

DEPARTMENT OF THE INTERIOR**Office of Surface Mining Reclamation and Enforcement****30 CFR Parts 816 and 817**

RIN 1029-AC02

Topsoil Replacement and Revegetation Success Standards

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

ACTION: Proposed rule.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are proposing minor changes to our regulations that govern topsoil replacement and revegetation success standards. These revisions would: Encourage species diversity on reclaimed lands; provide flexibility to States in using new vegetative success standards and sampling techniques; define success standards for undeveloped land; remove shelter belts from the list of postmining land uses subject to success standards; remove what we believe is an impediment to reforestation of mined lands and provide practical means of measuring woody shrubs commonly planted on arid lands in the West; and make the timing of revegetation success measurements in areas receiving 26 inches of annual precipitation or less consistent with those in areas receiving more than 26 inches of annual precipitation.

DATES: *Written comments:* Comments on the proposed rule must be received on or before 4:30 p.m., eastern time, on May 16, 2005, to ensure our consideration.

Public hearings: Upon request, we will hold a public hearing on the proposed rule at a date, time and location to be announced in the **Federal Register** before the hearing. We will accept requests for a public hearing until 5 p.m., eastern time, on April 7, 2005.

ADDRESSES: You may submit comments, identified by docket number 1029-AC02, by any of the following methods:

- Department of the Interior's on-line commenting system: <https://occonnect.mms.gov>. Follow the instructions on the Web site for submitting comments.

- E-mail: rules_comments@osmre.gov. Include docket number 1029-AC02 in the subject line of the message. We encourage you to e-mail your comments; however, our network may not accept

comments from a yahoo.com or a hotmail.com address.

- Mail/Hand Delivery/Courier: Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 252, 1951 Constitution Avenue, NW., Washington, DC 20240.

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Docket: You may review the docket (administrative record) for this rulemaking including comments received in response to this proposed rule at the Office of Surface Mining Reclamation and Enforcement, Administrative Record, located in Room 101, 1951 Constitution Avenue, NW., Washington, DC 20240. The Administrative Record office is opened Monday through Friday, excluding holidays from 8 a.m. to 4 p.m. The telephone number is 202-208-2847.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see "III. How Do I Submit Comments On the Proposed Rule?" in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Robert Postle, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, P.O. Box 46667, Denver, CO 80201; telephone: 303-844-1400, extension 1469. E-mail: bpostle@osmre.gov.

SUPPLEMENTARY INFORMATION:

- I. Background Information
- II. What Are The Proposed Rule Changes?
- III. How Do I Submit Comments On The Proposed Rule?
- IV. Procedural Matters and Required Determinations

I. Background Information

In response to several revegetation issues and questions that have been raised over the years both by the public and internally within OSM, we decided to conduct a public outreach initiative to review and assess our revegetation regulations at 30 CFR 816.111 through .116 and 30 CFR 817.111 through .116. As part of this revegetation outreach initiative, we published a **Federal Register** notice on May 17, 1999 (64 FR 26773), announcing public meetings and soliciting comments, concerns, and new ideas regarding the regulatory performance standards that determine revegetation success. In the notice, we also announced the availability of an OSM concept paper that reviewed various longstanding revegetation issues. The concept paper was made available to interested parties upon

request, via FAX ON DEMAND, and on the Internet at <http://www.osmre.gov>. Ten public meetings were held around the country between May 27 and August 25, 1999. In the Spring of 2003, as a follow-up to this 1999 revegetation initiative, OSM conducted a survey of State regulatory authorities. The survey was designed to determine if the statistical and/or production requirements of the current revegetation regulations at § 816.116 and § 817.116 adversely affect the establishment of a diverse plant community; if there is a continuing need for inclusion of success standards and sampling techniques in a State's approved program; and if there is a need for success standards for the undeveloped postmining land.

In addition to the revegetation initiative and survey, we also established a reforestation outreach initiative that began with three workshops involving Federal and State regulatory personnel, industry representatives, and landowners. These workshops were held between January 1999 and May 2002. As part of this second initiative, we raised the question whether specific OSM regulations act as a disincentive to the choice of forestry as a postmining land use.

Largely as a result of these revegetation and reforestation initiatives and survey, OSM identified five minor revisions that it felt needed to be made to the existing regulations. The proposed revisions would be to the topsoil replacement standards at § 816.22(d)(1)(i) and § 817.22(d)(1)(i); the success standards and sampling techniques requirements at § 816.116(a)(1) and § 816.117(a)(1); the land use categories subject to the success standards of § 816.116(b)(3) and § 817.116(b)(3); the revegetation success standards for trees and shrubs at § 816.116(b)(3)(ii) and § 817.116(b)(3)(ii); and timing of revegetation success measurements at § 816.116(c)(3)(i) and (ii) and § 817.116(c)(3)(i) and (ii). These proposed revisions would, respectively, encourage species diversity on reclaimed land; provide States more flexibility in using additional success standards and sampling techniques; provide success standards for undeveloped land; remove shelter belts from the list of postmining land uses subject to success standards; remove what we believe to be an impediment to the reforestation of mined lands and provide a practical means of measuring woody shrubs commonly planted in the West (the tree and shrub stocking standards); and make the timing of revegetation success measurements in areas receiving 26 inches of annual

precipitation or less consistent with those in areas receiving more than 26 inches of annual precipitation. Since the soil replacement and revegetation success standards are identical for surface and underground mining activities, this preamble will discuss our proposed revisions to part 816 with the understanding that the discussion also applies to our proposed revisions to part 817.

II. What Are the Proposed Rule Changes?

1. Section 816.22(d)(1)(i): Topsoil Redistribution

We are proposing changes to our topsoil redistribution standard in § 816.22(d)(1)(i) in an effort to encourage the growth of the diverse vegetative cover required by both section 515(b)(19) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) and its implementing regulations at § 816.111(a)(1). Our current topsoil redistribution regulations at § 816.22(d)(1)(i) require that topsoil be replaced in a manner that “achieves an approximately uniform, stable thickness consistent with the approved postmining land use * * *.”

The § 816.22(d)(1)(i) requirement that topsoil be replaced to an approximate uniform thickness has proven to be particularly appropriate when the approved postmining land uses are, for example, commercial forestry or cropland, which involve a single species vegetative cover in a managed agricultural environment. However, when the approved postmining land uses are wildlife habitat or grazingland (rangeland) that require satisfaction of specified vegetative diversity standards for bond release, the § 816.22(d)(1)(i) requirement that topsoil be replaced to an approximate, uniform thickness may often work against the achievement of those vegetative diversity standards. This is because a plant community that will sustain itself without constant management input is, to a considerable degree, a function of the physical and chemical characteristics of the soil upon which it is growing. In turn, topsoil depth is one of the several physical characteristics that can easily be varied to encourage the desired species diversity. Accordingly, we propose to revise our topsoil redistribution regulations at § 816.22(d)(1)(i) to allow soil thickness to be varied to the extent that such variation encourages the specific revegetation goals identified in the permit. As explained in more detail at the end of this section, the proposed topsoil revision will allow topsoil to be distributed at variable thicknesses when

such variations will encourage the development of the diverse plant community required for a specific postmining land use.

