.11 that include incremental bonding. In its revision, West Virginia eliminates a prohibition in paragraph 11.4.a.2. that reads: ''Once the operator has chosen to proceed with bonding either the entire permit area or with incremental bonding, he shall continue bonding in that manner for the term of the permit.'' The provision sought to be removed from the West Virginia regulations is contained verbatim in W.Va. Code 22–3–11(a), which will remain in effect. This limitation binding the operator's decision to bond either the entire permit or by increments for the life of the permit is not in the Federal regulations or otherwise required under the Federal program. Removing this limitation from the West Virginia regulations does not render the proposal less effective than the Federal regulations. Therefore, we approve the revisions proposed in CSR 38–2–11.4.

b. CSR 38–2–11.6—Environmental Security Account for Water Quality— West Virginia is proposing the removal of subsection 11.6, which requires WVDEP to study the desirability of developing an environmental security account for water quality. Subdivisions (a) through (e) called for the inclusion of: (a) a screening process for determining which sites have the potential for producing acid mine drainage, (b) a process for predicting the rate and duration of acid mine drainage, (c) a method for estimating water treatment costs, (d) a system to ensure that sufficient monies will be placed in an escrow account to provide financial assurance that treatment will be accomplished and maintained, and (e) procedures to ensure the expenditure of funds from the escrow account in the event of default will provide water treatment. Furthermore, subdivision 11.6.f provides that after the study is completed, the Secretary of WVDEP may propose regulations to implement the environmental security account for water quality, but the regulations will not become effective until approved by the legislature. Subdivision 11.6.g provides that the Secretary of WVDEP will inform the legislature if statutory changes are necessary to implement an effective system for financial assurances. Subdivision 11.6.h provides that no changes proposed by this subsection shall authorize in any way the issuance of a permit in which acid mine drainage is anticipated and which would violate applicable effluent limitations or water quality standards without treatment. Because this study was completed, West Virginia is deleting this provision from its program.

OSMRE Findings: We approved these provisions as part of a decision on the solvency of West Virginia's alternative bonding system on October 4, 1995 (60 FR 51900). This provision required WVDEP to prepare a report and submit it to the West Virginia Legislature within 240 days so that options could be developed to ensure the solvency of West Virginia's alternative bonding system. The study, entitled ''Acid Mine Drainage Bond Forfeiture Report'' was completed and submitted to the West Virginia Legislature on December 31, 1993. This specific provision did not modify any duties or functions under the approved West Virginia program.

We determined that the development of an environmental security account for water quality could enhance the financial status of the State's special reclamation fund. We noted at the time that there was no correlating Federal provision and that any amendments to the program implemented as a result of the study would have to be approved by us. West Virginia completed the study and has taken various actions and approaches towards addressing the solvency of its alternative bonding system since that time.

The deletion of this specific provision will not have an adverse impact on the ability or the obligation of the West Virginia Alternative Bonding System to meet the criteria in 30 CFR 800.11(e), and we are approving its removal. The renumbering of remaining sections 38–2–11.7 to 38–2–11.6 is likewise approved. This finding does not express an opinion on the solvency or status of the State's alternative bonding systems.

4. CSR 38–2–12. Replacement, Release and Forfeiture of Bonds

a. CSR 38–2–12.2.a—West Virginia proposes to add, move, and revise language at CSR 38–2–12.2.a.3; 38–2–12.2.a.4; 38–2–12.2.a.4.A; and 38–2–12.2.a.4.B related to bond release. West Virginia proposes requiring, at paragraph 12.2.a.3, that the applicant provide a notarized statement certifying applicable reclamation activities have been accomplished. In addition, West Virginia proposes to restructure and revise existing language from CSR 38–2–12.2.e, e.1, and e.2 to proposed CSR 38–2–12.2.a.4, a.4.A, and a.4.B. Proposed CSR 38–2–12.2.a.4 maintains but modifies the limitation on the release or reduction of bond if water discharged from or affected by an operation requires chemical or passive treatment in order to comply with effluent limitations. West Virginia removed ''or water quality standards'' from the limitation along with other verbiage modifications. The revised language also modifies an existing prohibition to allow bond release to now be considered for Phases II and III on sites with a discharge requiring treatment so long as the remaining bond or other qualifying financial assurance is adequate to assure long term treatment. Currently, only Phase I bond release may be considered under these circumstances. As proposed, if the applicant demonstrates that the remaining bond is adequate to assure long term treatment or the operator has provided irrevocable financial assurances, WVDEP may approve and release the excess portions of the bond. The application must address, at a minimum, the current and projected quantity and quality of drainage to be treated, the anticipated duration of treatment, and the estimated capital and operating cost of the treatment facility, as well as the calculations that demonstrate the adequacy of the remaining bond or financial assurance. Proposed CSR 38–2–12.a.4.A makes no changes to existing CSR 38–2–12.e.1. Proposed CSR 38–2–12.a.4.B rephrases portions of existing CSR 38–2–12.e.1, adds references to the Federal and state statutes governing water quality treatment, removes a proviso that the alternate arrangement provides a mechanism by which WVDEP can assume the treatment work in the event of the operator's default, and deletes language stating that default on the treatment obligation ''shall be considered equivalent to a bond forfeiture,'' while retaining that default will subject the operator to penalties and sanctions, including permit blocking.

