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DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 152

Valuation of Imported Merchandise for Customs Purposes

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to enable the Customs Service ("Customs") to implement and administer the provisions of Title II of Pub. L. 96-39, the "Trade Agreements Act of 1979", relating to the valuation of imported merchandise for customs purposes.

The more significant changes are:

1. To eliminate section 402a, Tariff Act of 1930, as amended (19 U.S.C. 1402), the basis for appraising "Final List" articles.

2. To eliminate the "American Selling Price" basis for valuation.

3. To provide five bases—one primary and four secondary—for determining customs value:

a. Transaction value of the imported merchandise (the primary basis);

b. Transaction value of identical merchandise;

c. Transaction value of similar merchandise;

d. Deductive value; and

e. Computed value.

4. To provide that if Customs rejects the transaction value in a particular instance, the importer will be notified of the rejection, receive an explanation of the action, and be given 20 days in which to reply if in disagreement.

5. To provide that Customs, upon written request, shall furnish an importer with a written explanation of how the customs value of the imported merchandise was determined.

6. To provide that information submitted by an importer, buyer, or producer regarding the valuation of merchandise will not be rejected on the basis of the accounting method used to prepare the information if the preparation was in accordance with "generally accepted accounting principles".

The proposed amendments are considered to be significant.

DATE: Comments must be received on or before May 30, 1980.

ADDRESS: Written comments should be addressed to the Commissioner of Customs, Attention: Regulations and Research Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2335, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Thomas Lobred (202-566-2938) or Richard Rosettie (202-566-8235), Office of Commercial Operations.

SUPPLEMENTARY INFORMATION:

Background

Pub. L. 96-39 (93 Stat. 144), the "Trade Agreements Act of 1979", approved July 26, 1979 (the "Act"), incorporates into U.S. law the trade agreements negotiated by the United States in the Tokyo Round of Multilateral Trade Negotiations (MTN) and transmitted to the Congress by the President on June 19, 1979.

Title II of the Act, "Customs Valuation", implements the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade ("the Agreement") relating to customs valuation. Title II makes significant changes in the laws administered by the Customs Service relating to the valuation of imported merchandise. This document proposes to amend the Customs Regulations to implement and administer the provisions of Title II.

Effective Dates

1. The effective dates for implementing the provisions of Title II (the "new value law" in this document) have not been determined.

Pursuant to section 2(b)(2) of the Act, Title II would apply between the United States and another country only if that country has accepted the Agreement and the President determines it should not otherwise be denied the benefits of the Agreement with respect to the United States because that country has not accorded adequate benefits, including substantially equal competitive opportunities for the commerce of the United States to the extent required under section 126(c), Trade Act of 1974 (19 U.S.C. 2136(c)), to the United States. However, pursuant to section 2(b)(3) of the Act, the President may not accept the Agreement with respect to another country unless he determines that, with certain exceptions, each "major industrial country", as defined in section 126(d), Trade Act of 1974 (19 U.S.C. 2136(d)), is accepting the Agreement.

Under section 204 of Title II, the amendments made by Title II will take effect on January 1, 1981, if the Agreement enters into force with respect to the United States, or on the date after January 1, 1981, on which the Agreement enters into force, subject to two exceptions:

a. Section 204(a)(2) provides that if the President determines before January 1, 1981, that the European Economic Community (EEC) (and the other major industrial countries (see section 2(b)(3) of the Act)) have accepted the obligations of the Agreement with respect to the United States, and each member state of the EEC has implemented the Agreement under its laws, the President shall announce by proclamation such determination. The amendments made by Title II, except those relating to certain rubber footwear, would take effect on the date specified in the proclamation, but not before July 1, 1980.

b. Section 204(c) provides that the amendments made by section 223(b), relating to certain rubber footwear, will take effect on July 1, 1981, or the date on which the Agreement enters into force with respect to the United States, whichever is later.

2. Implementation of the "new value law" will neither repeal nor amend automatically sections 402 and 402a, Tariff Act of 1930, as amended (19 U.S.C. 1401a, 1402) (the "current value law" in this document), with regard to merchandise exported to the United States *before* the respective effective dates. When the applicable effective dates have been determined, the new value law will be applicable to merchandise exported to the United States on or after the applicable effective date, and the value will be determined in accordance with section 402, Tariff Act of 1930, as amended by section 201 of the Act.

However, the "current value law", sections 402 and 402a, Tariff Act of 1930, as amended, will apply to merchandise exported to the United States before the applicable effective date. This would include merchandise in a Customs bonded warehouse, in a foreign-trade zone, or in international transit to the United States before the applicable effective date.

Because of the necessity to continue to administer the "current value law" for an indefinite period while it also implements the "new value law", Customs proposes to amend its regulations to provide for a new subpart relating to the "new value law" while retaining the regulations relating to the "current value law".

Current Value Law

The current U.S. valuation system consists of two separate laws, sections 402 and 402a, Tariff Act of 1930, as amended (19 U.S.C. 1401a, 1402). There are nine bases for determining customs value under these laws.

Five bases for determining value were established in the Tariff Act of 1930, before its amendment by the Customs Simplification Act of 1956. These bases, set forth in section 402a, are export value, foreign value, United States value, cost of production, and American selling price. Articles which are valued under these bases are listed in Treasury Decision 54521 and are called "Final List" articles. Under section 402a, valuation is based upon an article's export value or foreign value, whichever is higher. If neither export nor foreign value can be determined, valuation then is determined on the basis of the United States value. If United States value cannot be determined, a cost of production basis is used. *American selling price* as a basis for value under section 402a is discussed below.

1. *Export value* essentially is the price at which merchandise is freely offered for sale to all purchasers in the usual wholesale quantities in the principal markets of the exporting country for export to the United States.

2. *Foreign value* essentially is the price of merchandise for sale in the home market of the country of exportation which is the same as or similar to imported merchandise and which is freely offered for sale in the country of exportation to all purchasers in the usual wholesale quantities.

3. *United States value* is essentially the freely offered resale price in the United States of merchandise which is the same as or similar to the imported merchandise, with deductions from that price for duty, cost of transportation and insurance, and other expenses from the place of shipment to the place of delivery, and a commission or profit and general expenses.

4. *Cost of production* is the aggregate of the costs of producing the merchandise and placing it in condition, packed ready for shipment to the United States, plus an amount for general expenses and profit.

There are four bases for determining value under section 402, established by the Customs Simplification Act of 1956—export value, United States value, constructed value, and American selling price. Under section 402, valuation is based upon an article's export value, if it can be determined. If not, United States value is used. If United States value cannot be determined, constructed value is used. *American selling price* as a basis for value under section 402 is discussed below.

1. *Export value* essentially is the price at the time of exportation at which merchandise the same as or similar to imported merchandise is freely sold or offered for sale in the usual wholesale quantities in the exporting country for export to the United States.

2. *United States value* under section 402 is similar to United States value under section 402a, except that there are no statutory maximums for commissions or for profit and general expenses.

3. *Constructed value* is similar to cost of production under section 402a, except that there are no statutory minimums for general expenses and profit.

American Selling Price

American selling price (ASP), as used in both sections 402 and 402a, essentially is the selling price in the United State of a domestic article which is like or similar to the imported article. ASP is used for specific articles. These are benzenoid chemicals, certain plastic or rubber-soled footwear, canned clams, and certain gloves (see § 152.24, Customs Regulations (19 CFR 152.24)).

New Value Law

Section 201 of Title II repeals section 402a of the Tariff Act of 1930, as amended.

Section 201 also amends section 402 to provide for five bases for determining value presented in a hierarchical manner. The first and primary basis is *transaction value.* If transaction value cannot be determined, or if determined, cannot be used, then the second basis, the *transaction value of identical merchandise,* is used. If transaction value of identical merchandise cannot be determined, then *transaction value of similar merchandise* is used. If transaction value of similar merchandise cannot be determined, then *deductive value* is used. If deductive value cannot be determined, then *computed value* is used. The Act also provides that if none of the five bases can be used, then a value will be derived from one of those bases, reasonably adjusted.

The Act further provides, with respect to the order of priority, that the importer may elect to have the merchandise appraised on the basis of computed value, rather than deductive value. However, if computed value cannot be determined, the merchandise will be appraised on the basis of deductive value. If deductive value cannot be determined, the merchandise will be appraised on the basis of one of the five bases, reasonably adjusted.

Section 500, Tariff Act of 1930

Section 500(a) of the Tariff Act of 1930 has been amended by section 202(a)(4) of the Act to provide that amended section 402 will be the basis for ascertaining the value of merchandise exported to the United States after the effective dates of the Act previously referred to. The legislative history states that the Customs officer shall appraise merchandise under section 402, and that section 500 is not a separate basis of valuation but is used to permit Customs to consider the best evidence available in appraising merchandise.

Transaction Value

New section 402(b) provides essentially that the transaction value of imported merchandise is the "price actually paid or payable", as defined in section 402(b)(4)(A), for the merchandise when sold for exportation to the United States. The "price actually paid or payable" is the total payment, less any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.

To this payment may be added amounts equal to (1) packing costs incurred by the buyer; (2) any selling commission incurred by the buyer; (3) any "assist" as defined in section 402(h)(1); (4) any royalty or license fee the buyer is required to pay as a condition of sale of the merchandise to him; and (5) proceeds of a subsequent resale, disposal, or use of the imported merchandise accruing to the seller. These additions, and no others, may be made to the price actually paid or payable only if they are not otherwise included and are based upon "sufficient information" (as defined in section 402(h)(5)). If additions cannot be made on the basis of such information, the transaction value cannot be determined.

Certain items will not be included in the transaction value if identified separately from the price actually paid or payable and from the items specified in section 402(b)(1). New section 402(b)(3) provides that these items are (1) any cost or charge incurred for the construction, erection, assembly, or maintenance of, or technical assistance provided with respect to, the merchandise after its importation; (2) any reasonable cost or charge for the transportation of the merchandise after its importation; and (3) "customs duties and other Federal taxes" payable on the

merchandise by reason of its importation.

New section 402(b)(2) sets forth those factors which may lead to a rejection of transaction value. These factors include: (1) Certain restrictions on the disposition or use of the imported merchandise other than those which are imposed or required by law, which limit the geographical area of resale, or which do not substantially affect the value of the merchandise; (2) conditions or considerations attaching to the sale or price of the imported merchandise for which a value cannot be determined with respect to the imported merchandise; (3) cases where proceeds from a subsequent resale, disposal, or use of the imported merchandise accrue to the seller, and an appropriate addition cannot be made to the price paid or payable; and (4) cases where the buyer and seller are related, as defined in section 402(g)(1), and the transaction value is not acceptable.

New section 402(b)(4)(B) provides that any rebate of, or other decrease in, the price actually paid or payable that is made or otherwise effected between the buyer and seller after the date of importation of the merchandise will be disregarded in determining transaction value.

Transaction Value of Identical Merchandise and Similar Merchandise

Section 402(c) provides that the transaction value of identical merchandise is the previously accepted transaction value of imported merchandise identical to that being appraised, adjusted if appropriate for commercial and quantity levels, sold for export to the United States and exported at or about the same time as the merchandise being appraised. The transaction value of similar merchandise is the previously accepted transaction value of imported merchandise similar to that being appraised, adjusted if appropriate for commercial and quantity levels, sold for export to the United States, and exported at or about the same time as the merchandise being appraised. The terms "identical merchandise" and "similar merchandise" are defined in section 402(h).

Deductive Value

Section 402(d) provides that deductive value will be based upon one of three appropriately adjusted prices depending upon when and in what condition the imported merchandise is sold to unrelated persons in the United States. Sales to unrelated persons in the United States are the only sales which may be used in determining deductive value.

1. If the merchandise concerned is sold in the condition as imported at or about the date of importation of the merchandise being appraised, the price is the unit price at which the merchandise concerned is sold in the greatest aggregate quantity at or about such date.

2. If the merchandise concerned is sold in the condition as imported, but is not sold at or about the date of importation of the merchandise being appraised, the price is the unit price at which the merchandise concerned is sold in the greatest aggregate quantity after the date of importation of the merchandise being appraised but before the close of the 90th day after the date of such importation.

3. If the merchandise concerned is not sold in the condition as imported before the close of the 90th day after the date of importation of the merchandise being appraised, the price is the unit price at which the merchandise being appraised, after further processing, is sold in the greatest aggregate quantity before the 180th day after the date of such importation. The importer must specifically elect to use this "further processing" option, and notify the Customs officer concerned of that election

The unit price determined then will be reduced by an amount equal to:

1. Commissions paid or agreed to be paid, or additions usually made for profit and general expenses, in connection with sales in the United States of imported merchandise of the same class or kind as the merchandise being appraised;

2. Actual costs and associated costs of transportation and insurance incurred with respect to international shipment of the merchandise;

3. Usual costs and associated costs of transportation and insurance incurred within the United States with respect to such merchandise;

4. Customs duties and other Federal taxes imposed on the merchandise by reason of its importation, and Federal excise taxes on the merchandise for which vendors in the United States are ordinarily liable; and

5. In the case of a price determined under the "further processing" method, the value added by that processing after importation into the United States.

The deduction made for profit and general expenses must be based upon the importer's profit and general expenses, unless they are inconsistent with those reflected in sales in the United States of imported merchandise of the same class or kind.

For purposes of determining deductive value, any sale to a person who supplies any assist for use in the production or sale for export of the merchandise will be disregarded.

Computed Value

Section 402(e) provides that computed value is the sum of:

1. The cost or value of the materials and the fabrication and other processing employed in the production of the imported merchandise;

2. An amount for profit and general expenses equal to that usually reflected in sales of merchandise of the same class or kind as the imported merchandise that are made by the producers in the country of exportation for export to the United States;

3. Any assist, if not included in paragraph (1) or (2) above; and

4. The packing costs.

The amount for profit and general expenses included in the computed value will be based upon the producer's profit and expenses, unless those figures are inconsistent with those usually reflected in sales of merchandise of the same class or kind as the imported merchandise that are made by the producers in the country of exportation.

General Discussion—Assists

An assist is an item or service supplied directly or indirectly free of charge or at a reduced cost for use in connection with the production or the sale for export to the United States of imported merchandise. Whereas under the current value law, the existence of an assist requires appraisement under a secondary valuation basis, the new value law provides for the addition of the value of an assist directly to the price to arrive at transaction value. Under the current practice, an assist generally is dutiable regardless of who furnishes the assist. Under the Act, an assist is dutiable only if furnished directly or indirectly by the buyer of the imported merchandise. Under current practice, certain assists such as engineering and design work, wherever undertaken, are dutiable. Under the Act, as it relates to transaction value, the only assists of this type that are dutiable are engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the United States. However, if service or work is performed outside the United States by a U.S. domiciliary who is acting as an employee or agent of the buyer, and the work or service is incidental to other engineering, development, artwork, design work, or plans or sketches that are undertaken in the United States, the service or work is not treated as an assist.

The concept of an assist is relevant in the following circumstances: (1) As an addition to the price actually paid or payable in transaction value, (2) as an element comprising computed value, or (3) as a factor in determining the suitability of deductive value as a basis of value.

Royalty or License Fee

The addition of an amount for a royalty or license fee to the price actually paid or payable for the imported merchandise in determining transaction value generally follows current practice. However, certain elements called "royalties" may or may not fall within the scope of section 402(b)(1)(D) or section 402(b)(1)(E), relating to proceeds of any subsequent resale, disposal, or use of the imported merchandise accruing to the seller.

Sufficient Information

Under section 402(h)(5), "sufficient information" means information that establishes the accuracy of:

1. Any amount:

Added to the price actually paid or payable, in determining transaction value,

Deducted as profit or general expenses or value from further processing, in determining deductive value, or

Added as profit or general expenses, in determining computed value,

2. Any difference taken into account in connection with sales between related persons, in determining transaction value, or

3. Any adjustment made in determining the transaction value of identical or similar merchandise.

Generally Accepted Accounting Principles

Under section 402(g)(3), information submitted by an importer, buyer, or producer concerning the appraisement of merchandise may not be rejected by Customs solely on the basis of the accounting method used to prepare the information if the preparation was in accordance with "generally accepted accounting principles". This term is defined to mean any generally recognized consensus or substantial authoritative support regarding:

Which economic resources and obligations should be recorded as assets and liabilities,

Which changes in assets and liabilities should be recorded,

How the assets and liabilities and changes in them should be measured,

What information should be disclosed and how it should be disclosed, and

Which financial statement should be prepared.

Related Persons

Under section 402(b)(2)(B), two alternative methods are available to determine whether transaction value may be acceptable if the buyer and seller of imported merchandise are related. If an examination of the circumstances of sale of the imported merchandise indicates that the relationship did not influence the price, the transaction value may be accepted without further inquiry provided all other conditions are met. The transaction value of the imported merchandise also may be accepted if the transaction value "closely approximates" one of the following test values:

1. The transaction value of identical or similar merchandise in sales to unrelated buyers in the United States;

2. The deductive value or computed value of identical or similar merchandise; or

3. The transaction value in sales to unrelated buyers in the United States of merchandise that is identical to the imported merchandise except for having been produced in a different country.

Under the current law, the only standard that may be used to determine the acceptability of related party transactions is whether the related-party price "fairly reflects the market value".

Unacceptable Bases of Appraisement

Under section 402(f)(2), imported merchandise may not be appraised on the basis of:

1. The selling price in the United States of merchandise produced in the United States;

2. A system that provides for appraisement of imported merchandise at the higher of two alternative values;

3. The price of merchandise in the domestic market of the country of exportation;

4. A cost of production, other than a computed value for merchandise that is identical or similar to the merchandise being appraised;

5. The price of merchandise for export to a country other than the United States;

6. Minimum values for appraisement; or

7. Arbitrary or fictitious values.

Antidumping Duties and Contervailing Duties

The statutory changes made to section 402, Tariff Act of 1930, as amended, and the regulatory changes proposed under that section do not change or affect those separate provisions of United States law that set forth how imported merchandise is to be appraised for the purpose of levying antidumping or countervailing duties.

Notice of Value Determination

Section 402(a)(3) provides that upon written request by the importer, and subject to the provisions of law regarding the disclosure of information, Customs will provide the importer with a reasonable and concise written explanation of how the customs value of the merchandise was determined.

Discussion of Proposed Amendments

Accordingly, to reflect the statutory changes made by Title II of the Act, it is proposed to amend Part 152, Customs Regulations (19 CFR Part 152), by adding a new § 152.20 to Subpart C and a new Subpart E, entitled "Valuation of Merchandise", divided into nine sections, as described below:

New Section 152.20 of Subpart C—Appraisement

Proposed § 152.101(a), discussed below, would provide that the customs value of merchandise exported to the United States after the effective dates of Title II of the Act will be appraised under the provisions of proposed Subpart E, which implements the new value law. Therefore, proposed § 152.20 would be added to Subpart C, "Appraisement", to make clear that merchandise exported to the United States before the effective dates of Title II will continue to be appraised under the current value law.

New Subpart E—Valuation of Merchandise

1. Proposed § 152.100 would state that the interpretative notes set forth in Subpart E have been derived from information contained in the Statement of Administrative Action relating to customs valuation, submitted to and approved by Congress along with the Act, and will have the force and effect of regulations issued under this subpart.

2. Proposed § 152.101(a) would provide that the customs value of merchandise exported to the United States on or after the effective dates of Title II of the Act will be determined in accordance with section 402, Tariff Act of 1930 (19 U.S.C. 1401a), as amended by section 201 of the Act

Proposed § 152.101(b) would provide that imported merchandise will be appraised on the basis, and in the order, of the following:

a. Transaction value provided for in § 152.103;

b. Transaction value of identical merchandise provided for in § 152.104, if

the transaction value cannot be determined, or can be determined but cannot be used because of the limitations provided for in § 152.103(j);

c. Transaction value of similar merchandise provided for in § 152.104, if the transaction value of identical mercahndise cannot be determined;

d. Deductive value provided for in § 152.105, if the transaction value of similar merchandise cannot be determined;

e. Computed value provided for in § 152.106, if deductive value cannot be determined; or

f. The value provided for in § 152.107, if the computed value cannot be determined.

Proposed § 152.101(c) would set forth the procedure whereby the importer may request, at the time the entry summary is filed, that computed value be used before deductive value to appraise imported merchandise.

Proposed § 152.101(d) would provide the procedure whereby the district director shall provide a reasonable and concise written explanation of how the customs value of the merchandise was determined.

3. Proposed § 152.102 would define the following terms:

a. Assist,

b. Commission (buying or selling),

c. Generally accepted accounting principles,

d. Identical merchandise,

e. Packing costs,

f. Price actually paid or payable,

g. Related persons,

h. Same class or kind,

i. Similar merchandise,

j. Sufficient information, and

k. Unit price in greatest quantity.

4. Proposed § 152.103 would discuss "transaction value". Paragraph (a) would discuss "price actually paid or payable" and provide examples. Paragraph (b) would discuss the "additions to the price actually paid or payable" for the imported merchandise, and paragraph (c) would provide that additions to the price actually paid or payable will be made only when there is information sufficient to establish the accuracy of the additions and the extent to which they were not included in the price. An interpretative note would be provided.

Paragraph (d) would discuss "assists" and provide examples, and paragraph (e) would discuss the "apportionment" of the value of assists and provide an interpretative note.

Paragraph (f) would discuss "royalties or license fees" and provide an example, and paragraph (g) would discuss "proceeds of subsequent resale" and provide an example. Paragraph (h) would discuss "right to reproduce" and provide an example.

Paragraph (i) would discuss the exclusions from transaction value, and paragraph (j) would provide the limitations on the use of transaction value.

Paragraph (k) would discuss "restrictions and conditions on sale" and provide interpretative notes. Paragraph (l) would discuss "related buyer and seller" and provide interpretative notes and examples.

Paragraph (m) would provide that when Customs has grounds for rejecting the transaction value declared by an importer and that rejection increases the duty liability, the district director shall inform the importer of the grounds for the rejection.

5. Proposed § 152.104 would discuss the transaction value of identical merchandise and similar merchandise. Paragraph (a) would set forth a general discussion on determining the value under this section. Paragraph (b) would provide that minor differences in appearance will not preclude otherwise conforming merchandise from being considered "identical". Paragraph (c) would discuss factors considered to determine whether merchandise is "similar". Paragraph (d) would discuss "commercial level and quantity", and paragraph (e) would discuss "adjustments" for identical and similar merchandise and provide an interpretative note.

6. Proposed § 152.105 would discuss "deductive value". Paragraph (a) would discuss "merchandise concerned", and paragraph (b) would discuss "merchandise of the same class or kind". Paragraph (c) would set forth the three variables for determining the prices which would be appropriate for determining deductive value. The regulations would provide that the importer must make his election to use the "further processing" method at the time of filing the entry summary.

Paragraph (d) would discuss "deductions from price" determined under § 152.105(c). Paragraph (e) would discuss the special rules relating to profit and general expenses. Paragraph (f) would provide that the price determined under § 152.105(c) will be increased by an amount equal to the packing costs incurred by the importer.

Paragraph (g) would provide that for purposes of determining deductive value, any sale to a person who supplies any assist for use in connection with the production or sale for export of the merchandise concerned will be disregarded.

Paragraph (h) would discuss "unit price in greatest aggregate quantity" and provide three interpretative notes. Paragraph (i) would discuss "further processing" and provide an example.

7. Proposed § 152.106 would discuss "computed value". Paragraph (a) would provide the elements comprising computed value, and paragraph (b) would discuss special rules relating to proposed § 152.106(a). Paragraph (c) would discuss "profit and general expenses" and provide interpretative notes.

Paragraph (d) would discuss "assists and packing costs", and paragraph (e) would discuss "merchandise of the same class or kind" and provide an example. Paragraph (f) would discuss "availability of information".

8. Proposed § 152.107 would discuss how customs value is to be derived if the other value bases cannot be determined or used. Paragraph (a) would provide that if the value of imported merchandise cannot be determined or used under proposed §§ 152.103 through 152.106, the merchandise will be appraised on the basis of a value that is derived from the bases set forth in those sections, with the methods reasonably adjusted to the extent necessary to arrive at a value.

Paragraph (b) would discuss "identical merchandise" and "similar merchandise". Paragraph (c) would provide that the "90 days" requirement relating to deductive value for the sale of merchandise may be administered flexibly, and would provide an example.

9. Proposed § 152.108 would provide that imported merchandise may not be appraised on the basis of the items listed.

Authority

These amendments are proposed under the authority of R.S. 251, as amended (19 U.S.C. 66); section 624, 46 Stat. 759 (19 U.S.C. 1624); and Title II, Pub. L. 96–39 (July 26, 1979).

Comments

Before adopting this proposal, consideration will be given to any written comments, preferably in triplicate, that are submitted timely to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with § 103.8(b) Customs Regulations (19 CFR 103.8(b)), during regular business hours at the Regulations and Research Division, Headquarters, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2335, Washington, D.C. 20229.

Customs specifically solicits comments on (1) proposed § 152.101(c), relating to the importer's requesting the application of computed value before deductive value at the time the entry

summary is filed; and (2) proposed § 152.105(c)(3), relating to the election of the importer to use the "further processing method" at the time of filing the entry summary.

Drafting Information

The principal authors of this document were Todd J. Schneider and Charles D. Ressin, Regulations and Research Division, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Proposed Amendments

It is proposed to amend Part 152, Customs Regulations (19 CFR Part 152), in the following manner:

PART 152—CLASSIFICATION AND APPRAISEMENT OF MERCHANDISE

Subpart C—Appraisement

It is proposed to add a new § 152.20 to read as follows:

§ 152.20 Effective date.

The value for appraisment of merchandise exported to the United States before [the effective dates of Title II of Pub. L. 96–39] will be determined in accordance with this subpart.

It is proposed to add a new Subpart E, "Valuation of Merchandise", to read as follows:

Subpart E—Valuation of Merchandise

Sec.
152.100 Interpretative notes.
152.101 Basis of appraisement.
152.102 Definitions.
152.103 Transaction value.
152.104 Transaction value of identical merchandise and similar merchandised.
152.105 Deductive value.
152.106 Computed value.
152.107 Value if other values cannot be determined or used.
152.108 Unacceptable bases of appraisement.

Authority. R.S. 251, as amended (19 U.S.C. 66); sec. 624, 46 Stat. 759 (19 U.S.C. 1624); and Title II, Pub. L. 96–39 (July 26, 1979).

Subpart E—Valuation of Merchandise

§ 152.100 Interpretative notes.

The interpretative notes set forth in this subpart have been derived from information contianed in the Statement of Administrative Action relating to customs valuation, submitted to and approved by Congress along with the Trade Agreements Act of 1979 (Pub. L. 96–39), and will have the force and effect of regulations issued under this subpart.

§ 152.101 Basis of appraisement.

(a) *Effective date.* The value for appraisement of merchandise exported to the United States on or after [the effective dates of Title II of Pub. L. 96–39] will be determined in accordance with section 402, Tariff Act of 1930 (19 U.S.C. 1401a), as amended by section 201, Trade Agreements Act of 1979.

(b) *Methods.* Imported merchandise will be appraised on the basis, and in the order, of the following:

(1) The transaction value provided for in § 152.103;

(2) The transaction value of identical merchandise provided for in § 152.104, if the transaction value cannot be determined, or can be determined but cannot be used because of the limitations provided for in § 152.103(j);

(3) The transaction value of similar merchandise provided for in § 152.104, if the transaction value of identical merchandise cannot be detrmined;

(4) The deductive value provided for in § 152.105, if the transaction value of similar merchandise cannot be determined;

(5) The computed value provided for in § 152.106, if the deductive value cannot be determined; or

(6) The value provided for in § 152.107, if the computed value cannot be determined.

(c) *Importer's option.* The importer may request the application of the computed value method before the deductive value method. The request must be made at the time the entry summary for the merchandise is filed with the district director (see § 141.0a(b) of this chapter). If the importer makes the request, but the value of the imported merchandise cannot be determined using the computed value method, the merchandise will be appraised using the deductive value method if it is possible to do so. If the deductive value cannot be determined, the appraised value will be determined as provided for in § 152.107.

(d) *Explanation to importer.* Upon receipt of a written request from the importer within 90 days of liquidation, the district director shall provide a reasonable and concise written explanation of how the value of the imported merchandise was determined. The explanation will apply only to the imported merchandise being appraised and will not serve as authority with respect to the valuation of importations of any other merchandise at the same or a different port of entry. This procedure is for informational purposes only, and will not affect or replace the protest or administrative ruling procedures contained in Parts 174 and 177, respectively, of this chapter, or any other Customs procedures. Under this procedure, Customs will not be required to release any information not otherwise subject to disclosure under the Freedom of Information Act, as amended (5 U.S.C. 552), the Privacy Act of 1974 (5 U.S.C. 552a), or any other statute (see Part 103 of this chapter).

§ 152.102 Definitions.

As used in this subpart, the following terms will have the meanings indicated:

(a) *Assist.* (1) "Assist" means any of the following if supplied directly or indirectly, and free of charge or at reduced cost, by the buyer of imported merchandise for use in connection with the production or the sale for export to the United States of the merchandise:

(i) Materials, components, parts, and similar items incorporated in the imported merchandise.

(ii) Tools, dies, molds, and similar items used in the production of the imported merchandise.

(iii) Merchandise consumed in the production of the imported merchandise.

(iv) Engineering, development, artwork, design work, and plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise.

(2) No service or work to which subparagraph (1) (iv) of this paragraph applies will be treated as an assist if the service or work—

(i) Is performed by an individual domiciled within the United States;

(ii) Is performed by that individual while acting as an employee or agent of the buyer of the imported merchandise; and

(iii) Is incidental to other engineering, development, artwork, design work, or plans or sketches that are undertaken within the United States.

(3) The following apply in determining the value of assists described in subparagraph (1) (iv) of this paragraph—

(i) The value of an assist that is available in the public domain is the cost of obtaining copies of the assist.

(ii) If the production of an assist occurred in the United States and one or more foreign countries, the value of the assist is the value added outside the United States.

(iii) If the assist was purchased or leased by the buyer from an unrelated person, the value of the assist is the cost of the purchase or of the lease.

(b) *Commission.* "Buying commission" ordinarily means a fee paid by the buyer to an agent for the service of representing the buyer abroad in the purchase of the merchandise being appraised.

(2) "Selling commission" means any commission incurred by the buyer other than a "buying commission".

(c) *Generally accepted accounting principles.* (1) "Generally accepted accounting principles" refers to any generally recognized consensus or substantial authoritative support regarding—

(i) Which economic resources and obligations should be recorded as assets and liabilities;

(ii) Which changes in assets and liabilities should be recorded;

(iii) How the assets and liabilities and changes in them should be measured;

(iv) What information should be disclosed and how it should be disclosed; and

(v) Which financial statements should be prepared.

(2) The applicability of a particular set of generally accepted accounting principles will depend upon the basis on which the value of the imported merchandise is sought to be established.

(3) Information submitted by an importer, buyer, or producer in regard to the appraisement of merchandise may not be rejected by Customs because of the accounting method by which that information was prepared, if the preparation was in accordance with generally accepted accounting principles.

(d) *Identical merchandise.* "Identical merchandise" means merchandise identical in all respects to, and produced in the same country and by the same person as, the merchandise being appraised. If identical merchandise cannot be found (or for purposes of related buyer and seller transactions (see § 152.103(j)(2)(i)(A)), regardless of whether identical merchandise can be found), merchandise identical in all respects to, and produced in the same country as, but not produced by the same person as, the merchandise being appraised, may be treated as "identical merchandise". "Identical merchandise" does not include merchandise that incorporates or reflects any engineering, development, artwork, design work, or plan or sketch supplied free or at reduced cost by the buyer of the merchandise for use in connection with the production or sale for export to the United States of the merchandise, and is not an assist because undertaken within the United States.

(e) *Packing costs.* "Packing costs" means the cost of all containers and coverings of whatever nature and of packing, whether for labor or materials, used in placing merchandise in condition, packed ready for shipment to the United States.

(f) *Price actually paid or payable.* "Price actually paid or payable" means the total payment (whether direct or indirect, and exclusive of any charges, costs, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.

(g) *Related persons.* "Related persons" means: (1) Members of the same family, including brothers and sisters (whether by whole or half blood), spouse, ancestors, and lineal descendants.

(2) Any officer or director of an organization, and that organization.

(3) An officer or director of an organization and an officer or director of another organization, if each individual also is an officer or director in the other organization.

(4) Partners.

(5) Employer and employee.

(6) Any person directly or indirectly owning, controlling, or holding with power to vote, five percent or more of the outstanding voting stock or shares of any organization, and that organization.

(7) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

(h) *Same class or kind.* "Merchandise of the same class or kind" means merchandise (including, but not limited to, identical merchandise and similar merchandise) within a group or range of merchandise produced by a particular industry or industry sector.

(i) *Similar merchandise.* "Similar merchandise" means merchandise produced in the same country and by the same person as the merchandise being appraised, like the merchandise being appraised in characteristics and component material, and commercially interchangeable with the merchandise being appraised. If similar merchandise cannot be found (or for purposes of related buyer and seller transactions (see § 152.103(j)(2)(i)(A)), regardless of whether similar merchandise can be found), merchandise produced in the same country as, but not produced by the same person as, the merchandise being appraised, like the merchandise being appraised in characteristics and component material, and commercially interchangeable with the merchandise being appraised, may be treated as "similar merchandise". "Similar merchandise" does not include merchandise that incorporates or reflects any engineering, development, artwork, design work, or plan or sketch supplied free or at reduced cost by the buyer of the merchandise for use in connection with the production or the sale for export to the United States of the merchandise, and is not an assist because undertaken within the United States.

(j) *Sufficient information.* "Sufficient information" means information that establishes the accuracy of:

(1) Any amount—

(i) added under § 152.103(b) to the price actually paid or payable;

(ii) deducted under § 152.105(d) as profit or general expenses or value from further processing, or

(iii) added under § 152.106(b) as profit or general expenses; or

(2) Any difference taken into account under § 152.103(j)(2)(iv); or

(3) Any adjustment made under § 152.104(d).

(k) *Unit price in greatest aggregate quantity.* "Unit price at which merchandise is sold in the greatest aggregate quantity" means the unit price at which the "merchandise concerned" is sold to unrelated persons at the first commercial level after importation (in cases to which § 152.105(c)(1) and (2) apply), or after further processing (in cases to which § 152.105(c)(3) applies), at which the sales take place in a total volume greater than the total volume sold at any other price and sufficient to establish the unit price.

§ 152.103 Transaction value.

(a) *Price actually paid or payable*—(1) *General.* In determining transaction value, the price actually paid or payable will be considered without regard to its method of derivation. It may be the result of discounts, increases, or negotiations, or may be arrived at by the application of a formula, such as the price in effect on the date of export in the London Commodity Market. The word "payable" refers to a situation in which the price has been agreed upon, but actual payment has not been made at the time of importation. Payment may be made by letters of credit or negotiable instruments and may be made directly or indirectly.

(2) *Indirect payment.* An indirect payment would include the settlement by the buyer, in whole or in part, of a debt owed by the seller, or where the buyer receives a price reduction on a current importation as a means of settling a debt owed him by the seller. Activities such as advertising, undertaken by the buyer on his own account, other than those for which an adjustment is provided in § 152.103(b), will not be considered an indirect payment to the seller though they may benefit the seller. The costs of those

activities will not be added to the price actually paid or payable in determining the customs value of the imported merchandise.

(3) *Assembled merchandise.* The price actually paid or payable may represent an amount for the assembly of imported merchandise in which the seller has no interest other than as the assembler. The price actually paid or payable in that case will be calculated by the addition of the value of the components and required adjustments to form the basis for the transaction value.

(4) *Rebate.* Any rebate of, or other decrease in, the price actually paid or payable made or otherwise effected between the buyer and seller after the date of importation of the merchandise will be disregarded in determining the transaction value under § 152.103(b).

Example 1. In a transaction with foreign Company X, a U.S. firm pays Company X $10,000 for a shipment of meat products, packed ready for shipment to the United States. No selling commission, assist, royalty, or license fee is involved. Company X is not related to the U.S. purchaser and imposes no condition or limitation on the buyer.

The customs value of the imported meat products is $10,000—the transaction value of the imported merchandise.

Example 2. A foreign shipper sold merchandise at $100 per unit to a U.S. importer. Subsequently, the foreign shipper increased its price to $110 per unit. The merchandise was exported after the effective date of the price increase. The invoice price of $100 was the price originally agreed upon and the price the U.S. importer actually paid for the merchandise.

How should the merchandise be appraised?

Actual transaction value based on the price actually paid or payable.

Example 3. A foreign shipper sells to U.S. wholesalers at one price and to U.S. retailers at a higher price. The shipment undergoing appraisement is a shipment to a U.S. retailer. There are continuing shipments of identical and similar merchandise to U.S. wholesalers.

How should the merchandise be appraised?

Actual transaction value based on the price actually paid or payable by the retailer.

Example 4. Company X in the United States pay $2,000 to Y Toy Factory abroad for a shipment of toys. The $2,000 consists of $1,850 for the toys and $150 for ocean freight and insurance. Y Toy Factory would have charged Company X $2,200 for the toys; however, because Y owed Company X $350, Y charged only $1,850 for the toys. What is the transaction value?

The transaction value of the imported merchandise is $2,200, that is, the sum of the $1,850 plus the $350 indirect payment. Because the transaction value excludes C.I.F. charges, the $150 ocean freight and insurance charge is excluded.

(b) *Additions to price actually paid or payable.* (1) The transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts equal to—

(i) The packing costs incurred by the buyer with respect to the imported merchandise;

(ii) Any selling commission incurred by the buyer with respect to the imported merchandise;

(iii) The value, apportioned as appropriate, of any assist;

(iv) Any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States; and

(v) The proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller.

(2) The price actually paid or payable for imported merchandise will be increased by the amounts attributable to the items (and no others) described in paragraphs (b)(2) (i) through (v) of this section to the extent that each amount is not otherwise included within the price actually paid or payable, and is based on sufficient information. If sufficient information is not available, for any reason, with respect to any amount referred to in this section, the transaction value will be treated as one that cannot be determined.

(c) *Sufficiency of information.* Additions to the price actually paid or payable will be made only if there is sufficient information to establish the accuracy of the additions and the extent to which they are not included in the price.

Interpretative note. A royalty is paid on the basis of the price in a sale in the United States of a gallon of a particular product imported by the pound and transformed into a solution after importation. If the royalty is based partially on the imported merchandise and partially on other factors which have nothing to do with the imported merchandise (such as if the imported merchandise is mixed with domestic ingredients and is no longer separately identifiable, or if the royalty cannot be distinguished from special financial arrangements between the buyer and the seller), it would be inappropriate to attempt to make an addition for the royalty. However, if the amount of this royalty is based only on the imported merchandise and can be readily quantified, an addition to the price actually paid or payable will be made.

(d) *Assist.* If the value of an assist is to be added to the price actually paid or payable, or to be used as a component of computed value, the district director shall determine the value of the assist and apportion that value to the price of the imported merchandise in the following manner:

(1) If the assist consists of materials, components, parts, or similar items incorporated in the imported merchandise, or items consumed in the production of the imported merchandise, acquired by the buyer from an unrelated seller, the value of the assist is the cost of its acquisition. If the assist were produced by the buyer or a person related to the buyer, its value would be the cost of its production. In either case, the value of the assist would include transportation costs to the place of production.

(2) If the assist consists of tools, dies, molds, or similar items used in the production of the imported merchandise, acquired by the buyer from an unrelated seller, the value of the assist is the cost of its acquisition. If the assist were produced by the buyer or a person related to the buyer, its value would be the cost of its production. If the assist has been used previously by the buyer, regardless of whether it had been acquired or produced by him, the original cost of acquisition or production would be adjusted downward to reflect its use before its value could be determined. If the assist were leased by the buyer from an unrelated seller, the value of the assist would be the cost of the lease. In either case, the value of the assist would include transportation costs to the place of production. Repairs or modifications to an assist may increase its value.

Example 1. A U.S. importer supplied detailed designs to the foreign producer. These designs were necessary to manufacture the merchandise. The U.S. importer bought the designs from an engineering company in the U.S. for submission to his foreign supplier.

Should the appraised value of the merchandise include the value of the assist?

No, design work undertaken in the U.S. is not to be included in dutiable value.

Example 2. A U.S. importer supplied molds free of charge to the foreign shipper. The molds were necessary to manufacture merchandise for the U.S. importer. The U.S. importer had some of the molds manufactured by a U.S. company and others manufactured in a third country.

Should the appraised value of the merchandise include the value of the molds?

Yes. It is an addition required to be made to transition value.

(e) *Apportionment.* The apportionment of the value of assists to imported merchandise will be made in a reasonable manner appropriate to the circumstances and in accordance with generally accepted accounting principles. The method of apportionment actually accepted by Customs will depend upon the documentation submitted by the importer. If the entire anticipated production using the assist is for exportation to the United States, the total value may be apportioned over

(1) the first shipment, if the importer wishes to pay duty on the entire value at once, (2) the number of units produced up to the time of the first shipment, or (3) the entire anticipated production. In addition to these three methods, the importer may request some other method of apportionment in accordance with generally accepted accounting principles. If the anticipated production is only partially for exportation to the United States, or if the assist is used in several countries, the method of apportionment will depend upon the documentation submitted by the importer.

Interpretative note. An importer provides the producer with a mold to be used in the production of the imported merchandise and contracts to buy 10,000 units. By the time of arrival of the first shipment of 1,000 units, the producer has already produced 4,000 units. The importer may request Customs to apportion the value of the mold over 1,000, 4,000, or 10,000 units.

(f) *Royalties or license fees.* Royalties or license fees for patents covering processes to manufacture the imported merchandise generally will be dutiable. Royalties or license fees paid to third parties for use, in the United States, of copyrights and trademarks related to the imported merchandise generally will be considered selling expenses of the buyer and not dutiable. The dutiable status of royalties or license fees paid by the buyer will be determined in each case and will depend on (1) whether the buyer was required to pay them as a condition of sale of the merchandise for exportation to the United States, and (2) to whom and under what circumstances they were paid. Payments made by the buyer for the right to distribute or resell the imported merchandise will not be added to the price actually paid or payable for the imported merchandise if the payments are not a condition of the sale of the merchandise for exportation to the United States.

Example. A foreign producer sold merchandise to an unrelated U.S. importer. The U.S. importer pays a royalty to an unrelated third party for the right to manufacture and sell a product made in part from the imported merchandise. The royalty is based on the selling price of the further-manufactured product in the U.S.

Is the license fee part of the appraised value? No. The license fee is not a condition of the sale of the imported merchandise for export to the U.S.

(g) *Proceeds of subsequent resale.* Additions to the price actually paid or payable will be made for the value of any part of the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrues directly or indirectly to the seller. Dividends or other payments from the buyer to the seller which do not relate directly to the imported merchandise will not be added to the price actually paid or payable. Whether any addition would be made will depend on the facts of the particular case.

Example. A buyer contracts to import a new product. Not knowing whether the product ultimately will sell in the United States, the buyer agrees to pay the seller initially $1 per unit with an additional $1 per unit to be paid upon the sale of each unit in the United States. Assuming the resale price in the United States can be determined promptly, the transaction value of each unit would be $2. Otherwise, the transaction value could not be determined for want of sufficient information.

(h) *Right to reproduce.* Charges for the right to reproduce the imported merchandise in the United States will not be added to the price actually paid or payable. The right to reproduce denotes that an idea or an original work is incorporated in, or reflected by, the imported merchandise, and the right is reserved to reproduce that idea or work in other merchandise by using the imported merchandise. The concept of the right to reproduce relates only to the following classes of merchandise: originals or copies of artistic or scientific works; originals or copies of models and industrial drawings; model machines and prototypes; and plant and animal species.

Example. The importer purchases a painting. By purchasing the painting, the owner possesses the right to resell, lease, or otherwise place it on display. Absent an agreement to the contrary, he does not possess the right to reproduce copies of the painting. Fees paid for the right to reproduce the painting would not be dutiable.

(i) *Exclusions from transaction value.* The transaction value of imported merchandise does not include any of the following, if identified separately from the price actually paid or payable and from any cost or other item referred to in paragraph (b) of this section:

(1) Any reasonable cost or charge that is incurred for—

(i) The construction, erection, assembly, or maintenance of, or the technical assistance provided with respect to, the merchandise after its importation into the United States; or

(ii) The transportation of the merchandise after its importation.

(2) The customs duties and other Federal taxes currently payable on the imported merchandise by reason of its importation, and any Federal excise tax on, or measured by the value of, the merchandise for which vendors in the United States ordinarily are liable.

Example. A foreign shipper sells a piece of equipment to a U.S. buyer. The total contract price for the equipment includes technical assistance in the U.S. The equipment cannot be purchased without the technical assistance, but the contract provides a breakdown of costs.

Should the appraised value include the technical assistance? No, transaction value does not include any reasonable costs for construction, erection, assembly, maintenance of, or technical assistance, for the imported merchandise after its importation into the U.S., the cost of which can be accurately identified as being separate from the price actually paid or payable for the merchandise to which they relate.

(j) *Limitations on use of transaction value.*—(1) *In general.* The transaction value of imported merchandise will be the appraised value only if—

(i) There are no restrictions on the disposition or use of the imported merchandise by the buyer, other than restrictions which are imposed or required by law, limit the geographical area in which the merchandise may be resold, or do not affect substantially the value of the merchandise;

(ii) The sale of, or the price actually paid or payable for, the imported merchandise is not subject to any condition or consideration for which a value cannot be determined;

(iii) No part of the proceeds of any subsequent resale, disposal, or use of the imported merchandise by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made under paragraph (b)(1)(v) of this section; and

(iv) The buyer and seller are not related, or the buyer and seller are related but the transaction value is acceptable.

(2) *Related person transactions.* (i) The transaction value between a related buyer and seller is acceptable if an examination of the circumstances of sale indicates that their relationship did not influence the price actually paid or payable, or if the transaction value of the imported merchandise closely approximates—

(A) The transaction value of identical merchandise, or of similar merchandise, in sales to unrelated buyers in the United States; or

(B) The deductive value or computed value of identical merchandise, or of similar merchandise; or

(C) The transaction value as determined in sales for exportation to the United States to unrelated buyers of merchandise that is identical in all respects to the imported merchandise but was not produced in the country in which the imported merchandise was produced, except that no two sales to unrelated buyers may be used for

comparison unless the sellers are unrelated; and

(D) Each value referred to in paragraph (j)(2)(i) (B) and (C) of this section that is used for comparison relates to merchandise that was exported to the United States at or about the same time as the imported merchandise.

(ii) In applying the values used for comparison, differences with respect to the sales involved will be taken into account if based on sufficient information supplied by the buyer or otherwise available to Customs and if the differences relate to—

(A) Commercial levels;

(B) Quantity levels;

(C) The costs, commissions, values, fees, and proceeds described in paragraph (b) of this section; and

(D) The costs incurred by the seller in sales in which the seller and the buyer are not related that are not incurred by the seller in sales in which the seller and the buyer are related.

(k) *Restrictions and conditions on sale.* (1) A restriction placed on the buyer of imported merchandise that does not affect substantially its value will not prevent transaction value from being accepted as the appraised value.

Interpretative note. A seller requires a buyer of automobiles not to sell or exhibit them before a fixed date that represents the beginning of a model year.

(2) The transaction value will not be accepted as the appraised value if the sale of, or the price actually paid or payable for, the merchandise is subject to a condition or consideration for which a value cannot be determined.

Interpretative note 1. The seller establishes the price of the imported merchandise on condition that the buyer also will buy other merchandise in specified quantities.

Interpretative note 2. The price of the imported merchandise is dependent upon the price or prices at which the buyer of the merchandise sells other merchandise to the seller of the merchandise.

Interpretative note 3. The price of the imported merchandise is established on the basis of a form of payment extraneous to the merchandise, such as where the merchandise is to be further processed by the buyer, and has been provided by the seller on condition that he will receive a specified quantity of the finished merchandise.

(l) *Related buyer and seller.*—(1) *Validation of transaction.* The district director shall not disregard a transaction value solely because the buyer and seller are related. There will be related person transactions in which validation of the transaction value, using the procedures contained in § 152.103(j)(2), may not be necessary.

Interpretative note 1. Customs may have previously examined the relationship or may already have sufficient detailed information concerning the buyer and seller to be satisfied that the relationship did not influence the price actually paid or payable. In such case, if Customs has no doubts about the acceptability of the price, the price will be accepted without requesting further information from the importer. If Customs does have doubts about the acceptability of the price and is unable to accept the transaction value without further inquiry, the importer will be given an opportunity to supply such further detailed information as may be necessary to enable Customs to examine the circumstances of the sale. In this context, Customs will examine relevant aspects of the transaction, including the way in which the buyer and seller organize their commercial relations and the way in which the price in question was arrived at in order to determine whether the relationship influenced the price.

Interpretative note 2. If it is shown that the buyer and seller, although related, buy from and sell to each other as if they were not related, this will demonstrate that the price has not been influenced by the relationship, and the transaction value will be accepted. If the price has been settled in a manner consistent with the normal pricing practices of the industry in question, or with the way the seller settles prices for sales to buyers who are not related to him, this will demonstrate that the price has not been influenced by the relationship.

Interpretative note 3. If it is shown that the price is adequate to ensure recovery of all costs plus a profit which is equivalent to the firm's overall profit realized over a representative period of time (e.g., on an annual basis) in sales of merchandise of the same class or kind, this would demonstrate that the price had not been influenced.

Example. A foreign seller sells merchandise to a related U.S. importer. The foreign seller does not sell identical merchandise or similar merchandise to any unrelated parties. The transaction between the foreign seller and the U.S. importer is determined by Customs to be unaffected by the relationship. Similar merchandise is being sold at a higher price, which includes a higher percentage for profit and general expenses.

How should the merchandise be appraised?

Transaction value based on the price actually paid or payable. A transaction value between a related buyer and seller is acceptable if the relationship did not affect the price actually paid or payable.

(2) *Test values.* (i) The importer or the buyer may demonstrate that the transaction value in a related person transaction is acceptable by showing that the value "closely approximates" any one of the test values provided in § 152.103(j)(2)(i). The factors that will be examined to determine if the transaction value closely approximates a test value are:

(A) The nature of the imported merchandise and the industry,

(B) The season in which the merchandise is imported,

(C) Whether the difference in value is commercially significant, and

(D) Whether the difference in value is attributable to internal transport costs in the country of exportation.

(ii) Because these factors may vary, Customs will not be able to apply a uniform standard, such as a fixed percentage, in each case. A small difference in value in a case involving one type of imported merchandise may be unacceptable, although a large difference in a case involving another type may be acceptable, in determining if the transaction value closely approximates any of the test values. Customs will be consistent in determining if one value "closely approximates" another value. The same approach will be taken if Customs considers a transaction value that is higher than any of the enumerated test values as will be taken if the transaction value is lower than any of the test values.

Example. In applying any of the test values, if the transaction value in the sale under consideration is rejected because 95 does not closely approximate 100, then a transaction value for the sale of the same merchandise at 105 occurring at or about the same time likewise would have to be rejected. Similarly, if 103 were considered to closely approximate 100, a transaction value of 97 likewise would closely approximate 100.