When we first promulgated our topsoil regulations over 20 years ago, we noted that two commenters had objected to the proposed uniform thickness requirement as being a design standard, not a performance standard. 48 FR 22092 (May 16, 1983). These commenters warned that the rule’s uniform soil thickness requirement could lead to a monoculture vegetative community rather than a diverse native species community. We did not accept this comment, responding that topsoil thickness is but one of several factors affecting plant growth and species diversification. We stressed, with words that suggested our awareness of the significant practical problems that could be posed by a variable thickness requirement, that soil horizons commonly develop in variable thicknesses and abrupt changes occur within short linear distances. In consideration of these facts, the 1983 rule required that soil be redistributed to an “approximately uniform, stable thickness consistent with the approved postmining land uses * * *.” We characterized this rule language as a “common sense approach to provide a workable standard that would sufficiently protect the environment and achieve the goals of the Act.” 48 FR 22097 (May 16, 1983).

More recently, in response to OSM’s 1999 revegetation outreach effort, commenters again questioned the appropriateness of the § 816.22(d)(1)(i) provision, which they interpreted as requiring that topsoil always be redistributed to a uniform thickness. These commenters stated that uniform soil thickness tends to promote a limited number of species in the vegetative cover while variable soil thicknesses tend to promote a more diverse vegetative community. The truth of this proposition has been born out by the experience of OSM agronomists and is consistent with well-established principles of soil-plant relationships. On this basis, we propose to revise our regulations at § 816.22(d)(1)(i) by adding a sentence that would expressly allow soil thickness to be varied to the extent such variations help to meet the specific revegetation goals identified in the permit. We would also insert the word “when” between the words “thickness” and “consistent” in the existing language of § 816.22(d)(1)(i). This insertion should make clear that the uniform soil thickness provision is a function of the approved postmining land use, contours, and surface water

drainage systems, and is not, in itself, an inflexible requirement. Section 816.22(d)(1)(i), as revised, would read as follows: “Achieves an approximately uniform, stable thickness when consistent with the approved postmining land use, contours, and surface-water drainage systems. Soil thickness may also be varied to the extent such variations help meet the specific revegetation goals identified in the permit.”

In these proposed revisions to § 816.22(d)(1)(i), which would allow but not require non-uniform redistribution of topsoil, we seek to avoid the very practical redistribution problems discussed in the 1983 preamble. 48 FR 22097. While the uniform topsoil redistribution standard of that rule has generally worked quite well, the proposed revisions to that standard are intended to provide the operator with another tool for encouraging the development of the diverse plant communities required of specific postmining land uses. For example, if the designated postmining land use was fish and wildlife habitat, and the desired plant communities were a mixture of grasslands with interspersed shrub and trees areas for wildlife cover, then the permit could describe the use of variable topsoil thickness to ensure the establishment of grasses on thicker soils and trees and shrubs on thinner soils. The fact that the permit applicant must clearly set forth the justification for any non-uniform redistribution of topsoil should largely protect against potential abuse. This rule would not affect existing topsoil salvage requirements.

2. Section 816.116(a)(1)

Removal of requirement that only revegetation success standards and measurement techniques that have been approved as part of regulatory programs through the Federal rulemaking process may be used to document whether revegetation has been successfully attained.

Introduction

Our regulation at § 816.116(a)(1), which we adopted on September 2, 1983 (48 FR 40160), requires regulatory authorities to select standards for determining revegetation success and statistically valid sampling techniques to demonstrate whether the selected standards have been achieved at reclaimed mine sites. It also requires that the standards and sampling techniques from which these selections are made be approved as part of State regulatory programs, which in essence requires compliance with the Federal

rulemaking process that governs the review and approval of regulatory programs and program amendments.

Revegetation success standards set out the type, nature, density, and distribution of plants that a permittee must reestablish on the disturbed areas of a minesite and the length of time that the plants must be in place before they may be counted for purposes of determining whether the standard has been met. Revegetation success standards include both qualitative and quantitative elements.

Qualitative elements include most of the items listed in § 816.111, which focuses on the kind of plant species to be established (based on their suitability for the postmining land use and the other factors listed, such as permanence, diversity, and seasonality). In some cases, they also may include species diversity, the type and condition of plants that may be counted for purposes of evaluating revegetation success, the spatial distribution of various types of plants on the reclaimed area (when evaluating diversity), and a determination of whether vegetative ground cover is adequate to control erosion.

For the purposes of this preamble, the quantitative elements of revegetation success standards consist of the three parameters listed in § 816.116(a)(2): ground cover, production, and stocking. Ground cover is defined in § 701.5 as the percentage of the land surface that is overlain by either aerial parts of plants (generally live leaves and stems) or naturally produced litter (dead leaves and stems). Production refers to the quantity of a particular part or parts of the plants grown on a site. The most common production standards are row crop yields (e.g., bushels of corn per acre) and the amount of hay or forage produced (e.g., tons of hay per acre, adjusted for moisture content, or the average weight of oven-dried clippings from sample plots). Stocking is a measure of the density of woody plants, generally the number of trees (and sometimes shrubs) per acre. Consistent with the precedent established in our 1979 rules (see 30 CFR 816.116(b)(3) [1979]), we interpret the requirement in § 816.116(a)(1) and (2) that revegetation success be evaluated using statistically valid sampling techniques as applying only to the standards for the three parameters mentioned in paragraph (a)(2): ground cover, production, and stocking.

Standards for success and statistically valid sampling techniques must comply with the requirements of § 816.116(a)(2) and (b). As discussed in above, paragraph (a)(2) of those rules requires

that revegetation success standards include the parameters of ground cover, production, and stocking to the extent that those parameters are appropriate for the type of vegetation associated with the postmining land use. It also requires that those parameters be evaluated using sampling techniques with a 90 percent statistical confidence interval. These sampling techniques are needed because, with the exception of whole-field harvest of hay and grains, it is rarely practical to count every qualifying plant or plant part on the minesite being evaluated. Use of appropriate statistical methods will ensure that the estimate (average of all sample plots measured) of the true value of the vegetation parameter being evaluated is correct a specified percentage of the time. For example, if the estimate of the site's ground cover, as determined by the average of ground cover measurements from individual plots within the site, is valid at the 90 percent confidence level, that estimate will represent the true value, or actual ground cover of the entire site, 9 out of 10 times.

The numerical standards for the parameters mentioned in paragraph (a)(2) must be representative of the values for those parameters on unmined lands in the area. For example, crop yields from reclaimed lands must be equivalent to yields from similar unmined lands in the vicinity of the operation. Paragraph (b) of § 816.116 specifies which of the three parameters must be included in revegetation success standards for various postmining land uses (cropland; pastureland; grazingland; fish and wildlife habitat; recreation, shelterbelts, or forestry; and areas to be developed for industrial, commercial, or residential use). It also establishes additional criteria that the revegetation success standards for the parameters associated with those land uses must meet. Finally, it provides that only the ground cover parameter will apply when an operation mines and reclaims previously mined areas that had not been reclaimed to permanent program standards.

