

determinations with regard to any claim of privilege or CEII status, and the discretion to release information as necessary to carry out its jurisdictional responsibilities.

(ii) The Secretary of the Commission will place the request for privileged or CEII treatment and a copy of the original document without the privileged or CEII information in a public file while the request is pending.

(2) For documents submitted to Commission staff. The notification procedures of paragraphs (d), (e), and (f) of this section will be followed by staff before making a document public.

(d) Notification of request and opportunity to comment. When a FOIA or CEII requester seeks a document for which privilege or CEII status has been claimed, or when the Commission itself is considering release of such information, the Commission official who will decide whether to release the information will notify the person who submitted the document and give the person an opportunity (at least five calendar days) in which to comment in writing on the request. A copy of this notice will be sent to the requester.

(e) Notification before release. Notice of a decision by the Commission, the Chairman of the Commission, the Director, Office of External Affairs, the General Counsel or General Counsel's designee, a presiding officer in a proceeding under part 385 of this chapter, or any other appropriate official to deny a claim of privilege, in whole or in part, or to make a limited release of CEII, will be given to any person claiming that the information is privileged or CEII no less than 5 calendar days before disclosure. The notice will briefly explain why the person's objections to disclosure are not sustained by the Commission. A copy of this notice will be sent to the FOIA or CEII requester.

\* \* \* \* \*

■ 3. In § 388.113 paragraphs (d)(3)(i) and (d)(3)(ii) are revised to read as follows:

**§ 388.113 Accessing critical energy infrastructure information.**

\* \* \* \* \*

(d) *Optional procedures for requesting critical energy infrastructure information.*

\* \* \* \* \*

(3) \* \* \*

(i) File a signed, written request with the Commission's CEII Coordinator. The request must contain the following: requester's name (including any other name(s) which the requester has used and the dates the requester used such name(s)), date and place of birth, title,

address, and telephone number; the name, address, and telephone number of the person or entity on whose behalf the information is requested; a detailed statement explaining the particular need for and intended use of the information; and a statement as to the requester's willingness to adhere to limitations on the use and disclosure of the information requested. Requesters are also requested to include their social security number for identification purposes. Federal agency employees making requests on behalf of Federal agencies may omit their social security number, and date and place of birth.

(ii) Once the request is received, the CEII Coordinator will determine if the information is CEII, and, if it is, whether to release the CEII to the requester. The CEII Coordinator will balance the requester's need for the information against the sensitivity of the information. If the requester is determined to be eligible to receive the information requested, the CEII Coordinator will determine what conditions, if any, to place on release of the information. Where appropriate, the CEII Coordinator will forward a non-disclosure agreement (NDA) to the requester for execution. Once the requester signs any required NDA, the CEII Coordinator will provide the requested critical energy infrastructure information to the requester. The CEII Coordinator's decisions regarding release of CEII are subject to rehearing as provided in § 385.713 of this chapter. Copies of requests for rehearing of the CEII Coordinator's decision must be served on the CEII Coordinator and the Associate General Counsel for General Law.

\* \* \* \* \*

[FR Doc. 03-19607 Filed 8-5-03; 8:45 am]

BILLING CODE 6717-01-P

**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 926**

[MT-023-FOR]

**Montana Regulatory Program**

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

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

**SUMMARY:** We are approving, with certain exceptions and additional requirements, a proposed amendment to the Montana regulatory program (the

“Montana program”) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Montana proposed revisions to and additions of rules and statutes about: definitions; ownership and control; baseline information; maps; prime farmland; reclamation plan; ponds and embankments; transportation facilities plan; coal processing plants and support facilities; permit applications, conditions, revisions, and renewal; backfilling and grading; small depressions; burial and treatment of exposed mineral seams; storage and disposal of garbage; disposal of off-site generated waste and fly ash; contouring; buffer zones; thick overburden and disposal of excess spoil; permanent cessation of operations; roads and railroad loops; soil removal; blasting schedule; sealing of drilled holes; water quality performance standards; reclamation of drainages; sedimentation ponds and other treatment facilities; discharge and outflow structures; permanent and temporary impoundments; groundwater and surface water monitoring; wells and underground operations; redistribution and stockpiling of soil; establishment of vegetation; soil amendments and other management techniques; other revegetation comparison standards; vegetation production, cover, diversity, density, and utility requirements; measurement standards for trees, shrubs, and half-shrubs; postmining land use; alternate reclamation; general performance standards; subsidence controls; disposal of underground development waste; disposal of coal processing waste; information and monthly reports; renewal and transfer of prospecting permits; prospecting drill holes; prospecting roads and other transportation facilities; removal of prospecting equipment; prospecting test pits; prospecting bond release procedures; notice of intent to prospect; bonding; reassertion of jurisdiction; areas where coal mining is prohibited; designation of lands unsuitable; small operator assistance program; certification of blasters; and blaster training courses. Montana also proposed to recodify its program rules in the Administrative Rules of Montana (ARM) from Title 26 Chapter 4 to Title 17 Chapter 24. Montana revised its program to be consistent with the corresponding Federal regulations and SMCRA, and provide additional safeguards and clarify ambiguities.

**EFFECTIVE DATE:** August 6, 2003.

**FOR FURTHER INFORMATION CONTACT:** Guy Padgett, Telephone: 307.261.6550, Internet address: [gpadgett@osmre.gov](mailto:gpadgett@osmre.gov).

**SUPPLEMENTARY INFORMATION:**

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

**I. Background on the Montana Program**

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act \* \* \*; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act." See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Montana program on April 1, 1980. You can find background information on the Montana program, including the Secretary's findings, the disposition of comments, and conditions of approval in the April 1, 1980, **Federal Register** (45 FR 21560). You can also find later actions concerning Montana's program and program amendments at 30 CFR 926.15, 926.16, and 926.30.

**II. Submission of the Proposed Amendment**

By letter dated May 7, 2002, Montana sent us an amendment (SATS No. MT-023-FOR, Administrative Record No. MT-20-01) to its program under SMCRA (30 U.S.C. 1201 *et seq.*). Montana sent the amendment: (1) In response to letters dated March 29, 1990; June 5, 1996; January 13, 1997; and June 26, 1997 (Administrative Record Nos. MT-60-07, MT-60-09, MT-60-10, and MT-60-11) that we sent to Montana in accordance with 30 CFR 732.17(c), (2) in response to the required program amendments at 30 CFR 926.16(e)(9), and (3) to include the changes made at its own initiative.

We announced receipt of the proposed amendment in the July 15, 2002, **Federal Register** (67 FR 46434). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment's adequacy (Administrative Record No. MT-20-06). We did not hold a public hearing or meeting because one was not requested. The public comment period ended on August 14, 2002. We received comments from one private citizen.

**III. OSM's Findings**

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment with exceptions and additional requirements as described below.

**A. Minor Revisions to Montana's Rules and Statutes**

Montana proposed minor wording, editorial, punctuation, grammatical, and recodification changes to the following previously-approved rules and statutes.

We note that as a result of the reorganization of the natural resources function of the Montana State Government in 1995, which transferred the authority to regulate coal mining under SMCRA from the Department of State Lands to the Department of Environmental Quality (Department), all of the Montana program rules were recodified from Title 26 Chapter 4 to Title 17 Chapter 24 of the Administrative Rules of Montana.

- ARM 17.24.301(34)-(141) Definitions (recodified).
- ARM 17.24.301(46) Definition of "habit or characteristic pattern" [relocated from ARM 17.24.634].
- ARM 17.24.301(79) Definition of "owned or controlled."
- ARM 17.24.301(111) Definition of "soil survey."
- ARM 17.24.302(6) Permit application format.
- ARM 17.24.303(15)(a)(ii) Permit applications; legal, financial, compliance, and related information.
- ARM 17.24.306 Permit applications; prime farmland investigation.
- ARM 17.24.313(6) Permit applications; reclamation plan.
- ARM 17.24.324 Permit applications; prime farmland special application requirements.
- ARM 17.24.327(2) Permit applications; coal processing plants, special application requirements.
- ARM 17.24.401 Processing of permit applications; filing of application.
- ARM 17.24.403 Processing of permit applications; informal conference.
- ARM 17.24.405(8) Processing of permit applications; findings and notice of decision.
- ARM 17.24.413 Processing of permit applications; conditions of permit.
- ARM 17.24.415 Processing of permit applications; permit revisions.
- ARM 17.24.507 Storage and final disposal of garbage and other debris.
- ARM 17.24.510(2) Disposal of offsite-generated waste and fly ash.
- ARM 17.24.518 Buffer zones.
- ARM 17.24.520(3) (recodification) Thick overburden and excess spoil.
- ARM 17.24.601(3), (4), (5), (7), (8) General requirements for roads.
- ARM 17.24.605 recodification, (3)(d)(iii), (f) [delete "or road"], hydrologic impact of roads.

- ARM 17.24.606 Surfacing of roads [moved to ARM 17.24.601(7)].
- ARM 17.24.607(2) (intro), (2)(c), Maintenance of roads.
- ARM 17.24.625 Seismograph measurements.
- ARM 17.24.632 Permanent sealing of drilled holes.
- ARM 17.24.634 (1) (intro), replacement of "stream" and "drainage" by "channel" throughout; reclamation of drainages.
- ARM 17.24.639(6), (9), (15)(a), (b) Sediment Ponds.
- ARM 17.24.640 Discharge structures.
- ARM 17.24.642(1)(f), (2), (3) Permanent and temporary impoundments.
- ARM 17.24.645(5) Groundwater monitoring.
- ARM 17.24.647 Transfer of wells.
- ARM 17.24.652 Wells and underground openings; safety.
- ARM 17.24.702(1), (2) Redistribution and stockpiling of soil.
- ARM 17.24.711(6)(b) Establishment of vegetation.
- ARM 17.24.716(1), (5)(a) Method of revegetation.
- ARM 17.24.718 Soil amendments.
- ARM 17.24.724 Use of revegetation comparison standards.
- ARM 17.24.733 (recodification of (3)-(5)) Measurement standards for woody plants.
- ARM 17.24.762 Postmining land use.
- ARM 17.24.815(2)(c)-(e), (h) Prime farmlands; revegetation.
- ARM 17.24.821 Alternate reclamation; submission of plan.
- ARM 17.24.823 Alternate reclamation; approval of plan and review of operation.
- ARM 17.24.825 Alternate reclamation; alternate revegetation.
- ARM 17.24.903 Underground mining, general performance standards.
- ARM 17.24.924 (Recodification (15)-(20)) Underground mining, disposal of underground development waste.
- ARM 17.24.925 Underground mining, disposal of underground development waste; durable rock fills.
- ARM 17.24.927 Underground mining, disposal of underground development waste; valley fill.
- ARM 17.24.1001(1), (2)(b)-(k), (2)(m)-(4) Prospecting, permit requirements.
- ARM 17.24.1005 Prospecting, drill holes.
- ARM 17.24.1006 Prospecting, roads and other transportation facilities, ARM 17.24.1010 Prospecting, removal of equipment.
- ARM 17.24.1014(1)-(3) Prospecting, test pits; application requirements, etc.
- ARM 17.24.1017 Prospecting, bond release procedures for drilling operations.
- ARM 17.24.1018(5)-(9) Prospecting, notice of intent to prospect.
- ARM 17.24.1108 Bonding, certificate of deposit.
- ARM 17.24.1116, 1116A Bonding, criteria for bond release, reassertion of jurisdiction.
- ARM 17.24.1132 Areas upon which coal mining is prohibited; definitions and standard for measurement of distances.
- ARM 17.24.1143 Designation of lands unsuitable; prospecting on designated lands.

Montana Code Annotated (MCA) 82-4-205 (recodification) and (1) Administration by department.

MCA 82-4-241(1) Receipts paid into general fund.

MCA 82-4-254 (3, last sentence), (4) Violation, penalty, waiver.

Because these changes are minor, we find that they will not make Montana's rules or statutes less effective than the corresponding Federal regulations or less stringent than SMCRA. We approve the proposed revisions.

