§ 7.74 Virgin Islands National Park [Amended].

35. In § 7.74 remove and reserve paragraph (a).

§ 7.75 Padre Island National Seashore [Amended].

36. a. In § 7.75 remove and reserve paragraphs (c), (d), and (f).

b. Revise paragraphs (h) (3) and (4) as follows:

* * * * *

(h) * * *

(3) *Exercise of non-Federal Oil and Gas Rights.* Before entering the National Seashore for the purpose of conducting any operations pursuant to a mineral interest authorized under the Act providing for establishment of the Seashore, the operator shall comply with the requirements of Part 9, Subpart B of this chapter.

(4) All activities relating to the exercise of mineral interests which take place within the boundaries of the park shall be in accordance with an approved Plan of Operations.

* * * * *

c. Remove existing paragraph (h)(5) and redesignate paragraph (h)(6) as (h)(5).

§ 7.79 Amistad Recreation Area [Amended].

37. In § 7.79 remove and reserve paragraphs (a) and (b).

§ 7.84 Channel Islands National Monument [Amended].

38. a. In § 7.84 remove and reserve paragraph (a).

b. Remove paragraph (c)(5).

§ 7.85 Big Thicket National Preserve [Amended].

39. a. In § 7.85 remove paragraph (d)(3).

b. Remove paragraphs (e) and (f).

§ 7.86 Big Cypress National Preserve [Amended].

40. In § 7.86 remove and reserve paragraph (d).

§ 7.87 [Amended]

41. In § 7.87 remove paragraphs (a) through (h).

§ 7.93 Guadalupe Mountains National Park

42. In § 7.93 revise paragraph (a) as follows:

(a) *Cave entry.* No person shall enter any cave or passageway of any cave without a permit.

§ 7.94 Andersonville National Historic Site [Amended].

43. In § 7.94 remove and reserve paragraph (a).

PART 9—MINERALS MANAGEMENT

44. Change the reference in § 9.18(b) from "§ 7.44 (a) and (b)" to "§ 7.45(a)."

PART 13—NATIONAL PARK SYSTEM UNITS IN ALASKA

§ 13.3 [Reserved]

45. Remove and Reserve § 13.3.

Dated: June 17, 1983.

G. Ray Arnett,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 83-17469 Filed 6-29-83; 8:45 am]

BILLING CODE 4310-70-M

federal register

Thursday
June 30, 1983

Part III

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

Surface Mining and Reclamation Operations Under a Federal Program; State of North Carolina

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 933

Surface Mining and Reclamation Operations Under a Federal Program for the State of North Carolina

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

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) of the Department of the Interior promulgates a Federal program for regulation of coal exploration and surface coal mining and reclamation operations on non-Federal and non-Indian lands in North Carolina. This includes surface effects of underground coal mining. This program is necessary in order to regulate surface coal mining activities in the absence of a State program.

DATE: Effective date, August 1, 1983.

ADDRESSES: Documents in the Administrative Record are available for public review and copying during regular business hours at the Office of Surface Mining, Knoxville Field Office, 530 Gay Street, SW, Knoxville, Tennessee 3902, or the Administrative Record Room Office of Surface Mining, 1100 L Street, NW., Washington, DC. Copies of both the proposed and final rules may also be obtained by mail from the Office of Surface Mining, Knoxville Field Office, 530 Gay Street, SW, Knoxville, Tennessee 37902, or from Office of Surface Mining, Administrative Record, 1951 Constitution Avenue, NW., Washington, DC. 20240. Copies of both may also be obtained at either location.

FOR FURTHER INFORMATION CONTACT: James M. Kress, Office of Surface Mining, Branch of Regulatory Programs, Room 222, 1951 Constitution Avenue, NW., Washington, D.C. 20240. Telephone (202) 343-5866. James A. Curry, Knoxville Field Office, Office of Surface Mining, Knoxville, Tennessee (615) 673-4504.

SUPPLEMENTARY INFORMATION:

Availability of Copies

Copies of this program are available for inspection and may be obtained at the OSM office listed above in "ADDRESSES."

Background

Under Section 504(a) of the Surface Mining Control and Reclamation Act of 1977 (the Act), Pub. L. 95-87, 30 U.S.C. 1201 *et seq.*, the Secretary of the Interior (the Secretary) is required to promulgate a Federal program within 34 months after passage of the Act if a State fails to submit a program to assume responsibility for regulating surface mining activities, fails to resubmit a program within 60 days of disapproval, or fails at any time to implement, enforce or maintain an approved State program.

North Carolina has identifiable coal reserves, but has not submitted a program to the Secretary to obtain primary regulatory responsibility. The Director, therefore, has decided to promulgate this Federal program for North Carolina.

This decision does not necessarily imply any expectation of imminent mining in North Carolina. It instead recognizes that the Act prohibits coal exploration or surface coal mining in States which do not have either an approved State program or a fully promulgated Federal program. Accordingly, OSM believes it prudent to put the required regulatory framework into place so that any future coal exploration or mining may be conducted in North Carolina legally, without unnecessary delay, and in an environmentally sound manner.

Once a decision is made that a Federal program is necessary for a State, the Secretary must make several determinations before promulgating a program. Section 504(a) of the Act requires that in implementing a Federal program the Secretary take into consideration the nature of the State's terrain, climate, biological, chemical, and other relevant physical conditions. This requirement is also found in the regulations, 30 CFR 736.22(a)(1). The Act (Section 505(b)) and the regulations (Section 736.23(b)) also provide that if a State has more stringent land use and environmental laws or regulations, they shall not be construed to be inconsistent with the Act or the Secretary's regulations. If the State's laws or regulations establish more stringent standards regulating surface mining control and reclamation procedures than those found in the Act or the Secretary's regulations, or if the State regulates or protects an aspect of the environment affected by surface mining operations which neither the Act nor the Secretary's regulations protect, then those State standards are specifically preserved. Thus, the Secretary believes that the requirements of Section 505(b) can best be met by identifying North Carolina laws and regulations which impose equivalent or more stringent environmental controls and by listing them in Section 933.700(e).

Also, in promulgating a program for a State, Section 504(g) specifies that any State statutes or regulations which regulate surface mining and reclamation operations subject to the Act will be superseded and preempted by the Federal program to the extent that they interfere with the achievement of the purposes and requirements of the Act and the Federal program. This provision is reinforced by Section 505(a) of the Act, which states that only those State laws and regulations which are inconsistent with the Act and its implementing regulations shall be superseded by the Federal program. Thus, State statutes and rules regulating the same activities as those covered by the Federal law and regulations and which interfere with achievement of the purposes of the Act must be identified and preempted by OSM.

Finally, a Federal program, according to Section 504(h) of the Act, must include a process for coordinating the review and issuance of surface mining permits with other Federal or State permits applicable to the proposed operation. The Federal statutes with which the surface mining permitting process must be coordinated are set out in 30 CFR 736.22(c). State statutes for which a permit is required must be identified in the process of promulgating a Federal program, and the Federal program must provide for coordination with the review and issuance procedures required by those statutes.

Federal programs are based on the Secretary's permanent program regulations: 30 CFR Subchapters A, F, G, J, K, L and M. The permanent program regulations establish procedures and performance standards under the Act and form the benchmark for State programs. In order for a State to have a program approved by the Secretary, Section 503(a)(7) requires that the State's rules and regulations be consistent with the Secretary's regulations.

The parts of the permanent program regulations that must be included in a Federal program are listed at 30 CFR 736.22(b). They include general requirements and definitions (Parts 700 and 701), the exemption for coal extraction incident to government-financed highway or other construction (Part 707), the designation of lands unsuitable for surface mining (Parts 760, 761, 762, and 764), permits and permit applications (Subchapter G), reclamation bonding (Subchapter J), performance standards (Subchapter K), inspection and enforcement (Parts 842, 843 and 845), and blaster training and certification (Subchapter M). In

addition, the provisions in the permanent regulations on protection of employees (Subchapter P) and restrictions on financial interests (Part 706) are applicable to Federal employees who perform functions or duties under the Act. The rules for the permanent program are found in 30 CFR Parts 700–707 and 730–865. Part 705 was published October 20, 1977 (42 FR 56060). Parts 795 and 865 (originally Part 830) were published December 13, 1977 (42 FR 62639). The other permanent program regulations were published at 44 FR 15323–15463 (March 13, 1979). Subchapter M was published on December 12, 1980 (45 FR 82098). Corrections were published at 44 FR 15485 (March 14, 1979); 44 FR 53507–53509 (September 14, 1979); 44 FR 66195 (November 19, 1979); 45 FR 26001 (April 16, 1980); 45 FR 37818 (June 5, 1980); and 45 FR 47424 (July 15, 1980). 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 77440–77447 (December 31, 1979); 45 FR 2626–2629 (January 11, 1980); 45 FR 25998–26001 (April 16, 1980); 45 FR 33926–33927 (May 20, 1980); 45 FR 39446–39447 (June 10, 1980); 45 FR 52306–52324 (August 6, 1980); 45 FR 52375 (August 7, 1980); 45 FR 58780–58786 (September 4, 1980); and 45 FR 76932 (November 20, 1980); 46 FR 37232 (July 17, 1981); 46 FR 41702 (August 17, 1981); 46 FR 47720 (September 29, 1981); 46 FR 53376 (October 28, 1981); 46 FR 59934 (October 26, 1981); 47 FR 32942 (July 30, 1982); 47 FR 33431 (August 2, 1982); 47 FR 35620 (August 16, 1982); and 47 FR 38486 (August 31, 1982); 47 FR 44942 (October 12, 1982); 47 FR 47212 (October 22, 1982); 47 FR 51316 (November 12, 1982); 48 FR 1160 (January 10, 1983); 48 FR 2266 (January 18, 1983); 48 FR 9478 and 9486 (March 4, 1983); 48 FR 9788 (March 8, 1983); 48 FR 14814 (April 15, 1983); 48 FR 19314 (April 28, 1983); 48 FR 20392 (May 5, 1983); 48 FR 21446 (May 12, 1983); 48 FR 22110 (May 16, 1983); 48 FR 22092 (May 16, 1983); 48 FR 23356 (May 24, 1983); and 48 FR 24638 (June 1, 1983).

Representatives of industry, two States and several environmental groups challenged the permanent regulatory program in the U.S. District Court for the District of Columbia. These suits were consolidated and heard in a single lawsuit entitled *In re: Permanent Surface Mining Regulation Litigation* (Civil Action No. 79–1144). In response to the arguments raised in the challenges, the Secretary voluntarily suspended several permanent program regulations. These suspensions were announced in the **Federal Register** on November 27, 1979 (44 FR 67942); December 31, 1979 (44 FR 77447–77455); January 30, 1980 (45 FR 6913); and August 4, 1980 (45 FR 51547–51550). In two opinions the Court remanded certain other regulations which had been challenged in the lawsuit. These opinions were issued on February 26, 1980, and May 16, 1980. Many of the issues decided by the District Court have been appealed to the Court of Appeals for the District of Columbia Circuit. *In re: Permanent Surface Mining Regulation Litigation*, Nos. 80–1810, 80–1811, 80–1812, 80–1813 and 80–1823. The appeals have been remanded to the District Court and the issues on appeal have been considered in the revisions to the permanent program rules discussed below.

North Carolina Federal Program

OSM published a proposed Federal program for North Carolina in the **Federal Register** on March 2, 1983. 48 FR 8954–8961. The notice announced a 60-day comment period ending on May 2, 1983, and a public hearing for April 4, 1983, in Sanford, North Carolina. On April 1, 1983, OSM announced the postponement of the public hearing and the extension of the public comment period until April 26, 1983. Because no one expressed an interest in testifying, OSM subsequently published a notice on April 26, 1983, cancelling the public hearing.

As mentioned above, when promulgating a Federal program for a State, the Secretary is required by Section 504(a) of the Act to take into consideration the nature of the terrain, climate, biological, chemical, and other relevant physical conditions of that State. OSM has reviewed North Carolina laws and regulations to determine whether they suggest that special provisions may be necessary or appropriate based on special terrain or other physical conditions in the State. The results of the review are found under the section below entitled "Detailed Discussion."

Pursuant to Section 504(a), the Secretary becomes the regulatory authority when a Federal program is implemented for a State. OSM's permanent program regulations contain references to "the regulatory authority" and to "the State regulatory authority," both of which mean the Secretary when a Federal program for a State is involved. Section 701(22) of the Act. The Office of Surface Mining is delegated all of the Secretary's authority for implementing, maintaining and enforcing a Federal program. This Federal program for North Carolina does not change these responsibilities.

Explanation of Cross-Referencing

In the general notice of intent to promulgate Federal programs of May 16, 1980 (45 FR 32228), OSM stated that each Federal program would be specific to the particular State and would implement the permanent program procedures and environmental protection provisions of the Act (45 FR at 32229). However, except for changes to incorporate more stringent State environmental protection standards, to list other State laws requiring permits for which coordination is required, and to recognize unique or unusual physical conditions affecting surface coal mining and reclamation in a State, OSM believes that few changes are needed in the permanent program regulations for any particular State for which a Federal program must be promulgated.

In January, 1981, the Secretary directed that the Department review all existing regulations in order to eliminate those which are burdensome, excessive and unnecessary. Review of the permemant program regulations was initiated and in many instances is resulting in significant revision of them. See Calendar of Federal Regulations notice of rule review and revision, 47 FR 1709 (January 13, 1982). See also; e.g., revisions of OSM's subsidence regulations, 30 CFR Sections 784.20 and 817.121 and 122. 48 FR 24638 (June 1, 1983) and OSM's inspection and enforcement regulations, 30 CFR Parts 842, 843, and 845, 47 FR 35620 (August 16, 1982).

In order to take advantage of the results which revision of the permanent program regulations will achieve, OSM is promulgating this Federal program in the following manner. Rather than repeating the full text of the permanent regulations which are being revised, there is a cross-reference to the permanent program regulations. For example, criteria for the designation of lands unsuitable for surface coal mining have been provided by the statement that "Part 762 of this Chapter . . . shall apply to surface coal mine operations" (see Section 933.762). One effect of cross-referencing the permanent program regulations is that as the permanent program regulations are revised, this Federal program will be similarly revised. Over time, all of the permanent program regulations will undergo review and many will be revised. No separate rulemaking will be undertaken or necessary for revision of this program, however, unless OSM determines that special conditions are necessary for North Carolina.

The promulgation of this cross-referencing program will not result in any modification of the substance of OSM's permanent program rules. Where specific provisions are needed for an individual State's Federal program which are different from the permanent program regulations, a separate paragraph has been added to the appropriate section of this Federal program. Cross-referencing to the permanent program rules is also used in the promulgation of other Federal programs. Public comment on the cross-referencing method as it affects other Federal programs, however, should be directed to each of those rulemaking notices.

When all of the permanent program rules have been revised, OSM will publish corrections to the cross-referencing Federal programs in order to combine changes in the numbering of permanent program rules to the citation in the **Federal Register.**

Several provisions of the permanent program regulations are already applicable and need not be cross-referenced here because they were fully promulgated for application to all regulatory programs. Those provisions are 30 CFR Chapter VII, Subchapter P—Protection of Employees; Part 706—Restrictions on Financial Interests of Federal Employees; and Part 769—Petition Process for Designation of Federal Lands Unsuitable for Surface Coal Mining. (30 CFR Part 764—Designating Lands Unsuitable for Surface Coal Mining are included in the North Carolina Federal program by a cross-reference under Section 933.764, to provide a petition process on non-Federal and non-Indian lands in that State.)

This final rule notice does not contain Section 983.818 because the final rule notice revising the concurrent surface and underground mining rules deleted 30 CFR Part 818. 48 FR 24638 (June 1, 1983).

With regard to the bonding regulations (Subchapter J), only Part 800 is cross-referenced here because OSM has proposed to revise Subchapter J to include just one part, Part 800. 46 FR 45082 (September 9, 1981) (proposed). Should this program become effective before a final rule notice revising the bonding regulations appears, and the bonding rules not be revised by the time a permit under this program is to be issued, as a condition of issuance of that permit the applicant will be required to abide by the then-effective bonding rules until such rules are superseded.

Content and Organization of the Program

The content and organization of the Federal program for North Carolina generally follow the permanent program regulations. But, as discussed above, instead of the full text appearing, each section of the program includes only reference to the pertinent permanent program regulation. Sections 933.700 (e) and (f), respectively, list North Carolina statutes that are more stringent than, and those that are inconsistent with, the Act. Where specific provisions are needed for this Federal program which are different from the permanent program regulations, a separate paragraph has been added to the appropriate section.

Detailed Discussion

In order to fulfill the Secretary's obligation under Section 504(a) of the Act to take into consideration the nature of the terrain, climate, biological, chemical, and other relevant physical conditions in each State, OSM has reviewed North Carolina laws and regulations. OSM has determined that certain North Carolina statutes may impose, in certain circumstances, more stringent environmental controls than are provided for under the act or the Federal regulations. Section 933.700(e) lists the North Cariolina laws which OSM has identified as setting more stringent land use and environmental controls for surface mining. Those more stringent North Carolina statutes are summarized as follows:

(a) North Carolina General Statute (NCGS) 74–51, concerning conditions under which a mining permit may be granted, contains provisions which are not found in the Act or the Federal regulations. The North Carolina Department of Natural Resources and Community Development may deny a permit for a mining operation which will have a significantly adverse effect on the purposes of a publicly owned park, forest, or recreation area. OSM has altered the following sections as they apply to Part 933: 30 CFR 761.11(c) has been amended by adding the phrase "forest, recreation area," after the phrase "publicly owned park,"; 30 CFR 761.12(f)(1) has been amended by adding the phrase "forest, recreation area," after the phrase "public park,"; and 30 CFR 780.31 and 784.17 have been amended by adding, "forest, or recreation areas" after the phrase "public parks."

NCGS 74–51 also provides that permit approval may be conditioned on a "requirement of visual screening, vegetative or otherwise, so as to screen the view of the operation from public highways, public parks, or residential areas where the Department finds such screening to be feasible and desirable." As these sections are more stringent, OSM has added to Sections 780.31 and 784.17 paragraphs requiring that mining operations visible from public parks, public highways, or residential areas include in the plan of operations, measures to be taken to screen the operation from the view of public parks, public highways, or residential areas or reasons why such screening measures are either not feasible or not desirable.

(b) North Carolina mining laws and regulations apply to mining operations affecting an area greater than one acre, while the Act applies to those mining operations affecting an area greater than two acres, Section 528(2). To the extent that North Carolina mining law and regulations apply to coal mining operations not regulated by the Surface Mining Control and Reclamation Act, they are not preempted by this Federal program for North Carolina. Also, the mining of peat, an activity which is believed to be imminent in North Carolina, is not subject to regulation under the Surface Mining Control and Reclamation Act. It may, however, be subject to regulation under the State's mining laws and regulations because it includes the mining of substances other than those minerals listed. NCGS 74–49(6). Regulation of peat mining under the North Carolina Mining Act of 1971 would not interfere with achievement of the purposes of the Federal Act.

(c) Dam Safety Law of 1967, NCGS 143–215.23 through 143–215.37, and Title 15 North Carolina Administrative Code, Subchapter 2K, Dam Safety, include requirements for certification and inspection of water impoundments and diversions.

(d) Geophysical Exploration regulations, Title 15, North Carolina Administrative Code, Subchapter 5C, applies to any coal exploration involving the use of explosives.

