

*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. 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 analysis performed under various laws

and executive orders for the counterpart Federal regulations.

*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 analysis performed under various laws and executive orders for the counterpart Federal regulations.

**List of Subjects in 30 CFR Part 948**

Intergovernmental relations, Surface mining, Underground mining.

Dated: August 1, 2006.

**Brent Wahlquist**,  
*Regional Director, Appalachian Region.*

■ For the reasons set out in the preamble, 30 CFR part 948 is amended as set forth below:

**PART 948—WEST VIRGINIA**

■ 1. The authority citation for part 948 continues to read as follows:

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

■ 2. Section 948.15 is amended by adding a new entry to the table in chronological order by “Date of publication of final rule” to read as follows:

**§ 948.15 Approval of West Virginia regulatory program amendments.**

\* \* \* \* \*

Original amendment submission date	Date of publication of final rule	Citation/description
April 17, 2006	August 28, 2006	W. Va. Code 22–3–24(c), (d), (e), and (h). CSR 38–2–7.2.e.1; 7.3.d; and 7.8 (qualified approval).

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**DEPARTMENT OF THE INTERIOR**  
**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 950**  
**[WY–034–FOR]**

**Wyoming 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 Wyoming regulatory program (“Program” or “Wyoming program”) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). It involves revisions to and additions of rules about bonding, revegetation and highwall retention. Wyoming intends to revise its program to be consistent with the corresponding Federal regulations, and clarify ambiguities and improve operational efficiency.

**DATES:** *Effective Date:* August 28, 2006.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey Fleischman, Telephone: 307/261–6550, E-mail address: [JFleischman@osmre.gov](mailto:JFleischman@osmre.gov).

**SUPPLEMENTARY INFORMATION:**

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

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

**II. Submission of the Proposed Amendment**

By letter dated October 24, 2005, Wyoming sent us an amendment to its program (Administrative Record No. WY–39–1) under SMCRA (30 U.S.C. 1201 *et seq.*). Wyoming sent the amendment in response to a June 19, 1997, letter (Administrative Record No. WY–39–7) that we sent to Wyoming in accordance with 30 CFR 732.17(c) and to include changes made at its own initiative. We announced receipt of the proposed amendment in the February 13, 2006, **Federal Register** (71 FR 7492). 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. WY–39–8). We did not hold a public hearing or meeting because no one requested one. The public comment period ended on March 14, 2006. We received comments from one industry group and two Federal agencies. A third Federal agency mailed us a “no comment” letter.

**III. OSM’s Findings**

The Federal regulation at 30 CFR 732.17(h)(10) requires that State program amendments meet the criteria for approval of State programs set forth in 30 CFR 732.15, including that the State’s laws and regulations are in accordance with the provisions of the Act and consistent with the

requirements of 30 CFR part 700. In 30 CFR 730.5, OSM defines consistent with and in accordance with to mean (a) with regard to the SMCRA, the State laws and regulations are no less stringent than, meet the minimum requirements of and include all applicable provisions of the Act and (b) with regard to the Federal regulations, the State laws and regulations are no less effective than the Federal regulations in meeting the requirements of SMCRA.

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment in its entirety.

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

Wyoming proposed minor wording changes (from "SCS" to "NRSC," (Natural Resources Soil Conservation) in Chapter 4, Section 2(d)(ix) as well as an addition of an administrative paragraph (Chapter 15, Section 1(a)), to Wyoming's Coal Rules.

Because these changes to Wyoming's rules are minor and do not alter their meaning, we find that the revised rules are consistent with the corresponding Federal regulations.

#### B. Proposed Revisions to Wyoming's Coal Rules To Adopt Language With the Same Meaning as the Corresponding Provisions of the Federal Regulations

Wyoming Coal Rule Chapter 15, Section 1(b); [Federal Regulations 30 CFR 800.40(a)(2) and (3)]

Wyoming proposed revisions to its regulations for applications for bond release. These revisions are in response to a letter we sent dated June 19, 1997, under 30 CFR 732.17, informing Wyoming of changes to Federal regulations and the need to make corresponding changes to the State regulations. Wyoming's proposed revisions contain language that is nearly the same as the corresponding Federal provisions and is therefore consistent with the Federal regulations.

