

- (iii) Include reagent blank and spike recovery data;
- (iv) Describe instrumental conditions and parameters;
- (v) Include the analysts' signatures;
- (vi) Include the analysts' calculations; and
- (vii) Contain a certificate of analysis.

(b) You must provide, as part of your analytical package, an affidavit stating that:

(1) The analytical package pertains to the only test(s) done on the lot or product and that you are not aware of any other tests being performed; or

(2) If you are aware of other tests that are being or have been performed by other persons, the name and address of the person who is conducting or who has conducted the other tests.

(c) You must submit the analytical package and the original sample collection report to the FDA district office that processed the entry of the imported food. Additionally, you must:

(1) Maintain records relating to the requirements under paragraphs (a) and (b) of this section for 3 years after you submitted the analytical package and original sample collection report to FDA, and

(2) Upon request, make records available to FDA for inspection and copying.

#### **§ 59.303 What are the requirements for private laboratories collecting samples?**

If you are a private laboratory and collect samples of an imported food in connection with an FDA enforcement action, you must comply with subpart C of this part.

Dated: April 22, 2004.

**Lester M. Crawford,**

*Acting Commissioner of Food and Drugs.*

[FR Doc. 04-9699 Filed 4-26-04; 11:58 am]

BILLING CODE 4160-01-S

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## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 948

[WV-089-FOR]

#### West Virginia Regulatory Program

**AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

**ACTION:** Proposed rule; withdrawal.

**SUMMARY:** We are withdrawing a proposed rulemaking for an amendment to the West Virginia regulatory program

under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The proposed rulemaking pertained to the State's response to several letters that we had sent it, which identified changes to SMCRA and the Federal regulations and that may require amendments be made to the State coal regulatory program. We are withdrawing the proposed rulemaking, because, for the 12 items published as a proposed amendment, the State actually provided rationale for not making some changes, rather than proposing changes, and for various other reasons.

**FOR FURTHER INFORMATION CONTACT:** Mr. Roger W. Calhoun, Director, Charleston Field Office, 1027 Virginia Street East, Charleston, West Virginia 25301. Telephone: (304) 347-7158; Internet address: [chfo@osmre.gov](mailto:chfo@osmre.gov).

#### **SUPPLEMENTARY INFORMATION:**

I. Background on the West Virginia Program

II. Submission of the Amendment

III. OSM's Findings

IV. Summary and Disposition of Comments

#### **I. Background on the West Virginia Program**

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, " \* \* \* a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act \* \* \* ; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act." See 30 U.S.C. 1253 (a)(1) and (7). On the basis of 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 findings, 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**

By letter dated August 15, 2000, we requested that the West Virginia Department of Environmental Protection (WVDEP) provide us a response to six 30 CFR part 732 notifications that we had previously sent the State (Administrative Record Number WV-1178). The Federal regulations at 30 CFR 732.17(d) provide that OSM must

notify the State of all changes in SMCRA and the Federal regulations that will require an amendment to the State program. Such letters sent by us are often referred to as "732 letters or notifications." On December 20, 2000 (Administrative Record Number WV-1191), the WVDEP responded to our August 15, 2000, letter. We note that in its December 20, 2000, letter, the State incorrectly cited a March 6, 2000, letter from OSM rather than our August 15, 2000, letter.

The Federal regulations at 30 CFR 732.17(b) provide that the State regulatory authority shall notify OSM, as a possible program amendment, of any significant events or proposed changes which affect the implementation, administration or enforcement of the approved State program. In a January 12, 2001, **Federal Register** notice (66 FR 2866), we announced receipt of the State's December 20, 2000, letter and published it as a proposed rulemaking. In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on whether the proposed amendment satisfies applicable program approval criteria.