(iii) If one of the test values provided in § 152.103(j)(2)(i) has been found to be appropriate, the district director shall not seek to determine if the relationship between the buyer and seller influenced the price. If the district director already has sufficient information to be satisfied, without further detailed inquires, that one of the test values is appropriate, he shall not require the importer to demonstrate that the test value if appropriate.

(m) *Rejection of transaction value.* When Customs has grounds for rejecting the transaction value declared by an importer and that rejection increases the duty liability, the district director shall inform the importer of the grounds for the rejection. The importer will be afforded 20 days to respond in writing to the district director if in disagreement. This procedure will not affect or replace the administrative ruling procedures contained in Part 177 of this chapter, or any other Customs procedures.

§ 152.104 Transaction value of identical merchandise and similar merchandise.

(a) *General.* The transaction value of identical merchandise, or of similar merchandise, is the transaction value (acceptable as the appraised value under § 152.103 but adjusted under

paragraph (e) of this section) of imported merchandise that is—

(1) With respect to the merchandise being appraised, either identical merchandise, or similar merchandise; and

(2) Exported to the United States at or about the time that the merchandise being appraised is exported to the United States.

(b) *Identical merchandise.* Minor differences in appearance will not preclude otherwise conforming merchandise from being considered "identical". See § 152.102(d).

(c) *Similar merchandise.* The quality of the merchandise, its reputation, and the existence of a trademark will be factors considered to determine whether merchandise is "similar". See § 152.102(i).

(d) *Commercial level and quantity.* Transaction values determined under this section will be based on sales of identical merchandise, or similar merchandise, at the same commercial level and in substantially the same quantity as the sales of the merchandise being appraised. If no such sale is found, sales of identical merchandise, or similar merchandise, at either a different commercial level or in different quantities, or both, will be used, but adjusted to take account of that difference. Any adjustment made under this section will be based on "sufficient information". See section 152.102(j). If in applying this section to any merchandise, two or more transaction values for identical merchandise, or for similar merchandise, are determined, the merchandise will be appraised on the basis of the lower or lowest of those values.

(e) *Adjustments.* Adjustments for identical merchandise, or similar merchandise, because of different commercial levels or quantities, or both, whether leading to an increase or decrease in the value, will be made only on the basis of sufficient information; e.g., valid price lists containing prices referring to different levels or quantities.

Interpretative note. If the imported merchandise being valued consists of a shipment of 10 units and the only identical imported merchandise for which a transaction value exists involved a sale of 500 units, and it is recognized that the seller grants quantity discounts, the required adjustment may be accomplished by resorting to the seller's price list and using that price applicable to a sale of 10 units. This does not require that a sale had to have been made in quantities of 10 as long as the price list has been established as being *bona fide* through sales at other quantities. In the absence of such an objective measure, however, the determination of a customs value under the provisions for transaction value of identical or similar merchandise is not appropriate.

§ 152.105 Deductive value.

(a) *Merchandise concerned.* For the purposes of deductive value, "merchandise concerned" means the merchandise being appraised, identical merchandise, or similar merchandise.

(b) *Merchandise of the same class or kind.* For the purposes of deductive value, "merchandise of the same class or kind" includes merchandise imported from the same country as well as other countries as the merchandise being appraised.

(c) *Prices.* The deductive value of the merchandise being appraised is whichever of the following prices (as adjusted under paragraph (d) of this section) is appropriate depending upon when and in what condition the merchandise concerned is sold in the United States:

(1) If the merchandise concerned is sold in the condition as imported at or about the date of importation of the merchandise being appraised, the price is the unit price at which the merchandise concerned is sold in the greatest aggregate quantity at or about such date.

(2) If the merchandise concerned is sold in the condition as imported but not sold at or about the date of importation of the merchandise being appraised, the price is the unit price at which the merchandise concerned is sold in the greatest aggregate quantity after the date of importation of the merchandise being appriased but before the close of the 90th day after the date of such importation.

(3) If the merchandise concerned was not sold in the condition as imported and not sold before the close of the 90th day after the date of importation of the merchandise being appraised, the price is the unit price at which the merchandise being appriased, after further processing, is sold in the greatest aggregate quantity before the 180th day after the date of such importation. This provision will apply to appraisement of merchandise only if the importer so elects at the time of filing the entry summary.

(d) *Deductions from price.* The price determined under paragraph (c) of this section will be reduced by an amount equal to—

(1) Any commission usually paid or agreed to be paid, or the addition usually made for profit and general expenses, in connection with sales in the United States of imported merchandise that is of the same class or kind, regardless of the country of exporation, as the merchandise concerned;

(2) The actual costs and associated costs of transportation and insurance incurred with respect to international shipments of the merchandise concerned from the country of exportation to the United States;

(3) The usual costs and associated costs of transportation and insurance incurred with respect to shipments of the merchandise concerned from the place of importation to the place of delivery in the United States, if those costs are not included as a general expense under paragraph (d)(1) of this section;

(4) The customs duties and other Federal taxes currently payable on the merchandise concerned by reason of its importation, and any Federal excise tax on, or measured by the value of, the merchandise for which vendors in the United States ordinarily are liable; and

(5) But only in the case of price determined under paragraph (c)(3) of this section, the value added by the processing of the merchandise after importation to the extent that the value is based on sufficient information relating to the cost of that processing.

(e) *Profit and general expenses; special rules.* (1) The deduction made for profit and general expenses (taken as a whole) will be based upon the importer's profit and general expenses, unless the profit and general expenses are inconsistent with those reflected in sales in the United States of imported merchandise of the same class or kind from all countries, in which case the deduction will be based on the usual profit and general expenses reflected in those sales, as determined from sufficient information. Any State or local tax imposed on the importer with respect to the sale of imported merchandise will be treated as a general expense.

(2) In determining deductions for commissions and usual profit and general expenses, sales in the United States of the narrowest group or range of imported merchandise of the same class or kind, including the merchandise being appraised, for which sufficient information can be provided, will be examined.

(f) *Packing costs.* The price determined under subsection (c) will be increased, but only to the extent that the costs are not otherwise included, by an amount equal to the packing costs incurred by the importer or the buyer with respect to the merchandise concerned.

(g) *Assists.* For purposes of determining deductive value, any sale to a person who supplies any assist for use

in connection with the production or sale for export of the merchandise concerned will be disregarded.

(h) *Unit price in greatest aggregate quantity.* The unit price will be established after a sufficient number of units have been sold to an unrelated person. The unit price to be used when the units have been sold in different quantities will be that at which the total volume sold is greater than the total volume sold at any other unit price.

Interpretative note 1. Merchandise is sold to an unrelated person from a price list which grants favorable unit prices for purchases made in larger quantities:

Sale quantity	Unit price	Number of sales	Total quantity sold at each price
1-10 units	$100	10 sales of 5 units	65
		5 sales of 3 units	
11-25 units	$95	5 sales of 11 units	55
over 25 units	$90	1 sale of 30 units	80
		1 sale of 50 units	

The greatest number of units sold at a price is 80; therefore, the unit price in the greatest aggregate quantity is $90.

Interpretative note 2. Two sales to unrelated persons occur: in the first sale, 500 units are sold at a price of $95 each; in the second sale, 400 units are sold at a price of $90 each. In this example, the greatest number of units sold at a particular price is 500; therefore, the unit price in the greatest aggregate quantity is $95.

Interpretative note 3. Various quantities are sold to unrelated persons at various prices:

(a) *Sales*

Sale quantity	Unit price
40 units	$100
30 units	$90
15 units	$100
50 units	$95
25 units	$105
35 units	$90
5 units	$100

(b) *Totals*

Total quantity sold	Unit price
65	$90
50	$95
60	$100
25	$105

In this example, the greatest number of units sold at a particular price is 65; therefore, the unit price in the greatest aggregate quantity is $90.

(i) *Further processing.*—(1) *Quantified data.* If merchandise has undergone further processing after its importation into the United States and the importer elects the method specified in paragraph (c)(3) of this section, deductions made for the value added by that processing will be based on objective and quantifiable data relating to the cost of the work performed. Accepted industry formulas, recipes, methods of construction, and other industry practices would form the basis for the deduction. That deduction also will reflect amounts for spoilage, waste, or scrap derived from the further processing.

(2) *Loss of identity.* If the imported merchandise loses its identity as a result of further processing, the method specified in paragraph (c)(3) of this section will not be applicable unless the value added by the processing can be determined accurately without unreasonable difficulty for either importers or Customs. If the imported merchandise maintains its identity but forms a minor element of the merchandise sold in the United States, the use of paragraph (c)(3) of this section will be unjustified. The district director shall review each case involving these issues on its merits.

Example. A foreign shipper sells merchandise to a related U.S. importer. The foreign shipper does not sell to any unrelated person. The transaction between the foreign shipper and the U.S. importer is determined to have been affected by the relationship. There is no identical or similar merchandise from the same country of production. The U.S. importer further processes the product and sells the finished product to an unrelated buyer in the U.S. within 180 days of the date of importation. No assists from the unrelated U.S. buyer are involved, and the type of processing involved can be accurately costed.

How should the merchandise be appraised?

The merchandise should be appraised under deductive value with allowances for profit and general expenses, freight and insurance, duties and taxes, and the cost of processing.

§ 152.106 Computed value.

(a) *Elements.* The computed value of imported merchandise is the sum of—

(1) The cost or value of the materials and the fabrication and other processing of any kind employed in the production of the imported merchandise;

(2) An amount for profit and general expenses equal to that usually reflected in sales of merchandise of the same class or kind as the imported merchandise that are made by the producers in the country of exportation for export to the United States;

(3) Any assist, if its value is not included under paragraph (a) (1) or (2) of this section; and

(4) The packing costs.

(b) *Special rules.* (1) The cost or value of materials under paragraph (a)(1) of this section will not include the amount of any internal tax imposed by the country of exportation that is directly applicable to the materials or their disposition if the tax is remitted or refunded upon the exportation of the merchandise in the production of which the materials were used.

(2) The amount for profit and general expenses under paragraph (a)(2) of this section will be based upon the producer's profit and general expenses, unless the producer's profit and general expenses are inconsistent with those usually reflected in sales of merchandise of the same class or kind as the imported merchandise that are made by producers in the country of exportation for export to the United States. In that case, the amount under paragraph (a)(2) of this section will be based on the usual profit and general expenses of such producers in those sales, as determined from "sufficient information". See § 152.102(j).

(c) *Profit and general expenses.* The amount for profit and general expenses will be taken as a whole. If the producer's profit figure is low and general expenses high, those figures taken together nevertheless may be consistent with those usually reflected in sales of imported merchandise of the same class or kind.

Interpretative note 1. A product is introduced into the United States, and the producer accepts either no profit or a low profit to offset the high general expenses required to introduce the product into this market. If the producer can demonstrate that there is a low profit on sales of the imported merchandise because of peculiar commercial circumstances, the actual profit figures will be accepted provided the producer has valid commercial reasons to justify them and his pricing policy reflects the usual pricing policies in the industry.

Interpretative note 2. Producers have been forced to lower prices temporarily because of an unforeseeable drop in demand, or they sell merchandise to complement a range of merchandise being produced in the United States and accept a low profit to maintain competitiveness. If the producer's own figures for profit and general expenses are not consistent with those usually reflected in sales of merchandise of the same class or kind as the merchandise being valued which are made in the country of exportation for export to the United States, the amount for profit and general expenses will be based upon reliable and quantifiable information other than that supplied by or on behalf of the producer of the merchandise.

(d) *Assists and packing costs.* Computed value also will include an amount equal to the apportioned value of any assists used in the production of the imported merchandise and the packing costs for the imported merchandise. The value of any engineering, development, artwork, design work, and plans and sketches undertaken in the United States will be included in computed value only to the

extent that their value has been charged to the producer. Depending on the producer's method of accounting, the value of assists may be included (duplicated) in the producer's cost of materials, fabrication, and other processing, or in the general expenses. If duplication occurs, a separate amount for the value of the assists will not be added to the other elements as it is not intended that any component of computed value be included twice.

(e) *Merchandise of same class or kind.* Sales for export to the United States of the narrowest group or range of imported merchandise, including the merchandise being appraised, will be examined to determine usual profit and general expenses. For the purpose of computed value, merchandise of the same class or kind must be from the same country as the merchandise being appraised.

Example. A foreign shipper sells merchandise to a related U.S. importer. The foreign shipper does not sell to any unrelated persons. The transaction between the foreign shipper and the U.S. importer is determined to have been affected by the relationship. There is no identical or similar merchandise from the same country of production. The U.S. importer further processes the product and sells the finished product to an unrelated buyer in the U.S. within 180 days of the date of importation. No assists from the unrelated U.S. buyer are involved, and the type of processing involved can be accurately costed. The U.S. importer has requested that the shipment be appraised under computed value. The profit and general expenses figure for the same class or kind of merchandise in the country of exportation for export to the U.S. is known.

How should the merchandise be appraised?

The merchandise should be appraised under computed value, using the company's profit and general expenses if not inconsistent with those usually reflected in sales of merchandise of the same class or kind.

(f) *Availability of information.* (1) It will be presumed that the computed value of the imported merchandise cannot be determined if—

(i) The importer is unable to provide required computed value information within a reasonable time, and/or

(ii) The foreign producer refuses to provide, or is legally prevented from providing, that information.

(2) If information other than that supplied by or on behalf of the producer is used to determine computed value, the district director shall inform the importer, upon written request, of

(1) The source of the information,

(ii) The data used, and

(iii) The calculation based upon the specified data if not contrary to domestic law regarding disclosure of information. See also § 152.101(d).

§ 152.107 Value if other values cannot be determined or used.

(a) *Reasonable adjustments.* If the value of imported merchandise cannot be determined or otherwise used for the purposes of this subpart, the imported merchandise will be appraised on the basis of a value derived from the methods set forth in §§ 152.103 through 152.106, reasonably adjusted to the extent necessary to arrive at a value. Only information available in the United States will be used.

(b) *Identical merchandise or similar merchandise.* The requirement that identical merchandise, or similar merchandise, should be exported at or about the same time of exportation as the merchandise being appraised may be interpreted flexibly. Identical merchandise, or similar merchandise, produced in any country other than the country of exportation or production of the merchandise being appraised may be the basis for customs valuation. Customs values of identical merchandise, or similar merchandise, already determined on the basis of deductive value or computed value may be used.

(c) *Deductive value.* The "90 days" requirement for the sale of merchandise referred to in § 152.105(c) may be administered flexibly.

§ 152.108 Unacceptable bases of appraisement.

For the purposes of this subpart, imported merchandise may not be appraised on the basis of—

(1) The selling price in the United States of merchandise produced in the United States;

(2) A system that provides for the appraisement of imported merchandise at the higher of two alternative values;

(3) The price of merchandise in the domestic market of the country of exportation;

(4) A cost of production, other than a value determined under § 152.106 for merchandise that is identical merchandise, or similar merchandise, to the merchandise being appraised;

(5) The price of merchandise for export to a country other than the United States;

(6) Minimum values for appraisement; or

(7) Arbitrary or fictitious values.

R. E. Chasen,

Commissioner of Customs.

Approved: March 20, 1980.

John P. Simpson,

Acting Assistant Secretary of the Treasury.

[FR Doc. 80-9647 Filed 3-28-80; 8:45 am]

BILLING CODE 4810-22-M

DEPARTMENT OF STATE

22 CFR Parts 121, 122, 123, 124, 125, 126, 127, 128, and 161

[Docket No. SD-152]

Improving Government Regulations; Semiannual Agenda of Regulations

AGENCY: Department of State.

ACTION: Publication of semiannual agenda of regulations (Improving Government Regulations).

SUMMARY: As required by section 2(a) of Executive Order No. 12044, Improving Government Regulations, the second semiannual agenda of regulations is set forth below. The first semiannual agenda was published in May (44 FR 28000).

FOR FURTHER INFORMATION CONTACT: K. E. Malmborg, Assistant Legal Adviser for Management, Department of State, Room 4427A, 2201 C Street, NW., Washington, D.C. 20520, telephone (202) 632-2350.

Semiannual Agenda of Regulations

One significant regulation expected to be developed by the Department of State, prior to publication of the next semiannual agenda, will be the regulations on International Traffic in Arms, Subchapter M, Parts 121 through 128 and Part 130 of Title 22, Code of Federal Regulations.

A number of significant changes and additions to these regulations have been made in recent years. The authority is found in 22 U.S.C. 2778 and 2779. Development of the regulations is now substantially complete; when finally completed a notice of proposed rulemaking will be published in the **Federal Register** for public comment.

Another significant regulation in advanced stages of issuance will implement the National Environmental Policy Act, 42 U.S.C. 4321 et seq., and Executive Order 11991. These regulations were published for public comment on November 21, 1979 (44 FR 66838); revisions of the proposed regulations are substantially complete and the final regulations will be published in the near future. The Department has also published notice of its procedures, prepared pursuant to Executive Order 12114, relating to assessment of environmental impacts abroad of Department actions (44 FR 67004).

The point of contact for the first regulation in the Department is Mr. William B. Robinson, Director, Office of Munitions Control, Department of State (mailing address) 2201 C Street, NW., Washington, D.C. 20520, telephone (202)

235-9755. For the second regulation, contact Mr. William H. Mansfield, Office of Environment and Health, Department of State, 2201 C Street, NW., Washington, D.C. 20520, telephone (202) 632-9266.

The Department plans to publish its next semiannual agenda in November 1980.

For the Secretary of State.

Dated: March 20, 1980.

Ben Read,

Under Secretary of State for Management.

[FR Doc. 80-9830 Filed 3-28-80; 8:45 am]

BILLING CODE 4710-08-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Federal Housing Commissioner—Office of Assistant Secretary for Housing

24 CFR Parts 203, 213, 221, 227, 234, 235

[Docket No. R-80-790]

Transmittal of Interim Rule to Congress

AGENCY: Department of Housing and Urban Development.

ACTION: Notice of transmittal of interim rule to Congress under Section 7(o) of the Department of HUD Act.

SUMMARY: Recently enacted legislation authorizes Congress to review certain HUD rules for fifteen (15) calendar days of continuous session of Congress prior to each such rule's publication in the **Federal Register.** This Notice lists and summarizes for public information an interim rule which the Secretary is submitting to Congress for such review.

FOR FURTHER INFORMATION CONTACT: Burton Bloomberg, Director, Office of Regulations, Office of General Counsel, 451 7th Street, S.W., Washington, D.C. 20410, (202) 755-6207.

SUPPLEMENTARY INFORMATION: Concurrently with issuance of this Notice, the Secretary is forwarding to the Chairmen and Ranking Minority Members of both the Senate Banking, Housing, and Urban Affairs Committee and the House Banking, Finance and Urban Affairs Committee the following rulemaking document: 24 CFR Parts 203, 213, 221, 227, 234 and 235—Mutual Mortgage Insurance and Insured Home Improvement Loans Relating to Amortization Periods.

This interim rule would amend certain sections of 24 CFR to remove the requirement of amortization of mortgages at five-year intervals. This amendment would allow financing of insured mortgages with bonds and other types of financing having irregular maturities.

(Section 7(o) of the Department of HUD Act, 42 U.S.C. 3535(o), Section 324 of the Housing and Community Development Amendments of 1978)

Issued at Washington, D.C., March 24, 1980

Moon Landrieu,

Secretary, Department of Housing and Urban Development.

[FR Doc. 80-9637 Filed 3-28-80; 8:45 am]

BILLING CODE 4210-01-M

Office of the Secretary

24 CFR Part 3280

[Docket No. R-80-789]

Notice of Transmittal of Proposed Interpretative Bulletin to Congress

AGENCY: Department of Housing and Urban Development.

ACTION: Notice of transmittal of proposed interpretative bulletin to Congress under Section 7(o) of the Department of HUD Act.

SUMMARY: Recently enacted legislation authorizes Congress to review certain HUD rules for fifteen (15) calendar days of continuous session of Congress prior to each such rule's publication in the **Federal Register.** This Notice lists and summarizes for public information a proposed interepretative bulletin which the Secretary is submitting to Congress for such review. This interpretative bulletin is not listed in the Department's semiannual agenda of significant rules, published pursuant to Executive Order 12044.

FOR FURTHER INFORMATION CONTACT: Burton Bloomberg, Director, Office of Regulations Office of General Counsel, 451 7th Street, S.W., Washington, D.C. 20410 (202) 755-6207.

SUPPLEMENTARY INFORMATION: Concurrently with issuance of this Notice, the Secretary is forwarding to the Chairmen and Ranking Minority Members of both the Senate Banking, Housing and Urban Affairs Committee and the House Banking, Finance and Urban Affairs Committee the following rulemaking document: Interpretative Bulletin—24 CFR Section 3280.808(n)—"Substantial Brace".

This interpretative bulletin would permit mobile homes manufacturers to use certain braces to support electrical outlet boxes, even though such braces do not conform to the design requirements contained in the National Electrical Code. The braces and their fastening mechanisms must be capable of withstanding a 50-pound force level, as specified by Underwriters Laboratories.

(Section 7(o) of the Department of HUD Act, 42 U.S.C. 3535(o), Section 324 of the Housing and Community Development Amendments of 1978)

Issued at Washington, D.C., March 24, 1980.

Moon Landrieu,

Secretary, Department of Housing and Urban Development.

[FR Doc. 80-9636 Filed 3-28-80; 8:45 am]

BILLING CODE 4210-01-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[LR-183-78]

Regulated Investment Companies and Real Estate Investment Trusts

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking

SUMMARY: This document contains proposed regulations relating to deficiency dividends paid by certain regulated investment companies (RICs) and real estate investment trusts (REITs). Changes to the applicable tax law were made by the Tax Reform Act of 1976 and by the Revenue Act of 1978. A RIC and REIT whose income is adjusted by a determination will be affected by the proposed regulations.

DATES: Written comments and requests for a public hearing must be delivered or mailed by May 27, 1980

ADDRESS: Send comments and requests for a public hearing to Commissioner of Internal Revenue, Attention: CC:LR:T (LR-183-78), Washington, D.C. 20224.

FOR FURTHER INFORMATION CONTACT: Charles M. Whedbee of the Legislation and Regulations Division, Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Ave., NW., Washington, D.C. 20224, Attention CC:LR:T (202-566-3458, not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR Part 1) under section 860 of the Internal Revenue Code, which relates to deficiency dividends of RICs and REITs. Section 1601 of the Tax Reform Act of 1976 (Pub. L. 94-455, 90 Stat. 1742) added a new section 859 to the Code. this section established a procedure by which a REIT could be relieved from the payment of a deficiency in (or be allowed a credit or refund with respect to) certain income taxes that are

determined by taking into account the deduction for dividends paid. This procedure allows an additional deduction for dividends paid by a REIT after a determination with respect to its income tax liability. Subject to certain limitations, the deficiency dividend is included in the deduction for dividends paid for the taxable year to which the determination applies. A REIT that pays a deficiency dividend is subject to interest and penalties determined with respect to the amount of the deduction allowed. Section 859 applied to determinations with respect to REITs after October 4, 1976.

Section 362 of the Revenue Act of 1978 (Pub. L. 95–600, 92 Stat. 2848) extended the privilege of paying deficiency dividends to RICs, effective with respect to determinations after November 6, 1978. The 1978 Act also consolidated the deficiency dividend provisions for both RICs and REITs into new section 860 of the Code.

The proposed regulations provide rules for applying the deficiency dividend procedure for both RICs and REITs.

Prior Proposed Regulations

On July 7, 1978, the **Federal Register** (43 FR 29316) published proposed regulations relating to the taxation of REITs and their shareholders to reflect the extensive changes made to the REIT provisions of the Code by the 1976 Act, and to add or modify other regulations applicable to REITs. These proposed regulations include rules for the deficiency dividend procedure for REITs under section 859 of the Code, as enacted by the 1976 Act. In general, the proposed regulations in this document are the same in substance as the proposed rules relating to deficiency dividends published on July 7, 1978, except that RICs are included and there are stylistic improvements.

The only substantive additions to the regulations as proposed on July 7, 1978, relate primarily to RICs. The first addition relates primarily to a RIC that has interest income excludable from gross income. In general, under section 852(a)(1)(B) a RIC which has interest income exempt under section 103(a)(1) of the Code must distribute dividends which equal or exceed 90 percent of the excess of the exempt interest over certain nondeductible expenses related to that interest. However, in order for a RIC to pay a deficiency dividend, section 860 (d)(1) requires that there must be either (1) an increase in its investment company taxable income (determined without the dividends paid deduction), (2) and increase in its undistributed net capital gain, or (3) a decrease in its deduction for dividends paid. Since an increase in tax exempt interest does not come within any of these categories, the proposed regulations provide that such an increase does not afford the RIC the opportunity to pay a deficiency dividend. This result obtains notwithstanding that the increase may result in the RIC's disqualification.

The second addition relates to certain reporting requirements in § 1.852–4(c)(2) that apply when a RIC pays a capital gain dividend to a shareholder of record who is a nominee acting as a custodian of a unit investment trust (as defined in section 851(f)(1)). the timing of these reporting requirements is keyed to the 45th day following the close of the RIC's taxable year, which is generally the last date under section 852(b)(3)(C) that a RIC may designate a dividend as a capital gain dividend. Under the amendments made by the 1978 Act, However, if a determination results in an increase in the RIC's undistributed net capital gain, the designation with respect to such increase may be made during the 120-day period following the date of the determination. Accordingly, in the case of a capital gain dividend designation made during the 120-day period following a determination pursuant to the change made by the 1978 Act, the reporting requirements are extended. The extension in effect treats the 120-day period as the 45-day period following the close of the RIC's taxable year. Thus, for example under the proposed extension, certain notices generally due by the 55th day after the close of the RIC's taxable year would be due by the 130th day following the determination.

Also, this document does not include rules regarding the effect of deficiency dividends on the amount of the WIN credit and jobs credit allowed by sections 40 and 44B of the Code. The effect of deficiency dividends on the amount of those credits will be addressed in regulations issued to implement those sections.

Authority

The regulations are to be issued under the authority contained in the following Code sections: section 859 (c)(3) and (e) (as in effect before enactment of the Revenue Act of 1978) (90 Stat. 1743, 1744; 26 U.S.C. 859 (c)(3) and (e)); section 860 (e)(3) and (g) (92 Stat. 2849, 2850; 26 U.S.C. 860 (e)(3) and (g)); 7805 (68A Stat. 917, 26 U.S.C. 7805).

Drafting Information

The principal author of these proposed regulations is Charles M. Whedbee of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations, both on matters of substance and style.

Proposed amendments to the regulations

The proposed amendments to 26 CFR Part 1 are as follows:

Paragraph 1. Section 1.46–4(b)(2) is amended by adding three new sentences after the second sentence, to read as set forth below.

§ 1.46–4 Limitations with respect to certain persons.

* * * * *

(b) *Regulated investment companies and real estate investment trusts.* * * *

(2) * * * In the case of a taxable year ending after October 4, 1976, real estate investment trust taxable income, for purposes of section 46(e) and this paragraph, is determined by excluding any net capital gain, and by computing the deduction for dividends paid without regard to capital gains dividends (as defined in section 857(b)(3)(C)). The amount of the deduction for dividends paid includes the amount of deficiency dividends (other than capital gains deficiency dividends) taken into account in computing investment company taxable income or real estate investment trust taxable income for the taxable year. See section 860(f) for the definition of deficiency dividends. * * *

* * * * *

Par. 2. Section 1.316(d) is amended by adding a new example (7) at the end thereof, to read as follows:

§ 1.316–1 Dividends.

* * * * *

(d) * * *

Example (7). In 1979, a deficiency of $48,000 in the tax on real estate investment trust taxable income is established against corporation R for the taxable year 1977, based on an increase in real estate investment trust taxable income of $100,000. Corporation R complied with the provisions of section 860 and in December, 1979, distributed to its stockholders $100,000 which qualified as "deficiency dividends" under section 860. The distribution of $100,000 is a taxable dividend. It is immaterial whether corporation R is a real estate investment trust for the taxable year 1979 or whether it had accumulated or current earnings and profits in 1979. See section 316(b)(3).

Par. 3. A new § 1.381(c)(25) is added after § 1.381(c)–(24), to read as follows:

§ 1.381(c)(25)–1 Deficiency dividend of a qualified investment entity.

(a) *Carryover requirement.* If a distributor or transferor corporation in a

transaction to which section 381(a) applies—

(1) Is a qualified investment entity (within the meaning of section 860(b)) for any taxable year ending on or before the date of distribution or transfer, and

(2) A determination (as defined in section 860(e)) establishes that it is liable for additional tax imposed by sections 11(a), 56(a), 852(b), 857(b)(1) or (3)(A), or 1201(a) for such year.

then determining its liability for such tax it is allowed the deduction described in section 860 for the deficiency dividends the acquiring corporation pays for the distributor or transferor corporation. Except as otherwise provided in this section, the provisions of section 860 and the regulations thereunder apply with respect to a deficiency dividend deduction allowable pursuant to section 381(c)(25).

(b) *Deficiency dividends paid by the acquiring corporation for distributor or transferor corporation.* A deficiency dividend paid by the acquiring corporation for the distributor or transferor corporation must be one—

(1) That would satisfy the definition of a deficiency dividend under section 860(f) if paid by the distributor or transferor corporation to its own shareholders;

(2) That is paid by the acquiring corporation to its own shareholders; and

(3) That is paid after the date of distribution or transfer to which section 381(a) applies and on, or within 90 days after, the date of the determination but before the acquiring corporation files a claim under paragraph (c) of this section.

(c) *Claim for deduction.* A claim for a deduction under this section shall be made by the acquiring corporation of Form 976, and shall be filed within 120 days after the date of the determination. The form shall contain, or be accompanied by, the information required under § 1.860–2(b)(2) in sufficient detail to identify properly the facts with respect to the distributor or transferor corporation and the acquiring corporation. The required certified copy of the resolution authorizing the payment of the dividend shall be that of the trustees, board of directors, or other authority of the acquiring corporation. Necessary changes may be made in Form 976 in order to carry out the provisions of this paragraph. The claim shall be filed with the district director, or director of the internal revenue service center, with whom the return of the distributor or transferor corporation to which the claim relates was filed.

(d) *Effect on dividends paid deduction.* A deficiency dividend paid by the acquiring corporation that is allowable as a deduction to a distributor or transferor corporation pursuant to section 381(c)(25) shall not become a part of the dividends paid deduction of the acquiring corporation under section 561 for any taxable year.

(e) *Successive transactions to which section 381(a) applies.* The provisions of this section apply in the case of successive transactions to which section 381(a) applies. In such case the principles of § 1.381(c)(17)–1(e) shall apply.

§ 1.852 [Deleted]

Par. 4. Section 1.852 is deleted.

Par. 5. Section 1.852–4 is amended as follows:

1. Paragraph (c)(1) is amended by striking out "not later than 45 days (30 days for a taxable year ending before February 26, 1964) after the close of its taxable year" in the first sentence and inserting in lieu thereof, "within the period specified in paragraph (c)(4) of this section".

2. Paragraph (c)(2) is amended by adding a new sentence at end thereof, to read as set forth below.

3. A new paragraph (c)(4) is added after paragraph (c)(3), to read as set forth below.

§ 1.852–4 Method of taxation of shareholders of regulated investment companies.

* * * * *

(c) *Definition of capital gain dividend.* * * *

(2) *Shareholder of record custodian of certain unit investment trusts.* * * * If a notice under paragraph (c)(1) of this section is mailed within the 120-day period following the date of a determination pursuant to paragraph (c)(4)(ii) of this section, the 120-day period and the 130-day period following the date of the determination shall be substituted for the 45-day period and the 55-day period following the close of the regulated investment company's taxable year prescribed by this subparagraph (2).

* * * * *

(4) *Mailing of written notice to shareholders.* (i) Except as provided in paragraph (c)(4)(ii) of this section, the written notice designating a dividend or part thereof as a capital gain dividend must be mailed to the shareholders not later than 45 days (30 Days for a taxable year ending before February 26, 1964) after the close of the taxable year of the regulated investment company.

(ii) If a determination (as defined in section 860 (e)) after November 6, 1978, increases the excess for the taxable year of the net capital gain over the deduction for capital gains dividends paid, then a regulated investment company may designate all or part of any dividend as a capital gain dividend in a written notice mailed to its shareholders at any time during the 120-day period immediately following the date of the determination. The aggregate amount designated during this period may not exceed this increase. A dividend may be designated if it is actually paid during the taxable year, is one paid after the close of the taxable year to which section 855 applies, or is a deficiency dividend (as defined in section 860(f)), including a deficiency dividend paid by an acquiring corporation to which section 381(c)(25) applies. The date of a determination is established under § 1.860–2(b)(1).

* * * * *

§ 1.857 [Deleted]

Par. 6. Section 1.857 is deleted.

Par. 7. Section 1.857–4 is amended by striking out "not later than 30 days after the close of its taxable year" in the first sentence of paragraph (e)(1) and inserting in lieu thereof "within the period specified in paragraph (f) of this section", and by adding a new paragraph (f) at the end thereof, to read as follows:

§ 1.857–4 Method of taxation of shareholders of real estate investment trusts.

* * * * *

(f) *Mailing of written notice to shareholders.* (1) Except as provided in paragraph (f)(2) of this section, the written notice designating a dividend or part thereof as a capital gain dividend must be mailed to the shareholders not later than 30 days after the close of the taxable year of the real estate investment trust.

(2) If a determination (as defined in section 860(e)) after October 4, 1976, increases the excess for the taxable year of the net capital gain over the deduction for capital gains dividends paid, then a real estate investment trust may designate all or part of any dividend as a capital gain dividend in a written notice mailed to its shareholders at any time during the 120-day period immediately following the date of the determination. The aggregate amount designated during this period may not exceed this increase. A dividend may be designated if it is actually paid during the taxable year, is one paid after the close of the taxable year to which section 858 applies, or is a deficiency dividend (as defined in section 860(f)), including a deficiency dividend paid by an acquiring corporation to which section 381(c)(25) applies. The date of a

determination is established under § 1.860–2(b)(1).

Par. 8. New §§ 1.860–1, 1.860–2, 1.860–3, 1.860–4, and 1.860–5 are added after § 1.858–1, to read as follows:

§ 1.860–1 Deficiency dividends.

Section 860 allows a qualified investment entity to be relieved from the payment of a deficiency in (or to be allowed a credit or refund of) certain taxes. "Qualified investment entity" is defined in section 860(b). The taxes referred to are those imposed by sections 852(b) (1) and (3), 857(b) (1) or (3), the minimum tax on tax preferences imposed by section 56 and, if the entity fails the distribution requirements of section 852(a)(1)(A) or 857(a)(1) (as applicable), the corporate income tax imposed by section 11(a) or 1201(a). The method provided by section 860 is to allow an additional deduction for a dividend distribution (that meets the requirements of section 860 and § 1.860–2) in computing the deduction for dividends paid for the taxable year for which the deficiency is determined. A deficiency dividend may be an ordinary dividend or, subject to the limitations of sections 852(b)(3)(C), 857(b)(3)(C), and 860(f)(2)(B), may be a capital gain dividend.

§ 1.860–2 Requirements for deficiency dividends.

(a) *In general*—(1) *Determination, etc.* A qualified investment entity is allowed a deduction for a deficiency dividend only if there is a determination (as defined in section 860(e) and paragraph (b)(1) of this section) that results in an adjustment (as defined in section 860(d)(1) or (2)) for the taxable year for which the deficiency dividend is paid. An adjustment does not include an increase in the excess of (i) the taxpayer's interest income excludable from gross income under section 103(a)(1) over (ii) its deductions disallowed under sections 265 and 171(a)(2).

(2) *Payment date and claim.* The deficiency dividend must be paid on, or within 90 days after, the date of the determination and before the filing of a claim under section 860(g) and paragraph (b)(2) of this section. This claim must be filed within 120 days after the date of the determination.

(3) *Nature and amount of distribution.* The deficiency dividend must be a distribution of property (including money) that would have been properly taken into account in computing the dividends paid deduction under section 561 for the taxable year for which tax liability resulting from the determination exists if the property had been distributed during that year. Thus, if the distribution would have been a dividend under section 316(a) if it had been made during the taxable year for which the determination applies, the distribution may qualify under sections 316(b)(3), 562(a), and 860(f)(1), even though the distributing corporation, trust, or association has no current or accumulated earnings and profits for the taxable year in which the distribution is actually made. The amount of the distribution is determined under section 301 as of the date of the distribution. The amount of the deduction is subject to the applicable limitations under sections 562 and 860(f)(2). Thus, if the entity distributes to an individual shareholder property (other than money) which on the date of the distribution has a fair market value in excess of its adjusted basis in the hands of the entity, the amount of the deficiency dividend in the individual's hands for purposes of section 316(b) (3), is determined by using the property's fair market value on that date. Nevertheless, the amount of the deficiency dividend the entity may deduct is limited, under § 1.562–1 (a), to the adjusted basis of the property and the amount taxable to the individual as a dividend is determined by reference to the current and accumulated earnings and profits for the year to which the determination applies.

(4) *Status of distributor.* The corporation, trust, or association that pays the deficiency dividend does not have to be a qualified investment entity at the time of payment.

(5) *Certain definitions to apply.* For purposes of sections 860(d) (defining adjustment and (f)(2) (limitations), the definitions of the terms "investment company taxable income," "real estate investment trust taxable income," and "capital gains dividends" in sections 852(b)(2), 857(b)(2), 852(b)(3)(C), and 857(b)(3)(C) apply, as appropriate to the particular entity.

(b) *Determination and claim for deduction*—(1) *Determination.* For purposes of applying section 860(e), the following rules apply:

(i) The date of determination by a decision of the United States Tax Court, the date upon which a judgment of a court becomes final, and the date of determination by a closing agreement shall be determined under the rules in § 1.547–2(b) (ii), (iii), and (iv).

(ii) A determination under section 860(e)(3) may be made by an agreement signed by the district director or another official to whom authority to sign the agreement is delegated, and by or on behalf of the taxpayer. The agreement shall set forth the amount, if any, of each adjustment described in subparagraphs (A), (B), and (C) of section 860(d) (1) or (2) (as appropriate) for the taxable year and the amount of the liability for any tax imposed by section 11(a), 56(a), 852(b)(1), 852(b)(3)(A), 857(b)(1), 857(b)(3)(A), or 1201(a) for the taxable year. The agreement shall also set forth the amount of the limitation (determined under section 860(f)(2)) on the amount of deficiency dividends that can qualify as capital gain dividends and ordinary dividends, respectively, for the taxable year. An agreement under this subdivision (ii) which is signed by the district director (or other delegate) shall be sent to the taxpayer at its last known address by either registered or certified mail. If registered mail is used, the date of registration is the date of determination. If certified mail is used, the date of the postmark on the sender's receipt is the date of determination. However, if a dividend is paid by the taxpayer before the registration or postmark date, but on or after the date the agreement is signed by the district director (or other delegate), the date of determination is the date of signing.

(2) *Claim for deduction.* A claim for deduction for a deficiency dividend shall be made, with the requisite declaration, on Form 976 and shall contain the following information and have the following attachments:

(i) The name, address, and taxpayer identification number of the corporation, trust, or association;

(ii) The amount of the deficiency and the taxable year or years involved;

(iii) The amount of the unpaid deficiency or, if the deficiency has been paid in whole or in part, the date of payment and the amount thereof;

(iv) A statement as to how the deficiency was established (*i.e.*, by an agreement under section 860(e)(3), by a closing agreement under section 7121, or by a decision of the Tax Court or court judgment);

(v) Any date or other information with respect to the determination that is required by Form 976;

(vi) The amount and date of payment of the dividend with respect to which the claim for the deduction for deficiency dividends is filed;

(vii) The amount claimed as a deduction for deficiency dividends;

(viii) If the amount claimed as a deduction for deficiency dividends includes any amount designated (or to be designated) as capital gain dividends, the amount of capital gain dividends for which a deficiency dividend deduction is claimed;

(ix) Any other information required by the claim form;

(x) A certified copy of the resolution of the trustees, directors, or other authority authorizing the payment of the dividend with respect to which the claim is filed; and

(xi) A copy of any court decision, judgment, agreement, or other document required by Form 976.

(3) *Filing claim.* The claim, together with the accompanying documents, shall be filed with the district director, or director of the internal revenue service center, with whom the income tax return for the taxable year for which the determination applies was filed. In the event that the determination is an agreement with the district director (or other delegate) described in section 860(e)(3) and paragraph (b)(1)(ii) of this section, the claim may be filed with the district director with whom (or pursuant to whose delegation) the agreement was made.

§ 1.860–3 Interest and additions to tax.

(a) *In general.* If a qualified investment entity is allowed a deduction for deficiency dividends with respect to a taxable year, under section 860(c)(1) the tax imposed on the entity by chapter 1 of the Code (computed by taking into account the deduction) for that year is deemed to be increased by the amount of the deduction. This deemed increase in tax, however, applies solely for purposes of determining the liability of the entity for interest under subchapter A of chapter 67 of the Code and for additions to tax and additional amounts under chapter 68 of the Code. For purposes of applying subchapter A of chapter 67 and chapter 68, the last date prescribed for payment of the deemed increase in tax is considered to be the last date prescribed for the payment of tax (determined in the manner provided in section 6601(b)) for the taxable year for which the deduction for deficiency dividends is allowed. The deemed increase in tax is considered to be paid as of the date that the claim for the deficiency dividend deduction described in section 860(g) is filed.

(b) *Overpayments of tax.* If a qualified investment entity is entitled to a credit or refund of an overpayment of the tax imposed by chapter 1 of the Code for the taxable year for which the deficiency dividend deduction is allowed, then, for purposes of computing interest, additions to tax, and additional amounts, the payment (or payments) that result in the overpayment and that precede the filing of the claim described in section 860(g) will be applied against and reduce the increase in tax that is deemed to occur under section 860(c)(1).

(c) *Examples.* This section is illustrated by the following examples.

Example (1). Corporation X is a real estate investment trust that files its income tax return on a calendar year basis. X receives an extension of time until June 15, 1978, to file its 1977 income tax return and files the return on May 15, 1978. X does not elect to pay any tax due in installments. For 1977, X reports real estate investment trust taxable income (computed without the dividends paid deduction) of $100, a dividends paid deduction of $100, and no tax liability. Following an examination of X's 1977 return, the district director and X enter into an agreement which is a determination under section 860(e)(3). The determination is dated November 1, 1979, and increases X's real estate investment trust taxable income (computed without the dividends paid deduction) by $20 to $120. Thus, taking into account the $100 of dividends paid in 1977, X has undistributed real estate investment trust taxable income of $20 as a result of the determination. X pays a dividend of $20 on November 10, 1979, files a claim for a deficiency dividend deduction of this $20 pursuant to section 860(g) on November 15, 1979, and is allowed a deficiency dividend deduction of $20 for 1977. After taking into account this deduction, X has no real estate investment trust taxable income and meets the distribution requirements of section 857 (a) (1). However, for purposes of section 6601 (relating to interest on underpayment of tax), the tax imposed by chapter 1 of the Code on X for 1977 is deemed increased by this $20, and the last date prescribed for payment of the tax is March 15, 1978 (the due date of the 1977 return determined without any extension of time). The tax of $20 is deemed paid on November 15, 1979, the date the claim for the deficiency dividend deduction is filed. Thus, X is liable for interest on $20, at the rate established under section 6621, for the period from March 15, 1978, to November 15, 1979. Also, for purposes of determining whether X is liable for any addition to tax or additional amount imposed by chapter 68 of the Code (including the penalty prescribed by section 6697), the amount of tax imposed on X by chapter 1 of the Code is deemed to be increased by $20 (the amount of the deficiency dividend deduction allowed), the last date prescribed for payment of such tax is March 15, 1978, and the tax of $20 is deemed to be paid on November 15, 1979. X, however, is not subject to interest and penalties for the amount of any tax for which it would have been liable under secton 11 (a), 56 (a), 1201 (a), or 857 (b) had it not been allowed the $20 deduction for deficiency dividends.

Example (2). Assume the facts are the same as in example (1) except that the district director, upon examining X's income tax return, asserts an income tax deficiency of $4, based on an asserted increase of $10 in real estate investment trust taxable income, and no agreement is entered into between the parties. X pays the $4 on June 1, 1979, and files suit for refund in the United States District Court. The District Court, in a decision which becomes final on November 1, 1980, holds that X did fail to report $10 of real estate investment trust taxable income and is not entitled to any refund. (No other item of income or deduction is in issue.) X pays a dividend of $10 on November 10, 1980, files a claim for a deficiency dividend deduction of this $10 on November 15, 1980, and is allowed a deficiency dividend deduction of $10 for 1977. Assume further that $4 is refunded to X on December 31, 1980, as the result of the $10 deficiency dividend deduction being allowed. Also assume that any assessable penalties, additional amounts, and additions to tax (including the penalty imposed by section 6697) for which X is liable are paid within 10 days of notice and demand, so that no interest is imposed on such penalties, etc. X's liability for interest for the period March 15, 1978, to June 1, 1979, is determined with respect to $10 (the amount of the deficiency dividend deduction allowed). X's liability for interest for the period June 1, 1979, to November 15, 1980, is determined with respect to $6, *i.e.*, $10 minus the $4 payment. X is entitled to interest on the $4 overpayment for the period described in section 6611 (b)(2), beginning on November 15, 1980.

§ 1.860–4 Claim for credit or refund.

If the allowance of a deduction for a deficiency dividend results in an overpayment of tax, the taxpayer, in order to secure credit or refund of the overpayment, must file a claim on Form 1120X in addition to the claim for the deficiency dividend deduction required under section 860 (g). The credit or refund will be allowed as if on the date of the determination (as defined in section 860 (e)) two years remained before the expiration of the period of limitations on the filing of claim for refund for the taxable year to which the overpayment relates.

§ 1.860–5 Effective date.

(a) *In general.* Section 860 and §§ 1.860–1 through 1.860–4 apply with respect to determinations after November 6, 1978.

(b) *Prior determination of real estate investments trusts.* Section 859 (as in effect before the enactment of the Revenue Act of 1978) applies to determinations with respect to real estate investment trusts occurring after October 4, 1976, and before November 7, 1978. In the case of such a determination, the rules in §§ 1.860–1 through 1.860–4 apply, a reference in this chapter 1 to section 860 (or to a particular provision of section 860) shall be considered to be a reference to section 859 (or to the corresponding substantive provision of section 859), as in effect before enactment of the Revenue Act of 1978, and "qualified investment entity" in §§ 1.381(c)–25–1(a)

and 1.860–1 through 1.860–3 means a real estate investment trust.

Jerome Kurtz,

Commissioner of Internal Revenue.

[FR Doc. 80-9715 Filed 3-28-80; 8:45 am]

BILLING CODE 4830-01-M

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 178

[Notice No. 340; Ref.: Notice No. 331]

Definition of the Phrase "Engaged in the Business"

AGENCY: Bureau of Alcohol, Tobacco and Firearms (ATF).

ACTION: Extension of comment period.

SUMMARY: This notice extends the comment period for Notice No. 331, Definition of the Phrase "Engaged in the Business", an additional 30 days. Notice No. 331 was published in the **Federal Register** on December 19, 1979 (44 FR 75186).

DATE: The comment period for Notice No. 331 is extended until April 17, 1980.

ADDRESS: Send comments, in duplicate, to: Director, Bureau of Alcohol, Tobacco and Firearms, P.O. Box 385, Washington, DC 20044 (Attn: Chief, Regulations and Procedures Division—Notice No. 331).

FOR FURTHER INFORMATION CONTACT: Robert White, Research and Regulations Branch (202–566–7626).

SUPPLEMENTARY INFORMATION:

Background

On December 19, 1979, the Bureau of Alcohol, Tobacco and Firearms (ATF) published an advance notice of proposed rulemaking (Notice No. 331) to obtain comments on the proposal to amend the regulations in 27 CFR Part 178 to include the definition of the phrase "engaged in the business" when referring to a dealer of firearms or ammunition. The original comment period for this advance notice ended March 18, 1980.

ATF wishes to gather information by inviting comments from the public and industry on how the phrase "engaged in the business" should be defined. ATF also desires public comment on the feasibility and desirability of defining the phrase.

Extension of Comment Period

One national organization has requested an extension of the comment period for Notice No. 331. The organization states that it needs more time to complete an empirical study it is conducting which might prove useful to the Bureau in considering the phrase "engaged in the business."

ATF feels that an extension of the comment period for 30 days is reasonable. Therefore, ATF is extending the comment period for Notice No. 331 until April 17, 1980.

Public Participation

ATF requests comments from all interested persons concerning this proposal. All comments received before the closing date will be carefully considered. Comments received after the closing date and too late for consideration will be treated as possible suggestions for future ATF Action. ATF will not recognize any material in the comments as confidential. Comments may be disclosed to the public. Any material which the commenter considers to be confidential or inappropriate for disclosure to the public should not be included in the comments. The name of any person submitting comments is not exempt from disclosure. After consideration of all comments and suggestions, ATF may issue a notice of proposed rulemaking. The proposals discussed in the advance notice may be modified due to the comments and suggestions received.

Drafting Information

The principal author of this document is Robert White, Research and Regulations Branch, Bureau of Alcohol, Tobacco and Firearms.

Authority

This notice is issued under the authority of 18 U.S.C. 926, as amended [82 Stat. 1226].

Signed: March 26, 1980.

Miles N. Keathley,

Acting Director.

[FR Doc. 80-9706 Filed 3-28-80; 8:45 am]

BILLING CODE 4810-31-M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 950

Partial Approval of the Permanent Program Submission From the State of Wyoming Under the Surface Mining Control and Reclamation Act of 1977

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), U.S. Department of the Interior.

ACTION: Proposed Rule.

SUMMARY: On August 15, 1979, the State of Wyoming submitted to the Department of the Interior its proposed permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The purpose of the submission is to demonstrate the State's intent and the capability to administer and enforce the provisions of SMCRA and permanent regulatory program regulations, 30 CFR Chapter VII. After opportunity for public comment and thorough review of the program submission, the Secretary of the Interior has determined that certain parts of the Wyoming program meet the minimum requirements of SMCRA and the Federal permanent program regulations and others do not. Accordingly, the Secretary of the Interior has approved the Wyoming program in part. The State of Wyoming has the opportunity to correct the deficiencies in those parts not being approved. Until an entire permanent regulatory program has been approved, the interim program will remain in effect in Wyoming.

DATES: The State of Wyoming may submit, on or before May 30, 1980, a revised program to correct the deficiencies in the parts of the program being disapproved.

FOR FURTHER INFORMATION CONTACT: Mr. Carl C. Close, Assistant Director, State and Federal Programs, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, South Building, 1951 Constitution Avenue, NW., Washington, D.C. 20240, Telephone (202) 343–4225.

ADDRESSES: Copies of the Wyoming program submission and the administrative record on the Wyoming program submission are available for public inspection and copying during business hours at:

Wyoming Department of Environmental Quality, Land Quality Division, Hathaway Building, Cheyenne, Wyoming 82002

Wyoming Department of Environmental Quality, Land Quality Division, Field Office, 30 East Grinnell Street, Sheridan, Wyoming 82801

Wyoming Department of Environmental Quality, Land Quality Division, Field Office, 933 Main Street, Lander, Wyoming 82520

Office of Surface Mining Reclamation and Enforcement, Region V, Brooks Tower, 1020 15th Street, Denver, Colorado 80202

Office of Surface Mining, Room 135, Interior South Building, 1951 Constitution Avenue, Washington, D.C. 20240, Telephone (202) 343–4728.

