WEST VIRGINIA CODE: §22-3-13

§22-3-13. General environmental protection performance standards for surface mining; variances.

(a) Any permit issued by the secretary pursuant to this article to conduct surface mining operations shall require that the surface mining operations meet all applicable performance standards of this article and other requirements set forth in legislative rules proposed by the secretary.

(b) The following general performance standards are applicable to all surface mines and require the operation, at a minimum, to:

(1) Maximize the utilization and conservation of the solid fuel resource being recovered to minimize reaffecting the land in the future through surface mining;

(2) Restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood so long as the use or uses do not present any actual or probable hazard to public health or safety or pose any actual or probable threat of water diminution or pollution and the permit applicant's declared proposed land use following reclamation is not considered to be impractical or unreasonable, inconsistent with applicable land use policies and plans, involves unreasonable delay in implementation or is violative of federal, state or local law;

(3) Except as provided in subsection (c) of this section, with respect to all surface mines, backfill, compact where advisable to ensure stability or to prevent leaching of toxic materials and grade in order to restore the approximate original contour: Provided, That in surface mining which is carried out at the same location over a substantial period of time where the operation transects the coal deposit and the thickness of the coal deposits relative to the volume of the overburden is large and where the operator demonstrates that the overburden and other spoil and waste materials at a particular point in the permit area or otherwise available from the entire permit area is insufficient, giving due consideration to volumetric expansion, to restore the approximate original contour, the operator, at a minimum, shall backfill, grade and compact, where advisable, using all available overburden and other spoil and waste materials to attain the lowest practicable grade, but not more than the angle of repose, to provide adequate drainage and to cover all acid-forming and other toxic materials in order to achieve an ecologically sound land use compatible with the surrounding region: Provided, however, That in surface mining where the volume of overburden is large relative to the thickness of the coal deposit and where the operator demonstrates that due to volumetric expansion the amount of overburden and other spoil and waste materials removed in the course of the mining operation is more than sufficient to restore the approximate original contour, the operator shall, after restoring the approximate contour, backfill, grade and compact, where advisable, the excess overburden and other spoil and

waste materials to attain the lowest grade, but not more than the angle of repose, and to cover all acid-forming and other toxic materials in order to achieve an ecologically sound land use compatible with the surrounding region and the overburden or spoil shall be shaped and graded in a way as to prevent slides, erosion and water pollution and revegetated in accordance with the requirements of this article: Provided further, That the secretary shall propose rules for legislative approval in accordance with article three, chapter twenty-nine-a of this code governing variances to the requirements for return to approximate original contour or highwall elimination and where adequate material is not available from surface mining operations permitted after the effective date of this article for: (A) Underground mining operations existing prior to August 3, 1977; or (B) for areas upon which surface mining prior to July 1, 1977, created highwalls;

(4) Stabilize and protect all surface areas, including spoil piles, affected by the surface mining operation to effectively control erosion and attendant air and water pollution;

(5) Remove the topsoil from the land in a separate layer, replace it on the backfill area or, if not utilized immediately, segregate it in a separate pile from other spoil and, when the topsoil is not replaced on a backfill area within a time short enough to avoid deterioration of the topsoil, maintain a successful vegetative cover by quick growing plants or by other similar means in order to protect topsoil from wind and water erosion and keep it free of any contamination by other acid or toxic material: Provided, That if topsoil is of insufficient quantity or of poor quality for sustaining vegetation, or if other strata can be shown to be more suitable for vegetation requirements, then the operator shall remove, segregate and preserve in a like manner any other strata which is best able to support vegetation;

(6) Restore the topsoil or the best available subsoil which is best able to support vegetation;

(7) Ensure that all prime farmlands are mined and reclaimed in accordance with the specifications for soil removal, storage, replacement and reconstruction established by the United States Secretary of Agriculture and the Soil Conservation Service pertaining thereto. The operator, at a minimum, shall: (A) Segregate the A horizon of the natural soil, except where it can be shown that other available soil materials will create a final soil having a greater productive capacity and, if not utilized immediately, stockpile this material separately from other spoil and provide needed protection from wind and water erosion or contamination by other acid or toxic material; (B) segregate the B horizon of the natural soil, or underlying C horizons or other strata, or a combination of the horizons or other strata that are shown to be both texturally and chemically suitable for plant growth and that can be shown to be equally or more favorable for plant growth than the B horizon, in sufficient quantities to create in the regraded final soil a root zone of comparable depth and quality to that which existed in the natural soil and, if not utilized immediately, stockpile this material separately from other spoil and provide needed protection from wind and water erosion or contamination by other acid or toxic material; (C) replace and regrade the root zone material described in paragraph (B) of this subdivision with proper compaction and uniform depth over the regraded spoil material; and (D) redistribute and grade in a uniform manner the surface soil horizon described in paragraph (A) of this subdivision;

