

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 regulations did not impose an unfunded mandate.

**List of Subjects in 30 CFR Part 936**

Intergovernmental relations, Surface mining, Underground mining.

Dated: February 14, 2005.

**Ervin J. Barchenger,**

*Acting Regional Director, Mid-Continent Regional Coordinating Center.*

■ For the reasons set out in the preamble, 30 CFR part 936 is amended as set forth below:

**PART 936—OKLAHOMA**

■ 1. The authority citation for part 936 continues to read as follows:

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

■ 2. Section 936.25 is amended in the table by adding a new entry in chronological order by “Date of Final Publication” to read as follows:

**§ 936.25 Approval of Oklahoma abandoned mine land reclamation plan amendments.**

\* \* \* \* \*

Original amendment submission date	Date of final publication	Citation/description
11/01/2004 .....	4/4/05	Oklahoma Plan §§ 884.13(c)2—Project Ranking and Selection; (c)3—Coordination with Other Entities; and (c)7—Public Participation.

[FR Doc. 05–6600 Filed 4–1–05; 8:45 am]

**BILLING CODE 4310–05–P**

**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 950**

[WY–032–FOR]

**Wyoming Regulatory Program**

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

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

**SUMMARY:** We are approving, with one exception, a proposed amendment to the Wyoming regulatory program (the “Wyoming program”) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Wyoming proposed to remove rules pertaining to soft rock surface mining and to revise and add rules about highwalls and coal exploration. Wyoming intended to revise or revised its program to be consistent with the corresponding Federal regulations, provide additional safeguards, clarify ambiguities, and to enhance and diversify reclamation.

**DATES:** *Effective Date:* April 4, 2005.

**FOR FURTHER INFORMATION CONTACT:** James F. Fulton, Chief, Denver Field Division, telephone: (303) 844–1400, extension 1424; Internet address: [jfulton@osmre.gov](mailto:jfulton@osmre.gov).

**SUPPLEMENTARY INFORMATION:**

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

**I. Background on the Wyoming Program**

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, “a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act \* \* \* and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.” See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Wyoming program on November 26, 1980. You can find background information on the Wyoming program, including the Secretary’s findings, the disposition of comments, and conditions of approval in the November 26, 1980, **Federal Register** (45 FR 78637). You can also find later actions concerning Wyoming’s program and program amendments at 30 CFR 950.10, 950.12, 950.15, 950.16, and 950.20.

**II. Submission of the Proposed Amendment**

By letter dated May 21, 2004, Wyoming sent us an amendment to its program (Rule Package 1R, Administrative Record number WY–37–1) under SMCRA (30 U.S.C. 1201 *et seq.*). Wyoming sent the amendment in response to a February 21, 1990, letter (Administrative Record number WY–37–7) that we sent to the State under 30 CFR 732.17(c), and in response to the required program amendments at 30 CFR 950.16(a), (w), and (l), and to include the changes made at its own initiative.

Changes Wyoming proposed to make in its Coal Rules included: (1) Chapter 1, section 2(l), revising the definition of “coal exploration;” (2) Chapter 1, section 2(ce), removing the definition of “soft rock surface mining;” (3) Chapter 4, section 2(b)(iv)(A), adding provisions for small depressions; (4) Chapter 4, section 2(b)(ix), (ix)(A), (B), and (C), removing soft rock surface mining provisions for backfilling and grading; (5) Chapter 4, section 2(b)(ix)(D), retaining and revising a soft rock mining provision for highwall retention; (6) Chapter 10, sections 1 and 1(b)(iii), revising requirements for coal exploration of 250 tons or less; (7) Chapter 10, sections 2(b), (b)(i), (ii), (iii), (iv), (v), (vi), (vii), (viii), (ix), (x), (xi), and (xii), adding and revising application requirements for coal exploration of more than 250 tons or in areas designated unsuitable for mining; (8) Chapter 10, section 3(b), revising

provisions of application approval for exploration of more than 250 tons or in areas designated unsuitable for mining; (9) Chapter 10, section 4(e), revising performance standards for protecting certain critical, crucial and important habitats during exploration; and (10) Chapter 10, sections 8, 8(a), (b), (b)(i), (ii), (ii)(A), (ii)(B), (ii)(C), (iii), and (iv), adding rules pertaining to commercial use and sale of coal extracted during exploration.

We announced receipt of the proposed amendment in the August 17, 2004, **Federal Register** (69 FR 51026). 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 number WY-37-10). We did not hold a public hearing or meeting because nobody requested either one. The public comment period ended on September 15, 2004. We received comments from two Federal agencies.

During our review of the amendment, we identified concerns about Wyoming's proposed highwall retention rule at Chapter 4, section 2(b)(ix)(D). We notified the State of our concerns by letter dated August 11, 2004 (Administrative Record Number WY-37-11).

Wyoming responded in a letter dated August 30, 2004, by sending us a Coal Rule Package 1-T (Administrative Record Number WY-37-12). In that package, Wyoming proposed additional revisions to the highwall retention rule at Chapter 4, section 2(b)(ix)(D). It also noted, however, that the proposed change to the highwall retention rule included in Coal Rule Package 1-T must be reviewed further in the State's internal rulemaking process, which it expected to take several months. In light of Wyoming's ongoing rulemaking, we will defer making a final decision on Chapter 4, section 2(b)(ix) until that process is completed and we know the final wording of that proposed rule.

### III. OSM's Findings

Following are our findings concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment, with one exception as noted above and discussed below.

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

Wyoming proposed minor recodification changes to the following previously-approved rules as shown:

Chapter 10, sections 2(b)(iii), (iv), (v), (vii), (vi), and (viii), application requirements for exploration of more than 250 tons or in an area designated

unsuitable for mining, recodified as 2(b)(vi), (vii), (viii), (x), (xi), and (xii), respectively (Federal counterparts at 30 CFR 772(b)(6), (7), (8), (8)(i), (8)(ii), (8)(iii), (9), (11), (12), and (13), respectively).

