bonds are posted be reclaimed in accordance with their reclamation

Therefore, to the extent that the proposed provision provides only for a ranking of sites for reclamation without compromising the requirement that all sites for which bonds were posted be properly and timely reclaimed, this provision is not inconsistent with the bond forfeiture provisions at section 509(a) of SMCRA and 30 CFR 800.50(b)(2), or the alternative bonding system criteria of 30 CFR 800.11(e). The proposed provision on the selection and prioritizing of forfeiture sites is hereby approved.

(2) West Virginia proposes to revise § 22–3–11(g) to specify that the Director of WVDEP may expend up to 25 percent of the annual amount of fee collections of the special reclamation fund to design, construct, and maintain water treatment systems when they are required to complete reclamation of

bond forfeiture sites.

For conventional bonds, 30 CFR 800.14(b) provides that "the amount of the bond shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture." Under 30 CFR 780.18(b)(9), 780.21(h), 784.13(b)(9), and 784.14(g), the reclamation plan must include the steps to be taken to comply with all applicable effluent limitations and State and Federal water quality laws and regulations. These steps include treatment. Therefore, when the mining and reclamation plan indicates that treatment will be needed on a temporary basis during mining and the early stages of reclamation, the bond must be calculated to include an amount adequate to provide for continued temporary treatment in the event forfeiture occurs within the timeframe during which treatment is needed.

Also, under 30 CFR 800.15(a), the regulatory authority is required to adjust the amount and terms of a conventional bond whenever the cost of future reclamation changes. Therefore, if an unanticipated treatment need arises, the regulatory authority has an obligation to order an increase in the minimum bond required for the site. This amount must be adequate to cover all foreseeable treatment costs. This interpretation is consistent with the preamble to 30 CFR 800.17, which under the heading "Section 800.17(c)" states that:

Performance bonding continues to be required at § 800.17(a) for surface disturbances incident to underground mining to ensure that the reclamation plan is completed for those areas. Completion of the reclamation plan as it relates to mine

drainage and protection of the hydrologic balance would continue to be covered by the bond with respect to requirements included in § 784.14. 48 FR 32948, July 19, 1983.

Sections 780.21(h) and 784.14(g) require a hydrologic reclamation plan showing how surface and underground mining operations will comply with applicable State and Federal water quality laws and regulations. Furthermore, section 519(b) of SMCRA requires the regulatory authority, when evaluating bond release requests, to consider whether pollution of surface and ground water is occurring, the probability of any continuing pollution, and the estimated cost of abating such pollution. Section 519(c)(3) of SMCRA and the implementing regulations at 30 CFR 800.40(c)(3) provide that no bond shall be fully released until all the reclamation requirements of the Act, the regulatory program, and the permit have been met. These requirements include abatement of surface and ground water pollution resulting from the operation.

The preamble to 30 CFR 700.11(d) clarifies that the regulatory authority may release the bond and terminate jurisdiction over a site with ongoing treatment needs, but only if an enforceable mechanism such as a contract or a trust fund of sufficient duration and with adequate resources exists to ensure that treatment continues once jurisdiction is terminated. See 53 FR 44361-62, November 2, 1988.

Section 509(c) of SMCRA authorizes the Secretary to approve an alternative bonding system if it will achieve the objectives and purposes of the otherwise mandatory conventional bonding program. As noted previously in this preamble, Section 519(c)(3) of SMCRA provides final bond release shall not occur "until all reclamation requirements of this Act are fully met." The Federal regulations at 30 CFR 800.11(e)(1) require that this system ensure that the regulatory authority has sufficient funds to assure completion of the reclamation plan, which includes treatment to meet State and Federal water quality requirements.

Therefore, to be in accordance with the above-referenced sections of SMCRA and the Federal regulations, an alternative bonding system must provide for complete abatement or treatment of water pollution from bond forfeiture sites. If particular sites were bonded with conventional bonds, such bonds would have to be sufficient to address all reclamation obligations on site, and none of these site-specific bonds could be "fully released until all reclamation requirements of this Act are fully met." See SMCRA Section 519(c)(3). Similarly, OSM cannot allow

States to set a predetermined limit on the amount of funds expended on any aspect of bond forfeiture reclamation, including water treatment. Such a limit, whether it be 25 percent of total annual revenues or any other predetermined amount, arbitrarily restricts expenditures for water treatment purposes, without regard to the amount needed to adequately treat each site so that it meets applicable effluent limits and water quality standards. In effect, such a limit means that sites covered by the alternative bonding system would be covered by bonds which are not "sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture." See SMCRA Section 509(a). In other words, the State cannot be certain, in advance, that only 25 percent of the total annual revenues of the special reclamation fund will be needed to accomplish the water treatment objectives for all bond forfeiture sites, since the alternative bonding system must assume all reclamation-related responsibilities, including water treatment, for a participant who defaults on his or her reclamation obligations.

Therefore, the Director is not approving the proposed revision to the extent that water treatment on bond forfeiture sites is made discretionary (use of the word "may" instead of "shall"). Similarly, the Director is not approving this proposed revision to the extent that it limits expenditures for water treatment to 25 percent of the fees collected annually for the special reclamation fund. The Director is requiring West Virginia to amend its program to remove the 25 percent limitation or to otherwise provide for the treatment of polluted water discharged from all bond forfeiture sites. The cost of water treatment at existing bond forfeiture sites may be addressed by program amendments that increase the special reclamation tax or provide additional funding from other sources. The cost of water treatment at future bond forfeiture sites may be addressed by adjusting site-specific bonds for water treatment at future bond forfeiture sites may be addressed by adjusting sitespecific bonds for water treatment where necessary, or by implementing the environmental security account envisioned in CSR § 38-2-11.7, or by increasing the special reclamation tax to cover the additional cost of water treatment.

(3) West Virginia proposes to revise § 22–3–11(g) to require that monies accrued in the special reclamation fund, including interest, be used solely and exclusively for the purposes set forth in