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

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

- ARM 17.24.301(34) (30 CFR 701.5), Definition of "domestic water supply."
- ARM 17.24.301(39) (30 CFR 701.5), Definition of "excess spoil."
- ARM 17.24.301(64) (30 CFR 701.5), Definition of "material damage."
- ARM 17.24.301(71) (30 CFR 701.5), Definition of "non-commercial building."
- ARM 17.24.301(73) (30 CFR 701.5), Definition of "occupied residential dwelling."
- ARM 17.24.301(76) (30 CFR 701.5), Definition of "other treatment facilities."
- ARM 17.24.301(103) (30 CFR 701.5), Definition of "replace adversely affected domestic water supply."
- ARM 17.24.301(110) (30 CFR 701.5), Definition of "soil horizon."
- ARM 17.24.304(5) (30 CFR 780.21(c)(1)/784.14(c)(1)), Baseline information; environmental resources.
- ARM 17.24.315(1)(b) (30 CFR 780.25(a)(2), (f)/784.16(a)(2), (f)), Plan for ponds and embankments.
- ARM 17.24.324(2), (3) (30 CFR 785.17(d), (e)), Prime farmlands, application requirements.
- ARM 17.24.505(2) (30 CFR 816/817.102(f)), Burial and treatment of waste materials.
- ARM 17.24.639(7)(b), (c) (30 CFR 816/817.49(c)(2)), Sediment ponds, containment requirements.
- ARM 17.24.639(8) (30 CFR 816/817.49(a)(6)(i)); 17.24.639(14) (30 CFR 816/817.46(c)(1)(iii)(H)); and 17.24.639(16) (30 CFR 816/817.49(a)(4)) Sediment ponds, foundation stability and embankment stability.
- ARM 17.24.639(17) (30 CFR 816/817.49(a)(3)), Sediment ponds, design standards.
- ARM 17.24.639(21) (30 CFR 816/817.49(a)(5), (a)(9)(ii)(A)), Sediment ponds, freeboard and spillway capacity.
- ARM 17.24.639(23) (30 CFR 816/817.49(a)(12)), Sediment ponds, inspections.
- ARM 17.24.642(6) (30 CFR 816/817.49(a)(12)), Permanent and temporary impoundments, inspections.

- ARM 17.24.725(1) (30 CFR 816/817.116(c)(3)(i)), Period of responsibility.
- ARM 17.24.726(2) (30 CFR 816/817.111), Vegetation production, etc.
- ARM 17.24.728 (30 CFR 816/817.111), Composition of vegetation.
- ARM 17.24.815(2)(f)(i) (30 CFR 823.15(b)(3)), Prime Farmlands, revegetation.
- ARM 17.24.823(2) (30 CFR 785.17(d)), Alternate reclamation; approval of plan.
- ARM 17.24.826 [replaces 17.24.1103] (30 CFR 816.111(d), 816.116(c)(3)), Alternate reclamation; period of responsibility.
- ARM 17.24.1002 (30 CFR 772.10 & 772.12), Prospecting, information & monthly reports.
- ARM 17.24.1003 (30 CFR 774.15 & 774.17), Prospecting, renewal & transfer of permits.
- ARM 17.24.1014(4) (30 CFR 772.12 & 772.14), Prospecting test pits, application requirements, etc.
- ARM 17.24.1104 (30 CFR 817.121(c)(5)), Bonding; adjustment of amount.
- ARM 17.24.1111 (30 CFR 800.40(a)(3)), Bonding; bond release application.
- ARM 17.24.1221 (30 CFR 795.3), Small operator assistance program (SOAP), program services.
- ARM 17.24.1222 (30 CFR 795.6), SOAP, eligibility.
- ARM 17.24.1223 (30 CFR 795.7), SOAP, filing for assistance.
- ARM 17.24.1224 (30 CFR 795.8), SOAP, application approval.
- ARM 17.24.1225 (30 CFR 795.9), SOAP, data requirements.
- ARM 17.24.1226 (30 CFR 795.10), SOAP, qualification of laboratories & consultants.
- ARM 17.24.1228 (30 CFR 795.12), SOAP, applicant liability.
- ARM 17.24.1261 (30 CFR 850.15), Certification of blasters.
- ARM 17.24.1262 (30 CFR 850.13), Blaster training courses.
- MCA 82-4-254(3) (SMCRA 518(b)), Violation penalty and hearing.

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

*C. Revisions to Montana's Rules and Statutes That Are Not the Same as the Corresponding Provisions of the Federal Regulations and Statutes*

**C.1. ARM 17.24.301(13) Definition of "Approximate original contour" (SMCRA Sec. 701(2) & 30 CFR 701.5)**

Montana proposed to revise its definition of "approximate original contour" to: (1) Eliminate the phrase which includes terracing or access roads in the reclaimed area; (2) change "refuse" to "waste;" (3) add the requirement that depressions, except as provided at ARM 17.25.503(1), are eliminated; and (4) eliminate the statement which reads "Permanent water impoundments may be permitted

where the department determines that they are in compliance with ARM 17.24.504."

The Federal statute at SMCRA Sec. 701(2) and the Federal regulation at 30 CFR 701.5 include the phrase concerning terracing or access roads in the reclaimed area. The Federal regulations use the term "coal refuse piles." The Federal statute and regulations do not specify the elimination of depressions. The Federal regulatory definition of "approximate original contour" (AOC) contains the phrase concerning the option of permitting of permanent water impoundments; SMCRA does not.

Montana states that it does not need to specify terracing or access roads as part of the reclaimed area, as elsewhere in the State program (ARM 17.24.501 and 17.24.501A), all affected areas must be graded to AOC. The reclamation and grading of roads to be returned to AOC is specifically addressed at ARM 17.24.605 in the Montana program. Both the Federal statute and regulations address grading to achieve AOC for the reclamation of disturbed areas and roads (30 CFR 816.102/817.102; 816.150(b), (c), & (f)/817.150(b), (c), & (f); and Sec. 515(b)(3) of SMCRA), in addition to the definition of AOC. The preamble does not address the need or reason to repeat this reclamation guidance in both sections. Therefore, because Montana contains the requirement to regrade and reclaim all disturbed areas to AOC elsewhere in the State program other than the definition of AOC, OSM finds the Montana proposal to be no less effective than the Federal regulations and no less stringent than SMCRA.

Concerning use of the term "waste" instead of "refuse," Montana stated that "waste" is defined in the state program whereas "refuse" is not. Some States prefer to use the term "waste" instead of "refuse," with New Mexico's program as an example. Because Montana has chosen to use and define the term "waste" instead of "refuse," OSM approves Montana's revision as being no less effective than the Federal regulations.

Montana proposed to add the statement that depressions, except as provided in ARM 17.24.503(1), be eliminated. This requirement is not contained in the Federal definition of AOC but rather at 30 CFR 816.102(h). Montana also contains this requirement in its program at ARM 17.24.503. OSM finds no conflict with also including this requirement in the definition of AOC. OSM finds the Montana proposal to be no less effective than the Federal regulations.

Montana proposed to eliminate the phrase concerning the option of permitting permanent water impoundments if they are in compliance with ARM 17.24.504. This phrase is not an integral part of the definition of AOC and is only contained in the Federal regulatory definition of AOC, not in SMCRA. The preamble does not require this phrase for the definition of AOC. Both 30 CFR 816.49(b)/817.49(b) and ARM 17.24.504 allow permanent impoundments in reclaimed areas providing certain conditions are met. Therefore, OSM finds this revision to be no less effective than the Federal regulations.

C.2. ARM 17.24.301(47), (133) Definition of "Head of Hollow Fill" and "Valley Fill" (30 CFR 701.5)

Montana did not propose any revisions to these definitions. However, in the narrative included in the submittal, Montana addressed a required program amendment at 30 CFR 926.16(e)(9) that was imposed in a final rule dated August 19, 1992 (57 FR 37436). The amendment required Montana to delete the modifier "non-coal" from the organic materials prohibited in these fills. Under the Federal definitions, these fills may consist of "any material, other than organic material." The Montana definitions allow "any material other than non-coal organic material."

In its narrative, Montana stated that under its definitions, the same materials are allowed, and excluded, as under the Federal definitions. It references earlier arguments in a letter to OSM dated February 19, 1993. The differences in the Montana and OSM positions on this issue stem from whether the terms "coal" and "organic" are used in an engineering sense or in a general natural-science sense. In an engineering sense, OSM considers coal to be rock, not an organic material, and "organic" to indicate biological materials that have undergone little decomposition (and hence are, from an engineering point of view, unstable). Montana uses "organic" in a general natural-science sense, to indicate that the material consists of molecules with a carbon framework. Montana argues that, as understood in the natural-science sense, its definitions exclude all organic materials other than those derived from coal, including all of the engineering-unstable materials excluded by the Federal regulations. Further, Montana's definitions allow only coal-derived materials, which are also allowed under the Federal regulations.

Based on this discussion, we agree with Montana that its definitions are not

inconsistent with the Federal definitions, and that the Montana program definitions need not be revised. The required program amendment will be further addressed in a finding below regarding another part of the required amendment (applying to permit application requirements), at ARM 17.24.305.

C.3. Ownership and Control (ARM 17.24.301(79), 17.24.303(14), and 17.24.404) (30 CFR Parts 701, 724, 750, 773, 774, 775, 778, 785, 795, 817, 840, 842, 843, 846, 847)

Montana has proposed various revisions to its ownership and control (O&C) regulations. Montana previously proposed various programmatic revisions to ownership and control in MT-003-FOR. However, in the final rule notice on MT-003-FOR dated February 12, 2002 (67 FR 6395), OSM deferred on Montana's ownership and control regulations. This was because OSM revised the Federal regulations in response to recent legal challenges contesting the validity of OSM's regulations. OSM published a final rule **Federal Register** notice dated December 19, 2000 (65 FR 79663), on revised ownership and control regulations. A new 30 CFR part 732 letter concerning ownership and control will be sent to the States in the future to advise them of changes they need to make to their program in order to be no less effective than the newly revised Federal regulations. Until such time as OSM issues revised O&C guidance concerning necessary programmatic revisions to the States, OSM defers on the proposed Montana revisions concerning ownership and control.

C.4. ARM 17.24.305(2)(b) Preparation and Certification of Maps, Plans, and Cross-Sections (30 CFR 780.14(c))

Montana proposed to revise this rule (1) To delete the term "professional geologist," (2) to change "registered professional engineer" to "licensed professional engineer," and (3) to allow licensed professional land surveyors to prepare and certify materials except for maps, plans, and cross-sections for sedimentation ponds and spoil disposal facilities.

In the August 19, 1992, **Federal Register** notice (57 FR 37436), OSM placed a required program amendment (30 CFR 926.16(e)(9)) on Montana to submit proposed revisions to remove parts of the State program which the OSM Director could not approve, but which had been promulgated by Montana. Those parts of the State program that OSM requested be removed included the phrases

"registered land surveyor," and "or a registered land surveyor" at ARM 26.4.305(2)(b) and 26.4.321(3) (now ARM 17.24.305(2)(b) and 17.24.321(3)). ARM 17.24.321(3) was revised as required in program amendment MT-003-FOR which was approved in a final rule published on February 12, 2002 (67 FR 6395). ARM 17.24.305(2)(b) and ARM 17.24.924(15) are addressed in this submittal, MT-023-FOR.

In its May 7, 2002, submittal, Montana proposed that maps, plans, and cross-sections required under certain sections of ARM 17.24.305 must be prepared by, or under the direction of, and certified by a qualified licensed professional engineer with assistance from experts in related fields, except that: (1) Maps and cross-sections required under certain sections of ARM 17.24.305 may be prepared by, or under the direction of, and certified by a qualified licensed professional land surveyor with assistance from experts in related fields, and (2) maps, plans, and cross-sections for sedimentation ponds and spoil disposal facilities may be prepared only by a qualified licensed, professional engineer. Montana states that MCA 37-67-101(6) provides that licensed professional land surveyors can prepare and certify mine maps and cross-sections but not plans. Montana has deleted the undefined term of "professional geologist." Montana has also replaced "registered" with "licensed" which reflects current State practices.