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

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

Wyoming proposed revisions to the following rules containing language that is the same as or similar to the corresponding sections of the Federal regulations. In some cases, the State also proposed to recodify the revised rules as shown below:

1. Chapter 1, section 2(l), revising the definition of "coal exploration" (30 CFR 701.5);

2. Chapter 4, section 2(b)(iv)(A), adding a new provision for the use of small depressions in reclamation (30 CFR 816.102(h));

3. Chapter 10, sections 1 and 1(b)(iii), revising general requirements for coal exploration of 250 tons or less (30 CFR 772.11, 11(b), and 11(b)(3));

4. Chapter 10, sections 2(b), (b)(i), (ii), and (iii), (b)(iv), and (b)(v), revising and adding general requirements for coal exploration of more than 250 tons or in an area designated as unsuitable for mining, including recodification (30 CFR 772.12(b), (b)(1), (2), (3), (4) and (5));

5. Chapter 10, section 2(b)(ix), description of measures to be used so exploration of more than 250 tons or in areas designated unsuitable for mining complies with exploration performance standards at Chapter 10, section 4, including recodification (30 CFR 772.12(b)(10));

6. Chapter 10, section 3(b), provision for administrative and judicial review for anyone adversely affected by decisions on coal exploration applications (30 CFR 772.12(e)(2); required amendment at 30 CFR 950.16(a));

7. Chapter 10, section 8, adding a new heading for the section addressing commercial use or sale of coal extracted under a coal exploration license (30 CFR 772.14);

8. Chapter 10, section 8(b), adding a new provision for written approval to not require a mining permit for coal exploration where sale or commercial use of extracted coal is for coal testing purposes only, with an added requirement for an application to

demonstrate the need for coal testing and the purpose for coal extraction during exploration (30 CFR 772.14(b));

9. Chapter 10, section 8(b)(i), adding a new requirement for the testing firm name and coal testing locations for coal extracted during exploration (30 CFR 772.14(b)(1));

10. Chapter 10, section 8(b)(ii), adding a new requirement for a statement from the end user or agent or broker if coal extracted during exploration is sold or commercially used, with a requirement for the statement to include other information described in following subsections (30 CFR 772.14(b)(2));

11. Chapter 10, section 8(b)(ii)(A), adding a new requirement for the statement to include the reason for the test, including why the coal is so different from the user's coal as to require testing (30 CFR 772.14(b)(2)(i));

12. Chapter 10, section 8(b)(ii)(B), adding a new requirement for the statement to show the amount of coal needed for testing and why a lesser amount is insufficient (30 CFR 772.14(b)(2)(ii));

13. Chapter 10, section 8(b)(ii)(C), adding a new requirement for a description of the test to be conducted (30 CFR 772.14(b)(2)(iii));

14. Chapter 10, section 8(b)(iii), adding a new requirement for evidence of sufficient coal reserves to show that coal to be removed during exploration is not the total reserve but a sample (30 CFR 772.14(b)(3)); and

15. Chapter 10, section 8(b)(iv), adding a new requirement for an explanation as to why other means of exploration are not adequate to determine coal quality and/or mining feasibility (30 CFR 772.14(b)(4)).

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 and can be approved.

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

##### 1. Information Required in Applications for Exploration About Historic or Archeological Resources

Wyoming proposed to add a sentence to the end of recodified section 2(b)(vii) in Chapter 10 of its Coal Rules describing requirements for applications for coal exploration involving more than 250 tons or in areas designated unsuitable for mining. Wyoming's proposed change responds to the amendment required at 30 CFR 950.16(w). The new sentence would expand exploration application

requirements to “\* \* \* include any other information which the Administrator may require regarding known or possible historic or archeological resources.” With the exception of the word “possible,” Wyoming’s proposed change is substantively identical to the counterpart Federal regulation at 30 CFR 772.12(b)(8)(iv), which requires a description of “[a]ny other information which the regulatory authority may require regarding known or *unknown* historic or archeological resources” (emphasis added for comparison). Wyoming did not explain its use of the word “possible” in contrast to the term “unknown” used in the Federal regulation.

Neither Black’s Law Dictionary nor the regulations at 36 CFR part 800 *et seq.* define the adjectives “possible” or “unknown.” Webster’s Ninth New Collegiate Dictionary defines the adjective “unknown” as—

[n]ot known or not well-known; also: having an unknown value.

On the other hand, Webster’s defines the adjective “possible” as—

1 a: being within the limits of ability, capacity, or realization b: being what may be done or may occur according to nature, custom, or manners 2 a: being something that may or may not occur b: being something that may or may not be true or actual 3: having an indicated potential.

In its explanation of synonyms for “possible,” Webster’s adds that—

POSSIBLE implies that a thing may certainly exist or occur given the proper conditions \* \* \*.

In the preamble to the final rule **Federal Register** publishing the regulations at 30 CFR 772.12 (52 FR 4244; February 10, 1987) we said “[s]everal commenters stated that they do not believe that OSMRE has any authority to require information on unknown archeological sites.” In response, we acknowledged that “[s]ection 772.12(b) does not require submission of information on unknown archeological sites.” We continued by saying—

[r]ather, OSMRE is making explicit that the regulatory authority has the discretion to require such information, should the regulatory authority need the information to make informed decisions in the public interest concerning important historic properties that may be disturbed by coal exploration activities. The basis for such authority is the same as for requiring information on historic resources in the permitting process, discussed in the preceding portion of this preamble (*Id.*, at 4256).

In the preamble’s discussion of our authority to require information on historic and archeological resources in the permitting process, as referenced in the quotation above, we said—

[c]onsideration of the effects of surface coal mining operations extends both to know[n] [sic] resources and to situations where a well reasoned conclusion has been reached that there may be resources which are likely to be impacted, as well as to properties listed on, and those eligible for listing on, the National Register of Historic Properties.

The foregoing explanation reveals consistency between use of the terms “unknown” and “possible” in the Federal regulation and proposed State rule, respectively. The preamble’s explanation of the Federal regulation characterizes “unknown” resources as “situations where a well reasoned conclusion has been reached that there may be resources which are likely to be impacted \* \* \*.” Wyoming’s use of the term “possible” is not inconsistent with the Federal regulation’s corresponding use of the term “unknown” in view of Webster’s definition of “possible” as “being what may be done or may occur according to nature, custom, or manners” and its explanation that “possible” “\* \* \* implies a thing may certainly exist or occur given the proper conditions.”

As we explained in the 1987 final rule (*Id.*), the Federal regulation does not require operators to submit information about “unknown” resources but gives regulatory authorities the discretion to require such information if they need it. In effect, Wyoming’s proposed rule gives it the authority to require additional information about historic and archeological resources if needed and the discretion to require it for known resources and “possible” others that might exist but are not definitely known to exist. As such, we find the State’s proposed rule at Chapter 10, recodified section 2(b)(vii) is not inconsistent with, and is no less effective than, the counterpart Federal regulation and can be approved. We also are removing the required amendment at 30 CFR 950.16(w).

## 2. Restrictions on Disturbing Certain Critical, Crucial, and Important Habitats During Exploration

Wyoming’s proposed rule at Chapter 10, section 4(e) of its coal rules would prohibit disturbing critical habitat for listed threatened and endangered species during exploration. It also would prohibit disturbing crucial or important wildlife habitat during exploration without written evidence of consultation with the Wyoming Game and Fish Department, including any

resulting recommendations. The counterpart Federal regulation at 30 CFR 815.15(a) prohibits disturbing unique or unusually high value habitats for fish, wildlife, and other related environmental values and critical habitats for threatened and endangered species during exploration. The State rule pertains to *listed* threatened and endangered species; the counterpart Federal regulation refers only to threatened and endangered species.

