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Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 926
Montana Regulatory Program; Final Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 926

[MT–024–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, 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 statutes about: State policy and findings concerning mining and reclamation; definitions; the time required to approve or disapprove minor permit revisions; permit application requirements, including determinations of probable hydrologic consequences and land use; requirements to protect the hydrologic balance; area mining, post-mine land use, and wildlife enhancement; revegetating disturbed areas; timing of reclamation; standards for successful revegetation; making vegetation the landowner's property after bond release; jurisdictional venue in right-of-entry actions; transfer of revoked permits; and mandamus. The State also proposes to add new provisions to its statutes for: Revising applications for permits, permit amendments, and permit revisions; codifying the changes proposed in the amendment; clauses for severability, saving, and contingent voidness; and a delayed effective date for the proposed changes. Montana intends to revise its program to incorporate the additional flexibility afforded by the revised Federal regulations and SMCRA, as amended, to provide additional clarification, and to improve operational efficiency.

EFFECTIVE DATE: February 16, 2005.

FOR FURTHER INFORMATION CONTACT: Guy Padgett, Director; Casper Field Office. Telephone: (307) 261–6550. E-mail: *gpadgett@osmre.*

SUPPLEMENTARY INFORMATION:

I. Background on the Montana Program
II. Submission of the Proposed Amendment
III. Office of Surface Mining Reclamation and Enforcement's (OSM's) 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 July 29, 2003, Montana sent us an amendment to its program (State Amendment Tracking System (SATS) MT–024–FOR; Administrative Record No. MT–21–1) under SMCRA (30 U.S.C. 1201 *et seq.*). Montana sent the amendment to include the changes made at its own initiative.

We announced receipt of the proposed amendment in the October 27, 2003, **Federal Register** (68 FR 61175). 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–21–06). We did not hold a public hearing or meeting because no one requested one. The public comment period ended on November 26, 2003. We received one comment from a citizens group and two comments from coal-mining-related entities in Montana.

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.

We note here that most of the revisions proposed in this submittal were included within House Bill (HB) 373. Included in that legislation (at Section 15: contingent voidness) was a provision that if any other provision of HB 373 were to be disapproved by OSM, then that disapproved portion would be void. For that reason, for any proposed revisions that we do not approve (as noted below), those portions of HB 373 are automatically void. Therefore we do not need to require Montana to delete them.

A. Minor Revisions to Montana's Statutes

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

Montana Code Annotated (MCA) 82–4–202, except new paragraphs (1) and (3)(c) through (e); legislative intent, policy, and findings.

MCA 82–4–203, except paragraphs (2), (4), (13), (16), (17), (20) through (24), (26) through (28), (30), (37), (38), (42) through (44), (46), (47), (50), and (55); definitions.

MCA 82–4–222(1) through (1)(l), and (1)(q) through (6); permit application requirements.

MCA 82–4–232 recodification; Area mining, bond.

MCA 82–4–233 recodification and (5); Planting of vegetation.

MCA 82–4–234 except last sentence; Commencement of reclamation.

MCA 82–4–235 recodification and (2) through (3)(b); Determination of successful revegetation.

MCA 82–4–236; Vegetation as property of landowner.

MCA 82–4–252 except (2) deletion of "in the district court * * *"; Mandamus.

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

B. Revisions to Montana's Statutes That Have the Same Meaning as the Corresponding Provisions of the Federal Regulations and/or SMCRA

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

MCA 82–4–203(2), (13), (16), (17), (20) through (23), (26), (27), (28), (37), (38), (42) through (44), and (46) [No SMCRA counterparts; 30 CFR 701.5], definitions.

MCA 82–4–222(1)(m) and (n) [No SMCRA counterparts; 30 CFR 780.21(f)(3), (i), (j)], permit application hydrology requirements.

MCA 82–4–232(7) and (8) (as newly enacted) [SMCRA 515(b)(2), 30 CFR 816/817.133], land use capability.

Because these proposed rules contain language that is the same as or similar

to SMCRA and/or the corresponding Federal regulations, we find that they are no less effective than the corresponding Federal regulations and no less stringent than SMCRA.

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

C.1. MCA 82–4–203(4) Definition of Approximate Original Contour (AOC) [SMCRA 701(2), 30 CFR 701.5].

a. Montana proposed to add a new statutory definition of this term. Under the proposal, " 'approximate original contour' means that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls, spoil piles, and coal refuse piles eliminated, so that: * * *." This introductory text duplicates the Federal definition, except that the Montana definition makes no allowance for impoundments. Impoundments as an aspect of AOC are addressed in a proposed revision of MCA 82–4–232(1)(a), which is addressed in a separate finding below. Since this introductory language is the same as the Federal language, we approve this part of the proposed definition.

b. The "so that" phrase introduces four proposed new subparagraphs which are intended to provide clarification or refinement of the definition in the introductory text. Proposed MCA 82–4–203(4)(a) provides additional guidance on the meaning of the phrase "closely resembles the general surface configuration." Specifically, it provides that the regraded area "closely resembles" the general surface configuration if it is comparable to the premine terrain. The proposal gives as an example that if the area was basically level or gently rolling before mining, it should retain these features after mining, recognizing that rolls and dips need not be restored to their original locations and that level areas may be increased. This additional guidance in the proposal is consistent with the intent of SMCRA in that reclaimed surface configuration does not have to duplicate the premine topography, only approximate it. This means that not all premine features need necessarily be restored in the same location as they the existed prior to mining. Nor is it necessary to restore all the minor undulations that existed prior to mining. We also note that this language is very similar to that in OSM's policy guidance contained in Directive INE–26:

> The reclaimed area should closely resemble the general surface configuration of the land prior to mining. This should not be interpreted, however, as requiring that postmining contours exactly match the premining contours or that long uninterrupted premining slopes must remain the same. Rather, the general terrain should be comparable to the premining terrain; that is, if the area was basically level or gently rolling before mining, it should retain these general features after mining. Rolls and dips need not be restored in their original locations and level areas may be increased or terraces created in accordance with 30 CFR 816.102.

Since Montana's proposal essentially duplicates the Federal guidance, we approve proposed subparagraph MCA 82–4–203(4)(a).

c. Proposed MCA 82–4–203(4)(b) provides additional guidance in implementing the phrase "complements the drainage pattern of the surrounding terrain," providing that "the reclaimed area blends with and complements the drainage pattern of the surrounding area so that water intercepted within or from the surrounding terrain flows through and from the reclaimed area in an unobstructed and controlled manner." It is one intent of the requirement for restoration of the hydrologic balance in SMCRA that backfilling and grading restore the flow of surface water across the site to premining conditions; we note that water quantity inflow into a hydrologic unit, minus water quantity outflow from that unit, is the most basic level of "hydrologic balance" (see the Federal definition of "hydrologic balance" at 30 CFR 701.5). The proposed language simply clarifies this requirement as part of the restoration of AOC. We approve proposed MCA 82–4–203(4)(b).

d. Proposed MCA 82–4–203(4)(c) provides still more guidance on the phrase "blends into and complements the drainage pattern of the surrounding terrain," providing that "postmining drainage basins may differ in size, location, configuration, orientation, and density of ephemeral drainageways compared to the premining topography if they are hydrologically stable, soil erosion is controlled to the extent appropriate for the postmining land use, and the hydrologic balance is protected as necessary to support postmining land uses within the area affected and the adjacent area." SMCRA and the Federal regulations lack a counterpart to this language. The initial proposed language ("postmining drainage basins may differ in size, location, configuration, orientation, and density of ephemeral drainageways compared to the premining topography") provides guidance beyond that contained in the Federal AOC definition. The remaining proposed language provides specialized performance standards for protection of the hydrologic balance and control of soil erosion when postmining drainage basins differ from premining.

We note first that, since they are being used in defining AOC, these special performance standards are applicable to the proposed postmining topography to be created during the reclamation process, and thus do not apply during the mining process. Second, erosion rates are controlled by both land shape and vegetation cover (in cases, like mine reclamation, where precipitation and soil do not change). So, the erosion control referred to here is that provided by land shape (we note that erosion control provided by revegetation, as required by SMCRA 515(b)(19), is addressed in the proposed amendment at MCA 82–4–233(1)(d), discussed in a separate finding below).

Regarding soil erosion, Federal performance standards at SMCRA 515(b)(4) require all affected areas to be stabilized and protected to effectively control erosion and attendant air and water pollution. "Effectively" is not defined; but the legislative history on "effective vegetative cover" indicates control to "normal premining background levels" ["effective" vegetative cover includes both "the productivity of the vegetation concerning its utility for the postmining land use as well as its capability of stabilizing the soil surface with respect to reducing siltation to normal premining background levels" H. Rep. No. 95–218, pg. 106]. SMCRA 515(b)(10)(B) requires the use of the best technology currently available to control sediment, and requires compliance with State and Federal effluent limits. Neither of these Federal erosion control requirements limits erosion control, and hence in this instance land shape, to the needs of the postmining land use.

However, we believe that this does not render the proposed definition inconsistent with SMCRA, provided the proposed definition is interpreted as requiring that all four subparagraphs apply; that is, that subparagraph (c) does not take precedence over subparagraph (a). To be no less effective than the Federal definition of AOC, subparagraph (c) may not be interpreted as authorizing selection of a postmining land use that would necessitate a deviation from the remainder of the AOC definition; *i.e.*, the postmining

land topography must still closely resemble the general surface configuration of the land prior to mining regardless of the nature of the approved postmining land use. If the reclaimed terrain is comparable to the premine terrain, then the erosion control provided by land shape should approximate the normal premining background level.