SUPPLEMENTARY INFORMATION:

Introduction

This notice is organized to assist understanding of the findings underlying

the Secretary's decision. It is divided into six major parts.

A. General Background on the Permanent Program
B. General Background on the State Program Approval Process
C. General Background on the Wyoming Program
D. Secretary's Findings
E. Explanation of the Secretary's Findings
F. The Secretary's Decision

Part A sets forth the statutory and regulatory framework of the environmental protection regulatory scheme under the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

Part B sets forth the general statutory and regulatory scheme applicable to all States which wish to obtain primary jurisdiction to implement the permanent program within their borders.

Part C summarizes the steps undertaken by Wyoming and officials of the Department of the Interior, beginning with Wyoming's program submission and leading to the decision being announced today.

Part D contains the findings the Secretary has made with respect to each of the thirty (30) criteria for evaluation of a State Program found in SMCRA and the Secretary's regulations.

Part E contains the reasons for each finding in Part D. For each finding, only the significant differences between Federal laws and rules and the Wyoming program are discussed, relevant public comments are analyzed and the provisions of Wyoming's program, as proposed, are evaluated.

Part F identifies those parts of the Wyoming program which have been approved and those which have been disapproved. Procedures Wyoming may follow to correct the deficiencies are presented and the effect of the decision is discussed.

A. General Background on the Permanent Program

The environmental protection provisions of SMCRA are being enacted in two phases—the initial program and the permanent program—in accordance with Sections 501–03 of SMCRA. 30 U.S.C. 1251–1253. The initial program has been in effect since December 13, 1977, when the Secretary of the Interior promulgated interim program rules, 30 CFR Parts 710–725, 42 FR 62639.

The permanent program will become effective in each State upon the approval of a State program by the Secretary of the Interior or implementation of a Federal program within the State. If a State program is approved, in full, the State will be the primary regulator of activities subject to SMCRA, rather than the Federal government.

The Federal rules for the permanent program, including procedures for States to follow in submitting State programs and minimum standards and procedures the State programs must include to be eligible for approval, are found in 30 CFR Parts 700–707 and 730–865. Part 705 was published October 20, 1977 (FR 56064). Parts 795 and 865 (originally Part 860) were published December 13, 1977 (42 FR 62639). The other permanent program regulations were published at 44 FR 15385–15393 (March 13, 1979). Corrections were published at 44 FR 15485 (March 14, 1979), 44 FR 49673–49687 (August 24, 1979), 44 FR 53507–53509 (September 14, 1979) and 44 FR 66195 (November 19, 1979). Amendments to the rules have been published at 44 FR 60969 (October 22, 1979), as corrected at 44 FR 75143 (December 19, 1979), at 44 FR 75302 (December 19, 1979), 44 FR 77440–77447 (December 31, 1979) and 45 FR 2626–2629 (January 11, 1980). Portions of these rules have been suspended, pending further rulemaking. See 44 FR 67942 (November 27, 1979), 44 FR 77447–77454 (December 31, 1979), 44 FR 77454–77455 December 31, 1979) and 45 FR 6913 (January 30, 1980).

B. General Background on State Program Approval Process

Any State wishing to assume primary jurisdiction for the regulation of coal mining under SMCRA may submit a program for consideration. The Secretary of the Interior has the responsibility to approve or disapprove the submission.

The Federal rules governing State program submissions are found at 30 CFR Parts 730–732. After review of the submission by OSM and other agencies, opportunity for the state to make additions or modifications to the program, and opportunity for public comment, the Secretary may either approve the program unconditionally, approve it conditioned upon minor deficiencies being corrected in accordance with a timetable set by the Secretary, or disapprove the program in whole or in part. If any parts of the program are disapproved, the State may submit a revision of these parts to correct the items which needed change to meet the requirements of SMCRA and the applicable Federal regulations. If any of these revised program parts are also disapproved, SMCRA requires the Secretary of the Interior to establish a Federal program in that State. The State may again request approval to assume primary jurisdiction after the Federal program is implemented. A State may not assume primary jurisdiction until all parts of its program have been approved.

Different criteria apply to various elements of a State program for the purpose of determining whether they can be approved by the Department. There are three categories of potential program elements, each with its own standard of review, as follows:

1. *"State window" proposals*—Pursuant to 30 CFR 731.13, a State proposed alternative to a provision of the Secretary's regulations must be in accordance with SMCRA and consistent with the Secretary's regulations. Under 30 CFR 730.5, in accordance with SMCRA means that the State alternative meets the minimum requirements, and includes all applicable provisions of SMCRA, while consistent with the Secretary's regulations means that the State proposal is no less stringent than, and meets the applicable provisions of, 30 CFR Chapter VII.

2. *Regulations for Inspection and Enforcement*—As required by Section 518 of SMCRA, the civil and criminal penalty provisions of a State program must be no less stringent than the requirements of Section 518 and must be consistent with the Federal regulations in 30 CFR Part 845 (see item 1 above for meaning of "consistent with"). However, as discussed below in Finding 19.3, a recent court decision has held that States cannot be required to establish a point system, like that in Part 845. Under Section 521 of SMCRA, the enforcement sanctions of a State program must also be no less stringent than those in Section 521 and must be consistent with 30 CFR Part 808, Sections 843.11, 843.12, 843.13, 843.19 and Subchapter G (Permit Systems). State regulations which establish the procedural requirements related to civil and criminal penalties and enforcement sanctions must be the same as or similar to the procedures in Sections 518 and 521 of SMCRA and must be consistent with 30 CFR Parts 808, 843, 845 and Subchapter G.

3. *Other State Program Elements*—If a State provision is neither a State window alternative nor a procedure or sanction related to inspection and enforcement, then the standard to be applied in evaluating each element is whether the State provision is consistent with the corresponding provision of the Federal regulations or in accordance with the relevant section of SMCRA, as set forth in 30 CFR 732.15(b) for each of the 16 State program requirements.

The Secretary, in reviewing State programs, is complying with the provisions of Section 503 of SMCRA, 30 U.S.C. 1253, and 30 CFR 732.15. The Secretary has evaluated the Federal rules as corrected, amended, and

suspended in the **Federal Register** notices cited above under "General Background on the Permanent Program."

The special requirements under SMCRA and 30 CFR Chapter VII for anthracite mines in Pennsylvania are inapplicable in Wyoming.

With respect to suspend regulations, the following standards are being applied in reviewing State program submissions:

1. A State program need not contain provisions to implement a suspended regulation and no State program will be disapproved for failure to contain a suspended regulation.

2. A State program must be able to implement all provisions in SMCRA which are part of the regulation of coal mining during the permanent program, including those provisions of SMCRA upon which the suspended regulations were based.

3. A State program may not contain any provision which is inconsistent with a provision of SMCRA. A State program may not include provisions implementing a suspended regulation if that regulation was suspended because it was inconsistent with SMCRA. There were two such suspensions, relating to 30 CFR 805.13(d) and 808.12(c). The Wyoming program has no provisions existing or proposed, which would implement these two suspended rules.

4. Subject to public comment and agency analysis in the context of a particular State program, it would appear that any other suspended provisions, if included in a State program, could probably be characterized as more stringent than the Secretary's remaining rules. Accordingly, its inclusion in the State program could not ordinarily be grounds for disapproval under Section 503 of SMCRA, 30 U.S.C. 1253. Alternatively, a State may delete or suspend its corresponding regulation so long as standard 2 is met.

5. Upon promulgation of new regulations to replace those which have been suspended, the Secretary will afford States which do not have approved programs a reasonable opportunity to amend their programs, as appropriate. In general, the provisions of 30 CFR 732.17 will govern this process for States with approved programs.

After the Secretary published the Federal regulations for the permanent program, they were challenged in a lawsuit brought in the United States District Court for the District of Columbia (*In re: Permanent Surface Mining Regulation Litigation*, No. 79-1144 (D.D.C., Feb. 26, 1980)). Because of the large number of regulations being challenged the Court decided to hear the case in two rounds. Approximately half the issues were briefed in the first round and argued at a hearing held on November 16, 1979. The remaining issues were briefed and argued in the second round, which followed behind the first round schedule by approximately two months.

On February 26, 1980, the court ruled on the regulations challenged in the first round. The court upheld most of the challenged regulations, but did remand the following regulations to the Secretary for further consideration and rulemaking:

1. 30 CFR 732.15(b)(7) and 840.13(a)—These sections state that State programs must be consistent with 30 CFR Part 845, which establishes a point system for assessing civil penalties; the court held that the Secretary could not require the States to establish a point system for penalty assessment.

2. 30 CFR 761.5(a)(2)(i)—This definition of "valid existing rights" requires that all permits necessary for mining must have been obtained before August 3, 1977, if an operation is to be eligible to mine in those areas where mining is prohibited under Section 522(e) of SMCRA; the court held that it is only necessary for the operator to establish that a "good faith" effort was made to acquire the necessary permits before August 3, 1977;

3. Provisions of 30 CFR Parts 779, 780, 783, and 784 which require information for the "mine plan area" and the definition of that term set forth in § 701.5—These provisions require information in the permit application and reclamation plan for areas which will not be in the permit area under the current application but which will be in future permit areas; the court held that the informational requirements of 30 Parts CFR 779, 780, 783 and 784 should be limited to the permit area unless otherwise required by the Act;

4. 30 CFR 779.20 and 780.16—These regulations require that each permit application and reclamation plan contain detailed information on fish and wildlife resources, but the court held that there was no statutory authority for requiring this information;

5. 30 CFR 779.21 and 783.21—These sections require permit applications to include soil survey information where the lands do not qualify as prime farmlands; the court concluded that, under the Act, soil surveys can only be required for prime farmland;

6. 30 CFR 807.11(e)—This section was remanded because it does not provide that, in informal hearings on bond release, the regulatory authority may arrange for citizens to accompany an inspector on a mine site inspection;

7. 30 CFR 808.14(b)—This section allows forfeiture of the entire bond amount, even if this amount will exceed the cost of reclamation; but the court ruled that bond forfeitures should be limited to the amount needed to cover reclamation costs;

8. 30 CFR 785.19(d)(2)(iii) and (iv)—These paragraphs require one year of hydrologic data and water quality analyses for alluvial valley floors, but the court held that such data can be provided for a shorter period of time or on the basis of extrapolations from existing information rather than requiring one year of data in all cases;

9. 30 CFR 785.19(e)(2)—This paragraph defines as a "significant" effect on farming any mining on an alluvial valley floor which removes from production, over the life of the mine, sufficient acreage to decrease the farm's income from agricultural activity; the court held that the Act's authorized permit approval when the mining activity will have a "negligible impact" on farm productivity;

10. 30 CFR 785.19(e)(1)—This section prohibits mining on alluvial valley floors if it will cause hydrologic damage to undeveloped range land or small farm land areas; instead, the court ruled that this regulation should incorporate the statutory exemption of Section 510(b)(5)(A) to allow mining in such areas;

11. 30 CFR 816.115, 817.115, 823.11(c), 823.15(b) and (c)—These sections were remanded because they require that, after mining and before bond release, the land must actually be used for grazing or cropland as a measure of the success of revegetation; the court held that there was no statutory basis for such an actual use standard;

12. 30 CFR 816.116(b) and 817.116(b)—These sections were remanded because they require the operator to be responsible for revegetation for five years beginning with achievement of required vegetative cover, rather than beginning with the last year of augmented seeding and fertilizing;

13. 30 CFR 816.133(c)(4), (c)(9) and 817.133(c)(4), (c)(9)—These sections require that, before certain postmining land uses can be approved, the operator must provide written commitments of financing or management to the regulatory authority; the court held that only a reasonable likelihood of postmining land use is required by the Act and that letters of commitment should not be required.

The Wyoming program was submitted to the Department before the court's decision and contains provisions based on these remanded regulations. After the Secretary has had an opportunity to

review the court's opinion in depth, he will determine what action to take while pursuing an appeal of the decision, if any is taken, or while reconsidering the remanded rules. To the extent any of the rules listed above are suspended or modified pending appeal or reconsideration, Wyoming will be given opportunity to amend its program to reflect the changes adopted by the Department. To codify decisions on State programs, Federal programs, and other matters affecting individual States, OSM has established Subchapter T of 30 CFR Chapter VII. Subchapter T will consist of Parts 900 through 950. Provisions relating to Wyoming's will be found in 30 CFR Part 950 once Wyoming's resubmission has been approved or disapproved, or if Wyoming does not resubmit its program within sixty days.

C. Background on the Wyoming Program Submission

On August 15, 1980, the Secretary of Interior received a proposed regulatory program for the State of Wyoming. The program was submitted by the Governor of Wyoming. Notice of receipt of the submission initiating the program review was published in the August 22, 1979, **Federal Register** (44 FR 49313–49314) and in newspapers of general circulation within the State. The announcement noted information for public participation in the initial phase of the review process relating to the Regional Director's determination of whether the submission was complete.

On September 10, 1979, a public review meeting on the Wyoming program was conducted by the Governor of Wyoming, in Cheyenne. A transcript of this meeting was placed in the Administrative Record on September 20, 1979 (Administrative Record No. WY–17).

On September 20, 1979, a public review meeting on the program and its completeness was held by the Regional Director in Cheyenne, Wyoming. September 20, 1979, was also the close of the public comment period on completeness which had begun August 22, 1979 (Administrative Record No. WY–24).

On October 24, 1979, the Regional Director published notice in the **Federal Register** announcing that he had determined the program to be complete (44 FR 61266).

On October 26, 1979, the Wyoming Department of Environmental Quality submitted an amendment to its program submission, containing a **Federal Register** notice and a letter relating to the Regional Director's finding of completeness (Administrative Record No. WY–36).

On December 11, 1979, the Regional Director published notice in the **Federal Register** (44 FR 71798–17199) and in newspapers of general circulation within the State setting forth procedures for the public hearing and comment period on the substance of the Wyoming program. The public comment period was scheduled to close January 7, 1980.

On January 7, 1980, a public hearing on the Wyoming submission was held in Cheyenne, Wyoming, by the Regional Director.

On January 8, 1980, representatives of the Department reviewed drafts of amendments to the Wyoming program. Final copies of these proposed amendments were informally submitted January 17, 1980 (Administrative Record No. WY–118). They are not part of the official submission. The proposed amendments submitted January 17 related to Wyoming's civil penalty point system, the side-by-side analysis for sections 701(29) and 521(a)(2) and (3) of SMCRA, and the Wyoming Attorney General's opinion.

On January 9, 1980, representatives of the Wyoming Department of Environmental Quality, Land Quality Division (hereinafter, Land Quality Division), met with representatives of OSM and informally submitted draft amendments to its regulations and statutes. These draft amendments have not been adopted and are not part of the formal program submission. They were drafted after four days of meetings, held January 2–5 in Cheyenne, Wyoming, between officials of OSM and the State of Wyoming and after a meeting on January 7, 1980, between the Secretary of the Interior and the Governor of Wyoming. Minutes and notes of these meetings were placed in the public record for review and comment.

On January 15, 1980, the Director published notice in the **Federal Register** extending until January 21, 1980, the public comment period on the Wyoming program to enable the public to review and comment on matters discussed at the meetings held January 2–5 and Janaury 7 and the draft amendments informally submitted January 9, and January 17, 1980.

On January 28, 1980, the Regional Director submitted to the Director of OSM, his analysis of the Wyoming program, noting numerous differences between the program and the Federal regulations, together with copies of the transcript of the public meeting and the public hearing, written presentations, exhibits, copies of all public comments received, and other documents comprising the administrative record. The Regional Director recommended to the Director that the Wyoming program be approved in part.

On February 14, 1980, OSM published in the **Federal Register** a notice of the availability of the views on the Wyoming program submitted by the Administrator of the Environmental Protection Agency, the Secretary of Agriculture through the Soil Conservation Service, the U.S. Forest Service, and the Science and Education Administration, the Fish and Wildlife Service, the Advisory Council on Historic Preservation, the U.S. Bureau of Mines, the Mine Safety and Health Administration, the Missouri River Basin Commission, the Bureau of Land Management, the U.S. Water Resources Council, the Department of Energy, the National Park Service, and the U.S. Army Corps of Engineers. 45 FR 10046–10047.

On February 15, 1980, the Administrator of the Environmental Protection Agency transmitted his written concurrence with the Secretary's approval of those parts of the Wyoming program being approved.

On February 15, 1980, the Director recommended to the Secretary that the Wyoming program be partially approved. The Secretary accepted that recommendation and approved the Wyoming program, in part. The Secretary's decision was made in a letter to Governor Herscher on February 15, 1980. Enclosures to that letter list the Secretary's findings (Part D of this **Federal Register** notice) and the parts of the Wyoming program that were approved and that were disapproved (Part F of this **Federal Register** notice). A copy of the letter to Governor Herscher is available for review in the administrative record.

The Wyoming program consists of the formal submission of August 15, 1979, (Administrative Record No. WY–3), as amended on October 26, 1979. This represents the entire submission.

Throughout the period beginning with the submission of the program, the Secretary and OSM have had frequent contact with the Governor of Wyoming and the staff of the Wyoming Land Quality Division. Discussions of the State program submission were held among various officials. Minutes or notes of the discussions were placed in the administrative record and made available for public review and comment. After the public comment period closed, no discussions were held at which new information was presented which might have influenced this decision, except information relating to parts of the program being disapproved today. That information

will be subject to public comment during the public comment period on the review of Wyoming's anticipated resubmission.

All contacts between officials and staff of the Interior Department and the State of Wyoming were conducted in accordance with the Department's guidelines for such contacts published September 19, 1979 (44 FR 54444–54445).

As a result of some of these discussions, Wyoming proposed various changes to its submission with respect to issues raised by the Department of the Interior and the public. These proposals were *not* made part of the program submission and have not been formally approved or disapproved. No decisions can be made on these materials until they are formally submitted. Any discussion of these items in this notice is for general guidance only and does not bind the Secretary of the Interior's decision on any resubmission. In particular, this includes proposed statutory, regulatory and other changes are set forth in the voluminous working papers of the January 2–5, 1980 meetings, and follow-up documents. The working papers consist of copies of a looseleaf binder used by all participants and referred to as the "orange book." Copies of the orange book, including copies annotated by participants at the January 2–5 meeting, are in the administrative record as Administrative Record No. WY–99. Most of the more significant issues raised in the "orange book" are discussed in this notice. Additional analysis as to other issues not discussed in this decision may be found in the "orange book" containing the notes on the January 2–5, 1980, meetings in Cheyenne.

Following the meetings in Cheyenne on January 2–5, 1980, the Wyoming Land Quality Division proposed to the staff of the Interior Department 141 pages of draft regulation changes dated January 9, 1980 (Administrative Record No. WY–119). On January 17, 1980, Wyoming informally submitted further draft program amendments, primarily relating to enforcement provisions (Administrative Record No. WY–118). The changes proposed in the orange book and the January 9, 1980, draft amendments and the January 17, 1980, material, have not been enacted, and are not part of the State program submission.

D. Secretary's Findings

In accordance with Section 503(a) of SMCRA, the Secretary finds that Wyoming has or fails to have the capability to carry out the provisions of SMCRA and to meet its purposes, in the ways and to the extent set forth in findings 1 through 7 below:

1. The Wyoming Environmental Quality Act (Wyoming EQA), the regulations adopted thereunder, and the Wyoming Administrative Procedures Act, provide, in part, for the regulation of surface coal mining and reclamation operations on non-Indian and non-Federal lands in Wyoming in accordance with SMCRA;

2. The Wyoming EQA provides sanctions for violations of Wyoming laws, regulations or conditions of permits concerning surface coal mining and reclamation operations, and these sanctions meet the requirements of SMCRA, in part, including, in part, civil and criminal actions, forfeiture of bonds, suspensions, revocations, and withholding of permits, and the issuance of cease-and-desist orders by the Land Quality Divisions or its inspectors;

3. The Wyoming Land Quality Division does not have sufficient administrative and technical personnel, but has sufficient funds to enable Wyoming to regulate surface coal mining and reclamation operations, in part in accordance with the requirements of SMCRA;

4. Wyoming law provides, in part, for the effective implementation, maintenance, and enforcement of a permit system that meets the requirements of SMCRA for the regulation of surface coal mining and reclamation operations on non-Indian and non-Federal lands within Wyoming;

5. Wyoming has established, in part, a process for the designation of areas as unsuitable for surface coal mining in accordance with Section 522 of SMCRA;

6. Wyoming has, in part, established for the purpose of avoiding duplication, a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with other Federal and State permit processes applicable to the proposed operations; and

7. Wyoming does not have enacted regulations consistent with regulations issued pursuant to SMCRA.

As required by Section 503(b)((1)–(3) of SMCRA, 30 U.S.C. 1253(b)(1)–(3), and 30 CFR 732.11–732.13, the Secretary has, through OSM, fulfilled the requirements set forth in findings 8 through 10, below:

Solicited and publicly disclosed the views of the Administrator of the Environmental Protection Agency, the Secretary of Agriculture, and the heads of other Federal agencies concerned with or having special expertise pertinent to the proposed Wyoming program;

9. Obtained the written concurrence of the Administrator of the Environmental Protection Agency with respect to those parts of the Wyoming program being approved today which relate to air or water quality standards promulgated under the authority of the Federal Clean Water Act, as amended (33 U.S.C. 1151–1175), and the Clean Air Act, as amended (42 U.S.C. 7401 *et seq.*); and

10. Held a public review meeting in Cheyenne, Wyoming, on September 20, 1979, to discuss the Wyoming program submission and its completeness and held a public hearing in Cheyenne, Wyoming, on January 7, 1980, on the substance of the Wyoming program submission;

11. In accordance with Section 503(b)(4) of SMCRA, 30 U.S.C. 1253(b)(4), the Secretary finds that the State of Wyoming has, in part, the legal authority, but does not have sufficient qualified personnel necessary for the enforcement of the environmental protection standards of SMCRA and 30 CFR Chapter VII.

In accordance with 30 CFR 732.15, the Secretary makes findings 12 through 30, below, on the basis of information in the Wyoming program submission, including the side-by-side comparison of the Wyoming law and regulations with SMCRA and 30 CFR Chapter VII, public comments, testimony and written presentations at the public hearings, and other relevant information.

12. The Wyoming program provides, in part, for Wyoming to carry out the provisions and meet the purposes of SMCRA and 30 CFR Chapter VII. The Secretary also makes findings 12.1 through 12.12 below with respect to Wyoming's proposed alternative approaches ("State window" items) to the requirements of 30 CFR Chapter VII pursuant to 30 CFR 731.13:

12.1 Wyoming's alternative approach to 30 CFR 780.23 (reclamation plan information on postmining land use) is, in part, in accordance with the provisions of SMCRA and consistent with the regulations in 30 CFR Chapter VII;

12.2 Wyoming's alternative approach to 30 CFR 785.14 and Part 824 (special requirements for mountaintop removal operations) is in accordance with the provisions of SMCRA and consistent with the regulations in 30 CFR Chapter VII. The Federal provisions implement a variance from the requirement to return a mined area to approximate original contour.

Wyoming has not proposed regulations for mountaintop removal because situations where mountaintop removal would be appropriate have not been identified within the State. Since Wyoming has chosen not to implement this variance, the Secretary finds the

Wyoming alternative approach to be more stringent than SMCRA and the Federal rules. This approach is explicitly contemplated by Section 515(c)(1) of SMCRA (30 U.S.C. 1265(c)(1)) which makes the variance optional for State program;

12.3 Wyoming's alternative approach to 30 CFR 785.15, 785.16 and Part 826 (special provisions for operations on steep slopes) is not in accordance with SMCRA and consistent with the Secretary's regulations because it is not implemented in an enacted statute or regulations, which makes it inconsistent with the regulations in 30 CFR Chapter VII;

12.4 Wyoming's alternative approach to 30 CFR 785.19 (c), (d) and (e) (identification of alluvial valley floors and evaluation of the effect mining an alluvial valley floor has on farming) is, in part, in accordance with the provisions of SMCRA and is, in part, consistent with the regulations in 30 CFR Chapter VII;

12.5 Wyoming's alternative approach to 30 CFR 816.22 (identification of topsoil to be removed before mining and redistributed afterwards) is, in part, in accordance with the provisions of SMCRA and is, in part, consistent with the regulations in 30 CFR Chapter VII;

12.6 Wyoming's alternative approach to 30 CFR 816.44(d) (requirements for permanent diversions and reconstruction of channels temporarily diverted) is, in part, in accordance with the provisions of SMCRA and is, in part, consistent with the regulations in 30 CFR Chapter VII;

12.7 Wyoming's alternative approach to 30 CFR 816.57 (identification of streams for which authorization is necessary to mine within 100 feet) is, in part, in accordance with the requirements of SMCRA and is, in part, consistent with the regulations in 30 CFR Chapter VII;

12.8 Wyoming's alternative approach to 30 CFR 816.72 (valley fill requirements) is, in part, in accordance with the requirements of SMCRA and is, in part, consistent with the regulations in 30 CFR Chapter VII;

12.9 Wyoming's alternative approach to 30 CFR 816.73 (head-of-hollow fill requirements) is, in part, in accordance with the requirements of SMCRA and is, in part, consistent with the regulations of 30 CFR Chapter VII;

12.10 Wyoming's alternative approach to 30 CFR 816.74 (requirements for durable rock fills) is, in part, in accordance with the provisions of SMCRA and is, in part, consistent with the regulations in 30 CFR Chapter VII;

12.11 Wyoming's alternative approach to 30 CFR 816.104 (provisions for restoration of contour in thin overburden situations) is, in part, in accordance with SMCRA and is, in part, consistent with the regulations in 30 CFR Chapter VII;

12.12 Wyoming's alternative approach to 30 CFR 816.105 (provisions for restoration of contour in thick overburden situations) is, in part, in accordance with SMCRA and is, in part, consistent with the regulations in 30 CFR Chapter VII;

13. The Land Quality Division has, in part, the authority under Wyoming laws and regulations to implement, administer, and enforce all applicable requirements consistent with 30 CFR Chapter VII, Subchapter K (Performance Standards), and the Wyoming program includes provisions adequate, in part, to do so;

14. The Land Quality Division has the authority under Wyoming laws and regulations and the Wyoming program includes adequate provisions to implement, administer and enforce a permit system consistent, in part, with 30 CFR Chapter VII, Subchapter G (Permits);

15. The Land Quality Division has, in part, the authority to regulate coal exploration consistent with 30 CFR part 776 and 815 (Coal Exploration) and to prohibit coal exploration that does not comply with 30 CFR Parts 776 and 815, and the Wyoming program includes provisions adequate, in part, to do so;

16. The Land Quality Division has the authority under Wyoming laws and the Wyoming program includes provisions to require that persons extracting coal incidental to government-financed construction maintain information on site, in part consistent with 30 CFR Part 707;

17. The Land Quality Division has the authority, and the Wyoming program includes provisions to enter, inspect, and monitor all coal exploration and surface coal mining and reclamation operations on non-Indian and non-Federal land within Wyoming consistent, in part, with the requirements of Section 517 of SMCRA (Inspections and Monitoring) and 30 CFR Chapter VII, Subchapter L (Inspection and Enforcement);

18. The Land Quality Division has the authority under Wyoming laws and the Wyoming program includes provisions to implement, administer, and enforce a system of performance bonds and liability insurance, or other equivalent guarantees, in part consistent with 30 CFR Chapter VII, Subchapter J (Performance Bonds);

19. The Land Quality Division has the authority, and the Wyoming program includes provisions to provide for civil and criminal sanctions for violation of Wyoming law, regulations and conditions of permits and exploration approvals including civil and criminal penalties, in part in accordance with Section 518 of SMCRA (Penalties) and consistent, in part, with 30 CFR Part 845 (Civil Penalties), including, in part, the same or similar procedural requirements;

20. The Land Quality Division has the authority under Wyoming laws, and the Wyoming program contains provisions, to issue, modify, terminate and enforce notices of violation, cessation orders and show-cause orders in accordance, in part, with Section 521 of SMCRA (Enforcement) and consistent, in part, with 30 CFR Chapter VII, Subchapter L (Inspection and Enforcement), including, in part, the same or similar procedural requirements;

21. The Land Quality Division has the authority, and the Wyoming program contains provisions, to designate areas as unsuitable for surface coal mining, in part consistent with 30 CFR Chapter VII, Subchapter F (Designation of Lands Unsuitable for Mining);

22. The Land Quality Division has the authority under Wyoming laws and the Wyoming program contains provisions to provide for public participation in the development, revision and enforcement of Wyoming laws and regulations and the Wyoming program, in part consistent with the public participation requirements of SMCRA and 30 CFR Chapter VII;

23. The Land Quality Division has the authority under Wyoming laws and the Wyoming program includes provisions to monitor, review, and enforce the prohibition against indirect or direct financial interests in coal mining operations by employees of the Land Quality Division, in part consistent with 30 CFR Part 705 (Restrictions on Financial Interests of State Employees);

24. The Land Quality Division has the authority under Wyoming laws and the program includes provisions to require the training, examination, and certification of persons engaged in or responsible for blasting and the use of explosives in accordance with Section 719 of SMCRA to the extent required for approval of its program;

25. The Land Quality Division has the authority under Wyoming laws and the Wyoming program contains provisions to provide small operator assistance, in part consistent with 30 CFR Part 795 (Small Operator Assistance);

26. The Land Quality Division does not have the authority under Wyoming laws and the Wyoming program does not contain provisions to provide protection of employees of the Land

Quality Division in accordance with the protection afforded Federal employees under Section 704 of SMCRA (Protection of Employees);

27. Wyoming has the authority under its laws and the Wyoming program contains provisions to provide for administrative and judicial review of State program actions in accordance, in part, with Sections 525 and 526 of SMCRA (Review of Decisions) and 30 CFR Chapter VII, Subchapter L (Inspection and Enforcement);

28. The Land Quality Division has the authority under Wyoming laws and the Wyoming program contains provisions to cooperate and coordinate with and provide documents and other information to the Office of Surface Mining under the provisions of 30 CFR Chapter VII;

29. The Wyoming EQA and Wyoming Land Quality Rules and Regulations, as currently in effect, contain numerous provisions which would interfere with or preclude implementation of SMCRA and 30 CFR Chapter VII. Wyoming Administrative Procedures Act, Wyoming Water Quality Rules and Regulations, Wyoming Air Quality Rules and Regulations, Wyoming Water Law, Wyoming State Engineer Regulations and Instructions, Wyoming Water Laws, Department of Environmental Quality Rules of Informational Practices, Wyoming Public Records Law, Wyoming Open Meeting Law, and other laws and regulations of Wyoming do not contain provisions which would interfere with or preclude implementation of the provisions of SMCRA and 30 CFR Chapter VII;

30. The Land Quality Division and other agencies having a role in the program would not have sufficient legal, technical, and administrative personnel, but would have sufficient funds to implement, administer, and enforce the provisions of the program, the requirements of 30 CFR 732.15(b) (Program Requirements), and other applicable State and Federal laws.

E. Explanation of the Secretary's Findings

The discussion in this section is based on a review of the Wyoming program as submitted August 15, 1979, and amended October 26, 1979, as well as material Wyoming subsequently made available to the Department. The program submission and other material include enacted laws and regulations and various proposed amendments to those laws and regulations. None of the amendments has been enacted. In accordance with 30 CFR 732.11(d), the failure to have all necessary laws and regulations fully enacted requires that the Secretary not approve this program at this time.

This discussion includes differences between the Wyoming program and the Federal requirements identified by the Department of the Interior or commenters in the review of the program. In addition, significant issues or questions raised by commenters are addressed. No detailed discussion is presented of those aspects of the Wyoming program which are equivalent to the Federal requirements.

Two versions of Land Board Rules and Regulations were contained in Wyoming's program submission. The first version consisted of the existing rules of the Land Quality Division (Vol. IV, Section A.1 of Administrative Record No. WY-3). The second version was a full set of rules and regulations which consisted of the existing rules, extensively modified to comply with the requirements of SMCRA and 30 CFR Chapter VII. This second version has not been adopted by the Land Quality Division, and was submitted as proposed rules (Vol. IV, Section A.2 of Administrative Record No. WY-3).

After review of these two versions by OSM, other governmental agencies and members of the public, Wyoming discussed a third version of rules. This version was presented to the Department of the Interior in the form of the "Regulatory Memorandum" in the orange book (Administrative Record WY-99). This version was modified after the discussions on January 2-5 between representatives of the Department of the Interior and the State of Wyoming. The modifications are incorporated in the fourth version of the rules, given to the Department of the Interior on January 9, 1980 (Administrative Record No. WY-119).

Only the first and second versions of the rules are part of the formal program submission. Only the first version has been enacted. The other three versions were merely proposals.

Because the Land Quality Division intends to make extensive modifications in its rules, the Secretary is disapproving the entire body of rules. Accordingly, a full set of Land Quality Division Rules and Regulations must be part of Wyoming's resubmission within sixty days if the Secretary is to be able to approve the Wyoming program. This resubmitted set of rules will be open to public comment.

The discussion of particular issues, below, reflects review of all four versions of rules which have been before the Department of the Interior and the public during the period of consideration of Wyoming's program submission leading to the Secretary's decision being announced today. Comments by other Federal agencies and the public were based on review of the first two versions of the rules. Analysis of disposition of those comments reflects, where appropriate, later versions of Wyoming's rules.

In the discussion, reference to particular rules for the most part is to the January 9, 1980, version of proposed rules. In some cases this version is identical to one or more earlier versions. In other cases, it contains modifications resulting from review of earlier versions. Other versions are referenced only in instances where identification of those versions is necessary to understand the analysis of issues of comments.

The versions in the submission, the first and second versions, are being disapproved by the Secretary. The Secretary has made no final decision on the other two versions. The discussion of particular rules, which follow, is presented primarily to assist Wyoming, the public, and government agencies, in the development and review of Wyoming's resubmission pursuant to 30 CFR 732.14, consistent with Section 102(g) and (i) of SMCRA (30 U.S.C. 1202(g) and (i)).

Any indication of the adequacy or inadequacy of Wyoming's latest version of its rules is tentative, and is subject to modification upon further review by the Department, the public and other agencies.

The Wyoming EQA is being approved in part. Only sections of the EQA which are fully enacted are being approved. Discussions of proposed amendments to the EQA are included below as guidance for Wyoming, other government agencies and the public, in the development and review of Wyoming's resubmission. The conclusions expressed with respect to such amendments are not necessarily final.

In the discussion of comments, individual commenters have been identified where it may assist the reader of this notice. All comments identified as coming from EPA were submitted by the EPA regional office in Denver.

Many of the comments of EPA and others were on early versions of the statutory and regulatory language. Accordingly, in the discussion below, the Secretary often points to new proposed language in discussing the issues raised and in many cases this new language resolves the issue.

Finding 1

The Secretary finds the Wyoming Environmental Quality Act (Wyoming EQA), the regulations adopted thereunder, and the Wyoming Administrative Procedures Act, provide,

in part, for the regulation of surface coal mining and reclamation operations on non-Indian and non-Federal lands in Wyoming in accordance with SMCRA.

This finding corresponds to Section 503(a)(1) of SMCRA (30 U.S.C. 1253(a)(1)). Analysis of the issues underlying this finding is found in the detailed discussions of findings 12 through 30, below.

Finding 2

The Secretary finds that the Wyoming EQA provides sanctions for violations of Wyoming laws, regulations or conditions of permits concerning surface coal mining and reclamation operations, and these sanctions meet the requirements of SMCRA, in part, including, in part, civil and criminal actions, forfeiture of bonds, suspensions, revocations, and withholding of permits, and the issuance of cease-and-desist orders by the Land Quality Division or its inspectors.

This finding corresponds to Section 503(a)(2) of SMCRA (30 U.S.C. 1253(a)(2)). Analysis of the issues underlying this finding is found in the detailed discussion of findings 18, 19, and 20, below.

Finding 3

The Secretary finds that the Land Quality Division does not have sufficient administrative and technical personnel, but has sufficient funds to enable Wyoming to regulate surface coal mining and reclamation operations, in part, in accordance with the requirements of SMCRA.

This finding corresponds to Section 503(a)(3) of SMCRA (30 U.S.C. 1253(a)(3)). An analysis of the issues underlying this finding is found in the detailed discussion of finding 30, below.

Finding 4

The Secretary finds that Wyoming law provides, in part, for the effective implementation, maintenance, and enforcement of a permit system that meets the requirements of SMCRA for the regulation of surface coal mining and reclamation operations on non-Indian and non-Federal lands within Wyoming.

This finding corresponds to Section 503(a)(4) of SMCRA (30 U.S.C. 1253(a)(4)). An analysis of the issues underlying this finding is found in the detailed discussion of finding 14, below.

Finding 5

The Secretary finds that Wyoming has established, in part, a process for the designation of areas as unsuitable for surface coal mining in accordance with Section 522 of SMCRA.

This finding corresponds to Section 503(a)(5) of SMCRA (30 U.S.C. 1253(a)(5)). An analysis of the issues underlying this finding is found in the detailed discussion of finding 21, below.

Finding 6

Wyoming has, in part, established for the purpose of avoiding duplication, a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with other Federal and State permit processes applicable to the proposed operations.

This finding corresponds to Section 530(a)(6) of SMCRA. In addition to the information in the following four paragraphs, discussion of the analysis underlying this finding is found in the detailed discussions of findings 13 and 14, below.

Wyoming has identified in its program submission seven State agencies having related responsibilities for elements of permitting and inspection of surface and underground coal mining operations. These are the Land, the Air, and Water Quality Divisions of the Department of Environmental Quality, the State Engineer, the Recreation Commission, the Game and Fish Department, and the Wyoming State Inspector of Mines. The related responsibilities are coordinated through five Memoranda of Understanding (MOUs). In these MOUs, the agencies agree to review elements of applications, provide technical assistance to the principal agency, the Land Quality Division (which serves as the "regulatory authority"), and to apply certain environmental protection performance standards to permit applications (Administrative Record No. WY-3).

The MOUs between the three divisions in the Department of Environmental Quality and the MOU between the Land Quality Division and the State Engineer contain standards and require plans to meet certain requirements. This information would be required to be in the permit application for the surface (or underground) coal mining operation pursuant to Rule II 3a(5), which, if promulgated, will require inclusion of air quality, water quality, solid waste (also the responsibility of the Land Quality Division), and State Engineer applications. The permit can be approved only with this information included; otherwise the requirements of Rule II 3a(5) would not be met. Once the permit is approved, the permittee must comply with the measures in the application. Thus, the requirements of the Water Quality and Air Quality Divisions, and the requirements of the State Engineer would be enforceable under the provisions of Wyoming's program.

Only one comment was raised on the Wyoming procedures to coordinate its permit process. The Department of Energy pointed out that coordination may be difficult as a result of the fragmentation of responsibility among the Divisions of the Department of Environmental Quality, State Engineer, Inspector of Mines, and Game and Fish Department. Along with the MOUs that have been drafted, DOE suggested that the establishment of an interdepartment task force may provide for the necessary on-going coordination.

The MOUs would establish important functions within a Department Environmental Quality and would provide a strong vehicle for coordination among air, water, and land concerns. The agreements with other entities such as the State Engineer and the Game and Fish Department establish protocols and identify authorities. While coordination will require on-going attention, the Land Quality Division staff has worked under the MOUs successfully. This comment is being sent to the State for its consideration.

Finding 7

The Secretary finds that Wyoming does not have enacted regulations consistent with regulations issued pursuant to SMCRA.

This finding corresponds to Section 503(a)(7) of SMCRA (30 U.S.C. 1253(a)(7)). As discussed earlier, Wyoming proposes to revise the existing regulations of the Land Quality Division extensively. Since the provisions of the regulations are interrelated to a great degree, the Secretary cannot approve any part of these rules until substantially all of them have been finalized. Accordingly, the entire body of Land Quality Division Rules and Regulations is disapproved.

Finding 8

The Secretary has, through OSM, solicited and publicly disclosed the views of the Administrator of the Environmental Protection Agency, the Secretary of Agriculture, and the heads of other Federal agencies concerned with or having special expertise pertinent to the proposed Wyoming program.

This finding corresponds to Section 503(b)(1) of SMCRA (30 U.S.C. 1253(b)(1)). This finding is based on the facts set forth in a **Federal Register** notice published February 14, 1980, identifying the Federal agencies from which comments were solicited, the agencies which responded and the offices of OSM and the Wyoming Land

Quality Division at which copies of the comments were made available (45 FR 10046–10047).

Finding 9

The Secretary has, through OSM, obtained the written concurrence of the Administrator of the Environmental Protection Agency with respect to those parts of the Wyoming program being approved today which relate to air or water quality standards promulgated under the authority of the Federal Clean Water Act, as amended (33 U.S.C. 1151–1175), and the Clean Air Act, as amended (42 CFR 7401 *et seq.*).

This finding corresponds to Section 503(b)(2) of SMCRA (30 U.S.C. 1253(b)(2)). The finding is based on the letter transmitted by the Administrator of EPA to the Secretary on February 15, 1980. A copy of this letter has been placed in the Administrative Record.

Finding 10

The Secretary, through the OSM Regional Director for Region V, held a public review meeting in Cheyenne, Wyoming, on September 20, 1979, to discuss the Wyoming program submission and its completeness and held a public hearing in Cheyenne, Wyoming, on January 7, 1980, on the substance of the Wyoming program submission.

This finding corresponds to Section 503(b)(3) of SMCRA (30 U.S.C. 1253(b)(3)).

Finding 11

The Secretary finds that the State of Wyoming has, in part, the legal authority, but does not have sufficient qualified personnel necessary for the enforcement of the environmental protection standards of SMCRA and 30 CFR Chapter VII.

This finding corresponds to Section 503(b)(4) of SMCRA (30 U.S.C. 1253(b)(4)). Analysis of the issues underlying this finding are found in the detailed discussions of findings 12 through 30, below.

Finding 12

The Secretary finds that the Wyoming program provides, in part, for Wyoming to carry out the provisions and meet the purposes of SMCRA and 30 CFR Chapter VII.

This finding corresponds to the first half of 30 CFR 732.12(a). This finding is based on findings 1 through 11 and 12.1 through 30. Analysis of the issues underlying those findings is found throughout this section of the Federal Register notice.

Findings 12.1–12.12

Wyoming proposed twelve alternative approaches to the Federal regulations, "state window" items, in its submission. These are found in Administrative Record No. WY–3, Vol. 6, Section G.1. The Secretary finds that one of these items, relating to mountaintop removal, is acceptable as presented. See Finding 12.2 in Section D, above. When promulgated, it appears that the remainder of the items would be accordance with SMCRA and consistent with the Federal regulations, or more stringent than the Federal requirements, as required either for State window items or for other provisions. These items are discussed below. These tentative conclusions are subject, of course, to consideration of issues raised by public comments on Wyoming's resubmission.

Wyoming has proposed to rely on the discussion of premining land use required by Rule II 3a(6)(d) for the postmining land use description required by 30 CFR 780.23 if there is no land use change, and to require a description of proposed changes for postmining land use through Rule II 3b(11). This modification of the Federal requirements appears to be an administrative modification proposed in order to eliminate any unnecessary potential requirement to discuss the premining land use twice. Wyoming has proposed to satisfy the requirements of 30 CFR 780.23 by its requirement for surface owner consent and notices (W.S. 35–11–406(f) and Rule XIII 1a(2)) when there is no proposed change in land use.

Wyoming has not proposed regulations for steep slope mining and will prohibit such mining until rules are promulgated if the proposed revision to the Wyoming Statute is promulgated (proposed W.S. 35–11–406(m)). It would appear that the change proposed would satisfy the requirements of SMCRA and 30 CFR Chapter VII.

Wyoming has developed, in Rule VII 2, an alternative to the requirements of 30 CFR 785.19 (alluvial valley floors). The alternative uses comprehensive language to summarize the requirements which are listed in detail in the Federal rule. Wyoming has proposed to draft additional language to be certain that any additional information required shall be included in an application and Wyoming has provided an alluvial valley floor technical guidance document, as part of the program, which will give the detailed guidance on premining investigations. Wyoming has also proposed an alternative to 30 CFR 785.19(e)(2) which uses an equation expressing a lower limit of a three percent loss in production that would constitute a significant effect of proposed operations on farming. The equation used to project a percentage loss in production equivalent to a significant effect appears to be acceptable in terms of providing environmental protection, based on characteristics of regional agricultural conditions.

In light of the remand of sections 785.19(d), (e) (1) and (2) by the district court's decision in *In re Permanent Surface Mining Regulation Litigation* on February 26, 1980. Wyoming's Rule VII 2 on alluvial valley floors now appears to be more stringent than the federal requirements. Wyoming may therefore choose either to proceed with its proposed alternatives and additional draft language or to adopt other alluvial valley floor requirements which reflect the district court's decision. Any new provisions will then be re-evaluated in light of the district court's decision when the revised Wyoming program is resubmitted. Once new federal rules are adopted, Wyoming will be able to amend its program to reflect those changes.

Wyoming's program contains a definition of topsoil and describes topsoil protection provisions which do not include the 6" minimum for removal of acceptable A horizon material (i.e., "topsoil") required by 30 CFR 816.22(c). Instead, Wyoming has a broader definition of topsoil; the A, B, and C horizons, or any combination thereof which has been determined through soil surveys, laboratory analyses and field trials to be suitable as a plant growth medium (Rule I 2(96)). Wyoming has proposed the alternative to accomplish equal environmental protection despite the extreme variation in local soil conditions. Wyoming has also proposed addition of a provision to segregate soil horizons (in the January 9, 1980, proposed rules, Administrative Record No. WY–119) which provides for segregation of A, B, or C horizons when appropriate. If the drafted change is added, it appears that environmental protection in accordance with SMCRA and consistent with 30 CFR Chapter VII will result, given the regional soil conditions found in Wyoming.

Wyoming has provided language in Rule IV 3e(2)(b) regaridng restoration of stream channels and construction of permanent diversions which requires establishment or restoration of stream characteristics, including aquatic habitat, to approximate premining stream channel characteristics. This is proposed as a substitute for the Federal requirements to establish the stream to

its natural meandering shape or an environmentally acceptable gradient, as determined by the regulatory authority (30 CFR 816.44(d)(2)) and to establish or restore the longitudinal profile and cross section, including aquatic habitat (30 CFR 816.44(d)(3)). Wyoming reasons that the alternative provides restoration of a stable channel and floodplain conditions considering the relationship between discharge and channel properties. It would appear that this alternative should provide the ability to restore streams, considering topographic changes, textural changes, spoil structure, transitions between disturbed and undisturbed ground, bedrock control and time-dependent changes, based upon characteristics of the regional environment.

Wyoming proposed in Rule IV 3p(2) the substitution of intermittent and perennial streams for the "biological community" test to define the stream buffer zones required by 30 CFR 816.57(a) and (c). Wyoming perceived problems with enforcement using the "biological community" concept. Wyoming considers the alternative no less stringent than that of the Federal regulations and reasons that the hydrologic definition using stream characteristics provides a more enforceable provision reflecting local drainage, aquatic life conditions, and the Wyoming permit system which requires identification of surface water and ground water flow systems to the degree necessary to identify ephemeral, intermittent and perennial flow conditions. The substitution probably would provide equivalent protection of the environment, considering the characteristics of the regional environment and other provisions of the Wyoming program.

Wyoming has not provided counterparts to 30 CFR 816.72 (valley fills), 30 CFR 816.73 (head-of-hollow fills), or 30 CFR 816.74 (durable rock fills), on the grounds that the Federal regulations are designed for areas where the valley walls slope more than 20 degrees or the slope profile of the valley is more than 10 degrees. Since area mining and contour mining operations in Wyoming are conducted on relatively flat, rolling terrain, spoil can be placed on relatively flat to moderately sloping and stable areas not requiring special stabilizing measures. Wyoming prohibits mining or spoil placement on steep slopes until regulations are promulgated. The Wyoming rules would apparently achieve equal environmental protection as the Federal regulations, considering the characteristics of the areas in Wyoming where mining occurs.

Wyoming has proposed in Rule IV 3a, not to use the ratios of 0.8 and 1.2 to distinguish between thin and thick overburden as do 30 CFR 816.104 and 816.105. Wyoming considers that the single ratio does not allow for site-specific considerations since local environmental considerations dictate that the approximate original contour provisions be sufficiently flexible to allow consideration for the types of materials and methods of excavation. Without using the ratio tests, the Wyoming approach would assure that the special provisions of 30 CFR 816.104 and 816.105 are not more broadly available than they would be under the Federal rules. In the case of thin overburden, Wyoming proposes backfilling with all material to obtain as close as possible to the approximate original contour. In the case of thick overburden, Wyoming's alternative would allow for consideration of differing earthen materials and associated mining methods. All the specific requirements of Section 515(b)(3), 30 U.S.C. 1265(b)(3), will be met under the Wyoming approach. The Wyoming alternatives appear to be in accordance with SMCRA and consistent with 30 CFR Chapter VII.

Finding 13

The Secretary finds that the Land Quality Division has, in part, the authority under Wyoming laws and regulations to implement, administer, and enforce applicable requirements consistent with 30 CFR Chapter VII, Subchapter K (Performance Standards), and the Wyoming program includes provisions adequate, in part, to do so. This finding is made under 30 CFR 732.15(b)(1).

Wyoming incorporates provisions corresponding to Section 515 and 516 of SMCRA and Subchapter K of 30 CFR Chapter VII in Wyoming Statute 35–11–401, 402, 404, 405, 406, 411, 415 and 601 and in Wyoming rules Chapters III, IV, V, VI, VII, VIII, and XV. Vol. 1 Part G.6, of the program submission contains a discussion of Wyoming's administrative and enforcement procedures for performance standards.

Discussion of significant issues raised during the review of the Wyoming provisions for environmental performance standards follows.

Signs and Markers

13.1 The differences between 30 CFR 816.11, signs and markers, and the Wyoming proposed provisions contained in Rules IV 3m, IV 2c and VI 1d are organization and minor word differences. The same signs are required by Wyoming, and, in addition, Wyoming requires spoil or waste material to be marked with signs (Rule IV 2c(3)). The proposed Wyoming provisions appear to be consistent with the requirements of 30 CFR 816.11.

Casing and Sealing

13.2 30 CFR 816.13 through 816.15 discuss casing and sealing of drilled holes. Wyoming proposed to specify approval by the administrator of temporary sealing of holes and the use of protective devices and requires that other exposed underground openings be "properly managed." Plugging, sealing, and capping of drilled holes (except for blasting) are addressed in Rule IV 3b(8), "General Environmental Protection Performance Standards," and in Rule XV, "Exploration by Drilling." The Federal rules, in 30 CFR 816.14 and 816.15, distinguish between temporary and permanent casing and sealing and Wyoming does so in Rule IV 3n. Wyoming Rule XV 3a(2)(a) provides specifications to be met by drilling muds used to seal exploration drill holes where the API "Standard Procedures for Testing Drilling Fluids" are used. The proposed Wyoming provisions appear to be consistent with the requirements of 30 CFR 816.13 through 816.15.

