

**DEPARTMENT OF THE INTERIOR****Office of Surface Mining Reclamation and Enforcement****30 CFR Part 950**

[SATS No WY-038-FOR; Docket ID OSM-2009-0012]

**Wyoming Regulatory Program**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.

**ACTION:** Final rule; approval of amendment with certain exceptions.

**SUMMARY:** We are issuing a final decision on an amendment to the Wyoming regulatory program (the “Wyoming program”) under the Surface Mining Control and Reclamation Act of 1977 (“SMCRA” or “the Act”). Our decision approves in part, disapproves in part and defers in part the amendment. Wyoming proposed to amend Chapters 1, 2, 4, 5, and Appendix A of the Land Quality Division (LQD) Coal Rules and Regulations to address required program amendments and other deficiencies identified by OSMRE, and to improve and clarify rules relating to requirements for vegetation measurements and performance standards. Specifically, the proposed changes clarify baseline vegetation requirements and revegetation reclamation plan requirements, clarify revegetation success standards and codify normal husbandry practices, reorganize and clarify species diversity and shrub density requirements, and revise and add definitions supporting those proposed changes. Wyoming also proposed changes to its rules in Chapters 2, 4, and 5 regarding cultural and historic resources, prime farmland, siltation structures and impoundments, and operator information. Wyoming revised its program to be consistent with the corresponding Federal regulations and SMCRA, clarify ambiguities, and improve operational efficiency.

**DATES:** *Effective Date:* June 14, 2011.

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**SUPPLEMENTARY INFORMATION:**

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- II. Submission of the Proposed Amendment
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**I. Background on the Wyoming Program**

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, “a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act \* \* \*; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.” See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Wyoming program on November 26, 1980. You can find background information on the Wyoming program, including the Secretary's findings, the disposition of comments, and the conditions of approval of the Wyoming program in the November 26, 1980, **Federal Register** (45 FR 78637). You can also find later actions concerning Wyoming's program and program amendments at 30 CFR 950.12, 950.15, 950.16, and 950.20.

**II. Submission of the Proposed Amendment**

By letter dated October 15, 2009, Wyoming sent OSMRE a proposed amendment to its approved regulatory program (SATS number: WY-038-FOR, Administrative Record Docket ID No. OSM-2009-0012). Wyoming sent the amendment in response to: Portions of a February 21, 1990, letter that we sent to Wyoming in accordance with 30 CFR 732.17(c); previous OSMRE disapprovals at 30 CFR 950.12(a) (6) and (7); and required program amendments at 30 CFR 950.16(f), (l), (m), (p), and (u). The amendment also includes changes made at Wyoming's own initiative.

We announced receipt of the proposed amendment in the February 9, 2010, **Federal Register** (75 FR 6332). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment's adequacy (Administrative Record Document ID No. OSM-2009-0012-0001). We did not hold a public hearing or meeting because no one requested one. The public comment period ended on March 11, 2010. We received comments from three Federal agencies and one State agency discussed under “IV. Summary and Disposition of Comments.”

During our review of the amendment, we identified concerns regarding Wyoming's proposed deletion of its definition for “surface coal mining and

reclamation operations” at Chapter 1, Section 2 (ct) and the term “surface” in Chapters 1, 2, 4 and 5; its proposed deletion of the U.S. Geological Survey topographic map scale requirement at Chapter 2, Section 1 (c); its response to a required program amendment at 30 CFR 950.16(p) concerning fish and wildlife enhancement measures at Chapter 2, Section 5(a) (viii) (A); design precipitation event requirements for siltation structures and impoundments at Chapter 4, Section 2(c) (xii) (D) (II); and, incorrect rule cross-references regarding normal husbandry practices at Chapter 4 Section 2(d) (i) (M) (II). We notified Wyoming of these concerns by letter dated May 21, 2010 (Administrative Record Document ID No. OSM-2009-0012-0006).

We delayed final rulemaking to afford Wyoming the opportunity to submit new material to address the deficiencies. Wyoming responded in a letter dated June 21, 2010, that it could not currently submit formal revisions to the amendment due to the administrative rulemaking requirements for promulgation of revised substantive rules (Administrative Record Document ID No. OSM-2009-0012-0007). Specifically, Wyoming explained that the required changes would be considered substantive in nature and therefore the LQD is required to present the proposed rules to the LQD Advisory Board and then the Wyoming Environmental Quality Council for vetting. Following approval by the Governor, the rules may be submitted to OSMRE for final review. While it could not submit formal changes, Wyoming did submit informal responses to the noted concerns. Therefore, we are proceeding with the final rule **Federal Register** document. Our concerns and Wyoming's responses thereto are explained in detail below.

**III. OSMRE's Findings**

30 CFR 732.17(h)(10) requires that State program amendments meet the criteria for approval of State programs set forth in 30 CFR 732.15, including that the State's laws and regulations are in accordance with the provisions of the Act and consistent with the requirements of 30 CFR Part 700. In 30 CFR 730.5, OSMRE defines “consistent with” and “in accordance with” to mean (a) with regard to SMCRA, the State laws and regulations are no less stringent than, meet the minimum requirements of, and include all applicable provisions of the Act and (b) with regard to the Federal regulations, the State laws and regulations are no less effective than the Federal

regulations in meeting the requirements of SMCRA.

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment with certain exceptions as described below.

#### *A. Purpose and History of Wyoming's Amendment Regarding Appendix A*

Appendix A of the LQD Coal Rules and Regulations contains rules on vegetation sampling methods and reclamation success standards for shrubs on reclaimed lands. Appendix A was previously incorporated by reference in Chapters 2 and 4 of the LQD Coal Rules and Regulations and was approved by OSMRE in a November 24, 1986, **Federal Register** notice (51 FR 42212). However, on August 30, 2006, OSMRE published new revegetation success standards that no longer required sampling and statistical methods to be included in the rules of the regulatory authority (*See* 71 FR 51684). Consequently, much of Appendix A was no longer required to be in the rule and Wyoming proposed to delete Appendix A entirely and relocate portions thereof into Chapters 1, 2, and 4. Specifically, Wyoming's proposed changes to Chapter 1 contain definitions that were relocated from deleted Appendix A, plus new and revised definitions intended to clarify current or proposed rules and/or sampling methods in support of proposed changes in Chapters 2 and 4. Wyoming also proposed to substantially reorganize the structure of Chapter 2 to revise Section 1 (General Requirements) and divide Section 2 (Application Content Requirements) into five new sections including Adjudication Requirements; Vegetation Baseline Requirements; General Baseline Requirements; Mine Plan; and, Reclamation Plan. Similarly, Wyoming proposed to substantially reorganize the structure of Chapter 4 Section 2(d) into two new subsections with subsection (i) containing General Revegetation Performance Standards and most of the current Section 2(d) rules, and adding rules dealing with normal husbandry practices. Subsection (ii) contains Revegetation Success Standards listed by post-mine land use categories. Wyoming also proposed to combine the standards for grazingland and pastureland into a single section and proposes new Chapter 4 Appendix 4A, Evaluation of Shrub Density, which describes the different shrub standard options and is relocated from deleted Appendix A. Lastly, Wyoming indicates in its "Statement of Principal Reasons

for Adoption" (SOPR) that rules for sampling and statistical methods that had previously been developed for inclusion into Chapter 4 will now be incorporated into the Administrator's Approved Sampling and Statistical Methods document.

#### *B. Minor Wording, Editorial, Punctuation, Grammatical, and Recodification Changes to Previously Approved Regulations*

Wyoming proposed minor wording, editorial, punctuation, grammatical, and recodification changes to previously approved rules. The proposed changes are intended to simplify references to applicable rules and reduce unnecessary, outdated, and duplicative language. No substantive changes to the text of these regulations were proposed. Because the proposed revisions to these previously approved rules are minor in nature and do not change any fundamental requirements or weaken Wyoming's authority to enforce them, we are approving the changes and find that they are no less effective than the Federal regulations at Title 30 (Mineral Resources), Chapter VII (Office of Surface Mining Reclamation and Enforcement, Department of the Interior), Parts 700 through 887.

Chapter 1, Section 2(f); deletion of "Animal unit" definition because it is no longer used in the rules;

Chapter 1, Section 2(j) through (q); recodification of definitions;

Chapter 1, Section 2(s); deletion of "Complete application" definition as it is already defined in Wyoming's statutes;

Chapter 1, Section 2(by)(i), (iii)–(xi); minor punctuation and grammatical changes;

Chapter 1, Section 2(eb)(i)–(iv); minor formatting and grammatical changes;

Chapter 1, Section 2(ed); minor grammatical changes;

Chapter 2, Section 1(c)(iii) and (iv); minor grammatical changes;

Chapter 2, Section 1(c)(v); reference to new rule documenting time frames and bond release standards defined in Chapter 1(dm);

Chapter 2, Section 2; title change to "Adjudication Requirements" to reflect reorganization of the chapter;

Chapter 2, Sections 3–6; recodification of existing Section 2 to reflect reorganization and expansion to new sections 3 through 6;

Chapter 2, Section 2(a)(i)(C), (D), (E), and (iv); minor grammatical and punctuation changes;

Chapter 2, Section 2(a)(v)(A)(I)(2.) and (III); minor grammatical changes;

Chapter 2, Section 2(a)(vi)(C) and (C)(I); deletion of current subsections

and relocation of rule language throughout reorganized Chapter 2 where appropriate.

Chapter 2, Section 2(b)(vii); deletion of existing rule language as being duplicative due to reorganization and is covered in new Section 6(b)(iii).

Chapter 2, Section 3(l); minor grammatical change;

Chapter 2, Section 4; new section entitled "Other Baseline Requirements" to reflect reorganization of the Chapter;

Chapter 2, Section 4(a)(i); reference to land uses and vegetation communities that comprise them as defined in Chapter 1;

Chapter 2, Section 4(a)(v)(A); change "Soil Conservation Service" to "Natural Resource Conservation Service;"

Chapter 2, Section 4(a)(xiv); recodification of cross-reference;

Chapter 2, Section 5(a)(ii); deletion of existing rule language as being duplicative as it is covered in greater detail elsewhere in the section.

Chapter 2, Section 5(a)(ix)(E); recodification of cross-reference;

Chapter 2, Section 6(a), (b), and

(b)(iii)(A); minor grammatical changes;

Chapter 4, Section 2; recodification of existing Section 2(d) to reflect reorganization and expansion to new subsections (i) and (ii);

Chapter 4, Section 2(d)(i)(C); minor grammatical change;

Chapter 4, Section 2(d)(i)(E); minor grammatical change;

Chapter 4, Section 2(d)(i)(J); minor grammatical change and recodification of cross-reference;

Chapter 4, Section 2(d)(i)(K); minor grammatical change;

Chapter 4, Section 2(g)(vi); minor grammatical change;

Chapter 4, Section 2(g)(v); minor grammatical change;

Chapter 4, Section 2(i); recodification of cross-reference;

Chapter 4, Section 2(j)(vii)(B); recodification of cross-reference;

Chapter 4, Appendix 4A Introduction; minor change referencing the recodified and revised definition of "eligible lands."

#### *C. Revisions to Wyoming's Rules That Have the Same Meaning as the Corresponding Provisions of the Federal Regulations*

Wyoming proposes revisions to the following rules containing language that is the same as or similar to the corresponding sections of the Federal regulations and/or SMCRA. Therefore we are approving them.

Chapter 1, Section 2(cm); definition of "Noxious weed" [30 CFR 701.5];

Chapter 4, Section 2(d)(i)(I); Tree density and replacement [30 CFR 816/817.116(b)(3)(ii)];

Chapter 4, Section 2(g)(iv)(L); Impoundment spillways [30 CFR 816/817.49(a)(9)(i)];

Chapter 4, Section 2(g)(iv)(M); Temporary impoundments [30 CFR 816/817.49(c)(2)];

Chapter 4, Section 2(g)(v)(A); Design precipitation event criteria [30 CFR 816/817.49(a)(9)(ii)(B)];

Chapter 4, Section 2(g)(v)(B); Design precipitation event criteria [30 CFR 816/817.84(b)(2)];

#### *D. Reorganization/Relocation of Existing Provisions and Previously Approved Language in Wyoming's Rules*

1. Wyoming proposes to relocate both existing definitions in Chapter 1 as well as previously approved definitions in Appendix A to Chapter 1. The changes are intended to reorganize and/or relocate already existing and approved language to a more appropriate place within the regulations and clarify language contained in the current rules. Because the relocation of previously approved definitions within the regulations does not change any fundamental requirements or weaken Wyoming's authority to enforce them, we are approving the following proposed changes.

Chapter 1, Section 2(r); deletion of "Comparison area" definition and relocated as a subcategory under new definition for "Reference area;"

Chapter 1, Section 2(t); deletion of "Control area" definition and relocated as a subcategory under new definition for "Reference area;"

Chapter 1, Section 2(af); relocation of existing definition of "Density" from Appendix A Glossary;

Chapter 1, Section 2(ba); relocation of existing definition of "Full Shrub" from Appendix A Glossary;

Chapter 1, Section 2(ct); relocation of existing definition of "Plotless sampling" from Appendix A Glossary.

2. Wyoming proposes to substantially reorganize the structure of Chapter 2 by revising Section 1 (General Requirements) and dividing current Section 2 (Application Content Requirements) into the five new sections. Wyoming proposed minor revisions to Sections 1, 2, 4, and 5 all which are approved in Section B. above.

Wyoming also proposes to create new Section 6 entitled "Reclamation Plan" by reorganizing rules currently found in Chapter 2 and consolidating both existing revegetation requirements and revised text from Chapter 4 and Appendix A. The reorganized provisions contain concepts and rule language that was previously approved by OSMRE. Wyoming notes in its SOPR that some of the language in the

relocated Appendix A rules has been revised to be technically current. In addition, Wyoming explains that a few of the rules currently in Chapter 4 Section 2(d) were moved to Chapter 2 so that all of the rules regarding the reclamation plan are located together. Wyoming further indicates in its SOPR that in most cases, the relocated rules have been reworded and/or restructured to clarify their intent and better fit the rules format. The revised rules in newly-created Section 6 are intended to provide clarity and consistency regarding reclamation plan requirements, as well as maintain organizational continuity. Wyoming's relocation and inclusion of already existing and approved language to a more appropriate place within the regulations, along with its proposed revisions to these previously approved rules, do not change any fundamental requirements or weaken Wyoming's authority to enforce them. Accordingly, we are approving the proposed changes and find that they are consistent with and no less effective than the basic Federal requirements of 30 CFR 780.18(b)(5).