In accordance with 30 CFR 736.23, OSM has found that those North Carolina statutes and rules listed in Section 933.700(f) interfere with the attainment of the goals and purposes of the act and the permanent program rules thereunder. Thus, the following North Carolina statutes and rules are preempted and superseded on and after the effective date of this program:

(a) North Carolina Mining Act of 1971 (NCGS 74–46 through 74–68) insofar as it applies to surface coal mining operations affecting more than two acres and which are regulated by the Surface Mining Control and Reclamation

Act. North Carolina law continues to apply to the mining of minerials and substances other than coal, and to coal mining operations which affect two acres or less or otherwise are not regulated by the Surface Mining Control and Reclamation Act.

(b) Title 15, North Carolina Administrative Code, Subchapters 5A, 5B, and 5F, Mining and Mineral Resources, insofar as they apply to surface coal mining operations of more than two acres and which are regulated by the Surface Mining Control and Reclamation Act. These regulations continue to apply to the mining of minerals and substances other than coal and to coal mining operations that affect two acres or less or otherwise not regulated by the Surface Mining Control and Reclamation Act.

These North Carolina laws and regulations represent the main body of North Carolina law relating to the exploration and surface mining of minerals and the reclamation of mined land. A close review of these North Carolina statutes and rules indicates that they are not consistent with the Act or the Federal permanent program rules and that they interfere with the attainment of the goals and purposes of the Act. Thus, the North Carolina statutes and rules described above will no longer be applicable to the regulation of coal exploration, surface coal mining operations or the reclamation of surface coal mined lands in North Carolina, except as they pertain to operations affecting two acres or less or which otherwise are not regulated by the Surface Mining Control and Reclamation Act.

Paragraph (g) of Section 933.700 authorizes the Secretary to grant a limited variance from the performance standards of the permanent program rules based on a showing by a permit applicant or permittee that the variance is necessary due to the unique nature of North Carolina's terrain, climate, biological, chemical, or other relevant physical conditions. This provision gives effect to Section 504(a) which directs the Secretary to take into consideration, in promulgating a Federal program for a State, the aforementioned physical characteristics. In promulgating each Federal program for a State, the Secretary reviews State laws to determine whether any would interfere with achievement of the purposes of a Federal program and must be superseded and whether any establish more stringent standards for environmental protection and must therefore, be preserved. The presumption is that State laws are a reflection of the particular environmental conditions in the State. There may, however, be conditions present which are not specifically covered by State law, but which must be deferred to pursuant to the requirement in Section 504(a). Paragraph (e) authorizes the Secretary to so do. The variance that may be granted must be shown by a permit applicant to be necessitated by special environmental conditions in North Carolina in order to be granted. It is not a general variance authorization. Congress did not provide for a general variance from standards set in the Act. Congress was concerned that States not be allowed to grant variances from Federally-set minimum standards. The variance allowed under Section 933.700(g), however, would be granted by the Secretary through OSM and would be tied to the relevant environmental conditions found in North Carolina.

To coordinate the Federal program permitting process under the Act with the permitting requirements imposed by other Federal statutes and by North Carolina, Section 933.770 identifies the various permits, statutes, and rules which may, expressly or impliedly, impact on coal exploration and surface coal mining and reclamation under this Federal program. The following permits, statutes, and rules are pertinent and are listed in Section 933.770.

(a) NCGS 143–211 through 143–215.114 set forth requirements for the protection of air and water resources. 1) A permit is required from the Environmental Management Commission of the Department of Natural Resources and Community Development for any outlet into the waters of the State, pursuant to NCGS 143–215.1. 2) A permit may be required by the local government authority for any obstruction to a floodway pursuant to NCGS 143–215.57. 3) The Dam Safety Act, NCGS 143–215.23 through 143–215.37 and Dam Safety Regulations, Title 15, North Carolina Administrative Code, Subchapter 2K, require that notice be provided to the Department of Natural Resources and Community Development at least ten days prior to the construction of any dam and that a certificate of approval of the dam, if necessary, be obtained from the Department in accordance with NCGS 143–215.26 and Title 15, Subchapter 2K. 4) An air pollution control permit may be required pursuant to NCGS 143–215.108. 5) Mining operations must maintain air and water quality reporting systems as required by NCGS 143–215.63 through 143–215.69.

(b) The Coastal Area Management Act, NCGS 113A–100 through 113A–128, requires a permit from the Secretary of Natural Resources and Community Development for a mining operation in any area of environmental concern designated pursuant to that Act.

(c) A permit is required for dredging or for filling in or about estuarine water on State-owned lakes, in accordance with the provisions of NCGS 113–229. The obstruction of navigable water is regulated by NCGS 76–40 and 76–41.

(d) Mining operations must comply with any applicable land use regulations adopted in a soil conservation district pursuant to Section 139–9 of the Soil Conservation District Law, NCGS 139–1 *et seq.*

(e) NCGS 153A–128 requires compliance with any county ordinance or regulation concerning the possession, storage, use or conveyance of explosives. NCGS 14–284.1 regulates the sale, delivery and storage of explosives and imposes criminal sanctions for violations of the statute. NCGS 14–50 through 14–50.1 impose criminal sanctions for the improper use of explosives.

(f) Title 15, North Carolina Administrative Code, Subchapter 5C, Geophysical Exploration, requires a permit for all coal exploration involving the use of explosives.

(g) NCGS 14–284.2 prohibits the dumping of toxic substances without a permit and imposes criminal sanctions for violations.

Other North Carolina laws with which compliance is required but which do not require a permit or license have not been listed. These include, but are not limited to:

NCGS 113.265, which prohibits the obstruction, pollution or diminution of the natural flow of water through a fish hatchery; NCGS 113.293, which prohibits the obstruction of rivers and creeks in a manner preventing the passage of fish; NCGS 113.263, pursuant to which the Wildlife Resource Commission may inspect proposals and specifications for dams having an adverse impact upon fish within the State; and NCGS 143–434 through 143–447, under which mining operations using pesticides must comply with the Pesticide Control Law.

Disposition of Comments

OSM proposed a Federal program for North Carolina in the March 3, 1983, **Federal Register**. The notice announced a 60-day comment period ending on May 2, 1983, and a public hearing for April 4, 1983, in Sanford, North Carolina. On April 1, 1983, OSM announced the postponement of the public hearing and

the extension of the public comment period until April 26, 1983. Because no one expressed an interest in testifying, OSM subsequently published a notice on April 26, 1983, canceling the public hearing.

OSM received written comments on the proposed North Carolina Federal program from the North Carolina Department of Natural Resources and Community Development and from Delta Mining, Inc.

1. Delta Mining stated their interest in mining North Carolina coal reserves, and urged that OSM implement the Federal program in North Carolina.

2. The North Carolina Department of Natural Resources and Community Development identified several errors in the preamble and the text of the proposed Federal program for North Carolina as printed in the March 3, 1983, **Federal Register**. They were:

(a) Page 8958, first column, second line, the correct citation is NCGS 14–284.1, not 14–248.1;

(b) Page 8958, first column, two-thirds of the way down, the reference to the Pesticide Control Law should be to NCGS 143–434 through 143–447, not 143–441; and

(c) Page 8960, first column, line 22, the correct name of the cited agency is the Department of Natural Resources and Community Development.

Further, OSM has made the following modification in the final program as a courtesy to North Carolina:

OSM has added a new Paragraph (b) to § 933.786, under which the Secretary will forward to the North Carolina Department of Natural Resources and Community Development a copy of each decision to grant or deny a permit application.

OMB Review

The recordkeeping and reporting requirements of the Federal program for North Carolina are the same as those of the permanent program regulations which have been approved by the Office of Management and Budget under 44 U.S.C. 3507. Although this program contains information and recordkeeping requirements, OSM anticipates less than ten respondents. Under the Paperwork Reduction Act, clearance of information collection forms is required only when ten or more respondents are expected. If in the future the number of respondents appears to be increasing, the proper forms, if they differ from those already approved, will be submitted to the Office of Management and Budget with accompanying notices in the **Federal Register**, in accordance with the requirements of 44 U.S.C. Chapter 35.

Other Information

OSM has examined these rules according to the criteria of Executive Order 12291 (46 FR 13193, February 19, 1981) and determined that they do not constitute a major rule. There will be no major economic impact through adoption of this rule because it will affect only a small number of mining operations.

OSM has examined these rules pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, and determined that they will not have a significant impact on a substantial number of small entities.

Section 702(d) of the Act provides that promulgation of a Federal program shall not constitute a major Federal action under the National Environmental Policy Act, 42 U.S.C 4332. Thus, no Environmental Assessment is required for this rulemaking.

List of subjects in 30 CFR Part 933

Coal mining, Intergovernmental relations, Surface mining, Underground mining, Reporting and recordkeeping requirements.

Drafting Information

These regulations were drafted by Courtney W. Shea, Office of the Solicitor and James M. Kress, Branch of Regulatory Programs, Office of Surface Mining.

Dated: June 10, 1983.

William P. Pendley,

Acting Assistant Secretary, Energy and Minerals.

Authority: Pub. L. 95–87, Surface Mining Control and Reclamation Act of 1977 (30 U.S.C 1201 *et seq.*).

30 CFR Chapter VII is amended by adding Part 933 to read as follows:

PART 933—NORTH CAROLINA

Sec.

933.700—North Carolina Federal Program.
933.701—General.
933.707—Exemption for coal extraction incident to government-financed highway or other construction.
933.761—Areas designated unsuitable for surface coal mining by act of Congress.
933.762—Criteria for designating areas as unsuitable for surface coal mining operations.
933.764—Process for designating areas unsuitable for surface coal mining operations.
933.770—General requirements for permit and exploration procedures.
933.771—General requirements for permits and permit applications.
933.776—General requirements for coal exploration.
933.778—Surface mining permit applications—minimum requirements for legal, financial, compliance, and related information.
933.779—Surface mining permit applications—minimum requirements for information on environmental resources.
933.780—Surface mining permit applications—minimum requirements for reclamation and operations plan.
933.782—Underground mining permit applications—minimum requirements for legal, financial, compliance, and related information.
933.783—Underground mining permit applications—minimum requirements for information on environmental resources.
933.784—Underground mining permit applications—minimum requirements for reclamation and operation plan.
933.785—Requirements for permits for special categories of mining.
933.786—Reviews, public participation, and approval or disapproval of permit applications and permit terms and conditions.
933.787—Administrative and judicial review of decisions on permit applications.
933.788—Permit review, revisions, and renewals, and transfer, sale, and assignment of rights granted under permits.
933.795—Small operator assistance.
933.800—General requirements for bonding of surface coal mining and reclamation operations.
933.815—Performance standards—coal exploration.
933.816—Performance standards—surface mining activities.
933.817—Performance standards—underground mining activities.
933.819—Special performance standards—auger mining.
933.823—Special performance standards—operations on prime farmland.
933.824—Special performance standards—mountaintop removal.
933.826—Special performance standards—operations on steep slopes.
933.827—Special performance standards—coal processing plants and support facilities not located at or near the minesite or not within the permit area for a mine.
933.828—Special performance standards—in situ processing.
933.842—Federal inspections.
933.843—Federal enforcement.
933.845—Civil penalties.
933.850—Blaster training and certification.

Authority: Pub. L. 95–87, The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, 91 Stat. 445.

§ 933.700—North Carolina Federal Program.

(a) This part contains all rules that are applicable to surface coal mining operations in North Carolina which have been adopted under the Surface Mining Control and Reclamation Act of 1977.

(b) The rules in this part cross-reference pertinent parts of the permanent program regulations in this chapter. The full text of a rule is in the

permanent program rule cited under the relevant section of the North Carolina Federal program.

(c) The rules in this part apply to all surface coal mining operations in North Carolina conducted on non-Federal and non-Indian lands. The rules in Subchapter D of this chapter apply to operations on Federal lands in North Carolina.

(d) The information collection requirements contained in this part do not require approval by the Office of Management and Budget under 44 U.S.C. 3507 because there are fewer than ten respondents annually.

(e) The following provisions of North Carolina laws and regulations provide, where applicable, for more stringent environmental control and regulation of some aspects of surface coal mining operations than do the provisions of the Act and the regulations in this chapter. Therefore, pursuant to section 505(b) of the Act, they shall not be construed to be inconsistent with the Act unless in a particular instance the rules in this chapter are found by OSM to establish more stringent environmental controls.

(1) North Carolina General Statute (NCGS) 74–51, concerning conditions under which a mining permit may be granted, authorized the North Carolina Department of Natural Resources and Community Development to deny a permit for a mining operation which will have a significantly adverse effect on the purposes of a publicly owned park, forest, or recreation area and may condition permit approval on a requirement of visual screening, vegetative or otherwise, so as to screen the view of the operation from public highways, public parks, or residential areas where the Department finds such screening to be feasible and desirable, or determines that such screening measures are either not feasible or not desirable.

(2) North Carolina mining laws and regulations apply to mining operations affecting an area greater than one acre. To the extent that North Carolina mining law and regulations cited in Paragraph (f) of this Section apply to coal mining operations not regulated by the Surface Mining Control and Reclamation Act, they are not preempted by this Federal program for North Carolina.

(3) North Carolina Dam Safety Law of 1967, North Carolina General Statutes (NCGS) 143–215.23 through 143–215.37.

(4) Geophysical Exploration regulations, Title 15, North Carolina Administrative Code, Subchapter 5C, applies to any coal exploration involving the use of explosives.

(f) The following are North Carolina laws and regulations that generally interfere with the achievement of the purposes and requirements of the Act and are, in accordance with Section 504(g) of the Act, preempted and superseded to the extent that they regulate coal exploration or surface coal mining and reclamation operations regulated by the Surface Mining Control and Reclamation Act. Other North Carolina laws may interfere with the achievement of the proposes of goals of the Act in an individual situation, and may be preempted and superseded as they affect a particular coal exploration or surface mining operation by publication of the notice to that effect in the **Federal Register.**

(1) North Carolina Mining Act of 1971, as amended, NCGS 74–46 through 74–68, except to the extent that the Mining Act is preserved as provided in Paragraph (e) of this section.

(2) Title 15, North Carolina Administrative Code, Subchapters 5A, 5B, and 5F Mining and Mineral Resources, except to the extent that those regulations are preserved as provided in Paragraph (e) of this section.

(g) The Secretary may grant a limited variance from the performance standards of §§ 933.815 through 933.828 of this Part if the applicant for coal exploration approval or a surface mining permit submitted pursuant to §§ 933.770 through 933.788 of this Part can demonstrate in the application that: (1) such variance is necessary because of the unique nature of the State's terrain, climate, biological, chemical, or other relevent physical conditions; and (2) that the proposed alternative will achieve equal or greater environmental protection than does the performance requirement from which the variance is requested.

§ 933.701—General.

Sections 700.5, 700.11, 700.12, 700.13, 700.14, 700.15 and Part 701 of this chapter shall apply to surface coal mining and reclamation operations in North Carolina.

§ 933.707—Exemption for Coal Extraction Incident to government-financed highway or other construction.

Part 707 of this chapter, Exemption for Coal Extraction Incident to Government-Financed Highway or Other Construction, shall apply to surface coal mining and reclamation operations.

§ 933.761—Areas designated unsuitable for surface coal mining by Act of Congress.

Part 761 of this chapter, Areas Designated Unsuitable for Coal Mining by Act of Congress, with the exception of §§ 761.11(c) and 761.12(f)(1), shall apply to surface coal mining and reclamation operations, beginning one year after the effective date of this program. For the purposes of Part 933, the following §§ 761.11(c) and 761.12(f)(1) shall replace the existing §§ 761.11(c) and 761.12(f)(1).

(c) On any lands which will adversely affect any publicly owned park, forest, recreation area, or any places included on, or eligible for listing on, the National Register of Historic Places, unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park, forest, recreation area, or places;

(f)(1) Where the proposed surface coal mining operation may adversely affect any public park, forest, recreation area, or any places included on, or eligible for listing on, the National Register of Historic Places, the regulatory authority shall transmit to the Federal, State, or local agencies with jurisdiction over, or a statutory or regulatory responsibility for, the park, forest, recreation area, or historic place a copy of the completed permit application containing the following:

(i) A request for that agency's approval or disapproval of the operators;

(ii) A notice to the appropriate agency that it must respond within 30 days from receipt of the request.

§ 933.762—Criteria for designating areas as unsuitable for surface coal mining operations.

Part 762 of this chapter, Criteria for Designation Areas Unsuitable for Surface Coal Mining Operations, shall apply to surface coal mining and reclamation operations.

§ 933.764—Process for designating areas unsuitable for surface coal mining operations.

Part 764 of this chapter, State Processes for Designatng Areas Unsuitable for Surface Coal Mining Operations, pertaining to petitioning, initial processing, hearing requirements, decisions, data base and inventory systems, public information, and regulatory responsibilities shall apply to surface coal mining and reclamation operations beginning one year after the effective date of this program.

§ 933.770—General requirements for permits and exploration procedures.

(a) Part 770 of this chapter, General Requirements for Permit System Under State Programs, shall apply to coal exploration and surface coal mining and reclamation operations.

(b) The Secretary shall coordinate, to the extent practicable, the issuance of the following permits, leases and/or certificates required by the State of North Carolina: Water discharge permit (NCGS 143–215.1); water use permits in

a capacity use area (NCGS 143-215.5); an approval of dam construction (NCGS 143-215.108); an air pollution control permit (NCGS 143-215.26, Title 15, North Carolina Administrative Code, Subchapter 2K); air and water quality reporting systems (NCGS 143-215.63—143-215.69); a geophysical exploration permit (Title 15, North Carolina Administrative Code, Subchapter 5C); a development permit for operations in an area of environmental concern designated pursuant to the Coastal Area Management Act (NCGS 113A-100—113A-128); a dredging or filling permit issued by the Department of Natural Resources and Community Development (NCGS 113-229); a permit for dumping of toxic substances (NCGS 14-284.2); compliance with any applicable land use regulations adopted in a soil conservation district (NCGS 139-9); and compliance with any county ordinance regarding explosives (NCGS 153A-128).

(c) No person shall be granted a permit to conduct exploration which results in the removal of more than 250 tons of coal or shall conduct surface coal mining unless that person has acquired all required permits, leases, and/or certificates listed in paragraph (b) of this section.

§ 933.771—General requirements for permits and permit applications.

(a) Part 771 of this chapter, General Requirements for Permits and Permit Applications, shall apply to any person who makes application for a permit to conduct surface coal mining and reclamation operations.

(b) A person who wishes to conduct new surface coal mining and reclamation operations or who wishes a revision of his permit shall file a complete application at least 12 months prior to the date upon which permit issuance or revision is desired, and shall pay to the Secretary a permit fee in accordance with Section 736.25 of this chapter.

§ 933.776—General requirements for coal exploration.

(a) Part 776 of this chapter, *General Requirements for Coal Exploration*, shall apply to any person who conducts or seeks to conduct coal exploration operations.

(b) OSM shall make every effort to act on an exploration application within 60 days of receipt or such longer time as may be reasonable under the circumstances. If additional time is needed, OSM shall notify the applicant that the application is being reviewed, but that more time is necessary to complete such review, setting forth the reasons and the additional time that is needed.

§ 933.778—Surface mining permit application—Minimum requirements for legal, financial, compliance and related information.

Part 778 of this chapter, *Surface Mining Permit Applications—Minimum Requirements for Legal, Financial, Compliance, and Related Information*, shall apply to any person who makes application for a permit to conduct surface coal mining and reclamation operations.

§ 933.779—Surface mining permit applications—minimum requirements for information on environmental resources.

Part 779 of this chapter, *Surface Mining Permit Applications*—Minimum Requirements for Information on Environmental Resources, shall apply to any person who makes application to conduct surface coal mining and reclamation operations.