#### C. Proposed Revisions to Wyoming's Rules That Are Not the Same as the Corresponding Federal Regulations and Require an Explanation and Basis for Approval

1. Chapter 4, Section 2(d)(x)(f): Technical Standards for Evaluating Revegetation Success [Federal Regulations at 30 CFR 816.116(a)(2) and (b)]

Wyoming proposes to add a new rule at Chapter 4, Section 2(d)(x)(f) to state that the Administrator (of Wyoming's Land Quality Division, (LQD)) may set

technical success standards for cover and production based on data collected from undisturbed portions of the permit area or adjacent areas for a minimum of five independent sampling programs over a minimum of five years and that the technical success standards may be set for a single mine or a group of mines in the same geographical area.

The Federal regulations at 30 CFR 816.116(b)(1), and (2) require that for grazing land, pastureland, and cropland, the cover and production of the revegetated area shall be at least equal to that of the reference area or such other success standards approved by the regulatory authority. Wyoming states the purpose of the proposed rule is to provide an alternate method to evaluate revegetation success, specifically, the development of technical standards for cover and production. The proposed standards are calculated from baseline vegetation data and the cover and production of the reclaimed area would be compared to those standards.

Wyoming believes that a five-year period is necessary to account for differing climatic factors during the collection of baseline information for the development of these technical standards.

Vegetation does vary across Wyoming and within smaller regions such as the Powder River Basin. However, smaller sub-regions (such as the southern portion of the Powder River Basin) and individual permit areas may have similar vegetation that could lend itself, or might be conducive to, development of technical standards. Mine operators could opt to apply for mine-specific technical standards in the event the LQD has not developed standards for the sub-region in which the mine is located. Alternatively, an operator could apply to "fine tune" technical standards developed by LQD for a particular sub-region.

We have determined that the new technical standards Wyoming proposes to allow permittees to use are representative of unmined lands in the area being reclaimed. They were developed using baseline vegetation information collected from areas proposed for mining thereby ensuring that the success standards will be representative of the extent of cover compared to the cover occurring in the natural vegetation of the area. For these reasons, we find Wyoming's new technical standards to be consistent with the Federal regulations.

2. Chapter 4, Section 2(d)(x)(E)(III) & (F): Tree Density [Federal Regulations at 30 CFR 816.116(a)(2) and (b)(3)(i) & (ii)]

Wyoming proposes changing Section 2(d)(x)(E)(III) to require that trees be returned to a number equal to the premining number by substituting the word "number" for the word "density". In its submission, Wyoming states the proposed rule clarifies that the standard is the number of trees (sometimes the number of trees per species) on the affected lands, not on a unit area. Wyoming also proposes revisions to Section 2(d)(x)(F) to allow the inclusion of volunteer trees in evaluations of revegetation success. The revised rule requires that on affected lands, the total number of postmining trees must be at least equal to the premining total number on those lands. The reclamation plan will be required to specify the tree species, the number per species, and the location of tree plantings. To be included in success measurements, volunteer tree species which invade the reclaimed lands must support the postmining land use and must be approved by the Administrator. Planted trees must be healthy, and at least 80 percent must have been planted for at least eight years. Invading trees that are counted to meet the approved stocking rate must be healthy and may be of any age. Preference is given to those species that are native or which are known not to be "weedy" (e.g. species approved by the Natural Resources Conservation Service). Wyoming states that trees that invade indicate an evolving self-renewing ecosystem and therefore the age of trees that invade is not an issue as long as they are healthy.

The Federal regulation at 30 CFR 816(a)(2) requires, in part, that standards for success shall include criteria representative of unmined lands in the area being reclaimed. 30 CFR 816.116(b)(3) establishes criteria for revegetation success standards for tree and shrub establishment.

OSM agrees with Wyoming that the proposed wording change from "density" to "number" reflects the actual intent of the existing rule language, which is replacement of premine tree numbers. It should be noted that replacement of premine tree numbers is the same as replacement of premine tree density (total number of trees over the total disturbed area).

