

## II. Submission of the Amendment

By letter dated March 18, 2003, the West Virginia Department of Environmental Protection (WVDEP) sent us a proposed amendment to its program (Administrative Record Number WV-1352) under SMCRA (30 U.S.C. 1201 *et seq.*). West Virginia submitted the amendment in response to the required program amendments at 30 CFR 948.16(nnn), (ooo), and (qqqq) and made other changes at its own initiative.

We announced receipt of the proposed amendment in the April 14, 2003, **Federal Register** (68 FR 17896). 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 (Administrative Record Number WV-1358). We did not hold a public hearing or meeting because no one requested one. The public comment period ended on May 14, 2003. We received comments from two Federal agencies.

## III. OSM's Findings

Following are the findings we made pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17 concerning the proposed amendment to the West Virginia program. Any revisions that we do not specifically discuss below concern nonsubstantive wording or editorial changes and are approved here without discussion.

The program amendment consists of changes to the W. Va. Code as contained in House Bills 2881 and 2882, and changes to the State's Coal Related Dam Safety Rule at CSR 38-4 and to the Surface Mining Reclamation Regulations at CSR 38-2 as contained in House Bill 2603. The amendment concerns a variety of topics including bond release, dam safety, permit application requirements, drainage and sediment control systems, fish and wildlife considerations, revegetation, performance standards, inspection and enforcement, coal refuse, and remining operations. The amendment is intended to improve the effectiveness of the West Virginia program and to render the West Virginia program no less effective than the Federal regulations.

In order to expedite our review of the provisions that concern the recommendations of West Virginia's 2002 Flood Study (Governor's Executive Order No. 16-01), we have separated the amendment relating to CSR 38-4 Coal Related Dam Safety Rule and will address those proposed amendments in a separate **Federal Register** notice at a later date, except for CSR 38-4-25.14

which is addressed below at Finding 31. In addition, the proposed amendment to CSR 38-2-3.31.a is similar to language that we are currently considering under a separate program amendment. Therefore, we are removing the proposed amendment to CSR 38-2-3.31.a from the current amendment, and we will address the proposed amendment to CSR 38-2-3.31.a in a separate **Federal Register** notice at a later date. Our findings relating to the W. Va. Code and the remainder of the amendments to West Virginia's Surface Mining Reclamation Regulations are detailed below.

1. As described in Committee Substitute for House Bill 2881, W. Va. Code 22-3-23(a)-(h), concerning release of bond or deposits, are amended by changing the term "director" to "secretary" in numerous locations, and by changing the term "division" to "department" in one location. We find that these amendments accurately reflect the current organization of the WVDEP and do not render the West Virginia program less stringent than SMCRA nor less effective than the Federal regulations and can be approved.

2. As described in Committee Substitute for House Bill 2881, W. Va. Code 22-3-23(c)(1)(C), concerning bond release for all operations that are being returned to approximate original contour (AOC), is amended by adding the following language to the end of the last sentence: "where expressly authorized by legislative rule promulgated pursuant to section three, article one of this chapter." As amended, the sentence reads as follows:

"Provided, however, that the release may be made where the quality of the untreated post-mining water discharged is better than or equal to the premining water quality discharged from the mining site where expressly authorized by legislative rule promulgated pursuant to section three, article one of this chapter."

On July 11, 1985, OSM disapproved and on August 29, 1985, OSM preempted and superseded the language of the proviso that is being amended here (50 FR 28316, 28319 and 50 FR 35082, 35083, respectively). At that time, the proviso was located at W. Va. Code 22A-3-23(c)(3). OSM took that action because under certain circumstances, the proviso would permit final bond release prior to attainment of revegetation standards in accordance with the approved reclamation plan. OSM took that action after determining that the provision was inconsistent with section 519(c)(3) of SMCRA, based on the reasons cited in

Finding 6 of the July 11, 1985, **Federal Register** notice.

The language that is being added to the proviso has the effect of limiting the application of the proviso to only those regulations where such alternative water quality standards are specifically authorized. This amendment renders the language of this proviso inoffensive to section 519(c)(3) of SMCRA, because the circumstances of its applicability will be dictated by specific regulations that were promulgated in accordance with the Clean Water Act. Therefore, the specific implementing regulations authorized by this proviso must be evaluated relative to the requirements of section 519(c)(3) of SMCRA. Indeed, the State has amended its bond release requirements that apply only to remining operations at CSR 38-2-24.4, and that amendment directly relates to this proviso. See Finding 35, below for our finding on the amendment to CSR 38-2-24.4. We find that, as amended, and for the reasons further explained in Finding 35, below, the proviso at W. Va. Code 22-3-23(c)(1)(C) as quoted above is not inconsistent with SMCRA section 519(c)(3) and can be approved.

3. As described in Committee Substitute for House Bill 2881, W. Va. Code 22-3-23(c)(2)(C), concerning bond release for operations with an approved variance from AOC, is amended by adding the following language to the end of the last sentence: "where expressly authorized by legislative rule promulgated pursuant to section three, article one of this chapter." This amendment is intended to satisfy the required program amendment codified at 30 CFR 948.16(qqqq). As amended, the sentence reads as follows:

Provided, however, that the release may be made where the quality of the untreated post mining water discharged is better than or equal to the premining water quality discharged from the mining site where expressly authorized by legislative rule promulgated pursuant to section three, article one of this chapter.

For the same reasons discussed directly above at Finding 2, we find that the amended proviso at W. Va. Code 22-3-23(c)(2)(C) is not inconsistent with SMCRA section 519(c)(3) and can be approved. Furthermore, we also find that this amendment satisfies the required program amendment codified at 30 CFR 948.16(qqqq), which can be removed.

W. Va. Code 22-3-23(c)(2)(C) is also amended by deleting the reference to subdivision 3 and continuing to require compliance with the bond release scheduling requirements of subdivisions 1 and 2 of this subsection. This change corrects a typographical error, in that