§ 933.780—Surface mining permit applications—minimum requirements for reclamation and operation plan.

Part 780 of this chapter, *Surface Mining Permit Applications—Minimum Requirements for Reclamation and Operation Plan*, shall apply to any person who makes application to conduct surface coal mining and reclamation operations, except that for the purposes of Part 933, the paragraph in § 780.31 shall be replaced by the following two paragraphs:

(a) For any public parks, forest, or recreation areas, or historic places that may be adversely affected by the proposed operations, each plan shall describe the measures to be used to minimize or prevent these impacts and to obtain approval of the regulatory authority and other agencies as required in 30 CFR 761.12(f).

(b) Each application for an operation which will be visible from any public park, public highway, or residential area shall include measures to be taken to screen the operation from the view of public parks, public highways and residential areas, or shall set forth the reasons why such screening measures are either not feasible or not desirable.

§ 933.782—Underground mining permit applications—minimum requirements for legal, financial, compliance, and related information.

Part 782 of this chapter, *Underground Mining Permit Applications—Minimum Requirements for Legal, Financial, Compliance, and Related Information*, shall apply to any person who makes application for a permit to conduct underground coal mining operations.

§ 933.783—Underground mining permit applications—minimum requirements for information on environmental resources.

Part 783 of this chapter, *Underground Mining Permit Applications—Minimum Requirements for Information on Environmental Resources*, shall apply to any person who submits an application to conduct underground coal mining operations.

§ 933.784—Underground mining permit applications—minimum requirements for reclamation and operation plan.

Part 784 of this chapter, *Underground Mining Permit Applications—Minimum Requirements for Reclamation and Operation Plan*, shall apply to any person who makes application to conduct underground coal mining except that for the purposes of Part 933, the paragraph in Section 784.17 shall be replaced by the following two paragraphs:

(a) For any public parks, forest, or recreation areas, or historic places that may be adversely affected by the proposed operation, each plan shall describe the measures to be used to minimize or prevent these impacts and to obtain approval of the regulatory authority and other agencies as required in 30 CFR 761.12(f).

(b) Each application for an operation which will be visible from any public park, public highway, or residential area shall include measures to be taken to screen the operation from the view of public parks, public highways and residential areas, or shall set forth the reasons why such screening measures are either not feasible or not desirable.

§ 933.785—Requirements for permits for special categories of mining.

Part 785 of this chapter, *Requirements for Permits for Special Categories of Mining*, shall apply to each person who makes application for a permit to conduct certain categories of surface coal mining and reclamation operations as specified therein.

§ 933.786—Review, public participation, and approval or disapproval of permit applications and permit terms and conditions.

(a) Part 786 of this chapter, *Review, Public Participation, and Approval or Disapproval of Permit Applications and Permit Terms and Conditions*, shall apply to the review of applications made by any person for surface coal mining and reclamation operations.

(b) The Secretary shall provide to the North Carolina Department of Natural Resources and Community Development a copy of each decision to grant or deny a permit application.

§ 933.787—Administrative and judicial review of decisions on permit applications.

Decisions on permit applications shall be subject to administrative and judicial review in accordance with Part 787 of this chapter and sections 520, 525 and 526 of the Act.

§ 933.788—Permit reviews, revisions, and renewals, and transfer, sale, and assignment of rights granted under permits.

Part 788 of this chapter, *Permit Reviews, Revisions, and Renewals, and Transfer, Sale, and Assignment of Rights Granted Under Permits,* shall apply to review, revision, and renewal of permits for surface coal mine operations, and to transfer, sale, and assignment of rights granted under permits.

§ 933.795—Small operator assistance.

Part 795 of this chapter, *Small Operator Assistance,* shall apply to any person making application for assistance under the small operator assistance program.

§ 933.800—General requirements for bonding of surface coal mining and reclamation operations.

Part 800 of this chapter, *General Requirements for Bonding of Surface Coal Mining and Reclamation Operations Under Regulatory Programs,* shall apply to all surface coal mining and reclamation operations.

§ 933.815—Performance standards—coal exploration.

Part 815 of this chapter, *Permanent Program Performance Standards—Coal Exploration,* shall apply to any person conducting coal exploration operations.

§ 933.816—Performance standards—surface mining activities.

Part 816 of this chapter, *Permanent Program Performance Standards—Surface Mining Activities,* shall apply to any person who conducts surface coal mining and reclamation operations.

§ 933.817—Performance standards—underground mining activities.

Part 817 of this chapter, *Permanent Program Performance Standards—Underground Mining Activities,* shall apply to any person who conducts underground coal mining operations.

§ 933.819—Special performance standards—auger mining.

Part 819 of this chapter, *Special Permanent Program Performance Standards—Auger Mining,* shall apply to any person who conducts surface coal mining operations which include auger mining.

§ 933.823—Special performance standards—operations on prime farmland.

Part 823 of this chapter, *Special Permanent Program Performance Standards—Operations on Prime Farmland,* shall apply to any person who conducts surface coal mining and reclamation operations on prime farmlands.

§ 933.824—Special performance standards—mountaintop removal.

Part 824 of this chapter, *Special Permanent Program Performance Standards—Mountaintop Removal,* shall apply to any person who conducts surface coal mining operations constituting mountaintop removal mining.

§ 933.826—Special performance standards—operations on steep slopes.

Part 826 of this chapter, *Special Permanent Program Performance Standards—Operations on Steep Slopes,* shall apply to any person who conducts surface coal mining and reclamation operations on steep slopes.

§ 933.827—Special performance standards—coal processing plants and support facilities not located at or near the minesite or not within the permit area for a mine.

Part 827 of this chapter, *Special Permanent Program Performance Standards—Coal Processing Plants and Support Facilities Not Located at or Near the Minesite or Not Within the Permit Area for a Mine,* shall apply to any person who conducts surface coal mining and reclamation operations which include the operation of coal processing plants and support facilities not located at or near the minesite or not within the permit area for a mine.

§ 933.828—Special performance standards—in situ processing.

Part 828 of this chapter, *Special Permanent Program Performance Standards—In Situ Processing,* shall apply to any person who conducts in situ processing activities.

§ 933.842—Federal inspections.

(a) Part 842 of this chapter, *Federal Inspections,* shall apply to all exploration and surface coal mining and reclamation operations.

(b) OSM will furnish a copy of any inspection report written pursuant to this part to the North Carolina Department of Natural Resources and Community Development upon request.

§ 933.843—Federal enforcement.

(a) Part 843 of this chapter, Federal Enforcement, shall when enforcement action is required for violations on surface coal mining and reclamation operations.

(b) OSM will furnish a copy of each enforcement action and order to show cause issued pursuant to this part to the North Carolina Department of Natural Resources and Community Development upon request.

§ 933.845—Civil penalties.

Part 845 of this chaper, Civil Penalties, shall apply when civil penalties are assessed for violations on surface coal mining and reclamation operations.

§ 933.850—Blaster training and certification.

Part 850 of this chapter, *Program for Blaster Training and Certification,* shall apply to any person who conducts coal exploration or surface coal mining operations.

[FR Doc. 83-17390 Filed 6-29-83; 8:45 am]
BILLING CODE 4310-05-M

federal register

Thursday
June 30, 1983

Part IV

Department of Transportation

Office of the Secretary

Standard Time Zone Boundaries in the State of Alaska; Proposed Relocation

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 71

[OST Docket No. 9; Notice 83-13]

Standard Time Zone Boundaries in the State of Alaska; Proposed Relocation

AGENCY: Office of the Secretary, DOT.

ACTION: Proposed rule.

SUMMARY: DOT proposes to relocate the boundaries between Pacific and Yukon time, Yukon and Alaska–Hawaii time, and Alaska–Hawaii and Bering time in the State of Alaska in order to reduce from four to two the number of time Zones in that State. Public comments are invited and public hearings will be held in the State.

DATE:

Public hearings: To be announced later

Deadline for submission of comments: August 29, 1983.

Proposed effective dates: For the Yukon/Alaska–Hawaii and Alaska–Hawaii/Bering changes—2 a.m. A.H.d.t. and 2 a.m. B.d.t., respectively, Sunday, October 30, 1983; for the Pacific/Yukon change—2 a.m. p.s.t. Sunday, April 30, 1984

ADDRESSES: The public hearings will be held at times and places to be announced later. Written comments should be addressed to Docket Clerk, OST Docket No. 9, Office of the General Counsel, C–50, Department of Transportation, Washington, DC 20590. If you wish to receive acknowledgement that your comment has been received, please include with your comments a self-addressed stamped postcard. All comments received will be available for public inspection and copying, both before and after the deadline date above, in the Office of the Assistant General Counsel for Regulation and Enforcement, Room 10105, Department of Transportation, 400 Seventh Street, SW, Washington, D.C., Between 9:00 a.m. and 5:30 p.m. eastern time.

FOR FURTHER INFORMATION CONTACT: Robert I. Ross, Office of the General Counsel, (202) 426–4723.

SUPPLEMENTARY INFORMATION:

Background of the proposal. Under the Standard Time Act of 1918, as amended by the Uniform Time Act of 1966 (15 U.S.C. 260–64), the Secretary of Transportation has authority to issue regulations modifying the boundaries between time zones in the United States in order to move an area from one time zone to another. The standard in the statute for such decisions is "regard for the convenience of commerce and the existing junction points and division points of common carriers engaged in interstate or foreign commerce".

A formal request from the Governor and Legislature of the State of Alaska has been submitted to the Secretary requesting that the present four time zones in Alaska be reduced to two zones. In support of this request, information has been submitted indicating that changing the State's time as requested would serve the convenience of commerce, as discussed below. Consequently, DOT is proposing to make the change requested and inviting public comment. Although the State has submitted sufficient information to begin the rulemaking process, the decision whether actually to make the change will be based upon the information received at the public hearings and submitted in writing to the docket. Persons favoring the change should not assume that the change will be made merely because DOT is making the proposal. DOT reserves the right to implement the entire proposal, or some variation of it, or reject it completely.

The appropriate times for Alaska have been the subject of much controversy over the past few years. The State is in four of the eight time zones in the United States. The current arrangement of four time zones was established by DOT on October 27, 1968 and, except as noted below, has not been changed since. Under this arrangement, that portion of the State which is east of 137 degrees west longitude (southeastern Alaska, including the cities of Juneau, Ketchikan, and Petersburg) is in the Pacific time zone and on the same time as contiguous portions of Canada. The portion of the State which falls between 137 degrees west longitude and 141 degrees west longitude is in the Yukon time zone; it includes Yakutat and the Tongass National Forest. It is not on the same time as any other portion of North America, since the adjoining portion of Canada moved to Pacific time some years ago. The portion of the State which lies between 141 and 162 degrees west longitude—the "Railbelt"—is in the Alaska-Hawaii zone. It includes the majority of the population of the State, including the cities of Anchorage, Fairbanks, and Bethel, and the route of the Alaska Railroad; its time differs by two hours from the time of contiguous portions of Canada. The fourth zone—Bearing—includes that portion of the State which is west of 162 degrees west longitude, including the Aleutian Islands; it includes Nome. During the period of the year when standard time is in effect, its time differs on the clock by four hours from the time of the nearest portions of Japan. (When it is 1:00 p.m. B.s.t. Monday in Nome, it is 9:00 a.m. Tuesday in Tokyo.) Under this arrangement, there is a two-hour time difference between Juneau and Anchorage-Fairbanks, and a three-hour difference between Juneau and Nome. A decision by DOT to grant the request of the State would mean that there would not be more than a one-hour time difference betwen any points in the State. Alaska is the only State in which there is now more than a one-hour time difference within the State.

The State's request. There are two elements of the State's request. The first is a Joint Resolution of the Legislature (House Joint Resolution 25; Legislative Resolve No. 10) transmitted to DOT by the Lietutenant Governor of Alaska on April 28, 1983. It asks the Secretary of Transportation to make the change discussed above. It states four arguments in support of the request: (1) Alaska is the only State that spans four time zones; (2) Time differences between communities in Alaska create an artificial barrier that impairs efforts to improve communications among the widely scattered population centers of this vast State; (3) Elimination of the time differential between the State Capital and the other centers of finance, trade, and commerce in Alaska would bring State government closer to all the people of the State; and (4) The transfer of most of Alaska to the Yukon Standard Time Zone would place most Alaskans on an identical time schedule that would avoid inconvenience to the traveler, the transportation industry, and other commercial enterprises.

The other element of the request is a letter from the Governor of Alaska to the Secretary of Transportation dated May 16, 1983; it includes extensive supporting material. It also adds that the State's own analysis of the impact of the requested change on commerce and transportation demonstrates that the benefits of consolidating the State's four time zones into two far outweigh the possible inconveniences. Much of the material submitted in support of the requested change discusses the improvements in administration of the State Government that would ensue from the reduction in the number of time zones. Other benefits included commercial improvements within the State from having more of the States on the same time, and between the State and the continental United States from having more of the State's major cities closer in time to the "Lower 48" States. Included also are reports on a series of 16 hearings throughout the State conducted by the State on the time zone

issue. Of the 79 persons who participated, a majority opposed the change. Of the 109 letters submitted to the State on the proposal, 24 were in support and 85 in opposition. The Governor suggests that the relatively small amount of participation by State residents indicates that the requested change is not a negative or divisive issue. He adds that Statewide editorial and press coverage of the proposal has been extensive and, for the most part, favorable.

History of time zones in Alaska. Prior to the enactment of the current Federal statute—the Uniform Time Act of 1966, which took effect April 1, 1967—there were no formal time zones for Alaska except Pacific time, in which Juneau had been included since 1937. The 1966 Act added three more zones—Yukon, Alaska-Hawaii, and Bering—and in 1968 DOT proposed boundaries for these zones. The proposal that was published for public comment on August 9, 1967 included in Yukon time all territory of the United States between 127 degrees 30 minutes west longitude and 141 degrees west longitude; in Alaska-Hawaii, between 141 degrees west longitude and 157 degrees 30 minutes west longitude and the entire State of Hawaii; and in Bering, between 157 degrees 30 minutes west and 172 degrees 30 minutes west longitude (thus including also American Samoa), and all of the Aleutian Islands west of 172 degrees 30 minutes west, but not any part of Hawaii. The effect of this would have been to include in the Yukon zone both Juneau and Ketchikan; on the basis of strong objections from residents of those areas that they wished for reasons of commerce to remain on the same time as the west coast of the continental United States, the proposal was amended on November 30, 1967 to include in Yukon time only that portion of the United States which lies between 137 degrees west and 141 degrees west longitude. As so amended, the proposal was adopted.

In 1968, complaints were received from the Bristol Bay area of Alaska, most particularly the city of Dillingham. By the initial establishment of the three new time zones, this part of the State had been placed within the Bering zone. On the basis of Dillingham's role as a commercial trading area for several villages and towns lying to the east and situated in the Alaska-Hawaii zone, residents in the area requested that Dillingham and several adjacent villages in the Bristol Bay area be included within the Alaska-Hawaii zone facilitate commerce and public services in the area. On June 14, 1968, DOT proposed to achieve this end by extending the Alaska-Hawaii zone westward to 161 degrees west longitude. The proposal was adopted and the zone extended effective September 22, 1968.

During the proceeding which led to the extension of the Alaska-Hawaii zone westward to 161 degrees west longitude, the Alaska Region of the Federal Aviation Administration (FAA), a part of DOT, recommended that the zone be extended to 162 degrees west, so as to include the community of Bethel as well as Dillingham in the Alaska-Hawaii zone; the benefits urged for this included more effective administration of FAA facilities, since the office responsible for FAA matters in these two communities was located in the Alaska-Hawaii time zone; and improved transportation and communications in the area generally, since so much of these services are provided to the Bristol Bay area from Anchorage in the Alaska-Hawaii zone. Accordingly, a proposal was published for public comment to extend the Alaska-Hawaii zone to 162 degrees west longitude. The proposal was adopted without change and took effect October 27, 1968.

The relative isolation of Juneau, the State Capital, from the rest of the State led to a movement to relocate the State Capital to Willow, near Anchorage. In an attempt to moot some of the opposition to keeping Juneau as the capital, in 1979 the government of Juneau asked that DOT move Juneau and its surrounding area—but not the entire Panhandle area of the State—to Yukon time, thus reducing by one hour the time differences with the rest of the State. DOT proposed this change for public comment and conducted hearings in the affected area. On September 27, 1979, DOT made the requested change, to be effective April 27, 1980. On Friday, March 28, 1980, by a popular vote of approximately 2–1, the voters of Juneau required the City Assembly to seek DOT's reconsideration of the change to Yukon time. On May 5, 1980, DOT denied the City's petition for reconsideration, largely on the basis that it would have been unfair to those commercial interests that had relied on the change to undo it on such short notice. DOT stated its willingness to consider the matter further and to conduct further hearings in the area. On Monday, June 9, 1980, DOT proposed to return the affected area to Pacific time and invited public comment. On September 25, 1980, DOT made the change back to Pacific time for the affected area, to take effect October 26, 1980. There have been no changes in the time zone situation in Alaska since this date. In 1982, Alaska voted not to move the capital from Juneau.

Issues to considered. The principal standard in the 1966 Act—"the convenience of commerce"—is construed very broadly by DOT. We examine not merely the impact that a time zone change would have on the business community in the area, but also, for example, on the activities of all levels of government, including schools; on recreation, transporation, and tourism; and on the needs of individuals to travel for employment, worship, shopping, medical care, education, and other aspects of daily life. Initial investigation indicates that Alaska is a unique part of the United States in respects which affect how DOT will evaluate the proposal. First, impacts on foreign commerce may be much more significant than in the normal time zone rulemaking, given the proximity to Canada and Japan. Second, the State's far northern location means that there are seasonal extremes in conditions of daylight and darkness which may affect the role which recreation plays in our consideration. Third, the State's vast size, small population, and relatively greater use of general aviation to communicate with outlying communities may affect the relevancy of the "daily life" factors mentioned above. Fourth, the harshness of the winter weather means that life in Alaska may be more cyclical than in other parts of the United States (e.g., very much less outdoor activity in winter than in summer). It is not clear what impact these differences may have upon the factors which DOT normally evaluates in making time zone change decisions. We emphasize our desire to receive comment on these and other aspects of the uniqueness of Alaska.

Impact of proposal on observance of daylight saving time. The proposal has no relation to the observance of daylight saving time (DST). Under the Uniform Time Act of 1966, the standard time of each time zone in the United States is advanced one hour from 2:00 a.m. on the last Sunday in April until 2:00 a.m. on the last Sunday in October, except in any State that has, by law, exempted itself from this observance. (A State in more than one time zone may have its exemption apply only to that part of the State which is in the more easterly time zone.) Although the State of Alaska did not observe DST before the 1966 Act took effect, it has done so every year since then. Whether this proposal is adopted or not does not in any way affect the State's power to observe DST or not.

Timing. The State's request asks that the entire requested time zone change take effect when DST ends this year (2:00 a.m. local time Sunday, October 30, 1983). Insofar as the changes west of Yakutat are concerned, this aspect of the proposal comports completely with DOT practice. If a decision is made to move an area to the zone to its east, that is done when DST next ends. Since, for example, Bering DST is the same time on the clock as Alaska-Hawaii standard time, making the change from Bering to Alaska-Hawaii effective at the moment DST ends means that clocks in the affected area do not have to be changed. Thus, confusion is minimized. On the other hand, when a decision is made to move an area to the zone to the west, that is done at the moment when DST next begins, for the converse reasons of those above. Consequently, the State's request to have the change from Pacific to Yukon made effective October 30, 1983 does not comport with DOT's normal practice, in that it would require a two-hour time change. Consequently, DOT proposes that, if that portion of the proposal relating to the Pacific time zone is implemented, it be made effective at 2.00 a.m. PST Sunday, April 30, 1984. Comments are invited on this issue of the timing of any change.