Topsoil

13.3 Wyoming proposes to substitute a broader definition of topsoil in Rule I 2(96) for that of 30 CFR 701.5 and does not specify the 6" minimum removal depth of 30 CFR 816.22(c). See also Wyoming Rule IV 2c. Wyoming's definition includes portions of the B and C horizons acceptable for plant growth and thus provides a definition suited for reclamation procedures. Experience in Wyoming shows this topsoil analysis and the resulting recovery procedures to be appropriate, especially in areas where sodic or saline soils are encountered. Wyoming submitted as a "State window" an alternative to the 6" minimum removal depth as discussed above in detail under the explanation of findings 12.1–12.12.

13.4 The Public Lands Institute commented that the proposed Wyoming regulations do not require saving subsoil, do not set a minimum amount of topsoil to be removed, and do not require segregation of horizons and vegetation and laboratory certification of field-site trials of reclaiming overburden as required by Section 515(b)(5) of SMCRA and 30 CFR 816.21 and 22. 30 CFR 816.22(d) requires subsoil segregation of the B and C horizons "if the regulatory authority determines that either of these is necessary or desirable to ensure soil productivity consistent with the approved postmining land use."

Wyoming originally submitted its program without the B and C horizon segregation requirement. Wyoming now proposes to require in rule IV 3b(1) that "The A horizon or more organic horizon of the topsoil shall be segregated from the B and C horizons where such practice would enhance revegetation" (Administrative Record No. WY-119). Since topsoil is defined as the A, B, and C horizons when these are suitable for plant growth, the proposed Wyoming program would appear to provide the equivalent authority to segregate soil horizons where necessary or desirable. Likewise, saving all soil suitable for plant growth would appear to be consistent with the Federal requirement to save subsoil.

13.5 The Wyoming Mining Association indicated that the State's original definitions of subsoil ("any subsurface earthen material excluding any material within the topsoil layer") and topsoil (which would include A, B, and C soil horizons) would mean that subsoils would not include B and C soil horizons. This appears to conflict with the definition of "A, B and C soil horizons," under which B and C soil horizons were considered subsoil.

Wyoming now proposes to define "subsoil" in rule I 2(90) as earthen materials including materials capable of supporting plant life. "Topsoil" is defined to include the suitable plant growth material in the A, B, or C horizons, (rule I 2(96)). Wyoming's definition of "soil horizons" excludes bedrock or unconsolidated lithologic materials. Therefore, "subsoil" refers to materials below a C horizon if a C horizon exists, or to materials below the lowest of the A, B or C horizons. The Wyoming rules appear to be internally consistent and consistent with the Federal requirements as far as soils definitions are concerned.

13.6 By defining spoil as "all materials removed except minerals and topsoil," according to one commenter, spoil could include subsoil. The commenter suggested that the definition for spoil be changed to "overburden that has been removed during surface coal mining operations," which the commenter concludes would be consistent with the Federal regulations.

Wyoming proposes to require subsoil analyses equivalent to those required for topsoil only if topsoil is not available or if topsoil is inadequate and subsoil is to be used for reclamation. If special handling requirements for subsoil are not identified or required to be in the plan approved by the Land Quality Division, subsoil is treated as spoil in the manner prescribed by Rules VI 2c(3), VI 3a, and IV 3c(1). If the soil materials requiring protection are identified, and if subsoil materials requiring or benefiting from special protection are identified, the remaining overburden materials shall be treated as spoil. Specially identified subsoil would have to be handled in accordance with the approved reclamation plan. The provisions of the Wyoming program for defining spoil appear to be adequate to protect against disposal of subsoil in a manner which is inconsistent with the Federal regulations.

13.7 Wyoming proposes to remove the phrase "in accordance with applicable Federal and State air quality standards" from proposed Rule IV 3o, air resources protection, in order to eliminate the possible reliance on quantitative total suspended particulate standards due to soil disturbance which may not relate to visibility at a mining operation or the more subtle effects of air pollution. This revision appears to be consistent with 30 CFR 816.21 through 816.25 for topsoil protection and 30 CFR 816.95 for air resources protection.

13.8 Wyoming proposes to require scarification prior to topsoiling. This is considered to be a practice preferable for stabilization of the topsoil, in most instances, to scarifying after topsoiling and may be allowed pursuant to 30 CFR 816.24(a). The variation from the Federal rule appears to be consistent with the Federal rule, in accordance with 30 CFR 730.11(b) which states that provisions which are more stringent than the Federal rules are not inconsistent with them.

13.9 Wyoming does not specifically state in its regulations that postmining soils analysis will be performed by a qualified laboratory as specified in 30 CFR 816.25, but does have a "soils" guideline that specifies acceptable soils analysis procedures. The guidelines do not, however, stipulate that the laboratory must be qualified in accordance with 30 CFR 816.25. The program resubmission should provide for qualification of laboratories.

13.10 In regard to determining soil suitability, the U.S. Forest Service suggested that soils with more than 15% coarse fragment be identified with a gr prefix (example: grl is a gravelly loam). It also suggested that additional tests for particle size, pH and electrical conductivity be conducted on the restored topsoil. Wyoming's Rule II 3a6(f) would specify that soils analyses for permits are to be conducted in accordance with the standards of the National Cooperative Soil Survey of the U.S. Department of Agriculture (USDA). The designation of gravelly material will be specified pursuant to the USDA requirements and would appear to be acceptable. The "soils" guideline includes standard specifications for particule size, pH, and electrical conductivity for soils analysis.

Hydrologic Balance

13.11 In comparison to 30 CFR 816.41(a), Wyoming's submission did not provide a direct statement on prevention of long-term adverse changes to the hydrologic balance. However, Wyoming now proposes to prohibit material damage to the hydrologic balance outside the permit area (proposed W.S. 35-11-406(j)(iii)) and to define "hydrologic balance" (Rule I 2(38)) in a manner which is not time-restricted. Wyoming has represented that its regulations and statutes require, by common usage and definition, prevention of long- and short-term adverse changes and uses. (See notes of January 2-5 meetings, Administrative Record No. WY-99.) Accordingly the program appears to be consistent with the Federal requirements on this point.

13.12 Although the Wyoming program mentions the necessity of controlling water pollution and gives many specific steps to be taken, according to the Environmental Protection Agency (EPA), none of the steps listed specifically seem to cover 30 CFR 816.41(d)(2)(vii) which requires "selectively placing and sealing acid-forming and toxic-forming material." Wyoming now proposes in Rule IV 3c(3) to require acid-forming and toxic-forming materials to be buried or treated within 30 days after exposure. Rule IV 3a(2) requires backfilled materials to be placed so as to minimize adverse effects on ground water and to support the approved postmining land use. Rule IV 3c(3)(d) requires, where acid-forming or toxic materials are disposed of in backfilled spoil piles in the pit, that these materials be selectively hauled or conveyed, and compacted, wherever necessary to prevent leaching of acid-forming or toxic material into surface or subsurface waters. These provisions appear to be consistent with the Federal requirements.

13.13 In the Wyoming equivalent to 30 CFR 816.42, water quality standards and effluent limitations, the State retains sedimentation ponds until the affected lands have been *restored* and until drainage meets applicable water quality standards (for the receiving waters) whereas Federal requirements are for retention until the revegetation requirements of 30 CFR 816.111-117 are met. Wyoming includes revegetation requirements in the word *"restored"* and thus the equivalent criteria for pond removal are used. Wyoming uses the equivalent term "affected lands" in

place of "disturbed area." Wyoming does not use the "small area exemption" but rather includes all runoff in the sedimentation pond requirement, which is more stringent than the Federal requirement and, under 30 CFR 730.11(b), consistent with it.

13.14 Wyoming uses "daily average" for measuring *total suspended* solids. The program utilizes the Water Quality Division's regulations and the Land Quality Division has proposed a Memorandum of Understanding with that Division regarding cooperative review and enforcement of water quality aspects of surface coal mining and reclamation operations (see the orange book, Administrative Record No. WY-99). The measuring provisions and coordination provisions appear to provide enforceable water quality limits and measurement requirements for point source discharges from coal mining and reclamation operations consistent with 30 CFR Chapter VII.

13.15 Wyoming's proposal for sedimentation ponds (Rule IV 3) requires surface drainage to pass through such ponds and *excludes* "sediment ponds, diversion ditches and road disturbances," which are requirements of 30 CFR 816.42 and 817.42, according to two commenters, including EPA. EPA also says there are no apparent detention time provisions as required by 30 CFR 816.46(c).

The Federal regulations exclude from the definition of disturbed area "those areas in which only diversion ditches, sedimentation ponds, or roads are installed." Thus, the exlusion noted by EPA is also provided by the Federal regulations. The proposed regulations for the Water Quality Division require that sedimentation ponds provide a *minimum* 24 hour theoretical detention time for the 10 year, 24 hour event (Rule III 8(6)). Thus the two regulations (State and Federal) appear to be consistent with the Federal requirements in effect. It should be noted that 30 CFR 816.46(b), (d) and (h) concerning sedimentation ponds were suspended on December 31, 1979.

13.16 National Wildlife Federation suggested that Wyoming's water monitoring standards be more explicit regarding the requirement for adequate monitoring wells, stating that the regulations should make it clear that additional wells shall be drilled when the number of existing wells is inadequate. Wyoming (Rule IV 3i) does reiterate the Federal requirement for monitoring to be adequate to plan for modification of surface mining activities, if necessary, to minimize adverse effects on water. The drilling of an adequate number of wells for observation appears to be included within this requirement.

13.17 The Public Lands Institute maintains that the State's requirements for maintaining the hydrologic balance are not as complete as 30 CFR 816.41 through 53 and are not as stringent nor as holistic.

Wyoming proposes to require the applicant to affirmatively demonstrate that the proposed operations are designed to prevent material damage to the hydrologic balance outside the permit area (W.S. 35-11-406(j)(iii)). An approvable plan must contain the procedures necessary to minimize disturbances to the prevailing hydrologic balance at the minesite and in associated offsite areas and to the quality and quantity of water in surface and ground water systems, both during and after mining and during reclamation (W.S. 35-11-406(b)(xviii)). The plan, if complete, will have to contain a determination of the probable hydrologic consequences of the proposed operation on the hydrologic regime and must provide a basis for the regulatory authority to assess the cumulative hydrologic impacts (Rules II 3b(10) and XXIII 2).

Wyoming also proposes to provide equivalent requirements to those of 30 CFR 816.42 through 816.57. (See, for example, Rules IV 3e, IV 3g, IV 3c(3), IV 3h, IV 3f, and IV 3i.) These provisions appear to provide authority equivalent to the Federal rules, and to be consistent with them.

13.18 The Wyoming program does not list manganese in the effluent limitations of the Water Quality Division on the basis that all coal mines in Wyoming have alkaline discharge (30 CFR 816.42(a)(7)). This issue is discussed under Finding 14 in relationship to the requirements of 30 CFR 779.16. Although acid drainage is not normally encountered in Wyoming, the program resubmission should further demonstrate the appropriateness of eliminating manganese from the listing.

13.19 30 CFR 701.5 defines "acid drainage" to include water * * * in which total acidity exceeds total alkalinity * * *" Wyoming's proposed definition in Rule I 2(1) does not include this provision. pH alone might occasionally be insufficient as an indicator of acid drainage. Occasionally a stream in its natural state will fall briefly and slightly below a pH of 6; however, its acidity will not exceed its alkalinity. Therefore, it appears that the proposed Wyoming definition does not meet the requirements of 30 CFR 701.5. However, because of the general chemical nature of the waters and soils in Wyoming it is unlikely that a condition of acidity exceeding alkalinity will ever occur. Further discussion of the issue is necessary in the program's discussion of the counterpart to 30 CFR 816.42 before the Wyoming provisions could be approved. (This issue is closely related to the manganese issue discussed immediately above.)

13.20 The State proposes to add ephemeral streams to Rule IV 3e and Rule IV 2(e) to ensure equivalency to 30 CFR 816.43 (divisions, overland flow, shallow ground water flow, and ephemeral streams). The Wyoming provisions would appear to meet the Federal requirements.

13.21 EPA is concerned that the Wyoming program states that operators must "establish and restore erosionally stable stream channels and flood plains" without stating that the regulatory authority "determines what is environmentally acceptable" as required in 30 CFR 816.44(d)(2). Further, EPA noted the Federal requirement (in 30 CFR 816.44(d)(3)) to restore "the stream to a longitudinal profile and cross section including aquatic habitats that approximate premining characteristics" has been changed in the Wyoming rules to cover *only* aquatic habitats and that there is a separate requirement to renovate all permanent diversions to "comply with design criteria" in the Wyoming program, but no statement that such design criteria includes "approximate premining stream channel characteristics."

The requirements of 30 CFR 816.44(d)(2) for all streams is to establish or restore the stream to its natural meandering shape by an environmentally acceptable gradient as determined by the regulatory authority. Wyoming proposes to require that such diverted streams be designed to be erosionally stable and to be consistent with the role of the fluvial system (Rule IV 2f(5)).

Wyoming further proposes to require the operator to establish or restore the stream characteristics, including aquatic habitats, to approximate premining stream channel characteristics (Rule IV 3e(2)(b)(ii)). These requirements would include meanders, riffles, pools, and drops, the latter three at a minimum since the term "aquatic habitat" is used in Rule IV 3e(2)(b)(ii), which appears to be consistent with 30 CFR 816.44(d)(3). Thus, the Wyoming rules appear to follow 816.44 (d)(2) and (d)(3).

13.22 EPA states that Wyoming does not discuss the necessity of modifying downstream water treatment facilities once a stream channel diversion protecting that facility is removed, as required by 30 CFR 816.44(c). The Federal requirement is to modify

downstream water treatment facilities previously protected by diversions if such facilities remain in place after removal of the diversions.

Wyoming proposes to require minimization of the hydrologic impacts (Rule II 3a(6)(m)) and to provide requirements to properly size sedimentation ponds and other water treatment facilities that are part of the mining operations. Wyoming considers the general hydrologic protection requirements of its statute and rules to afford adequate protection to downstream water treatment facilities. Contingent on Wyoming submitting an analysis of the possibility of encountering a situation when a downstream water treatment facility could be adversely affected by removal of the sedimentation pond or other water pollution control facility related to coal mining operations, Wyoming's rules appear to meet the Federal requirements.

13.23 When discussing restoration of stream channels, as required by 30 CFR 816.44(d), Wyoming included, in the program submission, a requirement to maintain an "average or lesser" stream channel gradient in permanent diversions. Since this terminology could lead to increased deposition of sediment, Wyoming now proposes language in Rule IV 2(f)(5) to specify that permanent diversions shall be designed and constructed to be erosionally stable and to be consistent with the role of the fluvial system.

Wyoming has addressed the alternatives for describing the postmining longitudinal profiles as a "State window" item which is further discussed above under finding 12.1–12.12. The existing State regulations are deficient but the proposed revisions will provide, if promulgated, equivalent protection of the environment in comparison to the Federal requirements.

13.24 EPA is concerned that Wyoming's program does not show that the requirements for minimizing erosion and sediment control methods meet the requirements of 30 CFR 816.45(a)(3), and (b).

The Federal sediment control requirements include minimizing erosion to the extent possible (30 CFR 816.45(a)(3)) and list seven types of control methods that should be considered, such as limiting the disturbed area or diverting runoff away from disturbed areas (30 CFR 816.45(b)). In Rule IV 3g(6) Wyoming would require appropriate sediment control measures consisting of limiting the extent of disturbed land (as in 30 CFR 816.45(b)(1)), retaining sediment (as in 30 CFR 816.45(b)(3), and diverting water away from disturbed areas (as in 30 CFR 816.45(b)(4)). Diversions through pipes (30 CFR 816.45(b)(5)) are not specifically listed, but diversions are addressed in Rules IV 2e and IV 3e in sufficient detail to require diversion through pipes wherever necessary.

The suggested sediment control measures of 30 CFR 816.45(b)(6) are addressed throughout the Wyoming rules (for example, the use of mulch is listed in Rule IV 3d(3)).

The commenter is correct, however, in that the Wyoming rule does not specifically include, in the listing, minimizing erosion by retaining sediment (as in 30 CFR 816.45(a)(3)); stabilizing backfill (as in 30 CFR 816.45(b)(7)). "Stabilizing and treating" in the Wyoming rule relates to runoff and thus indirectly to soils and sediment.

The Wyoming Rules have been proposed to be changed to include "stabilizing" in Rule IV 3(g)(6). The Wyoming rules would also require stabilizing backfill under the backfilling regulations (Rule IV 3a(3)). The Wyoming resubmission should clarify where in the program the sediment retention and treatment alternatives for sediment control will appear in the program.

13.25 EPA stated that Wyoming's program does not contain a parallel to 30 CFR 816.46(u) describing *when* sedimentation ponds may be removed. Wyoming's Rule IV 3g(1) would require sedimentation control devices to be retained until the affected lands have been *restored* and until the untreated drainage will meet the water quality requirements for the receiving water. The State Engineer's regulations, which would be incorporated by Rule II 3a(5)(iv), are designed to control construction of sedimentation ponds. Sediment control is required under the Land Quality Division's Rules. Revegetation is included in the "restored" and thus the requirements of 30 CFR 816.42(a)(2) and 816.46(u) will apparently be met in the Wyoming program when the proposed rules are enacted. Wyoming should confirm this intention in the program resubmission, a related issue is discussed above in paragraph 13.13.

13.26 Another commenter states that the Wyoming language in the proposed Water Quality Division's rules and regulation is the same as its Federal counterpart, 30 CFR 816.46(c), except for the definition of "theoretical detention time for sedimentation ponds."

The provision for theoretical detention time are contained in the proposed rules of the State Engineer's regulations. Additionally, 816.46 (b), (d) and (h) were suspended on December 31, 1979. Wyoming's rules appear to meet the requirements of the provisions of 30 CFR 816.46.

13.27 Wyoming's State Engineer's proposed regulations specify that the emergency spillway, grades and allowable velocities be approved by the State Engineer. The Water Quality proposed regulations specify that the combined principal and emergency spillways shall pass safely the runoff from a 25-year flood event. The State Engineer's regulations also require the ponds to have an appropriate combination of principal and emergency spillways to safely pass the 100-year or longer flood event. However, the Wyoming program does not identify the requirement of 30 CFR 816.46(i) that the crest of the emergency spillway be located at least one foot above the crest of the principal spillway.

Wyoming proposes to require compliance with Public Law 83–566 and SCS criteria in the proposed State Engineer's regulations. However, it will be necessary for Wyoming to require the 1.0 foot separation, or to provide a demonstration that equivalent protection is offered, as required by 30 CFR 816.46(j). Wyoming thus needs to demonstrate equivalency of their program for impoundment embankments with all applicable design criteria of 30 CFR 816.46.

13.28 The Federal regulations, 30 CFR 816.46 (n) and (o), require that the sedimentation pond embankment or fill material be free from sod, large roots and vegetation material; the foundation be cleared from all *organic matter;* the exposed surface not be steeper than 1h:1v, and the foundation be scarified. In addition, 30 CFR 816.49 requires that both temporary and permanent impoundments be built to certain design criteria to assure both safety and environmental protection.

The Wyoming's State Engineer proposed regulations require that the fill material in the sedimentation pond embankment be started at the lowest point of the foundation and be spread in horizontal layers of a thickness that will facilitate compaction and to meet the safety factors (Section 1 of the State Engineer's rules). The State Engineer's proposed regulations also require compliance with Public Law 83–566, MSHA, and SCS requirements, and require construction to be supervised by, and certified by a registered professional engineer (Section 1).

Since normal engineering practice would consist of ensuring pond embankment stability by eliminating organic material that could create instability, and by laying the

embankment to the ground surface to avoid slippage, the Secretary believes that the required results of the Federal regulations will be achieved under the Wyoming program. However, since some modifications of the Wyoming program have been proposed to clarify the requirements for the sedimentation ponds, dams, and embankments requirements by the State Engineer's requirements in Administrative Record No. WY-119, this portion of the program cannot be approved.

Wyoming also utilizes State Engineer regulations to ensure safety of design and construction of ponds. The State Engineer's regulations and the Land Quality Division Rules use a criterion of 50 acre feet (Rule IV 3h(2)) as opposed to the Federal requirement of 20 acre feet (though they measure the 20 foot height from the downstream toe of the dam embankment which may be more stringent than the Federal requirements). Wyoming's State Engineer's regulations require that sedimentation ponds larger than 20 feet high or 50 acre-feet of storage be designed in accordance with the SCS Release 60 and also utilize a criteria for imposition of the more stringent standard for "any impoundment which may pose a public health and safety hazard or cause significant environmental damage from overtopping or failure of the dam." This material is contained in the draft regulations (Administrative Record No. WY-99).

Wyoming has not submitted adequate information to show that the criterion of 50 acre feet plus the discretionary provisions proposed in Rule IV 3h(3) to allow the administrator to impose more stringent requirements on any impoundment which may pose a public health and safety hazard will be as stringent as is required by 30 CFR 816.46(q). Specific areas of concern include, but are not limited to, design storm for emergency spillway use, emergency spillway hydrograph, freeboard hydrograph, embankment factor of safety including factor of safety with seismic consideration, time required for principal spillway drawdown of retarding pond, and elevation difference between emergency spillway crest and top of dam. The Wyoming program, when resubmitted, should contain clear evidence that the applicable requirements of 30 CFR 816.46 and 816.49 are satisfied by the various rules.

13.29 30 CFR 701.5 defines "toxic materials" as those which "* * * are likely to produce chemical or physical conditions in soils or water that are *detrimental* to biota or uses of water." Wyoming proposes to substitute the word "lethal" for the "detrimental" in Rule I 2(97). The toxicity of elements in water is determined by the lethal effect of the material, in water, to selected aquatic species. Thus the substitution of "lethal" for "detrimental" is a technically-valid substitution. However, the State should provide additional documentation regarding the compatibility of this definition to the rules which depend on the definition.

13.30 EPA states that the Wyoming program drops the phrase "detriment to vegetation" (30 CFR 816.48(a)) in describing the necessity for burying or treating acid and toxic forming spoil after it is first exposed, as is required by 30 CFR 816.48(c). Further, there is no provision for burying or treating the spoil for a period shorter than 30 days.

Wyoming proposes to require that all overburden and spoil material that is determined to be toxic, acid forming, or will prevent adequate reestablishment of vegetation on the reclaimed land surface must be properly disposed of during the mining operation in Rule IV 2c(3)(f). This would provide equivalent environmental protection provisions to that of the Federal rules under 30 CFR 816.48(a).

The Wyoming Rule IV 3c(3)(a) would require acid forming and toxic forming materials to be buried within 30 days of exposure unless a longer time is approved. Additionally, Rule IV 3c(3)(b) would require burial of such materials to a depth not to impair an adequate plant growth. Thus, the Wyoming proposed rules would appear to be consistent with 30 CFR 816.48.

13.31 EPA states that Wyoming's program does not contain the requirement that water impoundments shall not affect the water of adjacent and surrounding landowners for listed uses, as is required by 30 CFR 816.49(a)(4).

Wyoming proposes to address permanent impoundments in Rule IV 3h. Further, Wyoming Statutes (35-11-406(b)) require minimizing disturbances to the prevailing hydrologic balance and to the quantity and quality of water in surface and ground water systems. The Wyoming rules ensure protection of the quantity and quality of, and rights to, surface and ground water both within and adjacent to the permit area (Rule II 3b(9)).

Wyoming water law also requires applications for permits to construct reservoirs (W.S. 41-3-301) and subjects such applications to review procedures to protect water rights (W.S. 41-3-302). The statute (W.S. 35-11-416(b)) provides the right of action, against an operator, by a holder of a valid adjudicated water right who obtains all, or part, of its supply through the water right which is polluted, diminished or interrupted. Additionally, Rule II 3a(b)(m) would require an evaluation of the impact of proposed operations that may result in contamination, diminution, or interruption of the quality and quantity of water and for domestic, agricultural, industrial, or other legitimate purposes and the identification of alternative sources for replacement in accordance with State law.

Lastly, Rule IV 3h(1) would require that the quantity and quality of affected water will support or constitute a postmining use equal or greater than the previous use, that discharge water will not degrade the quality of the receiving waters, and that the surface owner has consented to the impoundment. Thus, the Wyoming proposed rules appear to make the Wyoming program consistent with 30 CFR 816.49.

13.32 EPA states that Wyoming's program does not contain the requirement of 30 CFR 816.50(b) regarding design and construction of pits and cuts to control harmful drainage to ground water.

Wyoming requires all operations to be conducted so as to minimize disturbance to the prevailing hydrologic balance (W.S. 35-11-406(b)). Therefore, the effect of mine drainage into ground water systems is controlled. Further, drainage from acid-forming and toxic-forming material into ground and surface water is to be avoided (Rule II 3e(3)(b)), and burial of acid- or toxic-forming materials must not result in surface or subsurface water pollution or be subject to erosion (Rule IV 3c(3)(a)). Selective placement of acid-forming and toxic-forming materials in backfilling is addressed in Rule IV 3c(3)(d). Thus, the necessary provisions to meet 30 CFR 816.50 are proposed to be included in Wyoming's program.

13.33 Wyoming proposes provisions for surface and ground water monitoring requirements equivalent to 30 CFR 816.52 in Rule II 2b(9)(c) which requires a plan to ensure protection. That rule would include a plan to collect, record, and report water quantity and quality data in accordance with Rule IV 3i. This latter rule includes monitoring of surface water flow and quantity from affected lands that have been graded and stabilized. Rule IV 3i(2) would ensure that the results of the monitoring will be utilized to demonstate that disturbance to the hydrologic balance is minimized and to assure that water quality standards are not violated. The Wyoming provisions appear to meet the minimum requirements set forth in SMCRA and 30 CFR 816.52.

13.34 EPA expressed concern that Wyoming does not state the alternative reporting system to be followed where a mine's discharge is also subject an NPDES permit, as is required by 30 CFR 816.52(b)(2)(iii).

Wyoming proposes to amend its Memorandum of Understanding between the Water Quality Division, which has NPDES Permit authority, and the Land Quality Division, which is the regulatory authority under SMCRA, to assure coordination of the reporting system whenever a mine's discharge requires an NPDES permit.

Thus, the NPDES reporting procedures would be followed at a minimum and reports would be sent to the Department pursuant to Section II 12 of the Water Quality Division regulations. The Land Quality Division, according to Rule II 3a(5)(a)(ii), would require the plan to be submitted and reviewed as part of the mining and reclamation plan. This would keep the Water Quality Division informed of all NPDES permits. This appears to assure proper NPDES reporting procedures.

13.35 EPA further commented that Wyoming's program does not contain the monitoring requirement of 30 CFR 816.52(a)(2), if ground water systems serve as aquifers for water use on or off the mine plan area. The Federal regulation requires periodic monitoring of ground water levels and quality and other chemical analyses and specifies that monitoring be adequate to plan for the modification of mining activities, if necessary, to minimize disturbance to the prevailing hydrologic balance.

Wyoming proposes to require monitoring for the same purpose in Rule IV 3i. Further, Rule II 3b(9) requires a plan to ensure the protection of the quantity and quality of, and rights to, surface and ground water; Rule II 3a(5)(a)(ii)(B) requires a plan for collecting ground water and surface water information; and Rule IV 2c(3)(e) requires analyses of spoil material in order to determine if it will be a source of water pollution through leaching. Wyoming's regulations, when revised, appear to require monitoring consistent with that of 30 CFR 816.52(a)(2).

13.36 With respect to the requirements of 30 CFR 816.53 for transfer of wells, Wyoming proposes to rely on the State Engineer's Office. Wyoming Statute 41-3-905, which is enforced by the State Engineer, requires permits for any wells from which water is to be withdrawn for beneficial purposes. Wyoming proposes to regulate through the State water law requirements as they are incorporated in permits pursuant to Rule II 3a(5) and also will provide additional guidance for construction, completion, and abandonment of wells through the State Engineer's rules. Rule IV 3n serves to relate the coal mining regulations to existing water law when wells are transferred. Similarly, the requirements for protection of water rights (30 CFR 816.54) are proposed by Wyoming to be addressed by amending W.S. 35-11-415(b)(xii) to read "replace in accordance with State law the water supply of an owner of interest in real property who obtains all or part of his water supply."

Surface coal mining and reclamation operation will be managed by the regulatory authority through a MOU between the Land Quality Division and the State Engineer. These proposed provisions appear to make Wyoming's provisions equivalent to the Federal requirements.

13.37 Wyoming does not propose to allow discharge of water into an underground mine (Rule IV 3e(3)(c)). This is more stringent than the Federal requirements under 30 CFR 816.55 and appears to be acceptable.

13.38 Wyoming proposes to require all permanent diversions and ponds to meet performance standards or more stringent requirements for postmining land use plans through language such as that in Rule IV 3e(2) (for diversions). When the revisions are enacted, this provision will apparently be equivalent to that of the Federal requirement under 30 CFR 816.56 for postmining rehabilitation of control facilities.

13.39 The Federal regulations identify streams deserving of a buffer zone as "perennial streams or a stream with a biological community" (30 CFR 816.57(a)). Wyoming proposes to identify buffer zone streams only as perennial and intermittent (Rule (IV 3p(2))). EPA and the Bureau of Mines also commented on this difference from the Federal requirement.

In consultation with the Wyoming Game and Fish Department, the Land Quality Division determined that measurement of biological communities was sufficiently difficult that the preferable alternative was to determine whether a stream was intermittent or perennial, which is required in the application (Rule II 3a(h)(i)). Wyoming provides several other mechanisms to safeguard streams with a biological community. Rule IV 3p(1) requires, to the extent possible, using the best technology currently available, minimal disturbance to and adverse impacts on fish, wildlife, and related environmental values. Rule IV 3p(1)(c) requires an operator to afford protection and enhance when practicable habitats of high value to fish and wildlife. In addition the Land Quality Division has a MOU with the Game and Fish Division for consideration of effects on fish, wildlife, and related values. Further, the Federal program does allow disturbances of these biological systems upon a finding by the regulatory authority.

The Wyoming provisions appear to be an adequate alternative to the Federal regulations in that the Wyoming regulations provide for adequate consideration of biological communities when establishing buffer zones. This is also discussed under the "State window" alternatives above, findings 12.1-12.12.

Coal Recovery

13.40 Wyoming does not use the term "while utilizing the best appropriate technology currently available" to maintain environmental integrity as provided by 30 CFR 816.59 in relation to coal recovery, but does require maintenance of environmental integrity. The best technology currently available in the Western United States employs the recovery of rider seams and deeper seams. Wyoming's Rule IV 3t does require maximizing the utilization and conservation of the coal resource. Wyoming incorporates the recovery of rider seams and deeper seams in applications as standard operating procedures which appears to be equivalent to the Federal requirements for coal recovery.

Use of Explosives

13.41 Wyoming's program, as submitted, does not provide that an operator be held responsible for a preblasting survey as required by 30 CFR 816.62. Wyoming now proposes in Rule VI 2a to require that the survey be performed by personnel approved by the administrator, or that the administrator would conduct the survey on behalf of the operator. This change appears to be equivalent to the Federal requirement.

The Public Lands Institute pointed out that deficiency and indicated a need to strengthen the Wyoming requirements for giving notices of blasting to workers and taking measurements of blasting operations (30 CFR 816.64 and 65). Wyoming now proposes revisions in Rules VI 3a(4) and VI 5a(3) that appear to satisfy the Federal requirements.

13.42 Wyoming's proposed program provides for the use of the interim program standards for airblast measurements. These standards are not consistent with 30 CFR 816.65(e). This was also pointed out by the Mine Safety and Health Administration (MSHA). Wyoming now proposes changes to Rule VI 5a(6) to incorporate the Federal

permanent program requirements for maximum airblast levels. The revised Wyoming provisions appear to meet the Federal requirements.

13.43 In addition to the airblast standards discussed above, there are other instances where Wyoming's blasting regulations are different in ways than the Federal requirements. Upon detailed analysis, differences appear minor to the Secretary and the Wyoming requirements appear to be equivalent to the Federal requirements because all of the requirements are included in the regulations though in different form.

13.44 Wyoming's proposed program first omitted and then incorrectly represented the scaled distance equation under the blasting regulations of 30 CFR 816.65. MSHA also identified this omission. According to the State, the problem resulted from a typographical error and that the error was corrected in the redrafted rules (Administrative Record No. WY-119).

Disposal of Excess Spoil

13.45 Wyoming's regulations, as submitted, covering disposal of excess spoil contain a conflict in static safety factor values since values of 1.3 and 1.5 are used for the same requirement. Wyoming's draft Rule IV 3c(1)(d)(ii) deletes the 1.3 value and retains the 1.5 value. This appears to bring Wyoming's provisions into conformance with 30 CFR 816.71(f).

13.46 Wyoming Rule IV 3c(1)(b)(ii) prohibits placement of excess spoil in areas of springs, seeps, drainages, croplands or important wildlife habitat. The Wyoming regulations will also prohibit valley fills, head-of-hollow fills, and durable rock ("field design") fills. These are discussed further as State window items above under findings 12.1–12.12. The Wyoming provisions appear to provide protection for drainages from disposal of excess spoil consistent with 816.71–816.74.

Protection of Underground Mining

13.47 Wyoming does not duplicate the requirements of 30 CFR 816.79(b) for protection of underground mining since the phrase "endanger any present or future operations of either surface or underground mining activities" is not repeated in the Wyoming rules. However, Wyoming proposes rules preventing operations which would impose a danger to health and safety and for coal conservaiton (Rule XIII 1a(8)(d) and Rule IV 3t), require a 500 foot separator between an underground mine (Rule IV 3r), and require MSHA approval for mining closer than 500 feet. The Wyoming provisions, if enacted, appear to be in conformance with the Federal requirements with regard to protection of underground mining.

Coal Processing Waste Banks

13.48 Wyoming proposed requirements for coal processing wastes in Rule IV 3c(2). The requirements of the Wyoming program do not reiterate the Federal requirements found at 30 CFR 816.81–816.93 for dams and embankments since Wyoming proposes to prohibit disposal of coal processing wastes in dams, embankments, or diversion structures (Rule IV 3c(2)). Coal processing wastes may not be disposed of in drainages and, when disposed of, shall be placed in accordance with excess spoil disposal requirements (Rule IV 3c(2)(a)(i)). Coal processing wastes would be allowed to be placed in excess spoil fills (Rule IV 3c(2)(b)) but not in situations defined as valley or head-of-hollow fills (Rule IV 3c(1)(b)(ii)). The Corps of Engineers stated that the provisions for coal waste dams and embankments were deficient but did not identify any specific deficiencies. It appears that the provisoins would be compatible with the Federal requirements.

13.49 The original State submission did not include provisions to implement 30 CFR 816.82(b), notification procedures for potential hazards at coal waste bank sites. The State now proposes to revise Rule IV 3c(2)(c)(vii) to require that if a potential hazard is found to exist, the administrator shall be notified immediately, and that if no remedial procedures are formulated, emergency agencies shall be notified of the hazard. The revision would appear to provide authority equivalent to that provided under Federal permanent program.

13.50 The Public lands Institute commented that several of Wyoming's coal processing waste regulations needed to be strengthened to be at least as stringent as 30 CFR 816.81–93. Wyoming has proposed revisions (Rule IV 3c(3)(c)(iii)) which would prohibit coal processing wastes to be placed in drainages or within the flood plain of a natural drainage. These revisions to Wyoming's regulations appear to provide a level of protection equivalent to that of 30 CFR 816.83(a).

13.51 EPA also noted that Wyoming's program did not specifically state that all sections listed in 30 CFR 816.83(d) for water discharged from a coal processing waste bank must be complied with. The references include provisions for sedimentation pond, hydrologic balance and other requirements to minimize disturbance to the hydrologic balance. More specifically, the Federal requirements cited in 30 CFR 816.83(d) are for water discharged from a coal processing waste bank to meet general hydrologic balance provisions, effluent limitations, sediment control and sediment pond design provisions, and ground water monitoring and underground mine discharge requirements.

Wyoming proposes to prohibit locating a coal processing waste bank on or within the flood plain of a natural drainage or in areas where seepage problems may be anticipated (Rule IV 3c(2)(c)(iii)). The other provisions of 30 CFR 816.83(d) are included elsewhere in the Wyoming rules (Rule IV 3e(3)(a)) controls discharge; Rule IV 3e(3)(c) specifies no discharge to underground mine; Rule IV 3g(1) requires sedimentation ponds, and Water Quality Division regulations and Rule IV 3i(1) require ground water monitoring). Thus, the requirements of the Federal regulations apparently will be met.

13.52 Wyoming's program submission did not satisfy the compaction requirements of 30 CFR 816.85(c)(2). The Public Lands Institute also pointed out this deficiency. Wyoming proposes revisions to Rule IV 3c(2)(c)(i) to provide compaction standards which will not be less than 90 percent of the maximum dry density. The proposed compaction requirements appear to be equivalent to the Federal standard.

13.53 The requirements of 30 CFR 816.87 for utilization of burned coal processing wastes were not included in the Wyoming program submission. However, Rule IV 3c(2)(e) of Wyoming's regulations requires MSHA approval of all coal processing waste piles and requires that coal processing waste fires be extinguished. Because of these requirements, significant amounts of burned coal processing wastes are unlikely. Further, there are no significant amounts of coal processing wastes in Wyoming. Considering the limited probability of burned coal processing wastes in Wyoming, the Wyoming provisions appear to provide for equivalent protection of the environment.

13.54 Wyoming's requirements for solid waste disposal are those of the State solid waste program. Rather than develop a new set of requirements for compliance with 30 CFR 816.89, Wyoming has modified and incorporated, by reference, existing waste disposal standards into its surface coal mining regulatory programs. Wyoming's Land Quality Division will be responsible for coordination and compliance with the solid waste disposal provisions. This appears to be

consistent with the Federal requirements.

13.55 EPA expressed concern that Wyoming's solid waste regulations did not contain language to require water barriers at non-coal waste disposal sites or to require operations of the disposal sites in accordance with "all local, State, and Federal requirements," as required in 30 CFR 816.89(b).

The Wyoming Solid Waste Management Standards (Chapter I 11c(1) (c) and (e)) require that "sites shall be constructed in such a manner that surface water will not run onto, into, or out of the working area," and such that, "* * * leachates . . . or liquids will not enter the water in such quantities as to be in violation of Water Quality Standards." Wyoming also proposes to specify that all operations monitoring solid waste disposal as part of a surface coal mining and reclamation operation are required to be evaluated for impact on the hydrologic balance (Rule XXIII 2a(1)) and to be conducted to minimize disturbance to the prevailing hydrologic balance (W.S. 35–11–406(b)). These requirements appear to satisfy the Federal regulation for requiring a "appropriate" water barriers at the botton and sides of the fills.

Air Resources Protection

13.56 The Wyoming program, as submitted, did not provide for air quality protection consistent with the requirements of 30 CFR 816.95. EPA also pointed out that several specific provisions for air resources protection were absent. Wyoming proposes to provide for air resources protection through the combination of its air quality regulations (and proposed amendments), and a MOU between the Air Quality Division and the Land Quality Division. These provisions appear to be equivalent to 30 CFR 816.95 and 817.95. This assumes that the listed fugitive dust control measures are included in the MOU.

13.57 The National Wildlife Federation expressed the concern that the land quality regulations and the proposed air quality regulations do not provide the broad and flexible control over air quality problems that are required by 30 CFR 816.95. Wyoming proposes to revise the MOU between the divisions to enumerate all of the control requirements of 30 CFR 816.95(b). (See Administrative Record No. WY–99.)

13.58 Peabody Coal Company and ARCO Coal expressed the opinion that the provision that the operator be required to enclose, cover, or treat loaded railroad cars as a condition of operation is extremely harsh and unrealistic. The commenters stated that operators usually have no control over the operations of the railroad after the coal leaves the site and also pointed out that the title to the coal passes at the time it is loaded. The commenters further stated that this provision would require the operator to make an extraordinary contractual relationship with the railroad to require the railroad to take these measures, and that the cost of these measures would be one more factor, putting Wyoming coal at a competitive disadvantage with midwestern and eastern coals. This provision is one of several alternatives which may be required in a specific case by 30 CFR 816.95(b) and as such is contained in the MOU with the Air Quality Division. There has been no convincing evidence presented that this alternative would be inappropriate in Wyoming.

13.59 The Powder River Basin Resources Council and the Public Lands Institute stated that the references in Rule I 14(f) and 21(c) of Wyoming's Air Quality Rules and Regulations provided little in the way of strong enforcement for fugitive dust emissions. The commenter recommends that, at the very least, an additional provision be added similar to 30 CFR 816.95(c) which allows the regulatory authority to require additional measures and practices as necessary to control fugitive dust emissions. Wyoming proposes an amendment to the MOU between the Air Quality Division and the Land Quality Division to include authority to require additional measures determined to be necessary.

13.60 ARCO was concerned with the requirement in Wyoming's proposed Air Quality Rules and Regulations (Rule I 1(2)(3)), stipulating that fugitive dust be restricted during periods of air stagnation. The commenter stated that this could result in severe curtailment of production, specifically coal haulage during cold winter months, which would make it difficult to meet contractual delivery.

The commenter correctly points out that if air quality standards are exceeded activities may be curtailed. This factor must be taken into account in planning a coal mine. Curtailment is one of a number of control measures which might be required and is the most drastic. In most cases, the other control methods should remove the need for curtailment.

13.61 The Federal regulations define "fugitive dust" in 30 CFR 701.5 as particulate matter not emitted from a duct or stack which becomes airborne due to wind or mining and which may include dust from haul roads, erosion of exposed surface, and reclamation in which materials are removed, stored, transported, or redistributed. The Air Quality Division's standard, incorporated in permit applications by the MOU between the Land Quality Division and the Air Quality Division, does not provide a definition of fugitive dust. However, the air quality regulations at Section 14f refer to fugitive dust as particulate matter that is caused by persons handling, transporting, or storing coal and apply control measures of 30 CFR 816.95 to fugitive dust.

Wyoming defines "particulate matter" at Rule I 2a(29) as any material, except water, that is or has been airborne and exists as a liquid or solid at standard conditions. Wyoming has submitted additional proposed fugitive dust control measures to make the submittal complete with respect to 30 CFR 816.95(b) (see Administrative Record No. WY–99). These materials appear to be consistent with the Federal requirements.

Protection of Fish, Wildlife and Related Environmental Values

13.62 Wyoming's program did not include a section to insure protection equivalent to 30 CFR 816.97(d)(5) concerning protection of riparian vegetation and wetlands. Rule IV 3e(2)(b) would provide for restoration, enhancement where practicable, or maintenance of natural riparian vegetation on banks and in floodplains. These changes, appear to meet the Federal requirements. In addition, the Wyoming program includes a MOU with the Wyoming Game and Fish Department which requires, as policy, the "enhancing and preserving (of) fish and wildlife and their habitats."

13.63 Wyoming's program does not specifically address the interspersing of wildlife habitat with cropland, residential, public service, or other similar types of land as provided by 30 CFR 816.97(d)(10) and (11), concerning protection of fish and wildlife resources under a postmining land use change. Rule IV 3 (which takes precedent over Section 2 in the event of conflict), in particular Rule IV 3(p), requires enhancement of fish, wildlife and related values where practicable, the distribution of habitat in a manner which includes diversity and interspersion of habitats, and the optimization of edge effect and other benefits for fish and wildlife. Since little cropland or use other than grazing and wildlife is envisioned, Wyoming's program is judged equivalent to the Federal provisions.

13.64 The Fish and Wildlife Service (FWS) expressed concern that the Wyoming program requires that roads and powerlines be "properly constructed," but does not provide the appropriate direction and references which appear in 30 CFR 816.97. The FWS also pointed out that the State's regulations are overall less stringent than the Federal regulations because they allow: (1) Total loss of wildlife habitat when postmining land use is agricultural or recreational; (2) conversion to cropland with no consideration of adverse impacts to wildlife habitat; and (3) draining wetlands rather than preserving or creating them.

With respect to powerlines, the State must identify the criteria used to construct powerlines at a minimum. Citations in the "Wildlife" technical guideline may suffice for this requirement if there is a clear requirement in the Wyoming rules for the Land Quality Division to utilize equivalent wire-spacing criteria as are in the guidance specified in 30 CFR 816.97(c). Wyoming also proposes to require applicants for permits to provide statements on efforts to control impacts on habitats of unusually high value which would include wetlands and riparian vegetation (Rule II 3b(4)(b)(iii).

As discussed in Finding 13.14, Wyoming proposes revisions to its program to consider wildlife habitat when approving postmining land use changes.

13.65 The Public Lands Institute commented that the Wyoming program lacks the specificity of the Federal regulations on protection and enhancement of wildlife and wildlife habitat (30 CFR 816.97). Review indicates that, while stated differently, the requirements of the Wyoming program would be consistent with those of the Federal regulations, except as discussed above.

Contemporaneous Reclamation

13.66 The Public Lands Institute asserts that the provision of Wyoming's Rule IV 2(1) and (2), which requires that all reclamation be completed within two years, violates the contemporaneous reclamation requirements of 30 CFR 816.100 and Section 515(b)(16) of SMCRA.

Wyoming uses Section 3 of Rule IV to supercede the more general Section 2 of Rule IV when addressing surface coal mining and reclamation operations. Thus, the apparent deficiency of Rule IV 2(1) and (2), allowing two years for completing reclamation, is superseded by Rule IV(3)(a) which requires activities to be conducted in a manner commensurate with the Federal requirements of 30 CFR 816.100. Further, the word "completed" is interpreted as meaning that all reclamation necessary to release the bond is accomplished, which is impossible for coal mining and reclamation operations given the 10 year revegetation bond. Therefore, Rule IV 2(1) and (2) will apply to other minerals and to coal only as modified by proposed Rule IV 3a. The Wyoming provisions appear to meet the Federal regulations.

Backfilling and Grading

13.67 In comparison to the requirements of 30 CFR 816.101, Wyoming proposes to require reestablishment of drainage, if necessary, through Rule IV 2b(1). However, this rule, which applies to soft rock mining, would be superseded by both Rule IV 3a(3), which requires return to approximate original contour, and Rule I 2b which would define approximate original contour as that which complements the drainage pattern of surrounding lands. Thus, Wyoming's backfilling and grading requirements to achieve approximate original contour would reestablish drainage equivalent to the Federal requirements.

13.68 Wyoming's initial submission contained a provision which automatically placed spoil from permanent impoundments into the excess spoil category. This provision would be changed in Rule IV 3a(7) by inserting the requirement that such spoil first be shown to be excess in accordance with Rule II 3b(11) (the postmining land use plan). Thus, an assessment of this approximate original contour requirement will be integrated into the determination of whether excess spoil exists.

13.69 The National Wildlife Federation expressed concern that Wyoming's statutes do not require that mined land be returned to the approximate original contour. This is covered by the State's regulations, but the commenter believes that this should not be left to regulation alone because of possible conflict between regulations and statutes.

The Wyoming statutes require contouring to meet the plan approved in accordance with the regulations. Rules IV 2b and IV 3a address backfilling and grading in detail. In particular, Rule IV 3a(3) requires return of all affected lands to approximate original contour. Highwalls are to be eliminated through Rule IV 3a(4). The exemptions from the approximate original contour provisions are for thin overburden, thick overburden, permanent impoundments and cut-and-fill terraces, as in the Federal regulations. The rule, as part of Wyoming's program, cannot be changed without approval of the Secretary. The Wyoming statute, therefore, provides adequate authority to require backfilling and grading to achieve the approximate original contour.

13.70 Requirements for cut-and-fill terraces are specified in Rule IV 3a(8) of the Wyoming program. These provisions appear to be equivalent to the Federal requirements.

13.71 In rule IV 3a, the equivalent to 30 CFR 816.105 for backfilling and grading thick overburden, Wyoming proposes to use the language of SMCRA rather than the numerical criteria in 30 CFR 816.105. Wyoming's rules require a demonstration that the volume of all available spoil and suitable waste is either sufficient or insufficient to meet the approximate original contour standard. Recognizing that the 20 percent difference used in the Federal regulation is used as an indicator and not as an absolute value, Wyoming should achieve the same results under its regulations as would be achieved under Federal requirements. This issue is further discussed as a "State window" item in Findings 12.1 through 12.12 above.

13.72 Wyoming's program submission did not provide for requirements comparable to 30 CFR 816.106, which require stabilization of rills and gullies. Wyoming now proposes Rule IV 3b(4) to correct this deficiency by requiring removal or stabilization of any rills or gullies with an average depth of 6 inches or more, unless the rills and gullies are determined consistent with the postmining land use, and do not preclude successful revegetation. This provision appears to meet the Federal requirements.

Revegetation

13.73 30 CFR 816.111 requires establishment of an effective and permanent vegetative cover on all affected land. Wyoming Rule IV 2d(2) appears to allow no revegetation on areas such as playas which would be inconsistent with the requirement of 30 CFR 816.111. However, Wyoming also proposes Rule IV 3d which requires the establishment of a permanent vegetative cover on all affected lands. Therefore, the requirement for establishment of permanent vegetative cover would appear to be met by the Wyoming rules.

13.74 For revegetation using introduced species, the Wyoming rules do not directly address the compatibility requirements of 30 CFR 816.112(c) and (d). However, Wyoming proposes to state that seed types shall depend on climate and soil conditions and uses in

Rule IV 2d(4). In addition, Rule IV 3d would require diverse, permanent vegetative cover of the same seasonal variety native to the area or of a species that will support the approved postmining land use. Rule IV 2d(5) also provides that alternate species must be used only if test plot data show those species to be of superior value. The Wyoming provisions appear to require that introduced species meet the compatibility requirements of 30 CFR 816.112(c) and (d).

13.75 The Wyoming program, according to the FWS, neither encourages nor requires the use of native plant species compatible with the plant and animal species of the region, as is required by 30 CFR 816.112. Wyoming proposes through Rule IV 3d(6) to require that "when wildlife is part of the postmining land use, shrubs and trees shall be returned to a density at least equal to that existing before mining." In addition, Rule IV 3p(1)(f) would require relocation of "plant species with shrubs well regenerated, which will enhance the nutritional and cover aspects of fish and wildlife habitats, where such habitat is identified as part of the postmining use, and distribute the reestablished habitat in a manner which includes a diversity and intergression of habitats, optimizes edge effects, cover and other benefits of fish and wildlife." This provides overall protection if introduced species are proposed since the requirements of Rule IV 3 take precedence over those of Rule IV 2 (in particular Rule IV 2d(5)).

13.76 Wyoming proposes Rule IV 2d(6) as the equivalent to 30 CFR 816.115 where revegetation is to be at least capable of withstanding grazing pressure comparable to similar non-mined lands for the latter two years in the 10-year liability period of 30 CFR 816.116(b). Because 30 CFR 816.115 and 816.116(b) have been remanded by the district court's decision of February 26, 1980, Wyoming's rule appears to be more stringent than the federal requirement. Wyoming may either retain Rule IV 2d(6) or revise it to reflect the court's ruling that land need not actually be used for grazing and that the period of responsibility begins from the last year of augmented seeding and fertilizing.

13.77 Peabody Coal Company questioned the standard for grazing land recovery. Wyoming proposes the standard in Rule IV 3d(6)(b) to be the rate that lands "could" support before mining. (In the January 9, 1980 draft this has been changed from "could" to "would".) Peabody believes this provision should be changed to "did" support before mining.

