



4310-05-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 948

**[SATS No. WV-120-FOR; Docket ID: OSM-2014-0006;
S1D1S SS08011000 SX066A000 201S180110;
S2D2S SS08011000 SX066A000 20XS501520]**

West Virginia Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing.

SUMMARY: We, Office of Surface Mining Reclamation and Enforcement (OSMRE), are announcing receipt of a proposed amendment to the existing West Virginia Federal Lands Cooperative Agreement. Section 523(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) and the Federal regulations authorize a State with an approved permanent regulatory program to enter into an agreement for the State regulation and control of surface coal mining and reclamation operations on Federal lands. West Virginia's existing cooperative agreement was adopted in February of 1984, between the State and the Secretary of the Interior (the Secretary), to allow the State administration of SMCRA on Federal lands within West Virginia under its approved permanent regulatory program (the West Virginia program). Since several years have passed since the original agreement was adopted, West Virginia is now proposing to amend the existing cooperative agreement to reflect the current statutory schemes, regulatory requirements, and agency responsibilities associated with the regulation of

coal mining and reclamation activities on Federal lands. Additionally, the revised cooperative agreement would grant the State the authority to regulate all coal exploration activities on Federal lands, and would delegate the primary responsibility to review and approve coal mining permits involving federally and privately owned coal. This document gives the times and locations that the West Virginia program and this proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4:00 p.m., E.S.T., [Insert date 30 days after the date of publication in the FEDERAL REGISTER]. If requested, we will hold a public hearing on the amendment on [Insert date 25 days after date of publication in the FEDERAL REGISTER]. We will accept requests to speak at a hearing until 4:00 p.m., E.S.T. on [Insert date 15 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by SATS No. WV-120-FOR, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. The proposed rule has been assigned Docket ID OSM-2014-0006. Follow the instructions for submitting comments.
- Fax: (304) 347-7170.
- Mail/Hand Delivery: Mr. Ben Owens, Field Office Director, Pittsburgh Field Office, OSMRE, 3 Parkway Center South, 2nd Floor, Pittsburgh, PA 15220.

Please include the rule identifier (WV-120-FOR; Docket ID OSM-2014-0006) with your written comments.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Comment Procedures” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to review copies of the West Virginia program, this amendment, a listing of any scheduled public hearings, and all written comments received in response to this document, you must go to the address listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSMRE’s Charleston Field Office or the full text of the program amendment is available for you to read at <http://www.regulations.gov>.

Mr. Ben Owens, Pittsburgh Field Office Director
Office of Surface Mining Reclamation and Enforcement
3 Parkway Center South, 2nd Floor
Pittsburgh, Pennsylvania 15220
Telephone: (412) 937-2827
E-mail: chfo@osmre.gov.

In addition, you may review a copy of the amendment during regular business hours at the following location:

Mr. Harold Ward

West Virginia Department of Environmental Protection

601 57th Street SE

Charleston, West Virginia 25304

Telephone: (304) 926-0490

E-mail: harold.d.ward@wv.gov.

In addition, you may review a copy of the amendment during regular business hours at the following locations:

Office of Surface Mining Reclamation and Enforcement

Morgantown Area Office

604 Cheat Road, Suite 150

Morgantown, West Virginia 26508

Telephone: (304) 291-4004 (By Appointment Only).

Office of Surface Mining Reclamation and Enforcement

Beckley Area Office

313 Harper Park Drive, Suite 3

Beckley, West Virginia 25801

Telephone: (304) 255-5265.

FOR FURTHER INFORMATION CONTACT: Mr. Ben Owens, Field Office Director, Pittsburgh Field Office, Office of Surface Mining Reclamation and Enforcement, Telephone: (412) 937-2827. E-mail: chfo@osmre.gov.

SUPPLEMENTARY INFORMATION:

- I. Background on the West Virginia Cooperative Agreement
- II. Proposed Revisions to the Cooperative Agreement
- III. Public Comment Procedures
- IV. Statutory and Executive Order Reviews

I. Background on the West Virginia Cooperative Agreement

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, “. . . State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act . . . ; and rules and regulations consistent with regulations issued by the Secretary pursuant to this 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, in the January 21, 1981, **Federal Register** (46 FR 5915). You can also find later actions concerning the West Virginia program and program amendments at 30 CFR 948.10, 948.12, 948.13,

948.15, and 948.16.

West Virginia sent a request, received on August 26, 1981, proposing the existing Federal Lands Cooperative Agreement (herein referred to as the existing cooperative agreement) between the Department of the Interior and the State of West Virginia to give the State primacy and grant the ability to administer its approved regulatory program on Federal lands within West Virginia. West Virginia's existing cooperative agreement was approved on February 24, 1984, and the final rule was published in the March 9, 1984, **Federal Register** (49 FR 8913). The text of the existing cooperative agreement can be found at 30 CFR 948.30.

On August 5, 2014, the West Virginia Department of Environmental Protection (WVDEP) submitted a proposed, revised cooperative agreement (herein referred to as the revised agreement) to address several changes that have occurred since the existing cooperative agreement was adopted. (Administrative Record No. WV-1599). After expressing an interest in revising the agreement in 2009, WVDEP collaborated with OSMRE's Charleston Field Office (CHFO) before it submitted a final draft of the revised agreement.

The provision for amending cooperative agreements is found in 30 CFR 745.14. This provision provides that a cooperative agreement, which has been approved pursuant to 30 CFR 745.11, may be amended by mutual agreement of the Secretary and of the Governor of a State.

Amendments to a cooperative agreement must be adopted by Federal rulemaking in accordance with 30 CFR 745.11. Sections 745.11(b)(1) through (8) require that certain information be submitted with a request for a cooperative agreement if the information

has not previously been submitted in the State program. The information relating to the budget, staffing, organization and duties of the State regulatory authority, WVDEP, was submitted when West Virginia requested its existing cooperative agreement. See 49 FR 8913.

OSMRE has determined that this information satisfies the requirements for the proposed amendments to the cooperative agreement, and no additional information is needed. A written certification from the West Virginia Attorney General was also included in the State's request for its existing cooperative agreement. The Attorney General concluded that no State statutory, regulatory or other legal constraint exists which would limit the capability of the State to fully comply with section 523(c) of the Act, as implemented by 30 CFR Part 745.

OSMRE is seeking comments on the proposed revisions to the existing cooperative agreement. If the amendment is deemed as sufficient, it will become part of the West Virginia program.

II. Proposed Revisions to the Cooperative Agreement

Through this proposed rulemaking, West Virginia seeks to revise the outdated contents of its existing cooperative agreement. As the existing cooperative agreement does not contemplate the State's desire to regulate coal exploration activities and assume responsibility for approving coal mining permits involving federally leased coal, the revised agreement would authorize the State regulation of these activities. Under the revised agreement, the State would be primarily responsible for reviewing and approving coal mining permits involving federally and privately owned coal, as well as regulate all

surface coal mining and reclamation operations on Federal lands within West Virginia. As a result, upon approval of the revised agreement, OSMRE would no longer be responsible for approving permits on Federal lands involving federally leased coal and would instead function solely in its oversight capacity to ensure the State complies with the West Virginia program and the terms of the revised cooperative agreement. The revised agreement would further clarify the requirements, procedures, and responsibilities of the State, OSMRE, the Secretary, and the other Federal agencies affected by such operations conducted on Federal lands.

As discussed and summarized below, the revised agreement would include a more in-depth discussion of the agency duties regarding permit application review, permit revisions or renewals, agency coordination, bonding, and transfer, assignment, or sale of permit rights. The revised agreement would incorporate the Bureau of Land Management (BLM) responsibilities under the Mineral Leasing Act of 1920 (MLA) for lands involving leased Federal coal and would include a new Article to address areas unsuitable for mining, valid existing rights (VER), and compatibility determinations reserved for the Secretary and non-delegable to the State.