Wyoming defines the terms “crucial habitat” and “important habitat” in its rules. We approved Wyoming’s definitions of those two terms in the August 6, 1996, **Federal Register** for amendment WY-022-FOR (61 FR 40735). In that approval, we noted that Wyoming’s definition of “important habitat” coincides with “habitats of unusually high value for fish [and] wildlife” as described further in 30 CFR 780.16(a)(2)(ii) (*Id.*, at 40737). It also is consistent with the wording of the counterpart Federal regulation at 30 CFR 815.15(a) for the rule being revised at section 4(e) of Chapter 10 of the State’s rules. In the 1996 approval (*Id.*), we found Wyoming’s definitions of “important habitat” and “crucial habitat” were not inconsistent with the surface mining permit application regulations at 30 CFR 780.16(a) and (b) and the performance standards at 816.97(f). There are no counterpart provisions in the Federal regulations for the term “crucial habitat.”

In the same August 6, 1996, **Federal Register** (*Id.*), we required Wyoming to revise section 4(e) of Chapter 10. The required amendment is found at 30 CFR 950.16(l). As proposed then in amendment WY-022-FOR, section 4(e) would have allowed coal exploration operations to disturb important habitat after consultation with the Wyoming Game and Fish Department while prohibiting disturbance to critical and crucial habitat. Because “important habitat” in Wyoming’s rules is analogous to “habitats of unique or unusually high value for fish [and] wildlife” as used in the Federal regulations and because the Federal regulations prohibit disturbance of unusually high value habitats, we found Wyoming’s proposed rule was less effective than the counterpart Federal regulation because it allowed coal exploration to disturb important habitat based on consultation with the Wyoming Game and Fish Department.

In a letter dated April 8, 1997 (Administrative Record number WY-37-13), Wyoming noted its ongoing efforts to reword section 4(e) of Chapter 10 to comply with the required amendment. The State asked us for

guidance and flexibility in interpreting the prohibition on disturbance required at 30 CFR 815.15(a). We responded to Wyoming's request for guidance in a letter dated September 7, 2000 (Administrative Record number WY-37-14) after discussing the issue with the State on a number of occasions. In that letter, we acknowledged the Federal regulation's prohibition of exploration disturbance on habitats of unique or unusually high value for fish, wildlife, and related environmental values, and by analogy, on important habitats in Wyoming. However, we suggested the following alternative:

For coal exploration on "important habitat" or "crucial habitat" the State may wish to consider a proposed amendment that requires the same consultation process with State and Federal agencies responsible for fish and wildlife as those required by permanent regulatory program surface coal mining activities and reclamation plans (30 CFR 780.16, 816.97 and the State counterparts). We would consider this alternative to be consistent with and no less effective in meeting the intent of SMCRA.

As proposed, Wyoming's exploration performance standard at section 4(e) of Chapter 10 responds to the required amendment as follows:

Critical habitats of listed threatened or endangered species identified pursuant to the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) shall not be disturbed during coal exploration. Crucial or important habitat for wildlife shall not be disturbed during coal exploration unless written evidence of consultation with the Wyoming Game and Fish Department and any resulting recommendations are submitted to the Administrator as part of either a coal exploration license or notice of intent to explore application.

Wyoming explained in its amendment how its proposed rule addresses the approval criterion we established in the September 7, 2000, letter. The State explained that—

\* \* \* as is currently required prior to approving any coal permit, the Wyoming Game and Fish Department reviews the permit application and their recommendations for minimizing the impacts to wildlife and their habitats are considered and integrated into the Mine and Reclamation Plan of that permit. A similar process would be necessary as part of any [Land Quality Division] approval of a Notice of Intent to Explore or a Coal Exploration License. Therefore, this proposed rule amendment is maintaining the current requirement that important habitat can only be disturbed after consultation with the Wyoming Game and Fish Department, but is extending this flexibility to crucial habitats which had previously been off limits to coal exploration.

We reviewed Wyoming's surface coal mining provisions for consultation on

fish and wildlife issues in context of the criterion established in our September 7, 2000, letter. The State's approved counterparts to the Federal regulations for permit application requirements and consultation at 30 CFR 780.16(a) and (a)(1) are found at Chapter 2, sections 2(a)(vi)(C)(III), (G), (G)(I), (II), and (III). Its approved counterparts to the Federal regulations for permit application requirements at 30 CFR 780.16(a)(2)(i) and (ii) and 780.16(b) are found at Chapter 2, sections 2(b)(vi), (vi)(B) and (vi)(C). Chapter 4, section 2(r) of Wyoming's rules includes the State's previously-approved counterparts to the Federal performance standards for surface coal mining at 30 CFR 816.97(a) and (b).

Chapter 10 of Wyoming's exploration rules includes requirements pertaining to endangered and threatened species as well. Section 2(b)(v) of Wyoming's coal exploration rules is the State's previously-approved counterpart to the Federal regulation at 30 CFR 772.12(b)(9). The State's rule requires applications for exploration of more than 250 tons or in areas designated as unsuitable to include a description of any endangered or threatened species listed under the Endangered Species Act that are in the proposed exploration area. Further, section 2(b)(vi) requires a map showing the areas of land to be disturbed by proposed exploration and reclamation, including the location of critical habitats of any endangered or threatened species listed pursuant to the Endangered Species Act. Its Federal counterpart is found at 30 CFR 772.12(b)(12).

Proposed section 4(e) does not repeat the various fish and wildlife consultation provisions that appear throughout the State's regulations for surface coal mining. However, it requires written evidence of consultation with the Wyoming Department of Game and Fish and the results of that consultation to be submitted to the State as a prerequisite to disturbing important or crucial habitat during coal exploration. Wyoming's explanation for proposed section 4(e) said it would require a process similar to that for mine permit applications. Such a process would require the Game and Fish Department's review of applications for exploration that would disturb important or crucial habitat, consider its recommendations for minimizing impacts to wildlife and their habitats, and integrate its recommendations into any approval of a Notice of Intent to Explore or a Coal Exploration License. Those procedures are not explicit in Wyoming's proposed wording of section 4(e). We interpret

proposed section 4(e) as requiring persons who explore for coal in crucial and important habitats to submit to the Land Quality Division the recommendations that resulted from their consultation with the Wyoming Department of Game and Fish and to fully comply with those recommendations. We interpret and therefore accept Wyoming's explanation as a commitment to providing the described level of protection for important and crucial habitat during exploration, and will verify its implementation during our oversight of the State's regulatory program.