Otherwise, the operator will not be given credit for overgrazing that may have occurred. The Wyoming language, as revised, is correct because SMCRA requires restoration of premining capability.

13.78 In Rule IV 2d(6), the word "again" was struck from the third and last sentence of that paragraph to eliminate what appeared to be a requirement to measure reference areas only twice. This change was made on the January 9, 1980, version of Wyoming's regulations and appears to make the provision acceptable.

13.79 The Wyoming regulation fails to define the phrase "reasonably good husbandry practices" which is used in Rule IV 3d(6) in the statement: "The bonding period shall not be affected where normal and reasonably good husbandry practices are being followed." This language is of concern since it could establish a method of circumventing the intent of Section 515(b)(2) of SMCRA by allowing augmented seeding, planting, fertilization, or other practices in the name of good husbandry. The intent of this provision appears to permit only those practices, after seeding, planting, and augmentation, which are characteristic of the land management practices normally conducted in the area.

However, the lack of a definition casts some doubt on the meaning. Therefore, this provision is not adequate and a definition or other clarification of the term "reasonably good husbandry practices" should be included in the Wyoming resubmission to ensure that the phrase is not interpreted to allow violation of the liability period necessary to determine whether revegetation efforts are successful.

13.80 The Bureau of Mines pointed out that Wyoming does not require use of the 90 percent statistical measure of revegetation required by 30 CFR 816.116(b)(3). Wyoming's provisions for revegetation in Rule IV 2(d) require that revegetation be at least equal to the premining conditions. This is more stringent than the Federal requirement.

13.81 The FWS commented that Wyoming's program establishes a period shorter than the Federal requirement in 30 CFR 816.116 for measuring revegetation success. Wyoming proposes Rule IV 3d(6) which would require the 10 year period of responsibility. Rule IV 2d(6) requires revegetation success to be measured in terms of cover, productivity and diversity. As noted in connection with Finding 13.76 above, 30 CFR 816.116 has been remanded by the district court. Consequently, the Wyoming rules as currently written appear to be more stringent than the federal requirements.

13.82 The FWS also commented that the term "population density goal" is undefined. The term "population density" is used in Rule IV 2d(6)(a) addressing reforestation for commercial harvest. That rule is proposed to be modified through Rule IV 3b(e) and to be conditioned on future establishment of standards for success. In addition, no permits for reforestation are to be issued until the standards have been promulgated and approved by the Secretary as part of the program.

13.83 The Public Lands Institute states that specific Federal requirements in 30 CFR 816.116 requiring field trials and analyses for introduced species, definition of seasonal variety, measurement of productivity at the start of the bonding period, and management of reference areas should be adopted by Wyoming.

Wyoming proposes Rule IV 2d(5) which specifies that "more suitable species of vegetation may be substituted" if revegetation test plot results show such species to be of superior value for reclamation purposes. Rule IV 3d(2), which prevails over Rule IV 2d, specifies that "introduced species shall be used only to achieve a quick, temporary stabilizing cover to control erosion, or to achieve a postmining land use approved by the administrator." If a postmining land use different from the premining use is proposed, the demonstration of feasibility of the proposed land use must satisfy criteria listed in Rule II 3b(11) which includes identification of the utility and capacity of the reclaimed land to support "a variety of uses."

The Institute also states that the Wyoming rules do not contain the requirement for 10 years of operator responsibility. Wyoming's Rule IV 3d(6) states that the bond for revegetation shall be retained for not less than ten years after the last seeding, fertilizing, irrigation, or other work to ensure revegetation. Rule IV 2d(6) identifies cover, productivity, and diversity as factors of success. The bonding period for all bond levels is clearly 10 years under the prevailing provisions of Rule IV 3e(6) and, thus, the uncertainty of Rule IV 2d(2) and (3) is removed. Further, Wyoming is proposing to revise the 5 year period in Rule IV 3e(b)(c) (see Administrative Record No. WY-99).

13.85 Wyoming's equivalent to 30 CFR 816.117 is proposed to be added to Rule IV 3d(6) and 3e to say that standards for success of reforestation for commercial harvest shall be

established prior to approval of any plan that proposes reforestation. It is not expected that any near future coal mining and reclamation of substance will occur on commercial forest lands in Wyoming since most of the commercial forest land is not in coal resource areas. As noted above, the 10 year bond period properly applies to these lands because Rule IV 3d(6)(e) would prevail over Rule IV 2d(6). This appears to be equivalent to the Federal requirements.

Cessation of Operations

13.86 30 CFR 816.131 covers temporary cessation of operations and requires operators to "secure" surface facilities and provide certain information to the regulatory authority. Wyoming's proposed Rule IV 3s(1) which requires that information be submitted in an annual report. The annual report as set forth in W.S. 35–11–411 requires information on the numbers of acres affected, the extent and limit of reclamation that will have been accomplished, and identification of reclamation activities that will continue. The proposed Wyoming rules would appear to cover the requirements of 30 CFR 816.131.

13.87 30 CFR 816.132 covers permanent cessation. Wyoming's proposed Rules IV 2k and IV 2l which require a timetable for removal of all buildings and compliance with the approved postmining land use. These rules appear to be consistent with 30 CFR 816.132.

Postmining Land Use

13.88 30 CFR 816.133 covers postmining land use. In Rules II and IV, Wyoming ties the criterion of restoration to conditions capable of supporting premining uses to restoration to a condition equal to or greater than the "highest previous use," and restoration to a condition "suitable" for the previous use which was of the greatest economic or social value to the community area, or which has more social or economic value than all other previous uses. Thus, Wyoming has incorporated a judgment more stringent than the Federal requirements. The Federal regulations do not provide any further definition of "higher or better uses." Wyoming is on record (see notes of January 2–5 meetings, Administrative Record No. WY–99) as requiring that the capability of the land to support the premining uses will be restored through the backfill and grading, hydrology, soils, and vegetation requirements. All other elements of 30 CFR 816.133 would appear to have equivalent language in the proposed Wyoming provisions.

13.89 The FWS states that Wyoming's Rules II 3b(11) and IV contain no provisions for State and Federal fish and wildlife agency review of postmining land use changes or approval of mitigation measures as required by 30 CFR 816.133. The Wyoming program would require coordination with fish and wildlife agencies in Rule II 3a(6)(3). This rule would provide that the level of detail of studies is determined after consultation with Federal and State agencies with respect to changes in postmining land use. (Also see discussion 13.63.)

Roads

13.90 Wyoming proposes standards for *all* roads, standards for haul roads or access roads, and standards for light use roads in Rule IV 3j(1), (2), and (3). The requirements of 30 CFR 816.150 are addressed in Rule IV 3j(1) and (2). Stream fords are prohibited under Rule IV 3j(1)(d) and Wyoming is proposing a restriction on clearing more vegetation than is necessary in Rule IV 3j(1)(e). Wyoming has also provided language in Rule IV 3j(2)(a)(vii) to address embankment construction. The diversion of drainage from large fills and switch backs is included in Rule IV 3j(2)(b)(ii). These provisions appear to meet the Federal requirements.

13.91 The Carter Coal Company is concerned with the requirement that "embankment layers for coal haul roads not exceed 12 inches in thickness." The company believes the maximum 12-inch requirement is unnecessary for coal haul roads in Wyoming. The Federal legislative history indicates to the commenter that the requirement was included in 30 CFR Chapter VII as a result of concern for the environmental impacts of haul roads which are frequently located outside the permit area and for mines in the high rainfall areas of Appalachia and the Midwest. The commenter urges that this section be modified to delete the 12-inch lift requirement.

The Federal regulations specify 12-inch lifts unless the material is too large or unless an alternative design and construction of the roads is certified by a registered professional engineer and approved by the regulatory authority. Wyoming proposes Rule IV 3j(2)(a)(vii) to specify that embankment materials be compacted in layers not greater than 12 inches in thickness. In order to compact embankment materials to a stable density, the maximum lift should not, for good engineering practice, be more than 12 inches thick. Thicker layers are not generally compactable to standard design densities. The lower precipitation rates will be reflected in lesser designs for sediment control facilities than these that could prevail in the Midwest and the East. The proposed Wyoming Rule appears consistent with the Federal requirements.

13.92 With the exception that Wyoming proposes Rule I 2 to include a definition of "exempted roads," the definition of types of roads in the Wyoming program is similar to that of the Federal regulations. Wyoming defines "exempted roads" as construction roads, pit roads (which drain into the mine pit), county roads, State or Federal roads, or existing roads which require no upgrading. The types of roads included in the "exempted road" definition are included in several provisions of the program. Rule IV 2j states that access roads and railroad spurs shall be considered within the permit area and shall be covered by a reclamation bond. Rule IV 3j(1) provides general performance standards for "all roads." Rule II 3b(2) requires a map and analysis of existing structures to determine whether they meet the requirements of Rule IV, or a plan for modification of any existing structure to comply with those standards. Rule IV 3j(2)(a) requires haul roads and access roads to be designed or reconstructed in compliance with specified standards. A complete discussion of roads, which includes a geotechnical analysis, is required by Rule II 3b(16).

The intent of the "exempted road" definition appears to be consistent with the Federal requirements but needs to be further explained in the Wyoming program in order to ensure that all roads covered by the Federal regulations and used for surface coal mining and reclamation operations are designed, constructed, maintained, and reclaimed in a manner equivalent to the Class I, II, and III roads of the Federal regulations (30 CFR 701.5).

13.93 ARCO commented that Wyoming's definition of roads in Rule I does not exclude certain roads of temporary duration. Wyoming has proposed to modify the Rule I 2(10)(c) to include the term "light use roads." These roads are limited to use by lightweight vehicular traffic, for pioneer construction, or for the transport of soil and topsoil to stockpile sites. This term would be applicable where the road requires little construction, is used for less than two weeks, and is then promptly replaced or reclaimed. The standards for these roads are contained in Wyoming Rule IV 3j(3) and appears to be consistent with the Federal requirements.

13.94 While Wyoming does not reiterate the specific requirement of 30 CFR 816.152(c)(1) for a geotechnical

analysis of cut slopes, it does require that a static safety factor of 1.5 be achieved. In order to make the demonstration of compliance with the safety factor, the program requires a geotechnical analysis. This appears to be consistent with the Federal requirements.

13.95 Wyoming has proposed revisions to Rule IV 3j(2)(b) to ensure that spacing between culvert outlets is sufficient to ensure adequate drainage and minimize erosion. This provision appears to satisfy the culvert spacing requirement of 30 CFR 816.153(c)(2)(ii). Wyoming has also modified its equivalent to 30 CFR 816.153(c)(1) to require the larger culverts (greater than 35 square feet) to pass a 25 year flood event and to specify that the head behind the culvert may extend to within two feet of the top of the fill unless flooding or instability of the fill is created. These design criteria appears to meet Federal requirements.

13.96 EPA pointed out that Wyoming's program does not contain the requirement stated in 30 CFR 816.153(a)(2) and 816.163(a)(2) that, for road drainage, sediment control must comply with 30 CFR 816.42 and 45 (water quality standards, effluent limitations and sediment control performance standards).

The Federal requirements for sediment control in 30 CFR 816.42(a)(4) exclude areas only occupied by roads from the definition of "disturbed area;" therefore, the Wyoming program is equivalent. Wyoming addresses reclamation of roads in Rule IV 3j(4) and thereby applies all these requirements to all roads. The Wyoming provisions do not detail the specific reclamation procedures for each of the road categories. However, it would appear that the proposed rules would comply with the Federal requirements.

13.97 Wyoming proposes in Rule I 2(70)(c) a classification of "light use roads" for roads used by light weight vehicles for monitoring or inspection, or for less than two months for transport of spoil and topsoil. If these roads remain in place for more than 12 months, Wyoming Rule IV 3j(3)(b) requires the drainage design to be for the 10 year, 24 hour precipitation event. The Federal requirements are for any road used longer than six months to be designed and constructed to meet the requirements for Class III roads (30 CFR 816.160 *et seq.).* 30 CFR 816.160(d) allows demonstration by a qualified professional engineer of equivalency of alternative designs for Class III roads. Wyoming has limited use of light use roads by heavy vehicles to less than two months to mesh with the Class III road requirements. However, Wyoming does not require the light use roads to be evaluated in the context of the Class III roads when used for more than six months. The light use road standards do parallel the Class III road standards for sidecast construction, culverts, maintenance, restriction on use if usage will degrade water quality and general protection of the hydrologic balance.

Light use roads would be field designed to minimize erosion, limited to lv:10h overall grade, may include sidecast construction, provide for topsoil protection, and provide for protection of drainage for either a one year, six hour event or a 10 year, 24 hour event, depending on their expected longevity. Maintenance to minimize erosion is also required in Rule IV 3j(3) pursuant to the Federal rules.

The Federal regulations clearly require roads in place for more than six months to meet special requirements. Therefore, the Wyoming provision for light use roads cannot be accepted without, at a minimum, a demonstration that the requirements of 30 CFR 816.160(d) are met to assure that roads are designed by a registered professional engineer.

13.98 The Public Lands Institute contends that Wyoming's regulations regarding roads need to be more stringent on location, design, analysis and construction as specified 30 CFR 816.151 *et seq.* The Wyoming requirements for roads in Rule IV 3j appear to provide the authority for enforcing the protection equivalent to that required by 30 CFR 816.151 *et seq.*, except as otherwise discussed above.

Other Transportation Facilities and Support Facilities

13.99 Wyoming provides protection equivalent to 30 CFR 816.180 through Rule IV 3j(5) by including, almost verbatim, the Federal requirements and by including the other transportation facilities in the full spectrum of Rule IV's standards.

EPA expressed concern that Wyoming's counterpart to 30 CFR 816.181 does not specify "best technology available" with regard to the design, construction, and maintenance of support facilities and omits the requirement that support facilities be designed to prevent "additional contributions of suspended solids to streamflow or runoff outside the permit area" at least in excess of Federal or State limits.

The Federal requirements are for railroad loops, sidings, conveyors, and similar transportation facilities as well as support facilities to be developed so as to insure to the extent possible, using the best technology currently available, protection to fish and wildlife, drainage control, and protection of soils as required in 30 CFR 816.180(a) and 816.181. The requirements of 30 CFR 816.180(a) are contained in Rule IV 3j(5)(a)(i). The Wyoming rule applies to "other transportation and *mine facilities"* (emphasis added) and therefore incorporates the provisions of 30 CFR 816.181. Further, in Rule IV 3k, all support buildings are to be designed, constructed, or reconstructed and located to control erosion and prevent pollution and damage to public or private property. This provision appears to be consistent with the Federal requirements.

Underground Mining

13.100 Wyoming Rule VII 2 includes environmental protection performance standards for underground mines. By reference, this section requires that applicable performance standards of the Wyoming Statute and Rule IV for surface mining shall apply to underground mines. This section also requires additional general and special performance standards for underground mines. This provision appears to meet the Federal requirements.

13.101 Wyoming Rule VII differs from 30 CFR Part 817 by the absence of a phrase relating to prevention of subsidence, which appears in 30 CFR 817.121. That phrase states that standards for the prevention of subsidence shall not prohibit the standard method of room and pillar mining. This Wyoming provision could be viewed as more stringent.

13.102 Another difference noted in the Wyoming submission for underground mines was the apparent omission from Rule VII 2b(4) of the need for detailed subsurface information prior to the authorization of underground mining (assuming no material damage) beneath or adjacent to any occupied dwelling, home, park, cemetery, public buildings, perennial streams, or impoundments having a storage volume of 20 acre-feet or more. Wyoming now proposes in Rule VII 2b(4) to require detailed subsurface information to demonstrate that subsidence would not cause material damage.

13.103 Rule VIII 2a(2) states that "all shafts and adits to underground mine working must be sealed in accord with the requirement sof the U.S. Bureau of Mines and appropriate Federal and State laws." MSHA pointed out that it is the appropriate Federal agency to be referenced rather than the Bureau of Mines. That is correct. The MSHA requirements must be met. The Bureau of Mines is more generally involved in

research related to mine shaft sealing. Since the Wyoming rules also specify compliance with appropriate Federal and State laws, MSHA requirements will be covered.

13.104 The Public Lands Institute is uncertain as to whether Wyoming has or proposes definitions adequate to permit and regulate the surface effects of underground mining, all of the activities and facilities covered under Section 701(28) of SMCRA and postmining land use. Wyoming's definitions should be at least as inclusive as the Federal, according to the comments.

Wyoming Rule VII requires underground mining permits to comply with Rule II (see Rule VII 1a and b) and requires operators to comply with the Wyoming statute and Rule IV (see Rule IV 2a(5)). The special performance standards will apply for the various categories such as alluvial valley floors since the special categories apply to all types of mining. The cross-reference from Rule VII, underground mining, to the environmental performance standards in Rule IV and the special Rule VIII appears to adequately assure that surface effects of underground mining operations will meet the Federal requirements.

13.105 EPA states that provisions for changes in water quality as a result of underground mining, required by 30 CFR 817.41(b), have no State counterpart. EPA also notes that Wyoming has only one of the eleven acceptable Federal practices to minimize water pollution listed in 30 CFR 817.41(d)(2).

For underground mines, Wyoming requires compliance with the sediment control and hydrologic balance protection provisions of Rule IV and with the permit provisions of Rule II. Rule II requires planning to control, protect, and treat, as necessary, surface and ground water systems. As a counterpart to 30 CFR 817.41(b), Wyoming requires a plan to "minimize disturbances to the prevailing hydrologic balance at the minesite and in associated offsite areas and to the quality and quantity of water in surface and ground water systems" (W.S. 35–11–406(b)). The remaining sections of 30 CFR 817.41(d)(2) are addressed in other portions of the Wyoming rules (e.g., stabilizing through land shaping is addressed in Rule IV 2c(3)(b), diversion is addressed in Rule IV 2e and IV 3e, and gravity drainage is addressed at Rules VIII 1c(2) and VIII 2b(2)).

13.106 EPA states that the requirement for "treating mine drainage in underground sumps" (one of eight examples of acceptable sediment control methods) is omitted in the State's counterpart to 30 CFR 817.45(i). Rule IV 3g(6) requires that appropriate sediment control measures be designed, constructed, and maintained using the best technology currently available. This applies to underground mines through Rule VII 2a(5). The issue of underground sumps is sufficiently routine in underground mining as to be understood to be a method of controlling sediment.

13.107 EPA expressed concern that Wyoming omits the words "without treatment" when stating that gravity discharge of water from an underground mine may be allowed if it is demonstrated that it satisfies effluent limitations *without treatment* as required by 30 CFR 817.50(b)(1)(i). The Federal requirements are to prevent gravity discharge unless, without treatment, the discharge does not exceed the effluent limitations, among other limits. Gravity discharge prevention measures are required pursuant to Rule VII 1c(2) of the Wyoming program as well as Rule VII 2b(2). The Wyoming program requires any discharge to not exceed State or Federal water quality standards.

13.108 The State wording for disposal of underground development waste, as required by 30 CFR 817.71, makes the State provision less stringent, according to EPA. The State's regulation requires that such spoils be disposed in accordance with Rule IV 1 and 3c (see Rules VII 2a(5) and VI 2b(1)). The cited portion of Rule IV pertain to excess spoil (Section 1) and acid forming and toxic materials (Section 3). The excess spoil provisions provide equivalent standards to 30 CFR 816.71 of the Federal regulations for surface mines which is identical to 30 CFR 816.71 except the term "underground development waste" is added.

13.109 The FWS states that the State submission has no analogue for 30 CFR 817.97 on the protection of fish and wildlife and related environmental values as applicable to underground mining activities. Rule VIII requires all applications for underground mining operations to comply with Rule IV, the environmental protection performance standards for surface mining operations. (See Rule VIII 2a(1)). Thus, the provisions of surface mines also apply to underground mines. Similarly, applications for underground mines must comply with the permit requirements for surface mines through the cross-references of Rule VII 1a and b. Wildlife resources information requirements are limited to those areas affected by surface facilities and subsidence in a manner equivalent to 30 CFR 783.20(a).

13.110 EPA states that Wyoming gives the administrator the right to approve underground mining beneath or adjacent to any perennial stream without being provided specifically *detailed subsurface information*, as required by 30 CFR 817.126(a). EPA also states that Wyoming has omitted 30 CFR 817.126(d) which requires the administrator to suspend underground mining under an urban area in the event of imminent danger.

The Federal requirements are for the regulatory authority to determine that subsidence will not cause material damage to any perennial stream prior to allowing mining without subsidence control. Wyoming Rule VII 2b(4) would require identical protection based on "detailed subsurface information demonstrating that subsidence will not cause material damage." This same rule specifies the same demonstration if mining is proposed beneath or adjacent to any occupied dwelling, home, park, cemetery, or public buildings, and perennial streams and impoundments.

Concurrent Surface and Underground Mining

13.111 30 CFR Part 818 requires performance standards for contemporaneous reclamation for concurrent surface and underground mining. Most of the information required by 30 CFR Part 818 is included in Wyoming's Rules III 4b and XIII 1a(7) which would include the procedure and criteria for approving a delay in contemporaneous reclamation for concurrent surface and underground mining. The requirements of 30 CFR 818.15(a) are included in Wyoming's Rule IV 3r. All mining is required to include maintenance of a 500 foot barrier between permitted operations and active or abandoned underground mines, unless otherwise approved by MSHA.

13.112 The requirements of 30 CFR 818.15(b), which requires a sufficient vertical distance between combined surface and underground mining, are not covered in Wyoming's provisions. Wyoming proposes to require in Rule XIII 1a(8)(d), as a condition of the permit, that the operator take all possible steps to minimize any adverse impact to the environment or public health and safety resulting from noncompliance. Wyoming will have to add the requirements of 30 CFR 818.15(b) and (c) to its regulations to satisfy the Federal requirements or show the manner in which the vertical separation will be maintained to protect health and safety and to prevent surface water from entering underground workings.

Auger Mining

13.113 The Wyoming regulations for auger mining are generally similar to 30 CFR Part 819. However, the Wyoming rules omit the specific spacing requirements of 30 CFR 819(a). The Wyoming rules do include a general requirement to leave areas of undisturbed coal between auger holes to provide access for removal of mineable coal reserves by future underground mining. This omission is considered a deficiency requiring correction even though there are a limited number of auger operations envisioned in Wyoming.

13.114 EPA notes that Wyoming's regulations may probit auger mining if an "area of environmental impact" cannot be prevented. The term "area of environmental impact" is not defined, specifically as it relates to the adverse water quality impacts which cannot be prevented, as referenced in 30 CFR 819.11(e)(1). EPA is also concerned that Wyoming's program did not contain provisions comparable to 30 CFR 819.11(c)(1) and (2) which specifies when auger holes are to be plugged.

The term "area of environmental impact" reasonably includes any environmental impacts, including those on water quality. Therefore, the provisions of Rule V 4b appear to meet the Federal requirements.

13.115 Wyoming's program submission did not include provisions comparable to 30 CFR 819.11(c) (1) and (2) which require plugging auger holes within specified periods. Wyoming now proposes a revision to Rule V 4c(1) which would require operators to plug auger holes discharging water containing toxic-forming or acid-forming material within 72 hours or within 30 days of completion if there is no discharge. This proposed revision to the Wyoming regulations appears to provide more stringent requirements than the Federal regulations.

Alluvial Valley Floors

13.116 The Wyoming rules include the environmental protection performance standards for alluvial valley floors in Rule V 2. The Wyoming rule includes word changes from 30 CFR Part 822 and is generally more concise. For example, Rule IV 2a does not reference the specific characteristics that may support an alluvial valley floor's essential hydrologic functions (as done in 30 CFR 822.11(c) by reference to 30 CFR 785.19(d)(3)). However, Rule IV 2 does require consideration of geohydrologic, biologic, and hydrologic characteristics. In addition, Wyoming provides detailed instruction for this consideration in Guideline 9, Alluvial Valley Floors. These provisions appear to provide that the preservation and re-establishment of essential hydrologic functions of alluvial valley floors will be achieved.

13.117 With Rule V 2, Carter Coal Company is concerned that Wyoming has adopted an unreasonable and unnecessary approach which will result in the classification of dozens of small, insignificant drainages and dry washes in Wyoming as alluvial valley floors. The company states that no one seems to know just what is required to preserve "the essential hydrologic functions" and that, in the extreme case, it could mean that each separate sand strata and gravel lense must be individually mined, separately stored and replaced using scrapers and similar equipment, resulting in a cost much greater than otherwise would be required.

It appears to the company that a number of dry gullies may be designated by the regulatory authority as alluvial valleys, even where they currently and historically have not been of any significance to farming and ranching. The company suggests that the State clarify its regulations to insure that substantial monies are only expended on true alluvial valley floors, which the commenter defines as those drainages with stream-laid deposits holding streams where water availability is sufficient for subirrigation or flood irrigation for significant farming or ranching activities.

The company proposes the definition for alluvial valley floors contained in W.S. 33–11–103(3)(xviii) except that the word "significant" is added and the upland area clause is dropped. Thus, the commenter suggests the term alluvial valley floors be applied only to situations of "significant farming or ranching activities."

The word "significant" is used in the SMCRA to identify situations where alluvial valley floors cannot be mined and on which farming cannot be interrupted (see Section 510(6)(5)). The term "significant" is not applied in SMCRA to either the definition of alluvial valley floors (Section 701(1)) or to Section 515(b)(10)(F) which requires re-establishment of the essential hydrologic functions of alluvial valley floors. Inserting the word "significant" in the Wyoming definition would result in implications that alluvial valley floors which were not significant to farming could be mined without regard to the requirements of Section 515(b)(10)(F). On the other hand, Wyoming's rules provide a detailed requirement for alluvial valley floor determinations that indicates the factors which, when evaluated are found to be "negative," will provide the basis for a negative declaration regarding alluvial valley floors. Streams in which water is not available for flood irrigation or subirrigation activities will not be classified as alluvial valley floors (see Rules III 2a and XIII 1a(1)(b)). (See Preamble to the Permanent Program Regulations at 44 FR 15092, March 13, 1979, for a further discussion of "significance" in regard to alluvial valley floors.)

This issue is discussed further below, under Finding 14, and above, in the "State window" discussion of Findings 12.1–12.12.

13.118 The Wyoming rules for alluvial valley floors do not provide a grandfather clause for the protection of farming for operations approved prior to August 3, 1977 (as provided for in 30 CFR 822.12(d)). Wyoming Rule V 2g, upon promulgation of the proposed revision, will further require all mines with permits prior to August 3, 1977, or which affect land after August 3, 1977, to provide restoration and preservation of the essential hydrologic functions, as appropriate within and outside the affected areas. The Wyoming rules appear to be more stringent than the Federal requirements.

13.119 The Wyoming regulations in Rule V 2e and f have word differences from 30 CFR 822.14 relating to monitoring in alluvial valley floor areas. The principal objectives of monitoring agricultural utility and production and the characteristics supporting the essential hydrologic functions are included in Wyoming's program. For example, the requirements of 30 CFR Part 822.14(a)(ii), (ii), and (iii) are combined into Wyoming's Rule V 2e(1) and 30 CFR 822.14(a)(iv) is contained in Rule V 2e(2). Rule V 2f requires the monitoring data to be reported in the annual report and thus satisfies 30 CFR 822.14(d). This portion of Wyoming's rules appear to be consistent with the Federal requirements.

Prime Farmlands

13.120 Wyoming proposes regulations to include the performance standards for mining activities on prime farmlands in Rule V 1. With respect to stockpiling of topsoil, the Wyoming prime farmland regulation omits the requirement to comply with 30 CFR 816.23 or 817.23 (as included in 30 CFR 823.13). However, it should be noted that the protection of topsoil stockpiles is addressed in the Wyoming Rule IV 2c and therefore would appear to be acceptable.

13.121 Sunedco expressed the concern that the term "history of intensive agricultural use" in Rule I 2(34) is so defined that large acreages which are no longer utilized for cropping would be included. The provision of non-irrigated lands being cropped for five out of ten-year period, the commenter continues, would include that period when extensive efforts were made to farm submarginal to marginal lands which were eventually returned to rangeland. The commenter also indicated that the provision, "had a cultivated crop, small grains, or hay crops harvested for any one year," could cover an extraordinary situation that might not be repeated for several years. These situations, according to the commenter, would hardly qualify as intensive agricultural use. Also, the Powder River Basin Resources Council believes that the definition of intensive agricultural use is incomplete and, therefore, does not read properly. The definition of "intensive agricultural use" has been deleted from the Wyoming regulations. This concept is fully covered by the definition of "history of intensive agricultural use" in Rule I 2(37).

The term "history of intensive agricultural use" is used to assist in the determination of prime farmlands under Rule II 3a(6)(g)(i). Prime farmlands must also have soil mapping units designated prime farmland in accordance with 7 CFR Part 651. If the lands contain prime farmland soils, they must be protected by the requirements of Rule V 1. This is consistent with the Federal regulations in 30 CFR Part 823 and provides protection for prime farmland soils in Wyoming. The definition, as provided, appears to be more stringent than the Federal requirements.

13.122 Rule V 1a(3)(c) for prime farmlands provides a variance from the moist bulk density requirement of 0.1 gram per cubic centimeter if it can be demonstrated that the pore space of the soil, after reconstruction, is of a size distribution and amount which allows a favorable root zone. 30 CFR Part 823 did not allow this variance; however, the moist bulk density requirement of 0.1 gram per cubic centimeter requirement of the Federal rules has been suspended. Therefore, the Wyoming provision is not inconsistent with Federal requirements now in effect.

13.123 Wyoming proposes in Rule V 1b(3) to specify that revegetation success on prime farmlands shall be measured by a comparison of postmining crop production with crop production from the same area before disturbance (and/or with crop production on representative reference areas), and the average production must be equivalent to that on the area before mining or that on a reference area. In contrast, the Federal regulations in 30 CFR 823.15(c) and 785.17(d)(3) set target levels of crop production for standards of success and consider that success is achieved when production on revegetated areas is equivalent to or higher than the predetermined target levels of production. It is believed that the Wyoming rules is acceptable so long as the State, in its resubmission, is able to assure that the premining yields are based on current estimated yields under a high level of management as required 30 CFR 785.17(b)(8).

Special Bituminous Coal Mines

13.124 Wyoming's regulations for special bituminous coal mines (Rule VIII), in the official program submission did not meet the Federal requirements of 30 CFR Part 825. The definition of new special bituminous coal mines and the permit procedures did not adequately distinguish which mines could be included under the environmental performance standards for special bituminous coal mines. The perceived problems with the regulations were discussed during the January 2–5 meetings (Administrative Record No. WY–99).

On January 17, 1980, the State submitted a revised draft of the regulations to OSM (Administrative Record No. WY–118). Further clarification of the draft will be necessary to avoid misinterpretation of the requirements a mining operation must meet to qualify as a new special bituminous coal mine. While the Secretary's staff has not fully reviewed the new material, it is believed that the clarification needed will involve some further changes to the draft regulations as well as more explanation of the intended scope of new operations which will be allowed. Until full review is completed of the January 17 draft and further clarification is provided, the Wyoming program cannot be found to meet the requirements of 30 CFR Part 825.

13.125 Wyoming's definition of "new special bituminous coal mines" in Rule VIII of the proposed Land Quality Rules and Regulations concerns one commenter, who suggests that a literal reading might imply that FMC Corporation's Skull Point Mine might not qualify due to the fact that it began operations ten months before the enactment of SMRCA. Review of Congressional intent, the commenter contends, makes it clear that this mine was not intended to be precluded from this classification and asks that the definition be changed.

As discussed above, a determination cannot be made at this time on Wyoming's proposed regulations for special bituminous coal mines, and thus, the commenter's question cannot be answered at this time. However, the clarification of the January 17 draft (Administrative Record No. WY–118), requested above, should resolve the ambiguity noted by the commenter.

Steep Slope Mining

13.126 Under the "State window" discussion (Exhibit G.6, Volume 6, page 1e, of the Wyoming State Program submission) Wyoming indicates that existing areas of mining or areas which may be mined in the immediate future do not have topographic conditions characteristic of steep slope mining. Therefore, steep slope mining is not presently anticipated in the State of Wyoming. In addition, the proposed amendment of the State statute at W.S. 35–11–401(m) (Administrative Record No. WY–3, Vol 4, Section B.2) states that "No steep slope surface coal mining operation shall be commenced until the council has promulgated rules and regulations establishing steep slope mining performance standards." Steep slope is defined in Rule I 2(85) as areas with slopes of more than 20 degrees and thus the prohibition applies to the types of mining considered steep slope by the Federal regulations. This issue has also been discused in the context of "State windows" under Finding 12. The prohibition appears to provide equivalent environmental protection to that of the Federal regulations. Also, see discussion in finding 12.1–12.12.

13.127 One commenter pointed out that the State, if its program is approved, might promulgate rules and regulations for steep slope mining which would be inconsistent with the Federal rules and regulations. The Secretary must approve changes in State programs pursuant to 30 CFR 732.17. Thus, steep slope mining provisions would not be inconsistent with the Federal requirements.

Coal Processing Plants and Support Facilities

13.128 The Wyoming statute requires that coal processing plants and support facilities located away from the minesite be within the permit area for a mine and therefore such plants and facilities must comply with all applicable performance standards of Rule IV (rather than just the special performance standards for coal processing plants in 30 CFR Part 827). The Wyoming requirements related to the provisions of 30 CFR Part 827

appear to be equivalent to the Federal regulations.

In-Situ Mining

13.129 Chapter XX of the Wyoming rules covering in-situ mining does not address the requirements of 30 CFR 828.11(b), (c) and (e). The Federal requirements are for prevention of discharge of process fluids to surface water, a plan for treatment and disposal of hazardous, toxic, radioactive materials, and for providing equal or better final water quality after restoration. The FWS commented on the omission of a requirement for a plan for the treatment of materials from in-situ mining that constitute a fire, health, safety or environmental hazard as required by 30 CFR 828.11(c). EPA stated that the program omits the intent of having special performance standards for in-situ mining and omits two methods specified in 30 CFR 828.11(b) as well as all of (c) through (e).

The Wyoming program requires all operators, including operators of in-situ operations, to prevent discharge into surface waters in Rule V 3a(2), to dispose of wastes (acid, toxic, radioactive, or hazardous) in Rule XIV 3c(13), and to provide for the other requirements of 30 CFR 828.11 in these rules. The Wyoming program also contains a provision that allows a demonstration that ground water would be returned to a quality of use consistent with available technology and protection of public health and safety as opposed to returning to an equal or better quality. These provisions appear consistent with the Federal requirements in 30 CFR 828.11(b), (r) and (e).

Finding 14

The Secretary finds that the Land Quality Division has the authority under Wyoming laws and regulations and the Wyoming program does include provisions to implement, administer and enforce a permit system consistent, in part, with 30 CFR Chapter VII, Subchapter G (permits). This finding is made under 30 CFR 732.15(b)(2).

Wyoming incorporates provisions corresponding to Sections 506, 507, 508, 510, 511 and 513 of SMCRA and Subchapter G of 30 CFR Chapter VII in Wyoming Statute 35–11–401 and 406 and Wyoming rules Chapters II, III, IV, VII, VIII, IX and XIV. Part G.1 of the first volume of the program submission contains discussions of the systems for (1) mining permit review and approval, (2) amendments, (3) renewals, (4) revisions, (5) transfers and (6) licenses.

Discussion of significant issues raised during the review of the Wyoming permit provisions follows.

General Permit Requirements

14.1 the Wyoming program does not define the term "complete application" as is done in 30 CFR 770.5 (permit definitions), nor does it require a finding of completeness before approval. The Federal definition is general in nature and requires "all information." In the Federal rules, the concept of "completeness" is part of the permit approval process in 30 CFR Part 786. While the Wyoming program need not require a specific definition of "complete application" to be eligible for approval, the program resubmission should contain additional requirements or clarification to assure that the absence of a definition of this term will not reduce the degree of environmental protection or opportunity for public participation in the program.

14.2 The Wyoming program states that an application *may* be denied if it is incomplete (W.S. 35–11–406(h)(i)). The Wyoming Act does not require incomplete applications to be denied. Wyoming proposes to restrict approval of the permit until the applicant has demonstrated that the application is complete (proposed W.S. 35–11–406(j)(i)) (see Administrative Record No. WY–3, Vol. 4, Section A.4). The application that will be advertised for public review is to be complete (W.S. 35–11–406(f)). The administrator of the Land Quality Division must determine completeness of an application pursuant to W.S. 35–11–406(e). This appears to meet the Federal requirements.

Coordination of Review and Issuance of Permits

14.3 Wyoming's approach to the requirements of 30 CFR 770.12 for the coordination of review and issuance of permits with other identified Federal or State permit processes, the requirements of EPA-approved water quality management plans, and the requirements of certain identified Federal statutes is to require a list of required government agency approvals. Wyoming does not, however, list the same statutes and other requirements provided in 30 CFR 770.12. The Wyoming program employs inter-agency MOUs to ensure that information pertinent to the requirements is available in the permit review process. Wyoming's proposed coordination requirements are contained in Rules II 2a, II 3a, II 3b, and IV 3p(1)(g). Wyoming proposes in Rule XIII 1a(8)(c) to provide that a permit may not be issued if the applicant would not, pursuant to the approved plan, comply with State or Federal law. Thus, it appears that the Wyoming proposals would meet the requirements of 30 CFR 770.12.

14.4 In its comments, the Forest Service indicated concern that the Wyoming program would appear to assign authority to the State for decisions concerning actions on Federal lands but such authority cannot be delegated to the State. It is noted that the Wyoming program does not of itself apply to Federal lands. Questions of jurisdication on Federal lands would be addressed in any State-Federal cooperative agreement pursuant to Section 523(c) of SMCRA, which will be consummated only after the Wyoming program is approved and through a separate rulemaking procedure.

14.5 The FWS indicates the proposed Wyoming program fails to make specific reference to the requirements of the Endangered Species Act and the Fish and Wildlife Coordination Act, and does not require compliance with the Bald Eagle Protection Act and the Migratory Bird Treaty Act. The FWS also states that the analogue to 30 CFR 776.13, approval criteria for coal exploration, fails to clarify whether threatened or endangered species are from a Federal or a State list.

In response, Wyoming proposes to address these Acts in several sections. Rule II 2a(1)(e)(ii) requires special attention be paid to species listed on the endangered species list of the Wyoming Game and Fish Department. Rule II 3a(6)(e) requires that fish and wildlife studies be coordinated with State and Federal agencies. Rule II 3b(4)(b)(i) requires that information on threatened or endangered species of plants or animals listed by the Secretary under the Endangered Species Act of 1973, as amended, and their critical habitats be included in the wildlife plan associated with the permit application. Rule IV 3p(1)(g) requires reporting findings concerning critical habitats, threatened or endangered species, or golden eagles. The district court's remand of 30 CFR 779.20 and 780.16 has now rendered the Wyoming rules more stringent than the federal requirements.

14.6 The National Park Service asked that the relationship between Wyoming State agencies and their Federal counterparts be clarified.

The Wyoming program includes a proposed cooperative agreement for future operations by the State on Federal lands which will be the subject of a separate rulemaking. The Wyoming program also proposes to require coordination with other Federal agencies. Rule XIII 1a(2)(b) requires that

a notice be sent to the agencies. In addition, under Rule XVIII 3b(1), Wyoming would submit complete petitions to designate lands unsuitable to interested governmental agencies and request submissions of relevant information.

14.7 The Corps of Engineers stated that the program was deficient in addressing the discharge of dredged and fill material into waters of the United States as covered in 30 CFR 209.320(J)(7). As discussed above, proposed Rule II 3a(6)(e) requires notification of other Federal agencies. This would serve to initiate coordination for purposes of permits to discharge dredged and fill material.

14.8 It was suggested by a commenter that the word "full" be inserted in front of "approval" in W.S. 35-11-401(d)(i) of the proposed amendments to the Environmental Quality Act. If Wyoming only gets a conditional approval, the operator should not have to submit its application for a new permit under 30 CFR 771.11, to a program which is constantly changing the commenter states.

Wyoming and the operator should not be required to review and submit applications until it is clear once and for all that the State has a fully approved program. A "conditional approval," however, alerts both the State and the operator to those modifications of the State program necessary for final approval. As a result there is no significant uncertainty as to the requirements of the operator's permit application, since the required changes are known, the State has agreed to make them, and they may only relate to minor deficiencies in the program (30 CFR 732.13(i)).

14.9 The Wyoming program contains a provision to allow scheduling initial reviews of permit plans beyond 8 months. This provision is not in compliance with the Federal provisions. Wyoming has proposed that it be struck from the draft statutes by removal of the words "Provided, however" and substitution of "which" (35-11-401(d)(i)). (See Administrative Record No. WY-99, the orange book.) These changes would appear to make the proposal equivalent to the Federal scheduling requirements.

14.10 Wyoming's wording of the equivalent to 30 CFR 771.23 for the general information requirements for format and contents of permits is significantly different than the Federal wording. However, all information required by 30 CFR 771.23 is required by Wyoming Rule II 1. Wyoming does not require the use of the scale of 1:6000 provided by 30 CFR 771.23(e)(1) for maps; but rather states that the scale, to be determined by the administrator, shall not be smaller than 1:24,000. Wyoming will have to provide additional clarification to support a finding that the proposed Wyoming map scale meets the requirements of 30 CFR 771.23(e)(1).

14.11 EPA maintained that the Wyoming program did not require "descriptions of *methodology* used to collect and analyze technical data" to be submitted with an applicatoin, as is required by 30 CFR 771.23(c)(3). The Wyoming program requires that information be set forth in the application clearly and concisely and be supported or authenticated (Rule II 1b). There is no specific requirement in the program for descriptions of methodology. Wyoming now proposes in Rule II 3a(5)(ii)(B), which references Water Quality Regulations, Chapter 11, Section 12, to require that all water quality analyses are to be performed in accordance with EPA standards. Wyoming also has guidelines for soils and overburden, vegetation, water sampling, wildlife, organization of a permit application, hydrology and alluvial valley floors which detail field and analytical methods. Thus, Wyoming's provisions would appear to contain requirements equivalent to the Federal regulations.

14.12 The Wyoming program establishes the permit fee required by 30 CFR 771.25 at $10 per acre, not to exceed $2,000, in W.S. 35-11-406(a)(xii). As neither SMCRA nor 30 CFR Chapter VII provide for a minimum fee, and as the $2,000 maximum will not, realistically, ever exceed the maximum established by SMCRA, the Wyoming proposal is consistent with the Federal requirements.

14.13 Peabody Coal Company comments that the definition of "adjacent area" is exceedingly general and can create an erroneous interpretation. The commenter states an awareness that this definition is basically identical to the OSM definition (30 CFR 701.5), but remains concerned because there is (1) no reference to contiguity and (2) no outside parameter placed upon the size at the adjacent areas. The commenter suggests that the definition be limited to one square mile around the permit area itself.

Wyoming now proposes (Rule I 2(3)) to include the phrase "presumptively limited to lands within one half mile of the proposed permit area" with the understanding that this presumption will be superceded if there may be any reasonably expected adverse impact that may be caused at a greater distance by the mining and reclamation operation. This definition may resolve the commenter's concern.

14.14 The Wyoming provisions pertaining to the identification of interests in permit applications do not require the MSHA identification number as provided by 30 CFR 778.13(f). However, the listing of notices of violation, cross-referenced in Rules II 3a(2)(b) and W.S. 35-11-406(xiv), is otherwise equivalent to 30 CFR 778.14(c). The remaining requirements of 30 CFR 778.14(c) are more briefly, but adequately stated in Rule II 3a(2)(b). The MSHA identification is required by the Federal regulations and thus must be included in the Wyoming program.

14.15 W.S. 35-11-406(s)(xiv) requires the listing of violations as does 30 CFR 778.14(c) of the Federal regulations. Amax Coal Company expressed concern with the broad requirement that a listing of notices of violations for the three years prior to an application be submitted with a permit application, saying that this requirement could be misleading and burdensome. The commenter recommended that the language "violations of which a civil penalty was paid pertaining to land, air or water protection standards association with surface coal mining" be substituted to cover the intent of the Congress.

Wyoming Rule II 3a(2)(b) requires the listing of notices of violation to describe and identify the violation, any abatement action, and proceedings initiated (among other things).

This requirement should lessen the potential of misleading summaries. The requirements of the Federal Act are for the same listing for the same time period and, accordingly, the Wyoming provisions appear acceptable.

14.16 Wyoming phrases the requirements for right of entry and operation information in a manner significantly different from 30 CFR 778.15. Wyoming requires a sworn statement regarding the applicant's right of mining. Wyoming provides, if consent from a surface landowner cannot be obtained and if W.S. 35-11-406(b)(xi) does not apply, that the Environmental Quality Council may issue an order in lieu of surface owner consent. (See W.S. 35-11-406(b)(xii).) If a residential or agricultural landowner holds legal or equitable title to the surface (W.S. 35-11-406(b)(xi)(A)) and either resides or conducts farming or ranching operations on affected lands, or receives directly a significant portion of his or her income from such agricultural operation as the affected land, he or she is included, as provided for in 30 CFR 778.15(b). This language appears consistent with the Federal requirements.

14.17 One commenter noted that Section 714(e) of SMCRA defines a surface owner, and subpart (e)(3) states that a qualified surface owner is one who has met the requirements of subparts (e)(1) and (e)(2) for at least three years prior to the granting of consent, while Section 35–11–406(b)(xi)(A) of the Wyoming Environmental Quality Act defines a surface owner as one who has, among other things, held title to the property at least since January 1, 1970. The commenter was concerned that different provisions of the EQA apply to agriculture surface owners who do not meet the requirements of (b)(xi)(A) and (B) of the Wyoming Act. These different provisions, W.S. 35–11–406(b)(XII)(A) through (D), give the State Environmental Quality Council the power to grant consent in lieu of the surface owner if certain findings are made. The commenter contends that it seems that this second set of provisions would conflict with SMCRA, if one encountered a surface owner who has resided on his land, and derived a significant portion of his income from that land, for three years starting sometime after 1970.

There is nothing in the SMCRA or the Federal regulations which would require that the State eliminate its already existing authority to issue an order in lieu of the consent of the surface owner on non-Federal lands. Section 714 is applicable by its terms to coal owned by the United States and thus is not applicable to a State program. The issue will be further considered in the context of the proposed cooperative agreement between OSM and Wyoming.

14.18 Concern was expressed by Pittston Coal Company regarding W.S. 35–11–406(b)(xi) and (xii) of Wyoming's Environmental Quality Act which require that an application for a surface mining permit by an owner of mineral rights who does not also own the surface land include a specific, currently executed consent to the mining and reclamation plan by the surface owner. Thus, the commenter continued, if the surface owner is a "resident or agricultural landowner" who acquired title prior to January 1, 1970 (or by devise thereafter from a person who acquired title prior to such date), no approval of the applicant's mining plan may be granted.

W.S. 35–11–406(b)(xi) requires an instrument of consent from a resident or agricultural land owner who obtained title to the regulated surface estate prior to January 1, 1970, or by gift or conveyance and who resided to farm on the land or receives a significant portion of income from the farming operations. If the surface owner or user does not provide consent, the permit application cannot be issued. The Federal requirement (Section 510(b)(6) of the SMCRA) is similar. Thus, this portion of the Wyoming program appears to be adequate.

14.19 With regard to the term of a permit, Wyoming is in agreement that a permit may be issued for no more than five years of mining and up to eight years total (since mining is to begin within three years of permit issuance). The explanation of phasing of mining required by 30 CFR 778.17(a) would be required in the State program by Rule II 2b(1)(b). This would appear to be consistent with the Federal regulations.

14.20 Wyoming does not allow for self-insurance in the provisions of W.S. 35–11–406(a)(xiii), the equivalent to 30 CFR 778.18. This makes the Wyoming program more stringent than the Federal requirements in this regard.

14.21 The Wyoming equivalent to 30 CFR 778.19 would be in Rule II 3a(5) which would request a list of permits, but would not detail the type or identification numbers. However, the status of the permits would have to be specified with an application under the proposed Wyoming rules, and so much additional information would be included that the numbers of the permits would not add to the ability of the State or the public to review the applications. Considering the wide general knowledge of the types of permits required, Wyoming does not consider it necessary to require all identification numbers for all permits in the West. Wyoming Rules do not require the plan to identify the filing locations, but the statute does so require (in the office of the administrator and the county clerks). (W.S. 35–11–406(d).) This is acceptable. Wyoming requires, in different language, the proof of publication specified in 30 CFR 778.21 through W.S. 35–11–406(f). These provisions appear to be consistent with the Federal regulations.

Information on Environmental Resources

14.22 The Public Lands Institute commented that the Wyoming program needs to be changed to show clearly that 30 CFR Parts 779 and 780 are fully met, including the requirements that information must be provided by the operator on adjacent areas and the operator must demonstrate compliance with all regulations. Further, the commenter stated that it is not clear whether Wyoming's guidelines are enforceable.

Examination of the Wyoming program shows that the information requirements of the Federal program will probably be met if all the proposed amendments are adopted. However, due to the district court's ruling that the information requirements of Parts 779 and 780 should be limited to the permit area, rather than the mine plan area, Wyoming may choose to alter its proposed amendments and adopt different requirements. In the case of the two specific items addressed by the commenter, information on surface water is required, for example, on the permit area and adjacent areas (Rule II 3a(6)(h)), on subsurface waters (Rule II 3a(b)(m)), on geology for the adjacent and general areas (Rule II 3a(b)(m)), and for alluvial valley floors (Rule II 3a(b)(n)). Through proposed W.S. 35–11–406(j), the applicant would have to demonstrate affirmatively, and the administrator must find in writing, that the reclamation plan can accomplish reclamation as required by the EQA. The use of guidelines has been limited in the regulations. However, since the guidelines are part of the State program submission, they are subject to the Secretary's approval.

Further, W.S. 35–11–406(a)(xiv) allows the administrator to require "such other information as the administrator deems necessary or as good faith compliance with the provision of this Act required." This would include demonstration of compliance with the approved guidelines issued by the administrator. Wyoming should clarify, in its resubmission, whether it will enforce those parts of the guidelines which correspond to Federal rules.

14.23 Wyoming proposes an equivalent to 30 CFR 779.13 (description of hydrology and geology) in Rule II 3a(6)(k). This provision is exceptionally brief in that it requires simply a description of the surface and subsurface waters and related geology in the adjacent and general areas. There is no specific State analogue for 30 CFR 779.13(b), although W.S. 35–11–401(a) states in part, "* * * no operator shall be compelled to perform at his own expense measures required hereunder with respect to operations that were completed or substantially completed prior to the effective date hereof" and thus there is recognition of the need to provide available information, and Rule XXIII 3, indicates the hydrologic information may be obtained from the State or Federal government. Wyoming does require the geological information equivalent to 30 CFR 779.14. These provisions probably would be consistent with the Federal requirements.

14.24 EPA pointed out that the Wyoming program has no provision for

the Federal regulations in 30 CFR 779.13(b)(3) and 783.13(2)(3). Those provisions state that a permit shall not be approved until information on hydrology, water quality and quantity and geology related to hydrology is made available in the application.

Proposed revisions in W.S. 35-11-406(j) would require an approvable permit application be accurate and complete. Thus all hydrologic and geologic information required by Rule II of the Wyoming regulations would have to be provided in the application regardless of its source.

