

**§ 660.52 [Amended]**

■ 74. Section 660.52 is amended by removing the words “(HFB–221), Food and Drug Administration, 8800 Rockville Pike, Bethesda, MD 20892” and adding in their place “(HFM–407) (see mailing addresses in § 600.2 of this chapter)”.

**§ 660.53 [Amended]**

■ 75. Section 660.53 is amended by removing the words “(HFB–1), Food and Drug Administration, 8800 Rockville Pike, Bethesda, MD 20892”.

**§ 660.54 [Amended]**

■ 76. Section 660.54 is amended in the introductory paragraph by removing the words “(HFB–1), Food and Drug Administration, 8800 Rockville Pike, Bethesda, MD 20892”.

**§ 660.55 [Amended]**

■ 77. Section 660.55 is amended in the first sentence of paragraph (a)(3) by removing the mail code “(HFB–1)”.

**PART 680—ADDITIONAL STANDARDS FOR MISCELLANEOUS PRODUCTS**

■ 78. The authority citation for 21 CFR part 680 continues to read as follows:

**Authority:** 21 U.S.C. 321, 351, 352, 353, 355, 360, 371; 42 U.S.C. 216, 262, 263, 263a, 264.

**§ 680.1 [Amended]**

■ 79. Section 680.1 is amended in the last sentence of paragraph (b)(2)(iii), in paragraph (b)(3)(iv), and in the first sentence of paragraph (c) by removing the mail code “(HFB–1)” and adding in its place “(see mailing addresses in § 600.2)”, and in paragraph (d)(1) by removing the mail code “(HFB–1)”.

**PART 807—ESTABLISHMENT REGISTRATION AND DEVICE LISTING FOR MANUFACTURERS AND INITIAL IMPORTERS OF DEVICES**

■ 80. The authority citation for 21 CFR part 807 continues to read as follows:

**Authority:** 21 U.S.C. 321, 331, 351, 352, 360, 360c, 360e, 360i, 360j, 371, 374, 381, 393; 42 U.S.C. 264, 271.

■ 81. Section 807.90 is amended by revising the first sentence of paragraph (a)(2) to read as follows:

**§ 807.90 Format of a premarket notification submission.**

(a) \* \* \*

(2) For devices regulated by the Center for Biologics Evaluation and Research, be addressed to the Document Control Center (HFM–99), Center for Biologics Evaluation and Research, Food and Drug Administration, 1401

Rockville Pike, suite 200N, Rockville, MD 20852–1448; or for devices regulated by the Center for Drug Evaluation and Research, be addressed to the Central Document Room, Center for Drug Evaluation and Research, Food and Drug Administration, 5901–B Ammendale Rd., Beltsville, MD 20705–1266. \* \* \*

\* \* \* \* \*

**PART 822—POSTMARKET SURVEILLANCE**

■ 82. The authority citation for 21 CFR part 822 continues to read as follows:

**Authority:** 21 U.S.C. 331, 352, 360i, 360l, 371, 374.

■ 83. Section 822.8 is amended by revising the second and third sentences to read as follows:

**§ 822.8 When, where, and how must I submit my postmarket surveillance plan?**

\* \* \* For devices regulated by the Center for Biologics Evaluation and Research, send three copies of your submission to the Document Control Center (HFM–99), Center for Biologics Evaluation and Research, Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448. For devices regulated by the Center for Drug Evaluation and Research, send three copies of your submission to the Central Document Room, Center for Drug Evaluation and Research, Food and Drug Administration, 5901–B Ammendale Rd., Beltsville, MD 20705–1266. \* \* \*

Dated: March 15, 2005.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

[FR Doc. 05–5780 Filed 3–23–05; 8:45 am]

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**DEPARTMENT OF THE INTERIOR****Office of Surface Mining Reclamation and Enforcement****30 CFR Part 906****[CO–033–FOR]****Colorado Regulatory Program**

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

**ACTION:** Final rule; approval of amendment.

**SUMMARY:** We are approving an amendment to the Colorado regulatory program (the “Colorado program”) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Colorado proposed revisions to its

rules concerning prime farmland, revegetation, hydrology, enforcement, topsoil, historic properties, bond release and permit requirements. The State intends to revise its program to be consistent with the corresponding Federal regulations, provide additional safeguards, clarify ambiguities, and improve operational efficiency.

**EFFECTIVE DATE:** March 24, 2005.

**FOR FURTHER INFORMATION CONTACT:**

James F. Fulton, Telephone: (303) 844–1400, extension 1424; Internet address: [JFulton@osmre.gov](mailto:JFulton@osmre.gov).

**SUPPLEMENTARY INFORMATION:**

- I. Background on the Colorado Program
- II. Submission of the Amendment
- III. Office of Surface Mining Reclamation and Enforcement’s (OSM) Findings
- IV. Summary and Disposition of Comments
- V. OSM’s Decision
- VI. Procedural Determinations

**I. Background on the Colorado Program**

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, “a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act \* \* \*; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.” See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Colorado program on December 15, 1980. You can find background information on the Colorado program, including the Secretary’s findings, the disposition of comments, and conditions of approval in the December 15, 1980, **Federal Register** (45 FR 82173). You can also find later actions concerning Colorado’s program and program amendments at 30 CFR 906.10, 906.15, 906.16, and 906.30.

**II. Submission of the Amendment**

By letter dated March 27, 2003, Colorado sent us an amendment to its program (Administrative Record No. CO–696–1) under SMCRA (30 U.S.C. 1201 *et seq.*). Colorado sent the amendment in response to May 7, 1986, June 9, 1987, and March 22, 1990, letters that we sent to it in accordance with 30 CFR 732.17(c), as well as to include changes made at its own initiative. On April 4, 2003, Colorado sent us an addition to its March 27, 2003, amendment. Finally, Colorado submitted to us further revisions to its March 27, 2003, amendment on July 23, 2003.

We announced receipt of the proposed amendment in the June 3, 2003, **Federal Register** (68 FR 33032). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment's adequacy (Administrative Record No. CO-696-6). We did not hold a public hearing or meeting because no one requested one. The public comment period ended on July 3, 2003. We did not receive any comments.

In the November 20, 2003, **Federal Register** (68 FR 65422), we reopened the public comment period to allow for comments on Colorado's July 23, 2003, additional submittal which is as follows: Colorado recently amended its Noxious Weed Act which necessitated a revision to proposed rules 4.15.1(5), Rule 1.04(78), and also amended for consistency the earlier version of the draft rules. In addition, the earlier proposed revision to Rule 4.15.4 adding (5) was withdrawn. We did not receive any comments on the additional submittal.

Then in the October 1, 2004, **Federal Register** (69 FR 58873), we reopened the public comment period again to allow comments on Colorado's July 23, 2003, additional submittal. We received comments from the Rocky Mountain Director of "Public Employees for Environmental Responsibility" (PEER).

The amendment concerns revegetation, prime farmland, hydrology, enforcement, topsoil, historic properties, and bond release requirements.

### III. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17.

#### A. Minor Revisions to Colorado's Rules

Colorado proposed minor editorial changes to the following previously-approved rules.

1. 2.06.8(4)(a)(i) and (5)(b)(i), Alluvial Valley Floors;
2. 2.06.8(5)(b)(i), Permit approval or denial;
3. 2.07.6(1)(a)(ii), Permit review;
4. 2.07.6(2)(n), Criteria for permit approval or denial;
5. 2.08.4(6)(c)(iii), Minor revision;
6. 3.03.2(5)(a), Decision by the Division; and
7. 4.03.1(4)(e), Culverts and bridges.

Because these changes are minor, we find that they will not make Colorado's rules less effective than the corresponding Federal regulations.

#### B. Revisions to Colorado's Rules That Have the Same Meaning as the Corresponding Provisions of the Federal Regulations

Colorado proposed revisions to the following rules containing language that is the same as or similar to the corresponding sections of the Federal regulations.

1. Rule 2.06.6(2)(a) and (g), [30 CFR 785.17(c)((1)], Prime farmland soil survey;
2. Rule 3.03.2(1)(e), [30 CFR 800.40(a)(3)], Release of performance bonds;
3. Rule 4.05.2(2), [30 CFR 816/817.116(b)(5)], Sedimentation pond removal;
4. Rule 4.15.7(2), [30 CFR 780.18(b)(5)(vi), 780.13(b)(5)(vi)], Revegetation monitoring plan;
5. Rule 4.15.8(3)(a), [30 CFR 816/817.116(a)(2)], Ground cover standard;
6. Rule 4.15.8(4), [30 CFR 816/817.116(a)(2)], Production standard;
7. Rule 4.15.8(8), [30 CFR 816/817.116(b)(3)], Forestry success standards; and
8. Rule 4.25.2(4), [30 CFR 785.17(e)(5)], Prime Farmland issuance of permit.

Because these proposed rules contain language that is the same as or similar to the corresponding Federal regulations, we find that they are no less effective than the corresponding Federal regulations.