We also agree with Wyoming's proposal to include volunteer trees that support the postmining land use and are not considered weedy. Section 515(b)(19) of the Act requires the operator to establish vegetation that is "capable of self-regeneration and plant

succession at least equal in extent of cover to the natural vegetation of the area." Volunteer plants represent either regeneration of species already present on the reclaimed area or invasion of native species from adjacent undisturbed areas, which is an indication of plant succession. Live volunteer plants are as likely to continue to grow and mature as transplants of the same species that may be little more than two years old. Therefore, counting the first products of plant regeneration or invasion is a clear and reasonable indicator of successful reclamation. The proposed changes to the Wyoming rules are in accordance with Section 515(b)(19) of the Act which requires the operator to establish vegetation that is "capable of self regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area." The proposed changes are also consistent with 30 CFR 816.116 governing revegetation standards for success.

3. Chapter 4, Section 2(d)(xiv): Noxious Weeds [Federal Regulation at 30 CFR 816.111(b)(5)]

Wyoming proposes to revise Section 2(d)(xiv) to require that the operator must control and minimize the introduction of noxious weeds in accordance with Federal and State requirements until bond release.

Section 2(d)(xiv) currently requires that in those areas where there were no or very few noxious weeds prior to being affected by mining, the operator must control and minimize the introduction of noxious weeds into the revegetated areas for a period of at least five years after the initial seeding.

The Federal regulation at 30 CFR 816.111(b)(5) requires, in part, that reestablished plant species shall meet the requirements of applicable State and Federal noxious plant laws or regulations.

In its submission, Wyoming indicated that the current rule was enacted in 1975 prior to the passage of SMCRA when the State's time period for bond release was five years. The intent of the original rule was to control noxious weeds until bond release. The period for bond release is now ten years as required by SMCRA. While Wyoming's current rule was found to be consistent with the Federal rule when the Wyoming Program was approved in 1980, OSM revised the Federal rule in 1983. Wyoming's current rule could be interpreted to mean that noxious weeds are only controlled for the first five years after seeding. The Federal rule does not include a time restriction for the control of noxious weeds. To clarify

and ensure consistency, with the ten year liability period, the existing language concerning five years has been struck and replaced with "until bond release."

The proposed State rule ensures that control of noxious weeds will continue throughout the period of responsibility in accordance with State and Federal requirements. This is consistent with the Federal regulations.

4. Chapter 4, Section 2(d)(x); Appendix A, Subsections III.A and VIII.A: Timeframes for Evaluating Revegetation Success [Federal Regulation at 30 CFR 816.116(c)(3)(i)]

The revised rule will require that the Administrator not release the entire bond of any operator until such time as revegetation is complete, if revegetation is the method of reclamation as specified in the operator's approved reclamation plan. Revegetation shall be deemed to be complete when: (1) The vegetation cover of the affected land is shown to be capable of renewing itself under natural conditions prevailing at the site, and the vegetative cover and total ground cover are at least equal to the cover on the area before mining; (2) the productivity is at least equal to the productivity on the area before mining; (3) the species diversity and composition are suitable for the approved postmining land use; and (4) the requirements in (1), (2), and (3) are met for the last two consecutive years of the bonding period for those mines using native area comparisons, or the requirements in (1), (2), and (3) are met for two out of four years beginning no sooner than year eight of the bonding period for those mines using technical standards.

In addition, Subsections III.A.8 and VIII.A.4 of Appendix A are being revised to require attainment of cover, production, diversity and composition requirements for the last two consecutive years for those mines using reference areas, or for those mines using an approved technical standard two out of four years beginning no sooner than year eight of the bonding period.

The Federal regulation at 30 CFR 816.116(c)(3)(i) requires, in part, that in areas of 26 inches or less average annual precipitation, vegetation parameters identified in paragraph (b) of this section shall equal or exceed the approved success standard for at least the last two consecutive years of the responsibility period. The major difference between the Federal regulation and Wyoming's proposal is that Wyoming's proposal would allow measurement in nonconsecutive years

for areas evaluated using a technical standard.