14.25 The National Wildlife Federation expressed the opinion that the permit approval process should clearly set out the requirement that the State perform an assessment of the cumulative impact on the hydrologic balance of all anticipated mining in an area, as required by 30 U.S.C. 1260(b)(3). The commenter further stated that even though an operator may be required to make such an assessment, the State, is not relieved of the obligation to make a similar assessment on its own and the State has made it clear in the regulations or the proposed statutes that it is going to make such an assessment on its own.

A requirement is now proposed in Rule XXIII 2 that sufficient information must be contained in the permit application pursuant to Rule II 3b(10). This rule which provides for the information necessary to enable the administrator to determine the probable cumulative hydrologic impacts while W.S. 35-11-406(j)(iii), would prohibit issuance of a permit if the applicant has not affirmatively demonstrated that the proposed surface coal mining operation has been designed to prevent material damage to the hydrologic balance outside the permit area. These provisions appear to meet the Federal requirement.

14.26 The Wyoming program includes the equivalent to 30 CFR 779.14(b)(3) (waiver of need for borings and core samplings), in a soils guideline. The words "in writing" are proposed to be included in W.S. 35-11-406(j) to ensure that the administrator's determination is in writing. A written finding on the lack of need for samplings, consistent with the guidelines, would appear to meet the requirements of 30 CFR 779.14(b)(3).

14.27 Wyoming has organized its equivalents to 30 CFR 779.15 and 779.16 (relating to ground water and surface water information) differently. Wyoming proposes to paraphrase 30 CFR 779.16(2)(vii) in W.S. 35-11-406(a)(xv) and provides for such other information as the administrator may require. However, Wyoming does not include manganese in its list of analyses as required in 30 CFR 779.16(b)(2)(vi). 30 CFR 816.42 states that, "[t]he manganese limitations shall not apply to untreated discharges which are alkaline as defined by the Environmental Protection Agency (40 CFR 434)." If the State of Wyoming feels that manganese information requirements should not be necessary due to its regional climatic and physical environmental conditions, it must so demonstrate in writing in its resubmission.

14.28 EPA pointed out that Wyoming does not have a specific provision to meet the requirements of 30 CFR 779.15(a)(3) that the application specify "known uses of the water in the aquifers and water table, * * *" Wyoming proposes the following surface water rules:

1. Domestic, municipal, industrial, agricultural and wildlife purposes for surface water are to be listed (Rule II 2a(1)(g)(ii));

2. All know adjudicated and appropriated water rights are to be listed (Rule II 2a(1)(j)(i));

3. All existing wells are to be listed (Rule II 2a(1)(j)(ii));

4. Drilling to identify the depth and quality of subsurface water may be required (Rule II 2(h)(i));

5. The ground water systems must be described (Rules II 3(a)(6)(j)) and (k) and II 3b(10)); and lastly,

6. An application for underground mining is required to comply with the applicable regulations prescribing permits for surface mining operations (Rule VII 1).

As a result, all known uses of ground water and surface water, plus a description of the ground water system including depth to water, would be in a complete application.

14.29 In its equivalent to 30 CFR 779.18 under Rule II 2a(1)(c), Wyoming does not include seasonal temperature ranges. W.S. 35-11-406(a)(vii) of Wyoming's Act only requires information on precipitation and wind velocity. The State now proposes (Rule II 2(a)) to require "* * * a statement of the climatological factors." With this addition, the application would appear to have to include the "seasonal temperature ranges."

14.30 The FWS pointed out that the analog to 30 CFR 779.19, vegetation information, did not require a map. Wyoming did not specify a requirement for a map in the original program submission but has proposed addition in Rule II 3a(6)(d)(ii) which requires a "delineation of existing vegetative types." Thus a map would be expected.

Each plan obtained in Wyoming has a map showing vegetation communities. Thus Wyoming would set an indirect requirement for obtaining maps. In addition, Wyoming's vegetation guidelines require vegetation maps. The requirements of 30 CFR 779.19(b) for maps that allow evaluation of wildlife habitat would be addressed in Rule II 3a(6)(e) where cooperative studies of habitats are required to be included on the diversity of vegetative cover to be considered (Rule II 2a(1)(b)). Wyoming does not specifically repeat the admonition of 30 CFR 779.20(e)(1) to base study detail on published data, but requires consultation with the Wyoming Game and Fish Department and Federal agencies which should achieve the same goal. As noted above in Finding 14.5, the remand of 30 CFR 779.20 makes the Wyoming rules more stringent than federal requirements.

14.31 Proposed Rule II 2a(1) is analogous to 30 CFR 779.20, and Rule 3a(6)(e) is analogous to 30 CFR 783.20. The FWS had the following comments on those rules:

1. Referenced guidelines 5 should be a requirement and should include habitat mapping;

2. Federally listed threatened and endangered species should be considered;

3. Consultation on level of study should be sought in Section 2a(1);

4. The vegetative typemap in guideline 2 appears adequate, but should be a requirement rather than guidelines; and

5. Reference to surface water map is needed.

The Federal requirements are for the applicant to contact the regulatory authority to determine the scope of the fish and wildlife resource survey and for the regulatory authority to consult with State and Federal fish and wildlife management and conservation agencies. Wyoming Rule II 3a(6)(e) requires this contact and consultation and specifies the Wyoming Game and Fish Department and Federal agencies having responsibilities for the management or conservation of such environmental values. The rules require studies of habitats. The Technical Guideline Document provides additional detail and is part of the Wyoming program, though it is not part of the regulation and was submitted in draft form.

Rule II 3b(6)(e) would require that federally listed threatened and endangered species and their critical habitats are identified and protected. Vegetation baseline data as well as surface water information are required in conformance with other provisions of Wyoming's rules, just as they are

required by provisions of the Federal program other than 30 CFR 779.20.

Because 30 CFR 779.20 and 780.16 were remanded by the district court, Wyoming's rules are now more stringent than the Federal requirements. Wyoming may either retain these rules and finalize the Technical Guideline Document or revise them to reflect the district court's decision. Whatever provisions are adopted by Wyoming will then be re-evaluated when the revised program is resubmitted and, if necessary, Wyoming will be given an opportunity to amend its program to reflect any changes in the federal regulations.

14.32 The FWS also stated that a State program must include, according to 30 CFR 731.14(g)(10), documented evidence of procedures for consultations with State and Federal fish and wildlife agencies and notes that there are not sufficient narrative descriptions or flow charts to show this. The program appears to demonstrate adequate proposed procedures for consultation in Rule II 3a(6)(e), and flow charts are not required in the resubmission.

14.33 As to land use information, Wyoming proposes in Rule II 2a(1)(a) to specify that the past and present land uses to be discussed are "major" uses. No difference from 30 CFR 779.22(a) appears to have been intended other than to ensure that insignificant uses did not get unnecessarily addressed. However, Wyoming does not require all of the information requested in 30 CFR 779.22(b) for previous mined areas, but proposes to require some information in a narrative description (Rules II 2a(1) and II 3a(6)(d)). In particular, the provisions for premining information pursuant to 30 CFR 779.22(b)(1) through (4) are included in terms of requiring the major past uses of the land. The Wyoming provisions do not appear to provide for a description of land uses in previously mined areas consistent with the Federal requirements, and Wyoming should, in its resubmission, explain how the requirements of 30 CFR 779.22(b)(5) will be met.

14.34 One commenter expressed the concern that proposed Rule II 3b(11)(iii)(D) regarding permit applications would present a serious intrusion into the rights of a citizen to utilize his land as he elects and economics dictate. The commenter believes that it is important that the provision be made to terminate administrative control after bond release.

The regulation in question requires that proposals where cropland shall be the postmining land use must be supported with a firm written commitment from the operator, landowner, or land manager that the cropland will receive, after bond release, sufficient management and maintenance to be reasonably sustainable. Because the district court held that such letters of commitment need not be required; the Wyoming rule is more stringent than the Federal provision and may be revised if Wyoming chooses to do so. The Wyoming provision also would require information on how the proposed changed land use will be developed, achieved in a reasonable time, and sustained. Similarly, if the postmining land use is to be grazing, the plan would have to provide a logical postmining management program.

The Federal rules contain similar requirements for croplands in 30 CFR 816.133(c)(9). They establish that the land is to be returned to a condition capable of supporting the uses of which were capable prior to any mining (Section 515(b)(2) of SMCRA). Thus, changes to cropland which could be accomplished without providing evidence of a commitment for proper postmining management would not satisfy the requirement for proving that the postmining land use will achieve the premining capability or a higher or better use. The bond is to be released when the provisions of Rule XVI 6 are met. The administrative control referred to by the commenter would be terminated when the bond was released (i.e., when the requirements of the approved plan are met). The Wyoming provisions appear to be consistent with the Federal requirements.

14.35 Wyoming proposes to require map information equivalent to 30 CFR 779.24 in W.S. 35–11–406(a) and Rule II 3, except that the requirement of 30 CFR 779.24(d) to identify all buildings within 1,000 feet of the proposed permit area is not reiterated. Since the proposed definition of "adjacent areas" (Rule I 2(3)) will extend consideration of environmental effects to one-half mile of the permit area, the inventory of buildings appears to be at least as extensive as the Federal requirements.

14.36 Wyoming proposes provisions to protect cultural resources in Wyoming Statute 35–11–406(j)(iv). That statute specifies that a permit for prospecting, strip or undergound mining shall not be granted if the activity would adversely affect places listed on the National Register of Historic Places. This Wyoming statute also references Section 522(e) of SMCRA as to where surface mining is prohibited. The Land Quality Division requires a description of any significant artifacts, fossils or articles of cultural, historical, archeological, or paleontological value. Evaluation of the information is accomplished by the Wyoming Recreation Commission (the State Historic Preservation Officer (SHPO)). The SHPO will recommend approval or disapproval of the permit with any mitigating measures. This is provided for in a MOU between the Wyoming DEQ and Wyoming Recreation Commission. These proposed provisions appear to be consistent with the Federal requirements.

14.37 The Advisory Council on Historic Preservation provided guidelines that it recommends for use by the State to assure that properties listed on or eligible for the National Register of Historic Places are considered. This information is not required under 30 CFR Chapter VII. However, once the Secretary promulgates new rules to replace regulations concerning historic preservation suspended November 27, 1979 (44 FR 67942), Wyoming will have the opportunity to amend its program to be consistent with these new rules.

The information required by Rule II 3b(1)(a) and Rule II 2(a)(1), the State equivalent to 30 CFR 779.12, is the same or more extensive than the Federal requirements. Though the language regarding cultural and historical resources of 30 CFR 779.12 is not used, the Wyoming language requires a "description of any significant" artifacts, fossil, or other article of cultural, historical, archaeological or paleontological value which appears to include the resources identified in the Federal requirements.

Reclamation and Operations Plan

14.38 In proposed Rule II 3b(3), Wyoming does not set all the proposed blasting procedures of 30 CFR 780.12(b), but does require the application to show how the applicant intends to comply with Chapter VI (performance standards). Therefore, all unlisted information necessary for the evaluation of potential compliance would be indirectly required (e.g., charge, fuses, sequence and recording devices).

14.39 Wyoming revises the language of 30 CFR 780.14, for maps and plans to be provided, significantly by virtue of the varied locations of equivalent language in Wyoming's regulations, but covers all pertinent requirements in Rule II 2b and III 3b.

14.40 The proposed Land Quality Rules and Regulations which require inclusion of detailed engineering designs in the permit application for surface water diversions and other water systems, roads and spoil disposal sites, are of concern to the Carter Coal

Company. The company states an awareness of the legitimate need of the State for sufficient and relevant information, but does not believe that the level of detail included in detailed engineering designs is necessary to assess impact of proposed operations on the environment.

The commenter also stated that because of changes in regulatory agency policies and the regulations, the rapid advances in available control technology, and acquisition of additional geologic data, detailed engineering work done today for facilities to be constructed as soon as two years from now would in most cases have to be redone prior to construction. The commenter believes that inclusion of the conceptual designs of facilities in the mining permit application showing the purpose, size and location, should be adequate to assess their impacts on the environment and to insure their compliance with the regulations, and that the proposed regulations should be modified so that an operator is not required to obtain the approval of detailed engineering designs until just prior to the start of construction.

Section 510(b) of SMCRA requires the application to demonstrate affirmatively and the regulatory authority to find in writing, on the basis of information set forth in the application or from information otherwise available, that reclamation can be accomplished in accordance with the plan (among other findings). Wyoming statutes are being amended to include the requirement (W.S. 35–11–406(j)). However, the Wyoming Rule II 3b(1)(b) does allow "typical" designs of sedimentation ponds and other water treatment facilities that may be repeated in the operations. These provisions appear to meet the Federal requirements.

14.41 According to the Kemmerer Coal Company the map requirements would require an extensive number of maps. The company claimed that 276 maps would have to be added to the permit to cover the 30-year life of the mine and that the accuracy of these maps would be questionable because of the variable nature of the market conditions. The commenter suggested a two-fold alternative to the map requirement:

1. A five-year sequencing plan which would provide reasonably accurate information for the near future for a mine site; and

2. The currently required annual report which requires a history of the previous year and a projection for the coming years.

Rule II 2b(1)(b) would require "a map showing the yearly progression of mining and reclamation on all proposed affected lands." Additionally, Rule II 3b(1)(a) would require the size, sequence, and timing of the areas for which it is anticipated that renewed permits for mining will be requested over the estimated total life of the proposed operation. This requirement would appear to be met with two or three maps and would be updated through the annual report (W.S. 35–11–411). Thus an inordinate number of maps probably would not necessarily be required. Wyoming can require more maps than SMCRA would and still have a program which would be eligible for approval.

14.42 30 CFR 780.16 requires a plan for the protection of fish and wildlife values. Wyoming proposes in Rule II 3a(6)(e) to require consultation with appropriate State and Federal agencies and proposes in Rule II 3b(4) to require a plan for minimizing adverse effects to fish, wildlife and related environmental values. These requirements would appear to be equivalent to 30 CFR 780.16. As discussed in finding 14.31 above, the district court's remand of section 780.16 makes the Wyoming rule more stringent.

14.43 The FWS suggested that the State require that a fish and wildlife plan state why it is not practicable to achieve a condition which shows a trend toward an enhancement of fish and wildlife resources if such a condition cannot be achieved. This would be in Rule II 3b which is the analogue to 30 CFR 780.16 and 784.21. 30 CFR 780.16 provides that "if an applicant states that it will not be practicable to achieve enhancement of fish, wildlife, and related resources, the applicant must establish to the satisfaction of the regulatory authority why it is not practicable to achieve a condition leading to a trend."

Wyoming proposes to require "a plan for minimizing adverse impacts to fish, wildlife and related environmental values . . . including revegetation" in Rule II 3b(4)(a). Wyoming would require the plan to meet the performance standards, including Rule IV 3p(1) which requires it in part to "achieve enhancement of such resources where practicable." Thus the applicant is required to show the practicability of enhancing fish and wildlife resources. Without this demonstration, the applicant could not have a complete application. Like findings 14.31 and 14.43, these Wyoming rules now appear to be more stringent in light of the district court's remand of 30 CFR 780.16.

14.44 Wyoming Statute 35–11–406 and Rules II 2 and II 3 paraphrase in large part the general reclamation plan requirements of 30 CFR 780.18. Wyoming Guideline No. 1 requires information on soil testing including a handling plan. Since this guideline contains detailed analytical directions, it appears adequate to develop a soil testing plan conforming to 30 CFR 780.18(b)(5)(vii) if operators are required to comply with it. See discussion earlier in this section relating to guidelines in general. Wyoming's Rules II 3b(9) and (10) appear to be equivalent to the requirements of 30 CFR 780.21. Wyoming proposes to add to Rule II 3b(10) a reference to Rule XXIII 2 involving the analysis of the probable cumulative hydrologic impacts of all anticipated mining on the hydrologic regime. Those rules appear to include all required aspects of 30 CFR 780.21(c).

14.45 According to EPA, Wyoming's program does not show any requirement to describe measures to dispose of acid and toxic materials as is required by 30 CFR 780.18(b)(7) and 784.13(b)(7). The Federal requirements are designed to ensure a description of acid- and toxic-forming materials disposal methods. Wyoming proposes in Rule II 2b(3)(2) to require a plan for handling and disposing of all toxic-, acid-forming, or otherwise hazardous materials. Rule II 3b(7) would require contingency plans for prevention of sustained combustion. Rule IV 3c(3) would address the performance standard for acid-forming and toxic materials. These rules appear to require plans consistent with the Federal requirements.

14.46 EPA states that Wyoming omits the phrase required by 30 CFR 780.21(c), 784.14(c), and 784.16(e)(3) that hydrological consequences of mining "under all seasonal conditions" must be submitted in the reclamation plan. However, the State would require that baseline monitoring data submitted show "seasonal fluctuations" under Rule II, 3a(6)(h), which appears equivalent to the Federal requirements.

Wyoming proposes rules to require a determination of the probable hydrologic consequences of the proposed operation on the hydrologic regime and adequate data to enable an assessment by the regulatory authority of the probable cumulative hydrologic impacts (Rules II 3b(10) and XXIII 2). Rule XXIII 2a(1) would require the determination to include impacts under seasonal flow conditions. These rules appear to meet the Federal requirements.

14.47 The Public Lands Institute questions Wyoming's use of the term "postmining land use" and says further

explanation is needed. Wyoming uses the term "postmining land use" in Rule II 3b(11). The Federal regulations do not define the term "postmining land use," but use the term extensively, and only define the term "land use." Wyoming now proposes to do the same in Rule I 2(44).

14.48 Wyoming at present does not include the language of 30 CFR 780.23(a)(4) and (b) regarding postmining land use since it is not applicable if postmining use is not changed from premining use. This issue is discussed above under the "State window" items, Findings 12.1—12.12.

14.49 Wyoming proposes rules to provide for the requirements of 30 CFR 780.25 (ponds, impoundments, banks, dams, and embankments), with the exception that Wyoming does not permit coal processing wastes to be used in dams or embankments, a more stringent requirement than the Federal rules provide. The requirements are divided throughout Rule II of the Wyoming regulations. For example, the requirements of 30 CFR 780.25(a) for water impoundments are contained, in part, in Rules II 2b(3)(b)(iii) and in II 3b(1)(b)(iv). These rules appear to be consistent with the Federal requirements.

14.50 Wyoming proposes in Rule II 3b(1)(b)(vi) for "engineering for surface water and ground water hydrologic control methods" to meet the requirement of 30 CFR 780.29 for maps and cross sections of stream channel diversions. Further, Rule II 3b(1)(b)(iv) requires location of a "typical design" for hydrologic control methods and thus appears to be equivalent to 30 CFR 780.29. These rules appear to be consistent with 30 CFR 780.25–29.

14.51 Wyoming provides requirements equivalent to 30 CFR 780.31 for protection of public parks and historic places in Rules II 3b(14) to Rules XIII 5(a) and (c) which require description of measures to be taken to minimize or prevent impacts to public parks or historic places. The Wyoming rules appear consistent with the Federal requirements.

Underground Mining

14.52 30 CFR 783.11 requires a description of existing premining environmental resources within areas adjacent to the proposed mine plan area that may be affected by the proposed undergound mining activities. Wyoming Rule VII 1(b)(1) limits the description of soils, vegetation, fish and wildlife, topography, geology and overburden to the areas affected by surface mining, thus not including subsidence.

Wyoming proposes to add the word "subsidence" to Rule VII 1(b)(1) so that the description of environmental resources will relate to areas affected by surface operations or subsidence. As discussed above in finding 14.22, the district court's remand of the requirements in Part 783 for information on the mine plan area, rather than just the permit area, renders these Wyoming rules more stringent than 30 CFR 783.11.

14.53 Two commenters were concerned with the proposed amendment to W.S. 35–11–415(B)(xii) which would require the coal mining operator to "replace the water supply of an owner of interest" where the supply is affected by the mining operation.

One commenter felt this amendment would significantly change Wyoming's historical water appropriation system because mining operations in Wyoming are required to work within the present State water laws to obtain the right to use or to divert water for mining uses. Further, under Article 8, Section 2 of the Wyoming Constitution and related statutes, water rights are currently perfected by the filing of an application for a water permit which then is adjudicated by the Board of Control after it has determined that the applicant does have a right to beneficial use. Each subsequent appropriator in turn makes his right, subject to the right of any prior appropriator, for the same water supply. Thus, in some dry years, it is possible junior appropriators would receive less than the total amount of water they desired. This would not likely to be the case in the ranching and agricultural industries since the priority of their appropriations are almost always senior to that of nearby mining operations. The proposed amendments would give all other interests, even other industries, water rights superior to mining interests regardless of when the water right was obtained or regardless of what the State water statutes and Constitution provide.

The commenter recommended that the proposed amendment be revised to read: "The operator shall, as required by State law, replace the supply of an owner of interest." Another commenter suggested that this section be qualified by the phrase, "as may be required by existing State water laws and existing water rights."

The provisions of the Wyoming statute originates from Section 717 of SMCRA which requires the replacement of water supplies. Section 717(a) also provides that "nothing in this Act should be construed as affecting in any way the right of one person to enforce or protect, under applicable law, his interest in water resources affected by a surface coal mining operation." Wyoming proposes in Rule II 3a(6)(m) to require that the plan contain an evaluation of the impact of the proposed mining activities on water supplies, and if contamination, diminution, or interruption may result then the application shall identify the alternative sources of water supply that could be developed to replace the existing sources. Thus, replacement requirements take into account State law, and require replacement to operate in compliance with it. In addition, the operations must be conducted to minimize changes to the prevailing hydrologic balance (35–11–406(g)(xviii)). The Wyoming program appears to integrate Wyoming water laws into the permit requirements as allowed by Section 717 of SMCRA.

14.54 Wyoming proposes to require a narrative description for the construction, modification, use, maintenance, and removal of underground mine wastes in Rule VII 1c(1), which is equivalent to the mine development wastes requirement of 30 CFR 784.11. This appears to be consistent with the Federal requirements.

14.55 Wyoming's initial proposal for an equivalent of 30 CFR 784.14 did not include recognition of potentials for gravity discharges. However, Wyoming proposes to add the phrase "or measure to prevent or control gravity discharges of water" to Rule VII 1c(2) which appears to be equivalent to the Federal requirements.

14.56 Wyoming's proposed equivalent to 30 CFR 784.19, Rule VII 1c(1), does not specifically address the Federal requirement that the reclamation plan contain a description of geotechnical analyses of underground development waste disposal methods and sites. However, Rule II 2b, which applies to underground mining activities through Rule VII, requires that the plan include procedures for assuring the stability of the reclaimed land surface and requires a plan showing the location and construction of each proposed waste disposal facility relating to coal processing or pollution control (Rule II 3b(1)(iii). Other portions of Wyoming regulations would ensure that the necessary geotechnical analyses are performed. For example, Rule VII 2b(1) requires underground development wastes to be disposed in accordance with Rule IV 3c where professional construction designs are required and Rules IV 3c(1)(c) and (d) which would include geotechnical analyses. The Wyoming program appears to provide

authority for the necessary geotechnical analyses.

14.57 The detailed list of measures in 30 CFR 784.20(b)(2) to control subsidence is not contained in Wyoming Rule VII 1a(1). The Public Lands Institute also commented that these measures should be included. However, the Wyoming rule would probably meet the Federal requirement in the following ways: the statement "measures to be taken to prevent, lessen, or mitigate material damage or less of value of property" in Rule VII 1(c)(3) outlines information to be contained in a subsidence control plan; Rules VII 1(c)(3)(c) and (d) would require descriptions of subsidence and damage control measures; and, proposed Rule VII 1c(3)(d) includes the monitoring requirement of the Federal regulations.

14.58 Wyoming Rule VII 1a(1) does not contain the term "renewable resource lands" in its description of the areas that must be surveyed in evaluations of potential subsidence damage. The Wyoming rule uses the term "land surface" which appears to be more stringent than 30 CFR 784.20 since it is not qualified by the term "renewable resource."

14.59 The Wyoming program as submitted does not contain a rule equivalent to 30 CFR 784.25(c) on pneumatic backfilling operations. However, Wyoming now proposes a rule on pneumatic backfilling operations in Rule II 3(b)(12)(d) that is an equivalent to 30 CFR 784.25. This appears to meet the Federal requirement.

14.60 EPA commented that Wyoming omitted an equivalent rule to 30 CFR 784.26 (air pollution control plan for underground mines). The Wyoming statute and regulations contain requirements for the submission of air pollution control plans through the requirement that permit applications for underground mines comply with the permit requirements for surface mines in Rule II 1a. Thus, the requirements of 30 CFR 784.26 would appear to be met by Wyoming's proposal to require a plan in Rule II 3a(5)(a)(i) which specifies that the information from an air quality construction permit be included in the permit application. The air quality information must affirmatively demonstrate a monitoring program.

In addition, the Wyoming Air Quality Division regulations require a construction permit for any new facility or modification thereof if the use will cause air contaminants, a term defined to include dust and other particulate matter (Chapter 1, Wyoming Air Quality Regulations).

Special Bituminous Coal Mines

14.61 Wyoming proposes an equivalent to 30 CFR 785.12(c) in Rule VIII 2(a) and W.S. 35–11–406j which would require that a finding be made by the regulatory authority, in writing, that a special bituminous coal mine operation will be conducted in compliance with the performance standards also in Rule VIII 2. As discussed under Finding 13, Wyoming submitted new draft regulations for special bituminous coal mines on January 16, which have not yet been fully evaluated.

Experimental Practices

14.62 The Federal Act and regulations at 30 CFR 785.13 specify that if, for experimental practices, operations are to be conducted for purposes other than encouragement of advances in mining and reclamation, the postmining land use must be "industrial, commercial, residential or public use (including recreational facilities)." Wyoming proposes in Rule IX 1a to allow approval of any postmining land use regardless of whether the proposal promotes technological advance. While any land uses is allowed under the Federal rules if the purpose is to encourage advances in mining and reclamation technology, the postmining land use changes are also restricted for any other experimental practices. This provision does not appear to be consistent with the Federal regulation.

14.63 Wyoming proposes to provide a procedure for treating requests for variances authorizing departures in individual cases "on an experimental" basis from the environmental protection performance standards in Rule IX. The criteria listed in Rule IX are inclusive of those listed in 30 CFR 785.13. The Wyoming rule would provide for OSM's written approval (Rule IX 2a) and provide limits on the experimental practices equivalent to 30 CFR 785.13(e) including requiring that the practice not result in less stringent requirements than those of SMCRA and the Federal regulations (Rule IX 1a(2)(2)0). These provisions appear to be consistent with the Federal requirements.

14.64 Wyoming indicated that Chapter IX would include a provision that allows variances to be granted on the basis of unique local conditions (orange book, Part D, page 9; Administrative Record No. WY–99). This provision would be invoked when the imposition of the otherwise applicable standard would place an exceptionally harsh obligation on the operator because of the existence of unusual local conditions. It does not appear that this variance provision has actually been incorporated into the proposed Wyoming regulations.

This inconsistency between the administrative record and the proposed regulations should be resolved by Wyoming in its resubmission.

14.65 EPA commented that Wyoming's Rule IX on experimental practices omits the three permit conditions of 30 CFR 785.13(h)(4) which:

1. Limit the experimental practice authorized to that granted by the regulatory authority and the Director;

2. Impose enforceable alternative environmental protection requirements; and

3. Require the person to conduct periodic monitoring.

EPA also commented that Rule IX contains no provision equivalent to 30 CFR 785.13(e)(5) requiring special monitoring.

Wyoming now proposes in Rule IX 1a(2)(b) to require that the permit application show that the proposed operation is limited, that reclamation will be implemented if the experimental practices are a failure, and that special monitoring will be conducted. Furthermore, special monitoring must be involved "so that sufficient and reliable data are collected for comparisons with other practices and to ensure protection of the environmental and public health and safety." Rule IX 2 would require approval by the Director of OSM. These provisions appear to be consistent with the Federal requirements.

Steep Slope Mining

14.66 Wyoming omits the requirements of 30 FR 785.15 for steep slope mining but proposes in W.S. 35–11–406(m) to state that "no steep slope surface coal mining operations shall be commenced until the Council has promulgated rules and regulations establishing steep slope mining performance standards." IN W.S. 35–11–103(e)(XXI), "steep slope" is defined as slopes generally exceeding 20 degrees and which generally require special soil handling procedures. Rule XV 3c(1)(b)(i) would restrict disposal of excess spoil on slopes exceeding 20 degrees.

14.67 AMAX Coal Company recommended that the term "steep slope mining" be defined. If it is to be defined the same as in SMCRA, the commenter is concerned that areas around Gillette or Kemmerer, Wyoming, might be considered steep slope mining. The term "steep slope" is defined as any slopes of more than 20° or such lesser slopes as may be designated (Rule I 2(85)). The Federal regulations address areas in which there may be an occasional steep

slope in the special permit requirements of 30 CFR 785.15.

EPA also commented on whether the Wyoming program might be inconsistent with the Federal regulations for steep slope mining. Wyoming will not allow mining on steep slopes. However, since Wyoming's proposed definition of steep slopes is equivalent to the Federal definition, the same procedure as exists in the Federal regulations would prevail in Wyoming to assure that occasional outcrops and other limited areas containing slopes of 20° are not affected.

The Wyoming program will probably meet the minimum Federal requirements concerning steep slope mining.

Prime Farmlands

14.68 The Wyoming program presently allows exemption of "small acreages" of prime farmlands, provided the local Soil Conservation District personnel are consulted (Rule V 1b(4)). Though Wyoming considers the local Soil Conservation District to represent the U.S. Department of Agriculture (USDA), it is not clear that that State will request the USDA to concur in this determination. Therefore, the requirements of 7 CFR 657 amd 30 CFR 785.17 for protection of prime farmlands appear to exist only partially in the Wyoming program. Wyoming will have to further document compliance with the USDA consultation requirement.

14.769 The Wyoming program does not contain the provisions of 30 CFR 785.17(a) which state that areas in plans approved prior to August 3, 1977, are exempt from the prime farmland reconstruction standards. Thus, Wyoming does not allow an exemption and is more stringent than the Federal requirement.

14.70 The Wyoming equivalent to 30 CFR 785.17(b)(1) is proposed in Rule 11 3(2)(6)(g). That rule requires detailed soil information for prime farmlands, "including a soil survey conducted in accordance with the standards of the National Cooperative Soil Survey of the U.S. Department of Agriculture" and thus applies the requirements of 30 CFR 785.17(b)(1) to the mine plan area. The referenced publications of 30 CFR 785.17(b)(3) are incorporated in Wyoming Guideline #1. The term "soil survey" is defined in Rule I 2(70), including a map, and the SCS standards require profile descriptions; thus the standard appears to be equivalent to 30 CFR 785.17(b)(1)(ii). Wyoming substitutes the requirement of crop yield data for the more detailed discussion of 30 CFR 785.17(b)(6). The requirements of 30 CFR 785.17(b) for soil productivity to be returned to equivalent levels of yield is closely addressed in Rule XIII 1a(6)(c) where the applicant must demonstrate the technological capability to restore a condition where equivalent or higher yield can be obtained. The Wyoming program concerning prime farmlands soil surveys would probably meet the Federal requirements if the guidelines are enforced. See discussion above related to guidelines in general.

Contemporaneous Reclamation

14.71 The Wyoming program does not contain the requirement of 30 CFR 785.18(c)(7) for a demonstration of compliance with 30 CFR 816.71–816.74 for off-site storage of spoil when a variance is granted for delay in contemporaneous reclamation. Wyoming proposes in Rule IV 3c(1)(b) to require that spoil be disposed within the permit area and/or in a manner which complies with the provisions for disposal established in Rule IV 3c(1)(a). Accordingly, the Wyoming provisions probably would be consistent with the Federal requirement.

14.72 Wyoming originally had no requirement that findings be in writing before a variance from contemporaneous reclamation may be issued under 30 CFR 785.18(d). Wyoming proposes provisions in WS 35–11–406Ij and rule III 4(b) to specify that findings be in writing. This provision would probably be consistent with the Federal requirement.

14.73 The Wyoming program does not contain the requirement of 30 CFR 785.18(d)(8) that liability under the performance bond shall be for the duration of the underground mining activity. However, Wyoming proposes in Rules XIII 1b and 1c to require that all mining activities be bonded for the term of the operation. Therefore, the Federal requirement probably would be fulfilled.

14.74 30 CFR 785.18(e) requires the review of permits containing variances by the regulatory authority at least every three years. Rule III 4 includes no frequency of review for such variances. However, since the Wyoming program calls for an annual report (W.S. 35–11–411), such variances will receive annual review, and the Federal requirements appear to be satisfied.

Alluvial Valley Floors

14.75 Peabody Coal Company stated that the Wyoming program does not contain an adequate provision for a negative determination of alluvial floors. For lands which appear not to contain alluvial floors, or for those which clearly do, it is burdensome to require the operator to undertake the complicated process to determine that there indeed is not an alluvial floor. Wyoming proposes a procedure in Rule III 2a(4) which corresponds to 30 CFR 785.19 for alluvial valley floor determinations, which appears to be consistent with the Federal requirements. This is also discussed under finding 13.

14.76 The Federal permit requirements in 30 CFR 785.19 concerning mining in areas adjacent to alluvial valley floors can apparently be obtained through the authority established by the Wyoming provisions. Most segments of the Federal requirements for alluvial valley floors are covered by broad language in Wyoming Rule III 2, supplemented by detailed requirements in Technical Guidelines No. 9. Since the guidelines are not enforceable, Wyoming has agreed to include additional language in Rule III 2 to provide the administrator with the authority to require information necessary to assure that the detailed requirements of 30 CFR 785.19 are met. (See minutes of the January 9, 1980, meeting.)

14.77 The criteria contained in 30 CFR 785.19(e)(3) for determining whether a mining operation will materially damage the quality or quantity of waters are not specifically addressed in Wyoming's rules since Wyoming believes alternative documentation regarding the effect of increased concentrations of total dissolved solids is available. Wyoming indicated in the January 2–5 meetings with OSM its intent to use Maas and Hoffman (30 CFR 785.19(e)(3)(i)) when it is applicable. 30 CFR 785.19(e)(3)(iii) allows use of other means to measure material damage. The Wyoming approach appears to be consistent with the Federal requirements, provided the program resubmission reflects that commitment.

14.78 Wyoming proposes to use a formula in Rule III 2d to measure the significance of the alluvial valley floor as required in 30 CFR 785.19. The formula appears to be acceptable. Wyoming has also defined "undeveloped rangeland" as providing less than "substantially" the carrying capacity of a grazing unit. Wyoming does not include "livestock watering" as a single indicator of agricultural uses resulting in classification of lands as alluvial valley floors. The Federal regulation does not classify a lowland area as an aluvial valley floor if the only agricultural and hydrologic-related feature were a livestock watering pond. Thus, Wyoming's interpretation appears to be equivalent to the Federal requirements.

Auger Mining

14.79 The provisions of Rule III 5a provide that appropriate technical

information be submitted to determine whether augering is appropriate and if compliance can be achieved with the environmental protection performance standards of Rule V 4. In addition, permits cannot be issued by the State unless the written findings of compliance are made regardless of the category of mining (W.S. 35–11–406(j)). These Wyoming program requirements would apparently meet the minimum Federal requirements.

Coal Processing Plants

14.80 Wyoming rules omit any provision for coal processing plants or support facilities not located within the permit area as required in 30 CFR 785.21. Wyoming proposes in Rule II 3b(i) and (iii) to require that coal processing plants and support facilities be within the mine plan and, hence, the permit area. Thus, the Wyoming rule appears to meet the Federal requirement.

In Situ Mining

14.81 EPA pointed out that the Wyoming program Rule V 3 for in situ mining does not include compliance with the requirements for underground mining as does 30 CFR 785.22.

This deficiency was discussed with Wyoming officials during meetings on January 2–5, 1980. Wyoming proposes to modify Rule V 3a(5) so that it will reference Rules XIV, IV, and VII. See Administrative Record No. WY–99 and WY–119. This would require in situ operations to comply with the underground mining regulations (Rule VII) and thus appears to be equivalent to the Federal requirements.

Review and Approval/Disapproval of Permits

14.82 The Wyoming program definition of "willful violation" in Rule XVII 2d(1)(2) differs from the definition in 30 CFR 786.5 concerning review and approval of permits. The definition in 30 CFR 786.5 is phrased in terms of intending the result which actually occurs. The Wyoming definition would include the phrase "with knowledge or reason to know." This definition appears to be consistent with the Federal definitions. In 30 CFR 786.5, the Wyoming program also omits the definition of "irreparable damage." A separate definition of irreparable damage probably is not necessary for the permit approval requirements of 30 CFR Part 786 because use of its ordinary meaning would likely result in protection equivalent to the Federal rules.

14.83 With respect to the notification requirements of 30 CFR 786.11, public notices of filing of applications for permits, W. S. 35–11–406(f) requires that public notice be given within 15 days of the filing of a completed application. This provision is not inconsistent with Federal requirements so long as the public review period is continued after notification is given.

14.84 The FWS commented that Wyoming omits the requirement in 30 CFR 786.11(c)(1) that notification be given to fish and wildlife agencies. Wyoming Rule XIII 12(2)(b) would require that public notice be sent to "Federal, State, and local government agencies, with jurisdiction over or an interest in the proposed operation or permit area." Also, a Memorandum of Understanding (MOU) has been executed between the Wyoming Fish and Game Department and the Department of Environmental Quality which specifies that "whenever a mining and reclamation plan is submitted, the Land Quality Division will notify the Department of the need for technical assistance in the evaluation of the plan." The State program also contains a letter from the Fish and Wildlife Service indicating to whom requests for formal comments on State program and permitting should be directed. The provision appears to assure that fish and wildlife agencies will be properly notified.

14.85 EPA commented that Wyoming omits from its rule the requirement in 30 CFR 786.11(c)(4) that notification be given to Federal or State agencies with authority to issue other permits and licenses. Rule XIII 1a(2)(b) would require that notice be sent to Federal, State, and local governmental agencies within juridiction over or interest in the proposed operation or permit area Rule II 3a(5) also requires the administrator of the Department of Environmental Quality and the director of the Land Quality Division to advise, consult and cooperate with the identified authorities so as to provide for the consideration of review and issuance of listed licenses, permits, or approvals. In addition, MOUs have been developed between the Land Quality Division and the Air Quality Division, Water Quality Division, State Engineer, Wyoming Recreation Commission, and the Wyoming Game and Fish Department. These provisions appear to meet the Federal requirements.

14.86 The National Park Service (NPS) asked that its activities and the State's be formally coordinated with respect to permit applications and mining and reclamation plans, and that NPS receive a copy of each notice of application for a mining and prospecting permit so that NPS can determine which mines may potentially affect NPS resources.

As discussed above, Rule II 3a(5) requires consultation and coordination with identified authorities during review of a permit application. In addition, Wyoming proposes to incorporate the provisions of Section 522 of SMCRA into W.S. 35–11–406. Those provisions prohibit, subject to valid existing rights, mining in units of the National Park System and require approval of the official with jurisdiction if mining would adversely affect a publicly owned park. These Wyoming provisions appear to provide adequate coordination with the NPS.

14.87 The Wyoming equivalent to 30 CFR 786.12, concerning the opportunity to comment on permit applications, is W.S. 35–11–406. This statute allows any interested person to file "written objections" and does not expressly request written comments. Wyoming is on record as stating that it was not the intent of that section to restrict the filing to objections, but, rather, to imply that commenters would be required to follow a formalized procedure. (See notes on January 2–5 meeting, Administrative Record No. WY–99.) Wyoming envisions no constraints to providing public comments as well as objections. Wyoming combines the requirements of 30 CFR 786.13, concerning right to file objections, with those of 30 CFR 786.12. This Wyoming provision appears to meet the Federal requirement.

14.88 The Federal regulations in 30 CFR 786.13 identify the right to file written objections by "Any person whose interests are or may be adversely affected . . . with *30* days after the last publication . . .." W.S. 30–11–406(g), as submitted, allows only 20 days for written objections to be filed if no informal conference is requested. A 30-day period is provided if an informal conference if requested. The Secretary considers it necessary to provide 30 days for public comment. Wyoming has submitted a proposed change to its statute to provide the 30-day period.

14.89 Wyoming would provide, in Rule III 3 of *Rules of Practice and Procedure*, that the requester can request the informal conference on a permit application to be held in the locality of the proposed mine and also request access to the permit area. Wyoming does not specifically require that the record be maintained and made accessible as does 30 CFR 786.14(b)(4), but Wyoming is on record as having no intention of destroying documents which are part of the permit review process and insuring that such records will be open to the public. (See notes of January 2–5, 1980 meeting, Administrative

Record No. WY-99).) The combination of these provisions and W.S. 35-11-406 provide the equivalent to 30 CFR 786.14, procedures for informal conferences, so long as the program resubmission is revised to reflect the State's intention.

14.90 One commenter stated that he assumed that Chapter I Section 16b, of the Environmental Quality Act applied to a case wherein an informal conference was held, but not a hearing. If that is the correct interpretation, the commenter continued, the language of this subsection should be modified to reflect clearly that intent. Otherwise, viewing it as written, it does not make sense unless one is extremely familiar with all of the other rules of practice and procedure.

The commenter is apparently referring to the Department's Rules of Practice and Procedure. Under the Wyoming procedure there are circumstances under which a permit decision will be made initially after a hearing by the Council. The section cited applies in those circumstances where there is no hearing prior to a permit decision. Under those circumstances, the applicant or any person with an interest which is or may be adversely affected may appeal that decision and obtain a hearing before the Council. This appears to provide access for the public consistent with the Federal requirements.

14.91 Wyoming's provisions in Rule I 1g for defining public availability of information in permit applications differs from the Federal requirement of 30 CFR 786.15 in the use of the terms "privileged commercial or financial information." This provision applies only to coal exploration operations, however (which is permissable under Section 513(b) of SMCRA), and not to mining permits. Therefore, the Wyoming rule appears to be consistent with the requirement of 30 CFR 786.15.

14.92 The Wyoming program does not provide a counterpart to 30 CFR 786.17(c)(2) and therefore does not require the regulatory authority to consider whether the applicant filed, and is pursuing in good faith, a direct administrative or judicial appeal to contest the validity of a violation listed in the application. This omission does not appear to reduce the degree of environmental protection or opportunity for public participation in the program. Further information on this point may be provided by participants in the Secretary's review of the resubmission.

14.93 According to the Fish and Wildlife Service no provision is included in Wyoming's analogue to 30 CFR 786.19(m) to provide review and require approval of measures affecting fish, wildlife and related environmental values prior to approving a postmining land use change. In addition, there is no analogue to 30 CFR 786.19(o) which requires that mining activities not affect the continued existence of endangered or threatened species or result in the destruction or adverse modification of their critical habitats as determined under the Endangered Species Act of 1973.

Wyoming addresses changes in postmining land uses in proposed Rule II 3b(11) and requires, in order to change land uses, that approval of measures to prevent or mitigate adverse effects on wildlife or fish "have been obtained from appropriate State and Federal fish and wildlife management agencies" (Rule II 3b(ii)(h)). The Wyoming rules also would require all permits to describe and evaluate endangered or threatened plant species (Rule II 3b(4)(b)(i)) and require a plan for minimizing adverse impacts to fish, wildlife, and related values, including threatened or endangered species (16 U.S.C. 1531 *et seq.*) and their critical habitats. Consultation with State and Federal fish and wildlife agencies is required by Rule II 3a(6)(e).

An MOU with the Wyoming Department of Game and Fish also specifies consultation at the State level. Rule XIII requires operations to be conducted in accordance with this approved process and thus requires the necessary consultation and approvals prior to granting permits. Consultation provisions consistent with the Federal regulations appear to be provided in Wyoming's program. The Wyoming program does not, however, contain adequate assurance that mining activities will not be permitted that would adversely affect threatened or endangered species as required by 30 CFR 786.19(o). The program resubmission should provide for this requirement.

14.94 Wyoming proposes to require the assessment of cumulative hydrologic impacts (required by 30 CFR 786.19) through Rule XXIII 2a(1). However, the Wyoming program does not adequate show that permit applications provide adequate information for this review. This deficiency was identified during early reviews and Wyoming has proposed a correction through a clear citation to Rule XXIII in Rule II 3(b)(10). EPA commented on this deficiency. Wyoming's proposed provisions appear to meet the Federal requirements.

14.95 Another comment was addressed to the phrase, "prevent material damage to the hydrologic balance outside the permit area," which appears in W.S. 35-11-401(j)(iii) regarding information required in a permit application. The wording as it stands, according to the commenter, could be interpreted to place an impossible burden upon mining operators since in all but very unique situations it would be impossible to prevent all impact to the hydrologic balance outside the permit area. The commenter suggested that the proposed amendment be revised to read, "The proposed operation has been designed to minimize the disturbances to the prevailing hydrologic balance outside the permit area."

In response, Section 510(b)(3) of the SMCRA and 30 CFR 786.19(c) require the regulatory authority to find the proposed operation "designed to prevent material damage to hydrologic balance outside the permit area." Wyoming Rule XXIII 2a(1) would provide guidance to protect the effects of the proposed operations on ground and surface water quality and quantity. In addition, Rule I 2(4) defines "material damage to the hydrologic balance" to mean "a long term or permanent adverse change to the hydrologic regime." These provisions, therefore, appear to be consistent withe Federal requirements.

14.96 Amax Coal Company suggested that amendments to W.S. 35-11-401(d) be changed to read that the State has 30 days to determine completeness of a permit application, rather than the 90 days, as proposed. The commenter reasons that a 30 day completeness review period would provide Wyoming with more time for substantive review.

WS 35-11-401(d), as proposed, specifies that within two months of approval of the State program any operator that plans to be in operation six months after the approval must have submitted a plan (in compliance with the approved program). Wyoming requires a "completeness" determination with 90 days, a notice period of four weeks, and then must make a decision within 30 days, or within 60 days after a final hearing. If a plan is complete, the plan will be processed in a timely manner. It is also unlikely that a completeness review can be adequately performed within 30 days, considering the workload of the agency. Accordingly, Wyoming's provision appears to be reasonable and is not inconsistent with the Federal requirements.

14.97 The Wyoming program does not include a provision equivalent to that of 30 CFR 786.19(j) which requires operations to be performed under a permit to be consistent with other such operations anticipated to be performed in adjacent areas. The need for this provision was discussed with Wyoming

officials during meetings held January 2–5, 1980, and Wyoming now proposes comparable language in Rule XIII 1a(4). See Administrative Record No. WY–99 and WY–119.

14.98 Wyoming proposes to address the requirement of 30 CFR 786.21(b) to abandon existing structures through Rule IV 2k which requires disposal of all buildings and structures unless they are of beneficial use and if a compliance plan cannot be developed (Rule II 3b(2)). Clarifying language would be added to Rule II b(2). These provisions appear to be consistent with the Federal requirements.

14.99 The Department of Energy suggests that the State program information should explain why the license to mine would take longer to obtain than the permit to mine. There is no requirement under 30 CFR Chapter VII for a State program to require a license. Therefore, it would not be appropriate for the Secretary to require an explanation of the license process unless it appears inconsistent with the requirements of SMCRA, which it does not appear to be.

14.100 30 CFR 786.23 requires that notice of permit decisions be given to governmental officials in local jurisdictions and to persons who filed objections or comments. Wyoming Rule XIII 1a(2)(b) does not provide for this distribution of notices. This deficiency was discussed with Wyoming officials at a meeting held January 2 through 5, 1980, and Wyoming now proposes language to correct the deficiency. See Administrative Record No. WY–99 and WY–119.

14.101 AMAX Coal Company contends that WS 35–11–401(d) and (e) in the proposed amendments to Wyoming's EQA, the State's analogue to SMCRA 506(a) regarding the time period for permit requirements, is unclear. The commenter did not specify how the provision is unclear and the provisions appear to meet the minimum Federal requirements.

Permit Conditions

14.102 Wyoming's proposed provisions for permit conditions (Rule XIII 1a(8) and WS 35–11801) are the analogues to 30 CFR 786.27 which allow right of entry. The rule and statute also address the requirements of 30 CFR 786.29 since the operator must conduct operations in a manner that prevents violation of any other applicable State or Federal law and minimizes any adverse impact to the environment or public health and safety resulting from noncompliance, including monitoring. (This has been discussed further in reference to 30 CFR 840.12, right of entry for inspections.) Wyoming has submitted proposed revisions to Rule XVII 1 which further identify those persons having right of entry, and conditions for rights of entry.

14.103 EPA stated that the wording in both WS 35–11–801 and Rule XIII 1 seem to make Wyoming's provision for monitoring and warnings less stringent by omitting "accelerated or additional," "immediate" and "as soon as possible," as stated in 30 CFR 786.29(a). The Federal requirements are for permits to be issued conditioned on the permittee taking "all possible steps" to minimize any adverse impact including monitoring, compliance measures, and warning persons whose health and safety is in eminent danger.

The Wyoming provisions are identical to 30 CFR 786.29(a), except for the abbreviated phrase, which reads: "including monitoring to define the nature of the noncompliance and warning of any potentially dangerous condition" (Rule XIII 1a(8)(d)). In view of other provisions of Wyoming's program, which require conducting all operations in accordance with the approved plan and preventing violation of any other applicable law (Rule XIII 1a(9)(a) and (c)), this provision appears to include all the requirements of 30 CFR 786.29(a). The term "all possible steps" appears to meet the requirement of undertaking the tasks expeditiously.

14.104 EPA also pointed out that there was no apparent provision corresponding to 30 CFR 786.29(b) relating to water treatment. The Federal regulations require the permit to be conditioned on the disposal of solids, sludge, filter backwash, or pollutants removed in the course of treatment or control of waters or emissions to the air in the manner required by 30 CFR Subchapter K, and on preventing violation of any other applicable State or Federal law.

Wyoming proposes in Rule XIII 1a(7)(a) to require the operator to conduct all operations in accordance with the approved mining and reclamation plan. Rule IV 3c(2)(g) would require analyses of coal processing wastes prior to disposal and Rule IV 3c(3) addresses disposal of acid-forming and toxic-forming materials. Rule II 3a(5)(a)(iii) would require the necessary information for an industrial solid waste land disposal activity. These examples indicate that the Federal requirements of 30 CFR 786.29(b) would be required by Wyoming in any complete and approvable permit application to the same degree as they are in the Federal program since filter backwash and solids or sludge would be included in the waste disposal activities of the mining operations.

Administrative and Judicial Review of Decisions

14.105 The Environmental Policy Institute objects to the omission in the Wyoming program of any counterpart to SMCRA Section 514(d) which provides for temporary relief from a decision on a permit application. The Institute points out that such temporary relief is available under SMCRA Section 514(d) not only for permit applicants but also for any person with an interest that may be adversely affected. The temporary relief provisions in SMCRA Section 514(d) are a required element of a State program. Wyoming may presently provide such a right under other rules or laws. If so, such rules or laws should be contained in the next submission.

14.106 Wyoming does not define the terms "successor in interest" or "transfer, assignment, or sale of rights" which are defined in 30 CFR 788.5. The definition of permit transfer in Rule I 2(55) appears to be equivalent to the federal terms. This is because "permit transfer" is defined in Rule I 2(55) as a change in ownership or control over the right to conduct mining. A successor in interest, as identified in 30 CFR 788.19, would become involved in a permit transfer and would have to apply for a permit pursuant to proposed Rule XIII 1b. Thus, the provisions of 30 CR 788.19 appear to be satisfied.