The State's December 20, 2000, letter addressed 22 part 732 items. For six of the items (identified in our **Federal Register** notice as 2, 3, 6.F, 6.G, 6.H, and 6.I), the State indicated that it would be submitting proposed changes in the future. These items relate to coal extraction incidental to the extraction of other minerals, special reclamation fund, prime farmland, qualified SOAP (Small Operator Assistance Program) laboratory, qualifications for SOAP assistance, and filing for SOAP assistance, respectively. We stated that, for those items, we would announce the proposed changes in a future proposed rule upon their submission. For four items (identified as 4, 5, 6.J, and 7 regarding subsidence and water replacement, ownership and control, bond release, and staffing, respectively), we stated that (for various reasons described in the notice) the State had not submitted program changes. Therefore, we did not make these 10 items part of the proposed rule.

For the remaining 12 items addressed in the State's December 20, 2000, letter, we did characterize the State's responses as a program amendment and invited comments on the proposal. However, for each of these 12 items, the WVDEP actually asserted that no additional changes to the West Virginia program were necessary for the reasons explained in its letter. The State responses for which we requested

public comment were identified in the January 12, 2001, **Federal Register** notice as follows: Items 1, 2.A, 2.B, 2.C, 2.D, 2.E, 2.F, 2.G, 2.H, 3, 4, and an unnumbered item concerning inspection frequencies. These numbers do not fully correspond to the numbering system in the State's December 20, 2000, letter. The corresponding State numbers are: Items 1, 6A, 6B, 6C, 6D, 6E, 6K, 6L, 6M, unnumbered item, 8, and 9. These issues concern stocking and planting arrangements; definition of other treatment facilities; definition of previously mined area; definition of siltation structure; definition of significant recreational, timber, economic, or other values incompatible with surface mining operations; permitting requirements relating to the new dam classification criteria; performance standards relating to the new dam classification criteria; coal mine waste; thin and thick overburden; inspection frequencies at abandoned sites; subsidence due to underground mining; and valid existing rights, respectively.

The public comment period closed on February 12, 2001 (Administrative Record Number WV-1195). No one requested a public hearing, so none was held. However, a public commenter requested an extension of the public comment period, and to accommodate that request we accepted comments through February 28, 2001 (Administrative Record Numbers WV-1200 and WV-1201). We received comments on the December 20, 2000, submittal from one environmental group and two Federal agencies.

### III. OSM's Findings

For reasons more fully explained below, we are withdrawing our proposed rulemaking on all 12 of the items that we announced in our January 12, 2001, **Federal Register** notice as proposed amendments. These 12 part 732 items fall into three distinct categories with one common element. We will discuss each of these categories in turn, with our rationale for withdrawing the rulemaking in each category.

#### *a. State Has Committed to Future Rulemaking*

For six items, the State has since revised its position. WVDEP has committed to amending its approved program relating to six items, and, by letter dated December 2, 2003, has submitted a schedule for doing so. Therefore, the State's December 20, 2000, submission for those six items, which we published as a proposed

amendment identified as Items 1, 2.B, 2.E, 2.F, 2.G, and the unnumbered item on inspection frequencies at abandoned sites, is now moot because the State has subsequently revised its response and committed to future rulemaking. Therefore, we are withdrawing our January 12, 2001, rulemaking as it relates to these items. We will announce any proposed State changes in future rulemaking notices as they are received.

#### *b. Suspension of Part 732 Notifications*

For two items, we have suspended our requirement that the State amend its program. These items concern subsidence due to underground mining and valid existing rights. Given ongoing litigation, we have suspended all action on these two part 732 notifications until further notice. We will provide the State with formal notification in the future when these part 732 notifications will have to be addressed by the State. By letter dated November 17, 2003, we notified the State that we were suspending all actions relating to our August 22, 2000, part 732 letter regarding subsidence due to underground mining and valid existing rights until further notice (Administrative Record Number WV-1378). Items 3 and 4 in our January 12, 2001, proposed rulemaking addressed these issues. Therefore, the rationale provided by the State in its December 20, 2000, letter relating to these two items is now moot, because we are not mandating any changes at this time. Therefore, we are withdrawing our January 12, 2001, rulemaking notice as it relates to these two items.

