Response: As discussed in finding A.1.b.(2), the Director is requiring West Virginia to amend its program to remove the 25 percent limitation or to otherwise provide for treatment of polluted water discharged from all bond forfeiture sites. Also, as discussed in finding A.1.b.(4)(c), the Director is requiring the State to remove the provision that allows collection of the special reclamation tax only when the bond forfeiture liabilities of the State exceed the fund's assets.

This rulemaking does not attempt to answer all potential questions about bonding and the reclamation of bond forfeiture sites but only to address the proposed revisions to the West Virginia program. The findings contained in this preamble should be read in conjunction with the codification section to fully understand the Director's decision.

2. Comment: The WVHC commented that OSM should not only disapprove as part of the State program the provision limiting the use of monies for water treatment at bond forfeiture sites but should also require the State to remove the restricting language from its rules and law. WVHC stated that in the eyes of State legislature and State Courts the provision would continue to be implemented until removed from State law and regulations. WVHC added that without clear and decisive direction and actions on the part of OSM, there will be no significant improvement in the West Virginia program.

Response: As discussed in finding A.1.b.(2), the director is requiring West Virginia to remove the 25 percent limitation on the use of special reclamation funds for water treatment at bond forfeiture sites from its statute and regulations or to otherwise provide for the treatment of polluted water discharged from all bond forfeiture sites.

3. Comment: WVMRA generally supported the proposed bonding revisions for § 22-3-11(g). WVMRA argued that the special reclamation fund revisions, including the 25 percent set aside for water treatment systems, were not OSM issues since there are no Federal requirements in these areas. The question of water treatment at forfeiture sites was thought to be a Clean Water Act issue which should be handled by the State under the NPDES program. WVMRA pointed out that West Virginia's bonding provisions were more stringent than Federal government bonding requirements and cited the State's requirement for penal bonds as an example. WVMRA commented that "the bonding program has been consistent with insuring compliance with the State law and all regulations promulgated thereunder for more than

the 17 year history since PL 97–87 was passed.

WVMRA argued that West Virginia has adequate funds to guarantee that the performance standards of the Act are carried out, and referenced two actuarial studies as support for this view. WVMRA stated that any requirements beyond the performance standards of the Act are not germane to the bonding requirements. WVMRA also stated that "any attempt to burden the State of West Virginia, and more particular (sic) its mining industry, with rules and regulations not supported by Federal or State law, will not be tolerated nor can the State of West Virginia be held to any standard not imposed upon other States, including Tennessee, in which OSM administers the program." [WVMRA referenced text in a letter dated January 15, 1993, to David Callaghan from former OSM Director Harry Snyder pertaining to requirements for water treatment as support for its comments. Since this letter was subsequently rescinded by Acting OSM Director W. Hord Tipton by letter dated January 25, 1993, it no longer reflects OSM policy and is, therefore, not being discussed.]

Response: Section 509(č) of SMCRA authorizes the Secretary, acting through OSM, to approve an alternative bonding system if it will achieve the objective and purposes of the otherwise mandatory conventional bonding program. The Federal regulations at 30 CFR 800.11(e)(1) require funds to be sufficient to assure completion of the reclamation plans for all bond forfeiture sites, which includes treatment to meet State and Federal water quality requirements. The Secretary conditionally approved an alternative bonding system as part of the West Virginia program on January 21, 1981 (46 FR 5924), with subsequent final approval on March 1, 1983 (48 FR 8448). West Virginia's approved alternative bonding system includes the special reclamation fund as one source of money for completing the reclamation plan for a bond forfeiture site. Also, 30 CFR 732.17(g) requires changes to laws or regulations that make up the approved State program be submitted to the Director as an amendment. Therefore, the revisions pertaining to West Virginia's special reclamation fund are OSM issues, and OSM is required to make a determination as to whether these revisions are consistent with section 509(c) of SMCRA and the implementing Federal regulations at 30 CFR 800.11(e). The Director disagrees that only performance standards of the Act are germane to bonding requirements. See discussion in findings A.1.b.(2). The

Director also disagrees that the West Virginia alternative bonding system has adequate funding. See discussion in finding A.1.b.(4)(c).

4. Comment: The WVHC expressed concern that withdrawals from the Special Reclamation Fund for administrative purposes for programs other than bond forfeiture reclamation will deplete the Fund.

Response: As discussed in finding A.1.b(3), the State in  $\S 22-3-11(g)$  is proposing to limit the use of the Special Reclamation Fund. The Director of the WVDEP will have discretionary power to allocate up to 10 percent of the total annual assets of the Fund to administrative costs incurred under the abandoned mine land program, the mining and reclamation program, the minerals other than coal program, and the Surface Mine Board. While most of these expenditures are unrelated to the reclamation of bond forfeiture sites, the Director of OSM does not have the authority under SMCRA to restrict the use of the Fund to only bond forfeiture reclamation. However, the State is accountable for ensuring that adequate moneys are available in the special reclamation fund to complete the reclamation of all forfeiture sites in a timely manner. Under West Virginia's approved alternative bonding system, any drawdown of the fund for administrative purposes unrelated to bond forfeiture reclamation must be compensated for by higher site-specific bonds, a higher special reclamation tax or both.

5. Comment: The WVMRA commented that OSM had overstated the magnitude of the backlog in forfeiture sites that need to be reclaimed by failing to note that of the 243 forfeiture sites, 43 have been granted Phase I release, 17 have been granted Phase II release and 12 of the forfeitures were for technicalities like failure to have proper insurance. Also, the special reclamation fund was believed to be financially sound since as of April 30, 1995, there was a balance of over \$8 million with interest accumulating at a rate of \$250,000 per quarter. Annual payments into the fund by coal operators was more than \$3.7 million. Reclamation costs on forfeiture sites were \$2,820 per acre in 1994—the lowest per acre cost in the history of the

Response: The Director acknowledges that some sites on the list of bond forfeiture sites have been partially reclaimed, however, there is still a substantial backlog in reclamation work even after allowing for these sites. The State's estimate that, as of June 30, 1994, total liabilities of the special