State's alternative bonding system no longer met the requirements for such systems because, as of June 30, 1990, liabilities exceeded assets by \$6.2 million dollars. OSM also informed the State that its alternative bonding system must provide for the abatement or treatment of polluted water flowing from permanent program bond forfeiture sites unless its approved program included another form of financial guarantee to provide for water treatment. The proposed amendment now under consideration was submitted to OSM in response to this letter and concurrent State initiatives to address bonding and water quality problems.

In a series of three letters dated June 28, 1993, and July 30, 1993 (Administrative Record Nos. WV-888, WV-889 and WV-893), the West Virginia Division of Environmental Protection (WVDEP) submitted an amendment to its approved permanent regulatory program that included numerous revisions to the West Virginia Surface Coal Mining and Reclamation Act (referred to herein as "the Act," WVSCMRA § 22A-3-1 et seq.) and the West Virginia Surface Mining Reclamation Regulations (CSR § 38-2-1 et seq.). OSM grouped the proposed revisions that concern bonding into one amendment that is the subject of this notice. The main provisions of the amendment will:

• Allow for the selection and prioritization of bond forfeiture sites to be reclaimed;

• Limit administrative expenditures from the Special Reclamation Fund to an amount not to exceed 10 percent of the total annual assets in the Fund;

• Raise the special reclamation tax from one cent to three cents per ton and provide for the collection of the tax whenever liabilities exceed assets;

• Require site-specific bonds that reflect the relative potential cost of reclamation but do not exceed \$5,000 per acre;

• Allow for the use of incremental and open-acre bonds;

• Require penal bonds instead of performance bonds; and

• Require bond forfeiture sites to be reclaimed in accordance with the approved reclamation plan or modifications thereof.

OSM announced receipt of the proposed amendment in the August 12, 1993, Federal Register (58 FR 42903) and invited public comment on its adequacy. Following this initial comment period, WVDEP revised the amendment on August 18, 1994, September 1, 1994, and May 16, 1995 (Administrative Record Nos. WV–933, WV–937, and WV–979B). OSM reopened the comment period on August 31, 1994 (59 FR 44953), September 29, 1994 (59 FR 49619), and May 19, 1995 (60 FR 26855), and held public meetings in Charleston, West Virginia on September 7, 1993, October 27, 1994, and May 30, 1995.

III. Director's Findings

A. Proposed Revisions to the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA)

1. §22–3–11: Bonds; Amount and Method of Bonding; Bonding Requirements; Special Reclamation Tax and Fund; Prohibited Acts; Period of Bond Liability

a. §22-3-11(a): Penal Bonds. West Virginia proposes to revise its Code to require that penal bonds payable to the State of West Virginia be furnished by each operator before a permit is issued. The reference to "performance bond" has been changed to either "penal bond" or "bond" throughout § 22-3-11 to reflect this proposed revision. Section 509(a) of SMCRA and 30 CFR 800.11(a) require that a performance bond be furnished by each operator before a permit is issued. A penal bond differs from a performance bond in that, in the event of forfeiture, the State retains the entire amount of the bond without regard to the cost of reclamation. Under a performance bond, any funds not used to reclaim the site for which the bond was forfeited must be returned to the operator.

West Virginia's proposed requirement that the total bond or collateral amount be forfeited and deposited in the State's reclamation fund lies within the discretion provided to the States by section 509(c) of SMCRA. SMCRA authorizes States to establish alternative bonding systems that will achieve the objectives and purposes of the bonding program otherwise required by SMCRA. The penal bond provisions provide substantial economic incentive for the operator to complete the required reclamation of the permitted area. This is consistent with 30 CFR 800.11(e)(2) which provides that an alternative bonding system must include a substantial economic incentive for the permittee to comply with all reclamation provisions. Also, while the court in In re Permanent Surface Mining Regulation Litigation held that OSM cannot approve penal bonds in a State program under SMCRA in a conventional bonding system, this decision does not prohibit the approval of penal bonds when the State independently authorizes them by statute, not by a rule promulgated under the authority of SMCRA. In re

Permanent Surface Mining Regulation Litigation, 14 ERC 1083, 1100–01 (D.D.C., 1980) and Civ. No. 79–1144, mem. op. at 48–49 (D.D.C., May 16, 1980) as stayed in part on August 15, 1980. Therefore, the Director finds the proposed amendment is not inconsistent with SMCRA or the Federal regulations and is hereby approved.

b. §22–3–11(g): Special Reclamation Fund. The West Virginia alternative bonding system was conditionally approved by the Secretary on January 21, 1981, and the condition on the approval was removed on March 1, 1983 (46 FR 5954 and 48 FR 8448). This approval was granted under section 509(c) of SMCRA, which allows for the approval of an alternative bonding system that will achieve the objectives and purposes of section 509. In drafting section 509(c), Congress was not specific on how alternative bonding programs such as West Virginia's should be financed. The only test applicable is whether the proposed alternative system achieves the objectives and purposes of a conventional bonding system as expressed in section 509 of SMCRA and as implemented by 30 CFR 800.11(e).

(1) West Virginia is revising $\S 22-3-11$ (g) to allow development of a longrange planning process for selection and prioritization of sites to be reclaimed so as to avoid inordinate short-term obligations of the fund's assets of such magnitude that the solvency of the fund is jeopardized.

Section 509(a) of SMCRA requires the operator to post a reclamation bond that is sufficient to assure completion of the reclamation plan for that permitted site if the work must be performed by the regulatory authority. In addition, 30 CFR 800.50(b)(2) requires the regulatory authority to use funds collected from bond forfeiture to complete the reclamation plan for the site to which bond coverage applies. Section 509(c) of SMCRA and 30 CFR 800.11(e) are silent on the question of prioritizing sites for reclamation, but both imply that the funds necessary for adequate reclamation must be readily available. Specifically, 30 CFR 800.11(e)(1) specifies that an alternative bonding system must ensure that "the regulatory authority will have sufficient money to complete the reclamation plan for any areas which may be in default at any time.'

However, since the State's regulations at CSR 38–2–12.4(c) provide that reclamation operations must be initiated within 180 days following final forfeiture notice, a planning process for selection and prioritization of sites to be reclaimed should not adversely impact the requirement that all sites for which