#### *c. Agreement That No Change Is Required*

For the following four items, that we identified as Items 2.A., 2.C., 2.D., and 2.H. and solicited comments on in our January 12, 2001, **Federal Register** notice, we reviewed the State's December 20, 2000, response, conducted further evaluation of the issues, and concluded that the State's program, as currently approved, is no less effective than the Federal rules in regard to these items. Because the State had actually submitted rationale for not changing its approved program, rather than proposing any changes for these four items, and we have determined that no changes are required, that decision does not constitute rulemaking in regard to the approval of a State program amendment. Therefore, we are withdrawing our January 12, 2001, rulemaking notice in relation to these four items. Instead, we have notified the State by letter dated April 8, 2004, in which we explained that we have

withdrawn our part 732 notifications relating to these items because we have determined that the State's approved program is no less effective than the Federal rules in regard to these items.

Although the decision to terminate our part 732 notifications relating to the four items that were advertised is an administrative decision distinct from approving them as a State program amendment as proposed in our January 12, 2001, **Federal Register** notice, we are including our rationale for those decisions in this notice because we did receive comments on these issues and we feel a full explanation to the public of our decision is warranted. The explanation included here is the same as that provided the State in our letter dated April 8, 2004, resolving the following four issues and terminating the part 732 notifications associated with them.

#### *c.1. 30 CFR 701.5 Definitions of "other treatment facilities" (Item 2.A.) and "siltation structure" (Item 2.C.)*

In our July 22, 1997, part 732 letter to the WVDEP, we informed it that the Federal definition of "other treatment facilities" was revised and removed from 30 CFR 816/817.46(a)(3) to 30 CFR 701.5, and that the State must add a counterpart definition to its program. The revised Federal definition of "other treatment facilities" adds the words "neutralization" and "precipitators" (common water quality treatment processes) and the phrase "[t]o comply with all applicable state and Federal water quality laws and regulations." This latter modification was made to clarify that the purpose of a treatment facility is to comply with water quality laws, as well as to prevent additional contributions of dissolved or suspended solids to streamflow or off-site runoff.

Also, in our July 22, 1997, part 732 letter, we informed the State that OSM had moved the definition of "siltation structure" from 30 CFR 816/817.46(a)(1) to 30 CFR 701.5. OSM stated that the State's regulations do not define "siltation structure," but that the State's rules do define "sediment control or other water retention structure, sediment control or other water retention system or sediment pond." Finally, OSM stated that the State needs to define the terms "other treatment facilities" and "siltation structure" or explain why they are not needed.

In its December 20, 2000, letter, the WVDEP asserted that the State does not need the definitions of "other treatment facilities" or "siltation structure." The WVDEP stated that the West Virginia program contains a definition of "sediment control or other water

retention structure, sediment control or other water retention system, or sediment pond" at CSR 38-2-2.110, and the definition of "chemical treatment" at CSR 38-2-2.21. Additionally, the WVDEP stated that the term "siltation structure" is defined in the Federal rule as a sedimentation pond" and that corresponds to the State's definition of "sediment control or other water retention structure, sediment control or other water retention system, or sediment pond."

The Federal definition of "other treatment facilities," at 30 CFR 701.5, provides as follows:

Other treatment facilities means any chemical treatments, such as flocculation or neutralization, or mechanical structures, such as clarifiers or precipitators, that have a point source discharge and are utilized:

- (a) To prevent additional contributions of dissolved or suspended solids to streamflow or runoff outside the permit area, or
- (b) To comply with all applicable State and Federal water-quality laws and regulations.

The Federal definition of "siltation structure," at 30 CFR 701.5, provides as follows:

Siltation structure means a sedimentation pond, a series of sedimentation ponds, or other treatment facility.

We find that, despite the fact that the West Virginia program lacks definitions of "other treatment facilities" and "siltation structure," the State program is not rendered less effective than the Federal requirements for the following reasons.

The State's definition of "sediment control or other water retention structure, sediment control or other water retention system, or sediment pond" at CSR 38-2-2.110 "means an impoundment designed, constructed, and maintained \* \* \* for the purpose of removing solids from water in order to meet applicable water quality standards or effluent limitations before the water is discharged into the receiving stream. Examples include \* \* \* all ponds and facilities or structures used for water treatment." Part of the State's language quoted above (the part that states "for the purpose of removing solids from water in order to meet applicable water quality standards or effluent limitations before the water is discharged into the receiving stream.") is substantively identical to the Federal definition of the term "sedimentation pond," which is a term used in the Federal definition of "siltation structure."