OSM placed the required program amendment on the Montana program as OSM did not interpret the MCA as authorizing registration procedures for registered land surveyors to perform such tasks as preparing and certifying plans and cross-sections for: Mineral storage, cleaning and loading areas; storage areas for soil, spoil, coal waste, and garbage or other debris; water diversions and facilities for collection, conveyance, treatment, storage, and discharge of water; and explosives storage and handling facilities. In this submission, Montana maintains that the MCA does allow licensed professional land surveyors to prepare and certify mine maps and cross-sections, but not plans. Therefore, Montana has revised the language to reflect these duties.

We agree with Montana that many of the materials required by this rule may be prepared by surveyors, particularly descriptive maps and cross-sections of existing features, or cross-sections that interpolate between sections of plans prepared by an engineer. But Montana also notes that surveyors may not design and plan many structures. In addition to the provision here at (2)(b)(ii) specifying

certain materials that must be prepared by engineers, we reviewed the performance standards in Chapters 5 through 10 (*i.e.*, ARM 17.24.501–17.24.1018). We found that in those Chapters, where the exact plans, cross-sections, and maps are specified, preparation and certification by an engineer (as opposed to a surveyor) is specified where required. Therefore, we agree with Montana that qualified licensed professional land surveyors may prepare and certify some of these materials, and those they may not be adequately specified by subsection (2)(b)(ii) of this rule and the specific performance standards of Chapters 5–10 of the rules. Therefore, we approve Montana's proposal.

As noted above, we earlier required Montana to remove this language in a required program amendment codified at 30 CFR 926.16(e)(9). Based on this approval, that requirement is no longer applicable. In addition, 30 CFR 926.16(e)(9) required Montana to revise: (1) The definitions of "head-of-hollow fill" and "valley fill" at ARM 17.24.301; (2) 17.24.321(3) regarding surveyors; and (3) delete an alternate underdrain variance at 17.24.924(14) (now (15)). We note that in this final rule, we have removed the requirement to revise the fill definitions (*see* Finding C.2. above). Further, the Montana program at 17.24.321 and 17.24.924 was revised as required in a final rule published on February 12, 2002 (67 FR 6395). Therefore, all of the changes required by 30 CFR 926.16(e)(9) have been completed or removed. Accordingly, we are removing the required program amendment.

#### C.5. ARM 17.24.321 Transportation Facilities Plan (30 CFR 780.37/784.24)

In the May 7, 2002, submittal, Montana proposed revisions to combine the requirements for railroad systems (now labeled "railroad loops") with the requirements for roads at ARM 17.24.301, 17.24.321, 17.24.601, 17.24.603, 17.24.605, and 17.24.607. Also, Montana has prescribed that roads performance standards are applicable to haul roads and access roads. In this section concerning transportation facilities plans, Montana has made many editorial revisions to reflect these programmatic changes. In addition, Montana has specified that plans for low-water crossings of perennial and intermittent stream channels must be submitted and demonstrate that protection will be maximized in accordance with the performance standards of the ARM 17.25.600 series. Montana also specifies that ramp roads will be shown on the maps.

The Montana revisions have Federal counterparts at 30 CFR 780.37 (784.24 for underground mines) which require that such information be included in roads systems plans and drawings. The Federal regulations do not specify that railroad systems be included on road systems maps, so Montana is adding an extra requirement. The Federal requirements contain specifications for low-water crossings and intermittent stream channels at 30 CFR 780.37(a) relating to the hydrology performance standards. The Federal regulations at 30 CFR 780.37/784.24 contain the requirement that primary roads be certified by a qualified registered professional engineer with experience in the design and construction of roads. Secondary roads (access roads) need only be shown on road systems maps, and not certified. The Federal definition of "road" at 30 CFR 701.5 excludes "ramp roads."

Therefore, the Director finds that the Montana revisions are no less effective than the Federal counterpart and approves them.

#### C.6. ARM 17.24.405 Findings and Notice of Decision (30 CFR 926.30)

Montana proposed to delete the requirement that, when an application concerns Federal lands, the Department issue its findings on the same day that the Federal regulatory authority issues its findings. Montana explained that they consider the language proposed for deletion to be obsolete, because the Federal regulatory authority (OSM) no longer prepares written findings on Federal lands, that being the sole responsibility of the State.

Under the Federal Land Program at 30 CFR part 740, and the State-Federal Cooperative Agreement at 30 CFR 926.30, Montana has sole responsibility for findings related to permit approval or denial under SMCRA and OSM retains some responsibilities related to other Federal laws. Further, since the language proposed for deletion did not include the defined term "Federal coal regulatory authority," but rather the undefined term "federal regulatory authority," the language proposed for deletion might possibly refer to other Federal agencies.

Nevertheless, we find that the deleted language was directory, not mandatory. Further, there is no corresponding Federal requirement. This deletion does not affect the authority or jurisdiction of any Federal agency. In particular, we note that under the State-Federal Cooperative Agreement at 30 CFR 926.30 VI.C.3., the Department may approve a SMCRA mining permit prior to Secretarial approval of a mining plan

document, provided that the applicant is advised that authorization to mine is not complete. For these reasons, we find that the deletion is not inconsistent with any Federal requirement, and we approve the deletion.

#### C.7. ARM 17.24.416 (formerly 26.4.410) Permit renewal (30 CFR 774.15)

Montana proposed to: (1) Move former ARM 17.24.416(2)(c) to (1)(d); (2) eliminate (2)(b) concerning the extension of permit boundaries beyond the existing permit; (3) revise the cross-reference at proposed (2)(c); and (4) make other grammatical revisions.

Montana states that the elimination of (2)(b) concerning amendments to permits is due to its coverage under major permit revisions: All the provisions of ARM 17.24.401–405 and the performance standards of subchapters 3, 5, 6, 7, 8, 9, and 10. Montana reasons that permit renewals and major permit revisions are distinct processes and should be differentiated. The Federal regulations require that any extension to the area covered by the permit, except incidental boundary revisions, shall be made by a new permit application. This is addressed by Montana at ARM 17.24.417(1).

At 30 CFR 774.15 concerning permit renewals, the Federal regulations allow the renewal form to be set by the regulatory authority (RA) with certain minimum requirements necessary for submission. Montana addresses permit application criteria at ARM 17.24.401 to 17.24.405.

Montana states that the revised cross-reference at (2)(c), from the statutes at MCA 82–4–225 and 82–4–232 to ARM 17.24.1104(1), is a correction. This subsection requires that prior to approving a permit renewal, the Department shall require any additional performance bond. The Federal regulations at 30 CFR 774.15(b)(2)(v) contain a similar provision. The other revisions proposed by Montana to ARM 17.24.416 are non-substantive revisions. We believe that the Montana program contains permit renewal and permit revision provisions substantively identical to the Federal regulations. Thus, we find the proposed Montana revisions are no less effective than the Federal regulations and approve the revisions.

#### C.8. ARM 17.24.501 & 17.24.501A General Backfilling and Grading, Final Grading (30 CFR 816/817.100, .102, 816.101)

Montana proposed to delete rule ARM 17.24.501A, altering and moving some of its provision to rule 17.24.501, and deleting others. Revisions, deletions,

and additions were also proposed for 17.24.501. Revisions not discussed below are minor editorial or codification changes.

At 17.24.501(1), Montana proposed to delete an allowance for an operator to obtain more time for backfilling and grading; a similar provision was proposed to be added at paragraph (6) and will be discussed below. Montana also proposed to delete a provision that required additional bond in cases of extended time allowance. We note, however, that ARM 17.24.1104(1) would still allow the Department to adjust the bond amount "as standards of reclamation change." The Federal regulations do not have any specific provision requiring additional bonding for extended backfilling and grading times, except for the general bond adjustment clause at 30 CFR 800.30(a). Therefore, we find that this proposed deletion is not inconsistent with the Federal requirements.

At paragraph (4)(intro), Montana proposed to add a new provision incorporating a part of existing 17.24.519A(1)(a), requiring that all final grading be to approximate original contour, that final slopes be graded to prevent slope failure, may not exceed the angle of repose, and must have a static safety factor of 1.3. This is substantively the same as the Federal requirements at 30 CFR 816/817.102(a)(1) and (3).

At subparagraph (4)(a), Montana proposed to delete the requirement to eliminate all spoil piles and depressions. We note that these requirements have been added to the definition of "approximate original contour" at 17.24.301(13) (see Finding C.1. above). Therefore, this proposed deletion does not render the Montana program less effective than the Federal requirements.

At paragraph (6), Montana proposed revised standards for contemporaneous reclamation, that were moved in part from existing 17.24.501A(3). Montana proposed that, for strip mining, there must not be more than four consecutive spoil ridges and backfilling and grading to AOC must be complete within two years after coal removal. For "other excavations" (which presumably would include underground mines), backfilling and grading must be "kept current as departmental directives dictate for each set of field circumstances." It is unclear whether "departmental directives" refers to written policies or to instructions and/or permit conditions assigned ad hoc to each operation. The Montana proposal also provides for case-specific variances from these standards when approved by the

Department based on demonstrations by the operator. The Federal regulations establishing time and distance standards for the evaluation of contemporaneous reclamation at 30 CFR 816.101 have been suspended indefinitely (July 31, 1992; 57 FR 33875). Therefore each regulatory authority may define "as contemporaneously as practicable" for itself in accordance with its State processes. The Federal requirement for contemporaneous reclamation for underground mines at 30 CFR 817.100 also allows regulatory authorities to establish their own schedules. Therefore, we find that Montana's proposals are not inconsistent with the Federal requirements.

At 17.24.501A(1)(a), Montana proposed to delete a statement that the final surface need not have the exact elevations as the premining surface, and a requirement that no slope be steeper than 20 percent without departmental approval. No Federal counterparts exist for these requirements, so their deletion is not inconsistent with the Federal requirements.

At 17.24.501A(1)(b) and (c), Montana proposed to delete requirements for (1) Measuring methods for slopes pre- and post-mining, and (2) an upper limit for postmining slopes based on either the premining slope or lesser slopes specified by the Department. There are no Federal provisions for the measurement of slopes, and no limits on slope steepness beyond those incorporated by Montana at new 17.24.501(4). Therefore, these deletions do not render the Montana program inconsistent with the Federal requirements.

For the reasons discussed above, we approve the revisions proposed for ARM 17.24.501 and .501A.

#### C.9. ARM 17.24.503 Small Depressions (30 CFR 816/817.102(h))

Montana has proposed revisions to the rule on small depressions to: (1) Add the promotion of wildlife use to the approvable uses for small depressions by the Department of Environmental Quality; (2) delete the phrase that small depressions may not be inappropriate substitutes for construction of lower grades on reclaimed lands; and (3) delete the sentence that small depressions have a holding capacity of less than 1 cubic yard of water.

The Federal regulation at 30 CFR 816/817.102(h) allows the construction of small depressions to enhance wildlife habitat. Therefore, this proposal by Montana addressing wildlife use is no less effective than the Federal counterpart.

The phrase concerning "inappropriate substitutes for the construction of lower grades" comes from the original language in the Federal regulations at 30 CFR 816/817.102(c)(3). This phrase is no longer in the Federal regulations. Therefore, the Montana deletion would make the rules no less effective than the Federal counterpart.

Lastly, the proposed deletion of the size limit would leave it to the Department's discretion to define "small" in various circumstances. The Federal program has no size guidelines for small depressions. We find that the deletion would not be inconsistent with the Federal regulations.

#### C.10. ARM 17.24.510 Disposal of Offsite-Generated Waste and Fly Ash (30 CFR 816/817.81, 816/817.89)

Montana proposed to revise ARM 17.24.510 to allow waste produced outside the permit area to be used for "other purpose or disposed of on the mine site," in addition to use as fill material, if the permittee can demonstrate that the disposal will be conducted in accordance with sections of the Montana program concerning hydrologic requirements, soil redistribution and stockpiling, the establishment of vegetation, "and any other applicable provisions of the Act and rules." One included requirement is the performance standards at ARM 17.24.505, which governs the disposal of wastes generated on-site. All waste material used on the permit area must receive prior approval by the Department. Montana's explanatory note indicates that wastes might in the future be used for purposes other than fill or disposal (e.g., for road base material or road sanding in winter).