14.107 Wyoming requires annual review, via the annual report requirements, of outstanding permits and thus provides a more stringent analogue to 30 CFR 788.11 (permit review) through Rule XIV 5a and WS 35–11–411. These review provisions appear to afford authority equivalent to that of the Federal regulations.

14.108 The Public Lands Institute stated that Wyoming should make permit renewal contingent on the operator's compliance with the performance standards and the permit term, as in 30 CFR 788.16(a). The commenter suggested that the State's analogue to 30 CFR Part 788 be strengthened in definitions, public notice, public access to all reclamation plan data except chemical and physical properties of coal seams, criteria for approval, right of entry, extent of operations and permit conditions.

Wyoming proposes rules that would require that permit renewals be subject to all procedural requirements of the Wyoming EQA (Rule XIII 1b). WS 35–11–405(e) would give the right of successive renewal with respect to areas within the existing permit area, if public notice has been given and if the

permit is in compliance with applicable laws and regulations. WS 35–11–406(k) (Administrative Record No. WY–99) would require the application be denied if the operator has been and continues to be in violation of the provisions of the Act. These would apparently include the need for written findings. Wyoming also proposes amending WS 35–11–406(b)(iii) to require that all parts of the proposed operation be conducted in compliance with applicable laws and regulations which will apply to permit renewals. This could prevent issuance of a permit if the applicant has been and continues to be in violation of the provisions of the Wyoming Act.

Further, the public information provisions of the Wyoming program appear to be equivalent to those of the Federal regulations in making all appropriate information available. Thus, the Wyoming provisions now appear to meet the Federal requirements.

14.109 In the equivalent State requirements for 30 CFR 788.12, Wyoming did not, in its official submission, completely identify parameters to determine what changes constitute significant departures from the contemplated operations. The program now proposes to require, in Rule XIV 1a, contact with the department to determine whether a revision is required prior to "any change in mining or reclamation operations from those described in the approved permit application." However, in Rule XIV 2b, significant deviations are defined and, in Rule XIV 6a, only incidental boundary changes would be allowed as permit revisions. Two commenters addressed this deficiency in the official submission. These provisions appear to meet the Federal requirements.

14.110 The requirements of 30 CFR 788.14 would be reflected in Rule XIII 1b to the effect that all procedural requirements of the Wyoming EQA and the regulations apply to permit revisions, renewals, and transfers unless otherwise provided, and that the requirements of WS 35–11–405(e) must be met. Since applications that propose significant deviations could not be considered a renewal (Rule XIV), the requirements of 30 CFR 788.14(a) appear to be met. A change is necessary in Rule XIV to ensure that only incidental boundary revisions are eligible as renewals. Wyoming has proposed to drop the "s" from "terms" in Rule XIII 1b to make clear that the word refers to time and not permit terms and conditions. The Wyoming program needs a provision for incidental boundary changes in order to comply with the requirements of 30 CFR 788.14 for permit renewals.

14.111 The Wyoming program, according to EPA, does not state that denial of a permit renewal must be made on the basis of "written findings by the regulatory authority that terms and conditions of the existing permit are not being met." This is required by 30 CFR 788.16(a)(1).

Wyoming proposed Rule XIII 1b to require that all procedural requirements of the EQA and regulations relating to approval or disapproval apply to permit renewals, unless otherwise provided. These apparently would include the need for written findings.

Finding 15

The Secretary finds that the Land Quality Division has, in part, the authority to regulate coal exploration consistent with 30 CFR Parts 776 and 815 (Coal Exploration) and to prohibit coal exploration that does not comply with 30 CFR Parts 776 and 815, and the Wyoming program includes provisions adequate, in part, to do so. This finding is made under 30 CFR 732.15(b)(3).

The Wyoming Program incorporates provisions corresponding to Section 512 of SMCRA and 30 CFR Parts 776 and 815 (as related to coal exploration) in Wyoming Statute 35–11–402 and Wyoming rules Chapters X, XI and XV. Part G.1 of the first volume of the program submission includes a discussion of the system for exploration license review and approval.

A discussion of significant issues raised in the review of Wyoming's coal exploration provisions follows.

15.1 EPA states that Wyoming regulations do not state that exploration "shall be conducted in a manner which minimizes disturbance of the prevailing hydrologic balance and shall include control measures * * * or sedimentation ponds * * * ", as is required by 30 CFR 815.15(j) regarding performance standards for exploration.

Wyoming proposes to add the following requirement as Rule XI 5m: "Activities shall be conducted to minimize disturbance to the prevailing hydrologic balance, including, at a minimum, sediment control measures or sedimentation ponds, which comply with Chapter IX, Section 3r(31)(a) and Chapter IV, Section 3q." This addition appears to make the Wyoming provision consistent with 30 CFR 815.15(j).

15.2 Wyoming, in its submission, did not provide for adequate revegetation, sediment control, or facility removal in the case of operations removing 250 tons of coal or less. The Federal requirements arise through the cross-reference to 30 CFR Part 815 in 30 CFR 776.11(c) which requires seeding to the same seasonal variety native to the disturbed area, sedimentation ponds, and facility removal, respectively in accordance with 30 CFR 815.15(f), (j), and (i).

Wyoming proposes to correct this by adding, in Rule XI 5(d) and (n), references to Rule IV 3d(1) and (2) and Rule IV 3a, 3e, and 3g for revegetation and facility removal. This revised language appears acceptable.

15.3 Wyoming does not identify the scale of the required map (1:24,000) as does 30 CFR 776.11(b)(3). However, the equivalent requirements of 30 CFR Part 815 are contained in Rule II 5 and thus satisfy 30 CFR 776.11(c), in terms of controlling operations which substantially disturb the natural land surface. These provisions for exploration appear to be equivalent to the corresponding provisions of the Federal rules.

15.4 The Powder River Basin Resources Commission stated that Wyoming did not provide adequately for notice of review of coal exploration applications, as required by 30 CFR 776.12(b). The exploration notice of the Wyoming program is to be posted at the regional office of the Land Quality Division. Comments may be filed and are not limited to those persons with an interest which is or may be adversely affected as they are in 30 CFR 776.14(b). Thus, the Wyoming provisions appear to provide notification consistent with the Federal requirements.

15.5 Wyoming's requirements (Rule I 1(99)) for availability of information to the public use the term "trade secret." While this differs from the Federal definition of confidential information in 30 CFR 776.17(b), it appears to be equivalent. Wyoming has the appropriate constraints on the use of confidentiality in Rule XI 3.

15.6 Wyoming's proposes to add Rule XI 5n which would require the removal of equipment and facilities for all exploration which substantially disturbs the natural land surface or, whenever else necessary for the protection of the hydrologic balance. Further, Wyoming has proposed to add Rule XI 5m to require that operations be conducted to minimize disturbance to the prevailing hydrologic balance. The requirements of 30 CFR 815.15c(3)(ii), (f), and (j) would appear to be satisfied.

15.7 The Heritage Conservation and Recreation Service (HCRS) requested that the program contain the criteria which will be used to consider adverse effects on historic, archaeological, and cultural features as well as guidelines for protection of these resources for applications for approval to conduct exploration activities.

The Federal regulations do not require that the program contain either the criteria or guidelines to meet requirements for approval. As discussed in finding 14, the Advisory Council on Historic Preservation submitted suggested criteria and procedures which are being sent to the State for its consideration.

15.8 The HCRS asked that the program indicate how studies to identify historic, archaeological, or cultural resources will be funded and what steps will be taken if cultural resources will be affected by exploration activities greater than 250 tons.

Applicants for approval to conduct coal exploration activities are responsible for funding acquisition of the information. Rule XI states that approval to conduct coal exploration activities will be based on protection of historic, archaeological, or cultural resources.

15.9 The proposed Wyoming definition of "coal exploration," Rule I (9), appears to be inconsistent with the corresponding Federal definition in 30 CFR 701.5. The Federal definition expressly includes "mapping" and "geophysical" surveys in the category of field gathering techniques which are classified as exploration activity. In Wyoming's proposed definition I (9)(a), however, these two techniques appear to have been omitted from the list of exploration activities. Furthermore, proposed definition I (9)(b) suggests that environmental data gathering will not be considered to be exploration activity unless it substantially disturbs the natural land surface. The Federal definition does not contain such a requirement. Rule I (9)(b) of the proposed Wyoming definitions therefore appears to unacceptably narrow the circumstances under which environmental data gathering will be considered to be coal exploration activity.

It is essential that the State definition of "coal exploration" accurately reflect Federal standards. All coal exploration activities must conform to the requirements of 30 CFR 776. Exploration activity which will result in the removal of more than 250 tons of coal must be approved in writing under 30 CFR 776.12–14. Similarly, 30 CFR 776.11 requires that written notice be filed by any person who intends to conduct exploration activity which will result in the removal of less than 250 tons of coal. Either notification or prior approval is necessary for all exploration, whether or not there is a substantial environmental disturbance. Part 776.15 of the Federal regulations imposes the additional requirement that all coal exploration activity which will substantially disturb the natural land, no matter how many tons are removed, be conducted in accordance with performance standards specified under 30 CFR 776 and 815, and any other specific conditions imposed by the regulatory authority. This extensive regulatory scheme will be effective only if a comprehensive and accurate definition of "coal exploration" is adopted in the individual State programs.

15.10 According to EPA, Wyoming modifies the Federal requirement in 30 CFR 776.11(b)(6) to submit a description of practices proposed to be followed to protect the environment from the adverse impact of exploration by the phrase "where the operation will *substantially disturb* the natural land surface." Wyoming proposes in Rule XI 1b(6) to specify a "description of methods and practices proposed to protect the environment, including those necessary to comply with Section 5 of this Chapter, where the operations will substantially disturb the natural land surface." Rule XI 5 applies only to operations which "substantially disturb the natural land surface or which remove more than 250 tons of coal * * *." The modifying phrase is interpreted merely to highlight the fact that the requirements of Rule XII 5 only apply in cases of substantial disturbance. This would be greatly clarified by deletion of the comma in this section of the Wyoming rule. The language appears to meet the Federal requirements.

Finding 16

The Secretary finds that the Land Quality Division has the authority under Wyoming laws and the Wyoming program includes provisions to require that persons extracting coal incidental to government financed construction maintain information on site consistent, in part, with 30 CFR Part 707. This finding is made under 30 CFR 732.15(b)(4).

Provisions corresponding to 30 CFR 707 (exemptions for coal extraction incidental to government-financed highway and other construction) are found in Wyoming statute W.S. 35–11–401 and Wyoming regulation Chapter I.

While there is no specific reference to this requirement in the discussion of individual systems, the Secretary finds that he is able to evaluate this provision on the basis of regulations and statutes in the program.

Only one significant issue was raised in the review of Wyoming's provisions relating to government-financed construction. Section 528(3) of SMCRA exempts certain government-financed construction projects from the coverage of the Act. 30 CFR Part 707 defines the appropriate terms and requires that the operator of the project maintain on the site of the extraction operation the written exemption as well as certain descriptive details of the project relating to location, nature, and financing. The proposed Wyoming statute (WS–11–401(f)) allows for these types of exemptions. The Wyoming regulations essentially mirror the Federal regulatory requirements with one minor exception. Wyoming does not explicitly state that the information required to be maintained on the site must also be available for inspection, as does 30 CFR 707.12. However, it appears from Wyoming law and the regulation cited above that the Land Quality Division could demand proof of exemption and close the operation if the proof is not supplied. This should be confirmed in Wyoming's resubmission.

Finding 17

The Secretary finds that the Land Quality Division has the authority and the Wyoming program includes provisions to enter, inspect, and monitor all coal exploration and surface coal mining and reclamation operations on non-Indian and non-Federal land within Wyoming consistent, in part, with the requirements of Section 517 of SMCRA (inspections and monitoring) and 30 CFR Chapter VII, Subchapter L (inspection and enforcement). This finding is made under 30 CFR 732.15(b)(5).

Provisions corresponding to Section 517 of SMCRA and Subchapter L of 30 CFR Chapter VII for inspection and monitoring of operations are found in Wyoming statute 35–11–109, 431, 437, 701 and 1101 and Wyoming regulations Chapters IV and XVII. Volume 1, Part G.4, of the program submission contains a description of the inspection program to be carried out by the Land Quality Division.

Discussion of significant issues raised in the review of Wyoming's provisions for inspection and monitoring follows.

17.1 The National Wildlife Federation raises the concern that use of the term "investigation" does not necessarily include an "inspection." Wyoming's Rule XVIII states that the director's designated representative shall *inspect*. This rule appears to insure that inspections will be conducted.

17.2 AMAX Coal Company is concerned that the requirement that inspectors have access to an operator's records at any reasonable time is too much of a hardship on operators. The Secretary cannot agree. That inspectors must have access to operator's records and "at any reasonable time" gives

operators adequate safeguards while assuring that the requirements of the regulatory program can be enforced.

17.3 The Public Lands Institute comments that the Wyoming submission omits the requirement for no less than one partial inspection per month and one complete inspection per quarter. Wyoming proposes Rule XVIII to require a partial inspection *every* month and a complete inspection *every* quarter. This requirement is more stringent than the Federal requirement which calls for an *average* of one partial inspection per month and an *average* of one complete inspection per quarter. Hence, the Wyoming Rule would appear to be consistent with the Federal requirement of 30 CFR 840.11.

17.4 The Public Lands Institute raised the question of whether Wyoming inspectors will conduct field enforcement and will take an enforcement action for all violations observed. Proposed W.S. 35–11–437(a) requires the issuance of a cessation order covering that portion of the operation relevant to the violation. Proposed W.S. 35–11–437(b) requires the issuance of a notice for abatement for any violation of the Act, regulations or permit conditions. Both sections of the Wyoming statute authorize the director or his authorized representative to issue such notice or order. An explanation, perhaps in the narrative segment of the program, is needed to clarify Wyoming's provision that inspectors will conduct field enforcement, and will pursue enforcement actions for all violations observed.

17.5 The Public Lands Institute commented on whether the Wyoming Rule XVII 1a provisions for inspection without prior notice is compromised by the additional provision "except as the representative deems necessary." The Institute stated that Wyoming's legislative requirements do not contain a provision that inspections be unannounced. The Powder River Basin Resources Council and the U.S. Environmental Protection Agency stated that the phrase, "except as the representative deems necessary," should be deleted because the inspector should not have the discretion to inform the operator of an imminent inspection.

Although the provision for unannounced inspections, as required in 30 CFR 840.11(d)(2), does not appear in Wyoming's legislation, it appears in the regulations. The requirement of the Wyoming regulation is that all inspections be unannounced. Only in special circumstances, such as on-site meetings and the once-annual inspection when all applicable records are made available, will the inspector give notice to the person being inspected of an impending inspection. On the basis of this understanding, this addition appears to be acceptable.

17.6 EPA noted that Wyoming legislation omits the "without a search warrant" provision of 30 CFR 840.12(a) and (b). While the Wyoming proposed statute and regulations do not contain a "no search warrant" provision, such a provision is made a condition of every permit. Furthermore, Wyoming inspectors have inspected and do inspect without a search warrant. (See minutes on January 2–5, 1980, meeting, Administrative Record No. WY–99.) On this basis, this omission appears to be acceptable.

17.7 Wyoming's regulations omit the provision that inspections be made on an irregular basis including operations which operate nights, weekends or holidays as required by 30 CFR 840.11(d)(1).

This omission makes the Wyoming Rule XVII 1 inconsistent with 30 CFR 840.11(d)(1). This inconsistency could be corrected in a discussion of irregular inspections in the narrative description submitted under 30 CFR 731.14(g)(4), which may be amended as part of Wyoming's resubmission.

17.8 Wyoming regulations omit a provision requiring inspectors to "collect evidence of any violation observed" as required by 30 CFR 840.11(a) and (b). This issue, which was raised by the Public Lands Institute, is subsumed by the greater issue of complete enforcement which the State program appears to adequately provide. Since Wyoming's program contains proposed statutes and regulations that provide for complete enforcement, the issue of the omission of a separate provision for collecting evidence of any violation will probably be deemed insignificant once all of the proposed rules and statutory amendments are adopted.

17.9 The reporting requirements of 517(b)(2) of SMCRA will be met by Wyoming's annual report requirement in W.S. 35–11–411. The Wyoming performance standards in Rule IV will establish specific monitoring requirements which must be met by the applicant prior to permit approval. These State monitoring requirements, if enacted, will apparently satisfy the Federal monitoring requirements in Section 517(b)(2) of the Act.

17.10 The Bureau of Indian Affairs recommends that it be clearly stated in the program that State inspectors have no enforcement or regulatory authority on Indian lands. Under 30 CFR Subchapter C, the scope of State programs is restricted to non-Federal and non-Indian lands. Presently, the Secretary is responsible for inspection and enforcement activities over surface coal mining operations on Indian lands. This activity will continue until such time as the Secretary proposes legislation to the Congress and develops appropriate rules designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulations of surface mining of coal on Indian lands. Therefore, additional language regarding Indian lands in the Wyoming program is not necessary.

Finding 18

The Secretary finds that the Land Quality Division has the authority under Wyoming laws and the Wyoming program includes provisions to implement, administer, and enforce a system of performance bonds and liability insurance, or other equivalent guarantees consistent, in part, with 30 CFR Chapter VII, Subchapter J (performance bonds). This finding is made under 30 CFR 732.15(b)(6).

Provisions corresponding to Sections 509 and 519 of SMCRA (performance bonds and insurance) and to Subchapter J of 30 CFR Chapter VII are incorporated in Wyoming statute 35–11–406, 410, 411, 417, 418, 421 and 424. Volume 1, Part G.3, of the program submission contains a narrative describing the reclamation performance bond and liability insurance requirements for the State.

Discussion of significant issues raised in the review of Wyoming's bonding and insurance provisions follows.

18.1 The Wyoming program equates the terms "performance bond" with "surety bond" and the terms "deposit" with "collateral bond" in Rule XVI, which is the State equivalent to 30 CFR 800.5. The Federal term "collateral bond," however, is used in the context of secured transactions. The remainder of the terms are defined in a similar manner to the Federal definitions. The State definition of "self-bond," however, does not directly specify the granting of a security interest in real or personal property to the regulatory authority. This latter requirement would be changed by a proposed Federal rule change being considered by OSM. If the Federal rule is changed before the Secretary's decision on Wyoming's anticipated resubmission, as proposed, the Wyoming provisions probably would be acceptable.

18.2 In order to make the State requirements consistent with 30 CFR 800.11, Wyoming proposes to add language to Rule XIII 2a(1) requiring the bond amount to cover any additional amount of land which may reasonably be expected to be affected, prior to filing

a renewal bond. The addition would eliminate the possible 30 day delay between expiration of the reporting year and review of the annual report. If promulgated, this proposed rule will apparently be consistent with 30 CFR 800.11.

18.3 Wyoming does not provide an analogue to 30 CFR 805.13 concerning period of liability because all of this material is contained in the performance standards. This appears to be acceptable.

18.4 Wyoming provides for a minimum bond of $10,000 in W.S. 35–11–417(c) in accordance with 30 CFR 805.11, determination of bond amount. The minimum revegetation bond period is established through Rule IV 3d(6) as 10 years (since areas with greater than 26 inches of precipitation are not expected to occur in Wyoming's coal resource areas). With respect to the requirements of 30 CFR 805.14(a), which allows the permittee an opportunity for an informal conference on a bond adjustment, Wyoming allows anyone to file comments or objections under Rule XVI 3a and to request an informal conference. A request for release of all or part of a bond is to be published pursuant to Rule XVI 2b.

These Wyoming provisions appear to be consistent with 30 CFR Part 805.

18.5 The Wyoming program contains provisions analogous to 30 CFR 806.11 for the form of the performance bond. Wyoming Rule XII 2, regarding self-bonding, does not specifically require that the self-bond give the State the right to immediately attach property upon bond forfeiture. Additionally, the Wyoming Rule XII 2(b) gives the administrator the discretion to require proof of a mortgagor's possession and title to unencumbered real property, whereas no such discretion exists in 30 CFR 806.11(b)(4)(iii). Wyoming also has no requirement in Rule XII 2(c)(7) that the brief chronological history of business operations include such operations conducted within the last 10 years as in 30 CFR 806.11(b)(5)(iv). These provisions do not appear to be consistent with the Federal requirements and Wyoming should provide additional clarification in its resubmission.

18.6 Wyoming does not expressly require the operator to submit a statement listing any notices issued by the Security and Exchange Commission or listing proceedings alleging a failure to comply with any public disclosure or reporting requirements under the Federal securities laws. Rule XII 3b, however, authorizes the administrator to examine the affairs of the operator if there is reason to suspect the operator's financial condition, continuous operation, operational nature, or compliance with the Act or rules. Further, the language of 30 CFR 806.11(b)(5)(vii) has been added as proposed Rule XII 2a(10). While Wyoming does not list the parties required to sign an indemnity agreement (30 CFR 806.11(b)(6)), Rule XII 5 requires that all such parties certify that they have the right and power to sign. These provisions appear to be consistent with the Federal requirements so long as Wyoming will use its full authority to require information required under 30 CFR Subchapter J.

18.7 W.S. 35–11–417(a) states that the purpose of any bond is to insure that the operator faithfully complies with the Act, rules and permit conditions. This statement meets the requirements of 30 CFR 806.12(c). Wyoming does not allow an operator to self-bond solely on the basis of a letter of credit.

Letters of credit are used only as evidence of financial responsibility (Rule XII 2(a)(8)(e)). Wyoming does not provide an equivalent to 30 CFR 806.12(f) or (g) regarding collateral bonds and letters of credit. W.S. 35–11–418, however, does permit Federally insured certificates of deposit, cash or government securities in lieu of a bond. This difference appears to be consistent with 30 CFR 806.12 (f) and (g). Under Rule XII 11a, Wyoming allows substitution of self-bonds for other bonds as is allowed in 30 CFR 806,12. Wyoming's program appears to provide requirements consistent with 30 CFR 806.14 in W.S. 35–11–406(a)(xiii) and Rule VIII 2 (b) and (c).

18.8 In its initial submission under Rule XVI 4, Wyoming required inspection of permit areas for bond release within 60 days of receipt of the application for bond release, weather permitting. Wyoming Rule XVI 4a, as now proposed, requires the inspection within 60 days, "conditions permitting." The intent of this revision is to assure that there is an opportunity for a meaningful site inspection. (See Administrative Record No. WY–99.) This appears acceptable.

18.9 Wyoming has proposed to modify Rule XVI 2b(8) to require that requests for a hearing or conference be advertised, consistent with the requirements of 30 CFR 807.11(e). That change should also take into account the district court ruling that § 807.11(e) must include a procedure for citizen access to the mine site.

18.10 Wyoming's initial provisions did not implement 30 CFR 807.12(d) for residential and industrial postmining land uses. Therefore, proposed Rule XVI 6a(3) has been added to require a bond to be held until all operations are successfully completed. If promulgated, this draft rule appears to meet the requirements of 30 CFR 807.12.

18.11 Wyoming's bond release criteria provide less release for the first two phases of such release (50 percent compared to the Federal 60 percent at phase I, and 75 percent compared to the Federal 80 percent at phase II). The State provision, Rule XVI 6, is therefore more stringent than the Federal requirements for 30 CFR 807.12(b). Wyoming also incorporates a reference area into the equivalent prime farmland requirements of Rule XVI 6b(ii) which appears to be consistent with 30 CFR 807.12(e)(2)(iii).

18.12 Wyoming has no provision analogous to 30 CFR 808.11 regarding bond forfeiture. Instead, Wyoming requires a bond to be posted under W.S. 35–11–401(d)(vii), denies permits if the bond cannot be posted (W.S. 35–11–406(h)(ix)), and requires that the bond amount cover the estimated cost of reclamation. However, W.S. 35–11–421(a) states that if the director determines that a bond should be forfeited, he shall make a formal request of the Attorney General to begin such proceedings. These Wyoming provisions appear to be consistent with the Federal program requirements.

18.13 Under W.S. 35–11–421, Wyoming extends bond liability to the entire permit area and all costs of final reclamation as in 30 CFR 802.12, since the bond must cover reclamation operations. In the Wyoming program, the Attorney General institutes bond forfeiture proceedings on behalf of the regulatory authority (W.S. 35–11–421(b)). Wyoming's provisions require the director to determine forfeiture based upon "any violation of this act" (W.S. 35–11–421). Wyoming's provisions appear to be consistent with 30 CFR 808.13.

18.14 Wyoming does not address deposit of forfeiture amounts in interest bearing escrow accounts in W.S. 35–11–424, but requires the funds to be deposited with the State treasurer in the general fund. This appears acceptable if Wyoming can assure the Secretary, in its resubmission, that the funds forfeited will be available for reclamation. While 30 CFR 808.14(a) requires a determination of the amount of bond to be forfeited on the basis of estimated reclamation costs, Wyoming authorizes forfeiture proceedings for the entire bond. Furthermore, the State Attorney General must bring suit to recover costs if the forfeited bond is inadequate under W.S. 35–11–422. Therefore, no determination of the amount to be forfeited is necessary, and the State

provision appears to be consistent with the Federal requirement.

18.15 The National Park Service (NPS) was concerned that bond amount in Wyoming is set by the administrator and based on the operator's cost estimates and asked for the opportunity to review bonding procedures and amounts. The NPS is provided the opportunity to participate in every proceeding on permit applications, and to voice its concerns with proposed bond amounts and procedures at that time, in the context of each application decision.

Finding 19

The Secretary finds that the Land Quality Division has the authority and the Wyoming program provides for civil and criminal sanctions for violations of Wyoming law, regulations and conditions of permits and exploration approvals including civil and criminal penalties, in part consistent with Section 518 of SMCRA (penalties) including the same or similar procedural requirements. This finding is made under 30 CFR 732.15(b)(7).

Provisions corresponding to Section 518 of SMCRA and to 30 CFR 845 are incorporated in Wyoming statute W.S. 9–2–505 and 36–11–901 and Wyoming rule XVII. Part G.5 of Volume 1 of the Wyoming program submission contains a description of the methods and procedures by which the State will enforce the administrative, civil and criminal sanctions of State laws and regulations.

In the discussions below, reference is made to a February 5, 1980, telephone call among employees of OSM and the State of Wyoming (Administrative Record No. WY–134). The information obtained in this call is not part of the basis of the Secretary's decision, and relates solely to portions of the program being disapproved. Accordingly, the public will have adequate opportunity to comment on this material after Wyoming's resubmission is received.

Discussion of significant issues raised in the review of Wyoming's civil and criminal sanctions provisions follows.

19.1 Peabody Coal Company stated that the unavailability of equipment, strikes, adverse weather conditions, etc., should be considered by Wyoming in the assessment of civil penalties. Factors such as unavailability of equipment, strikes, adverse weather conditions, etc., are not required to be considered by the State since these factors are not considered in the Federal regulations.

19.2 EPA questions whether the State has the authority to assess civil penalties after violations have been abated as in 30 CFR 843.11(f) of the Federal program. W.S. 35–11–901(q), as proposed, indicates that any violator is liable for a civil penalty. SMCRA Section 518(a) makes the assessment of civil penalty discretionary in each case. Wyoming proposed Rule XVII 2(b) also states that all cessation orders remain in effect until the violation has been abated, or until the cessation order has been vacated, modified or terminated by the designated representative, administrator, director or council. Based on the wording of Wyoming's proposed statutes, regulations and practices, it appears that the State can and will assess civil penalties after the notice or order has been abated.

19.3 The State submitted materials to OSM on January 17, 1980, which constitute the draft of a "State window" proposal on the civil penalty system. (Administrative Record No. WY–118.) The Secretary's staff has not fully reviewed this material for consistency with 30 CFR Part 845 and may need to request further amplification. The district court has remanded 30 CFR 732.15(b)(7) and 840.13(a) to the extent that these sections required a State to establish a point system for assessing penalties. Therefore, this draft proposal will have to be evaluated in light of this remand and Wyoming may choose to alter its proposed civil penalty system prior to submission of its revised State program to take the district court's decision into account.

19.4 Proposed W.S. 35–11–901(n), if enacted, appears to be consistent with SMCRA Section 518(h) regarding the circumstances under which the $750/day penalty for failure to abate a violation may be stayed if the State makes it clear that the Department may relieve an operator from the abatement requirement only by a granting of temporary relief pursuant to draft Rule XVII 2(f).

19.5 The proposed language in W.S. 35–11–901(a) is not sufficient to assure criminal sanctions against corporate officers, directors or agents as required by SMCRA Section 518(f) because of the inconsistency in the language used to describe persons liable for civil and criminal sanctions in the State statute. The State submission would appear to be acceptable if the term "any person" is used in W.S. 35–11–901(a) for both criminal and civil violations, and Wyoming supplies an opinion from its Attorney General that confirms the applicability of both civil and criminal penalties to corporate officers, directors or agents consistent with SMCRA Section 518. This was discussed at the January 2–5 meetings with Wyoming (Administrative Record No. WY–99).

19.6 While the right to a conference is given in proposed W. S. 35–11–901(c), the State has specified no time limit for the holding of the conference as in 30 CFR 845.8(b)(1). This raised the question of whether there is any time limit for the State to schedule and hold a conference between the alleged violator and the director for the informal disposition of any dispute over either the occurrence of a violation or the proposed penalty to be assessed. The State has represented that it will include a 20 day time limit for the holding of such conferences in Rule III 3. If promulgated, the addition would appear to be more stringent than 30 CFR 845.18(b)(1).

19.7 The National Wildlife Federation states that Wyoming's proposed penalty section, Rule XVII 3, does not provide for independent review of a reduction of fines of greater than 25 percent. The director, under the proposed Wyoming penalty provisions, will be responsible for conducting the penalty conference. The independent Federal review is necessary only because the authority to reduce fines has been delegated to lower organizational levels than the director. Thus, the Wyoming regulation appears to be acceptable as written, if promulgated.

19.8 The National Wildlife Federation suggests that citizens be provided the opportunity to submit information bearing on the assessment of civil penalties. Citizen information is not considered in the Federal procedures for assessment of civil penalties and, therefore, is not required in the State's assessment process.

19.9 The National Wildlife Federation was concerned that the State program substitutes a bond for the pre-payment of civil penalties into an escrow account. The Secretary finds that the State's use of a bond, as opposed to placing the amount of the contested penalty in escrow, appears to provide the same degree of certainty that an assessed penalty will eventually be paid by a violator if the State prevails in a contested action.

19.10 The National Wildlife Federation stated that Wyoming must meet the burden of showing how often fines, *in fact*, will be assessed, and how high, *in fact*, these fines will be, under the administration of the proposed State program. Wyoming has submitted information comparing previous fine assessments, under the State procedure, to the potential fine assessments that would have occurred under the Federal procedure. (See Administrative Record No. WY–118.) This recently submitted

material will be evaluated in the context of the Wyoming program resubmission. In any case, use of the Federal point system on penalties is not required.

Finding 20

The Secretary finds that the Land Quality Division has the authority under Wyoming laws, and the Wyoming program contains provisions, to issue, modify, terminate and enforce notices of violation, cessation orders and show-cause orders consistent, in part, with Section 521 of SMCRA (enforcement), and with 30 CFR Chapter VII, Subchapter L (inspection and enforcement), including the same or similar procedural requirements. This finding is made under 30 CFR 732.15(b)(8).

Provisions corresponding to Section 521 of SMCRA and to Subchapter L of 30 CFR Chapter VII are included in Wyoming Statute W.S. 35-11-901 and 35-11-437 and in Wyoming Rules Chapter XVII. Volume 1, Part G.5, of the program submission contains a description of the methods and procedures by which the State will enforce the administrative civil and criminal sanctions of State laws and regulations. Volume 1, Part G.6, of the program submission contains a discussion of Wyoming's administrative and enforcement procedures for performance standards.

Some of the discussion below relates to information presented to the Department in a February 5, 1980, telephone conversation and follow-up letter from Ms. Nancy Wood, dated February 5. The Secretary is reserving judgment on issues discussed in the conversation and letter, to enable the public to comment on it when Wyoming resubmits its program.

Discussion of significant issues raised in the review of Wyoming's provisions for violation notices and orders follows.

20.1 Peabody Coal Company expressed dissatisfaction with the Wyoming definition of "significant imminent environmental harm to land, air, and water resources." The company is concerned that the definition is so general that the mere act of initial topsoil removal can be considered as a significant environmental harm, requiring the inspectors to post a cessation order. This interpretation is not a reasonable one, if the topsoil removal has been approved in the permit. The Wyoming definition is not consistent with the definition in 30 CFR 701.5. This inconsistency is discussed under finding 20.18.

20.2 EPA stated that it does not appear that cessation orders can be issued immediately. Rule XVII 2(e) would require that service of cessation orders be made by serving the operator either by tendering a copy at the operation or by hand to the operator but does not state that citations will be issued immediately. An explanation is needed to clarify Wyoming's provision for immediate issuance of cessation orders.

20.3 The National Wildlife Federation questions the meaning of the words "expeditiously abate" in Rule XVII 2 a(2). The proposed amendment to W.S. 35-11-437 does not contain the words "expeditiously abate." This statutory provision in conjunction with proposed Rule XVII 2a appears to require affimative obligations whenever an order or notice is issued and would be consistent with the Federal requirement. If enacted, W.S. 35-11-437 would appear to be acceptable as written.

Rule XVII 2(d)(3) would provide that the State Director shall revoke the bond of a permittee whose permit has been revoked if the permittee does not complete reclamation on the permit area within a time specified by the director. If promulgated, this would appear to be consistent with SMCRA Section 525(d). This was discussed at the meeting between DOI and the State on January 2-5, 1980. See Administrative Record No. WY-99. The State Director has the authority to institute bond forfeiture proceedings for any violation of the Act including, as in this case, failure to reclaim the permitted area.

20.4 One commenter raised the concern that the term "continued" in W.S. 35-11-437(c) may mean that there is room for continuation of an enforcement action beyond the 90-day maximum period. The language in proposed W.S. 35-11-437(c), if enacted, would probably be acceptable if the term "continued" is replaced by the term "affirmed." This change will insure that the total time for abatement of a violation may not be extended beyond 90 days.

20.5 The State's program fails to include the statement in SMCRA Section 521(a)(5) that any notice or order which requires cessation of mining shall expire within 30 days unless a public hearing is held. This omission operates to make the Wyoming program more stringent than the Federal requirement.

20.6 EPA and one other commenter raised the concern of whether the SMCRA-related items in 30 CFR 843.19 (a) through (g) could be items for injunctive relief. These items relate to how a civil action may be requested and what relief may be requested. The Wyoming program submission may be acceptable based on an Attorney General's memorandum which describes the power of the State Attorney General under W.S. 9-2-505 and *Big Horn Power Co.* v. *State*, 148 P. 1110 (1915). The memorandum reveals that the State has powers which are broader than those of OSM in SMCRA Section 521(c) and 30 CFR 843.19. See notes of telephone conversation between Richard Hall, Richard Robinson, Howard Roitman and Carl Pavetto of DOI and Nancy Wood of the State of Wyoming on February 5, 1980 (Administrative Record No. WY-134). The public is invited to comment on this after the Wyoming resubmission is received.

20.7 The proposed Wyoming Rule XVII 2(a) and proposed statute W.S. 35-11-437 omit the interim steps provision of 30 CFR 843.11(c) and 843.12(b). Wyoming's general authority to impose affirmative obligations on a coal operator in W.S. 35-11-437 and Rule XVII 2(a) appear to include any interim measures necessary to achieve compliance. Thus, interim step provisions are seemingly included in the abatement power. Failure to perform an interim step, therefore, appears to be grounds for the issuance of a cessation order.

20.8 One commenter asked that there be a guarantee in the statute that a hearing promptly be held on cessation orders. W.S. 35-11-437(c)(ii), if enacted, regarding formal review of notices for abatement and cessation orders is acceptable as written because it provides for formal review by filing an application for a hearing within 30 days after receiving notice. This provision appears to be consistent with 30 CFR 843.16.

20.9 The National Wildlife Federation stated that the Federal regulations require separate mandatory and discretionary approaches to the issuance of show-cause orders and that these approaches are not adequately covered in the Wyoming program.

The Public Lands Institute commented on the omission in W.S. 35-11-409(c) of the definition of how many violations constitute a "pattern" resulting in suspension or revocation of the operator's permit as in 30 CFR 843.13(a)(2) and (3). Wyoming's draft Rule XVII 2(b)(2), if promulgated, appears to be acceptable in this regard. It states that the director shall explain in writing why he has not issued a show cause order for violations during three or more inspections during any 12-month period. The presumption is that if the director finds that there are violations of the same or related requirements during three or more inspections in any 12-month period, he will find that a pattern of violations exists. See notes of

telephone conversation of February 5, 1980 (Administrative Record No. WY-134). This information will be considered during review of the Wyoming program resubmission.

20.10 Proposed W.S. 35-11-437(d) includes an internal review procedure that applies to notices and orders, and provides for Departmental review of any notice or order that requires cessation of mining within 48 hours. This provision, if enacted, appears to be acceptable because, although it has no Federal counterpart in the regulations, it constitutes an internal management review of certain orders and notices. This procedure is comparable to the OSM practice of internally reviewing the adequacy of orders and notices which have been issued.

W.S. 35-11-437(d) also provides a hearing within 10 days of the director's review of such notice or order, and a decision thereon within 48 hours of the adjournment of the hearing. Although somewhat comparable to the informal public hearing provided at 30 CFR 843.15, the State hearing is both more timely and more formal. The State hearing, however, is not required to be near the minesite like the Federal hearing. The Secretary makes no final finding on this State provision, because it was discussed in telephone conversations on February 5, 1980 (Administrative Record No. WY-134).

20.11 The service provision of proposed Rule XVII 2(e), if promulgated, and whether it provides for service in conformance with 30 CFR 843.14, was discussed in a telephone conversation on February 5, 1980 with Nancy Wood, Wyoming; Howard Roitman, OSM Region V; and Richard Hall, Richard Robinson and Carl Pavetto, OSM Headquarters (Administrative Record No. WY-134). Rule XVII 2(e) appears to be satisfactory when read in conjunction with the State Rules of Procedure. This issue will be reexamined, however, when Wyoming resubmits its program.

20.12 The Public Lands Institute, National Wildlife Federation, and Powder River Basin Resources Council stated that W.S. 35-11-701 does not insure that a violation found during a citizen complaint inspection will be cited. Proposed W.S. 35-11-437 provides that cessation orders and notices of abatement *shall* be issued if the director or his designated representative observes a violation of the State's Act, rules or any permit condition. This provision includes violations observed during an inspection based on a citizen complaint. Therefore, the proposed Wyoming statute, if enacted, would be consistent with the Federal requirement that an enforcement action be initiated in all cases of observed violations.

20.13 Amax Coal Company, Carter Coal Company, and one other commenter stated that the Wyoming program should *not* provide for inspectors to issue cessation orders in the field. Field issuance of cessation orders is required by SMCRA Section 521 and 30 CFR 843.11.

20.14 EPA raised the concern that omission of specific wording about violations of the State's rules may mean that a pattern of violations of the State's rules may not be grounds for permit revocation. The National Wildlife Federation also expressed the concern that Wyoming could not enforce its own regulations because of this omission. Proposed W.S. 35-11-437(a) and (b) specifically include violations of the Land Quality Division regulations as the basis for issuing notices and orders. If enacted, this provision apparently would allow for permit revocation or suspension based on a pattern of violations of the Wyoming rules.

20.15 Amax Coal Company and another commenter raised the concern that an operator should be entitled to a hearing in a very short period of time after receiving a cessation order. Proposed W.S. 35-11-437(d), requiring review of a cessation order which requires the cessation of mining by the director or the administrator within 48 hours, is one avenue of expedited operator relief. The other is to apply for temporary relief under proposed Rule XVII 2(f). If this statutory change is enacted and the rule is promulgated, an operator will apparently be provided with expedited relief consistent with the Federal rules.

20.16 The National Wildlife Federation expressed the concern that W.S. 35-11-437 makes the imposition of affirmative obligations discretionary rather than mandatory in the case of cessation orders. Proposed W.S. 35-11-437(b) states, "The director or his designated authorized representative shall issue a notice and impose any necessary affirmative obligations." Proposed W.S. 35-11-437(a) states that, "The director or his authorized representative shall issue a cessation order * * * which may impose affirmative obligations." Proposed Rule XVII 2(a) provides that, "any cessation order shall contain: (1) all affirmative obligations necessary to completely and reasonably expeditiously abate the violation or imminent change." The term "designated authorized representative" is defined in Rule I 2(16) as the "administrator, the district engineer, or other qualified inspector designated by the administrator." Taken together, the proposed statute and rule, if enacted, appear to be consistent with the Federal requirements since, if affirmative obligations are necessary, they will be included in the cessation order.

20.17 The National Wildlife Federation points out that the Wyoming program does not provide for a minimum mandatory suspension of a permit for at least three days as in 43 CFR 4.1194. The only reference to 43 CFR Part 4 in the enforcement sections of the Federal program is in 30 CFR 840.15 which states that, "Each State program shall provide for public participation in enforcement of the State program consistent with 30 CFR Parts 842, 843 and 845 and 43 CFR Part 4." Thus, all provisions of 43 CFR not addressing public participation are not required to be part of a State program. It is not necessary for a State to have every procedural rule that is contained in the Federal program. Therefore, the Wyoming statute and rules appear to be consistent with those of the Federal program regarding pattern of violations.

20.18 Wyoming indicated (Part D, page 3 of the orange book, Administrative Record No. WY-99) that it intends to alter its definition of "significant, imminent environmental harm." The modification would identify "environmental harm" as "significant" only when three conditions are met: (1) The adverse impacts are appreciable; (2) the harm was not contemplated in the approved permit; and (3) the harm cannot be mitigated within a "reasonable abatement" period. The January 9, 1980 version of the regulations (Administrative Record No. WY-119) did not contain the revised "reasonable abatement time" language.

The proposed provision which states that environmental consequences anticipated at the permit approval stage will not be considered "significant" appears to be acceptable. Cessation orders should not be issued for adverse impacts which were approved by the regulatory authority when the permit was granted.

The proposed "reasonable abatement time" provision, however, appears to be in conflict with the applicable Federal definition, which states that environmental harm will be deemed "significant" it if is "appreciable" and *"not immediately reparable."* 30 CFR 701.5 (emphasis added). The State may not lower the Federal standard by declaring that an environmental harm becomes "significant" only if it has not been eliminated after a "reasonable abatement" period. Until the State regulations are restructured to include this "immediately reparable" provision, or a similar effect is achieved through

other provisions of the program, the Wyoming definition of "significant, imminent environmental harm" appears to be unacceptable.

20.19 The Powder River Basin Resource Council objects to the provision in W.S. 35-11-701(a) which allows the administrator to endeavor by "conference, conciliation, and persuasion" to eliminate the source of cause of a violation. Proposed W.S. 35-11-437(g) provides that W.S. 35-11-437 is controlling over W.S. 35-11-701, and W.S. 35-11-437 is consistent with SMCRA Section 521 in requiring that all violations must be cited.

Finding 21

The Secretary finds that the Land Quality Division has the authority and the Wyoming program contains provisions to designate areas as unsuitable for surface coal mining consistent, in part, with 30 CFR Chapter VII, Subchapter F (designations of areas unsuitable for mining). This finding is made under 30 CFR 732.15(b)(9).

Provisions corresponding to Section 522 of SMCRA and to Subchapter F of 30 CFR Chapter VII are included in Wyoming statute W.S. 35-11-406 and 425 and Wyoming Rule XVIII. Volume 1, Part G.11, of the program submission describes the system by which petitions for designating areas unsuitable for surface coal mining will be received and processed and the establishment of a data base and inventory system. A dissussion of significant issues raised in the review of Wyoming's provisions for unsuitability designations follows.

21.1 The Wyoming program does not contain in the regulations definitions for "occupied dwelling," "public building," "public park," or "cemetery." These words are specifically defined in the Federal regulations concerning areas where mining is prohibited or limited under Section 522(e) of the Act. In discussions, the State indicated that the terms are commonly used and have caused no problems since their law was enacted in 1972 (see orange book and minutes of January 2-5 meeting, Administrative Record No. WY-99). Therefore, these definitions need not be included in the program.

The Public Lands Institute drew attention to the lack of definitions for "valid existing rights," "public roads," "surface mining operations" and "impact incident to an underground mine." "Valid existing rights," "public roads," and "surface coal mining operations" are defined in proposed Rule I 2. Rule VII makes the requirements for surface mining applicable to underground mining. Therefore, a definition of "impact incident to an underground mine" does not appear to be necessary.

21.2 The definition of "fragile lands" in Rule XVIII 1 includes the word "would" instead of "could." This causes a substantial change in meaning from the Federal definition at 30 CFR 762.5. The State has acknowledged that this was a typographical error that will be corrected. With correction of the error, the definition of "fragile lands" appears to meet the Federal requirements.

21.3 The Wyoming program, at proposed Rule XVIII 2c, omits the Federal requirement in 30 CFR 764.13(c) that petitions to terminate designations include allegations of fact, with supporting evidence not contained in the record of the proceeding under which the area was designated unsuitable.

Instead, the cited Wyoming regulation requires identification of criteria which the petitioner seeks to challenge and allegations of fact that support that challenge. Two commenters also pointed out that Wyoming's designation termination procedures failed to require new information not presented in the original designation proceeding.

The intent of 30 CFR 764.13(c) is to assure that petitions to terminate designations are based on new information and are not just a reevaluation of the initial designation decision. The Wyoming provisions do not negate this intent; however, the provisions are unclear. Therefore, the Wyoming program should be clarified to assure that a termination petition is judged on new information.

21.4 The Wyoming program does not require that a notice of a petition be published in the State Register as is required under 30 CFR 764.15(b)(2). This requirement is important since State agencies and organizations with a possible interest may be notified through the register. Therefore, publication of the notice in the State register should be ensured through modification of the Wyoming program.

21.5 The Wyoming program does not require that notice of the public hearing on a petition be sent to Federal, State, and local agencies which may have an interest. The program also limits public distribution of the notice to only those persons with a "property" interest. The Federal regulations at 30 CFR 764.17(b) require that the notice be sent to governmental agencies and to any person with an "ownership or *other* interest" (emphasis added). The Wyoming program should be revised to include notification of those agencies and persons.

21.6 The Wyoming program relies on the Administrative Procedures Act for the procedures to conduct public hearings. That Act provides for use of the "contested case procedure" for hearings on petitions to designate lands unsuitable. This procedure is a quasi-judicial process in which the petitioner is subject to cross examination and other judicial requirements. The Federal rules require a less formal proceeding.

The State proposes to delete reference to the Administrative Procedures Act for the petition hearings. The proposed revision appears to assure that proceedings on petition hearings will not be burdensome for petitioners.

21.7 Information required in a petition to designate lands unsuitable under the Wyoming program differs from the Federal regulations at 30 CFR 764.13(b) by requiring the petitioner to supply more information. In Rule XVIII 2b, the Wyoming program regulations would require the following items that are additional to the Federal requirements: the name and address of persons contributing to the expense of preparing petitions, a precise description of the boundary of the area covered by the petition, criteria on which the petition is based, sources of evidence to support allegations of fact, and identification of property interests known to the petitioner.

In its draft regulations submitted January 9, 1980, Wyoming now proposes to delete the requirement for information on persons contributing to the expense of petitions. The State has also agreed that a township-range description of the area would be adequate. These revisions appear to be consistent with the Federal requirements.

The requirement to identify criteria appears to be more burdensome to the petitioner and thus inconsistent with the Federal requirements. The requirement to identify known property interests would not necessarily be more burdensome or inconsistent with the Federal requirements so long as it is limited to information known to the petitioner and does not require research on the part of the petitioner. The requirement to provide sources of evidence does not appear to be burdensome or inconsistent with the Federal requirement so long as the "contested case" procedures, discussed above, are not used and the sources need not be more than what is readily available to the petitioner without research.

The Environmental Policy Institute and the Public Lands Institute objected to the requirement for information on persons contributing to the expense and the requirement that the petitioner provide a precise description of the area. The requirement that a petitioner provide sources of evidence was found

objectionable by one commenter on the grounds that it would make petitions vulnerable on a procedural basis.

The State procedures could be considered consistent with the Federal requirements, if the program resubmission contains adequate assurances that the additional information is based only on what is known or readily available to the petitioner.

21.8 Wyoming proposes, in Rule XVIII 2d, to establish "permissive contents" of a petition under which the petitioner may submit information to be included in the detailed statement of potential coal resources, demand for resources, and impact of the designation on the environment, economy, and supply of coal. The Powder River Basin Resource Council objected to this provision on the grounds that the information would unnecessarily cause argument during review of a contested case. The removal of the "contested case" procedures discussed above would eliminate this concern. Another commenter did not find the State requirement to prepare the statement. The statement is required by Rule XVIII 4d.

The Federal regulations at 30 CFR 764.17(e) place responsibility for preparing the statement on the State. The Wyoming regulations, in Rule XVIII 4d, place the responsibility for preparing the statement on the Council. Furthermore, proposed Rule XVIII 5a requires the Council to consider more than just that statement in making a decision on a petition. In light of those considerations and its permissive nature, the regulation appears consistent with the Federal regulations.

21.9 The Wyoming program does not contain a regulation which requires the establishment of a data base and inventory system on which to make decisions on petitions. The Federal regulations at 30 CFR 764.21 require the development and use of information in a data base and inventory system for making decisions on petitions. The State has proposed to amend the program to show the methods by which a data base and inventory system will be developed and has received a grant from OSM to collect data from various governmental agencies for use in the system. Contracts with these agencies are part of the program submission. (See Administrative Record No. WY-3.) In addition, Wyoming Rule XVIII 5a(1) requires use of information in the data base and inventory system for making decisions on petitions.

The Bureau of Mines pointed out that the State, in the description of the data base and inventory system, indicated that it would be difficult to determine that reclamation is not technologically and economically feasible and that such determinations would likely be overturned. This comment is a result of the State's discussion that a data base and inventory system would be of little use in making the decision. The Public Lands Institute objected to the failure to submit a specific regulation on the development of a data base and inventory system.

As discussed above, the State has agreed to develop a data base and inventory system. The Federal regulations do not require that the State establish regulations on a data base and inventory system, only that the State have and use such a system. If the State's proposed regulations are enacted, and revisions discussed above are made, it appears that the State's development and use of a data base and inventory system meet the Federal requirements.

21.10 The Federal regulations at 30 CFR 764.23 stipulate that data and information used in designating certain lands unsuitable should be available to the public. The State statute at 35-11-109(a)(iv) states that "the director is to collect information and to disseminate to the public such information as is deemed reasonable and necessary after the proper enforcement of this act." This appears to be more restrictive than the requirements of the Federal rules and could adversely affect opportunity for meaningful public participation. However, W.S. 9-9-101 and 9-104-102, the Administrative Procedures Act, provide that information of that type will be made available to the public. Therefore, the Wyoming program appears to meet the Federal requirements.

21.11 One commenter stated that the Wyoming regulations in proposed Rule XVIII allow for as long as one year before a final determination is made on a petition. The commenter expressed concern that these provisions give a tremendous opportunity to people who are bent solely upon restraining coal mining in any way and asks that a preliminary hearing be held within 30 days to determine whether a petition to designate lands unsuitable is frivolous and should be thrown out. The one year period is consistent with the Federal requirements. Moreover, no preliminary hearing is required.