A summary of the proposed changes to the existing cooperative agreement is provided below. For convenience, the existing Article is provided alongside the corresponding proposed revised Article. These proposed revisions are subject to further changes because of public comments and further discussions with West Virginia. The full text of the terms of the proposed cooperative agreement, as submitted, is also provided.

Cooperative Agreement

The proposed revisions to the introductory language concern non-substantive wording or editorial changes.

Existing Article I: Introduction, Purpose and Responsible Administrative Agency

Proposed Revised Article I: Introduction, Purposes, and Responsible Agencies

Article I would be retitled to read: *Article I: Introduction, Purposes, and Responsible Agencies*.

Under paragraph *A. Authority*, the statement “including surface operations and surface impacts incident to underground mining operations” is added for clarity. The language would be revised in paragraph A to (1) reference to activities reserved for BLM such as the ability to lease Federal coal subject to 43 CFR Part 3400, Subparts 3480 through 3487; (2) explain that the State regulation will be conducted in a manner consistent with SMCRA, the Federal lands program pursuant to 30 CFR Parts 740, 745, and 746, and the approved West Virginia program; and (3) delegate authority to the State to review and approve coal exploration activities on Federal lands within West Virginia.

Paragraph *B. Purposes* would be revised for editorial purposes and to incorporate the changes that have occurred in regards to agency structure.

Paragraph *C. Responsible Administrative Agencies* would be revised to more accurately reflect the current agency structure and responsibilities. These revisions would change the name of the State agency with authority to regulate coal mining in West Virginia and would authorize WVDEP to administer the cooperative agreement on behalf of the Governor, instead of the Department of Natural Resources, Reclamation

Division (DNR), as the existing cooperative agreement provided.

Existing Article II: Effective Date

Proposed Revised Article II: Effective Date

The proposed revisions to Article II concern non-substantive wording or editorial changes.

Existing Article III: Definitions

Proposed Revised Article III: Definitions

Article III would be revised to expand the list of definition sources, originally listing 30 CFR Parts 700, 701, and 740, and the State program, to incorporate SMCRA, 30 CFR 700.5, 701.5 and 740.5, the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA), the Office of Explosives and Blasting, and the rules and regulations promulgated pursuant to those Acts. Moreover, the proposed revisions would add a new paragraph to resolve instances where a conflict occurs between State and Federal definitions, stating that the definitions used in the approved State program will apply with exception to the definition of “valid existing rights” which will use the Federal VER definition.

Existing Article IV: Applicability

Proposed Revised Article IV: Applicability

The language in Article IV would be revised to clarify that although the laws, regulations, terms and conditions of the West Virginia program are applicable to Federal

lands in the State through the cooperative agreement, certain authority or responsibilities are reserved and cannot be delegated to the State as the regulatory authority. Existing language would be revised to include additional current statutory and regulatory references that are relevant, but are not presently included. The proposed revisions would remove from the existing cooperative agreement a statement that the terms of the agreement do not apply to operations on Federal lands that contain leased Federal coal. Under the revised agreement, WVDEP would be primarily responsible for regulating coal mine sites which may involve federally owned coal, which will be discussed further below.

The revised agreement would list the State Surface Mine Board, rather than the State of West Virginia's Reclamation Board of Review as provided in the existing cooperative agreement, as the appropriate entity to receive appeals of orders and decisions issued by WVDEP.

Existing Article V: Requirements for Cooperative Agreement

Proposed Revised Article V: General Requirements

Article V would be retitled to read: *Article V: General Requirements*. Paragraph *A. Authority of State Agency* would be revised to list WVDEP as the appropriate State agency to carry out the terms of the cooperative agreement. Proposed revisions to paragraph *B. Funding* would provide WVDEP the necessary funds to cover the full cost incurred by the State in carrying out its responsibilities under the agreement. However, the proposed revision would also include the proviso, "provided that such cost does not exceed the estimated cost the Federal Government would have expended on such

responsibilities in the absence of this Agreement.”

Paragraph *C. Reports and Records* would be revised to require the State, pursuant to 30 CFR 745.12(d), to report its compliance with the cooperative agreement to OSMRE on a more frequent basis.

Paragraphs *D. Personnel* and *E. Equipment and Facilities* would continue to require the State to provide the necessary personnel and access to facilities in order to implement the agreement. However, the revised agreement would make the existing personnel and facilities requirements contingent upon adequate appropriations and grant awards. Under the revised agreement, paragraph E would be retitled: *E. Equipment and Facilities*.

Paragraph F would be revised to read: *F. Permit Application Fees and Civil and Criminal Penalties* and would incorporate coal exploration application fees. Paragraph F, as revised, would require civil and criminal penalties and fines collected from operations on Federal lands to be deposited in the State’s Special Reclamation Fund and Special Reclamation Water Trust Fund and would allow the State to consider all permit application fees collected as program income to be retained by the State and deposited within WVDEP’s Mining and Reclamation Operation Fund. Additionally, the existing requirement to submit a financial status report pursuant to 30 CFR 735.26 would be revised to require that the State report the permit fee, penalty, and fine amounts collected from operations on Federal lands during the prior grant year.

Existing Article VI: Review of a Permit Application Package

Proposed Revised Article VI: Review of Permit Application

Article VI would be retitled to read: *Article VI: Review of Permit Application*.

Article VI would be revised to update the procedures, responsibilities of each agency, and agency coordination associated with permitting on Federal lands. Under the revised agreement, WVDEP would be responsible for reviewing and approving coal mining permits involving federally and privately owned coal as well as the authority to regulate all surface coal mining and reclamation operations on Federal land. The revised agreement would provide a more thorough outline of the specific duties assigned to the State or Federal agency for permitting actions, including the agency responsibilities and review procedures for operations involving Federal surface and leased Federal coal.

The proposed revisions would add paragraph *A. Responsibilities*. As established in the existing cooperative agreement, WVDEP would continue to hold the primary responsibility for reviewing and approving the permit application package. However, the revised paragraph A would identify BLM as the agency responsible for matters that concern Federal coal leases issued under mineral leasing laws which exclusively fall under 43 CFR Part 3400 of the Federal regulations. In instances where the operation involves leased Federal coal, the revised agreement would require OSMRE to prepare a mining plan decision document and obtain approval from the Secretary. OSMRE would be required to consult and seek concurrence from BLM, the Federal land management agency, and other Federal agencies in order to determine the appropriate mining plan recommendation for the Secretary.

The proposed revisions would set forth the Secretary's reserved right to carry out certain responsibilities, and act independently of WVDEP, pursuant to laws other than SMCRA. The revised agreement would provide a clear depiction of the Secretary's

responsibilities, outlined in 30 CFR 740.4(a), that cannot be delegated to the State under the Federal lands program, the MLA, NEPA, this proposed revised cooperative agreement, and other applicable Federal laws. However, the revised paragraph A would explain that the Secretary's authority to make certain determinations under SMCRA that cannot be delegated to WVDEP, but may be delegated to OSMRE. Although OSMRE retains responsibilities under NEPA, the revised paragraph A would specify that OSMRE may request the State's assistance in preparing documents for NEPA compliance. The revised agreement would enable OSMRE and the State, with the concurrence of other Federal agencies involved, to delegate additional responsibilities to WVDEP under other applicable Federal laws by establishing a working agreement.

The proposed addition of paragraph *B. Submission of Permit Application* would continue to set forth similar permit application submission procedures as those provided under paragraph *A. Contents of Permit Application Package* of the existing cooperative agreement, but would incorporate coal exploration operations on Federal lands. The proposed paragraph B would additionally require applicants to satisfy the 30 CFR 740.13(b) requirements, which set forth the information required for a permit package, submission procedures, and other permit requirements. If OSMRE is regulating or processing existing or pending permit applications on Federal lands before the revised cooperative agreement is effective, paragraph B would allow the State to request that OSMRE continue its responsibility for those permits. While regulating or processing those applications, OSMRE may, however, pass its additional responsibilities to the State under the terms of the revised agreement, along with any resulting attendant fees, fines or civil or criminal penalties.