The counterpart Federal regulations for coal mine waste (30 CFR 816.81(b)/817.81(b)) require that coal mine waste material from activities located outside a permit area may be disposed of in the permit area only if approved by the RA. Approval shall be based upon a showing that such disposal will be in accordance with those section's standards concerning coal mine waste disposal. This language is substantively similar to the Montana proposed revision. The Federal requirements for disposal of noncoal wastes (30 CFR 816.89/817.89) do not address off-site generated wastes or the use of wastes for beneficial purposes like those suggested by Montana. Thus, Montana's proposal to regulate these materials according to the performance standards for hydrology, coal waste disposal, soil protection, revegetation, and all other applicable requirements, is not inconsistent with the Federal requirements.

Since both the Federal regulation and the Montana rule allow for disposal of coal mine waste materials generated off the permitted area when approved by the RA and based a showing that performance standards will be met, we find the Montana revision to be no less effective than the Federal requirements. We approve the proposed rule.

C.11. ARM 17.24.514 Contouring (30 CFR 816.102(j))

Montana proposed to delete ARM 17.24.514 concerning contouring, stating it to be "redundant." ARM 17.24.514 states that final grading and surface preparation, before soil replacement, must be done along the contour to minimize subsequent erosion and instability unless approved otherwise by the RA. Surface preparation must be performed to minimize erosion and provide a surface for the replacement of soil that will minimize slippage.

At ARM 17.24.501(4), (5), and (6) and ARM 17.24.702(4) and (5), Montana addresses all or parts of the requirements to restore lands to approximate original contour; to grade to prevent slope failure, slippage and erosion; and to scarify on the contour. The Federal regulations address these requirements at 30 CFR 816/817.102(a), (j), and (k). Therefore, we agree that ARM 17.24.514 is redundant in the Montana program as it is covered at ARM 17.24.501 and 17.24.702. We approve the proposed deletion as being no less effective than the Federal regulations.

C.12. ARM 17.24.519A and .520 Thick Overburden and Excess Spoil (30 CFR 816.104)

At 17.24.519A, Montana proposed to move the requirements with revisions to 17.24.520. We note that Montana, in an earlier program amendment (MT-003-FOR; Administrative Record Nos. MT-12-01 and MT-12-5; February 1 and 28, 1995), proposed deletions in this rule on which OSM deferred a decision (February 12, 2002; 67 FR 6395, 6400; see Finding L). We must address that deferral before we address the current proposals.

The earlier deletions were (1) the requirement that all highwalls and spoil piles be eliminated with spoil and suitable waste materials; and (2) a variance from that requirement, based on highwall retention and alternate reclamation rules at ARM 26.4.313(3)(b) and 26.4.821-824. We further note that this second provision, *i.e.*, the variance, had been deferred by OSM in a still earlier amendment (MT-001 and MT-002; Administrative Record No. MT-5-

1; December 21, 1988; see final rule dated May 11, 1990; 55 FR 19728, 19730; see Finding 3). Since this variance provision had never been approved by OSM, we have no objection to its deletion. The deletion of the first provision was deferred until it could be established, by the Montana rule making that is the subject of the current program amendment, that the requirement for the elimination of highwalls and depressions existed elsewhere in the revised Montana program. We note that the currently proposed ARM 17.24.501, referencing the currently proposed definition of "approximate original contour," does indeed contain this requirement. Hence, we find the earlier-proposed deletion of this requirement, on which we earlier deferred a decision, to be not inconsistent with the Federal requirements. Since the remainder of 17.24.519A is being moved to 17.24.520, we find that the deletion of 17.24.519A does not substantively alter the Montana program, and we approve it.

At 17.24.520(1) and (2), Montana proposed new provisions taken in part from 17.24.519A. Paragraph (1) defines thick overburden according to a factor of 1.2. At paragraph (2), Montana adds the performance standard that for thick overburden, highwall elimination must be accomplished by backfilling (rather than highwall reduction) before any excess spoil disposal would be allowed. The Federal regulations at 30 CFR 816.104 do not place a numerical value on overburden thickness. Rather, thick overburden is defined more generally as those situations where the postmining (bulked) overburden depth so exceeds the premining depth (*i.e.*, the sum of overburden and coal depth) that backfilling and grading would not achieve AOC. The Federal performance standard for thick overburden is to restore AOC, then use remainder to attain the lowest possible grade, or dispose of it as excess spoil. We find the Montana proposal to be consistent with these requirements, and we approve it.

C.13. ARM 17.24.522 Permanent Cessation of Operations (30 CFR 773.4(a))

OSM advised Montana in an October 17, 1995, issue letter on MT-003-FOR (Administrative Record No. MT-12-16) that the Montana program needed to address situations where a permit is terminated, revoked, or suspended. In this submittal, Montana proposed a revision clarifying that an operator who permanently ceases strip or underground mining operations in all or part of the permit area must permanently reclaim all affected areas regardless of whether the permit has

expired, been revoked, or suspended. Additionally, Montana added an editorial clarification that this provision addresses mining operations not only in all of the permit area, but also when operations cease in only a part of the permit area. Therefore, Montana has made the revisions required by OSM. We find this revision to be no less effective than the Federal regulations and approve the proposed revision.

C.14. ARM 17.24.601 General Requirements for Road and Railroad Loop Construction (30 CFR 816/817.150, 816/817.151, and 816/817.181)

Montana proposed numerous changes to this rule. In several sections, Montana proposed to apply these requirements to railroad loops in addition to roads. Under OSM's rules, railroads are considered "support facilities." Their performance standards at 30 CFR 816/817.181 are similar to, but less specific than, the performance standards for roads. We find that applying road performance standards to railroad loops is not inconsistent with the Federal requirements.

In paragraph (1), Montana proposed to expand the conditions under which roads would be allowed to traverse otherwise reclaimed areas, with justification based on the needs of the operation. OSM's regulations do not address any limitation on road location in regard to any potential delay of other reclamation. Thus, we find that this proposed revision is not inconsistent with the Federal requirements.

At paragraph (2)(a) and (b), Montana proposed to delete some requirements for ramp roads. In OSM's regulations, ramp roads are excluded from the definition of "road" at 30 CFR 701.5, and hence OSM has no requirements for ramp roads. At subparagraph (c), Montana proposed to delete several requirements for specific grades, and to delete former (2)(e) regarding horizontal and vertical alignment of roads. New (2) would require that access and haul roads be graded, constructed, and maintained according to sound engineering and construction practices to incorporate appropriate limits for grade, width, surface material, surface-drainage control, culvert placement, and any other design criteria established by the Department. The Federal provisions at 30 CFR 816.150(c) similarly require that the design and construction of roads incorporate "appropriate" limits for grade, without specific numeric grade limits. For the reasons discussed here, we find the proposed revisions at paragraph (2) to be consistent with the OSM regulations.

Montana proposed at paragraph (6) to delete the last sentence regarding the applicability of State and Federal legal limitations on runoff from roads and railroad loops. As Montana notes, this provision is redundant with ARM 17.24.633(4).

At paragraph (9), Montana proposed to add a requirement for Departmental approval of dust-control methods. The Federal requirements at 30 CFR 816.150(b)(1) only require compliance with current prudent engineering practice. We find Montana's proposal to be consistent with the OSM requirement.

At paragraph (10), Montana proposed to delete some specific road reclamation requirements and state that roads must be reclaimed in accordance with the approved plan (under ARM 17.24.321(1)(g), the road reclamation plan must be in accordance with the standards of subchapters 5 through 8). Montana's narrative explained that the intent was to simplify the language while retaining the meaning. Proposed for deletion was the phrase "graded to approximate original contour and ripped, subsoiled or otherwise tilled." We note that under ARM 17.24.501(4), all affected lands are required to be regraded to approximate original contour, and ARM 17.24.702(4)(b) requires that all regraded areas must be scarified to a minimum of 12," and the operator must also achieve revegetation success (which may require deeper ripping). Also proposed for deletion was a sentence requiring reclaimed roads to be resoiled, conditioned, and seeded in accordance with subchapter 7 and a sentence indicating reclaimed roads must be abandoned in accordance with the Act and its rules. We note that subchapter 7, the Act, and the Act's rules are applicable with or without this language. Also proposed for deletion was a list of suggested measures to control erosion on reclaimed roads. The requirement to control erosion remains. We note that the suggested list is directory, not mandatory. Based on the above discussion, we find that the proposed revisions to paragraph (10) only eliminate redundant language and do not change any fundamental requirements.

For these reasons, we approve the revisions proposed for ARM 17.24.601.

C.15. ARM 17.24.603 Road and Railroad Loop Embankments (30 CFR 816/817.150, 816/817.151, and 816/817.181)

Montana proposed numerous changes to this rule. Previously, this rule also applied to embankments that impound water. In several sections, Montana

proposed to delete requirements for such embankments, adding a new statement at proposed paragraph (5) that embankments which impound water must be designed and constructed in accordance with ARM 17.24.639. We agree with moving the requirements for water-impounding embankments to ARM 17.24.639. They will be discussed in a separate finding below.

In the introductory paragraph, Montana proposed to delete language requiring that road/railroad embankments be designed and certified by a registered professional engineer. We note that this requirement still exists at ARM 17.24.321(3).

At previous paragraphs p(1)–(8) and (10)–(12), Montana proposed to delete numerous specific design, construction, and performance standards. Following the deletions, the remaining standards would be: at (1), removal of all organic material from embankment foundations; at (2), embankment material must meet some suitability standards; at (3), embankment layers must be compacted as necessary; and at (4), minimum seismic safety factor of 1.2 and static safety factor of 1.5 must be met.

OSM requirements for road embankments at 30 CFR 816/817.151(b) apply only to primary roads, and provide that each primary road embankment shall have a minimum static factor of 1.3 (or meet the requirements established under Sec. 780.37(c), which allow for regulatory authorities to establish design standards in lieu of the static safety factor). The Federal regulations for support facilities (which includes railroads) at 30 CFR 780.38/784.30 and 816/817.181 have no embankment or stability requirements. Therefore, we find that the proposed deletion of the more specific design, construction, and performance standards is not inconsistent with the Federal requirements.

For the reasons discussed above, we approve the proposed revisions to ARM 17.24.603.

C.16. ARM 17.24.604 Soil Removal (From Road Areas) (30 CFR 816/817.22, 816/817.150, 816/817.151, and 816/817.181)

Montana proposed to delete this rule, which required removal of soil before road or railroad construction, including a distance of 10 feet (or other distance approved by the regulatory authority) from the edge of the road, and to prevent contamination or degradation of soil. In its explanatory note, Montana indicates that all of these requirements are duplicated at ARM 17.24.701, except the 10 feet distance. They note that the

10 feet distance is arbitrary and impractical.

OSM's rules regarding roads and support facilities at 30 CFR 816/817.150, 816/817.151, and 816/817.181 do not address soil handling for roads; instead, soil handling requirements for all mining operations, including roads, are addressed in 30 CFR 816/817.22. There is no requirement for soil removal beyond the edges of roads or railroads. We find that Montana's proposed deletion of ARM 17.24.604 is not inconsistent with the Federal requirements, and we approve the deletion.

C.17. ARM 17.24.605 Hydrologic Impact of Roads and Railroad Loops (30 CFR 816/817.150, 816/817.151, and 816/817.181)

Montana proposed numerous changes to this rule. In several sections, Montana proposed to apply these requirements to railroad loops in addition to roads. Under OSM's rules, railroads are considered "support facilities." Their performance standards at 30 CFR 816/817.181 are similar to, but less specific than, the performance standards for roads. We find that applying road performance standards to railroad loops is not inconsistent with the Federal requirements.

At paragraph (1), Montana proposed to delete the requirement that contributions of sediment not exceed the limits of State or Federal law. As Montana noted in its explanation, this requirement also exists at ARM 17.24.633(4). Therefore, the deletion of this language does not eliminate the requirement.

At paragraph (2), Montana proposed to delete some detailed requirements for locations of road drainage ditches, particularly with regard to cut and fill slopes. Similar language existed in OSM's initial permanent program rules at then-existing 30 CFR 816.153(b)(1), but was subsequently deleted. Currently, at 30 CFR 816/817.151(d)(3), there are no corresponding requirements for road ditches. Montana also proposed to delete the last sentence of paragraph (2), which addressed ditch slope. As Montana notes, this is redundant with paragraph (3) (intro), which requires all roads to be adequately drained. Therefore, we find that these proposed deletions are not inconsistent with Federal requirements.

