

38 CSR 2. WEST VIRGINIA SURFACE MINING RECLAMATION RULE

Notice of Technical Completeness (Subdivision 3.2.g.)

This provision was amended into the Rule in 2008, and it requires applicants for surface mining permits to publicly advertise that the agency has deemed the permit application technically complete. It also establishes a 15-day public comment period on the “technically complete” application. This 15-day Notice of Technical Completeness does not exist in the federal counterpart regulation and is in addition to the State and federal requirements that a proposed surface mining permit application be advertised once a week for four consecutive weeks in a newspaper of general circulation. Although submitted for approval in 2008, this amendment has not been approved by the federal Office of Surface Mining, Reclamation, and Enforcement, though it is operative in West Virginia for State implementation purposes.

Valley Fill Construction (Subdivisions 3.7.d and Paragraph 14.14.g.2)

These provisions were amended into the Rule in 2003, following a flood analysis conducted by several entities, including the agency and the regulated community, at the executive order of Governor Bob Wise (Executive Order No. 16-01) after the catastrophic flooding in Southern West Virginia in the early 2000s. In consultation with, and with the approval of, the regulated community, the agency added these valley fill construction requirements – which have no direct federal counterpart(s) – in order to minimize erosion during heavy rainfall events and assure mass stability. Specifically, in addition to more detailed permit information requirements, the State rule prohibits the construction of single lift / durable rock fills unless the operator constructs an “erosion protection zone” below the main fill structure.

Approved Person Oversight (Subsection 3.15)

This provision of the Rule has no direct corollary in the federal counterpart regulation, but several provisions of the federal regulations require “qualified professionals” (i.e. engineers, surveyors) to submit data, technical plans, and related permit applications to the agency. The State rule establishes procedures for the Secretary to designate persons who are qualified to submit information to the agency (“approved persons”) during the permitting process and creates an administrative procedure for the Secretary to remove the “approved person” status under certain circumstances.

Surface Water Runoff and Flood Routing Analysis (Subsection 5.6)

This provision was amended into the Rule in 2003, in response to the flood analysis described above. Again, in consultation with, and with the approval of, the regulated community, the agency established these requirements necessary to demonstrate that a proposed mining operation will not increase runoff from pre-mining levels during active mining operations and after final reclamation. This subsection also contains rainfall monitoring and reporting requirements. Although there is no direct federal counterpart to these State requirements, the federal regulations contain a broad requirement to “prevent material damage to the permit area”, including preventing “additional contributions to streamflow outside the permit area.”

Alternative Bonding System / Water Treatment at Bond Forfeiture Sites

The Rule contains several sections that obligate the State's alternative bonding system (the Special Reclamation Fund and the Special Reclamation Water Trust Fund) to fund water treatment activities at former surface mine sites on which the agency has revoked the permit and forfeited the bond in order to maintain compliance with Clean Water Act (CWA) NPDES permit effluent limits. The federal surface mining regulations contain no such requirements. Instead, the federal surface mining regulations recognize the obligations created by the CWA and the enforcement process it establishes for the original mine operator to maintain compliance with the NPDES permits it obtained during its active operations. Senate Bill 687, passed during the Regular Session of the 2017 Legislature, revised several statutory provisions related to the State's alternative bonding system and water treatment obligations and directed the agency to revise the Rule accordingly. In accordance with that direction, the Division of Mining & Reclamation proposed revisions to the Rule for consideration by the Legislature during the 2018 Session that would conform the requirements related to the bonding and water treatment to those of the federal counterpart regulations in most (but not all) instances.

Approximate Original Contour Policy

The State's rule governing the reclamation of surface mining operations to "approximate original contour" (AOC) are functionally equivalent to the corresponding federal regulations. However, in accordance with the settlement of a federal lawsuit, the State has implemented a policy document to determine compliance with the AOC requirements that is more detailed and precise than the requirements contained in the Rule or its federal counterpart regulations. The AOC Policy was negotiated by the agency, environmental groups, and the coal industry in 1999 and, in addition to satisfying the mining program's mandate to restore AOC, has been accepted by the U.S. Army Corps of Engineers and the federal Environmental Protection Agency as a demonstration of "fill minimization" under the Clean Water Act Section 404 dredge and fill program.