

not render the provision less effective than the Federal revegetation standards at 30 CFR 816/817.116(a), because the Secretary of WVDEP will set the productivity success standards for the State. The WVDEP submitted a policy establishing such success standards that we approved in the **Federal Register** on May 1, 2002 (67 FR 21904, 21906–21907). The State's productivity success standards for hayland, pastureland, rangeland and cropland are set forth in that policy. Therefore, we find that the proposed amendments do not render the West Virginia program less effective than the Federal requirements and can be approved.

17. CSR 38–2–14.5.h, concerning hydrologic balance, is amended by adding a proviso which provides that the requirement for replacement of an affected water supply that is needed for the land use in existence at the time of contamination, diminution or interruption or where the affected water supply is necessary to achieve the post-mining land use shall not be waived. This amendment is intended to satisfy the required program amendment codified at 30 CFR 948.16(sss). As discussed in the **Federal Register** dated March 4, 2003, we reinstated this required amendment in order to comply with U.S. District Court Judge Haden's ruling of January 9, 2003 (68 FR 10178).

The required program amendment codified at 30 CFR 948.16(sss) provides that the West Virginia program must be amended to clarify that the replacement of water supply can only be waived under the conditions set forth in the definition of "Replacement of water supply," paragraph (b), at 30 CFR 701.5, which provides as follows:

(b) If the affected water supply was not needed for the land use in existence at the time of loss, contamination, or diminution, and if the supply is not needed to achieve the postmining land use, replacement requirements may be satisfied by demonstrating a suitable alternative water source is available and could feasibly be developed. If the latter approach is selected, written concurrence must be obtained from the water supply owner.

We find that the proposed language provides a counterpart to the Federal requirement that limits waivers of water supply replacement to only those cases where the affected water supply is not needed for the current or proposed postmining land use. Therefore, the proposed amendment can be approved. In addition, we find that it is reasonable to presume that a waiver authorized under W. Va. Code 22–3–24(b) and CSR 38–2–14.5.h would be in writing. However, we recommend that the State amend subsection CSR 38–2–14.5.h to

clarify that a waiver of water supply replacement be in writing. Finally, the CSR 38–2–14.5.h continues to lack a requirement that a waiver can only be approved where it is demonstrated that a suitable alternative water source is available and could feasibly be developed. Therefore, we will revise the required program amendment at 30 CFR 948.16(sss) to require that CSR 38–2–14.5.h be further amended to provide a counterpart to the Federal requirement in the definition of "Replacement of water supply," paragraph (b), at 30 CFR 701.5, which provides that replacement requirements may be satisfied by demonstrating that a suitable alternative water source is available and could feasibly be developed.

18. CSR 38–2–14.14.g.1 is amended by adding language to provide that durable rock fills proposed after January 1, 2004, may only be approved with the design, construction, and use of a single lift fill if they include an erosion protection zone or a durable rock fill designed to be reclaimed from the "tow" [toe] upward. There is no direct counterpart to the proposed language in the Federal regulations concerning the design of durable rock fills. However, we find that the proposed requirements do not render CSR 38–2–14.14.g.1 less effective than the Federal regulations regarding durable rock fills at 30 CFR 816/817.73 and can be approved. We note the inadvertent typographical error ("tow" should be "toe") and understand that it will be corrected at a future date.

19. CSR 38–2–14.14.g.2 is new and adds design specifications and requirements for single lift fills with an erosion protection zone. The new language provides as follows:

14.14.g.2.A. Erosion Protection Zone. The erosion protection zone is a designed structure constructed to provide energy dissipation to minimize erosion vulnerability and may extend beyond the designed toe of the fill.

14.14.g.2.A.1. The effective length of the erosion protection zone shall be at least one half the height of the fill measured to the target fill elevation or fill design elevation as defined in the approximate original contour procedures and shall be designed to provide a continuous underdrain extension from the fill through and beneath the erosion protection zone.

14.14.g.2.A.2. The height of the erosion protection zone shall be sufficient to accommodate designed flow from the underdrain of the fill and shall comply with 14.14.e.1. of this rule.

14.14.g.2.A.3. The erosion protection zone shall be constructed of durable rock as defined in 14.14.g.1. originating from a permit area and shall be of

sufficient gradation to satisfy the underdrain function of the fill.

14.14.g.2.A.4. The outer slope or face of the erosion protection zone shall be no steeper than two (2) horizontal or one (1) vertical (2:1). The top of the erosion protection zone shall slope toward the fill at a three (3) to five (5) percent grade and slope laterally from the center toward the sides at one (1) percent grade to discharge channels capable of passing the peak runoff of a one-hundred (100) year, twenty-four (24) hour precipitation event.

14.14.g.2.A.5. Prior to commencement of single lift construction of the durable rock fill, the erosion protection zone must be seeded and certified by a registered professional engineer as a critical phase of fill construction. The erosion protection zone shall be maintained until completion of reclamation of the fill.

14.14.g.2.A.6. Unless otherwise approved in the reclamation plan, the erosion protection zone shall be removed and the area upon which it was located shall be regarded [regraded] and revegetated in accordance with the reclamation plan.

14.14.g.2.B. Single Lift Construction Requirements.

14.14.g.2.B.1. Excess spoil disposal shall commence at the head of the hollow and proceed downstream to the final toe. Unless required for construction of the underdrain, there shall be no material placed in the fill from the sides of the valley more than [than] 300 feet ahead of the advancing toe. Exceptions from side placement of material limits may be approved by the Secretary if requested and the applicant can demonstrate through sound engineering that it is necessary to facilitate access to isolated coal seams, the head of the hollow or otherwise facilitates fill stability, erosion, or drainage control.

14.14.g.2.B.2. During construction, the fill shall be designed and maintained in such a manner as to prevent water from discharging over the face of the fill.

14.14.g.2.B.2.(a). The top of the fill shall be configured to prevent water from discharging over the face of the fill and to direct water to the sides of the fill.

14.14.g.2.B.2.(b). Water discharging along the edges of the fill shall be conveyed in such a manner to minimize erosion along the edges of the fill.

14.14.g.2.B.3. Reclamation of the fill shall be initiated from the top of the fill and progress to the toe with concurrent construction of terraces and permanent drainage.

The proposed provisions are more detailed than, but are not inconsistent