At paragraph (3), Montana proposed to exclude ramp roads from road drainage control requirements. As noted above, in OSM's regulations ramp roads are excluded from the definition of "road" at 30 CFR 701.5, and hence OSM has no requirements for ramp roads



beyond the general sediment controls required in the pit area. Montana also proposed to add culverts and bridges to the non-exhaustive list of drainage control structures that may be used. The Federal provision at 30 CFR 816/817.151(d)(1) similarly suggests culverts and bridges. Therefore, we find that these proposed revisions are not inconsistent with the Federal requirements.

At new subparagraph (3)(a), Montana proposed to delete the restriction that discharge capacity of road water-control structures may not rely on hydraulic head (*i.e.*, impoundment at the entrance). Instead, Montana proposed that the discharge must "safely" pass the required design event. Montana notes in its explanation that use of hydraulic head to increase discharge rates can be safe in some cases. The OSM requirement at 30 CFR 816/817.151(d)(1) only requires that the drainage-control system be designed to "safely pass" the design event. We find the Montana revision to be consistent with the Federal requirement. Montana also proposed to add a provision that the Department may require a greater design event for culverts than the 10-year storm. This revision matches language in the Federal rule.

At new subparagraph (3)(b), Montana proposed to delete a requirement that certain large culverts be designed for a 25-year storm event. Similar language existed in OSM's initial permanent program rules at then-existing 30 CFR 816.153(c)(1), but was subsequently deleted. Current OSM rules require, for primary roads, that the drainage control system be designed for a 10-year storm "or greater event" as specified by the regulatory authority (which was also added by Montana at new subparagraph (3)(a)). We find that Montana's proposed revision is consistent with the Federal requirement.

At new subparagraph (3)(c), Montana proposed to delete culvert requirements for trash racks and fill cover depths. Similar language existed in OSM's initial permanent program rules at then-existing 30 CFR 816.153(c)(1), but was subsequently deleted. OSM's current regulations at 30 CFR 816/817.151(d)(2) require only that culverts be maintained in a free and operating condition. Montana has retained language requiring that culverts be constructed to avoid plugging. We find Montana's proposed deletion to be consistent with the Federal requirements.

Also in this subparagraph, Montana has proposed to delete a provision specifying culvert spacing. Again, similar language existed in OSM's initial permanent program rules at then-

existing 30 CFR 816.153(c)(2), but was subsequently deleted. OSM's current regulations at 30 CFR 816/817.151(d)(1) require only that the drainage control system be designed to safely pass the runoff from the design storm event. A similar requirement exists in the Montana program at subparagraph (3)(a). We find Montana's proposed deletion to be consistent with the Federal requirements.

At new subparagraph (3)(f), Montana proposed to delete a cross-reference requiring soil removal to be consistent with ARM 17.24.604. As noted in the finding above, we are approving deletion of the Montana rule at ARM 17.24.604. As noted above, OSM regulations do not impose any soil-removal requirements specific to roads. We find Montana's proposed deletion of this cross-reference to be consistent with the Federal requirements.

For the reasons discussed above, we approve Montana's proposed revisions to ARM 17.24.605.

#### C.18. ARM 17.24.607 Maintenance of Roads and Railroad Loops (30 CFR 816/817.150, 816/817.151, and 816/817.181)

Montana proposed to make the following revisions concerning the maintenance of roads: (1) Montana proposed to include railroad loops with the performance standards for roads and eliminate the differentiation of "access and haul" roads; (2) at new subsection (2)(a), Montana proposed to eliminate the phrase "resulting from sudden runoff events" concerning wet field conditions; (3) at new subsection (2)(c), Montana proposed to specify that runoff and sediment are contained "in accordance with the approved drainage control plan;" and (4) Montana proposed to make other editorial revisions and to recodify some provisions.

At ARM 17.24.607, as well as other sections in this submittal, Montana proposed to add "railroad loops," and to eliminate the differentiation of access and haul roads in favor of "roads." OSM has approved Montana's definition of "railroad loops" in another technical finding. Under OSM's rules, railroads are considered "support facilities." Their performance standards at 30 CFR 816/817.181 are similar to, but less specific than, the performance standards for roads. We find that applying road performance standards to railroad loops is not inconsistent with the federal requirements.

At paragraph (1), Montana's proposal would apply maintenance requirements to all roads. Since Montana's definition of roads includes more travel ways than does the Federal definition, the

maintenance requirement is being applied to all roads covered by the Federal requirement at 30 CFR 816/817.150. Therefore, we find Montana's proposed revision to be consistent with the Federal requirement.

At ARM 17.24.607(2)(a), Montana proposed to eliminate the phrase "resulting from sudden runoff events" concerning the operator's inability to maintain ditches, culverts, drains, trash racks, debris basins and other drainage structures due to wet field conditions. Montana has proposed this deletion to broaden the rule and to consider all wet field conditions, not only those caused by sudden runoff events. For example, this may apply to spring snow melt. As previously approved, the provision in essence allows temporary deferral of maintenance on drainage-control structures under wet conditions, but the deferral is only allowed when there is no environmental or public risk and when all sediment is controlled. There is no corresponding OSM provision. Given the limits on the applicability of the deferral, we find that extending the deferral to other wet field conditions is not inconsistent with the Federal requirements.

Based on the discussions above, we approve Montana's proposed revisions to this rule.

#### C.19. ARM 17.24.623 Blast Schedule (30 CFR 816/817.64)

Montana proposed to delete the requirement that the blasting period may not exceed an aggregate of 8 hours in any one day and that the Department may impose more restrictive conditions pursuant to ARM 17.24.624.

The Federal equivalent at 30 CFR 816.64(a)(1) states that the operator shall conduct blasting operations at times approved by the RA and that the RA may limit the area covered, timing, and sequence of blasting as listed in the schedule if such limitations are necessary and reasonable in order to protect the public health and safety or welfare. The provision which Montana proposed for deletion falls within the State's discretion to specify, according to the Federal regulations. There is no exact Federal equivalent. Therefore, we find the proposed revisions are not inconsistent with the applicable Federal provisions and we approve them.

#### C.20. ARM 17.24.633 Water Quality Performance Standards (30 CFR 816/817.42, 816/817.46)

At paragraph (3), Montana proposed to extend the requirement that sediment ponds be constructed prior to mining to all sediment controls and add a cross-reference requiring compliance with

ARM 17.24.638 (sediment control measures). As revised, all sediment controls must be constructed before mining operations, and comply with ARM 17.24.638 and 17.24.639. Similarly, OSM's rules at 30 CFR 816/817.46(b)(3) and (4) require all siltation structures to be constructed prior to mining operations, and impoundments to be in compliance with the impoundments rule. We find Montana's proposed revisions to be consistent with the Federal requirements.

At paragraph (4), Montana proposed to delete language specifying under which circumstances effluent limits apply, but the deleted language is replaced by the added language "all discharges which include \* \* \* [water from disturbed areas]." Similarly, Montana proposed to delete a non-exhaustive list of effluent parameters which must be met, but also proposed to replace the deletion with language stating that discharges must be in compliance with all Federal and State laws and regulations and "all applicable effluent limitations." The Federal requirement at 30 CFR 816.42 requires that discharges of water from disturbed areas meet effluent limits promulgated by the U.S. Environmental Protection Agency. We find Montana's proposed revisions to be consistent with the Federal requirement. At subparagraph (4)(b), Montana proposed to delete language requiring that "when BTCA practices result in a point discharge, the discharge must meet applicable effluent limitations." Montana's explanation notes that this language is redundant. We agree that the deleted language is repetitive ("discharges must be in compliance with all federal and state laws and regulations and all applicable effluent limitations"). We also note that this deletion would not affect any legal requirements under the Montana counterparts to the Clean Water Act.

At paragraph (6), Montana proposed to delete a provision requiring that "BTCA [Best Technology Currently Available]" practices must be installed, operated, and maintained to treat any water discharged from the disturbed area to ensure compliance with all federal and state laws and regulations and the limitations of this rule." We agree with Montana that this provision was redundant, repeating other language in the rule as noted above.

For the reasons discussed above, we find that Montana's proposed revisions are no less effective than the Federal requirements, and we approve the proposed revisions.

C.21. ARM 17.24.634 Reclamation of Drainages (30 CFR 816/817.43)

At paragraph (2), Montana proposed to delete the requirement for operators to submit design modifications at least 120 days prior to reclamation of a drainage. However, the designs would still be required to be approved by the Department before construction begins. We note that reclaimed drainages meet the definition of "diversion" at ARM 17.24.301(33), and in particular are permanent diversions. Hence, under ARM 17.24.317, initial designs must be included in the initial permit application. Further, Montana proposed to delete language requiring the operator to notify the Department when construction begins, and to require Departmental inspection and approval of regraded drainages prior to resoiling and seeding. We agree with Montana that the explicit timeframe for submission of revised designs is not needed, so long as regulatory authority approval is obtained prior to construction. We further agree with Montana's explanatory note that operational efficiencies of both the mine operator and the Department are unnecessarily limited by the notification and pre-soiling inspection and approval requirements. The Federal regulations at 30 CFR 816/817.43 contain no such specific requirements.

Also at paragraph (2), Montana proposed to delete the word "detailed," used to describe the required designs. We agree that the specific requirements for the designs are specified elsewhere. Also proposed for deletion was the requirement that the designs "represent the state of the art in reconstruction of geomorphically stable channels." We agree that "state of the art" is a subjective standard difficult to enforce fairly, and that geomorphically stable channels are in any case required under paragraph (1) of the rule.

Montana further proposed to delete language requiring that drainage reclamation designs be certified by a qualified registered professional engineer. Montana's explanatory note indicates that the requirement "is unnecessary, because there does not appear to be more of a rationale for having such designs certified compared to any other work submitted by an operator that does not currently require certification. There is nothing particularly unique or critical (e.g., public safety) about drainage designs that requires certification. Thus, this requirement is proposed for deletion." We disagree with this position. Like diversions in general, reclaimed stream channels require the calculation of

runoff volumes, peak flows, channel-flow velocities, and erosive potential. In this case, there is a particular need to address "geomorphic habit or characteristic pattern," geomorphic stability, and riffle-pool sequences. Therefore, we find adequate need for professional engineer design and certification. We note that the Federal rules at 30 CFR 816/817.43(b)(4) require stream channel diversions of intermittent and perennial streams to be designed and certified by a registered professional engineer. However, we note that in this case deletion of this language does not in fact delete the requirement that reclaimed drainages be designed and certified by a registered professional engineer. As discussed above, these reclaimed drainages meet the Montana definition of "diversion" at ARM 17.24.301(33). Hence, under ARM 17.24.635(5), design and certification by a registered professional engineer is still required for any diversion of a stream channel.

At paragraph (3), Montana proposed to remove subparagraph (1)(a) from the requirements for which alternative reclamation techniques might be approved. This deletion would restrict the allowed variance to a greater extent than is currently approved. There is no exact Federal counterpart to this rule. The regulations at 30 CFR 780.21(h), 816.41(a) and (d), and 816/817.43(b) require that diversions protect the hydrologic balance, water quality, and channel volume. We find Montana's proposed deletion to be consistent with those requirements.

For the reasons discussed above, we find that Montana's proposed revisions are no less effective than the Federal requirements, and we approve the proposed revisions. As noted above, approval of the proposed deletion in paragraph (2) of the requirement for engineer design and certification of designs for drainage channel reclamation does not effectively eliminate that requirement, as it is duplicated in ARM 17.24.635(5).

C.22. ARM 17.24.639 Sedimentation Ponds and Other Treatment Facilities (30 CFR 816/817.46, 816/817.49)

At subparagraph (1)(c), Montana proposed to delete a requirement that sediment storage in sediment ponds be determined using the universal soil loss equation (with some specified parameters), the sediment density method, or other empirical method derived from regional studies. The revision would instead require only that the sediment storage volume be determined by a method approved by the Department. One currently-

approved alternative to this, to provide 0.035 acre-feet per disturbed acre, was proposed to be revised by reducing the required volume to 0.02 acre-feet per acre and excluding acres of well-established reclamation. Lesser sediment storage would be allowed upon site-specific demonstration, but greater sediment volume may be required if necessary. The corresponding Federal regulation at 30 CFR 816/817.46(c)(1)(iii)(A) only requires sediment ponds to provide adequate sediment storage volume. The preamble to this regulation (48 FR 44032, 44041-2; 9/26/83) states that the determination of actual sediment storage volume is left to the professional engineer, and that in approving the design the regulatory authority must be satisfied that the storage volume is adequate. Montana has long-term experience in working with sediment volume estimates in its coal fields. Under the proposed revision, Montana must approve the method of storage volume calculation. Montana has also determined that 0.02 acre-feet of storage per acre of disturbed area is adequate. Montana also retains the ability to require greater storage volumes when necessary. Therefore, this proposed revision is no less effective than the corresponding Federal regulation.