The State's definition of "chemical treatment," at CSR 38-2-2.21, "means the treatment of water from a surface coal mining operation using chemical

reagents such as but not limited to sodium hydroxide, calcium carbonate, or anhydrous ammonia for purposes of meeting applicable state and federal effluent limitations." Therefore, these two State definitions combine to encompass impoundments, sediment ponds, facilities or structures, and chemical treatments used to assure compliance with State and Federal water quality standards or effluent limitations.

In addition, the State performance standards at CSR 38-2-14.5.c, concerning "treatment facilities," provide that "[a]dequate treatment facilities shall be installed, operated and maintained \* \* \* to treat any water discharged from the permit area so that it complies with the \* \* \* [effluent limitations] of CSR 38-2-14.5.b. \* \* \*". Finally, CSR 38-2-14.5.b provides that "[d]ischarge from areas disturbed by surface mining shall not violate effluent limitations or cause a violation of applicable water quality standards. The monitoring frequency and effluent limitations shall be governed by the standards set forth in a NPDES [National Pollutant Discharge Elimination System] permit issued pursuant to W. Va. Code [Code of West Virginia] 22-11 *et seq.*, the Federal Water Pollution Control Act as amended, 33 U.S.C. 1251 *et seq.* and the rules and regulations promulgated thereunder."

We find that, combined, the State provisions at CSR 38-2-2.110, 38-2-2.21, 38-2-14.5.b, and 38-2-14.5.c are no less effective than the substantive meaning of the Federal definitions of "other treatment facilities" and "siltation structure" at 30 CFR 701.5. While the West Virginia program does not specifically provide examples of chemical or mechanical treatment as does the Federal definition of "other treatment facilities," that omission alone does not render the State program less effective, since the Federal examples are illustrative only. Furthermore, the State's provisions do not exclude nor prohibit the use of any of the treatment facilities identified in the Federal definitions of "other treatment facilities" or "siltation structure." Because State rules acknowledge that sediment control structures are used for water treatment and such structures are used to ensure compliance with effluent limitations and water quality standards, the aforementioned State provisions are no less effective than the Federal definitions of "other treatment facilities" and "siltation structure" at 30 CFR 701.5. For these reasons, we find that these part 732 issues are satisfied

and no amendments of the approved State program are required.

c.2. 30 CFR 761.5. "Significant Recreational, Timber, Economic, Other Values Incompatible With Surface Coal Mining Operations" as it Relates to Federal Lands (Item 2.D.)

In our July 22, 1997, part 732 letter to the WVDEP, we informed it that the phrase "significant recreational, timber, economic, or other values incompatible with surface coal mining operations" is part of the State's approved program at W. Va. Code 22-3-22(d)(5), but it is not defined.

In its December 20, 2000, letter, the WVDEP stated that the State does not need to define this term since 30 CFR 740.4 states that the determination of significant recreational, timber, economic, or other values incompatible with surface coal mining operations is the responsibility of the Secretary of the Department of the Interior.

We concur with the WVDEP's assessment of this term, and we find that the West Virginia program is not rendered less effective than SMCRA or the Federal regulations by lacking a definition of the term for the following reasons. Section 522(e)(2) of SMCRA provides that, subject to valid existing rights, no surface coal mining operations except those which exist on the date of enactment of SMCRA shall be permitted "on any Federal lands within the boundaries of any national forest: Provided, however, that surface coal mining operations may be permitted on such lands if the Secretary [of the Department of the Interior] finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations \* \* \*." The Federal regulations at 30 CFR 740.4(a)(5) clearly provide that it is the sole responsibility of the Secretary of the Department of the Interior to make these findings. When making such determinations on Federal lands within the State of West Virginia, the Secretary will use the Federal definition of that term at 30 CFR 761.5. Therefore, we find that the State does not have to add a definition of the term to the West Virginia program, and that this 30 CFR part 732 issue is satisfied.

c.3. 30 CFR 816.104(a) and 816.105(a) Thin or Thick Overburden (Item 2.H.)