Though proposed section 4(e) also does not explicitly require consultation with the U.S. Department of the Interior, Fish and Wildlife Service (U.S. Fish and Wildlife Service or the Service), it prohibits disturbing critical habitat for listed threatened and endangered species. Moreover, section 2(b)(v) of the State's exploration rules requires a description of any listed endangered or threatened species in the proposed exploration area, and section 2(b)(vi) requires a map showing areas to be disturbed by exploration and reclamation, including the location of critical habitats of any listed endangered or threatened species. We recognized in our August 6, 1996, approval of amendment WY-022-FOR (*Id.*, at 40741) that the Service is responsible for listing, recovery, administration, and prohibitions associated with threatened and endangered species designated under the Endangered Species Act. As such, the Service is the primary repository of information compiled for threatened and endangered species and their critical habitats under the Endangered Species Act. Our experience shows that the Service either disseminates such information directly to State regulatory authorities upon request or indirectly through States' wildlife / fish and game agencies. We interpret the proposed wording of Wyoming's section 4(e), as well as sections 2(b)(v) and (b)(vi) of its Chapter 10 exploration rules, to imply direct or indirect consultation with the Service as a result of requiring information pertaining to listed threatened and endangered species and critical habitats.

Wyoming applied proposed section 4(e)'s prohibition of disturbance to critical habitats to such habitats of threatened and endangered species listed under the Endangered Species Act. The State explained in its amendment that it added the word "listed" to the rule "\* \* \* in order to add specificity and to be consistent with the language in the rest of the chapter \* \* \*." The distinction is that such a

prohibition would not apply to species that are proposed for listing but are not yet listed. As Wyoming noted, proposed section 4(e) is consistent with the previously-approved wording of sections 2(b)(v) and 2(b)(vi) of Chapter 10, described above, which pertain to threatened and endangered species and critical habitats, respectively, listed under the Endangered Species Act. Section 4(a)(1) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) requires the Secretary of the Interior to determine if species within his or her program responsibilities are threatened or endangered based on certain factors, and section 4(c) requires the publication of a list of such species. Also, section 4(a)(3) of the Endangered Species Act requires the Secretary to designate critical habitat of species concurrently when determining the same species to be threatened or endangered. The Endangered Species Act's requirement to designate critical habitats applies only to those species determined to be threatened and endangered (*i.e.*, listed species), not to species only proposed for listing. Wyoming's qualification of its proposed rule's prohibition on disturbing critical habitats of listed threatened and endangered species is not inconsistent with that limitation of the Endangered Species Act. The State's proposed addition of the "listed" qualifier also is not inconsistent with the counterpart Federal regulation at 30 CFR 815.15(a), which similarly prohibits exploration operations from disturbing critical habitats of threatened or endangered species "identified pursuant to the Endangered Species Act \* \* \*."

Based on the foregoing discussions, we find Wyoming's proposed Chapter 10, section 4(e) to be in accordance with SMCRA and consistent with the Federal regulations. We also find it satisfies the required amendment at 30 CFR 950.16(l). Accordingly, we approve proposed section 4(e) and remove the required amendment.

### 3. Requirement To Obtain a Permit To Conduct Surface Coal Mining Operations If Coal Extracted During Exploration Will Be Commercially Used or Sold

Our 30 CFR part 732 (Part 732) letter dated September 21, 1990, notified Wyoming of the need to change its rules in response to changes in the Federal regulations for coal exploration. Item F-4 of that letter addressed 30 CFR 772.14(a). We said —

[t]his Federal rule has been expanded to apply to both commercial use and sale of coal. Thus, except as provided under 30 CFR 772.14(b) and 700.11(a)(5), any person who

intends to commercially use or sell coal extracted under an exploration permit must first obtain a surface coal mining and reclamation operations permit. Since Wyoming's rules restrict commercial sale but not commercial use, the program will need to be revised to include commercial use restrictions no less effective than those of the Federal rule.

Wyoming proposes a number of changes in response to our letter. First, it proposes to revise its definition of "coal exploration" at Chapter 1, section 2(l) of its rules by removing the sentence that reads "[i]f this activity results in the extraction of coal, the coal shall not be offered for commercial sale (except for test burns) \* \* \*." That change makes Wyoming's proposed definition substantively identical to the Federal definition at 30 CFR 701.5, and is included in our finding at Part III.B of this final rule.

The State also proposes to add new rules at section 8 of Chapter 10 for coal exploration. Proposed section 8(a) would require any person who intends to commercially use or sell coal extracted during coal exploration operations under an exploration license to first obtain a permit to conduct surface coal mining operations, except as provided under proposed section 8(b). Wyoming's proposed rule contains the required restrictions on commercial use and sale of coal as described in our Part 732 letter and contained in the Federal regulation. Referenced, proposed section 8(b) provides that, with the Administrator's prior written permission, no permit to mine is required for the sale or commercial use of coal extracted during exploration if such sale or use is for coal testing purposes only. It also describes the application that must be filed with, and approved by, the Administrator as a basis for waiving the permit requirement. Referenced, proposed section 8(b) is Wyoming's counterpart to 30 CFR 772.14(b) and is substantively identical to that Federal regulation. We included it in our finding at Part III.B of this final rule.

As proposed, section 8(a) is similar to counterpart 30 CFR 772.14(a) with one significant difference. The Wyoming rule provides one exception to the requirement to obtain a mine permit if coal extracted during exploration is to be commercially used or sold; the Federal regulation provides two exceptions. The exception provided in Wyoming's rules is referenced section 8(b), described above, and is the same as the first exception provided by the Federal regulation at referenced 30 CFR 772.14(b). The second exception provided by the Federal regulation is

referenced 30 CFR 700.11(a)(5), which has no counterpart in Wyoming's proposed rule. Under that regulation, Chapter VII of Title 30 does not apply to exploration on lands subject to the requirements of 43 CFR parts 3480—3487. Those referenced regulations govern operations for the exploration, development, and production of Federal coal under Federal coal leases, licenses, and permits. As authorized by 43 CFR 3480.0–6(b), the U.S. Department of the Interior, Bureau of Land Management (BLM) issues exploration licenses for unleased Federal coal and supervises exploration operations for Federal coal.

Wyoming noted in its amendment that it is required by State statute to oversee coal exploration on all lands within Wyoming regardless of the ownership of the coal. The State referred to three sections of the Wyoming Environmental Quality Act to support its position that its rule must apply to all lands within the State's borders. Section 35–11–404(a) addresses closure of all drill holes "on all lands within the State of Wyoming \* \* \*." Section 35–11–404(j) requires notice to be filed with the Administrator before drilling "on lands within the state of Wyoming \* \* \*." Third, section 35–11–414(a) requires anyone who wants to "engage in mineral exploration \* \* \*" to apply to the Administrator for a special license.