Regarding protection of the hydrologic balance, SMCRA 515(b)(10) requires that disturbances to the hydrologic balance on the mine site be minimized, regardless of the postmining land use. Further, SMCRA 515(b)(10)(E) prohibits channel deepening or enlargement in receiving streams (an aspect of hydrologic balance protection), regardless of any effect or lack of effect on postmining land uses.

We conclude that this clarification of the AOC definition, when applied to the performance standard at MCA 82–4–232(1)(a) to restore AOC, would conflict with SMCRA's performance standards requiring protection of the hydrologic balance. Therefore we do not approve, in this subparagraph, the phrase "as necessary to support postmining land uses within the area affected and the adjacent area" in the clause regarding hydrologic balance protection.

Based on the above discussion, we approve proposed MCA 82–4–203(4)(c) except the phrase "as necessary to support postmining land uses within the area affected and the adjacent area" in the clause regarding hydrologic balance protection.

e. Proposed MCA 82–4–203(4)(d) provides that one part of the definition of AOC is that the reclaimed surface configuration must be appropriate for the postmining land use. The SMCRA definition has no such provision. Here Montana is inserting a performance standard in the definition of AOC, equivalent to 30 CFR 816.102(a)(5). We believe that this does not render the definition inconsistent with SMCRA, provided the definition is interpreted as requiring that all four subparagraphs apply; that is, that subparagraph (d) does not take precedence over subparagraphs (a) through (c). To be no less effective than the Federal definition of AOC, subparagraph (d) may not be interpreted as authorizing selection of a postmining land use that would necessitate a deviation from the remainder of the AOC definition; *i.e.*, the postmining land topography must still closely resemble the general surface configuration of the land prior to mining regardless of the nature of the approved postmining land use. Consistent with the above reasoning, we approve proposed MCA 82–4–203(4)(d).

C.2 MCA 82–4–203(24) Definition of Hydrologic balance [30 CFR 701.5].

Montana proposes here a new definition for "hydrologic balance," as follows:

> "Hydrologic balance" means the relationship between the quality and quantity of water inflow to, water outflow from, and water storage in a hydrologic unit, such as a drainage basin, aquifer, soil zone, lake, or reservoir, and encompasses the dynamic relationships among precipitation, runoff, evaporation, and changes in ground water and surface water storage as they relate to uses of land and water within the area affected by mining and the adjacent area.

The first part of this duplicates both Montana's regulatory definition at Administrative Rules of Montana (ARM) 17.24.301(53) and the Federal definition at 30 CFR 701.5, down through and including the term "surface water storage." Montana has now added the last clause, "as they relate to uses of land and water within the area affected by mining and the adjacent area." Under this proposal, dynamic hydrologic relationships would be considered only to the extent that they relate to uses of the land and water; in short, Montana proposes to define hydrologic balance in terms of the anticipated post-mining land use. Therefore, under the proposal, components of the hydrologic regime would not be identified, protected, or monitored unless those components relate to post-mining uses of land and water.

As used in SMCRA and the Federal regulations, "hydrologic balance" describes a natural resource, the hydrologic conditions and interactions, that exists within and around the area proposed for mining. These conditions are independent of the intended land use. By proposing to define "hydrologic balance" in terms of the proposed post-mining land use, the Montana definition is significantly narrower than the Federal regulatory definition of "hydrologic balance." We therefore find that this proposal is not consistent with the Federal regulatory definition. We approve proposed MCA 82–4–203(24) to the extent that it duplicates ARM 17.24.301(53); we do not approve the final phrase "as they relate to uses of land and water within the area affected by mining and the adjacent area."

C.3. MCA 82–4–221(3) Permit revisions [SMCRA 511(a)(2)].

Montana proposed to decrease the time allowed to approve or disapprove an application for minor permit revision from 120 days to 60 days, with an additional 30 day extension by mutual agreement. SMCRA 511(a)(2) requires only that each regulatory program establish a timeframe. We find that Montana's proposal is consistent with the Federal requirement, and we approve it.

C.4. MCA 82–4–222(1)(o) Permit application: proposed postmining topography [SMCRA 507(b)(14), 30 CFR 780.18(b)(3)].

As part of the permit application, proposed MCA 82–4–222(1)(o) requires submission of maps, cross sections, range diagrams or other means approved by the Department (the Department of Environmental Quality) (which is the regulatory authority under SMCRA), that depict the projected postmining topography, soil placement, overburden swell, and drainage patterns and their tie-in points to surrounding drainages. There is no direct comparison to this requirement in either SMCRA or the Federal regulations. SMCRA section 507(b)(14) does require maps, cross sections or plans that identify constructed or natural drainways and the location of any discharges to any surface body of water on the area of land to be affected or adjacent thereto, and profiles at appropriate cross sections of the anticipated final surface configuration that will be achieved pursuant to the operator's proposed reclamation plan. The Federal regulations at 30 CFR 780.18(b)(3) also require contour maps or cross sections that show the final surface configuration. Montana's proposed language provides additional specificity beyond that in SMCRA or the Federal regulations. We find that proposed MCA 82–4–222(1)(o) is consistent with and no less stringent than SMCRA and no less effective than the Federal regulations. We approve the proposed language.

C.5. MCA 82–4–222(1)(p) Permit Application—Land Capability [SMCRA 508(a)(2)].

The Montana proposed language is identical in all respects to SMCRA except for the SMCRA requirement that, if applicable, the application include a soil survey prepared pursuant to section 507(b)(16). Section 507(b)(16) requires a soil survey be done to confirm the location of prime farmlands, if a reconnaissance inspection suggests that such lands may be present in those lands in the permit application. The Montana Act as proposed lacks a counterpart to section 507(b)(16).

However, the Montana rules, at ARM 26.4.306, require a prime farmland investigation and ARM 26.4.304(11) requires a soil survey according to the standards of the Natural Cooperative Soil Survey describing all soils on the proposed permit area. Minimum soils information, including soil series and phase, mapping unit, descriptions,

physical and chemical analysis of all horizons and soils maps, is also specified as part of this rule. Because the State rules require a soil survey for all soils within a proposed permit with sufficient information to identify any prime farmland soils within a proposed permit area this fulfills the requirements of sections 507(b)(16) and 508(b)(2). Therefore, the lack of a counterpart in MCA 82–4–222(1)(p) to the Federal requirement that, if applicable, a soil survey be prepared pursuant to section 507(b)(16), does not render the State program less stringent. Based on the proposed language at MCA 82–4–222(1)(p) and the existing requirements of the State rules, we find the proposed change to be consistent with and no less effective than SMCRA and the Federal regulations. We approve the proposed revision.

C.6. MCA 82–4–231(10)(k) Protection of Hydrologic Balance [SMCRA 515(b)(10), 30 CFR 816.41(a)].

The existing provision duplicates the Federal provision and requires the operator to minimize disturbances to the prevailing hydrologic balance at the mine site and in associated offsite areas and to minimize disturbances to the quantity and quality of water in the surface water and ground water systems by a specified list of techniques. Montana proposed to revise this, first, by changing "associated offsite areas" to "adjacent areas." We note that the SMCRA provision also uses the phrase "associated offsite areas," but the Act does not define that phrase. In the implementing rules at 30 CFR 816.41(a), the phrase "within the permit and adjacent areas" is substituted, and the rules define both areas (30 CFR 701.5). OSM has noted in a rule preamble that the final definition of "adjacent area" was modified from the proposed definition to delete the spatial concept of "near" or "contiguous" to focus instead on protecting the natural resources which may be impacted. 44 FR 14923; March 13, 1977. The Montana statute also does not define the phrase "associated offsite areas," but does define "adjacent area," and that definition essentially duplicates the Federal rule definition. Therefore we approve this change.

Montana proposed to further revise this requirement by adding a limitation that these minimizations would only be required "as necessary to support postmining land uses and to prevent material damage to the hydrologic balance in the adjacent area." In other words, some efforts at minimization would not be required if postmining land uses would not be adversely affected and material damage in the adjacent area would not occur. This limitation would render the Montana statute less stringent than SMCRA and it would not meet SMCRA's minimum requirements. Montana stated in the submittal that this language was intended to be consistent with the general performance standard in the Federal regulations at 30 CFR 816.41(a). However, we find that the cited Federal regulation establishes three separate performance standards: surface mining and reclamation must be conducted (1) to minimize disturbance of the hydrologic balance on permit and adjacent areas, (2) to prevent material damage to the hydrologic balance outside the permit area, and (3) to support postmining land uses. This language does not, like Montana's proposal, limit the application of the first standard (minimization).

We also note that there is an internal inconsistency within this proposed new language. The proposed limitation would apply to material damage in the "adjacent area." But the new definition of "material damage" applies to all areas "outside of the permit area," which is an area more extensive than "adjacent area."

For these reasons, we do not approve the addition of the phrase "as necessary to support postmining land uses and to prevent material damage to the hydrologic balance in the adjacent area."

C.7. MCA 82–4–231(10)(k)(viii) Protection of Hydrologic Balance [SMCRA 515(b)(10)(G)].