Chapter 2, Section 6(b)(iii)(B) and (C); (existing rule language of Chapter 2, Section 2(b)(iv)(C) has been divided into two new subsections and revised to clarify language in the current rules and fit the new format);

Chapter 2, Section 6(b)(iii)(D); Requirements for tree species in reclamation plan (relocated from Chapter 4, Section 2(d)(x)(F));

Chapter 2, Section 6(b)(iii)(E); Requirements for seed mixtures (relocated with revision from Appendix A, Section VII.B.);

Chapter 2, Section 6(b)(iii)(E)(I)–(IV); Species of vegetation described in the reclamation plan and seeding rates (relocated with revision from Chapter 4, Section 2(d)(v));

Chapter 2, Section 6(b)(iii)(E)(V)(1)–(5); Requirements for introduced species seed mixtures (relocated with revision from Appendix A, Section VII.B. and Chapter 4, Section 2(d)(vi));

Chapter 2, Section 6(b)(iii)(E)(VI); Requirement to document suitability of introduced species (relocated with revision from Chapter 4, Section 2(d)(vi));

Chapter 2, Section 6(b)(iii)(E)(VII); Seed mix requirements for grazingland (relocated with revision from Appendix A, Section VII.B.5.);

Chapter 2, Section 6(b)(iii)(E)(IX); Postmining locations of seed mixes (relocated with revision from Appendix A, Section VII.B.);

Chapter 2, Section 6(b)(iii)(F); Operator requests to not use mulch

(relocated from Appendix A, Section VII.C.);

Chapter 2, Section 6(b)(iii)(H); Irrigation plans (relocated from Chapter 4, Section 2(d)(xii));

Chapter 2, Section 6(b)(iii)(I); Pest and disease control measures (revision of current Chapter 2, Section 2(b)(vii)(A) to maintain organizational consistency);

Chapter 2, Section 6(b)(iii)(J); Monitoring plan for permanent revegetation (relocated from current Chapter 2, Section 2(b)(vii)(C));

Chapter 2, Section 6(b)(iv); Plan to measure revegetation success (revision of current Chapter 2, Section 2(b)(vii)(B) to maintain organizational consistency);

Chapter 2, Section 6(b)(iv)(A), (B), (D), (E), and (F); Reclamation plan requirements for measuring revegetation success (relocated with revision from Appendix A, Section VIII.F.);

Chapter 2, Section 6(b)(iv)(C); Reclamation plan requirements for measuring revegetation success (inclusion of previously approved shrub goal standard);

Chapter 2, Section 6(b)(iv)(G); Reforestation for commercial harvest success standards (relocated from Chapter 4, Section 2(d)(x)(G)).

3. Wyoming proposes to substantially reorganize the structure of Chapter 4 Section 2(d) into two new subsections. New subsection (i) contains General Revegetation Performance Standards and most of the current Section 2(d) rules, and adds rules dealing with normal husbandry practices. Wyoming explains that a few of the rules currently in Chapter 4 Section 2(d) were moved to Chapter 2 so that all of the rules regarding the reclamation plan are located together. Other rules with performance standards for Revegetation Success listed by post-mine land use categories were moved to new subsection (ii) and are addressed in Finding No. III.E.15. below.

Wyoming also indicates in its SOPR that in several instances, the relocated rules have been reworded for purposes of consistent terminology usage and restructured to clarify their intent and better fit the rules format. The revised rules in newly-created subsection (i) are intended to provide clarity and consistency regarding revegetation performance standards, and maintain organizational continuity. Wyoming's relocation of already existing and approved language to a more appropriate place within the regulations, along with its proposed revisions to these previously approved rules, do not change any fundamental requirements or weaken Wyoming's authority to enforce them. Accordingly, we are approving the proposed changes

and find that they are consistent with and no less effective than the basic Federal requirements of 30 CFR 816/817.111.

Chapter 4, Section 2(d)(i)(F); Rills and gullies (relocated from Chapter 4, Section 2(d)(v));

Chapter 4, Section 2(d)(i)(L); existing rule language has been revised to clarify noxious weed control responsibility by the operator;

Chapter 4, Section 2(d)(v) and (vi); deleted and relocated with revision to Chapter 2, Section 6(b)(iii)(E);

Chapter 4, Section 2(d)(vii); deleted and relocated with revision to Chapter 4, Section 2(d)(ii) and divided into Section 2(d)(ii)(C) for "cropland" and (F) for "industrial, commercial, and residential land uses;"

Chapter 4, Section 2(d)(viii); deleted and relocated to Chapter 4, Section 2(d)(ii)(I) under "special success standards;"

Chapter 4, Section 2(d)(i)(H); Bond release and revegetation (first sentence relocated from Chapter 4, Section 2(d)(x));

Chapter 4, Section 2(d)(x); deleted and relocated with revision to Chapter 4, Section 2(d)(ii)(B)(I) under "Revegetation Success Standards for Grazingland and Pastureland;"

Chapter 4, Section 2(d)(x)(A)–(D); deleted and relocated with revision to Chapter 1, Section 2(d) "Reference Area" definitions;

Chapter 4, Section 2(d)(x)(E) and (E)(I)–(E)(IV); deleted and relocated with revision to Chapter 4, Section 2(d)(ii)(B)(II) under shrub replacement requirements for grazingland;

Chapter 4, Section 2(d)(x)(G); Standards for success of reforestation (deleted; first and last sentences relocated with revision to Chapter 4, Section 2(d)(ii)(H), with remainder moved to Chapter 2, Section 6(b)(iv)(G));

Chapter 4, Section 2(d)(x)(H); deleted and relocated with revision to Chapter 4, Section 2(d)(ii)(C)(I) under cropland success standards;

Chapter 4, Section 2(d)(x)(I); deleted and relocated with revision to Chapter 4, Section 2(d)(ii)(C)(II) under cropland success standards;

Chapter 4, Section 2(d)(x)(J); deleted and relocated with revision to Chapter 4, Section 2(d)(ii)(B)(I)(3.) under cropland success standards;

Chapter 4, Section 2(d)(xii); Irrigation plans deleted and relocated with revision to Chapter 2, Section 6(b)(iii)(H).

4. Wyoming proposes new Chapter 4 Appendix 4A, Evaluation of Shrub Density, which describes the different shrub standard options and is relocated from deleted Appendix A. Wyoming's

relocation of already existing and previously approved language to a more appropriate place within the regulations does not change any fundamental requirements or weaken Wyoming's authority to enforce them. Accordingly, we are approving the proposed change.

#### *E. Revisions to Wyoming's Rules That Are Not the Same as the Corresponding Provisions of the Federal Regulations*

##### 1. Chapter 1, Section 2(j); Definition of "Augmented Seeding"

Wyoming proposes to add a new definition for "Augmented Seeding" to its rules at Chapter 1, Section 2(j) that reads as follows:

(j) "Augmented Seeding" means reseeding in response to the unsuccessful germination, establishment or permanence of revegetation efforts. Augmented seeding resets the applicable liability period. A synonym is reseeding.

In its SOPR, Wyoming states that this definition is needed to support its proposed normal husbandry rules [Chapter 4, Section 2(d)(i)(M)(I)], and was required by OSM to address the difference between interseeding, which is a husbandry practice that does not reset the bond clock, and augmented seeding which does reset the bond clock. Wyoming continues that the difference between the two is that augmented seeding is used when the original seeding has been unsuccessful, and that interseeding is used to enhance established vegetation in order to improve composition.

The proposed definition appropriately distinguishes the differences between augmented seeding and interseeding, and is consistent with other state definitions and uses previously approved by OSMRE. We also find that while there is no direct Federal counterpart to the proposed rule it implements the Federal requirements at 30 CFR 816/817.116(c)(1) and (4), and is no less effective than the Federal regulations. Accordingly, we are approving Wyoming's proposed definition.

##### 2. Chapter 1, Section 2(am); Definition of "Eligible Land"

Wyoming proposes to revise its definition for "Eligible land" in its rules at Chapter 1, Section 2(am) to read as follows:

(am) "Eligible land" means all land to be affected by a mining operation after August 6, 1996 which carries the grazingland land use designation and all affected pastureland land use units which have a full shrub density greater than one full shrub per square meter. Pastureland is eligible only if the surface owner requests that the pastureland be eligible and only if the land units are

included in a new permit or permit amendment application which is submitted to the Administrator after approval of this rule by the Office of Surface Mining.

Wyoming states in its SOPR that grazingland, including land with pre-mining shrub densities of less than one shrub per square meter, functions as wildlife habitat and is eligible for shrub reclamation. Wyoming continues that pastureland, with its primary use as domestic livestock grazing and haying, often has a significant enough shrub component that it also functions as wildlife habitat. Thus, the Pastureland shrubs may be replaced on other reclaimed land such as grazingland.

Next, Wyoming states that the revision adds pastureland with a full shrub density greater than one shrub per square meter as eligible land. Wyoming goes on to explain that this means the areas defined as pastureland are required to meet the shrub density standard if their pre-mine shrub densities are greater than one full shrub per square meter. Conversely, pasturelands with lower pre-mine shrub densities are not required to replace shrubs postmine.

Wyoming also notes that the definition is being revised to make pastureland "eligible land" only if the surface owner requests that pastureland be eligible. Originally, the proposed rule made pastureland subject to shrub replacement when full shrub density was greater than one shrub per square meter. Wyoming confirms that meeting this standard is still required, but only with surface owner consent. Wyoming also explains that the concept of surface owner consent was added as a result of public comment and testimony during a Wyoming Environmental Quality Council hearing on these rules. Wyoming concludes by stating that this adds the option of replacing shrubs on pastureland with a shrub density of greater than one shrub per square meter if the owner of the land requests that pastureland be eligible land.

The Federal regulations at 30 CFR 816/817.116(b)(1) require that for areas developed for use as grazing land or pasture land, the ground cover and production for living plants shall be at least equal to that of a reference area or such other [revegetation] success standards approved by the regulatory authority. Wyoming's proposed definition for "Eligible land" adds specificity beyond that contained in the Federal regulations. We also find that while there is no direct Federal counterpart to the proposed rule, it implements the Federal requirement at 30 CFR 816/817.116(b)(1) and is no less effective than the Federal regulations.

Accordingly, we are approving Wyoming's revised definition.

### 3. Chapter 1, Section 2(bm); Definition of "Husbandry Practice"

Wyoming proposes to add a new definition for "Husbandry practice" to its rules at Chapter 1, Section 2(bm) that reads as follows:

(bm) "Husbandry practice" means when preceded by the word "normal", those management practices that may be used to achieve revegetation success without restarting the bond responsibility period. Normal husbandry practices are sound management techniques which are commonly practiced on native lands in the area of the mine and, if discontinued after the area is bond released, shall not reduce the probability of permanent vegetation success.

Wyoming states that a definition of "Husbandry practice" is needed to support its proposed normal husbandry rules [Chapter 4, Section 2(d)(i)(M)], and explains that the new definition includes elements from the current "Good husbandry practices" definition at Chapter 1, Section 2(ao) that is proposed for deletion. Specifically, the second sentence of the proposed definition was moved from the current definition of "Good husbandry practices" in response to public comments. Wyoming also points out that the specific list of acceptable normal husbandry practices and their limitations, which are enforceable, are included in Chapter 4, Section 2(d)(i)(M).

The Federal regulations at 30 CFR 816/817.116(b) state, in pertinent part, that "Standards for [revegetation] success shall be applied in accordance with the approved postmining land use \* \* \*."

The Federal regulations at 30 CFR 816.116(c)(1) require that the period of extended responsibility for successful revegetation shall begin after the last year of augmented seeding, fertilizing, irrigation, or other work, excluding husbandry practices that are approved by the regulatory authority in accordance with 30 CFR 816.116(c)(4).

The Federal regulations at 30 CFR 816.116(c)(4) state, in pertinent part, that management practices are normal husbandry practices "if such practices can be expected to continue as part of the postmining land use or if discontinuance of the practices after the liability period expires will not reduce the probability of permanent revegetation success."

We are approving Wyoming's proposed definition of "Husbandry practice," with the understanding that it be interpreted as achieving successful revegetation through "normal

husbandry practices" in accordance with the approved postmining land use. We also find, based on the above understanding, that while there is no direct Federal counterpart definition to the proposed rule, it implements the Federal requirements at 30 CFR 816/817.116(b) and (c)(4) and is no less effective than the Federal regulations.

Wyoming also proposes to delete its current definition of "Good husbandry practices" at Chapter 1, Section 2(ao) as being unnecessary and redundant because the proposed addition of the term "normal" has been included in the new definition for "Husbandry practice." For the same reasons explained above, we approve the proposed deletion.

### 4. Chapter 1, Section 2(bu); Definition of "Interseed"

Wyoming proposes to add a new definition for "Interseed" to its rules at Chapter 1, Section 2(bu) that reads as follows:

(bu) "Interseed" means a secondary seeding into established vegetation in order to improve composition, diversity or seasonality. Interseeding is done to enhance revegetation rather than to augment the revegetation that is unsuccessful in terms of germination, establishment, or permanence.

Similar to Finding No. III.E.1. above for "Augmented seeding," Wyoming states that a definition of "Interseeding" is needed to support its proposed normal husbandry rules [Chapter 4, Section 2(d)(i)(M)(I)], and distinguish it from augmented seeding which restarts the bond responsibility period. OSMRE has previously approved the use of interseeding as a normal husbandry practice in both Colorado and New Mexico using similar language.

We find that Wyoming's proposed definition provides specificity beyond that contained in the Federal regulations, appropriately distinguishes the differences between augmented seeding and interseeding, and is consistent with other state definitions and uses previously approved by OSMRE. We also find that while there is no direct Federal counterpart to the proposed rule it implements the Federal requirements at 30 CFR 816/817.116(c)(1) and (4), and is no less effective than the Federal regulations. Accordingly, we are approving Wyoming's proposed definition.

### 5. Chapter 1, Section 2(by)(ii); Definition of "Pastureland"

Wyoming proposes to revise its definition for "Pastureland" in its rules at Chapter 1, Section 2(by)(ii) to read as follows:

(ii) "Pastureland" means land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or occasionally cut and cured for livestock feed. In addition, for the purpose of determining premining land use, the relative cover of introduced perennial forage species must be greater than 40% of the relative cover of total vegetation in order for the land to be pastureland. If the full shrub density is greater than one shrub per square meter on those lands and the surface owner requests the lands to be eligible, the land use is still pastureland but the land is also "eligible land" in terms of shrub reclamation.

Wyoming explains that the revised definition of pastureland is intended to identify land that has been altered in the past to better suit domestic grazing and haying purposes. Wyoming further states that it is recognized that many pasturelands have, since initial treatment, reverted back to a more native vegetation composition, including shrubs, which now also provide functional wildlife habitat as a pre-mining land use. Thus, the distinction between pastureland and grazingland needs to be clear. Wyoming notes that the rule identifies the vegetative composition, including native forage and shrubs, that would distinguish treated lands as either pastureland or grazingland, and that since it is possible for land to be defined as pastureland and still have a functional shrub habitat component, the definition also identifies when pastureland is eligible for shrub reclamation. Lastly, Wyoming states that surface owner consent is required in addition to the requirement that shrub density be greater than one shrub per square meter for lands to become eligible lands. The surface owner consent requirement was added as a result of public comment and testimony during a Wyoming Environmental Quality Council rulemaking hearing.