Examples of revegetation success standards established pursuant to this rule include a requirement that a minimum percentage of vegetative ground cover be established on the reclaimed area, a minimum stocking requirement for woody plants (a specified number of qualifying trees or shrubs per land unit), minimum crop yields per land unit, and minimum forage production per land unit. Success standards may be established in a variety of ways, including (1) on a program-wide basis, (2) through the use

of technical guides such as average county crop yield statistics collected by the National Agricultural Statistics Service or other State or Federal agencies, or (3) the use of reference areas, in which measurements of pertinent vegetative parameters from the reclaimed area are compared with measurements from an undisturbed area with weather, soil, slope, aspect, and other characteristics similar to those of the reclaimed area before it was mined.

Paragraph (a)(2) of § 816.116 requires the use of objective, statistically valid sampling techniques to document whether revegetation success standards for the parameters of ground cover, production, and stocking have been achieved. This requirement does not apply to the other elements of the evaluation of revegetation success required by the introductory paragraph of § 816.116(a), such as species composition and diversity. Specifically, all such techniques must use a 90 percent confidence interval; *i.e.*, a one-sided test with a 0.10 alpha error. Examples of statistically valid sampling techniques include the point-intercept and line-intercept methods of measuring ground cover; harvest of sample plots to measure crop production; weighing oven-dried clippings from sample plots to determine forage production on pasture and grazingland; and belt transect and point-centered quarter methods to measure stocking of woody plants.

We remain satisfied with this approach to documenting the success of revegetation. However, the rule we adopted in 1983 allows use of only those revegetation success standards and measurement techniques that have been incorporated into the approved regulatory program. See, § 816.116(a)(1). We propose to remove that requirement. The criteria in § 816.116(a)(2) and (b) would continue to govern the selection of appropriate revegetation success standards and measurement techniques for ground cover, production, and stocking. Furthermore, as provided in § 780.18(b)(5)(vi) and § 784.13(b)(5)(vi), each permit application must specify the particular revegetation success standards and measurement techniques that will be used to document successful revegetation at that site.

As explained in more detail below, there are a number of reasons why we no longer believe that revegetation success standards and measurement techniques need to be included in the approved regulatory program. First, ongoing research findings and technological advances sometimes provide a basis for refining success standards and modifying or improving

sampling techniques. However, the relatively cumbersome State-program amendment process may discourage States from utilizing those research findings and technological advances to adopt new and improved sampling techniques and modified revegetation success standards. Second, from the beginning of the program, we have recognized that appropriate revegetation success standards may vary greatly, even within a State, depending upon the range of land uses, climates, soils, etc. that occur. Third, our regulations do not require that sampling techniques and technical standards used to meet other program requirements be incorporated into an approved regulatory program.

Finally, of all the Federal regulatory programs, only the one for Tennessee (*see* 30 CFR 942.816(f) and 942.817(e)) includes specific revegetation success standards. None of the Federal regulatory programs includes specific measurement techniques for documenting revegetation success. Our experience in the three Federal programs that have jurisdiction over active mining operations (Tennessee, Washington, and the Indian lands program) indicates that the absence of specific standards and techniques in those programs has not resulted in inadequate revegetation of mined lands, in an inability to ensure documentation of attainment of revegetation success, or in determinations that are inconsistent with other determinations either within the State or program or with those in other States.

We believe that allowing States to select revegetation success standards and sampling techniques without requiring prior approval of those standards and techniques through the program amendment process would better enable States and operators both to keep up with technological advances and to tailor success standards to local conditions. The existing requirement that those standards and techniques comply with the detailed criteria of § 816.116(a)(2) and (b) should ensure that the success standards and sampling techniques used in the various States will provide similar degrees of proof that adequate reclamation has been achieved.

Statutory and Regulatory Background—the Revegetation Provisions of SMCRA

Section 515(b)(19) of SMCRA mandates that surface coal mine operators “establish on the regraded areas, and all other lands affected, a diverse, effective, and permanent vegetative cover * * * capable of self-regeneration and plant succession at least equal in extent of cover to the

natural vegetation of the area * * * .” 30 U.S.C. 1265(b)(19).

Section 515(b)(20) requires the surface mine operator to “assume the responsibility for successful revegetation, as required by paragraph (19) above, for a period of five full years after the last year of augmented seeding, fertilizing, irrigation, or other work in order to assure compliance with paragraph (19) above, except in those areas or regions of the country where the annual average precipitation is twenty-six inches or less, then the operator’s assumption of responsibility and liability will extend for a period of ten full years after the last year of augmented seeding, fertilizing, irrigation, or other work * * * .” 30 U.S.C. 1265(b)(20).

Section 516(b)(6) requires underground mining operators to “establish on regraded areas and all other lands affected, a diverse and permanent vegetative cover capable of self-regeneration and plant succession and at least equal in extent of cover to the natural vegetation of the area * * * .” 30 U.S.C. 1266(b)(6).

The Revegetation Provisions of the Current Rule

The Secretary has fleshed out these statutory performance standards for revegetation with detailed regulatory ones found at §§ 816.111 through 816.116. In doing so the Secretary concluded that there was no reason to establish differing standards for surface and underground mining. 48 FR 40140 (September 2, 1983). In particular, § 816.116 sets out at some length the parameters to be used to document the success of revegetation and how those parameters are to be measured.

Section 816.116(a)(1), which we propose to remove in part, requires that the regulatory authority select revegetation success standards and statistically valid sampling techniques and include those standards and techniques in the approved regulatory program: “Standards for success and statistically valid sampling techniques for measuring success shall be selected by the regulatory authority and included in an approved regulatory program.”

We propose to remove the phrase “and included in an approved regulatory program” and retain only the requirement that the regulatory authority select revegetation success standards and statistically valid sampling techniques. We anticipate that the States will continue to put the success standards and statistically valid sampling techniques in an internal guidance document for use by operators in developing permit applications.

Sections 816.116(a)(2) establishes certain criteria for the revegetation success standards and sampling techniques: “Standards for success shall include criteria representative of unmined lands in the area being reclaimed to evaluate the appropriate vegetation parameters of ground cover, production, or stocking. Ground cover, production, or stocking shall be considered equal to the approved success standard when they are not less than 90 percent of the success standard. The sampling techniques for measuring success shall use a 90-percent statistical confidence interval (*i.e.*, one-sided test with a 0.10 alpha error).”

Section 816.116(b) sets out more specific criteria for revegetation success standards based on the land’s previous mining history and the approved postmining land use.

The Reasons We Adopted Objective Measurements and Tests for Documenting the Success of Revegetation

The existing regulation at § 816.116(a)(1) requiring that the regulatory authority select standards for revegetation success and statistically valid sampling techniques and include those standards and techniques in the regulatory program was proposed March 23, 1982 (47 FR 12596), and adopted September 2, 1983 (48 FR 40150). The rule was intended to address at least two potentially competing considerations when determining the success of revegetation: (1) The need to reflect local soils and climatic conditions and (2) the need for consistent determinations both between States and within a particular State—“The proposed regulations would require the regulatory authority to develop standards that reflect the capabilities of local soils and climatic conditions. Minimum standards and acceptable sampling techniques would become parts of State programs and would be subject to approval by OSM. OSM believes this arrangement will enable States to tailor success standards to local conditions and at the same time will assure that, regardless of State, all selected standards will provide similar degrees of proof that adequate reclamation has been achieved.” Preamble to proposed rule. 47 FR 12596, 12599 (March 23, 1982).

