

**DEPARTMENT OF THE INTERIOR****Office of Surface Mining Reclamation and Enforcement****30 CFR Parts 780, 784, 816, and 817****RIN 1029-AC04****Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States****AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.**ACTION:** Proposed rule.

**SUMMARY:** We, the Office of Surface Mining Reclamation and Enforcement (OSM), are proposing to amend our regulations concerning stream buffer zones, stream diversions, siltation structures, impoundments, and the creation and disposal of excess spoil and coal mine waste. Among other things, this proposed rule would require that surface coal mining operations be designed to minimize the creation of excess spoil and the adverse environmental impacts of fills constructed to dispose of excess spoil and coal mine waste. It would apply the buffer requirement to all waters of the United States, not just perennial and intermittent streams. The rule would clearly specify the activities to which that requirement does and does not apply and the limitations on conducting activities within the buffer, either under a variance or an exception. It also would specify requirements to protect aquatic and other resources when an activity is conducted under either a variance or an exception.

**DATES:** *Electronic or written comments:* We will accept written comments on the proposed rule on or before October 23, 2007.

*Public hearings:* If you wish to testify at a public hearing, you must submit a request before 4:30 p.m., Eastern time, on September 24, 2007. We will hold a public hearing only if there is sufficient interest. Hearing arrangements, dates and times, if any, will be announced in a subsequent **Federal Register** notice. If you are a disabled individual who needs reasonable accommodation to attend a public hearing, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**ADDRESSES:** You may submit comments, identified by docket number 1029-AC04, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. The proposed rule is listed under the agency name "OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT."

- *Mail/Hand-Delivery/Courier:* Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 252 SIB, 1951 Constitution Avenue, NW., Washington, DC 20240. Please identify the comments as pertaining to RIN 1029-AC04.

You may submit a request for a public hearing on the proposed rule to the person and address specified under **FOR FURTHER INFORMATION CONTACT**. If you are disabled and require special accommodation to attend a public hearing, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

If you are commenting on the information collection aspects of this proposed rule, please submit your comments to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, via e-mail to [oir\\_docket@omb.eop.gov](mailto:oir_docket@omb.eop.gov), or via facsimile to 202-365-6566.

You may review the draft environmental impact statement for this proposed rule online at <http://www.regulations.gov>. At that internet address, the document is listed under "Office of Surface Mining Reclamation and Enforcement." You may also review the draft environmental impact statement at any of the following locations:

Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 101 SIB, 1951 Constitution Avenue, NW., Washington, DC 20240, 202-208-4264.

Office of Surface Mining Reclamation and Enforcement, Appalachian Regional Office, Three Parkway Center, Pittsburgh, PA 15220, 412-937-2909.

Office of Surface Mining Reclamation and Enforcement, Mid-Continent Regional Office, Alton Federal Bldg., 501 Belle Street, Rm 216, Alton, IL 62002, 618-463-6460.

Office of Surface Mining Reclamation and Enforcement, Western Regional Office, 1999 Broadway, Suite 3320, Denver, CO 80201-6667, 303-844-1401.

**FOR FURTHER INFORMATION CONTACT:** Dennis G. Rice, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240. Telephone: 202-208-2829. E-mail address: [drice@osmre.gov](mailto:drice@osmre.gov).

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**I. How does this rule relate to the proposed rule published on January 7, 2004?**

On January 7, 2004 (69 FR 1036), we published a proposed rule to amend our excess spoil, stream buffer zone, and stream diversion regulations. The preamble to that proposed rule contains an extensive discussion of the purpose and need for the proposed rule and pertinent background information. We will not fully repeat that information in

this preamble, but we will supplement that information as appropriate.

On February 26, 2004 (69 FR 8899), we announced the schedule and arrangements for five hearings on the proposed rule, and extended the time allowed for receipt of comments by 30 days until April 7, 2004. On March 30, 2004, we held public hearings in Harriman, Tennessee; Hazard, Kentucky; Charleston, West Virginia; Pittsburgh, Pennsylvania; and Washington, DC. Approximately 200 people testified at the five hearings. We received approximately 32,000 written comments. Numerous commenters asked us to consider other alternatives to the proposed rule. Some commenters also asked that we prepare an environmental impact statement (EIS) on the proposed action.

On June 16, 2005 (70 FR 35112), we announced our intent to prepare an EIS on the proposed rule changes. We also stated that we intended to consider additional alternatives and to publish a new proposed rule to coincide with the release of a draft EIS. The proposed rule that we are publishing today reflects that decision and replaces the proposed rule published on January 7, 2004.

## II. Why is there a need to construct fills in streams in connection with coal mining?

Most fill material placed in streams in connection with coal mining is a result of the need to dispose of excess spoil generated by mining operations conducted in areas consisting of steep slopes and narrow valleys. To remove coal by surface mining methods, the formerly solid rock strata overlying the coal seam must be broken up into fragments and excavated. The broken rock fragments (referred to as spoil) are separated by numerous voids, resulting in a significant increase in volume over the volume of solid rock in place before mining. The increase in volume varies considerably depending upon the nature of the rock and the mining method, but the industry average is about 25 percent. Returning all spoil to the mined-out area in steep-slope terrain would create highly unstable conditions and in most cases is physically impossible. Consequently, some spoil must be permanently placed outside the mined-out area in engineered fills. The most economically feasible disposal areas are the upper reaches of valleys adjacent to the mine. As defined in 30 CFR 701.5, spoil not needed to restore the approximate original contour and disposed of in locations other than the mined-out area is considered "excess spoil."

A nationwide survey of all coal mining permits issued between October 1, 2001, and June 30, 2005, found that those permits included a total of 1,612 excess spoil fills, of which 1,589 (98.6 percent) are located in the central Appalachian coalfields. Specifically, most of the fills approved in those permits are located in Kentucky (1,079), West Virginia (372), and Virginia (125), with 13 approved in Tennessee. The remaining fills approved during that time are located in Alaska, Alabama, Ohio, Pennsylvania, and Washington. This survey is discussed in greater detail in the draft environmental impact statement (DEIS) that accompanies this proposed rule. You may review the DEIS for this proposed rule online at <http://www.regulations.gov>. At that internet address, the document is listed under "Office of Surface Mining Reclamation and Enforcement." A notice announcing the availability of the DEIS was published in this edition of the **Federal Register**. That notice also lists OSM offices and public libraries in Kentucky, Tennessee, Virginia, and West Virginia where you may review the DEIS.

The central Appalachian coalfields are characterized by highly eroded plateaus, dissected by numerous narrow, deeply incised valleys with steep side slopes. In this region, even small valleys may contain intermittent and perennial streams. For example, in a study conducted in West Virginia, the United States Geological Survey found that, on average, perennial streams begin in watersheds as small as 40.8 acres and intermittent streams in watersheds as small as 14.5 acres. See Katherine S. Paybins, *Flow Origin, Drainage Area, and Hydrologic Characteristics for Headwater Streams in Mountaintop Coal-Mining Region of Southern West Virginia*, Water Resources Investigations Report 02-4300, U.S. Geological Survey, 2003, p. 1. Consequently, the construction of excess spoil fills in those valleys often involves burying the upper reaches of perennial and intermittent streams.

Underground mines also may result in the filling of some stream segments. Rock and other overburden materials removed as part of the cut made to expose the coal seam into which the mine entries and ventilation shafts are driven normally are used to construct an adjoining bench upon which mine offices, parking lots, equipment, and other support facilities are located. This process is referred to as "facing up" the mine. Any material removed as part of the face-up operation that is not used to construct the bench or placed in temporary storage for use in restoring

the approximate original contour and reclaiming the face-up area once the mine closes permanently is excess spoil. Should such excess spoil exist, it would be placed in fills on adjacent hillsides or in adjoining valleys. Underground mining operations also may involve the excavation of non-coal waste rock from underground tunnels. The waste rock, which we define as underground development waste, is typically brought to the surface and placed in fills.

Activities associated with coal preparation plants also may result in the filling of some stream segments. These plants clean coal by removing impurities, especially ash, incombustible rock, and sulfur. They create large quantities of coal processing waste, including both a very fine fraction, which is often suspended in water in a semi-liquid form (slurry) and a coarse fraction (refuse). Coal processing waste normally is placed in disposal sites near the plant. The slurry is usually impounded behind dams constructed of coarse refuse in a valley adjacent to the plant.

The previously mentioned survey of all coal mining permits issued between October 1, 2001, and June 30, 2005, indicates that coal mining activities authorized by those permits will directly affect about 535 miles of streams nationwide, of which 324 miles (60.6 percent) are in the central Appalachian coalfields. Based on data from the West Virginia permits, we estimate that approximately two-thirds of the 324 miles will be permanently covered by excess spoil fills and coal mine waste disposal facilities. Most of the remaining miles of stream directly affected by mining operations should experience only temporary adverse environmental impacts, chiefly as a result of mining through those streams. In those cases, the streams are diverted and relocated while the mining operation proceeds through the streambed. When mining is completed, the stream is restored to its original location unless the relocation is permanent.

A further description of the existing environment of the central Appalachian coalfields can be found in the draft and final environmental impact statements issued in 2003 and 2005, respectively, by the U.S. Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, OSM, and the West Virginia Department of Environmental Protection. The draft EIS, which the final EIS incorporates by reference, contains the bulk of that description. The draft EIS is entitled "Mountaintop Mining/Valley Fills in Appalachia Draft

Programmatic Environmental Impact Statement" (EPA 9-03-R-00013, EPA Region 3, June 2003) and is available at <http://www.epa.gov/region3/mntop/eis.htm>. The final EIS, which is entitled "Mountaintop Mining/Valley Fills in Appalachia Final Programmatic Environmental Impact Statement" (EPA 9-03-R-05002, EPA Region 3, October 2005), is available at [http://www.epa.gov/region3/mntop/pdf/mtm-vf\\_fpeis\\_full-document.pdf](http://www.epa.gov/region3/mntop/pdf/mtm-vf_fpeis_full-document.pdf).

According to the draft EIS referenced in the preceding paragraph, approximately 5,700 excess spoil fills were approved between 1985 and 2001 in the central Appalachian coalfields. These fills, if constructed, would cover approximately 724 miles of intermittent and perennial streams, which is about 1.2 percent of the approximately 59,000 miles of intermittent and perennial streams within the central Appalachian coal fields (EPA 9-03-R-00013, Chapter IV.B-2 and Table III.K-8).

The draft EIS, as incorporated into the final EIS, also contains the following statements regarding actual and projected impacts:

- "Impacts (including valley fills and other permit features) \* \* \* based on ten years (1992-2002) of permit footprints were 1,208 miles (2.05%) of the 58,998 stream miles in the EIS study area." (EPA 9-03-R-00013, Chapter IV.B-1)
- "If valley fill construction continued at this historical rate documented in the Fill Inventory for the next seventeen years (2003-2020), an additional 724 miles (for a total of 2.4%) could be impacted." (EPA 9-03-R-00013, Chapter IV.B-2)
- "If that rate (for permit footprints) continued for another 10 years, a total of 4.10% would be impacted by 2013." (EPA 9-03-R-00013, Chapter IV.B-1)

### III. Why are we proposing to revise our stream buffer zone rules?

In regulating surface coal mining operations, OSM and State regulatory authorities have historically applied the 1983 stream buffer zone rules in 30 CFR 816.57 and 817.57 in a manner that allows excess spoil fills, refuse piles, coal mine waste impoundments, and sedimentation ponds to be located in perennial and intermittent streams under certain circumstances. However, as discussed below, there has been considerable controversy over the proper interpretation of the 1983 rules. Some of those interpretations appear to be at odds with the underlying provisions of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Therefore, Federal action is needed to end the ambiguity in

interpretation of the stream buffer zone rules and to ensure that regulatory authorities, mine operators, other governmental entities, landowners, and citizens all can have a common understanding of what the stream buffer zone rules do and do not require, consistent with underlying statutory authority.

As discussed below, two Federal appellate court decisions are relevant to our reconsideration of the 1983 stream buffer zone rules. One of those decisions concluded that SMCRA does not prohibit placement of excess spoil in waters of the United States. It further recognized that section 515(b)(22) of SMCRA contemplated the placement of excess spoil in such waters. The other decision reversed contrary district court decisions on other grounds (lack of jurisdiction under the Eleventh Amendment to the U.S. Constitution) without reaching the merits of the district court's holding on the applicability of the stream buffer zone rules. Nevertheless, we believe that both the public and the regulated community would best be served by revising the 1983 stream buffer zone rules to clearly specify the scope of their applicability.

The revisions that we are proposing today represent an attempt to minimize disputes and misunderstandings associated with application of the existing rules. The revised rules distinguish between those situations in which maintenance of an undisturbed buffer between mining and reclamation activities and waters of the United States constitutes the best technology currently available to implement the underlying statutory provisions (sections 515(b)(10)(B)(i) and (24) and 516(b)(9)(B) and (11) of SMCRA) and those situations in which maintenance of a buffer is neither feasible nor appropriate because the activities inherently involve placement of fill material in waters of the United States. Examples of the latter category of activities include mining through streams and the construction of excess spoil fills, refuse piles, slurry impoundments, and in-stream sedimentation ponds. Those activities are governed by other regulations.

We are also proposing changes to better conform the rule language to the underlying provisions of SMCRA and to expand the scope of the rule to include all waters of the United States instead of just perennial and intermittent streams as under the existing rules. Finally, we are proposing to reorganize the rules in recognition of the fact that the review and approval of proposals to disturb the surface of lands within buffer zones is a permitting action, not

a performance standard. At present, the buffer zone rules are part of the performance standards in subchapter K. We are proposing to move portions of those rules to new sections 780.28 and 784.28, which would be part of the permitting requirements of subchapter G.

The history of the existing stream buffer zone rules, their statutory basis, and the impetus for our proposed rule changes are discussed at length below. A detailed rationale for our proposed changes to the existing buffer zone rules appears in Parts VI.C. and VI.I. of this preamble.

#### A. What does SMCRA say about surface coal mining operations in or near streams?

SMCRA contains three references to streams, two references to watercourses, and several provisions that indirectly refer to activities in or near streams.

Section 507(b)(10) requires that permit applications include "the name of the watershed and location of the surface stream or tributary into which surface and pit drainage will be discharged." However, this provision has no relevance to mining-related activities in or near streams or to the existing or proposed buffer zone rules.

Section 515(b)(18) requires that surface coal mining and reclamation operations "refrain from the construction of roads or other access ways up a stream bed or drainage channel or in such proximity to such channel so as to seriously alter the normal flow of water."

Section 516(c) requires the regulatory authority to suspend underground coal mining under permanent streams if an imminent danger to inhabitants exists. However, this provision is not relevant to a discussion of the stream buffer zone rules because, in response to litigation concerning the 1983 version of 30 CFR 817.57, we stipulated that "this regulation is directed only to disturbance of surface lands by surface activities associated with underground mining." *In re: Permanent Surface Mining Regulation Litigation II-Round II*, 21 ERC 1725, 1741, footnote 21 (D.D.C. 1984).

Section 515(b)(22)(D) provides that sites selected for the disposal of excess spoil must "not contain springs, natural water courses or wet weather seeps unless lateral drains are constructed from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil pile will be prevented." In adopting this provision, Congress could have chosen to exclude perennial and intermittent streams (or other waters) from the scope

of "natural water courses," but it did not do so. In addition, the fact that this provision of the Act authorizes disposal of excess spoil in areas containing springs and seeps further suggests that Congress did not intend to prohibit placement of excess spoil in perennial or intermittent streams. Springs and seeps constitute groundwater discharges. To the extent that those discharges provide intermittent or continuous flow in a channel, they are included within the scope of our definitions in 30 CFR 701.5 of "intermittent stream" and "perennial stream," respectively. The definition of "intermittent stream," which is based upon technical literature, includes any "stream or reach of a stream that is below the local water table for at least some part of the year, and obtains its flow from both surface runoff and ground water discharge." Furthermore, the U.S. Court of Appeals for the Fourth Circuit cited section 515(b)(22) as the basis for its statement that "it is beyond dispute that SMCRA recognized the possibility of placing excess spoil material in waters of the United States even though those materials do not have a beneficial purpose." *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 443 (4th Cir. 2003).

Section 515(c)(4)(D) provides that, in approving a permit application for a mountaintop removal operation, the regulatory authority must require that "no damage will be done to natural watercourses." The regulations implementing this provision clarify that the prohibition applies only to natural watercourses "below the lowest coal seam mined." See 30 CFR 824.11(a)(9). However, section 515(c)(4)(E) of the Act specifies that "all excess spoil material not retained on the mountaintop shall be placed in accordance with the provisions of subsection (b)(22) of this section." By including this proviso, Congress recognized that not all excess spoil generated by mountaintop removal operations could be retained on benches or placed within the mined-out area. And by cross-referencing section 515(b)(22), Congress authorized placement of excess spoil from mountaintop removal operations in natural watercourses, provided all requirements of section 515(b)(22) are met. As discussed in Part II of this preamble, in the steep-slope terrain of central Appalachia, excess spoil typically can most feasibly be placed in valley fills.

In addition, the legislative history of section 515(f) of SMCRA indicates that Congress anticipated that coal mine waste impoundments would be

constructed in perennial and intermittent streams:

In order to assure that mine waste impoundments used for the disposal of liquid or solid waste material from coal mines are constructed or have been constructed so as to safeguard the health and welfare of *downstream* populations, H.R. 2 gives the Army Corps of Engineers a role in determining the standards for construction, modification and abandonment of these impoundments. \* \* \*

Thus, the corps' experience and expertise in the area of design, construction, maintenance, et cetera, which were utilized for carrying out the congressionally authorized surveys of mine waste embankments in West Virginia following the disastrous failure of the mine waste impoundments on *Buffalo Creek*, is to be applied in order to prevent *similar* accidents in the future.

H. Rep. No. 95-218; at 125 (April 22, 1977) (emphasis added).

Section 515(f) provides that—

The Secretary, with the written concurrence of the Chief of Engineers, shall establish within one hundred and thirty-five days from the date of enactment, standards and criteria regulating the design, location, construction, operation, maintenance, enlargement, modification, removal, and abandonment of new and existing coal mine waste piles referred to in section 515(b)(13) and section 516(b)(5).

Sections 515(b)(13) and 516(b)(5) concern "all *existing and new* coal mine waste piles consisting of mine wastes, tailings, coal processing wastes, or other liquid and solid wastes and used either temporarily or permanently as dams or embankments." (Emphasis added.) Sections 515(f), 515(b)(13), and 516(b)(5) do not specifically mention streams or watercourses. However, the reference to dams and embankments, the requirement for the concurrence of the U.S. Army Corps of Engineers (for its expertise in dam construction and flood control), and the legislative history documenting that the 1972 Buffalo Creek flood was the driving force behind adoption of those SMCRA provisions demonstrate that Congress was aware that coal mine waste impoundments had been constructed in perennial and intermittent streams in the past and would be constructed there in the future. Furthermore, the fact that all three paragraphs specifically apply to both new and existing structures (rather than to just existing structures) implies that new structures would and could be built in streams under SMCRA. As mentioned in the legislative history, Congress' intent was to prevent a recurrence of the Buffalo Creek impoundment failure and to ensure that all coal mine waste impoundments either are or have been constructed in a

manner that protects the safety of downstream residents. There is no indication that Congress intended to prohibit construction of those structures in perennial or intermittent streams.

Finally, sections 515(b)(11) and 516(b)(4) of the Act govern the construction of coal refuse piles that are not used as dams or embankments. While those paragraphs do not mention constructing refuse piles in watercourses, neither do they prohibit such construction. Because of the similarity of those piles to excess spoil fills, the regulations implementing sections 515(b)(11) and 516(b)(4) incorporate language similar to that of section 515(b)(22)(D) for the construction of excess spoil disposal facilities. Specifically, the regulations at 30 CFR 816.83 (a)(1) and 817.83(a)(1) allow the construction of non-impounding coal refuse piles on areas containing springs, natural or man-made watercourses, or wet weather seeps if the design includes diversions and underdrains. Not all areas containing springs, watercourses, or wet-weather seeps are waters of the United States, but some are, which means that refuse piles may be constructed in streams or other waters of the United States.

*B. What provisions of SMCRA form the basis for the existing stream buffer zone rules?*

Paragraphs (b)(10)(B)(i) and (24) of section 515 of SMCRA provide the basis for the existing stream buffer zone rule at 30 CFR 816.57, which applies to surface mining activities. Section 515(b)(10)(B)(i) requires that surface coal mining operations be conducted so as to prevent the contribution of additional suspended solids to streamflow or runoff outside the permit area to the extent possible using the best technology currently available. Section 515(b)(24) requires that surface coal mining and reclamation operations be conducted to minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values "to the extent possible using the best technology currently available."

Paragraphs (b)(9)(B) and (11) of section 516 of SMCRA form the basis for the existing stream buffer zone rule at 30 CFR 817.57, which applies to surface activities associated with underground mines. Those section 516 provisions are substantively equivalent to paragraphs (b)(10)(B)(i) and (24) of section 515 of SMCRA, respectively, except that section 516(b)(9)(B) also includes the provisions found in section 515(b)(10)(E) regarding the avoidance of channel deepening or enlargement. Therefore, in the remainder of this

preamble, we generally refer only to the section 515 paragraphs, with the understanding that, unless otherwise indicated, references to those paragraphs should be read as including their section 516 counterparts.

### C. What is the history of the existing stream buffer zone rules?

#### SMCRA and Its Legislative History

SMCRA does not establish or require a buffer zone for streams or other waters. In 1972, the U.S. House of Representatives passed a bill (H.R. 6482) that included a flat prohibition on mining within 100 feet of any "body of water, stream, pond, or lake to which the public enjoys use and access, or other private property." This prohibition appeared in the counterpart to what is now section 522(e) of the Act. However, the bill never became law and the provision did not appear in subsequent versions of SMCRA legislation.

#### Initial Regulatory Program

As part of the regulations implementing the initial regulatory program under SMCRA, we adopted the concept of a 100-foot buffer zone around intermittent and perennial streams as a means "to protect stream channels from abnormal erosion" from nearby upslope mining activities. See 30 CFR 715.17(d)(3) and 42 FR 62652 (December 13, 1977). The regulation reads as follows:

No land within 100 feet of an intermittent or perennial stream shall be disturbed by surface coal mining and reclamation operations unless the regulatory authority specifically authorizes surface coal mining and reclamation operations through such a stream. The area not to be disturbed shall be designated a buffer zone and marked as specified in § 715.12.

The rule does not specify the conditions under which the regulatory authority may authorize operations within the buffer zone.

#### Permanent Regulatory Program (1979 Rules)

The original version of the permanent program regulations, as published on March 13, 1979, included more extensive stream buffer zone rules at 30 CFR 816.57 (for surface mining operations) and 817.57 (for underground mining operations). Specifically, the 1979 version of section 816.57 reads as follows:

(a) No land within 100 feet of a perennial stream or a stream with a biological community determined according to paragraph (c) below shall be disturbed by surface mining activities, except in accordance with §§ 816.43–816.44 [the

stream diversion regulations], unless the regulatory authority specifically authorizes surface mining activities closer to or through such a stream upon finding—

(1) That the original stream channel will be restored; and

(2) During and after the mining, the water quantity and quality from the stream section within 100 feet of the surface mining activities shall not be adversely affected.

(b) The area not to be disturbed shall be designated a buffer zone and marked as specified in § 816.11.

(c) A stream with a biological community shall be determined by the existence in the stream at any time of an assemblage of two or more species of arthropods or molluscan animals which are:

(1) Adapted to flowing water for all or part of their life cycle;

(2) Dependent upon a flowing water habitat;

(3) Reproducing or can reasonably be expected to reproduce in the water body where they are found; and

(4) Longer than 2 millimeters at some stage of the part of their life cycle spent in the flowing water habitat.

The counterpart regulation for underground mining at 30 CFR 817.57 was identical except that it substituted the term "surface operations and facilities" for "surface mining activities" and clearly indicated that the restrictions were limited to "surface areas."

The preamble to the 1979 rules explains that the purpose of the revised rules was to implement sections 515(b)(10) and (24) of the Act. 44 FR 15176, March 13, 1979. It states that "[b]uffer zones are required to protect streams from the adverse effects of sedimentation and from gross disturbance of stream channels," but that "if operations can be conducted within 100 feet of a stream in an environmentally acceptable manner, they may be approved." *Id.* In addition, it states that "[t]he 100-foot limit is based on typical distances that should be maintained to protect stream channels from sedimentation," but that, while the 100-foot standard provides a simple rule for enforcement purposes, "site-specific variation should be made available when the regulatory authority has an objective basis for either increasing or decreasing the width of the buffer zone." *Id.*

#### Permanent Regulatory Program Revisions (1983 Rules)

In 1983, we revised the stream buffer zone rules to delete the requirement that the original stream channel be restored, to replace the biological community criterion for determining which non-perennial streams must be protected under the rule with a requirement for protection of all intermittent streams,

and to add a requirement for a finding that the proposed mining activities will not cause or contribute to a violation of applicable State or Federal water quality standards and will not adversely affect the environmental resources of the stream.