#### C. Revisions to Colorado's Rules That Are Not the Same as the Corresponding Provisions of the Federal Regulations

1. Rule 4.15.1(5), Revegetation—Weed Control and 1.04(78), Noxious Weeds

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

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

Colorado is adding a new rule requiring a weed management plan. The plan is designed to deal with noxious weeds and other weed species that could threaten development of the desired vegetation.

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

2. Rule 4.15.7(1), Determining Revegetation Success

The Federal regulations at 30 CFR 816/817.116(a)(1) require that 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. The proposed revision simply adds a reference to "the techniques identified in these rules."

By revising 4.15.7(1) as proposed, along with the other changes proposed in this amendment, Colorado is including standards for success and statistically valid sampling techniques for measuring success in its approved regulatory program. This is consistent with and no less effective than the Federal regulations. Specific standards and techniques are addressed in other Findings in this document.

3. Rule 4.15.7(3)(b), Use of Reference Areas

The Federal regulations at 30 CFR 816/817.116(a)(1) require that 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.

The Federal regulations at 30 CFR 816/817.116(a)(2) require that 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.

The Federal regulations at 30 CFR 816/817.116(b) require, in part, that (1) for areas developed for use as grazing land or pasture land, the ground cover and production of living plants on the revegetated area shall be at least equal to that of a reference area or such other success standards approved by the regulatory authority; and (2) for areas developed for use as cropland, crop production on the revegetated area shall be at least equal to that of a reference area or such other success standards approved by the regulatory authority.

In support of its proposal, Colorado proposes to reorganize and amend Rule 4.15.7(3)(b) to specify exceptions to the requirement that reference areas be demonstrated to be statistically comparable to equivalent pre-mine vegetation types in terms of vegetation cover and herbaceous production.

Rule 4.15.7(3)(b)(i) is proposed to be recodified to identify cropland post-mine land use as one exception to this requirement. The content of the existing rule is not changed by the recodification.

Rule 4.15.7(3)(b)(ii) is proposed to be added to identify situations in which the post-mining land use will be different than pre-mining land use as a second exception to the pre-mine equivalency requirement. This amendment is in recognition of the fact that when there is a change in land use, such as from forestry or wildlife habitat to pasture land or cropland, assumptions upon which the traditional reference area concepts are based may no longer be valid or applicable. Selection of a reference area that reflects the alternative post-mining land use and planned vegetation community structure may be a more practical approach in such cases, when suitable areas occur in the vicinity of the mine.

Rule 4.15.7(3)(b)(iii) is added to identify situations in which the planned post-mining vegetative community structure will differ significantly from the pre-mining vegetative community structure as a third exception to the pre-mining equivalency requirement. In such cases, Colorado does not require selection of separate reference areas representative of each plant community present within the area to be disturbed. In these situations, selection of a reference area that reflects the planned vegetation community structure may be more appropriate and practical than the traditional reference area approach when suitable areas are identified in the vicinity of the mine.

We concur with Colorado's proposal. The use of reference areas representative of unmined lands in the area as success standards is in compliance with the Federal regulations. The selection of reference areas that allow direct comparisons between communities with the same postmining land uses or similar plant community structures, rather than dissimilar communities, is appropriate and biologically and statistically valid. The use of multiple reference areas for developing weighted success standards based on relative premine ecological site acreages ensures restoration of premine capability. The provision requiring the permittee to demonstrate that management of the reference area will be under its control and will remain under its control throughout the period of extended liability, regardless of location, ensures the long-term protection of the reference areas. We have reviewed the proposed rule change and have determined it is consistent with and no less effective than the Federal regulations at 30 CFR 816/817.116(a)(2) and (b)(1) and (2).

#### 4. Rule 4.15.7(3)(f), Reference Area Management

There is no Federal counterpart to this requirement.

The proposed change to this rule would require equivalent management of the reclaimed and reference areas in any year vegetation sampling will be conducted. In discussing this proposed change, Colorado indicated that rule 4.15.7(3)(f) was amended to be consistent with the proposed amendment to rule 4.15.7(5), which will allow vegetation sampling in two out of any four consecutive years beginning in year nine of the liability period.

This change is appropriate because it assures that similar management will be applied to both the reference and reclaimed areas during any year bond release evaluation of vegetation occurs. Moreover, the change maintains the statistical validity of any direct comparison. The proposed change is consistent with the intent of SMCRA and no less effective than the Federal regulations.

#### 5. Rule 4.15.7(4), Use of Reference Areas

The Federal regulations at 30 CFR 816/817.116(a)(1) require that 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.

The Federal regulations at 30 CFR 816/817.116(a)(2) require that 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.

The Federal regulations at 30 CFR 816/817.116(b) require, in part, that (1) for areas developed for use as grazing land or pasture land, the ground cover and production of living plants on the revegetated area shall be at least equal to that of a reference area or such other success standards approved by the regulatory authority; and (2) for areas developed for use as cropland, crop production on the revegetated area shall be at least equal to that of a reference area or such other success standards approved by the regulatory authority. Essentially, the revisions to the rule simply address how reference areas may be used to determine revegetation success.

In other words, the proposed revisions to rule 4.15.7(4) provide additional guidance in the use of reference areas for the evaluation of revegetation success. In discussing the proposed revisions, Colorado stated that rule 4.15.7(4) is amended to address

reference area comparison approaches applicable to each of the reference area types identified in proposed rule 4.15.7(3).

The inclusion of approaches for using established reference areas helps further define acceptable success standards for evaluating revegetation success. As proposed, the approaches represent valid methods for using reference areas. There is no direct Federal counterpart to the proposed rule. As proposed, the State rule is consistent with and no less effective than the Federal regulations. Therefore, we approve it.

#### 6. Rule 4.15.7(5), Timeframes for Demonstration of Revegetation Success—Sections of the State Regulation Proposed for Amendment: 4.15.7(5) and 4.15.9 [30 CFR 816/817.116(c)(3)]

Colorado proposes in Rule 4.15.7(5) that revegetation success criteria shall be met for at least two of the last four years of the liability period and that sampling for final revegetation success shall not be initiated prior to year nine of the liability period. The responsibility period for Colorado is a minimum of ten years, the proposed rule thus allows for measurements to occur in any four year period beginning in year nine.

The Federal regulations at 30 CFR 816.116(c)(3), which are applicable for areas with less than 26 inches of annual precipitation, including Colorado, require that revegetation success standards be met during the last two consecutive years of the revegetation responsibility period. The major difference between the Federal regulations and Colorado's proposal is that Colorado's proposal would allow measurement in nonconsecutive years.

Originally the Federal regulations applicable for areas with greater than 26 inches of annual precipitation at 30 CFR 816.116(c)(2) required success standards to be met for the last two consecutive years of the responsibility period. These regulations were amended (53 FR 34636, September 7, 1988) to allow the standard to be met during any two years of the five year responsibility period excluding the first year. The change eliminated the requirement to measure revegetation success during the last two (consecutive) years of the responsibility period. The basis for the change was that measurements in nonconsecutive years avoid unduly penalizing the permittee for negative effects of climatic variability.

We previously approved New Mexico regulations stating ground cover and productivity shall equal the approved standard for at least two of the last four

years, starting no sooner than year eight of the responsibility period. New Mexico, like Colorado, experiences less than 26 inches of annual precipitation. We based our approval on the fact that the climatic variability of New Mexico was greater than that in areas with greater than 26 inches of precipitation. We stated that we believe it is appropriate to avoid penalizing

permittees in New Mexico for the negative effects of climatic variability (the same reasoning used for areas receiving greater than 26 inches of precipitation). See New Mexico's approval at 65 FR 65770, November 2, 2000.

Similar to New Mexico, Colorado submitted climatic data. The Colorado mines are located in areas that represent

variable precipitation ranges as shown on the table below. The data in the following table is from the monthly climate data, Colorado Climate Center at Colorado State University (<http://ccc.atmos.colostate.edu>), the Trapper Mine Annual Reclamation Report and the **Federal Register**: November 2, 2000 (Volume 65, Number 213), pages 65776–65777.

#### HISTORICAL PRECIPITATION

Geographical area	Years of record	Precipitation range (inches)	Mean	Standard deviation	Coefficient of variation
Trapper Mine .....	1980–2000	.....	16.56	3.54	0.21
Craig .....	1937–1974	7.42–20.83	13.29	3.26	0.25
Hayden .....	1932–1999	10.89–26.40	16.38	3.39	0.21
Trinidad .....	1938–1999	5.42–22.24	13.42	3.36	0.25
Grand Junction .....	1963–1999	5.69–15.02	8.89	3.39	0.29
Henderson, KY .....	1978–1998	30.94–63.27	45.64	8.89	0.19

As seen in the table above, the coefficient of variation (a measure of the variability of the data) for the Colorado locations is greater than the Henderson, Kentucky location, which is representative of conditions in the east. Given the variability in precipitation, a dry year may present an obstacle to the second year of revegetation success sampling. Flexibility in sampling is needed to skip the drought year(s), and allow the operator to sample in one of the two following non-consecutive years. A demonstration of successful revegetation following a drought would clearly indicate the revegetation could withstand drought and the variable climatic conditions. Revegetation that is capable of meeting the performance standards both before and after a period of drought or pestilence would provide a better demonstration of resilience, effectiveness, and permanence than revegetation that could meet the standards during two consecutive (and fortuitous) years of more or less normal precipitation and damage. The likelihood of drought in Colorado needs to be recognized. The proposed rule changes ensure that performance standards will be met without undue costs or extensions of the ten-year liability period.