In discussing the proposed change in the timeframes for evaluating revegetation success, the State has indicated that the climatic conditions in Wyoming vary greatly from one year to the next. The climatic variability is not considered a problem in the use of a reference area because the reference area would be impacted by drought or other adverse environmental conditions in a manner similar to the corresponding reclaimed area. However, the climatic variability may impact an operator's ability to achieve two consecutive years of vegetation success when using a technical standard because the standard would not be based on drought conditions but on a mean or median of several years of differing climatic conditions (see approval of the use of technical standards in this review under Chapter 4, Section 2(d)(x)(j)). Wyoming hopes that allowing success to be measured in two out of four years beginning no sooner than year eight in lieu of requiring measurement in consecutive years will encourage operators to start bond release demonstrations sooner. Wyoming notes that the existing requirement for success to be measured in consecutive years means a failure to meet the criteria during the second year of sampling will force the sampling period to start over.

Wyoming also notes that OSM regulations recognize climatic variability in the east and operators can meet the bond release criteria in any two years after year one. Wyoming states that eastern states have only a five-year bond period due to the amount of rainfall received and the positive effect the added moisture has on the ability to meet reclamation standards. Conversely, the western states have a ten-year bond period because of the limited rainfall and the longer time required for vegetation to become established during reclamation.

Originally the Federal regulation applicable for areas with greater than 26 inches of annual precipitation (30 CFR 816.116(c)(2)) required success standards to be met for the last two consecutive years of the responsibility period. This regulation was 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 for areas with a land use of crop land, pasture land or grazing land, and only for the last year for all other postmining land uses. 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.

Previously, we approved New Mexico regulations stating that 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 Wyoming,

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 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.

Wyoming's 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, Western Regional Climate Center (<http://www.wrcc.dri.edu/summary/climsmwy.html>), and the November 2, 2000, **Federal Register** (Volume 65, Number 213, pages 65776–65777).

HISTORICAL PRECIPITATION

Geographical area	Years of record	Precipitation range (inches)	Mean	Standard deviation	Coefficient of variation
Gillette, WY .....	1925–2005	8.13–15.90	15.60	3.77	0.24
Rock Springs, WY .....	1948–2005	4.53–14.54	8.71	2.64	0.30
Medicine Bow, WY .....	1949–2005	5.34–15.90	10.16	2.22	0.22
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 Wyoming 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, particularly when the success standard is a technical standard based on a cover or production mean or median from several years of sampling during differing climatic conditions. Flexibility in vegetation success 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. Arguably, 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 meeting the standards during two consecutive years of more or less normal precipitation and damage. The likelihood of drought in Wyoming 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.

Wyoming's proposed rules prohibit the inclusion of measurements taken during the first seven years of the responsibility period and are applicable only to reclaimed areas using technical standards for evaluation of revegetation

success. 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. The proposed rules do not affect the length of the extended period of responsibility, which is 10 years in Wyoming.

The preamble to 30 CFR 816.116(c)(3)(i) published in the **Federal Register** on March 23, 1982, (47 FR 12600) and applicable to areas of 26 inches or less precipitation, does not provide rationale for the measurement being made in consecutive years. The preamble does state that for areas of less than 26 inches average annual precipitation, because of the greater variability in climatic conditions in such areas, 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.

Wyoming's proposed rules at Chapter 4, Section 2(d)(x) and Appendix A, Subsections III.A and VIII.A are consistent with the corresponding Federal regulations at 30 CFR 816.116(c)(3) and in accordance with the achieving the revegetation requirements of sections 515(b)(19) and (b)(20) of SMCRA.

5. Chapter 4, Section 2(b)(iv): Retention of Portions of Highwalls [SMCRA at Section 515(b)(3)]

Wyoming is proposing in Section 2(b)(iv) to allow the retention of limited stretches of highwall to replace

escarpments and cliffs that exist naturally in the area of the mine prior to the mine operations. Previously, OSM approved similar provisions for the New Mexico and Utah State regulatory programs (45 FR 86464, December 31, 1980 and 60 FR 28040, May 30, 1995).