Similar to the provision discussed in the Finding immediately above, the existing provision duplicates the Federal provision. It allows the Department to prescribe "any other actions" to minimize the specified disturbances to the hydrologic balance. And similar to the provision discussed above, Montana proposed to revise this allowance by adding a limitation. In this case, the Department would be limited to prescribing actions to minimize the specified disturbances "to protect the hydrologic balance as necessary to support postmining land uses within the area affected and to prevent material damage to the hydrologic balance in adjacent areas." In other words, the Department would not be allowed to prescribe some actions to minimize disturbances to the hydrologic balance if postmining land uses would not be adversely affected or if material damage in the adjacent area would not occur without those actions. This limitation would limit the discretion of the regulatory authority provided by SMCRA and hence render the Montana statute less stringent than SMCRA.

Montana again stated in the submittal that this language was intended to be consistent with the general performance standard in the Federal regulations at 30 CFR 816.41(a). But we again note that the cited Federal regulation establishes minimization of disturbance to the hydrologic balance (on permit and adjacent areas) as a separate goal from the prevention of material damage to the hydrologic balance (outside the permit area) and support of the postmining land use.

We again note that there is an internal inconsistency within this proposed new language. The proposed limitation would apply to material damage in the "adjacent area." But the new definition of "material damage" applies to all areas "outside of the permit area," which is an area more extensive than "adjacent area."

For these reasons, we do not approve the addition of the phrase "to protect the hydrologic balance as necessary to support postmining land uses within the area affected and to prevent material damage to the hydrologic balance in adjacent areas."

C.8. MCA 82–4–231(10)(k)(vii) Protection of Hydrologic Balance [SMCRA 515(b)(10)].

Montana proposed an addition to the existing list of techniques required to minimize disturbances to the hydrologic balance. The existing list duplicated the list in SMCRA at 515(b)(10). The proposed addition would require that disturbances to the hydrologic balance be minimized by "designing and constructing reclaimed channels of intermittent streams and perennial streams to ensure long-term stability." Insofar as this is an addition to the list provided in SMCRA, this proposed addition would be considered under SMCRA 515(b)(10)(G) as "such other actions as the regulatory authority may prescribe," the prescription being, in this case, a program-wide one. There is a question, though, whether by specifying intermittent and perennial streams, this provision may be interpreted to exclude ephemeral streams. That is, does this provision implicitly, if not expressly, state that it is not necessary to design and construct the reclaimed channels of ephemeral streams to ensure long-term stability? For the following reasons, we believe that the answer to this question is "no." We note that under MCA 82–4–231(10)(k)(ii)(A) and (k)(v), operators are required to prevent additional contributions of sediment to runoff, and to avoid channel deepening or enlargement when water is discharged from mines. These requirements effectively require long-term stability in

reclaimed channels of ephemeral streams. Thus we find that the proposed addition is consistent with SMCRA 515(b)(10)(G), and we approve the language.

C.9. MCA 82–4–232(1)(a) Backfilling & Approximate Original Contour (AOC) [SMCRA 515(b)(3); 30 CFR 816.102(a)].

Montana proposed to delete language requiring highwall reduction/elimination and spoil pile elimination, leaving requirements that area mining is required for strip mines and that the area of land affected must be backfilled and graded to AOC. Montana further proposed to add another sentence containing four clauses after the word "However." Clause (i) provides that, if it is consistent with the adjacent unmined landscape elements, the operator may propose and the Department may approve a regraded topography gentler than the premining topography if the gentler topography is consistent with adjacent unmined landscape elements and if it would enhance the postmining land use, improve stability, provide greater moisture retention, and reduce erosional soil losses. Clause (ii) provides that postmining slopes may not exceed the angle of repose or whatever lesser slope is necessary to achieve a long-term static safety factor of at least 1.3 and to prevent slides. Clause (iii) allows the creation of permanent impoundments in some cases. Clause (iv) provides that the reclaimed topography must be suitable for the postmining land use.

The corresponding Federal provision in section 515(b)(3) of SMCRA requires that all surface coal mining operations backfill, compact, and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated (except small depressions for moisture retention). Section 515(b)(8) also authorizes the creation of permanent impoundments under certain conditions. The Federal regulations at 30 CFR 816.102(a) require that disturbed areas be backfilled and graded to—

(1) Achieve the approximate original contour (except as provided in paragraph (k), which provides exceptions for thin and thick overburden, mountaintop removal operations, and certain steep-slope operations);

(2) Eliminate all highwalls, spoil piles, and depressions, except as provided in paragraph (h) (small depressions) and in paragraph (k)(3)(iii) (previously mined highwalls);

(3) Achieve a postmining slope that does not exceed either the angle of repose or such lesser slope as is necessary to achieve a minimum long-term static safety factor of 1.3 and to prevent slides;

(4) Minimize erosion and water pollution both on and off the site; and

(5) Support the approved postmining land use.

In summary, the Federal requirements are to backfill and grade to restore AOC (with four specified exemptions); eliminate highwalls, spoil piles, and depressions (except certain small depressions and permanent impoundments); achieve long-term stability; minimize erosion and water pollution; and support the postmining land use.

The Montana proposal deletes the performance standard requiring the elimination of all highwalls and spoil peaks.

However, it continues to require restoration of AOC. As discussed in finding C.1. above, Montana also is adding a definition of AOC at section 82–4–203(4), MCA, that requires the elimination of all highwalls, spoil piles, and coal refuse piles. Therefore, the deletion of this requirement from the Montana performance standards does not render the State program less stringent than SMCRA or less effective than the Federal regulations. We are predicating this finding upon interpretation of the sentence beginning "However," in section 82–4–232(1)(a), as not establishing an exemption to the highwall and spoil pile elimination requirement. In other words, we are interpreting that sentence as providing additional parameters for determining when AOC restoration has been achieved, not as exceptions to the AOC restoration requirement. With this stipulation, we approve the proposed deletion of the sentence: "Reduction, backfilling, and grading must eliminate all highwalls and spoil peaks."

Proposed clause (i) in the sentence beginning "However," provides that, if it is consistent with the adjacent unmined landscape elements, the operator may propose and the Department may approve a regraded topography gentler than the premining topography if the gentler topography is consistent with adjacent unmined landscape elements and if it would enhance the postmining land use, improve stability, provide greater moisture retention, and reduce erosional soil losses. We find that this provision is consistent with the discussion of the meaning of "approximate original contour" in OSM Directive INE–26. In pertinent part, Part 3.a. of that directive specifies that "the reclamation of any minesite must take into consideration and accommodate site-specific and unique characteristics of the surrounding terrain and postmining land uses." Part 3.c.(2)(a) of the directive also clarifies that "level areas may be increased," provided that, as specified in Part 3.c.(2)(c), all highwalls, spoil piles, and unapproved depressions are eliminated. Therefore we approve this proposed clause (i).

Montana's proposed clause (ii) requires slope stability equivalent to that required by the Federal regulations, proposed clause (iii) provides for permanent impoundments equivalent to that provided by the Federal regulations, and proposed clause (iv) requires compatibility with the postmining land use equivalent to that required by the Federal regulations discussed above. Therefore, we approve these three provisions.

C.10. MCA 82–4–232(1)(b) Backfilling & Approximate Original Contour (AOC) [30 CFR 816.102].

MCA 82–4–232(1)(b) allows the operator to leave spoil from the first cut in place so long as highwalls are eliminated, first cut spoils are blended with the surrounding terrain and AOC is achieved. There is no direct Federal counterpart addressing whether first-cut spoil should be transported to the last cut. The Federal regulations at 30 CFR 816.102(d) provide that, in non-steep-slope areas, spoil may be placed outside the mined-out area under some conditions (this is informally known as "blending"). Additionally, in the preamble to the Federal regulations addressing backfilling and grading, OSM indicates that the regulatory authority should have the discretion to establish the final provisions for the disposal of first cut or box cut spoils so long as (1) the area where the box cut spoils are placed conforms to other requirements, such as topsoil removal and grading of the mined area to AOC; (2) the box cut spoils are also graded to AOC or to the lowest practicable grade; (3) the reclamation achieves an ecologically sound land use compatible with the surrounding region; and (4) other provisions pertaining to spoil handling are met (44 FR 15227, March 13, 1977). These are the same conditions specified in 30 CFR 816.102(d). The preamble goes on to indicate that any excess spoil, including box cut spoils, which is deposited on lands that satisfy the slope angles specified in the definitions for head-of-hollow and valley fills must comply with the excess spoil regulations and that the stockpiling and transportation of box cut spoil to the final cut is encouraged in order that the requirements for the elimination of highwalls, spoil piles and depressions are satisfied. Montana's proposed language complies with these

requirements. Highwalls must be eliminated, grading of the box cut spoils must blend with the surrounding terrain and AOC must be achieved. In addition, MCA 82–4–232(1)(a)(iv) requires that the grading must be suitable for the postmining land use.

Thus proposed MCA 82–4–232(1)(b) is consistent with the intent of SMCRA and the Federal regulations. We approve proposed MCA 82–4–232(1)(b).

C.11. MCA 82–4–232(1)(c) Backfilling & Approximate Original Contour (AOC) [SMCRA 515(b)(3)].

At MCA 82–4–232(1)(c), Montana proposed to delete from the provision, which addresses the creation of terraces and diversions during final grading, a sentence which allowed the Department to promulgate rules requiring "additional restoration work." This provision is newly designated at subparagraph (c); as currently approved, these are the last two sentences of paragraph (1). Hence, the "additional restoration work" applies to the general performance standard of backfilling and grading, highwall and spoil pile elimination, and restoration of AOC.