Colorado's proposed rules prohibit the inclusion of measurements taken during the first eight years of the responsibility period. This ensures that the plants will have the opportunity to become well established prior to any evaluation of the vegetation. This also provides the same level of flexibility in evaluating revegetation success provided by the Federal regulations for States receiving more than 26 inches of

precipitation. Further, Colorado has asserted that if revegetation success were not demonstrated the second year of sampling, the operator would be required to take the necessary actions to achieve revegetation success. The liability period would then be reinitiated. The proposed rules do not affect the length of the extended period of responsibility, which is 10 years in Colorado. It should also be pointed out that because the proposed rules clearly state that the demonstration of success must be done for at least two of the last four years, the proposed rules provides the opportunity for requiring additional demonstrations as needed.

The current regulation at 30 CFR 816.116(c)(3)(i) pertaining to areas of 26 inches or less average precipitation does provide that success equal or exceed the approved success standard during the last two consecutive years of the responsibility period. However, the preamble to that rule published in the **Federal Register** on March 23, 1982, (47 FR 12600) does not provide rationale for measurement of revegetation success in consecutive years. OSM does state that for areas of less than 26 inches average annual precipitation, because of the greater variability in climatic conditions in these Western States, especially precipitation, it is difficult to base success on a single year's data. Thus, there is support for considering climatic variability in measuring revegetation success and for requiring two years of success, but not necessarily for consecutive years.

Colorado's proposed rules at 4.15.7(5) and 4.15.9 are as effective as the corresponding Federal regulations at 30 CFR 816.116(c)(3) in achieving the

revegetation requirements of sections 515(b)(19) and (b)(20) of SMCRA.

7. Rule 4.15.7(5)(a)–(f), Normal Husbandry Practices [30 CFR 816/817.116(c)(4)]

The Federal regulations at 30 CFR 816.116(c)(1) require that the period of extended responsibility for successful revegetation shall begin after the last year of augmented seeding, fertilizing, irrigation, or other work, excluding husbandry practices that are approved by the regulatory authority in accordance with 30 CFR 816.116(c)(4). The Federal regulations at 30 CFR 816.116(c)(4) require that a State may approve selective husbandry practices, excluding augmented seeding, fertilization, or irrigation, provided it obtains prior approval from us that the practices are normal husbandry practices. In addition, a State may also approve selective husbandry practices, without extending the period of responsibility for revegetation success and bond liability, if such practices can be expected to continue as part of the post-mining land use or if discontinuance of the practices after the liability period expires will not reduce the probability of permanent vegetation success. Approved practices shall be normal husbandry practices within the region for unmined land having land uses similar to the approved postmining land use of the disturbed area, including such practices as disease, pest, and vermin control, and any pruning, reseeding, and transplanting specifically necessitated by such actions.

Colorado proposed to add rules identifying normal husbandry practices that will not be considered augmented practices and will not result in

restarting the responsibility period. In support of the proposed normal husbandry practices, Colorado indicated that several management practices are also addressed in this proposed rule. In rule 4.15.7(5)(a), repair of minor erosion (including revegetation) is allowed under certain conditions, to reflect the fact that minor erosion affecting limited areas is common during the early stages of reclamation, even when appropriate reclamation and stabilization measures are applied. The provision specifies that the operator's liability period for a reclaimed parcel subject to erosion repair extend for a minimum of five years after completion of such repair. This will allow the Colorado Division of Minerals and Geology (hereinafter DMG or Division) to determine that the repair has been successful in stabilizing the area prior to final bond release. Documentation of the repair work in the annual reclamation report will ensure accurate tracking for bond release purposes.

In Colorado's proposed rule at 4.15.7(5)(b), weed control measures are considered normal husbandry practices provided they are conducted in compliance with the Colorado Weed Management Act and the Division's Guidelines for Management of Noxious Weeds. A copy of the "Colorado Noxious Weed Act" [§ 5-5.5-115, C.R.S. (1996 Supp.)] and rules established pursuant thereto, and a copy of DMG's "Guideline for the Management of Noxious Weeds on Coal Mine Permit Areas" were included in the March 27, 2003, submission by Colorado (see Exhibits A and D).

Rules 4.15.7(5)(c), (d), and (e) identify specific practices recognized as normal husbandry practices for annual crop production, perennial cropland, and pasture land forage production, respectively. These land uses are characterized by more intensive management than is typical of rangeland or wildlife habitat. The Federal regulations require that all normal husbandry practices be identified in the approved State program.

Rule 4.15.7(5)(f) limits transplanting to a period within the first four years of the ten year liability period. The limitation on the number of trees or shrubs transplanted is 20 percent of the approved standard. These limitations will insure that transplanting to replace initial mortality loss during the liability period is of a limited nature and that artificially seeded or transplanted woody plants will have been in place for a minimum of six years prior to final bond release. Such limited transplanting is a normal husbandry practice associated with intensive woody plant

establishment efforts such as wildlife plantings, windbreaks, etc. The U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) (formerly known as the Soil Conservation Service), the Colorado Soil Conservation Board, and the Colorado Division of Wildlife (DOW) submitted comments supporting this approach (Exhibit F to Colorado's March 27, 2003, State Program Amendment submission).

We consider, on a practice-by-practice basis, the administrative record supporting each normal husbandry practice proposed by a regulatory authority (53 FR 34641, September 7, 1988). We have also provided specific guidance concerning the repair of rills and gullies by stating that a regulatory authority could allow the repair of rills and gullies as a husbandry practice that would not restart the liability period if the general standards of 30 CFR 816.116(c)(4) are met, and after consideration of the normal conservation practices within the region (48 FR 40157, September 2, 1983).

In support of the proposed rule at 4.15.7(5)(a), allowing for the repair of rills and gullies, Colorado has provided a copy of a letter from the State Resource Conservationist with the NRCS. The letter clearly supports the repair of rills and gullies as a normal husbandry practice.

We reviewed the proposed normal husbandry practices and supporting documentation contained in Exhibit G of Colorado's March 27, 2003, submission for weed control, crop management and tree and shrub replanting. Exhibit G includes correspondence regarding normal husbandry practices and comments received from resource agencies.

Based on our review, we have determined that Colorado has provided sufficient supporting documentation to demonstrate that the normal husbandry practices described under rules 4.15.7(5)(a), (b), (c), (d), (e) and (f) are acceptable for unmined lands having land uses similar to the approved postmining land use of the disturbed area. In addition, in (a) and (b), Colorado limits the real extent of affordable repair of rills and gullies and weed control measures to no more than five percent of the acreage revegetated in any one year. If these limits are exceeded, the permittee would be required to restart the liability period.

We have determined that the proposed normal husbandry practices meet the criteria to be approved under 30 CFR 816/817.116(c)(4) and are no less effective than the Federal regulations.

8. Rule 4.15.7(5)(g), Normal Husbandry Practices—Interseeding [30 CFR 816/817.116(c)(4)]

Proposed rule 4.15.7(5) requires, in part, that the liability period shall re-initiate whenever augmented seeding, planting, fertilization, irrigation, or other augmentive work is required or conducted. Colorado proposes that management activities that are not augmentive, are approved as normal husbandry practices, and may be conducted without re-initiating the liability period.

At rule 4.15.7(5)(a), Colorado proposed that interseeding is considered a normal husbandry practice to enhance species or life form diversity on rangeland or wildlife habitat. Interseeding is not an allowable substitute for complete reseeding when a stand is dominated by species that do not support the approved post mine land use, or when vegetation cover is deficient and excessive erosion has resulted. Interseeding shall be permitted within the first four years of any ten-year liability period, upon approval by the Division. The nature, location and extent of the interseeding must be fully described in the annual reclamation report.

Colorado defines interseeding as a tool to enhance the diversity of established vegetation. Forb, shrub, and grass species native to the area are considered acceptable. The exact species to be used depends upon the post mining land use. Interseeding only applies to lands where vegetation is established and no other management tools are necessary. In contrast, augmented seeding is reseeding with fertilizer or irrigation, or is in response to an unsuccessful germination and establishment. If a reclaimed parcel is deficient in vegetative cover due to insufficient moisture, poor germination or improper planting methodologies, augmented seeding would be necessary and the ten-year liability period would be re-initiated.

The Federal regulations at 30 CFR 816.116(c)(1) require that the period of extended responsibility for successful revegetation shall begin after the last year of augmented seeding, fertilizing, irrigation, or other work, excluding husbandry practices that are approved by the regulatory authority in accordance with 30 CFR 816.116(c)(4). The Federal regulations at 30 CFR 816.116(c)(4) require that a State may approve selective husbandry practices, excluding augmented seeding, fertilization, or irrigation, provided it obtains prior approval from OSM that the practices are normal husbandry

practices without extending the period of responsibility for revegetation success and bond liability, if such practices can be expected to continue as part of the post-mining land use or if discontinuance of the practices after the liability period expires will not reduce the probability of permanent vegetation success. Approved practices shall be normal husbandry practices within the region for unmined land having land uses similar to the approved postmining land use of the disturbed area, including such practices as disease, pest, and vermin control, and any pruning, reseeding, and transplanting specifically necessitated by such actions.