The revised agreement would add paragraph *C. Review Procedures* to provide a more extensive description of agency responsibilities during permit review. The proposed paragraph C would require OSMRE and WVDEP to develop a work plan and permit application review schedule, incorporating the timeframes established by the approved State program. In addition to agency coordination procedures, the paragraph C would require OSMRE to provide the State with its comments on the application as well as any requirements for additional data, within 45 days of receiving the administratively complete permit application. OSMRE would coordinate the resolution of conflicts between WVDEP and other Federal agencies to assist the State in carrying out its responsibilities.

The proposed, revised agreement would add paragraph *D. Review Procedures Where There is Federal Surface, but No Leased Federal Coal Involved* to clarify that WVDEP will be responsible for reviewing permit applications for operations on Federal lands that do not involve leased Federal coal and do not require a mining plan.

The revised agreement would add paragraph *E. Review Procedures Where Federal Surface and Leased Federal Coal Is Involved*. Paragraph E would allow OSMRE to delegate its obligations under 30 CFR 740.4(c)(1) through (4), (6), and (7), thereby authorizing WVDEP to issue permitting decisions for operations on Federal land, review exploration operations not subject to 43 CFR Part 3400, and assist OSMRE in the preparation of NEPA documents. After consulting the appropriate agency, the revised agreement would also enable the State to approve and release bonds and determine the post-mining land use. The proposed addition to paragraph E would also require BLM to notify WVDEP of its leasing actions and provide a copy of the decision.

Paragraph *F. [WV]DEP, OSMRE, and Other Federal Agency Coordination* would be added under the revised agreement, to reiterate the agency coordination required when Federal leased coal is involved. In addition to discussing WVDEP's responsibility to consult with BLM and the Federal land management agency when the proposed permit application involved leased Federal coal, WVDEP would be responsible for seeking comments from other agencies with jurisdiction over Federal lands affected by the proposed operation. Under the proposed paragraph F, the State would be able to request Federal agencies to provide their comments and findings to WVDEP within 45 calendar days after receipt of the permit application. Pursuant to paragraph F, WVDEP would also be responsible for providing OSMRE written findings that each permit application involving lands containing leased Federal coal is in compliance with the State program.

Paragraph F would set forth the State, OSMRE, and BLM's responsibility to coordinate with other agencies in instances where the land at issue contains leased Federal coal. Under the revised agreement, the State would be required to provide OSMRE with written findings demonstrating that each permit application complies with the West Virginia program and perform a technical analysis of each application to assist OSMRE.

To make the recommendation for the Secretary's decision on the mining plan, OSMRE would be required to consult and obtain concurrence from BLM, the Federal land management agency, and any other agency with jurisdiction over Federal lands affected by the proposed operations. Lastly, paragraph F of the revised Article VI would also establish a 5 day deadline for BLM to notify the State of actions taken pursuant to 43 CFR Part 3400 and provide documentation on all leasing decisions.

The revised agreement would add paragraph *G. Permit Application Decision and Permit Issuance*. Under the proposed revised Article VI, paragraph G would authorize the State to approve, disapprove, or conditionally approve coal exploration activities on Federal lands. The proposed paragraph G would require certain terms or conditions to be incorporated into State-issued permits, including but not limited to, lease requirements pursuant to the MLA and post-mining land use conditions imposed by the Federal land management agency.

Additionally, the proposed paragraph G would allow the State to approve surface mining permits or coal exploration activities involving leased Federal coal before the Secretary has issued a decision on the mining plan. However, paragraph G would clarify that the State would be responsible for informing the operator that permit issuance is contingent upon the Secretary's approval of the mining plan and coal exploration or surface mining cannot commence unless the mining plan has been approved. Further, the revised agreement would authorize the State to reserve the right to withdraw permit approval or modify the permit requirements in order to conform with any terms or conditions imposed by the Secretary in the approval of the mining.

The revised agreement would add paragraph *H. Review Procedures for Permit Revisions; Renewals; and Transfer, Assignment or Sale of Permit Rights*, which would incorporate the procedures for the above-listed permit actions. For applications involving permit revisions or renewals on Federal lands, WVDEP would be responsible, under the revised agreement, to review and approve the proposed revision or renewal. However, the revised agreement would require the State to consult OSMRE beforehand, to determine whether the proposed permitting action constitutes a mining plan modification.

The proposed paragraph H would require OSMRE to notify the State, within 15 days of receiving a copy, if the proposed permit revision or renewal constitutes a mining plan modification. For mining plan modifications requiring Secretarial approval, the proposed paragraph H would direct OSMRE and the State to follow the procedures outlined in proposed paragraph *E. Review Procedures Where Federal Surface and Leased Federal Coal Is Involved* of the revised agreement.

Additionally, the proposed paragraph H would allow OSMRE to establish criteria, consistent with the mining plan modification criteria set forth in 30 CFR 746.18, to identify those revisions or renewals that clearly do not constitute mining plan modifications. If OSMRE determines the renewal or revision does not constitute a mining modification, or the criteria for non-mining plan modifications is satisfied, the revised agreement under the proposed paragraph H would direct the State to review the proposed revision or renewal according to the procedures set forth in the proposed paragraph *D. Review Procedures Where There is Federal Surface, but No Leased Federal Coal Involved*, the West Virginia Program, and the regulations at 30 CFR 740.13(d), if applicable.

The proposed paragraph H would require transfer, assignment or sale of permit rights on Federal lands to be processed in accordance with the West Virginia program and the regulations at 30 CFR 740.13(e). Similar to the permit revisions or renewals procedures, applications for transfer, assignment or sale of permit rights must be evaluated to determine whether the application constitutes a mining plan modification. Those applications that constitute a mining plan modification would be processed according to the procedures provided in the proposed paragraphs E. Otherwise,

applications that do not constitute a mining plan modification would be evaluated by the State according to the procedures set forth in the proposed paragraph D of the revised agreement.

Existing Article VII: Inspections

Proposed Revised Article VII: Inspections

The revised Article VII would continue to require WVDEP to perform inspections on Federal land pursuant to 30 CFR 740.4(c)(5) and provide OSMRE with a copy of the completed State inspection report. However, the proposed revisions to Article VII would require WVDEP to provide OSMRE with access to a copy after the State conducts an inspection on Federal lands, on a “timely basis”, rather than the 15 day deadline required by the existing cooperative agreement. Although the existing cooperative agreement states that nothing within the 1984 cooperative agreement will prevent other inspections by authorized Federal or State agencies, the proposed agreement would specifically include a reference to 30 CFR Parts 842 and 843 to clarify that the authority for Federal inspection and monitoring and Federal enforcement is retained. Additionally, the proposed revisions would refer all citizen complaints, which do not involve an imminent danger or significant, imminent environmental harm, to WVDEP for action. The information regarding State and Department of Interior witness availability would be moved to *Article VIII: Enforcement*.

Existing Article VIII: Enforcement

Proposed Revised Article VIII: Enforcement

Article VIII would be revised to clarify that WVDEP's enforcement actions includes the assessment of civil or criminal penalties in addition to issuing orders of cessation or notices of violation. Although the existing cooperative agreement requires the State to take appropriate enforcement action pursuant to the agreement, the revised agreement would additionally require WVDEP to notify OSMRE and the Federal land management agency of decisions to suspend or revoke a permit on Federal land prior to issuing such decision.

In instances where inspections are conducted solely by OSMRE, or during a joint inspections where WVDEP and OSMRE do not agree on a particular enforcement action, the proposed revisions incorporate a reference to 30 CFR Part 846 and would allow OSMRE to take the necessary enforcement actions regarding individual civil penalties.