The preamble reiterates the general rationale for adoption of a stream buffer zone rule that we specified in the preamble to the 1979 rules. It identifies the reason for replacing the biological community threshold with the intermittent stream threshold as a matter of improving the ease of administration and eliminating the possibility of applying the rule to ephemeral streams and other relatively insignificant water bodies:

The biological-community standard was confusing to apply since there are areas with ephemeral surface waters of little biological or hydrologic significance which, at some time of the year, contain a biological community as defined by previous § 816.57(c). Thus, much confusion arose when operators attempted to apply the previous rule's standards to springs, seeps, ponding areas, and ephemeral streams. While some small biological communities which contribute to the overall production of downstream ecosystems will be excluded from special buffer-zone protection under final § 816.57(a), the purposes of Section 515(b)(24) of the Act will best be achieved by providing a buffer zone for those streams with more significant environmental-resource values.

48 FR 30313, June 30, 1983. The preamble further states that "[i]t is impossible to conduct surface mining without disturbing a number of minor natural streams, including some which contain biota" and that "surface coal mining operations will be permissible as long as environmental protection will be afforded to those streams with more significant environmental-resource value." *Id.* It further provides that the revised rules "also recognize that intermittent and perennial streams generally have environmental-resource values worthy of protection under Section 515(b)(24) of the Act." *Id.* at 30312. In addition, the preamble notes that "[a]lthough final § 816.57 is intended to protect significant biological values in streams, the primary objective of the rule is to provide protection for the hydrologic balance and related environmental values of perennial and intermittent streams." *Id.* at 30313. It further states that "[t]he 100-foot limit is used to protect streams from sedimentation and help preserve riparian vegetation and aquatic habitats." *Id.* at 30314.

We also stated that we removed the requirement to restore the original stream channel in deference to the

stream channel diversion requirements of 30 CFR 816.43 and 817.43 and to clarify that there does not have to be a stream diversion for mining to occur inside the buffer zone. *Id.*

Finally, the preamble states that we added the finding concerning “other environmental resources of the stream” to clarify “that regulatory authorities will be allowed to consider factors other than water quantity and quality in making buffer-zone determinations” and “to provide a more accurate reflection of the objectives of Sections 515(b)(10) and 515(b)(24) of the Act.” *Id.* at 30316.

Revised 30 CFR 816.57 (1983) reads as follows:

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

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

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

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

We revised the stream buffer zone rule for underground mining at 30 CFR 817.57 in identical fashion except for substitution of the term “underground mining activities” for “surface mining activities.”

The National Wildlife Federation challenged this regulation as being inconsistent with sections 515(b)(10) and (24) of the Act, primarily because it deleted the biological community threshold for stream protection. However, the court rejected that challenge, finding without elaboration that the “regulation is not in conflict with either section 515(b)(10) or 515(b)(24).” *In re: Permanent Surface Mining Regulation Litigation II—Round II*, 21 ERC 1725, 1741–1742 (D.D.C. 1984).

The court also noted that the Secretary had properly justified the rule change on the grounds that the previous rule was confusing and difficult to apply without protecting areas of little biological significance. Unfortunately, the new criterion (intermittent streams) has proven as difficult to apply as the biological community standard that it replaced. The definition of “intermittent stream” in 30 CFR 701.5 has two parts, separated by an “or.” The first part defines all streams with a drainage area

of one square mile as intermittent. This part of the definition is the aspect that was litigated and upheld for its clarity of application. However, the second part of the definition includes all streams and stream segments that are below the local water table for part of the year and that derive at least part of their flow from groundwater discharge. This part of the definition has been much more difficult to apply in practice. In fact, some States use biological criteria for making that determination.

Industry also challenged 30 CFR 817.57(a) to the extent that it included all underground mining activities. However, industry withdrew its challenge when the Secretary stipulated that the rule would apply only to surface lands and surface activities associated with underground mining. See footnote 21, *id.* at 1741.

#### *D. How have the existing stream buffer zone rules been interpreted?*

Historically, we and the State regulatory authorities have applied the 1983 stream buffer zone rules as allowing the placement of excess spoil fills, refuse piles, slurry impoundments, and sedimentation ponds in intermittent and perennial streams. However, as discussed at length in the preamble to the January 7, 2004 proposed rule (69 FR 1038–1042), there has been considerable controversy over the proper interpretation of both the Clean Water Act and the 1983 rules as they apply to the placement of fill material in and near perennial and intermittent streams. Some interpretations of our 1983 rules appear to be at odds with the underlying provisions of SMCRA.

We first placed our interpretation of the 1983 stream buffer zone rules in writing in a document entitled “Summary Report—West Virginia Permit Review—Vandalia Resources, Inc. Permit No. S–2007–98.” According to our annual oversight reports for West Virginia for 1999 and 2000, that document stated that the stream buffer zone rule does not apply to the footprint of a fill placed in a perennial or intermittent stream as part of a surface coal mining operation. On June 4, 1999, in *West Virginia Highlands Conservancy v. Babbitt*, Civ. No. 1:99CV01423 (D.D.C.), the plaintiffs challenged the validity of that document, alleging that it constituted rulemaking in violation of the Administrative Procedure Act. In an order filed September 23, 1999, the court approved an unopposed motion to dismiss the case as moot.

In a lawsuit filed in the U.S. District Court for the Southern District of West Virginia in July 1998, plaintiffs asserted that the stream buffer zone rule allows

mining activities through or within the buffer zone for a perennial or intermittent stream only if the activities are minor incursions. They argued that the rule did not allow substantial segments of the stream to be buried underneath excess spoil fills or other mining-related structures. On October 20, 1999, the district court ruled in favor of the plaintiffs on this point, holding that the stream buffer zone rule applies to all segments of a stream, including those segments within the footprint of an excess spoil fill, not just to the stream as a whole. The court also stated that the construction of fills in perennial or intermittent streams is inconsistent with the language of 30 CFR 816.57(a)(1), which provides that the regulatory authority may authorize surface mining activities within a stream buffer zone only after finding that the proposed activities “will not adversely affect the water quantity and quality or other environmental resources of the stream.” See *Bragg v. Robertson*, 72 F. Supp. 2d 642, 660–663 (S.D. W. Va., 1999).

The U.S. Court of Appeals for the Fourth Circuit ultimately reversed the district court on other grounds (lack of jurisdiction under the Eleventh Amendment to the U.S. Constitution) without reaching the merits of the district court’s holding on the applicability of the stream buffer zone rule. *Bragg v. West Virginia Coal Association*, 248 F.3d 275, 296 (4th Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002).

In a different case, the same district court stated that SMCRA and the stream buffer zone rule do not authorize disposal of overburden in streams: “SMCRA contains no provision authorizing disposal of overburden waste in streams, a conclusion further supported by the buffer zone rule.” *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 204 F. Supp. 2d 927, 942 (S.D. W. Va. 2002).

The U.S. Court of Appeals for the Fourth Circuit subsequently rejected the district court’s interpretation, stating that “SMCRA does not prohibit the discharge of surface coal mining excess spoil in waters of the United States.” *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 442 (4th Cir. 2003). The court further stated that “it is beyond dispute that SMCRA recognizes the possibility of placing excess spoil material in waters of the United States even though those materials do not have a beneficial purpose.” *Id.* at 443.

The court explained the basis for its statements as follows:

Section 515(b)(22)(D) of SMCRA authorizes mine operators to place excess spoil material in "springs, natural water courses or wet weather seeps" so long as "lateral drains are constructed from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil pile will be prevented." 30 U.S.C. § 1265(b)(22)(D). In addition, § 515(b)(24) requires surface mine operators to "minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable," implying the placement of fill in the waters of the United States. 30 U.S.C. § 1265(b)(24). It is apparent that SMCRA anticipates the possibility that excess spoil material could and would be placed in waters of the United States, and this fact cannot be juxtaposed with § 404 of the Clean Water Act to provide a clear intent to limit the term "fill material" to material deposited for a beneficial primary purpose. *Id.* at 443.

The preamble to the proposed rule that we published on January 7, 2004, contains additional discussion of litigation and related matters arising from the 1983 stream buffer zone rules. See especially Part I.B.1. at 69 FR 1038–1040.

#### **IV. Why are we proposing to revise our rules concerning excess spoil?**

The environmental impacts of fills and other structures associated with the disposal of excess spoil from surface coal mining operations, and of coal mine waste, have been the subject of controversy, largely because they involve the filling of substantial portions of stream valleys, especially in central Appalachia. This controversy has highlighted the need to ensure that excess spoil creation is minimized to the extent possible, and that, to the extent possible, excess spoil and coal mine waste disposal facilities are located and designed to minimize adverse impacts on the hydrologic balance, streams and other aquatic resources, fish, wildlife, and related environmental values.

Our existing regulations pertaining to the disposal of excess spoil primarily focus on ensuring that fills are safe and stable. To complement the proposed rule changes concerning buffers for waters of the United States, we propose to revise our excess spoil rules by adding several requirements focused on environmental considerations, including minimization of the adverse environmental impacts of fill construction in waters of the United States. The proposed rule changes would implement, in part, the requirement at section 515(b)(24) of SMCRA that surface coal mining and reclamation operations be conducted in a manner that minimizes disturbances

to, and adverse impacts on, fish, wildlife, and related environmental values to the extent possible, using the best technology currently available. Section 515(b)(24) applies to the disposal of excess spoil both by its own terms and through section 515(b)(22)(I), which requires that the placement of excess spoil meet "all other provisions of this Act."

The proposed rules (see the discussion of specific rule changes in Part VI of this preamble) require that surface coal mining operations be designed to minimize the creation of excess spoil to the extent possible. They also specify that the maximum cumulative design volume of all proposed excess spoil fills within the permit area must be no larger than the capacity needed to accommodate the anticipated cumulative volume of excess spoil that the operation will generate. These requirements should reduce the adverse environmental impacts of the operation by minimizing the amount of land and waters disturbed to construct excess spoil fills. The proposed rules further require that the permit application include an analysis of the environmental impacts of a reasonable range of alternatives for disposal of excess spoil, including variations in the number, size, location, and configuration of proposed fills. The analysis must consider impacts on both terrestrial and aquatic ecosystems. To the extent possible, the applicant must select the alternative with the least overall adverse environmental impact, including adverse impacts on water quality and aquatic ecosystems. The proposed rule clarifies that an alternative is possible if it is capable of being done after consideration of cost, logistics, and available technology, and that the least costly alternative may not be selected at the expense of environmental protection solely on the basis of cost. If another alternative considered would be more environmentally protective than the alternative selected by the applicant, the application must demonstrate, to the satisfaction of the regulatory authority, that implementation of the more environmentally protective alternative is not possible. In addition, when construction of the excess spoil fill would involve placement of excess spoil in waters of the United States, the proposed rule specifies certain factors that must be considered as part of the evaluation of environmental impacts to ensure adequate assessment of impacts on water quality and aquatic ecosystems, which are among the "related environmental values"

mentioned in sections 515(b)(24) and 516(b)(11) of SMCRA.

We are proposing these rule changes to improve the analysis of permit applications and permitting decisions under SMCRA. We recognize that SMCRA itself does not require an analysis of alternatives. However, we believe that the alternatives analysis that we propose to require is a reasonable means of implementing sections 515(b)(24) and 516(b)(11) of SMCRA. Those provisions of the law require that surface coal mining and reclamation operations be conducted in a manner that minimizes disturbances to, and adverse impacts on, fish, wildlife, and related environmental values to the extent possible, using the best technology currently available.

The addition of requirements for an alternatives analysis and selection of the alternative with the least overall adverse environmental impact (to the extent possible) also may facilitate the coordinated processing of coal mining permit applications in accordance with a memorandum of understanding entitled "Memorandum of Understanding among the U.S. Army Corps of Engineers, the U.S. Office of Surface Mining, the U.S. Environmental Protection Agency, and the U.S. Fish and Wildlife Service for the Purpose of Providing Concurrent and Coordinated Review and Processing of Surface Coal Mining Applications Proposing Placement of Dredged and/or Fill Material in Waters of the United States," which took effect February 8, 2005. For example, Nationwide Permits 21, 49, and 50, which authorize placement of excess spoil and coal mine waste in waters of the United States as part of surface coal mining operations, are predicated upon issuance of a SMCRA permit or participation in an integrated permitting process. See 72 FR 11092, 11184 and 11191, March 12, 2007. A person seeking authorization under one of these nationwide permits must submit a preconstruction notification to the U.S. Army Corps of Engineers (Corps). The Corps then must review the notification and issue a decision on whether the proposed activities lie within the scope of the nationwide permit or whether an individual permit is necessary under section 404 of the Clean Water Act. While an alternatives analysis is not listed as a required element of the preconstruction notification that must be submitted to the U.S. Army Corps of Engineers under Nationwide Permits 21, 49, and 50, we believe that such an analysis may assist the Corps in evaluating preconstruction notifications that involve construction

of an excess spoil fill, refuse pile, or slurry impoundment.

The addition of these requirements to our rules is consistent with section 102(d) of SMCRA, which provides that one of the purposes of SMCRA is to assure that surface coal mining operations are conducted so as to protect the environment. In addition, the proposed additions are consistent with section 102(f) of SMCRA, which provides that another purpose of SMCRA is to strike a balance between protection of the environment and the Nation's need for coal as an essential energy source. The rule changes that we are proposing today would not prohibit coal production. If the creation of excess spoil as part of a surface coal mining operations is unavoidable, the proposed rules would not prevent construction of the fills needed to accommodate the excess spoil. Instead, the rules that we are proposing are intended to ensure that surface coal mining operations are planned and conducted in a manner that minimizes adverse environmental impacts from the construction of fills for the disposal of excess spoil. Section 201(c)(2) of SMCRA, 30 U.S.C. 1211(c)(2), which directs the Secretary of the Interior to publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of SMCRA, provides additional authority for the adoption of these rule changes.

Since the mid-1990s, the extent of excess spoil fill construction in central Appalachia has been controversial, especially when fills bury stream segments. As part of our oversight activities, we conducted studies in 1999 in Kentucky, Virginia, and West Virginia to determine how State regulatory authorities were administering SMCRA regulatory programs regarding restoration of approximate original contour. From our review of permit files and reclaimed mines, we determined that, typically, some of the spoil placed in excess spoil fills could have been retained on or returned to mined-out areas. See "An Evaluation of Approximate Original Contour and Postmining Land Use in Kentucky" (OSM, September 1999); "An Evaluation of Approximate Original Contour Variances and Postmining Land Uses in Virginia" (OSM, September 1999); and "Final Report: An Evaluation of Approximate Original Contour and Postmining Land Use in West Virginia" (OSM, May 1999).

In many instances, we found that the permit application overestimated the anticipated volume of excess spoil that the operation would produce. In addition, fills were designed and

constructed larger than necessary to accommodate the anticipated excess spoil, which resulted in the unnecessary disturbance of additional land. Kentucky, Virginia and West Virginia worked with us to develop enhanced guidance on material balance determinations, spoil management, and approximate original contour determinations to correct these problems to the extent feasible under the existing regulations. We also developed guidance for use under the Tennessee Federal regulatory program. In most cases, the regulatory authorities in those states have adopted policies based on that guidance for use in reviewing permit applications. Adopting regulations that clearly establish limits on excess spoil generation and fill capacity and that require an analysis of alternatives when selecting locations and designs for fills would reinforce the basis for those policies, strengthen the enforceability of decisions based on those policies, and provide national consistency by ensuring that certain basic requirements will be applied nationwide, including in those states that have not adopted policies. We also believe that the environment, the public, and the regulated community would best be served by the adoption of national regulations to clarify environmental considerations concerning the generation and disposal of excess spoil.

We also are taking this opportunity to propose to consolidate most fill design and permitting requirements in the permit application regulations at 30 CFR 780.35 and 784.19, rather than splitting them between those regulations and the performance standards at 30 CFR 816.71 and 817.71, as they are at present. In addition, we are proposing to revise those rules to be more consistent with plain language principles, to eliminate redundancies, and to remove inconsistencies between the performance standards and the permitting requirements. We invite comment on whether further changes would be useful or desirable in achieving these goals.

#### **V. Why are we proposing to revise our rules concerning coal mine waste?**

As noted in the first paragraph of Part IV of this preamble, our reasons for proposing revisions to our coal mine waste disposal rules are similar to the reasons for which we are proposing changes to our excess spoil disposal rules. In steep-slope areas, coal mine waste disposal facilities are similar to excess spoil fills in that they are often placed in valleys containing perennial and intermittent streams and other

waters of ecological significance. Consequently, to minimize the environmental impacts of those structures on fish, wildlife, and related environmental values to the extent possible using the best technology currently available, as required by sections 515(b)(24) and 516(b)(11) of SMCRA, we are proposing to revise our coal mine waste disposal rules in a manner similar to the proposed changes to the excess spoil rules by requiring consideration of other methods of handling coal mine waste, an analysis of alternative locations for coal mine waste disposal facilities, and, to the extent possible, selection of the alternative with the least overall adverse environmental impact.

#### *Additional Proposed Changes to Permitting Rules Concerning Coal Mine Waste*

On September 26, 1983 (48 FR 44006), we revised the definitions and performance standards in our regulations relating to coal mine waste to be more consistent with the terminology used by the Mine Safety and Health Administration (MSHA). As we stated at 48 FR 44009, col. 1, "[i]t is undesirable to have two regulatory programs for the same subject that contain conflicting standards or which use fundamentally different terminology."

Among other things, we adopted definitions of three new terms in 30 CFR 701.5. "Coal mine waste" is defined as "coal processing waste and underground development waste." "Impounding structure" is defined as "a dam, embankment, or other structure used to impound water, slurry, or other liquid or semi-liquid material." "Refuse pile" is defined as "a surface deposit of coal mine waste that does not impound water, slurry, or other liquid or semi-liquid material." The latter two terms are consistent with the terminology of MSHA's rules. "Refuse pile" replaces the term "coal processing waste bank" previously used in our rules, while "impounding structure" incorporates all structures that our rules previously referred to as coal processing waste dams or embankments.

In concert with the new definition of coal mine waste, we revised our performance standards at 30 CFR 817.71–817.74 to eliminate the language that combined underground development waste with excess spoil for purposes of performance standards for underground mines. Because the definition of coal mine waste includes underground development waste, we revised our rules to specify that the disposal of underground development



waste is subject to the performance standards for refuse piles (30 CFR 817.83) rather than the performance standards for the disposal of excess spoil that applied under the old rules.

However, we did not revise our permitting requirements in a similar fashion at that time. We are taking this opportunity to propose to modify our regulations in 30 CFR parts 780 and 784 to harmonize those rules with the 1983 changes to the definitions and performance standards concerning coal mine waste. In essence, we are proposing to replace references to coal processing waste banks and coal processing waste dams and embankments with references to refuse piles and coal mine waste impounding structures, respectively.

Also, because the definition of coal mine waste, as adopted on September 26, 1983, includes both coal processing waste and underground development waste, we are proposing to restructure the permitting regulations to take this change into account. In particular, 30 CFR 784.19, which is currently entitled "Underground Development Waste," even though it refers to the disposal of both underground development waste and excess spoil, would be retitled "Disposal of Excess Spoil." The language of that section also would be revised to eliminate references to underground development waste, which would instead be regulated under the refuse pile provisions of revised 30 CFR 784.16, consistent with the 1983 changes to the performance standards. The new language of 30 CFR 784.19 would parallel the language of 30 CFR 780.35 (the permit application requirements for the disposal of excess spoil generated by surface mining activities), which the existing rule incorporates by reference. Adding specific language in place of the cross-reference to section 780.35 would make this rule consistent with the pattern established in most of our other rules for surface and underground mines (i.e., the provisions for surface and underground mines are in separate parts, but are nearly identical except for cross-references and the type of operation to which they apply). In addition, adding specific language in place of the cross-reference to section 780.35 would allow the incorporation of cross-references to the appropriate underground mining performance standards in part 817 rather than having to use the existing cross-references in 30 CFR 780.35 to the surface mining performance standards in part 816.

We are also proposing to delete the cross-references to 30 CFR 77.216-1 in 30 CFR 780.25(e) and 784.16(e) because

30 CFR 77.216-1 consists solely of signage requirements and does not include any design requirements. Consequently, there is no purpose in cross-referencing 30 CFR 77.216-1 in our permitting rules. The cross-reference to 30 CFR 77.216-2, which contains design requirements for impoundments and impounding structures, would remain.

#### **VI. How are we proposing to revise our existing rules?**

##### *A. Sections 780.14 and 784.23: Operation Plan: Maps and Plans*

We propose to revise 30 CFR 780.14(b)(11) and 784.23(b)(10) by replacing the terms "coal processing waste bank" and "coal processing waste dam and embankment" with "refuse pile" and "coal mine waste impounding structure" to employ terminology consistent with the definitions and performance standards that we adopted September 26, 1983. See Part V of this preamble for a more detailed explanation.

In addition, we propose to replace the references to sections 780.35(c) and 816.71(b) in existing section 780.14(c) with a reference to section 780.35 to be consistent with other changes that we are proposing to those rules, including moving the design certification requirement of existing section 816.71(b) to section 780.35(b). In similar fashion, we are proposing to delete the reference in existing section 784.23(c) to section 817.71(b) because we are proposing to move the design certification provisions of existing section 817.71(b) to section 784.19(b). There is no need for a replacement cross-reference because section 784.23(c) already cross-references section 784.19 in its entirety.

##### *B. Sections 780.25 and 784.16: Reclamation Plan: Siltation Structures, Impoundments, Refuse Piles, and Coal Mine Waste Impounding Structures*

We propose to revise the heading and contents of sections 780.25 and 784.16 by replacing the terms "coal processing waste bank" and "coal processing waste dam and embankment" with "refuse pile" and "coal mine waste impounding structure." With these changes, our permitting requirements concerning coal mine waste will employ terminology consistent with the definitions and performance standards for coal mine waste that we adopted September 26, 1983. See Part V of this preamble for a more detailed explanation.

To improve clarity, we propose to remove the last sentence of existing

paragraph (a)(2) of sections 780.25 and 784.16 and redesignate the remainder of that paragraph as paragraph (a)(2)(i). The last sentence of existing paragraph (a)(2) would be redesignated as paragraph (a)(2)(ii). Existing subparagraphs (a)(2)(i) through (iv) would be redesignated as subparagraphs (a)(2)(ii)(A) through (D). We propose to make these redesignations because the last sentence of existing paragraph (a)(2) and existing subparagraphs (i) through (iv) apply to all structures meeting the criteria of 30 CFR 77.216(a), while the remainder of existing paragraph (a)(2) applies only to those impoundments that meet the Class B or C criteria (now the Significant Hazard Class or High Hazard Class criteria, respectively) for dams in the U.S. Department of Agriculture publication Technical Release No. 60, "Earth Dams and Reservoirs."

We propose to revise redesignated paragraph (a)(2)(i) of these sections to update the incorporation by reference of U.S. Department of Agriculture publication "Earth Dams and Reservoirs," Technical Release No. 60 (210-VI-TR60, October 1985), by replacing the reference to the October 1985 edition with a reference to the superseding July 2005 edition. Consistent with the terminology in the newer edition, we propose to replace references to Class B or C dam criteria with references to Significant Hazard Class or High Hazard Class criteria, respectively. (The actual criteria remain unchanged.) The newer publication is not available from the National Technical Information Service, but is available online from the Natural Resources Conservation Service (the successor to the Soil Conservation Service). Consequently, we propose to delete the ordering information pertinent to the National Technical Information Service and replace it with the URL (Web address) at which the publication may be reviewed and from which it may be downloaded without charge. We also propose to update the address and location of our administrative record room and to update the URL information (Web address) for the National Archives and Records Administration.

To improve clarity and consistency with other regulations, we propose to revise paragraph (c)(2) by replacing the term "Mine Safety and Health Administration" with a citation to 30 CFR 77.216(a), which contains the MSHA impoundment criteria to which paragraph (c)(2) refers. As revised, paragraph (c)(2) requires that plans for impoundments meeting MSHA criteria comply with MSHA's impoundment

design requirements at 30 CFR 77.216–2. We are proposing to delete the existing requirement that those plans also comply with 30 CFR 77.216–1. The deleted requirement is not germane to permit applications and plans because it contains signage requirements that apply only to impoundments that already exist or are under construction.