In our July 22, 1997, part 732 letter to the WVDEP, we informed it that 30 CFR 816.104(a) and 816.105(a) contain revised definitions of thin and thick overburden, respectively. Although W. Va. Code 22-3-13(b)(3) contains provisions regarding thin and thick overburden and CSR 38-2-14.15

contains West Virginia's backfilling and grading requirements, we stated that West Virginia does not define thin or thick overburden. In addition, we stated that the State does not have regulations comparable to 30 CFR 816.104 and 816.105. We also stated that since backfilling and grading of thick overburden is a common practice in the State, the WVDEP needs to amend its regulations or explain why its existing requirements are no less effective than those set forth in 30 CFR 816.105.

In its December 20, 2000, response, the WVDEP stated that West Virginia does not need to amend its rule. The WVDEP stated that the statute at W. Va. Code 22-3-13(b)(3) defines thin and thick overburden, and it has similar language to that contained in 30 CFR 816.104(a) and 816.105(a).

For the following reasons, we agree with the WVDEP's assertion that the State does not need to further amend its rules. The Federal regulations at 30 CFR 816.104(a) provide that "[t]hin overburden means insufficient spoil and other waste materials available from the entire permit area to restore the disturbed area to its approximate original contour [AOC]." It further provides that "[i]nsufficient spoil and other waste materials occur where the overburden thickness times the swell factor, plus the thickness of other available waste materials, is less than the combined thickness of the overburden and coal bed prior to removing the coal, so that after backfilling and grading the surface configuration of the reclaimed area would not: (1) Closely resemble the surface configuration of the land prior to mining; or (2) Blend into and complement the drainage pattern of the surrounding terrain."

The State provision at W. Va. Code 22-3-13(b)(3) provides for reclamation to AOC, with the following exception for thin overburden:

Provided, that in surface-mining which is carried out at the same location over a substantial period of time where the operation transects the coal deposit, and the thickness of the coal deposits relative to the volume of the overburden is large and where the operator demonstrates that the overburden and other spoil and waste materials at a particular point in the permit area or otherwise available from the entire permit area is insufficient, giving due consideration to volumetric expansion, to restore the approximate original contour, the operator, at a minimum, shall backfill, grade and compact, where advisable, using all available overburden and other spoil and waste materials to attain the lowest practicable grade, but not more than the angle of repose, to provide adequate drainage and to cover all acid-forming and other toxic

materials, in order to achieve an ecologically sound land use compatible with the surrounding region \* \* \*.

This language, though not identical to the Federal definition at 30 CFR 816.104(a), entails the same substantive analysis of a coal seam and its surrounding overburden. Under both the Federal and State schemes, the volume of the postmining overburden, spoil and waste material must be less than that of the combined premining volume of the overburden and coal in order for the proposed operation to qualify for the "thin overburden" AOC exemption.

Also, the State's thin overburden provision does not contain specific counterparts to the Federal language at 30 CFR 816.104(a)(1) and (2). However, the State's counterparts to those provisions are located at W. Va. Code 22-3-3(e) (the definition of AOC), and are, in effect, incorporated into W. Va. Code 22-3-13(b)(3) by the State's reference to insufficient overburden, spoil and waste to restore AOC.

Therefore, we find that the State's description of thin overburden at W. Va. Code 22-3-13(b)(3) is substantively identical to the Federal definition of thin overburden at 30 CFR 816.104(a).

The State's description of thick overburden is also contained in W. Va. Code 22-3-13(b)(3), and provides as follows:

Provided, however, that in surface-mining where the volume of overburden is large relative to the thickness of the coal deposit and where the operator demonstrates that due to volumetric expansion the amount of overburden and other spoil and waste materials removed in the course of the mining operation is more than sufficient to restore the approximate original contour, the operator shall, after restoring the approximate original contour, backfill, grade and compact, where advisable, the excess overburden and other spoil and waste materials to attain the lowest grade, but not more than the angle of repose, and to cover all acid-forming and other toxic materials, in order to achieve an ecologically sound land use compatible with the surrounding region and, the overburden or spoil shall be shaped and graded in a way as to prevent slides, erosion and water pollution and is [sic] revegetated in accordance with the requirements of this article \* \* \*.