The proposed revisions to Article VIII would provide that permits to conduct coal exploration or surface coal mining and reclamation operations may be suspended or revoked by WVDEP pursuant to the State program, but issuance of any decision to suspend or revoke a permit on Federal land requires that WVDEP must first inform OSMRE and the Federal land management agency before its decision is issued. The State would be required to notify BLM, under the revised agreement, of its decision to revoke or suspend a permit is on lands containing leased Federal coal, so BLM may assess whether cancellation of the Federal lease is necessary.

The proposed revisions to Article VIII would reference a new Appendix A, which lists the enforcement authority reserved to the Secretary.

Existing Article IX: Bonds

Proposed Revised Article IX: Bonds

The revised Article IX would incorporate coal exploration activities, use of penal bonds, the conversion to a full-cost reclamation bond in the event the cooperative agreement is suspended or terminated, and the agency coordination and procedures associated with bond release and forfeiture. Under the revised agreement, the State and the Secretary would require operators conducting coal exploration or surface coal mining and reclamation activities on Federal lands to submit a performance and/or penal bond. While the existing cooperative agreement provides that such bond is conditioned upon the compliance with all applicable requirements, the revised Article would specify that these requirements include those established by SMCRA, the State program, other State or Federal laws and regulations, along with any other requirements imposed by the Secretary or Federal land management agency. In order for the State to release the bond, the State would be required to obtain OSMRE's concurrence in the bond release, which in turn would require OSMRE to consult the Federal land management agency and any other agency with jurisdiction or responsibility over Federal lands affected by the operation. The proposed revisions to this Article would additionally require the State to advise OSMRE of any annual adjustments to the bonds made pursuant to the West Virginia program.

The proposed revised Article would continue to require bonds to be made payable only to the United States in the event the cooperative agreement terminated. However, the proposed revisions would additionally require the bond to provide that the portion covering Federal lands to be converted into a full-cost reclamation bond upon the termination, as well as suspension, of the cooperative agreement. Further, the proposed

revisions to this Article would require WVDEP, before termination of the cooperative agreement, to assist OSMRE in obtaining the full-cost reclamation bond from the operator for the areas only covering Federal lands.

Moreover, the list of funds available to the State in the event of bond forfeiture would be revised to include the Special Reclamation Water Trust Fund. Additional language would be added to clarify that reclamation by the State is to be completed consistent with the West Virginia program and the reclamation plan before the permit is revoked or modified.

Further, this existing Article would be revised to include additional bonds requirements and would identify the responsible agencies for collection and maintenance of such bonds. The revised agreement would provide that OSMRE or the appropriate Federal agency will be responsible for the collection and maintenance of Federal lease bonds or lessee protection bonds, if such bonds are required. The revised agreement would require BLM concurrence and compliance with 43 CFR Part 3400 requirements before releasing a Federal lease bond.

Proposed Revised Article X: Designating Land Areas Unsuitable for all or Certain Types of Surface Mining and Reclamation Operations and Activities and Valid Existing Rights (VER) and Compatibility Determinations

The revised agreement would add a new Article to the existing cooperative agreement entitled, *Article X: Designating Land Areas Unsuitable for all or Certain Types of Surface Mining and Reclamation Operations and Activities and Valid Existing Rights (VER) and Compatibility Determinations*. Although Article VI of the existing cooperative agreement contemplates the content discussed below, the revised agreement

would provide a more extensive outline of the procedures and agency responsibilities associated with the following determinations.

Paragraph *A. Unsuitability Petitions* would set forth the Secretary's reserved authority to designate Federal lands as unsuitable for mining as provided by 30 CFR 745.13(a). The addition of paragraph A would discuss OSMRE's responsibilities in processing requests for designating Federal lands as unsuitable for mining and the termination of previous designations in accordance with 30 CFR Part 769. The revised agreement would provide the required procedures for State and Federal agency coordination after a petition to designate lands unsuitable for mining is received.

Paragraph *B. Valid Existing Rights Determinations* would provide the procedures and appropriate actions to be taken by the applicable State or Federal agency when requests for determinations of VER, pursuant to section 522(e) of SMCRA and the Federal regulations at 30 CFR 761.11, are received. For private in-holdings within areas protected under 30 CFR 761.11(a) and SMCRA section 522(e)(1), WVDEP is to process the VER request in accordance with the State program, but use the Federal VER definition at 30 CFR 761.5 when making VER determinations.

Paragraph *C. Compatibility Determinations* would outline the procedures for compatibility determinations and will state that the Secretary is responsible for issuing findings discussing whether there are significant recreational, timber, economic or other values that may be incompatible with surface coal mining operations incident to underground mining on Federal lands within the boundaries of a national forest protected pursuant to section 522(e)(2) of SMCRA and 30 CFR 761.11(b). The proposed revision would list OSMRE as the responsible agency to process requests for compatibility

determinations in accordance with the procedures outlined in 30 CFR 761.13.

Existing Article X: Termination of Cooperative Agreement

Proposed Revised Article XI: Termination of Cooperative Agreement

Article X would be renumbered to read: *Article XI: Termination of Cooperative Agreement.*

Existing Article XI: Reinstatement of Cooperative Agreement

Proposed Revised Article XII: Reinstatement of Cooperative Agreement

Article XI would be renumbered to read: *Article XII: Reinstatement of Cooperative Agreement.*

Existing Article XII: Amendment of Cooperative Agreement

Proposed Revised Article XIII: Amendment of Cooperative Agreement

Article XII would be renumbered to read: *Article XIII: Amendment of Cooperative Agreement.*

Existing Article XIII: Changes in State or Federal Standards

Proposed Revised Article XIV: Changes in State or Federal Standards

Article XIII would be renumbered to read: *Article XIV: Changes in State or Federal Standards.* The proposed revisions to the existing Article XIV concern non-substantive wording or editorial changes.

Existing Article XIV: Changes in Personnel and Organization

Proposed Revised Article XV: Changes in Personnel and Organization

Article XIV would be renumbered to read: *Article XV: Changes in Personnel and Organization*. The proposed revisions to the existing Article XIV concern non-substantive wording or editorial changes.

Existing Article XV: Reservation of Rights

Proposed Revised Article XVI: Reservation of Rights

Article XV would be renumbered to read: *Article XVI: Reservation of Rights*. The proposed amendment would include a reference to Appendix A.

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the State program.

Electric or Written Comments

If you submit written or electronic comments on the proposed rule during the 30-day comment period, they should be specific, confined to issues pertinent to the proposed regulations, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent State or Federal laws or regulations, technical literature, or other relevant

publications.

We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4:00 p.m., E.S.T. on [Insert date 15 days after date of publication in the FEDERAL REGISTER]. If you are disabled and need reasonable accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold a hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at the public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak

after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If a public meeting is held instead, the Field Office Director will prepare a summary for the administrative record. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

IV. Statutory and Executive Order Reviews

Executive Order 12866 - Regulatory Planning and Review and Executive Order 13563 – Improving Regulation and Regulatory Review

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB) will review all significant rules. Pursuant to OMB guidance, dated October 12, 1993, the approval of State program amendments is exempted from OMB review under Executive Order 12866. Executive Order 13563, which reaffirms and supplements Executive Order 12866, retains this exemption.

Other Laws and Executive Orders Affecting Rulemaking

When a State submits a program amendment to OSMRE for review, our

regulations at 30 CFR 732.17(h) require us to publish a notice in the **Federal Register** indicating receipt of the proposed amendment, its text or a summary of its terms, and an opportunity for public comment. We conclude our review of the proposed amendment after the close of the public comment period and determine whether the amendment should be approved, approved in part, or not approved. At that time, we will also make the determinations and certifications required by the various laws and executive orders governing the rulemaking process and include them in the final rule.

List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Lanny E. Erdos, Principal Deputy Director
Office of Surface Mining Reclamation and Enforcement

For the reasons set out in the preamble, 30 CFR part 948 is proposed to be amended as set forth below:

PART 948 – WEST VIRGINIA

1. The authority citation for Part 948 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Section 948.30 is amended and revised to read as follows:

§ 948.30 -- State-Federal Cooperative Agreement.