Wyoming's proposed revision specifies the amount of relative cover required of pastureland species in order for the vegetation community to be considered pastureland. The revision also specifies when pre-mine plant communities qualify as pastureland, and when pastureland is required (eligible) to meet the shrub density standard. We find that Wyoming's revised definition for pastureland adds specificity beyond that contained in the Federal definition and is no less effective than the counterpart Federal Regulation at 30 CFR 701.5. Accordingly, we are approving Wyoming's revised definition.

6. Chapter 1, Section 2(ct); Definition “Surface Coal Mining and Reclamation Operations” and deletion of the Term “Surface” in Chapters 1, 2, 4, and 5

Wyoming proposes to delete the definition of “surface coal mining and reclamation operations” at Chapter 1, Section 2(ct), as well as the word “surface” throughout its rules in Chapters 1, 2, 4, and 5, respectively. Wyoming states that both the definition and term are being deleted because they are holdovers from when the coal and non-coal rules were combined. Wyoming also notes in its SOPR that deletion of the word “surface” is necessary to eliminate potential confusion for underground coal operations because the same requirements apply for both surface and underground mines. At OSMRE’s request, Wyoming provided additional justification for deleting its regulatory definition of “surface coal mining and reclamation operations” by explaining that similar definitions are included in its statutes for “Surface coal mining operation” at 35–11–103(e)(xx) and “Reclamation” at 35–11–103(e)(i). Wyoming concluded by noting that if the statute and regulation conflict, the statute would supersede the regulation; therefore redundant or duplicative regulations are removed when possible (Administrative Record Document ID No. OSM–2009–0012–0010).

OSMRE replied in a letter dated May 21, 2010, that Wyoming’s regulatory definition of “surface coal mining and reclamation operations,” which was approved in its November 26, 1980, original program approval, is substantively identical to the Federal definitions found at Section 701(27) of SMCRA and 30 CFR 700.5. Additionally, Wyoming’s statutory definition of “surface coal mining operation,” as approved by OSMRE on March 31, 1980, is substantively identical to the Federal definitions found at Section 701(28) of SMCRA and 30 CFR 700.5. Consequently, we determined that, like their Federal counterparts, Wyoming’s definitions of “surface coal mining and reclamation operations” and “surface coal mining operation” are companion requirements that complement one another and do not conflict. We also informed Wyoming that its proposed deletions would result in continued use of the undefined terms “coal mining and reclamation operations” and “coal mining operations” throughout its rules. Therefore, in lieu of removing the definition of “surface coal mining and reclamation operations” we required that Wyoming propose definitions for

“coal mining operations” and “coal mining and reclamation operations” that are consistent with and no less effective than the requirements of Federal counterpart definitions found at 30 CFR 700.5. In the absence of such definitions, we concluded that Wyoming’s proposed deletions are less stringent than SMCRA and inconsistent with and less effective than the corresponding Federal regulations.

Wyoming responded in a letter dated June 21, 2010, by stating its agreement with OSMRE that removal of the definition “surface coal mining and reclamation operations” and the term “surface” throughout Chapters 1, 2, 4, and 5 “would result in Wyoming’s continued use of the undefined terms.” As a result, Wyoming replied that it will review the formally submitted rules for instances where the term “surface” was removed and reinsert that language as originally approved. Wyoming also stated that it would place the definition of “surface coal mining and reclamation operations” back in Chapter 1 as originally defined as part of its future Advisory Board rulemaking efforts.

Based on the discussion above, we are not approving Wyoming’s proposed rule changes deleting the definition of “surface coal mining and reclamation operations” at Chapter 1, Section 2(ct), and removing the term “surface” throughout its rules in Chapters 1, 2, 4 and 5. We also acknowledge Wyoming’s commitment to reinstate the proposed deletions in a future rulemaking effort and are deferring our decision on them until such time as they are formally submitted to OSMRE for review.

7. Chapter 1, Section 2(dl); Definition of “Reference Area” and Subcategories “Comparison Area,” “Control Area,” “Extended Reference Area,” and “Limited Reference Area”

Wyoming proposes to revise its definition for “Reference area” in its rules at Chapter 1, Section 2(dl) to read as follows:

(dl) “Reference area” means a land unit established to evaluate revegetation success. A “Reference area” is representative of a vegetation community or communities that will be affected by mining activities, in terms of physiography, soils, vegetation and land use history. The “Reference area” and its corresponding postmine vegetation community (or communities) must be approved by LQD and shall be defined in the approved Reclamation Plan. All “Reference areas” shall be managed to not cause significant changes in the vegetation parameters which will be used to evaluate Chapter 4 revegetation success performance standards. A “Reference area” can be a “Comparison area”, “Control area”, “Extended reference area”, or “Limited

reference area”, depending on how it is established and used, in accordance with the following provisions:

Wyoming states in its SOPR that “Reference area” is now defined as a general umbrella term for all types of areas used for measuring revegetation success. These include the current revised definitions for “comparison area,” “control area,” “extended reference area,” and a newly-proposed definition for “limited reference area,” all of which are defined as subcategories under the reference area category. Wyoming explains that this allows “reference area” to serve as a generic term referring to all categories, which will facilitate clarity in rules and communication with the public and operators. Wyoming also notes that it combined the current revised and newly-proposed rules for “reference areas” from Appendix A, and Chapters 1, 2, and 4 and placed them in Chapter 1 under the definitions noted below to make it easier to compare them.

(i) “Comparison area” means a type of “Reference area” that is established after a vegetation community has been affected. A qualitative determination shall be used to evaluate if the proposed “Comparison area” adequately represents the affected vegetation community. A “Comparison area” may be used when other types of “Reference areas” are not available for measuring revegetation success or when other types of “Reference areas” will not be representative of revegetation success. “Comparison areas” shall be approved by the Administrator prior to their establishment. When evaluating Chapter 4 revegetation success performance standards, data from the “Comparison areas” are directly compared by statistical procedures to data from the reclaimed area.

(ii) “Control area” means a type of “Reference area” that is established during baseline sampling. Quantitative comparisons of vegetation cover, total ground cover, and production between the proposed “Control area” and the vegetation community to be affected are used to demonstrate the representative nature of the “Control area”. When evaluating revegetation success, baseline data are climatically adjusted using equations. These adjusted data are directly compared by statistical procedures to vegetation data from the reclaimed area. The Administrator may determine to make a direct comparison without the climatic adjustment between the “Control area” and the reclaimed area. Each “Control area” shall be at least two acres.

Wyoming explains in its SOPR that “Control areas” have been deemed not the best technology because of their small size and will not be allowed for new permitted lands. However, mines that have “Control areas” currently approved will be allowed to continue to use them on currently permitted lands but will not be allowed to use “Control

areas” on lands amended into the permit after the effective date of these rules as per new rule Chapter 4, Sec. 2(d)(ii)(A)(I)(1). Wyoming also clarifies that the two acre size remains because these areas were selected under the current rules which require two acres.

(iii) “Extended reference area” means a type of a “Reference area” that includes a major portion of one or more premine vegetation communities within the permit area. During baseline sampling, the “Extended reference area” includes areas proposed to be affected and areas that will be unaffected. Postmine, the unaffected areas constitute the “Reference area” for revegetation success evaluation. “Extended reference areas” should be established during baseline sampling, but in some circumstances, may be established after mining begins. The representative nature of the vegetation community within the “Extended reference area” is demonstrated by vegetation community mapping procedures, sampling data, soil data, physiography and land use history. To evaluate revegetation success, data from the “Extended reference area” are directly compared by the statistical procedures to data from the reclaimed area. Each “Extended reference area” will be as large as possible.

(iv) “Limited reference area” is one type of a “Reference area” that is established during baseline sampling to represent one vegetation community to be reestablished. The representative nature of the “Limited reference area” is determined by quantitative comparisons of vegetation cover, and production between the “Limited reference area” and proposed affected areas at the 90 percent confidence level. To evaluate revegetation success, data from the “Limited reference area” are directly compared by statistical procedures to data from the reclaimed area. Each “Limited reference area” shall be at least five acres.

In order to alleviate the potential for confusion OSMRE notes that, with respect to vegetation, the term “established” generally infers the seeding, germination, and successful independent propagation of vegetation. Thus, we interpret the term “established” in Wyoming’s proposed rules to mean those areas “designated,” “delineated,” and/or “identified” as meeting a “Reference area” standard.

Additionally, we interpret the five acre requirement for “Limited Reference Areas” to be a minimum requirement even if a valid statistical analysis indicates the validity of a smaller sized area; a minimum five acre requirement will help buffer the reference area from such things as edge and other effects.

The Federal definition of “Reference area” is found at 30 CFR 701.5 and reads as follows:

*Reference area* means a land unit maintained under appropriate management for the purpose of measuring vegetation

ground cover, productivity, and plant species diversity that are produced naturally or by crop production methods approved by the Regulatory authority. Reference areas must be representative of geology, soil, slope, and vegetation in the permit area.

Wyoming’s proposed definition for “Reference area” adds specificity beyond that contained in the Federal regulations. We also find that while there are no direct Federal counterparts to the proposed subcategory definitions for “comparison area,” “control area,” “extended reference area,” and “limited reference area,” they implement the Federal requirements at 30 CFR 816/817.116 and are no less effective than the Federal regulations. Accordingly, we are approving both Wyoming’s revised and proposed definitions with the understanding that they be interpreted as explained above.

#### 8. Chapter 2, Section 1(c); U.S. Geological Survey Topographic Map Scale Requirement

Wyoming proposes to delete the requirement that maps the equivalent of a U.S. Geological Survey topographic map submitted with a permit application be no smaller than a scale of 1:24,000. In its SOPR, Wyoming states that “the reference to a particular scale has been removed from rule and will be placed in a guideline. This will allow maximum flexibility to allow the scale be appropriate for the size of the mine or item depicted. The scale will still have to be acceptable to the Administrator to ensure its usefulness to the division.”

By letter dated May 21, 2010, OSMRE responded that Section 507(b)(13)(B) of SMCRA requires, in pertinent part, that: permit applications shall be submitted in a manner satisfactory to the regulatory authority and shall contain, among other things, accurate maps to an appropriate scale clearly showing \* \* \* all types of information set forth on topographic maps of the United States Geological Survey of a scale of 1:24,000 or 1:125,000 or larger, \* \* \*.

In addition, we stated that the counterpart Federal regulations at 30 CFR 777.14(a) concerning the general requirements for maps and plans require, in pertinent part, that:

Maps submitted with applications shall be presented in a consolidated format, to the extent possible, and shall include all the types of information that are set forth on topographic maps of the U.S. Geological Survey of the 1:24,000 scale series. \* \* \* Maps of the adjacent area shall clearly show the lands and waters within those areas and be in a scale determined by the regulatory authority, but in no event smaller than 1:24,000.

30 CFR Part 730 sets forth criteria and procedures for amending approved

programs to be no less stringent than SMCRA and no less effective than the Federal regulations, and does not contemplate the use of guidelines in lieu of counterpart State laws and regulations. Thus, we determined that Wyoming’s proposal to remove the scale requirement from its currently approved rules and place it in a guideline renders its program less stringent than SMCRA and less effective than the Federal regulations, and concluded that Wyoming must retain the 1:24,000 scale requirement at Chapter 2, Section 1(c) for maps that are submitted with permit applications.

Wyoming replied in a letter dated June 21, 2010, that it will submit a rule package to the Advisory Board that will put the 1:24,000 scale requirement back into its rules at Chapter 2, Section 1(c).

Based on the discussion above, we are not approving Wyoming’s proposed rule change deleting the 1:24,000 scale requirement at Chapter 2, Section 1(c) for maps that are submitted with permit applications. We also acknowledge Wyoming’s commitment to reinstate the proposed deletion in a future rulemaking effort and are deferring our decision on it until such time as the rule is formally submitted to OSMRE for review.

#### 9. Chapter 2, Section 3(a)–(m); Vegetation Baseline Requirements

Wyoming proposes to add a new section to its rules at Chapter 2, Section 3 entitled “Vegetation Baseline Requirements.”

In its SOPR, Wyoming states that Section 3, Vegetation Baseline Requirements, is almost entirely new language for Chapter 2. Wyoming explains that most of these rules are relocated from Appendix A, and include rules on mapping, sampling, species inventory, and vegetation community descriptions. Wyoming continues that the concepts contained in the current Appendix A and elsewhere in Chapters 2 and 4 were combined and presented in a single location to provide clarity and consistency to maps provided to the LQD for review. Wyoming maintains that the new section includes rules that assimilate and clarify the requirements applicable to the mapping of vegetation communities, and states that terminology used by the Natural Resources Conservation Service may be used to describe the vegetation communities. The rules contain a requirement that locations of certain weeds be shown on the map, and Wyoming states that this has been the normal practice but it is now clarified in the rules. Wyoming also proposes to reduce baseline measurement



requirements for plant communities that have already been thoroughly described in previous baseline studies and proposes to add new rules on shrub standard option selection and sample sizes. Additionally, the requirement for production measurements was eliminated for baseline sampling unless the operator is developing a technical standard or the vegetation community has not been described adequately in the past. Wyoming explains that a semi-quantitative method is proposed for areas where the LQD has numerous data sets that describe in detail the pre-mine vegetation communities.

The Federal regulations at 30 CFR 779.19 concerning the general requirements for collecting information on plant communities to document pre-mine baseline vegetation conditions require that:

(a) The permit application shall, if required by the regulatory authority, contain a map that delineates existing vegetative types and a description of the plant communities within the proposed permit area and within any proposed reference area. This description shall include information adequate to predict the potential for reestablishing vegetation.

(b) When a map or aerial photograph is required, sufficient adjacent areas shall be included to allow evaluation of vegetation as important habitat for fish and wildlife for those species of fish and wildlife identified under 30 CFR 780.16.

Furthermore, the Federal regulations at 30 CFR 816/817.116 require the use of statistically valid sampling techniques to ensure that all revegetation meet or exceed success standards—including criteria representative of unmined lands in the area being reclaimed to evaluate the appropriate vegetation parameters of ground cover, production, or stocking—for purposes of achieving bond release, regardless of whether technical standards or comparisons to reference areas are used. All approved State programs must maintain counterparts to these key nationwide minimum protections.

Therefore, any methods used to designate a reference area for comparison to reclaimed areas and demonstrate revegetation success at the time of bond release should also use valid methods of comparison during such designation and during the success standard demonstration.