Public participation. Interested persons are invited to participate in this rulemaking by submitting written comments to the above address not later than the date shown above. Although it is DOT's policy to consider to the maximum extent possible comments which are received after the deadline date, we urge that persons who wish to participate do so promptly. Additionally, to facilitate participation by persons in the State, a number of public hearings will be held in the State. Their dates, times, and locations, will be announced later. It will not be necessary to request in advance the opportunity to speak at the hearings. The hearings will be recorded.

Regulatory Impact. I certify under the criteria of the Regulatory Flexibility Act that this proposed rule, at promulgation, would not have a significant economic impact on a substantial number of small entities, because of its highly localized impact. Further, it is not a major rule under Executive Order 12291, nor a significant rule under DOT Regulatory Policies and Procedures, 44 FR 11034, for the same reason. The anticipated economic impact is so minimal that it does not warrant preparation of a regulatory evaluation. Finally, DOT has determined that this rulemaking is not a major Federal action significantly affecting the quality of the human environment under the National Environmental Policy Act and therefore that an environmental impact statement is not required. Comments are invited on all of these issues, however, and DOT very much wants interested persons to comment upon the environmental, economic, and energy impacts, if there be any, of making the requested change or not.

List of Subjects in 49 CFR Part 71

Time.

PART 71—[AMENDED]

In consideration of the foregoing, it is proposed to amend Title 49, Code of Federal Regulations, by revising §§ 71.10 through 71.13 to read as appears below:

§ 71.10 Pacific zone.

The fifth zone, Pacific standard time zone, includes that part of the continental United States that is west of the boundary line between the mountain and Pacific standard time zones described in § 71.9, but does not include and part of the State of Alaska.

§ 71.11 Yukon zone.

The sixth zone, the Yukon standard time zone, includes that part of the State of Alaska which is east of 162 degrees west longitude.

§ 71.12 Alaska-Hawaii zone.

The seventh zone, the Alaska-hawaii standard time zone, includes the entire State of Hawaii and that part of the State of Alaska that is west of 162 degrees west longitude.

§ 71.13 Bering zone.

The eight zone, the Bering standard time zone, includes that part of the United States that is between 162 degrees west longitude and 172 degrees 30 minutes west longitude, but does not include any part of the States of Hawaii and Alaska.

(Act of March 19, 1918, as amended by the Uniform Time Act of 1966 and Pub. L. 97–449, 15 U.S.C. 260–64; 49 CFR 1.59(a))

Issued in Washington, D.C., on June 27, 1983.

James H. Burnley IV,

General Counsel.

[FR Doc. 83-17700 Filed 6-29-83; 8:45 am]

BILLING CODE 4910-62-M

federal register

Thursday
June 30, 1983

Part V

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

Surface Coal Mining and Reclamation Operations Permanent Regulatory Program; Stream Buffer Zones and Fish, Wildlife, and Related Environmental Values; Final Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 816 and 817

Surface Coal Mining and Reclamation Operations Permanent Regulatory Program; Stream Buffer Zones and Fish, Wildlife, and Related Environmental Values

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

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) is adopting final rules for protection of stream buffer zones and fish, wildlife, and related environmental resources. The new rules will revise the requirements relative to stream buffer zones and protection of endangered species; clarify the relationship of the Surface Mining Control and Reclamation Act of 1977 to the Endangered Species Act and the Bald Eagle Protection Act; remove several specific design standards; and allow regulatory authorities and operators greater flexibility in protecting stream buffer zones as well as fish, wildlife, and related environmental values from adverse impacts due to surface coal mining and reclamation operations.

EFFECTIVE DATE: August 1, 1983.

FOR FURTHER INFORMATION CONTACT: John D. Parsons, Division of Engineering Analysis, Office of Surface Mining, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240, 202–343–3190.

SUPPLEMENTARY INFORMATION:

I. Background.
II. Discussion of Comments and Rules Adopted.
III. Procedural Matters.

I. Background

On March 30, 1982 (47 FR 13466), OSM published a notice of proposed rulemaking to revise the rules for protection of stream buffer zones and fish, wildlife, and related environmental resources. The rules were proposed to reduce the burdens of existing rules, change the requirements relating to stream buffer zones, wetlands protection, and endangered species protection, and to clarify the relationship between the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.* ("the SMCRA" or "the Act"), and the Bald Eagle Protection Act.

Rules governing the hydrologic balance of stream buffer zones were initially published as proposed rules for public comment on September 18, 1978 (43 FR 41888, 41908) and were published as final rules on March 13, 1979 (44 FR 15403, 15430). Rules for protection of fish, wildlife, and related environmental values were initially published as rules proposed for public comment on September 18, 1978 (43 FR 41894, 41914) and were published as final rules on March 13, 1979 (44 FR 15410, 15437).

Throughout the development of these final rules, OSM solicited public comments and recommendations. Following the publication of proposed rules in the **Federal Register** (47 FR 13466, March 30, 1982), OSM made provisions to hold public hearings and to schedule public meetings upon request. OSM scheduled public hearings in the Department of Interior Auditorium, Washington, D.C., and in the 2d Floor Conference Room, Brooks Tower, Denver, Colorado, on April 27, 1982. However, no persons requested a hearing or meeting, and therefore none was held.

The **Federal Register** notice provided for the comment period to close on April 29, 1982. To provide the public with additional opportunity to participate in the rulemaking process, the comment period was reopened on May 13, 1982 (47 FR 20361), and extended until August 25, 1982. The comment period was again reopened, on September 7, 1982 (47 FR 39201), and remained open until September 10, 1982.

II. Discussion of Comments and Rules Adopted

OSM received over 175 comments from operators, representatives of industry, environmental groups, State regulatory authorities, and Federal and State fish and wildlife agencies. OSM has reviewed each comment carefully and has considered the commenters' suggestions and remarks in writing these final rules. Since the rules for underground mining activities are identical to those for surface mining activities, the following discussion applies to both Parts 816 and 817.

A. Stream Buffer Zones

General

Buffer zones are used to protect streams from sedimentation and from gross disturbance of stream channels caused by surface coal mining and reclamation operations. Final § 816.57 recognizes that stream buffer zones are an effective method, in conjunction with sedimentation ponds and other measures, to prevent excessive sedimentation of streams by runoff from disturbed surface areas. (Tennessee Valley Authority, 1971; Karr and Schlosser, 1978; Grim and Hill, 1974, p. 102 and Appendix D, p. 255; Hardaway and Kimball, 1976, pp. 27–29; Weigle, 1965; U.S. Environmental Protection Agency, 1976, vol. 1, pp. 7, 14, 19, 30, 32, 61–62.) The new rules also recognize that intermittent and perennial streams generally have environmental-resource values worthy of protection under Section 515(b)(24) of the Act. Several commenters agreed with the proposed changes in the rules and believed that OSM's suggested revisions were necessary and cost effective and that they clarified the rules. Commenters strongly endorsed the requirement for stream buffer zones along all perennial and intermittent streams, regardless of a stream's biological communities.

Section 816.57(a)

As proposed, § 816.57(a) provided that no land within 100 feet of a perennial or an intermittent stream could be disturbed by surface mining activities unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream. After considering remarks from commenters and for the reasons discussed below, OSM has adopted the proposed rule as final § 816.57(a).

Several commenters objected to OSM's proposal to include stream buffer requirements and urged that proposed § 816.57 be deleted from OSM's final rules. These commenters argued that the concept of stream buffer zones was not specifically supported by the Act and that hydrologic balance and related environmental values were adequately protected by numerous other rules. One commenter contended that Congress would have addressed the issue of buffer zones directly in the Act if it had intended to impose such a drastic requirement on operators. This commenter also claimed that the requirement of buffer zones was an onerous and unnecessary burden that could have serious adverse effects on many operations and preclude the mining of significant reserves.

OSM rejects the position that there is no need for a section dealing with stream buffer zones. Final § 816.57 implements Sections 515(b)(10) and 515(b)(24) of the Act and is also authorized by Sections 102, 201, 501, 503, 504, 506, 507, 508, 510, and 517 of the Act. Streams are crucial conduits of sediment pollution from mine areas and are often valuable fish and biological habitats. Because of the significance of streams, OSM will specify how streams are to be treated and protected. Section 816.57 establishes the kinds of streams that will trigger direct protection measures. Proposed § 816.43 would describe how stream channels and surface water must

be handled when diversions are justified (see the preferred alternative for § 816.43 in Volume III of OSM's Final Environmental Impact Statement OSM EIS–1: Supplement (EIS)).

One commenter recommended that the word "significantly" be added before the word "disturbed" in proposed § 816.57(a) to allow activities such as minimal clearing for drill holes and construction of sedimentation-pond discharge structures to take place. The commenter believed that such activities within the buffer zone would not necessarily alter stream-channel configuration or water quality.

OSM has rejected the change proposed by the commenter. OSM recognizes that some surface mining activities can be conducted within 100 feet of a perennial or an intermittent stream without causing significant adverse impacts on the hydrologic balance and related environmental values. The final rule provides the regulatory authority the flexibility to allow surface mining activities to take place within the 100-foot buffer zone if such activities are conducted in an environmentally acceptable manner. Under final § 816.57(a), the use of erosion and drainage-control measures near the stream will be allowed if they are approved by the regulatory authority in accordance with the specified requirements.

Previous § 816.57(a) required that no land within 100 feet of a perennial stream or a stream with a biological community be disturbed, except where the regulatory authority made certain determinations entitling the operator to an exemption under paragraph (c) of the section. Previous § 816.57(c) stated that a stream had a biological community if it had an assemblage of at least two species of arthropods or molluscan animals which are adapted to, or are dependent on, flowing water, which reproduce in the stream, and which are longer than 2 millimeters at some stage in their lives. Several commenters supported OSM's proposal to remove reference to streams with a biological community and to add reference to intermittent stream on the grounds that the inclusion of intermittent streams would provide a more appropriate and less confusing description of the streams to be protected by buffer zones, as well as eliminate from consideration insignificant streams containing biological communities. Other commenters urged OSM to continue to require a buffer zone for any stream with a biological community. These commenters failed to appreciate how difficult it was to apply the biological-community concept under previous § 816.57(a). They argued that the proposed intermittent-stream standard was logically unrelated to the values which the Act sought to protect and that the proposed rule would exclude from coverage many small streams with biological communities worthy of protection.

OMS has rejected the suggestion that it continue to require protection for any stream with a biological community. The final rule will require buffer zones within 100 feet of any intermittent or perennial stream regardless of the existence of a biological community, unless the regulatory authority grants the operator an exemption. The biological-community standard was confusing to apply since there are areas with ephemeral surface waters of little biological or hydrologic significance which, at some time of the year, contain a biological community as defined by previous § 816.57(c). Thus, much confusion arose when operators attempted to apply the previous rule's standards to springs, seeps, ponding areas, and ephemeral streams. While some small biological communities which contribute to the overall production of downstream ecosystems will be excluded from special buffer-zone protection under final § 816.57(a), the purposes of Section 515(b)(24) of the Act will best be achieved by providing a buffer zone for those streams with more significant environmental-resource values. Those streams not covered by final § 816.57 will still be subject to the general requirements for protection of water quality and hydrologic balance under the preferred alternative of § 816.41 (see volume III of EIS). It is impossible to conduct surface mining without disturbing a number of minor natural streams, including some which contain biota. For this reason, surface coal mining operations will be permissible as long as environmental protection will be afforded to those streams with more significant environmental-resource value.

Several commenters feared that the proposed rule would require buffer zones for insignificant streams, such as manmade drainage ditches and small headwater streams. One commenter recommended that the regulatory authority be allowed to determine what would constitute an intermittent stream according to a minimum drainage area. Two commenters suggested that the regulatory authority be allowed to set a rate of flow figure for streams or, if the regulatory authority chose not to set such a figure, that it be required to use the U.S. Army Corps of Engineers' limit of 5 cubic feet per second as specified by Section 404 of the Clean Water Act. A commenter also suggested that the regulatory authority be required to determine whether the intermittent stream is significant for purposes of protection.

OSM has rejected these suggestions and has retained the definition of intermittent stream provided in 30 CFR 701.5 to avoid problems of interpretation. This definition, coupled with final § 816.57, will allow the regulatory authority the flexibility to determine the significance of streams and the appropriate measures for their protection. The preamble to § 701.5 (44 FR 14932, March 13, 1979) further explains the rationale for OSM's adoption of its definition for the term.

One commenter thought that rills, gullies, drains, and access roads were intermittent streams for which buffer zones would be required under the proposed rule. This commenter feared that no waivers by the regulatory authority would be allowed for construction of head-of-hollow and valley fills and haul roads and for mountaintop-removal projects. Under § 701.5, an intermittent stream is defined to mean a stream or reach of a stream that drains a watershed of at least 1 square mile or that is below the local water table for at least some part of the year and obtains its flow from both surface runoff and ground-water discharge. Thus, by definition, rills, gullies, drains, and access roads will be excluded from the rules for intermittent streams under final § 816.57.

One commenter thought the proposed rule needed clarification and justification since the definition of intermittent stream in § 701.5 is based solely on hydrologic factors and includes no consideration of a stream's importance for biological or wildlife resources. Asserting that the proposed rule was intended to protect intermittent streams of biological importance, the commenter suggested that the rule be revised to take into account whether or not an intermittent stream has significant enough biological value to warrant protection. Although final § 816.57 is intended to protect significant biological values in streams, the primary objective of the rule is to provide protection for the hydrologic balance and related environmental values of perennial and intermittent streams. A definition of intermittent streams based on hydrologic considerations helps avoid problems of practical application and will aid in uniform interpretation of the rule.

Commenters recommended that the proposed rule be revised to give the regulatory authority discretion to determine the width of a buffer zone on a site-specific basis. Because some intermittent-stream valleys in Appalachia are less than 100 feet wide at the bottom, one commenter thought it would be impossible to maintain the 100-foot buffer zone even if a diversion were constructed. One commenter added that designation of 100-foot buffer zones would be difficult in areas where the stream meanders or in areas with seasonal changes in channel configuration. Accordingly, he suggested that the 100-foot buffer zone be retained as a general guideline, but urged that flexibility be built into the rule to allow for a case-by-case evaluation of the width of the buffer zone necessary to protect "associated habitat values."

The 100-foot limit is used to protect streams from sedimentation and help preserve riparian vegetation and aquatic habitats. Since the 100-foot zone provides a simple and valuable standard for enforcement purposes, OSM has chosen not to change the general rule. However, OSM recognizes that site-specific variations in the 100-foot standard should be available whenever there is an objective basis for expanding or contracting the width of the buffer zone. Final § 816.57(a) allows the width of the buffer zone to be modified pursuant to the findings of the regulatory authority.

Sections 816.57(a) (1) and (2)

Section 816.57(a), as proposed, provided that the regulatory authority may authorize surface mining activities within 100 feet of a perennial or an intermittent stream only upon finding that: (1) Any temporary or permanent stream-channel diversion will comply with § 816.44, and (2) such activities will not adversely affect the water quantity and quality of the stream as determined by State and Federal water quality standards. OSM has adopted the proposed rule in final § 816.57(a) with several changes. First, the cross reference to § 816.44 in the proposed rule has been changed to § 816.43 in final § 816.57(a)(2). If the preferred alternative of § 816.43 is not adopted (see volume III of the EIS), a technical amendment will be issued to incorporate the correct reference. Second, the phrase "as determined by State and Federal water quality standards" in proposed § 816.57(a)(2), has been modified and replaced with the requirement that surface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream in final § 816.57(a)(1). Third, a revision has been made to clarify that the provisions of § 816.43 relating to stream-channel diversions apply when such diversions occur, but that there does not have to be a diversion for mining to occur inside the buffer zone. In addition, the order of the two paragraphs has been reversed so that proposed paragraph (a)(1) is final paragraph (a)(2) and proposed paragraph (a)(2) is final paragraph (a)(1).

A commenter stated that field sampling of premining aquatic habitats would be necessary to restore aquatic habitats that approximate premining stream-channel characteristics as required by previous § 816.44. Previous § 816.44 would be superseded and replaced by a new § 816.43 (referenced in the preceding paragraph) if the preferred alternative is adopted. However, OSM agrees that in order for an applicant to demonstrate that a proposed temporary or permanent stream-channel diversion will comply with proposed §§ 816.43 and 816.57, sufficient premining field data and plans are necessary to show how important characteristics of stream channels will be restored.

Several commenters asserted that "and," used as a connective between paragraphs (a)(1) and (a)(2) of proposed § 816.57, implied that operators were required to construct stream-channel diversions to obtain waivers of the general buffer-zone requirements. They requested that the qualifying word "only" be deleted and that the connective "and" be replaced by the word "or" to allow regulatory authorities to consider circumstances on a State- or site-specific basis in making the requisite buffer-zone determinations.

The words "only" and "and" have been retained. However, the second aspect of the commenters' suggestion has been accepted in part. As indicated by another commenter, some minor disturbances such as minimal clearing for drill holes or construction of hydrologic-discharge structures may be appropriate within the 100-foot buffer zone. However, such activities may not be significant enough to justify a diversion of the stream channel. The proposed rule was not intended to prohibit such activities unless the stream channel was going to be diverted, but merely to require that such disturbance be specifically authorized by the regulatory authority on the basis of a finding that water quantity and quality would not be adversely affected. The final rule more accurately reflects this intention by applying the channel-diversion requirements of proposed § 816.43 only if there will be a stream-channel diversion.

A commenter noted that proposed § 816.57(a)(1) would not require restoration of the original stream channel affected by mining, but, instead, would require restoration of important stream-channel characteristics (for example, meanders, pool-riffle ratio, gradients, and riparian vegetation) as specified in proposed § 816.43. The commenter thought this would provide flexibility to the industry in satisfying the requirements of previous § 816.44(d). OSM concurs with the commenter's remarks.

One commenter suggested that proposed § 816.57(a) be revised to include additional language requiring a finding that the native community would be kept functional within the 100-foot buffer zone. A commenter also suggested that § 816.57(a)(1) be revised to contain an explicit provision that disturbed areas in the buffer zone be revegetated with a community of native plants to function as riparian areas.

OSM has rejected the commenter's first suggestion. The Act does not prohibit the disturbance of the native community. Rather, Section 515(b)(19) of the Act requires the reestablishment of vegetation upon completion of mining. The second suggestion has also been rejected as unnecessary since requirements for revegetation are already specified in § 816.11 and since § 816.97(g) prescribes additional vegetation requirements for postmining enhancement of fish and wildlife habitat. Also, proposed § 816.43 requires restoration or approximation of riparian vegetation after stream-channel diversions.

Two commenters thought that the preamble to the proposed rule suggested that restored stream channels had to comply only with requirements for permanent diversions in previous § 816.44(d), while proposed § 816.57 encompassed all of previous § 816.44. These commenters suggested that the proposed rule should also require an operator to reproduce the average stream gradient, channel configuration, meandering, roughness, vegetative habitat, and bank stability in order to minimize disturbances to the sediment-transport process and to restore premining stream habitats.