OSMRE Findings: CSR 38–2–12.2.a.3 is identical to the Federal provision at 30 CFR 800.40(a)(3), which requires certification of all reclamation activities, except West Virginia references ''the rules promulgated thereof'' instead of ''the regulatory program.'' This difference is merely editorial; therefore, we are approving this provision. CSR

38–2–12.2.a.4.A is identical to CSR 38–2–12.2.e.1 as we approved it in the July 24, 1996, **Federal Register** (61 FR 38382), and so we are approving its move.

The provisions at CSR 38–2–12.2.a.4 and 12.2.a.4.B include some revisions to the language we approved in the July 24, 1996, **Federal Register** (61 FR 38382). While moving the language, West Virginia has excised ''or water quality standards'' from the previously approved phrase ''effluent limitations or water quality standards.'' However, West Virginia's performance standards at CSR 38–2–14.5.b., both the existing version and after the revisions we are approving below, describe ''effluent limitations'' broadly, incorporating all applicable water quality laws and regulations. Therefore, we are approving this change.

Next, West Virginia revises the language of paragraph 12.2.a.4 to allow Phase II and Phase III bond release to be considered for sites with a discharge requiring treatment, where the existing paragraph only allows Phase I release. The two subparagraphs, 4.A and 4.B, allow release only when the remaining bond is adequate to assure long term treatment or the operator provides an irrevocable financial assurance adequate to provide long term treatment. This is consistent with our decisions approving treatment trusts and annuities in Pennsylvania, *see* 70 FR 25472, 25474 (May 13, 2005) (approving 52 P.S. 1396.4(g)(3) authorizing Phase III bond release when the operator has made provisions for ''the sound future treatment of pollutional discharges'' and other relevant requirements are met), and Tennessee, *see* 72 FR 9636, 9619, 9625–26 (March 2, 2007) (promulgating 30 CFR 942.800(c)(9) providing for the release of conventional bonds upon providing a fully-funded trust or annuity to provide for treatment and otherwise meeting reclamation requirements). However, in those approvals we explained that the release of conventional bonds cannot occur until the long-term irrevocable financial assurance is in place and fully funded and other reclamation obligations have been completed and that the remaining site required for treatment must remain bonded but the long-term financial assurance may act as that bond. We also explained that this action is a form of partial bond release in accordance with 30 CFR 800.40(c). West Virginia provides these requirements in the proposed regulations authorizing treatment trusts and annuities at CSR 38–2–11.3.f.8 and f.9, discussed and approved above. However, CSR 38–2–12.2.a.4 and a.4.B are not limited to trust funds and annuities. They apply generally to any irrevocable financial assurance in a form satisfactory to WVDEP, which could include, for example, a dedicated escrow account funded through monthly deposits, *see* CSR 38–2–11.3.e.2.B.1. West Virginia's escrow account provisions do not separately require the account to be fully funded before all phases of the bond may be released. The broader application of paragraph 12.2.a.4 and subparagraph a.4.B justify the two provisos, which West Virginia proposes to delete, that the arrangement allow for WVDEP's management of treatment in the event of default and that default ''shall be considered equivalent to a bond forfeiture.'' We did not expressly discuss those provisos when we initially approved them under CSR 38–2–12.2.e.2. *See* 61 FR 38382, 38384–85 (July 24, 1996). While these provisos might be redundant or unnecessary when the irrevocable financial assurance is a trust fund (where WVDEP is the trustee and the trust is not collected like a bond), they might be necessary where the financial assurance takes a different form, such as a dedicated escrow account, which is allowed to be funded in monthly installments and would require forfeiting upon default. The proposed revisions would leave financial security arrangements other than trust funds and annuities without a set of safeguards to ensure they are fully funded and that a permitted site remains. Therefore, the revisions would render the West Virginia program less effective than the Federal regulations concerning bond release at 30 CFR 800.40 and less stringent than the requirements of SMCRA. Therefore, we are approving the renumbering of, and revisions to, CSR 38–2–12.2.a.4 and a.4.B except the following: from subdivision 12.2.e, now paragraph 12.2.e.4, the deletion of the phrase ''Phase I but not Phase II or III'' from the last sentence; and from paragraph 12.2.e.2, now subparagraph 12.2.a.4.B, deletion of the proviso that the financial arrangement provide a mechanism whereby WVDEP can assume management of the resource and treatment work in the event of operator default, and deletion of the proviso that default is considered equivalent to a bond forfeiture. Our decision regarding these provisions does not affect our approval above of CSR 38–2–11.3.f.8 and f.9 related specifically to the release of conventional bonds where trust funds and annuities meet all applicable requirements.

b. CSR 38–2–12.2.c.—West Virginia proposes to modify its existing language in this section covering the release of bonds to make it substantively identical to the Federal regulations found at 30 CFR 800.40(c). West Virginia is revising language with respect to the WVDEP Secretary's authority to release all or part of the bond for the entire permit or incremental area if they are satisfied that all reclamation or a phase of the reclamation covered by the bond has been accomplished in accordance with the schedules for reclamation Phases I, II, and III. Through its restructured language, West Virginia has removed the specific limitations relevant to open-acre permit bonding (*i.e.,* that all coal extraction operations for the permit or increment thereof are completed and that the entire disturbed area for the permit or increment thereof has been completely backfilled and regraded before bond release), and moved the former prohibitions and requirements associated with bond release on sites with water discharges requiring treatment to the preceding section. In addition, West Virginia has eliminated the previously approved requirement that no violations exist relative to the permitted site before bond is released.