In support of the proposed normal husbandry practice, Colorado states that interseeding on rangelands and wildlife habitat is a normal husbandry practice recommended by biologists and land managers to enhance established vegetation. In Rule 4.15.7(5)(g), the Division is proposing the use of interseeding. A. Perry Plummer, in "Restoring Big Game Range in Utah" (1968) states that "interseeding (seeding directly into established vegetation usually with only partial reduction in competition) is a widely successful means of improving vegetative cover for game and livestock." He indicates that interseeding can be an effective means to establish shrubs and forbs in perennial grass stands and notes that the approach is especially useful on steep slopes where it is desirable to establish shrubs in predominantly herbaceous cover.

Many of the Conservation Reserve Program (CRP) lands in northwestern Colorado lack spatial, structural and vegetative diversity. To improve the diversity of some grass-dominated CRP lands for sharp-tailed grouse habitat, the DOW recommended, "adding legumes and bunchgrasses and reducing sod-forming grasses within these fields to enhance the suitability for sharp-tailed grouse." Some reclaimed lands resemble CRP fields and interseeding is one of the tools DOW recommends to improve habitat diversity as documented in the DOW letter in Exhibit H of Colorado's March 27, 2003, State Program Amendment submission. To further implement this recommendation, the DOW assisted with the formation of the Habitat Partnership Program.

The Habitat Partnership Program is designed to protect and enhance the condition of public and private rangeland through the use of interseeding technology to modify species composition. Working cooperatively together in this program are representatives of the Rio Blanco Cooperative Extension Service, Douglas

Creek Soil Conservation District, the White River Soil Conservation District, the DOW, and the NRCS.

Through funding made available by the DOW, an interseeding drill was purchased. The drill is available to landowners based on the priority list found in the Habitat Partnership Program Proposal. Of highest priority are wildlife forage improvement projects to improve wildlife habitat. The DMG believes that the use of interseeding on reclaimed lands can enhance the established vegetation similar to CRP lands and native rangelands to improve wildlife habitat.

Additional applicable references include Yoakum et. al. (1980), Monsen and Shaw (1983), Frischknecht (1983), and Soil Conservation Service (now known as NRCS) "Range Seeding Standards and Specifications for Colorado" (1987). In this latter reference, NRCS limits the practice to the eastern plains. Two coal mines on the eastern plains have successfully applied this practice to increase the warm season grass cover. Specifically, at the Bacon Mine and at the CCMC mine, warm season grasses were interseeded after it became apparent that the presence of those grasses was not as high as desired. Interseeding was a very effective technique for increasing the warm season grass component in the reclaimed community. Both of these mines have successfully achieved Phase III bond release criteria.

In rule 4.15.7(5)(g), Colorado defines interseeding as a tool used to enhance the diversity of established vegetation. Forb, shrub, and grass species native to the area will be considered acceptable. The exact species to be used will depend upon the post mining land use. Interseeding will only apply to lands where vegetation is established and no other management tools are necessary. In contrast, augmented seeding is reseeding with fertilizer or irrigation, or in response to an unsuccessful reclaimed parcel. If a reclaimed parcel is deficient in vegetative cover due to insufficient moisture, poor germination or improper planting methodologies, augmented seeding would be necessary.

Based on these references and practices, it is clear that in certain cases interseeding is desirable to increase the structural and vegetative diversity of the reclaimed lands for wildlife habitat and for rangeland improvement.

We consider, on a practice-by-practice basis, the administrative record supporting each normal husbandry practice proposed by a regulatory authority (53 FR 34641, September 7, 1988). In 1983, we considered and rejected the idea of allowing

interseeding and supplemental fertilization during the first 5 years of the 10-year responsibility period. While allowing replanting of trees and shrubs "to utilize the best technology available" without extending the responsibility period, we determined that augmented seeding, fertilizing or irrigation are not allowed during the responsibility period. (See 48 FR 40156, September 2, 1983.)

However, in 1988 (53 FR 34641, September 7, 1988) we stated, in the context of the Federal regulation at 30 CFR 816.116(c)(4), that seeding, fertilization, or irrigation performed at levels that do not exceed those normally applied in maintaining comparable unmined land in the surrounding area would not be considered prohibited augmentative activities.

Further, in the response to comments received concerning an Ohio program amendment, OSM stated that "[t]he legislative history of the Act [SMCRA] reveals no specific Congressional intent in the use of the term augmented seeding." Accordingly, our interpretation of augmented seeding is given deference so long as it has a rational basis (see 63 FR 51832, September 29, 1998).

Included in the proposal to allow interseeding as a normal husbandry practice are proposed definitions for "augmented seeding" and "interseeding" to distinguish the differences between them. Interseeding is clearly aimed at establishing species that require special conditions for germination and the establishment or altering of species composition. Colorado's discussion of interseeding as a normal husbandry practice in the "Coal Mine Reclamation Program Vegetation Standards" guidance document further clarifies that interseeding is done to enhance revegetation, rather than to augment revegetation. Colorado reiterates that interseeding is defined as a secondary seeding into established revegetation in order to improve diversity. In contrast, augmented seeding is reseeding with fertilization or irrigation, or in response to unsuccessful revegetation in terms of adequate germination or establishment or permanence. Thus, Colorado's goal for interseeding is not only to ensure that the reclaimed area will meet the success standards, but to go beyond the minimum standards of the regulations and improve the overall diversity of the reclaimed area.

Colorado also proposes to limit interseeding as a normal husbandry practice to the first four years of any ten year liability period. Such interseeding may consist of only native species and

approved introduced species contained in the original seed mix.

To support interseeding as a normal husbandry practice, Colorado submitted the documents identified above. Colorado also proposed interseeding as a method to improve wildlife habitat and grazing values. Further, all referenced publications support the use of interseeding as a normal husbandry practice.

We previously approved Indiana's definition of "augmented seeding, fertilization, or irrigation" as seeding, fertilizing, or irrigation in excess of normal agronomic practices within the region. Our approval was based on the concept that the proposed definition made a distinction between normal conservation practices that were not augmented seeding, fertilizing, irrigation or other work, and augmented husbandry practices (60 FR 53512, October 16, 1995).

We also previously approved the use of interseeding as a normal husbandry practice in New Mexico (65 FR 65770, November 2, 2000). The Colorado proposal is based on language in the approved New Mexico program.

Based on Colorado's proposed restrictions on "interseeding," and the differentiation between "interseeding" and "augmented seeding" and the guidance provided for using interseeding as a normal husbandry practice, and other documentation and publications supporting interseeding as a normal husbandry practice in Colorado, we find that Colorado has demonstrated that the proposed use of interseeding is not augmented seeding. Because the use of interseeding proposed by Colorado clearly supports a key goal of SMCRA, which is the establishment of a permanent, diverse, and effective vegetative cover without compromising compliance of the State program with the Act, we also find that Colorado's proposed use of interseeding in rule 4.15.7(5)(g) is consistent with and no less effective than the Federal regulations at 30 CFR 816.116(c)(1) and (4).

9. Rules 4.15.11 and 4.15.8(7), Revegetation Sampling Methods and Statistical Demonstrations for Revegetation Success [30 CFR 816/817.116(a)(1)].

The Federal regulations at 30 CFR 816/817.116(a)(1) require that 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.

The Federal regulations at 30 CFR 816/817.116(a)(2) require that standards

for successes 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).

Colorado indicates that existing rule 4.15.8(7) is reorganized to correspond to proposed rule 4.15.11. Reference to a specific confidence level is deleted, and detailed statistical requirements including confidence levels are addressed in rule 4.15.11. Reference to a demonstration that "woody plant density exceeds 90 percent \* \* \*" is added to allow for use of the "reverse null" approach to a success demonstration, an option further detailed in rule 4.15.11. The amended rules at 4.15.11(1)(b) require DOW consultation and approval for shrub plantings, address statistical approaches appropriate to woody plant density evaluation, and address the "80/60" requirement of 30 CFR 816/817.116(b)(3)(ii).

Colorado states that rule 4.15.8(7) also allows for a reverse null success demonstration based on the median for woody plant density, with a success threshold of "70% of the approved technical standard." These changes correspond to the provisions of rule 4.15.11, and a detailed justification for use of the median-based reverse null approach, supported by data and analyses included in Exhibit I (found in the March 27, 2003, State Program Amendment submission), is presented within the statement of basis and purpose sections corresponding to pertinent provisions of rule 4.15.11. The current rule states that the "establishment of woody plants shall be considered acceptable if the density is not less than 90% of the approved reference area or standard with 90% statistical confidence." This language is essentially identical to the Federal requirement at 30 CFR 816/817.116(a)(2). The "not less than" language implies use of the standard, or the traditional formulation of the null hypothesis, in which the inherent assumption is that reclamation has been successful for the parameter in question and the assumption of success must be upheld unless demonstrated to be false with statistical certainty. In this formulation, the "burden of proof" could be thought of as falling on the

"opponent" of bond release. The current rule does not specify the use of the mean or median, but traditionally the population mean as estimated by the sample mean with associated confidence interval has been applied.