In its SOPR, Wyoming acknowledges this requirement, in part, by stating that “With the exception of shrubs which have special rules \* \* \*, the baseline data collected by quantitative methods are not used to develop bond release standards unless a technical standard is being developed because reference areas

are used instead when a technical standard is not. The development of technical standards requires the use of data that are collected by specified methods that ensures the data is representative of the vegetation community. Quantitative methods are also appropriate for those mining areas that have vegetation communities that have not been fully described by previous baseline studies.”

Wyoming’s proposed amendment relocates and combines existing previously approved rules from former Appendix A and Chapters 2 and 4 in a single location to maintain organizational continuity and provide clarity and consistency regarding mapping, sampling, species inventory, and vegetation community descriptions. Moreover, Wyoming’s newly-proposed rules on shrub standard option selection and sample sizes provide specificity beyond that contained in the Federal regulations. We find that Wyoming’s explanation justifying the addition of these new provisions in Chapter 2, Section 3 is reasonable, and the lack of exact Federal counterpart requirements do not render them less effective than the Federal regulations. Accordingly, we are approving them.

10. Chapter 2, Section 4(a)(xvii); Public Availability of Permit Applications and Confidentiality

In an October 29, 1992, **Federal Register** (57 FR 48987) notice, we required Wyoming to further amend its regulations regarding procedures, including notice and opportunity to be heard for persons seeking disclosure, to ensure confidentiality of qualified information, which shall be clearly identified by the by the applicant and submitted separately from the remainder of the application as required by the Federal regulations at 30 CFR 773.13(d)(3). The Federal rules concerning Public Participation in Permit Processing were subsequently amended and redesignated as 30 CFR 773.6 in a **Federal Register** notice dated December 19, 2000 (65 FR 79663). Consequently, the rules addressing confidentiality are now found at 30 CFR 773.6(d)(3).

In response to the required program amendment at 30 CFR 950.16(u), Wyoming proposes to revise its rules at Chapter 2, Section 4(a)(xvii) regarding procedures for protecting the confidentiality of qualified archeological information to read as follows:

(xvii) Boundaries and descriptions of all cultural, historic and archaeological resources listed on, or eligible for listing on, the National Register of Historic Places. In

compliance with the Archaeological Resources Protection Act of 1979 (P.L. 96–95), this information shall not be placed on display at the county clerk’s office (as required by W.S. § 35–11–406(d)) where such resources occur on lands owned by the United States. This information shall be clearly labeled as “Confidential” and submitted separately from the remainder of the application materials. Requests to disclose confidential information shall be administered under the Department of Environmental Quality, Rules of Practice and Procedure, the Wyoming Public Records Act (W.S. §§ 16–4–2001 thru 16–4–2005 (2007)) and the Wyoming Environmental Quality Act (2007).

In its SOPR, Wyoming explains that the proposed rule language clarifies that information related to the nature and location of archeological resources on public lands shall be submitted separately from other application materials, and outlines the procedures which govern requests to disclose information that has been submitted as confidential. Wyoming further notes that the proposed language references the Department of Environmental Quality Rules of Practice and Procedure, the Wyoming Public Records Act, and the Environmental Quality Act to more clearly identify the applicable standards regarding the administration of requests for confidential information.

Although Wyoming’s rationale for making the rule change is sound, the proposed language referencing its Public Records Act contains an incorrect citation wherein W.S. §§ 16–4–2001 thru 16–4–2005 (2007) is referenced rather than W.S. §§ 16–4–201 thru 16–4–205 (2007). For this reason, we are not approving Wyoming’s proposed rule revision rule regarding administrative procedures to ensure confidentiality of qualified archaeological information and the required program amendment at 30 CFR 950.16(u) remains outstanding.

11. Chapter 2, Section 5(a)(viii)(A); Fish and Wildlife Enhancement Measures

In a July 8, 1992, **Federal Register** (57 FR 30124), we placed a required program amendment on Wyoming at 30 CFR 950.16(p) that discussed two distinct items. The first item required Wyoming to revise its rules at former Chapter 2, Section 3(b)(iv)(A) or otherwise amend its program to specify that, when fish and wildlife enhancement measures are not included in a proposed permit application, the applicant must provide a statement explaining why such measures are not practicable. The second item required that the rule be revised to clarify that fish and wildlife enhancement measures are not limited to revegetation efforts.



In response to questions from OSMRE regarding the underlying rationale for not revising or amending its rules in response to 30 CFR 950.16(p), Wyoming explains that it informally submitted rule language [in a January 28, 1993, letter] that was intended to resolve the required program amendment. By letter dated April 12, 1993, OSMRE found that the proposed language was less effective than the Federal counterpart regulations, and it appears that Wyoming never attempted to revise the language and promulgate it anytime after the 1993 comment letter. Consequently, Wyoming states that it did not draft any specific language to address the required amendment in this rule package.

Rather, Wyoming provides additional clarification and suggests that the current requirements of Chapter 2, Section 5(a)(viii)(B) (former Chapter 2, Section 3(b)(iv)(B)) and Chapter 4, Section 2(r) (former Chapter 4, Section 3(o)), respectively, address the required program amendment. Wyoming continues that OSMRE's April 12, 1993, comment letter directed it to clarify that wildlife enhancement was not limited to revegetation efforts. Wyoming also states that the deficient language is now found in Chapter 2, Section 5(a)(viii)(A) and it has not changed. However, Wyoming submits that the language in subsection (B) makes clear that enhancement efforts are not limited to revegetation because this section goes on to clarify that the applicant must show how certain habitat components and features will be "protect[ed] or enhance[d]." This would include important habitats such as wetlands, riparian areas, rimrocks, and other special habitat features. Wyoming also notes that the wildlife performance standards contained in Chapter 4, Section 2(r) speaks to things other than vegetation (Administrative Record Document ID No. OSM-2009-0012-0009).

We replied in a letter dated May 21, 2010, that OSMRE's April 12, 1993, comment letter in response to Wyoming's informal rule proposal stated that "the existing rules at Chapter II, Section 3(b)(iv)(A) appear to limit enhancement only to revegetation efforts in Chapter IV, Section 3(o)." We also noted that this "is confusing since the rules at Chapter IV, Section 3(o) refer to many enhancement features in addition to revegetation enhancement which is specifically located at Chapter IV, Section 3(o) (D). Thus, it appears that removal of the existing language "through successful revegetation" \* \* \* would allow enhancement features to include all the items in Chapter IV,

Section 3(o)." Notwithstanding Wyoming's reference to Chapter 2, Section 5(a)(viii)(B) our position remains unchanged from the April 12, 1993, comment letter. The July 8, 1992, **Federal Register** (57 FR 30124) specifically identified former Chapter 2, Section 3(b)(iv)(A) as being the deficient provision in Wyoming's rules, and Wyoming states that the problematic language has not changed. For these reasons, we continue to interpret current Chapter 2, Section 5(a)(viii)(A) as limiting the scope of enhancement measures to revegetation efforts and concluded that Wyoming's explanation does not satisfy the program deficiency specified in 30 CFR 950.16(p).

Next, Wyoming submits that while it did not specifically add a provision requiring a statement from the applicant when that person did not include enhancement efforts in a proposed permit application, Chapter 2, Section 5(a)(viii)(B) requires a statement of how the applicant will "utilize monitoring methods as specified in Appendix B \* \* \* and impact control measures and management techniques to protect and enhance" wildlife habitats and features. Wyoming also asserts that Chapter 4, Section 2(r) requires the operator to the extent possible using the best technology currently available minimize disturbance and impacts and achieve enhancement of such resources when practicable. Accordingly, Wyoming believes that the combination of these two sections is no less effective than the Federal regulations because the rules are written as affirmative duties on the part of the applicant and are required as part of the application. Specifically, Wyoming states that when an application is reviewed, it would become apparent that the applicant did not include enhancement measures and then the application would not be deemed complete which would require follow up information by the applicant. Therefore, the applicant would either include additional enhancement features or respond that the enhancement features would not be practicable.

In our May 21, 2010, letter we responded that the Federal regulations at 30 CFR 780.16 and 784.21(b)(3)(ii) require, in pertinent part:

\* \* \* Where the plan does not include enhancement measures, a statement shall be given explaining why enhancement is not practicable.

We also maintained that in its January 28, 1993, informal rule submittal in response to 30 CFR 950.16(p), Wyoming proposed to amend its rules at former Chapter II, Section 3(b)(iv)(A) by adding the following language:

When such enhancement measures are not included in a plan, the applicant shall affirmatively demonstrate why such measures are not practicable.

OSMRE found this language to be acceptable, but stated that "Discussion of such enhancement plans would appear to be relevant to LQD Rules at Chapter II, Section 3(b)(iv) which discusses 'A plan for minimizing adverse impacts to fish, wildlife, and related environmental values'." We further explained that "In order to be no less effective than the Federal requirements and to provide for clarity of the Wyoming program the proposed language at LQD Rules Chapter II, Section 3(b)(iv)(A) should be relocated at Chapter II, Section 3(b)(iv) which discusses 'A plan' or Wyoming should clarify how the existing rule construction is to be interpreted." This statement now applies to current Chapter 2, Section 5(a)(viii).

As Wyoming states above, it never attempted to revise the language and promulgate it anytime after the 1993 comment letter and did not draft any specific language to address the required amendment. Accordingly, the basis for OSMRE's April 12, 1993, comment letter still applies, particularly since Wyoming previously proposed language that appears to have been acceptable to OSMRE but was never resubmitted. For these reasons we determined that the additional information offered by Wyoming and reliance on its application review process falls short of directly imposing on an applicant the requisite burden to provide a statement explaining why enhancement measures are not practicable when they are not included in a permit application.

Lastly, Wyoming notes that Chapter 2, Section 5(a)(viii)(B)(II) includes an improper reference. Specifically, that section refers to a consultation process found at Section 2(a)(vi)(G). However, the reference should have been revised to reflect the new chapter reorganization and Wyoming states that it will be corrected during the next rulemaking.

Wyoming replied in a letter dated June 21, 2010, that it will present rule language to its Advisory Board that will address both the required program amendment as well as the incorrect Chapter citation in subsection (II).

Based on the discussion above, we do not accept Wyoming's explanation for not revising or amending its rules in response to 30 CFR 950.16(p). We also acknowledge Wyoming's commitment to address both the required program amendment and the incorrect cross-reference in a future rulemaking effort, and are deferring our decision on them

until such time as the changes are formally submitted to OSMRE for review.

12. Chapter 2, Section 2(b)(iii)(G); Weed Control Plan

Wyoming proposes to add a new rule at Chapter 2, Section 6(b)(iii)(G) requiring that reclamation plans include a weed control plan for State of Wyoming Designated Noxious and Designated Prohibited Weeds, and on Federal surface, any additional weeds listed by the Federal land managing agency. In its SOPR, Wyoming explains that Subsection G has been added to clarify that only those weeds designated by the State as noxious and prohibited are required to have a control plan in addition to those by the Federal land managing agency if Federally owned surface land is involved.

The Federal regulations at 30 CFR 816/817.111(b)(5) require that the reestablished plant species shall meet the requirements of applicable State and Federal seed, poisonous and noxious plant, and introduced species laws or regulations.

The Federal definition of noxious plants at 30 CFR 701.5 means species that have been included on official State lists of noxious plants for the State in which the surface coal mining and reclamation operation occurs.

While there is no direct Federal counterpart to the proposed rule, it implements the Federal requirement at 30 CFR 816/817.111(b)(5) and, as proposed, is no less effective than the Federal regulations. Accordingly, we approve it.

13. Chapter 2, Section 6(b)(iii)(D); Reclamation Plan Tree Replacement Requirements

Wyoming proposes to add a new rule at Chapter 2, Section 6(b)(iii)(D) requiring that reclamation plans include the tree species, the number per species, and the location of tree plantings.

Wyoming's proposed rule contains language that was previously approved by OSMRE in an August 28, 2006, **Federal Register** (71 FR 50848, 50850) for Wyoming's rules at Chapter 4, Section 2(d)(x)(F). In that approval, we found that Wyoming's proposed wording was consistent with the Federal rules at 30 CFR 816.116(b)(3) which establish criteria for revegetation standards for tree and shrub establishment. Similar to that decision, we are approving Wyoming's proposed rule language regarding reclamation plan tree replacement requirements at Chapter 2, Section 6(b)(iii)(D). While there is no direct Federal counterpart to the proposed rule, we find that it

implements the Federal requirements at 30 CFR 780.18(b)(5) and 816/817.116(b)(3), respectively.

14. Chapter 4, Section 2(c)(xii)(D)(II); Siltation Structures and Impoundments

Wyoming proposes to revise its rules at Chapter 4, Section 2(c)(xii)(D)(II) to be consistent with its proposed rule language in Chapter 4, Section 2(g)(iv)–(v) and correct a deficiency in response to a February 21, 1990, letter issued by OSMRE. Subsection C–2 of that letter states “[t]hese Federal rules have been revised to require that structures meeting the criteria of 30 CFR 77.216(a) and either constructed of coal mine waste or intended to impound coal mine waste have sufficient spillway and/or storage capacity to safely pass or control the runoff from the probable maximum precipitation of a 6-hour or greater precipitation event. Since the Wyoming rule currently specifies the 100-year, 6-hour event, the State will need to revise its rule to incorporate the larger event.”

Wyoming informally responded to the February 21, 1990, letter on May 14, 1990, and stated that it would amend its rules to require that permanent impoundments meeting the criteria of 30 CFR 77.216(a), which are constructed of coal mine waste or are intended to impound coal mine waste, have sufficient spillway and/or storage capacity to safely pass or control runoff from the probable maximum precipitation of a 6-hour or greater event. OSMRE replied on October 3, 1990, that, to be no less effective than the Federal regulations at 30 CFR 816/817.84(b)(2), Wyoming must revise its rules to require that all coal mine waste impounding structures, which are temporary structures, must have sufficient spillway and/or storage to safely pass or control runoff from the probable maximum precipitation of a 6-hour or greater storm. Wyoming has satisfied this deficiency at Chapter 4, Section 2(g)(v)(B) in its proposed rule package. (See Section III.C. above).

Revised Chapter 4, Section 2(c)(xii)(D)(II), pertaining to dams and embankments constructed to impound coal mine waste, reads as follows:

If the impounding structure meets the criteria of 30 CFR § 77.216(a), the combination of principal and emergency spillways shall be able to safely pass or control runoff from the probable maximum precipitation of a 6-hour precipitation event or a storm duration having a greater peak flow, as may be required by the Administrator.

Following our initial review of Wyoming's proposed rule change, OSMRE responded by letter dated May 21, 2010, that the proposed language is

vague and the phrase “control runoff” is open to interpretation without the specificity of ‘storage capacity’ to contain or control the design event runoff. Consequently, in order to comply with Item C–2 of the February 21, 1990, letter and maintain consistency with its proposed rule at Chapter 4, Section 2(g)(v)(B), OSMRE required Wyoming to revise its rule language at Section 2(c)(xii)(D)(II) to require that all temporary coal mine waste impounding structures shall have “sufficient spillway and/or storage capacity to safely pass or control runoff” from a 6-hour event.