We also propose to combine existing paragraph (d), which addresses coal processing waste banks, and existing paragraph (e), which addresses coal processing waste dams and embankments, into a substantially revised paragraph (d), and to redesignate paragraph (f) as paragraph (e). The last paragraph also would be revised to reflect plain language principles and to include classification terminology consistent with the 2005 edition of NRCS Technical Release No. 60, as discussed in the context of the proposed changes to 30 CFR 780.25(a)(2)(i).

Proposed paragraph (d)(1) contains new general requirements for all structures constructed of or impounding coal mine waste; i.e., refuse piles and slurry impoundments. Subparagraph (d)(1)(i)(A) provides that the application must identify a reasonable range of alternative disposal methods and alternative locations for any proposed refuse piles or coal mine waste impoundments and impounding structures. Subparagraph (d)(1)(i)(B) provides that the application must include an analysis of the viability and environmental impacts (both terrestrial and aquatic) of each alternative identified. Subparagraph (d)(1)(i)(C) requires that the applicant select the alternative that would have the least overall adverse environmental impact, including adverse impacts on water quality and aquatic ecosystems, to the extent possible. The proposed rule clarifies that an alternative is possible if it is capable of being done after consideration of cost, logistics, and available technology, and that the least costly alternative may not be selected at the expense of environmental protection solely on the basis of cost. If another alternative considered would be more environmentally protective than the alternative selected by the applicant, the application must demonstrate, to the satisfaction of the regulatory authority, that implementation of the more environmentally protective alternative is not possible.

When construction of the proposed refuse pile or coal mine waste impoundment would involve placement of coal mine waste in waters of the United States, proposed paragraph (d)(1)(ii) requires that the analysis

performed under paragraph (d)(1)(i)(B) include an evaluation of the short-term and long-term impacts of each alternative on the aquatic ecosystem, both individually and on a cumulative basis. The analysis also must consider impacts on the physical, chemical, and biological characteristics of downstream flows, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, the degree to which the coal mine waste may introduce or increase contaminants, the effects on aquatic organisms, and the extent to which wildlife is dependent upon those organisms.

In addition, if the applicant must prepare an analysis of alternatives for the proposed refuse pile or coal mine waste impoundment or impounding structure under 40 CFR 230.10, which sets forth requirements for individual permits for placement of fill material in waters of the United States under section 404 of the Clean Water Act, proposed paragraph (d)(1)(ii) provides that the application may initially include a copy of that analysis in lieu of the analysis of alternatives required under proposed paragraph (d)(1)(i)(B). The regulatory authority must then determine the extent to which the Clean Water Act analysis satisfies the analytical requirements of proposed paragraph (d)(1). When OSM is the regulatory authority, we will coordinate with the Corps of Engineers in conducting any necessary analysis of alternatives under the National Environmental Policy Act.

The rationale for these new requirements is set forth in Parts III, IV, and V of this preamble. In essence, the new requirements would, in part, implement section 515(b)(24) of SMCRA, which provides that surface coal mining and reclamation operations must use the best technology currently available to minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values to the extent possible. The new requirements would achieve this goal by requiring that the permit applicant demonstrate that the proposed operation has been designed to minimize adverse impacts on land and waters and that environmental factors have been taken into consideration when locating and designing the refuse pile or coal mine waste impoundment.

We are proposing these rule changes to improve the analysis of permit applications and permitting decisions under SMCRA. However, the addition of these provisions also may facilitate achieving the coordinated processing of coal mining permit applications in

accordance with a memorandum of understanding entitled “Memorandum of Understanding among the U.S. Army Corps of Engineers, the U.S. Office of Surface Mining, the U.S. Environmental Protection Agency, and the U.S. Fish and Wildlife Service for the Purpose of Providing Concurrent and Coordinated Review and Processing of Surface Coal Mining Applications Proposing Placement of Dredged and/or Fill Material in Waters of the United States,” which took effect February 8, 2005. For example, the information and analysis submitted under the proposed rule may assist the Corps of Engineers in its review of preconstruction notifications submitted under Nationwide Permits 21, 49, or 50, or, if an individual permit is needed under section 404 of the Clean Water Act, compliance with the Section 404(b)(1) Guidelines at 40 CFR part 230 concerning placement of dredged or fill materials in waters of the United States.

The provisions in the proposed rule that would allow the applicant to select an alternative other than the most environmentally protective alternative if implementation of the most environmentally protective alternative is not possible are consistent with paragraphs (b)(10)(B)(i) and (24) of section 515 of the Act, both of which require use of the best technology currently available to achieve the requirements of those sections “to the extent possible.” The proposed rule clarifies that an alternative is possible if it is capable of being done after consideration of cost, logistics, and available technology, and that the least costly alternative may not be selected at the expense of environmental protection solely on the basis of cost. See also the discussion of the meaning of “to the extent possible” in Part VI.K. of this preamble, as well as the meaning of “best technology currently available” in Part VI.L. of this preamble. We seek comment on whether this approach is an appropriate interpretation of the phrase “to the extent possible” in SMCRA.

Proposed paragraph (d)(2) provides that each application for an operation that will generate or dispose of coal mine waste must describe the steps to be taken to avoid or, if avoidance is not possible, to minimize the adverse environmental impacts that may result from the construction of refuse piles and coal mine waste impoundments and impounding structures. This requirement applies to construction, maintenance, and reclamation of the alternative selected under paragraph (d)(1)(i)(C). It also would implement, in part, the sedimentation prevention requirements of sections 515(b)(10)(B)(i)

and 516(b)(9)(B) of SMCRA and the fish, wildlife, and related environmental value protection requirements of sections 515(b)(24) and 516(b)(11) of SMCRA.

Proposed paragraph (d)(3) is substantively identical to existing paragraph (d). We propose to delete the cross-reference to section 816.84 in existing section 780.25(d) and the cross-reference to section 817.84 in existing section 784.16(d) because proposed sections 780.25(d)(3) and 784.16(d)(3), like existing sections 780.25(d) and 784.16(d), pertain only to refuse piles, not to the coal mine waste impounding structures to which sections 816.84 and 817.84 apply.

Proposed paragraph (d)(4) is substantively identical to existing paragraph (e). We propose to delete the cross-reference to section 816.83 in existing section 780.25(e) and the cross-reference to section 817.83 in existing section 784.16(e) because proposed sections 780.25(d)(4) and 784.16(d)(4), like existing sections 780.25(e) and 784.16(e), pertain only to coal mine waste impoundments and impounding structures, not to the refuse piles to which sections 816.83 and 817.83 apply. In addition, we propose to delete the requirement in existing sections 780.25(e) and 784.16(e) that each plan for an impounding structure comply with 30 CFR 77.216-1, which contains MSHA requirements for signage for existing impoundments and impoundments under construction. There is no reason to retain this cross-reference because the referenced requirement is not relevant to preparation of plans or permit applications for proposed impoundments.

Proposed paragraph (e) is substantively identical to existing paragraph (f). Consistent with the terminology in the July 2005 edition of Technical Release No. 60, we propose to replace references to Class B or C dam criteria with references to Significant Hazard Class or High Hazard Class criteria, respectively. The actual criteria remain unchanged.

*C. Sections 780.28 and 784.28: Activities in or Adjacent to Waters of the United States*

Proposed sections 780.28 and 784.28 contain permitting requirements specific to waters of the United States, as regulated under the Clean Water Act, 33 U.S.C. 1311, 1362, and activities within or adjacent to those waters. Among other things, they would replace the existing stream buffer zone rules at 30 CFR 816.57(a)(1) and 817.57(a)(1), which provide that the regulatory

authority may authorize activities on the surface of lands within 100 feet of a perennial or intermittent stream only upon finding that the activities will not cause or contribute to the violation of applicable State or Federal water quality standards and will not adversely affect the water quantity and quality or other environmental resources of the stream.

Paragraph (a) of the proposed rules provides that sections 780.28 and 784.28 apply to applications to conduct activities in waters of the United States or on the surface of lands near waters of the United States to the extent that those waters are regulated under the Clean Water Act. This paragraph reflects the fact that, under 30 CFR 816.57(a) and 817.57(a), we propose to prohibit disturbance of the surface of lands within 100 feet of all waters of the United States, not just perennial and intermittent streams as under existing 30 CFR 816.57 and 817.57. Sections 515(b)(10)(B)(i) and (24) and 516(b)(9)(B) and (11) of SMCRA, which form the basis for the existing stream buffer zone rules, are not limited to preventing or minimizing adverse impacts on perennial and intermittent streams. The change that we are proposing recognizes that waters such as lakes, ponds, and wetlands also may have value for fish, wildlife, and related environmental resources and that sedimentation and sediment-laden runoff from mine sites could degrade that value. However, we do not anticipate that this change in terminology will result in a significant expansion in the applicability of our rules because the vast majority of waters that may be affected by surface coal mining and reclamation operations are perennial and intermittent streams.

If we ultimately adopt this proposal, both the SMCRA regulatory authority and permit applicants would no longer be able to use or rely upon the definitions of “perennial stream” and “intermittent stream” in 30 CFR 701.5 to determine when the prohibitions of 30 CFR 816.57(a) and 817.57(a) apply. Permit applicants may request a jurisdictional determination from the U.S. Army Corps of Engineers before submitting a SMCRA permit application in situations in which there is a question as to whether waters within or adjacent to the proposed permit area are waters of the United States under the Clean Water Act. Similarly, we anticipate that the SMCRA regulatory authority would consult and coordinate with the Corps of Engineers in situations in which there is a question as to whether waters within or adjacent to the proposed permit area are waters of the United States under the Clean

Water Act. In effect, under the proposed rule, permit applicants must receive a jurisdictional determination from the Corps of Engineers before the SMCRA permitting process can be completed if there is any question as to whether the proposed permit area includes or is adjacent to any waters that may be waters of the United States.

We seek comment on the impact of this change on the administration of SMCRA regulatory programs and, whether the benefits (increased environmental protection and consistency with the Clean Water Act) outweigh any problems identified. We will carefully evaluate all comments received before deciding whether to adopt the rule as proposed or retain the scope of the existing rules, which apply to perennial and intermittent streams.

We are not soliciting comment on the interpretation of the term “waters of the United States” under the Clean Water Act. That issue lies outside the scope of this rulemaking.

Proposed section 780.28(b) specifies that the maps prepared under 30 CFR 779.25, 780.14 or 780.21(b)(2) must show all waters of the United States that are located either within the proposed permit area or within the adjacent area, as that term is defined at 30 CFR 701.5. Proposed section 784.28(b) contains identical requirements for underground mining operations, with the substitution of cross-references to 30 CFR 783.25, 784.23, and 784.14(b)(2), respectively. Both rules also require that the maps delineate all lands within the proposed permit area that are within 100 feet, measured horizontally, of any waters of the United States. This requirement is intended to ensure that the maps submitted with the permit application include sufficient detail about waters of the United States within the proposed permit area and the adjacent area to determine what lands within the proposed permit area are potentially subject to the prohibition under 30 CFR 816.57(a) or 817.57(a). The 100 feet must be measured from the ordinary high water mark of the stream or other waters of the United States, consistent with the Corps of Engineers’ practices for establishing jurisdictional limits for waters of the United States. For wetlands without an ordinary high water mark, the 100 feet must be measured in a manner consistent with the Corps’ practices for wetland delineations under the Clean Water Act. See the online version of the 1987 “Corps of Engineers Wetlands Delineation Manual” (<https://www.nwo.usace.army.mil/html/od-rne/87-manual.pdf>), which includes

updates subsequent to the original January 1987 publication date.

Paragraph (b) of proposed sections 780.28 and 784.28 establishes requirements for requesting a variance from the prohibition in 30 CFR 816.57(a) and 817.57(a) on surface activities that would disturb the surface of lands within 100 feet, measured horizontally, of any waters of the United States. Under paragraph (c), the permit application must describe any measures that would be implemented in lieu of maintaining the 100-foot buffer, including the extent of any lesser buffer to be maintained, and explain how the proposed measures constitute the best technology currently available to—

(1) Prevent the contribution of additional suspended solids to streamflow or runoff outside the permit area to the extent possible; and

(2) Minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible.

Paragraph (c) would not apply to the activities listed in proposed 30 CFR 816.57(b) and 817.57(b) because those activities are exempt from the prohibition in 30 CFR 816.57(a) and 817.57(a). Therefore, the applicant does not need a variance to conduct them in or within 100 feet of waters of the United States. However, the applicant will need to make the demonstration required under proposed paragraph (e) of 30 CFR 780.28 and 784.28 and the regulatory authority will need to make the findings required under that paragraph before approving a permit that authorizes those activities. See Part VI.I. of this preamble for a request for comment on whether the list of activities in proposed 30 CFR 816.57(b) and 817.57(b) is sufficiently comprehensive to include all activities that inherently occur in waters of the United States or whether additional rules are needed to address activities that are not included in either paragraph (a) or (b) of those sections.

Paragraph (d) of proposed sections 780.28 and 784.28 specifies that, before approving any measures proposed under paragraph (c), the regulatory authority must determine that the measures—

(1) Would be no less effective in meeting the requirements of the regulatory program than the prohibition in 30 CFR 816.57(a) or 817.57(a) on disturbance of the surface of lands within 100 feet of waters of the United States; and

(2) Constitute the best technology currently available to—

(i) Prevent the contribution of additional suspended solids to

streamflow or to runoff outside the permit area to the extent possible; and

(ii) Minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible.

Paragraph (e) of proposed sections 780.28 and 784.28 provides that, if the permit applicant proposes to conduct any surface mining activities (or, for underground mines, surface activities) that are not subject to the prohibition in 30 CFR 816.57(a) or 817.57(a), the application must demonstrate, and the regulatory authority must find, that, to the extent possible, the operation will utilize the best technology currently available in accordance with 30 CFR 816.41(d) and 816.97(a) [or, for underground mines, 30 CFR 817.41(d) and 817.97(a)], as required by 30 CFR 780.16(b) and 780.21(h) [or, for underground mines, 30 CFR 784.21(b) and 784.14(g)]. The regulations at 30 CFR 816.41(d) and 817.41(d) require, in relevant part, that mining operations prevent, to the extent possible using the best technology currently available, additional contribution of suspended solids to streamflow outside the permit area. They implement, in part, the sedimentation prevention requirements of sections 515(b)(10)(B)(i) and 516(b)(9)(B) of SMCRA, respectively. The regulations at 30 CFR 816.97(a) and 817.97(a) require, in relevant part, that, to the extent possible using the best technology currently available, mining operations minimize disturbances and adverse impacts on fish, wildlife, and related environmental values. They implement, in part, the fish and wildlife protection requirements of sections 515(b)(24) and 516(b)(11) of SMCRA, respectively. The regulations at 30 CFR 780.21(h) and 784.14(g) require that each permit application include a hydrologic reclamation plan designed to implement, among other things, the requirements of 30 CFR 816.41(d) and 817.41(d), respectively. The regulations at 30 CFR 780.16(b) and 784.21(b) require that each permit application include a fish and wildlife protection and enhancement plan designed to implement the requirements of 30 CFR 816.97(a) and 817.97(a), respectively.

Paragraph (f) of proposed sections 780.28 and 784.28 summarizes the relationship between SMCRA permitting actions and Clean Water Act requirements. Paragraph (f)(1) provides that every permit application must identify the authorizations that the applicant anticipates will be needed under sections 401, 402, and 404 of the Clean Water Act, 33 U.S.C. 1341, 1342, and 1344, and describe the steps that the permit applicant has taken or will

take to procure those authorizations. This provision would in part implement section 508(a)(9) of SMCRA, which requires that each permit application include “the steps to be taken to comply with applicable air and water quality laws and regulations \* \* \*.” It also is intended to facilitate coordination of permitting activities under SMCRA and the Clean Water Act.

Paragraph (f)(2) of proposed sections 780.28 and 784.28 specifies that, if the permit application meets all applicable requirements of subchapter G (the permitting regulations), the regulatory authority will process the permit application and may issue the permit before the applicant obtains all necessary authorizations under the Clean Water Act, 33 U.S.C. 1251 *et seq.* This arrangement may facilitate the Corps of Engineers review of any preconstruction notification submitted by the permit applicant with respect to any proposed placement of fill material in waters of the United States. Nationwide Permits 21, 49, and 50, as issued by the Corps, apply only if the SMCRA permit has already been issued or if the application is being processed as part of an integrated permit processing procedure. See 72 FR 11092, 11184, and 11191, March 12, 2007.

For informational purposes, proposed paragraph (f)(2) also provides that the permittee may not initiate any activities for which Clean Water Act authorization or certification is required until that authorization or certification is obtained. We seek comment on whether this provision should remain informational or whether we should revise our rules to require inclusion of this provision as a SMCRA permit condition, which would mean that the prohibition on initiation of activities before obtaining all necessary Clean Water Act authorizations and certifications would be independently enforceable under SMCRA.

Proposed 30 CFR 780.28(c) and (d) and 784.28(c) and (d) would replace the requirement in existing 30 CFR 816.57(a) and 817.57(a) that the regulatory authority make the finding specified in paragraph (a)(1) of those rules before authorizing activities that would disturb the surface of lands within 100 feet of a perennial or intermittent stream. The rationale for this change appears in Part III of this preamble and in the following discussion of how the proposed rule changes would better implement the statutory provisions underlying the existing stream buffer zone rules.

The first SMCRA provision underlying the existing stream buffer zone rules is section 515(b)(10)(B)(i),

which, in context, provides that the performance standards adopted under SMCRA must require that surface coal mining and reclamation operations—

(10) minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation by—

(A) \* \* \*

(B)(i) conducting surface coal mining operations so as to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow, or runoff outside the permit area, but in no event shall contributions be in excess of requirements set by applicable State or Federal law.

\* \* \* \* \*

The second provision, section 515(b)(24), requires that surface coal mining and reclamation operations be conducted in a manner that—

to the extent possible using the best technology currently available, minimize[s] disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve[s] enhancement of such resources where practicable.

The common thread in both provisions is the requirement for use of the *best technology currently available* to achieve the requirements of those provisions *to the extent possible*.

The existing stream buffer zone rules at 30 CFR 816.57 and 817.57 manifest an assumption that maintenance of an undisturbed 100-foot buffer around perennial and intermittent streams is the best technology currently available to achieve the sediment control and fish and wildlife protection requirements of sections 515(b)(10)(B)(i) and (24) with respect to those streams. However, that specificity is inconsistent with the concept of best technology currently available, which is inherently flexible, as discussed below. Appropriate measures may vary from site to site and may change over time in concert with advances in technology and scientific knowledge.

Therefore, we propose to revise our rules to allow the regulatory authority to modify the prohibition on disturbances to the surface of land within 100 feet of waters of the United States. That modification would apply in situations in which the applicant proposes (and the regulatory authority approves) alternative methods of implementing the requirement to use the best technology currently available to the extent possible. Under proposed 30 CFR 780.28(c) and (d) and 784.28(c) and (d), the regulatory authority may approve a

lesser buffer, or the use of a technique that does not involve the maintenance of any buffer, whenever the permit applicant demonstrates that a lesser buffer or the use of alternative mining or reclamation techniques would constitute the best technology currently available to (1) prevent the contribution of additional suspended solids to streamflow or runoff outside the permit area to the extent possible, and (2) minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values to the extent possible. The latter two requirements correspond to the two statutory requirements that have historically been described as the basis for the existing stream buffer zone rules and their predecessors. Under the proposed rules, the regulatory authority also would have to first find that the proposed techniques would be no less effective in meeting the requirements of the regulatory program than the prohibition in 30 CFR 816.57(a) or 817.57(a) on activities that would disturb the surface of lands within 100 feet of waters of the United States.

Our proposed approach also is consistent with the definition of “best technology currently available” at 30 CFR 701.5. In relevant part, the definition provides that, “[w]ithin the constraints of the permanent program, the regulatory authority shall have the discretion to determine the best technology currently available on a case-by-case basis, as authorized by the Act and this chapter.”

In concert with this change, we propose to remove the provision in existing 30 CFR 816.57(a)(1) and 817.57(a)(1) that specifies that, before authorizing an activity closer than 100 feet to a perennial or intermittent stream, the regulatory authority must find that the activity will not cause or contribute to the violation of applicable State or Federal water quality standards and will not adversely affect the water quantity and quality or other environmental resources of the stream. That requirement has no direct counterpart in either section 515(b)(10)(B)(i) or section 515(b)(24) of SMCRA, which, as previously discussed, are the two provisions of SMCRA that form the basis for the buffer zone rules.

We acknowledge that the introductory language of sections 515(b)(10) and 516(b)(9) of SMCRA provides that performance standards for surface coal mining operations must include a requirement for the minimization of disturbances to the quality and quantity (or, in the case of section 516(b)(9), just the quantity) of water in surface and

ground water systems. However, that language does not stand alone as an independent requirement. Instead, when read in its entirety, section 515(b)(10) provides that the requirement for minimization of disturbances to water quality and quantity must be achieved by implementation of the measures and techniques described in subparagraphs (A) through (F) of section 515(b)(10). Similarly, section 516(b)(9) provides that the requirement for minimization of disturbances to water quantity must be achieved by implementation of subparagraphs (A) and (B) of section 516(b)(9).

In addition, sections 515(b)(10)(B)(i) and 516(b)(9)(B) refer only to the prevention of additional contributions of suspended solids. While those paragraphs provide that contributions of suspended solids to streamflow must not be in excess of requirements set by applicable State or Federal law, they do not mention any other water quality parameter. Therefore, that provision by itself does not authorize the required finding in existing 30 CFR 816.57(a)(1) and 817.57(a)(1) that we propose to remove. Furthermore, the SMCRA regulatory authority is not necessarily in the best position to determine whether a proposed activity will cause or contribute to a violation of applicable State or Federal water quality standards for any parameter. Those standards and parameters are established and implemented under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*), not SMCRA, and are sometimes administered by an agency other than the SMCRA regulatory authority. Under 30 CFR 780.18(b)(9) and 784.13(b)(9), the SMCRA permit application must include a description of the steps to be taken to comply with the requirements of the Clean Air Act (42 U.S.C. 7401 *et seq.*), the Clean Water Act (33 U.S.C. 1251 *et seq.*), and other applicable air and water quality laws and regulations, but there is no requirement that the SMCRA regulatory authority pass judgment on the adequacy of that description or on the adequacy of the steps that the applicant proposes to take.

In addition, the absolute nature of the “will not adversely affect” language of existing 30 CFR 816.57(a)(1) and 817.57(a)(1) is inconsistent with paragraphs (b)(10)(B)(i) and (24) of section 515 of the Act, both of which provide that surface coal mining operations must be conducted to meet the requirements of those paragraphs “to the extent possible” using the “best technology currently available.” The appropriate standard under section 515(b)(24) is *minimization* of adverse

impacts on fish, wildlife, and related environmental values, not absolute avoidance of all adverse effects.

As discussed more fully in Part III.C. of this preamble, the preamble to the existing stream buffer zone rules (“the 1983 preamble”) recognizes that the protection afforded by those rules need not be absolute. It acknowledges that some adverse impacts on hydrology and fish, wildlife, and related environmental values are unavoidable because of the nature of surface coal mining operations. Furthermore, the 1983 preamble states that “OSM recognizes that some surface mining activities can be conducted within 100 feet of a perennial or an intermittent stream without causing *significant* adverse impacts on the hydrologic balance and related environmental values,” thus implying that some adverse impacts would occur. 48 FR 30313, col. 1, June 30, 1983, emphasis added. Similarly, “final § 816.57 is intended to protect *significant* biological values in streams.” *Id.*, col. 3, emphasis added. And, with respect to stream diversions, the 1983 preamble specifies that—

Alteration of streams may have adverse aquatic and ecological impacts on both diverted stream reaches and other downstream areas with which they merge. However, final § 816.57(a) will *minimize* these impacts \* \* \*.

*Id.* at 30315, col. 1, emphasis added.

Our proposed removal of the requirement in existing 30 CFR 816.57(a)(1) and 817.57(a)(1) for a finding concerning applicable State or Federal water quality standards would not authorize activities that would constitute or result in a violation of State or Federal water quality standards. Section 702(a)(2) of SMCRA provides that nothing in SMCRA may be construed as superseding, amending, modifying, or repealing the Clean Water Act, its implementing regulations, State laws enacted pursuant to the Clean Water Act, or other Federal laws relating to preservation of water quality. In addition, our regulations at 30 CFR 816.42 and 817.42 require that discharges of water from disturbed areas “be made in compliance with all applicable State and Federal water quality laws and regulations.” We seek comment on whether we should amend 30 CFR 816.42 and 817.42, which currently address only discharges of water, to include a paragraph specifying, for informational purposes, that discharges of dredged or fill materials in waters of the United States must comply with all applicable State and Federal requirements.