In the New Mexico and Utah approvals, OSM required the State programs to contain the following provisions: (1) Requirement for regulatory authority approval; (2) restrictions on allowable height and length of the retained highwall in relation to natural escarpments and cliffs; (3) requirement that a retained highwall replace a preexisting cliff or similar natural premining feature that was removed by the mining operation; and (4) requirement for the permit applicant to demonstrate that the retained highwall feature is stable and will achieve a long term static safety factor of 1.3 and will not pose a hazard to the public health and safety. With these restrictions, OSM found provisions for limited highwall retention in the New Mexico and Utah regulatory programs to be in accordance with the requirements in section 515(b)(3) of the Act and consistent with 30 CFR 816.102(a)(2) to backfill and grade to achieve the approximate original contour (AOC). AOC in these requirements includes the provision to eliminate all highwalls. The establishment of the above restrictions, however ensures that for a limited stretch of highwall to be retained, it must replace a similar feature that exists in the original contours thereby meeting the requirement to restore AOC. In the approval of the provision for New Mexico, OSM found that if an operator

can demonstrate to the satisfaction of the Director (State) that all of the above criteria can be met, then the limited highwall retention is available. Such retention in these instances actually reflects the intent of "approximate original contour" since these features were part of the natural pre-mined landscape.

Wyoming's provisions for highwall retention to replace existing natural features are contained in Chapter 4, Section 2(b)(iv) of Wyoming's Coal Rules. As we required in the Utah and New Mexico programs, Wyoming requires the features to be approved by the regulatory authority (Administrator). In addition, Wyoming's provisions ensure stability and a factor of safety of 1.3; contain restrictions on allowable height and length in relation to premine features; require restoration of wildlife habitat; and replacement of natural features that were mined out or are planned to be mined out under the current mine plan. For these reasons, we find Wyoming's provisions for highwall retention to be in accordance with section 515(b)(3) of SMCRA and consistent with 30 CFR 816.102(a)(2).

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

1. Chapter 4, Section 2(d)(x), and Appendix A, Subsections III.A, VII.E, VIII.A and VIII.F: Grazing

Wyoming proposes to revise this rule to eliminate the requirement that the revegetated area be capable of withstanding grazing pressure at least comparable to that which the land could have sustained prior to mining unless Federal, State or local regulations prohibit grazing on such lands. There is no Federal counterpart to this Wyoming Coal Rule.

The State requirement now being eliminated corresponded to Federal regulations promulgated in 1979 at 30 CFR 816.115, but removed by OSM on September 2, 1983 (48 FR 40160) in response to a U.S. District Court ruling "Permanent Surface Mining Regulation Litigation," No. 79-1144 (D.D.C., February 26, 1980). Eliminating Wyoming's requirement is consistent with the Federal regulations.

2. Chapter 4, Section 2(d)(x)(E)(I) & (II): Reinstatement of Pre-1996 Shrub Goal

Wyoming proposes to reinstate its shrub goal rule for the postmining land use of grazing and wildlife and also clarify that this is to be applied from May 3, 1978, to August 6, 1996. The rule establishes postmining requirements for density, composition and distribution of

shrubs. There is no Federal counterpart to this Wyoming Coal Rule.

In its submission, Wyoming indicated that in 1978 rules were adopted that required shrubs to be replaced to a density equal to the premining density. For the postmining land use of grazing land and wildlife, and other areas, the amount of shrubs required by the rule was not desirable. In 1981, Wyoming changed the rules to establish a goal of returning shrubs to one shrub per square meter across 10% of the reclaimed lands. In 1996, a rule was approved which changed the requirement for the reestablishment of shrubs from a 10% goal to a 20% standard. The effective date of the new rules was the date those rules were approved by OSM. Lands disturbed before that date retained the shrub goal requirement.

Unfortunately, the 1996 rule inadvertently deleted the shrub goal rule. The deletion of the shrub goal rule was an oversight, and it was intended that the shrub goal rule still applied to those lands affected after the initial date of the shrub reestablishment requirement (1978) and prior to the approval of the shrub standard rule (1996). In practice, both the LQD and the operators have been working with the understanding that the shrub goal would be reinstated.

The proposed change reinstates the goal and clarifies that prior to May 3, 1978, there was no specific requirement for shrub reestablishment. The change clarifies that the shrub goal is to be applied from May 3, 1978, to August 6, 1996.