The 1979 rule required the use of either reference areas or technical standards published by the U.S. Department of Agriculture or the U.S. Department of the Interior to evaluate ground cover and productivity. *See* 30 CFR 816.116(a) and (b)(1) (1979). The 1983 rule allowed States to select

technical standards from any source or, if desirable, to develop new standards. In response to comments that the proposed rules would leave individual States without guidance when determining minimum acceptable standards for revegetation success, OSM stated in the preamble to the final rule that “[t]his rulemaking reaffirms OSM’s position that the primary responsibility for regulating surface mining and reclamation operations should rest with the States. Federal rules must be capable of nationwide application. The absence of detail in the Federal rules is not a weakening of revegetation requirements but reflects that the rules are designed to account for regional diversity in terrain, climate, soils, and other conditions under which mining occurs.” Preamble to final rule. 47 FR 40140 (September 2, 1983).

OSM believed that the flexibility provided by the new rule would not adversely impact the consistency and reliability of results: “Proposed § 816.116(a)(1) would require the use of statistically valid sampling techniques for measuring success. Under the proposal, the sampling procedures would be chosen by the regulatory authority. OSM believes that the use of statistically valid sampling techniques would aid regulatory authorities in making consistent decisions regarding performance bond release and provide standardized inspection techniques sought by mine operators.” Proposed rule. 47 FR 12596, 12599 (March 23, 1982).

In the preamble to the final rule, OSM described how these measurement techniques might work: “Under this rule, the method of sampling vegetation could vary depending upon the precise standard for success included in the State program. In this manner, both an “ecologically sound” and “scientifically acceptable” technique for measuring the success of revegetation can be developed. On sparsely vegetated lands, sampling may be limited to gathering data for estimates of total vegetative ground cover. There also may be circumstances where, with the approval of the regulatory authority, historical data collected for the same cover type within the region can be used, rather than reference-area data. In the East, 100 randomly located point-frequency observations will usually provide an acceptable sample size for the estimation of vegetative ground cover. Small sample sizes are associated with large statistical error which can make a test for revegetation success meaningless. OSM has not stated a level of sampling precision in the final rules but will instead evaluate on a case-by-

case basis the adequacy of predetermined sample sizes or methods of sample size selection proposed for use in State programs.” Preamble to final rule. 47 FR 40140, 40150 (September 2, 1983).

The Reasons for Removing the Requirement That Success Standards and Statistically Valid Sampling Techniques Be Approved as Part of the Regulatory Program

a. The requirement to include success standards and sampling techniques for revegetation in approved regulatory programs is unnecessarily burdensome.

In the years since adoption of the 1983 rule, as discussed below, we have found that the requirement that revegetation success standards and statistically valid sampling techniques, including modifications to those standards and techniques, be approved as part of the regulatory program imposes a significant and unnecessary burden on both OSM and the States.

Further, this requirement may discourage the utilization of new and improved sampling methods based on new technologies or research by academia and government agencies. For example, in the West, the Western Region Coordinating Center has been working with representatives of State regulatory authorities in the region to develop resources such as success/failure charts and handbooks on successful practices. In the Western region, improvements in statistical tools, such as the application of nonparametric statistics and use of the “reverse” null hypothesis, as well as the commonly used classical null hypothesis and parametric statistics, have increasingly allowed revegetation specialists to more accurately evaluate and compare relatively sparse and irregularly distributed premining and postmining vegetation. Similarly, new techniques using computers and satellite-based remote sensing tools now can be used to more accurately evaluate vegetation characteristics of premining lands, and perhaps in the future, postmining lands. In the future, it may be possible to use these tools to document vegetation diversity that may not be apparent from random design sampling grids. More and more frequently, remote sensing tools are being used to evaluate premining vegetation mosaics. The Western Region Coordinating Center is encouraging States and operators to develop and experiment with new tools and techniques such as multi-spectral remote sensing, to document plant diversity and more accurately reflect the composition of plant communities. In

the Appalachian Region OSM is working with the State of West Virginia and academia to demonstrate the utility and suitability of the plate method for evaluating herbaceous productivity on reclaimed lands.

The time and resources required by the State program amendment process, however, discourage updating approved standards and techniques. Because of the time and resources required by the program amendment process, States forfeit flexibility to make changes that may be more accurate measures of revegetation success. Review of OSM’s program amendment records indicates that processing of revisions to approved success standards and sampling techniques takes an average of approximately 4.5 months and can range from 2.5 months to 7 months, not taking into account the time it takes States to prepare the program amendment submission. The amendment process, codified at § 732.17, requires publication of a proposed rule in the **Federal Register**, a period for public comment, review of the standards and sampling techniques for consistency with the requirements in § 816.116, identification of any deficiencies to the regulatory authority, response from the State, possible reopening of the comment period, development of a draft final rule, Solicitor review of that final rule, and publication of the final rule in the **Federal Register** as part of the approved State regulatory program. The concern that in 1983 led OSM to reject national standards and sampling techniques in favor of local standards and techniques supports the more flexible approach that we are proposing here. 47 FR 12599 (March 23, 1982).

Moreover, our regulations do not require that sampling techniques used to meet other program requirements, such as the collection of geologic data and evaluation of overburden characteristics under § 780.22 or the models used to prepare the determination of the probable hydrologic consequences of mining under § 780.21(d), be approved as part of the regulatory program. Nor do they require that other technical standards, such as the definition of material damage to the hydrologic balance needed to prepare the cumulative hydrologic impact assessment under § 780.21(g), be approved as part of the regulatory program. Instead, regulatory authorities generally deal with these issues by preparing technical guidance documents. We have found this approach to be highly effective, both in States with approved State programs and in States where OSM is the

regulatory authority, such as Federal program States and on Indian lands.

Finally, of all the Federal regulatory programs, only the one for Tennessee (see 30 CFR 942.816(f) and 942.817(e)) includes specific revegetation success standards. None of the three Federal programs that have active mining (Tennessee, Washington, and the Indian lands program) include specific vegetation sampling techniques. The Tennessee program at 30 CFR 942.816(f)(6) and 942.817(e)(6) expressly states that sampling techniques for measuring woody plant stocking and ground cover shall be in accordance with techniques approved by the Office. In addition, only the Tennessee program (at 30 CFR 942.816(f) and 942.817(e)) includes revegetation success standards. In all other cases, the burden of going through a Federal rulemaking process to establish revegetation success standards and sampling techniques has effectively been imposed only upon States. The fact that we have not incorporated revegetation success standards and sampling techniques into most Federal programs has not created a significant divergence between Federal program States and other States with respect to standards and techniques for documenting successful reclamation.

b. Adoption of this rule change will not lead to inconsistent performance standards and sampling techniques.

For a number of reasons, we believe that allowing State regulatory authorities to select revegetation success standards and sampling techniques for documenting revegetation success without first incorporating those requirements into their approved programs will not adversely affect the quality of reclamation of mined lands or lead to significant inconsistencies among the States.