In its proposed revision of CSR 38–2–12.2.c.1, while mirroring the language of 30 CFR 800.40(c)(1), West Virginia eliminates specific references to compliance with the WVSCMRA, its implementing rules, and the terms and conditions of the permit, as well as a specific inclusive reference to the need to meet all requirements pertaining to maintaining the hydrologic balance before a Phase I bond release may occur.

In its proposed revision of CSR 38–2–12.2.c.2, West Virginia has eliminated the specified amount (25 percent) that is to be returned upon a Phase II bond release and has eliminated the minimum two-year waiting period after the last augmented seeding standards have been met before a Phase II bond release may occur. As a result of the modifications, the remaining subsections are renumbered.

In its proposed revision of CSR 38–2–12.2.c.3, West Virginia has adopted language from the Federal requirements pertaining to the conditions necessary for the release of a Phase III bond while excluding the requirement that ''all surface coal mining and reclamation activities'' be successfully completed before Phase III bond release. *See* 30 CFR 800.40(c)(3). West Virginia's proposal is that ''reclamation activities'' be complete before any such release.

OSMRE Findings: Through its restructured language, West Virginia looks to simplify and revise its existing provisions with respect to the release of bonds to more closely model Federal

language. However, West Virginia's approved program uses an alternative bonding system. This system requires extensive consideration of multiple interdependent factors in arriving at and maintaining a particular bond amount. Through its proposed restructured language, West Virginia is proposing the removal of the specific limitation relevant to open-acre bonding that all coal extraction operations for the permit or increment thereof are completed and that the entire disturbed area for the permit or increment thereof has been completely backfilled and regraded before bond release. In the original approval of this provision, we found: ''The State proposes to add new [subdivision 12.2.d] to prohibit the release of any portion of the bonds posted in accordance with subsection 11.5 (open-acre limit bonding) until all coal extraction operations are completed and the entire disturbed area has been completely backfilled and regraded. Because of the floating nature of this type of bond, this restriction is needed to provide a degree of protection consistent with other types of site-specific bond authorized under the alternative bonding system.'' 60 FR 51908 (October 4, 1995). Having previously found that these restrictions were necessary as part of the alternative bonding system, absent any rationale or alternative measures demonstrating why this provision is no longer necessary, we do not approve the change. Likewise, as discussed above, the restrictions regarding sites with water discharges are also relevant to bond release. Therefore, the existing introductory language ''except as provided in subdivisions 12.2.d and 12.2.e'' at CSR 38–2–12.2.c. is retained. We are approving an editorial correction that is necessary to correct the now changed reference from ''12.2.e'' to ''12.2.a.4.''

In its proposed revision of 38–2–12.2.c.1, West Virginia proposes the elimination of requirements to comply with ''the Act, this rule, and the terms and conditions of the permit'' as well as the elimination of the specific inclusive reference of the need to meet all requirements pertaining to maintaining the hydrologic balance before a Phase I bond release may occur. These references are eliminated in favor of the Federal language that requires compliance with the ''approved reclamation plan.'' Unlike the Federal regulations at 30 CFR 780.18, the approved West Virginia regulations do not include a specific provision defining the requirements of the ''reclamation plan.'' However, W.Va. Code 22–3–10 identifies the extensive requirements for a reclamation plan and requires them to be included ''in the degree of detail necessary to demonstrate that reclamation required by [WVSCMRA] can be accomplished.'' This provision of WVSCMRA remains in effect. When taken together, removal of the requirement references in this section of the West Virginia regulations in favor of the encompassing section of the WVSCMRA does not render the program less stringent than SMCRA or less effective than the Federal regulations. Therefore, we are approving the revisions proposed in 38–2–12.2.c.1.

With respect to the proposed revision of CSR 38–2–12.2.c.2, eliminating the specified amount (25 percent) that is to be returned upon a Phase II bond release, and CSR 38–2–12.2.c.2.A, eliminating the minimum two-year waiting period after the last augmented seeding before revegetation standards may be met for a Phase II bond release to occur, the Federal regulations neither specify an amount of bond to be released upon Phase II nor do they proscribe a time period for the determination that revegetation has been established for the purpose of Phase II bond release. Rather, the Federal regulations give the regulatory authority discretion to determine what amount of bonding is adequate to complete all required reclamation and to determine when successful revegetation has been established. *See* 30 CFR 800.40(c)(2); *see also* 48 FR 32932, 32953 (July 19, 1983) (removing a 25 percent Phase II maximum bond release from the Federal regulations at 30 CFR 800.40(c)(2)). As we note in our findings above about revision to CSR 9.3.d, the two-year requirement was more stringent than the Federal requirements, which contain no direct counterpart. The remaining provisions direct the standards of revegetation and obligate WVDEP to inspect and determine whether those standards are met. Therefore, we approve of those revisions because they are no less effective than the Federal regulations. We also approve of the renumbering of subparagraphs in CSR 38–2–12.2.c.2. We note separately that West Virginia has also proposed to remove the 25 percent Phase II maximum bond release from its statutes at W.Va. Code 22–3–23(c)(1)(B). We have not yet acted on that program amendment, docketed at WV–125–FOR and published as proposed in the April 8, 2019, **Federal Register** (84 FR 13853), but that has no effect on our approval of the instant revision deleting that requirement from the regulations.