We find Wyoming's proposed section 8(a) of Chapter 10 to be no less effective than counterpart 30 CFR 772.14(a) based on restricting the commercial sale and use of coal extracted during exploration as required by item F-4 in the September 21, 1990, Part 732 letter, and can be approved. We also recognize that proposed section 8(a) reflects Wyoming's assertion of jurisdiction over all coal exploration on lands within the State's borders. Including exploration for Federal coal within the scope of Wyoming's proposed rule does not make it less effective than the Federal regulations because the State's rule applies as needed to exploration for non-Federal coal and the commercial use and sale of that coal. Though we recognize Wyoming asserts jurisdiction over all exploration within the State, we make no determination on that point and expect Wyoming and persons seeking permits to explore for Federal coal to abide by the regulations at 43 CFR part 3480 *et seq.*

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

#### 1. Definition of "Soft Rock Surface Mining"

Wyoming explained that the definition of "soft rock surface mining" was to have been deleted from its coal rules when the State separated its coal and noncoal rules in 1994. That is a reference to OSM's approval of amendment WY-016-FOR in the March 30, 1994, **Federal Register** (59 FR 14750). The State noted that, though the definition of "soft rock surface mining" includes coal mining, it "\* \* \* should not have been incorporated into the Coal-Only set of rules \* \* \*." Wyoming added that, "\* \* \* because the Coal rules pertain only to coal mining, there is no reason to maintain a definition that also lists other minerals."

In the March 30, 1994, **Federal Register** approving amendment WY-016-FOR, (*id.*), OSM recognized that Wyoming submitted that amendment "\* \* \* as part of a State effort to eliminate the confusion that was inherent in regulatory rules that applied to two separate and distinct programs, i.e. the regulation of coal and noncoal mining operations." OSM further noted that "[t]he proposed reorganized rule package is intended to facilitate a better understanding of and increased compliance with Wyoming's statutes and rules, and with SMCRA."

Wyoming's removal of the definition at Chapter 1, section 2(c) further clarifies that its coal rules pertain only to coal mining. We find the proposed change does not make the State's coal rules less effective than the Federal regulations and, therefore, we can approve it.

#### 2. Backfilling and Grading Requirements for Soft Rock Surface Mining, Including Highwall Retention

Wyoming explained that it proposed to remove sections 2(b)(ix), 2(b)(ix)(A), (B), (C), and (D) from Chapter 4 of its coal rules because section 2(b)(ix) was inadvertently "\* \* \* carried over when the coal and noncoal rules were divided into separate rules." The State added that, "[w]hen the rules were separated in 1994, the rules pertaining to soft rock mining should not have been incorporated into the Coal-Only set of rules." Amendment WY-016-FOR, which we approved in the March 30, 1994, **Federal Register** (59 FR 14750), separated most of the State's coal and noncoal regulations by removing most "soft rock surface mining" provisions from the State's coal rules. The rules cited above survived that separation, and Wyoming now proposes to correct

that oversight by removing them in amendment WY-032-FOR. Also, the State explained that the "\* \* \*" language [of section 2(b)(ix)(A)] was redundant to other sections of the Coal rules."

In a letter dated December 20, 1993 (Administrative Record number WY-20-26), responding to our concerns for amendment WY-016-FOR, the State agreed to delete section 2(b)(ix) of Chapter 4 to remove language pertaining to "bluffs," which we considered a form of retained highwalls. Because section 2(b)(ix) is only the heading "Soft rock surface mining," Wyoming's reference to it can be interpreted to include subsections A, B, C, and D as well, though subsection D specifically addresses highwall retention, not bluffs. We referred to Wyoming's removal of section 2(b)(ix) in our approval of amendment WY-016-FOR when its subsections included provisions for bluff retention as a form of highwall retention that we never approved (*Id.*, at 14751).

Sections 2(b)(ix), 2(b)(ix)(A), (B), and (C) included backfilling and grading performance standards for "soft rock surface mining" operations that do, or do not, plan to leave permanent impoundments and for those that wish to construct terraces or benches. Similar provisions appear in Wyoming's rules at Chapter 8, sections 4(a)(v), (vi), and (vii) for special bituminous surface coal mines and in the permit application requirements at Chapter 2, sections 2(b)(i)(D)(IV) and 2(b)(iv)(B). There are no direct counterpart provisions in the Federal regulations though 30 CFR 816.102 includes similar provisions concerning general backfilling and grading and 30 CFR 816.49(10) addresses underwater highwalls in permanent impoundments. Removal of these provisions, given Wyoming's assertion that they only pertain to noncoal mining, does not make the State's rules less effective than the Federal regulations. Accordingly, we can approve Wyoming's removal of sections 2(b)(ix), 2(b)(ix)(A), 2(b)(ix)(B), and 2(b)(ix)(C) from Chapter 4 of its coal rules.

Though Wyoming noted that its highwall retention rule at Chapter 4, section 2(b)(ix)(D) is among those pertaining to "soft rock surface mining" that should be removed to complete its separation of coal and noncoal rules, instead it proposed to partly delete that rule and partly revise it. Wyoming explained that it wants to "\* \* \* make a clear statement that [it] supports the retention of highwalls to enhance and diversify reclamation as allowed by the

current coal program." The rule currently reads—

[h]ighwall retention may be considered on a case-by-case basis for enhanced wildlife habitat. The Wyoming Game and Fish Department shall be consulted by the applicant for need and design of the land form. Any approval under this paragraph shall be based on a demonstration of safety, stability, environmental protection, and equal or better land use considerations.

Wyoming's proposed rule would read—

[h]ighwall retention may be considered on a case-by-case basis to enhance wildlife habitat as replacement for natural features that were eliminated by mining.

In the amendment's statement of reasons, Wyoming recognized the differences between its proposed rule, the Federal regulations, and the highwall retention provision we approved as part of the New Mexico regulatory program. It also said a future State rule amendment package would address those differences.

Section 515(b)(3) of SMCRA and 30 CFR 816.102(a)(2) require highwalls to be eliminated to achieve approximate original contour (AOC), with an exception for previously mined areas. As Wyoming noted in its amendment, however, we previously approved a highwall retention provision in New Mexico's rules (45 FR 86458; December 31, 1980). The approved New Mexico provision is an alternative approach to restoring mined land to its approximate original contour, in contrast to a provision that would allow a variance from AOC. It also imposes specific criteria for retained highwalls. Those criteria address: The static safety factor; overall highwall safety; backfilling to cover coal seams; allowable length of retained highwalls; the need to replace pre-existing cliff-type habitat and contouring the ends of highwalls; and a requirement for State approval to retain highwalls. By requiring an operator to demonstrate that retained highwalls will meet all six criteria of New Mexico's rule, thereby showing they closely resemble premining features, we concluded that—

[s]uch retention in these instances actually reflects the intent of "approximate original contour" since these features were part of the natural pre-mined landscape. In all other cases, the highwall must be eliminated according to 30 CFR 816.102 (*id.*, at 86464).

Based on the criteria New Mexico imposed for retained highwalls, as conditioned in the approval, we found the State's "\* \* \* alternative to be in accordance with the provisions of SMCRA and consistent with the regulations in 30 CFR Chapter VII."