OSM concurs with Wyoming's analysis of the shrub density requirements applicable to lands reclaimed under Wyoming's regulatory program. Since neither SMCRA nor the Federal regulations contain shrub goals, Wyoming's proposal to reinstate this previously-approved rule is consistent with the Federal regulations.

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

##### *Public Comments*

We asked for public comments on the amendment (Administrative Record No. WY-39-3), but did not receive any from State agencies or individuals. Since no one requested a public hearing or meeting, none was held.

##### *Federal Agency Comments*

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Wyoming program (November 1, 2005, Administrative Record No. WY-39-3).

The U.S. Fish and Wildlife Service (FWS or the Service) commented in a December 23, 2005, memorandum (Administrative Record No. WY-39-06), and the Bureau of Land Management (BLM) commented in a November 30, 2005, e-mail (Administrative Record No. WY-39-05). The U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) also commented in a November 28, 2005, letter (Administrative Record No. WY-39-04).

NRCS stated that it reviewed the Amendment and had no comments.

BLM stated that the requirement in existing Section 2(b) Backfilling, Grading and Contouring, for covering the uppermost minable coal seam should be changed from 4 feet to at least 20 feet. BLM states this is necessary to "prevent outcrop burn in the future" and that "this is important in SW Wyoming."

The State's proposed revision is only applicable to areas subject to the AOC Alternative. OSM's regulation in this matter, 30 CFR 816.102(f), that all exposed coal seams be "adequately covered," and does not define a minimum depth. Wyoming stated that, while 4 feet is the minimum cover requirement, it often requires 10 or 15 feet or more depending upon the circumstances. The preamble to 30 CFR 816.102(f) (see 48 FR 23362, May 24, 1983) rejects a national standard for cover thickness and relies on the regulatory authority to set whatever standards, specific or otherwise, which provide the best solution within the State. The State's proposed regulation requiring a minimum of 4 feet of cover is consistent with the Federal provisions. Wyoming can require additional depth should it determine that is necessary.

The FWS stated that it "supports the rule package as written;" however, it was providing specific comments that it believed would assist in clarifying the rule changes. The FWS provided seven specific comments listed below. Each comment is followed by OSM's response:

1. *FWS: Revegetation Success, Chapter 4, Section 2(d)(x):* It is unclear whether the Administrator is qualified to measure whether reclamation meets with the postmining land use or whether the Administrator will seek assistance in the matter. Therefore, the Service recommends that a recognized authority assist the Administrator in determining whether the vegetative diversity and composition meet the postmining land use.

*OSM:* The Wyoming regulatory authority employs vegetation experts to

assist with the administration of this provision.

2. *FWS*: Native trees, Chapter 4, Section 2(d)(x)(EIII): The Service is concerned that the rules do not mention the importance of replanting tree species that are native to Wyoming. The Service recommends that trees and shrubs native to Wyoming be planted at a number equal to or greater than what existed premining and that distribution of trees be similar to premining distribution.

*OSM*: In its Statement of Principal Reasons for changing the rule cited by *FWS*, Wyoming states that “preference is given to those species that are native or which are known not to be weedy.” In addition, the Wyoming rules in, in Chapter 4, Section 2(d)(i) require that the operator establish on all affected lands a diverse, permanent vegetative cover of the same seasonal variety native to the area or a mixture of species that will support the approved postmining land use in a manner consistent with the approved reclamation plan. This will result in the use of native tree species in a large percentage of permits. As discussed in this rulemaking, the State is requiring replacement of premine number of trees. Planting plans are included in permit applications, which are available for review and comment.

3. *FWS*: Critical habitat, Chapter 4(IV): The Service is concerned with the use of the term “critical habitat” when not referencing listed species. The Service uses this term to identify specific areas within a geographical area occupied by a listed species. We recommend that the rules clearly define this term as it pertains to the document or use some other terminology less agency-specific.

*OSM*: Critical Habitat Is Defined in Chapter 1, Section 2(v) of Wyoming’s Coal Rules.