Cooperative Agreement

The Governor of the State of West Virginia (the Governor) and the Secretary of the Department of the Interior (the Secretary) enter into a Cooperative Agreement

(Agreement) to read as follows:

Article I: Introduction, Purposes, and Responsible Agencies

A. Authority

This Agreement is authorized by section 523(c) of the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. 1273(c), which allows a State with a permanent regulatory program approved by the Secretary under section 503 of SMCRA, 30 U.S.C. 1253, to elect to enter into an Agreement for the State regulation and control of surface coal mining and reclamation operations (including surface operations and surface impacts incident to underground mining operations) on Federal lands. This Agreement provides for State regulation of coal exploration operations and surface coal mining and reclamation operations on Federal lands within West Virginia, except for those activities reserved for the Bureau of Land Management (BLM) involving leased Federal coal subject to 43 CFR Part 3400, Subparts 3480 through 3487.

This Agreement provides for State regulation of coal exploration and surface mining activities consistent with SMCRA, the Federal lands program (30 CFR Parts 740, 745 and 746), and the approved West Virginia regulatory program (State Program). This Agreement does not abridge any rights that West Virginia may have under State law to regulate coal exploration activities within the State.

B. Purposes

The purposes of this Agreement are to (a) foster Federal-State cooperation in the regulation of surface coal mining and reclamation operations and coal exploration operations not subject to BLM's authority under 43 CFR Part 3400, (b) minimize intergovernmental duplication of effort, and (c) provide for uniform and effective

application of the State Program on all lands within West Virginia in accordance with SMCRA, the State Program, and this Agreement.

C. Responsible Administrative Agencies

The West Virginia Department of Environmental Protection (DEP) will be responsible for administering this Agreement on behalf of the Governor under the approved West Virginia Permanent Regulatory Program. The Office of Surface Mining Reclamation and Enforcement (OSMRE) will administer this Agreement on behalf of the Secretary, in accordance with the regulations in 30 CFR Chapter VII.

Article II: Effective Date

After being signed by the Secretary and the Governor, this Agreement will take effect immediately after publication in the *Federal Register* as a final rule. This Agreement will remain in effect until terminated as provided in Article XI.

Article III: Definitions

The terms and phrases used in this Agreement that are defined in SMCRA, 30 CFR 700.5, 701.5 and 740.5, the State Program, including the approved West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA) W. Va. Code section 22-3-1, *et seq.* and The Office of Explosives and Blasting, W. Va. Code section 22-3A-1, *et seq.*, and the rules and regulations promulgated pursuant to those Acts, will be given the meanings set forth in said definitions. Where there is a conflict between the above referenced State and Federal definitions, the definitions used in the approved State Program will apply, except for valid existing rights (VER) requests pursuant to 30 CFR 761.16. The Federal VER definition will apply when making VER determinations for those protected areas identified in 30 CFR 761.11 (a) and (b).

Article IV: Applicability

In accordance with the Federal lands program, the laws, regulations, terms and conditions of the State Program, as conditionally approved effective January 21, 1981, 30 CFR Part 948, or hereinafter amended in accordance with 30 CFR 732.17, are applicable to Federal lands in West Virginia, except as otherwise stated in this Agreement, SMCRA, 30 CFR 740.4, 740.11(a) and 745.13, and other applicable laws, Executive Orders, or regulations.

Orders and decisions issued by DEP in accordance with the State Program that are appealable must be appealed to the State Surface Mine Board. Orders and decisions issued by the Secretary or OSMRE that are appealable must be appealed to the Department of the Interior's Office of Hearings and Appeals.

Article V: General Requirements

The Governor and the Secretary affirm that they will comply with all the provisions of this Agreement.

A. Authority of State Agency

DEP has and will continue to have the authority under State law to carry out this Agreement.

B. Funding

Upon application by DEP and subject to the availability of appropriations, OSMRE will provide the State with the funds to defray the costs associated with carrying out its responsibilities under this Agreement as provided in section 705(c) of SMCRA, the grant agreement, and 30 CFR 735.16. Such funds will cover the full cost incurred by DEP in carrying out these responsibilities, provided that such cost does not exceed the

estimated cost the Federal Government would have expended on such responsibilities in the absence of this Agreement.

The amount of the grant will be determined using the procedures specified in the Federal Assistance Manual Chapter 3-10 and Appendix III.

If DEP applies for a grant but sufficient funds have not been appropriated to OSMRE, OSMRE and DEP will promptly meet to decide on appropriate measures that will insure that coal exploration operations and surface coal mining and reclamation operations on Federal lands within West Virginia are regulated in accordance with the State Program. If an agreement cannot be reached, either party may terminate this Agreement in accordance with Article XI of this Agreement.

Funds provided to the DEP under this Agreement will be adjusted in accordance with the Office of Management and Budget Common Rule for Uniform Administration Requirements for Grants and Cooperative Agreements to State and Local Governments and must be reduced by the amount of permit application fees collected by the State that are attributable to the Federal lands covered by this Agreement.

C. Reports and Records

DEP will make regular reports to OSMRE containing information with respect to compliance with the terms of this Agreement pursuant to 30 CFR 745.12(d). Upon request, DEP and OSMRE will exchange information developed under this Agreement, except where prohibited by Federal or State law.

OSMRE will provide DEP with a copy of any final evaluation report prepared concerning State administration and enforcement of this Agreement. DEP comments on

the report will be appended before transmission to the Congress, unless necessary to respond to a request by a certain date or to other interested parties.

D. Personnel

Subject to adequate appropriations and grant awards, the DEP will maintain the personnel necessary to fully implement this Agreement in accordance with the provisions of SMCRA, applicable regulations, the Federal lands program, and the approved State Program.

E. Equipment and Facilities

Subject to adequate appropriations and grant awards, the DEP will assure itself access to equipment, laboratories, and facilities with which all inspections, investigations, studies, tests, and analyses can be performed which are necessary to carry out the requirements of this Agreement.

F. Permit Application Fees and Civil and Criminal Penalties

The amount of the fee accompanying an application for a coal exploration operation or a surface coal mining and reclamation operation on Federal lands in West Virginia will be determined in accordance with the approved West Virginia Program. All permit application fees collected from operations on Federal lands will be considered program income to be retained by the State and must be deposited within the Department of Environmental Protection's Mining and Reclamation Operations Fund. Civil and criminal penalties and fines collected from operations on Federal lands must be deposited in State's Special Reclamation Fund and Special Reclamation Water Trust Fund. The financial status report submitted pursuant to 30 CFR 735.26 will include a report on the

amount of permit fees, penalties, and fines collected from operations on Federal lands during the State's prior grant year.

Article VI: Review of Permit Application

A. Responsibilities

DEP will assume primary responsibility for the analysis, review, and approval, disapproval or conditional approval of the permit application component of the permit application package-required by 30 CFR 740.13 for surface coal mining and reclamation operations or for coal exploration operations in West Virginia on Federal lands.

For proposals to conduct surface coal mining operations involving leased Federal coal, OSMRE is responsible for preparing a mining plan decision document in accordance with 30 CFR 746.13 and obtaining the Secretary's approval. The mining plan includes: the permit application; the resource recovery and protection plan reviewed and approved by BLM; information prepared in accordance with the National Environmental Policy Act (NEPA); documentation assuring compliance with other Federal laws and regulations; comments from other Federal agencies and the public; findings and recommendations from BLM with respect to the resource recovery and protection plan; findings and recommendations from DEP with respect to the permit application and the approved State program; and findings and recommendations from OSMRE with respect to the additional requirements of the Federal Lands Program.

BLM is responsible for matters concerned exclusively with regulations under 43 CFR Part 3400.