First, the regulations at § 816.116(a)(2) and (b), for which all State programs must have counterparts, establish detailed criteria and requirements for the standards and sampling techniques that States may utilize. These regulations should ensure that the revegetation success standards and sampling techniques that States employ for the parameters of ground cover, production, and stocking will be consistent with one another in terms of the quality of revegetation success required and the statistical validity of measurement techniques. Each State program must include provisions consistent with § 816.116(a)(2) and (b). The change that we are proposing would allow a State program to employ the latest analytical and sampling techniques without first having to seek

Federal approval. The criteria enunciated in § 816.116(a)(2) and (b), however, would prohibit States from establishing inadequate success standards or selecting sampling techniques for which there is no sound scientific basis. In short, the requirements of § 816.116(a)(2) and (b) would adequately ensure that the revegetation success standards and sampling techniques selected by the various States would provide similar degrees of proof that adequate reclamation has been achieved.

Second, under § 773.6(a) and (b)(2), any person with an interest that might be adversely affected by a decision on a permit application has the opportunity to review and comment on the permit-specific revegetation success standards and sampling techniques that each permit application must include pursuant to § 780.18(b)(5)(vi) and § 784.13(b)(5)(vi). Also, when a permittee applies for final bond release, the surface owner must be notified of the bond release inspection and given the opportunity to participate. See, § 800.40(b)(1). Before a bond is released, persons with a valid legal interest, including surface owners, have the right to file written objections to the bond release and to request a public hearing. See, § 800.40(f).

Finally, under § 733.12(a)(1), we annually evaluate the administration of each State program. The inspections conducted as part of that oversight process should identify any major deficiencies with respect to a State's revegetation success standards and revegetation sampling techniques. If we discover that inappropriate or inadequate standards or sampling techniques have contributed to problems with reclamation adequacy, we will require that the State modify them. We will also continue to afford technical assistance to the States in selecting and using success standards and sampling techniques that meet the requirements and needs of the approved program.

For the reasons stated above, OSM proposes to remove the requirement to include the standards for revegetation success and statistically valid sampling techniques in the approved program. However, States must still select the standards for success and statistically valid sampling techniques in accordance with the criteria in their State program counterparts to § 816.116(a)(2) and (b). In addition, permit applicants still must propose standards and techniques from those selected by the State for use in the particular State and include them in their permit applications for regulatory

authority review and approval. Vegetation sampling conducted for Phase III bond release must be in compliance with the standards for success and statistically valid sampling techniques selected by the State and included in the approved permit. These regulatory requirements and procedures should be adequate to ensure that the various State programs provide similar degrees of proof that adequate reclamation has been achieved.

3. Section 816.116(b)(3): Success Standards for Undeveloped Land

OSM is proposing to revise § 816.116(b)(3) to include undeveloped land among the list of approved post mining land use areas subject to the success standards of this section. This list currently includes fish and wildlife habitat, recreation and forest products (forestry). During OSM's 1999 revegetation outreach effort, several commenters suggested that undeveloped land should be available as an approved postmining land use. Current § 701.5 includes undeveloped land among its listed land use categories, and defines it as land that is undeveloped or, if previously developed, land that has been allowed to return naturally to an undeveloped state or has been allowed to return to forest through natural succession. Without any change to the current regulations, undeveloped land can be approved as a postmining land use under the postmining land use provisions of § 816.133. On this basis, OSM has already approved three State program amendments specifically recognizing undeveloped land as an approved postmining land use. See Ohio (59 FR 22507, 22513 (May 2, 1994)); also discussing Texas (1991) and Alabama (1992).

The particular problem with undeveloped land, which this proposal seeks to address, is that, unlike all the other land use categories listed in § 701.5, undeveloped land does not have specified success standards in § 816.116(b). Accordingly, we are proposing to revise § 816.116(b)(3) to add undeveloped land as one of the land uses subject to that section's success standards. Revised § 816.116(b)(3) would then read: "For areas to be developed for fish and wildlife habitat, recreation, undeveloped land, or forest products, success of vegetation shall be determined on the basis of tree and shrub stocking and vegetative ground cover." This revision will mean that undeveloped land will be subject to cover and, if applicable, stocking requirements depending on the vegetation goals for that parcel of land.

The cover and stocking requirements of § 816.116(b)(3) are particularly appropriate criteria for evaluating the revegetation success of an undeveloped land use area, as they can be used to ensure the establishment of the seral species, *i.e.*, a community of mixed grasses, forbs, shrubs and trees, necessary to facilitate natural plant succession.

4. Section 816.116(b)(3): Shelter Belts

OSM is proposing to further revise § 816.116(b)(3) by removing shelter belts from among the list of postmining land uses subject to the success standards of that section. As noted above, § 816.116(b)(3) currently sets forth the success standard conditions for areas to be developed with an identified postmining land use of fish and wildlife habitat, recreation, forestry, and shelter belts. The longstanding problem of including shelter belts among the § 816.116(b)(3) postmining land use areas is that shelter belts are not a recognized land use, as defined at § 701.5, but rather are conservation practices used in support of land uses. As such, shelter belts are better dealt with under our regulations at § 816.116(c)(4) governing the use of normal husbandry practices.

Section 816.116(c)(4) expressly permits the regulatory authority to allow the use of selective husbandry practices, excluding augmented seeding, fertilization, or irrigation, provided the regulatory authority obtains prior approval from the Director that the practices are normal husbandry practices for the area. This approval would not extend the period of responsibility for revegetation success and bond liability if the practices could be expected to continue as part of the postmining land use, or if discontinuance of the practices after the liability period expires would not reduce the probability of permanent revegetation success. In the September 2, 1983, preamble discussion of § 816.116(c)(4), OSM stated that the approved measures, *e.g.*, normal husbandry practices, must be normal conservation practices within the region for unmined lands having uses similar to the approved postmining land use of the disturbed area. 48 FR 48140, 40157.

The Natural Resources Conservation Service (NRCS) also considers shelter belts (also referred to as windbreaks) as conservation practices, not land uses, and defines them as linear plantings of single or multiple rows of trees or shrubs or sets of linear plants (NRCS Field Office Technical Guide (FOTG), Section IV, Conservation Practice Standard—Windbreak/Shelterbelt

Establishment, 380). Some of the purposes of shelter belts cited by that document include reducing soil erosion and protecting plants from wind, altering the microenvironment for enhancing plant growth, managing snow deposition, providing shelter for structures, livestock, and recreational areas, and enhancing wildlife habitat by providing travel corridors. From these cited purposes, it is also clear that the NRCS treats shelter belts as normal husbandry practices used in support of other land uses such as cropland, pastureland or recreation; not as land uses themselves. Another factor supporting the conclusion that shelter belts are more akin to normal husbandry practices than land uses is that shelter belts, like normal husbandry practices, require ongoing maintenance to ensure their functionality, including replacement of dead trees and shrubs, application of water as needed, thinning and pruning and application of nutrients.