Wyoming responded in a letter dated June 21, 2010, by clarifying that the rule in question at Chapter 4, Section 2(c)(xii)(D)(II) would always operate together with Chapter 4, Section 2(g)(v)(B), and that subsection 2(c)(xii)(D)(II) is only applicable to the dam or embankment. Wyoming further explained that subsection 2(c)(xii)(D)(II) discusses design requirements for the principal and emergency spillways and does not discuss the storage capacity because the regulated party would have to comply with the requirements applicable to temporary impoundments in subsection 2(g)(v)(B).

We agree that the result of Chapter 4, Section 2(c)(xii)(D)(II), when functioning in concert with Chapter 4, Section 2(g)(v)(B), ensures that the coal mine waste impounding structure will have a sufficient spillway capacity to safely pass, adequate storage to safely control, or a combination of storage capacity and spillway capacity to safely control the probable maximum precipitation of a 6-hour precipitation event or greater as specified by the regulatory authority. Accordingly, we find that the combination of Wyoming's rules at Chapter 4, Section 2(c)(xii)(D)(II) and Chapter 4, Section 2(g)(v)(B) are no less effective than the corresponding Federal regulations at 30 CFR 816/817.84(b)(2) and we are approving them.

15. Chapter 4, Section 2(d)(i)(M) and (ii); Normal Husbandry Practices and Revegetation Success Standards

Wyoming proposes to substantially reorganize the structure of Chapter 4 Section 2(d) into two new subsections with subsection (i) containing general revegetation performance standards and most of the current Section 2(d) rules, and adding rules dealing with normal husbandry practices. Subsection (ii) contains Revegetation Success Standards listed by post-mine land use categories.

On August 30, 2006, OSMRE revised the Federal regulations at 30 CFR

816.116(a)(1) by eliminating the requirement that revegetation success standards and statistically valid sampling techniques be included in approved State regulatory programs (71 FR 51684, 51688). The revised current regulation continues to require that standards for success and sampling techniques for measuring success must be selected by the regulatory authority, and shall be described in writing and made available to the public in order to ensure that all interested parties can readily find out all the options available in their jurisdiction for evaluating revegetation success. The removal of the approved program requirement does not leave a regulatory void as our regulations at 816.116(a)(2) and (b), which remain in effect, already specify minimum criteria for success standards and sampling techniques, and those criteria will ensure the achievement of SMCRA's goal of establishing a diverse, permanent, and effective vegetative cover. Section 816.116(a)(2) provides that the sampling techniques must use a 90-percent confidence interval (also known as a one-sided test with a 0.10 alpha error), and that the ground cover, production or stocking must meet 90 percent of the success standard. Section 816.116(b) provides additional guidelines for particular types of ecosystems and post-mining land uses. These nationwide minimum requirements for revegetation success and sampling techniques will continue to apply to the State regulatory authorities and indirectly to the permits that they issue.

In accordance with the requirements at 30 CFR 816.116(a)(1), Wyoming both describes in writing and makes available to the public the post-mine land use revegetation success standards it has selected by virtue of its proposed rule changes. Therefore, consistent with the rationale explained in OSMRE's August 30, 2006, rule change, we are making no decision on Wyoming's revegetation success rules at Chapter 4, Section 2(d)(ii) as they are not required to be included in the approved regulatory program.

However, OSMRE approval is still required for the list of Normal Husbandry Practices Wyoming proposes in its Coal Rules and Regulations at Chapter 4, Section 2 (d) (i) (M) that mine operators may employ without restarting the responsibility period prior to application for Phase III bond release. The September 7, 1988, **Federal Register** notice (53 FR 34641) states that OSMRE "would consider, on a practice-by-practice basis, the administrative record supporting each practice proposed by a regulatory authority as

normal husbandry practice" and that the regulatory authority "would be expected to demonstrate (1) that the practice is the usual or expected state, form, amount, or degree of management performed habitually or customarily to prevent exploitation, destruction, or neglect of the resource and maintain a prescribed level of use or productivity of similar unmined lands and (2) that the proposed practice is not an augmentative practice prohibited by section 515(b)(20) of [SMCRA]."

The Federal regulations at 30 CFR 816.116(c)(1) for surface mining operations and 817.116(c)(1) for underground mining operations require that the period of extended responsibility for successful revegetation shall begin after the last year of augmented seeding, fertilizing, irrigation, or other work, excluding husbandry practices that are approved by the regulatory authority in accordance with 30 CFR 816(c)(4) and 817.116(c)(4).

The Federal regulations at 30 CFR 816.116(c)(4) and 817.116(c)(4) require that a regulatory authority may approve selective husbandry practices, excluding augmented seeding, fertilization, or irrigation, provided it obtains prior approval from OSMRE's Director that the practices are normal husbandry practices, without extending the period of responsibility for revegetation success and bond liability, if such practices can be expected to continue as part of the postmining land use or if discontinuance of the practices after the liability period expires will not reduce the probability of permanent vegetation success. Approved practices shall be normal husbandry practices within the region for unmined land having land uses similar to the approved postmining land use of the disturbed area, including such practices as disease, pest, and vermin control; and, any pruning, reseeding, and transplanting specifically necessitated by such actions.

In response to a deficiency identified by OSMRE in a February 21, 1990, letter, Wyoming is proposing to add eleven categories of Normal Husbandry Practices that will not be considered augmented practices and will not result in the restart of the responsibility period. Each category references the applicable Conservation Practice Standard currently approved by the Wyoming Natural Resources Conservation Service that will be included as approved Normal Husbandry Practices for the category.

During our initial review of the amendment proposal, OSMRE identified incorrect performance standard citation references in Wyoming's proposed

normal husbandry practice for supplemental planting of tree and shrub stock at Chapter 4, Section 2(d)(i)(M)(II). We notified Wyoming of our concerns by letter dated May 21, 2010, (Administrative Record No. OSM-2009-0012-0006) and delayed final rulemaking to afford Wyoming the opportunity to submit new material to address the deficiency. Wyoming replied in a letter dated June 21, 2010, that it will present corrected Chapter citations for subsection (II) to its Advisory Board as part of a future rule package (Administrative Record No. OSM-2009-0012-0007). Consequently, we do not approve Wyoming's proposed normal husbandry practice for supplemental planting of tree and shrub stock at Chapter 4, Section 2(d)(i)(M)(II). We also acknowledge Wyoming's commitment to address the incorrect performance standard citation references in a future rulemaking effort, and are deferring our decision on them until such time as the changes are formally submitted to OSMRE for review.

To remain clear and concise and to eliminate repetition, we have grouped the remaining ten categories of proposed normal husbandry practices as follows: Interseeding (III.E.15.A.); Grazing (III.E.15.B.); Shelterbelt (III.E.15.C.); Cropland and Pastureland Fertilization (III.E.15.D.); Mechanical (III.E.15.E.); Cropland Tillage and Replanting (III.E.15.F.); Weed and Pest Control; Controlled Burning; Subsidence, Settling, and Erosion; and Removal of Pipelines, Small Culverts, and Sediment Control Measures (III.E.15.G.).

A. Interseeding. Wyoming proposes to add the following language regarding Interseeding at Chapter 4, Section 2(d)(i)(M)(I):

The operator may interseed species contained in the approved seed mix over established revegetation, but not within 6 years before the end of the bond responsibility period. The operator may add mulch to an interseeded area to facilitate plant establishment. Augmented seeding (reseeding) is not considered normal husbandry practice.

Wyoming proposes an appropriate time frame limiting the application of interseeding as a normal husbandry practice without restarting the bond liability period. Exceeding this limit would result in extending the period of responsibility. OSMRE has determined that the proposed normal husbandry practices for interseeding meet the criteria to be approved as normal husbandry practices under 30 CFR 816/817.116(c)(4). Accordingly, we approve these proposed changes to Wyoming's Coal Rules and Regulations.

B. Grazing. Wyoming proposes to add the following language regarding Grazing at Chapter 4, Section 2(d)(i)(M)(III):

Grazing of reclamation is a normal husbandry practice.

OSMRE has determined that the proposed normal husbandry practices for grazing meet the criteria to be approved as normal husbandry practices under 30 CFR 816/817.116(c)(4). Accordingly, we approve these proposed changes to Wyoming's Coal Rules and Regulations.

C. Shelterbelt. Wyoming proposes to add the following language regarding Shelterbelt at Chapter 4, Section 2(d)(i)(M)(IV):

For trees and shrubs planted in an approved shelterbelt, the practices of fertilization, irrigation and rototilling may be used as normal husbandry/nursery practices in accordance with standard practices.

OSMRE has determined that the proposed normal husbandry practices for shelterbelt meet the criteria to be approved as normal husbandry practices under 30 CFR 816/817.116(c)(4). Accordingly, we approve these proposed changes to Wyoming's Coal Rules and Regulations.

D. Cropland and Pastureland Fertilization. Wyoming proposes to add the following language regarding Cropland and Pastureland Fertilization at Chapter 4, Section 2(d)(i)(M)(V):

Beyond establishment, fertilization is a normal husbandry practice for cropland and pastureland throughout the bond responsibility period. Irrigation is a normal husbandry practice beyond establishment for cropland and pastureland, provided the approved postmine land use is irrigated cropland or irrigated pastureland.

OSMRE has determined that the proposed normal husbandry practices for cropland and pastureland fertilization meet the criteria to be approved as normal husbandry practices under 30 CFR 816/817.116(c)(4). Accordingly, we approve these proposed changes to Wyoming's Coal Rules and Regulations.

E. Mechanical. Wyoming proposes to add the following language regarding Mechanical at Chapter 4, Section 2(d)(i)(M)(VI):

Mechanical husbandry practices such as selective cutting, mowing, combining, aerating, land imprinting, raking, or harrowing to stimulate permanent vegetation establishment, increase decomposition of organic matter, control weeds, harvest hay, and/or reduce standing dead vegetation and litter are considered normal husbandry practices. Other mechanical practices may be used if approved by the Administrator prior to their application.

OSMRE has determined that the proposed normal husbandry practices for mechanical meet the criteria to be approved as normal husbandry practices under 30 CFR 816/817.116(c)(4).

Accordingly, we approve these proposed changes to Wyoming's Coal Rules and Regulations.

F. Cropland Tillage and Replanting. Wyoming proposes to add the following language regarding Cropland Tillage and Replanting at Chapter 4, Section 2(d)(i)(M)(VII):

Tillage and replanting are considered normal husbandry practices for croplands.

OSMRE has determined that the proposed normal husbandry practices for cropland tillage and replanting meet the criteria to be approved as normal husbandry practices under 30 CFR 816/817.116(c)(4). Accordingly, we approve these proposed changes to Wyoming's Coal Rules and Regulations.

G. Weed and Pest Control; Controlled Burning; Subsidence, Settling, and Erosion; and Removal of Pipelines, Small Culverts, and Sediment Control Measures. Wyoming proposes to add the following language regarding Weed and Pest Control at Chapter 4, Section 2(d)(i)(M)(VIII):

Acceptable weed and pest control techniques representing normal husbandry practices include manual or mechanical removal, controlled burning, biological controls, and herbicide/pesticide applications. The operator may reseed treated areas of less than five acres per year as a component of this husbandry practice without restarting the bond responsibility period.

Wyoming proposes to add the following language regarding Controlled Burning at Chapter 4, Section 2(d)(i)(M)(IX):

Controlled burning may be used to reduce the buildup of litter, weed seeds, and to control undesirable species. The operator may interseed any portion of the treated area, or reseed up to five acres, as a component of this husbandry practice without restarting the bond responsibility period.

Wyoming proposes to add the following language regarding subsidence, settling, and erosion at Chapter 4, Section 2(d)(i)(M)(X):

Subsidence, settling, and erosional features, such as rills, gullies, or headcuts less than five acres in size may be repaired as a normal husbandry practice. Repairs considered to be normal husbandry practices include hand work, mechanical manipulation, installation of erosion-control matting, silt fences, straw bales, or other similar work. The operator may reseed treated areas of less than five acres as a component of this husbandry practice without restarting the bond responsibility period.

Wyoming proposes to add the following language regarding removal of pipelines, small culverts, and sediment control measures at Chapter 4, Section 2(d)(i)(M)(XI):

Removal of pipelines, small culverts, and small sediment control measures, such as traps, riprap, rock or straw bale check dams, small sediment ponds, and silt fences are considered normal husbandry practices. The operator may reseed treated areas of less than five acres as a component of this husbandry practice without restarting the bond responsibility period, provided the structures are reclaimed at least two years prior to the end of the bond responsibility period.

As proposed, the Wyoming normal husbandry practice categories for weed and pest control; controlled burning; subsidence, settling, and erosion; and removal of pipelines, small culverts, and sediment control measures are normal husbandry practices within the region for unmined lands having land uses similar to the approved postmining land use of the disturbed area. In addition, these normal husbandry practices contain a provision that allows operators to reseed treated areas of less than five acres as a component of the husbandry practice without restarting the bond responsibility period. While reseeding is normally associated with "augmented seeding," which is not considered normal husbandry practice, reseeding in these particular instances is specifically necessitated by the management practices that are being used to achieve revegetation success in accordance with 30 CFR 816.116/817.116(c)(4). We also find that the proposed five acre limit is both reasonable and realistic considering similar areal limitations have been previously approved by OSM in Colorado, Montana, and New Mexico, and the size and extent of disturbance on surface mining operations in Wyoming often involves hundreds or even thousands of acres. Consequently, OSMRE finds that Wyoming's proposed normal husbandry practices identified above are consistent with and no less effective than the Federal regulations at 30 CFR 816.116/817.116(c)(1) and (4) in meeting the requirements of SMCRA and we approve them.

16. Chapter 5, Section 2(b)(iii); Prime Farmland

Wyoming proposes to revise its rules at Chapter 5, Section 2(b)(iii) to address a deficiency that was identified in a February 21, 1990, letter issued by OSMRE. Subsection B-1 of that letter stated that "Wyoming's regulations include an exemption from prime farmland performance standards for small acreage based upon an

unidentified economic determination. The Federal rules contain no such exclusion, except to the extent that such acreage is so small that it would not qualify for mapping under Soil Conservation Service rules and standards. Therefore, Wyoming must eliminate this provision to be no less effective than the Federal regulations."

In a May 14, 1990, informal response to the February 21, 1990, letter, Wyoming stated that "[t]he exemption from prime farmland performance standards for small acreage will be deleted from the State rule." In a letter dated October 3, 1990, OSMRE informally replied that "[t]he proposal to remove the exemption from prime farmland performance standards appears acceptable." Wyoming now proposes to remove the problematic language and retain the sentence "Areas where permits were issued prior to August 3, 1977, are exempt from the reconstruction standards of this Section." The revised rule contains language that is consistent with and no less effective than the corresponding Federal regulations at 30 CFR 785.17(a)(1) and we approve it.