The corresponding Federal provision at SMCRA 515(b)(3) does not specially provide for the promulgation of additional backfilling and grading requirements (although SMCRA 515(a) and (b) do provide for the regulatory authority to promulgate "other requirements" and note that the defined performance standards are minimums). By deleting this discretionary provision, Montana is not removing from its program anything required by SMCRA. Therefore we approve the proposed deletion.

C.12. MCA 82–4–232(7) and (8) Alternate Reclamation [SMCRA 515(b)].

Montana has proposed to delete previously existing paragraphs (7) and (8). [We note that Montana in this submittal has enacted new paragraphs (7) and (8), providing requirements for land capability and alternative land uses. These new paragraphs are addressed in Finding B above.] The deleted paragraphs address "alternatives" to backfilling, grading, highwall elimination, topsoiling, and planting of a permanent diverse cover; the implementing rules refer to this as "alternate reclamation."

When the Montana program was initially approved, these deleted paragraphs were a topic of public comment (see 45 FR 21572; April 1, 1980; Disposition of Comments No. 24). At that time, OSM wrote that it found that the implementing rule "is analogous to the Federal alternative postmining land use provisions rather than to the experimental practices provision." The deleted provisions resemble the Federal experimental practice provision, but also provided the only means for Montana to provide for postmining land uses other than the otherwise-required combination of grazing and fish & wildlife habitat.

Since the newly-promulgated paragraphs (7) and (8) now provide requirements for land capability and alternative land uses (as addressed in Finding B. above), deletion of the original paragraphs will not render the Montana program inconsistent with SMCRA. Therefore we approve these deletions.

However, we note that several rules within the Montana program were statutorily authorized only by these now-deleted paragraphs. This also applies to a couple of rules proposed in earlier amendments to the Montana program on which OSM had deferred decisions (see 55 FR 19728, 19730, May 11, 1990; 67 FR 6395, 6400, February 12, 2002; and 68 FR 46460, 46466, August 6, 2003). Since the statutory authorization for these Montana rules will no longer exist upon the effective date of this OSM rule, Montana will have to remove these Montana rules when promulgating new rules to implement these statutory changes. OSM will follow up on this matter when such proposed implementing rules are submitted. The rules this deleted authority applies to are: ARM 17.24.313(3)(b)(second sentence), 17.24.515(2), 17.24.821, 17.24.823, 17.24.824, and 17.24.825.

C.13. MCA 82–4–232(9) Wildlife Enhancement [SMCRA 515(b)(24)].

Montana proposed to add a new paragraph (9) to this statute to require that wildlife habitat enhancement features be integrated into the postmining land use plans for "cropland, grazing land, pastureland, land occasionally cut for hay, or other uses"; the features are to enhance habitat diversity, emphasizing big game animals, game birds, and threatened and endangered species in the area. Features must also be planned to enhance wetlands and riparian areas. Finally, the provision states that such wildlife habitat enhancement features do not constitute a land use change to fish and wildlife habitat, and may not interfere with the designated postmining land use.

We note that the Montana program already contains, at MCA 82–4–231(10)(j), an exact duplicate of the Federal requirement at SMCRA 515(b)(24), with both requiring that the operator, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values and achieve enhancement of such resources where practicable. Since the proposed new paragraph does not address minimizing disturbance or adverse impacts, it must be read together with the last part of the existing Montana and Federal requirements; that is, read together with the requirement that operators, where practicable, achieve enhancement of fish, wildlife, and related environmental values to the extent possible using the best technology currently available. If the proposed new provision would in any way limit the existing requirement for "enhancement where practicable," then the proposed provision would conflict with the existing Montana and SMCRA requirement.

In one way, the proposed provision is more stringent than the existing Montana and Federal requirements: by stating that reclamation plans "must incorporate appropriate wildlife habitat enhancement features," this provision effectively declares that enhancement of habitat diversity is always "practicable." At first reading, the required enhancement appears to be limited to agricultural postmining land uses. But other postmining land uses are referenced by the proposed language "or other uses," though this expanded application would be clearer if the words "and all" were added: "and all other uses." Although the proposed new provision would provide for an "emphasis" on three specified "wildlife types," this does not exclude other wildlife types from the requirement; and a placement of emphasis is within Montana's discretion. The SMCRA and existing Montana requirement requires "enhancement where practicable" for all postmining land uses; so we agree that inclusion of those features does not necessarily turn other postmining land uses into the postmining land use of fish and wildlife habitat.

The final clause of the proposed new paragraph prohibits enhancement features from interfering with the postmining land use. Read together with the requirement that reclamation plans "must" incorporate appropriate enhancement features, this clause in effect requires that if a given type of enhancement feature (for example, hedgerows) would interfere with a postmining land use (for example, cropland), then other enhancement features must be employed (for example, raptor perches or songbird nest boxes) that would be more appropriate by interfering less. We find this to be consistent with the existing SMCRA and

Montana provisions, which require enhancement where practicable.

Based on the above discussion, we approve proposed MCA 82–4–232(9).

C.14. MCA 82–4–233 Planting of revegetation [SMCRA 515(b)(19), 30 CFR 816/817.111].

a. Montana proposed to delete existing paragraph (1), providing general revegetation requirements, and replace it with a new paragraph (1) that almost exactly duplicates 30 CFR 816/817.111(a). These Federal regulations directly implement, with increased detail, SMCRA 515(b)(19). Therefore, the proposed new paragraph, with the two exceptions noted below, provides revegetation requirements equivalent to SMCRA 515(b)(19) and 30 CFR 816/817.111(a).

The first exception is that Montana's proposal at proposed paragraph (1) would not require operators to plant water areas, surface areas of roads, "and other constructed features." The Federal requirements of SMCRA 515(b)(19), as implemented at 30 CFR 816/817.111(a), provide only the first two exemptions. The third exemption provided by Montana, "and other constructed features," is undefined. All of reclamation could be considered "constructed," so this exemption could broadly be construed to apply to the whole affected area. We believe that Montana intended here that this exemption would be applied to parking lots, material storage yards, etc., that are limited in size and slope, and are stabilized against erosion by paving or gravel. We are approving this language with the proviso that Montana not apply it until (1) Montana promulgates rules to implement it, which rules must provide for a clear definition of "other constructed features" and provide for limits on size and slope and stabilization against erosion, and other factors that may affect environmental stability, and (2) those rules are approved by OSM.

The second exception is that Montana's proposal adds to new (1)(d) (corresponding to 30 CFR 816/817.111(a)(4)) a limitation that the revegetation need only be capable of stabilizing soil erosion to the extent appropriate for the postmining land use. SMCRA 515(b)(19), by requiring establishment of vegetation at least equal in extent of cover to the natural vegetation of the area, might be interpreted as requiring the revegetation to stabilize soil erosion to the level of the premining conditions [see note included in Finding C.1. above about the meaning of "effective" vegetation]. However, we note that the phrase "of the area" need not refer to the specific parcel being mined. This is particularly true when an alternative, "higher or better," land use is being established during reclamation. OSM's interpretation of this situation, as indicated in the requirements for success standards at 30 CFR 816.116(a)(2), is that revegetation success standards must be representative of unmined lands under that proposed postmining land use in the area. In this case, the erosion control achieved by revegetation that meets the success standards will be equivalent to the erosion protection of unmined lands being used for the same purpose, within that general vicinity. For example, if an area that premining was unmanaged grazing land is reclaimed, postmining, to a "higher or better" land use of row crops, the required erosion control will be that comparable to other (unmined) row crop fields in the area, not the erosion control that is achieved by grazing land. The possible increase in soil erosion would be one factor that the regulatory authority would have to consider in deciding whether row crops would in fact be a higher or better use than grazing in this situation. We find Montana's proposal to be consistent with this interpretation of SMCRA 515(b)(19) as expressed at 30 CFR 816.116(a)(2), and we approve it with this understanding.

For the reasons discussed above, we are approving MCA 82–4–233(1), with the proviso that the exemption for "and other constructed features approved as part of the postmining land use" not be applied until Montana promulgates implementing rules to limit the exemption, and those rules are approved by OSM.

b. We note that existing paragraph (1), proposed for deletion, required the revegetative cover to be capable of (1) "feeding and withstanding grazing pressure from a quantity and mixture of wildlife and livestock at least comparable to [premining conditions]" (subparagraph (1)(a)); and (2) "regenerating under the natural conditions * * * including occasional drought, heavy snowfalls, and strong winds."