Nonetheless, the 1979 and 1983 revegetation rules, without explanation, grouped shelter belts with wildlife, recreation, or forest uses other than commercial forest land uses in the § 816.117(c) success standards (44 FR 15311, 15414), and later with fish and wildlife habitat, recreation and forestry land uses in the § 816.116(b)(3) success standards (48 FR 40152, 40160). Notwithstanding this inclusion, one theme that ran throughout both those preambles and final rules, and which supports our proposed deletion of shelter belts from the § 816.116(b)(3) listed land uses, is that revegetation success was always to be judged on the effectiveness of the vegetation for the approved postmining land use. Because shelter belts have never been included among the land use categories listed in § 701.5, because shelter belts are defined as conservation practices not land uses by the NRCS, and because the recognized purpose and ongoing maintenance requirements of shelter belts are consistent with normal husbandry practices, we are proposing to remove shelter belts from the land use areas listed in § 816.116(b)(3). The use of shelter belts would instead be covered under the normal husbandry practice provision of § 816.116(c)(4). If the use of shelter belts is necessary in a given area to achieve the postmining land use, then, in accordance with the requirements of § 816.116(c)(4), the regulatory authority would need to identify shelter belts as a normal husbandry practice and include them in the approved regulatory program under § 732.17.

5. Section 816.116(b)(3)(ii): Tree and Shrub Stocking Standards

OSM is proposing three minor revisions to the way operators may satisfy existing revegetation success standards for areas developed for fish and wildlife habitat, recreation, or forest product postmining land uses. For these postmining land uses, existing § 816.116(b)(3)(ii), commonly referred to as the “80/60 rule,” requires that, at the time of bond release, at least 80 percent of the trees and shrubs used to determine revegetation success must have been in place for 60 percent of the applicable minimum period of responsibility. In addition, the rule requires that trees and shrubs used to determine revegetation success must have been in place for not less than two growing seasons.

The response to OSM’s 1999 revegetation and reforestation initiatives highlighted the fact that many mine operators perceived the 80/60 rule as not only being complex and confusing but also subject to uncertain implementation by State regulatory authorities. Furthermore, operators often perceived as unnecessarily difficult, costly, and time-consuming the need, under the 80/60 rule, for determining the length of time that individual trees and shrubs have been in place. As a result, in areas of greater than 26 inches of average annual precipitation (“humid areas”) where mined land could reasonably be reforested, the need for determining a tree’s time in place has proven to be a significant disincentive for reforestation as operators have consistently avoided choosing the forestry postmining land use. Instead, operators tended to choose grazingland or pastureland, not forestry, in order to avoid application of the tree-counting requirements of the 80/60 rule.

In areas of less than 26 inches or less of average annual precipitation (“semi-arid areas”) where the planting of woody shrubs is often required under the approved postmining land use, the time in place requirement of the 80/60 rule was seen as posing a somewhat different problem. In these semi-arid areas, many of the planted or seeded woody shrub species undergo a continual process called “suckering,” by which multiple new aboveground stems are generated from the initial plant. However, it is not possible to document the time in place for these new suckers. Therefore, even though the sucker plant community may be vigorous and expanding, the individual suckers cannot be counted for purposes of meeting the 80/60 revegetation success count. Finally, in a related issue, both

operators and regulatory officials from both the humid and semi-arid precipitation areas questioned the wisdom of not being able to include volunteer plants of approved species in the 80/60 revegetation success count when it cannot be verified that the volunteer plants have been in place for not less than two growing seasons.

In an effort to address these concerns regarding implementation of the 80/60 rule, OSM proposes to add four sentences to the end of the existing language of § 816.116(b)(3)(ii). The first sentence would effectively eliminate the current potential need under the 80/60 rule for field verification of the time in place of individual plants. Instead, operators could document compliance with the 80/60 time-in-place requirements by comparing records of initial planting and replanting to the final count of individual plants. More specifically, the 80/60 time in place requirements could be met when the following easily documented facts were established: (1) The final field count shows that the requisite number of plants of approved species are in place; (2) records show that no woody species has been planted in the last 3 years of a 5-year responsibility period or 6 years of a 10-year responsibility period; (3) if replanting has occurred in the last 60% of the responsibility period, that planting records show that the number of plants replanted is below 20% of the total acceptable plant count; and (4) no woody species were planted during the last two years of the responsibility period. By establishing these facts, we believe that it is possible to make a numerical assessment of compliance with the 80/60 rule that is at least as accurate as could be obtained under the current laborious practice of having to determine the length of time that individual plants have been in place.

The second and third sentences that OSM is proposing to add to the existing rule language of § 816.116(b)(3)(ii) would allow volunteer plants of approved species to be included in the 80/60 revegetation success count even when it cannot be verified that the volunteers are more than two years old. We believe this revision is consistent with section 515(b)(19) of the Act, which requires the operator to establish vegetation that is "capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area." These volunteer plants represent either regeneration of species already present on the reclaimed area or invasion of native species from adjacent undisturbed areas, which is an indication of plant succession. Live

volunteer plants are as likely to continue to grow and mature as transplants of the same species that may be little more than two years old. Therefore, counting the first products of plant regeneration or invasion is a clear and reasonable indicator of successful reclamation and an appropriate revision to the 80/60 rule. OSM hopes that this and the prior revision will work together to encourage the choice of forestry, rather than grazingland or pastureland, as a postmining land use.

The fourth sentence that OSM is proposing to add to the existing rule language of § 816.116(b)(3)(ii) would allow individual suckers from woody shrubs to be counted as volunteer plants when it is evident the shrub community is vigorous and expanding. As is the case with other volunteer plants, OSM believes that counting individual suckers within a vigorous and expanding shrub community is a reasonable indicator of successful reclamation and an appropriate revision to the 80/60 rule.

6. Section 816.116(c)(3): Timing of Revegetation Success Measurements

We are proposing a further change to our revegetation regulations to bring the timing of revegetation success measurements for areas of 26 inches or less of average annual precipitation ("semi-arid areas") into line with those for areas of greater than 26 inches of average annual precipitation ("humid areas"). In OSM's 1979 regulations, the timing of revegetation success measurements for arid areas at § 816.116(b)(1)(ii) was identical to that for humid areas at § 816.116(b)(1)(i). Both the humid and arid area regulations required that the revegetation success standards be equaled or exceeded for the last two consecutive years of the respective 5- and 10-year responsibility periods. 44 FR 15237, 15413 (March 13, 1979).

Later, in 1983, OSM revised its humid area regulation, redesignated as § 816.116(c)(2)(i), to require that revegetation success standards be equaled or exceeded during the growing season of the last year of the five-year responsibility period, or, if required by the regulatory authority, during the growing season of the last 2 consecutive years of the responsibility period. We did not, however, change its arid area regulation at § 816.116(c)(3)(i), which continued to require that the revegetation success standard be equaled or exceeded for the last 2 consecutive years of the 10-year responsibility period. 48 FR 40155, 40160 (September 2, 1983). The 1983 revision requiring revegetation

standards in humid areas to be equaled or exceeded during the growing season of the last year of the responsibility period was challenged by environmental and citizen groups. In 1985, the court remanded the challenged revision because the lack of supporting evidence in the record precluded a determination that the regulations supported the goals set forth in SMCRA. *In Re: Permanent Surface Mining Regulation Litigation (II)*, 620 F. Supp. 1519, 1564 (D.D.C. 1985).