The reference in the preamble to the proposed rule was intended only to point out that previous § 816.44(d) specified those characteristics of stream channels which mine operaters were required to restore, not to suggest that

operators were required to comply only with those criteria. The requirements for operators to restore characteristics of stream channels have been generally carried forward in proposed § 816.43. However, final § 816.57(a)(2) will allow the regulatory authority to authorize disturbances within the 100-foot buffer zone only if any stream-channel diversion will comply with proposed § 816.43. Thus, operators will be required to comply with all the requirements for permanent or temporary diversions provided in proposed § 816.43, not merely with the rule's requirements for restoration of the important features of altered streams.

One commenter alleged that destruction of aquatic inhabitants would be increased and that natural recovery of altered streams would be delayed because operators would no longer be required to reconstruct the original stream channel under proposed § 816.57(a)(1). Alteration of streams may have adverse aquatic and ecological impacts on both diverted stream reaches and other downstream areas with which they merge. However, final § 816.57(a) will minimize these impacts since mining within the 100-foot stream buffer zone will be allowed only in situations where the regulatory authority determines that any proposed diversion will comply with proposed § 816.43 and that water quantity and quality and related environmental resources will not be adversely affected by these mining activities. Thus, these adverse effects will be short term and natural recovery of the diverted stream will be enhanced.

One commenter felt the requirement for restoration or approximation of the original stream channel would violate a property-owner's rights to achieve a landform compatible with the intended use. He claimed that proposed § 816.57(a)(1) would eliminate the use of valley fills and require operators to remove culverts and road fills which were properly designed to cross streams although these restrictions were unauthorized by the Act.

Final § 816.57(a) provides the regulatory authority sufficient flexibility to allow stream disturbances, including permanent crossings, if adequate environmental protection measures will be adopted. Additional requirements pertaining to culverts and other features of roads are specified in §§ 816.150 and 816.151. (See volume III of the EIS.)

One commenter argued that temporary stream diversions should not have to meet the same standards as permanent diversions, since it frequently may not be possible to stabilize the stream banks and surrounding area for a short period of time in a cost-effective manner to ensure that applicable water-quality standards will be met.

OSM has rejected the commenter's argument as inconsistent with the Act's requirements for operators to minimize disturbances to the prevailing hydrologic balance and to the quality and quantity of water. In particular, Section 515(b)(10)(i) of the Act provides that surface coal mining operations shall be conducted so as to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow or runoff outside the permit area. Proposed § 816.43 would require that any diversion, whether permanent or temporary, remain stable and prevent the conveyance of suspended solids outside the permit area in accordance with Section 515(b)(10) of the Act. Because damage to the prevailing hydrologic balance can result from permanent or temporary alterations of streams, new § 816.57(a)(2) will require all proposed diversions of perennial or intermittent streams to comply with the criteria specified in proposed § 816.43.

One commenter thought that the period for comment on deletion of the requirement for restoration of the original stream channel under proposed § 816.57(a)(1) should have been extended until the time that revisions of existing requirements on channel diversions in § 816.44 were published. Changes in § 816.44 were explained in the notice of proposed rulemaking and published on June 25, 1982 (47 FR 27712). Although the notice of proposed rulemaking discussing revision of rules on stream buffer zones was published on March 30, 1982 (47 FR 13466), the period for comments on both proposed rulemakings was extended until September 10, 1982 (47 FR 39201). In view of these facts, commenters were provided sufficient time in which to analyze the interaction of these provisions.

Proposed § 816.57(a)(2) provided that the regulatory authority may authorize surface mining activities within 100 feet of a perennial or an intermittent stream upon finding that such activities will not adversely affect the water quantity and quality of the stream as determined by State and Federal water quality standards. In response to the remarks of commenters and for reasons discussed below, OSM has modified the phrase "as determined by State and Federal water quality standards" in final § 816.57(a)(1). Under the final rule, the regulatory authority may authorize mining within the stream buffer zone upon finding that such activities will not adversely affect the water quantity and quality and related environmental resources of the stream.

Several commenters recommended deletion or clarification of the phrase "as determined by State and Federal water quality standards" in proposed § 816.57(a)(2). Two commenters asked whether the proposed rule would require the operator to "clean up" a stream flowing into the permit area so that it would meet applicable State and Federal water-quality standards even though the operation did not adversely affect the stream's water quantity and quality. A commenter questioned whether the "standards" reference in the proposed rule pertained to drinking-water standards, effluent limitations for the coal-mine point-source category (NPDES), or some other water-quality standards. Several commenters contended that State and Federal water-quality standards would not provide sufficient protection for all streams because standards for smaller streams might be nonexistent, some State standards might not cover various salts and heavy metals released by mining activities, or because quality standards would not minimize disturbance of the quantity of stream water as required by Section 515(b)(10) of the Act. Commenters also argued that water-quality standards are inadequate to ensure that aquatic habitats would be restored to approximate their premining conditions since the standards failed to consider turbidity and streamflow during periods of drought. One commenter claimed that the proposed rule would emasculate the requirements in Sections 515(b)(10)(B)(i) and 515(b)(24) of the Act by allowing the regulatory authority to decrease the width of the 100-foot buffer zone according to the impact on streams under State and Federal water quantity and quality standards. The commenter alleged that reductions in the width of the buffer zone should not be allowed unless the quantity and quality of water in a stream would not be affected.

Under proposed § 816.41, operators will be required to protect the prevailing hydrologic balance and comply with all applicable non-Act requirements for water-quality protection. To eliminate confusion, OSM has modified the phrase "as determined by State and Federal water quality standards" in final § 816.57(a)(1) to require mining activities not to cause or contribute to the violation of applicable State or Federal water quality standards and not to adversely affect water quantity and quality or other environmental resources of the stream. In determining whether an

operator should be granted an exemption from the buffer-zone requirement, the final rule requires the regulatory authority to consider whether there will be an adverse effect on water quality and whether mining will inhibit the attainment of applicable water-quality standards.

One commenter thought that OSM should delete the word "quantity" from proposed § 816.57(a)(2) because water quantity is not determined by State and Federal water-quality standards. The commenter added that water quantity is adequately covered by § 816.54, but that, in some situations, it would be desirable to separate water flow into several drainage patterns to achieve the most beneficial postmining land use. Another commenter recommended that the quantity aspects of the proposed rule be explored since quantity in water-quality standards usually relates to mixing and dilution capabilities.

OSM recognizes that State and Federal water-quality standards ordinarily do not regulate water quantity. However, instead of deleting the word "quantity" in the final rule, OSM has separated the "quantity" standard from the applicability of State and Federal water quality standards. Under final § 816.57(a)(1), the regulatory authority will consider impacts on streamflow in making the requisite buffer-zone determination.

The phrase "and related environmental resources" has been added to the language of the final rule to indicate that regulatory authorities will be allowed to consider factors other than water quantity and quality in making buffer-zone determinations. This revision will provide a more accurate reflection of the objectives of Sections 515(b)(10) and 515(b)(24) of the Act.

Section 816.57(b)

Section 816.57(b), as proposed, would have provided that the operator must designate the area not be be disturbed as a buffer zone and must mark it as specified in § 816.11. Two commenters contended that the language of the proposed rule went beyond the intent of the Act since it could be interpreted as granting the operator a prerogative to define the limits of the buffer zone. These commenters recommended that the rule be reworded to make it clear that the regulatory authority will have sole responsibility for delineating buffer-zone boundaries.

In final § 816.57(b), OSM has adopted the revised language suggested by the commenters. Accordingly, the final rule provides that the area not to be disturbed must be designated as a buffer zone, and, further, that the operator must mark it as specified in § 816.11.

Section 817.57

Final § 817.57 is essentially the same as final § 816.57, except that this is rule applies the stream buffer-zone requirements to underground mining activities. Interested persons should consult the preamble to final § 816.57 for a discussion of comments and responses relative to final § 817.57. In addition to the authorities cited in the preamble to § 816.57, this rule is also based on Section 516 of the Act.

B. Protection of Fish, Wildlife, and Related Environmental Values

General

OSM received several general comments on proposed § 816.97. A commenter objected to the proposed rules, alleging that they failed to provide for development of natural resources in a responsible manner that would guard fish and wildlife from the adverse impacts of coal mining for the benefit of present and future generations. OSM disagrees with this comment. Final § 816.97 will ensure that harm to fish and wildlife from surface coal mining and reclamation operations will be minimized to the extent possible by requiring operators to use the best technology currently available to protect these resources.

Other commenters favored the proposed rules. One commenter agreed with OSM's proposal to delete certain design requirements specified in previous § 816.97 since they applied only to coal regions and had limited effectiveness as national standards for fish and wildlife protection. A commenter thought the proposal clarified the operator's obligation to protect fish and wildlife from the adverse impacts of mining by eliminating unnecessary language from the rule. Another commenter approved of OSM's efforts to allow regulatory authorities to consider conditions of relevance to fish and wildlife protection, which vary according to the locale of the mine site, but added that some of the proposed changes "seemed reactionary" to district court decisions, which were subject to reversal on appeal and had no "beneficial impact" on wildlife.

Proposed § 816.97 was not simply a reaction to district court decisions. Section 816.97 is intended to satisfy OSM's statutory responsibilities under the Surface Mining Control and Reclamation Act, 30 U.S.C. 1201 *et seq.*; the Endangered Species Act, 16 U.S.C. 1531 *et seq.*; and the Bald Eagle Protection Act, 16 U.S.C. 688 *et seq.*

Representatives of the coal industry, the States of Virginia and Illinois, and certain environmental groups challenged OSM's previous permitting rules as legally inconsistent with the Act. *In re: Permanent Surface Mining Regulation Litigation*, No. 79–1144 (D.D.C., filed March 10, 1979). In that matter, the plaintiffs argued that there was no statutory authorization in Sections 507, 508, or 515(b)(24) of the Act to require fish and wildlife information in the permit application or the reclamation plan. Since Sections 507 and 508 of the Act gave the regulatory authority power to decide on other necessary requirements, plaintiffs contended that the challenged rules usurped the role Congress had delegated to the States by creating a uniform system of permit-data requirements, which left no flexibility for consideration of State-specific conditions.

The district court remanded 30 CFR 779.20 and 780.16, which provided permit requirements for fish and wildlife information. See *In re: Permanent Surface Mining Regulation Litigation*, No. 79–1144, slip op. at 39 (D.D.C. February 26, 1980). OSM subsequently suspended the remanded rules (45 FR 51547, August 4, 1980). Informational requirements on fish and wildlife for permit applications are therefore beyond the scope of this rulemaking.

Section 816.97(a)

Section 816.97(a), as proposed, provided that the operator must, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of fish, wildlife, and related environmental values and must achieve enhancement of such resources where practicable. In response to remarks from commenters and for reasons discussed below, OSM has adopted the proposed rule in final § 816.97(a). Commenters urged that the phrase "[t]he operator" in the proposed rule be replaced with the phrase "[a]ny person," which was used in previous § 816.97(a). They argued that OSM's revision would constrict the scope of protection afforded by Section 515(b)(24) of the Act, since the language of proposed § 816.97(a) would no longer require all non-operators on permitted mine sites to minimize disturbance on fish and wildlife or impose liability on operators for damage to fish and wildlife as a result of illegal (nonpermitted) mining.

This suggestion has been rejected. Under Section 515(b)(24) of the Act, all surface coal mining and reclamation operations are required to minimize disturbances on fish and wildlife, and

related environmental resources to the extent possible by use of the best technology currently available. Final § 816.97(a) makes the operator responsible for minimizing disturbances on fish, wildlife, and related environmental resources in the permit area. The operator is reasonsible for the actions of all persons engaged in the surface coal mining and reclamation operation and for ensuring that the operation is in compliance with the requirements of the Act. In addition, these responsibilities do not supersede those imposed by any other statute or regulation.

Because § 701.5 treats as a "permittee" any person required by the Act or 30 CFR Chapter VII to have a mining permit, an operator mining without a permit is subject to civil liability for violation of the Act's requirements under Section 518. Persons conducting surface coal mining operations without a permit are also subject to the immediate issuance of a cessation order under 30 CFR 843.11(a)(2). (See 47 FR 16558, April 29, 1982.) Accordingly, the duty to minimize the adverse impacts of mining on fish and wildlife under final § 816.97(a) will apply to illegal operators as well as to operators having valid permits.

Commenters found the language of proposed § 816.97(a) unclear regarding who would make the decision as to what would constitute an acceptable minimization of harm from mining on fish and wildlife. One commenter thought that a handbook of guidelines for fish and wildlife protection, prepared by OSM in conjunction with the U.S. Fish and Wildlife Service (USFWS), should be required to clarify these deficiencies.

Under final § 816.97(a), the regulatory authority will determine what will consititute an acceptable minimization of harm. As announced in the notice of the proposed rulemaking (47 FR 13468, March 30, 1982), OSM plans to work with USFWS to devleop manuals to assist operators in preparing site-specific fish and wildlife protection plans. However, the suggestion that operators be required to comply with the guidelines in OSM's proposed manuals has been rejected. The commenter's suggested requirement would discourage operators from implementing innovative conservation techniques. Furthermore, specific manuals provide only suggestions on appropriate techniques; they are not intended to be used as regulatory requirements. Final § 816.97(a) will allow an operator to consult any technical authorities on conservation methods to assure their compliance with the statutory requirement for use of the best technology currently available.

Section 816.97(b)

Proposed § 816.97(b) prohibited any surface mining operations likely to jeopardize the continued existence of endangered or threatened species listed by the Secretary or to result in the destruction or adverse modification of designated critical habitats of such species. Under the proposed rule, the operator was required to report promptly to the regulatory authority any endangered or threatened species within the permit area of which he or she became aware. The proposed rule also required the regulatory authority to consult with appropriate State and Federal fish and wildlife agencies upon such notification from an operator and authorized the regulatory authority to identify whether, and under what circumstances, the operator might proceed with mining only after the mandatory consultation. OSM has adopted the proposed rule in final § 816.97(b) with minor revisions.

Commenters questioned the purpose and source of authority for proposed § 816.97(b). One commenter claimed that neither the SMCRA nor the Endangered Species Act (ESA) authorized OSM's proposed rule. Another commenter, viewing proposed § 816.97(b) as a means for OSM to ensure enforcement of the ESA's provisions by States with approved Title V programs, argued that such a provision would be unnecessary since Section 11 of the ESA granted OSM enforcement power under these circumstances.

Final § 816.97(b), as proposed and adopted, is intended to satisfy OSM's responsibilities under the ESA and to provide protection for endangered or threatened species listed by the Secretary of the Interior and for critical habitats of such species after appropriate consultation with the affected States.

OSM has authority under the ESA to ensure that approved State programs contain appropriate requirements to avoid jeopardy to listed species and to prevent destruction or adverse modification of their critical habitats. Final § 816.97(b) is authorized by Section 7(a) of the ESA, which requires non-ESA programs to be administered and used to further the ESA's purposes. The rule has been revised to indicate specific reliance on the provisions of the ESA. Other sources of authority for this rule are Sections 515(b)(24), 515(b)(10), 515(b)(17), and 201 of the Act.

A commenter recommended that proposed § 816.97(b) be revised to include requirements for species "proposed" for listing, as provided in the 1979 amendments to the ESA. The requirements for species proposed for listing have not been incorporated into the final rule. Final § 816.97(b) provides protection only for endangered or threatened species listed by the Secretary, as was proposed, and for critical habitats of such species designated pursuant to Section 7(a) of the ESA.

One commenter objected to the absolute prohibition of surface mining in proposed § 816.97(b) and contended that OSM's responsibilities under the ESA could be satisfied by requiring that surface mining operations not be conducted "*in such a manner* as to jeopardize the continued existence of endangered or threatened species listed by the Secretary or result in the destruction or adverse modification of designated critical habitats of such species" [emphasis added].

Under the commenter's alternative language, mining operations which could affect endangered species or critical habitats would be allowed, but they would have to be conducted so as to avoid destruction of such species or adverse modification of their critical habitats. OSM agrees with the commenter and has revised § 816.97(b) to prohibit only those operations which would jeopardize endangered or threatened species, by substituting the word "will" for the words "is likely to." Final § 816.97(b) will prohibit operators from conducting surface mining activities which will jeopardize the existence of endangered species or destroy or adversely modify their critical habitats in violation of the ESA. The final rule is consistent with 30 CFR § 786.19(o) of the permitting rules, under which approval of a permit application is contingent on a finding by the regulatory authority that the proposed operation would not affect the existence of listed species or result in destruction of their critical habitats, as determined by the ESA. (See also the perferred alternative for 30 CFR 773.15(c)(10) in volume III of the EIS.)

Previous § 816.97(b) required that operators report promptly to the regulatory authority sightings on the permit area of any plant or animal listed by the State as threatened or endangered. One commenter supported the proposal to delete this provision from OSM's final rules and agreed that the reporting requirement under previous § 816.97(b) would be provided in State programs approved under Title V of the Act.

Several commenters took the position that OSM's final rules should retain a specific requirement for reporting species listed by the State in order to promote identification of critical habitats on mine sites and to achieve the objectives expressed in Section 515(b)(24) of the Act. Commenters alleged that the proposed rule would leave considerations regarding the biological status of species listed by the State to the convenience of mine operators. They argued that the reference to State-listed species in previous § 816.97(b) should be added to the language of OSM's proposed rule to provide endangered species listed by the State the same degree of protection accorded endangered species under Federal law. One commenter believed that operators should be required to continue to report sightings of endangered species listed by the State, since the regulatory authority's responsibility for consultation on the reported sightings under proposed § 816.97(b) would not involve the same full-scale consultation required of Federal agencies by Section 7(a) of the ESA.

A group of commenters claimed that the absence of explicit reference to State listed species in proposed § 816.97(b) would preclude regulatory authorities from requiring operators to report the presence of such species on mine sites in any jurisdiction where enactment of provisions more stringent than those contained in the Federal statute or rules is prohibited by State law. Another commenter feared that OSM would lack authority to order the cessation of mining operations conducted pursuant to a Federal program for a State if an express requirement for reporting species listed by the State were omitted from OSM's final rule.

OSM has rejected the commenters' suggestions and has eliminated express reference to State-listed species from final § 816.97(b). OSM concedes that the consultation required of regulatory authorities under this final rule is not the same formal consultation process required of Federal agencies by the ESA. However, endangered or threatened species listed by the State are not necessarily entitled to protection under Federal law. Additional protection may be required for State-listed species under State law according to Section 505 of the Act.

Previously §816.97(b) required operators to report promptly to the regulatory authority the presence in the permit area of any critical habitat of a threatened or endangered species listed by the Secretary. Several commenters urged OSM to retain this requirement in the final rule to ensure identification and verification of critical habitats known to be within the permit area. One commenter contended that a specific duty to report critical habitats coupled with the responsibility to report sightings, would promote identification and verification of critical habitats not known to exist in the permit area before commencement of mining operations. Another commenter, who supported the proposed deletion of the previous requirement, agreed that critical habitats on mine sites would be adequately identified and reported to the regulatory authority during the permitting process pursuant to § 786.19(o).

OSM has not reinstated the requirement for reporting critical habitats in new § 816.97(b). Under § 786.19(o), approval of an operator's mine permit application is conditional on a determination by the regulatory authority that the proposed operation would not have an adverse effect on critical habitats protected by the ESA. Thus, critical habitats on mine sites will be considered pursuant to § 786.19(o) before a proposed operation is authorized by the regulatory authority. Critical habitats are designated by the Secretary; therefore, they would not be "discovered" on the mine site after the commencement of mining operations.

One commenter wondered whether the reporting requirement in proposed § 817.97(b) applied only to species known to reside on the mine site or whether it also included sightings of endangered or threatened birds along migration routes or flyways in the permit area. The commenter recommended that the final rule require an operator to report such sightings only if the species discovered on the permit area is known to reside there or in a similar habitat.