Neither SMCRA nor the Federal regulations contain these requirements. Therefore, deletion of them is not inconsistent with SMCRA or the Federal regulations. As noted above, the other general revegetation requirements of existing paragraph (1) have been replaced by the new paragraph (1). We therefore approve the deletion of existing paragraph (1). We note, however, that the deleted language of existing subparagraph (1)(a) ["feeding and withstanding grazing pressure from a quantity and mixture of wildlife and livestock at least comparable to [premining conditions"] was the language that up until this time had been interpreted by Montana as requiring, as a postmining land use, a combination of grazing and fish & wildlife habitat (unless a higher or better use was approved). Therefore, upon the effective date of this approval, Montana will no longer generally require the combination of grazing and fish & wildlife habitat as a postmining land use. Instead, Montana will be evaluating premining land use and land use capability with proposed postmining land uses under the terms of new MCA 82–4–232(7) and (8) (as newly codified) [equivalent to SMCRA 515(b)(2), 30 CFR 816/817.133], addressing land use capability [approved at Finding B above].

c. Montana proposed to delete existing MCA 82–4–233(2), which provided that the regulatory authority ("board") must define by rule the requirements for seed mixtures, quantities, and other planting requirements. SMCRA has no such specific requirement. Therefore deletion of this requirement is not inconsistent with SMCRA, and we approve it.

d. Montana proposed to replace deleted existing paragraph (2) with a new paragraph (2) that exactly duplicates 30 CFR 816/817.111(b). This Federal regulation, in turn, provides additional detail to SMCRA 515(b)(19). Since the proposed new paragraph (2) is the same as the Federal regulation, and in accordance with SMCRA, we approve it.

e. Montana proposed to add a new paragraph (3), which requires revegetation to be appropriate for the postmining land use. This proposed provision to some extent addresses general revegetation success standards; but we note that Montana has provided additional requirements for revegetation success standards at proposed MCA 82–4–235 (to be addressed in a finding below). At subparagraph (3)(a), revegetation appropriate for cropland provides exemptions from the general revegetation requirements of: diverse, effective, permanent; at least equal in cover to the natural vegetation; having the same seasonal characteristics of growth as the natural vegetation; and being capable of self-regeneration and plant succession. This same exemption for cropland from the general requirements of SMCRA 515(b)(19) is provided in the Federal regulations at 30 CFR 816/817.111(d).

At subparagraph (3)(b), revegetation appropriate for pastureland or grazing land must have use for grazing by

domestic livestock at least comparable to premining conditions, and enhanced when practicable. Again, we note that proposed success standards will be addressed below. There is no exact Federal equivalent to this proposal. It is consistent with the requirements of SMCRA 515(b)(19) that the revegetation be effective and at least equal in extent of cover to the natural vegetation of the area. The postmining land uses of grazing and pastureland imply land management practices directed to livestock use, but this does not preclude wildlife use. We believe it will usually be the case that if the postmining revegetation provides for at least as much livestock use as the premining vegetation, the same would hold true for grazing wildlife. We note that the definition of "grazing" at MCA 82–4–203(22) (addressed above) requires that the vegetation be indigenous, and hence would be appropriate for wildlife.

At subparagraph (3)(c), revegetation appropriate for fish and wildlife habitat, forestry, or recreation requires that trees and shrubs must be planted to achieve appropriate stocking rates. Again, we note that proposed success standards will be addressed below; as noted below, the success standards for these land uses require ground cover measures. There is no exact Federal equivalent to this proposal. It is consistent with the requirements of SMCRA 515(b)(19) that the revegetation be diverse and effective.

For the reasons discussed above, we approve proposed paragraph (3).

C.15. MCA 82–4–234 Commencement of Reclamation [SMCRA 515(b)(16)].

Montana proposed to delete the final sentence of this provision. The sentence requires that Departmental approval is required before an operator may redisturb any area already seeded for revegetation. Neither SMCRA nor the Federal regulations contain such a requirement. Therefore, deletion of this sentence is not inconsistent with SMCRA, and we approve it.

C.16. MCA 82–4–235 Determination of Successful Revegetation [SMCRA 515(b)(19) & (20); 30 CFR 816.111, 816.116].

Introductory note: The nature of the material proposed for addition here (for example, the proposed rule addresses ground cover, crop production, stem density, and "reestablished vegetation"), plus the similarity to the Federal regulations at 30 CFR 816/817.116, suggests that these proposed new requirements are meant, like 30 CFR 816/817.111 and 816/817.116, to set basic requirements for success standards to measure when operators have met the requirement of MCA 82–4–233 to establish a vegetative cover. We have evaluated these requirements with this understanding. We further note that these basic requirements do not satisfy the Federal requirements at 30 CFR 816/817.116(a)(1) that the regulatory authority select detailed success standards (with consultation with State agencies required in some cases and recommended in all cases). This has actually already been accomplished by the Department; see ARM 17.24.711 through 17.24.733.

Montana proposed to change the title of this provision from "inspection of vegetation" to "determination of successful revegetation," with (in both cases) a subtitle of "final bond release." Montana also proposed to add a new paragraph (1) as follows:

(1) Success of revegetation must be judged on the effectiveness of the vegetation for the approved postmining land use, the extent of cover compared to the cover occurring in the natural vegetation, and the requirements of 82–4–233. Standards for success are:

(a) for areas reclaimed for use as cropland, crop production must be at least equal to that achieved prior to mining based on comparison with historical data, comparable reference areas, or United States department of agriculture (sic) publications applicable to the area of the operation, as referenced in rules adopted by the board;

(b) for areas reclaimed for use as pastureland or grazing land, the ground cover and production of living plants on the revegetated area must be at least equal to that of a reference area or other standard approved by the department as appropriate for the postmining land use;

(c) for areas reclaimed for use as fish and wildlife habitat, forestry, or recreation, success of revegetation must be determined on the basis of approved tree density standards or shrub density standards, or both, and vegetative ground cover required to achieve the postmining land use;

(d) reestablished vegetation is diverse if multiple plant species meeting the requirements of 82–4–233(1)(b) are present. The department may approve a lesser diversity standard for postmining land uses other than grazing land.

(e) reestablished vegetation is considered effective if the postmining land use is achieved and erosion is controlled;

(f) reestablished vegetation is considered permanent if it is diverse and effective at the end of the 10-year responsibility period specified under subsection (2); and

(g) plant species comprising the reestablished vegetation are considered to have the same seasonal characteristics of growth as the original vegetation, to be capable of regeneration and plant succession, and to be compatible with the plant and animal species of the area if those plant species are native to the area, are introduced species that have become naturalized, or are introduced species approved by the department as desirable and necessary to achieve the postmining land use.

a. In part, these proposed new requirements are derived from the Federal regulations at 30 CFR 816/817.116; in particular, proposed paragraph (1) duplicates 30 CFR 816/817.116(a). And subparagraphs (1)(a) and (c) effectively duplicate 30 CFR 816/817.116(b)(2) and (3). Subparagraph (1)(b) duplicates 30 CFR 816/817.116(b)(1), except for the addition of the phrase "appropriate for the postmining use." Since proposed paragraph (1) requires success standards to reflect the extent of cover compared to natural cover, and MCA 82–4–233(1)(c) [addressed in a finding above] requires the established cover to be at least equal to the natural cover, any standard approved by the Department as "appropriate" under this section would have to exceed this minimum requirement. And, since subparagraphs MCA 82–4–235(1), (1)(a), (1)(b), and (1)(c) effectively duplicate the Federal regulations, we approve these subparagraphs.

b. Subparagraphs (1)(e) and (f) provide definitions of "effective" and "permanent." Neither SMCRA nor the Federal regulations define these terms. But these concepts were discussed in preambles to Federal regulations, which themselves discuss House Report No. 95–218 (see 47 FR 12597; March 23, 1982; and 48 FR 48141–48146; September 2, 1983). According to these preambles:

Effective means * * * both the productivity of the planted species concerning its utility to the intended postmining land use * * * as well as its capability of stabilizing the soil surface with respect to reducing siltation to normal background levels * * * Permanent means that the plant community as a whole must be capable of providing the necessary amount of ground cover over time through plant succession, and not necessarily that every individual plant species will propagate itself in identical numbers and rations throughout the future.

Montana's proposed definitions here are consistent with these preamble discussions. Proposed subparagraph (e) provides that vegetation is effective if the postmining land use is achieved and erosion is controlled; these are the same two factors considered in the Federal preambles. And proposed subparagraph (f) provides that vegetation is permanent if it is diverse and effective at the end of the bond liability period. We note, though, that while this definition of "permanent" may serve as a basis for determining criteria for bond release, it provides little guidance applicable to approving revegetation plans in permit applications. Since these definitions are

consistent with the Federal regulations, we approve subparagraphs (1)(e) and (f).

c. Subparagraph (1)(d) defines "diverse" as "multiple" plant species and provides for a "lesser" diversity standard for all postmining land uses except grazing. We understand "multiple" as being more than one. So, this provision could allow as few as two species, and possibly one if approved by the Department for non-grazing land.

Neither SMCRA nor the Federal regulations define "diverse." But pertinent discussion is found in the rule preambles cited above: " 'Diverse' means sufficiently varied amounts and types of vegetation to achieve ground cover and support the postmining land use. The precise numbers required to achieve this diversity should be determined by regional climate and soil conditions. However, the ultimate test will be the sufficiency of the plant communities to assure survival of adequate number and varieties to achieve the postmining land use and the required extent of ground cover. Diversity does not necessarily mean that every species or variety of premining grass, shrubs, or trees be established in identical numbers and ratios after mining." See 47 FR 12597; March 23, 1982. We do not believe that this Federal description for diversity, and the conclusion that the ultimate test is related to the plant communities' ability to assure survival of adequate numbers and varieties to achieve the postmining land use and required extent of cover, is consistent with Montana's proposal, which could result in as few as two species and possibly one in some cases. In particular, the postmining land use of fish and wildlife habitat will often require a fairly high diversity (*i.e.*, sufficiently varied amounts and types of vegetation) to fulfill the various food and cover needs of various species of wildlife and other biota.

Based on the above discussion, we find proposed subparagraph (1)(d) to be less effective than the Federal requirements, and we do not approve it.

d. Subparagraph (1)(g) describes the criteria required to meet the terms "same seasonal characteristics of growth as the original vegetation," "capable of regeneration and plant succession," and "to be compatible with the plant and animal species of the area." In all three cases, the proposal states that these requirements are met if the reestablished vegetation species meet one or more of three criteria: (1) They are native to the area, (2) they are introduced species that have been naturalized, or (3) they are introduced species approved by the Department as both necessary and desirable for the postmining land use.

The Federal regulations do not define the terms "same seasonal characteristics of growth as the original vegetation," "capable of regeneration and plant succession," and "to be compatible with the plant and animal species of the area". But preamble discussion (see 47 FR 12597; March 23, 1982) clarifies that "seasonality" refers to the major season of growth. Herbaceous species are generally grouped into cool season species (which grow mostly in spring or fall, but are largely dormant in mid-summer) and warm season species (which grow in late spring and summer, but are dormant in early spring and fall); woody species may be deciduous or evergreen. Species that are native to the area would exhibit these characteristics. Introduced species could be approved by the Department as "desirable" only if they exhibit these characteristics. "Naturalized species," in this context, are introduced species that were not planted with Department approval; however, they may have invaded the area after planting, or their seeds may have been in the soil prior to mining. Since they have not been planted with approval, it is unknown whether they match the seasonality of the original vegetation. Based on this discussion, we approve this definition of "the same seasonal characteristics of growth as the original vegetation," except for its inclusion of naturalized species.

Regarding capacity for regeneration and plant succession, species that are native to the area would exhibit these characteristics. Introduced species could be approved by the Department as "desirable" only if they exhibit these characteristics. Since naturalized species would not have been planted with approval, it is unknown whether they would have these characteristics. Based on this discussion, we approve this definition of "capable of regeneration and plant succession," except for its inclusion of naturalized species.

Regarding compatibility with local plants and animals, the native species are co-adapted with plant and animal species of the area and therefore have this characteristic. Introduced species could be approved by the Department as "desirable" only if they exhibit this characteristic. As OSM noted in the preamble to 30 CFR 816.111(b)(4), "[a]ny species approved for use in reclamation must be compatible with the plant and animal species of the area. Hence, 816.111(b)(4) is one of the criteria that the regulatory authority will use in determining whether to approve or disapprove any plant species proposed for planting in disturbed areas" (48 FR 40145; September 2, 1983). Therefore, introduced species approved by the Department must, consistent with 30 CFR 816.111(b), be compatible with other species of the area. Since naturalized species would not have been planted with approval, it is unknown whether they would have this characteristic. Based on this discussion, we approve this definition of "to be compatible with the plant and animal species of the area," except for its inclusion of naturalized species.

For the reasons discussed above, we approve subparagraph (1)(g) except insofar as it includes "introduced species that have become naturalized."

C.17. MCA 82–4–252(2) Mandamus [SMCRA 520].

Montana proposed to revise Paragraph (2) of this section to delete the option for actions of mandamus to be brought in the first judicial district of the State, thereby requiring that such actions be brought in the district court of the county in which the land is located.

The Federal citizen suit provision at SMCRA 520 requires that Federal district courts have jurisdiction for Federal citizen suit actions. It does not specify jurisdiction for State actions. We find that Montana's proposal is not inconsistent with this, and we approve it.

D. Revisions to Montana's Statute With No Corresponding Federal Regulation and/or Statute

D.1. MCA 82–4–202(1) Policy Intent.

Montana proposed to add a new paragraph (1), stating the legislature's intent to fulfill its responsibility under the Montana Constitution. There is no direct Federal counterpart.

We find that the adequacy of this legislation to meet the obligations of the Montana Constitution is beyond the scope of our review. We are empowered under SMCRA 503 and 505 only to evaluate Montana's laws in comparison to SMCRA. Therefore, we take no action on this proposed new paragraph.

D.2. MCA 82–4–202(3)(c)—(e) Policy Intent.

Montana proposed to add three new subparagraphs (c) through (e) to renumbered paragraph (3), as follows:

(3)(c) coal mining alters the character of soils and overburden materials and that duplication of premining topography, soils, and vegetation composition is not practicable;

(d) the standard for successful reclamation of lands mined for coal is the reestablishment of sustainable land use comparable to premining conditions or to higher or better uses; and

(e) standards for successful reclamation must be well-defined, consistent, and

attainable so that mine operators can reclaim lands disturbed by mining with confidence that the release of performance bonds can be achieved."

There are no similar provisions in SMCRA. We agree with proposed subparagraph (c) that surface mining alters soils and geology, and that an exact duplication of premining conditions is not practicable. This provision is not inconsistent with the intent of SMCRA. Therefore we approve subparagraph (3)(c).

In regard to proposed (3)(d), we note that restoration of sustainable land use is indeed one of the main requirements of SMCRA, as noted at SMCRA 515(b)(2). But in SMCRA 101(c), Congress also identified many other adverse effects of mining which SMCRA is intended to prevent:

(c) many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property[,] by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.

Therefore, in addition to restoring or enhancing sustainable land use, other standards for successful reclamation include highwall elimination and restoration of AOC to, for example, prevent impairment of natural beauty and eliminate hazards dangerous to life and property; protection and enhancement of fish & wildlife habitat; control of erosion and other pollution of surface waters and ground waters; contemporaneous reclamation, etc. Thus the body of SMCRA itself, not just the findings in section 101, contain postmining reclamation requirements that are not necessarily limited to the postmining land use, *e.g.*, hydrologic balance protection outside the permit area and fish and wildlife protection and enhancement even when fish and wildlife habitat is not the postmining land use (see also 30 CFR 816.97(a), (h), and (i)). Also, we note that that section 519(c)(3) of SMCRA specifies that no bond shall be fully released until "all reclamation requirements of this Act are fully met."

Therefore we do not agree with Montana that restoration of sustainable land use is "the [one] standard" for successful reclamation of lands mined for coal. We additionally note a conflict between proposed (d) and proposed (e): proposed (d) states that there is one "standard" for successful reclamation, while proposed (e) addresses plural "standards for successful reclamation." For these reasons, we find that this provision is inconsistent with the intent of SMCRA, and we do not approve proposed subparagraph MCA 82–4–202(3)(d).

With regard to proposed subparagraph (3)(e), we agree that standards for successful reclamation must be well-defined, because as Montana notes, considerable legal and monetary liability is attached. The term "consistent" can be used in several different ways. We certainly agree that standards for successful reclamation should be consistent in the administrative sense; that is, not arbitrarily created or applied, and applied to all operators equally.

But we disagree that such standards should be, as proposed here, "attainable." Standards for reclamation success must be based on premining conditions. It is possible that mining and reclamation technology are not capable of restoring the premining conditions of some specific geographic areas; hence, reclamation success could not be attained in those areas. If the standards for successful reclamation were attainable everywhere, then surface mining operations under SMCRA could be conducted everywhere. But on the contrary, SMCRA 102(c) states as one purpose for the Act to "assure that surface mining operations are not conducted where reclamation as required by this Act is not feasible." Similarly, SMCRA 510(b)(2) requires that before a permit application is approved, the regulatory authority must find in writing that "the applicant has demonstrated that reclamation as required by this Act and the [regulatory] program can be accomplished by the reclamation plan contained in the permit application." If the standards for successful reclamation under SMCRA were always "attainable," these two SMCRA requirements would be rendered pointless. We additionally note that this Montana provision, if approved, could provide a basis for Montana's approval of standards that are inconsistent with those required by SMCRA and the Federal regulations.

Based on the above discussion, we approve proposed subparagraph MCA 82–4–202(3)(e), except for the words "and attainable." We do not approve the words "and attainable."

D.3. MCA 82–4–203(30) Definition of "Material damage."

Montana proposes to add a new definition, as follows:

(30) "Material damage" means, with respect to protection of the hydrologic balance, degradation or reduction by coal mining and reclamation operations of the quality or quantity of water outside of the permit area in a manner or to an extent that land uses or beneficial uses of water are adversely affected, water quality standards are violated, or water rights are impacted. Violation of a water quality standard, whether or not an existing water use is affected, is material damage.

We note that there is no such definition in Montana's rules. Neither is there a definition in SMCRA or in the Federal regulations. Because of the great variation nationwide, and even permit-to-permit, in geologic, hydrologic, climate, and weather systems, OSM has elected not to establish any fixed criteria to measure material damage except for compliance with water-quality standards and effluent limits (see 48 FR 43973; September 26, 1983). This proposal is consistent with that position. We therefore find this proposal to be not inconsistent with SMCRA, and we approve it.

D.4. MCA 82–4–203(47) Definition of "Restore or restoration."

Montana proposes to add a new definition, as follows:

(47) "Restore" or "restoration" means reestablishment after mining and reclamation of the land use that existed prior to mining or to higher or better uses.

We note that the introduction to the "definitions" section provides: "Definitions. Unless the context requires otherwise, in this part, the following definitions apply:". We note further that there is no such definition in Montana's rules. Neither is there a definition in SMCRA or in the Federal regulations.

We examined Montana's statute (MCA Title 82, Chapter 4, Part 2) to determine where these defined words are used. We did not observe any place where they are used in the sense defined here. We found several places in which the context requires the usual interpretation of "restore," meaning to return something to its original condition (MCA 82–4–202(2)(d), 82–4–231(10)(k)(i)(C)(iv), 82–4–239, 82–4–243(1)(a)). Therefore we question the need to add this definition to the Montana program. However, anyplace where "restore" or "restoration" are used in the Montana statute as counterparts to SMCRA provisions, it is clear from context to mean "return to original condition." Therefore we do not find this proposed definition to be inconsistent with SMCRA, and we approve it.

D.5. MCA 82–4–203(50) Definition of "Surface owner."

Montana proposed to revise this existing definition by deleting the phrase "and whose principal place of residence is on the land" from the defined category of persons holding legal or equitable title to the land surface. Therefore, Montana has revised this category to make it more inclusive, so that the Montana program will protect the interests of more people. Montana also proposed to add a new subparagraph (d) to provide that "surface owner" means the Federal land management agency when the United States government owns the surface. We agree that this is accurate, and will simplify permit applications for operators; it is also consistent with the permit application requirements and land use requirements of the Federal regulations. Therefore we find this proposal to be not inconsistent with SMCRA, and we approve it.

D.6. MCA 82–4–203(55) Definition of "Wildlife habitat enhancement feature."

Montana proposed to add a new definition, as follows:

"Wildlife habitat enhancement feature" means a component of the reclaimed landscape, established in conjunction with land uses other than fish and wildlife habitat, for the benefit of wildlife species, including but not limited to tree and shrub plantings, food plots, wetland areas, water sources, rock outcrops, microtopography, or raptor perches.

We examined Montana's statute (MCA Title 82, Chapter 4, Part 2) to determine where this phrase is used. We found it only at the related performance standard at MCA 82–4–232(9), where it seems it would be clear from context. Therefore we question the need to add this definition to the Montana program. However, we do not find it to be in conflict with SMCRA 515(b)(24) or 30 CFR 816.97, both dealing with the protection of fish, wildlife, and related environmental values. Therefore we find it to be not inconsistent with SMCRA, and we approve it.

D.7. MCA 82–4–232(10) Pre-existing Facilities & Roads [SMCRA 522(e)(4)].

Montana proposed to add a new paragraph, MCA 82–4–232(10), to provide that "facilities existing prior to mining, including but not limited to public roads, utility lines, railroads, or pipelines, may be replaced as part of the reclamation plan."

Of these facilities, only public roads are addressed by SMCRA (at 522(e)(4)), which provides that public roads may be disturbed by mining operations (other than at mine road intersections with public roads) only after a public hearing and finding that the interests of the public and the landowners will be protected. Montana's proposal is not inconsistent with this Federal requirement. Indeed, Montana has a duplicate of the SMCRA 522(e)(4) requirement, at MCA 82–4–227(7)(d).

The other types of premining facilities here would be addressed as right-of-entry questions under SMCRA 507(b)(1) and 510(b)(6). We find that Montana's proposal is not inconsistent with these requirements, and we approve the proposal.

D.8. HB 373 Section 11 [not yet codified as submitted], Revision of Permits or Applications to Incorporate These Statutory Provisions [SMCRA 511].

This proposed section would allow any existing permits, or applications for permits or permit revisions, to be revised to incorporate provisions of House Bill 373 (which includes most of the revisions proposed in this submittal). SMCRA does not address the revision of permits to incorporate newly approved regulatory provisions. But neither does it prohibit this; it appears that such revisions would be addressed as any other revisions under SMCRA 511. Montana's rules at ARM 17.24.404(1) address the effects of revisions upon applications already in the review process. We find that this proposal is not inconsistent with SMCRA, and we approve it.

D.9. MCA 82–4–239(3) through (5), Reclamation by Department.

One substantive and several minor revisions were proposed for this section, which was included in this submittal (SATS MT–024–FOR; Administrative Record No. MT–21–1), and was included in the proposed rule **Federal Register** notice for this amendment (68 FR 61175; October 27, 2003). However, upon closer review of this statutory section, we find that it is not applicable to Montana's regulatory program under SMCRA Title V, but rather to Montana's Abandoned Mined Land (AML) program under SMCRA Title IV. Therefore we are taking no action on the proposed amendments to this statutory section. We will consider them in connection with a future proposed amendment to the Montana AML program.

D.10. MCA 82–4–250 Operating permit revocation—permit transfer.

Montana proposes to delete from this statutory section a clause that the section would terminate on October 1, 2005. With the proposed deletion, MCA 82–4–250 would not terminate, but would remain part of the Montana program until removed by legislation.

OSM approved MCA 82–4–250 (including the termination clause) as being no less stringent than SMCRA (see 66 FR 58375; November 21, 2001; SATS MT–022-FOR). Since MCA 82–4–250 was consistent with SMCRA at that time, it remains consistent until or unless SMCRA is changed. Therefore we find that deletion of the termination clause does not affect the findings made by OSM in approving the entire MCA–82–4–250, and we approve the deletion.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment (Administrative Record No. MT–21–06), and received three comment letters.

a. We received a letter from Westmoreland Mining LLC ("WML"), which operates three mines in Montana (Administrative Record No. MT–21–09). WML commented that one provision in the Montana statute had remained unchanged since 1973 (thus predating SMCRA by several years). That provision required that mined land be reclaimed to a postmining land use of native rangeland and wildlife habitat (with any exceptions requiring a cumbersome review process). WML further stated that this statutory provision has increasingly been applied as a requirement to restore ecological function. The result, WML states, is that reclamation success has been impossible to define, hence subject to shifting and varying interpretation by individual staff members, and a lack of objective evaluation of reclamation success for release of bond (and therefore, there have been very few final bond releases).

WML goes on to state that this proposed program amendment has been developed through a cooperative effort by the Montana Coal Council, the Department, and OSM. The proposed amendment "is a clear statement of legislative intent that the 'standard for successful reclamation of lands mined for coal is the reestablishment of sustainable land use comparable with premining conditions or higher or better uses.'" WML comments that approval by OSM will enable Montana to proceed with bond releases based on standards that are objective, attainable, and consistent with OSM requirements. WML urges timely approval of the proposed amendment.

In response, we note that we have approved the proposed deletion of existing MCA 82–4–233(1)(a), which was the provision interpreted as requiring a postmining land use of grazing and fish & wildlife habitat. Further, we are approving proposed new MCA 82–4–232(7) and (8), which

require restoration of the land to a condition capable of supporting the premining uses, or higher or better uses. See Findings B. and C.14.b.

Regarding the statements of legislative intent at proposed MCA 82–4–202(3)(d) and (e), as discussed in more detail above, we disagree with the Montana legislature that the reestablishment of a sustainable land use is the only standard for reclamation success. We note that for final bond release, SMCRA 519(c)(3) requires that "all reclamation requirements of this Act are met." This includes such requirements as elimination of highwalls and restoration of AOC, protection of the hydrologic balance, and protection and enhancement of fish & wildlife habitat and related environmental values. See Finding D.2. above. We also note that SMCRA provides other protections that are applicable earlier in the operation, but not at final bond release, such as contemporaneous reclamation, control of blasting, and protection of surface owner rights. Violations of these requirements delay, hinder, or reduce the success of mine reclamation.

We also disagree with the Montana legislature that whatever standards might be applied to measure reclamation success must be across-the-board "attainable." As noted in Finding D.2. above, mining and reclamation technology (or the economic aspects of the operation) may not be able to adequately restore premining conditions (as required by SMCRA) in all situations. In those situations, the standards for success would not be attainable with current technology and/or current investment and coal prices.

b. We received a letter from the Montana Coal Council ("MCC"), which represents the coal industry before the Montana legislature (Administrative Record No. MT–21–08). MCC commented that the Montana program statute had allowed reclamation standards to be set subjectively, and that in application they had changed over time, providing a "moving target." MCC believes that this proposed amendment will allow the coal mining industry to return the land to its premining condition, and allow input from the entity who will own and use the land in the future. MCC urges approval of the proposed amendment.

In response, we note that we cannot comment here on how statutory or regulatory requirements are applied. The application of requirements to specific cases, including what standards are applicable to which parts of which mines over time, is subject to administrative and judicial review as part of the Montana program, and possibly under other parts of Montana law as well. In its regular oversight of State regulatory programs, OSM reviews the implementation of regulatory programs; OSM seeks input from the public (including the industry) in determining what parts of program implementation to review. Here we can comment only on the establishment of the statutory and regulatory requirements. We note that when we initially approved the Montana program under SMCRA in 1980, OSM determined that the Montana program met SMCRA requirements. And in this action, we are also determining whether the proposed amendment is in accordance with SMCRA.

We interpret the comment about obtaining input from the future land possessor and user as applying to proposed MCA 82–4–232(8)(b). We note that this is a valuable addition to the program, and we commend the industry and the legislature for this service to Montana's citizens.

c. Finally, we received a lengthy and complex comment letter from the Northern Plains Resource Council ("NPRC") (Administrative Record No. MT–21–07), which describes itself on its Web site as follows:

> "Northern Plains Resource Council organizes Montana citizens to protect our water quality, family farms and ranches, and unique quality of life. We are a grassroots conservation and family agriculture group that gets the job done—protecting the Northern Plains and the people who make their home here."

The letter included some general comments and many section-by-section comments.

In general comments, NPRC noted that this proposal marks a shift in the Montana program, from the required postmining land use of combination grazing/wildlife (with limited alternatives) to a focus on process, where any operator going through the process can get bond release. NPRC sees this in the new legislative intent at proposed MCA 82–4–202(2)(c)–(e). NPRC also comments that the Montana legislature has said it is not practicable to reclaim. NPRC noted that other Western states find it practicable to reclaim using native grasses, forbs, shrubs, and trees to attain a climax vegetation; this goal is sought because if native species can grow as well postmining as they did premining, then there is a stable, self-regenerating landscape that can be used in the future for any use that was foreseeable prior to mining (implying that under the proposed amendment, some of those potential future land uses would be lost). Further, NPRC comments that the broad array of now-available postmining land uses are "pie-in-the-sky," and are poorly delineated.