4. *FWS*: Invading trees, Chapter 4(F): The Service is concerned that such species as Russian olive and/or tamarisk may “invade” the reclaimed lands and crowd out native species. The Service recommends that tree species be native to Wyoming and that the permittee not receive credit for non-natives.

*OSM*: Again, Wyoming’s Statement of Principal Reasons (for the Amendment) states that “preference is given to those species that are native or which are known not to be ‘weedy’”.

5. *FWS*: Bond release and wildlife, Chapter 15, Section 1(b): The Service is concerned that no information is required regarding fish or wildlife resources or status of listed species prior to bond release. Therefore, prior to bond release the Service recommends a status review of fish and wildlife resources

and a comparison to the baseline information to determine whether changes have occurred that should be addressed prior to bond release.

*OSM*: The only changes made to Chapter 15, Section 1(b) relate to a notarized statement. Also, Appendix B of Wyoming’s Coal Rules includes the monitoring requirements related to wildlife. An operator must submit wildlife information which includes consultation with *FWS* prior to issuing a permit to mine. Inspections, annual reports and other information submitted will form the basis of the Administrator’s decision of whether or not to release the bond.

6. *FWS*: Appendix A, Subsection VIII(F)(8): The Service recommends that the qualitative assessment include whether native vegetation is present and at densities equal to or greater than premining.

*OSM*: This Section was merely renumbered and none of the previously-approved language was changed.

7. *FWS*: Highwall retention and wildlife habitat, Chapter 4, Section (b)(iv): The Service is concerned that the decision to retain highwalls may not consider the needs of local raptors. The Service recommends that highwall retention be considered as raptor nesting habitat in coordination with the Service and other qualified biologists.

*OSM*: *OSM* is approving in III.C.5 above Wyoming’s requirements for highwall retention that are contained in Chapter 4, Section 2(b)(iv) of Wyoming’s Coal Rules. One of the requirements is that the retained highwall will enhance or restore important wildlife habitat. This would include raptor nesting habitat. Also, Appendix B, Section C of Wyoming’s Coal Rules contains requirements for raptor production and monitoring so consideration of raptor nesting habitat will be taken into account when considering highwall retention. In addition, State and Federal wildlife agencies are provided opportunity to review and comment on proposed permits.

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

Under 30 CFR 732.17(h)(11)(i), *OSM* requested comments on the amendment from EPA (Administrative Record No. WY–39–3). EPA did not respond to our request.

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

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic

properties. On November 1, 2005, we requested comments on Wyoming’s amendment (Administrative Record No. WY–39–3), but neither responded to our request.

#### **V. OSM’s Decision**

Based on the above findings, we approve Wyoming’s October 24, 2005 amendment, as discussed in: finding no. A; finding no. B; findings no. C.1, C.2, C.3, C.4, and C.5; and finding nos. D.1, and D.2.

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

##### *Executive Order 12630—Takings*

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

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

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (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 CFR U.S.C. 1292(d)) provides that agency decisions on proposed State

regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C) *et seq.*).

*Paperwork Reduction Act*

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

*Regulatory Flexibility Act*

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

*Small Business Regulatory Enforcement Fairness Act*

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

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

the ability of U.S.-based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

*Unfunded Mandates*

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

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

Intergovernmental relations, Surface mining, Underground mining.

Dated: July 28, 2006.

**Allen D. Klein,**  
*Regional Director, Western Region.*

■ For the reasons set forth in the preamble, 30 CFR part 950 is amended to read as follows:

**PART 950—WYOMING**

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

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

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

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

\* \* \* \* \*

Original amendment submission date	Date of final publication	Citation/description
10/24/05	8/28/06	Chapter 4, Section 2(b)(iv) Chapter 4, Section 2(d)(ix) Chapter 4, Section 2(d)(x) Chapter 4, Section 2(d)(x), Appendix A, Subsection III.A; VII.E; VIII.A & VIII.F Chapter 4, Section 2(d)(x)(E)(I)&(II) Chapter 4, Section 2(d)(x)(E)(III) & (F) Chapter 4, Section 2(d)(x)(J) Chapter 4, Section 2(d)(xiv) Chapter 15, Section 1(a) Chapter 15, Section 1(b)