In its proposed revision of CSR 38–2–12.2.c.3, West Virginia proposes to adopt some of the language from the Federal requirements pertaining to the conditions necessary before the release of all or part of a Phase III bond while excluding the requirement that ''all surface coal mining and reclamation activities'' be successfully completed. Instead, West Virginia proposes only that ''successful reclamation activities'' be completed as a condition precedent to any Phase III bond release. However, W.Va. Code 22–3–23, both before and after the revisions West Virginia proposes under WV–125–FOR, contains the full language ''all surface coal mining and reclamation activities.'' Despite the omission of ''surface coal mining'' in West Virginia's proposed regulation, its statutory inclusion of ''all surface coal mining and reclamation activities'' will control how West Virginia implements the regulation. Therefore, we are approving the proposed change because it is not less effective than the Federal regulations.

c. CSR 38–2–12.2.d.—West Virginia proposes to eliminate the existing prohibition on bond release for any site-specific bonding (*i.e.,* open-acre bonding) until all coal extraction is completed and the disturbed area is completely backfilled and regraded.

OSMRE Findings: As noted in our finding 4.b. above, having previously found that these restrictions were necessary as part of the alternative bonding system, absent there being any rationale or alternative measures provided demonstrating why this provision is no longer necessary, we do not approve the removal of existing CSR 38–2–12.2.d, and the existing language is retained.

d. CSR 38–2–12.2.e.—West Virginia proposes to restructure and revise existing approved language in this section and move it to *38–2–12.2.a.4.*

OSMRE Findings: As is set forth above in our finding 4.a., the proposed revisions to this language are not approved, and, therefore, the existing language in CSR 38–2–12.2.e is retained.

e. CSR 38–2–12.2.f.—West Virginia proposes to move, unchanged, this existing language to CSR 38–2–12.2.d. as a result of other proposed revisions.

OSMRE Findings: As is set forth above in this document, we did not approve the proposed revisions to CSR 38–2–12.2.d, which affected the renumbering of this provision; thus, we are also not approving the proposed movement of this language to CSR 38–2–12.2.d. The existing language in CSR 38–2–12.2.f is retained.

f. CSR 38–2–12.2.g.—West Virginia proposes to move, unchanged, this existing language to CSR 38–2–12.2.f as a result of other proposed revisions.

West Virginia also proposes to include a new provision for CSR 38–2–12.2.g, anticipating the aforementioned move, outlining the Secretary's authority to conduct a hearing on objections.

OSMRE Findings: As is set forth above in this document, we did not approve the proposed revisions, which affected the renumbering of this existing provision. Therefore, we are not approving the proposed movement of existing language to CSR 38–2–12.2.f, and the existing language in CSR 38–2–12.2.g is retained. We are, however, approving West Virginia's additional language outlining the Secretary's authority in conducting a hearing on objections to bond release, which mirrors the Federal counterpart at 30 CFR 800.40(g). We also approve of an editorial correction that is necessary to correct the now changed reference from ''12.2.f'' to ''12.2.g'' or ''this paragraph''.

g. CSR 38–2–12.2.h.—Without change to the existing language, West Virginia proposes to both renumber existing CSR 38–2–12.2.h to 12.2.i and to insert it as a new CSR 38–2–12.2.h.

OSMRE Findings: As is set forth above in this document, we did not approve the proposed revisions, which affected the renumbering of this existing provision. Therefore, the proposed renumbering of this section to CSR 38–2–12.2.i is not necessary and would result in duplicative sections, and we are not approving these revisions. The existing language in CSR 38–2–12.2.h is retained.

h. CSR 38–2–12.4.a.2.B.—In its section dealing with the forfeiture of bonds, West Virginia proposes to add and delete language in this section to make it substantively identical to the Federal regulations found at 30 CFR 800.50. West Virginia is proposing to revise CSR 38–2–12.4.a.2.B to include a specific reference to the exception that allows the Secretary to approve partial surety liability release.

OSMRE Findings: The inclusion of the reference to the exception mirrors the Federal regulations at 30 CFR 800.50(a)(2)(ii). The additional reference and rephrasing do not render the proposal less effective than the Federal regulations, and we therefore approve these revisions.

i. CSR 38–2–12.4.b.—In this section, West Virginia is proposing to revise and eliminate specific references to the purposes that bond proceeds should be used for upon forfeiture, including rules governing water quality. In revised CSR 38–2–12.4.b.1 and 12.4.b.2, West Virginia incorporates and adopts language mirroring 30 CFR 800.50(b)(1) and (2), which identifies the steps to be undertaken upon forfeiture and the authorized use of those funds for completing the reclamation plan, or portion thereof, on the permit area or increment to which the bond coverage applies.