21.12 The National Park Service (NPS) requested the opportunity to accompany State inspectors on visits to coal mines and to review permit applications which have potential impact on resources of NPS lands. The NPS asked for advance notice of such inspections and copies of inspection reports for these mines. This request can be achieved through the State's public participation procedures of Wyoming Rule Chapter XVII 1b wherein a person, who submits a written complaint to the regulatory authority, has a right of entry to, upon and through the exploration or surface coal mining operation. Prior to a permit issuing, any person can visit the minesite (see proposed rules). This comment has been forwarded to the State for further action as it deems appropriate. No point has been made which would be the basis of a disapproval of the program. The provisions for public participation also allow the opportunity for the NPS to review permits.

21.13 The National Park Service requested that it be identified in the Wyoming program as a source of information for archaeological, historical, faunal, floral, recreational and visual expertise. This comment is being provided to the State for its use in developing a data base and inventory system and for assisting applicants for permits. However, absence of explicit mention of the National Park Service in the program is not deemed a deficiency in the Wyoming program.

21.14 The Public Lands Institute noted that there is no requirement that exploration operations be reviewed and approved only if they do not interfere with the values in an unsuitable area. This requirement is included in proposed Rule XI 4a(3). Once enacted the proposed regulations would appear to be consistent with the Federal requirements.

21.15 The Fish and Wildlife Service stated that the State's definition of "person" (in W.S. 35-11-103(a)) fails to include agency, unit or instrumentality of Federal government and thereby excludes them from many intended provisions, including petitioning for designating lands unsuitable, or commenting on permit applications. The Wyoming definition of "person" does not exclude Federal agencies since it includes "any other legal entity." Any agency, unit, or instrumentality of Federal government would be a legal entity.

21.16 The National Park Service objected to the request for an applicant's determination of unsuitability, rather than a determination based upon input from the National Park Service where NPS lands are involved. The commenter goes on to discuss buffer zones and NPS role in defining such areas. This comment appears to address two different provisions.

The first is a requirement that permit applicants indicate whether the area to be mined is within an area designated as unsuitable, under study for designation, or where mining is prohibited by Section 522(e) of SMCRA. This requirement pertains only to the location of the proposed mine. It does not allow the applicant to make a determination on unsuitability except with respect to the spatial relationship of his operation to areas that have already been determined to be unsuitable or being considered for designation by the regulatory authority, or were designated by SMCRA. The applicant's information involves no judgment, and is readily verifiable. The second part of the comment deals with buffer zones. Buffer zones would be designated unsuitable only in response to a petition on which the State regulatory authority would make the decision. The State's definition of fragile lands covers buffer zones and is consistent with the definition in 30 CFR 762.5. NPS will have the same opportunity as any other Federal agency or member of the public to participate with the State in determining whether a particular area should be designated. The State requirements appear consistent with 30 CFR Chapter VII.

21.17 The Fish and Wildlife Service encouraged the State to use the same criteria for designating lands unsuitable as established for the Federal Coal Management Program. Wyoming has included, in W.S. 35–11–425(b), the same criteria for designating lands unsuitable as established in 30 CFR 762.11. This is the minimum requirement and there is no basis on which to require additional criteria.

21.18 The Heritage Conservation and Recreation Service asked that the program contain provisions to withhold from public disclosure specific locations of certain types of resources, such as archaeological sites and declining species sites, so that those sites are protected. The Federal rules upon which the Secretary must make his decision at this time contain no such requirement. The Secretary notes, however, that changes to the present Federal regulations will be required to comply with the Archaeological Resources Protection Act of 1979 and that a revision to the Wyoming program may then be necessary.

Finding 22

The Secretary finds that the Land Quality Division has the authority under Wyoming laws, and the Wyoming program contains provisions to provide for public participation in the development, revision and enforcement of Wyoming laws and regulations and the Wyoming program consistent, in part, with the public participation requirements of SMCRA and 30 CFR Chapter VII. This finding is made under 30 CFR 732.15(b)(10).

Provisions corresponding to public participation requirements in SMCRA and 30 CFR Chapter VII are included throughout Wyoming State statutes and rules submitted as part of the program. Volume 1, Part G.14, of the program submission describes the procedures to ensure that adequate public participation is provided throughout the development and functioning of the State program.

Discussion of significant issues raised in the review of Wyoming's public participation provisions follows.

22.1 The Federal regulations, at 30 CFR 786.14(a) and (c), require that an informal conference on a permit application be held in the locality of the proposed mining operations and that the regulatory authority shall arrange access to the proposed mining area for the objector. One commenter requested that the State provide for informal conferences which is a less strict provision that the State's. The Wyoming program does not include these provisions.

In a memorandum dated November 1, 1979, the State indicated that a citizen can make the above requests. The memorandum did not indicate that the State must comply with the requests. The memorandum also contends that additional mandatory language is not critical in light of new proposed language (not provided) that will make the holding of an informal conference discretionary to the administrator. The requirements to hold an informal conference in the locale of the proposed mine, if requested, and to provide access to objectors are mandatory in order for the program to be found consistent with the Federal regulations.

22.2 The Wyoming program relies upon the Administrative Procedures Act for all public participation processes. That Act does not provide for public participation in the enforcement of regulations, standards, reclamation plans, or programs established by the State.

By memorandum dated January 15, 1980, the State has agreed to develop provisions for public participation in those enforcement activities. If the change agreed to by the State were incorporated, the Wyoming program processes for allowing public participation would appear to be consistent with Federal requirements.

22.3 Wyoming's general rulemaking procedures, 9–4–103 of the Administrative Procedures Act, contain no provision for general publication of proposed rules but rather requires only that a twenty day notice of intended action be provided to the Attorney General and to members of the public who request such notice in advance. This, according to the commenter, is less stringent than the publication requirement of Section 501 of SMCRA. The commenter also points out that public hearings on proposed rules are not mandatory as in Section 501 of SMCRA. A hearing is required only if requested by at least 25 people, by a government entity or by an association, and the term "association" is not defined, the commenter concludes. The State has indicated that its practice was to publish a 30-day notice of intented action and to hold a public hearing on proposed rules. The State has agreed to incorporate this practice into its proposed rules. If adopted, the proposed rule change should make this provision consistent with the Federal requirements.

22.4 One commenter questions the language in W.S. 35–11–437(c)(ii) of the proposed amendments to the Environmental Quality Act which gives jurisdiction to any person having an interest which is or may be adversely affected to file a petition for review of a cessation order and to request a public hearing. Any person wishing to obstruct a mine from operating again, according to the commenter, can claim that he may be adversely affected, file a petition for review and demand a public hearing. In the meantime, the cessation order continues. The provisions of Section 525(a)(1) of SMCRA will be available to the person, according to the commenter, and inserting them into the State statute is ill-advised and detracts from the smooth resolution of the problem.

Two of the findings which the Secretary must make in order to approve the State program are a function of this public involvement: (1) That the program provides for public participation in the enforcement of State regulations and the State program is consistent with public participation requirements of the Federal Act and regulations (30 CFR 732.15(b) (10)); and (2) that the program provides for administrative and judicial review of State program actions in accordance with Sections 525 and 526 of the Federal Act (30 CFR 732.15(b)(15)). It would not be possible to make either of these findings without this provision, and the program cannot be found adequate until the State's proposed amendments are enacted.

22.5 Amax Coal Company and one other commenter questioned the determination by the director, as opposed to the court, of the "aggregate amount of all costs and expenses" to be assessed against a party in proposed W.S. 35-11-437(f), contending that such amount should be assessed only by a court. Even though the aggregate amount is determined by the director, a court has final review and determination authority. This provision, if enacted, appears acceptable as written.

22.6 Amax Coal Company objected to the provision allowing a citizen to accompany the inspector on an inspection which is a direct result of information provided by the citizen. Section 517(h) of SMCRA and 30 CFR Part 842 clearly give the citizen the right to file a complaint and to accompany the inspector on the minesite during an inspection. A State program must contain these provisions (Wyoming's proposed Rule XXVII 1b).

22.7 The Powder River Basin Resources Council expressed concern that Wyoming proposed Rule XVII 1(b) implies that no oral citizen complaints will be sufficient to initiate an inspection. 30 CFR 842.12 requires that all citizen complaints be submitted in writing. The Federal regulation allows oral complaints only if followed by a signed, written statement. The Wyoming rule, if promulgated, appears to be consistent with the Federal rule.

22.8 The National Wildlife Federation expressed concern that Wyoming omitted the requirement for a citizen complaint inspection within fifteen days as required under 30 CFR 842.12(d). Wyoming's program does not contain a provision for prompt citizen complaint inspection. The program is not consistent with the Federal requirement on this point.

22.9 Wyoming's analogue to Section 525 of SMCRA (providing for the award of costs and expenses, including attorney fees, in all administrative and judicial proceedings) is deficient, according to one commenter, who stated that proposed W.S. 35-11-437(e) does not provide for attorneys fees. If this problem is corrected, the commenter continued, Wyoming must ensure through regulation the award of fees consistent with the approach taken in the Federal regulations (43 CFR Part 4 1290).

This has been discussed with the State and the State has drafted a revised version of W.S. 35-11-437(f) which provides for the award of attorneys fees as in Section 525(e) of SMCRA. The State has not, however, proposed or promulgated any rules which are consistent to 43 CFR Part 4 regarding the award of attorneys fees. This omission may create an inconsistency with the Federal requirements.

22.10 One commenter inquired into the tort liability of the operator for injuries which are suffered by a private citizen while on a minesite inspection with an inspector. The commenter asked if the State does not assume liability, may the operator require the citizen to sign a release.

Proposed W.S. 35-11-701(a) of the Wyoming program identifies the operator's duties towards private citizens participating in inspections. Wyoming represented that the duty set out there reflected ordinary tort law principles governing that situation under State law. Page 15299 of the Preamble to the Permanent Program Regulations (March 13, 1979) rejects the requirement that citizens be required to sign a release from damages for any injury sustained while accompanying an inspector on the inspection. It states, "OSM has no objection to a citizen signing a release form if he wishes to do so, but there is nothing in the Act or the legislative history to require a citizen to sign a release. However, OSM will insist that the citizen follow MSHA safety requirements, and OSM regulations require that the citizen be under the direction, control and supervision of the inspector."

22.11 Four commenters disputed the validity of Wyoming's assertion that the Environmental Quality Act, in is present form, and the Administrative Procedure Act obviate the need for a citizen suit provision comparable to Section 520 of SMRA. The State has, in fact, submitted a draft statute, W.S. 35-11-902, which appears consistent with Section 520 of SMCRA. This was discussed in a telephone conversion of January 15, 1980, between Robert Uram of DOI and David Freudenthal and Nancy Wood of the State of Wyoming. See the proposed citizen suit statute attached to January 16, 1980, memorandum regarding the telephone conversation. (Administrative Record No. WY-113.) W.S. 35-11-902, as proposed, if enacted with the changes indicated, would appear to be consistent with Section 520 of SMCRA.

22.12 Proposed W.S. 35-11-437(f) provides for the assessment of expert witness fees in a manner similar to Section 520(d) of SMCRA. The proposed statute includes the phrase "a sum equal to the aggregate amount of all costs and expenses." This phrase would include expert witness fees. If enacted, W.S. 35-11-437(f) will likely meet the requirements of the Federal statutes for assessment of expert witness fees.

22.13 The State program includes provisions for informal review of citizen complaints as provided in Section 517(h) of SMCRA and 30 CFR 840.15, 842.12, and 842.15. Proposed W.S. 35-11-701(a), if enacted, and Rule XVII 1(b) of the State's proposed regulations, if promulgated, appear to be consistent with Section 517(h)(1) of SMCRA and 30 CFR 840.15, 842.12, and 842.15. The State must assure, in its resubmission, that an informal review of the adequacy and completeness of inspections, as in Section 517(h)(2) of SMCRA and 30 CFR 842.14, will be conducted in the same manner as a review of a decision not to inspect or enforce pursuant to Rule XVII 1b of the proposed State regulations. This was discussed at a meeting between DOI and the State on January 2-5, 1980 (Administrative Record No. WY-99), and during a telephone conversation between Richard Hall, Richard Robinson, Howard Roitman and Carl Pavetto of DOI and Nancy Wood of the State of Wyoming on February 5, 1980 (Administrative Record No. WY-134).

22.14 The Wyoming program does not require the regulatory authority to include a preamble in each set of new regulations (proposed or final). In contrast, Federal rules (1 CFR 18.12) require Federal agencies to include a preamble whenever rules are promulgated as proposed or final. One component of the preamble prescribed under 1 CFR 18.12 is information addressing the agency's response to substantive public comments. A commenter suggested that a similar provision be incorporated into the Wyoming program to assure that public comments are given due and sufficient consideration in rulemaking processes. Although this suggestion has merit, such a procedure is not required of a State under any Federal statute or regulation. The public participation procedures found in the Wyoming Administrative Procedures Act and the Wyoming Department of Environmental Quality's Rules of Practice and Procedure, however, appear to meet the minimum Federal requirements.

22.15 Several commenters stated that Wyoming could not omit a provision comparable to Section 520(f) of SMCRA which provides a cause of action for damages due to injuries resulting from violations of laws, regulations, orders or permit requirements of the program.

Wyoming states in its side-by-side analysis that Section 520(f) is merely a venue provision for Section 520(a) of SMCRA and not be included in the State program. That statement is incorrect. First, the legislative history of SMCRA shows that Section 520(f), "* * *

establishes a right of action for injuries resulting from an operator's violation of any rule, regulation, or order or permit issued under * * * [SMCRA]." H.R. Report No. 493, 95th Cong., 1st Sess. 110 (1977). (Emphasis added.) Second, venue for Section 520(a) is set forth in 520(c). Section 520(f) was not in the House version of SMCRA; it was added by the Senate and agreed to by the House in the Conference Committee. As 520(f) was not even in the original House bill, it is clear that what became 520(c) of SMCRA was the pertinent venue provision for Section 520(a). Finally, Section 520(f) could not possibly be a venue provision for 520(a). The only kind of relief that can be granted under 520(a) is injunctive or enforcement relief, commonly referred to as relief in the nature of equity. Section 520(f), on the other hand, addresses the method for obtaining an award of monetary damages. Damages, unlike injunctive relief, are matters of law and not of equity. It is very unlikely that Congress would provide venue for actions in equity by using language which could only be applicable to actions in law. Therefore, the commenters are correct that a provision for damages comparable to Section 520(f) must be included in the State program.

22.16 The Public Lands Institute contends that Wyoming does not provide citizen participation in administrative adjudication (contested cases) to the same degree as does the Federal Act and Regulations (SMCRA 503(a)(7) and 30 CFR 840.15). The State's Administrative Procedures Act, according to the commenter, does not provide the necessary standards for citizen intervention. Wyoming's provisions on intervention are found in Chapter II of the Proposed Department Rules of Practice and Procedure, Section 7, as well as Rule 2 of the Wyoming Rules of Civil Procedure, incorporated by Section 14 of the same Chapter. It appears that the right of intervention may not be as broad as under the Federal regulations. Wyoming should, in its resubmission, provide further clarification.

22.17 The Secretary believes that Wyoming has adequately provided for public participation in the development and revision of State regulations and the State program. Wyoming has gone beyond ensuring public access to the legislative process and administrative rulemaking to specifically solicit comments on the State program from industry, the environmental community and legislative leaders. The State has indicated its intent, in Vol. 1, Part G.14, of its submission (Administrative Record WY-99) to follow up on the comments received by sending copies of the proposed statutory and rulemaking changes to the same set of interested parties. While most of the interests served by a public participation process are satisfied by the Wyoming Administrative Procedure Act and the Department's Rules of Practice, the legislative process is also an important aspect of public participation. Through all of these methods, then, Wyoming has provided for adequate public participation in the development and revision of the State regulations and State program.

22.18 Wyoming general rulemaking procedures, 9-4-103 of the Administrative Procedures Act, contain no provision for general publication of proposed rules, but rather a twenty day notice of intended action is provided to the attorney General and to members of the public who request such notice in advance. This, according to the commenter, is less stringent than the publication requirement of SMCRA 501. The commenter also points out that public hearings on proposed rules are not mandatory as in SMCRA 501. A hearing is required only if requested by at least 25 people, by a government entity or by an association, and the term "association" is not defined, the commenter concludes.

The State has since represented that its practice was to publish a 30-day notice of intended action and to hold a public hearing on proposed rules during the meeting between OSM and Wyoming officials on January 2-5, 1980 (Administrative Record No. WY-99). The State further agreed to incorporate this practice into its proposed rules. If effected, the proposed rule change would apparently resolve the commenter's concern.

Finding 23

The Secretary finds that the Land Quality Division has the authority under Wyoming laws and the Wyoming program includes provisions to monitor, review, and enforce the prohibition against indirect or direct financial interest in coal mining operations by employees of the Wyoming Land Quality Divison consistent, in part, with 30 CFR Part 705 (restrictions on financial interests of State employees). This finding is made under 30 CFR 732.15(b)(11).

Provisions corresponding, in part, to Section 517(g) of SMCRA and 30 CFR Part 705 are incorporated in the Wyoming program through Wyoming Personnel Rules PPM 3.01. Volume 1, Part G.12, of the program submission describes the procedures by which the Department of Environmental Quality will implement provisions for financial interest control.

Discussion of the significant issues raised in the review of Wyoming's conflict of interest provisions follows.

23.1 The Wyoming statute W.S. 35-11-111(a), one commenter commented, states that Environmental Quality Council (EQC) members with more than a 10 percent interest in permit applications cannot take part in decisions on such applications, while Section 517(g) of SMCRA states that no employee performing any function under the Act shall have a direct or indirect financial interest in any coal mining operation.

Under 30 CFR 705.5, definitions for applicability of the conflict of interest regulations, Boards established by State law or regulations to represent multiple interests are not considered to be employees and thus are not subject to the restriction of financial interest provisions of 30 CFR Part 705. Thus, the State provision is not inconsistent with the Federal requirements.

23.2 The State program does not include criminal sanctions for violation of the Wyoming conflict of interest provision as in Section 517(g) of SMCRA. This was discussed at a meeting between DOI and the State on January 2-5, 1980. It is not necessary for the State to have criminal enforcement power to resolve conflict of interest violations. 30 CFR 705.4(a)(3) specifically states that a State need not have such penalties, but may refer such cases to the Director of OSM.

Finding 24

The Secretary finds that the Land Quality Division has the authority under Wyoming laws and the Wyoming program includes provisions to require the training, examination, and certification of persons engaged in or responsible for blasting and the use of explosives in accordance with Section 719 of SMCRA to the extent required for approval of its program. This finding is made under 30 CFR 732.15(b)(12).

Provisions corresponding to Section 719 of SMCRA are incorporated in Wyoming statute W.S. 30-3-501 and W.S. 35-11-415. There are no regulations required at this time. Volume 1, Part G.13 of the program submission contains a description of the cooperative effort between the State Inspector of Mines and the Department of Environmental Quality.

Only one significant issue was raised in the review of Wyoming's blaster certification provisions. The Wyoming program states that "all blasting operations shall be conducted by

experienced, trained, competent persons * * * (who) * * * shall have obtained a certificate of completion of training and qualifications as required by State law." (Rule VI 1e) An agreement (MOU) between the Land Quality Division and the Wyoming State Inspector of Mines is proposed in the Wyoming program submission to require issuance of certificates to persons handling explosives at coal mines. Since there are currently no Federal regulations for this area, the Wyoming provisions are currently consistent with Federal regulations.

Finding 25

The Secretary finds that the Land Quality Division has the authority under Wyoming laws and the Wyoming program contains provisions to provide small operator assistance consistent, in part, with 30 CFR Part 795 (small operator assistance). This finding is made under 30 CFR 732.15(b)(13).

Provisions corresponding to Section 507(c) of SMCRA and 30 CFR Part 795 are incorporated in Wyoming statute W.S. 35-11-109. Volume 1, Part G.16, of the State program submission contains a description of the small operator assistance program within the State.

Discussion of significant issue raised in the review of Wyoming's small operator assistance program follows.

25.1 No authority is cited in the Wyoming regulations or statutes for providing a small operator assistance program (SOAP). Rule XXIII would provide for studies to be performed for small operators seeking assistance. That rule refers to W.S. 35-11-109 (powers and duties of the director) and 35-11-110 (powers of the administrator) as the authority to do the studies. Those statutory provisions provide for studies, but there is no specific reference to a SOAP program.

Although W.S. 35-11-109 states that the director may request studies, the program narrative make it clear that the director intends to do so, and Rule XXIII 3b states the director shall provide assistance to qualified small operators. The narrative of the program submission (G.16) states the SOAP assistance will be approved through the administrator and supported by the Land Quality Division staff. The application form used by the Department will be used as a "short form." Rule XXIII, if promulgated, will provide instructions for applications, laboratory procedures and information handling. Funding procedures are those of W.S. 9-3-2001-2031, according to the State program narrative.

These provisions of the Wyoming program appear to provide the framework for a SOAP program consistent with the Federal requirements.

25.2 The Wyoming Land Quality Division regulations, at Rule XXIII 3b(6), mention that "qualified personnel" will have a legal right of entry to the lands being mined and adjacent lands. 30 CFR 795.14(f)(2) delegates this right to the Office of Surface Mining, regulatory authority, and laboratory personnel. The term "qualified personnel" is not defined by Wyoming to include the entities mentioned in the Federal regulation. If the proposed rule is enacted, and the program is clarified to indicate that "qualified personnel" includes the people covered by 30 CFR 795.14(f)(2), the program appears to be adequate in this respect.

Finding 26

The Secretary finds that the Land Quality Division has the authority under Wyoming laws and the Wyoming program contains provisions to provide protection of employees of the Land Quality Division corresponding with the protection afforded Federal employees under Section 704 of SMCRA (protection of employees). This finding is made under 30 CFR 732.15(b)(14).

Provisions corresponding to Section 704 of SMCRA are incorporated in Wyoming statute W.S. 35-11-901. While there is no specific reference to protection of State employees in the presentation of systems in the State program submission, the Secretary finds that incorporation of the appropriate authority is sufficient.

Only one significant issue was raised in the review of Wyoming's employee protection provisions. Section 704 of SMCRA (30 U.S.C. 1294) provides that anyone interfering with a Federal employee in enforcement of the Act shall be liable to a maximum $5,000 fine and up to one year imprisonment. Wyoming currently has no comparable statutory provision but has proposed a new provision as W.S. 35-11-901(m) which provides identical protection to that of Section 704 of SMCRA. If the change is enacted, the Wyoming program appears to be adequate with regard to this provision.

Finding 27

The Secretary finds that Wyoming has the authority under its laws and the Wyoming program contains provisions to provide for administrative and judicial review of State program actions in accordance, in part, with Sections 525 and 526 of SMCRA (review of decisions) and 30 CFR Chapter VII, Subchapter L (inspection and enforcement). This finding is made under 30 CFR 732.15(b)(15).

Provisions corresponding to Section 525 and 526 of SMCRA and to Subchapter L of 30 CFR Chapter VII are incorporated in Wyoming statute W.S. 35-11-406 and 437, Wyoming Rules of Civil Procedure, Rule 72.1, Wyoming Rules of Practice and Procedure, Chapter 2, Wyoming Administrative Procedures Act W.S. 9-4-107 and 114 and Wyoming rules Chapters XVII and XVIII. Volume 1, G.15, of the program submission contains a description of the adminsitrative and judicial procedures which are available for the review of administrative decisions, actions and refusals to act. Additional provisions are included in Vol. 1, G.4, of the program submission, which sets out administrative and judicial review of inspection and enforcement actions.

Discussion of significant issues raised in the review of Wyoming's administrative and judicial review provisions follows.

27.1 The Powder River Basin Resources Council states that W.S. 35-11-701(c) provides that upon request of an operator an order pertaining to a violation *shall* be stayed pending a final determination from the Council. W.S. 35-11-437(c) provides that such an order *may* be stayed and requires that the Council give a detailed reason supporting a decision to grant a stay. The commenter states that W.S. 35-11-437(c) is preferable since it allows a case-by-case determination. This was discussed at meetings with Wyoming on January 2-5, 1980. W.S. 35-11-437(g) would provide that Section 437 is controlling over Section 701(c). Wyoming also has stated that Section 35-11-701(c) does not apply to coal mining.

27.2 The State's program fails to include the statement corresponding to Section 525(b) of SMCRA which provides that Secretarial decisions on applications for review regarding cessation orders shall be issued within 30 days of receipt. This omission makes the State program more stringent than the Federal requirement and is acceptable.

Finding 28

The Secretary finds that the Land Quality Division has the authority under Wyoming laws and the Wyoming program contains provisions to cooperate and coordinate with and provide documents and other information to the Office of Surface Mining under the provisions of 30 CFR Chapter VII. This finding is made under 30 CFR 732.15(b)(16).

Wyoming Rules XIII, XIV, and XVII provide for notice of applications for permits, applications for permit revisions, and actions to revoke permits. In addition, the Wyoming Administrative Procedures Act assures that information is publicly available.

Fourteen comments, including from the Bureau of Land Management and Geological Survey, were received regarding Wyoming's proposed cooperative agreement between OSM and the State of Wyoming for regulation of coal exploration and mining activities on lands covered by the Federal lands program in 30 CFR Subchapter D. These comments will be included in OSM's cooperative agreement file and will be considered in the cooperative agreement review as provided in 30 CFR 745.11.

Final action on the cooperative agreement will not occur until nearer the final decision on the State program. The cooperative agreement will be subject to public review and comment under a separate rulemaking action at that time.

Finding 29

The Secretary finds that the Wyoming laws and regulations and the Wyoming program do not contain provisions which would interfere with or preclude implementation of those in SMCRA and 30 CFR Chapter VII. This finding is made under 30 CFR 732.15(c).

In Wyoming's permanent program submission, laws other than Wyoming's Environmental Quality Act were referenced as legal authority for various sections of Wyoming's program. Other State laws and regulations directly affecting the regulation of surface coal mining and reclamation operations include:

Wyoming Administrative Procedures Act;

Wyoming Water Quality Rules and Regulations;

Wyoming Air Quality Rules and Regulations;

Wyoming Solid Waste Management Rules and Regulations;

Wyoming Water Law;

Wyoming State Engineer Regulations and Instructions;

Wyoming Water Laws;

Wyoming Mine and Minerals Laws;

Department Rules of Informational Practices;

Wyoming Public Records Law; and

Wyoming Open Meeting law.

In the substantive review of the program submission, OSM either reviewed these laws and regulations as part of the adequacy analysis or reviewed them for their potential for conflicting with the statutory and regulatory elements of the State program. In using those laws and regulations and in reviewing these for scope and purpose, OSM did not find conflicts which might weaken those State laws and State regulations which form the basis for implementation of a program equal to or more stringent then Pub. L. 95–87 or 30 CFR Chapter VII.

Wyoming's program includes proposed amendments to the Water Quality Rules and Regulations, Solid Waste Management Rules and Regulations, Wyoming Mines and Minerals Regulations, and Engineers Rules and Regulations. These proposed amendments must be enacted before Wyoming's program can be approved. Although the existing laws do not conflict with an adequate program, they do not contain sufficient provisions to constitute one.

Two commenters expressed the belief that the Federal courts may enjoin or in some other way alter Pub. L. 95–87. One of the commenters proposes language, supported by the other commenter, which would make it necessary to litigate the validity of various components of the surface mining law in one form, thus enabling the State to avoid the cost of unnecessary litigation. This language reads as follows: "If any part of Pub. L. 95–87, Federal Surface Mining Control and Reclamation Act of 1977, or regulations adopted by the Department of Interior thereunder, is permanently or temporarily enjoined or set aside, or if enforcement of any such law or regulations is permanently or temporarily enjoined or suspended by any court of competent jurisdiction, then enforcement of any laws and regulations derived from or substantially based on that Federal law or regulation shall likewise be suspended based on that Federal law or regulation shall likewise by suspended automatically and shall remain in suspense unless and until such Federal law or regulations are reinstated or any bar to enforcement of same is removed. When and if any of the provisions of the Federal act or regulations are deleted or amended, declared invalid or set aside, the State regulatory authority will enact regulations where needed to replace those so set aside." The State has chosen not to replace those so set aside. The State has chosen not to incorporate this provision in its program submission. Such a provisions is not required by the SMCRA or Federal regulations.

Finding 30

The Secretary finds that the Land Quality Division and other agencies having a role in the program would not have sufficient legal, technical, and administrative personnel, but would have sufficient funds to implement, administer, and enforce the provisions of the program, the requirements of 30 CFR 732.15(b) (program requirements), and other applicable State and Federal laws. This finding is made under 30 CFR 732.15(d).

Volume 1, Parts I and J, contain descriptions of existing and proposed staff, and how such staff will be adequate to carry out the functions for the projected workload to ensure that coal exploration and surface coal mining and reclamation requirements of SMCRA and the Federal regulations are met. Volume 1, Part L, contains a description of the actual capital and operating budget to administer the State program for the prior and current fiscal years, and the projected annual budget for the next two fiscal years.

The State regulatory authority and other agencies having a role in the State program do not have sufficient legal, technical, and administrative personnel and sufficient funding to implement, administer and enforce the provisions of the program, the requirements of 30 CFR 732.15(b) and other applicable State and Federal laws.

Wyoming's Land Quality Division has a full-time staff of 30 persons. Due to an integrated managment system, 24 of these persons are technically qualified to perform functions associated with inspection, enforcement, and mine plan review. The Wyoming program assigns 16.34 full-time equivalents (FTE) to the implementation of their surface coal mining program. Analysis of workload requirement indicates a 21.47 FTE need, a 5.13 FTE differential. The Wyoming Land Quality Division staff is aware of the above analysis and have indicated that the 5.13 FTE are available; however, the State has chosen not to present in writing evidence to verify this contention. Wyoming will submit additional data in the future, but at this time the staffing pattern cannot be recommended for approval.

Two commenters, including the Bureau of Land Management, expressed concern that Wyoming does not have adequate staff to comply with the six month permit application review deadline established by W.S. 35–11–401 or to conduct inspections in a timely manner. OSM agrees that the State's staffing level is inadequate.

In addition, Wyoming's assumption of eight enforcement actions per year, on which it proposed its staffing conflicts with OSM's anticipated figure of some 60 enforcement actions per year. Wyoming's inspection and enforcement staffing, as presently written is unacceptable. More justification is

needed to demonstrate that the staffing is adequate.

F. The Secretary's Decision

Based on the Secretary's findings discussed above, the Secretary is approving the Wyoming program in part. Because the entire program is not approved, the permanent program under SMCRA is not yet in effect in Wyoming. The interim program will continue in effect on all lands in Wyoming until after Wyoming has had the opportunity to resubmit those parts of the program not being approved at this time.

Wyoming may, within sixty days from the date of this notice, resubmit those parts of its program not now being approved. If all those parts are approved, Wyoming will assume primary jursidiction for implementing and enforcing the permanent program within its borders. If the resubmitted parts are not all approved, the Secretary will implement a Federal program in Wyoming, and the Department of the Interior will have primary jurisdiction, under SMCRA, for coal mining in Wyoming.

The following parts of the Wyoming program are approved.

1. Wyoming Environmental Quality Act:

Article 1 General Provisions

W. S. 35-11-101. Short title.
W. S. 35-11-102. Policy and purpose.
W. S. 35-11-103. Definitions.

Note.—A new subsection is expected to be added, W. S. 35-11-103(f)(xxi), to provide a definition of steep slope mining.

W. S. 35-11-104. Created.
W. S. 35-11-105. Divisions Enumerated.
W. S. 35-11-106. Powers, duties, functions and regulatory authority.
W. S. 35-11-107. Records and physical properties; rights of personnel; successors.
W. S. 35-11-108. Appointment of director and division administrators; term; salaries; employment of assistants.
W. S. 35-11-109. Powers and duties of director. Except that W.S. 35-11-109(a)(iv) and W. S. 35-11-109(a)(vi) are disapproved.
W. S. 35-11-110. Powers and duties of administrators.
W. S. 35-11-111. Independent environmental quality council created; terms; officers; meetings; expenses.
W. S. 35-11-112. Powers and duties of the environmental quality council.
W. S. 35-11-113. Advisory boards created; membership; terms; meetings; expenses.
W. S. 35-11-114. Powers and duties of advisory boards.
W. S. 35-11-115. Power of director to issue emergency orders.

Article 2 Air Quality

W. S. 35-11-201. Discharge of emission contaminants; restrictions.
W. S. 35-11-202. Establishment of standards.

Article 3 Water Quality

W.S. 35-11-301 Prohibited acts.
W.S. 35-11-302 Administrator's authority to recommend rules, regulations, etc.

Article 4 Land Quality

W.S. 35-11-401 Compliance generally: Exceptions.

(**Note.**—Although the existing language is approved, this section is expected to be amended to include new requirements for permits and steep slope mining. See Wyoming submission, Vol. IV, pp A2-5 through A2-13 (Administrative Record No. WY-3). The proposed language for the new W.S. 35-11-401(d) is found under item 1 in the statutory memorandum in the orange book (Administrative Record No. WY-99). Before the Secretary can approve the program the EQA must be amended as proposed or the program changes in some other manner to accomplish the same result. W.S. 35-11-401(d) (vi), (viii) and (ix) are disapproved.

W.S. 35-11-402 Establishment of standards.

(**Note.**—W.S. 35-11-402(a) (i) and (ii) is approved based on information correcting Wyoming's side-by-side analysis. This information was presented on January 2-5 in connection with discussion of item 13 of the statutory memorandum in the orange book (Administrative Record No. WY-99).

W.S. 35-11-402(a) is proposed to be amended by adding a new subsection (xi) relating to coal exploration. See Administrative Record No. WY-3, Vol. IV, p. A2-13. Before the Secretary can approve Wyoming's program, the EQA must be amended as proposed or the program changed in some other manner to accomplish the same result.

W.S. 35-11-403 Power of administrator of land quality division.
W.S. 35-11-404 Drill holes to be capped, sealed or plugged. Except W.S. 35-11-404 (g), (j) and (k) are disapproved. (See Administrative Record No. WY-3, Vol. IV, p. A2-14).
W.S. 35-11-405 Permit defined; no mining operation without valid permit; when validity terminated. Except W.S. 35-11-405(e) is disapproved (see Administrative Record No. WY-3, Vol. IV, p. A2-15).
W.S. 35-11-406 Application for permit; generally; denial; limitations.
Exceptions: W.S. 35-11-406(g); W.S. 35-11-406(h); W.S. 35-11-406(j).

(**Note.**—Wyoming's submission includes proposed new sections W.S. 35-11-406(a)(xiv) and W.S. 35-11-406(j). (See Administrative Record No. WY-3, Vol. IV, p. A-16 and A-19). Before the Secretary can approve the Wyoming program, the QA must be amended as proposed or the program changed in some other manner to accomplish the same result.

Further Note.—Wyoming proposed to repeal W.S. 35-406(h) (xii), (xiii) and (xiv). See Administrative Record No. WY-3, Vol. IV, p. A2-32. The secretary explicitly disapproves such proposed repeal, and if enacted it will not affect the approval and effectiveness of the sections intended to be repealed.

W.S. 35-11-407 Water impoundments.
W.S. 35-11-408 Permit transfer.
W.S. 35-11-409 Permit revocation.
W.S. 35-11-410 License to mine for minerals: application.
W.S. 35-11-411 Annual report.
W.S. 35-11-412 License revocation or suspension.
W.S. 35-11-413 Special license to explore for minerals by dozing.
W.S. 35-11-414 Same; application; standards; fee; bond; denial; appeal.
W.S. 35-11-415 Duties of operator.

Note.—Wyoming's submission includes a proposed new section W.S. 35-11-415(b)(xii) relating to replacement of water supplies. Before the Secretary can approve Wyoming's program, the EQA must be amended as proposed or some other change must be made in the program to accomplish the same result.

W.S. 35-11-416 Protection of surface owner.
W.S. 35-11-417 Bonding provisions.
W.S. 35-11-418 Cash, etc. in lieu of bond.
W.S. 35-11-419 Bond cancellation.
W.S. 35-11-420 Cancellation of surety's license; substitution.
W.S. 35-11-421 Bond forfeiture proceedings.
W.S. 35-11-422 Forfeited bond inadequate; suit to recover reclamation costs.
W.S. 35-11-423 Release of bonds.

Exception.—W.S. 35-11-423(d) is disapproved. (See the Wyoming program submission for a proposed change, Administrative Record No. WY-3, Vol. IV, p. A2-23.)

W.S. 35-11-424 Deposit of fees and forfeitures.
W.S. 35-11-425 Designation of loads unsuitable.

Exceptions.—W.S. 35-11-425(b)(i) and W.S. 35-11-425(f) are disapproved. (See the Wyoming program submission for proposed changes in these sections, Administrative Record No. WY-3, Vol. IV, p. A2-24.)

W.S. 35-11-427 In situ mining permit; permit required; authority of land quality division exclusive.
W.S. 35-11-428 Same; requirements for application; contents of application.
W.S. 35-11-429 Same; contents of permit.
W.S. 35-11-430 Duties of in situ mine operator; records; annual report.
W.S. 35-11-431 Research and development license; renewal; application.
W.S. 35-11-432 Same; grounds for denial; appeal.
W.S. 35-11-433 Same; bond required; release or forfeiture; review of license.
W.S. 35-11-434 Same; notice of incomplete application; when application deemed complete.
W.S. 35-11-435 Records to be filed on completion; abandoned drill holes.
W.S. 35-11-436 Existing in situ permits.

Article 5 Solid Waste Management

W.S. 35-11-501 Other powers and duties of director.
W.S. 35-11-502 Solid waste disposal requirements.
W.S. 35-11-503 Director authorized to promulgate rules and regulations for operation of solid waste disposal sites.

Article 6 Variances

None approved.

Article 7 Complaints

W.S. 35-11-701 Complaint; investigation; conference; cease and desist order; hearing; referee.

Exception.—W.S. 35-701(a) is disapproved. Wyoming has proposed to amend this section to cure the deficiency. See the Wyoming program WY-3, Vol. IV, p. A2-25.

Article 8 Permits

W.S. 35-11-801 Issuance of permits.
W.S. 35-11-802 Refusal to grant permits.

Article 9 Penalties

W.S. 35-11-902 Civil or cirminal remedy.

Article 10 Judicial Reviews

W.S. 35-11-1001 Judicial review.
W.S. 35-11-1002 Publication of rules and regulations.

Article 11 Miscellaneous Provisions

W.S. 35-11-1101 Records available to the public; restrictions.
W.S. 35-11-1102 Hearing unnecessary prior to issuance of emergency order.
W.S. 35-11-1103 Property exempt from ad valorem taxation.
W.S. 35-11-1104 Limitation of scope of act.

2. Wyoming Water Law, W.S. 41-3-301 through W.S. 41-3-938.

3. Wyoming Mines and Minerals Law, W.S. 30-6-101 through W.S. 30-6-101 (Explosives); W.S. 30-3-201 through W.S. 30-3-225 (Safety); W.S. 30-2-415 and W.S. 30-3-501 through W.S. 30-3-506 (Explosives).

4. Wyoming Administrative Procedures Act, W.S. 9-4-101 through W.S. 9-4-115.

5. Wyoming Department of Environmental Quality Rules of Information Practice.

6. Wyoming Public Records Law, W.S. 9-9-101 through W.S. 9-9-105.

7. Wyoming Open Meeting Law, W.S. 9-11-101 through W.S. 9-11-107.

8. Memorandum of Understand (MOU) dated August 9, 1979, between the Wyoming Game and Fish Department and Wyoming DEQ, Land Quality Division.

9. MOU executed July 19, 1979, and August 6, 1979 between the Wyoming Recreation Commission and the Wyoming DEQ.

10. MOU, executed by DEQ August 9, 1979, between the Wyoming Inspector of Mines and Wyoming DEQ. The Secretary notes that he has not been presented a copy of the MOU as executed by the Wyoming Inspector of Mines.

11. The following Guidelines of the Wyoming DEQ, Division of Land Quality:

a. Guideline No. 1 Soil and Overburden
b. Guideline No. 2 Vegetation
c. Guideline No. 3 Soil Suitability
d. Guideline No. 4 (Revised) Water Sampling
e. Guideline No. 6 Permit Organization
f. Guideline No. 7 Hydrology
g. Guideline No. 8 Sediment Pond; Sediment Storage

12. Contract dated November 1, 1978, between Wyoming DEQ and the Nature Conservancy, relating to data gathering of information for designation of lands unsuitable for coal mining.

13. Contract dated February 15, 1979, between Wyoming DEQ, Land Quality Division and the Geological Survey of Wyoming relating to data gathering for designation of lands unsuitable for coal mining.

14. Contract dated April 19, 1979, between Wyoming DEQ, Land Quality Division and the Wyoming Recreation Commission relating to collection of data for designation of areas unsuitable for coal mining.

15. Contract dated May 1, 1979, between Wyoming DEQ, Land Quality Division and the Wyoming Game and Fish Department for collection of data for designation of lands unsuitable for coal mining.

16. Wyoming DEQ Policies and Procedures Manual for Financial Interest Restrictions.

17. Wyoming Department of Administration and Fiscal Control Laws, W.S. 9-30-2001 through W.S. 9-20-2031.

18. Wyoming Department of Administration and Fiscal Controls, Division of Purchasing and Property Control, Purchasing Section, Procurement Instructions.

19. Wyoming DEQ Manual of Expenditures.

The following parts of the Wyoming program are disapproved:

1. The following sections of the Wyoming Environmental Quality Act:

W.S. 35-11-109(a), (iv) and (vi). See proposed amendments in Wyoming program. (Administrative Record No. WY-3, Vol. IV, p A2-5 through A2-7.)

W.S. 35-11-401(d)(vi), (vii) and (ix).

(Note.—During the January 2-5 meetings the State of Wyoming proposed that these provisions should be acceptable, and offered to supply an opinion of its Attorney General. (See orange book, statutory memorandum, p. 4-Issue 12 (Administrative Record No. WY-99). A proposed opinion has been submitted, informally, but it not part of the record and accordingly cannot be the basis of approval of these sections.))

W.S. 35-11-404(g) (j) and (k). (See Wyoming program, Adminstrative Record No. WY-3, Vol. IV, p. A2-14.)

W.S. 35-11-405(e). See Wyoming program, Administrative Record No. WY-3, Vol. IV, p. A2-15.

W.S. 35-11-406(g), (h) and (j). See proposed changes in the program (WY-3, Vol. IV, part A2) and the orange book WY-99, Statutory Memo; p. 4).

W.S. 35-11-423(d). See discussion of approved parts of W.S. 35-11-423, immediately above.

W.S. 35-11-425(b)(i) and (f). See the Wyoming program for proposed changes. Administrative Record WY-3, Vol. IV, p. A2-24.

W.S. 35-11-426 In situ mineral mining permits and testing license. Proposed revisions to this Section are found in the Wyoming program, Administrative Record No. WY-3, Vol. IV, p. A2-24.

W.S. 35-11-601 Applications; authority to grant; hearing; limitations; renewals; judicial review; emergencies. Wyoming has proposed to amend this section by addition of a new subsection (p). See Wyoming submission, Administrative Record No. WY-3, Vol. IV, p. A2-25. The Secretary cannot approve this section until it is changed to achieve the results of the proposed amendment, which has been changed after discussions between OSM and the DEQ. See Administrative Record No. WY-118 (Statutory Memorandum changes).

W.S. 35-11-701(a). See discussion above relating to approved parts of W.S. 35-11-701.

W.S. 35-11-901 Violations of Act; penalties. Wyoming has proposed to amend this section to cure the deficiencies. See Wyoming submission, Administrative Record WY-3, Vol. IV, p. A2-26 through A2-31. Note that the proposed amendments have been further changed in item 6 in the statutory memorandum in the orange book (Administrative Record No. WY-99).

In addition to the enumerating sections of existing law which are disapproved, the Secretary finds that the program is deficient for failure to have provisions which would accomplish the results intended by proposed amendments or additions of the following sections discussed above under approved parts:

W.S. 35-11-401(d).
W.S. 35-11-402(a).
W.S. 35-11-406(a)(xiv).
W.S. 35-11-406(j).
W.S. 35-11-415.
W.S. 35-11-437 (see Wyoming program, Administrative Record No. WY-3, Vol. IV, p. A2-2).

Finally, no Wyoming statute has provisions for citizen suits.

2. Wyoming Land Quality Rules and Regulations. These rules are disapproved in their entirety because they are proposed to be so extensively amended that virtually no significant identifiable portion is likely to remain unaffected. See Administrative Record No. WY-119.

3. Wyoming Water Quality Rules and Regulations. These rules are disapproved because Wyoming proposed to amend them significantly. See Administrative Record No. WY-3, Vol. V, Section B.2.

4. Wyoming Air Quality Standards and Regulations. These rules are disapproved because Wyoming proposed to amend them significantly. See Administrative Record No. WY-3, Vol. V, Section B.4.

5. Wyoming Solid Waste Management Regulations. These rules are disapproved because Wyoming proposed to amend them significantly. See Administrative Record No. WY-3, Vol. V, Section B.6.

6. Wyoming State Engineer Regulation and Instructions. These documents are disapproved because Wyoming proposes to amend them significantly. See Administrative Record No. WY-3, Vol. V, Section B.6.

7. Wyoming State Inspector of Mines rules relating to blaster certification. These rules are disapproved because they have not been adopted. See Administrative Record WY-3, Vol. V.

8. Rules of Practice and Procedure, Wyoming DEQ. These rules are disapproved because Wyoming intends to amend them significantly. (See Administrative Record No. WY-13, Vol. V, Section B.14 and orange book (WY-99.))

9. Memorandum of Understanding (MOU) dated August 9, 1979, between Department of Environmental Quality Divisions. This MOU is disapproved because it is proposed to be significantly amended. See orange book (WY-99).

10. The partially executed MOU signed by DEQ, August 9, 1979, between the Wyoming State Engineer and the DEQ. This MOU is disapproved because it is proposed to be significantly amended. See orange book (WY-99).

11. Guideline No. 5 (Wildlife), dated August 9, 1979, is disapproved because it has not yet been adopted. (See WY-3, Vol. V, Section G.1.e).

The Secretary received several comments on the process of review and the alternative of partial approval for the Wyoming program. The National Wildlife Federation (NWF) and the Public Lands Institute (PLI) have made several comments regarding the propriety of meetings between officials of the Department of the Interior and the State of Wyoming from January 2 to 5, 1980. They allege that the meetings appear to be "negotiating sessions" where hard and fast "deals" were struck without benefit of the public's right to know, review and comment.

The sessions were largely for the purposes of providing reliable information on an expedited basis to the State of Wyoming, due to the State's very brief 1980 legislative session and of discussing apparent deficiencies in Wyoming's proposed rules which had become apparent from public comments and Interior Department review of Wyoming's program. The State clearly understood that any conclusions were merely tentative and subject to further analysis and public comment.

The meetings were entirely in keeping with procedures required for rulemakings as well as with the Department's own announced policies found in guidelines published September 19, 1979, 44 FR 54444. Voluminous notes and records of the meetings were kept and made available for public inspection and comment, and the record was kept open for an additional period to enable the public to review and comment on the minutes and notes of the meetings. The commenters have in no way been foreclosed from affecting the outcome of any issue discussed in the January meetings. In fact, public interest groups did review the records of the meetings and commented upon them. See, for example, comment of Environmental Policy Institute, dated January 18, 1980, Administrative Record No. WY-116.

No decisions have been made on the basis of the meetings, although analysis of the State's response to significant issues discussed at the meetings have been included in Part E of this notice. All of the materials and the State's program revisions as a result of the meetings will be available during public participation processes in the program resubmission.

These commenters also suggest that the Wyoming program be disapproved in its entirety and that the State begin anew on resubmission. Aside from the fact that that approach would be administratively inefficient, and contrary to the two-phase submission process contemplated by Section 503(b) of SMCRA, there is no doubt that the Secretary may choose to approve the *part* of a program which is acceptable and disapprove the *part* which is not. Section 503(b) of SMCRA explicitly states that the Secretary shall approve or disapprove a program "* * * in whole or *in part* * * *" For administrative efficiency, the Secretary chooses to approve the Wyoming program in part and disapprove it, in part.

Additional Findings

The Secretary has determined that, pursuant to Section 702(d) of SMCRA, 30 U.S.C. 1292(d), no environmental impact statement need be prepared on this approval in part.

Note.—The Secretary has determined that this document is not a significant rule under E.O. 12044 or 43 CFR Part 14, and no regulatory analysis is being prepared on this approval in part.

Dated: March 25, 1980.

Cecil D. Andrus,

Secretary of the Interior.

[FR Doc. 80-9697 Filed 3-28-80; 8:45 am]

BILLING CODE 4310-05-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

(CCGD3-80-1A)

33 CFR Part 110

Special Anchorage Area, Oyster Bay, N.Y.

AGENCY: Coast Guard, DOT.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: At the request of the Incorporated Village of Centre Island, Oyster Bay, New York, the Coast Guard is proposing to establish a special anchorage in Oyster Bay Harbor at Oyster Bay, New York. This designation is needed to accommodate existing and anticipated increases of recreational boating in the area. The proposal will enhance navigational safety by providing charted indication (by depiction on appropriate charts) to passing vessels that unlighted vessels or vessels not sounding fog signals may be present in the anchorage and by reducing congestion in the adjacent, existing special anchorage described in 33 CFR 110.60 (u-2).

DATES: Comments must be received on or before May 16, 1980.

ADDRESS: Comments should be submitted to, and are available for examination at, the Office of the Commander (mps), Third Coast Guard District, Building 108, Governors Island, New York 10004.

FOR FURTHER INFORMATION: Captain J. B. Ekman, Project Manager, Chief, Port Safety Branch, Coast Guard District Three (mps), Building 108, Room 108, Governors Island, New York 10004 (212-668-7179).

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in this proposed rulemaking by submitting written views, data, or arguments. Each person submitting a comment should include the writer's name and address, identify the specific section of the proposal to which the comment applies, and give the reason for the comments. All comments received before the expiration of the comment period will be considered before final action is taken on the proposal.

DRAFTING INFORMATION: The principal persons involved in drafting this proposal are: Lieutenant William St. J. Chubb, Port Safety Officer, Third Coast Guard District Port Safety Branch, and Lieutenant Thomas J. Donlon, Project Attorney, Third Coast Guard District Legal Office.

DISCUSSION OF THE PROPOSED REGULATION: The area proposed for designation as a special anchorage lies adjacent to the southern end of Centre Island on the north shore of Long Island in the vicinity of the Town of Oyster Bay, New York. This is an area of heavy recreational boating concentration and the area proposed for designation has been used as an anchorage for small boats for several years.

This rule would allow anchoring of small boats (vessels under 65 feet in length) without requiring that they display anchor lights or sound fog signals. In addition (as provided by articles 11 and 15 of the Inland Rules of the Road (33 USC 180 and 33 USC 191)), anchored barges, canal boats, scows, and other non descript craft may display only one anchor light where two would otherwsie be required; and need not sound fog signals regardless of size. Depiction of the anchorage on