In our disapproval of the rule Wyoming proposed in 1988 to allow highwall retention by recreating "bluffs" (54 FR 52958; December 26, 1989), we asserted that—

[w]here the two requirements [achieving AOC and eliminating highwalls] are in conflict, *i.e.*, where the premining topography includes sheer cliffs or bluffs, as is common in New Mexico's San Juan Basin, the Secretary previously determined that highwalls could be retained only to the extent that they closely resemble premining features in both form and function \* \* \* (Finding 4(b), 45 FR 86464, December 31, 1980).

Our review of Wyoming's proposed section 2(b)(ix)(D) finds that it is not specific enough with respect to the criteria retained highwalls must meet as an alternative approach to achieving AOC. As proposed, the rule would provide for highwall retention on a case-by-case basis to enhance wildlife habitat as replacement for natural features that were eliminated by mining. In comparison with the New Mexico provision that Wyoming refers to in its amendment, the proposed rule addresses one criterion for allowing highwall retention: Retained highwalls would replace pre-existing natural features. However, the proposed rule does not address other criteria that would require retained highwalls to closely resemble premining features in form and function.

To approve Wyoming's proposed alternative approach to achieving AOC by retaining highwalls, we must find that the proposed rule is in accordance with the provisions of SMCRA and consistent with the requirements of the Federal regulations at Chapter VII of the Title 30 regulations, as required by the reference at 30 CFR 732.17(h)(10) to 732.15. As defined at 30 CFR 730.5, "consistent with" and "in accordance with" mean, respectively:

(a) With regard to [SMCRA], the State laws and regulations are no less stringent than, meet the minimum requirements of and include all applicable provisions of [SMCRA].

(b) With regard to the Secretary's regulations, the State laws and regulations are no less effective than the Secretary's regulations in meeting the requirements of [SMCRA].

Absent more specific criteria for retained highwalls to meet, Wyoming's proposed rule does not impose requirements similar to those of 30 CFR 816.102 for ensuring the safety and effectiveness of reclamation in achieving AOC. As such, it is not in accordance with the requirements of SMCRA and is not consistent with the Federal regulations.

In a letter dated August 11, 2004, we notified Wyoming of our concern with the proposed highwall retention rule at section 2(b)(ix)(D) of Chapter 4 (Administrative Record number WY-37-11). As noted above, Wyoming's amendment recognized the differences between the proposed rule, the Federal regulations, and New Mexico's approved highwall retention regulation. It also said the State would submit another amendment to continue addressing those differences. Given those statements, we said in our August 11, 2004, letter that we were uncertain how to proceed with the amended highwall retention rule and are unlikely to approve it as proposed. We suggested that Wyoming provide a letter with specific rule language that would further explain how the State will further consider highwall retention, including provisions similar to those we approved for New Mexico. We added that we could defer a decision on the proposed highwall retention rule in amendment WY-032-FOR instead of disapproving it if the letter described Wyoming's future rulemaking and a timetable for submitting another amendment.

Wyoming responded to our August 22, 2004, letter, by submitting Coal Rule Package 1-T, dated August 30, 2004 (Administrative Record number WY-37-12). That submittal patterns additional proposed changes after provisions we approved as part of the New Mexico and Utah regulatory programs. However, the transmittal letter says several months might pass before the State's internal rulemaking can proceed to the next step, "\* \* \* which is to require a hearing before the Environmental Quality Council (EQC) \* \* \*" on changes proposed in Coal Rule Package 1(T). Because the EQC has yet to make the final determination of how Wyoming's rule will be worded, at this time we cannot consider the State's August 30, 2004, submittal to be the final version of the proposed revision to the highwall retention rule. We therefore defer making a decision on proposed Chapter 4, section 2(b)(ix)(D) until the State completes its internal rulemaking.

#### IV. Summary and Disposition of Comments

##### A. Public Comments

We asked for public comments on the amendment (Administrative Record number WY-37-10), but did not receive any.

##### B. Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Wyoming program (Administrative Record number WY-37-06).

##### 1. U.S. Department of Labor, Mine Safety and Health Administration Comments

The U.S. Department of Labor, Mine Safety and Health Administration (MSHA), responded to our request for comments in a letter dated July 15, 2004 (Administrative Record number WY-37-09). MSHA stated that it did not find anything in the proposed amendment that would conflict with its regulations or policies.

##### 2. U.S. Department of the Interior, Fish and Wildlife Service Comments

We also received comments from the U.S. Fish and Wildlife Service (Service) in a letter dated July 15, 2004 (Administrative Record number WY-37-08). The Service found the proposed changes "increased clarity of some sections of the program direction."

The Service also expressed concern that the proposed amendment might lead to increased use of undesirable grading and contouring of disturbed areas and a decreased use of highwall retention around permanent ponds. More specifically, the Service commented that—

\* \* \* it is unclear why soft rock surface mining; terraces or benches; sloping, grading or contouring or proposed pit areas for permanent water impoundments; and highwall retention are being dropped from the program direction.

The Service's comment refers to Wyoming's proposed removal of the rules at Chapter 4, section 2(b)(ix), (ix)(A), (B), (C), and (D). Regarding the proposed removal of section 2(b)(ix)(A) and (B), the Service commented that eliminating those provisions—

[w]ill lead to an increase in the use of terraces and benches to recontour disturbed areas. The Service strongly recommends, to the greatest extent possible, that all mining reclamation reestablish areas to the original contour.

As we explained in our finding at Part III.D.2 of this final rule, Wyoming explained that it proposed to remove sections 2(b)(ix), 2(b)(ix)(A), (B), (C), and (D) from Chapter 4 of its coal rules because those rules were inadvertently "carried over when the coal and noncoal rules were divided into separate rules \* \* \*." We previously approved Wyoming's separation of most



of its coal and noncoal rules on March 30, 1994, in amendment WY-016-FOR (59 FR 14750). The rules cited in the Service's comment survived that separation, and Wyoming now proposes to remove them in amendment WY-032-FOR. Wyoming also explained that the provisions of section 2(b)(ix)(A) were repeated elsewhere in the coal rules and asserted that 2(b)(ix), (ix)(A), (B), (C), and (D) do not belong in its coal-only rules.

In our approval of amendment WY-016-FOR, we recognized the State's effort to eliminate the confusion inherent to rules that applied to two separate and distinct programs (coal and noncoal mining). We further noted that separating the coal and noncoal rules is " \* \* \* intended to facilitate a better understanding of and increased compliance with Wyoming's statutes and rules, and with SMCRA."

We also believe the Service's comment misinterprets section 2(b)(ix)(B). This rule allows use of terraces or benches " \* \* \* *only* when it can be shown to the Administrator's satisfaction that other methods of contouring will not provide the required result \* \* \* " (emphasis added). As written, it provides a limited exception to the requirement to backfill and grade to approximate original contour ("the required result"). By removing this rule, Wyoming will reduce those circumstances under which terraces and benches can be used in final reclamation.