Final § 816.97(b), as proposed and adopted, requires an operator to report endangered or threatened species within the permit area of which the operator becomes aware. It does not require operators to report species merely sighted at a distance as they fly near the permit area. However, endangered or threatened species found in the permit area must be reported.

One commenter recommended that the reporting and consultation requirements be eliminated from the rule since these procedures are adequately provided for by the ESA. Citing the attraction of eagles and other raptors to silos as evidence that some mining facilities have no adverse impacts on threatened or endangered species, the commenter characterized the reporting requirement in proposed § 816.97(b) as inconsistent with the ESA and as onerous to operators.

OSM has rejected the commenter's recommendation. The reporting and consultation duties in final § 816.97(b) are consistent with Section 7(a) of the ESA, which obligates Federal agencies to use their authority in furtherance of the ESA's objectives.

One commenter advocated that the words "consult" and "consultation" in the proposed rule be changed to "coordinate" and "coordination" to make it clear that the regulatory authority's responsibility for consultation under OSM's rule would not be the same consultation required of Federal agencies by Section 7(a) of the ESA. OSM acknowledges that the consultation required under final § 816.97(b) will not be the formal consultation provided for in Section 7(a) of the ESA when a Federal agency takes an action which may harm an endangered species. While "coordination" refers to the process of harmonizing and adjusting a set of interrelated requirements, "consultation" denotes the process of conferring with other persons for their advice or opinions in order to reach a decision on a particular matter. OSM continues to believe that the word "consultation" as used in final § 816.97(b) is appropriate.

A commenter recommended that the phrase "continuing to operate while taking proper precautions to protect such species" be added to the end of the second sentence and that the words "whether and" be deleted from the last sentence of proposed § 816.97(b) so that mining could continue on the permit area during the interim between the reported sighting and the verification of any threatened species or critical habitat on the mine site.

Another commenter requested that OSM clarify whether proposed § 816.97(b) would require the regulatory authority to order the shutdown of an entire permitted operation or the cessation of mining only in the area of the sighting during the interim between reporting the sighting and the regulatory authority's determination on continuation of mining.

Final § 816.97(b) authorizes the shutdown of a permitted operation only after the regulatory authority has determined that the operation may not be allowed to proceed and after consulting with the appropriate fish and wildlife agencies. The language suggested by the commenter is unnecessary since the final rule will

allow a permitted operation to proceed with mining during the interim between the reported sighting and the regulatory authority's decision on continuation of the operation. However, final § 816.97(a) will require the operator to continue to use the best technology currently available to minimize harm to fish and wildlife as a result of mining during that interim.

In addition, OSM has retained the words, "whether and" in new § 816.97(b). Thus, the final rule authorizes the cessation of a permitted operation after startup upon a determination by the regulatory authority, in consultation with the appropriate fish and wildlife agencies, that such a mining operation will jeopardize the continued existence of federally-listed species or result in destruction or adverse modification of their critical habitats.

One commenter feared that continuation of any mining operation after startup would automatically be jeopardized by the unexpected appearance of any endangered or threatened species, whether migratory or transitory, as a result of the consultation requirement in proposed § 816.97(b). Because species permanent or indigenous to the areas of the operation would be identified in the operator's permit application, the commenter argued that the consultation requirement should be deleted from proposed § 816.97(b) to protect the substantial legal and financial commitments of the operator on the permit site.

The commenter has overstated the potential impact of mandatory consultation on the continuation of permitted mining operations. Final § 816.97(b) requires consultation whenever the regulatory authority receives a report from an operator that any endangered species has been identified on the permit area. The consultation process will lead to the shutdown of a permitted operation only if the regulatory authority, upon consultation with the appropriate fish and wildlife agencies, determines that mining may not proceed on all or part of the site. Final § 816.97(b) should result in the cessation of very few permitted operations, since the regulatory authority is required to consider impacts of the operation on threatened and endangered species before permit approval under § 786.19(o). No permit will be issued to an operator unless the regulatory authority finds that the proposed mining activities will not jeopardize the continued existence of endangered species or result in the destruction or adverse modification of their critical habitats. Even in those situations where mandatory consultation will culminate in the permanent shutdown of permitted operations, provisions for appeal of the regulatory authority's cessation order at 30 CFR Part 775 will provide due-process protection for any substantial legal and financial commitments of the operator in procuring a permit for the site.

Section 816.97(c)

Proposed § 816.97(c) prohibited surface mining operations from being conducted in a manner which would result in the unlawful taking of a golden eagle nest. Under the proposed rule, the operator was required to report promptly to the regulatory authority any golden eagle nest on the permit area of which he became aware. The proposed rule also required the regulatory authority to consult with the appropriate Federal and State fish and wildlife agencies upon such notification from the operator, and authorized the regulatory authority to identify whether, and under what circumstances, the operator may proceed with mining only after the mandatory consultation.

OSM has adopted the language of the proposed rule in final § 816.97(c), with one change. The phrase "a golden eagle nest" in the first sentence of proposed § 816.97(c) has been revised to "a bald or golden eagle, its nest, or any if its eggs" in the final rule. This revision will provide protection for bald and golden eagles and their nests or eggs in accordance with the Bald Eagle Protection Act (BEPA), as amended, 16 U.S.C. 668 *et seq.* and will clarify the relationship between the SMCRA and the 1978 amendment to the BEPA that authorizes the taking of inactive or abandoned golden eagle nests which interfere with the development and recovery of natural resources.

Since the BEPA authorizes the U.S. Fish and Wildlife Service (USFWS) to protect golden eagle nests, one commenter suggested that operators should be required to report to USFWS any golden eagle nest sighted on the permit area, rather than to State regulatory authorities.

This suggestion has been rejected. The objective of the provision is to ensure that the regulatory authority implementing the SMCRA is provided necessary information to resolve conflicts between the SMCRA and the BEPA, not to create an enforcement or reporting mechanism for the fish and wildlife agencies. The commenter's reporting alternative would require USFWS to notify OSM, State regulatory authorities, or State fish and wildlife agencies of the need for consultation. OSM has no authority to require USFWS to assume or discharge such a duty. Thus, the reporting requirement under final § 816.97(c) is considered more appropriate to ensure that mining operations are conducted in accordance with Section 515(b)(24) of the SMCRA and the provisions of the BEPA and that the requirements of the two statutes are promptly reconciled.

One commenter recommended that the proposed rule be revised to require prompt reports to the regulatory authority "in accordance with the approved mining and reclamation plan" of the operation. OSM has not accepted this recommendation since addition of the phrase suggested by the commenter could require the operator to report the presence of a golden or bald eagle nest on the mine site only if the eagle had been previously identified by the operator and listed in the operational plan segment of his or her permit application. A broader reporting and consultation provision is warranted. Final § 816.97(c) will require the operator to submit a prompt report to the regulatory authority of *any* bald or golden eagle nest, regardless of whether its existence on the mine site was identified during the permitting process or disclosed after commencement of a permitted mining operation.

A commenter suggested that OSM not include the proposed provisions for mandatory consultation in final § 816.97(c) since the regulatory authority would *always* consult with the appropriate fish and wildlife agencies upon notice from the operator. The commenter claimed any specification limited the flexibility that the regulatory authority needs in consultation.

OSM disagrees and has retained the proposed consultation requirement in final § 816.97(c). The final rule requires the regulatory authority to consult the USFWS and also, where appropriate, the State fish and wildlife agency, to ensure that the regulatory authority has the benefit of their concerns and suggestions before instructing the operator whether and under what conditions, he or she may proceed. This will not impose any undue burden or create additional delay.

Section 816.97(d)

Proposed § 816.97(d) provided that nothing in Chapter VII authorized the taking of an endangered or threatened species or a golden eagle nest in violation of the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C.

1531 *et seq.*, or the Bald Eagle Protection Act, as amended, 16 U.S.C. 668 *et seq.*

One commenter suggested that the relationship between the BEPA and SMCRA should be clarified by revising the language of the proposed rule to protect bald eagles as well as golden eagles, their nest, and their eggs. A commenter also recommended that OSM insert a specific reference to the Migratory Bird Treaty Act of 1918, 16 U.S.C. 703 *et seq.*, in the language of the proposed rule to ensure administration of the SMCRA's requirements in accordance with the other act's provisions.

OSM has accepted both suggestions. The language of the proposed rule has been revised to incorporate the commenters' recommendations in final § 816.97(d) regarding the protection of bald eagles. The final rule provides that nothing in Chapter VII authorizes the taking of an endangered or threatened species, a bald or golden eagle, its nest, or any of its eggs in violation of the ESA or the BEPA. This section makes it clear that in reconciling the requirements of the SMCRA with the acts identified under Paragraphs (b) and (d) of this section, these other acts take precedence over the requirements of the SMCRA. OSM will insert a specific reference to the Migratory Bird Treaty Act of 1918, as amended, 16 U.S.C. 703 *et seq.*, in final 30 CFR 773.12 to recognize the regulatory authority's responsibilities under that act in the permit-application review process.

One commenter suggested that the word "active" be inserted before the phrase "golden eagle nest" in proposed §§ 816.97 (c) and (d). This revision was claimed to be consistent with rules proposed by the USFWS under the BEPA. Since eagles are known to construct several nests simultaneously and since nests not in use may last several years, the commenter argued that operators should not be required to report the presence of inactive or abandoned nests on the permit area. The commenter's suggested language has not been accepted. To the extent that an inactive nest could be disturbed under the BEPA and the fish and wildlife rules, the consultation provisions of § 816.97 (c) should not impose and undue burden on operators, but instead, may help operators to avoid actions in violation of the BEPA.

Final §§ 816.97 (c) and (d), which require operators to report inactive or abandoned nests on permitted sites, is in accordance with USFWS rules under the BEPA. The rules proposed by USFWS (45 FR 809, January 3, 1980) would authorize the taking of nests under limited circumstances and would require permits for removal or disturbance of nests with documented use patterns.

Section 816.97(e)(1)

Previous § 816.97(c) required mine operators to ensure that electric powerlines and other transmission facilities used for, or incidental to, mining activities on the permit area were designed and constructed in accordance with guidelines set forth by the U.S. Departments of the Interior and of Agriculture (1970) or in other manuals approved by the regulatory authority. The previous rule also required that distribution lines be designed and constructed in accordance with criteria specified by the U.S. Rural Electrification Administration (1972), or in the other guidance manuals approved by the regulatory authority. OSM proposed the deletion of these provisions from the rules on the theory that their requirements would be implicit in the operator's duty to use the best technology currently available under § 816.97(a), as proposed. Only one commenter concurred with OSM's proposal. The overwhelming majority of commenters urged OSM to retain specific criteria for design and construction of powerlines on the permit area.

Commenters thought specific requirements were necessary in the rules to minimize entanglement and electrocution hazards and to avoid any increase in raptor mortality from mining activities which are inconsistent with the purposes of the Bald Eagle Protection Act and related Federal statutes. A commenter claimed that OSM's elimination of the requirement would leave States without the authority to require mine operators to use raptor-proof powerlines even though 6 golden eagles had been electrocuted on mine sites in Wyoming during the past 2 years as a result of poorly designed powerlines. Commenters argued for reinstatement of specific requirements since the technology-forcing aspect of Section 515(b)(24) of the Act must be coupled with adequate notice and guidance for operators to ensure the protection of wildlife. One commenter considered the manual that OSM proposed to develop to assist operators in preparing site-specific plans for fish and wildlife protection inappropriate, since it would not empower regulatory authorities to require proper construction of power poles on mine sites. A commenter added that the Act's public-participation requirements would be thwarted if design standards were eliminated from the rule and placed in manuals known only to mine operators. One commenter claimed the lack of specific design criteria would leave mine operators too much discretion and assure inadequate compliance with the best-technology standard. Another commenter contended that the previous rule did not impose excessive burdens on the coal mining industry because costs of compliance with the former requirements for design of powerlines reported by some operators were less than costs for conventionally-designed lines. One commenter advocated express requirements in the rules to make operators aware of potential hazards to large raptors from powerlines on mine sites, inform them of the best technology currently available to protect such species, and ensure effective implementation of the best-technology requirement by regulatory authorities.

OSM has modified the substance of previous § 816.97(c) and specified revised requirements for design and construction of powerlines in a new § 816.97(e)(1) to accord with the commenters' concerns and to avoid problems of interpretation. Under the final rule, operators will be required, to the extent possible using the best technology currently available, to ensure that electric powerlines and other transmission facilities used for or incidental to surface mining activities on the permit area are designed and constructed to minimize electrocution hazards to raptors, except where the regulatory authority determines that such requirements are unnecessary. This exemption will provide the regulatory authority discretion to take into account specific conditions on each mine site as well as to eliminate the need for operators to comply with new § 816.97(e)(1) when eagles or other large birds are not known to frequent the permit area or there is no chance that raptors will be electrocuted on the site.

One commenter suggested that the reference in previous § 816.97(c) to the U.S. Rural Electrification Administration Bulletin 61–10 (1972) be omitted from the final rules since raptor-proofing powerlines would be less costly than retrofitting problem powerlines. OSM agrees with the commenter's position, and the previously cited reference has been deleted from final § 816.97(e)(1).

Another commenter recommended that operators be required to construct powerlines on mine sites in accordance with design criteria set forth in a 1981 report on raptor protection from powerlines. However, because specific sources of guidance for wildlife protection may become obsolete or outdated as a result of technical innovations, OSM has eliminated any

citations to specific manuals or publications from the final rule. Final § 816.97(e)(1) will require the regulatory authority to determine which specific measures are necessary to ensure that hazards of electrocution to raptors will be minimized on the permit area. However, mine operators will be free to consult any technical literature for guidance on how to protect large birds from contact with powerlines.

Sections 816.97 (e)(2) and (e)(3)

OSM specifically requested comments on whether requirements for location and use of haul roads, fencing of migratory routes, and fencing of toxic ponds, as provided in paragraphs (d)(1), (d)(2), and (d)(3) of previous § 816.97, should be retained in the new rules. Several commenters supported OSM's proposal to delete these requirements since they involved issues which should be resolved by State regulatory authorities based on the site-specific needs of local species. They believed OSM's rules should afford regulatory authorities the flexibility to develop specific guidelines for wildlife protection tailored to particular conditions in each State. Other commenters recommended that final § 816.97(a) include a specific requirement for operators to comply with guidelines for fish and wildlife protection in regional manuals prepared by USFWS, instead of retaining previous §§ 816.97 (d)(1), (d)(2), and (d)(3) in the final rules. One commenter thought that the previous requirements should be specified in the final rules until such time as OSM could issue a technical manual to guide operators in preparing site-specific plans for fish and wildlife protection.

The majority of commenters, however, objected to OSM's proposal to delete previous §§ 816.97 (d)(1), (d)(2), and (d)(3) and advocated their retention in the final rules. One commenter complained that the Act's public-participation requirements would be thwarted if these requirements were eliminated from OSM's final rules and placed in manuals known only to mine operators. Several commenters claimed that specification of the requirements was necessary to provide for effective implementation of the general performance standard in proposed § 816.97(a) for operators to use the best technology currently available. They argued that the language of proposed § 816.97(a) merely restated the general mandate in Section 515(b)(24) of the Act and was insufficient to satisfy Section 201(c) of the Act in the absence of specific requirements for protection of fish and wildlife. Another commenter thought OSM should reinstate the former requirements in the final rules to help States comply with their obligations under Section 515(b)(24) of the Act, since regulatory authorities had tended to overlook many considerations relevant to wildlife protection during the permitting process.

One commenter, characterizing the general mandate in proposed § 816.97(a) as "very broad," recommended that the final rules expressly provide for the previous requirements "when deemed necessary to wildlife protection by the regulatory authority" to avoid problems of interpretation as well as problems resulting from nationwide application of rules suited only to a particular geographic region. A commenter claimed that elimination of the requirements from OSM's rules would leave States without authority to initiate the development of guidelines and standards for the protection of fish and wildlife. Another commenter argued that OSM's proposal was contrary to the congressional policy expressed in the Act for a consistent nationwide program inasmuch as State regulatory authorities would be allowed to develop guidelines and impose requirements for fish and wildlife protection on a local basis. According to the commenter, these developments would invite the type of varying enforcement that originally made the Act necessary. One commenter contended that the proposal would make mine operators responsible for identification of riparian communities and threatened or endangered species, designation of buffer zones, and evaluation of habitats of unusually high value, even though OSM should be responsible for those functions which require professional judgment and expertise.

Previous § 816.97(d)(1) required that, to the extent possible using the best technology currently available, mine operators locate and operate haul and access roads so as to avoid or minimize impacts on important fish and wildlife species or other species protected by State or Federal law. Numerous commenters urged OSM to retain this requirement in the final rules as a specific qualification of the operator's general duty to protect fish and wildlife by use of the best technology currently available. Commenters claimed that previous § 816.97(d)(1) should be retained to inform operators of their specific obligations and emphasize the importance of their compliance since improperly used or located haul roads have the potential to disrupt oxygen, production of plants, destroy fish and benthic macroinvertebrates, and interfere with aquatic reproduction by introducing large amounts of eroded silt and sediment into streams.

Proper use and placement of haul roads are factors of which mine operators should be aware, given the potential of roads to cause environmental damage. For this reason, OSM has reinstated the previous requirements for haul roads in a new § 816.97(e)(2). However, OSM has rejected the suggestion for addition of the phrase "when deemed necessary to wildlife protection by the regulatory authority" as inappropriate since proper location and operation of haul and access roads is necessary in all parts of the country. New § 816.97(e)(2) will continue to require mine operators, to the extent possible using the best technology currently available, to locate and operate haul and access roads so as to avoid or minimize impacts on important fish and wildlife species or other species protected by State or Federal law.

Under previous § 816.97(d)(2), mine operators were required to fence roadways, to the extent possible using the best technology currently available, where specified by the regulatory authority to guide locally important wildlife to underpasses or overpasses and to construct the necessary passages. The previous rule also prohibited the creation of new barriers in known and important wildlife migration routes.

Numerous commenters recommended that a specific requirement for protection of migratory routes be included in OSM's final rules. One commenter found the term "best technology currently available" ambiguous and urged OSM to retain the previous requirements as a means of emphasizing to operators the importance of protecting wildlife-migration routes from the impacts of mining activities. Commenters noted that migratory routes in some areas are extremely important to large mammals which rely on different seasonal habitats, such as elk and mule deer. Other commenters considered obstruction of large-mammal movement to be a major problem only in the Western states, where survival of an entire herd may well depend on the animals' ability to migrate into areas where forage is available and other conditions are favorable for reproduction. A commenter, claiming that State regulatory authorities had not used previous § 816.97(d)(2) to obstruct mining, alleged that it prescribed cost-effective means for operators to protect Western wildlife from the impacts of mining. One commenter recommended that OSM adopt a new rule prohibiting

the development of any mine plan feature that would create new barriers to any corridor important to wildlife movement. Another commenter suggested that OSM adopt a new rule requiring operators to design barriers with a potential for obstructing the movement of wildlife in a manner that would allow wildlife access to important migratory routes.