At paragraph (2), Montana proposed to delete a requirement that the permittee may be required to conduct annual bathymetric studies of some sediment ponds. There is no such requirement in the Federal regulations. Therefore, the proposed deletion is not inconsistent with the Federal requirements.

At existing paragraph (6), Montana proposed to delete a statement that compliance with this rule does not eliminate operator responsibility for compliance with the effluent limits of ARM 17.24.633. The earlier rule, as discussed above, requires that all discharges must be in compliance with all effluent limits. We agree with Montana that the language proposed for deletion duplicates the requirements of ARM 17.24.633. Therefore, the proposed deletion is not inconsistent with the Federal requirements.

At existing paragraph (9), Montana proposed to delete a requirement that embankments for sediment ponds be constructed in compliance with ARM 17.24.603. As discussed above, Montana is moving such requirements from ARM 17.24.603 to this rule at paragraphs (11)-(17). Therefore, this proposed deletion does not remove any applicable requirements.

At existing paragraphs (12), (14), and (15), Montana proposed to delete

requirements that (1) Embankment heights be increased to allow for settlement; (2) specified embankment slopes; and (3) specified foundation scarification. There are no such requirements in the Federal regulations. Therefore, the proposed deletions are not inconsistent with the Federal requirements.

At new paragraphs (13) and (15)(c), Montana proposed to add requirements for embankment foundation construction on steeper slopes and embankment compaction standards. There are currently no such Federal requirements, though similar detailed design specification were earlier included in OSM's first permanent program regulations in 1979. These requirements are not inconsistent with the Federal requirements for impoundment stability at 30 CFR 816/817.49(a)(4) and foundation stability at 816/817.49(a)(6).

At paragraph (18), Montana proposed to add a requirement for temporary sediment controls during sediment pond construction. There is no such requirement in the Federal regulations, but this is not inconsistent with the requirement at 30 CFR 816/817.46(b) that additional contributions of sediment be prevented to the extent possible.

At paragraph (22)(b), Montana proposed a new requirement that, for ponds containing (rather than passing) design storms, the design certification indicate that safe dewatering will occur within appropriate times. Montana proposed this revision in response to our letter of July 10, 1997 (Item 10b), in which we identified issues in a previous program amendment submittal. The proposed addition is substantively the same as the Federal requirement at 30 CFR 816/817.49(c)(2).

At paragraph (27)(a), Montana proposed to delete a requirement that, for excavated sediment ponds, the perimeter slopes must not be steeper than 33 percent. Montana's explanatory note indicates that steeper slopes would help minimize the amount of land disturbed and increase operational efficiency. The Federal regulations at 30 CFR 816/817.46 and 816/817.49 do not specifically address excavated impoundments, nor their perimeter slopes. The vertical portion of any remaining highwall is required at 816/817.49(a)(10) to be far enough below water line to provide adequate safety for water users. Impoundment designs must be certified as meeting current, prudent engineering practices, which would include stable slopes; this would still be required by the Montana rule. We find

the proposal to be consistent with these requirements.

For the reasons discussed above, we approve these proposed revisions.

C.23. ARM 17.24.645(6) and 17.24.646(6) Ground Water Monitoring and Surface Water Monitoring (30 CFR 816/817.41(c), (e))

Montana proposed to revise these paragraphs to update references to standard water quality analysis methods that may be used for ground water monitoring. Most of the revisions are editorial clarifications. One of the standard references proposed for approval is the Department's "Circular WQB-7" (November 1998 edition). In a final rule dated February 12, 2002 (67 FR 6395, 6401; see Finding P), we deferred a decision whether to approve an earlier proposed revision to these paragraphs that referenced an earlier (April 1994) edition of "Circular WQB-7." We deferred then because Montana informed us that "Circular WQB-7" was being revised, and we could not approve the revised rule until the new edition of "Circular WQB-7" was reviewed by OSM to ensure that it did not conflict with 40 CFR part 136.

We have not yet been able to review the revised "Circular WQB-7." However, we note that the current proposed revision requires groundwater analyses to comply with both 40 CFR part 136 and "Circular WQB-7." Hence, if any conflict exists, the discrepancy would have to be resolved in favor of the more stringent requirements. Therefore, we find that the proposed revisions are not inconsistent with the Federal requirement, and we approve the revisions. This action supercedes the earlier deferral.

C.24. ARM 17.24.702(6) Redistribution and stockpiling of soil (30 CFR 816/817.22(d))

Montana proposed to delete the requirement that soil redistribution achieve "approximate uniform" thicknesses. Montana's explanatory note indicates that the intent is "to allow varying soil substrate thicknesses conducive to plant diversity and specific revegetation needs."

We note that ARM 17.24.701 requires removal of soil from all areas disturbed by mining operations. Hence, "redistribution" would imply that all such areas receive at least some soil during resoiling operations. Similarly, ARM 17.24.702(1) and (2) require soil to be distributed on all graded areas. Taken together with paragraph (6) as proposed for revision, all of these requirements would imply that no area disturbed by mining operations could be left without

any soil. So the question is whether the disturbed area must all be resoiled to the same thickness.

The preamble to the Federal regulation (48 FR 22100; May 16, 1983) included a discussion of this issue. Concern was expressed by a commenter that uniform soil depths might lead to monocultures and be incompatible with reclamation objectives. In response, OSM modified the final rule to add that redistribution would be to an approximately uniform thickness "consistent with the approved postmining land use" and final graded contour. We note that native undisturbed soils exhibit a great range of depths within small areas, reflecting both topographic impacts and biotic influences, and soil depth range contributes to the premine plant communities and landscape diversity. Efforts to reconstruct the premining ecosystem should thus also include varying replaced soil depths to reflect topography, the various plant communities to be obtained by revegetation, and postmining land use. The Montana rules at ARM 17.24.313(4)(c)(ii) require such soil replacement depths to be specified in the permit application. We note that the majority of reclamation in Montana is directed to the postmining land uses of grazing and wildlife habitat, with the goal of achieving diverse plant communities, for which varying soil depths are appropriate. On lands with postmining land uses where approximately uniform soil replacement depths are appropriate (such as cropland or pasture), Montana would retain the authority to require such approximately uniform depths.

Because Montana has retained the requirement that soil be redistributed in a manner that achieves thicknesses consistent with soil resource availability and appropriate for the postmining vegetation, land uses, contours, and surface water drainage patterns, we find that the proposed deletion of the requirement for approximate uniform thickness does not render the Montana program less effective than the Federal requirements in achieving the purposes of SMCRA.

C.25. ARM 17.24.711(1) Establishment of vegetation (30 CFR 816/817.111)

Montana proposed to move from ARM 17.24.716(2) two requirements: that the revegetation consist of predominantly native species and that the revegetation be capable of self-regeneration. We agree with Montana that those requirements make more sense in this rule, stating general performance standards, than in the latter rule about revegetation

methods. Accordingly, we approve this revision.

Montana also proposed to add exceptions to the "predominantly native" requirement as provided in MCA 82-4-233(4) or 82-4-235(2). The first of these is a provision that, for some operations (those seeded between SMCRA's initial regulatory date and January 1, 1984), introduced species are considered by Montana to be necessary and desirable to achieve the postmining land use and may constitute a major or dominant component of the revegetation. This provision was approved by OSM on June 12, 2001 (66 FR 31530, 31531; Finding 3). The provision at MCA 82-4-235(2) provides a similar allowance, and supplemental planting without restarting the bond liability period, for areas disturbed prior to SMCRA regulation. It was approved by OSM on January 22, 1999 (64 FR 3604, 3608; Finding 8). The revision proposed at ARM 17.24.711(1) implements these previously-approved statutory exemptions, and is therefore not inconsistent with the Federal requirements. Therefore, we approve this revision.

C.26. ARM 17.24.716(2), (5) Method of revegetation (30 CFR 816/817.111)

As noted in the finding above, Montana proposed to move two requirements from paragraph (2) of this rule to ARM 17.24.711: that the revegetation consist of predominantly native species and that the revegetation be capable of self-regeneration. This revision was approved in that finding. Other descriptors proposed for deletion here (*e.g.* permanent, diverse) are duplicated in the earlier rule, and we also approve those deletions.

Montana also proposed in paragraph (2) to: (1) Change a requirement for Department approval of seeding other than on the contour to a requirement that seeding be done on the contour whenever possible; and (2) delete an allowance for drill seeding in separate rows according to Soil Conservation Service (now known as Natural Resources Conservation Service) guidelines. These existing requirements provided more detail than is contained in the Federal requirements at 30 CFR 816/817.22 and .111-.114. Therefore, deletion of these more specific provisions is not inconsistent with the Federal requirements and we approve them.

At subparagraph (5)(b), Montana proposed to add two allowances for introduced species intended to implement two statutory revisions previously approved by OSM. For the same reasons discussed in the finding

above on ARM 17.24.711, we approve the revisions proposed here.

C.27. ARM 17.24.733(3) Measurement Standards for Woody Plants (30 CFR 816/817.116(b)(3))

Montana proposed to delete a provision requiring that, when counting woody plants with multiple stems, only the tallest stem may be counted. There is no Federal counterpart for the provision proposed for deletion.

We agree with Montana's statement that it is often difficult to determine which multiple stems constitute one individual, and hence difficult to obey the provision. Further, as long as the same techniques are used for both determining success standards and measuring success against those standards, determination of revegetation success is not hindered. Therefore, we find that the proposed deletion does not render the Montana program less effective than the Federal regulations and we approve the revision.

C.28. ARM 17.24.825(3) Alternate Reclamation: Alternate Revegetation (30 CFR 816/817.116(b)(2))

In this paragraph, Montana proposed to revise one method of determining revegetation success standards for non-prime farmland cropland from target yields under ARM 17.24.815(2) to technical standards from historical data under 17.24.724(5). We note that success standards for prime farmlands are those specified at ARM 17.24.815(2). The success standards addressed in this revision are for non-prime cropland, and need not address the requirements for prime farmland.

The Federal regulations at 30 CFR 816/817.116(b)(2) require only that, in determining whether revegetation meets the premining vegetation, either a reference area or other success standards be specified by the regulatory authority. We find that the reference to technical standards derived from historic data meets these requirements. Therefore, we approve the revision.

C.29. ARM 17.24.901 and .911 Underground Mining, General Application Requirements and Subsidence Control (30 CFR 784.20, 817.121, 817.41(j))

Montana proposed revisions to these sections in response to OSM's letter (June 5, 1996) in accordance with 30 CFR part 732, which informed Montana of changes needed to its program to implement the provisions of the Energy Policy Act for subsidence protection and water supply restoration in connection with underground mines.

Montana notes that it interprets its statutory language at 82-4-231(10)(f) to require that (except where planned subsidence is used) subsidence be prevented, rather than merely minimized or mitigated. For this reason, it has altered certain Federal counterparts in these proposed revisions, as will be discussed below.

At subparagraph ARM 17.24.901(1)(c)(i)(G), Montana proposed to require a survey of the condition of all residences (and related structures) and all non-commercial buildings within the area of the pre-subsidence survey (*i.e.*, the permit area and adjacent area). We consider this area to be at least as extensive as the area initially required by the Federal regulation at 30 CFR 784.20(a)(3) (*i.e.*, the angle of draw). However, the areal extent of the Federal requirement is in any case under suspension by court order.