(8) Create, if authorized in the approved surface mining and reclamation plan and permit, permanent impoundments of water on mining sites as part of reclamation activities in accordance with rules promulgated by the secretary;

(9) Where augering is the method of recovery, seal all auger holes with an impervious and noncombustible material in order to prevent drainage except where the secretary determines that the resulting impoundment of water in the auger holes may create a hazard to the environment or the public welfare and safety: Provided, That the secretary may prohibit augering if necessary to maximize the utilization, recoverability or conservation of the mineral resources or to protect against adverse water quality impacts;

(10) Minimize the disturbances to the prevailing hydrologic balance at the mine site and in associated off-site areas and to the quality and quantity of water in surface and groundwater systems both during and after surface mining operations and during reclamation by: (A) Avoiding acid or other toxic mine drainage by such measures as, but not limited to: (i) Preventing or removing water from contact with toxic producing deposits; (ii) treating drainage to reduce toxic content which adversely affects downstream water upon being released to water courses; and (iii) casing, sealing or otherwise managing boreholes, shafts and wells and keep acid or other toxic drainage from entering ground and surface waters; (B) conducting surface mining operations so as to prevent to the extent possible, using the best technology currently available, additional contributions of suspended solids to streamflow or runoff outside the permit area, but in no event may contributions be in excess of requirements set by applicable state or federal law; (C) constructing an approved drainage system pursuant to paragraph (B) of this subdivision, prior to commencement of surface mining operations, the system to be certified by a person approved by the secretary to be constructed as designed and as approved in the reclamation plan; (D) avoiding channel deepening or enlargement in operations requiring the discharge of water from mines; (E) unless otherwise authorized by the secretary, cleaning out and removing temporary or large settling ponds or other siltation structures after disturbed areas are revegetated and stabilized, and depositing the silt and debris at a site and in a manner approved by the secretary; (F) restoring recharge capacity of the mined area to approximate premining conditions; and (G) any other actions prescribed by the secretary;

(11) With respect to surface disposal of mine wastes, tailings, coal processing wastes and other wastes in areas other than the mine working excavations: (A) Stabilize all waste piles in designated areas through construction in compacted layers, including the use of noncombustible and impervious materials if necessary, and assure the final contour of the waste pile will be compatible with natural surroundings and that the site will be stabilized and revegetated according to the provisions of this article; and (B) assure that the construction of any coal waste pile or other coal waste storage area utilizes appropriate technologies, such as capping or the use of liners, or any other demonstrated technologies or measures which are consistent with good engineering practices, to prevent an acid mine drainage discharge;

(12) Design, locate, construct, operate, maintain, enlarge, modify and remove or abandon, in

accordance with standards and criteria developed pursuant to subsection (f) of this section, all existing and new coal mine waste piles consisting of mine wastes, tailings, coal processing wastes or other liquid and solid wastes and used either temporarily or permanently as dams or embankments;

(13) Refrain from surface mining within five hundred feet of any active and abandoned underground mines in order to prevent breakthroughs and to protect health or safety of miners: Provided, That the secretary shall permit an operator to mine near, through or partially through an abandoned underground mine or closer to an active underground mine if: (A) The nature, timing and sequencing of the approximate coincidence of specific surface mine activities with specific underground mine activities are coordinated jointly by the operators involved and approved by the secretary; and (B) the operations will result in improved resource recovery, abatement of water pollution or elimination of hazards to the health and safety of the public: Provided, however, That any breakthrough which does occur shall be sealed;

(14) Ensure that all debris, acid-forming materials, toxic materials or materials constituting a fire hazard are treated or buried and compacted, or otherwise disposed of in a manner designed to prevent contamination of ground or surface waters, and that contingency plans are developed to prevent sustained combustion: Provided, That the operator shall remove or bury all metal, lumber, equipment and other debris resulting from the operation before grading release;

(15) Ensure that explosives are used only in accordance with existing state and federal law and the rules promulgated by the secretary, which shall include provisions to:

(A) Maintain for a period of at least three years and make available for public inspection, upon written request, a log detailing the location of the blasts, the pattern and depth of the drill holes, the amount of explosives used per hole and the order and length of delay in the blasts; and

(B) Require that all blasting operations be conducted by persons certified by the Division of Mining and Reclamation.

(16) Ensure that all reclamation efforts proceed in an environmentally sound manner and as contemporaneously as practicable with the surface mining operations. Time limits shall be established by the secretary requiring backfilling, grading and planting to be kept current: Provided, That where surface mining operations and underground mining operations are proposed on the same area, which operations must be conducted under separate permits, the secretary may grant a variance from the requirement that reclamation efforts proceed as contemporaneously as practicable to permit underground mining operations prior to reclamation:

(A) If the secretary finds in writing that:

(i) The applicant has presented, as part of the permit application, specific, feasible plans for the proposed underground mining operations;

(ii) The proposed underground mining operations are necessary or desirable to assure maximum practical recovery of the mineral resource and will avoid multiple disturbance of the surface;

(iii) The applicant has satisfactorily demonstrated that the plan for the underground mining operations conforms to requirements for underground mining in the jurisdiction and that permits necessary for the underground mining operations have been issued by the appropriate authority;

(iv) The areas proposed for the variance have been shown by the applicant to be necessary for the implementing of the proposed underground mining operations;

(v) No substantial adverse environmental damage, either on-site or off-site, will result from the delay in completion of reclamation as required by this article; and

(vi) Provisions for the off-site storage of spoil will comply with subdivision (22), subsection (b) of this section;

(B) If the secretary has promulgated specific rules to govern the granting of the variances in accordance with the provisions of this subparagraph and has imposed any additional requirements as the secretary considers necessary;

(C) If variances granted under the provisions of this paragraph are reviewed by the secretary not more than three years from the date of issuance of the permit: Provided, That the underground mining permit shall terminate if the underground operations have not commenced within three years of the date the permit was issued, unless extended as set forth in subdivision (3), section eight of this article; and

(D) If liability under the bond filed by the applicant with the secretary pursuant to subsection (b), section eleven of this article is for the duration of the underground mining operations and until the requirements of subsection (g), section eleven of this article and section twenty-three of this article have been fully complied with;

(17) Ensure that the construction, maintenance and post-mining conditions of access and haul roads into and across the site of operations will control or prevent erosion and siltation, pollution of water, damage to fish or wildlife or their habitat, or public or private property: Provided, That access roads constructed for and used to provide infrequent service to surface facilities, such as ventilators or monitoring devices, are exempt from specific construction criteria provided adequate stabilization to control erosion is achieved through alternative measures;

(18) Refrain from the construction of roads or other access ways up a stream bed or drainage channel or in proximity to the channel so as to significantly alter the normal flow of

water;

(19) Establish on the regraded areas, and all other lands affected, a diverse, effective and permanent vegetative cover of the same seasonal variety native to the area of land to be affected or of a fruit, grape or berry producing variety suitable for human consumption and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area, except that introduced species may be used in the revegetation process where desirable or when necessary to achieve the approved post-mining land use plan;

(20) Assume the responsibility for successful revegetation, as required by subdivision (19) of this subsection, for a period of not less than five growing seasons, as defined by the secretary, after the last year of augmented seeding, fertilizing, irrigation or other work in order to assure compliance with subdivision (19) of this subsection: Provided, That when the secretary issues a written finding approving a long-term agricultural post-mining land use as a part of the mining and reclamation plan, the director may grant exception to the provisions of subdivision (19) of this subsection: Provided, however, That when the director approves an agricultural post-mining land use, the applicable five growing seasons of responsibility for revegetation begins on the date of initial planting for the agricultural post-mining land use;

On lands eligible for remining assume the responsibility for successful revegetation, as required by subdivision (19) of this subsection, for a period of not less than two growing seasons, as defined by the director after the last year of augmented seeding, fertilizing, irrigation or other work in order to assure compliance with subdivision (19) of this subsection;

(21) Protect off-site areas from slides or damage occurring during surface mining operations and not deposit spoil material or locate any part of the operations or waste accumulations outside the permit area: Provided, That spoil material may be placed outside the permit area if approved by the secretary after a finding that environmental benefits will result from the placing of spoil material outside the permit area;

(22) Place all excess spoil material resulting from surface mining activities in a manner that: (A) Spoil is transported and placed in a controlled manner in position for concurrent compaction and in a way as to assure mass stability and to prevent mass movement; (B) the areas of disposal are within the bonded permit areas and all organic matter is removed immediately prior to spoil placements; (C) appropriate surface and internal drainage system or diversion ditches are used to prevent spoil erosion and movement; (D) the disposal area does not contain springs, natural water courses or wet weather seeps, unless lateral drains are constructed from the wet areas to the main under drains in a manner that filtration of the water into the spoil pile will be prevented; (E) if placed on a slope, the spoil is placed upon the most moderate slope among those upon which, in the judgment of the secretary, the spoil could be placed in compliance with all the requirements of this article, and is placed, where possible, upon, or above, a natural terrace, bench or berm, if placement

provides additional stability and prevents mass movement; (F) where the toe of the spoil rests on a downslope, a rock toe buttress, of sufficient size to prevent mass movement, is constructed; (G) the final configuration is compatible with the natural drainage pattern and surroundings and suitable for intended uses; (H) the design of the spoil disposal area is certified by a qualified registered professional engineer in conformance with professional standards; and (I) all other provisions of this article are met: Provided, That where the excess spoil material consists of at least eighty percent, by volume, sandstone, limestone or other rocks that do not slake in water and will not degrade to soil material, the secretary may approve alternate methods for disposal of excess spoil material, including fill placement by dumping in a single lift, on a site-specific basis: Provided, however, That the services of a qualified registered professional engineer experienced in the design and construction of earth and rockfill embankment are utilized: Provided further, That the approval may not be unreasonably withheld if the site is suitable;

(23) Meet any other criteria necessary to achieve reclamation in accordance with the purposes of this article, taking into consideration the physical, climatological and other characteristics of the site;

(24) To the extent possible, using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife and related environmental values, and achieve enhancement of these resources where practicable; and

(25) Retain a natural barrier to inhibit slides and erosion on permit areas where outcrop barriers are required: Provided, That constructed barriers may be allowed where: (A) Natural barriers do not provide adequate stability; (B) natural barriers would result in potential future water quality deterioration; and (C) natural barriers would conflict with the goal of maximum utilization of the mineral resource: Provided, however, That at a minimum, the constructed barrier shall be of sufficient width and height to provide adequate stability and the stability factor shall equal or exceed that of the natural outcrop barrier: Provided further, That where water quality is paramount, the constructed barrier shall be composed of impervious material with controlled discharge points.

(c)(1) The secretary may prescribe procedures pursuant to which he or she may permit surface mining operations for the purposes set forth in subdivision (3) of this subsection.

(2) Where an applicant meets the requirements of subdivisions (3) and (4) of this subsection, a permit without regard to the requirement to restore to approximate original contour set forth in subsection (b) or (d) of this section may be granted for the surface mining of coal where the mining operation will remove an entire coal seam or seams running through the upper fraction of a mountain, ridge or hill, except as provided in paragraph (A), subdivision (4) of this subsection, by removing all of the overburden and creating a level plateau or a gently rolling contour with no highwalls remaining and capable of supporting post-mining uses in accordance with the requirements of this subsection.

(3) In cases where an industrial, commercial, agricultural, commercial forestry, residential

or public facility including recreational uses is proposed for the post-mining use of the affected land, the secretary may grant a permit for a surface mining operation of the nature described in subdivision (2) of this subsection where: (A) The proposed post-mining land use is determined to constitute an equal or better use of the affected land, as compared with premining use; (B) the applicant presents specific plans for the proposed post-mining land use and appropriate assurances that the use will be: (i) Compatible with adjacent land uses; (ii) practicable with respect to achieving the proposed use; (iii) obtainable according to data regarding expected need and market; (iv) supported by commitments from public agencies where appropriate; (v) practicable with respect to private financial capability for completion of the proposed use; (vi) planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the post-mining land use; and (vii) designed by a person approved by the secretary in conformance with standards established to assure the stability, drainage and configuration necessary for the intended use of the site; (C) the proposed use would be compatible with adjacent land uses, and existing state and local land use plans and programs; (D) the secretary provides the county commission of the county in which the land is located and any state or federal agency which the secretary, in his or her discretion, determines to have an interest in the proposed use, an opportunity of not more than sixty days to review and comment on the proposed use; and (E) all other requirements of this article will be met.

(4) In granting any permit pursuant to this subsection, the secretary shall require that: (A) A natural barrier be retained to inhibit slides and erosion on permit areas where outcrop barriers are required: Provided, That constructed barriers may be allowed where: (i) Natural barriers do not provide adequate stability; (ii) natural barriers would result in potential future water quality deterioration; and (iii) natural barriers would conflict with the goal of maximum utilization of the mineral resource: Provided, however, That, at a minimum, the constructed barrier shall be sufficient in width and height to provide adequate stability and the stability factor shall equal or exceed that of the natural outcrop barrier: Provided further, That where water quality is paramount, the constructed barrier shall be composed of impervious material with controlled discharge points; (B) the reclaimed area is stable; (C) the resulting plateau or rolling contour drains inward from the outslopes except at specific points; (D) no damage will be done to natural watercourses; (E) spoil will be placed on the mountaintop bench as is necessary to achieve the planned post-mining land use: And provided further, That all excess spoil material not retained on the mountaintop shall be placed in accordance with the provisions of subdivision (22), subsection (b) of this section; and (F) ensure stability of the spoil retained on the mountaintop and meet the other requirements of this article.

(5) All permits granted under the provisions of this subsection shall be reviewed not more than three years from the date of issuance of the permit; unless the applicant affirmatively demonstrates that the proposed development is proceeding in accordance with the terms of the approved schedule and reclamation plan.

(d) In addition to those general performance standards required by this section, when surface mining occurs on slopes of twenty degrees or greater, or on lesser slopes as may be

defined by rule after consideration of soil and climate, no debris, abandoned or disabled equipment, spoil material or waste mineral matter will be placed on the natural downslope below the initial bench or mining cut: Provided, That soil or spoil material from the initial cut of earth in a new surface mining operation may be placed on a limited specified area of the downslope below the initial cut if the permittee can establish to the satisfaction of the secretary that the soil or spoil will not slide and that the other requirements of this section can still be met.

(e) The secretary may propose rules for legislative approval in accordance with article three, chapter twenty-nine-a of this code that permit variances from the approximate original contour requirements of this section: Provided, That the watershed control of the area is improved: Provided, however, That complete backfilling with spoil material is required to completely cover the highwall, which material will maintain stability following mining and reclamation.

(f) The secretary shall propose rules for legislative approval in accordance with article three, chapter twenty-nine-a of this code for the design, location, construction, maintenance, operation, enlargement, modification, removal and abandonment of new and existing coal mine waste piles. In addition to engineering and other technical specifications, the standards and criteria developed pursuant to this subsection shall include provisions for review and approval of plans and specifications prior to construction, enlargement, modification, removal or abandonment; performance of periodic inspections during construction; issuance of certificates of approval upon completion of construction; performance of periodic safety inspections; and issuance of notices and orders for required remedial or maintenance work or affirmative action: Provided, That whenever the secretary finds that any coal processing waste pile constitutes an imminent danger to human life, he or she may, in addition to all other remedies and without the necessity of obtaining the permission of any person prior or present who operated or operates a pile or the landowners involved, enter upon the premises where any coal processing waste pile exists and may take or order to be taken any remedial action that may be necessary or expedient to secure the coal processing waste pile and to abate the conditions which cause the danger to human life: Provided, however, That the cost reasonably incurred in any remedial action taken by the secretary under this subsection may be paid for initially by funds appropriated to the division for these purposes and the sums expended shall be recovered from any responsible operator or landowner, individually or jointly, by suit initiated by the Attorney General at the request of the secretary. For purposes of this subsection, operates or operated means to enter upon a coal processing waste pile, or part of a coal processing waste pile, for the purpose of disposing, depositing, dumping coal processing wastes on the pile or removing coal processing waste from the pile, or to employ a coal processing waste pile for retarding the flow of or for the impoundment of water.

(g) The secretary shall promulgate for review and consideration by the West Virginia Legislature during the 2017 Regular Session of the West Virginia Legislature revisions to the rules for minimizing the disturbances to the prevailing hydrologic balance at a mine site and in associated off-site areas both during and after surface mining operations and during

reclamation as required under subdivision (10), subsection (b) of this section, including specifically the rules for stormwater runoff and control plans. The secretary shall specifically conform these rules to the federal standards codified at 30 C.F.R. §816.41 (1983) and 30 C.F.R. §816.45-47 (1983) when proposing revisions to the state rule. The secretary shall not propose rules more stringent than the federal standards codified at 30 C.F.R. §816.41 (1983) and 30 C.F.R. §816.45-47 (1983) when proposing revisions to the state rule.