The term 'other responsible party' is not defined. We believe that this undefined term is either redundant or intended by WVDEP to extend the scope of the surface mining laws to land owners and other persons that SMCRA was intended

to protect.'

NCCL stated that ''the term 'operator' is defined in broad terms to include all persons who either should obtain a permit or who engage in surface mining and reclamation. This term thus includes all persons who might be liable for reclamation costs incurred by an operator, including those persons who might individually be liable for the violations of corporations. Accordingly, there is no need to create another category of 'other responsible persons.' We are concerned that in situations where a specific bond is insufficient to cover the cost of reclaiming a site, including potential long term treatment of acid mine drainage, WVDEP will decline to use the State Special Reclamation Fund to treat water and will instead try to impose these costs on landowners pursuant to revised subsection 12.4(e). Whatever its motivation, the WVDEP's actions are absolutely inconsistent with the goals of SMCRA.

NCCL further stated that "West Virginia has an alternative bonding system as provided in 30 CFR 800.11(e) funded by a mix of site-specific bond and 'bond pool' (i.e., the State Special Reclamation Fund) monies. Despite the bifurcated funding mechanism of this system, the full costs of reclamation are and must nonetheless be borne exclusively by the operators either through site-specific bonds or the special reclamation fund (which operators alone fund through a severance fee)." NCCL also commented that "the incentives to reclaim are absent or diminished when reclamation costs may be transferred from operators to other parties such as area landowners, which Congress intended to protect, nor hold liable for, surface mining operations. See 30 U.S.C. § 1202(b).

NCCL also stated that "OSM has even recognized in promulgation of its expansive 'ownership and control' regulations that direct liability for reclamation costs and for compliance with SMCRA belongs solely to the operator or permittee." To support this statement, NCCL presented discussions from two Federal Register notices (54 FR 18438-43, April 28, 1989, and 53 FR 38868-85, October 3, 1988).

Response: As discussed in finding B.9.d.(3), the proposed requirement in CSR § 38–2–12.4(e) is not prohibited by SMCRA. Also, under the Federal Clean

Water Act, a permittee, operator and/or landowner can be held responsible for the treatment of point source discharges that do not meet NPDES effluent limitations after forfeiture.

## CSR § 38-2-12.5 Water Quality Enhancement

1. Comment subsection 12.5(d): BCC commented that the proposal for supplementing and adjusting the special reclamation fund to pay for long-term acid mine drainage treatment from forfeiture sites goes far beyond any OSM counterpart.

WVMRA commented that "this policy sets a priority and inventory and makes some recommendations, but there is no legal guidance from OSM regarding what such a program should include. This makes evaluation of this policy impossible.

Response: As discussed in finding B.10.a., subsection 12.5 is being approved to the extent that it provides only for a ranking of sites for reclamation without compromising the requirement that all sites be properly reclaimed in a timely manner.

2. Comment subsection 12.5(d): WVHC stated that the alternative bonding system fund must be increased to address the liability rather than the liability being adjusted to match the funds available.

Response: As discussed in finding B.10.b., the Director is requiring the State to revise subsection 12.5(d) to remove the 25 percent limitation or to otherwise provide for the treatment of polluted water discharged from bond forfeiture sites.

## Retroactive Approval of Amendment

Comment: The WVCA and the WVMRA objected to the proposed provision at 30 CFR 948.15(o)(1) which would make OSM's approval of the State's program amendment retroactive. WVMRA commented that OSM had no authority to retroactively approve the amendment.

Response: As discussed in the Director's Decision (Subsection V), the Director believes he has ample cause and legal basis for making his decision on this amendment retroactive to the dates when the proposed revisions were submitted to OSM.

## Federal Agency Comments

Pursuant to section 503(b)(1) of SMCRA and 30 CFR 732.17(h)(11)(i), OSM solicited comments on the proposed amendment from various Federal agencies with an actual or potential interest in the West Virginia program on four different occasions (Administrative Record Nos. WV-891,

WV-897, WV-936, and WV-942). Comments were received from the U.S. Bureau of Land Management, the Mine Safety and Health Administration, the U.S. Bureau of Mines, and the U.S. Army Corps of Engineers. These Federal agencies acknowledged receipt of the amendments, but generally had no comment or acknowledged that the revisions were satisfactory.

Environmental Protection Agency (EPA)

Pursuant to 30 CFR 732.17(h)(11)(ii), OSM is required to obtain the written concurrence of the EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 et seq.) or the Clean Air Act (42 U.S.C. 7401 et seq.).

On July 2 and August 3, 1993 (Administrative Record Nos. WV-892 and WV-896), OSM solicited EPA's concurrence with the proposed amendment. On October 17, 1994 (Administrative Record No. WV-949), EPA gave its written concurrence with a condition based on subsection 5.4(b)(4) of West Virginia's regulations. This conditional concurrence does not pertain to the bonding requirements, which are the subject of this rulemaking. Therefore, EPA's concurrence will be discussed in the third and final rulemaking on the proposed amendment.

Pursuant to 30 CFR 732.17(h)(11)(i), the Director solicited comments on the proposed amendment from EPA on four different occasions in 1993 and 1994 (Administrative Record Nos. WV-891, WV-897, WV-936, and WV-942). In its letter dated October 17, 1994 (Administrative Record No. WV-949), EPA submitted the following comments on the proposed amendment provisions pertaining to the bonding requirements.

1. Comment: EPA commented that "the matrices on Tables 1 and 4 [CSR  $\,$ § 38–2–11.6, Site-Specific Bonding] provide a method for determining reclamation bonds with a maximum of \$5,000 per acre. It is noted that the maximum portions which can be attributed for water quality concerns are based on overburden/ material analyses and are only \$400 for surface mines and \$800 for refuse disposal sites. It is also understood that, under current State regulations, a maximum of only 25 percent of the Special Reclamation Fund, or bond pool, can be used for treatment of forfeiture sites. Considering the experience to date for long-term treatment of acid discharges from bond forfeiture sites, the above funding sources are very inadequate. It is apparent that the answer for preventing