#### *D. Section 780.35: Disposal of Excess Spoil From Surface Mines*

For the reasons discussed in Part IV of this preamble, we propose to revise 30 CFR 780.35 by adding several new requirements (in paragraphs (a)(1) through (4)) for permit applications for operations that propose to generate excess spoil. First, under proposed paragraph (a)(1), each application for an operation that would generate excess spoil must include a demonstration, prepared to the satisfaction of the regulatory authority, that the operation has been designed to minimize the volume of excess spoil to the extent possible, thus ensuring that as much spoil as possible is returned to the mined-out area. The demonstration must take into consideration applicable regulations concerning restoration of the approximate original contour, safety, stability, and environmental protection and the needs of the proposed postmining land use. Some or all of those factors may limit the amount of spoil that can be returned to the mined-out area, especially the requirements related to safety, stability, and postmining land use. Also, if the regulatory authority does not approve the proposed postmining land use, the applicant and the regulatory authority will need to revisit the demonstration to determine whether it must be revised to reflect the needs and attributes of the postmining land use that is finally approved.

Second, proposed paragraph (a)(2) requires that the application include a demonstration that the designed maximum cumulative volume of all proposed excess spoil fills within the permit area is no larger than the capacity needed to accommodate the anticipated cumulative volume of excess spoil that the operation will generate.

The goal of both requirements is to minimize fill footprints and thus minimize disturbances of forest, streams, and riparian vegetation, consistent with the requirement in sections 515(b)(24) and 516(b)(11) of SMCRA to minimize disturbances of and adverse impacts to fish, wildlife, and related environmental values to the extent possible using the best technology currently available.

Third, proposed paragraph (a)(3)(i) provides that each application must include a description of all excess spoil disposal alternatives considered and an analysis of the environmental impacts of those alternatives. The analysis must consider impacts to both terrestrial and aquatic ecosystems. The alternatives must vary with respect to the number,

size, location, and configuration of proposed fills to ensure consideration of a reasonable range of alternatives and potential environmental impacts. For example, depending on the topography and geology of the area, the analysis could compare the impacts of constructing a few large excess spoil fills versus a greater number of small fills. In addition, the quality of the receiving waters must be taken into consideration in that it may be environmentally preferable to concentrate fills and their impacts in watersheds with the lowest water quality, to the extent that it is possible to do so.

When the disposal method would involve placement of excess spoil in waters of the United States, proposed paragraph (a)(3)(ii) requires that the analysis performed under paragraph (a)(3)(i) include an evaluation of the short-term and long-term impacts of each alternative on the aquatic ecosystem, both individually and on a cumulative basis. The analysis must consider impacts on the physical, chemical, and biological characteristics of downstream flows, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, the degree to which the excess spoil may introduce or increase contaminants, the effects on aquatic organisms, and the extent to which wildlife is dependent upon those organisms.

Proposed paragraph (a)(3)(ii) also provides that, if the applicant must prepare an analysis of alternatives for the proposed excess spoil fill under 40 CFR 230.10, which sets forth requirements for individual permits for placement of fill material in waters of the United States under section 404 of the Clean Water Act, 33 U.S.C. 1344, the application may initially include a copy of that analysis in lieu of the analysis of alternatives required under proposed paragraph (a)(3). The regulatory authority then must determine the extent to which the Clean Water Act analysis satisfies the requirement for an analysis of alternatives under paragraph (a)(3). When OSM is the regulatory authority, we will coordinate with the Corps of Engineers in conducting any necessary analysis of alternatives under the National Environmental Policy Act.

Proposed paragraph (a)(3)(iii) specifies that, to the extent possible, the applicant must select the alternative that would have the least overall adverse environmental impact, including adverse impacts on water quality and aquatic ecosystems. If another alternative considered would be more environmentally protective than

the alternative selected by the applicant, the application must demonstrate, to the satisfaction of the regulatory authority, that implementation of the more environmentally protective alternative is not possible. The rule clarifies that an alternative is possible if it is capable of being done after consideration of cost, logistics, and available technology, and that the least costly alternative may not be selected at the expense of environmental protection solely on the basis of cost.

The alternative selected need not necessarily be the one with the least adverse impact to aquatic ecosystems. Under 40 CFR 230.10(a), which is part of the Clean Water Act Section 404(b)(1) Guidelines, no discharge of dredged or fill material may be permitted if there is a practicable alternative to the proposed discharge that would have less adverse impact to the aquatic ecosystem, "so long as the alternative does not have other significant adverse environmental consequences." In other words, if the alternative with the least adverse impact to the aquatic ecosystem has other significant adverse environmental impacts, the Clean Water Act rules allow selection of a different alternative.

Parts III and IV of this preamble explain how the requirements that we are proposing in paragraph (a)(3) are consistent with SMCRA. In essence, the new requirements would, in part, implement sections 515(b)(24) and 516(b)(11) of SMCRA, which provide that surface coal mining and reclamation operations must use the best technology currently available to minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values to the extent possible. The new requirements would achieve this goal by requiring that the permit applicant take environmental factors into consideration when locating and designing excess spoil fills and by requiring that the permit applicant demonstrate that the proposed operation has been designed using the best technology currently available to minimize adverse environmental impacts to land and waters and related environmental values to the extent possible. The phrase "to the extent possible," which appears in the statutory provisions underlying these proposed rules, connotes an element of both economic and technological feasibility, although we do not interpret that phrase as authorizing selection of the least expensive alternative at the expense of environmental protection solely on the basis of cost. See Parts VI.K. and VI.L. of this preamble for further discussion of the meaning of "to the extent possible" and "best

technology currently available," respectively. We seek comment on whether this approach is an appropriate interpretation of the phrase "to the extent possible" in sections 515(b)(10)(B)(i), 515(b)(24), 516(b)(9)(B), and 516(b)(11) of SMCRA.

We are proposing these rule changes to improve the analysis of permit applications and permitting decisions under SMCRA. However, these changes also may facilitate achieving the coordinated processing of coal mining permit applications in accordance with a memorandum of understanding entitled "Memorandum of Understanding among the U.S. Army Corps of Engineers, the U.S. Office of Surface Mining, the U.S. Environmental Protection Agency, and the U.S. Fish and Wildlife Service for the Purpose of Providing Concurrent and Coordinated Review and Processing of Surface Coal Mining Applications Proposing Placement of Dredged and/or Fill Material in Waters of the United States," which took effect February 8, 2005. For example, the information and analysis that the permit applicant must submit under the proposed rule may assist the Corps of Engineers in its review of preconstruction notifications submitted under Nationwide Permits 21, 49, or 50, or, if an individual permit is needed under section 404 of the Clean Water Act, compliance with the Section 404(b)(1) Guidelines at 40 CFR part 230 concerning placement of dredged or fill materials in waters of the United States.

Fourth, proposed paragraph (a)(4) provides that each application must include a description of the steps that the permit applicant proposes to take to avoid adverse environmental impacts that may result from the construction of fills or, if avoidance is not possible, to minimize those impacts. This requirement applies to construction, maintenance, and reclamation of the alternative selected under proposed paragraph (a)(3). It also would implement, in part, the sedimentation prevention requirements of sections 515(b)(10)(B)(i) and 516(b)(9)(B) of SMCRA and the fish, wildlife, and related environmental value protection requirements of sections 515(b)(24) and 516(b)(11) of SMCRA. We anticipate that the steps mentioned in proposed paragraph (a)(4) would include provisions in the operation plan to require that, when consistent with prudent engineering practice and applicable regulatory requirements, excess spoil placement begin at the highest elevation of the planned fill and proceed down the valley to the toe of the fill, thus minimizing both impacts to waters of the United States and the area

affected in the event that the full design capacity of the fill is not needed because of changes in mining plans or other reasons. We seek comment on whether this approach should be incorporated into the rule language.

We also propose to substantially reorganize and revise 30 CFR 780.35 for clarity and to incorporate permitting requirements that are currently found in 30 CFR 816.71, which contains the performance standards for excess spoil disposal.

Proposed paragraph (a)(5) requires that each application for an operation that proposes to generate excess spoil include maps and cross-section drawings showing the location of all proposed disposal sites and structures. It also requires that fills be located on the most moderately sloping and naturally stable areas available, unless the regulatory authority approves a different location based upon the alternatives analysis under proposed paragraph (a)(3) or other factors, taking into account other requirements of the Act and regulations. When possible, fills must be placed upon or above a natural terrace, bench, or berm if that location would provide additional stability and prevent mass movement.

The requirement for maps and cross-section drawings currently appears in the first sentence of existing 30 CFR 780.35(a), while the fill location requirements in proposed paragraph (a)(5) are currently found in existing 30 CFR 816.71(c). We believe that those location requirements are more logically included as part of the planning and design requirements in the permitting regulations rather than as part of the performance standards. In addition, we propose to modify the requirement in the existing rule that fills be located on the most moderately sloping and naturally stable areas available. The proposed rule allows the regulatory authority to approve different locations, based upon the analysis of alternatives required under proposed paragraph (a)(3) and other relevant factors. This change is needed to ensure that the analysis of alternatives and consideration of environmental impacts are a meaningful part of the site selection process. The proposed change is consistent with section 515(b)(22)(E) of SMCRA, which requires that excess spoil be placed "upon the most moderate slope among those upon which, in the judgment of the regulatory authority, the spoil could be placed in compliance with all the requirements of the Act." One of the requirements of the Act is the provision in section 515(b)(24) specifying that surface coal mining and reclamation operations must

be conducted so as to minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available. Implementation of that requirement may entail placement of spoil on slopes other than the most moderate ones available.

Proposed paragraph (a)(6) requires that an application for an operation that would generate excess spoil include detailed design plans for each excess spoil disposal structure, prepared in accordance with the requirements of sections 780.35 and 816.71 through 816.74. These requirements correspond to the first sentence of existing section 780.35(a), with the addition of a cross-reference to section 780.35 in recognition of the proposed revisions to that section. The first sentence of existing section 780.35(a) also includes a requirement for appropriate maps and cross-section drawings, which we propose to move to section 780.35(a)(5). Proposed paragraph (a)(6) also includes a requirement to design the fill and appurtenant structures using current prudent engineering practices and any additional design criteria established by the regulatory authority. This requirement is not new. It currently appears in the first sentence of existing 30 CFR 816.71(b)(1). We propose to move it to 30 CFR 780.35(a)(6) because it is a design requirement, not a performance standard.

Proposed paragraph (a)(7) requires that the application include the results of a geotechnical investigation of each proposed excess spoil disposal site, with the exception of those sites at which spoil will be placed only on a pre-existing bench under 30 CFR 816.74. This requirement currently appears in existing section 780.35(b). The proposed rule retains the existing requirements for the contents of the geotechnical investigation. Currently located at 30 CFR 780.35(b)(1) through (5), these requirements appear as 30 CFR 780.35(a)(7)(i) through (v) in the proposed rule. We also propose to shift the requirement to conduct sufficient foundation investigations from existing 30 CFR 816.71(d)(1) to 30 CFR 780.35(a)(7). This shift is consistent with our effort to consolidate design requirements in the permitting rules rather than splitting them between the permitting rules and the performance standards. The foundation investigation is an element of the geotechnical investigation.

Proposed paragraph (a)(8) requires that each application include plans for the construction, operation, maintenance, and reclamation of all excess spoil disposal structures (fills) in

accordance with the requirements of 30 CFR 816.71–816.74. This requirement corresponds to a similar provision in existing 30 CFR 780.35(a). However, the existing rule requires plans for the “removal, if appropriate, of the site and structures.” Because excess spoil fills are permanent, it is not appropriate to include plans for their removal in the application. Consequently, we propose to replace the requirement for plans for removal of the fills with a requirement for plans for their reclamation, which would consist of final site preparation and revegetation consistent with the approved postmining land use.

Proposed paragraph (a)(9) combines overlapping requirements of existing 30 CFR 780.35(c) and 816.71(d)(2) concerning application and design requirements for keyway cuts or rock-toe buttresses. We are not proposing any substantive changes.

Proposed paragraph (b) requires that the application include a certification by a qualified registered professional engineer experienced in the design of earth and rock fills that the design of all fills and appurtenant structures meets the requirements of 30 CFR 780.35. This requirement currently appears in the second sentence of existing 30 CFR 816.71(b)(1). We propose to move it to section 780.35 consistent with our effort to consolidate design requirements in the permitting rules rather than splitting them between the permitting rules and the performance standards. We are not proposing any substantive changes to this provision.

#### *E. Section 784.19: Disposal of Excess Spoil From Underground Mines*

Existing 30 CFR 784.19 applies the same fill construction requirements to both underground development waste and excess spoil. However, on September 26, 1983 (48 FR 44006), we adopted rules that classify underground development waste as coal mine waste, which means that fills constructed of underground development waste must adhere to the requirements for refuse piles instead of those applicable to excess spoil fills. Consequently, we propose to revise section 784.19 to apply only to the disposal of excess spoil, consistent with the revised definitions and performance standards that we adopted on September 26, 1983. For the same reason, we propose to replace the current section title, “Underground Development Waste,” with “Disposal of Excess Spoil.” We also propose to eliminate all references to underground development waste because that waste would instead be regulated under the refuse pile provisions of revised section 784.16,

consistent with the 1983 rule changes to the definitions and performance standards relating to coal mine waste.

The new language of section 784.19 is identical to the language of proposed 30 CFR 780.35, which establishes permit application requirements for the disposal of excess spoil generated by surface mining activities, except that cross-references to the surface mining performance standards in part 816 are replaced by cross-references to the underground mining performance standards in part 817. In that respect, the proposed rule is similar to existing section 784.19, which incorporates the requirements of section 780.35 by cross-reference.

#### *F. Sections 816.11 and 817.11: Signs and Markers*

Existing 30 CFR 816.57(b) and 817.57(b) require that the operator mark buffer zones for perennial and intermittent streams. However, that requirement also appears in 30 CFR 816.11(e) and 817.11(e). We believe that this requirement is more logically placed in sections 816.11 and 817.11, because the title for those sections identifies them as pertaining to signs and markers. Therefore, we propose to consolidate our buffer zone marking requirements in sections 816.11(e) and 817.11(e). We also propose to revise those paragraphs to be consistent with other proposed changes to the existing stream buffer zone rules. As revised, proposed section 816.11(e) provides that the boundaries of any buffer to be maintained between surface mining activities and waters of the United States in accordance with 30 CFR 780.28 and 816.57(a) must be clearly marked to avoid disturbance by surface mining activities. Similarly, proposed section 817.11(e) provides that the boundaries of any buffer to be maintained between surface activities and waters of the United States in accordance with 30 CFR 784.28 and 817.57(a) must be clearly marked to avoid disturbance by surface operations and facilities resulting from or in connection with an underground mine. We are not proposing any substantive changes to sections 816.11(e) and 817.11(e).

#### *G. Sections 816.43 and 817.43: Diversions*

Existing 30 CFR 816.43(b)(1) and 817.43(b)(1) provide that the regulatory authority may approve diversion of perennial and intermittent streams within the permit area after making the finding relating to stream buffer zones that the diversion will not adversely affect the water quantity and quality and



related environmental resources of the stream. The referenced finding is the second part of the finding in existing 30 CFR 816.57(a)(1) and 817.57(a)(1).

We propose to replace this finding with a provision that is more consistent with the underlying provisions of SMCRA. Specifically, sections 515(b)(10), 515(b)(24), 516(b)(9), and 516(b)(11) of SMCRA do not establish a "will not adversely affect" standard. Section 515(b)(10) requires that surface coal mining and reclamation operations be conducted to "minimize the disturbances to the prevailing hydrologic balance at the mine site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation." Section 516(b)(9), which pertains to underground coal mining operations, contains similar language with the exception that it does not mention water quality. Sections 515(b)(24) and 516(b)(11) require that surface coal mining and reclamation operations be conducted to "minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values" "to the extent possible using the best technology currently available." As demonstrated by these quotes, SMCRA establishes a minimization standard rather than an absolute "will not adversely affect" standard with respect to disturbance of the hydrologic balance and adverse impacts on fish, wildlife, and related environmental values.

Consequently, we propose to revise paragraph (b) of 30 CFR 816.43(b)(1) and 817.43(b)(1) to provide that the regulatory authority may approve the diversion of perennial and intermittent streams within the permit area if the diversion is located, designed, constructed, and maintained using the best technology currently available to minimize adverse impacts to fish, wildlife, and related environmental values to the extent possible. This provision is consistent with sections 515(b)(24) and 516(b)(11) of SMCRA. Nothing in this proposed rule should be construed as superseding the performance standards for the protection of fish, wildlife, and related environmental values in 30 CFR 816.97 and 817.97 or the related permitting requirements at 30 CFR 780.16 and 784.21.

No counterpart to sections 515(b)(10) or 516(b)(9) is necessary because paragraph (a)(1) of 30 CFR 816.43 and 817.43, which applies to diversions of all types, including stream-channel diversions, already provides that "[a]ll diversions shall be designed to

minimize adverse impacts to the hydrologic balance within the permit and adjacent areas." Furthermore, paragraph (a)(2)(iii) requires that all diversions be designed, located, constructed, maintained, and used to prevent, to the extent possible, using the best technology currently available, additional contributions of suspended solids to streamflow outside the permit area." The language of that paragraph closely resembles the language of sections 515(b)(10)(B)(i) and 516(b)(9)(B) of the Act, which are two of the statutory provisions underlying the existing stream buffer zone rules.

The last sentence of existing paragraph (a)(3) of 30 CFR 816.43 and 817.43 pertains only to stream-channel diversions. Therefore, we propose to move that sentence to paragraph (b) of sections 816.43 and 817.43 because those sections contain all other performance standards that pertain only to stream-channel diversions. We propose to insert the sentence as paragraph (b)(4) of sections 816.43 and 817.43 and to redesignate existing paragraph (b)(4) as paragraph (b)(5).

The last sentence in paragraph (a)(3) of the existing rules requires that a permanent stream-channel diversion or a stream channel reclaimed after the removal of a temporary diversion be designed and constructed so as to restore or approximate the premining characteristics of the original stream channel, including the natural riparian vegetation, to promote the recovery and enhancement of the aquatic habitat. In new paragraph (b)(4), we propose to revise that sentence to specify that a permanent stream-channel diversion or a stream channel reclaimed after the removal of a temporary diversion must be designed and constructed using natural channel design techniques so as to restore or approximate the premining characteristics of the original stream channel, including the natural riparian vegetation and the natural hydrological characteristics of the original stream, to promote the recovery and enhancement of the aquatic habitat and to minimize adverse alteration of stream channels on and off the site, including channel deepening or enlargement, to the extent possible.

The new language concerning natural channel design and adverse alteration of stream channels would reinforce and clarify the meaning of the existing requirement to restore or approximate the premining characteristics of the original stream. The goals of natural channel design include creating a stream channel that will maintain the equilibrium of a natural stream, neither downcutting (degrading) nor filling in

(aggrading). A natural channel is not stable in the sense that a concrete, trapezoidal channel is stable. Depending on the stream type, a natural channel may meander, eroding and depositing sediment at natural rates as part of its dynamic equilibrium. The channel must pass the water and sediment that it receives downstream, and the channel must maintain a connection to the stream's floodplain. The new provisions are consistent with sections 515(b)(24) and 516(b)(11) of SMCRA, which require use of the best technology currently available to minimize adverse impacts to fish, wildlife, and other environmental values to the extent possible.

We seek comment on whether the proposed revisions to 30 CFR 816.43(b) and 817.43(b) are sufficient to meet the requirements of SMCRA, or whether we should also revise our permitting rules to include a requirement for submission of alternatives and an analysis of the environmental impacts of each alternative whenever the applicant proposes to mine through waters of the United States or divert perennial or intermittent streams. The requirements would be similar to the corresponding requirements for excess spoil fills and coal mine waste disposal facilities in proposed 30 CFR 780.25(d)(1) and 780.35(a)(3) for surface mines or 784.16(d)(1) and 784.19(a)(3) for underground mines. We anticipate that alternatives would vary with respect to the number of stream segments diverted, the length of segments diverted, diversion design, construction technique, location of the diversion, and whether the diversion is temporary or permanent. We invite comment on whether these alternatives are consistent with SMCRA and whether there are other alternatives that should be considered.

Finally, we propose to redesignate existing paragraph (b)(4) of sections 816.43 and 817.43 as paragraph (b)(5) and revise that paragraph to require that a qualified registered professional engineer certify the design and construction of all stream-channel restorations. The existing rule applies that requirement only to diversions of perennial and intermittent streams. We are proposing the additional requirement because stream-channel restorations are equally significant in terms of stability and environmental concerns; i.e., reconstructed stream channels should be safe and stable and should approximate premining conditions regardless of whether the channel is a diversion or a restoration of the original channel.

#### *H. Sections 816.46 and 817.46: Siltation Structures*

Paragraph (b)(2) of existing 30 CFR 816.46 and 817.46 requires that all surface drainage from the disturbed area be passed through a siltation structure before leaving the permit area. In essence, that paragraph prescribes siltation structures (sedimentation ponds and other treatment facilities with point-source discharges) as the best technology currently available for sediment control. However, existing paragraph (b)(2) was struck down upon judicial review because the court found that the preamble to the rulemaking in which it was adopted did not articulate a sufficient basis for the rule under the Administrative Procedure Act. The court stated that the preamble did not adequately discuss the benefits and drawbacks of siltation structures and alternative sediment control methods and did not enable the court "to discern the path taken by [the Secretary] in responding to commenters' concerns" that siltation structures in the West are not the best technology currently available. See *In re: Permanent Surface Mining Regulation Litigation II, Round III*, 620 F. Supp. 1519, 1566–1568 (D.D.C. July 15, 1985).

On November 20, 1986 (51 FR 41961), we suspended the rules struck down by the court. To avoid any confusion that may result from the continuing publication of those rules in the Code of Federal Regulations, we are proposing to remove paragraph (b)(2) of 30 CFR 816.46 and 817.46 and redesignate the remaining paragraphs of those sections accordingly. This action would supersede the 1986 suspension of paragraph (b)(2) of those regulations. Sections 816.45 and 817.45, which remain unchanged by this rule, set forth various measures and techniques that may constitute the best technology currently available for sediment control, although applicants and regulatory authorities are not limited to those measures and techniques.

#### *I. Sections 816.57 and 817.57: Activities in or Adjacent to Waters of the United States*

##### 1. General Description of Proposed Changes

We propose to extensively revise and reorganize 30 CFR 816.57 and 817.57 for the reasons discussed in Parts III and VI.C. of this preamble and further explained below. The existing stream buffer zone rules at 30 CFR 816.57(a) and 817.57(a) contain both permitting requirements and performance standards. The rules that we are proposing today would separate the two

for clarity and consistency. Revised sections 816.57 and 817.57 would include only performance standards. As discussed in Part VI.C. of this preamble, we propose to extensively revise the permitting elements of the existing stream buffer zone rules and move them to new sections 780.28 and 784.28.

We propose to delete the provision in existing 30 CFR 816.57(a)(2) and 817.57(a)(2) that requires the regulatory authority to make a finding that any proposed temporary or permanent stream-channel diversion will comply with 30 CFR 816.43 or 817.43. We find this provision to be unnecessary because the obligation to comply with the stream-channel diversion requirements of section 816.43 or 817.43 is independent of any cross-reference in section 816.57(a)(2) or 817.57(a)(2).

We also propose to delete existing paragraph (b) of sections 816.57 and 817.57, which provides that the area not to be disturbed must be designated as a buffer zone and marked as specified in 30 CFR 816.11 or 817.11. This deletion is not a substantive change because the requirement to mark the area to be left undisturbed also appears in 30 CFR 816.11(e) and 817.11(e), which we are proposing to revise for clarity and consistency as discussed in Part VI.F. of this preamble. Some commenters have requested that the language proposed for deletion be retained because it functions as a de facto definition of "buffer zone." We do not see the need to do so in view of the reduced usage of the term "buffer zone" in the revised rules and the fact that the term "buffer" has a commonly understood meaning for which no regulatory definition is needed because the rules do not use the term in any manner that would deviate from the dictionary definition. However, we seek comment on whether a formal regulatory definition of buffer or buffer zone would be useful.

We propose to revise 30 CFR 780.28, 784.28, 816.57, and 817.57 to apply to all waters of the United States, not just to perennial and intermittent streams as in existing 30 CFR 816.57 and 817.57. We are proposing this change because waters other than perennial and intermittent streams may be of significant value to fish and wildlife and thus should be protected in accordance with the requirements of sections 515(b)(24) and 516(b)(11) of SMCRA. The proposed change also better harmonizes the SMCRA regulatory program with regulatory programs under the Clean Water Act, especially the section 404 regulatory program, which governs placement of dredged and fill materials into waters of the United States. For further discussion of

this change, please refer to Part VI.C. of this preamble.

##### 2. Proposed Paragraph (a)

We propose to revise paragraph (a) of 30 CFR 816.57 and 817.57 to specify that the permittee or operator may not conduct surface activities that would disturb the surface of land within 100 feet, measured horizontally, of waters of the United States unless the permit authorizes the disturbance under section 780.28 or 784.28 or unless the activities are allowed under proposed 30 CFR 816.57(b) or 30 CFR 816.57(b). We propose to retain the 100-foot buffer requirement in paragraph (a) of the existing rules, but all other provisions of existing paragraph (a) would be modified, deleted, or moved to 30 CFR 780.28 and 784.28 (see Part VI.C. of this preamble).

##### 3. Proposed Paragraph (b)

Proposed paragraph (b) provides that the prohibition in paragraph (a) does not apply to the following activities:

- (1) Mining through waters of the United States;
- (2) Placement of bridge abutments, culverts, or other structures in or near waters of the United States to facilitate crossing of those waters;
- (3) Construction of sedimentation pond embankments in waters of the United States; and
- (4) Construction of excess spoil fills and coal mine waste disposal facilities in waters of the United States.

Proposed paragraph (b) also specifies, for purposes of clarity, that persons conducting the activities listed in paragraphs (b)(1) through (4) must comply with all other applicable requirements of the regulatory program. Paragraph (b)(1) further emphasizes that mining through waters of the United States must comply with the requirements of 30 CFR 816.43(b) or 817.43(b) if the mining involves the temporary or permanent diversion of a perennial or intermittent stream. Paragraph (b)(2) emphasizes that the placement of bridge abutments, culverts, or other structures to facilitate the crossing of waters of the United States must comply with the road design, construction, and maintenance requirements of 30 CFR 816.150 and 816.151 or, for railroad spurs, with the support facility requirements of 30 CFR 816.181. For underground mining operations, the appropriate cross-references are 30 CFR 817.150, 817.151, and 817.181, respectively. Paragraph (b)(3) emphasizes that construction of sedimentation pond embankments in waters of the United States must comply with the requirements of 30 CFR

816.45(a) or 817.45(a). Paragraph (b)(4) emphasizes that excess spoil fills must comply with the requirements of 30 CFR 816.71(a) and (f) or 817.71(a) and (f). It also provides a reminder that coal mine waste disposal facilities must comply with the pertinent requirements of 30 CFR 816.81(a), 816.83(a), and 816.84, or, for underground mining operations, 30 CFR 817.81(a), 817.83(a), and 817.84, respectively.

Specifying the activities to which the prohibition on disturbance does not apply should reduce the confusion that has sometimes arisen regarding implementation of the existing stream buffer zone rules (see Part III.C. of this preamble). We intend that the list of activities in paragraph (b) include, among other things, the universe of activities that inherently involve placement of fill material into waters of the United States as part of surface coal mining and reclamation operations. We invite comment on whether the list meets this goal and, if not, how any other activities that involve placement of fill material into waters of the United States as part of surface coal mining and reclamation operations should be regulated under SMCRA with respect to this rule. Paragraph (a) applies to all activities within 100 feet of waters of the United States except to the extent that those activities also appear in paragraph (b). Paragraph (b) is intended to include all activities that inherently occur in waters of the United States, as well as some that inherently occur near those waters. We seek comment on whether additional rules are needed to address activities that may not be included in either paragraph (a) or (b).

Not all coal mining operations involve placement of fill material in waters of the United States or disturbance of the surface of lands within 100 feet of those waters. However, the nature of surface coal mining and reclamation operations and the topography of the areas within which those operations occur, as discussed in part below and in Part II of this preamble, mean that many operations will affect waters of the United States and adjacent areas. In general, there are five classes of activities that may take place in or near waters of the United States as part of surface coal mining and reclamation operations:

(1) Activities adjacent to, but not in, waters of the United States. Common examples of those activities include spoil and topsoil storage and the construction or use of roads or buildings.

(2) Mining through streams and other waters of the United States, with the original stream being either temporarily

or permanently diverted in accordance with 30 CFR 816.43 or 817.43.

(3) Placement of bridge abutments, culverts, or other structures in or near waters of the United States to facilitate crossing those waters.

(4) Construction of sedimentation pond embankments in waters of the United States. These embankments usually provide temporary sediment control. They must be removed unless the regulatory authority approves their retention as permanent impoundments as part of the postmining land use.

(5) Activities that permanently fill portions of a stream channel or other waters of the United States; i.e., construction of excess spoil fills or coal mine waste disposal facilities in waters of the United States.

Neither SMCRA nor the Clean Water Act precludes any of the activities listed above, provided the activities comply with all applicable requirements of those laws and their implementing regulations. Part III.A. of this preamble explains the extent to which either SMCRA or its legislative history contemplates the activities listed above. Specifically, section 515(b)(22)(D) mentions the construction of excess spoil fills in areas containing natural watercourses, springs, and wet-weather seeps. In addition, the legislative history of SMCRA indicates that Congress anticipated the continued construction of coal mine waste impoundments in streams. As discussed in Part III.C. of this preamble, Congress, in developing the legislation that ultimately became SMCRA, specifically considered and rejected inclusion of an absolute prohibition on disturbance of land within 100 feet of certain waters of the United States. While we subsequently adopted stream buffer zone rules as part of our regulations implementing SMCRA, those rules did not operate as an absolute prohibition on disturbance of the buffer zone. In addition, as discussed in Part III.D. of this preamble, we and the states have historically interpreted the existing stream buffer zone rules as allowing placement of fill material in waters of the United States, subject to approval of that placement under the Clean Water Act. The rules that we are proposing today would remove any lingering ambiguity regarding this interpretation.

The existing stream buffer zone rules effectively prescribe maintenance of a 100-foot undisturbed zone between mining activities and streams as the best technology currently available to fulfill the sediment control and fish and wildlife protection requirements of sections 515(b)(10)(B)(i), 515(b)(24), 516(b)(9)(B), and 516(b)(11) of SMCRA.

However, the concept of a buffer zone as the best technology currently available is best suited to activities in the first category because those activities do not require disturbance of the streambed or other waters or immediately adjacent lands. By contrast, all activities in the other four categories necessarily occur within or immediately adjacent to the streambed or other waters, which means that an undisturbed buffer between those activities and the stream or other waters inherently cannot be maintained. Consequently, paragraphs (b)(1) through (4) of proposed 30 CFR 816.57 and 817.57 exempt those four categories of activities from the prohibition in paragraph (a) on disturbance of the buffer zone.

Instead, proposed 30 CFR 780.28(d) and 784.28(d) provide that the permit applicant must demonstrate (and the regulatory authority must find) that other measures and techniques will meet the requirement to use the best technology currently available to prevent offsite sedimentation and to minimize adverse impacts to fish, wildlife, and related environmental values. Paragraph (c) of proposed 30 CFR 816.57 and 817.57 also includes provisions reiterating that the permittee must comply with all other permitting requirements and performance standards relating to implementation of the statutory requirements underlying this proposed rule and the existing stream buffer zone rules.

SMCRA does not specifically contemplate every activity listed in paragraphs (b)(1) through (4) of the proposed rules. However, as previously noted, those activities are sometimes necessary for the conduct of certain surface coal mining operations. In those situations, the purpose of SMCRA as expressed in section 102(f) must be taken into consideration. That paragraph specifies that one of the purposes of SMCRA is to—

(f) assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy.

Under section 201(c)(2), we have the authority to publish "such rules and regulations as may be necessary to carry out the purposes and provisions of this Act."

Proposed paragraph (b) of 30 CFR 816.57 and 817.57 is intended to strike the balance to which section 102(f) refers. First, it facilitates energy production by providing an exception from the prohibition on conducting

activities that would disturb the surface of lands within 100 feet of waters of the United States. Second, it facilitates environmental protection by limiting the exception to those activities that are essential to the conduct of surface coal mining operations and by requiring that operations availing themselves of the exception adopt other measures to comply with the sedimentation control and fish and wildlife protection requirements of SMCRA.

The preceding paragraphs set forth the basis and purpose of proposed paragraph (b). We are providing additional descriptions and discussion of each proposed exception below. To the extent that the discussion identifies selected other SMCRA regulatory requirements that apply to those activities or structures, the listing of applicable regulatory requirements is by no means exhaustive.

#### Proposed Paragraph (b)(1): Mining Through Waters of the United States

Mining through waters of the United States is an activity that we propose to categorize as exempt from the prohibition on disturbance of the surface of lands within 100 feet of waters of the United States because it is not possible to maintain an undisturbed buffer around the original waters when mining through a stream or other waters of the United States. The permittee must comply with the requirements of 30 CFR 816.43(b) or 817.43(b) if the mining involves the permanent or temporary diversion of a perennial or intermittent stream. Part VI.G. of this preamble explains how we propose to revise 30 CFR 816.43 and 817.43 to incorporate provisions corresponding to those of existing 30 CFR 816.57(a)(1) and 817.57(a)(1) and how those provisions, as revised, in combination with existing provisions of 30 CFR 816.43 and 817.43, better reflect the statutory provisions underlying the existing stream buffer zone rules.

#### Proposed Paragraph (b)(2): Structures for Crossing Waters of the United States

Our existing regulations at 30 CFR 816.151(d)(6) and 817.151(d)(6) contain standards governing the types of structures that primary mine roads may use to cross perennial and intermittent streams. Any low-water crossings must be designed, constructed and maintained to prevent erosion of the structure or the streambed and additional contributions of suspended solids to streamflow. Sections 816.151(c)(2) and 817.151(c)(2) prohibit the use of stream fords for primary roads unless they are approved by the regulatory authority as temporary routes

during road construction. All mine access and haul roads, whether primary or not, must comply with 30 CFR 816.150(b) or 817.150(b). Those regulations include language similar to the sedimentation control and fish and wildlife protection requirements of sections 515(b)(10)(B)(i), 515(b)(24), 516(b)(9)(B), and 516(b)(11) of SMCRA.

Also, under our existing regulations, support facilities, which may include railroads, must comply with 30 CFR 816.181 and 817.181. Paragraph (b) of 30 CFR 816.181 and 817.181 includes language similar to the sedimentation control and fish and wildlife protection requirements of sections 515(b)(10)(B)(i), 516(b)(9)(B), 515(b)(24), and 516(b)(11) of SMCRA.

Proposed paragraph (b)(3): Sedimentation pond embankments in waters of the United States

Both the 1979 and 1983 versions of our permanent regulatory program regulations prohibit the placement of sedimentation ponds in perennial streams unless approved by the regulatory authority. See 30 CFR 816.46(a)(2) (1979) and 816.46(c)(1)(ii) (1983). However, the preamble to the 1979 rules explains that construction of sedimentation ponds in streams typically is a necessity in steep-slope mining conditions:

Sedimentation ponds must be constructed prior to any disturbance of the area to be drained into the pond and as near as possible to the area to be disturbed. [Citation omitted.] Generally, such structures should be located out of perennial streams to facilitate the clearing, removal and abandonment of the pond. Further, locating ponds out of perennial streams avoids the potential that flooding will wash away the pond. However, under design conditions, ponds may be constructed in perennial streams without harm to public safety or the environment. Therefore, the final regulations authorize the regulatory authority to approve construction of ponds in perennial streams on a site-specific basis to take into account topographic factors. [Citation omitted.]

\* \* \* \* \*

Commenters suggested allowing construction of sedimentation ponds in intermittent and perennial streams. Because of the physical, topographic, or geographical constraints in steep-slope mining areas, the valley floor is often the only possible location for a sediment pond. Since the valleys are steep and quite narrow, dams must be high and must be continuous across the entire valley in order to secure the necessary storage.

\* \* \* \* \*

The Office recognizes that mining and other forms of construction are presently undertaken in very small perennial streams. Many Soil Conservation Service (SCS) [now the Natural Resources Conservation Service]

structures are also located in perennial streams. Accordingly, OSM believes these cases require thorough examination. Therefore, the regulations have been modified to permit construction of sedimentation ponds in perennial streams only with approval by the regulatory authority.

44 FR 15159-60, March 13, 1979.

In short, sedimentation ponds must be constructed where there is sufficient storage capacity, which, in narrow valleys lacking natural terraces, usually means in the stream.

A letter dated March 1, 2006, from Benjamin Grumbles, Assistant Administrator of the Environmental Protection Agency, to John Paul Woodley, Assistant Secretary of the Army (Civil Works), confirms that this practice also is acceptable under the Clean Water Act for surface coal mining operations in the Appalachian Mountains. It further states that, under the Clean Water Act, the stream segment between the mining activity (the toe of the fill, in the situation addressed by the letter) and the sedimentation pond will be considered part of the treatment system, not waters of the United States. The sedimentation pond must be constructed as close to the toe of the fill as practicable to minimize temporary adverse environmental impacts associated with construction and operation of the waste treatment system. As a condition of approval, the Corps also requires that the stream segment be restored as soon as the mining operation is completed and the pond is no longer needed for treatment purposes. At that time, the stream segment will once again be classified as waters of the United States. However, under SMCRA, the pond may be retained as a permanent impoundment if approved by the regulatory authority in accordance with the criteria in 30 CFR 816.49(b) or 817.49(b).

We believe that the existing rules at 30 CFR 816.46(c)(1)(ii) and 817.46(c)(1)(ii), can be applied in a manner consistent with the March 1, 2006, letter from the Environmental Protection Agency discussed above. In particular, 30 CFR 816.46(c)(1)(ii) and 817.46(c)(1)(ii) require that all sedimentation ponds be placed as near as possible to the disturbed area that they serve. We interpret this provision as meaning that sedimentation ponds collecting runoff from excess spoil fills must be constructed as close to the toe of the fill as possible. We also believe that application of the existing rules in this manner will properly implement the intent of Congress in enacting SMCRA, as expressed in section 102(f) of the Act, which provides that one of

the purposes of the Act is to strike a balance between energy production and environmental protection. However, we seek comment on whether it would be appropriate or helpful to revise those rules by replacing the term “perennial streams” with “waters of the United States” or whether we should more clearly specify the conditions under which the regulatory authority may approve placement of sedimentation ponds in perennial streams or other waters of the United States.

#### Proposed Paragraph (b)(4): Construction of Excess Spoil Fills and Coal Mine Waste Disposal Facilities in Waters of the United States

Part III of this preamble explains the rationale for this exemption. As discussed in Parts IV, VI.B., VI.D., VI.E., and VI.J., we are proposing to revise our rules to require that, to the extent possible using the best technology currently available, operations be designed and constructed to minimize both the creation of excess spoil and the adverse environmental impacts that may result from excess spoil and coal mine waste disposal facilities. Proposed 30 CFR 780.35(a) and 784.19(a) require the applicant to demonstrate to the satisfaction of the regulatory authority that the operation has been designed to minimize the generation of excess spoil to the extent possible, taking into consideration applicable regulations concerning approximate original contour restoration, safety, stability, and environmental protection and the needs of the proposed postmining land use. Under the proposed rules, the applicant also must demonstrate that the designed maximum cumulative volume of all excess spoil fills proposed for the operation is no larger than needed to accommodate the anticipated volume of excess spoil that the operation will generate. In addition, the proposed rules require that the applicant analyze the environmental impacts of a reasonable range of alternatives for excess spoil disposal facilities, including varying the size, number, configuration, and location of fills. The applicant must select the alternative with the least overall adverse environmental impact or demonstrate, to the satisfaction of the regulatory authority, why implementation of that alternative is not possible.

With respect to coal mine waste, proposed 30 CFR 780.25(d) and 784.16(d) require that the applicant consider and evaluate the viability and environmental impacts of a reasonable range of disposal methods and alternative locations for refuse piles and coal mine waste impoundments. The

applicant must select the alternative with the fewest overall adverse environmental impacts or demonstrate, to the satisfaction of the regulatory authority, why implementation of that alternative is not possible.

#### 4. Proposed Paragraph (c)

Proposed paragraph (c) of 30 CFR 816.57 provides that the activities listed in paragraph (b); i.e., activities exempt from the prohibition on disturbance of the surface of lands within 100 feet of waters of the United States, must comply with paragraphs (b)(10)(B)(i) and (b)(24) of section 515 of the Act and the regulations implementing those provisions of the Act. Those regulations include the requirement in 30 CFR 816.41(d)(1) that surface mining activities be conducted according to the plan approved under 30 CFR 780.21(h) and that earth materials, ground-water discharges, and runoff be handled in a manner that prevents, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow outside the permit area; and otherwise prevents water pollution. They also include the requirement in 30 CFR 816.45(a) that appropriate sediment control measures be designed, constructed, and maintained using the best technology currently available to prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area. And they include the requirement in 30 CFR 816.97(a) that the operator must, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish and wildlife and related environmental values and achieve enhancement of those resources where practicable. Proposed paragraph (c) of 30 CFR 817.57 includes virtually identical requirements with the exception that it refers to paragraphs (b)(9) and (11) of section 516 of SMCRA in place of the references to section 515, and it replaces references to the surface mining regulations in parts 780 and 816 with references to the corresponding underground mining regulations in parts 784 and 817.

Proposed paragraph (c) does not impose any new requirements. We are including it to reiterate for informational purposes that an activity that is exempt from the prohibition on disturbance of the surface of lands within 100 feet of waters of the United States is not exempt from other requirements of the regulatory program.

#### 5. Proposed Paragraph (d)

Proposed paragraph (d) of 30 CFR 816.57 and 817.57 provides that a permittee may not initiate any activities under paragraph (b); i.e., activities exempt from the prohibition on disturbance of the surface of lands within 100 feet of waters of the United States, until the permittee obtains all necessary certifications and authorizations under sections 401, 402, and 404 of the Clean Water Act, 33 U.S.C. 1341, 1342, and 1344. As with proposed paragraph (c), proposed paragraph (d) does not impose any new requirements. We are including it as a reminder that, under paragraphs (a) and (a)(2) of section 702 of SMCRA, nothing in SMCRA (and, by extension, regulations adopted under SMCRA) may be construed as superseding, amending, modifying, or repealing the Clean Water Act or any state or federal rules adopted under the Clean Water Act.

As discussed in Part VI.C. of this preamble, we seek comment on whether a similar provision in proposed 30 CFR 780.28(f) and 784.28(f) should remain informational or whether we should revise our rules to require inclusion of this provision as a SMCRA permit condition, which would mean that the prohibition on initiation of activities before obtaining all necessary Clean Water Act authorizations and certifications would be independently enforceable under SMCRA.

#### *J. Sections 816.71 and 817.71: General Requirements for Disposal of Excess Spoil*

We propose to revise paragraph (a) of 30 CFR 816.71 and 817.71 by adding subparagraph (a)(4) to implement, in part, the requirements of sections 515(b)(24) and 516(b)(11) of the Act. Sections 515(b)(24) and 516(b)(11) require that surface coal mining and reclamation operations be conducted to “minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values” “to the extent possible using the best technology currently available.” The new subparagraph requires that excess spoil be placed in designated disposal areas within the permit area in a controlled manner to minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values to the extent possible using the best technology currently available. We seek comment on whether the addition of this performance standard would be a meaningful addition to our rules or whether its requirements are effectively subsumed within the permitting requirements in proposed 30 CFR

780.35 and 784.19 and the provisions of proposed 30 CFR 816.71(c) and 817.71(c).

We are not proposing any changes to subparagraph (a)(1) of existing 30 CFR 816.71 and 817.71. That subparagraph is the counterpart to sections 515(b)(10) and 516(b)(9) of SMCRA, which require in relevant part that surface coal mining and reclamation operations be conducted to minimize disturbances to the prevailing hydrologic balance at the minesite and in associated offsite areas.

As previously discussed in Parts VI.D. and VI.E. of this preamble, we propose to move paragraphs (b)(1) (design certification), (c) (location), and (d)(1) (foundation investigations) of existing 30 CFR 816.71 and 817.71 to 30 CFR 780.35 and 784.19 as part of our effort to place provisions that are solely design considerations and requirements in our permitting regulations rather than in the performance standards. We also propose to delete the last sentence of paragraph (d)(2) of existing 30 CFR 816.71 and 817.71, which requires a stability analysis for rock toe buttresses and keyway cuts, because it duplicates requirements included in both existing and proposed 30 CFR 780.35 and 784.19. Consequently, proposed 30 CFR 816.71(d) and 817.71(d) would consist only of the first sentence of existing paragraph (d)(2); i.e., it would require that keyway cuts or rock-toe buttresses be constructed to ensure fill stability when the slope in the disposal area exceeds either 2.8h:1v (36 percent) or any lesser slope designated by the regulatory authority based on local conditions.

We propose to redesignate paragraph (b)(2) of existing 30 CFR 816.71 and 817.71 as paragraph (b) of those sections and to expand its provisions to require that the fill not only be designed to attain a minimum static safety factor of 1.5 as the existing rules require, but that the fill actually be constructed to attain that safety factor. This change is consistent with section 515(b)(22)(A) of the Act, which requires that all excess spoil be placed in a way that ensures mass stability and prevents mass movement.

We propose to add a new paragraph (c) to 30 CFR 816.71 and 817.71 to require that the permittee construct the fill in accordance with the design and plans submitted under 30 CFR 780.35 or 784.19 and approved as part of the permit. This provision would emphasize that fills must be built on the sites selected under section 780.35 or 784.19 in a manner consistent with the designs submitted under those sections and approved as part of the permit.

Finally, we propose to remove 30 CFR 817.71(k), which provides that spoil resulting from face-up operations for underground coal mine development may be placed at drift entries as part of a cut-and-fill structure if that structure is less than 400 feet in length and is designed in accordance with 30 CFR 817.71. We propose to remove this paragraph because most spoil excavated as part of face-up operations and used to construct a mine bench is not excess spoil. As defined in 30 CFR 701.5, excess spoil consists of spoil material disposed of in a location outside the mined-out area, but it does not include spoil needed to achieve restoration of the approximate original contour. In most cases, spoil used to construct the bench for an underground mine will later be used to reclaim the face-up area when the underground mine is finished. That is, the bench will be regraded to cover the mine entry and eliminate any highwall once mining is completed and the bench is no longer needed for mine offices, parking lots, equipment storage, conveyor belts, and other mining-related purposes. Consequently, this paragraph of the regulations does not belong in a section devoted to disposal of excess spoil.

We are not proposing to move these requirements to another part of our rules because we do not find it necessary to impose the design requirements for excess spoil fills (which are permanent structures) on temporary spoil storage structures and support facilities, such as the benches to which 30 CFR 817.71(k) applies. Nor do we find it necessary or appropriate to limit these benches to 400 feet in length. Bench length and configuration are more appropriately determined by operational, topographic, geologic, and other site-specific considerations. However, the regulatory authority has the right to impose design and construction requirements on a case-by-case basis when it determines that those requirements are a necessary prerequisite to making the permit application approval findings specified in 30 CFR 773.15. We seek comment on (1) whether this approach is adequate to accomplish the purposes and requirements of SMCRA, (2) whether we should codify the preceding sentence concerning the right of the regulatory authority to impose requirements, or (3) whether more specific rules are needed or appropriate.

*K. What does the phrase "to the extent possible" mean in these rules?*

The requirements of sections 515(b)(10)(B)(i), 515(b)(24), 516(b)(9)(B), and 516(b)(11) of SMCRA apply "to the extent possible." Most of the rules that

we are proposing today include similar language because they are based upon those provisions of the Act. Given the wide array of circumstances to which these requirements apply and the paucity of legislative history, we have elected not to propose a definition of the phrase "to the extent possible" as part of this rulemaking (although, as discussed below, we propose to clarify that in the context of the analysis of alternatives for excess spoil fills, refuse piles, and coal mine waste impoundments, the term requires consideration of cost, logistics, and technology). Instead, we and the State regulatory authorities will continue to determine the meaning of that phrase on a case-by-case basis in a manner consistent with section 102(f) of SMCRA. That section of the Act provides that one of the purposes of SMCRA is to "assure that the coal supply essential to the Nation's energy requirements and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy."

In addition, section 515(b)(1) of SMCRA requires that surface coal mining operations be conducted "so as to maximize the utilization and conservation of the solid fuel resource being recovered so that re-affecting the land in the future through surface coal mining can be minimized." We believe that the "to the extent possible" clause in paragraphs (b)(10)(B)(i) and (24) of section 515 of SMCRA serves in part to allow balancing the environmental protection requirements of those paragraphs with the maximum coal recovery performance standard in section 515(b)(1).

Nothing in this discussion should be construed as meaning that the regulatory authority may approve use of a less environmentally protective technique or alternative solely because an applicant pleads poverty or argues that use of a less environmentally damaging technique or alternative would be more costly. To do so would be inconsistent with both the language and purpose of sections 515(b)(10)(B)(i), 515(b)(24), 516(b)(9)(B), and 516(b)(11) of SMCRA, all of which also require use of the "best technology currently available." Specifically, those provisions of the Act specify that their requirements must be achieved "to the extent possible using the best technology currently available." Persons considering a potential coal mining operation may include the costs of adopting particular technologies as one factor in determining what is possible

although they may not reject an environmentally protective alternative solely on the basis of cost. Similarly, as part of its responsibility to balance coal production with environmental protection, the regulatory authority should not rely solely upon cost considerations in determining the meaning of “to the extent possible.”

Proposed 30 CFR 780.25(d)(1), 780.35(a)(3), 780.16(d)(1), and 784.19(a)(3), require that permit applicants conduct an analysis of alternatives for excess spoil fills and coal mine waste disposal structures. Those rules provide that, to the extent possible, permit applicants must select the alternative that would have the least overall adverse environmental impact. The interpretation of “possible” required under those proposed rules is similar to the way that the term “practicable” is applied under 40 CFR 230.10(a)(2) for purposes of section 404 of the Clean Water Act. That is, the proposed rules state that an alternative is possible if it is capable of being done after consideration of cost, logistics, and available technology. The rules further clarify that the least costly alternative may not be selected under this standard at the expense of environmental protection solely on the basis of cost. We recognize that the proposed clarification is subjective and we invite comment on whether it could or should be made more objective.

On January 7, 2004, 69 FR 1036, 1047, we proposed to adopt a similar phrase (“to the maximum extent possible”) as part of 30 CFR 780.18(b)(3). Several commenters suggested that we replace “possible” with “practicable” or “technologically and economically feasible.” Other commenters stated that the proposed language was too vague, but they did not provide suggested replacement language.

In this proposed rule, we are not proposing any of the previous commenters’ suggestions for several reasons. First, “possible” is the term used in the pertinent sections of SMCRA. Therefore, it is the term that should be used in the regulations implementing those sections of the Act. Second, the replacement language suggested by several commenters is no less vague or more specific than “possible.” However, we acknowledge that a more specific approach might be desirable and we welcome additional suggestions on how we could define the phrase “to the extent possible.”

We also received a comment suggesting that, to reduce ambiguity, we propose to incorporate 40 CFR 230.70 through 230.75 (part of the Clean Water Act Section 404(b)(1) Guidelines) as part

of our rules. Our review indicates that 40 CFR 230.70 through 230.75 would have relatively little relevance to surface coal mining and reclamation operations, but we invite comment on whether incorporation of those Clean Water Act rules would be appropriate.

*L. What does the phrase “best technology currently available” mean in these rules?*

Our regulations at 30 CFR 701.5 define “best technology currently available” to mean—

equipment, devices, systems, methods, or techniques which will (a) prevent, to the extent possible, additional contributions of suspended solids to stream flow or runoff outside the permit area, but in no event result in contributions of suspended solids in excess of requirements set by applicable State or Federal laws; and (b) minimize, to the extent possible, disturbances and adverse impacts on fish, wildlife and related environmental values, and achieve enhancement of those resources where practicable. The term includes equipment, devices, systems, methods, or techniques which are currently available anywhere as determined by the Director, even if they are not in routine use. The term includes, but is not limited to, construction practices, siting requirements, vegetative selection and planting requirements, animal stocking requirements, scheduling of activities and design of sedimentation ponds in accordance with 30 CFR parts 816 and 817. Within the constraints of the permanent program, the regulatory authority shall have the discretion to determine the best technology currently available on a case-by-case basis, as authorized by the Act and this chapter.

We are not proposing to revise that definition. It is a definition that clearly embraces a wide range of activities, including those that may not be in routine use, if the regulatory authority determines they are currently available and will work. As such, it is sufficiently flexible to include new techniques developed over time that were not contemplated or in use at the time the definition was promulgated. Similarly, it is sufficiently flexible to include techniques that are not contemplated or in use today. Consequently, we cannot state with specificity what measures would constitute the best technology currently available in all situations.

Our regulations at 30 CFR 816.45 and 817.45 address sediment control measures and requirements for all surface coal mining and reclamation operations. Paragraph (a)(1) of those sections reiterates the requirements of sections 515(b)(10)(B)(i) and 516(b)(9)(B) of SMCRA concerning prevention of additional contributions of suspended solids to streamflow or runoff outside the permit area.

Paragraph (b) of those rules lists various

measures that may be employed to accomplish the sediment control requirements of paragraph (a).

At one time, paragraph (b)(2) of 30 CFR 816.46 and 817.46 prescribed siltation structures (sedimentation ponds and other treatment facilities with point-source discharges) as the best technology currently available for sediment control. However, that paragraph was struck down upon judicial review because the court found that we did not articulate a sufficient basis for the rule under the Administrative Procedure Act. In particular, the court held that the preamble to the rulemaking did not adequately discuss the benefits and drawbacks of siltation structures and alternative sediment control methods and did not enable the court “to discern the path taken by [the Secretary] in responding to commenters’ concerns” that siltation structures in the West are not the best technology currently available. See *In re: Permanent Surface Mining Regulation Litigation II, Round III*, 620 F. Supp. 1519, 1566–1568 (D.D.C. July 15, 1985). Consequently, on November 20, 1986 (51 FR 41961), we suspended the regulations that the court struck down.

On November 13, 1990 (55 FR 47430–47435), we proposed to revise 30 CFR 816.45, 817.45, 816.46(b)(2), and 817.46(b)(2) to reestablish siltation structures as the best technology currently available for sediment control on surface coal mining and reclamation operations in areas receiving more than 26 inches of average annual precipitation. Regulatory authorities in areas with less than that amount of precipitation would have been able to specify alternative sediment control measures as the best technology currently available through the program amendment process. Most commenters opposed that approach and we never adopted the proposed rule, in part because it could have inhibited the development and implementation of new and innovative practices to control sediment. We decided that the regulatory authority should retain the discretion to determine what sediment control practices constitute the best technology currently available. Our decision not to adopt the 1990 proposed rule meant that the 1986 suspension remained in place. As part of this proposed rule, we are proposing to remove the suspended rules to minimize the potential for confusion on the part of persons reading the Code of Federal Regulations.

In addition to the definition of best technology currently available in 30 CFR 701.5 and the sediment control

regulations at 30 CFR 816.45 and 817.45 discussed above, the legislative history of section 515(b)(15)(B)(i) of SMCRA provides some guidance as to what measures Congress considered to be the best technology currently available at that time to control sedimentation from minesites:

Similarly, technology exists to prevent increased sediment loads resulting from mining from reaching streams outside the permit area. Sediment or siltation control systems are generally designed on a mine-by-mine basis which could involve several drainage areas or on a small-drainage-area basis which may serve several mines. There are a number of different measures that when applied singly or in combination can remove virtually all sediment or silt resulting from the mining operation. A range of individual siltation control measures includes: erosion and sediment control structures, chemical soil stabilizers, mulches, mulch blankets, and special control practices such as adjusting the timing and sequencing of earth movement, pumping drainage, and establishing vegetative filter strips.

H.R. Rep. No. 95–218 at 114 (April 22, 1977).

Furthermore, in Directive TSR–3, “Sediment Control Using the Best Technology Currently Available,” dated November 2, 1987, we state that we anticipate “that in most cases sedimentation ponds or some other siltation structure will be BTCA [the best technology currently available]” for sedimentation control. Finally, the preamble to the 1990 proposed rule lists numerous literature resources concerning the best technology currently available for sedimentation control. See the footnotes at 55 FR 47431–47433, November 13, 1990. The preamble notes that “[t]he effectiveness of specific practices may be restricted to specific areas and be dependent upon variables such as geomorphology, hydrology, climate and engineering design.” *Id.* at 47342, col. 1.

As previously noted, SMCRA does not limit use of the term “best technology currently available” to the sediment control requirements of sections 515(b)(10)(B)(i) and 516(b)(9)(B). Sections 515(b)(24) and 516(b)(11) of SMCRA also require use of the best technology currently available to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values. Sections 515(b)(24) and 516(b)(11) are primarily implemented by 30 CFR 816.97 and 817.97, which reiterate and expand upon the statutory requirement to use the best technology currently available to protect and enhance (where practicable) fish, wildlife, and related environmental values. Like the other regulations discussed in this part of the preamble, those requirements and the

related permitting requirements at 30 CFR 780.16 and 784.21 apply to all aspects of surface coal mining and reclamation operations, including those activities that would not be subject to the prohibition on disturbance of the surface of lands within 100 feet of waters of the United States under our proposed revisions to 30 CFR 816.57 and 817.57.

The preamble to 30 CFR 816.97(a) and 817.97(a) states that those rules “allow an operator to consult any technical authorities on conservation methods to assure their compliance with the statutory requirement for use of the best technology currently available.” 48 FR 30317, June 30, 1983. We anticipate that State and Federal fish and wildlife, land management, and conservation agencies will be a useful resource in assisting the permittee and the regulatory authority in determining the best technology currently available under 30 CFR 780.16, 784.21, 816.97(a), and 817.97(a). For example, the Bureau of Land Management within the U.S. Department of the Interior has developed best management practices relating to stream crossings (see [http://www.blm.gov/wo/st/en/prog/energy/oil\\_and\\_gas/best\\_management\\_practices/technical\\_information.html](http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/best_management_practices/technical_information.html)) and the Utah Division of Oil, Gas and Mining has published “The Practical Guide to Reclamation in Utah” (see [https://fs.ogm.utah.gov/PUB/MINES/Coal\\_Related/RecMan/Reclamation\\_Manual.pdf](https://fs.ogm.utah.gov/PUB/MINES/Coal_Related/RecMan/Reclamation_Manual.pdf)). Chapter 2 of the latter document discusses stream restoration and streambank bioengineering.

Other measures that might constitute best technology currently available for both sedimentation control and minimization of adverse impacts to fish, wildlife, and related environmental values include analysis of alternatives during the mine planning process; mining and reclamation techniques, and facility construction and operational considerations. In some cases, the best technology currently available may consist primarily of minimizing the amount of land and waters affected. We anticipate that the analysis of alternatives and site selection requirements of 30 CFR 780.25(d), 784.16(d), 780.35(a), and 784.19(a) would be the primary means of demonstrating use of the best technology currently available for disposal of excess spoil and coal mine waste, although construction methodology and mining and reclamation techniques also may be significant, as discussed in Part VI.D. of

this preamble with respect to proposed 30 CFR 780.35(a)(4), for example.

## VII. Are we considering any alternatives to this proposed rule?

Yes. The draft environmental impact statement for this proposed rule includes an analysis of five rulemaking alternatives, which are summarized below. The proposed rule that we are publishing today reflects Alternative 1, which is our preferred alternative. However, we invite comment on whether we should adopt all or part of the other alternatives or variants thereof in lieu of all or part of the proposed rule.

### A. No Action Alternative

Under this alternative, we would not adopt any new or revised rules. The current regulations applicable to excess spoil generation, coal mine waste disposal, fill construction, and stream buffer zones would remain unchanged.

### B. Alternative 1: Preferred Alternative

This is the alternative that we are proposing to adopt in this proposed rule. In short, under this alternative, we would revise our rules to—

- Require the permit applicant to demonstrate that the operation has been designed to minimize the volume of excess spoil to the extent possible.
- Require that excess spoil fills be designed and constructed to be no larger than needed to accommodate the anticipated volume of excess spoil that the proposed operation will generate.
- Require that permit applicants for operations that would generate excess spoil develop various alternative excess spoil disposal plans in which the size, numbers, configuration, and locations of the fills vary; submit an analysis of the environmental impacts of those alternatives; and select the alternative with the least overall adverse environmental impact or demonstrate to the satisfaction of the regulatory authority why implementation of that alternative is not possible.
- Require that excess spoil fills be constructed in accordance with the plans approved in the permit and in a manner that minimizes disturbances to and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available.
- Require that permit applicants for operations that would include coal mine waste disposal structures identify alternative disposal methods and alternative locations for any disposal structures; analyze the viability and environmental impacts of each alternative; and select the alternative



with the least overall adverse environmental impact or demonstrate to the satisfaction of the regulatory authority why implementation of that alternative is not possible.

- Revise the stream buffer zone rules to apply to all waters of the United States and modify the permit application requirements accordingly; identify those activities that are not subject to the prohibition on conducting mining and reclamation activities on the surface of lands within 100 feet of waters of the United States; consolidate and revise requirements for stream-channel diversions in 30 CFR 816.43 and 817.43, and replace the existing findings regarding stream water quantity and quality and State and Federal water quality standards with language that better correlates with the underlying provisions of SMCRA (paragraphs (b)(10)(B)(i) and (24) of section 515 and paragraphs (b)(9)(B) and (11) of section 516).

At the suggestion of one of the agencies with which we consulted in developing our proposed rule, we also seek comment on a variant of this alternative, which, like the proposed rule, would revise the buffer zone rule to apply to all waters of the United States, not just to perennial and intermittent streams. Like the proposed rule, it would eliminate paragraph (a)(2) of existing 30 CFR 816.57 and 817.57, which contains a requirement for a finding that stream-channel diversions will comply with 30 CFR 816.43 or 817.43. This finding is unnecessary because the referenced rules already apply to all diversions, not just to stream-channel diversions. Also, as in the proposed rule, paragraph (b) of existing 30 CFR 816.57 and 817.57, which requires that buffer zones be marked, would be deleted and merged with our other signs and markers requirements at 30 CFR 816.11(e) and 817.11(e).

However, the variant otherwise would retain much of the existing stream buffer zone rule language at 30 CFR 816.57(a) and 817.57(a), with several modifications. The first modification would revise paragraph (a)(1), which currently requires that the regulatory authority find that the “mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream,” by inserting the clause “as indicated by issuance of a certification under section 401 of the Clean Water Act or a permit under section 402 or 404 of the Clean Water Act” after “State or Federal water

quality standards,” by replacing the phrase “adversely affect” with “significantly degrade,” and by replacing the phrase “of the stream” with “of the waters outside the permit area.” In addition, this variant would add a new finding that would require minimization of disturbances and adverse impacts on fish, wildlife, and other related environmental values of the waters to the extent possible using the best technology currently available.

Under the variant, the revised rule at 30 CFR 816.57 would read as follows:

(a) Except as provided in paragraph (b) of this section, no land within 100 feet of waters of the United States may be disturbed by surface mining activities.

(b) The regulatory authority may specifically authorize surface mining activities closer to, or through, waters of the United States only upon finding that those activities—

(1) Would not cause or contribute to the violation of applicable State or Federal water quality standards, as indicated by issuance of a certification under section 401 of the Clean Water Act or a permit under section 402 or 404 of the Clean Water Act;

(2) Would not significantly degrade the water quantity or quality or other environmental resources of the waters outside the permit area; and

(3) Would minimize disturbances and adverse impacts on fish, wildlife, and other related environmental values of the waters to the extent possible using the best technology currently available.

Apart from its expansion to include all waters of the United States, this variant would largely preserve the status quo in terms of application of the existing stream buffer zone rules. The revised rule language would be more consistent than the existing rule language with the historical application of the 1983 stream buffer zone rules and related appellate court decisions, which we discussed earlier in Part III.D. of this preamble. The change from “adversely affect” to “significantly degrade” would replace language of uncertain provenance with language similar to that found in the regulations at 40 CFR 230.10(c) implementing section 404 of the Clean Water Act, which pertains to placement of dredged or fill materials in waters of the United States. The proposed new finding in paragraph (a)(3) would reiterate the requirements of section 515(b)(24) of SMCRA.

This variant would include numerous references to Clean Water Act-related procedures and terminology. It would not as closely reflect the language and requirements of the underlying provisions of SMCRA as would the proposed rule. We seek comment on the benefits and drawbacks of this variant as contrasted with the buffer zone rule

changes that we are proposing. In particular, we invite comment on the extent to which our rules can or should incorporate broad references to Clean Water Act requirements and use Clean Water Act terminology in place of SMCRA terminology. We also invite comment on whether and how our preferred alternative and this variant differ in terms of impact on the ability of proposed surface coal mining and reclamation operations to qualify for a nationwide permit under section 404 of the Clean Water Act.

#### *C. Alternative 2: January 7, 2004, Proposed Rule*

Under this alternative, we would revise our regulations in a manner similar to that set forth in our January 7, 2004, proposed rule (69 FR 1036). In essence, the changes to our excess spoil regulations would be generally analogous to the changes described in Alternative 1, but we would not make similar changes to our coal mine waste disposal rules. With respect to the stream buffer zone rules, we would retain the prohibition on disturbance of land within 100 feet of a perennial or intermittent stream, but alter the findings that the regulatory authority must make before granting a variance to this requirement. The revised rule would replace the Clean Water Act-oriented findings in the existing rule with a requirement that the regulatory authority find in writing that the activities will, to the extent possible, use the best technology currently available to prevent additional contributions of suspended solids to the section of stream within 100 feet downstream of the mining activities, and outside the area affected by mining activities; and minimize disturbances and adverse impacts on fish, wildlife, and other related environmental values of the stream.

Under this alternative, the revised rule would apply to all activities. Persons seeking to conduct surface mining activities (or, for underground mines, surface activities) on the surface of lands within the buffer of protected waters would have to seek and obtain a variance from the regulatory authority in all cases. There would be no categorical exceptions for certain activities as there are under Alternative 1.

#### *D. Alternative 3: Change Only the Excess Spoil Regulations*

Under this alternative, we would revise our excess spoil regulations as described in Alternative 1. We would not revise our coal mine waste disposal

rules or the stream buffer zone regulations.

#### *E. Alternative 4: Change Only the Stream Buffer Zone Regulations*

Under this alternative, we would revise our stream buffer zone regulations as described in Alternative 1. We would not revise our excess spoil or coal mine waste disposal regulations.

### **VIII. How do I submit comments on the proposed rule?**

#### *General Guidance*

We will review and consider all comments that we receive, but the most helpful comments and the ones most likely to influence the final rule are those that include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent Federal laws or regulations, technical literature, or other relevant publications or that involve personal experience. Your comments should reference a specific portion of the proposed rule or preamble, be confined to issues pertinent to the proposed rule, explain the reason for any recommended change or objection, and include supporting data when appropriate.

Please include the rule identification number "RIN 1029-AC04" at the beginning of all written comments. We will log all comments that are received prior to the close of the comment period into the docket for this rulemaking; however, we cannot ensure that comments received after the close of the comment period (see **DATES**) or at locations other than those listed above (see **ADDRESSES**) will be included in the docket for this rulemaking or considered in the development of a final rule.

#### *Public Availability of Comments*

Before including your address, phone number, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

#### *Public Hearings*

We will hold a public hearing on the proposed rule only if we receive a request to do so from more than one person. We will announce the time, date, and address for any hearing in the **Federal Register** at least 7 days before the hearing.

If you wish to testify at a hearing please contact the person listed in **FOR FURTHER INFORMATION CONTACT**, either orally or in writing, by 4:30 p.m., Eastern time, on September 24, 2007. If no one expresses an interest in testifying at a hearing by that date, we will not hold a hearing. If only one person expresses an interest, we will hold a public meeting rather than a hearing. We will place a summary of the public meeting in the docket for this rulemaking.

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

*Public meeting:* We may hold a public meeting in place of a public hearing if there is only limited interest in a hearing. If you wish to meet with us to discuss the proposed rule, you may request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All meetings will be open to the public and, if appropriate, we will post notice of the meetings. We will include a written summary of the meeting in the docket for this rulemaking.

### **IX. Procedural Matters and Required Determinations**

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

This proposed rule is considered a "significant regulatory action" under Executive Order 12866 and is subject to review by the Office of Management and Budget (OMB) because it may raise novel legal or policy issues, as discussed in the preamble.

With respect to other determinations required under Executive Order 12866—

a. This rule would not have an annual effect of \$100 million or more on the economy. It would not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities. The revisions contained in the rule are intended to (1) minimize the adverse environmental impacts stemming from the construction of excess spoil fills and coal mine waste impoundments and fills, and (2) clarify

the circumstances in which the prohibition in the buffer zone rule applies. The revisions are not expected to have an adverse economic impact on states and Indian tribes or the regulated industry.

Some of the regulatory changes will result in an increase in the costs and burdens placed on coal operators and primacy states. We preliminarily estimate that the total annual cost increase for operators would be approximately \$240,500, while the total annual cost increase for primacy states would be approximately \$24,200. These increases are a result of the requirement to document the analyses and findings required by the revised rules. The cost increases will principally affect those coal operators and states (Kentucky, Virginia, and West Virginia) located in the steep-slope terrain of the central Appalachian coalfields, where the bulk of excess spoil is generated. Because all regulatory authorities in the Appalachian coalfields have implemented policies to minimize the volume of excess spoil disposed of outside the mined-out area, we expect no significant additional costs of implementing these regulatory changes other than those associated with the alternatives analysis required for the disposal of excess spoil and coal mine waste. Because of the preliminary nature of this assessment, the agency will conduct a more comprehensive analysis to assess the effect of this rule for the final rule stage. We request comments, specifically studies or data, that would inform the agency on the effects of this rule.

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

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

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

This proposed rule is not considered a significant energy action under Executive Order 13211. The revisions contained in this proposed rule would not have a significant effect on the supply, distribution, or use of energy.

#### *C. Regulatory Flexibility Act*

The Department of the Interior certifies that this proposed rule would 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.*). For the reasons

previously stated, the revisions would not be expected to have an adverse economic impact on the regulated industry including small entities. Further, the rule would produce no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

#### *D. Small Business Regulatory Enforcement Fairness Act*

This proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. For the reasons stated above, the proposed rule would not—

- a. Have an annual effect on the economy of \$100 million or more.
- b. Cause a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions.
- c. Have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

#### *E. Unfunded Mandates*

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

#### *F. Executive Order 12630—Takings*

Because of the nature of the rules that would be revised, the proposed rule would not have significant takings implications.

#### *G. Executive Order 13132—Federalism*

For the reasons discussed above, the proposed rule would not have significant federalism implications. Consequently, there is no need to prepare a federalism assessment.

#### *H. Executive Order 12988—Civil Justice Reform*

The Office of the Solicitor for the Department of the Interior has determined that this proposed rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

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

We have evaluated the potential effects of this proposed rule on federally recognized Indian tribes and have determined that its provisions would not have substantial direct effects on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

#### *J. Paperwork Reduction Act*

In accordance with 44 U.S.C. 3507(d), we have submitted the information collection and recordkeeping requirements of 30 CFR parts 780, 784, 816, and 817 to OMB for review and approval.

##### 30 CFR Part 780

*Title:* Surface Mining Permit Applications—Minimum Requirements for Reclamation and Operation Plan.

*OMB Control Number:* 1029–0036.

*Summary:* Sections 507 and 508 of the Act contain permit application requirements for surface coal mining activities, including a requirement that the application include an operation and reclamation plan. The regulatory authority uses this information to determine whether the proposed surface coal mining operation will achieve the environmental protection requirements of the Act and regulatory program. Without this information, OSM and state regulatory authorities could not approve permit applications for surface coal mines and related facilities.

*Bureau Form Number:* None.

*Frequency of Collection:* Once.

*Description of Respondents:*

Applicants for surface coal mining permits and state regulatory authorities.

*Total Annual Respondents:* 232

applicants and 24 state regulatory authorities.

*Total Annual Burden Hours:* 168,871.

*Non-Labor Cost Burden:* \$2,424,900.

##### 30 CFR Part 784

*Title:* Underground Mining Permit Applications—Minimum Requirements for Reclamation and Operation Plan.

*OMB Control Number:* 1029–0039.

*Summary:* Among other things, section 516(d) of SMCRA, 30 U.S.C. 1266(d), in effect requires applicants for permits for underground coal mines to prepare and submit an operation and reclamation plan for coal mining activities as part of the application. The regulatory authority uses this information to determine whether the plan will achieve the reclamation and environmental protection requirements

of the Act and regulatory program. Without this information, OSM and state regulatory authorities could not approve permit applications for underground coal mines and related facilities.

*Bureau Form Number:* None.

*Frequency of Collection:* Once.

*Description of Respondents:*

Applicants for underground coal mine permits and state regulatory authorities.

*Total Annual Respondents:* 62 applicants and 24 state regulatory authorities.

*Total Annual Burden Hours:* 21,761.

*Non-Labor Cost Burden:* \$612,106.

##### 30 CFR Parts 816 and 817

*Title:* Permanent Program Performance Standards—Surface and Underground Mining Activities.

*OMB Control Number:* 1029–0047.

*Summary:* Sections 515 and 516 of the Surface Mining Control and Reclamation Act of 1977 provides that permittees conducting coal mining and reclamation operations shall meet all applicable performance standards of the regulatory program approved under the Act. The information collected is used by the regulatory authority in monitoring and inspecting surface coal mining activities to ensure that they are conducted in compliance with the requirements of the Act.

*Bureau Form Number:* None.

*Frequency of Collection:* Once, on occasion, quarterly and annually.

*Description of Respondents:* Coal mine operators, permittees, permit applicants, and state regulatory authorities.

*Total Annual Respondents:* 4,764 permittees and 24 state regulatory authorities.

*Total Annual Burden Hours:* 1,039,351.

*Non-Labor Cost Burden:* \$371,046.

Comments are invited on:

(a) Whether the proposed collection of information is necessary for SMCRA regulatory authorities to implement their responsibilities, including whether the information will have practical utility.

(b) The accuracy of our estimate of the burden of the proposed collection of information.

(c) Ways to enhance the quality, utility, and clarity of the information to be collected.

(d) Ways to minimize the burden of collection on the respondents.

Under the Paperwork Reduction Act, we must obtain OMB approval of all information and recordkeeping requirements. No person is required to respond to an information collection request unless the form or regulation

requesting the information has a currently valid OMB control (clearance) number. These numbers appear in sections 780.10, 784.10, 816.10, and 817.10 of 30 CFR parts 780, 784, 816, and 817, respectively. To obtain a copy of our information collection clearance requests, contact John A. Trelease at (202) 208-2783 or by e-mail at [jtrelease@osmre.gov](mailto:jtrelease@osmre.gov).

By law, OMB must respond to us within 60 days of publication of this proposed rule, but it may respond as soon as 30 days after publication. Therefore, to ensure consideration by OMB, you must send comments regarding these burden estimates or any other aspect of these information collection and recordkeeping requirements by September 24, 2007 to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, via e-mail to [OIRA\\_DOCKET@omb.eop.gov](mailto:OIRA_DOCKET@omb.eop.gov), or via facsimile to (202) 395-6566. Also, send a copy of your comments to John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., Room 202 SIB, Washington, DC 20240, or electronically to [jtrelease@osmre.gov](mailto:jtrelease@osmre.gov). You may still send comments on the proposed rulemaking to us until 4:30 p.m., Eastern time, on October 23, 2007.

#### K. National Environmental Policy Act

We have prepared a draft environmental impact statement (DEIS) for the proposed rule in accordance with the National Environmental Policy Act. You may review the DEIS for this proposed rule online at <http://www.regulations.gov>. At that internet address, the document is listed under "Office of Surface Mining Reclamation and Enforcement." A notice announcing the availability of the DEIS was published in this edition of the **Federal Register**. That notice also lists OSM offices and public libraries in Kentucky, Tennessee, Virginia, and West Virginia where you may review the DEIS. We will complete a final environmental impact statement and make a finding on the significance of any potential impacts before we publish a final rule.

#### L. Clarity of This Regulation

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following:

(1) Are the requirements in the proposed rule clearly stated?

(2) Does the proposed rule contain technical language or jargon that interferes with its clarity?

(3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity?

(4) Would the rule be easier to understand if it were divided into more but shorter sections (a "section" appears in bold type and is preceded by the symbol "\$" and a numbered heading; for example, "\$ 780.14 Operation plan: Maps and plans.")?

(5) Is the description of the proposed rule in the **SUPPLEMENTARY INFORMATION** part of this preamble helpful in understanding the proposed rule?

(6) What else could we do to make the proposed rule easier to understand?

Send a copy of any comments that concern how we could make this proposed rule easier to understand to: Office of Information and Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may also e-mail the comments to this address: [Exsec@ios.doi.gov](mailto:Exsec@ios.doi.gov).

#### List of Subjects

##### 30 CFR Part 780

Reporting and recordkeeping requirements, Surface mining.

##### 30 CFR Part 784

Reporting and recordkeeping requirements, Underground mining.

##### 30 CFR Part 816

Environmental protection, Reporting and recordkeeping requirements, Surface mining.

##### 30 CFR Part 817

Environmental protection, Reporting and recordkeeping requirements, Underground mining.

Dated: August 3, 2007.

#### C. Stephen Allred,

*Assistant Secretary, Land and Minerals Management.*

For the reasons set forth in the preamble, the Department proposes to amend 30 CFR parts 780, 784, 816, and 817 as set forth below.

### PART 780—SURFACE MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

1. The authority citation for part 780 continues to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.* and 16 U.S.C. 470 *et seq.*

2. The part heading is revised to read as set forth above.

3. Section 780.10 is revised to read as follows:

#### § 780.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned clearance number 1029-0036. Sections 507 and 508 of SMCRA contain permit application requirements for surface coal mining activities, including a requirement that the application include an operation and reclamation plan. The regulatory authority uses this information to determine whether the proposed surface coal mining operation will achieve the environmental protection requirements of the Act and regulatory program. Without this information OSM and state regulatory authorities could not approve permit applications for surface coal mines and related facilities. Persons intending to conduct such operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

4. Amend § 780.14 by revising paragraphs (b)(11) and (c) to read as follows:

#### § 780.14 Operation plan: Maps and plans.

\* \* \* \* \*

(b) \* \* \*

(11) Locations of each siltation structure, permanent water impoundment, refuse pile, and coal mine waste impoundment for which plans are required by § 780.25 of this part, and the location of each fill for the disposal of excess spoil for which plans are required under § 780.35 of this part.

(c) Except as provided in §§ 780.25(a)(2), 780.25(a)(3), 780.35, 816.73(c), 816.74(c), and 816.81(c) of this chapter, cross-sections, maps, and plans required under paragraphs (b)(4), (5), (6), (10), and (11) of this section must be prepared by, or under the direction of, and certified by a qualified registered professional engineer, a professional geologist, or, in any state that authorizes land surveyors to prepare and certify cross-sections, maps, and plans, a qualified, registered, professional land surveyor, with assistance from experts in related fields such as landscape architecture.

5. Amend § 780.25 as follows:

A. Revise the section heading, paragraph (a) introductory text, paragraph (a)(1) introductory text, and paragraph (a)(2);

B. In paragraph (c)(2), remove the words "the size or other criteria of the

Mine Safety and Health Administration" and add in their place the words "the criteria in § 77.216(a) of this title", and remove the citation "§§ 77.216-1 and 77.216-2" and add in its place "§ 77.216-2";

C. Revise paragraph (d);

D. Remove paragraph (e), redesignate paragraph (f) as paragraph (e), and revise paragraph (e).

The revisions to paragraphs (a), (d), and (e) read as follows:

**§ 780.25 Reclamation plan: Siltation structures, impoundments, and refuse piles.**

(a) *General.* Each application must include a general plan and a detailed design plan for each proposed siltation structure, impoundment, and refuse pile within the proposed permit area.

(1) Each general plan must—

\* \* \* \* \*

(2)(i) Impoundments meeting the criteria for Significant Hazard Class or High Hazard Class (formerly Class B or C) dams in "Earth Dams and Reservoirs," Technical Release No. 60 (210-VI-TR60, July 2005), published by the U.S. Department of Agriculture, Natural Resources Conservation Service, must comply with the requirements of this section for structures that meet the criteria in § 77.216(a) of this title. Technical Release No.60 (TR-60) is hereby incorporated by reference. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may review and download the incorporated document from the Natural Resources Conservation Service's Web site at [http://www.info.usda.gov/scripts/lpsis.dll/TR/TR\\_210\\_60.htm](http://www.info.usda.gov/scripts/lpsis.dll/TR/TR_210_60.htm). You may inspect a copy of this document as part of the docket that we, the Office of Surface Mining Reclamation and Enforcement, maintain at 1951 Constitution Avenue, NW., Washington, DC 20240. You also may inspect a copy of this document at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030 or go to <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

(ii) Each detailed design plan for a structure that meets the criteria in § 77.216(a) of this title must—

(A) Be prepared by, or under the direction of, and certified by a qualified registered professional engineer with assistance from experts in related fields such as geology, land surveying, and landscape architecture;

(B) Include any geotechnical investigation, design, and construction requirements for the structure;

(C) Describe the operation and maintenance requirements for each structure; and

(D) Describe the timetable and plans to remove each structure, if appropriate.

\* \* \* \* \*

(d) *Coal mine waste impoundments and refuse piles—(1) Analysis of alternatives and environmental impacts.*

(i) If you, the permit applicant, propose to generate or dispose of coal mine waste as part of your operation, you must—

(A) Identify a reasonable range of alternative disposal methods and alternative locations for any proposed refuse piles or coal mine waste impoundments.

(B) Include an analysis of the viability and environmental impacts of each alternative identified. You must consider impacts on both terrestrial and aquatic ecosystems.

(C) To the extent possible, select the alternative with the least overall adverse environmental impact, including adverse impacts on water quality and aquatic ecosystems. An alternative is possible if it is capable of being done after consideration of cost, logistics, and available technology. This provision does not authorize selection of the least costly alternative at the expense of environmental protection solely on the basis of cost. If you propose to select an alternative other than the one that provides the most environmental protection, you must demonstrate, to the satisfaction of the regulatory authority, why implementation of the more environmentally protective alternative is not possible.

(ii) For every alternative under paragraph (d)(1)(i)(A) of this section that would involve placement of coal mine waste in waters of the United States, the analysis required under paragraph (d)(1)(i)(B) of this section must include an evaluation of the short-term and long-term impacts on the aquatic ecosystem, both individually and on a cumulative basis. In evaluating alternatives subject to this paragraph, you must consider impacts on the physical, chemical, and biological characteristics of downstream flows, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, the degree to which the coal mine waste may introduce or increase contaminants, the effects on aquatic organisms, and the extent to which wildlife is dependent upon those organisms. If you have prepared an

analysis of alternatives for the proposed impoundment or refuse pile under 40 CFR 230.10, you may initially include a copy of that analysis in lieu of the analysis of alternatives required under paragraph (d)(1)(i)(B) of this section. The regulatory authority will determine the extent to which that analysis satisfies the requirements of paragraph (d)(1) of this section.

(2) *Avoidance and minimization of adverse environmental impacts.* Describe the steps that you will take to avoid the adverse environmental impacts that may result from the construction of refuse piles or coal mine waste impoundments or, if avoidance is not possible, the steps that you will take to minimize those impacts.

(3) *Design requirements for refuse piles.* Refuse piles must be designed to comply with the requirements of §§ 816.81 and 816.83 of this chapter.

(4) *Design requirements for impoundments and impounding structures.* (i) Impounding structures constructed of or intended to impound coal mine waste must be designed to comply with the requirements of §§ 816.81 and 816.84 of this chapter.

(ii) The plan for each structure that meets the criteria of § 77.216(a) of this title must comply with the requirements of § 77.216-2 of this title.

(iii) Each plan for a coal mine waste impoundment must contain the results of a geotechnical investigation to determine the structural competence of the foundation that will support the proposed impounding structure and the impounded material. An engineer or engineering geologist must plan and supervise the geotechnical investigation. In planning the investigation, the engineer or geologist must—

(A) Determine the number, location, and depth of borings and test pits using current prudent engineering practice for the size of the impoundment and the impounding structure, the quantity of material to be impounded, and subsurface conditions.

(B) Consider the character of the overburden and bedrock, the proposed abutment sites for the impounding structure, and any adverse geotechnical conditions that may affect the particular impoundment.

(C) Identify all springs, seepage, and groundwater flow observed or anticipated during wet periods in the area of the proposed impoundment.

(D) Consider the possibility of mudflows, rock-debris falls, or other landslides into the impoundment or impounded material.

(e) If the structure meets the Significant Hazard Class or High Hazard Class criteria for dams in TR-60 or

meets the criteria of § 77.216(a) of this title, each plan under paragraphs (b), (c), and (d) of this section must include a stability analysis of the structure. The stability analysis must include, but not be limited to, strength parameters, pore pressures, and long-term seepage conditions. The plan also must contain a description of each engineering design assumption and calculation with a discussion of each alternative considered in selecting the specific design parameters and construction methods.

6. Add § 780.28 to read as follows:

**§ 780.28 Activities in or adjacent to waters of the United States.**

(a) *Applicability.* This section applies to applications to conduct activities in waters of the United States or on the surface of lands within 100 feet of waters of the United States to the extent that those waters are regulated under the Clean Water Act, 33 U.S.C. 1311, 1362.

(b) *Mapping requirements.* Maps prepared under §§ 779.25, 780.14, or 780.21(b)(2) of this chapter must identify and delineate all—

(1) Waters of the United States within the proposed permit area.

(2) Waters of the United States within the adjacent area, as that term is defined in § 701.5 of this chapter.

(3) Lands within the proposed permit area that lie within 100 feet, measured horizontally, of any waters of the United States.

(c) *Application requirements for variance from prohibition on disturbance.* If you propose to conduct an activity that is subject to the prohibition of § 816.57(a) of this chapter on the surface of any lands delineated under paragraph (b)(3) of this section, your application must describe any measures that you propose to implement in lieu of maintaining a 100-foot undisturbed buffer between surface mining activities and waters of the United States, including the extent of any lesser buffer that you propose to maintain between surface mining activities and waters of the United States, and explain how the proposed measures constitute the best technology currently available to—

(1) Prevent the contribution of additional suspended solids to streamflow or runoff outside the permit area to the extent possible; and

(2) Minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible.

(d) *Approval requirements for variance from prohibition on disturbance.* Before approving any

measures proposed under paragraph (c) of this section, the regulatory authority must determine that those measures—

(1) Would be no less effective in meeting the requirements of the regulatory program than the prohibition in § 816.57(a) of this chapter on disturbance of the surface of lands within 100 feet of waters of the United States; and

(2) Constitute the best technology currently available to—

(i) Prevent the contribution of additional suspended solids to streamflow or runoff outside the permit area to the extent possible; and

(ii) Minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible.

(e) *Requirements for activities not subject to prohibition on disturbance.*

For activities not subject to the prohibition in § 816.57(a) of this chapter, if you propose to conduct any surface mining activities in waters of the United States or that would disturb the surface of lands within 100 feet of waters of the United States, your application must demonstrate, and the regulatory authority must find, that, to the extent possible, you will utilize the best technology currently available in accordance with §§ 816.41(d) and 816.97(a) of this chapter, as required by §§ 780.16(b) and 780.21(h) of this part.

(f) *Relationship to the Clean Water Act.* (1) In all cases, your application must identify the authorizations and certifications that you anticipate will be needed under sections 401, 402, and 404 of the Clean Water Act, 33 U.S.C. 1341, 1342, and 1344, and describe the steps that you have taken or will take to procure those authorizations and certifications.

(2) The regulatory authority will process your application and may issue the permit before you obtain all necessary authorizations and certifications under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, provided your application meets all applicable requirements of subchapter G of this chapter. However, you may not initiate any activities for which Clean Water Act authorization or certification is required until you obtain all necessary authorizations and certifications.

7. Revise § 780.35 to read as follows:

**§ 780.35 Disposal of excess spoil.**

(a) If you, the permit applicant, propose to generate excess spoil as part of your operation, your application must include the following items—

(1) *Demonstration of minimization of excess spoil.* A demonstration, prepared to the satisfaction of the regulatory

authority, that the operation has been designed to minimize, to the extent possible, the volume of excess spoil that the operation will generate, thus ensuring that spoil is returned to the mined-out area to the extent possible, taking into consideration applicable regulations concerning restoration of the approximate original contour, safety, stability, and environmental protection and the needs of the proposed postmining land use.

(2) *Capacity demonstration.* A demonstration that the designed maximum cumulative volume of all proposed excess spoil fills within the permit area is no larger than the capacity needed to accommodate the anticipated cumulative volume of excess spoil that the operation will generate, as approved by the regulatory authority under paragraph (a)(1) of this section.

(3) *Analysis of alternatives and environmental impacts.* (i) A description of all alternatives considered for disposal of the amount of excess spoil determined under paragraphs (a)(1) and (2) of this section and an analysis of the environmental impacts of those alternatives. You must consider impacts on both terrestrial and aquatic ecosystems. The alternatives must vary with respect to the number, size, location, and configuration of proposed fills to ensure consideration of a reasonable range of alternatives and potential environmental impacts.

(ii) For every alternative under paragraph (a)(3)(i) of this section that would involve placement of excess spoil in waters of the United States, the analysis required under that paragraph must include an evaluation of the short-term and long-term impacts on the aquatic ecosystem, both individually and on a cumulative basis. In evaluating alternatives subject to this paragraph, you must consider impacts on the physical, chemical, and biological characteristics of downstream flows, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, the degree to which the excess spoil may introduce or increase contaminants, the effects on aquatic organisms, and the extent to which wildlife is dependent upon those organisms. If you have prepared an analysis of alternatives under 40 CFR 230.10, you may initially submit a copy of that analysis with your application in lieu of the analysis of alternatives required by paragraph (a)(3)(i) of this section. The regulatory authority will determine the extent to which that analysis satisfies the analytical requirements of paragraph (a)(3)(i) of this section.

(iii) To the extent possible, you must select the alternative with the least overall adverse environmental impact, including adverse impacts on water quality and aquatic ecosystems. An alternative is possible if it is capable of being done after consideration of cost, logistics, and available technology. This provision does not authorize selection of the least costly alternative at the expense of environmental protection solely on the basis of cost. If another alternative considered under paragraph (a)(3)(i) of this section would be more environmentally protective than the alternative you selected, you must demonstrate, to the satisfaction of the regulatory authority, that implementation of the more environmentally protective alternative is not possible.

(4) *Avoidance and minimization of adverse environmental impacts.* A description of the steps that you will take to avoid the adverse environmental impacts that may result from the construction of fills or, if avoidance is not possible, the steps that you will take to minimize those impacts.

(5) *Location.* Maps and cross-section drawings showing the location of all proposed disposal sites and structures. You must locate fills on the most moderately sloping and naturally stable areas available, unless the regulatory authority approves a different location based upon the alternatives analysis under paragraph (a)(3) of this section or other factors, taking into account other requirements of the Act and this chapter. When possible, you must place fills upon or above a natural terrace, bench, or berm if that location would provide additional stability and prevent mass movement.

(6) *Design plans.* Detailed design plans for each structure, prepared in accordance with the requirements of this section and §§ 816.71 through 816.74 of this chapter. You must design the fill and appurtenant structures using current prudent engineering practices and any additional design criteria established by the regulatory authority.

(7) *Geotechnical investigation.* The results of a geotechnical investigation of each proposed disposal site, with the exception of those sites at which spoil will be placed only on a pre-existing bench under § 816.74 of this chapter. You must conduct sufficient foundation investigations, as well as any necessary laboratory testing of foundation material, to determine the design requirements for foundation stability for each site. The analyses of foundation conditions must take into consideration the effect of underground mine workings, if any, upon the stability of

the fill and appurtenant structures. The information submitted must include—

(i) The character of the bedrock and any adverse geologic conditions in the proposed disposal area.

(ii) A survey identifying all springs, seepage, and groundwater flow observed or anticipated during wet periods in the area of the proposed disposal site.

(iii) A survey of the potential effects of subsidence of subsurface strata as a result of past and future mining operations.

(iv) A technical description of the rock materials to be utilized in the construction of disposal structures containing rock chimney cores or underlain by a rock drainage blanket.

(v) A stability analysis including, but not limited to, strength parameters, pore pressures, and long-term seepage conditions. This analysis must be accompanied by a description of all engineering design assumptions and calculations and the alternatives considered in selecting the design specifications and methods.

(8) *Operation and reclamation plans.* Plans for the construction, operation, maintenance, and reclamation of all excess spoil disposal structures in accordance with the requirements of §§ 816.71 through 816.74 of this chapter.

(9) *Additional requirements for keyway cuts or rock-toe buttresses.* If keyway cuts or rock-toe buttresses are required under § 816.71(d) of this chapter, the number, location, and depth of borings or test pits, which must be determined according to the size of the spoil disposal structure and subsurface conditions. You also must provide the engineering specifications used to design the keyway cuts or rock-toe buttresses. Those specifications must be based upon the stability analysis required under paragraph (a)(7)(v) of this section.

(b) *Design certification.* A qualified registered professional engineer experienced in the design of earth and rock fills must certify that the design of all fills and appurtenant structures meets the requirements of this section.

#### **PART 784—UNDERGROUND MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN**

8. The authority citation for part 784 continues to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.* and 16 U.S.C. 470 *et seq.*

9. Section 784.10 is revised to read as follows:

#### **§ 784.10 Information collection.**

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned clearance number 1029-0039. Collection of this information is required under section 516(d) of SMCRA, which in effect requires applicants for permits for underground coal mines to prepare and submit an operation and reclamation plan for coal mining activities as part of the application. The regulatory authority uses this information to determine whether the plan will achieve the reclamation and environmental protection requirements of the Act and regulatory program. Without this information, OSM and state regulatory authorities could not approve permit applications for underground coal mines and related facilities. Persons intending to conduct such operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

10. Amend § 784.16 as follows:

A. Revise the section heading, paragraph (a) introductory text, paragraph (a)(1) introductory text, and paragraph (a)(2);

B. In paragraph (c)(2), remove the words “the size or other criteria of the Mine Safety and Health Administration” and add in their place the words “the criteria in § 77.216(a) of this title”, and remove the citation “§§ 77.216-1 and 77.216-2” and add in its place “§ 77.216-2”;

C. Revise paragraph (d);

D. Remove paragraph (e), redesignate paragraph (f) as paragraph (e), and revise paragraph (e).

The revisions read as follows:

#### **§ 784.16 Reclamation plan: Siltation structures, impoundments, and refuse piles.**

(a) *General.* Each application must include a general plan and a detailed design plan for each proposed siltation structure, impoundment, and refuse pile within the proposed permit area.

(1) Each general plan must—

\* \* \* \* \*

(2)(i) Impoundments meeting the criteria for Significant Hazard Class or High Hazard Class (formerly Class B or C) dams in “Earth Dams and Reservoirs,” Technical Release No. 60 (210-VI-TR60, July 2005), published by the U.S. Department of Agriculture, Natural Resources Conservation Service, must comply with the requirements of this section for structures that meet the

criteria in § 77.216(a) of this title. Technical Release No. 60 (TR-60) is hereby incorporated by reference. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may review and download the incorporated document from the Natural Resources Conservation Service's Web site at [http://www.info.usda.gov/scripts/lpsii.dll/TR/TR\\_210\\_60.htm](http://www.info.usda.gov/scripts/lpsii.dll/TR/TR_210_60.htm). You may inspect a copy of this document as part of the docket that we, the Office of Surface Mining Reclamation and Enforcement, maintain at 1951 Constitution Avenue, NW., Washington, DC 20240. You also may inspect a copy of this document at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030 or go to <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

(ii) Each detailed design plan for a structure that meets the criteria in § 77.216(a) of this title must—

(A) Be prepared by, or under the direction of, and certified by a qualified registered professional engineer with assistance from experts in related fields such as geology, land surveying, and landscape architecture;

(B) Include any geotechnical investigation, design, and construction requirements for the structure;

(C) Describe the operation and maintenance requirements for each structure; and

(D) Describe the timetable and plans to remove each structure, if appropriate.

\* \* \* \* \*

(d) *Coal mine waste impoundments and refuse piles*—(1) *Analysis of alternatives and environmental impacts.*

(i) If you, the permit applicant, propose to generate or dispose of coal mine waste as part of your operation, you must—

(A) Identify a reasonable range of alternative disposal methods and alternative locations for any proposed refuse piles or coal mine waste impoundments.

(B) Include an analysis of the viability and environmental impacts of each alternative identified. You must consider impacts on both terrestrial and aquatic ecosystems.

(C) To the extent possible, select the alternative with the least overall adverse environmental impact, including adverse impacts on water quality and aquatic ecosystems. An alternative is possible if it is capable of being done after consideration of cost, logistics, and available technology. This provision

does not authorize selection of the least costly alternative at the expense of environmental protection solely on the basis of cost. If you propose to select an alternative other than the one that provides the most environmental protection, you must demonstrate, to the satisfaction of the regulatory authority, why implementation of the more environmentally protective alternative is not possible.

(ii) For every alternative under paragraph (d)(1)(i)(A) of this section that would involve placement of coal mine waste in waters of the United States, the analysis required under paragraph (d)(1)(i)(B) of this section must include an evaluation of the short-term and long-term impacts on the aquatic ecosystem, both individually and on a cumulative basis. In evaluating alternatives subject to this paragraph, you must consider impacts on the physical, chemical, and biological characteristics of downstream flows, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, the degree to which the coal mine waste may introduce or increase contaminants, the effects on aquatic organisms, and the extent to which wildlife is dependent upon those organisms. If you have prepared an analysis of alternatives for the proposed impoundment or refuse pile under 40 CFR 230.10, you may initially include a copy of that analysis in lieu of the analysis of alternatives required under paragraph (d)(1)(i)(B) of this section. The regulatory authority will determine the extent to which that analysis satisfies the requirements of paragraph (d)(1) of this section.

(2) *Avoidance and minimization of adverse environmental impacts.*

Describe the steps that you will take to avoid the adverse environmental impacts that may result from the construction of refuse piles or coal mine waste impoundments or, if avoidance is not possible, the steps that you will take to minimize those impacts.

(3) *Design requirements for refuse piles.* Refuse piles must be designed to comply with the requirements of §§ 817.81 and 817.83 of this chapter.

(4) *Design requirements for impoundments and impounding structures.* (i) Impounding structures constructed of or intended to impound coal mine waste must be designed to comply with the requirements of §§ 817.81 and 817.84 of this chapter.

(ii) The plan for each structure that meets the criteria of § 77.216(a) of this title must comply with the requirements of § 77.216-2 of this title.

(iii) Each plan for a coal mine waste impoundment must contain the results of a geotechnical investigation to determine the structural competence of the foundation that will support the proposed impounding structure and the impounded material. An engineer or engineering geologist must plan and supervise the geotechnical investigation. In planning the investigation, the engineer or geologist must—

(A) Determine the number, location, and depth of borings and test pits using current prudent engineering practice for the size of the impoundment and the impounding structure, the quantity of material to be impounded, and subsurface conditions.

(B) Consider the character of the overburden and bedrock, the proposed abutment sites for the impounding structure, and any adverse geotechnical conditions that may affect the particular impoundment.

(C) Identify all springs, seepage, and groundwater flow observed or anticipated during wet periods in the area of the proposed impoundment.

(D) Consider the possibility of mudflows, rock-debris falls, or other landslides into the impoundment or impounded material.

(e) If the structure meets the Significant Hazard Class or High Hazard Class criteria for dams in TR-60 or meets the criteria of § 77.216(a) of this chapter, each plan under paragraphs (b), (c), and (d) of this section must include a stability analysis of the structure. The stability analysis must include, but not be limited to, strength parameters, pore pressures, and long-term seepage conditions. The plan also must contain a description of each engineering design assumption and calculation with a discussion of each alternative considered in selecting the specific design parameters and construction methods.

11. Revise § 784.19 to read as follows:

**§ 784.19 Disposal of excess spoil.**

(a) If you, the permit applicant, propose to generate excess spoil as part of your operation, your application must include the following items—

(1) *Demonstration of minimization of excess spoil.* A demonstration, prepared to the satisfaction of the regulatory authority, that the operation has been designed to minimize, to the extent possible, the volume of excess spoil that the operation will generate, thus ensuring that spoil is returned to the mined-out area to the extent possible, taking into consideration applicable regulations concerning restoration of the approximate original contour, safety, stability, and environmental protection



and the needs of the proposed postmining land use.

(2) *Capacity demonstration.* A demonstration that the designed maximum cumulative volume of all proposed excess spoil fills within the permit area is no larger than the capacity needed to accommodate the anticipated cumulative volume of excess spoil that the operation will generate, as approved by the regulatory authority under paragraph (a)(1) of this section.

(3) *Analysis of alternatives and environmental impacts.* (i) A description of all alternatives considered for disposal of the amount of excess spoil determined under paragraphs (a)(1) and (2) of this section and an analysis of the environmental impacts of those alternatives. You must consider impacts on both the terrestrial and aquatic ecosystems. The alternatives must vary with respect to the number, size, location, and configuration of proposed fills to ensure consideration of a reasonable range of alternatives and potential environmental impacts.

(ii) For every alternative under paragraph (a)(3)(i) of this section that would involve placement of excess spoil in waters of the United States, the analysis required under that paragraph must include an evaluation of the short-term and long-term impacts on the aquatic ecosystem, both individually and on a cumulative basis. In evaluating alternatives subject to this paragraph, you must consider impacts on the physical, chemical, and biological characteristics of downstream flows, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, the degree to which the excess spoil may introduce or increase contaminants, the effects on aquatic organisms, and the extent to which wildlife is dependent upon those organisms. If you have prepared an analysis of alternatives under 40 CFR 230.10, you may initially submit a copy of that analysis with your application in lieu of the analysis of alternatives required by paragraph (a)(3)(i) of this section. The regulatory authority will determine the extent to which that analysis satisfies the analytical requirements of paragraph (a)(3)(i) of this section.

(iii) To the extent possible, you must select the alternative with the least overall adverse environmental impact, including adverse impacts on water quality and aquatic ecosystems. An alternative is possible if it is capable of being done after consideration of cost, logistics, and available technology. This provision does not authorize selection

of the least costly alternative at the expense of environmental protection solely on the basis of cost. If another alternative considered under paragraph (a)(3)(i) of this section would be more environmentally protective than the alternative you selected, you must demonstrate, to the satisfaction of the regulatory authority, that implementation of the more environmentally protective alternative is not possible.

(4) *Avoidance and minimization of adverse environmental impacts.* A description of the steps that you will take to avoid the adverse environmental impacts that may result from the construction of fills or, if avoidance is not possible, the steps that you will take to minimize those impacts.

(5) *Location.* Maps and cross-section drawings showing the location of all proposed disposal sites and structures. You must locate fills on the most moderately sloping and naturally stable areas available, unless the regulatory authority approves a different location based upon the alternatives analysis under paragraph (a)(3) of this section or other factors, taking into account other requirements of the Act and this chapter. When possible, you must place fills upon or above a natural terrace, bench, or berm if that location would provide additional stability and prevent mass movement.

(6) *Design plans.* Detailed design plans for each structure, prepared in accordance with the requirements of this section and §§ 817.71 through 817.74 of this chapter. You must design the fill and appurtenant structures using current prudent engineering practices and any additional design criteria established by the regulatory authority.

(7) *Geotechnical investigation.* The results of a geotechnical investigation of each proposed disposal site, with the exception of those sites at which spoil will be placed only on a pre-existing bench under § 817.74 of this chapter.

You must conduct sufficient foundation investigations, as well as any necessary laboratory testing of foundation material, to determine the design requirements for foundation stability for each site. The analyses of foundation conditions must take into consideration the effect of underground mine workings, if any, upon the stability of the fill and appurtenant structures. The information submitted must include—

- (i) The character of the bedrock and any adverse geologic conditions in the proposed disposal area.
- (ii) A survey identifying all springs, seepage, and groundwater flow observed or anticipated during wet periods in the area of the proposed disposal site.

(iii) A survey of the potential effects of subsidence of subsurface strata as a result of past and future mining operations.

(iv) A technical description of the rock materials to be utilized in the construction of disposal structures containing rock chimney cores or underlain by a rock drainage blanket.

(v) A stability analysis including, but not limited to, strength parameters, pore pressures, and long-term seepage conditions. This analysis must be accompanied by a description of all engineering design assumptions and calculations and the alternatives considered in selecting the design specifications and methods.

(8) *Operation and reclamation plans.* Plans for the construction, operation, maintenance, and reclamation of all excess spoil disposal structures in accordance with the requirements of §§ 817.71 through 817.74 of this chapter.

(9) *Additional requirements for keyway cuts or rock-toe buttresses.* If keyway cuts or rock-toe buttresses are required under § 817.71(d) of this chapter, the number, location, and depth of borings or test pits, which must be determined according to the size of the spoil disposal structure and subsurface conditions. You also must provide the engineering specifications used to design the keyway cuts or rock-toe buttresses. Those specifications must be based upon the stability analysis required under paragraph (a)(7)(v) of this section.

(b) *Design certification.* A qualified registered professional engineer experienced in the design of earth and rock fills must certify that the design of all fills and appurtenant structures meets the requirements of this section.

12. Amend § 784.23 by removing “817.71(b),” in paragraph (c) and revising paragraph (b)(10) to read as follows:

**§ 784.23 Operation plan: Maps and plans.**

\* \* \* \* \*

(b) \* \* \*

(10) Locations of each siltation structure, permanent water impoundment, refuse pile, and coal mine waste impoundment for which plans are required by § 784.16 of this part, and the location of each fill for the disposal of excess spoil for which plans are required under § 784.19 of this part.

\* \* \* \* \*

13. Add § 784.28 to read as follows:

**§ 784.28 Activities in or adjacent to waters of the United States.**

(a) *Applicability.* This section applies to applications to conduct activities in

waters of the United States or on the surface of lands within 100 feet of waters of the United States to the extent that those waters are regulated under the Clean Water Act, 33 U.S.C. 1311, 1362.

(b) *Mapping requirements.* Maps prepared under §§ 783.25, 784.14(b)(2), or 784.23 of this chapter must identify and delineate all—

(1) Waters of the United States within the proposed permit area.

(2) Waters of the United States within the adjacent area, as that term is defined in § 701.5 of this chapter.

(3) Lands within the proposed permit area that lie within 100 feet, measured horizontally, of any waters of the United States.

(c) *Application requirements for variance from prohibition on disturbance.* If you propose to conduct an activity that is subject to the prohibition of § 817.57(a) of this chapter on the surface of any lands delineated under paragraph (b)(3) of this section, your application must describe any measures that you propose to implement in lieu of maintaining a 100-foot undisturbed buffer between surface activities and waters of the United States, including the extent of any lesser buffer that you propose to maintain between surface activities and waters of the United States, and explain how the proposed measures constitute the best technology currently available to—

(1) Prevent the contribution of additional suspended solids to streamflow or runoff outside the permit area to the extent possible; and

(2) Minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible.

(d) *Approval requirements for variance from prohibition on disturbance.* Before approving any measures proposed under paragraph (c) of this section, the regulatory authority must determine that those measures—

(1) Would be no less effective in meeting the requirements of the regulatory program than the prohibition in § 817.57(a) of this chapter on disturbance of the surface of lands within 100 feet of waters of the United States; and

(2) Constitute the best technology currently available to—

(i) Prevent the contribution of additional suspended solids to streamflow or runoff outside the permit area to the extent possible; and

(ii) Minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible.

(e) *Requirements for activities not subject to prohibition on disturbance.* For activities not subject to the prohibition in § 817.57(a) of this chapter, if you propose to conduct any surface activities in waters of the United States or that would disturb the surface of lands within 100 feet of waters of the United States, your application must demonstrate, and the regulatory authority must find, that, to the extent possible, you will utilize the best technology currently available in accordance with §§ 817.41(d) and 817.97(a) of this chapter, as required by §§ 784.14(g) and 784.21(b) of this part.

(f) *Relationship to the Clean Water Act.* (1) In all cases, your application must identify the authorizations and certifications that you anticipate will be needed under sections 401, 402, and 404 of the Clean Water Act, 33 U.S.C. 1341, 1342, and 1344, and describe the steps that you have taken or will take to procure those authorizations and certifications.

(2) The regulatory authority will process your application and may issue the permit before you obtain all necessary authorizations and certifications under the Clean Water Act, 33 U.S.C. 1251 et seq., provided your application meets all applicable requirements of subchapter G of this chapter. However, you may not initiate any activities for which Clean Water Act authorization or certification is required until you obtain all necessary authorizations and certifications.

#### **PART 816—PERMANENT PROGRAM PERFORMANCE STANDARDS—SURFACE MINING ACTIVITIES**

14. The authority citation for part 816 is revised to read as follows:

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

15. Section 816.10 is revised to read as follows:

##### **§ 816.10 Information collection.**

In accordance with 44 U.S.C. 3501 et seq., the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned clearance number 1029–0047. Collection of this information is required under section 515 of SMCRA, which provides that permittees conducting surface coal mining and reclamation operations must meet all applicable performance standards of the regulatory program approved under the Act. The regulatory authority uses the information collected to ensure that surface mining activities are conducted in compliance with the requirements of the applicable regulatory program. Persons intending

to conduct such operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

16. In § 816.11, revise paragraph (e) to read as follows:

##### **§ 816.11 Signs and markers.**

\* \* \* \* \*

(e) *Buffer markers.* The boundaries of any buffer to be maintained between surface mining activities and waters of the United States in accordance with §§ 780.28 and 816.57 of this chapter must be clearly marked to avoid disturbance by surface mining activities.

\* \* \* \* \*

17. In § 816.43, revise paragraphs (a)(3), (b)(1), and (b)(4); and add paragraph (b)(5) to read as follows:

##### **§ 816.43 Diversions.**

(a) \* \* \*

(3) You, the permittee or operator, must—

(i) Promptly remove temporary diversions when no longer needed to achieve the purpose for which they were authorized.

(ii) Restore the land disturbed by the removal process in accordance with this part.

(iii) Before removing diversions, modify or remove downstream water-treatment facilities previously protected by the diversion as necessary to prevent overtopping or failure of the facilities.

(iv) Maintain water-treatment facilities as otherwise required.

\* \* \* \* \*

(b) \* \* \*

(1) The regulatory authority may approve the diversion of perennial or intermittent streams within the permit area if the diversion is located, designed, constructed, and maintained using the best technology currently available to minimize adverse impacts to fish, wildlife, and related environmental values to the extent possible.

\* \* \* \* \*

(4) A permanent stream-channel diversion or a stream channel reclaimed after the removal of a temporary diversion must be designed and constructed using natural channel design techniques so as to restore or approximate the premining characteristics of the original stream channel, including the natural riparian vegetation and the natural hydrological characteristics of the original stream, to promote the recovery and enhancement of the aquatic habitat and to minimize

adverse alteration of stream channels on and off the site, including channel deepening or enlargement, to the extent possible.

(5) A qualified registered professional engineer must certify the design and construction of all diversions of perennial and intermittent streams and all stream restorations as meeting the design and construction requirements of this section and any design criteria set by the regulatory authority.

\* \* \* \* \*

**§ 816.46 [Amended]**

18. In § 816.46, remove paragraph (b)(2) and redesignate paragraphs (b)(3) through (b)(6) as (b)(2) through (b)(5), respectively.

19. Revise § 816.57 to read as follows:

**§ 816.57 Hydrologic balance: Activities in or adjacent to waters of the United States.**

(a) *Prohibition.* You, the permittee or operator, may not conduct surface mining activities that would disturb the surface of land within 100 feet, measured horizontally, of waters of the United States, unless—

(1) The permit authorizes you to do so under § 780.28 of this chapter; or

(2) The provisions of paragraph (b) of this section apply to those activities.

(b) *Exceptions.* The prohibition in paragraph (a) of this section does not apply to the following surface mining activities—

(1) Mining through waters of the United States. You must comply with all other applicable requirements of the regulatory program, including the requirements of § 816.43(b) of this part if the mining involves the permanent or temporary diversion of a perennial or intermittent stream.

(2) Placement of bridge abutments, culverts, or other structures in or near waters of the United States to facilitate crossing of those waters. You must comply with all other applicable requirements of the regulatory program, including the requirements of §§ 816.150, 816.151, and 816.181 of this part, as appropriate.

(3) Construction of sedimentation pond embankments in waters of the United States. You must comply with all other applicable requirements of the regulatory program, including the requirements of § 816.45(a) of this part.

(4) Construction of excess spoil fills and coal mine waste disposal facilities in waters of the United States. You must comply with all other applicable requirements of the regulatory program, including the requirements of §§ 816.71(a) and (f) of this part for excess spoil fills and the requirements of §§ 816.81(a), 816.83(a), and 816.84 of

this part for coal mine waste disposal facilities.

(c) *Additional clarifications.* The activities listed in paragraph (b) of this section must comply with paragraphs (b)(10)(B)(i) and (b)(24) of section 515 of the Act and the regulations implementing those provisions of the Act, including—

(1) The requirement in § 816.41(d)(1) of this part that surface mining activities be conducted according to the plan approved under § 780.21(h) of this chapter and that earth materials, ground-water discharges, and runoff be handled in a manner that prevents, to the extent possible using the best technology currently available, additional contribution of suspended solids to streamflow outside the permit area; and otherwise prevents water pollution.

(2) The requirement in § 816.45(a) that appropriate sediment control measures be designed, constructed, and maintained using the best technology currently available to prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area.

(3) The requirement in § 816.97(a) of this part that the operator must, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish and wildlife and related environmental values and achieve enhancement of those resources where practicable.

(d) *Clean Water Act requirements.* You may not initiate any activities under paragraph (b) of this section until you obtain all necessary certifications and authorizations under sections 401, 402, and 404 of the Clean Water Act, 33 U.S.C. 1341, 1342, and 1344.

20. In § 816.71, revise paragraphs (a) through (d) to read as follows:

**§ 816.71 Disposal of excess spoil: General requirements.**

(a) *General.* You, the permittee or operator, must place excess spoil in designated disposal areas within the permit area in a controlled manner—

(1) Minimize the adverse effects of leachate and surface water runoff from the fill on surface and ground waters;

(2) Ensure mass stability and prevent mass movement during and after construction;

(3) Ensure that the final fill is suitable for reclamation and revegetation compatible with the natural surroundings and the approved postmining land use; and

(4) Minimize disturbances to and adverse impacts on fish, wildlife, and

related environmental values to the extent possible, using the best technology currently available.

(b) *Static safety factor.* The fill must be designed and constructed to attain a minimum long-term static safety factor of 1.5. The foundation and abutments of the fill must be stable under all conditions of construction.

(c) *Compliance with permit.* You, the permittee or operator, must construct the fill in accordance with the design and plans submitted under § 780.35 of this chapter and approved as part of the permit.

(d) *Special requirement for steep-slope conditions.* When the slope in the disposal area exceeds 2.8h:1v (36 percent), or any lesser slope designated by the regulatory authority based on local conditions, you, the permittee or operator, must construct keyway cuts (excavations to stable bedrock) or rock-toe buttresses to ensure fill stability.

\* \* \* \* \*

**PART 817—PERMANENT PROGRAM PERFORMANCE STANDARDS— UNDERGROUND MINING ACTIVITIES**

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

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

22. Section 817.10 is revised to read as follows:

**§ 817.10 Information collection.**

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned clearance number 1029-0047. Collection of this information is required under section 516 of SMCRA, which provides that permittees conducting underground coal mining operations must meet all applicable performance standards of the regulatory program approved under the Act. The regulatory authority uses the information collected to ensure that underground mining activities are conducted in compliance with the requirements of the applicable regulatory program. Persons intending to conduct such operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

23. In § 817.11, revise paragraph (e) to read as follows:

**§ 817.11 Signs and markers.**

\* \* \* \* \*

(e) *Buffer zone markers.* The boundaries of any buffer to be

maintained between surface activities and waters of the United States in accordance with §§ 784.28 and 817.57 of this chapter must be clearly marked to avoid disturbance by surface operations and facilities.

\* \* \* \* \*

24. In § 817.43, revise paragraphs (a)(3), (b)(1), and (b)(4); and add paragraph (b)(5) to read as follows:

**§ 817.43 Diversions.**

(a) \* \* \*

(3) You, the permittee or operator, must—

(i) Promptly remove temporary diversions when no longer needed to achieve the purpose for which they were authorized.

(ii) Restore the land disturbed by the removal process in accordance with this part.

(iii) Before diversions are removed, modify or remove downstream water-treatment facilities previously protected by the diversion as necessary to prevent overtopping or failure of the facilities.

(iv) Maintain water-treatment facilities as otherwise required.

\* \* \* \* \*

(b) \* \* \*

(1) The regulatory authority may approve the diversion of perennial or intermittent streams within the permit area if the diversion is located, designed, constructed, and maintained using the best technology currently available to minimize adverse impacts to fish, wildlife, and related environmental values to the extent possible.

\* \* \* \* \*

(4) A permanent stream-channel diversion or a stream channel reclaimed after the removal of a temporary diversion must be designed and constructed using natural channel design techniques so as to restore or approximate the premining characteristics of the original stream channel, including the natural riparian vegetation and the natural hydrological characteristics of the original stream, to promote the recovery and enhancement of the aquatic habitat and to minimize adverse alteration of stream channels on and off the site, including channel deepening or enlargement, to the extent possible.

(5) A qualified registered professional engineer must certify the design and construction of all diversions of perennial and intermittent streams and all stream restorations as meeting the design and construction requirements of this section and any design criteria set by the regulatory authority.

\* \* \* \* \*

**§ 817.46 [Amended]**

25. In § 817.46, remove paragraph (b)(2) and redesignate paragraphs (b)(3) through (b)(7) as (b)(2) through (b)(6), respectively.

26. Revise § 817.57 to read as follows:

**§ 817.57 Hydrologic balance: Activities in or adjacent to waters of the United States.**

(a) *Prohibition.* You, the permittee or operator, may not conduct surface activities that would disturb the surface of land within 100 feet, measured horizontally, of waters of the United States, unless—

(1) The permit authorizes you to do so under § 784.28 of this chapter; or

(2) The provisions of paragraph (b) of this section apply to those activities.

(b) *Exceptions.* The prohibition in paragraph (a) of this section does not apply to the following surface activities—

(1) Mining through waters of the United States. You must comply with all other applicable requirements of the regulatory program, including the requirements of § 817.43(b) of this part if the mining involves the permanent or temporary diversion of a perennial or intermittent stream.

(2) Placement of bridge abutments, culverts, or other structures in or near waters of the United States to facilitate crossing of those waters. You must comply with all other applicable requirements of the regulatory program, including the requirements of §§ 817.150, 817.151, and 817.181 of this part, as appropriate.

(3) Construction of sedimentation pond embankments in waters of the United States. You must comply with all other applicable requirements of the regulatory program, including the requirements of § 817.45(a) of this part.

(4) Construction of excess spoil fills and coal mine waste disposal facilities in waters of the United States. You must comply with all other applicable requirements of the regulatory program, including the requirements of §§ 817.71(a) and (f) of this part for excess spoil fills and the requirements of §§ 817.81(a), 817.83(a), and 817.84 of this part for coal mine waste disposal facilities.

(c) *Additional clarifications.* The activities listed in paragraph (b) of this section must comply with paragraphs (b)(9)(B) and (b)(11) of section 516 of the Act and the regulations implementing those provisions of the Act, including—

(1) The requirement in § 817.41(d)(1) of this part that surface activities be conducted according to the plan approved under § 784.14(g) of this chapter and that earth materials, ground-water discharges, and runoff be

handled in a manner that prevents, to the extent possible using the best technology currently available, additional contribution of suspended solids to streamflow outside the permit area; and otherwise prevents water pollution.

(2) The requirement in § 817.45(a) that appropriate sediment control measures be designed, constructed, and maintained using the best technology currently available to prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area.

(3) The requirement in § 817.97(a) of this part that the operator must, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish and wildlife and related environmental values and achieve enhancement of those resources where practicable.

(d) *Clean Water Act requirements.* You may not initiate any activities under paragraph (b) of this section until you obtain all necessary certifications and authorizations under sections 401, 402, and 404 of the Clean Water Act, 33 U.S.C. 1341, 1342, and 1344.

27. In § 817.71, remove paragraph (k) and revise paragraphs (a) through (d) to read as follows:

**§ 817.71 Disposal of excess spoil: General requirements.**

(a) *General.* You, the permittee or operator, must place excess spoil in designated disposal areas within the permit area in a controlled manner to—

(1) Minimize the adverse effects of leachate and surface water runoff from the fill on surface and ground waters;

(2) Ensure mass stability and prevent mass movement during and after construction;

(3) Ensure that the final fill is suitable for reclamation and revegetation compatible with the natural surroundings and the approved postmining land use; and

(4) Minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available.

(b) *Static safety factor.* The fill must be designed and constructed to attain a minimum long-term static safety factor of 1.5. The foundation and abutments of the fill must be stable under all conditions of construction.

(c) *Compliance with permit.* You, the permittee or operator, must construct the fill in accordance with the design and plans submitted under § 784.19 of this chapter and approved as part of the permit.

(d) *Special requirement for steep-slope conditions.* When the slope in the disposal area exceeds 2.8h:1v (36 percent), or any lesser slope designated

by the regulatory authority based on local conditions, you, the permittee or operator, must construct keyway cuts

(excavations to stable bedrock) or rock-toe buttresses to ensure fill stability.

\* \* \* \* \*

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