The Secretary reserves the right to act independently of DEP to carry out responsibilities under laws other than SMCRA or provisions of SMCRA not covered by

the State Program, and in instances of disagreement over SMCRA and the Federal lands program. The Secretary will, as provided by 30 CFR 740.4(a), make determinations under SMCRA that cannot be delegated to the State, some of which have been delegated to OSMRE.

The Secretary will concurrently carry out the responsibilities under 30 CFR 740.4(a) that cannot be delegated to DEP under the Federal lands program, the Mineral Leasing Act of 1920 (MLA), NEPA, this Agreement, and other applicable Federal laws. The Secretary will carry out these responsibilities in a timely manner and will avoid, to the extent possible, duplication of the responsibilities of the State as set forth in this Agreement and the State Program. The Secretary will consider the information in the permit application and, where appropriate, make decisions required by SMCRA, MLA, NEPA, and other Federal laws.

Where necessary to make the determination to recommend that the Secretary approve the mining plan as provided by 30 CFR 740.4(b)(1), OSMRE will consult with and obtain the concurrences of BLM, the Federal land management agency, and other Federal agencies as required.

DEP may assist OSMRE in the preparation of documentation to comply with the requirements of NEPA under 30 CFR 740.4(c)(7). If requested, DEP may assist with document preparation, but OSMRE will retain responsibility for preparing NEPA compliance documents, including the exceptions relating to NEPA as set forth in 30 CFR 740.4(c)(7)(i)-(vii).

DEP will be responsible for the approval and release of performance bonds and liability insurance under 30 CFR 740.4(c)(4) in accordance with Article IX of this

Agreement, and for the review and approval under 30 CFR 740.4(c)(6) of coal exploration operations not subject to 43 CFR Part 3400, Subparts 3480-3487. Responsibilities and decisions that can be delegated to DEP under other applicable Federal laws may be specified in working agreements between OSMRE and the State with the concurrence of any Federal agency involved and without amendment to this Agreement.

B. Submission of Permit Application

DEP will require an applicant proposing to conduct surface coal mining and reclamation operations or coal exploration operations on Federal lands covered by this Agreement to submit a permit application in the format as prescribed by DEP. DEP will furnish a copy of the permit application or make it available to OSMRE, the Federal land management agency, and any other agency with jurisdiction or responsibility over Federal lands affected by operations proposed in the permit application. The permit application will be in the form required by DEP and will include any supplemental information required by OSMRE, the Federal land management agency, and any other agency with jurisdiction or responsibility over Federal lands affected by operations proposed in the permit application.

At a minimum, the permit application will satisfy the requirements of 30 CFR 740.13(b) and include the information necessary for DEP to make a determination of compliance with 30 CFR 740.4(c) and the State Program, and for OSMRE, the appropriate Federal land management agencies, and any other agencies with jurisdiction or responsibilities over Federal lands affected by operations proposed in the permit application to make determinations of compliance with applicable requirements of

SMCRA, the Federal lands program, other Federal laws, Executive Orders, and regulations for which they are responsible.

For any existing or pending permit applications on Federal lands being regulated or processed by OSMRE prior to the effective date of this Agreement, OSMRE will coordinate with DEP and continue that responsibility, if so requested by the State. At any point during the regulation or processing of those applications, all additional responsibilities may be passed to DEP pursuant to the terms of this Agreement, along with any attendant fees, fines or civil or criminal penalties therefrom.

C. Review Procedures

DEP will be the primary point of contact for applicants regarding the review of the permit application for compliance with the State Program and other applicable State laws and regulations. OSMRE will be the point of contact regarding the review of the applicable portions of the permit application for compliance with the non-delegated responsibilities of SMCRA and for compliance with the requirements of other Federal laws, Executive Orders, and regulations.

OSMRE and DEP will develop a work plan and schedule for permit application review that complies with the time limitations established by the approved State Program, and each agency will designate a person as the Federal lands liaison. The Federal lands liaisons will serve as the primary points of contact between OSMRE and DEP throughout the review process.

Not later than 45 calendar days after receipt of an administratively complete permit application, unless a different schedule is agreed upon, OSMRE will furnish DEP with its review comments on the permit application and specify any requirements for

additional data. OSMRE and DEP will coordinate with each other during the review process, as needed. DEP will send to OSMRE copies of any correspondence with the applicant and any information received from the applicant regarding the permit application.

OSMRE will send to DEP copies of all OSMRE correspondence that may have a bearing on the permit application. OSMRE will provide technical assistance to DEP when requested and will have access to DEP files concerning coal exploration or surface mining operations on Federal lands. DEP will keep OSMRE informed of findings made during the review process that bear on the responsibilities of OSMRE or other Federal agencies.

OSMRE will assist the State in carrying out DEP's responsibilities by coordinating resolution of conflicts and difficulties between DEP and other Federal agencies in a timely manner; assisting in scheduling joint meetings, upon request, between State and Federal agencies; and exercising its responsibilities in a timely manner, governed to the extent possible by the deadlines established in the State Program.

D. Review Procedures Where There is Federal Surface, but No Leased Federal Coal Involved:

DEP will assume the responsibility for review of permit applications where there is no leased Federal coal to the extent authorized in 30 CFR 740.4(c)(1), (2), (4), (6) and (7).

DEP will assume responsibility for the analysis, review and approval, disapproval or conditional approval of the permit application component of the permit application

package required by 30 CFR 740.13 for surface coal mining and reclamation operations in West Virginia on Federal lands not requiring a mining plan pursuant to the MLA, as amended, including applications for revisions, renewals and transfer, sale and assignment of such permits.

E. Review Procedures Where Federal Surface and Leased Federal Coal Is Involved:

DEP will assume the responsibility for review of permit applications involving both Federal surface and leased Federal coal to the extent authorized in 30 CFR 740.4(c)(1), (2), (3), (4), (6) and (7).

DEP will, to the extent authorized, consult with the Federal land management agency and BLM pursuant to 30 CFR 740.4(c)(2) and (3), respectively. On matters concerned exclusively with regulations under 43 CFR Part 3400, Subparts 3480 through 3487, BLM will be the primary contact with the applicant. BLM will inform DEP of its actions and provide DEP with a copy of documentation on all leasing decisions.

F. DEP, OSMRE, and Other Federal Agency Coordination

DEP will, to the extent authorized, consult with the Federal land management agency and with BLM when Federal leased coal is involved pursuant to 30 CFR 740.4(c)(2) and (3), respectively. DEP will also be responsible for obtaining the comments and determinations of other agencies with jurisdiction or responsibility over the Federal lands affected by the operations proposed in the permit application. DEP will request all Federal agencies to furnish their findings or any request for additional information to DEP within 45 calendar days of the date of receipt of the permit application. OSMRE will, upon request, assist DEP in obtaining such information. In accordance with 30 CFR 745.12(g)(2), where lands containing leased Federal coal are

involved, DEP will provide OSMRE, in the form specified by OSMRE in consultation with DEP, with written findings indicating that each permit application is in compliance with the terms of the State Program and a technical analysis of each permit application to assist OSMRE in meeting its responsibilities under other applicable Federal laws and regulations.

Where leased Federal coal is involved, OSMRE will consult with and obtain the concurrences of BLM, the Federal land management agency, and any other agency with jurisdiction or responsibility over the Federal lands affected by the operations proposed in the permit application as required to make its recommendation for the Secretary's decision on the mining plan.

Where BLM contacts the applicant in carrying out its responsibilities under 43 CFR Part 3400, BLM will immediately inform DEP of its actions and provide DEP with a copy of documentation of all leasing decisions within 5 calendar days.

G. Permit Application Decision and Permit Issuance

DEP will prepare a State decision package, including written findings and supporting documentation, indicating whether the permit application is in compliance with the State Program. DEP will make the decision on approval, disapproval or conditional approval of the surface mining permit or coal exploration approval on Federal lands in accordance with the State Program.