Colorado states that the amended rule allows for the traditional approach of the current rule, but would also allow for an alternative median-based reverse null approach for a woody plant density success demonstration (as specified in proposed rule 4.15.11(3)(a)). The reverse null approach is inherently more stringent than the traditional null formulation because the assumption is that reclamation has been unsuccessful for the parameter in question. The assumption of failure must be upheld unless demonstrated to be false with statistical certainty. In this formulation, the "burden of proof" falls on the "proponent" of bond release to demonstrate with statistical certainty that the reclaimed area parameter exceeds the specified success threshold. The median has certain advantages compared to the mean as a measure of central tendency, as the median is more stable or robust than the mean and it is impacted less by extreme data values. As a result, it is generally possible to estimate the population median with relatively high precision based on a relatively small sample size. However, as demonstrated by data included in Exhibit I, the median is a more stringent standard of success than the mean for woody plant density due to the typically skewed data distributions associated with woody plant samples on reclaimed lands. Because of the influence of a relatively small percentage of extremely high data values, the woody plant density mean almost always exceeds the woody plant density median by a substantial margin.

For woody plant density, the reverse null approach, combined with use of the median as a specified measure of central tendency, is more stringent than the Federal requirements at 30 CFR 816/817.116(a)(2), which allow for the traditional null formulation using the mean as the specified measure of central tendency. The increased stringency is due to the effects of both the reverse null formulation and use of the median. In order to offset this excess stringency, proposed rule 4.15.8(7) (in combination with proposed 4.15.11(3)(a)) allows for a success demonstration to be based on a threshold of 70% of a technical standard rather than 90% of the standard. Documentation in Exhibit I supports the reduction of the success threshold when the median is the specified parameter of comparison. The reduced stress threshold is further



justified by the requirement to employ the more stringent reverse null formulation to demonstrate success.

Colorado states that rule 4.15.11 is being added to be no less effective than 30 CFR 816/817.116(a)(1) and to specify the statistically valid sampling methods and testing techniques that operators must use in demonstrations of revegetation success. Acceptable sampling methods and approaches for estimates of vegetation cover, herbaceous production, and woody plant density are addressed in proposed rule 4.15.11(1).

We have reviewed rule 4.15.11(1). As proposed, this identifies the sampling methods that can be used to evaluate vegetation cover, herbaceous production and woody plant density. For vegetation cover, point intercept, line intercept or quadrat sampling are listed. For herbaceous production, quadrat sampling or total harvest are the identified methods. For woody plant density, identified methods include belt transects and circular or rectangular quadrats. Sampling can be either random or systematic. We have determined that these are all standard sampling techniques used throughout the country and have been previously approved in multiple State programs. Thus, subsection 4.15.11(1) is consistent with and no less effective than the requirements of 30 CFR 816.116(a) and therefore should be approved.

The State indicates that statistical testing and sample adequacy approaches acceptable for vegetation cover, herbaceous production, and woody plant density are addressed in proposed rule 4.15.11(2). The amended rule ensures that tests for success will employ a 90 percent confidence level (alpha error probability = .10) for "standard null hypothesis-based" demonstrations of success, and that tests will employ an 80 percent confidence level (alpha error probability = .20) for "reverse null hypothesis-based" demonstrations of success. Data and analyses in Exhibit I of the program amendment demonstrate that reverse null tests at the 80% level of confidence are no less effective (and in fact are more stringent) than standard null tests at the 90% level of confidence. Selected revegetation success standards are addressed in rules 4.15.7(2)(d), 4.15.7(3), 4.15.7(4), 4.15.8, 4.15.9, and 4.15.10. Justification for the 70% success threshold of proposed rule 4.15.11(3)(a) for woody plant density is provided in the discussion under Rule 4.15.8(7) above, and pursuant to associated amendments to Rule 4.15.8(7). Additional justification is included in Exhibit I.

Colorado states that proposed rule 4.15.11(2)(a) incorporates into its regulations the standard statistical sample adequacy formula and direct success comparison approach previously specified in DMG guidelines. A notable modification is that the rule allows for use of a precision level of 0.15, rather than 0.10, in the standard sample adequacy formula for woody plant density estimation. Larson (1980) used a precision level of 0.10 in example data sets, and that level of precision has subsequently been widely specified in State regulations and guidelines. However, no specific level of statistical precision is required by the Federal regulations in 30 CFR 816/817.116. In Colorado, we have found the 0.10 precision level to be appropriate and practicable in the majority of cases for statistical evaluation of cover and production success. However, due to the high variability and skewed distributions typical of reclaimed area woody plant density data, extremely large sample sizes are typically necessary to demonstrate sample adequacy for woody plant density at the 0.10 level of statistical precision. The time and expense associated with obtaining estimates of woody plant density that are precise to within 10% of the true mean are not justified for coal reclamation lands in Colorado. Colorado enclosed, as Exhibit I, a package containing woody plant density data from representative mine reclamation areas in the Yampa Basin and North Park, Colorado. The package includes detailed analyses of the data, and presents justification for use of a precision level of 0.15 in the standard sample adequacy formula for woody plant density estimation. Colorado asserts that use of the 0.15 precision level rather than 0.10 will significantly reduce required sample sizes for reclaimed area woody plant density estimates. In Colorado's judgment, the increased precision associated with use of 0.10 for woody plant density estimation is not critical, and the relatively small increase in precision comes at too high a price in terms of the time and effort associated with the additional data collection. Colorado also asserts that the use of a 0.15 precision level rather than 0.10 for demonstrating woody plant density success will negligibly affect the extent to which reclaimed shrublands provide desired wildlife cover and forage on reclaimed landscapes. In Colorado, woody plant density standards are set based on consultation with DOW personnel and reflect the consideration of a wide range of variables typically involving

negotiation among DOW and DMG staff, operators and consultants. It is not an exact science and necessary or optimum levels of woody plant density to meet applicable habitat requirements are not precisely defined. Colorado believes that the application of such a high degree of precision to a standard that is based on professional recommendations and negotiation is unwarranted.

Our review affirms that rule 4.15.11(2) identifies the statistical analysis and sample adequacy procedures to be used in evaluating vegetative cover, herbaceous production and woody plant density. Rule 4.15.11(2)(a) gives the standard sample adequacy formula for use in direct comparisons when the value for the reclaimed area is greater than the standard, or when the reclaimed value is less than the standard but not significantly different. It sets sampling precision at 0.10 for vegetative cover and herbaceous production and 0.15 for woody plant density. In discussing the setting of precision levels, OSM indicates that it 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 (48 FR 40150, September 2, 1983). Colorado's proposal to set precision levels at 0.10 for vegetative cover and herbaceous production is consistent with previously approved precision levels used in States in the West. Colorado has also demonstrated that the proposal to use a precision level of 0.15 for woody plant density is appropriate given the high variability in shrub density across a reclaimed area. The proposed rule is consistent with and no less effective than the Federal requirements of 30 CFR 816.116(a) and should be approved.

We note that rule 4.15.11(2)(b) includes the standard method for comparing vegetative parameters from the reclaimed area to 90% of the success standard. This approach makes use of the classic null hypothesis, which is that the vegetation on the reclaimed land is equal to or greater than that of the success standard. Under this approach, the vegetation on the reclaimed area may be less than the success standard; but statistically, it is not significantly different and the null hypothesis is not rejected. The minimum sample size is 15 and all sampling must meet sample adequacy using the formula in Subsection 4.15.11(2)(a). This is the standard approach used by State Regulatory Authorities throughout the United States and is the approach discussed in



the 1983 preamble (48 FR 40152, September 2, 1983). As proposed, this subsection is consistent with and no less effective than the Federal regulations and should be approved.

As discussed in the State's supporting justification, subsection 4.15.11(2)(c) proposes to allow the use of the "reverse null" hypothesis when the vegetation parameter from the reclaimed area is greater than the success standard, but the number of samples taken is not sufficient to meet sample adequacy. The reverse null hypothesis states that vegetation on the reclaimed area is less than 90% of the success standard. OSM has previously approved use of the reverse null hypothesis in the New Mexico program. Under the Colorado proposal, the confidence interval is set at 80% ( $\alpha = 0.20$ ) and a minimum of 30 samples is required. The proposed  $\alpha$  (error probability) of 0.20 is greater than the 0.10 in the Federal regulations. However, in order to demonstrate that the revegetation meets the success standard under the reverse null hypothesis, the operator must show that the vegetative parameter of concern is significantly greater than 90% of the success standard. That is, the mean value for a given parameter must be well above the success standard because to be significantly greater than the success standard, the lower tail of the 80% confidence interval must also be greater than 90% of the success standard. Therefore, even though the error probability is slightly larger under the State's proposal, the requirement to exceed the success standard ensures consistency with the Federal regulations. To support this approach, data in Exhibit I shows that a comparison of (1) statistical testing using the standard null hypothesis and a 90% confidence interval and (2) the reverse null hypothesis using an 80% confidence interval either gave the same results or the reverse null was more stringent. For this reason, the use of an 80% percent confidence interval with an  $\alpha$  of 0.20 is consistent with and no less effective than the Federal regulations and should be approved.