Similar reasoning applies to the Service's comment concerning section 2(b)(ix)(C). General performance standards for sloping, grading, and contouring to blend in with the topography (*i.e.*, AOC) and to control erosion similar to those imposed by this rule appear in other sections of Chapter 4 of Wyoming's coal rules. The remaining part of the rule provides for certain circumstances in which partial pitwalls may be left intact above water along the shoreline of permanent impoundments. This provision actually conflicts with the Federal regulation at 30 CFR 816.49(10). That regulation requires the vertical portion of any remaining highwall " \* \* \* to be located far enough below the low-water line along the full extent of the highwall to provide adequate safety and access for the proposed water users \* \* \* " at temporary and permanent impoundments. By removing section 2(b)(ix)(C), Wyoming will reduce the circumstances under which highwalls may be left intact where they were not part of the premining landscape and also eliminate a conflict with Federal provisions for reclaiming to AOC.

Conversely, the Service expressed concern in another comment that Wyoming's proposed removal of section 2(b)(ix)(D) would lead to a decrease in highwall retention around permanent ponds. It stated that retained highwalls are " \* \* \* highly beneficial to wildlife, especially raptors, by providing nesting structure." Wyoming explained that it proposes to remove section 2(b)(ix)(D) along with other rules that pertain to "soft rock surface mining" in an effort to separate its coal rules from its noncoal rules. Further, while we agree in principle with the Service about highwalls' potential benefit, we cannot waive the requirement of SMCRA and the Federal regulations to reclaim mined lands to AOC on that basis. We are unlikely to approve the proposed revision as written because it provides an exemption from reclaiming mined lands to AOC that is not in accordance with section 515(b)(3) of SMCRA and consistent with 30 CFR 816.102(a)(1) and (2). The only exceptions to the AOC requirement are cases involving steep slopes or previously mined areas, and Wyoming's proposed rule does not fit either situation.

On the other hand, Wyoming is considering further revisions to proposed section 2(b)(ix)(D) in an effort to develop an alternative approach to achieving AOC that would allow highwall retention in certain cases. As we discussed in our finding at Part III.D.2 of this final rule, the State submitted Coal Rule Package 1-T in response to our August 11, 2004, concern letter. That package proposed to further revise section 2(b)(ix)(D) to include provisions similar to those we approved as part of the New Mexico and Utah regulatory programs for retaining highwalls where similar features existed in the pre-mine landscape and where the retained highwalls were very similar to the pre-existing features in form and function. We recognize Wyoming's review process is ongoing for this proposed rule and defer our decision on it until we know the final form it will take.

The Service also expressed concern that Wyoming's proposed change to section 4(e) of Chapter 10 would lessen protection of crucial wildlife habitats during coal exploration. It added that the State should also promote the protection of "other important habitats" during coal exploration. The proposed rule would prohibit disturbing crucial and important habitat during coal exploration " \* \* \* unless written evidence of consultation with the Wyoming Game and Fish Department and any resulting recommendations are submitted to the Administrator as part

of either a coal exploration license or notice of intent to explore application." In part III.C.2 of this final rule, we described an alternative we suggested Wyoming consider in response to the State's request for guidance and flexibility in interpreting the prohibition on disturbance required at 30 CFR 815.15(a). Specifically, we suggested that Wyoming consider requiring the same consultation process with State and Federal agencies for coal exploration on important or crucial habitat that it requires of surface coal mining activities and reclamation plans. We agreed that we would consider such an alternative to be consistent with and no less effective in meeting the intent of SMCRA. Our finding at Part III.C.2 of this final rule describes how we interpret Wyoming's proposed rule and additional explanation as a commitment to providing the same level of protection for important or crucial habitat during exploration as its rules require for surface coal mining and reclamation operations. As we stated in our finding, we will verify Wyoming's consultation during our oversight of its regulatory program.

### 3. 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 Wyoming proposed to make in this amendment pertains to air or water quality standards. Therefore, we did not ask EPA to concur on the amendment. Nevertheless, under 30 CFR 732.17(h)(11)(i), we requested EPA's comments on the amendment in a letter dated May 27, 2004 (Administrative Record number WY-37-05). EPA did not respond to our request.

### C. 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. In a letter dated May 27, 2004, we requested comments from the SHPO and ACHP on Wyoming's amendment (Administrative Record numbers WY-37-03 and WY-37-04, respectively), but neither responded to our request.



## V. OSM's Decision

Based on the above findings, we approve Wyoming's May 21, 2004, amendment with one exception as noted below.

We defer making a decision on proposed section 2(b)(ix)(D), highwall retention, as discussed in finding number III.D.2.

We approve, as discussed in: finding III.A, Chapter 10, sections 2(b)(vi), (vii), (x), and (xi), application requirements for exploration of more than 250 tons or in an area designated unsuitable for mining; finding III.B., Chapter 1, section 2(l), revising the definition of "coal exploration;" Chapter 4, section 2(b)(iv)(A), using small depressions; Chapter 10, sections 1 and 1(b)(iii), general requirements for coal exploration of 250 tons or less, including recodification; Chapter 10, sections 2(b), (b)(i), (ii), and (iii), (b)(iv), (vi), and (v), general requirements for coal exploration of more than 250 tons or in an area designated as unsuitable for mining, including recodification; Chapter 10, section 2(b)(ix), measures used so exploration of more than 250 tons or in areas designated unsuitable for mining complies with exploration performance standards, including recodification; Chapter 10, section 3(b), administrative and judicial review for anyone adversely affected by decisions on coal exploration applications; Chapter 10, section 8, section heading for commercial use or sale of coal extracted under a coal exploration license; Chapter 10, section 8(b), written approval to not require a mining permit for coal exploration where commercial use or sale of coal is for testing only and demonstrating the need for coal testing and the purpose for coal extraction; Chapter 10, section 8(b)(i), requirement for the testing firm name and coal testing locations; Chapter 10, section 8(b)(ii), requirement for a statement from the end user or agent or broker if coal extracted during exploration is sold or commercially used and for other information; Chapter 10, section 8(b)(ii)(A), requirement for the statement to include the reason for coal testing; Chapter 10, section 8(b)(ii)(B), requirement for the statement to show the amount of coal needed for testing and why a lesser amount is insufficient; Chapter 10, section 8(b)(ii)(C), requirement for a description of the test to be conducted; Chapter 10, section 8(b)(iii), requirement for evidence of sufficient coal reserves; Chapter 10, section 8(b)(iv), requirement for explanation why other means of exploration are not adequate to determine coal quality and/or mining

feasibility; in finding III.C.1, Chapter 10, section 2(b)(vii), provision authorizing the State to require exploration applications to include information regarding known or possible historic or archeological resources; in finding III.C.2, Chapter 10, section 4(e), prohibiting disturbance of critical habitat during exploration, and disturbance of important or crucial habitat during exploration without written evidence of consultation with the Wyoming Game and Fish Department; in finding III.C.3, Chapter 10, Section 8(a), requiring a permit to conduct surface coal mining operations if coal extracted during construction will be commercially used or sold, with one exception; in finding III.D.1, Chapter 1, section 2(c), removal of the definition of "soft rock surface mining;" and in finding III.D.2, Chapter 4, sections 2(b)(ix), (ix)(A), (B), and (C), removing backfilling and grading requirements for soft rock surface mining.