#### *F. Revisions to Wyoming's Rules With No Corresponding Federal Regulations*

Wyoming proposed numerous revisions to its regulatory program for which there are no Federal counterpart provisions. The proposed changes are intended to simplify references to applicable rules, reduce unnecessary, outdated, and duplicative language, reorganize and/or relocate already existing and approved language to a more appropriate place within the regulations, and to provide clarification and specificity to the rules pertaining to vegetation studies and revegetation standards.

1. Wyoming proposes to relocate existing previously approved definitions from former Appendix A to Chapters 1, 2, and 4. The language in the relocated Appendix A definitions has been revised to be technically current and rewritten to better fit the rules format. Wyoming's definition changes are intended to add specificity and clarity to current and proposed rules and/or sampling methods, standardize/support sampling methodology and provide consistency in data reporting, and support its proposed revisions to the performance standards in Chapters 2 and 4. Wyoming also proposes several new definitions that provide guidance beyond that contained in the Federal regulations. We find that the rationale Wyoming provided for justifying the relocation of the revised and existing definitions from Appendix A is

reasonable, and the lack of Federal counterpart language for the newly-proposed rules do not render them less effective than SMCRA and the Federal regulations. For these reasons, we are approving the following proposed rule changes.

Chapter 1, Section 2(f); new definition of "Annual;"

Chapter 1, Section 2(k); new definition of "Barren;"

Chapter 1, Section 2(l); relocation of revised definition of "Baseline vegetation inventory" from Appendix A Glossary;

Chapter 1, Section 2(m); new definition of "Belt transect;"

Chapter 1, Section 2(p); new definition of "Biennial;"

Chapter 1, Section 2(r); new definition of "Bond responsibility period;"

Chapter 1, Section 2(s); new definition of "Cactus;"

Chapter 1, Section 2(z); relocation of revised definition of "Cool season plant" from Appendix A Glossary;

Chapter 1, Section 2(aa); combined definitions of "Cover" in Chapter 1 and Appendix A Glossary;

Chapter 1, Section 2(ab); new definition of "Cover crop;"

Chapter 1, Section 2(ae); new definition of "Cryptogam;"

Chapter 1, Section 2(ak); relocation of revised definition of "Dominant" from Appendix A Glossary;

Chapter 1, Section 2(ao); new definition of "Endangered species;"

Chapter 1, Section 2(ap); new definition of "Enhancement wetland;"

Chapter 1, Section 2(az); new definition of "Forb;"

Chapter 1, Section 2(bd); new definition of "Graminoid;"

Chapter 1, Section 2(be); new definition of "Grass;"

Chapter 1, Section 2(bf); new definition of "Grass-like;"

Chapter 1, Section 2(bg); relocation of revised definition of "Grazing enclosure" from Appendix A Glossary;

Chapter 1, Section 2(bs); new definition of "Inclusion;"

Chapter 1, Section 2(bv); new definition of "Introduced;"

Chapter 1, Section 2(bz); new definition of "Lichen;"

Chapter 1, Section 2(ca); relocation of revised definition of "Life form" from Appendix A Glossary;

Chapter 1, Section 2(cb); relocation of revised definition of "Litter" from Appendix A Glossary;

Chapter 1, Section 2(cc); new definition of "Major species;"

Chapter 1, Section 2(cg); new definition of "Mitigation wetland;"

Chapter 1, Section 2(cj); new definition of "Moss;"

Chapter 1, Section 2(cl); new definition of "Native;"

Chapter 1, Section 2(co); new definition of "Perennial;"

Chapter 1, Section 2(cs); new definition of "Plant species inventory;"

Chapter 1, Section 2(cu); relocation of revised definition of "point intercept" from Appendix A Glossary;

Chapter 1, Section 2(cx); relocation of revised definition of "Primary shrub species" from Appendix A Glossary;

Chapter 1, Section 2(da); relocation of revised definition of "Production" from Appendix A Glossary;

Chapter 1, Section 2(df); relocation of revised definition of "Quadrat" from Appendix A Glossary;

Chapter 1, Section 2(dg); new definition of "Qualitative;"

Chapter 1, Section 2(dh); new definition of "Quantitative;"

Chapter 1, Section 2(di); new definition of "Random;"

Chapter 1, Section 2(dp); new definition of "Rock;"

Chapter 1, Section 2(ds); new definition of "Sample unit;"

Chapter 1, Section 2(dt); new definition of "Seasonal variety;"

Chapter 1, Section 2(dv); new definition of "Self-renewing;"

Chapter 1, Section 2(dw); new definition of "Semi-quantitative;"

Chapter 1, Section 2(dx); new definition of "Shrub;"

Chapter 1, Section 2(dy); relocation of revised definition of "Shrub mosaic" from Appendix A Glossary;

Chapter 1, Section 2(dz); relocation of revised definition of "Shrub patch" from Appendix A Glossary;

Chapter 1, Section 2(eg); new definition of "Species of Special Concern;"

Chapter 1, Section 2(el); relocation of revised definition of "Study area" from Appendix A Glossary;

Chapter 1, Section 2(eo); relocation of revised definition of "Subshrub" from Appendix A Glossary;

Chapter 1, Section 2(es); new definition of "Substantially complete;"

Chapter 1, Section 2(eu); new definition of "Succulent;"

Chapter 1, Section 2(ex); new definition of "Systematic sampling;"

Chapter 1, Section 2(ey); new definition of "Technical revegetation success standard;"

Chapter 1, Section 2(ez); new definition of "Threatened species;"

Chapter 1, Section 2(fe); relocation of revised definition of "Transect" from Appendix A Glossary;

Chapter 1, Section 2(ff); new definition of "Tree;"

Chapter 1, Section 2(fm); revised definition of "Vegetation type;"

Chapter 1, Section 2(fn); relocation of revised definition of “Warm season plant” from Appendix A Glossary;

2. Chapter 1, Section 2(n); Definition of “Best Practicable Technology”

Wyoming proposes to add a new definition for “Best Practicable technology” to its rules at Chapter 1, Section 2(n) that reads as follows:

(j) “Best Practicable technology” means a technology based on methods and processes that are both practicable and reasonably economic and is justifiable in terms of existing performance and achievability in relation to the establishment of shrubs in the required density, aerial extent and species.

Wyoming states that Best Technology Currently Available is an important component of its shrub rules that became effective in 1996. Wyoming also explains that the new language enables the State to require an operator to revise the permit to adopt shrub establishment methods that are more likely to result in successful shrub establishment if Wyoming finds the operator is not achieving the required shrub density, aerial extent, or species. Wyoming concludes by noting that the term has been changed to Best Practicable technology to reflect that not all technology may be practicable as stated in the previous definition.

Wyoming’s proposed definition clarifies that the term “Best Practicable technology” relates to shrub establishment whereas term “Best technology currently available” applies only to erosion control and fish and wildlife enhancement measures. The proposed definition also provides specificity beyond that contained in the Federal regulations. Moreover, Wyoming’s explanation justifying the addition of this provision is reasonable and the lack of a Federal counterpart requirement does not render it less effective than the Federal regulations. Therefore, we approve it.

3. Chapter 1, Section 2(as); Definition of “Establishment Practices”

Wyoming proposes to add a new definition for “Establishment practices” to its rules at Chapter 1, Section 2(as) that reads as follows:

(as) “Establishment practices” means practices used to facilitate actual establishment of targeted plants and are not intended to continue throughout the bond responsibility period. These practices are acceptable practices, but delay the start of the bond responsibility period until they are discontinued.

Wyoming states that a definition of “Establishment practices” is needed to support its proposed normal husbandry rules [Chapter 4, Section 2(d) (i) (M)],

and more clearly differentiate between those practices that delay the start of the bond responsibility period and those which do not impact the bond responsibility period. In its SOPR, Wyoming further explains that establishment practices are those that are used after planting to facilitate actual establishment of the targeted plants, and are not intended to continue throughout the duration of the bond responsibility period. These practices are acceptable, but the start of the bond responsibility period is delayed until they are discontinued. This can be contrasted to approved “husbandry” practices that are expected to be continued after the bond responsibility period and do not restart the bond clock.

Wyoming’s proposed definition provides specificity beyond that contained in the Federal regulations. Moreover, Wyoming’s explanation justifying the addition of this provision is reasonable and the lack of a Federal counterpart definition does not render it less effective than the Federal regulations. Therefore, we approve it.

4. Chapter 1, Section 2(dm); Definition of “Regulatory Categories”

Wyoming proposes to add a new definition for “Regulatory Categories” to its rules at Chapter 1, Section 2(dm) that reads as follows:

(dm) “Regulatory categories” means the following time frames that encompass the major regulatory periods from which the different performance and reclamation standards for specified lands within the permit area are established:

(i) “Category 1” means those lands which were affected to conduct and/or support mining operations and were completed or substantially completed prior to May 24, 1969 (the implementation date of the Open Cut Land Reclamation Act).

(ii) “Category 2” means those lands which were affected on or after May 24, 1969 (the implementation date of the Open Cut Land Reclamation Act) in order to conduct and/or support mining operations and were completed or substantially completed prior to or on June 30, 1973 (day prior to the effective date of the Wyoming Environmental Quality Act).

(iii) “Category 3” means those affected lands and support facilities if those lands supported operations which were not completed or substantially completed prior to July 1, 1973 (the effective date of the Wyoming Environmental Quality Act) and any affected lands or support facilities taken out of use on or after July 1, 1973 and before May 25, 1975 (the effective date of the Division’s 1975 Rules and Regulations).

(iv) “Category 4” means those affected lands if coal was removed from those lands prior to May 3, 1978 and which do not qualify for any of the previous categories. It also means those affected lands and support

facilities if they were taken out of use on or after May 25, 1975 (the effective date of the Division’s 1975 rules and Regulations) and before May 3, 1978 (the effective date of the Office of Surface Mining’s (OSM) Initial Regulatory Program).

(v) “Category 5” means those affected lands and support facilities if coal was not removed from those lands prior to May 3, 1978 (the effective date of OSM’s Initial Regulatory Program) or those lands were used on or after May 3, 1978 to facilitate mining (including support facilities and associated lands constructed before May 3, 1978 but still in use on or after May 3, 1978).

Wyoming maintains that this definition codifies policy set by the Administrator that has been used for several years (Administrative Record Document ID No. OSM–2009–0012–0008), and is needed to provide consistency in the administration of the applicable reclamation performance standards. The five proposed categories reflect different regulatory time periods and their associated performance and reclamation standards ranging from Category 1 (pre-law, before 1969) to rules based on SMCRA that apply after May 3, 1978, (Category 5). Wyoming explains in its SOPR that because regulations have changed through the years the standards that mined lands must meet are determined by the rules that were in effect when the lands were disturbed.

We agree with Wyoming’s need to clarify, provide consistency, and inform coal operators about the different regulatory time periods and their associated performance and reclamation standards. Categories 1 through 4 provide guidance beyond that contained in the Federal regulations and predate the passage of SMCRA. Category 5 clarifies the applicable timeframes wherein lands affected by coal mining operations fall under SMCRA’s jurisdiction and are subject to its reclamation performance standards. We find that the underlying rationale Wyoming provided for justifying the addition of these provisions is reasonable and the lack of exact Federal counterpart requirements do not render them less effective than the Federal regulations. Therefore, we approve them.

5. Chapter 1, Section 2(ef); Definition of “Species Lacking Creditable Value”

Wyoming proposes to add a new definition for “Species lacking creditable value” to its rules at Chapter 1, Section 2(ef) that reads as follows:

(ef) “Species lacking creditable value” means the cover and production of these species will be estimated but will not be credited or counted towards meeting the revegetation success standards for cover,

production or species diversity and composition. Species lacking creditable value include noxious weeds listed under the Wyoming Weed and Pest Control Act, *Bromus japonicus*, *Bromus tectorum*, *Taeniatherum caput-medusae*, *Halogeton glomeratus*, *Kochia scoparia* and *Salsola tragus* and all synonyms for these species as listed in the Natural Resources Conservation Service's Plants Database.

Wyoming states that the proposed definition prevents using those species that have limited or no value in support of the post mining land uses from being credited toward revegetation success, and thus are not assigned value in quantitative estimates of percent absolute vegetation cover nor annual herbaceous production nor semi-quantitative descriptions of species diversity and species composition. Wyoming goes on to explain in its SOPR that the new definition describes which species may not be counted in reference areas and reclaimed areas for evaluation of reclamation success. Current rules exclude listed noxious weeds from evaluation of reclamation success and exclude annual plants from production measurements. However, the proposed definition includes restrictions for cover and species diversity measurements in addition to production. Wyoming concludes by noting that the species list has been expanded to include six highly invasive species that can prevent reclamation from achieving a land use that is at least equal to pre-mine conditions.

Wyoming's proposed definition provides specificity beyond that contained in the Federal regulations. We also find that the underlying rationale Wyoming provided for justifying the addition of this definition is reasonable and the lack of an exact Federal counterpart requirement does not render it less effective than the Federal regulations. Accordingly, we are approving Wyoming's proposed definition.

#### 6. Chapter 1, Section 2(eg); Definition of "Species of Special Concern"

Wyoming proposes to add a new definition for "Species of Special Concern" to its rules at Chapter 1, Section 2(eg) that reads as follows:

(eg) "Species of Special Concern" means those plant species required to be surveyed by the U.S. Fish and Wildlife Service, U.S. Forest Service, and Bureau of Land Management.

Wyoming states that the proposed definition was added to explain Chapter 2 baseline requirements, and notes that the Federal agencies listed above use different terms to describe species that they have determined require

monitoring. Wyoming continues that the definition will be used as an umbrella term for those species which must be surveyed for the agencies listed above.

Wyoming's proposed definition provides specificity beyond that contained in the Federal regulations. We also find that the underlying rationale Wyoming provided for justifying the addition of this definition is reasonable and the lack of an exact Federal counterpart requirement does not render it less effective than the Federal regulations. Accordingly, we are approving Wyoming's proposed definition.

7. Wyoming proposes to delete the last sentence of its existing rule at Chapter 2, Section 2(b)(iv)(C) which requires that the Wyoming Department of Agriculture be consulted regarding croplands and erosion control techniques. Wyoming explains in its SOPR that the requirement is being deleted because the LQD and coal operators have gained the necessary experience over the past decades on how to control erosion.