This language, though not identical to the Federal definition at 30 CFR 816.105(a), entails the same substantive analysis of a coal seam and its surrounding overburden. Under both the Federal and State schemes, the volume of the postmining overburden, spoil and waste material must be greater than that of the combined premining volume of the overburden and coal, in order for the proposed operation to

qualify for the "thick overburden" AOC exemption.

Also, the State's thick overburden provision does not contain specific counterparts to the Federal language at 30 CFR 816.105(a)(1) and (2). However, the State's counterparts are located at W. Va. Code 22-3-3(e) (the definition of AOC), and are, in effect, incorporated into W. Va. Code 22-3-13(b)(3) by the State's requirement to restore the land to AOC.

The State counterparts to the requirements at 30 CFR 816.104(b)(1) (thin overburden) and 816.105(b)(1) (thick overburden), concerning using all available spoil and waste materials to achieve the lowest practicable grade, are located in the performance standards at W. Va. Code 22-3-13(b)(3).

The W. Va. Code lacks specific counterparts to the Federal regulations at 30 CFR 816.104(b)(2) and 816.105(b)(2), which require compliance with the Federal regulations at 30 CFR 816.102(a)(2) through (j). However, the State program does contain counterparts to 30 CFR 816.102(a)(2) through (j) at CSR 38-2-5.5, 14.3, 14.5, 14.6, 14.15, and 14.18. In addition, the State's counterparts to the Federal requirements concerning excess spoil disposal at 30 CFR 816.105(b)(3) are at W. Va. Code 22-3-13(b)(22) and CSR 38-2-14.14. Since these provisions are of general applicability to all surface coal mining operations in West Virginia, there is no reason to believe they will not be applied to thin or thick overburden operations in particular.

For all of the foregoing reasons, we find that the West Virginia program currently contains counterparts to the Federal regulations that are no less effective than the Federal regulations concerning thin and thick overburden at 30 CFR 816.104 and 816.105, and, therefore, this 30 CFR part 732 issue is satisfied. However, we do recommend that for clarity the State modify its rules at CSR 38-2-14.15.a.1 as discussed in its December 2, 2003, letter and specifically identify the AOC variance for thin or thick overburden and reference those backfilling and grading provisions that are applicable to such a variance.

#### **IV. Summary and Disposition of Comments**

##### *Public Comments*

In response to our requests for comments from the public on the proposed amendments (see Section II of this preamble), we received the following comments from the West Virginia Highlands Conservancy (WVHC) concerning the 30 CFR part 732

issues that are explained within this notice (Administrative Record Number WV-1202).

30 CFR Part 732 Letter Dated July 22, 1997

a. 30 CFR 701.5, definitions of "other treatment facilities" and "siltation structure." WVHC stated that the definitions cited by the State in its December 20, 2000, letter do not include all of the elements and limitations of "other treatment facilities." Without these elements, WVHC stated, the State program is less effective than the Federal program. The WVHC also stated that the Federal definition of "siltation structure" is broader than sedimentation pond.

We disagree with these comments. As discussed above in Finding c.1, the State provisions at CSR 38-2-2.110, 38-2-2.21, 38-2-14.5.b, and 38-2-14.5.c combined are no less effective than the Federal definitions of "other treatment facilities" and "siltation structure" at 30 CFR 701.5. While the West Virginia program does not specifically provide examples of chemical or mechanical treatment as does the Federal definition, that omission alone does not render the State program less effective, because the State's provisions do not exclude nor prohibit the use of any of the treatment facilities identified in the Federal definition of "other treatment facilities." In addition, the West Virginia program does have counterparts to the other aspects of the Federal definition of "other treatment facilities." That is, the State's program requires the installation of adequate treatment facilities for the purpose of meeting applicable State and Federal effluent limitations and water quality standards. Such treatment facilities could include a sedimentation pond or a series of sedimentation ponds.

b. 30 CFR 761.5, "Significant recreational, timber, economic, other values incompatible with surface coal mining operations" as it relates to Federal lands. WVHC stated that without including the broader and more specific Federal language, the State program is less effective than the Federal program.