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**DEPARTMENT OF HOMELAND SECURITY**

**Federal Emergency Management Agency**

**44 CFR Part 64**

[Docket No. FEMA-7788]

**List of Communities Eligible for the Sale of Flood Insurance**

**AGENCY:** Mitigation Division, Federal Emergency Management Agency (FEMA), Department of Homeland Security.

**ACTION:** Final rule.

**SUMMARY:** This rule identifies communities that are participating and suspended from the National Flood Insurance Program (NFIP). These communities have applied to the program and have agreed to enact certain floodplain management measures. The communities' participation in the program authorizes the sale of flood insurance to owners of properties located in the communities listed below.

**DATES: Effective Dates:** The effective date for each community is listed in the fourth column of the following tables.

**ADDRESSES:** Flood insurance policies for properties located in the communities listed below can be obtained from any licensed property insurance agent or broker serving the eligible community or from the NFIP by calling 1-800-638-6620.

**FOR FURTHER INFORMATION CONTACT:** David H. Stearrett, Chief, Floodplain Management Section, Risk Reduction Branch, Mitigation Division, 500 C Street, SW., Washington, DC 20472, (202) 646-2953.

**SUPPLEMENTARY INFORMATION:** The NFIP enables property owners to purchase flood insurance that is generally not otherwise available. In return, communities agree to adopt and implement local floodplain management regulations that contribute to protecting lives and reducing the risk of new construction from future flooding. Because the communities on the attached list have recently entered the NFIP, subsidized flood insurance is now available for properties in these communities.

FEMA has identified the Special Flood Hazard Areas (SFHAs) in some of these communities by publishing a Flood Hazard Boundary Map (FHBM) or Flood Insurance Rate Map (FIRM). The date of the flood map, if one has been published, is indicated in the fourth column of the table. In the communities listed where a flood map has been published, Section 202 of the Flood Disaster Protection Act of 1973, as amended, 42 U.S.C. 4016(a), requires the purchase of flood insurance as a condition of Federal or Federally-related financial assistance for acquisition or construction of buildings in the SFHAs shown on the map.

The Administrator finds that delayed effective dates would be contrary to the public interest and that notice and public procedure under 5 U.S.C. 553(b) are impracticable and unnecessary.

*National Environmental Policy Act.* This rule is categorically excluded from

the requirements of 44 CFR part 10, Environmental Considerations. No environmental impact assessment has been prepared.

*Regulatory Flexibility Act.* The Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because the rule creates no additional burden, but lists those communities eligible for the sale of flood insurance.

*Regulatory Classification.* This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

*Paperwork Reduction Act.* This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

**List of Subjects in 44 CFR Part 64**

Flood insurance, Floodplains.

■ Accordingly, 44 CFR part 64 is amended as follows:

**PART 64—[AMENDED]**

■ 1. The authority citation for part 64 is revised to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.*, Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

**§ 64.6 [Amended]**

The tables published under the authority of § 64.6 are amended as follows:

State	Location	Community No.	Effective date of eligibility	Current effective map date
<b>New Eligibles: Emergency Program</b>				
<b>Region V</b>				
Minnesota .....	Apple Valley, City of, Dakota County.	270050	April 14, 2006 .....	Never Mapped.
<b>Region VI</b>				
Arkansas .....	Datto, Town of, Clay County ..	050190	May 23, 2006 .....	Never Mapped.
Do* .....	Nimmons, Town of, Clay County.	050332	.....do .....	Do.
<b>Region VII</b>				
Missouri .....	Merriam Woods, Village of, Taney County.	290069	June 21, 2006 .....	Adopted Preliminary FIRM dated September 26, 2006.
<b>Region IV</b>				
Alabama .....	Phil Campbell, Town of, Franklin County.	010333	June 26, 2006 .....	FHBM dated of, October 29, 1976.
Georgia .....	Oxford, City of, Newton County.	130367	.....do .....	April 11, 1975.
<b>New Eligibles: Regular Program</b>				
<b>Region VII</b>				
Missouri .....	Cedar County, Unincorporated Areas.	290791	April 11, 2006 .....	July 17, 2002.