There are no similar provisions in SMCRA or the Federal regulations regarding consultation requirements for croplands and erosion control techniques. However, the remainder of Wyoming's existing rule at Chapter 2, Section 2(b)(iv)(C), which has been relocated to Chapter 2 Section 6(b)(iii)(A), requires that reclamation plans assure revegetation of all affected land in accordance with Chapter 4, Section 2(d) and contain, among other things, the method and schedule of revegetation including erosion control techniques. Additionally, Chapter 4, Section 2(d)(ii)(C)(I) specifically addresses revegetation success standards for cropland and includes requirements for erosion control. For these reasons, Wyoming's deletion of the requirement that the Wyoming Department of Agriculture be consulted regarding croplands and erosion control techniques and its rationale for doing so is acceptable and does not render Wyoming's rules less effective than SMCRA and the Federal regulations. Therefore, we are approving the deletion.

8. Wyoming proposes to add a new rule at Chapter 2, Section 6(b)(iii)(E)(VIII) requiring that for Federally owned surface, the Federal land managing agency shall be consulted for mulching requirements and seeding requirements for cover crops, temporary and permanent reclamation. In response to questions from OSMRE regarding the underlying rationale for the new rule, Wyoming explains that it was added in response

to Federal land managing agencies desire to have greater acknowledgement of their role in approving reclamation activities on Federal lands. Wyoming continues that Federal agencies already conduct reviews of the reclamation plans for Federal lands, and this new provision merely reaffirms and clarifies that responsibility (Administrative Record Document ID No. OSM-2009-0012-0008).

Wyoming's proposed amendment provides specificity beyond that contained in the Federal regulations and serves to codify procedures that it currently utilizes. We also find that Wyoming's explanation justifying the addition of this provision is reasonable and the lack of a Federal counterpart requirement does not render it less effective than the Federal regulations. Therefore, we approve it.

#### 9. Chapter 4, Section 2(d)(i)(N); Routine Land Management Activities

Wyoming proposes to add a new rule at Chapter 4, Section 2(d)(i)(N) that defines "Routine land management activities" as follows:

(N) The following actions have been administratively identified as those which qualify as routine land management activities; implementing these actions will not restart the bonding liability period:

- (I) Installation and/or removal of power lines and substations;
- (II) Installation and/or removal of fences;
- (III) Installation and/or removal of any monitoring equipment or features;
- (IV) Establishment and/or reclamation of two-track trails; and
- (V) Emplacement and/or removal of above-ground pipelines.

Wyoming explains in its SOPR that routine land management activities need to be separated to distinguish them from normal husbandry practices. Wyoming further states the LQD Administrator has determined that these activities involve insignificant disturbance area, are temporary in extent, and represent land stewardship practices.

Wyoming's proposed rule language provides specificity beyond that contained in the Federal regulations. We also find that the underlying rationale Wyoming provided for justifying the addition of this rule is reasonable and the lack of Federal counterpart requirements do not render it less effective than the Federal regulations. Accordingly, we are approving Wyoming's proposed rule.



### *G. Removal of Previously—Disapproved Rules*

#### 1. Disapproved Provision at 30 CFR 950.12(a)(6), Vegetative Cover and Total Ground Cover

In response to the disapproved provision at 30 CFR 950.12(a)(6), Wyoming proposes to delete the reference to “total ground cover” and add the term “absolute total” to the phrase “vegetative cover” in Chapter 4, Section 2(d)(ii)(B)(I), which is revised text from Chapter 4, Section 2(d)(x) in the currently approved rules. In its SOPR, Wyoming states that “absolute total” is added to vegetative cover to provide precise language for the vegetation cover parameter that is the standard and does not change the parameter currently used to evaluate revegetation success. Conversely, Wyoming notes that the phrase “total ground cover” is deleted because this parameter does not provide information on the successful establishment of vegetation on reclamation. Wyoming continues that its proposed rule change addresses the aforementioned disapproval set forth in a November 24, 1986, **Federal Register** notice (51 FR 42213) regarding Wyoming’s definition of cover wherein the Director of OSMRE found that inclusion of litter and rock in the definition rendered the Wyoming program less effective than the Federal regulations. Wyoming maintains that specifying total vegetative cover makes its regulations consistent with Federal regulations.

Wyoming’s proposed revision adds specificity to its rules concerning successful establishment of vegetation cover requirements and clarifies that prior to bond release, the vegetative cover of reclaimed areas will be at least equal to that of the natural vegetation of the area consistent with the Federal regulations at 30 CFR 816/817.111(a)(3). For these reasons, we are removing the program disapproval at 30 CFR 950.12(a)(6).

#### 2. Disapproved Provision at 30 CFR 950.12(a)(7), Alternative Success Standards Approved by the Administrator

In response to the disapproved provision at 30 CFR 950.12(a)(7), Wyoming proposes to delete language in proposed Chapter 4, Section 2(d)(i)(G) and 2(d)(ii)(B)(I), which is revised text from Chapter 4, Section 2(d)(x) in the currently approved rules, that allows the use of unspecified alternative success standards when approved by the Administrator. In both cases, Wyoming references the aforementioned disapproval set forth in a November 24,

1986, **Federal Register** notice (51 FR 42213) which stated that the Federal regulations at 30 CFR 816/817.116(a)(1) require that success standards be included in an approved regulatory program, and the preamble to the Federal regulations clarifies that standards are to be subject to public review and comment. Therefore, the Director could not approve language allowing alternative success standards in the absence of an explanation as to what the standards were, and how the operator’s success in attaining them would be evaluated.

On August 30, 2006, OSMRE revised the Federal regulations at 30 CFR 816/817.116(a)(1) by eliminating the requirement that revegetation success standards and statistically valid sampling techniques be included in approved State regulatory programs (*See* 71 FR 51684). The revised regulation retains the requirement that the regulatory authority select revegetation success standards and statistically valid sampling techniques; and that the selected success standards and sampling techniques be put in writing and made available to the public. Nevertheless, we are approving Wyoming’s proposed deletion of language allowing the Administrator to approve unspecified alternative success standards, and we are removing the program disapproval at 30 CFR 950.12(a)(7).

### *H. Removal of Required Amendments*

#### 1. Required Amendment at 30 CFR 950.16(f), Operator Property Interest Information

In a November 24, 1992, **Federal Register** (51 FR 42211) notice, we required Wyoming to further amend its program to include a provision comparable to that portion of the Federal regulations at 30 CFR 778.13(b) which requires that permit applications include the name, address, and telephone number of the operator if he or she is not the applicant. However, those portions of previous 30 CFR 778.13 that pertain to the identity of the applicant, operator, owners, controllers, and other persons with a role in the proposed surface coal mining operation were subsequently moved to new 30 CFR 778.11 in a **Federal Register** notice dated December 19, 2000, (65 FR 79582). As a result, 30 CFR 778.11(b)(3) now requires the applicant to provide the name, address, and telephone number for “[A]ny operator, if different from the applicant.”

In response to the required program amendment at 30 CFR 950.16(f), Wyoming proposes to revise its rules at Chapter 2, Section 2(a)(i)(B) by adding

substantively identical language that requires applicants for coal mining permits to provide a complete identification of interests including the names, addresses, and telephone numbers of any operators, if different from the applicant. Wyoming explains in its SOPR that the proposed rule was also revised to require the phone numbers for the other business interests which may be involved with the mining operation.

Wyoming’s proposed language requiring that permit applications for coal mining include the name, address, and telephone numbers of operators affiliated with an applicant makes its rules consistent with and no less effective than the Federal counterpart provision at 30 CFR 778.11(b)(3), and we are removing the required program amendment at 30 CFR 950.16(f).

#### 2. Required Amendment at 30 CFR 950.16(l), Operator Sampling Techniques for Evaluating Ground Cover Parameters

In a November 24, 1986, **Federal Register** (51 FR 42212) notice, we stated that while Appendix A provides general and often detailed guidance on sampling concepts and data analysis, it fails to identify the sampling techniques that are required to be included as part of an approved program by 30 CFR 816/817.116(a)(1). Therefore, to be no less effective than the Federal regulations, we required Wyoming to revise Appendix A to prescribe the specific techniques which operators can use to evaluate revegetation success.

On August 30, 2006, OSMRE revised the Federal regulations at 30 CFR 816/817.116(a)(1) by eliminating the requirement that revegetation success standards and statistically valid sampling techniques be included in approved State regulatory programs (*See* 71 FR 51684). However, the revised regulation continues to require that standards for success and sampling techniques for measuring success must still be selected by the regulatory authority, and shall be described in writing and made available to the public.

As a result of OSMRE’s August 30, 2006, rule change, Wyoming proposes to remove provisions regarding operator sampling techniques for evaluating ground cover parameters from its rules in Appendix A, Part II. B. In addition, Wyoming indicates in its SOPR that rules for sampling and statistical methods that had previously been developed for inclusion into Chapter 4 will now be incorporated into the Administrator’s Approved Sampling and Statistical Methods document.

Based on the foregoing, we have determined that Wyoming's program is consistent with and no less effective than the revised Federal regulations at 30 CFR 816/817.116(a)(1). Moreover, OSMRE's August 30, 2006, rule change renders the required program amendment at 30 CFR 950.16(l) moot and we are removing it.

Somewhat related to the finding above is Wyoming's proposal to remove language from its rules in Appendix A, Part 2 C. 1.a. regarding the use of ocular quadrat methods for estimating species, vegetation, and total ground cover. OSMRE previously approved the removal of required program amendment 30 CFR 950.16(k) in a May 8, 2003, **Federal Register** (68 FR 24647, 24653) notice pertaining to the aforementioned rule language. Therefore, we are merely acknowledging Wyoming's proposed deletion in this finding.

### 3. Required Amendment at 30 CFR 950.16(m), Cropland Success Standards

In the November 24, 1986, **Federal Register** (51 FR 42213) notice, we required Wyoming to amend its program to be no less effective than the Federal regulations at 30 CFR 816/817.116(c)(3) which held that in areas of 26.0 inches or less average annual precipitation, production standards must be met for at least the last two consecutive years of the ten-year minimum responsibility period, and not any two consecutive crop years within that period as provided by Appendix A of Wyoming's rules.

On August 30, 2006, OSMRE revised the Federal regulations at 30 CFR 816/817.116(c)(3)(i) for semi-arid areas to require that the vegetation parameters identified in 816.116(b) for grazing land, pasture land, or cropland must equal or exceed the approved success standard during the growing season of any two years after year six of the responsibility period (*See* 71 FR 51700).

As a result of OSMRE's August 30, 2006, rule change, Wyoming proposes to move text from Chapter 4, Section 2(d)(x)(I) of its current rules with revision to proposed Chapter 4, Section 2(d)(ii)(C)(II) by replacing the "two consecutive crop year" language with the requirement that revegetation success standards for cropland be demonstrated for two out of four years of the bond responsibility period, starting no sooner than year seven. Wyoming notes in its SOPR that the required amendment at 30 CFR 950.16(m) has not been revised to account for the OSM rule change, and still requires that "Wyoming shall submit revisions to clarify that operators

must meet cropland success standards during at least the last two consecutive crop years of the responsibility period." Wyoming further states that, in anticipation of changes to the required amendment, it has revised its rule to allow measurements two out of four years, starting year seven, to be consistent with new OSM rules.

Based on the discussion above, we have determined that Wyoming's program is consistent with and no less effective than the revised Federal regulations at 30 CFR 816/817.116(c)(3)(i). In addition, OSMRE's August 30, 2006, rule change renders the required program amendment at 30 CFR 950.16(m) moot and we are removing it.

## IV. Summary and Disposition of Comments

### Public Comments

We asked for public comments on the amendment (Administrative Record Document ID No. OSM-2009-0012-0001). We received comments from one State Agency.

The Wyoming Game and Fish Department commented in a March 11, 2010, letter that it reviewed the proposed amendment and had no terrestrial or aquatic resource concerns at this time (Administrative Record Document ID No. OSM-2009-0012-0005).

### Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Wyoming program (Administrative Record Document ID No. OSM-2009-0012-0011). We received comments from three Federal Agencies.

The Natural Resources Conservation Service (NRCS) commented in a November 23, 2009 letter (Administrative Record Document ID No. OSM-2009-0012-0002), the Mine Safety and Health Administration (MSHA) commented in a December 7, 2009 letter (Administrative Record Document ID No. OSM-2009-0012-0003), and the Bureau of Land Management (BLM) commented in a December 16, 2009 letter (Administrative Record No. WY-43-6).

The NRCS commented that, starting at Chapter 5, the document begins to refer to NRCS as the "U.S. Soil Conservation Service," and suggested that necessary changes be made to the document to reflect the agency's current name of NRCS or the Natural Resources Conservation Service. In response we

note that, other than Wyoming's proposal to revise its rules at Chapter 5, Section 2(b)(iii) regarding prime farmlands, no other changes are proposed in the chapter. Nevertheless, we acknowledge the NRCS's comments and are alerting Wyoming of the need to make these corrections by virtue of this **Federal Register** final rule notice.

MSHA responded that it reviewed the proposed changes to the Wyoming Reclamation Program and had no comments or concerns.

The BLM submitted several comments on Wyoming's amendment and stated that most of the changes appear to be editorial providing clarification, or are updates to current requirements to comply with OSM standards, with no significant changes in policy or clear deletions of prior requirements. In response to BLM's comments that are editorial or grammatical in nature, as well as those related to previously-approved rules that have merely been recodified or are not proposed for revision, we note that we can only speak to the establishment of regulatory requirements and determine whether the proposed amendment is in accordance with SMCRA and the Federal regulations. Therefore, we will only address substantive comments to Wyoming's proposed rules that specifically allege inconsistencies and conflicts with SMCRA and/or the Federal regulations.

BLM's substantive comments primarily concern Federal land management agency concurrence and consultation where Federal surface lands are involved with coal mining operations. Specifically, the BLM stated that overall it appears that the rule revisions provide the Administrator of the State Land Quality Division with considerable authority/discretion/flexibility in determining what will define successful reclamation revegetation and how it will be measured.

For example, in Chapter 1, Section 2(d)(i), "comparison areas" must be approved by the Administrator and in Section 2(er), "substantially affect" is determined by the Administrator. BLM continues that, while this may be acceptable on State or private land reclamation projects, it is crucial that the rules revision state that all reclamation (including revegetation) plans that involve Federal surface are subject to approval by the managing agency; otherwise, the BLM believes there would be a potential for conflict. BLM also comments that the bond release requirements have been substantially updated and notes that it is important that the affected BLM office

concurs in setting the amount and in releasing reclamation bonds on BLM surface.

Lastly, with respect to Wyoming's proposed rule changes at Chapter 2, Section 6(b)(iii)(B and C) and Chapter 4, Sections 2(d)(ii)(B)(II)(2)(d) and (D), BLM states that for Federally owned surface, the managing agency should be consulted as well as the Wyoming Game and Fish Department for tree and shrub species composition, ground cover, and minimum stocking and planting arrangements.