OSMRE Findings: In CSR 38–2–12.4.b, 4.b.1, and 4.b.2, West Virginia proposes to incorporate and adopt language mirroring that of the Federal regulations. While the inclusion of references to specific provisions pertaining to water quality have been removed in the revision of this subsection to mirror the Federal counterparts, the obligations of the West Virginia program to require adequate financial assurance for the treatment of pollution discharges and to use those funds upon forfeiture to complete the reclamation plan, as that requirement is set forth in W.Va. Code 22–3–10, including requirements related to water quality, have not been altered or removed. We are approving these provisions because the requirements to satisfy obligations related to water quality remain in place.

j. CSR 38–2–12.4.c.—In this section, West Virginia revises existing language to incorporate and adopt language identical to 30 CFR 800.50(c) further identifying measures the Secretary of WVDEP may take upon forfeiture. The revision eliminates an existing 180-day window for initiating operations to reclaim the site in accordance with the approved reclamation plan or modification thereof. The revised provision also removes the specific inclusion of taking the most effective actions possible to remediate acid mine drainage from the site, including chemical treatment where appropriate, with the resources available.

OSMRE Findings: In CSR 38–2–12.4.c, the proposed revision mirrors the Federal regulations, which do not include a specific time frame for initiating reclamation operations or a specific reference to actions related to the treatment of acid mine drainage. However, West Virginia uses an approved alternative bond system that is designed to achieve the objectives and purposes of section 509 of SMCRA as implemented by 30 CFR 800.11(e)(1). As noted previously, West Virginia's Special Reclamation Fund has been the subject of amendments, some required by us, imposed to address inadequacies of the system, to eliminate the deficit in the State's alternative bonding system, to ensure that sufficient money will be available to complete reclamation, including the treatment of polluted water discharged from all bond forfeiture sites, and to specify that moneys from the Special Reclamation Fund must be used, where needed, to pay for water treatment on bond forfeiture sites. These amendments were approved, and required amendments removed, in part, based upon the revisions made to W.Va. Code 22–3–11 and this section of the regulations. *See, e.g.,* 60 FR 51900 (Oct. 4, 1995); 66 FR 67446 (Dec. 28, 2001); and 67 FR 37610 (May 29, 2002).

Section 509(c) of SMCRA and 30 CFR 800.11(e) both imply that the funds held for reclamation must be readily available. Specifically, 30 CFR 800.11(e)(1) specifies that an alternative bonding system must ensure that ''the regulatory authority will have sufficient money to complete the reclamation plan for any areas which may be in default at any time.'' Through our past approvals, we have expressed reservations about the notion of prioritizing bond forfeited sites insofar as it could imply deviating from the requirements of 30 CFR 800.11(e)(1). However, relying upon the State's regulations at CSR 38–2–12.4(c), which provide that reclamation operations must be initiated within 180 days following final forfeiture notice, we found assurance that the requirement that all sites for which bonds are posted be reclaimed in accordance with their reclamation plans and that all sites for which bonds were posted be properly and timely reclaimed would be fulfilled. *See* 60 FR 51900, 51901 (Oct. 4, 1995) and 67 FR 37610, 37616 (May 29, 2002). The removal of this timing provision would nullify previous corrections to the program and would render the program less effective than the bond forfeiture provisions at section 509(a) of SMCRA and 30 CFR 800.50(b)(2), or the alternative bonding system criteria of 30 CFR 800.11(e). Therefore, we are not approving this revision, and the existing language at CSR 38–2–12.4.c is retained.

k. CSR 38–2–12.4.d—In this section, West Virginia revises existing language to incorporate and adopt language substantively similar to that of 30 CFR 800.50(d), identifying procedures to follow when the amount forfeited is insufficient to pay the full cost of reclamation. Specifically, West Virginia proposes to provide that the Secretary will make expenditures out of the Special Reclamation Fund to complete the reclamation of the bonded area and that the Secretary may recover all costs of reclamation in excess of the amount forfeited from the operator or permittee. The revision excludes the specific reference to the statement that the Secretary of WVDEP shall take the most effective actions possible to remediate acid mine drainage from the site, including chemical treatment where

appropriate, with the resources available.

OSMRE Findings: The revised language incorporates and adopts language substantively similar to that of 30 CFR 800.50(d), modifying it to reflect West Virginia's use of an alternative bonding system, the Special Reclamation Fund. Although the revision of this subsection excludes the specific reference to the statement that the Secretary shall take the most effective actions possible to remediate acid mine drainage from the site, including chemical treatment where appropriate, with the resources available, the West Virginia Code 22–3–11(h)(2) contains such an instruction, and the obligations of the West Virginia program to timely reclaim forfeited sites, including remediating acid mine drainage, has not been altered or removed. Therefore, we approve this revision.

5. CSR 38–2–12.5—Water Quality Enhancement

West Virginia proposes to delete subsection 12.5 of the West Virginia regulations, which directs WVDEP's collection, analysis, and reporting on sites where a bond has been forfeited including, in particular, data relating to the quality of water being discharged from forfeited sites. Subdivision 12.5.a requires the Secretary of WVDEP to establish an inventory of all sites for which bonds have been forfeited. The inventory is to include data relating to the quality of water being discharged from the sites. Subdivision 12.5.b requires a priority listing of these sites based upon the severity of the discharges, the quality of the receiving stream, effects on downstream water users, and other factors determined to affect the priority ranking. Subdivision 12.5.c provides that, until the legislature supplements or adjusts the special reclamation fund, the Secretary of WVDEP can selectively choose sites from the inventory for water quality enhancement projects. Subdivision 12.5.d provides that, in selecting sites for water improvement projects, the Secretary of WVDEP must consider relative benefits and costs of the projects. Subdivision 12.5.e requires the Secretary of WVDEP to submit to the legislature, on an annual basis, a detailed report and inventory of acid mine drainage from bond forfeiture sites.