In discussing rule 4.15.11(3), the State indicates that it allows for additional optional approaches for demonstrations of sample adequacy and revegetation success that are solely applicable to woody plant density. The approaches include (1) a median based reverse null confidence limit comparison, (2) a mean based pre-determined sample size direct comparison, and (3) an approach based on stabilization of the running sample mean. The range of options presented for woody plant density is warranted, due to the extremely large sample sizes

that have frequently been necessary in order for operators to demonstrate success for this parameter using traditional statistical methods. Based on the discussion below, the approaches specified in rules 4.15.11(3)(a), (b), and (c) are no less effective than the applicable Federal requirements of 30 CFR 816.116(a)(1) and (a)(2). However, depending on characteristics of the data, the range of options may allow for operators to select a success demonstration approach that requires a less intensive sampling effort than would be required if limited to only one or two approaches.

Colorado included, in Exhibit I, data and arguments in support of these approaches.

Rules 4.15.8(7) and 4.15.11(3)(a) propose using the reverse null hypothesis and nonparametric rank-sum test to demonstrate that the median value for the reclaimed area is greater than 70% of the success standard using an 80% confidence interval. In discussing this proposal in Exhibit I, the State indicates that, based on the literature and its observations, woody plant density data from reclaimed lands are seldom normally distributed and typically exhibit lognormal or similar distributions with a strong skewness to the right. Parametric statistics based on means and standard deviations include the assumption that the data come from a normal distribution. This limits the use of normal statistics in these type of populations. The median is a relatively "robust" or "resistant" measure of central tendency. It is not influenced by a few extreme values and so it does not get pulled toward the right tail. As a result, in a right-skewed distribution, the median is always lower than the mean. Because reclaimed parcel woody plant density data sets typically exhibit right-skewed distributions, the requirement to demonstrate woody plant density success based on a comparison of the median to a technical standard is more stringent than a demonstration based on a comparison of the mean to the same technical standard. Review of the various data sets and summary statistics submitted by Colorado in Exhibit I indicates that, on average, the medians for data averaged less than 75% of the mean for those same data sets. Based on this information, it is reasonable to use 70% (e.g., 90% of 75%) of the success standard when making comparisons to the median value of the reclaimed area. The fact that amended rule 4.15.11(3)(a) also requires a reverse null confidence limit comparison on the median adds an additional layer of stringency. To be judged successful, the one tailed 80%

lower confidence interval on the sample median would have to exceed the success threshold.

Based on a review of the data submitted by the State, OSM has determined that proposed rules 4.15.8(7) and 4.15.11(3)(a) are consistent with the intent of SMCRA and no less effective than 30 CFR 816.116(a)(2) in establishing success standards and ensuring that statistically valid comparisons are made during the evaluation of revegetation success. Accordingly, the rule should be approved.

In discussing rule 4.15.11(3)(b)(i) in Exhibit I, Colorado indicates that an approach that may in certain situations allow for a smaller sample size than indicated by the standard sample adequacy formula, without a corresponding reduction in stringency, is a non-statistical predetermined (or maximum) sample size.

Rule 4.15.11(3)(b)(i) allows for an empirically derived, predetermined sample size of 75 that operators could use for a success demonstration in cases where sample adequacy has not been demonstrated by approved statistical formulas. In this approach, the woody plant density sample mean obtained from a sample of at least 75 100-square-meter quadrats is compared directly against the approved success threshold (90% of the approved standard) with no consideration of statistical error or confidence level). The specified quadrat size restriction is necessary because a high percentage of the data that comprise the basis for the proposed sample size of 75 were obtained using a 2-meter by 50-meter quadrat.

Again, the State has included in Exhibit I a review of several data sets to demonstrate that a sample size of 75 is generally adequate to ensure that the sample mean would be within the 90% confidence interval of a statistically adequate sample. The 75 sample size was no less effective than using the sample adequacy formula to determine sample size more than 90% of the time. It should also be noted that in the preamble to the Federal regulations at 30 CFR 816.116(a)(1), OSM stated that we will evaluate on a case-by-case basis the adequacy of predetermined sample sizes (48 FR 40150, September 2, 1983). Based on the information submitted as part of this program amendment, we determined that the use of a maximum of 75 samples to evaluate the success of woody plant density is consistent with the intent of SMCRA and no less effective than the Federal regulations.

Rule 4.15.11(3)(b)(ii) will allow the use of a sample adequacy calculation that is based on the variance of the

running mean, a minimum sample size of 40 samples, a precision of 0.03, and an alpha of 0.10. In Exhibit I of this amendment, Colorado evaluated the variance of the running mean sample adequacy approach based on a number of the data sets. The running mean approach results in drastically reduced sample sizes compared to the standard sample adequacy approach (as specified in 4.15.11(2)(a)), when the same level of precision is specified in the formulas. This is due to the fact that successive running mean values are much less variable than successive sample observations. As such, the variance of the sample mean is correspondingly smaller than the sample variance.

As discussed in Exhibit I of the amendment, Colorado compared three different levels of precision, 0.10, 0.05, and 0.03, to determine the effect on sample size and estimates of the mean and to ensure that reduced sample size will not weaken the ability of hypothesis testing to detect a true difference between the reclaimed area mean and the approved standard (success threshold). The two lower levels of precision (*i.e.*, 0.10 or 0.05) do not appear to result in reliable estimates of the mean when applied to the Colorado data, even when a minimum sample size of 40 is imposed. At the .03 level of statistical precision, and with a minimum sample size of 40, the modified sample adequacy formula provides for a modest reduction in average sample size compared to average sample size resulting from application of the standard sample adequacy formula with a 0.15 precision level. Further, success demonstration stringency is comparable when the modified standard deviation term is substituted in the t-test formula.

We have reviewed the proposed alternative sample adequacy formula, which can be used either in a direct comparison (*i.e.*, the mean from the reclaimed area is greater than 90% of the success standard) or using a t-test with the classic null hypothesis and an alpha of 0.10. Based on review of the data analysis used to support Colorado's proposal, OSM agrees with the State's conclusion that the modified sample adequacy approach based on the variance of the running mean, with a precision level of 0.03 and a minimum sample size of 40, is no less stringent than the standard sample adequacy approach with a precision level of 0.15. As discussed above in relation to Colorado's rule 4.15.11(2)(a) we have approved a precision level 0.15. There is no level of statistical precision required by Federal regulations. Its use with either direct comparisons or a t-test

based on the classic null hypothesis is also appropriate. We have determined that the inclusion of a sample adequacy calculation that is based on the variance of the running mean, a minimum sample size of 40 samples, a precision of 0.03, and an alpha of 0.10 for establishing required sample sizes when sampling woody plants is consistent with and no less effective than the Federal regulations.

Finally, rule 4.15.11(3)(c) allows for the use of a t-test based on the classic null hypothesis and alpha of 0.10 to demonstrate success of woody plant density. This is the classic approach for demonstrating revegetation success and is consistent with and no less effective than the Federal regulations.

10. Rule 1.04(71)(f) and (g), Land Use—"Industrial or Commercial" and "Recreation" [30 CFR 701.5]

Colorado proposes to revise its land use definitions to create two categories of recreation land use. The existing definition of a "recreation" land use would be revised to limit it to non-intensive uses such as hiking, canoeing, and other undeveloped recreational uses. The State then proposes to add a developed commercial recreation category to its "industrial or commercial" land use. Developed commercial recreation would be designated as including facilities such as amusement parks, athletic or recreational sports facilities, and other intensive use recreational facilities. This designation applies only to lands that are physically developed for intensive recreational use, and does not include adjacent lands that are not physically affected.

In support of this proposal, Colorado states that developed commercial recreation facilities are more similar in nature to commercial service facilities than to undeveloped recreational uses such as hiking, canoeing, and other leisure activities that do not depend on specialized man-made structures and facilities.

The Federal definition for a recreation land use is land used for public or private leisure-time activities, including developed recreation facilities such as parks, camps, and amusement areas, as well as areas for less intensive uses such as hiking, canoeing, and other undeveloped recreational uses. The land use categories, as defined in the regulations, are used to determine if the postmining land use is different than the premining land use, thereby necessitating a land use change. They are also used to determine what the applicable revegetation success criteria would be. OSM has reviewed Colorado's

proposed land use definitions for commercial or industrial and recreation. The proposed change would have no effect on determining if a land use change is proposed. The proposed change would affect the revegetation success standards that developed commercial recreation, as defined by the State, would be subject to. Because the revised definition of developed commercial recreation is included under industrial or commercial, revegetation would only be evaluated based on the Federal requirements of 30 CFR 816/817.116(b)(4), vegetative ground cover not less than that required to control erosion. Currently, areas with a land use of recreation are required to comply with the Federal requirements of 30 CFR 816.116(b)(3), which include criteria for woody plant stocking and a ground cover not less than that required to achieve the postmining land use. Under this rule, minimum stocking and planting arrangements are specified by the regulatory authority on the basis of local and regional conditions and after consultation with and approval by the State agencies responsible for the administration of forestry and wildlife programs.

