rejected by the West Virginia Legislature in the 1992/1993 legislative session. WVCA explained that the Circuit Court of Kanawha County recently ruled that the WVSCMRA does not allow WVDEP to forfeit the entire amount of a reclamation bond, but only so much as is necessary to cover the estimated costs of reclamation (Vaco Enterprises, Inc., v. Callaghan, Civil Action No. 92-Misc-256 (Kanawha County, Nov. 9, 1992).

WVCA further commented that OSM has rejected this form of bond release since 30 CFR 800.50(d)(2) specifically provides that in the event the amount of performance bond forfeited was more than the amount necessary to complete the reclamation, the unused funds would be returned. WVCA then referenced a Federal court decision in In Re: Permanent Surface Mining Regulation Litigation, 14 Env't Rep. Cas. (BNA) 1083, 1100-1101 (D.D.C. 1980). WVCA stated that "based on the court's directive, OSM expressly rejected any notion that reclamation bonds are penal in nature. OSM wrote that: 'OSM views a reclamation bond as one guaranteeing the performance of reclamation work. Therefore, it is not a penal bond. Upon forfeiture, only the amounts necessary to complete the reclamation work can be used by the regulatory authority.' 48 FR 32932, 32957 (July 19, 1983).

Response: At the time WVCA submitted its comments on September 13, 1993, the referenced Circuit Court ruling was meaningful to the proposed amendment being reviewed by OSM. However, this amendment was revised with West Virginia's submitted dated August 18, 1994. The August 1994 submittal contained House Bill 4065 which was passed by the West Virginia legislature on or before March 12, 1994. In it, the West Virginia legislature approved the use of penal bonds, thereby effectively superseding the Circuit Court ruling. As discussed in finding A.1.a., the legislature's action creating penal bonds is not inconsistent with section 509 of SMCRA and the Federal implementing regulations pertaining to performance bonds.

## 2. Comments: Subsection 12.4(b)

WVHC commented that the State's duty to meet the requirements of subsection 14.5 when reclaiming bond forfeiture sites had been replaced with meeting the requirements of subsection 12.5. Subsection 12.5 establishes an inventory of all sites where bonds have been forfeited and a priority listing of sites to receive water treatment whereas subsection 14.5 establishes water quality standards for active mining operations.

Response: For the reasons given in finding B.9.c., the Director is approving this revision.

## 3. Comments: Subsection 12.4(c)

a. GAI argued that instead of West Virginia looking for "the most effective method to control acid mine drainage' that they should be looking for "the most cost effective method." GAI explained that one methodology may cost \$100,000 and another may cost \$3,000,000 with only one-tenth of one percent difference in remediation between the two methods.

Response: The Director agrees with the desirability of seeking the most costeffective treatment, so long as the site is brought into compliance with applicable effluent limitations and water quality standards. It is noted that subsection 12.5(d) requires the Director of WVDEP to take into consideration the relative benefits and costs of water enhancement projects for bond forfeiture sites.

b. Comment: WVHC stated that subsection 12.4(c) limits reclamation and the amount of acid mine drainage treatment to the amount of money available. WVHC commented that SMCRA 509(c) and 30 CFR 800.11(e) require that the amount of money be sufficient to match the problem rather than the other way around as this proposal suggests. WVHC stated that the last sentence of subsection 12.4(c) should be dropped from the rule.

Response: As discussed in finding C., the Director is requiring West Virginia to eliminate the deficit in the State's alternative bonding system and to ensure that sufficient money will be available to complete reclamation, including the treatment of polluted water, of all existing and future bond forfeiture sites.

c. Comment: WVMRA also did not support the revision at subsection 12.4(c) which requires the Director of WVDEP to take the most effective actions possible to remediate acid mine drainage, including chemical treatment where appropriate. WVMRA stated that there are no Federal or State programs which require mandatory water

Response: The Director disagrees with the commenter. See finding A.1.b.(2) for a discussion of this issue.

d. WVHC also commented that in its September 1, 1994, submission, WVDEP has added the phrase to reclaim the site "in accordance with the approved reclamation plan or modification thereof." WVHC commented that this could easily allow changes in reclamation plans after forfeiture to relieve the agency of any undesired

expense in land or water reclamation requirements without public notice or involvement. WVHC stated that the words "or modification thereof" are inappropriate and should be eliminated. WVHC pointed out that the State must be held responsible through the alternative bonding system for the same reclamation plan that it permitted and bonded. Doubts were also expressed on whether the State would make the proper distinction between significant and insignificant permit revisions.

Response: As discussed in finding B.9.d.(1), the Director is approving West Virginia's proposed amendment revising CSR  $\S 38-2-12.4(c)$  to require that bond forfeiture sites be reclaimed in accordance with the approved reclamation plan or modifications thereof. The Director believes that regulatory authorities need to have the flexibility to modify reclamation plans for forfeiture sites since existing approved plans may be technically impossible to implement and may not satisfy the changing interests of surface landowners. This most often happens when forfeiture occurs before mining is completed. All modifications to the reclamation plan by the regulatory authority must be consistent with the approved State permanent program.

The remainder of the comment pertaining to public notice and involvement in reclamation plan modifications goes beyond the scope of this proposed change by West Virginia since the proposed revision merely acknowledges that modification of reclamation plans can occur. The amendment is silent as to public participation in the modification

process.

4. Comment: Subsection 12.4(d) WVHC commented that this section also ends with the sentence that provides for limiting acid mine drainage treatment to the funds available. WVHC also stated that the words "in accordance with the approved reclamation plan" should be included, and the last sentence of subsection 12.4(d) should be deleted.

Response: Since subsection 12.4(c) provides that reclamation for bond forfeiture sites will be completed in accordance with the approved reclamation plan, West Virginia does not have to repeat this provision in

5. Comment: Subsection 12.4(e) NCCL expressed concerns pertaining to the insertion of the language "or other responsible party" into this subsection. NCCL stated that "WVDEP proposes to amend the regulation to provide that the 'operator, permittee or other responsible party shall be liable for all costs in excess of the [bond] amount forfeited.'