

with, the Federal requirements for durable rock fills at 30 CFR 816/817.73. Neither SMCRA nor the Federal regulations prohibit the construction of single-lift durable rock fills. However, the Environmental Protection Agency (EPA) commented on the proposed amendments and provided a conditional approval of CSR 38–2–14.14.g.2.A.6 concerning the removal of erosion protection zones following mining. See Section IV, Summary and Disposition of Comments, below, for a complete discussion of EPA's comments.

The EPA stated that it is concerned that erosion protection zones (EPZs) may result in permanent stream fills after completion of mining. According to CSR 38–2–14.14.g.2.A.1, the EPA stated, a 250-foot long EPZ would be required for a 500-foot high valley fill, which, EPA stated, is not unusual in southern West Virginia. Although Section 14.14.g.2.A.6 requires EPZ removal, regrading, and revegetating after mining, EPA stated, it does not appear to include removal of the stream fill associated with the EPZ or reconstruction of the stream channel.

The EPA stated that it concurs with the proposed revisions under the condition that a requirement be included to remove stream fills associated with EPZs after mining and reconstruct the stream channels.

Therefore, and considering EPA's conditional concurrence as noted above, we find that these new design specifications and requirements for single-lift fills with an erosion protection zone do not render the West Virginia program less effective than the Federal durable rock fill requirements at 30 CFR 816/817.71 and 816/817.73 and can be approved with the following exceptions.

At CSR 38–2–14.14.g.2.A.6, we are not approving the words “[u]nless otherwise approved in the reclamation plan” because leaving an EPZ in place would be inconsistent with EPA's conditional concurrence to remove stream fills associated with EPZs and to reconstruct the stream channels after mining. We are approving CSR 38–2–14.14.g.2.A.6 only to the extent that following mining, all stream fills associated with EPZs will be removed and the stream channels shall be reconstructed in the manner described at CSR 38–2–5.3 and 14.4.a concerning stream diversions.

20. CSR 38–2–14.14.g.3 is new and adds design specifications and requirements at 14.14.g.3 through 14.14.g.3.B for durable rock fills designed to be reclaimed from the toe upward. The new language provides as follows:

14.14.g.3.A. Transportation of material to toe of fill. The method of transporting material to the toe of the fill shall be specified in the application and shall include a plan for inclement weather dumping. The means of transporting material to the toe may be by any method authorized by the Act [the West Virginia Surface Coal Mining and Reclamation Act] and this rule and is not limited to the use of roads.

14.14.g.3.A.1. Constructed roads shall be graded and sloped in such a manner that water does not discharge over the face. Sumps shall be constructed along the road in switchback areas and shall be located at least 15 feet from the outslope.

14.14.g.3.A.2. The constructed road shall be in compliance with all applicable State and Federal safety requirements. The design criteria to comply with all applicable State and Federal safety requirements shall be included in the permit.

14.14.g.3.B. Once the necessary volume of material has been transported to the toe of the fill, face construction and installation of terraces and permanent drainage shall commence. The face construction and reclamation of the fill shall be from the bottom up with progressive construction of terraces and permanent drainage in dumping increments not to exceed 100 feet.

The proposed provisions are more detailed than, but are not inconsistent with, the Federal requirements for durable rock fills at 30 CFR 816/817.73. Therefore, we find that these new design specifications and requirements for durable rock fills designed to be reclaimed from the toe upward do not render the West Virginia program less effective than the Federal durable rock fill requirements at 30 CFR 816/817.71 and 816/817.73 and can be approved. In addition, we are approving these requirements with the understanding that if roads are not used to transport the excess material as provided in subsection 14.14.g.3.A, the alternative means of transportation will ensure that the excess spoil will be transported to the toe of the fill and placed in a controlled manner as provided by CSR 38–2–14.14.a.2 and 30 CFR 816/817.71(e)(2).

21. CSR 38–2–14.15.a.2, concerning contemporaneous reclamation standards, is amended by adding language to provide that the mining and reclamation plan shall contain information on how mining and reclamation operations will be coordinated so as to minimize surface water runoff, and comply with the storm water runoff plan. There is no direct Federal counterpart to the proposed

language. We find, however, that the proposed language is not inconsistent with the Federal regulations at 30 CFR 816/817.100 concerning contemporaneous reclamation and can be approved.

22. CSR 38–2–14.15.c, concerning reclaimed area, is amended by adding the words “and seeding has occurred” to the definition of reclaimed acreage that is applicable to this subsection. As amended, the definition of reclaimed area provides that for purposes of this subsection, reclaimed acreage shall be that portion of the permit area which has at a minimum been fully regraded and stabilized in accordance with the reclamation plan, meets Phase I standards, and seeding has occurred. We find that the amendment to this provision does not render the West Virginia rule less effective than the Federal regulations concerning contemporaneous reclamation at 30 CFR 816/817.100 and bond release at 30 CFR 800.40(c) can be approved.

23. CSR 38–2–14.15.g, concerning contemporaneous reclamation variance—permit applications, is amended by adding language to require a demonstration that the variance being sought will comply with CSR 38–2–5.6 concerning the new storm water runoff provisions. There are no counterpart Federal requirements to the new West Virginia storm water runoff provisions at CSR 38–2–5.6. We find, however, that the amendment to this provision does not render the West Virginia rule less effective than the Federal regulations concerning contemporaneous reclamation at 30 CFR 816/817.100 and can be approved.

24. CSR 38–2–17.1, concerning Small Operator Assistance Program (SOAP), is amended by adding that the Secretary of WVDEP shall establish a formula for allocating funds to provide services for eligible small operators if available funds are less than those required to provide the services pursuant to CSR 38–2–17. This new language provides the West Virginia program with a counterpart to the Federal requirement at 30 CFR 795.11(b) and can be approved. We note that the State must now actually establish a formula for allocating SOAP funds.

25. CSR 38–2–20.6.a, concerning civil penalty assessments, is amended by deleting all language concerning an “assessment officer,” and adding language concerning the Secretary of WVDEP. The new language provides that the Secretary shall not determine the proposed penalty assessment until such time as an inspection of the violation has been conducted and the findings of that inspection are submitted