OSM has evaluated the effect of Colorado's proposed revision to the definitions of "industrial or commercial" and "recreation" and determined there would be none. Developed commercial recreation would not be subject to stocking and planting requirements of the State agencies responsible for the administration of forestry or fish and wildlife programs because of the intensive development of these areas and the lack of authority over such commercial enterprises. And because developed commercial recreation is limited to lands that are physically developed for intensive recreational use, OSM believes that ground cover adequate to control erosion would achieve the postmining land use. The areas that would continue to fall under the recreation land use would continue to be evaluated in the same manner as is currently approved in the Colorado program.

Based on this OSM has determined that the proposed revisions to the land use definitions are no less effective than the Federal regulations and should be approved.

11. 4.06.1(2), Topsoil Storage [30 CFR 816/817.22(c)]

Colorado proposes to amend rule 4.06.1(2) to require that after removal, topsoil shall be immediately redistributed in accordance with rule 4.06.4, or stockpiled pending

redistribution in accordance with rule 4.06.3.

Federal regulations at 30 CFR 816/817.22(c)(1) require that materials removed under section 816/817.22(a) shall be segregated and stockpiled when it is impractical to redistribute such materials promptly on regraded areas.

In discussing the proposed revision, Colorado indicated that rule 4.06.1(2) was amended to be no less effective than 30 CFR 816/817.22(c). Alternative topsoil storage practices were deleted from the rule.

Item S-4 from OSM's May 7, 1986, 30 CFR part 732 letter required Colorado to provide that topsoil storage other than stockpiling may be used only when (1) stockpiling would be detrimental to the quantity or quality of the stored materials, (2) all stored materials are moved to an approved site within the permit area, (3) the alternative practice would not permanently diminish the capability of the soil of the host site, and (4) the alternative practice would maintain the stored materials in a condition more suitable for future redistribution than would stockpiling. In response, Colorado has eliminated the provision for allowing alternative practices for topsoil storage. The State now only allows the use of topsoil stockpiles. While the Federal regulations do allow the use of alternative practices for topsoil storage, it is only under limited circumstances. The lack of a State counterpart to this provision does not adversely affect the protection of salvaged topsoil or reduce the effectiveness of the State's program. Colorado's proposal is consistent with and no less effective than the Federal regulations. Therefore, we are approving it.

#### *D. Revisions to Colorado's Rules With No Corresponding Federal Regulation*

2.04.13(1)(e), Annual reclamation report.

There is no Federal counterpart to this requirement in Colorado's regulations that call for an annual reclamation report. Therefore, the requirement is more effective than the Federal regulations and more stringent than SMCRA. Therefore, we are approving it.

#### **IV. Summary and Disposition of Comments**

##### *Public Comments*

We received comments in response to our notice in the **Federal Register** published October 1, 2004. We did not receive comments in response to notices published June 3, 2003, and November 20, 2003.

We received a letter via e-mail dated October 18, 2004, from the Rocky

Mountain Director of Public Employees for Environmental Responsibility (PEER) (Administrative Record No. CO-696-11). On its Web page, PEER states that it is a national non-profit alliance of local, State and Federal scientists, law enforcement officers, land managers and other professionals dedicated to upholding environmental laws and values.

PEER comments address Colorado's proposed rules at 4.15.7(5), 4.15.7(5)(g), and 4.15.9. However only proposed changes to rules 4.15.1(5), 4.15.9 and 1.04(78) were the subject of the comment period established by OSM's notice published in the **Federal Register** on October 1, 2004 (69 FR 58873).

More specifically, PEER commented on changes to rule 4.15.7(5) amending general revegetation success requirements applicable to all postmining land uses and on the addition of proposed rule 4.15.7(5)(g) pertaining to interseeding versus augmented seeding. These proposed changes were included in the package submitted by Colorado on March 27, 2003, and subject to our comment period announced in the June 3, 2003, **Federal Register**. That comment period ended on July 3, 2003. Therefore, the changes proposed to rule 4.15.7(5) and 4.15.7(5)(g) are not subject to the instant comment period, and will not be discussed further herein.

In rule 4.15.9, Colorado proposes changes for areas used as cropland. Success of revegetation will be determined on the basis of crop production from the mined area as compared to approved reference areas or other approved standards. Crop production from the mined area will not be less than that of the approved reference area or standard for two of the last four years of the liability period established in rule 3.02.3. Crop production will not be considered prior to year nine of the liability period. This represents a change from Colorado's current rule requiring crop production to be considered during the last two years of the liability period.

PEER's comments on proposed rule 4.15.9 refer to an earlier version of the rule mistakenly submitted by Colorado. PEER objects that the proposed rule could allow measurement of revegetation success on cropland as early as year four after final augmented work if the crop is irrigated. In its submission dated July 23, 2003 (the subject of the instant comment period), Colorado states that wording from a previous version of the draft rules was inadvertently left in the proposed rule submitted to OSM on March 27, 2003. The submission made on July 23, 2003,

contained the corrected version of proposed rule 4.15.9. The corrected version of proposed rule 4.15.9 was quoted in the **Federal Register** notice establishing the instant comment period. The corrected version contains no reference to measurement starting earlier than year nine. Nor is there any allowance for changing the applicable period of responsibility based on irrigation.

In its comments, PEER cites Federal regulations at 30 CFR 816.116(c)(3)(i) noting that for western States (meaning specifically in areas of 26.0 inches or less average precipitation) revegetation success is to be measured in the last two consecutive years of the responsibility period. PEER states that Colorado's proposal could allow measurement in year nine and again in year 11, and that this would not be consistent with the Federal rules requiring measurement in the last two consecutive years of the responsibility period. PEER states that the change will result in bond release being allowed under the Colorado program in cases when it would not be allowed under OSM's rules. On this basis, PEER states Colorado's proposal is less effective than OSM's rules in achieving the requirements of SMCRA.

As described below, the criteria for a State provision to be no less effective than the Federal regulations is not dependent on comparing resulting situations as described by PEER for year nine and 11 versus results for the last two consecutive years of the responsibility period. The focus of OSM's analysis is a State's capability to achieve the result prescribed in SMCRA. SMCRA at 515(b)(19) and (20), as interpreted by the Federal regulations at 30 CFR 816.116 (b)(2), require that for areas developed for use as cropland, crop production on the revegetated area shall be at least equal to that of a reference area or such other success standards approved by the regulatory authority. See preamble to 30 CFR 816.116 (b)(2) (47 FR 40152) published September 2, 1983.

PEER based comments against the proposed changes on three additional factors. The first factor is a legal argument. PEER states that Colorado in its statement of basis and purpose notes that OSM has approved a similar proposal in New Mexico. PEER states that approval in another State is not grounds to approve a proposal from Colorado that is less effective than OSM's rules. PEER also takes exception to the rationale OSM relied on to approve the New Mexico variation.

OSM's standard for review and consideration of a State's proposed rule in comparison to a counterpart Federal

regulation is at 30 CFR 730.5(b), whereby State laws and regulations must be no less effective than the Secretary's regulations in meeting the requirements of the Act. PEER takes exception to regulations proposed by Colorado that fall under the standard in 30 CFR 730.5(b). The preamble to 30 CFR 730.5(b) (see 46 FR 53376, 53377, October 28, 1981) makes it clear that States are not required to precisely adopt the Secretary's regulations; that within limits, they are free to develop and adopt regulations that meet their special needs. States are no longer required to demonstrate that each alternative is necessary because of local requirements or local environmental or agricultural conditions. A State program will, however, have to be no less effective than the Secretary's regulations in meeting the requirements of the Act in order to be approved. As discussed in more detail above, OSM has determined that Colorado's proposal meets the criteria of 30 CFR 730.5(b).

The second factor is biological. PEER states that the amount of precipitation is far more important than the variability of precipitation. PEER notes that SMCRA holds the dry western States to a more stringent standard than the eastern States precisely because of the relative lack of precipitation. More specifically, PEER states that SMCRA already holds operators in western states to a 10-year responsibility period, as opposed to only a five-year period in the east. PEER contends that any effort to allow a western State to use the less stringent eastern standard as "no less effective" than the more stringent western standard is ridiculous on its face. PEER further contends that revegetation is still difficult in the West because of the limited precipitation. PEER does not agree that Colorado's argument alleging that non-consecutive years actually provides a better demonstration of revegetation success. PEER states that measuring revegetation during a drought year would more clearly show its resilience and permanence than measuring after the drought has broken. It is also concerned that the proposed rule would allow operators to "cherry pick" the most successful years and submit only the best revegetation data.

OSM notes that neither 515(b)(19) or (20) of SMCRA specify when revegetation success must be evaluated; these sections only state the requirement to establish vegetation on regraded areas and affected lands, and establish the responsibility period for successful revegetation. The longer responsibility period for areas where the annual average precipitation is 26.0

inches or less is based on the concept that more time is necessary to establish vegetation under lower precipitation regimes.