At subparagraph 17.24.901(1)(c)(iii)(A)(II) and (III), Montana proposed (for the subsidence control plan) to require a description of measures to be taken underground and on the surface to prevent subsidence and material damage to structures and lands. These proposals reflect Montana's statutory interpretation noted above that the rules must prevent subsidence. The counterpart Federal requirements at 30 CFR 784.20(b)(5) require descriptions of measures to prevent or minimize subsidence and material damage. We find Montana's proposal to be no less effective than the Federal requirements.

At subparagraph 17.24.911(2), for operations with planned and controlled subsidence, Montana proposed to require that all necessary measures be taken to prevent material damage to protected structures. The only exception is if the operator has written consent from the owners. This proposal again reflects Montana's statutory interpretation noted above that the rules must prevent subsidence. The counterpart Federal requirements at 30 CFR 817.121(a)(2) require measures to minimize damage "to the extent technologically and economically feasible," and an additional exception is allowed for cost-benefit considerations. We find Montana's proposal to be no less effective than the Federal requirements.

At subparagraph 17.24.911(7)(d), Montana proposed to add a requirement that the operator must replace any adversely affected domestic water supply. This paragraph applies only when underground mining has resulted in subsidence that causes material damage or reduces the value or use of surface lands. So, by adding the new

provision to this particular paragraph, Montana appears to be limiting the water-replacement requirement to instances where subsidence has occurred and that subsidence has caused material damage or reduced the value or use of surface lands. The Federal requirement at 30 CFR 817.41(j) is not so limited, and applies to water supply contamination, diminishment, or interruption by any underground mining activities, regardless whether or not subsidence has occurred.

Additionally, there is an ambiguity on this point in Montana's statutory provision for water replacement for underground mines, at MCA 82-4-243. This statutory provision was submitted by Montana in a previous program amendment (Administrative Record MT-17-01; July 20 and August 17, 2000; approved by OSM on June 12, 2001 (66 FR 31530; see Finding No. 4)). The sentence requiring water replacement does not contain any limitation to subsidence ("The permittee of an underground coal mining operation shall \* \* \* promptly replace any drinking, domestic, or residential water supply from a well or spring that was in existence prior to the application for the permit pursuant to 82-4-222 and that has been affected by contamination, diminution, or interruption resulting from the underground coal mining operation"). However, the entire section 82-4-243 is titled "Subsidence." Therefore, it is unclear whether Montana intends the statute to limit water replacement for underground mines to instances where subsidence has occurred.

Under standard canons of legal analysis, by proposing in this amendment to add the water replacement requirement at subparagraph ARM 17.24.911(7)(d), which applies only when subsidence has occurred, Montana may be understood to be resolving the statutory ambiguity by interpreting the statutory provision to be limited only to instances of subsidence. And were we to approve the proposal, we could be approving that limiting interpretation; such approval would render the statutory provision less stringent than SMCRA 720(a)(2). Additionally, under standard canons of legal analysis, a specific requirement for water replacement in one circumstance (where subsidence has occurred), as proposed here, while remaining silent on other circumstances (*i.e.*, where no subsidence has occurred) may be interpreted as a deliberate exclusion of the alternate (silent) circumstance. Therefore, Montana's proposed rule might be interpreted as requiring water replacement only when

subsidence has occurred and has caused material damage or reduced the value or use of surface lands. Such an interpretation would render the Montana rules less effective than the Federal requirement at 30 CFR 817.41(j), which is not so limited.

For these reasons, we do not approve the proposed addition of ARM 17.24.911(7)(d). Since the rule has already been promulgated, we are requiring Montana to amend its program by removing this provision. Further, in order to resolve the ambiguity in its statutory provision at 82-4-243, MCA (discussed above), we are requiring that Montana further amend its rules to require the prompt replacement of any drinking, domestic or residential water supply that is contaminated, diminished, or interrupted by underground mining activities, regardless of the occurrence of subsidence or whether subsidence has caused material damage or reduced the value or use of surface lands, to be no less effective in meeting the requirements of SMCRA 720(a)(2) than is 30 CFR 817.41(j).

At paragraph ARM 17.24.911(8), Montana proposed to add provisions establishing a rebuttable presumption of causation of damage by subsidence, and standards for rebutting the presumption. The proposal closely resembles the equivalent Federal counterparts at 30 CFR 817.121(4). However, these Federal requirements were suspended on December 22, 1999 (64 FR 71653). Montana's proposal provides another means for citizens to establish that damage to their buildings and/or residences was caused by subsidence (and hence subject to compensation or repair as discussed above). Even where the presumption is not applicable, citizens have other, though more difficult, means of proving causation. Protecting surface owners and those with legal interests in non-commercial buildings from the adverse effects of mining operations is one of the purposes of the Act specified at SMCRA 102(b). Therefore, providing the rebuttable presumption results in more stringent land use controls and regulation of mining operations than does the Federal regulations under the suspension. Therefore, under 30 CFR 730.11(b), we find that the proposal is not inconsistent with the Federal requirements.

Except as discussed above, the revisions proposed for ARM 17.24.901 and .911 are either minor editorial or recodification changes, or contain language that is the same as or similar to the corresponding Federal regulations promulgated to implement the Energy

Policy Act on March 31, 1995 (60 FR 16722). We find that they are no less effective than the corresponding Federal regulations. Except as discussed above regarding ARM 17.24.911(7)(d), and for the reasons discussed above, we approve the revisions proposed for these two sections.

C.30. ARM 17.24.932(5)(b)  
Underground Mining, Disposal of  
Underground Development Waste:  
Durable Rock Fill (30 CFR 816/817.73)

Montana proposed only a minor editorial revision to this rule, to revise a cross-reference to 17.24.924(18)(b). This cross-reference was created during an earlier program amendment (MT-003-FOR; Administrative Record Nos. MT-12-01 and MT-12-5; February 1 and 28, 1995). In the final rule addressing that amendment, OSM deferred on whether to approve the cross-reference, stating that the cross-reference should be to all of rule 17.24.924 and not to just one paragraph or subparagraph (*see* February 12, 2002; 67 FR 6395, 6404; *see* Finding Y). In this submittal, Montana has revised the cross-reference to reflect a recodification of 17.24.924, but has not revised the cross-reference in a way to resolve the problems identified earlier by OSM. For the reasons stated in the February 12, 2002 rule, we continue to defer a decision on this revision.

C.31. ARM 17.24.1001(2)(l)  
Prospecting, Permit Requirements; ARM  
17.24.1018(3), (4) Prospecting, Notice  
of Intent (30 CFR 772.12(b)(11), (13), (c),  
772.11)

Montana proposed to add at ARM 17.24.1001(2)(l) a new requirement that applications for prospecting permits include documentation that the owners of the land to be affected have been notified and understand that the Department has a right of entry for inspection and enforcement purposes.

There is no exact Federal counterpart to this proposed requirement. The Federal regulations noted above require that exploration permit applications contain the names and addresses of owners of both surface and mineral estates in the areas to be affected and, if the applicant does not own the land, a description of the legal basis for the right to explore. Additionally, as is true of the Montana program, a public newspaper advertisement of the application is required. The Montana proposal is similar to these Federal requirements, but would require more exacting and documented notification of land owners. One of the purposes of SMCRA is to assure that the rights of surface landowners and others with a

legal interest are fully protected (SMCRA 102(b)). We find the Montana proposal to be consistent with this goal, and we approve the proposal.

Similarly, Montana proposed to add at ARM 17.24.1018(3) and (4) new requirements that prospecting notices of intent include (1) Copies of documents providing legal right to prospect, and (2) documentation of notice to landowners similar to that discussed above. Again, there are no exact Federal counterparts at 30 CFR 772.11. However, for the reasons discussed above in regard to ARM 17.24.1001(2)(l), we approve the proposal.

C.32. ARM 17.24.1112 Bonding,  
Release Applications and Objections (30  
CFR 800.40(f))

At ARM 17.24.1112(h), Montana proposed to specify that "any affected person" may submit written comments, objections, and requests for public hearing or informal conference to the Department of Environmental Quality concerning the filing for bond release by the permittee. This information would be included in an advertisement in a newspaper of general circulation in the locality of the permit area.

The Federal regulations at 30 CFR 800.40(f) state that "Any person with a valid legal interest which might be adversely affected by release of the bond, or responsible officer or head of any Federal, State, or local governmental agency which has jurisdiction by law or special expertise with respect to any environmental, social, or economic impact involved in the operation or which is authorized to develop and enforce environmental standards with respect to such operations, shall have the right to file written objections to the proposed release from bond with the regulatory authority \* \* \*."

Montana's use of the term, "any affected person," would include persons with a valid legal interest and those without a valid legal interest but affected in some other way. This interpretation is similar to the Federal regulations which address both those persons with a valid legal interest which might be adversely affected by release of the bond, and the responsible officer or head of agencies which have jurisdiction by law or special expertise with respect to environmental, social, or economic impact involved in the operations. Therefore, Montana has included in its rules a term with a substantively identical interpretation to the Federal regulations. We find the Montana revision to be no less effective than the Federal regulations and approve it.

C.33. MCA 82-4-205(2) and 206  
Administration by Department and  
Procedure for Contested Case Hearings  
(SMCRA 201(c), 514(c), 525)

Montana proposed to delete an existing provision at subparagraph MCA 82-4-205(10) that stated the Department may conduct hearings under "this part" (*i.e.*, title 82, Minerals, Oil, And Gas; chapter 4, Reclamation; part 2, Coal and Uranium Mine Reclamation). Montana proposed to add a new paragraph (2) to provide that the board (*i.e.*, the Board of Environmental Quality) shall conduct contested hearings under the part. The effect of these revisions would be to transfer the authority to conduct contested case hearings from the Department to its overseeing board. Montana also proposed a new provision at MCA 82-4-206(1) stating that a person aggrieved by a final decision of the Department may within 30 days request a hearing before the board.

SMCRA is silent on the issue of which body should conduct contested case hearings. A provision addressing permit disputes at SMCRA 514(c) forbids anyone who presided at an informal conference from presiding at a formal hearing. SMCRA 525 establishes administrative review by the Secretary of the Interior, although under SMCRA 701(22), the Secretary is also the regulatory authority (RA). SMCRA 201(c) states that the Secretary, acting through OSM, shall be responsible for both program decisions and administrative review. In practice, however, administrative review under Federal programs is conducted by a panel answerable to the Secretary but independent from OSM. The Federal regulations at 30 CFR 732.15(b)(14) require that State programs provide for administrative review in accordance with SMCRA 525 and 30 CFR parts 840-847 (which implies the panel noted above). The 30-day period proposed by Montana is consistent with the time frames set forth in the Federal requirements. We find these Montana proposals to be consistent with the Federal requirements and we approve them.

C.34. MCA 82-4-231(8) Action on  
Reclamation Plan (SMCRA 503(a)(6),  
510)

Montana proposed several revisions to this statutory section to alter the timing of mining permit application review in coordination with reviews under the Montana Environmental Policy Act. The revisions do not amend any substantive requirements for reviewing mining permit applications.

SMCRA does not directly address the review of permit applications under the Federal National Environmental Policy Act. However, SMCRA 503(a)(6) does require that State programs include a process for coordinating the review and issuance of coal mining permits with any other State permit process applicable to the operation. We find the proposed revisions to be consistent with the Federal provisions and we approve them.

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

##### *D.1. Definition of "Railroad Loop", ARM 17.24.301(95)*

Montana proposed to define the term "railroad loop" in its program as meaning any rail transportation system within the mine permit area, whether in the form of a loop or a straight line. Montana's program currently uses the term "railroad loop" in its definition of "operation" and does not provide for straight rail configurations. Montana states that at the time the Act was passed (1973), most rail configurations were loops. In order to assure that the Department of Environmental Quality has jurisdiction over all rail configurations, Montana decided to define "railroad loop."

There is no direct Federal counterpart to Montana's proposed definition. At 30 CFR 816.180/817.180, OSM uses the term "railroad" in the discussion of utility installations. OSM does not differentiate among railroad configurations since that is not critical to SMCRA. Rather, it is the classification of railroads as utility installations and their regulation which is important. Therefore, OSM finds Montana's proposed definition to be consistent with the Federal regulations, and we approve it.