In response to that remand, OSM promulgated the current rules at § 816.116(c)(2)(i) setting forth the periods for measuring revegetation success for humid areas. 53 FR 34636, 34643 (September 7, 1988). The new regulations required that revegetation success standards for grazingland, pastureland, or cropland postmining land uses be equaled or exceeded during any two years of the last five years of the responsibility period, except the first. In support of this relaxation from the 1979 "last 2 consecutive years of the responsibility period" standard, the 1988 preamble noted that the earlier 1983 preamble had cited the effect of year-to-year [climatic] variability on crop yields or other parameters that are highly sensitive to such conditions as justifying the requirement of two consecutive years of revegetation success. 48 FR 40155, 40156 (September 2, 1983). Notwithstanding, OSM reasoned that, relative to grazingland, pastureland, and cropland postmining land uses in humid areas, "[m]easurement in nonconsecutive years avoids unduly penalizing the operator for the negative effects of climatic variability." The 1988 preamble continued that "OSM * * * believe[s] that measurement over two years is important to attenuate the influences of climatic variability, but now realizes that consecutiveness imposes an unnecessary degree of regulatory rigidity." Furthermore, we argued that to require measurement of crop or pasture yields in the last year of the responsibility period would be an unnecessary rigid standard given the variability of weather conditions. 53 FR 34640 (September 7, 1988).

The 1988 revision also provided that, for humid areas, the revegetation success standards for postmining land uses other than grazingland, pastureland, and cropland, *e.g.*, forest products, fish and wildlife habitat, etc., be equaled or exceeded during the growing season of the last year of the responsibility period. Supporting this relaxation of the 1979 "last two consecutive years of the responsibility standard," OSM reasoned that with a

forest ecosystem there exists a positive relationship between time and vegetative cover. Therefore, OSM concluded that, for forest-type ecosystems, the last year of the responsibility period would provide an accurate measurement of revegetation success. 53 FR 34641 (September 7, 1988). These revisions to the timing of revegetation success measurements for humid areas were not challenged.

The 1988 rulemaking did not, however, address the timing requirements for arid areas. Accordingly, the regulations for arid areas continued, as they had since 1979, to require that the revegetation success standards for all postmining land uses be equaled or exceeded during at least the last two consecutive years of the 10-year responsibility period.

After reviewing the 1988 preamble rationale that supported relaxation of the last two consecutive years requirement for humid areas, we have not found any persuasive reason why the same rationale would not equally apply to semi-arid areas. For example, for areas with postmining land uses other than grazingland, cropland, or pastureland, *e.g.*, forest products, fish and wildlife habitat, etc., determining vegetation success requires measurement of vegetative parameters that are not sensitive to short-term weather variations. With each of the "other" land uses, the vegetative measurements done for the last year of the responsibility period can be reasonably expected to represent the baseline for vegetative success in future years. This holds true whether the postmining land uses are located in a humid or arid area. For all postmining land uses, we believe that it is the uniqueness of the individual postmining land use and not the relative moisture of the area in which the land use is located that appropriately determines the number and spacing of the years for which vegetation success must be measured.

Accordingly, we are proposing to revise the agency's regulations for arid areas at § 816.116(c)(3)(i) to comport with its regulations for humid areas at § 816.116(c)(2)(i). The revised rules for arid areas would provide that the vegetation parameters identified in paragraph (b) of that section for grazingland, pastureland, or cropland shall equal or exceed the approved success standard during the growing season of any 2 years after year 6 of the responsibility period. Areas approved for other uses identified in paragraph (b) of that section would have to equal or exceed the applicable success standard

during the growing season of the last year of the responsibility period.

Revising the revegetation rules in this manner makes the rigor of § 816.116(c)(3)(i) for areas receiving 26 inches or less of annual precipitation, similar to § 816.116(c)(2)(i) for areas receiving more than 26 inches of annual precipitation. For the sake of further consistency, we are also proposing to revise our regulations governing the timing of revegetation success measurement for lands eligible for reining. Thus, the rules for lands in arid areas at § 816.116(c)(3)(ii) would be revised to comport with those for lands in humid areas at § 816.116(c)(2)(ii). Both rules would then require that revegetation standards be met or exceeded during the growing season of the last year of responsibility period.

III. How Do I Submit Comments on the Proposed Rule?

Electronic or Written Comments: If you submit written comments, they should be specific, confined to issues pertinent to the proposed rule, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on a final rule will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent State or Federal laws or regulations, technical literature, or other relevant publications.

Except for comments provided in an electronic format, you should submit three copies of your comments if possible. We will not consider anonymous comments. We cannot ensure that comments received after the close of the comment period (*see DATES*) or at locations other than those listed above (*see ADDRESSES*) will be considered or included in the Administrative Record.

Availability of Comments: Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours at the OSM Administrative Record Room (*see ADDRESSES*). Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, to the extent allowed by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. Individuals

making such a request should submit their comments by regular mail and not by e-mail. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Public hearings: We will hold a public hearing on the proposed rule upon request only. The time, date, and address for any hearing will be announced in the **Federal Register** at least 7 days prior to the hearing.

Any person interested in participating at a hearing should inform Mr. Robert Postle (*see FOR FURTHER INFORMATION CONTACT*), either orally or in writing by 5 p.m., eastern time, on April 7, 2005. If no one has contacted Mr. Postle to express an interest in participating in a hearing by that date, a hearing will not be held. If only one person expresses an interest, a public meeting rather than a hearing may be held, with the results included in the Administrative Record.

The public hearing will continue on the specified date until all persons scheduled to speak have been heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after all persons scheduled to speak and persons present in the audience who wish to speak have been heard. To assist the transcriber and ensure an accurate record, we request, if possible, that each person who testifies at a public hearing provide us with a written copy of his or her testimony.

IV. Procedural Matters and Required Determinations

Executive Order 12866—Regulatory Planning and Review

This document is considered a significant rule and is subject to review by the Office of Management and Budget (OMB) under Executive Order 12866.

a. This rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, Tribal, or local governments or communities. The revisions to the regulations governing topsoil replacement and revegetation success standards will not have an adverse economic impact on the coal industry or State regulatory authorities. During any given year, approximately 880 operators conduct vegetation sampling for bond release. The revisions may reduce operating expenses for coal operators by reducing

the time needed to conduct revegetation evaluations and expediting bond release. The estimated reduction in costs is unquantifiable. OSM estimates that approximately two State regulatory authorities will modify their standards for revegetation success during a year, requiring approximately 100 hours to complete each modification for submission to OSM. At an average wage rate of \$30 per hour, the annual cost savings for each State regulatory authority would be \$3,000 (100 hours/report × \$30), or \$6,000 for all States.

b. This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

c. This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

d. The proposed revisions to our topsoil replacement and revegetation success standards may raise novel legal or policy issues, which is why the rule is considered significant by OMB under Executive Order 12866.

Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This rule is not considered a significant energy action under Executive Order 13211. The proposed revisions to our regulations that govern topsoil replacement and revegetation success standards notice will not have a significant affect on the supply, distribution, or use of energy.

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The proposed revisions are not expected to have an adverse economic impact. Some of the revisions may facilitate bond release resulting in a reduction in operating costs for coal operators. Further, the rule produces no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

Small Business Regulatory Enforcement Fairness Act

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

a. Does not have an annual effect on the economy of \$100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises for the reasons stated above.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, Tribal, or local governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, Tribal, or local governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1534) is not required.

Executive Order 12630—Takings

The revisions to the regulations governing topsoil replacement and revegetation success standards do not have any significant takings implications under Executive Order 12630. Therefore, a takings implication assessment is not required.