The preamble to OSM's current Federal regulation at 30 CFR 816.116(c)(3)(i) pertaining to areas of 26.0 inches or less average precipitation published in the March 23, 1982, **Federal Register** (47 FR 12600) states that for areas of less than 26.0 inches average annual precipitation, because of the greater variability in climatic conditions, especially precipitation, it is difficult to base success on a single year's data. Thus, there is support for requiring two years of success, but not necessarily for consecutive years.

Additionally, SMCRA does not specify timeframes for actually evaluating revegetation success. OSM also concurs with Colorado's argument that recovery from a drought is an important demonstration of the success of revegetation in demonstrating compliance with 515(b)(19).

PEER's third factor for objecting to Colorado's proposed revision deals with the relevance of weather variability. PEER indicates that because Colorado generally uses reference areas rather than technical standards (the use of reference areas being less common in the East), weather variability is already taken into account. As noted above, weather variability is a factor for requiring two years of revegetation success, but is not necessarily a factor requiring two consecutive years of success.

PEER also contends that Colorado's proposal should be made to OSM in a petition for rulemaking. The procedure for petitioning for rulemaking is provided at 30 CFR 700.12. However, this does not preclude Colorado from proposing alternatives to OSM's rules under 30 CFR 730.5.

For the above reasons, notwithstanding PEER's comments, we are still approving Colorado's proposed changes to the rule at 4.15.9 pertaining to revegetation success criteria for cropland. A more detailed analysis of our reasoning is found under section C.6. above.

#### *Federal Agency Comments*

Under the Federal regulations at 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Colorado program (Administrative Record No. CO-696-5). No comments were received.

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

None of the revisions that Colorado proposed to make in this amendment pertain to air or water quality standards. Therefore we did not ask EPA to concur on this amendment.

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

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On May 2, 2003, we requested comments on Colorado's amendment (Administrative Record No. CO-696-3,4), but none were received.

#### **V. OSM's Decision**

Based on the above findings, we approve Colorado's March 27, 2003, amendment, its April 4, 2003, addition, and its July 23, 2003, revisions.

We approve the rules as proposed by Colorado with the provision that they be fully promulgated in identical form to the rules submitted to and reviewed by OSM and the public.

To implement this decision, we are amending the Federal regulations at 30 CFR part 906, which codify decisions concerning the Colorado program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

#### **VI. Procedural Determinations**

##### *Executive Order 12630—Takings*

This rule does not have takings implications. For most of the State provisions addressed, this determination is based on the analysis performed for the counterpart Federal regulation. For the remaining State provisions, this determination is based on the fact that the rule will not have impact on the use or value of private property and so does not result in significant costs to the government.

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

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

*Executive Order 12988—Civil Justice Reform*

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

*Executive Order 13132—Federalism*

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

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

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

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

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

*National Environmental Policy Act*

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

*Paperwork Reduction Act*

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

*Regulatory Flexibility Act*

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because it is largely based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations. The Department also certifies that the provisions in this rule that are not based upon counterpart Federal regulations 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.*). This determination is based upon the fact that the provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

*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 reason stated above, this rule: a. Does not have an annual effect on the economy of \$100 million; b. will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and c. does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that a portion of the State provisions are based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule. For the portion of the State provisions that is not based upon counterpart Federal regulations, this determination is based upon the fact that the State provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

*Unfunded Mandates*

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations, for which an analysis was prepared and a determination made that the Federal regulations did not impose an unfunded mandate. For the portion of the State provisions that is not based on counterpart Federal regulations, this determination is based upon the fact that the State provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

**List of Subjects in 30 CFR Part 906**

Intergovernmental relations, Surface mining, Underground mining.

Dated: January 20, 2005.

**Allen D. Klein,**

*Regional Director, Western Regional Coordinating Center.*

■ For the reasons set out in the preamble, the Federal regulations at 30 CFR part 906 are amended as set forth below:

**PART 906—COLORADO**

■ 1. The authority citation for part 906 continues to read as follows:

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

■ 2. Federal regulations at 30 CFR 906.15 are amended in the table by adding a new entry in chronological order by “Date of Final Publication” to read as follows:

**§ 906.15 Approval of Colorado regulatory program amendments**

\* \* \* \* \*

Original amendment submission date	Date of final publication	Citation/description
3/27/03	3/24/05	1.04(71)(f)&(g), 2.04.13(1)(e), 2.06.6(2)(a),(g), 2.06.8(4)(a)(i), 2.06.8(5)(b)(i), 2.07.6(1)(a)(ii), 2.07.6(2)(n), 2.08.4(6)(c)(iii), 3.03.2(1)(e), 3.03.2(5)(a), 4.03.1(4)(e), 4.05.2, 4.06.1(2), 4.15.1(5), 4.15.4(5), 4.15.7(1), 4.15.7(2), 4.15.7(3)(b), 4.15.7(3)(f), 4.15.7(4), 4.15.7(5), 4.15.7(5)(a), 4.15.7(5)(b), 4.15.7(5)(c), 4.15.7(5)(d), 4.15.7(5)(e), 4.15.7(5)(f), 4.15.7(5)(g), 4.15.8(3)(a), 4.15.8(4), 4.15.8(7), 4.15.8(8), 4.15.9, 4.15.11, 4.15.11(1)(a), 4.15.11(1)(b), 4.15.11(1)(c), 4.15.11(2), 4.15.11(3), 4.25.2(4).

[FR Doc. 05–5807 Filed 3–23–05; 8:45 am]

BILLING CODE 4310–05–P

**DEPARTMENT OF EDUCATION****34 CFR Part 225**

RIN 1855–AA02

**Credit Enhancement for Charter School Facilities Program**

**AGENCY:** Office of Innovation and Improvement, Department of Education.

**ACTION:** Final regulations.

**SUMMARY:** The Secretary issues these final regulations to administer the Credit Enhancement for Charter School Facilities program, and its predecessor, the Charter School Facilities Financing Demonstration Grant program. Under this program, the Department provides competitive grants to entities that are non-profit or public or are consortia of these entities to demonstrate innovative credit enhancement strategies to assist charter schools in acquiring, constructing, and renovating facilities through loans, bonds, other debt instruments, or leases.

**DATES:** These regulations are effective April 25, 2005.

**FOR FURTHER INFORMATION CONTACT:** Ann Margaret Galiatsos or Jim Houser, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W245, FB–6, Washington, DC 20202–6140. Telephone: (202) 205–9765 or via Internet, at: [charter.facilities@ed.gov](mailto:charter.facilities@ed.gov).

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

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**under FOR FURTHER INFORMATION CONTACT.****SUPPLEMENTARY INFORMATION:****Background**

These final regulations apply to both (a) the Credit Enhancement for Charter School Facilities program, which is authorized under title V, part B, subpart 2 of the Elementary and Secondary Education Act of 1965 (the Act), as amended by the No Child Left Behind Act of 2001 (Pub. L. 107–110, enacted January 8, 2002) and (b) its predecessor, the Charter School Facilities Financing Demonstration Grant program, as authorized by title X, part C, subpart 2 of the Act through the Department of Education Appropriations Act, 2001 as enacted by the Consolidated Appropriations Act, 2001. The purpose of this program is to assist charter schools in meeting their facilities needs. Under this program, funds are provided on a competitive basis to public and nonprofit entities, and consortia of these entities, to leverage other funds and help charter schools acquire school facilities through such means as purchase, lease, and donation. Grantees may also use grants to leverage other funds to help charter schools construct and renovate school facilities.

To help leverage funds for charter school facilities, grant recipients may, among other things: Guarantee and insure debt, including bonds, to finance charter school facilities; guarantee and insure leases for personal and real property; facilitate a charter school's facilities financing by identifying potential lending sources, encouraging private lending, and carrying out other, similar activities; and establish temporary charter school facilities that new charter schools may use until they can acquire a facility on their own.

Sections in these regulations that govern the management of grants apply to grants under both the Credit

Enhancement for Charter School Facilities program and its predecessor, the Charter School Facilities Financing Demonstration Grant program. These two programs are virtually identical, and grants made under them will operate for several years. Sections related to grantee selection apply only to grant competitions conducted after fiscal year (FY) 2004.

**Discussion of Regulations**

The primary purpose of these regulations is to establish selection criteria for this complex program's discretionary grant competitions after FY 2004. Since we seek to award grants to high-quality applicants with high-quality plans for use of their grant funds, these criteria essentially include assessments on the quality of the applicant and the quality of the applicant's plan. The criteria also assess how applicants propose to leverage private or public-sector funding and increase the number and variety of charter schools assisted in meeting their facilities needs. The selection criteria are similar to those we have used in the two previous competitions for this program. As noted in the *Background Section*, this regulation also includes several provisions that govern the ongoing management of the grants already awarded in preceding fiscal years.

**Analysis of Comments and Changes**

On October 22, 2004, the Secretary published a notice of proposed rulemaking (NPRM) for this program in the **Federal Register** (69 FR 62008). In response to the Secretary's invitation in the NPRM, four parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM follows. We discuss substantive issues under the subparts of the regulations to which