In response to the commenters' concerns, OSM has adopted a revised requirement for protection of wildlife-migration routes in new § 816.97(e)(3). Obstruction of wildlife migration is a regional problem with potentially severe impacts on large mammals peculiar to the West. For this reason, the final rule will require mine operators to design fences, overland conveyers, and other potential barriers to permit passage for large mammals, using the best technology currently available to the extent possible. OSM has also added the phrase "except where the regulatory authority determines that such requirements are unnecessary" in new § 816.97(e)(3) to avoid the problems attendant to nationwide application of rules suited only for a particular geographic region. This will allow the regulatory authority to exempt an operator from the specified requirements on the basis of a finding that compliance is unnecessary for wildlife protection. Additionally, new § 816.97(e)(3) will provide regulatory authorities the discretion to consider regional or site-specific conditions in determining whether compliance with the rule's requirements is necessary to protect wildlife on a particular permit area.

Previous § 816.97(d)(3) required mine operators, to the extent possible using the best technology currently available, to fence, cover, or use other appropriate methods to exclude wildlife from ponds containing hazardous concentrations of toxic-forming materials. Numerous commenters urged OSM to retain the previous requirement in the final rules. Several commenters contended that the absence of a specific fencing requirement from the rules would mean that regulatory authorities in those States that do not allow restrictions more stringent than Federal rules in their State programs or other laws would no longer be able to require operators to block wildlife access to toxic ponds. Since various species of wildlife, including big game and waterfowl, that are part of the human food chain in the West are attracted to water sources in an otherwise arid region, a commenter thought that retention of the fencing requirement was necessary to ensure that toxic substances consumed by these species would not eventually be passed on to humans.

Some commenters claimed it was inconsistent with the best-technology standard for OSM to relieve operators of the obligation to fence toxic ponds on mine sites. Although several commenters agreed with OSM's contention that fencing does not totally preclude access to toxic ponds for *all* wildlife, they thought that elimination of this requirement from the final rule would increase adverse impacts of mining operations on wildlife. One commenter also recommended that OSM adopt a new rule retaining fencing requirements only for large mammals, since the Migratory Bird Act already requires operators to take protective measures to exclude waterfowl and migratory birds from hazardous impoundments on mine sites.

OSM has rejected the commenters' suggestions and has eliminated the fencing requirement in the final rule. Toxic ponds are not ordinarily found on mine sites, even in the West. To date, there is little evidence of specific damage to wildlife as a result of unprotected toxic ponds on the site of any mining operation. In the event that there is a local problem with fish and wildlife being adversely affected by toxic ponds, the regulatory authority will have the authority under final § 816.97(a) to require the operator to use whatever method is consistent with the requirement to use the best technology currently available to exclude wildlife from those ponds, including fencing. For these reasons, a specific fencing requirement is deemed unnecessary in the final rule.

Previous § 816.97(d)(7) provided that operators, using the best technology available to the extent possible, must not use persistent pesticides on the permit area unless their use was approved by the regulatory authority. Several commenters recommended that this prohibition be retained in the final rules to qualify the operator's general duty to protect wildlife through use of the best technology currently available. One commenter, claiming that State regulatory authorities tended to overlook many considerations relevant to wildlife protection in the past, thought the prohibition should be restated to assist State regulatory authorities in enforcing Section 515(b)(24) of the Act.

Some commenters favored retention of previous § 816.97(d)(7) on the grounds that persistent chemicals are not readily degradable and would cause adverse impacts on fish and wildlife as well as on humans by remaining active in the environment for long periods of time after their use. Other commenters supported OSM's coordination efforts, but found the proposed rule inconsistent with OSM's obligations under Section 515(b)(24) of the Act, since the effects of pesticides used in coal mining operations are not specifically addressed by the U.S. Environmental Protection Agency (EPA) rules. See 40 CFR Parts 162–180. A commenter also claimed that specific prohibition on use of persistent pesticides was consistent with OSM's asserted jurisdiction over endangered species in connection with coal mining operations and would assist OSM's effort to coordinate inter-agency requirements.

OSM has rejected the suggestions that the prohibition on use of pesticides in previous § 816.97(d)(7) be included in this final rule. Operators will no longer be specifically prohibited from using pesticides on mine sites without prior regulatory authority approval. However, a regulatory authority will be able to impose necessary conditions concerning pesticides under final § 816.97(a). Also, pesticides used on the mine area will have to conform to Federal and State laws, including the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136a *et seq.*, which allows the use of only those chemicals registered or cleared by the EPA. For most circumstances, EPA regulations provide adequate restrictions on the use of pesticides during mining operations. See 40 CFR Parts 162–180.

Previous § 816.97(d)(8) required mine operators, to the extent possible using the best technology currently available, to prevent, control, and suppress range, forest, and coal fires not approved by the regulatory authority as part of a management plan. Several commenters urged OSM to retain this requirement in the final rules as an express qualification of the operator's duty to use the best technology currently available to protect wildlife. However, another commenter argued that the fire-prevention requirement should be specified because it was logically unrelated to the operator's responsibilities under proposed § 816.97(a). Other commenters disputed OSM's contention that the requirement was implicit in proposed § 816.97(a). They favored its specification in the final rules to ensure compliance with Sections 201(c)(2) and 515(b)(24) of the Act because 30 CFR 816.86 did not address all types of fires potentially incidental to coal mining operations. OSM has rejected the commenters' suggestions and has omitted the requirement from the final rules, since

coal-refuse fires are already addressed by § 816.86. Furthermore, final § 816.97(a) will allow the regulatory authority to require operators to prevent fires by using the best technology currently available where site-specific conditions make such a requirement necessary and where local regulation might be insufficient. In addition, fire prevention is standard procedure for most mines.

Section 816.97(f)

Proposed § 816.97(e) required the operator conducting surface mining activities to avoid disturbances to, enhance where practicable, restore, or replace wetlands, riparian vegetation along rivers and streams, and littoral-zone vegetation bordering ponds and lakes. The proposed rule also required that surface mining activities avoid disturbances to, enhance where practicable, restore, or replace habitats of unusually high value for fish and wildlife. OSM has adopted proposed § 816.97(e) as final § 816.97(f), but has not adopted the phrase "littoral zone vegetation" in the language of the final rule. Operators will be required to avoid disturbances to, enhance where practicable, restore, or replace wetlands and riparian vegetation along rivers and streams and bordering ponds and lakes.

Specific comments were requested and received on whether it was necessary or appropriate to include the proposed references to wetlands in OSM's final rules, given the U.S. Army Corps of Engineers' (Corps) regulatory authority over wetlands under Section 404 of the Clean Water Act, 33 U.S.C. 1344, and Section 10 of the Rivers and Harbors Act, 33 U.S.C. 403. Several commenters believed that references to wetlands should be eliminated from OSM's new rules since these areas would be protected from the impacts of coal mining under the Corps' permit program. One commenter found wetlands requirements unnecessary in OSM's rules on the grounds that these areas are already protected from damage as a result of surface mining activities by Section 404 of the Clean Water Act. Another commenter thought that OSM's proposal would provide mine operators more flexible standards for wetlands preservation than those provided by the previous rules, but agrued that wetlands protection involving surface mining activities should be left to State regulatory authorities under 33 CFR 330.5(a)(21) of the Corps' permit rules (44 FR 31833, July 22, 1982). A commenter found the Corps' permit program preferable to OSM's proposed § 816.97(e), which included no definition of wetlands and failed to specify the duties required of operators for compliance.

Among commenters who favored adoption of OSM's proposed wetlands provisions in its final rules, one claimed the provisions are necessary to implement OSM's statutory responsibilities under Section 515(b)(24) of the Act. Several commenters thought that OSM's proposed rules would provide greater protection for wetlands than would the Corps' permit program. One commenter noted that proposed § 816.97(e) would omit the 5-cubic-feet-per-second (cfs) limitation in the Corps' nationwide general permits and would include wetlands, including both riparian- and littoral-vegetation zones, while the commenter believed that the Corps' rules would protect only wetlands below the ordinary high-water line. A commenter recommended that references to wetlands be retained in OSM's final rules until the Corps resolves the issue of blanket permit status for surface mining activities nationwide under § 330.5(a)(21), as in its interim final rules. One commenter also suggested that OSM apply proposed § 816.97(e) only where neither the State nor the Corps has clearcut permit jurisdiction over the mining operation under Section 404 of the Clean Water Act. In situations where their regulatory responsibilities clearly overlap, the commenter thought that OSM or the Corps should waive jurisdiction.

OSM has decided to retain specific reference to wetlands protection in the final rules. These had been proposed at § 816.97(e) and are included under § 816.97(f) of the final rule.

In establishing special provisions for wetlands under Section 515(b)(24) of the Act, OSM recognizes that there will be some duplication between the requirements imposed by OSM under the Surface Mining Act and those imposed by the Corps under Section 404 of the Clean Water Act. OSM will continue to work with the Corps to minimize this duplication through the development of general permits under the Clean Water Act and, where appropriate, through future OSM rulemaking. Inclusion of specific wetlands-protection provisions in these final rules should help expedite the development of general permits by the Corps, since wetlands will always be ensured of regulatory protection. OSM has not developed a new definition for wetlands in § 816.97(f). Instead OSM intends to rely upon the wetlands definition developed by EPA and the Corps for the Section 404 program. Under the definition at 40 CFR 230.3, "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated-soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. This same definition of wetlands also appears in the Corps' interim final rules on dredging permits at 33 CFR 323.2(c) (47 FR 31811, July 22, 1982).

Several commenters sought reinstatement of the reference to "[e]ach person" under previous § 816.97(d) on the grounds that use of "[t]he operator" in proposed § 816.97(e) narrowed the scope of protection afforded by Section 515(b)(24) of the Act by allowing for unchecked wetlands degradation. For reasons discussed above under § 816.97(a), OSM disagrees and has used the term "[e]ach operator" in final § 816.97.

Several commenters requested that OSM reinstate the language of previous § 816.97(d)(10) that "[w]etlands shall be preserved or created rather than drained or otherwise permanently abolished" to effectuate the purposes of Section 515 (b)(24) of the Act. OSM has rejected this suggestion as unnecessary. Final § 816.97(f) will require that wetlands not be permanently abolished and that equivalent wetlands replace wetlands harmed by mining. These requirements are implicit in the duty to "restore, or replace wetlands . . ." under the final rule.

One commenter felt it was impracticable and infeasible to require an operator to "restore or replace" wetlands disturbed by mining. Another commenter suggested that "where practicable" be added after "restore" and that "where practicable or desirable" be inserted after "replace" in the first sentence of proposed § 816.97(e), since land would be more economically productive in postmining uses other than wetlands in many cases. Another commenter suggested that wetlands and habitats of unusually high value for fish and wildlife be restored "where consistent with a surface owner's post mining land use and if removal of such wetlands will have significant hydrological consequences on surrounding lands."

The value of wetlands has been recognized under the Clean Water Act and Executive Order 11990. These authorities indicate a strong presumption in favor of restoration of wetlands. OSM recognizes that restoration of the land to a higher and better use is also specifically allowed under Section 515(b)(2) of the Act. This

provision is implemented under § 816.133 to allow for alternative postmining land uses. However, when no alternative postmining land use is allowed, restoration of wetlands must proceed in accordance with final § 816.97(f).

One commenter recommended that the term "avoid" in proposed § 816.97(e) be replaced by the term "minimize," since the Act nowhere requires the operator to "avoid" disturbances. OSM has rejected this recommendation and retained the term "avoid" in final § 816.97(f). The final rule does not prohibit disturbance of wetlands. However, it does recognize that avoiding such disturbances would be consistent with the requirements of Section 515(b)(24) of the Act to protect fish, wildlife, and related environmental values.

Another commenter advocated the revision of proposed § 816.97(e) to require that riparian vegetation be restored "where practicable" or replaced "where practicable or desirable." According to this commenter, riparian vegetation cannot be replaced in its premining location whenever the postmining land use does not require restoration of a diverted stream or requires the stream to be replaced in another location. No change is necessary to accommodate the commenter's concern. The final rule is not intended to require restoration of riparian vegetation in locations other than near where the stream is ultimately located.

Several commenters urged OSM to reinstate "riparian" as the modifier of "vegetation bordering ponds and lakes" in proposed § 816.97(e), since the reference to "riparian vegetation" would include vegetation at the end of the waterline as well as vegetation in ponds and lakes. They contended that the proposed rule would not require mine operators to "avoid disturbances to, enhance where practicable, restore or replace" vegetation beyond the waterline because "littoral zone vegetation" is generally defined to include only aquatic vegetation.

The term "littoral zone vegetation" refers only to vegetation that exists in the interval between the high- and low-water marks, while "riparian zone" vegetation denotes vegetation growing at any place along the banks of a body of water. Accordingly, OSM has omitted the proposed reference to "littoral zone" as unnecessary. Under final § 816.97(f), mine operators will be required to avoid disturbances to, enhance where practicable, restore, or replace wetlands and riparian vegetation along rivers and streams and bordering ponds and lakes.

One commenter, who found proposed § 816.97(e) vague for not including a definition of "riparian vegetation," requested clarification on this point. Another commenter suggested that "riparian vegetation" be defined in the final rule to avoid confusion over the scope of the term.

It is unnecessary to include a definition of "riparian vegetation" in final § 816.97(f). Riparian vegetation varies considerably from site to site, but generally includes aquatic vegetation as well as other vegetation on the banks of a body of water.

One commenter requested that OSM clarify how far riparian vegetation would extend and whether operators would be required by proposed § 816.97(e) to enhance, restore, or replace riparian vegetation beyond the 100-foot buffer zone. Another commenter recommended addition of the terms "perennial and intermittent" before the words "rivers and streams" in proposed § 816.97(e) so that individual States would be responsible for determining what are "perennial and intermittent rivers and streams." As previously stated, riparian vegetation means aquatic vegetation as well as other vegetation on the banks of a body of water. This could include any body of water and need not be limited to perennial and intermittent streams. If existing riparian vegetation extends beyond the 100-foot zone before mining, then restoration of riparian vegetation beyond that limit could also be warranted. This determination will have to be made on a site-by-site basis.

Several commenters asked who would determine habitats of unusually high value for fish and wildlife under proposed § 816.97(e). One commenter recommended that consultation with Federal and State fish and wildlife agencies be required in making this determination. Another commenter suggested that the phrase "as determined by the regulatory authority" be added at the end of the second sentence of proposed § 816.97(e) to make it clear that the regulatory authority will be responsible for determining what constitutes a habitat of unusually high value for fish and wildlife.

It is unnecessary to add the provision "as determined by the regulatory authority" to final § 816.97(f). For purposes of clarification, the regulatory authority will be responsible for determining what will constitute a habitat of unusually high value under final § 816.97(f). OSM agrees that the regulatory authority should consult with Federal and State fish and wildlife agencies in determining habitats of unusually high value. However, a specific requirement for consultation has not been added to final § 816.97(f) since the regulatory authority may use other means to identify habitats of importance and need not be limited to any particular form of consultation.

Commenters agreed that determinations of habitats of unusually high value for fish and wildlife should depend on site-specific conditions, but suggested that OSM adopt a generic definition for the term to provide operators some certainty regarding the scope of their duties under proposed § 816.97(e). OSM has rejected the commenters' suggestion and omitted any specific definition from final § 816.97(f) to provide the regulatory authority maximum flexibility in determining what constitutes a habitat of unusually high value for fish and wildlife. Under the final rule, the determination may be established on the basis of conditions peculiar to the region where the mining operation is located. OSM will monitor application of these requirements and, if the provision proves to be unnecessarily confusing, OSM will consider providing additional guidance.

A commenter recommended that the second provision of proposed § 816.97(e) be deleted from the final rule, since habitats of unusually high value were already protected as "critical designated habitats" of endangered or threatened species under proposed § 816.97(b). Habitats of unusually high value for fish and wildlife under final § 816.97(f) are not intended to be limited to the "designated critical habitats" of endangered or threatened species under final § 816.97(b). Rather, this provision is intended to provide the regulatory authority the flexibility to require protection of certain locally important habitats even though they may not be critical habitats of any threatened or endangered species.

Section 816.97(g)

Proposed § 816.97(f) specified vegetation requirements for enhancement of lands that will be used for postmining fish and wildlife habitat. Paragraphs (f)(1), (f)(2), and (f)(3) of the proposed rule required that the plant species to be used on such reclaimed areas be selected on the basis of their proven nutritional value for fish or wildlife, their use as cover for fish or wildlife, and their ability to support and enhance fish or wildlife habitat after the release of performance bonds. In addition, proposed § 816.97(f)(3) required that the selected plants be grouped and distributed in a manner which optimizes edge effect, cover, and

other benefits to fish or wildlife. OSM has adopted the proposed provisions in final §§ 816.97 (g)(1), (g)(2), and (g)(3).

A commenter thought that microsites would be necessary to maximize plant diversity and develop a mixture of plant species capable of supporting postmining fish or wildlife habitat under proposed § 816.97(f). He conceded that topographic irregularities and selective soil salvage and replacement would promote the successful growth of various plant species, but claimed that wildlife species would not use areas of diverse vegetation for habitat when other conditions, such as rock or brush cover and snags or perches, are nonexistent in those areas.

Under final § 816.97(g), the regulatory authority will approve the mixture and distribution of plants required to optimize the reclaimed areas for use as postmining fish and wildlife habitats. OSM intends that operators create microsites only where the regulatory authority determines these conditions are necessary to support or enhance postmining habitat uses on the basis of site-specific factors.

A commenter stated that operators should be required to use only species native to the mined area in revegetation unless scientific research could clearly demonstrate that non-native plant species would have no impact upon surrounding native vegetation. He recommended addition of such a requirement to the language of proposed § 816.97(f). OSM has rejected this suggestion. Provisions for approval of the use of introduced species are included in the existing revegetation rules at 30 CFR 816.112 and in proposed 30 CFR 816.111, as set forth in Volume III of the EIS.

Section 816.97(h)

When cropland is to be the postmining land use, proposed § 816.97(g) required operators, where appropriate for wildlife- and crop-management practices, to intersperce the fields with trees, hedges, or fence rows throughout the harvested area to break up large blocks of monoculture and diversify habitat types for birds and other animals. After considering remarks from several commenters, OSM has adopted the proposed rule in final § 816.97(h).

One commenter found the proposed rule unnecessary and impractical because it would require areas for fish or wildlife habitats to be designed and included on reclaimed lands even where no fish or wildlife habitat existed before mining. The commenter suggested that operators be required to enhance cropland to support postmining fish and wildlife habitat only on areas diverted from use as premining fish and wildlife habitat.

This suggestion has been rejected. Final § 816.97(h) will allow the regulatory authority to require enhancement for fish or wildlife of all lands which will be used for postmining agriculture, not just those which were diverted from a premining fish or wildlife use. The general mandate of Section 515(b)(24) of the Act will be achieved more readily by final § 816.97(h) than by previous § 816.97(d)(10).

Another commenter claimed that the proposed requirement of enhancement for wildlife would impair the primary agricultural postmining land use unless crop-management practices were carefully planned. OSM agrees that careful planning by operators will be necessary to ensure that measures for enhancement of wildlife habitat are consistent with appropriate crop-management practices. The enhancement requirement in final § 816.97(h), however, will not impair agricultural postmining land uses. In situations where the specified enhancement measures are inconsistent with agricultural management practices, the final rule will allow the regulatory authority to exempt operators from the requirement to intersperse croplands with trees, rows, and hedges for wildlife habitat.

Section 816.97(i)

For postmining land uses which are residential, commercial, or industrial, proposed § 816.97(h), which has been renumbered as final § 816.97(i), required operators to intersperse the reclaimed lands with greenbelts utilizing species of grass, shrubs, and trees useful as food and cover for wildlife where such greenbelts are consistent with the approved postmining land use.

Commenters recommended that the phrase "public service" in former § 816.97(d)(11) be retained as a substitute for the word "commercial" in the proposed rule. They asserted that the reference to "public service" uses in the previous rule included both public and private uses, while the reference to "commercial" uses under proposed § 816.97(h) encompassed only private uses.