Any permit issued by DEP will incorporate, as applicable, any terms or conditions required by the lease issued pursuant to the MLA and by any other applicable Federal laws and regulations, including conditions imposed by the Federal land management

agency relating to post-mining land use or any special requirements to protect non-mineral resources and those of other affected agencies.

DEP may make a decision on approval, disapproval or conditional approval of the surface mining permit or coal exploration approval on Federal lands in accordance with the State Program prior to the necessary Secretarial decision on the mining plan when leased Federal coal is involved, provided that DEP advises the operator in the permit that Secretarial approval of the mining plan must be obtained before the operator may conduct coal exploration or surface coal mining operations on the Federal lease and conditions the issuance of the permit or approval as such. DEP will reserve the right to amend or rescind any requirements of the permit or approval to conform with any terms or conditions when imposed by the Secretary in the approval of the mining plan.

After making its decision on the permit application, DEP will send a notice to the applicant, OSMRE, the Federal land management agencies, and any other agency with jurisdiction or responsibility over Federal lands affected by the operations proposed in the permit application. A copy of the permit and written findings will also be submitted to OSMRE.

H. Review Procedures for Permit Revisions; Renewals; and Transfer, Assignment or Sale of Permit Rights

Any permit revision or renewal for a surface coal mining and reclamation operation on Federal lands will be reviewed and approved or disapproved by DEP after consultation with OSMRE on whether such revision or renewal constitutes a mining plan modification pursuant to 30 CFR 746.18. OSMRE will inform DEP within 15 calendar days of receiving a copy of a proposed permit revision or renewal whether the permit revision or renewal constitutes a mining plan modification. Where approval of a mining

plan modification is required, OSMRE and DEP will follow the procedures outlined in Section E of this Article.

OSMRE may establish criteria consistent with 30 CFR 746.18 to determine which permit revisions or renewals clearly do not constitute mining plan modifications. Permit revisions or renewals on Federal lands that are determined by OSMRE not to constitute mining plan modifications or that meet the criteria for not being mining plan modifications will be reviewed and approved by following the procedures set forth in Section D of this Article, the State Program, and 30 CFR 740.13(d), if applicable. Transfer, assignment or sale of permit rights on Federal lands will be processed in accordance with the State Program and 30 CFR 740.13(e). Those applications that do not or do require a mining plan modification will be processed according to the procedures set forth in Sections D or E of this Article, respectively.

Article VII: Inspections

DEP will conduct inspections on Federal lands in accordance with 30 CFR 740.4(c)(5) and prepare and file inspection reports in accordance with the State Program. DEP will, subsequent to conducting any inspection on Federal lands pursuant to 30 CFR 740.4(c)(5), and on a timely basis, provide OSMRE access to a copy of the completed State inspection report.

DEP will be the point of contact and primary inspection authority in dealing with the operator concerning operations and compliance with the requirements covered by this Agreement, except as described hereinafter. Nothing in this Agreement will prevent inspections by authorized Federal or State agencies for purposes other than those covered by this Agreement. The Department of the Interior may conduct any inspections

necessary to comply with 30 CFR Parts 842 and 843 and its obligations under laws other than SMCRA.

OSMRE will give DEP reasonable notice of its intent to conduct an inspection under 30 CFR 842.11 in order to provide State inspectors with an opportunity to join in the inspection.

When OSMRE is responding to a citizen complaint of an imminent danger to the public health and safety or of significant, imminent environmental harm to land, air or water resources, pursuant to 30 CFR 842.11(b)(1)(ii)(C), it will contact DEP prior to the Federal inspection, if circumstances and time allow, to facilitate a joint Federal/State inspection. All citizen complaints that do not involve an imminent danger or significant, imminent environmental harm will be referred to DEP for action. OSMRE may conduct any inspections necessary to comply with 30 CFR Part 842. OSMRE will provide DEP with a copy of the inspection report within 15 days of the inspection. The Secretary reserves the right to conduct inspections without prior notice to DEP to carry out his responsibilities under SMCRA or other Federal laws.

Article VIII: Enforcement

DEP will have primary enforcement authority on Federal lands to ensure compliance with the requirements of the State Program and this Agreement in accordance with 30 CFR 740.4(c)(5). Enforcement authority given to the Secretary under other Federal laws and Executive Orders including, but not limited to, those listed in Appendix A (attached) is reserved to the Secretary.

During any joint inspection by DEP and OSMRE, DEP will have primary responsibility for taking enforcement actions, including issuance of orders of cessation,

notices of violation, and assessment of civil or criminal penalties. DEP must inform OSMRE and the Federal land management agency prior to issuance of any decision to suspend or revoke a permit on Federal lands.

A permit to conduct coal exploration or surface coal mining and reclamation operations on Federal lands may be suspended or revoked by DEP pursuant to the State program.

If a permit to conduct coal exploration or surface coal mining and reclamation operations on lands containing leased Federal coal is suspended or revoked, the DEP must notify BLM so it can determine whether action should be taken to cancel the Federal lease pursuant to 30 CFR 740.13(f)(2).

During any inspection made solely by OSMRE or any joint inspection where DEP and OSMRE fail to agree regarding the propriety of any particular enforcement action, OSMRE may take any enforcement action necessary to comply with 30 CFR Parts 843, 845, and 846. Such enforcement action will be based on the standards in the State Program, SMCRA or both and will be taken using the procedures and penalty system contained in 30 CFR Parts 843, 845, and 846.

DEP and OSMRE will promptly notify each other and the Federal land management agency of all violations of applicable laws, regulations, orders or approved mining permits subject to this Agreement and of all actions taken with respect to such violations.

Personnel of DEP and the Department of the Interior, including OSMRE, will be mutually available to serve as litigation witnesses in enforcement actions taken by either party.

This Agreement does not affect or limit the Secretary's authority to enforce violations of Federal laws other than SMCRA.

Article IX: Bonds

DEP and the Secretary will require each operator who conducts coal exploration operations or surface coal mining and reclamation operations on Federal lands to submit a performance and/or penal bond payable to both the State of West Virginia and the United States to cover the operator's responsibilities under SMCRA and the State Program. The performance and/or penal bond will be conditioned upon compliance with the requirements of SMCRA, the State Program, other State or Federal laws and regulations, and any other requirements imposed by the Secretary or the Federal land management agency. Such bond will provide that if this Agreement is suspended or terminated, the portion of the bond covering Federal lands will be converted to a full-cost reclamation bond and made payable only to the United States. Prior to termination, DEP will assist OSMRE in obtaining the full-cost reclamation bond from the operator for those areas where only Federal lands are covered by the bond. If applicable, DEP will advise OSMRE of any annual adjustments to the performance and/or penal bond pursuant to the State Program.

Performance and/or penal bonds will be subject to release and forfeiture in accordance with the procedures and requirements of the State Program. Where coal exploration operations or surface coal mining and reclamation operations are conducted on Federal lands, the performance and/or penal bond must be released by the State upon compliance with all applicable State and Federal requirements and after the release is concurred in by OSMRE. OSMRE's concurrence will include coordination with the

Federal land management agency and any other agency with jurisdiction or responsibility over Federal lands affected by the coal exploration operation or surface coal mining and reclamation operation.

In the event of forfeiture by an operator of a performance and/or penal bond for a coal exploration operation or a surface coal mining and reclamation operation on Federal lands covered by this Agreement, the State must use funds received from the forfeited bond and, where necessary, funds from the West Virginia Special Reclamation Fund and/or the Special Reclamation Water Trust Fund, pursuant to W. Va. Code section 22-3-11, to ensure that complete reclamation is accomplished in accordance with the State Program and the reclamation plan of the permit prior to revocation or any modification thereto.

Submission of a performance and/or penal bond does not satisfy the requirements for a Federal lease bond required by 43 CFR Subpart 3474 or lessee protection bond required in addition to a performance bond, in certain circumstances, by section 715 of SMCRA. Where Federal lease or lessee protection bonds are required, OSMRE or the appropriate Federal agency is responsible for the collection and maintenance of such bonds.