We disagree with this comment. As we discussed above in Finding c.2, SMCRA at section 522(e)(2) provides that, subject to valid existing rights, no surface coal mining operations except those which exist on the date of enactment of SMCRA shall be permitted on any Federal lands within the boundaries of any national forest: Provided, however, that surface coal mining operations may be permitted on such lands if the Secretary of the Department of the Interior finds that

there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations. The Federal regulations at 30 CFR 740.4(a)(5) clearly provide that it is the sole responsibility of the Secretary of the Department of the Interior to make these findings. When making such determinations on Federal lands within the State, the Secretary will use the Federal definition of that term at 30 CFR 761.5. Since we found that the State does not have to add a definition of the term to the West Virginia program, this 30 CFR part 732 issue is satisfied.

c. 30 CFR 816.104(a) Backfilling and grading: Thin overburden. WVHC stated that the State definitions are different than and narrower than the Federal definitions. They must therefore be changed, the WVHC stated, to comply with the Federal program.

As we discussed above in Finding c.3, the State's provisions at W. Va. Code 22-3-13(b)(3) apply to thin and thick overburden. While the State's descriptions of thin and thick overburden are structured differently than the counterpart Federal definitions at 30 CFR 816.104(a) and 816.105(a), the State's requirements are, nevertheless, substantively identical to the Federal counterpart definitions and the performance standards.

#### *Federal Agency Comments*

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendments from various Federal agencies with an actual or potential interest in the West Virginia program by letters dated January 26, 2001 (Administrative Record Number WV-1199). By letter dated February 14, 2001 (Administrative Record Number 1204), the United States Department of Labor, Mine Safety and Health Administration (MSHA) responded to our request for comments. MSHA stated that in the event that any long-standing regulation or an amendment thereto should change or alter the areas of a surface or underground coal mine or a preparation facility, including refuse piles, impoundments, sealed mines, or highwalls at surface mines, to please call MSHA. MSHA also stated that an MSHA technical inspector will be assigned to discuss the mine operator's approved plans concerning the affected areas for the amendment at issue. MSHA's comments are outside the scope of the four part 732 issues discussed in the above Findings and, therefore, will not be discussed here.

#### *Environmental Protection Agency (EPA) Concurrence and Comments*

Under 30 CFR 732.17(h)(11)(ii), we are required to obtain written concurrence from EPA for those provisions of the State program amendment 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.*).

On January 26, 2001, we asked for concurrence on the amendment (Administrative Record Number WV-1198). On July 3, 2001, EPA sent us its written concurrence, with the understanding that implementation of the amendments must comply with the Clean Water Act (CWA), NPDES regulations, and other statutes and regulations under EPA authority (Administrative Record Number WV-1225). There is nothing in the State counterpart to the part 732 issues discussed in the Findings above that prevents compliance with the CWA, NPDES regulations, or other statutes and regulations under EPA authority. EPA provided us no other comments on the part 732 issues discussed above.

#### **List of Subjects in 30 CFR Part 948**

Intergovernmental relations, Surface mining, Underground mining.

Dated: April 8, 2004.

#### **Brent Wahlquist,**

*Regional Director, Appalachian Regional Coordinating Center.*

[FR Doc. 04-9538 Filed 4-28-04; 8:45 am]

BILLING CODE 4310-05-P

## **DEPARTMENT OF COMMERCE**

### **National Oceanic and Atmospheric Administration**

#### **50 CFR Part 229**

[Docket No. 030630163-4122-02, I.D. 052303F]

RIN 0648-AR15

#### **Authorization for Commercial Fisheries Under the Marine Mammal Protection Act of 1972; Zero Mortality Rate Goal**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; request for comments

**SUMMARY:** The Marine Mammal Protection Act (MMPA) was enacted in 1972 with the ideal of eliminating