OSM has accepted this recommendation and replaced the proposed reference to "commercial" uses with the reference to "public service" uses in final § 816.97(i). Under the final rule, "public service" uses will encompass both private and public uses. Where the primary postmining land use is to be residential, public service, or industrial, final § 816.97(i) will require the operator to intersperse the land with greenbelts where these areas are consistent with the approved postmining land use.

One commenter contended that §§ 816.97 (f), (g), and (h), as proposed, amounted to an unconstitutional taking of private property by government regulation. In addition, the commenter suggested that these provisions be deleted from OSM's final rules because they prescribe requirements too specific for nationwide application and are inconsistent with Section 508(a)(3) of the Act in failing to allow for any consideration of surface-owners' preferences on postmining land uses.

OSM has rejected the commenter's suggestion and adopted the proposed requirements in final §§ 816.97 (g), (h), and (i). These rules are authorized by Sections 515(b)(24) and 515(b)(2) of the Act. Neither Section 508(a)(3) nor any other provision of the Act makes the operator's reclamation responsibilities contingent on surface-owner consent. Section 508(a)(3) of the Act merely authorizes the regulatory authority to approve alternative proposed postmining land uses after mandatory consultation with the landowner, as recognized in § 816.133(c).

OSM also disagrees with the commenter's contention that the proposed requirements are too specific to include in national rules. The new rules are general in nature and cover anticipated categories of approved postmining land uses, including mixed postmining land uses. They require enhancement of reclaimed lands for postmining fish or wildlife uses only where enhancement is consistent with the specific proposed postmining land use. Certainly, this is not an unconstitutional taking of private property. In addition, regulatory authorities will be allowed to consider site- or region-specific factors in applying the general standards contained in the rules. Thus, final §§ 816.97 (g), (h), and (i) will provide requirements which are sufficiently flexible for nationwide application.

One commenter recommended that proposed §§ 816.97 (g) and (h) be revised to allow surface-owner preferences on postmining land use to prevail over the specified reclamation requirements. Another commenter suggested that a requirement for prior surface-owner consent be included in Paragraph (g) to provide explicit recognition of the surface-owner's right to state a preference on postmining land uses. The commenter argued that the proposed rules would not enhance

wildlife protection in a cost-effective manner unless the operator's reclamation responsibilities were contingent on the surface-owner's prior consent, since any postmining reclamation not mutually agreed upon could be eliminated or reversed by the surface owner once he or she regained control of the property if it interfered with his or her normal land uses. A commenter also noted that the reclamation measures required of the operator under proposed § 816.97(g) would be costly to implement on cropland even though it could be destroyed by the surface owner following bond release.

OSM has rejected the suggestion that surface-owner preferences on postmining land use be allowed to negate the operator's reclamation responsibilities. The suggestion is unauthorized by the Act and inconsistent with OSM's obligation to enforce Sections 515(b)(24) and 515(b)(2) of the Act. Final §§ 816.97 (h) and (i) will require operators to enhance reclaimed lands to support fish and wildlife habitats only where the specified methods of enhancement are appropriate for wildlife- and crop-management practices or are consistent with the approved postmining land use, respectively.

In the event that the specified enhancement measures are inappropriate to agricultural management practices or inconsistent with the approved postmining land use, the final rules allow the regulatory authority to exempt operators from requirements of enhancement to support postmining fish and wildlife habitats.

The suggestion to add a requirement of prior surface-owner consent to proposed § 816.97(g) has also been rejected. Under Section 508(a)(3) of the Act, the reclamation plan submitted as part of each permit application must explain the use proposed for the affected land following reclamation and include the comments of any surface landowner, who will have to approve or authorize the proposed postmining land use following reclamation. Section 508(a)(3) also empowers the regulatory authority to approve alternative proposed postmining land uses after mandatory consultation with the landowner. The landowner's right to mandatory consultation on the proposed postmining land use is already recognized in § 816.133(c).

A commenter recommended that "shall" in proposed §§ 816.97 (g) and (h) be replaced by "may" to ensure consistency of the operator's postmining enhancement with future land uses consented to by the surface owner. OSM has rejected this suggestion. The revisions advocated by the commenter are unnecessary. Final §§ 816.97 (h) and (i) will achieve the commenter's objective by requiring operators to intersperse reclaimed lands with the specified vegetation only when such vegetation is appropriate for agricultural management practices or consistent with the approved postmining land uses.

One commenter suggested that proposed §§ 816.97 (g) and (h) specify a minimum percentage of land that must be restored by the operator and include provisions for uniform dispersal of fish or wildlife habitats over the reclaimed areas to reduce the chance that the rules' requirements could be satisfied by token, but ineffective, plantings.

OSM has rejected both suggestions. Specification of a minimum percentage of land that must be restored to support postmining fish or wildlife uses is an inappropriate requirement to include in national rules. Because conditions vary according to site and region, only the local regulatory authority will be in a position to determine how much land will be required to restore a specific site to a condition capable of supporting postmining fish or wildlife habitat. Hence, final §§ 816.97 (h) and (i) will allow the regulatory authority to dictate the minimum percentage of land which an operator must restore to support postmining fish or wildlife habitats on the basis of site- or State-specific factors. A provision for uniform dispersal of requisite habitats over the reclaimed area will be unnecessary. Final § 816.97(g)(3) will allow the regulatory authority to direct the operator to plant species uniformly throughout the reclaimed area, whenever site-specific factors require uniform dispersal to optimize edge effect, cover, and other benefits to fish and wildlife.

A commenter recommended that OSM delete Paragraphs (f), (g), and (h) from proposed § 816.97 and include them with the standards for postmining land use proposed by OSM on April 14, 1982 (47 FR 16152). He claimed that the proposed requirements for postmining enhancement of fish and wildlife habitats could jeopardize the operator's ability to achieve bond release under the terms of the approved reclamation plan unless they were treated as requisite elements of the operator's revegetation plan.

Because these rules will implement the obligation in Section 515(b)(24) of the Act for operators to achieve enhancement of environmental resources where practicable by use of the best technology currently available, OSM rejects this suggestion and has included the enhancement requirements in final §§ 816.97 (g), (h), and (i).

Section 817.97

Final § 817.97 is essentially the same as final § 816.97, except that this rule applies the requirements for protection of fish, wildlife, and related environmental values to underground mining activities. Interested persons should consult the preamble to final § 816.97 for a discussion of comments and responses relative to final § 817.97. In addition to the authorities cited in the preamble to § 816.97, this rule is also based on Section 516 of the Act.

C. Reference Materials

Reference material (on file in OSM's Administrative Record) used to develop these final rules are as follows:

Grim, E. C., and Hill, R. D., 1974, Environmental protection in surface mining of coal: U.S. Environmental Protection Agency Publication EPA-670/2-74-093, 276 pp.

Hardaway, J. E., and Kimball, D. B., 1976, Trip report, Environmental Protection Agency research and development activities: Savage mine, Rosebud mine, Big Sky mine, Decker No. 1 mine, proposed East Decker and North Decker mines (Montana), Public Service of Oklahoma No. 1 mine, Bighorn mine, Wyodak mine, Black Thunder mine, Jacobs Ranch mine, proposed Coal Creed mine, Belle Ayr mine, Dave Johnston mine, and Highland uranium mine and mill. Memorandum dated July 10, 1076.

Karr, J. E., and Schlosser, I. J., 1978, Water resources and the land-water interface: Science, Vol. 2301, pp. 229–234.

Tennessee Valley Authority, 1971, Surface mining reclamation and conservation requirements, *in* Appendix A of Environmental statement: Policies relating to sources of coal used by the Tennessee Valley Authority for electric power generation: Tennessee Valley Authority Report TVA-OHES-EIS-71-4, pp. A-1 through A-10.

U.S. Department of the Interior and U.S. Department of Agriculture, 1970, Environmental criteria for electric transmission systems, 52 pp.

U.S. Envionmental Protection Agency, 1976, Erosion and sediment control-Surface mining in the eastern United States; Vol. 1, Planning; Vol. 2, Design: U.S. Environmental Protection Agency Technology Transfer Seminar Publication EPA-625/3-76-006. Vol. 1, 102 pp.; Vol. 2, 137 pp. (Available from U.S. Department of Commerce, NTIS PB 261-343.)

U.S. Rural Electrification Administration, 1972, Powerline contacts by eagles and other large birds: U.S. Rural Electrification Administration Bulletin 61-10, 6 pp.

Weigle, W.K., 1965, Designing coal-haul roads for good drainage, U.S. Forest Service, 23 pp.

III. Procedural Matters

Agency Approval

OSM has obtained all necessary comments and concurrences from other agencies. Sections 501 (a)(B) and (b) of the Act require the written concurrence of the Administrator of the U.S. Environmental Protection Agency in rules relating to air- or water-quality standards promulgated under the Clean Air Act, as amended, and the Federal Water Pollution Control Act, as amended. The Administrator of the Environmental Protection Agency has concurred in the issuance of these rules. Section 516(a) of the Act requires the written concurrence of the head of the department that administers the Federal Mine Safety and Health Act of 1977, the successor to the Federal Coal Mine Health and Safety Act of 1969, in rules concerning the surface effects of underground mining. OSM has obtained the written concurrence of the Assistant Secretary for Mine Safety and Health, U.S. Department of Labor.

Federal Paper Reduction Act

There are no information-collection requirements established by these rules requiring the approval of the Office of Management and Budget under 44 U.S.C. 3507.

Executive Order 12291

The U.S. Department of the Interior has determined that this document is not a major rule and does not require a regulatory impact analysis under Executive Order 12291.

Regulatory Flexibility Act

The U.S. Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities and therefore does not require a regulatory flexibility analysis under Public Law 96-354. The rules will allow small coal operators increased flexibility in meeting performance standards and should especially ease the regulatory burden on small coal operators in Appalachia.

National Environmental Policy Act

OSM analyzed the impacts of these final rules in its "Final Environmental Impact Statement OSM-EIS-1: Supplement" (FEIS) according to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4332(c)(C)). The EIS is available in OSM's Administrative Record, Room 5315, 1100 L Street, NW., Washington, D.C., or by mail request to Mark Boster, Chief, Branch of Environmental Analysis, Room 134, Interior South Building, U.S. Department of the Interior, Washington, DC 20240. This preamble serves as the record of decision under NEPA. A number of modifications from the proposed rules which are discussed in this preamble also differ from the draft final rules published in Volume III of the EIS. These changes do not affect the analysis in the EIS except to the extent discussed earlier in this preamble. The order of final §§ 816.57 (a)(1) and (a)(2) has been reversed from the order of those paragraphs in the EIS, as has the order of §§ 817.57(a) (1) and (2)). The substantive requirements of final paragraph (a)(2) are the same as those in paragraph (a)(1) of the EIS. Final paragraph (a)(1) does not include the specific references to the "normal flow or gradient of the stream," to "fish migration," and to "material damage" that appeared in Volume III of the EIS. The removal of these terms does not affect the EIS analysis as it applies to these final rules because they are all subsumed in the final proscription against causing or contributing to the violation of applicable State or Federal water quality standards and against adversely affecting the water quantity and quality or other environmental resources of the stream.

List of Subjects

30 CFR Part 816

Coal mining, Environmental protection, Reporting requirements, Surface mining.

30 CFR Part 817

Coal mining, Environmental protection, Reporting requirements, Underground mining.

For the reasons set forth in the preamble, 30 CFR Parts 816 and 817 are amended as set forth herein.

Dated: April 15, 1983.

William P. Pendley,

Acting Assistant Secretary, Energy and Minerals.

PART 816—PERMANENT PROGRAM PERFORMANCE STANDARDS—SURFACE MINING ACTIVITIES

1. Section 816.57 is revised to read as follows:

§ 816.57 Hydrologic balance: Stream buffer zones.

(a) No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities, unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream. The regulatory authority may authorize such activities only upon finding that—

(1) Surface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream; and

(2) If there will be a temporary or permanent stream-channel diversion, it will comply with § 816.43.

(b) The area not to be disturbed shall be designated as a buffer zone, and the operator shall mark it as specified in § 816.11.

2. Section 816.97 is revised to read as follows:

§ 816.97 Protection of fish, wildlife, and related environmental values.

(a) The operator shall, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and shall achieve enhancement of such resources where practicable.

(b) *Endangered and threatened species.* No surface mining activity shall be conducted which will jeopardize the continued existence of endangered or threatened species listed by the Secretary or which will result in the destruction or adverse modification of designated critical habitats of such species in violation of the Endangered Species Act (16 U.S.C. 1531 *et seq.*). The operator shall promptly report to the regulatory authority any endangered or threatened species within the permit area of which the operator becomes aware. Upon notification, the regulatory authority shall consult with appropriate State and Federal fish and wildlife agencies and, after consultation, shall identify whether, and under what conditions, the operator may proceed.

(c) *Bald and golden eagles.* No surface mining activity shall be conducted in a manner which would result in the unlawful taking of a bald or golden eagle, its nest, or any of its eggs. The operator shall promptly report to the regulatory authority any golden or bald eagle nest within the permit area of which the operator becomes aware. Upon notification, the regulatory authority shall consult with the U.S. Fish and Wildlife Service and also, where appropriate, the State fish and wildlife agency and, after consultation, shall identify whether, and under what conditions, the operator may proceed.

(d) Nothing in this chapter shall authorize the taking of an endangered or threatened species or a bald or golden eagle, its nest, or any of its eggs in violation of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et*

seq., or the Bald Eagle Protection Act, as amended, 16 U.S.C. 668 *et seq.*

(e) Each operator shall, to the extent possible using the best technology currently available—

(1) Ensure that electric powerlines and other transmission facilities used for, or incidental to, surface mining activities on the permit area are designed and constructed to minimize electrocution hazards to raptors, except where the regulatory authority determines that such requirements are unnecessary;

(2) Locate and operate haul and access roads so as to avoid or minimize impacts on important fish and wildlife species or other species protected by State or Federal law; and

(3) Design fences, overland conveyers, and other potential barriers to permit passage for large mammals, except where the regulatory authority determines that such requirements are unnecessary.

(f) *Wetlands and habitats of unusually high value for fish and wildlife.* The operator conducting surface mining activities shall avoid disturbances to, enhance where practicable, restore, or replace, wetlands, and riparian vegetation along rivers and streams and bordering ponds and lakes. Surface mining activities shall avoid disturbances to, enhance where practicable, or restore, habitats of unusually high value for fish and wildlife.

(g) Where fish and wildlife habitat is to be a postmining land use, the plant species to be used on reclaimed areas shall be selected on the basis of the following criteria:

(1) Their proven nutritional value for fish or wildlife.

(2) Their use as cover for fish or wildlife.

(3) Their ability to support and enhance fish or wildlife habitat after the release of performance bonds. The selected plants shall be grouped and distributed in a manner which optimizes edge effect, cover, and other benefits to fish and wildlife.

(h) Where cropland is to be the postmining land use, and where appropriate for wildlife- and crop-management practices, the operator shall intersperse the fields with trees, hedges, or fence rows throughout the harvested area to break up large blocks of monoculture and to diversify habitat types for birds and other animals.

(i) Where residential, public service, or industrial uses are to be the postmining land use, and where consistent with the approved postmining land use, the operator shall intersperse reclaimed lands with greenbelts utilizing species of grass, shrubs, and trees useful as food and cover for wildlife.

PART 817—PERMANENT PROGRAM PERFORMANCE STANDARDS—UNDERGROUND MINING ACTIVITIES

3. Section 817.57 is revised to read as follows:

§ 817.57 Hydrologic balance: Stream buffer zones.

(a) No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by underground mining activities, unless the regulatory authority specifically authorizes underground mining activities closer to, or through, such a stream. The regulatory authority may authorize such activities only upon finding that—

(1) Underground mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards and will not adversely affect the water quantity and quality or other environmental resources of the stream; and

(2) If there will be a temporary or permanent stream-channel diversion, it will comply with § 817.43.

(b) The area not to be disturbed shall be designated a buffer zone, and the operator shall mark it as specified in § 817.11.

4. Section 817.97 is revised to read as follows:

§ 817.97 Protection of fish, wildlife, and related environmental values.

(a) The operator shall, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and shall achieve enhancement of such resources where practicable.

(b) *Endangered and threatened species.* No underground mining activity shall be conducted which will jeopardize the continued existence of endangered or threatened species listed by the Secretary or which will result in the destruction or adverse modification of designated critical habitats of such species in violation of the Endangered Species Act (16 U.S.C. 1531 *et seq.*). The operator shall promptly report to the regulatory authority any endangered or threatened species within the permit area of which the operator becomes aware. Upon notification, the regulatory authority shall consult with appropriate State and Federal fish and wildlife agencies and, after consultation, shall identify whether, and under what conditions, the operator may proceed.

(c) *Bald and golden eagles.* No underground mining activity shall be conducted in a manner which would result in the unlawful taking of a bald or golden eagle, its nest, or any of its eggs. The operator shall promptly report to the regulatory authority any golden or bald eagle nest within the permit area of which the operator becomes aware. Upon notification, the regulatory authority shall consult with the U.S. Fish and Wildlife Service and also, where appropriate, the State fish and wildlife agency and, after consultation, shall identify whether, and under what conditions, the operator may proceed.

(d) Nothing in this chapter shall authorize the taking of an endangered or threatened species or a bald or golden eagle, its nest, or any of its eggs in violation of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*, or the Bald Eagle Protection Act, as amended, 16 U.S.C. 668 *et seq.*

(e) Each operator shall, to the extent possible using the best technology currently available—

(1) Ensure that electric powerlines and other transmission facilities used for, or incidental to, underground mining activities on the permit area are designed and constructed to minimize electrocution hazards to raptors, except where the regulatory authority determines that such requirements are unnecessary;

(2) Locate and operate haul and access roads so as to avoid or minimize impacts on important fish and wildlife species or other species protected by State or Federal law; and

(3) Design fences, overland conveyors, and other potential barriers to permit passage for large mammals, except where the regulatory authority determines that such requirements are unnecessary.

(f) *Wetlands and habitats of unusually high value for fish and wildlife.* The operator conducting underground mining activities shall avoid disturbances to, enhance where practicable, restore, or replace, wetlands, and riparian vegetation along rivers and streams and bordering ponds and lakes. Underground mining activities shall avoid disturbances to, enhance where practicable, or restore, habitats of unusually high value for fish and wildlife.

(g) Where fish and wildlife habitat is to be a postmining land use, the plant species to be used on reclaimed areas shall be selected on the basis of the following criteria:

(1) Their proven nutritional value for fish or wildlife.

(2) Their use as cover for fish or wildlife.

(3) Their ability to support and enhance fish or wildlife habitat after the release of performance bonds. The selected plants shall be grouped and distributed in a manner which optimizes edge effect, cover, and other benefits to fish and wildlife.

(h) Where cropland is to be the postmining land use, and where appropriate for wildlife- and crop-management practices, the operator shall intersperse the fields with trees, hedges, or fence rows throughout the harvested area to break up large blocks of monoculture and to diversify habitat types for birds and other animals.

(i) Where residential, public service, or industrial uses are to be the postmining land use, and where consistent with the approved postmining land use, the operator shall intersperse reclaimed lands with greenbelts utilizing species of grass, shrubs, and trees useful as food and cover for wildlife.

(30 U.S.C. 1201 *et seq.*)

[FR Doc. 83-17702 Filed 6-29-83; 8:45 am]

BILLING CODE 4310-05-M