To implement this decision, we are amending the Federal regulations at 30 CFR part 950, which codify decisions concerning the Wyoming program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrates 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 us for review as a program amendment. The Federal regulations at 30 CFR 732.17(g) prohibit any changes to approved State programs that we do not approve. In the oversight of the Wyoming program, we will recognize only the statutes, regulations and other materials we have approved, together with any consistent implementing policies, directives and other materials. We will require the State to enforce only approved provisions.

## VI. Procedural Determinations

### *Executive Order 12630—Takings*

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

Some of the State provisions addressed in this final rule have no counterpart Federal regulations. In those instances, we have determined that there are no takings implications because we are approving the State's removal of those provisions, which then no longer apply to the regulated industry. In one instance, we are deferring our decision on a State rule that has no Federal counterpart. There are no takings implications in that instance either because 30 CFR 731.17(g) prevents State laws and regulations from taking effect without our approval; therefore, the provision has no effect on the regulated industry.

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

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

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

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

### *Executive Order 13132—Federalism*

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

that State programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA.

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

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

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

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

*National Environmental Policy Act*

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

*Paperwork Reduction Act*

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

*Regulatory Flexibility Act*

The Department of the Interior certifies that the provisions in this rule

based on counterpart Federal regulations will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) This determination is based on the economic analysis performed for the counterpart Federal regulations for which a certification was made that those regulations would not have a significant economic effect on a substantial number of small entities. The Department of the Interior also certifies that the provisions in this rule that are not based on counterpart Federal regulations will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) This determination is based on the fact that the State is removing all those provisions but one. Because the removed provisions no longer apply to the regulated industry, they have no effect. The remaining provision does not impose significant economic impacts on a substantial number of small entities because we are deferring our decision in that instance, and 30 CFR 731.17(g) prevents State laws and regulations from taking effect without our approval.

*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 some of the State provisions are based on counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule. For all but one of those State provisions that are not based on counterpart Federal regulations, the "non-major" determination is based on the fact that

the State is removing them, so they no longer apply to the regulated industry. For the one remaining State provision without a Federal counterpart, this determination is based on the fact that we are deferring a decision on that provision, and 30 CFR 731.17(g) prevents State laws and regulations from taking effect without our approval.

*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 on the fact that part of the State submittal is based on counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate. For all but one of those State provisions that are not based on counterpart Federal regulations, this determination is based on the fact that the State is removing them, so they no longer apply to the regulated industry. For the one remaining State provision without a Federal counterpart, this determination is based on the fact that we are deferring a decision on that provision, and 30 CFR 731.17(g) prevents State laws and regulations from taking effect without our approval.

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

Intergovernmental relations, Surface mining, Underground mining.

Dated: February 25, 2005.

**Allen D. Klein,**

*Regional Director, Western Regional Coordinating Center.*

■ For the reasons set out in the preamble, 30 CFR part 950 is amended as set forth below:

**PART 950—WYOMING**

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

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

■ 2. Section 950.15 is amended in the table by adding a new entry in chronological order by date of final publication to read as follows:

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

\* \* \* \* \*

Original amendment submission date	Date of final publication	Citation description
May 21, 2004	April 4, 2005	Coal Rules: Chapter 1, sections 2(l) and (ce); chapter 4, sections 2(b)(iv)(A), (b)(ix), (b)(ix)(A), (B), and (C); Chapter 10, sections 1, 1(b)(iii), 2(b), (b)(i), (ii), (iii), (iv), (v), (vi), (vii), (viii), (ix), (x), (xi), and (xii), 3(b), 4(e), 8, 8(a), 8(b), (b)(i), (ii), (ii)(A), (ii)(B), (ii)(C), (iii), and (iv).

### § 950.16 [Amended]

■ 3. Section 950.16 is amended by removing and reserving paragraphs (a), (w), and (ll).

[FR Doc. 05-6602 Filed 4-1-05; 8:45 am]

BILLING CODE 4310-05-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[R03-OAR-2005-PA-0002; FRL-7894-5]

### Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; VOC and NO<sub>x</sub> RACT Determinations for Three Individual Sources

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** EPA is taking direct final action to approve revisions to the Commonwealth of Pennsylvania's State Implementation Plan (SIP). The revisions were submitted by the Pennsylvania Department of Environmental Protection (PADEP) to establish and require reasonably available control technology (RACT) for three major sources of volatile organic compounds (VOC) and nitrogen oxides (NO<sub>x</sub>). These sources are located in Pennsylvania. EPA is approving these revisions to establish RACT requirements in the SIP in accordance with the Clean Air Act (CAA).

**DATES:** This rule is effective on June 3, 2005, without further notice, unless EPA receives adverse written comment by May 4, 2005. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the *Federal Register* and inform the public that the rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Regional Material in EDocket (RME) ID Number R03-OAR-2005-PA-0002 by one of the following methods:

A. Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the

on-line instructions for submitting comments.

B. Agency Web site: <http://www.docket.epa.gov/rmepub/> RME, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.

C. E-mail: [morris.makeba@epa.gov](mailto:morris.makeba@epa.gov).  
D. Mail: R03-OAR-2005-PA-0002, Makeba Morris, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

E. Hand Delivery: At the previously listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

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**FOR FURTHER INFORMATION CONTACT:** Amy Caprio, (215) 814-2156, or by e-mail at [caprio.amy@epa.gov](mailto:caprio.amy@epa.gov).

#### SUPPLEMENTARY INFORMATION:

#### I. Background

Pursuant to sections 182(b)(2) and 182(f) of the CAA, the Commonwealth of Pennsylvania (the Commonwealth or Pennsylvania) is required to establish and implement RACT for all major VOC and NO<sub>x</sub> sources. The major source size is determined by its location, the classification of that area and whether it is located in the ozone transport region (OTR). Under section 184 of the CAA, RACT as specified in sections 182(b)(2) and 182(f) applies throughout the OTR. The entire Commonwealth is located within the OTR. Therefore, RACT is applicable statewide in Pennsylvania.

State implementation plan revisions imposing RACT for three classes of VOC sources are required under section 182(b)(2). The categories are: