

Dated: July 30, 1996.

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Acting Associate Director for Offshore Minerals Management.

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Office of Surface Mining Reclamation and Enforcement

30 CFR Part 950

[SPATS No. WY-022]

Wyoming Regulatory Program

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

ACTION: Final rule; approval of amendment.

SUMMARY: OSM is approving, with additional requirements, a proposed amendment to the Wyoming regulatory program (hereinafter, the "Wyoming program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed amendment consists of addition and revision of statutes and rules pertaining to shrub density stocking requirements and wildlife habitat. The amendment was intended to revise the Wyoming program to be consistent with SMCRA and the corresponding Federal regulations.

EFFECTIVE DATE: August 6, 1996.

FOR FURTHER INFORMATION CONTACT: Guy V. Padgett, Director, Casper Field Office, Telephone: (307) 261-5824, Internet address: GPADGETT@CWYGW.OSMRE.GOV.

SUPPLEMENTARY INFORMATION:

I. Background on the Wyoming Program

On November 26, 1980, the Secretary of the Interior conditionally approved the Wyoming program. General background information on the Wyoming program, including the Secretary's findings, the disposition of comments, and the conditions of approval of the Wyoming program can be found in the November 26, 1980, Federal Register (45 FR 78637). Subsequent actions concerning Wyoming's program and program amendments can be found at 30 CFR 950.12, 950.15, 950.16, and 950.20.

II. Proposed Amendment

By letter dated November 29, 1995, Wyoming submitted a proposed amendment to its program (administrative record No. WY-031-1) pursuant to SMCRA (30 U.S.C. 1201 et

seq.). Wyoming submitted the proposed amendment in response to the required program amendments at 30 CFR 950.16(q) and (bb) through (hh). The provisions of the Wyoming Environmental Quality Act that Wyoming proposed to revise were: Wyoming Statute (W.S.) 35-11-103, definitions, and W.S. 35-11-402, establishment of reclamation standards. The provisions of the coal rules and regulations of the Department of Environmental Quality, Land Quality Division, that Wyoming proposed to revise were: chapter I, section 2, definitions; chapter II, section 2, permit application requirements for surface coal mining operations; chapter IV, section 2, general environmental protection performance standards for surface coal mining operations; chapter X, section 4, coal exploration and reclamation performance standards; chapter XI, section 5, self-bonding; chapter XIII, section 3, notice and opportunity for public hearing on surface coal mining permit revisions; chapter XVII, section 1, definitions for designation of areas unsuitable for surface coal mining; and appendix A, vegetation sampling methods and reclamation success standards for surface coal mining operations.

OSM announced receipt of the proposed amendment in the December 18, 1995, Federal Register (60 FR 65048), provided an opportunity for a public hearing or meeting on its substantive adequacy, and invited public comment on its adequacy (administrative record No. WY-31-02). Because no one requested a public hearing or meeting, none was held.

During its review of the amendment, OSM identified concerns relating to the proposed provisions of the rule at chapter I, section 2(v), critical habitat for threatened and endangered species; the rules at chapter I, sections 2(ac) and (bc)(xi), and chapter IV, section 2(d)(x)(E)(I), definitions for "eligible land" and "treated grazingland" and reclamation success standard for shrub density; the rule at chapter II, section 2(a)(vi)(G)(II), consultation by the Wyoming Land Quality Division on critical habitat; W.S. 35-11-402(b) and the rules at chapter II, section 2(b)(iv)(C), and chapter IV, section 2(d)(x)(E)(III), approval of reclamation standards by the Wyoming Game and Fish Department; the rules at chapter II, section 2(b)(vi)(B)(III) and chapter IV, sections 2(c)(xi)(F)(II) and 2(r), permit application requirements and performance standards for protection of important and crucial habitats for fish and wildlife; the rule at chapter X, section 4(e), disturbance of important

habitat by exploration operations; the rule at chapter XIII, section 2(b), notice and opportunity for public hearing on permit revision; appendix A, section VIII.E. and the rule at chapter IV, section 2(d)(x)(E)(I), programwide or permit-specific consultation and approval by the Wyoming Game and Fish Department; and appendix A, appendix IV, plant species of special concern. OSM notified Wyoming of the concerns by letter dated March 8, 1996 (administrative record No. WY-31-17).

Wyoming responded by letter on April 9, 1996, to each of the issues (administrative record No. WY-31-18). For some of the issues, Wyoming submitted specific revisions that it intends to pursue in the State rulemaking process. This process is expected to produce a formal amendment that would be submitted to OSM by mid-1997. OSM acknowledges these revisions but, because they have not yet been promulgated, does not in the following findings make determinations on their effectiveness.

III. Director's Findings

As discussed below, the Director, in accordance with SMCRA and 30 CFR 732.15 and 732.17, finds, with additional requirements, that the proposed program amendment submitted by Wyoming on November 29, 1995, is no less stringent than SMCRA and no less effective than the corresponding Federal regulations. Accordingly, the Director approves, with additional requirements, the proposed amendment.

1. Substantive Revisions to Wyoming's Rules That Are Substantively Identical to the Corresponding Provisions of the Federal Regulations

Wyoming proposed revisions to the following rules that are substantive in nature and contain language that is substantively identical to the requirements of the corresponding Federal regulation provisions (listed in parentheses).

Chapter I, section 2(bc)(viii) (30 CFR 701.5), land use definition for "fish and wildlife habitat," and

Chapter XI, section 5(a) (30 CFR 800.23(g)), substitution of a surety bond for a self-bond.

Because these proposed Wyoming rules are substantively identical to the corresponding provisions of the Federal regulations, the Director finds that they are no less effective than the Federal regulations. The Director approves these proposed rules.

2. W.S. 35-11-103(e)(xxviii), Definition for "Agricultural Lands"

On January 24, 1994, OSM at 30 CFR 950.16(bb) required Wyoming to delete its definition for "agricultural lands" at W.S. 35-11-103(e)(xxviii) or provide an interpretation of the definition that would make it no less stringent than SMCRA and no less effective than the Federal regulations (finding No. 1, 59 FR 3521). Wyoming proposed to delete the definition.

This deletion satisfies the required amendment and does not make Wyoming's regulatory program less stringent than SMCRA and less effective than the Federal regulations. Therefore, the Director approves the proposed deletion of the definition for "agricultural lands" at W.S. 35-11-103(e)(xxviii) and removes the required amendment at 30 CFR 950.16(bb).

3. W.S. 35-11-103(e)(xxix) and Rule at Chapter I, Section 2(v), Definition for "Critical Habitat"

On January 24, 1994, OSM at 30 CFR 950.16(cc) (finding No. 2, 59 FR 3521, 3521-2) required Wyoming to delete its definition for "critical habitat" at W.S. 35-11-103(e)(xxix) or revise it to make the term applicable to animal and plant species habitats that have been designated by the Secretary of the Interior as critical habitats under section 3 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.).

In response to the required amendment, Wyoming proposed to delete the definition for "critical habitat" at W.S. 35-11-103(e)(xxix) but to add a similar definition for this term in its rules at chapter I, section 2(v). In this rule, Wyoming proposed that "critical habitat" means "those areas essential to the survival and recovery of species listed by the Secretary of the Interior or Commerce as threatened or endangered (50 CFR, parts 17 AND 226.)"

50 CFR part 226 pertains to habitat for marine mammals, fish, and reptiles designated as critical by the National Oceanic and Atmospheric Administration under the jurisdiction of the Secretary of Commerce. 50 CFR Part 17 pertains to critical habitats listed by the Secretary of the Interior under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531-1543), but it is also in 30 CFR 17.2(b), through its reference of subpart B, lists threatened and endangered wildlife and plant species completely under the jurisdiction of the Department of Commerce and other such species jointly under the jurisdiction of the

Departments of the Interior and Commerce.

There is no counterpart definition for "critical habitat" in SMCRA or the Federal regulations. However, the surface and underground mining permit application regulations at 30 CFR 780.16(a) and (b) and 784.21(a) and (b) require resource information and protection and enhancement plans for listed or proposed endangered or threatened species of plants or animals or their "critical habitats" listed by the Secretary of the Interior under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.). Also, the performance standards at 30 CFR 816.97(b) and 817.97(b) require that no surface or underground mining activity shall be conducted that is likely to jeopardize the continued existence of endangered or threatened species listed by the Secretary of the Interior or that is likely to result in the destruction or adverse modification of designated "critical habitats" of such species in violation of the Endangered Species Act of 1973, as amended.

Wyoming's referencing of the Secretary of Commerce's regulations at 50 CFR Part 226 has no relevance to the Wyoming regulatory program, because the State has no mammals, fish, and reptiles that spend at least part of their lives in a marine environment. Wyoming's referencing of these regulations does not itself make its rule less effective than the Federal regulations, but OSM indicated in the January 24, 1994, Federal Register notice that Wyoming's protection of critical habitat designated by the Secretary of the Interior or Commerce could be interpreted to allow Wyoming to choose to protect the critical habitat designated by one of the departments, but not both. OSM reasoned that Wyoming could choose to protect critical habitat designated by the Department of Commerce (for which there is none in Wyoming) and not protect critical habitat designated by the Secretary of the Interior.

In its April 9, 1996, response to OSM's issue letter, Wyoming stated that the Secretary of Commerce's regulations at 50 CFR part 226 have no relevance in the State.

On the basis of this clarification, OSM finds that Wyoming's proposed deletion of the definition for "critical habitat" at W.S. 35-11-103(e)(xxix) and the proposed addition of a definition for this term in its rule at chapter I, section 2(v) are no less effective than the Federal regulations at 30 CFR 780.16(a) and (b), 784.21(a) and (b), 816.97(b), and 817.97(b). Therefore, the Director approves the proposed deletion and

addition, and removes the required amendment at 30 CFR 950.16(cc). However, to avoid confusion by someone who reads Wyoming's rules but has not read this finding, OSM recommends that Wyoming in a future amendment delete in the rule at chapter I, section 2(v) the references to the Secretary of Commerce and the regulations at 50 CFR part 226.

4. W.S. 35-11-103(e)(xxx) and Rules at Chapter I, Sections 2(ax) and (w), Definitions for "Important Habitat" and "Crucial Habitat"

On January 24, 1994, OSM at 30 CFR 950.16(dd) (finding No. 3, 59 FR 3521, 3522) required Wyoming to delete its definition for "important habitat or crucial habitat" at W.S. 35-11-103(e)(xxx) or revise it so that it did not exclude "agricultural lands," which were defined at W.S. 35-11-103(e)(xxviii) as "cropland, pastureland, hayland, or grazingland," from lands that could also have to be protected as "important habitats or crucial habitats."

In response to the required amendment, Wyoming proposed to delete the definition for "important habitat or crucial habitat" at W.S. 35-11-103(e)(xxx) but to add separate definitions for "important habitat" and "crucial habitat" in the rules at chapter I, sections 2(ax) and (W).

Wyoming proposed that "important habitat" means

that habitat which, in limited availability, supports or encourages a maximum diversity of wildlife species or fulfills one or more living requirements of a wildlife species. Examples of important habitat include, but are not limited to, wetlands, riparian areas, rimrocks, areas offering special shelter or protection, reproduction and nursery areas, and wintering areas.

It also proposed that "crucial habitat" means "those areas, designated as such by the Wyoming Game and Fish Department, which determine a population's ability to maintain and reproduce itself at a certain level over the long term."

There is no counterpart definition for "important habitat" or "crucial habitat" in SMCRA or the Federal regulations. However, the surface mining permit application regulations at 30 CFR 780.16(a) and (b) require resource information and protection and enhancement plans for "habitats of unusually high value for fish and wildlife" such as important streams, wetlands, riparian areas, cliffs supporting raptors, areas offering special shelter or protection, migration routes, or reproduction and wintering areas. Also, the performance standards at 30 CFR 816.97(f) require that surface mining activities shall avoid

disturbances to, enhance where practicable, or restore "habitats of unusually high value for fish and wildlife."

As described in 30 CFR 780.16(a)(2)(ii), "habitats of unusually high value for fish and wildlife" include "important streams, wetlands, riparian areas, cliffs supporting raptors, areas offering special shelter or protection, migration routes, or reproduction and wintering areas." This description coincides with Wyoming's proposed definition for "important habitat" at chapter I, proposed section 2(ax), which states that "important habitat" includes "wetlands, riparian areas, rimrocks, areas offering special shelter or protection, reproduction and nursery areas, and wintering areas."

Wyoming's proposed rule definitions for "important habitat" and "crucial habitat" at chapter I, sections 2(ax) and (w) are not inconsistent with (1) the surface mining permit application regulations at 30 CFR 780.16 (a) and (b), which require resource information and protection and enhancement plans for "habitats of unusually high value for fish and wildlife" and (2) the performance standards at 30 CFR 816.97(f), which require that operators of surface coal mining activities shall avoid disturbances to, enhance where practicable, or restore "habitats of unusually high value for fish and wildlife." Therefore, the Director approves Wyoming's proposed rule definitions for "important habitat" and "crucial habitat" at chapter I, sections 2(ax) and (w).

Also, because Wyoming deleted its statutory definition for "important habitat or crucial habitat" at W.S. 35-11-103(e)(xxx) and because its proposed rule definitions for "important habitat" and "crucial habitat" at chapter I, sections 2 (ax) and (w) do not exclude "agriculture lands," which was defined at W.S. 35-11-103(e)(xxviii) but which has now been deleted (see finding No. 2), the Director removes the required amendment at 30 CFR 950.16(dd).

5. W.S. 35-11-402(b) and Rules at Chapter II, Section 2(b)(iv)(C), and Chapter IV, Sections 2(d)(x)(E) and (E)(III), Establishment of Reclamation Standards for Fish and Wildlife Habitat and Grazingland

On January 24, 1994, OSM at 30 CFR 950.16(ee) (finding No. 4, 59 FR 3521, 3522-3) required Wyoming to repeal the part of W.S. 35-11-402(b) that provides direction to the Wyoming Environmental Quality Council to use the statutory definitions for "agriculture lands," "critical habitat," and "important habitat or crucial

habitat" at W.S. 35-11-103(e)(xviii), (xxix), and (xxx) in establishing reclamation standards for fish and wildlife habitat that are required by Federal law or regulations to be approved by State Wildlife agencies. OSM placed this requirement on the Wyoming program because OSM had disapproved the three definitions on the basis that they were less stringent than SMCRA and less effective than the Federal regulations (finding Nos. 1, 2, and 3, 59 FR 3521, 3521-2).

As indicated in finding Nos. 1, 2, and 3, Wyoming proposed to delete the statutory definitions for "agricultural lands," "critical habitat," and "important habitat or crucial habitat" at W.S. 35-11-103(e)(xviii), (xxix), and (xxx), and the Director approved these deletions. At W.S. 35-11-402(b), Wyoming proposed to delete the references to these statutory definitions. Wyoming's proposed deletion of the statutory definitions satisfies the required amendment at 30 CFR 950.16(ee). Therefore, the Director removes the required amendment.

W.S. 35-11-402(b). At existing W.S. 35-11-402(b), Wyoming requires that, to the extent required by federal law or regulations, the Wyoming Game and Fish Department's approval has to be obtained for reclamation standards established for "fish and wildlife habitat" as defined at W.S. 35-11-103(e)(xxvi). As additional requirements at W.S. 35-11-402(b) (i) and (ii), Wyoming proposed that the Wyoming Game and Fish Department's approval would have to be obtained for standards established for "grazingland," as defined at W.S. 35-11-103(e)(xxvii), if the grazingland includes critical habitat designated by the U.S. Fish and Wildlife Service or if it includes crucial habitat designated by the Wyoming Game and Fish Department prior to submittal of the initial permit application or any subsequent amendments to the permit application. An amendment to a permit application is, as set forth in Wyoming's existing rule at chapter I, section 2(e), a permit application adding new lands to a previously approved permit area, as allowed by W.S. 35-11-406(a)(xii).

Although unstated, the standards addressed by the proposed provision are revegetation standards for which the Wyoming Land Quality Division would have to obtain the Wyoming Game and Fish Department's approval on a permit-specific basis.

This proposed State statute does not have any direct counterpart in SMCRA, but it does in part have a counterpart in the Federal regulations. The Federal regulation at 30 CFR 816.116(b)(3)(i) requires for areas to be developed for

fish and wildlife habitat, that success of vegetation, which is to be based upon tree and shrub stocking and vegetative ground cover parameters, be specified by the regulatory authority after consultation with and approval by the State agency responsible for the administration of the wildlife program.

The existing provision at proposed W.S. 35-11-402(b) requires Wyoming Game and Fish Department approval of revegetation standards for land to be reclaimed to fish and wildlife habitat. This provision is consistent with the corresponding Federal regulation at 30 CFR 816.116(b)(3)(i), which requires the State wildlife agency's approval of the revegetation standards for areas to be reclaimed for fish and wildlife habitat.

The proposed provision at W.S. 35-11-402(b)(i) requires Wyoming Game and Fish Department approval of revegetation standards for grazingland including critical habitat. As discussed in finding No. 10, the Federal regulation at 30 CFR 780.16(a)(2)(i) requires Wyoming to obtain the approval of the U.S. Fish and Wildlife Service, not the State wildlife agency, on any critical habitat that could be affected by mining operations. Although Wyoming does not indicate in the proposed provision at W.S. 35-11-402(b)(i) that it must obtain U.S. Fish and Wildlife Service approval, this does not make the provision less effective than the Federal regulation at 30 CFR 780.16(a)(2)(i), because Wyoming has narrowly worded the provision in such a way as to only apply to Wyoming Game and Fish Department approvals. This does not, however, relieve Wyoming of the responsibility to require such U.S. Fish and Wildlife Service approval through its rule at chapter II, section 2(a)(vi)(G)(II). Although the Federal regulations do not require State wildlife agency approval for critical habitat, Wyoming's proposal to do so amounts to an additional requirement that does not render the proposed provision at W.S. 35-11-402(b)(i) less effective than the Federal regulation at 30 CFR 780.16(a)(2)(i).

The proposed provision at W.S. 35-11-402(b)(ii) requires Wyoming Game and Fish Department approval of revegetation standards for grazingland, as defined at W.S. 35-11-103(e)(xxvii), which was designated by the Wyoming Game and Fish Department as crucial habitat prior to submittal of the initial permit application or any subsequent amendments to the permit application. As set out in Wyoming's definitions, grazingland is a different and separate land use from fish and wildlife habitat. Therefore, grazingland with crucial habitat on it, regardless of when the crucial habitat was designated, is not

fish and wildlife habitat. "Fish and wildlife habitat," as defined at W.S. 35-11-103(e)(xxvi), is "land dedicated wholly or partially to the protection, protection or management of species of fish or wildlife" (emphasis added). "Grazingland," as defined at W.S. 35-11-103(e)(xxvii) "includes rangelands and forestlands where the indigenous native vegetation is actively managed for grazing, browsing, occasional hay production, and *occasional use by wildlife*" (emphasis added). In its April 9, 1996, letter response to OSM's issue letter, Wyoming implicitly acknowledged this difference when it stated that there is "very little habitat which is *dedicated* wholly or partially to the production, protection or management of species of fish or wildlife" (emphasis in the original, page 3 of Wyoming's letter, item No. 4.B.). In its proposed provision at W.S. 35-11-402(b)(ii), the Wyoming Land Quality Division requires Wyoming Game and Fish Department approval of revegetation standards for certain "grazingland." To the extent that the corresponding Federal regulation at 30 CFR 816.116(b)(3)(i) only requires State wildlife agency approval of revegetation standards for "fish and wildlife habitat," the proposed provision at W.S. 35-11-402(b)(ii) goes beyond the requirements of the Federal regulation.

For the reasons discussed above, the Director finds that proposed W.S. 35-11-402(b)(i) and (ii) are no less stringent than SMCRA and no less effective than the Federal regulation at 30 CFR 816.116(b)(3)(i). The Director approves these statutory provisions.

Rules at chapter II, section 2(b)(iv)(C), and chapter IV, sections 2(d)(x)(E) and (E) (III).—Wyoming's revegetation plan requirements for surface coal mining permit applications are in its rule at chapter II, section 2(b)(iv)(C). Wyoming proposed to revise the rule to require consultation with the Wyoming Department of Agriculture on cropland and erosion control techniques. The Federal permitting regulation at 30 CFR 780.18(b)(5) requires a plan for revegetation as required in 30 CFR 816.111 through 816.116. The Director finds that consultation with the Wyoming Department of Agriculture would potentially result in a permit that affords greater environmental protection to lands developed for cropland. This proposed revision to the rule at chapter II, section 2(b)(iv)(C) is not inconsistent with the intent of the Federal regulation at 30 CFR 780.18(b)(5).

Some of Wyoming's revegetation performance standards are in its rules at chapter IV, section 2(d)(x)(E). Wyoming proposed at section 2(d)(x)(E) that the

postmining density, composition, and distribution of shrubs shall be based upon site-specific evaluation of premining vegetation and wildlife use. The Federal regulation at 30 CFR 816.116(a)(2) requires that standards for revegetation success shall include criteria representative of unmined lands in the area being reclaimed to evaluate the appropriate vegetation parameters of ground cover, production, or stocking. The Director finds that this proposed revision to the rule at chapter IV, section 2(d)(x)(E) is not inconsistent with the Federal regulation at 30 CFR 816.116(a)(2).

Wyoming proposed to further revise the rule at chapter II, section 2(b)(iv)(C) to (1) require, for crucial and critical habitats, consultation with and approval by the Wyoming Game and Fish Department on minimum stocking and planting arrangements of trees and shrubs, including species composition and vegetative ground cover and (2) require, for important habitats, consultation with the Wyoming Game and Fish Department on minimum stocking and planting arrangements of trees and shrubs, including species composition and vegetative ground cover. Wyoming proposed at chapter IV, section 2(d)(x)(E) (III) to (1) require, for areas containing designated critical or crucial habitats, consultation with and approval by the Wyoming Game and Fish Department on minimum stocking and planting arrangements of shrubs, including species composition, and (2) require, for areas containing important habitats, consultation with the Wyoming Game and Fish Department to obtain recommended minimum stocking and planting arrangements of shrubs, including species composition, that may exceed the preceding programmatic standard (the standard at section 2(d)(x)(E)(I), which requires that, except where a lesser density is justified from premining conditions in accordance with appendix A, at least 20 percent of the eligible lands shall be restored to shrub patches supporting an average density of one shrub per square meter). With two exceptions, these proposed consultation and approval requirements and consultation-only requirements are the same as the proposed statutory requirements for W.S. 35-11-402(b) that are addressed above.

The first exception is that the rules indicate that consultation with and approval by the Wyoming Game and Fish Department need occur on crucial habitat (i.e., all crucial habitat regardless of when it is designated), whereas the statute indicates that the approval by the Wyoming Game and Fish Department need only occur on those

crucial habitats that are designated prior to the submittal of the initial permit application or any subsequent permit application amendments. To the extent that the proposed rules at chapter II, section 2(b)(iv)(C), and chapter IV, section 2(d)(x)(E) (III), require Wyoming Game and Fish Department approval of certain crucial habitats not required by the statute at W.S. 35-11-402(b)(ii), the proposed rules and statute are not consistent. Therefore, the Director is requiring Wyoming to (1) revise the rules at chapter II, section 2(b)(iv)(C) and chapter IV, section 2(d)(x)(E)(III) to require Wyoming Game and Fish Department approval of revegetation standards for grazingland that was designated by the Wyoming Game and Fish Department as crucial habitat prior to submittal of the initial permit application or any subsequent amendments to the permit application, or (2) to revise the statute at W.S. 35-11-402(b)(ii) to remove the phrase "prior to submittal of the initial permit application or any subsequent amendments to the permit application."

The second exception is that the rules do not require consultation and approval on all surface mined lands to be reclaimed for a "fish and wildlife habitat" land use, whereas the statute does. The rules require consultation and concurrence on critical habitat and crucial habitat, but they do not require consultation and concurrence on lands to be reclaimed for the fish and wildlife habitat land use. The Federal regulations at 30 CFR 816.116(b)(3)(i) require, for areas to be developed for the fish and wildlife habitat land use, consultation and concurrence by the State agency responsible for the administration of the wildlife program on minimum stocking and planting arrangements for tree and shrub stocking. To the extent that the rules at chapter II, section 2(b)(iv)(C), and chapter IV, section 2(d)(x)(E)(III), do not require consultation with and approval by the Wyoming Game and Fish Department on minimum stocking and planting arrangements for tree and shrub stocking on lands to be reclaimed for the fish and wildlife habitat land use, they are less effective than the Federal regulations at 30 CFR 816.116(b)(3)(i). Therefore, the Director approves the rules at chapter II, section 2(b)(iv)(C) and chapter IV, section 2(d)(x)(E)(III) but requires Wyoming to revise them to require consultation with and approval by the Wyoming Game and Fish Department of tree and shrub standards for all lands to be reclaimed for the fish and wildlife habitat land use.

In conclusion, the Director finds, for the reasons discussed above, that the proposed rules at chapter II, section 2(b)(iv)(C), and chapter IV, section 2(d)(x)(E)(III), are less effective than the Federal regulations at 30 CFR 816.116(b)(3)(i). The Director approves the proposed rules but requires Wyoming to revise them.

6. W.S. 35-11-402(c), Establishment of Shrubs on Grazingland

On January 24, 1994, OSM at 30 CFR 950.16(ff) (finding No. 5, 59 FR 3521, 3523) required Wyoming to either delete W.S. 35-11-402(c) (which required reestablishment of shrubs on grazingland to a density of one shrub per 9 square meters, or to the premining density, whichever was less) or to submit documentation that the shrub density requirement was consistent with SMCRA and no less effective than the Federal regulations.

In response to the required amendment, Wyoming proposed to delete the shrub density for grazingland from W.S. 35-11-402(c). This deletion satisfies the required amendment at 30 CFR 950.16(ff), and the Director is removing the required amendment. (Note, however, that Wyoming has now proposed shrub density standards elsewhere in its rules. For a discussion of the effectiveness of those rules, see finding No. 7.)

At W.S. 35-11-402(c), Wyoming also proposed, for the reclamation of grazingland, that native shrubs be reestablished. It also stipulated that no shrub species shall be required to be more than one-half of the shrubs in the postmining standard.

Section 515(b)(19) requires that surface coal mining and reclamation operations establish on regraded areas, and all other lands affected, a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land affected.

Wyoming's proposed W.S. 35-11-402(c) is no less stringent than section 515(b)(19) of SMCRA in that it requires the use of native species and, through its requirement that no shrub species shall be more than one-half of the shrubs in the postmining standard, promotes a diverse vegetative cover.

For the above stated reasons, the Director approves proposed W.S. 35-11-402(c).

7. Rules at Chapter I, Section 2(ac); Chapter IV, Section 2(d)(x)(E)(I) and (II); and Appendix A: Definition for "Eligible Land" and Reclamation Success Standards for Shrub Density

On January 24, 1994, OSM at 30 CFR 950.16(gg) (finding No. 6, 59 FR 3521,

3524) required Wyoming to amend the rule at chapter IV, section 2(d)(X)(E) and appendix A to include shrub density requirements that are in compliance with SMCRA and the Federal regulations. In response to the required amendment, Wyoming proposed the following revisions to its rules.

At chapter I, section 2(ac), Wyoming proposed that "eligible land" means all land to be affected by a mining operation after the shrub standard set forth at chapter IV, section 2.(d)(x)(E) is approved by the Office of Surface Mining. Cropland, pastureland or *treated grazingland* approved by the Administrator which is to be affected by a mining operation after the shrub standard set forth at *chapter IV, section 2.(d)(x)(E)* is approved by the Office of Surface Mining is not "eligible land" (emphasis added).

In its rule at chapter IV, section 2(d)(x)(E) (I) and (II), Wyoming proposed that

(I) Except where a lesser density is justified from premining conditions in accordance with Appendix A, at least 20 percent of the *eligible land* shall be restored to shrub patches supporting an average of one shrub per square meter. Patches shall be no less than .05 acres each and shall be arranged in a mosaic that will optimize habitat interspersion and edge effect. Criteria and procedures for establishing the standard are specified in Appendix A. This standard shall apply upon approval by OSM to all lands affected thereafter.

(II) Approved shrub species and seeding techniques shall be applied to all remaining grazingland. Trees shall be returned to a density equal to the premining conditions (emphasis added).

Appendix A of Wyoming's rules contains vegetation sampling methods and reclamation success standards for surface coal mining operations. In the following sections of appendix A, Wyoming proposed revisions that restate the above-discussed rules and detail the vegetation analyses that must be made by operators to implement the rules: II.C.3, detailed qualitative and quantitative sampling procedures, suggested sampling procedures for shrub habitat characteristics; VII.F, developing a revegetation plan, restoration of shrubs, subshrubs, and trees; and VIII.E, testing adequacy of reclamation, summary. Also, in the following sections of appendix A, Wyoming proposed other miscellaneous related revisions: Table 1, values for use in sample adequacy formula; table 2 and IV.D. minimum and maximum sample sizes for various sampling methods; and appendix VII, glossary terms "dominant" and "primary shrub species." The effect of these proposed rules is that, with respect to lands to be reclaimed for a grazingland use or a fish

and wildlife habitat land use, there is one shrub reclamation standard that applies to lands disturbed prior to the date of OSM's approval of the rules, and there is a different one that applies to lands disturbed after the date of OSM's approval of the rules.

For those lands disturbed prior to the date of OSM's approval, the requirements of the existing rule at chapter IV, section 2(d)(x)(E) applies. It sets a reclamation goal of one shrub per square meter in shrub patches on 10 percent of the affected land. For those lands disturbed after the date of OSM's approval, the requirements of the new definition for "eligible land" at chapter I, section 2(ac), the revised rules at chapter IV, section 2(d)(x)(E) (I) and (II), and the revised appendix A for the rules apply. They require that, except where a lesser density is justified from premining conditions in accordance with appendix A, at least 20 percent of the affected land be restored to shrub patches supporting an average of one shrub per square meter.

For both the pre-approval and post-approval affected lands, the operator must seed the areas outside the shrub patches with an approved seeding mixture that includes shrubs. The existing rule at chapter IV, section 2(d)(x)(E) specifies this when it states that "(a)pproved shrub species and seeding techniques shall be applied to all remaining surfaces used jointly by livestock and wildlife." The proposed rule at chapter IV, section 2(d)(x)(E)(II) specifies this when it states that "(a)pproved shrub species and seeding techniques shall be applied to all remaining grazingland."

The Federal regulation at 30 CFR 816.116(a)(1) requires the State regulatory authority to select standards for success and statistically valid sampling techniques for measuring success and to include them in an approved regulatory program. The standards proposed by Wyoming and discussed above constitute such standards and techniques.

30 CFR 816.116(b)(3) requires, for areas developed for fish and wildlife habitat, success of vegetation to be determined on the basis of tree and shrub stocking and vegetative ground cover. As further required at 30 CFR 816.116(b)(3)(i), minimum stocking and planting arrangements must be specified by the State regulatory authority on the basis of local and regional conditions and after consultation with and approval by the State agency responsible for the administration of the wildlife program. By letter dated March 28, 1996, the Wyoming Game and Fish Department concurred with the

proposed shrub density standards (administrative record No. WY-31-18).

Because Wyoming has proposed shrub reestablishment success standards and statistically valid sampling techniques that should ensure a vegetative stand which is effective in implementing the grazingland and fish and wildlife habitat land uses, and because the State wildlife agency has concurred with the standards for the fish and wildlife habitat land use, the Director finds that Wyoming's proposed definition for "eligible land" at chapter I, section 2(ac), the revised rules at chapter IV, section 2(d)(x)(E) (I) and (II), and the revised appendix A, meet the requirements of 30 CFR 816.116(a)(1) and 816.116(b)(3). Accordingly, the Director approves the proposed rules, and the appendix to the rules, and removes the required amendment at 30 CFR 950.16(gg).

8. Rule at Chapter I, Section 3(bc)(iii), Definition for "Grazingland"

On July 8, 1992, OSM at 30 CFR 950.16(q) required Wyoming to revise its definition for "grazingland" in its rules at chapter I, section 2(ba)(iii) to clarify that Wyoming's rule requires that land managed for grazing must also receive consideration for wildlife use (finding No. 2, 57 FR 30121, 30123-5). Wyoming proposed to satisfy this required amendment by adding the phrase "and occasional use by wildlife" to its land use definition for "grazingland" at chapter I, recodified section 2(bc)(iii). With the addition of this phrase, this rule definition is substantively identical to the statute definition for grazingland at W.S. 35-11-103(e)(xxvii), which OSM approved in the above-cited 1992 Federal Register notice. The Director finds that Wyoming's proposed "grazingland" definition at chapter I, recodified section 2(bc)(iii), is no less effective than the corresponding Federal land use definition of "grazingland" at 30 CFR 701.5. Therefore, the Director approves the proposed definition and removes the required amendment at 30 CFR 950.16(q).

9. Rule at Chapter I, Section 2(bc)(xi), Definition for "Treated Grazingland"

In its process of adopting the shrub reestablishment standards included in this amendment, Wyoming realized that there might be an incentive for operators to mechanically or chemically treat areas to be permitted in the future. If allowed to do so, the operators could reduce premining shrub densities so that fewer shrubs would have to be established on reclaimed lands. At the same time, Wyoming recognized that

removal of shrubs from rangeland is a common management tool. With these things in mind, Wyoming created the term "treated grazingland" as a compromise between these two concerns (administrative record No. WY-31-18).

At chapter I, section 2(bc)(xi), Wyoming proposed that "treated grazingland" means

grazingland which has been altered to reduce or eliminate shrubs provided such treatment was applied at least five years prior to submission of the state program permit application. However, grazingland altered more than five years prior to submission of the state program permit application on which full shrubs have reestablished to a density of at least one per nine square meters does not qualify as treated grazingland.

In effect, the proposed definition for "treated grazingland" creates three classes of grazingland: (1) Grazingland that is affected after the date of OSM's approval and that was treated less than 5 years prior to the submission of the permit application; (2) grazingland that is affected after the date of OSM's approval and that was treated 5 or more years prior to the submission of the permit application where the premining shrub density is *equal to or greater* than one shrub per 9 square meters; (3) grazingland that is affected after the date of OSM's approval and that was treated 5 or more years prior to the submission of the permit application where the premining shrub density is *less* than one shrub per 9 square meters.

In order to determine the shrub reestablishment standard that applies to each of these three classes of grazingland, one must apply the proposed definition for "treated grazingland" in conjunction with the proposed definition for "eligible land" at chapter I, section 2(ac); the proposed rule at chapter IV, section 2(d)(x)(E); and appendix A to the rules at section VIII.E. A discussion of the shrub reestablishment standards for each of these classes of grazingland follows.

For the reasons discussed, the Director, approves the proposed definition for "treated grazingland" at chapter I, section 2(bc)(xi), because the shrub standards set by Wyoming for treated grazingland strikes a reasonable balance between agricultural interests and wildlife habitat needs that is not inconsistent with the intent of SMCRA and the Federal regulations. However, the Director is requiring Wyoming to clarify the revegetation standard for grazingland that is affected after the date of OSM's approval and that was treated less than 5 years prior to the submission of the permit application.

Grazingland that is affected after the date of OSM's approval and that was treated less than 5 years prior to the submission of the permit application. As set forth in the proposed definition for "treated grazingland" at chapter I, section 2(bc)(xi), grazingland that is disturbed after the date of OSM's approval of these rules and that was treated less than 5 years prior to the submission of the permit application is not "treated grazingland." Because it is not "treated grazingland," it is "grazingland." As set forth in the definition for "eligible land" at chapter I, section 2(ac), this grazingland is eligible land that is subject to the shrub standard set forth at chapter IV, section 2(d)(x)(E), which at subsection (I) states that "*[e]xcept where a lesser density is justified from premining conditions* in accordance with appendix A, at least 20 percent of the eligible land shall be restored to shrub patches supporting an average of one shrub per square meter" (emphasis added).

Given Wyoming's rationale that it wanted to take away any incentive for an operator permitting shrub densities so that fewer shrubs would have to be established on reclaimed grazinglands, it is not likely that Wyoming intended that the postmining shrub reestablishment standard could be a lesser density that was based on the premining, treated condition. Even so, the language of the rules could be interpreted to allow this. Alternatively, it's possible that Wyoming intended that any operator treating grazingland less than 5 years prior to the submission of the permit application would than automatically have to reclaim to the maximum standard of at least one shrub per square meter on 20 percent of the eligible land.

There is no direct counterpart definition for "treated grazingland" in the Federal regulations. However, 30 CFR 816.116(b)(1) requires that standards for success shall be applied in accordance with the approved postmining land use and, at a minimum, for areas developed for use as grazingland, the ground cover and production of living plants on the revegetated area shall be at least equal to that of a reference area of "such other success standards approved by the regulatory authority."

Because Wyoming's rules are unclear as to the shrub reestablishment standard for grazingland that is affected after the date of OSM's approval and that was treated less than 5 years prior to the submission of the permit application, the Director finds that Wyoming's proposed definition for "treated grazingland" at chapter I, section

2(bc)(xi), as applied in conjunction with the proposed definition for "eligible land" at chapter I, section 2(ac), the proposed rule at chapter IV, section 2(d)(x)(E)(I), and appendix A to the rules at section VIII.E, does not clearly satisfy for this class of grazingland the Federal regulation at 30 CFR 816.116(b)(1) that requires the regulatory authority to set standards of revegetation success for areas developed for grazingland. Therefore, the Director is requiring Wyoming to revise the definition for "treated grazingland" at chapter I, section 2(bc)(xi), to otherwise revise its rules, or to provide OSM with a policy statement, clarifying the shrub standard for grazingland that is affected after the date of OSM's approval and that was treated less than 5 years prior to the submission of the permit application.

Grazingland that is affected after the date of OSM's approval and that was treated 5 or more years prior to the submission of the permit application where the premining shrub density is equal to or greater than one shrub per 9 square meters.—As set forth in the proposed definition for "treated grazingland" at chapter I, section 2(bc)(xi), grazingland that is disturbed after the date of OSM's approval of these rules, was treated more than 5 years prior to the submission of the permit application, and supports a premining shrub density equal to or greater than one shrub per 9 square meters is not "treated grazingland." Because it is not "treated grazingland," it is "grazingland." As set forth in the definition for "eligible land" at chapter I, section 2(ac), this grazingland is eligible land that is subject to the shrub standard set forth at chapter IV, section 2.(d)(x)(E), which at subsection (I) states that "[e]xcept where a lesser density is justified from premining conditions in accordance with appendix A, at least 20 percent of the eligible land shall be restored to shrub patches supporting an average of one shrub per square meter." Thus, the postmining shrub standard for this class of grazingland is no more than one shrub per square meter on 20 percent of the land, and possibly less depending upon the premining shrub density.

The Director finds that Wyoming's proposed definition for "treated grazingland" at chapter I, section 2(bc)(xi), as applied in conjunction with the proposed definition for "eligible land" at chapter I, section 2(ac), the proposed rule at chapter IV, section 2(d)(x)(E)(I), and appendix A to the rules at section VIII.E, satisfies, for this class of grazingland, the Federal regulation at 30 CFR 816.116(b)(1) that

requires the regulatory authority to set standards of revegetation success for areas developed for grazingland.

Grazingland that is affected after the date of OSM's approval and that was treated 5 or more years prior to the submission of the permit application where the premining shrub density is less than one shrub per 9 square meters (treated grazingland).—As set forth in the proposed definition for "treated grazingland" at chapter I, section 2(bc)(xi), grazingland that is disturbed after the date of OSM's approval of these rules, was treated more than 5 years prior to the submission of the permit application, and supports a premining shrub density of less than one shrub per 9 square meters in "treated grazingland." Because it is "treated grazingland," it is *not* "eligible land" as defined at chapter I, section 2(ac) and is *not* subject to the shrub standard set forth at chapter IV, section 2(d)(x)(E). For this treated grazingland, the operator is required to reclaim the land in accordance with chapter IV, section 2(d)(x)(E)(II), which requires that "(a)pproved shrub species and seeding techniques shall be applied to all remaining grazingland." Thus, no postmining shrub standard is set for treated grazingland, but the operator is required to seed for shrubs using approved species and techniques.

The Director agrees with Wyoming that the shrub standard set by Wyoming for treated grazingland strikes a reasonable balance between agricultural interest and grazingland habitat needs that is not inconsistent with the intent of SMCRA and the Federal regulations. Therefore, the Director finds that Wyoming's proposed definition for "treated grazingland" at chapter I, section 2(bc)(xi), as applied in conjunction with the proposed definition for "eligible land" at chapter I, section 2(ac), and the proposed rule at chapter IV, section 2(d)(x)(E)(II), satisfies, for this class of grazingland, the Federal regulation at 30 CFR 816.116(b)(1) that requires the regulatory authority to set standards of revegetation success for areas developed for grazingland.

10. Rule Chapter II, Section 2(a)(vi)(G)(II), Consultation by the Wyoming Land Quality Division On Critical Habitat

In its permit application requirements rule at chapter II, section 2(a)(vi)(G)(II), Wyoming proposed that the Wyoming Game and Fish Department must be contacted by the Wyoming Land Quality Division if the disruption of critical habitat is likely. At chapter I, section 2(v), Wyoming proposed to define

"critical habitat" to mean the habitat of those threatened and endangered species listed by the Secretary of the Interior or Commerce in accordance with 50 CFR 17 parts and 226.

Wyoming's existing performance standard rule at chapter IV, section 2(r)(i)(E) requires an operator to promptly report to the Wyoming Land Quality Division any threatened or endangered species or critical habitat of such species, which was not reported or investigated in the permit application. Upon such notification, the Administrator of the Wyoming Land Quality Division is required to consult with the Wyoming Game and Fish Department and the U.S. Fish and Wildlife Service.

The Federal regulations at 30 CFR 780.16(a) require the regulatory authority to consult with State and Federal agencies with responsibilities for fish and wildlife. 30 CFR 780.16(a)(2)(i) requires site-specific resource information for listed or proposed endangered or threatened species of plants or animals or their critical habitats listed by the Secretary of the Interior under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.). The U.S. Fish and Wildlife Service is responsible for listing, recovery, administration, and prohibitions associated with threatened and endangered species designated under this Act. Therefore, 30 CFR 780.16(a) and (a)(2)(i) require the regulatory authority to consult with the Fish and Wildlife Service on critical habitat for Federally-listed threatened and endangered species.

Because Wyoming's proposed rule at chapter II, section 2(a)(vi)(G)(II) does not require consultation with the U.S. Fish and Wildlife Service on critical habitat, it is not consistent with its existing rule at chapter IV, section 2(r)(i)(E) and is less effective than the Federal regulations at 30 CFR 780.16(a) and (a)(2)(i). Therefore, the Director approves the proposed rule at chapter II, section 2(a)(vi)(G)(II) but requires Wyoming to revise it to require consultation with the U.S. Fish and Wildlife Service on critical habitat.

11. Rule at Chapter X, Section 4(e), Disturbance of Critical, Crucial, and Important Habitats by Exploration Operations

In its rule at chapter X, section 4(e), Wyoming proposed to prohibit coal exploration operations on critical habitat and crucial habitat, but to allow coal exploration operations on important habitat after consultation with the Wyoming Game and Fish Department.

The Federal regulations at 30 CFR 815.15(a) prohibit the disturbance of "habitats of unusually high value for fish [and] wildlife" by coal exploration operations. As described in 30 CFR 780.16(a)(2)(ii), these habitats include "important streams, wetlands, riparian areas, cliffs supporting raptors, areas offering special shelter or protection, migration routes, or reproduction and wintering areas." This description coincides with Wyoming's proposed definition for "important habitat" at chapter I, section 2(ax), which states that "important habitat" includes "wetlands, riparian areas, rimrocks, areas offering special shelter or protection, reproduction and nursery areas, and wintering areas." Therefore, Wyoming's "important habitat" is a "habitat of unusually high value" as described in the Federal regulations.

Because Wyoming's proposed rule at chapter X, section 4(e) does not prohibit the disturbance of "important habitat" by coal exploration operations it is less effective than the corresponding Federal regulation at 30 CFR 815.15(a). The Director approves the proposed rule but requires Wyoming to revise it to prohibit the disturbance of "important habitat" by coal exploration operations.

12. Rules at Chapter XIII, Section 3(a), Notice and Opportunity for Public Hearing on Permit Revision

At chapter XIII, section 3(a), Wyoming proposed that the applicant's newspaper notice for a significant permit revision shall contain the information required by W.S. 35-11-406(j), the permit number and date approved, and a general description of the proposed revision. W.S. 35-11-406(j) requires the notice to contain information regarding the identity of the applicant, the location of the proposed operation, the proposed dates of commencement and completion of the operation, the proposed future use of the affected land, the location at which information about the application may be obtained, and the location and final date for filing objections to the application.

In setting forth in corresponding Federal notice requirements for significant permit revisions, 30 CFR 774.13(b)(2) references 30 CFR 773.13. 30 CFR 773.13(a)(1) itemizes the information that must be included in an applicant's newspaper notice.

Proposed chapter XIII, section 3(a) includes some notice requirements that are not included in the corresponding Federal regulations at 30 CFR 774.13(b)(2) and 773.13(a)(1). These include: The proposed dates of commencement and completion of the operation, the proposed future use of

the affected land, the permit number and date approved, and a general description of the proposed revision. These additional requirements are not inconsistent with 30 CFR 774.13(b)(2) and 773.13(a)(1). Aside from these requirements, proposed chapter XIII, section 3(a) also includes, with two exceptions, all of the requirements of the counterpart Federal requirements at 30 CFR 774.13(b)(2) and 773.13(a)(1). The exceptions are that the proposed State rule does not include counterparts to 30 CFR 773.13(a)(1)(v) and (vi) respectively concerning notice of permit request to mine within 100 feet of the outside right-of-way of a public road or to relocate or close a public road, and permit request for experimental practice. Although proposed chapter XIII, section 3(a) does not include these requirements, it need not do so because they are included elsewhere in Wyoming's regulations at chapter XII, section 1(a)(v)(D) and chapter XII, section 1(a)(ii)(B). For these reasons, Wyoming's proposed newspaper notice requirements for permit revisions at chapter XIII, section 3(a) are no less effective than the corresponding notice requirements of the Federal regulations at 30 CFR 774.13(b)(2) and 773.13(a)(1).

At chapter XIII, section 3(a), Wyoming also proposed that the operator shall mail a copy of the application mine plan map the Wyoming Oil and Gas Commission.

As previously discussed, the Federal regulations at 30 CFR 774.13(b)(2) require for significant permit revisions that the regulatory authority comply with the notice requirements at 30 CFR 773.13. The Federal regulations at 30 CFR 773.13(a)(3) require the regulatory authority, upon receipt of a significant revision to a permit under 30 CFR 774.13, to issue a written notification indicating the applicant's intention to mine the described tract of land, the application number or other identifier, the location where the copy of the application may be inspected, and the location where comments on the application may be submitted. It further requires the regulatory authority to send the notification to all State governmental agencies with an interest in the proposed operation.

The proposed State requirement at chapter XIII, section 3(a) differs from the Federal requirements at 30 CFR 774.13(b)(2) and 773.13(a)(3) in that the permit revision applicant, rather than the regulatory authority, is required to notify the interested State agency. Although this difference is substantive, it does not make the proposed State rule less effective than the Federal regulations, because the Federal

requirement for notifying the interested State agency are met.

In conclusion, for the aforementioned reasons, Wyoming's proposed rule at Chapter XIII, section 3(a) is no less effective than the corresponding Federal regulations at 30 CFR 774.13(b)(2), 773.13(a)(1), and 773.13(a)(3). Therefore, the Director approves the proposed revisions to the rule.

13. Rule at Chapter XVII, Section 1(a), Lands Unsuitable for Mining and Definition for "Fragile Lands"

Wyoming proposed to revise its definition for "fragile lands" in its rule at chapter XVII, section 1, which pertains to the designation of areas unsuitable for surface coal mining. Wyoming proposed to add crucial or important habitats for fish or wildlife to the list of lands that constitute "fragile lands." It also proposed that "critical habitats for endangered species," rather than just "critical habitats for endangered species of plants," (emphasis added) are "fragile lands."

The corresponding Federal definition for "fragile lands" at 30 CFR 762.5 states that "valuable habitats for fish or wildlife" are examples of fragile lands. Instead of using this term, Wyoming uses the term "crucial or important habitat." Because "crucial habitat" and "important habitat," as defined by Wyoming in its rules at chapter I, sections 2(ax) and (w) (see findings No. 4), are "valuable habitats for fish or wildlife" as used in the Federal definition, Wyoming's listing of these habitats in its proposed definition for "fragile land" is consistent with the Federal definition for "fragile land."

The Federal definition for "fragile lands" at 30 CFR 762.5 further states that "critical habitats for endangered or threatened species of animals or plants" (emphasis added) are examples of fragile lands. In its proposed definition for "fragile lands," Wyoming does not use the emphasized words "threatened" and "of animals or plants." However, as defined by Wyoming at chapter I, section 2(v), "critical habitat" means "those areas essential to the survival and recovery of species listed by the Secretary of the Interior or Commerce as threatened or endangered" (emphasis added, see finding No. 3). Therefore, by using the term "critical habitat" in its proposed definition for "fragile lands," Wyoming protects critical habitats of threatened species in its process for designating lands unsuitable for mining. Also, by using the term "critical habitat" in its proposed definition for "fragile lands," Wyoming protects critical habitats of both plant and animal species, because

the Secretaries of the Interior and Commerce protect both plant and animal threatened or endangered species.

For these reasons, Wyoming's proposed definition for "fragile lands" at chapter XVII, section 1(a) is no less effective than the corresponding Federal definition for "fragile lands" at 30 CFR 762.5. Therefore, the Director approves the proposed definition.

14. Required Amendment at 30 CFR 950.16(hh)

By letters dated February 28, 1994, and September 1, 1994, Wyoming submitted a description of required amendments, a timetable for enactment of the amendments, and a request for additional time to complete the rulemaking associated with the required amendments at 30 CFR 950.16 (aa) through (gg). By final rule Federal Register notice dated December 23, 1994, OSM extended until November 30, 1995, the deadline for Wyoming to submit an amendment addressing the required amendments. OSM codified this deadline extension at 30 CFR 950.16(hh). Wyoming submitted the amendment, which is the subject of this notice, on November 29, 1995. Because Wyoming has submitted the amendment, the Director is removing the required amendment at 30 CFR 950.16(hh).

IV. Summary and Disposition of Comments

Following are summaries of all substantive written comments on the proposed amendment that were received by OSM, and OSM's responses to them.

1. Public Comments

National Wildlife Federation, Wyoming Wildlife Federation, and Wyoming Outdoor Council.—By letter dated January 16, 1996 (administrative record No. WY-31-09), the National Wildlife Federation, Wyoming Wildlife Federation, and Wyoming Outdoor Council jointly commented on W.S. 35-11-402(b)(ii). In this statutory provision, the Wyoming Land Quality Division proposed that, to the extent required by federal law or regulations, it would have to obtain the approval of the Wyoming Game and Fish Department for reclamation standards for "grazingland" as defined at W.S. 35-11-103(e)(xxvii), if the grazingland includes crucial habitat designated by the Wyoming Game and Fish Department "prior to submittal of the initial permit application or any subsequent amendments to the permit application."

The commenters started that the quoted part of the provisions places a restriction on the protection of crucial habitat that is not consistent with section 515(b)(2) of SMCRA, which requires that all surface coal mining operations shall at a minimum "restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses * * *" (emphasis added by commenters). They argue that there can be no restoration to the land's prior wildlife capabilities if the Wyoming Game and Fish Department cannot update crucial habitat areas after the initial permit application.

The commenters also cited section 515(b)(24), which requires that mine operators "to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable." The commenters stated that this provision cannot be carried out if the Wyoming Game and Fish Department cannot add to crucial habitat maps after the initial permit application.

In addition, the Wyoming Outdoor Council (Council) by letter dated January 22, 1996 (administrative record No. WY-31-13), stated that, although most big game crucial ranges in Wyoming are well defined, the Wyoming Game and Fish Department has not, because of only having three nongame biologists for all of Wyoming's 98,000 square miles, identified crucial habitats for a broad range of species, including raptors, sage and sharp tail grouse, and "state priority species." The Council stated that it is conceivable that a permit applicant's baseline wildlife information could reveal crucial habitats previously unrecognized by the Wyoming Game and Fish Department. The Council stated that the proposed statutory provision makes the collection of wildlife baseline data trivial if these data cannot be used to make certain resource determinations and then base management prescriptions on these determination (i.e., wildlife data included in permit application cannot be used as a basis for designating, protecting, and enhancing crucial habitat).

The Council cited 30 CFR 780.16(a), which requires that

[e]ach application shall include fish and wildlife resource information for the permit area and adjacent area. The scope and level of detail for such information * * * shall be sufficient to design the protection and

enhancement plan required under (b) of this section.

Referenced 30 CFR 780.16(b), at subsection (2), requires that

[e]ach application shall include a description of how, to the extent possible using the best technology currently available, the operator will minimize disturbances and adverse impacts on fish and wildlife. * * * This description shall—apply at a minimum to species and habitats identified under paragraph (a) of this section.

The Council concluded that the restriction that proposed W.S. 35-11-402(b)(ii) places on the protection and enhancement of crucial habitat is a violation of 30 CFR part 780.

OSM considered these comments in its review of proposed W.S. 35-11-402(b)(ii). For the reasons discussed in finding No. 5 and below, OSM does not agree that proposed W.S. 35-11-402(b)(ii) is less effective than SMCRA and the Federal regulations.

Wyoming's permit application rules at chapter II, section 2(a)(vi)(D) require studies of wildlife and their habitats in the level of detail as determined by the Wyoming Land Quality Division, after consultation with the Wyoming Game and Fish Department. The purpose of these baseline studies is to identify valuable wildlife habitats so that the permit applicant can be required to plan mining and reclamation operations to minimize wildlife impacts. If these studies reveal valuable wildlife habitat on grazingland, the permit applicant would be required to accordingly plan mining and reclamation operations to minimize wildlife impacts, regardless of whether the Wyoming Game and Fish Department subsequently (after initial permit or amendment application) designated the valuable habitat as critical habitat. If the crucial habitat designation on grazing land did occur after initial permit or amendment application, the Wyoming Land Quality Division would not under W.S. 35-11-402(b)(ii) have to obtain Wyoming Game and Fish Department approval of shrub revegetation standards, but, assuming that the habitat was at least important habitat, it would still have to solicit the Wyoming Game and Fish Department's recommendations. The Wyoming Land Quality Division has an obligation to afford good-faith considerations to all Wyoming Game and Fish Department recommendations regarding protection, restoration, and enhancement of wildlife resources, regardless of the postmining land use.

In addition to the aforementioned permitting requirements, the permit applicant would not be relieved of the responsibility to meet the performance

standards in Wyoming's rules at chapter IV, section 2(r), which requires an operator, to the extent possible using the best technology currently available and consistent with the approved postmining land use, minimize disturbance, and where practicable, enhance wildlife resources.

University of Wyoming.—The Head of the Department of Plant, Soil, and Insect Sciences, University of Wyoming, responded but had no comments on the amendment (administrative record No. WY-31-16).

2. Federal Agency Comments

Pursuant to 732.17(h)(11)(i), OSM solicited comments on the proposed amendment from various Federal agencies with an actual or potential interest in the Wyoming program.

U.S. Bureau of Mines.—By letter dated December 21, 1995, the U.S. Bureau of Mines, Division of Environmental Technology, responded that it had no comments on the amendment (administrative record No. WY-31-06).

U.S. Army Corps of Engineers.—By letter dated December 27, 1995, the U.S. Army Corps of Engineers responded that it found the amendment to be satisfactory (administrative record No. WY-31-07).

U.S. Department of Agriculture, Natural Resources Conservation Service (NRCS).—By letter dated January 12, 1996, NRCS responded with comments (administrative record No. WY-31-10).

NRCS recommended that the proposed land use definition of "grazingland" at chapter I, section 2(bc)(iii) be revised to read: "Grazingland includes rangelands and forest lands where the indigenous native vegetation is actively managed for grazing, browsing, occasional mechanical forage harvesting, and may also be used by wildlife." OSM made Wyoming aware of this recommendation, but it did not require Wyoming to revise the proposed definition because, as discussed in finding No. 8, it is no less effective than the corresponding Federal land use definition for "grazingland" at 30 CFR 701.5.

NRCS commented on the proposed rule at chapter II, section 2(b)(iv)(C), which includes requirements for permit application revegetation plans. The existing, unrevised language of this rule indicates that the "[t]he standards and specifications adopted by the State Conservation Commission for mine reclamation shall be considered by the applicant during the preparation of the reclamation plan whenever practicable." NRCS stated that the State

Conservation Commission is no longer in existence and that the State Board of Agriculture now has this former Commission's responsibilities; it also stated that the rule should indicate where the referenced standards and specifications can be obtained. In its March 8, 1996, issue letter, OSM notified Wyoming of this comment. In its April 9, 1996, response, Wyoming confirmed that the State Conservation Commission has disbanded and been replaced by the State Board of Agriculture. Wyoming stated that this Board does not have the responsibility for setting standards and specifications for mine reclamation. Therefore, Wyoming indicated it would in the future propose to OSM that the above-quoted sentence be deleted from the rule. Wyoming noted that another provision of the rule, which requires consultation with the Wyoming Department of Agriculture on croplands, will be retained because the Federal regulations at 30 CFR 780.23(a)(2)(ii) require consultation with such State agricultural agencies.

Bureau of Land Management.—By letter dated January 18, 1996, the Bureau of Land Management, Rock Springs District Office (BLM-RSDO), responded with comments (administrative record No. WY-31-12). Those comments that relate to proposed amendment revisions are discussed below. Other comments that relate to rules that are not proposed for revision in this amendment have been included in the administrative record for Wyoming's future consideration.

BLM-RSDO commented that the land use definition for "grazingland" in the proposed rule at chapter I, section 2(bc)(iii), should be revised by deleting the proposed phrase "and occasional use by wildlife." In making this comment, BLM-RSDO was apparently unaware that Wyoming was adding the phrase "and occasional use by wildlife" in response to the required amendment at 30 CFR 950.16(q) that OSM placed on the Wyoming program. For a discussion of the required amendment and proposed definition, which the Director is approving, see finding No. 8.

BLM-RSDO commented that the revisions proposed in the land use definition for "fish and wildlife habitat" in the proposed rule at chapter I, section 2(bc)(viii) should not be made and that the definition should remain unchanged. As discussed in finding No. 1, the Director is approving the proposed definition because it is substantively identical to the corresponding Federal land use definition for "fish and wildlife habitat" at 30 CFR 701.5.

BLM-RSDO submitted comments on appendix A, section VIII.E (testing of adequacy of reclamation, evaluation of shrub density) questioning why treated grazingland was not subject to the standard of one shrub per square meter on the 20 percent of the affected area that is set forth in the rules at chapter IV, section 2(d)(x)(E). As discussed in finding No. 9 and as set forth in the proposed definition for "treated grazingland" at chapter I, section 2(bc)(xi), grazingland that is disturbed after the date of OSM's approval of these rules, was treated more than 5 years prior to the submission of the permit application, and supports a premining shrub density of less than one shrub per 9 square meters is "treated grazingland." As discussed in the finding, the Director agrees with Wyoming that the shrub standard set by Wyoming for treated grazingland strikes a reasonable balance between agricultural interests and wildlife habitat needs that is not inconsistent with the intent of SMCRA and the Federal regulations.

Lastly, BLM-RSDO commented that the list of plant species of special concern in appendix A, appendix IV, should be updated with 1995 data from the Wyoming Natural Diversity Database. OSM included this comment in its March 9, 1996, issue letter to Wyoming. In response, Wyoming stated that it would, through the rulemaking process and in some future amendment, remove the list from appendix A and instead refer the reader to the Wyoming Natural Diversity Database Office for a current list of plant species of special concern.

By letter dated January 18, 1996, BLM, Wyoming State Office (BLM-WSO), responded with a comment on the proposed rule at chapter XIII, section 3(a) (administrative record No. WY-31-15). Wyoming proposed to revise the rule to require coal operators to mail copies of significant permit revision maps to the Wyoming Oil and Gas commission, rather than owners of record, in accordance with W.S. 35-11-406(j). BLM-WSO recommended that the rule be revised to require coal operators to mail pertinent maps to all oil and gas operators within the permit area. OSM did not require Wyoming to make this recommended revision because the Federal regulations at 30 CFR 774.13(b)(2) and 773.13(a)(3) do not require it. As discussed in finding No. 12, the Director is approving the proposed rule on the basis that it is no less effective than the corresponding Federal regulations.

U.S. Fish and Wildlife Service (FWS).—By letter dated January 19,

1996, FWS responded with comments (administrative record No. WY-31-11).

FWS commented that the rules in several places require consultation with the Wyoming Game and Fish Department on minimum stocking and planting arrangements of trees and shrubs on critical habitats, which Wyoming defines as those areas essential to the survival and recovery of species listed by the Secretaries of the Interior and Commerce as threatened or endangered. FWS stated that consultation on Federally designated critical habitats must occur with FWS and cannot be delegated to a State agency.

OSM agreed with FWS's comment and notified Wyoming in the March 8, 1996, issue letter that, to be no less effective than the Federal permit application at 30 CFR 780.16(a) and (a)(2)(i), Wyoming must revise its proposed rule at chapter II, section 2(a)(vi)(G)(II) to require consultation with FWS on critical habitat. In its April 9, 1996, response to the issue letter, Wyoming acknowledged the need to revise the rule, and it will do so in the future. As discussed in finding No. 10 of this notice, the Director finds that Wyoming's proposed rule at chapter II, section 2(a)(vi)(G)(II) is less effective than the Federal regulations at 30 CFR 780.16(a) and (a)(2)(i). Therefore, the Director is requiring Wyoming to revise the rule to require consultation with FWS on critical habitat.

FWS also commented that Wyoming's Enrolled Act No. 8, which limits some alterations to crucial habitat designations by the Wyoming Game and Fish Department, seems to conflict with the intent of SMCRA and could affect habitats of value to migratory birds and other species of high Federal interest. For a response to this general comment on W.S. 35-11-402(b)(ii), see the above responses to the comments on this section of the Wyoming's statute from the National Wildlife Federation, Wyoming Wildlife Federation, and Wyoming Outdoor Council.

Mine Safety and Health

Administration.—By letter dated January 24, 1996, the Mine Safety and Health Administration responded but had no comments on the amendment (administrative record No. WY-31-14).

3. Environmental Protection Agency (EPA) Concurrence and Comments

Pursuant to 30 CFR 732.17(h)(11)(ii), OSM is required to solicit the written concurrence of EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water

Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). None of the revisions that Wyoming proposed to make in its amendment pertain to air or water quality standards. Therefore, OSM did not request EPA's concurrence.

Pursuant to 732.17(h)(11)(i), OSM solicited comments on the proposed amendment from EPA (administrative record No. WY-31-03). It did not respond to OSM's request.

4. State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Pursuant to 30 CFR 732.17(h)(4), OSM solicited comments on the proposed amendment from the SHPO and ACHP (administrative record No. WY-31-04). By letter dated January 4, 1996, the SHPO indicated he had no objections to the proposed amendment (administrative record No. WY-31-08). ACHP did not respond to OSM's request.

V. Director's Decision

Based on the above findings, the Director approves, with additional requirements, Wyoming's proposed amendment as submitted on November 29, 1995.

The Director approves, as discussed in:

Finding No. 1, revision of the land use definition for "fish and wildlife habitat" at chapter I, section 2(bc)(viii), and revision of chapter XI, section 5(a), substitution of a surety bond for a self-bond;

Finding No. 2, deletion of the definition for "agricultural lands" at W.S. 35-11-103(e)(xxviii);

Finding No. 3, deletion of the definition for "critical habitat" at W.S. 35-11-103(e)(xxix) and revision of the definition for "critical habitat" at chapter I, section 2(v);

Finding No. 4, deletion of the definition for "crucial habitat" at W.S. 35-11-103(e)(xxx), addition of the definition for "crucial habitat" at chapter I, section 2(w), and revision of the definition for "important habitat" at chapter I, section 2(ax);

Finding No. 6, revision of W.S. 25-11-402(c), establishment of shrubs on grazingland;

Finding No. 7, addition of the definition for "eligible land" at chapter I, section 2(ac), and revision of chapter IV, section 2(d)(x)(E) (I) and (II), and appendix A, reclamation success standards for shrub density;

Finding No. 8, revision of the land use definition for "grazingland" at chapter I, section 2(bc)(iii);

Finding No. 12, revision of chapter XIII, section 3(a), notice and opportunity for public hearing on permit revision; and

Finding No. 13, revision of the definition for "fragile lands" at chapter XVII, section 1(a), with respect to designation of lands unsuitable for mining.

With the requirement that Wyoming further revise its rules and/or statute, the Director approves, as discussed in:

Finding No. 5, revision of W.S. 35-11-402(b), chapter II, section 2(b)(iv)(C), and chapter IV, sections 2(d)(x)(E) and (E)(III), establishment of reclamation standards for fish and wildlife habitat and grazingland;

Finding No. 9, addition of the land use definition for "treated grazingland" at chapter I, section 2(bc)(xi);

Finding No. 10, revision of chapter II, section 2(a)(vi)(G)(II), consultation by the Wyoming Land Quality Division on critical habitat; and

Finding No. 11, revision of chapter X, section 4(e), disturbance of critical, crucial, and important habitats by exploration operations.

The Federal regulations at 30 CFR part 950, codifying decisions concerning the Wyoming program, are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage states to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

VI. Procedural Determinations

1. Executive Order 12866

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

2. Executive Order 12988

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments

submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

3. National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

4. Paperwork Reduction Act

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

5. Regulatory Flexibility Act

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

6. Unfunded Mandates

This rule will not impose a cost of \$100 million or more in any given year on any governmental entity or the private sector.

List of Subjects in 30 CFR Part 950

Intergovernmental relations, Surface mining, Underground mining.

Dated: July 24, 1996.

Peter A. Rutledge,

Acting Regional Director, Western Regional Coordinating Center.

For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations is amended as set forth below:

PART 950—WYOMING

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

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

2. Section 950.15 is amended by adding paragraph (x) to read as follows:

§ 950.15 Approval of regulatory program amendments.

* * * * *

(x) The following statutes and rules, as submitted to OSM on November 29, 1995, are approved effective August 6, 1996: Deletion of W.S. 35–11–103(e)(xxviii), definition for “agricultural lands;” W.S. 35–11–103(e)(xxix) and the rule at chapter I, section 2(v), definition for “critical habitat;” W.S. 35–11–103(e)(xxx) and the rules at chapter I, sections 2(ax) and (w), definitions for “important habitat” and “crucial habitat;” W.S. 35–11–402(b), reclamation standards for fish and wildlife habitat and grazingland; W.S. 35–11–402(c), establishment of shrubs on grazingland; rules at chapter I, section 2(ac), chapter IV, section 2(d)(x)(E)(I) and (II), and appendix A, definition for “eligible land” and reclamation success standards for shrub density; rule at chapter I, section 2(bc)(iii), definition for “grazingland;” rule at chapter I, section 2(bc)(viii), land use definition for “fish and wildlife habitat;” rule at chapter I, section 2(bc)(xi), definition for “treated grazingland;” rule at chapter XI, section 5(a), substitution of a surety bond for a self-bond; rule at chapter XIII, section 3(a) notice and opportunity for public hearing on permit revision; rule at chapter XVII, section 1(a), lands unsuitable for mining and definition for “fragile lands;” the rules at chapter II, section 2(b)(iv)(C), and chapter IV, section 2(d)(x)(E)(III), establishment of reclamation standards for fish and wildlife habitat and grazingland; rule at chapter II, section 2(a)(vi)(G)(II), consultation by the Wyoming Land Quality Division on critical habitat; and rule at chapter X, section 4(e), disturbance of important habitat by exploration operations.

3. Section 950.16 is amended by removing and reserving paragraphs (q) and (bb) through (hh) and adding paragraphs (ii) through (ll) to read as follows:

§ 950.16 Required program amendments.

* * * * *

(ii) By May 30, 1997, Wyoming shall

(1) Revise the rules at chapter II, section 2(b)(iv)(C), and chapter IV, section 2(d)(x)(E)(III), to be consistent with the statute at W.S. 35–11–402(b) (ii) by requiring Wyoming Game and Fish

Department approval of revegetation standards for grazingland that was designated by the Wyoming Game and Fish Department as crucial habitat prior to submittal of the initial permit application or any subsequent amendments to the permit application; or revise the statute at W.S. 35–11–402(b)(ii) to be consistent with the rules at chapter II, section 2(b)(iv)(C), and chapter IV, section 2(d)(x)(E)(III) by deleting the phrase “prior to submittal of the initial permit application or any subsequent amendments to the permit application;” and

(2) Revise the rules at chapter II, section 2(b)(iv)(C), and chapter IV, section 2(d)(x)(E)(III), to require consultation with and approval by the Wyoming Game and Fish Department of tree and shrub standards for all lands to be reclaimed for the “fish and wildlife habitat” land use.

(jj) By May 30, 1997, Wyoming shall revise the definition for “treated grazingland” at chapter I, section 2(bc)(xi), otherwise revise its rules, or provide OSM with a policy statement, clarifying the shrub standard for grazingland that is affected after the date of OSM’s approval and that was treated less than 5 years prior to the submission of the permit application.

(kk) By May 30, 1997, Wyoming shall revise the rule at chapter II, section 2(a)(vi)(G)(II), or otherwise modify its program, to require consultation with the U.S. Fish and Wildlife Service on critical habitat.

(ll) By May 30, 1997, Wyoming shall revise the rule at chapter X, section 4(e), or otherwise modify its program, to prohibit the disturbance of important habitat by coal exploration operations.

[FR Doc. 96-19735 Filed 8-5-96; 8:45 am]

BILLING CODE 4310-05-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 95-51; RM-8591]

Radio Broadcasting Services; Shingletown, CA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allocates Channel 241A to Shingletown, California, as that community’s second local FM transmission service, in response to a petition for rule making filed by Mark C. Allen. See 60 FR 22022, May 4, 1995. Coordinates used for Channel 241A at