If a Federal lease bond is required as provided by 30 CFR 740.15, such bond may be released upon satisfactory compliance with all applicable requirements of 43 CFR Part 3400 and after the release is concurred in by BLM.

Article X: Designating Land Areas Unsuitable for all or Certain Types of Surface Coal Mining and Reclamation Operations and Activities and Valid Existing Rights (VER) and Compatibility Determinations

A. Unsuitability Petitions

The authority to designate Federal lands as unsuitable for mining pursuant to a 30

CFR Part 769 petition is reserved by the Secretary as provided by 30 CFR 745.13(a). OSMRE will consider the minimum criteria set forth in 30 CFR Part 762 when evaluating each petition for designating an area as unsuitable for mining. In addition, OSMRE will process all requests for designating Federal lands as unsuitable for mining or for terminating previous designations in accordance with 30 CFR Part 769.

When either DEP or OSMRE receives a petition to designate land areas unsuitable for all or certain types of surface coal mining operations that could impact adjacent Federal or non-Federal lands pursuant to section 522(c) of SMCRA, the agency receiving the petition will notify the other of its receipt and the anticipated schedule for reaching a decision and request and fully consider data, information, and recommendations of the other. OSMRE will coordinate with the Federal land management agency with jurisdiction over the petition area and will solicit comments from the agency.

B. Valid Existing Rights Determinations

The following actions will be taken when requests for determinations of VER pursuant to section 522(e) of SMCRA and 30 CFR 761.11 are received prior to or at the time of submission of a permit application that involves surface coal mining and reclamation operations and activities:

For Federal lands within the boundaries of any areas specified under section 522(e)(1) of SMCRA and 30 CFR 761.11(a), OSMRE will determine whether VER exists for such areas pursuant to 30 CFR 745.13(o).

For Federal lands within the boundaries of any national forest where proposed operations are prohibited by section 522(e)(2) of SMCRA and 30 CFR 761.11(b),

OSMRE will make the VER determinations pursuant to 30 CFR 745.13(o). OSMRE will process requests for determinations of compatibility under section 522(e)(2) of SMCRA and 30 CFR 761.13.

For private in-holdings within areas protected under 30 CFR 761.11(a) and SMCRA section 522(e)(1), DEP will process the VER request in accordance with the State Program, but use the Federal VER definition at 30 CFR 761.5 when making the VER determination.

For any lands, DEP will determine whether any proposed operation will adversely affect any publicly owned park or, in consultation with the State Historic Preservation Officer, sites listed on the National Register of Historic Places, with respect to the prohibitions or limitations of section 522(e)(3) of SMCRA and 30 CFR 761.11(c). DEP will make the VER determination for such lands using the approved State Program definition of VER. DEP will coordinate with any affected agency or agency with jurisdiction over the proposed surface coal mining and reclamation operations.

In the case that VER is determined not to exist under section 522(e)(3) of SMCRA or 30 CFR 761.11(c), no surface coal mining operations will be permitted unless jointly approved by DEP and the Federal, State or local agency with jurisdiction over the publicly owned park or historic place.

C. Compatibility Determinations

As provided by 30 CFR 740.4(a)(5), the Secretary is responsible for the issuance of findings concerning whether there are significant recreational, timber, economic or other values that may be incompatible with surface coal mining operations incident to underground mining on Federal lands within the boundaries of a national forest protected

pursuant to section 522(e)(2) of SMCRA and 30 CFR 761.11(b). OSMRE will process requests for compatibility determinations in accordance with the procedures set forth at 30 CFR 761.13.

Article XI: Termination of Cooperative Agreement

This Agreement may be terminated by the Governor or the Secretary under the provisions of 30 CFR 745.15.

Article XII: Reinstatement of Cooperative Agreement

If this Agreement has been terminated in whole or in part, it may be reinstated under the provisions of 30 CFR 745.16.

Article XIII: Amendment of Cooperative Agreement

This Agreement may be amended by mutual agreement of the Governor and the Secretary in accordance with 30 CFR 745.14.

Article XIV: Changes in State or Federal Standards

The Secretary or the Governor may from time to time promulgate new or revised performance standards or reclamation requirements or enforcement and administration procedures. Each party will, if it determines it to be necessary to keep this Agreement in force, change or revise its regulations or request necessary legislative action. Such changes will be made under the procedures of 30 CFR Part 732 for changes to the State Program and under the procedures of sections 501 and 523 of SMCRA for changes to the Federal lands program.

DEP and OSMRE will provide each other with copies of any changes to their respective laws, rules, regulations or standards pertaining to the enforcement and administration of this Agreement.

Changes in State law or regulations cannot take effect for the purposes of this Agreement until they have been approved by OSMRE pursuant to 30 CFR 732.17.

Article XV: Changes in Personnel and Organization

In accordance with 30 CFR Part 745, each party to this Agreement will notify the other, when necessary, of any changes in personnel, organization, and funding or other changes that may affect the implementation of this Agreement to ensure coordination of responsibilities and to facilitate cooperation.

Article XVI: Reservation of Rights

As provided by 30 CFR 745.13, this Agreement will not be construed as waiving or preventing the assertion of any rights that have not been expressly addressed in this Agreement and that the State or the Secretary may have under laws other than SMCRA or their regulations including, but not limited to, those listed in Appendix A.

Approved:

David Bernhardt,
Secretary of the Interior

Jim Justice,
Governor of West Virginia

Dated:

Dated:

Appendix A

1. The Federal Land Policy and Management Act, 43 U.S.C. 1701 *et seq.*, and implementing regulations.
2. The Mineral Leasing Act of 1920, 30 U.S.C. 181 *et seq.*, and implementing regulations, including 43 CFR Part 3400.
3. The National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and implementing regulations, including 40 CFR Part 1500.

4. The Endangered Species Act, as amended, 16 U.S.C. 1531 *et seq.*, and implementing regulations, including 50 CFR Part 402.
5. The Fish and Wildlife Coordination Act, as amended, 16 U.S.C. 661*et seq.*; 48 Stat. 401.
6. The Bald and Golden Eagle Protection Act of 1940, as amended, 16 U.S.C. 668-668d, and implementing regulations.
7. The Migratory Bird Treaty Act, as amended, 16 U.S.C. 701-718h *et seq.*
8. The National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.*, and implementing regulations, including 36 CFR Part 800.
9. The Clean Air Act, 42 U.S.C. 7401 *et seq.*, and implementing regulations.
10. The Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, and implementing regulations.
11. The Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.*, and implementing regulations.
12. The Reservoir Salvage Act of 1960, amended by the Preservation of Historical and Archaeological Data Act of 1974, 16 U.S.C. *et seq.*
13. Executive Order 11593 (May 13, 1971), Cultural Resource Inventories on Federal Lands.
14. Executive Order 11988 (May 24, 1977), for flood plain protection.
15. Executive Order 11990 (May 24, 1977), for wetlands protection.
16. The Mineral Leasing Act for Acquired Lands, 30 U.S. 351 *et seq.*, and implementing regulations.
17. The Stock Raising Homestead Act of 1916, 43 U.S.C. 291 *et seq.*
18. The Archaeological Resources Protection Act of 1979, 16 U.S.C. 470aa *et seq.*, as amended.
19. The Constitution of the United States.
20. Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, as amended.

21. 30 CFR Chapter VII.
22. The Constitution of the State of West Virginia.
23. West Virginia Department of Environmental Protection Permanent Regulatory Program at 30 CFR Part 948, as amended.
24. West Virginia Surface Coal Mining and Reclamation Act at W.Va. Code section 22-3-1 *et seq.*
25. West Virginia Department of Environmental Protection, Surface Mining Reclamation Regulations, CSR section 38-2-1 *et seq.*
26. The Office of Explosives and Blasting at W.Va. Code section 22-3A-1 *et seq.*
27. The West Virginia Surface Mining Blasting Rule, CSR section 199-1-1 *et seq.*

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