

less effective than the Federal bonding requirements at 30 CFR 800.11 concerning the requirement to file a bond and can be approved. In a similar fashion, the State has deleted the word "performance" at 38-2-3.25.a.4, 3.30.d.8, 3.32.e, 5.4.e.2, 8.2.b.3, 10.6.b.3, 11.2.b, 11.4.a.1, 11.4.a.4, and 22.7.a. For the reason stated above, we find that the deletion of the term "performance" does not render the West Virginia program less effective than the Federal bonding requirements at 30 CFR 800.11 concerning the requirement to file a bond and can be approved.

#### 5. 38-2-3.25.a.4. Reinstatement of Permits

This provision is amended by adding the word "reinstatement" following the word "transfer" that appears in the second sentence. Also, the third sentence is amended by adding the following words to the beginning of the sentence: "[e]xcept for reinstatement." The amendments are intended to clarify that CSR 38-2-3.25.a.4 also applies to the reinstatement of permits and in no event can a reinstated permit be approved in advance of the close of the public comment period. This amendment satisfies the required program amendment codified at 30 CFR 948.16(ssss). Therefore, we find that this amendment can be approved and the required program amendment codified at 30 CFR 948.16(ssss) can be removed.

#### 6. 38-2-7.4.a.1. Commercial Forestry and Forestry Postmining Land Use

This provision is amended by adding the words "[c]ommercial forestry shall be established on areas receiving a variance from AOC and" at the beginning of the third sentence. This amendment is intended to clarify that only commercial forestry postmining land use and not forestry postmining land use may be approved for areas receiving a variance from the AOC requirements. This amendment satisfies the required program amendment codified at 30 CFR 948.16(tttt). Therefore, we find that this amendment can be approved and the required program amendment codified at 30 CFR 948.16(tttt) can be removed.

#### 7. 38-2-7.4.b.1.C.5. Forestry Postmining Land Use—Ponds and Impoundments

This provision is amended by clarifying that ponds and impoundments below the fill must be removed after mining and all other ponds or impoundments that are left in place must meet the requirements of CSR 38-2-5.5. As amended, this provision satisfies the required program amendment at 30 CFR 948.16(uuuu).

Therefore, we find that this amendment can be approved and the required program amendment codified at 30 CFR 948.16(uuuu) can be removed.

#### 8. 38-2-7.4.b.1.D.1. Definition of Soil

This provision is amended by adding the following definitions of O horizon and Cr horizon:

O horizon means the top-most horizon or layer of soil dominated by organic material derived from dead plants and animals at various stages of decomposition; it is sometimes referred to as the duff or litter layer or the forest floor. Cr horizon means the horizon or layer below the C horizon, consisting of weathered or soft bedrock including saprolite or partly consolidated soft sandstone, siltstone, or shale.

We find that the definitions for O and Cr horizons at 38-2-7.4.b.1.D.1 are acceptable and further clarify the State's soil horizon requirements. Though different from the Federal definition of soil horizons at 30 CFR 701.5, the State's definitions are not inconsistent with the Federal definition and can be approved. As proposed, this provision partially satisfies the required program amendment at 30 CFR 948.16(vvvv).

The required program amendment at 30 CFR 948.16(vvvv) also requires that the State delete the phrase "except for those areas with a slope of at least 50%" from its regulations at CSR 38-2-7.4.1.D.2. We have reconsidered this required amendment, and for the reasons discussed below find that the phrase "except for those areas with a slope of at least 50%" does not render the West Virginia program less effective. Therefore, the required program amendment at 30 CFR 948.16(vvvv) is fully satisfied and can be removed.

The State regulations at CSR 38-2-7.4 set forth the standards applicable to mountaintop removal mining operations with a postmining land use of "commercial forestry and forestry." The CSR 38-2-7.4.b.1.D concerns soil and soil substitutes. Subsection 7.4.b.1.D.1 defines soil. Subsection 7.4.b.1.D.2 concerns the recovery of soil, and provides that the operator must recover and use the soil volume equal to the total soil volume on the mined area, except for those areas with a slope of at least 50 percent. In other words, soil, which includes the O, A, E, B, C, and Cr horizons on slopes less than 50 percent within the mined area will be recovered and used, whereas soil on slopes 50 percent or steeper will not be separately recovered. We had interpreted subsection 7.4.b.1.D.2 to mean that for slopes of 50 percent or greater, the topsoil would not be recovered and, therefore, the provision rendered the West Virginia program less

effective than the Federal regulations at 30 CFR 816.22.

Because subsection 7.4.b.1.D.2 only addresses soil, it must be read in concert with subsections 7.4.b.1.D.3, D.4, and D.5 to fully understand its effect. It is our understanding that under subsection 7.4.b.1.D.2, when slopes are 50 percent or steeper, the soil may not be separately recovered. In such cases, the requirements of subsection 7.4.b.1.D.3 concerning soil substitutes would apply. Subsection 7.4.b.1.D.3 provides that when the soil volume recovered under subsection 7.4.b.1.D.2 is not sufficient to meet the depth requirements for the postmining land use, selected overburden materials may be used as soil substitutes from within 10 feet of the soil surface on the mined area. Subsection 7.4.b.1.D.3 provides that material from this 10-foot layer may be removed with the soil and mixed with the soil in order to meet the depth requirement. We understand this to mean that, despite the fact that under subsection 7.4.b.1.D.2 soil may not be separately removed on slopes of at least 50 percent, the soil on those slopes will be removed together with the underlying 10-feet of weathered, slightly acid brown sandstone as necessary to meet the depth requirements, and the resulting soil medium will be the best available to support the proposed revegetation. (We note that subsection 7.4.b.1.D.3 contains a typographical error; in the first sentence, the word "sufficient" should be "insufficient" as noted previously in our final rule of August 18, 2000, 65 FR at 50417.)

Subsection 7.4.b.1.D.4 provides that if the soil and other materials saved under paragraph D.2 and the underlying 10 feet of weathered, slightly acid brown sandstone saved under paragraph D.3 are insufficient to meet the depth requirements, the operator will be required to use more of the weathered, slightly acid brown sandstone from below the 10 feet of soil surface on the mined area to meet the depth requirements.

Subsection 7.4.b.1.D.5 provides that upon a demonstration that the depth of materials saved under subsections 7.4.b.1.D.2, D.3, and D.4 are insufficient to meet the depth requirements, then up to 2/3 of the mine spoil may consist of the best available material or mix of materials.

Taken together, and based on our understanding discussed above, we find that these subsections are no less effective than the Federal regulations at 30 CFR 816.22. Therefore, the required program amendment at 30 CFR 948.16(vvvv) is satisfied and can be removed.