OSMRE Findings: This provision was originally added to the West Virginia regulations in 1995 to implement W.Va. Code 22–3–11(g), which authorizes WVDEP's actions with respect to bond forfeitures. There is no companion Federal regulation because West Virginia uses an approved alternative bond system that is designed to achieve the objectives and purposes of section 509 of SMCRA as implemented by 30 CFR 800.11(e)(1). As noted previously, the Special Reclamation Fund has been the subject of various amendments, some required by us, imposed to address inadequacies of the system, to eliminate the deficit in the State's alternative bonding system, and to ensure that sufficient money will be available to complete reclamation. This obligation includes the treatment of polluted water discharged from all bond forfeiture sites and a requirement that moneys from the Special Reclamation Fund must be used, where needed, to pay for water treatment on bond forfeiture sites. These amendments were approved, and required amendments removed, in part, based upon the revisions made to W.Va. Code 22–3–11 and this section of the regulations. *See, e.g.,* 60 FR 51900 (Oct. 4, 1995); 66 FR 67446 (Dec. 28, 2001); and 67 FR 37610 (May 29, 2002).

An important component of our approval of the required amendments was the fact that West Virginia had previously established, at W.Va. Code 22–1–17, the Special Reclamation Fund Advisory Council (Advisory Council) to oversee the State's alternative bonding system. One of the duties of the Advisory Council is to study the effectiveness, efficiency, and financial stability of the Special Reclamation Fund and the Special Reclamation Water Trust Fund. These funds are managed by the Office of Special Reclamation (OSR) under the Advisory Council. The OSR adjusts monies to pay for water treatment at bond forfeiture sites and ensures that the Fund is effectively used by approval of the Advisory Council. The Special Reclamation Fund is adjusted to pay for reclamation of forfeiture sites. The Secretary of WVDEP provides recommendations on how best to effectively ensure acid mine drainage is addressed in reports to the Legislature.

Another duty of the Advisory Council, as provided by W.Va. Code 22–1–17(f)(5), is to contract with a qualified actuary on a regular basis to determine the Fund's fiscal soundness and to conduct annual informal reviews of the Special Reclamation Fund. The actuarial studies and the annual informal financial reviews of the Special Reclamation Fund assist WVDEP and the State in ensuring that sufficient money will be available to complete land reclamation and water treatment at existing and future bond forfeiture sites within the State, a requirement that parallels the criterion for approval of a State's alternative bonding system under 30 CFR 800.11(e)(1).

A necessary component of the ability to conduct these studies, and to fulfill the requirements of the alternative bond system itself, is the compilation of data as is directed under existing CSR 38–2–12.5.a. Removing the requirement to maintain an inventory would impede successful analysis as is required under the West Virginia Code and implementing regulations and would thwart the efforts put in place to address the required amendments. Therefore, removal would render the program less effective than the Federal requirements, and we do not approve of its removal. The existing language of CSR 38–2–12.5.a is retained.

Section 509(c) of SMCRA and 30 CFR 800.11(e) are silent on the question of prioritizing bond forfeited sites for reclamation, but both imply that the funds held for reclamation must be readily available. Specifically, 30 CFR 800.11(e)(1) specifies that an alternative bonding system must ensure that ''the regulatory authority will have sufficient money to complete the reclamation plan for any areas which may be in default at any time.'' Through our past approvals, we have expressed reservations about the notion of prioritization insofar as it could imply deviating from the requirements of 30 CFR 800.11(e)(1). However, because the State's regulations at CSR 38–2–12.4.c provide that reclamation operations must be initiated within 180 days following final forfeiture notice, a planning process for selection and prioritization of sites to be reclaimed was determined to not adversely impact the requirement that all sites for which bonds are posted be reclaimed in accordance with their reclamation plans, and that all sites for which bonds were posted be properly and timely reclaimed. Therefore, the removal of the prioritization language proposed in CSR 38–2–12.5.b; 38–2–12.5.c; and 38–2–12.5.d is consistent with the bond forfeiture provisions at section 509(a) of SMCRA and 30 CFR 800.50(b)(2), or the alternative bonding system criteria of 30 CFR 800.11(e), and we approve of its removal. *See also* 60 FR 51901 (Oct. 4, 1995).

As addressed above in our disapproval in CSR 38–2–12.5.a, a necessary component of the ability to fulfill the requirements of the alternative bond system is the compilation, review, and reporting of relevant data on a regular basis. West Virginia Code requires no less. *See* W.Va. Code 22–3–11 and 22–1–17. The specifics of the report as directed in

existing CSR 38–2–12.5.e provide implementing details consistent with the requirements established in the West Virginia Code. Removing the minimum details to be contained in the report and inventory would impede successful analysis as is required under the West Virginia Code and implementing regulations and would thwart the efforts put in place to address the previous required amendments. Removal, without any indication of replacement, would render the program less effective than the Federal requirements, and we do not approve of its removal. The existing language of CSR 38–2–12.5.e is retained and may be renumbered accordingly in response to the approved removals in this section.

6. CSR 38–2–14—Performance Standards

38–2–14.5.b—Effluent Limitations— West Virginia proposes to revise language in this subdivision to make it identical to the Federal regulations found at 30 CFR 816.42. West Virginia removes a reference to ''the standards set forth in [National Pollutant Discharge Elimination System (NPDES)] permits'' and the authorizing statutes for those permits, replacing these references with the requirement to be in compliance with all applicable State and Federal water quality laws and regulations, including effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency.

OSMRE Findings: The revised language mirrors the counterpart Federal provision. By mirroring the Federal provision, the revised subdivision becomes more comprehensive in scope, incorporating the NPDES standards despite removing the specific reference. Therefore, revised subdivision 14.5.b is no less effective than the Federal counterpart regulation at 30 CFR 816.42, and we approve the revision.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the WV–118 amendment in the proposed rule notice published in the November 2, 2011, **Federal Register** (76 FR 67637). We did not receive any comments.

We asked for public comments on the WV–126 amendment in the proposed rule notice published in the February 14, 2020, **Federal Register** (85 FR 8497). We received one comment. This comment is summarized and addressed below.

The commenter stated that they live in the southern part of West Virginia and rely on the legal advertisements in their local newspaper for the opportunity to participate in the permitting process on surface mining operations near their local residence. The commenter noted that not all citizens residing in West Virginia have the ways or means to access internet services and that to a person on a fixed income buying a local newspaper is less costly than obtaining internet service. They believe that by not advertising in the local newspaper people will be at a disadvantage to participate in the permitting process.

OSMRE Response: We are disapproving revisions to W.Va. Code 22–3–9 and 22–3–20 based on the fact that the proposed amendment is less stringent than sections 507(b)(6) and 513 of SMCRA (30 U.S.C. 1257(b)(6) and 1263) and less effective than the Federal regulation at 30 CFR 773.6, which specifically requires that permit applications, significant revisions, or renewal of a permit shall be announced in an advertisement in a local newspaper of general circulation in the locality of the mining and reclamation operation at least once a week for four consecutive weeks.

Federal Agency Comments

On March 5, 2020, under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in West Virginia amendment WV–126 (Administrative Record No. WV–1634). We did not receive any comments.

On September 22, 2011, we requested comments on the amendment from various Federal agencies with an actual or potential interest in West Virginia amendment WV–118 (Administrative Record No. WV–1570). We did not receive any comments.

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(ii), we are required to get a written concurrence from EPA for those provisions of the program amendments that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). The only change related to water standards is to change WVDEP's regulation to mirror the Federal regulation, which has already received concurrence from EPA. Therefore, we did not ask EPA to concur on the amendment.

State Historic Preservation Office (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On March 5, 2020, we requested comments on West Virginia amendment WV–126 (Administrative Record No.WV–1634). We did not receive comments from the SHPO or ACHP.

On September 22, 2011, we requested comments on the West Virginia amendment WV–118 (Administrative Record Numbers WV–1570). We did not receive comments from the SHPO or ACHP.

V. OSMRE's Decision

Based on the above findings:

1. We are approving in part the amendment (WV–126) that West Virginia sent to us on May 2, 2018 (Administrative Record No. WV–1613–A and WV–1613–B).

2. We are not approving revisions to W.Va. Code 22–3–9 and 22–3–20 because the proposed revisions render the West Virginia program less stringent than sections 507(b)(6) and 513 of SMCRA (30 U.S.C. 1257(b)(6) and 1263) and less effective than the corresponding Federal regulation at 30 CFR 773.6, which require that permit applications, significant revisions, or renewal of a permit must be announced in an advertisement in a local newspaper of general circulation in the locality of the mining and reclamation operation at least once a week for four consecutive weeks.

3. We are not approving CSR 38–2–12.2.d, .e, .f, .g and .h, the elimination of the existing prohibition on bond release for any site specific bonding (*i.e.,* open-acre bonding) until all coal extraction is completed and the disturbed area is completely backfilled and regraded because these restrictions were necessary as part of the alternative bonding system, absent there being any rationale or alternative measures provided demonstrating why this provision is no longer necessary. We are also not approving *CSR 38–2–12.4.c,* which would eliminate an existing 180-day window for initiating reclamation operations to reclaim a site in accordance with the approved reclamation plan or modification thereof. The removal of this timing provision would nullify previous corrections to the program and would render the West Virginia program less effective than the bond forfeiture provisions at section 509(a) of SMCRA

and 30 CFR 800.50(b)(2), or the alternative bonding system criteria of 30 CFR 800.11(e). In addition, we are not approving proposed changes to CSR 38–2–12.5, which includes the deletion of subsection 12.5 of the West Virginia regulations that directs WVDEP's collection, analysis, and reporting on sites where bond has been forfeited, including, in particular, data relating to the quality of water being discharged from forfeited sites. Removal, without any indication of replacement, would render the West Virginia program less effective than the Federal requirements.

4. We are approving the changes to CSR 38–2–11.3.f (WV–118) sent to us on April 25, 2011 (Administrative Record Number WV–1561), pertaining to financial assurance requirements (trust funds).

To implement this decision, we are amending the Federal regulations at 30 CFR part 948 that codify decisions concerning the West Virginia program. In accordance with the Administrative Procedure Act, this rule will take effect 30 days after the date of publication.

VI. Statutory and Executive Order Reviews

Executive Order 12630—Governmental Actions and Interference With Constitutionally Protected Property Rights

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

Executive Orders 12866—Regulatory Planning and Review, 13563—Improving Regulation and Regulatory Review, and 14094—Modernizing Regulatory Review

Executive Order 12866, as amended by Executive Order 14094, provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB) will review all significant rules. Pursuant to OMB guidance, dated October 12, 1993, the approval of State program amendments is exempted from OMB review under Executive Order 12866, as amended by Executive Order 14094. Executive Order 13563, which reaffirms and supplements Executive Order 12866, retains this exemption.

Executive Order 12988—Civil Justice Reform

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

Executive Order 13132—Federalism

This rule has potential Federalism implications as defined under section 1(a) of Executive Order 13132. Executive Order 13132 directs agencies to ''grant the States the maximum administrative discretion possible'' with respect to Federal statutes and regulations administered by the States. West Virginia, through its approved regulatory program, implements and administers SMCRA and its implementing regulations at the State level. This rule approves, in part, an amendment to the West Virginia program submitted and drafted by the State and disapproves elements of the amendment only to the extent necessary to ensure that the State program is ''in accordance with'' the requirements of SMCRA and ''consistent with'' the regulations issued by the Secretary pursuant to SMCRA. Therefore, this rule is consistent with the direction to provide maximum administrative discretion to States.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

The Department of the Interior strives to strengthen its government-to-government relationship with Tribes through a commitment to consultation with Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it has no substantial direct effects on the distribution of power and responsibilities between the Federal Government and Tribes. The basis for this determination is that our decision on the West Virginia program does not include Indian lands, as defined by SMCRA, or regulation of activities on Indian lands. Indian lands are regulated independently under the applicable approved Federal program. The Department's consultation policy also acknowledges that our rules may have Tribal implications where the State proposing the amendment encompasses ancestral lands in areas with mineable coal. We are currently working to identify and engage appropriate Tribal stakeholders to devise a constructive approach for consulting on these amendments.

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

Executive Order 13211 requires agencies to prepare a Statement of Energy Effects for a rulemaking that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not a significant energy action under the definition in Executive Order 13211, a Statement of Energy Effects is not required.

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

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

National Environmental Policy Act

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

National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 3701 *et seq.*) directs OSMRE to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. (OMB Circular

A–119 at p. 14). This action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with SMCRA.

Paperwork Reduction Act

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

Regulatory Flexibility Act

This rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon corresponding Federal regulations for which an economic analysis was prepared, and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the corresponding Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) does not have an annual effect on the economy of $100 million; (b) will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based on an analysis of the corresponding Federal regulations, which were determined not to constitute a major rule.

Unfunded Mandates Reform Act

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

List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Thomas D. Shope,

Regional Director, North Atlantic—Appalachian Region.

For the reasons stated in the preamble, the Office of Surface Mining Reclamation and Enforcement amends 30 CFR part 948 as set forth below:

PART 948—WEST VIRGINIA

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

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

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

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

* * * * *

(k) We are not approving the following provisions of the proposed West Virginia program amendments dated May 2, 2018:

(1) At W.Va. Code 22–3–9, revisions substituting notice by newspaper with notice in a form and manner determined by the Secretary which may be electronic.

(2) At W.Va. Code 22–3–20, revisions substituting notice by newspaper with notice in a form and manner determined by the Secretary which may be electronic.

(3) At CSR 38–2–2.37, the removal of the definition ''completion of reclamation''

(4) At CSR 38–2–12.2.d., the elimination to the existing prohibition on bond release for any site specific bonding (*i.e.,* open-acre bonding) until all coal extraction is completed and the disturbed area is completely backfilled and regraded.

(5) At CSR 38–2–12.2.e., to restructure and revise existing approved language in this section and move it to CSR 38–2–12.2.a.4.

(6) At CSR 38–2–12.2.f., to move, unchanged, this existing language to CSR 38–2–12.2.d

(7) At CSR 38–2–12.2.g., to move, unchanged, this existing language to CSR 38–2–12.2.f.

(8) At CSR 38–2–12.2.h., to renumber existing CSR 38–2–12.2.h to 12.2.i. and to insert it as a new CSR 38–2–12.2.h.

(9) At CSR 38–2–12.4.c., to eliminate an existing 180 day window for initiating reclamation operations to reclaim the site in accordance with the approved reclamation plan or modification thereof.

(10) At CSR 38–2–12.5., to delete subsection 12.5 of the West Virginia regulations, which directs WVDEP's collection, analysis and reporting on sites where bond has been forfeited including, in particular, data relating to the water quality of water being discharged from forfeited sites.

■ 3. Section 948.15 is amended by adding a new entry to the table in chronological order by ''Date of publication of final rule'' to read as follows:

§ 948.15 Approval of West Virginia regulatory program amendments.

* * * * *

Original amendment submission dates	Date of publication of final rule	Citation/description of approved provisions
* *	*	* * * * *
April 25, 2011, May 8, 2018	March 18, 2024	CSR 38–2–2.6; 9.3.d; 11.3.f; 11.4; 11.6; 12.2.a, 12.5.b, and .c; 12.4.a.2.B, 12.4.b, 4.b.1 and 4.b.2; 12.4.d; 14.5.b.

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