For the reasons that follow, BLM's concerns regarding Federal land management agency concurrence and consultation where Federal surface lands are involved with coal mining operations are currently addressed, and do not warrant additional rulemaking by Wyoming. In particular, we refer BLM to the Federal Lands Program provisions set forth at 30 CFR Subchapter D, Part 740 and the Wyoming State/Federal Cooperative Agreement at 30 CFR 950.20 Article V, Policies and Procedures: Permit Application Package Review. 30 CFR 740.4(c)(2) and (3) and 740.13(c)(5) specifically address OSMRE and State Regulatory Authority requirements regarding consultation with and obtaining the consent, as necessary, of the Federal land management agency with respect to post-mining land use and permit review and processing.

In addition, 30 CFR 740.4(c)(4) requires Federal land management agency concurrence when approving or releasing Federal lessee protection bonds. While these provisions are not found in Wyoming's approved rules, Article V, Section 9 of the State/Federal Cooperative Agreement delineates the respective responsibilities that OSMRE and Wyoming shall assume under 30 CFR 740.4(c). Lastly, we note that 30 CFR 740.4(e)(1) states that "The Federal land management agency is responsible for: determining post-mining land uses." These Federal rules and accompanying Cooperative Agreement ensure that the requirements regarding consultation with and consent by the Federal land management agency where Federal surface lands are involved with coal mining operations will be adhered to.

Similar to the comments above, BLM quotes Wyoming's proposed rule at Chapter 2, Section 6(b)(iii)(E)(VIII) which states "For Federally owned surface, the Federal land managing agency shall be consulted for mulching requirements and seeding requirements for cover crops, temporary and permanent reclamation." BLM comments that it sounds like the Land

Quality Division will consult with the Federal agency only in regards to cover crops, and asserts that it should be clear that the Federal agency will be consulted for mulching and seeding requirements for both cover crops and the intended permanent vegetation for reclamation. BLM continues that if this is not clarified, they foresee a potential problem with the use of non-native/unapproved seeds or seeds not certified weed-free for revegetation on public lands, which would not follow the BLM/policy rules.

We disagree with BLM's interpretation and read Wyoming's proposed rule to require that the Federal land managing agency will be consulted for mulching and seeding requirements for both cover crops and the intended temporary and permanent vegetation for reclamation. We refer BLM to Finding No. III.F.8. for an explanation as to why proposed Chapter 2, Section 6(b)(iii)(E)(VIII) is being approved.

The BLM provided several specific comments in response to Wyoming's proposed rule changes in Chapter 1. First, BLM inquired whether Wyoming's existing definition of "Best technology currently available" at Chapter 1, Section 2(o) can be combined with the newly-proposed definition of "Best practicable technology" at Chapter 1, Section 2(n). In response, we note that these definitions are mutually exclusive to the extent that the definition of "Best technology currently available" applies only to erosion control and fish and wildlife enhancement measures, while "Best practicable technology" relates to shrub establishment.

BLM also asked that we explain the significance of the August 6, 1996, date in Wyoming's definition of "eligible land" at Chapter 1, Section 2(am). In response, we note that August 6, 1996, is the date on which OSMRE approved Wyoming's definition of "eligible land" and signifies that land affected by a mining operation after that date is eligible for shrub reclamation.

BLM commented that Wyoming's newly-proposed definition of "Sample unit" at Chapter 1, Section 2(ds) should define a minimum acreage. The proposed definition provides additional specificity as neither SMCRA nor the Federal regulations define "sample unit." Moreover, the definition of the size of the sample unit is to be established by mutual agreement between the permittee and the Administrator. For these reasons, we will defer to the State with regard to determining the size of a particular sample unit.

With respect to Wyoming's proposed rule change at Chapter 2, Section 1(c),

General Permit Application Requirements, BLM commented that the 1:24,000 scale requirement for maps be restored. We agree with BLM's comment and refer it to Finding No. III.E.8. BLM also commented that Wyoming's newly-proposed rule at Chapter 2, Section 3(c)(ii) should also have a scale detail requirement for mapping of vegetation communities. In response, we note that because Wyoming has committed to reinstate the 1:24,000 scale requirement for maps in its rules at Chapter 2, Section 1(c), the same requirement is unnecessary for mapping of vegetation communities. In addition, the Federal counterpart provision at 30 CFR 779.19(a) does not include such a requirement.

Next, BLM referenced Wyoming's proposed rule change at Chapter 4, Section 2(c)(xii)(D)(II) and commented that it is unclear whether the discretion of the Administrator applies only to designing an impoundment for a storm duration having greater peak flow than the runoff from the probable maximum precipitation of a 6-hour precipitation event, or to the probable maximum precipitation of a 6-hour precipitation event itself. BLM further noted that there should be a minimum standard that is not subject to the discretion of the Administrator. In response, we refer BLM to Finding No. III.E.14. for an explanation as to why the proposed rule is being approved and how it is to be interpreted.

Finally, the BLM stated that the five acre threshold for repairs of erosional features, subsidence, or settling in proposed Chapter 4, Section 2(d)(M)(X) seems fairly large to consider as a "normal husbandry practice" that avoids resetting the bond clock. We disagree with this comment and refer BLM to Finding No. III.E.15.G. for an explanation as to why the five acre limit is being approved. The commenter is also reminded that all mined lands must meet revegetation success standards prior to final bond release.

#### *Environmental Protection Agency (EPA) Concurrence and Comments*

Under 30 CFR 732.17(h)(11)(i) and (ii), we are required to get concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued 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.*).

Under 30 CFR 732.17(h)(11)(i), OSMRE requested comments on the amendment from EPA (Administrative Record Document ID No. OSM-2009-0012-0011). EPA did not respond to our request.

*State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)*

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On August 4, 2010, we requested comments on Wyoming's amendment (Administrative Record Document ID No. OSM-2009-0012-0012). The SHPO responded on September 2, 2010, and explained that in reviewing the cultural resources section of the document [specifically Chapter 2, Section 4(a)(xvii) and Section 4(a)(xviii), and Chapter 2, Section 5(a)(xix)], it is apparent that the Wyoming DEQ/LQD rules are not consistent with, nor are they as stringent or effective as, the regulations implementing Section 106 of the National Historic Preservation Act (NHPA) found at 36 CFR Part 800 (Administrative Record Document ID No. OSM-2009-0012-0013). SHPO further recommended that OSMRE retain its responsibilities under Section 106 of the NHPA pursuant to 30 CFR Part 800 until such time as the [state] rules can be made consistent with, and as stringent and effective as, the Federal regulations.

Notwithstanding our disapproval of Wyoming's proposed rule change at Chapter 2, Section 4(a)(xvii) for different reasons in Finding No. III.E.10 above, which was specifically submitted in response to a required program amendment at 30 CFR 950.16(u) concerning public availability of permit applications and confidentiality, we concur with the SHPO's acknowledgement in its response that the purpose of the amendment is not to make adjustments concerning compliance with Section 106 of the NHPA. Although the aforementioned comments are beyond the scope of this amendment and differ from the context in which the proposed rule change was submitted, we recognize the SHPO's concerns and are alerting Wyoming to them by virtue of this **Federal Register** final rule notice.

## V. OSMRE's Decision

Based on the above findings, we approve, with certain exceptions, Wyoming's October 15, 2009, amendment. We do not approve the following provisions or parts of provisions.

As discussed in Finding No. III.E.6, we are not approving Wyoming's proposed rule changes deleting the definition of "surface coal mining and reclamation operations" at Chapter 1,

Section 2(ct), and removing the term "surface" throughout its rules in Chapters 1, 2, 4, and 5.

As discussed in Finding No. III.E.8, we are not approving Wyoming's proposed rule change deleting the 1:24,000 scale requirement at Chapter 2, Section 1(c) for maps that are submitted with permit applications.

As discussed in Finding No. III.E.10, we are not approving Wyoming's proposed rule change at Chapter 2, Section 4(a)(xvii), concerning public availability of permit applications and confidentiality, and the required amendment at 30 CFR 950.16(u) remains outstanding.

As discussed in Finding No. III.E.11, we do not accept Wyoming's explanation for not revising or amending its rules at Chapter 2, Section 5(a)(viii)(A) concerning fish and wildlife enhancement measures, and the required amendment at 30 CFR 950.16(p) remains outstanding.

As discussed in Finding No. III.E.15, we are not approving Wyoming's proposed normal husbandry practice for supplemental planting of tree and shrub stock at Chapter 4, Section 2(d)(i)(M)(II).

We are removing existing required amendments and approving, as discussed in: Finding No. III.H.1, Chapter 2, Section 2(a)(i)(B), concerning operator property interest information; Finding No. III.H.2, Appendix A, Part II, B, concerning operator sampling techniques for evaluating ground cover parameters; and Finding No. III.H.3, Chapter 4, Section 2(d)(ii)(C)(II), concerning cropland success standards.

To implement this decision, we are amending the Federal regulations at 30 CFR Part 950, which codify decisions concerning the Wyoming program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately.

Section 503(a) of SMCRA requires that the State's program demonstrates that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

## *Effect of OSMRE's Decision*

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Similarly, 30 CFR 732.17(a) requires that any change of an approved State program be submitted to OSMRE for review as a program amendment. The Federal regulations at 30 CFR 732.17(g) prohibits any changes to approved State

programs that are not approved by OSMRE. In the oversight of the Wyoming program, we will recognize only the statutes, regulations and other materials we have approved, together with any consistent implementing policies, directives and other materials. We will require Wyoming to enforce only approved provisions.

## VI. Procedural Determinations

### *Executive Order 12630—Takings*

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

### *Executive Order 12866—Regulatory Planning and Review*

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

### *Executive Order 12988—Civil Justice Reform*

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSMRE. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

### *Executive Order 13132—Federalism*

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations "consistent with"

regulations issued by the Secretary pursuant to SMCRA.

*Executive Order 13175—Consultation and Coordination With Indian Tribal Governments*

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. The rule does not involve or affect Indian tribes in any way.

*Executive Order 13211—Regulations That Significantly Affect The Supply, Distribution, or Use of Energy*

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

*National Environmental Policy Act*

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 CFR U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C) *et seq.*).

*Paperwork Reduction Act*

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

*Regulatory Flexibility Act*

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

*Small Business Regulatory Enforcement Fairness Act*

This rule is not a major rule under 5 U.S.C. 804(2), of the Small Business Regulatory Enforcement Fairness Act. This rule:

- a. Does not have an annual effect on the economy of \$100 million.
- b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the State submittal which is the subject of this rule is based upon

counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

*Unfunded Mandates*

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

**List of Subjects in 30 CFR Part 950**

Intergovernmental relations, Surface mining, Underground mining.

Dated: January 7, 2011.

**Allen D. Klein,**

*Regional Director, Western Region.*

**Editorial Note:** This document was received in the Office of the Federal Register on June 6, 2011.

For the reasons set out in the preamble, 30 CFR part 950 is amended as set forth below:

**PART 950—WYOMING**

- 1. The authority citation for part 950 continues to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

- 2. Section 950.15 is amended in the table by adding a new entry in chronological order by “Date of Final Publication” to read as follows:

**§ 950.15 Approval of Wyoming regulatory program amendments.**

\* \* \* \* \*

Original amendment submission date	Date of final publication	Citation/description
* * *	* * *	* * *
October 15, 2009 .....	June 14, 2011 .....	Chap. 1, Section 2(f); Chap. 1, Section 2(j); Chap. 1, Section 2(k); Chap. 1, Section 2(l); Chap. 1, Section 2(m); Chap. 1, Section 2(n); Chap. 1, Section 2(p); Chap. 1, Section 2(r); Chap. 1, Section 2(s); Chap. 1, Section 2(z); Chap. 1, Section 2(aa); Chap. 1, Section 2(ab); Chap. 1, Section 2(ae); Chap. 1, Section 2(ak); Chap. 1, Section 2(am); Chap. 1, Section 2(ao);

Original amendment submission date	Date of final publication	Citation/description
		Chap. 1, Section 2(ap); Chap. 1, Section 2(as); Chap. 1, Section 2(az); Chap. 1, Section 2(bd); Chap. 1, Section 2(be); Chap. 1, Section 2(bf); Chap. 1, Section 2(bg); Chap. 1, Section 2(bm); Chap. 1, Section 2(bs); Chap. 1, Section 2(bu); Chap. 1, Section 2(bv); Chap. 1, Section 2(by)(ii); Chap. 1, Section 2(bz); Chap. 1, Section 2(ca); Chap. 1, Section 2(cb); Chap. 1, Section 2(cc); Chap. 1, Section 2(cg); Chap. 1, Section 2(cj); Chap. 1, Section 2(cl); Chap. 1, Section 2(cm); Chap. 1, Section 2(co); Chap. 1, Section 2(cs); Chap. 1, Section 2(cu); Chap. 1, Section 2(cx); Chap. 1, Section 2(da); Chap. 1, Section 2(df); Chap. 1, Section 2(dg); Chap. 1, Section 2(dh); Chap. 1, Section 2(di); Chap. 1, Section 2(dl); Chap. 1, Section 2(dm); Chap. 1, Section 2(dp); Chap. 1, Section 2(ds); Chap. 1, Section 2(dt); Chap. 1, Section 2(dv); Chap. 1, Section 2(dw); Chap. 1, Section 2(dx); Chap. 1, Section 2(dy); Chap. 1, Section 2(dz); Chap. 1, Section 2(ef); Chap. 1, Section 2(eg); Chap. 1, Section 2(el); Chap. 1, Section 2(eo); Chap. 1, Section 2(es); Chap. 1, Section 2(eu); Chap. 1, Section 2(ex); Chap. 1, Section 2(ey); Chap. 1, Section 2(ez); Chap. 1, Section 2(fe); Chap. 1, Section 2(ff); Chap. 1, Section 2(fm); Chap. 1, Section 2(fn); Chap. 2, Section 2(b)(iv)(C); Chap. 2, Section 2(c)(xii)(D)(II); Chap. 2, Section 3(a)-(m); Chap. 2, Section 6(b)(iii)(D); Chap. 2, Section 6(b)(iii)(E)(VIII); Chap. 2, Section 6(b)(iii)(G); Chap. 4, Section 2(c)(xii)(D)(II); Chap. 4, Section 2(d)(i)(G); Chap. 4, Section 2(d)(i)(I); Chap. 4, Section 2(d)(i)(M)(I) and (III)-(XI); Chap. 4, Section 2(d)(i)(N); Chap. 4, Section 2(g)(iv)(L); Chap. 4, Section 2(g)(iv)(M); Chap. 4, Section 2(g)(v)(A); Chap. 4, Section 2(g)(v)(B); Chap. 5, Section 2(b) (iii); also all minor, editorial, and codification changes and all reorganized or relocated rules.

**§ 950.16 [Amended]**

■ 3. Section 950.16 is amended by removing and reserving paragraphs (f), (l), and (m).

[FR Doc. 2011-14310 Filed 6-13-11; 8:45 am]

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