##### *D.2. MCA 82-4-241(2) Receipts Paid Into General Fund (30 CFR 800.50)*

Montana proposed to add two new provisions. At new paragraph (2), Montana proposed that bond forfeiture money not addressed in existing paragraph (1), be used for expenses pursuant to MCA 82-4-240, which addresses bond forfeiture reclamation. At new paragraph (3), Montana proposed a disposition of excess bond forfeiture funds when Montana cannot locate the funds' owners.

SMCRA does not specifically address these issues. The Federal regulations at 30 CFR 800.50 at (b)(2) require forfeiture receipts to be used for reclamation. At 30 CFR 800.50(2)(c), excess funds are to be returned to the party from whom they were collected, but the regulation

is silent about disposition of the funds when that party cannot be located. We find the Montana proposals to be consistent with the Federal provisions and we approve them.

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

##### *Public Comments*

We asked for public comments on the amendment (Administrative Record No. MT-20-06). We received a comment letter from one individual, with several comments as discussed below.

The commenter expressed a concern about the proposed removal of blasting restrictions. We interpret this as a reference to ARM 17.24.623, where Montana proposed to delete the requirement that the blasting period may not exceed an aggregate of 8 hours in any one day. We note that under ARM 17.24.624, blasting is still restricted to daylight hours. As discussed in Finding C.19 above, the Federal rules do not provide for any more strict limitation.

An additional concern was expressed regarding the proposal to allow steeper slopes on the insides of ponds and the possibility that under the proposal, cattle and wildlife would be more likely to drown in winter. We interpret this as a reference to ARM 17.24.639(27)(a) where Montana proposed to delete a requirement that, for excavated sediment ponds, the perimeter slopes must not be steeper than 33 percent. As discussed in Finding C.22. above, there is no more stringent Federal requirement, so Montana's proposal is not inconsistent with the Federal regulations. We note that at ARM 17.24.642(1)(d), permanent impoundments may be approved only on a demonstration of adequate safety and access for water users. However, this does not apply to temporary impoundments (nor does the corresponding Federal requirement at 30 CFR 816/817.49(b)(4)). We note that in Montana, where a given mining operation may exist in an area for decades, "temporary" may also mean decades. We note further the availability of the option under 30 CFR 700.12 to submit a petition for rulemaking, in case the commenter or other persons believe that the Federal rules should be revised to include long-term "temporary" impoundments under the category of permanent impoundments.

Another comment addressed the allowance to build excavations without spillways. We interpret this as a reference to ARM 17.24.639(7)(a), where Montana proposed to add a statement that excavated ponds need no spillway.

We note that this provision was actually submitted to OSM as part of an earlier program amendment that was approved (Administrative Record No MT-12-25, approved February 12, 2002; 67 FR 6395, 6401; *see* Finding N). However, in this current amendment Montana, in its narrative following Rule 639, indicated its intent in promulgating the provision saying that excavated ponds by their nature have no spillway. We interpret this as a reference to a dictionary definition of "spillway," which indicates that a spillway is a channel to rout excess water around an obstruction such as a dam. If the pond is totally excavated, there is no obstruction to route water around. We note that most of the spillway requirements in the Federal regulations are designed to prevent failure of pond embankments, which would allow all of the stored water in the pond, as well as incoming water, to threaten downstream areas. In excavated ponds, there is no danger of embankment failure, and the stored water will stay where it is. It is true that once the pond is filled, additional inflow will result in outflow from the pond. This will happen at one location of the pond's perimeter where the ground surface is lowest. Montana in its narrative recognizes this, and states that the outflow area below the excavation may require stabilization against erosion under ARM 17.24.640. That rule requires that discharge from ponds must be controlled by engineer-designed and certified structures or vegetation (open-channel spillways may also be stabilized by vegetation if the engineering design allows). Thus, if an engineer is designing outflow erosion control measures below an excavated pond, the resulting structure would be little different than a spillway. It just would not be bypassing an obstruction, and hence might not be called a spillway.

The commenter also noted Montana's proposal at ARM 17.24.634(2) to delete language requiring that drainage reclamation designs be certified by a qualified registered professional engineer. The commenter appears to have misinterpreted this rule to apply to impoundments, when it applies to reclaimed drainages that serve as diversions. As discussed in Finding C.21. above, although Montana is deleting the requirement that designs be certified by a qualified registered professional engineer, the requirement still exists at ARM 17.24.635(5). We further note that under ARM 17.24.639(22), all impoundments must be designed, inspected, and certified by a qualified registered professional

engineer experienced in the construction of impoundments. The commenter further addresses ARM 17.24.634(2), where Montana proposed to delete the requirement that the regraded channel not be resoiled or seeded until inspected and approved by the Department. In particular, the commenter expressed skepticism that Montana would make an operator redo deficient work if it were already resoiled and seeded. As discussed in our finding, we agree with Montana that operational efficiencies of both the mine operator and the Department are unnecessarily limited by the notification and pre-soiling inspection and approval requirements. The commenter's concern would apply equally to all phases of reclamation, and if justified would be a greater problem for general postmining surface configuration than for drainages. If the commenter's concern is justified, it would be a problem to be addressed in program oversight, particularly reviewing permit revisions approving "as-built" grading changes or drainage designs. In any case, we note that the Federal regulations at 30 CFR 816/817.43 contain no such specific pre-soiling inspection and approval requirements, so we cannot find Montana's deletion to be inconsistent with the Federal requirements.

The commenter further observes that many provisions proposed for deletion in this program amendment have already been deleted in rule packages Montana makes available to the public. As we note below (see "Effect of OSM's Decision"), Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Similarly, 30 CFR 732.17(a) requires that any change of an approved State program be submitted to OSM for review as a program amendment. The Federal regulations at 30 CFR 732.17(g) prohibit any changes to approved State programs that are not approved by OSM. In our oversight of State programs, we recognize only the statutes, regulations and other materials we have approved, together with any consistent implementing policies, directives and other materials. We require Montana to enforce only approved provisions. If the commenter is aware that any unapproved revisions are being enforced or implemented, the commenter should notify OSM's Casper Field Office of such (See "For Further Information Contact" provided at the beginning of this rule) so that OSM may take any necessary site-by-site inspection and enforcement actions and include an appropriate review in our

annual oversight of the Montana program.

The commenter also expressed some concern with the proposed revision at ARM 17.24.733, where Montana proposed to delete a provision requiring that, in counting woody plants with multiple stems, only the tallest stem may be counted. As discussed above in Finding C.27., the critical factor is that any vegetation parameter (cover, production, stem density, or others) be measured using the same methodology in setting success standards and determining operator compliance with the standard.

Finally, the commenter noted that the definitions in Montana's statute (presumably, 82-4-203, MCA) need to be examined and discussed. We are unclear in what way this comment relates to the current amendment. We did not note in reviewing the proposed regulatory definitions any conflict with the statutory definitions. If the commenter has any specific concerns, they should be addressed to the Casper Field Office.

#### Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Montana program (Administrative Record No. MT-20-03).

We received a reply from the Bureau of Indian Affairs (Rocky Mountain Regional Office) indicating that the revisions were acceptable from their point of view (Administrative Record No. MT-20-04).

We also received a reply from the Mine Safety and Health Administration, indicating that they found no direct impact on employee or public health or safety, and hence had no comments or recommendations (Administrative Record No. MT-20-05).

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

Under 30 CFR 732.17(h)(11)(i) and (ii), we are required to get concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued 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 Montana proposed to make in this amendment pertain to air or water quality standards. Therefore, we did not ask EPA to concur on the amendment.

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

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On May 14, 2002, we requested comments on Montana's amendment from the SHPO and ACHP (Administrative Record No. MT-20-03), but neither responded to our request.

#### V. OSM's Decision

Based on the above findings, we approve, with the following exceptions and additional requirements, Montana's May 7, 2002 amendment.

We defer decision on the following proposed revisions: Finding No. C.3., ARM 17.24.301(79), 17.24.303(14), and 17.24.404, concerning ownership and control; and Finding No. C.30., ARM 17.24.932(5)(b), concerning inspections of durable rock fills on underground mines.

With the requirement that Montana further revise its rules, we do not approve, as discussed in: Finding No. C.29, ARM 17.24.911(7)(d), concerning replacement of water supplies harmed by underground mining activities.

To implement this decision, we are amending the Federal regulations at 30 CFR part 926, which codify decisions concerning the Montana program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires a State program to demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

#### Effect of OSM's Decision

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Similarly, 30 CFR 732.17(a) requires that any change of an approved State program be submitted to OSM for review as a program amendment. The Federal regulations at 30 CFR 732.17(g) prohibit any changes to approved State programs that are not approved by OSM. In the oversight of Montana's program, we will recognize only those statutes, regulations and other materials we have approved, together with any consistent implementing policies, directives and other materials. We will require Montana to enforce only approved provisions.



## VI. Procedural Determinations

### *Executive Order 12630—Takings*

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

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

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

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

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

### *Executive Order 13132—Federalism*

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

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

In accordance with Executive Order 13175, we have evaluated the potential

effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on any Tribe, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The State of Montana, under a Memorandum of Understanding with the Secretary of the Interior (the validity of which was upheld by the U.S. District Court for the District of Columbia), does have the authority to apply the provisions of the Montana regulatory program to mining of some coal minerals held in trust for the Crow Tribe. This proposed program amendment does not alter or address the terms of the MOU. Therefore, this rule does not affect or address the distribution of power between the Federal Government and Indian Tribes or the relationship between the Federal Government and Indian Tribes.

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

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

### *National Environmental Policy Act*

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

### *Paperwork Reduction Act*

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

### *Regulatory Flexibility Act*

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5

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

### *Small Business Regulatory Enforcement Fairness Act*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: a. does not have an annual effect on the economy of \$100 million; b. will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and c. does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

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

### *Unfunded Mandates*

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

### **List of Subjects in 30 CFR Part 926**

Intergovernmental relations, Surface mining, Underground mining.

Dated: July 16, 2003.

**Allen D. Klein,**

*Regional Director, Western Regional Coordinating Center.*

■ For the reasons set out in the preamble, 30 CFR part 926 is amended as set forth below:

### **PART 926—MONTANA**

■ 1. The authority citation for part 926 continues to read as follows:

Authority: 30 U.S.C. 1201 et seq.
■ 2. Section 926.15 is amended in the table by adding a new entry in

chronological order by "Date of final publication" to read as follows:

§ 926.15 Approval of Montana regulatory program amendments.
\* \* \* \* \*

Table with 3 columns: Original amendment submission date, Date of final publication, Citation/description. Includes entries for May 7, 2002 and August 6, 2003, listing various ARM and MCA regulations.

■ 3. Section 926.16 is amended by removing and reserving paragraph (e)(9) and adding paragraph (m) to read as follows:

§ 926.16 Required program amendments.
\* \* \* \* \*

(m) By October 6, 2003, Montana shall revise ARM 17.24.911, or otherwise modify its program, to require the prompt replacement of any drinking, domestic or residential water supply that is contaminated, diminished, or interrupted by underground mining activities, regardless of the occurrence of subsidence or whether subsidence has caused material damage or reduced the value or use of surface lands, to be no less effective than 30 CFR 817.41(j) in meeting the requirements of SMCRA 720(a)(2).

[FR Doc. 03-19944 Filed 8-5-03; 8:45 am]

BILLING CODE 4310-05-P

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 4

RIN 1024-AC69

Operating Under the Influence of Alcohol or Drugs

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: This rule revises the National Park Service (NPS) regulation governing motor vehicle operation under the influence of alcohol. The revision is in response to a Presidential directive issued to all Federal agencies to promulgate regulations adopting a 0.08 blood alcohol concentration (BAC) as the legal limit for a per se impaired driving offense. This rule will assist in preventing tragic and unnecessary alcohol-related deaths and injuries on our Nation's roads.

DATES: Effective date: September 5, 2003.

FOR FURTHER INFORMATION CONTACT: Bernard C. Fagan, National Park Service, 1849 C Street, NW., Mailstop 7252, Washington, DC 20240. Telephone: (202) 208-7456. Email: Chick\_Fagan@nps.gov.

SUPPLEMENTARY INFORMATION:

Background

The NPS administers 388 areas throughout the country "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." The National Park Service Organic Act, 16 U.S.C. 1. Although the nearly 300 million annual visitors to the national park system use a variety of access methods, the vast majority rely on motor vehicles and roadways to reach park