Executive Order 13132—Federalism

In accordance with Executive Order 13132, the rule does not have significant federalism implications to warrant the preparation of a federalism assessment for the reasons discussed above.

Executive Order 12988—Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on federally recognized Indian Tribes and have determined that the proposed revisions to our regulations that govern topsoil replacement and revegetation success standards would not have substantial direct effects on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

Paperwork Reduction Act

We have determined that this rule does not substantially alter the currently approved collections of information authorized by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* OMB has previously approved the collection activities and assigned clearance number 1029–0047 for 30 CFR parts 816 and 817.

National Environmental Policy Act

OSM has prepared a draft environmental assessment (EA) of this proposed rule and has made a tentative finding that it would not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). It is anticipated that a finding of no significant impact (FONSI) will be made for the final rule in accordance with OSM procedures under NEPA. The draft EA is on file in the OSM Administrative Record at the address specified previously (*see ADDRESSES*). The EA will be completed and a finding made on the significance of any resulting impacts before we publish the final rule.

Clarity of This Regulation

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (A “section” appears in bold type and is preceded by the symbol “§” and a numbered heading; for example, § 816.116.) (5) Is the description of the proposed rule in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the proposed rule? What else could we do to make the proposed rule easier to understand? Send a copy of any comments that concern how we could make this proposed rule easier to understand to: Office Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may also e-mail the comments to this address: Exsec@ios.doi.gov.

List of Subjects

30 CFR 816

Environmental protection, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 817

Environmental protection, Reporting and recordkeeping requirements, Underground mining.

Dated: January 24, 2005.

Rebecca W. Watson, Assistant Secretary, Land and Minerals Management.

For the reasons given in the preamble, we propose to amend 30 CFR parts 816 and 817 as set forth below.

PART 816—PERMANENT PROGRAM PERFORMANCE STANDARDS—SURFACE MINING ACTIVITIES

1. The authority citation for part 816 continues to read as follows:

Authority: 30 U.S.C. 1201 et seq.; and sec. 115 of Pub. L. 98-146.

2. In § 816.22, revise paragraph (d)(1)(i) to read as follows:

§ 816.22 Topsoil and subsoil.

* * * * *

(d) * * *

(1) * * *

(i) Achieves an approximately uniform, stable thickness when consistent with the approved postmining land use, contours, and surface-water drainage systems. Soil thickness may also be varied to the extent such variations help meet the specific revegetation goals identified in the permit.

* * * * *

3. Amend § 816.116 as follows:

a. Revise paragraph (a)(1);

b. Revise the first sentence of paragraph (b)(3) introductory text;

c. Add four sentences to the end of paragraph (b)(3)(ii);

d. Revise paragraphs (c)(3)(i) and (ii).

§ 816.116 Revegetation: Standards for success.

(a) * * *

(1) Standards for success and statistically valid sampling techniques for measuring success shall be selected by the regulatory authority.

* * * * *

(b) * * *

* * * * *

(3) For areas to be developed for fish and wildlife habitat, recreation, undeveloped land, or forest products, success of vegetation shall be determined on the basis of tree and shrub stocking and vegetative ground cover. * * *

(i) * * *

(ii) * * * The requirements of this section apply to trees and shrubs that have been seeded or transplanted and can be met when records of woody vegetation planted show that no woody plants were planted during the last 2 growing seasons of the responsibility period and, if any replanting of woody plants took place during the responsibility period, the total number planted during the last 60% of that period is less than 20% of the total number of woody plants required. Any replanting must be by means of transplants to allow for adequate accounting of plant stocking. This final accounting may include volunteer trees and shrubs of approved species.

Volunteer trees and shrubs of approved species shall be deemed equivalent to planted specimens 2 years of age or older and can be counted towards success. Suckers on shrubby vegetation can be counted as volunteer plants when it is evident the shrub community is vigorous and expanding.

* * * * *

(c) * * *

(3) * * *

(i) Ten full years, except as provided in paragraph (c)(3)(ii) of this section. The vegetation parameters identified in paragraph (b) of this section for grazingland, pastureland, or cropland shall equal or exceed the approved success standard during the growing season of any 2 years after year 6 of the responsibility period. Areas approved for the other uses identified in paragraph (b) of this section shall equal or exceed the applicable success standard during the growing season of the last year of the responsibility period.

(ii) Five full years for lands eligible for remining included in permits issued before September 30, 2004, or any renewals thereof. To the extent that the success standards are established by paragraph (b)(5) of this section, the lands shall equal or exceed the standards during the growing season of the last year of the responsibility period.

* * * * *

PART 817—PERMANENT PROGRAM PERFORMANCE STANDARDS—UNDERGROUND MINING ACTIVITIES

4. The authority citation for part 817 continues to read as follows:

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

5. In § 817.22, revise paragraph (d)(1)(i) to read as follows:

§ 817.22 Topsoil and subsoil.

* * * * *

(d) * * *

(1) * * *

(i) Achieves an approximately uniform, stable thickness when consistent with the approved postmining land use, contours, and surface-water drainage systems. Soil thickness may also be varied to the extent such variations help meet the specific revegetation goals identified in the permit.

* * * * *

6. Amend § 817.116 as follows:

a. Revise paragraph (a)(1);

b. Revise the first sentence of paragraph (b)(3) introductory text;

c. Add four sentences to the end of paragraph (b)(3)(ii);

d. Revise paragraphs (c)(3)(i) and (ii).

§ 817.116 Revegetation: Standards for success.

(a) * * *

(1) Standards for success and statistically valid sampling techniques for measuring success shall be selected by the regulatory authority.

* * * * *

(b) * * *

* * * * *

(3) For areas to be developed for fish and wildlife habitat, recreation, undeveloped land, or forest products, success of vegetation shall be determined on the basis of tree and shrub stocking and vegetative ground cover. * * *

(i) * * *

(ii) * * * The requirements of this section apply to trees and shrubs that have been seeded or transplanted and can be met when records of woody vegetation planted show that no woody plants were planted during the last 2 growing seasons of the responsibility period and, if any replanting of woody plants took place during the responsibility period, the total number planted during the last 60% of that period is less than 20% of the total number of woody plants required. Any replanting must be by means of transplants to allow for adequate accounting of plant stocking. This final accounting may include volunteer trees and shrubs of approved species. Volunteer trees and shrubs of approved species shall be deemed equivalent to planted specimens 2 years of age or older and can be counted towards success. Suckers on shrubby vegetation can be counted as volunteer plants when it is evident the shrub community is vigorous and expanding.

* * * * *

(c) * * *

(3) * * *

(i) Ten full years, except as provided in paragraph (c)(3)(ii) of this section.

The vegetation parameters identified in paragraph (b) of this section for grazingland, pastureland, or cropland shall equal or exceed the approved success standard during the growing season of any 2 years after year 6 of the responsibility period. Areas approved for the other uses identified in

paragraph (b) of this section shall equal or exceed the applicable success standard during the growing season of the last year of the responsibility period.
(ii) Five full years for lands eligible for remining included in permits issued before September 30, 2004, or any renewals thereof. To the extent that the

success standards are established by paragraph (b)(5) of this section, the lands shall equal or exceed the standards during the growing season of the last year of the responsibility period.
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