In response, we agree that Montana in this proposal would eliminate the grazing/wildlife preference. But it is being replaced with the SMCRA system of comparing premining and proposed postmining land uses (which is the system that the other Western states, referred to positively by NPRC, are using). Regarding alternative postmining land uses, we note that under the proposal any postmining uses different from the premining use must: have a likelihood to be achieved; not present any hazard to public health or safety or any threat of water diminution or pollution; not be impractical or unreasonable; be consistent with applicable land use policies or plans; not involve unreasonable delay in implementation; and not cause or contribute to violation of federal, state, or local law. See proposed MCA 82–4–232(8) and Finding B above. SMCRA relies in part on public comment on permit applications including land use changes. We also note that under the proposal (see proposed MCA 82–4–203 (20) and (28)), "fish and wildlife habitat" can include land only partially managed for protection or management of wildlife species. Hence, unless premining grazing land or pastureland are managed to exclude wildlife, wildlife habitat is probably a joint use, and must be considered in postmining planting plans and revegetation success standards.

Regarding native species, we note that under this proposal (see proposed MCA 82–4–233(1)(b)), just as under SMCRA 515(b)(19), introduced species may be used only when desirable and necessary.

With regard to NPRC's comment on legislative intent and proposed MCA 82–4–202(2)(c)–(e), including whether it is practicable to reclaim, we note that we agree in part with Montana and in part with NPRC. We agree with Montana that surface mining operations are a radical disruption of the physical environment (soils, geology, premining vegetation) that cannot be totally undone; postmining overburden is not undisturbed geologic strata, reconstructed soils are not undisturbed soils, and exact replacement of the premining vegetation community is not possible). But as noted at Finding D.2. above, SMCRA requires, in addition to restoring or enhancing land productivity, other standards for successful reclamation, including highwall elimination and restoration of AOC, protection and enhancement of fish & wildlife habitat, control of erosion

and other pollution of surface waters and ground waters, contemporaneous reclamation, and others. These provisions require amelioration of the environmental disruption. But as we noted above, we also agree with NPRC that standards for determining reclamation success are not always attainable, and even where attainable they are not always attained; bond release is not automatic.

As a further general comment, the NPRC letter closed with a summary that this proposal is less protective than the Federal requirements, especially regarding AOC, alternate land uses, protection of the hydrologic balance, and not requiring native species. Further, NPRC thinks that the legislature was unduly influenced by a few mines, without much thought to how these amendments would change the larger environment of eastern Montana as more areas are mined. We reply that SMCRA counts on citizen review and awareness to ensure that the regulatory programs are properly implemented. We also note that OSM counts on input from the public in choosing which areas to review in our regular oversight of State programs; we encourage NPRC to participate in this process. We thank NPRC for its efforts in reviewing this submittal.

Specific NPRC comments: regarding the proposed definition of AOC (proposed MCA 82–4–203(4)), NPRC commented that subparagraph (4)(a) is too broad, and would allow rolling or hilly terrain to be flattened. Also, NPRC comments that under the proposed definition a hill might be moved 500 feet from its premining location, and questions whether that 500 foot shift should have been approved in the reclamation plan, rather than happening without planning during the last stage of backfilling and grading.

In response, we disagree that this proposal, like the guidance provided by OSM in Directive INE–26, would allow hilly or rolling terrain to be reclaimed as virtually flat. But we do agree that under both this proposal and OSM's Directive, a hill might be restored in the postmining landscape 500 feet from its premining location. However, we note that under both this proposed amendment (at proposed MCA 82–4–222(1)(o)) and under OSM's Directive, the proposed postmining location (500 feet removed from the premining location) would have to be proposed in the permit application, and approved before mining begins. An operator that actually reconstructed the hill (during backfilling and grading) shifted 500 feet from the location approved in the permit would be in violation of the permit and could not obtain Phase I bond release.

NPRC further comments on proposed subparagraph (4)(c) (addressing postmining drainage basins), noting that the discretion provided is too broad, and is coupled with a gradual erosion of State supervision over several years (under the old definition) of the location and design of ephemeral streams, with the result that the actual locations are decided by the equipment operators. In response, as noted above, we cannot here address field practice, only the statutes and rules. As noted immediately above, we observe that proposed drainage basins (like hills) must be shown in permit applications, as part of the postmining topography. Actual field construction by the equipment operator might vary a little bit, but not significantly, from the approved postmining topography. If such field construction does significantly vary from that approved in the permit, this would be a violation of the permit, and the operator could not obtain Phase I bond release.

NPRC further comments in regard to proposed subparagraph (4)(c) that this proposed provision is one instance of a subject that occurs throughout the entire proposed amendment. Here it is expressed in the control of adverse effects being required only to the extent appropriate to the postmining land use. NPRC comments that SMCRA 515(b)(10)(B)(i) requires erosion control using best available technology. Further, the proposed amendment (unlike SMCRA) ties protection of the hydrologic balance to the postmining land use. NPRC comments that in that case, if the postmining land use is industrial, little or no protection might be applied to the hydrologic balance. Further, NPRC notes, under such logic there would be many different standards for protecting the hydrologic balance, depending on the postmining land use. NPRC comments that the concept of " 'hydrologic balance * * * protected as necessary to support post mining land uses' " is inconsistent with SMCRA, and does not belong either in this definition or elsewhere in the Montana program.

In response, we note that we largely agree with NPRC on these comments. We agree that limiting resource protection to that needed for the postmining land use is a recurrent theme throughout this submittal, and we have attempted to address it in each case. We also noted that Montana has at several points drafted proposed definitions to impose performance standards (or limitations of performance standards). We believe that we addressed these instances in the Findings above, and will do so again where applicable in response to these comments. Finally, we agree that the proposal, in limiting hydrologic balance protection to the postmining land use, is not in accordance with SMCRA. As noted at Finding C.1.d. above, we have not approved this language. However, we disagree that limiting erosion control to that needed for the postmining land use would be inconsistent with SMCRA 515(b)(10)(B)(i). Erosion control using best available technology is required in all cases, regardless of any particular proposed postmining topography. See MCA 82–4–231(10)(k)(ii)(A).

NPRC comments that the proposed definition at MCA 82–4–203(17) of "drainageway" sounds very industrial, and that the Federal term "ephemeral stream" is more accurate. In response, we note that Montana is applying the proposed definition not just to the premining condition (where "stream" would indeed be more appropriate) but also to postmining constructed features. We did not find that it was defined or used in a way inconsistent with SMCRA; indeed, we only found it used in the definition of "approximate original contour."

NPRC comments that the proposed definition at MCA 82–4–203(24) of "hydrologic balance" is another instance of limiting the resource to be protected according to postmining land uses. We agree with this comment. As noted at Finding C.2. above, we find that this definition imposes a limit on the resource to be protected that is not in accordance with SMCRA; we did not approve this language.

At proposed MCA 82–4–203(22) (the proposed definition of "grazing land"), NPRC questioned whether the term "indigenous" was in accordance with SMCRA, noting that the term can mean "native," but may also have broader meanings. We respond that "indigenous" is also used in the Federal definition of "grazing land" (at 30 CFR 701.5). Thus Montana's proposed definition is consistent with the Federal definition. It must be kept in mind, though (as noted above), that both SMCRA and the Montana program require native species unless the land use cannot be achieved with them.

NPRC commented on the proposed definition of "reclamation" at MCA 82–4–203(42). NPRC commented that "here we see reclamation reduced to a process without a restoration goal. The goal of reclamation in the federal regs is to "restore" mined land to a postmining land use approved by [those regs]." We note that the only change proposed here was to add that the work is under a plan approved by the Department "to make

those lands capable of supporting the uses those lands were capable of supporting prior to any mining or to higher or better uses." So we understand NPRC to be saying that by adding the clause stating that the goal is land capability, Montana has removed the restoration goal; and that goal in the Federal regulations is to actually achieve a postmining land use rather than merely the capability. We note that the Federal definition of "reclamation" at 30 CFR 701.5 is not used within the Federal program to determine the applicability of any requirement or define the success of reclamation. Both SMCRA 515(b)(2) and 30 CFR 816/817.133(a) require that mined land be restored to a condition capable of supporting the premining land use or of supporting higher or better land uses than the premining use. Generally, that capability is indicated by land stability, hydrologic balance protection, erosion control, revegetation success, wildlife protection and enhancement, etc. Despite OSM's regulatory definition of "reclamation," OSM and the courts have held that the operator's responsibility is to restore the land's capability for the postmining land use, not to actually implement that postmining land use (with the exception of prime farmland and cropland). See 48 FR 39897; September 1, 1983. Thus, Montana's proposal is consistent with SMCRA and the Federal regulations.

NPRC commented that the proposed new definition of "restore or restoration" (MCA 82–4–203(47)) has been narrowed from SMCRA 515(b)(2), which includes "capability" for various uses; and that "capability" for various uses should be discussed in the permitting process. We note, as discussed in Finding D.4. above, that we do not see a need for this definition. We also note that this definition is essentially the same as the Federal definition of "reclamation" at 30 CFR 701.5, commented upon directly above. We further note that the Montana program requires discussion of land capabilities during the permitting process, at ARM 17.24.304(12); this requirement is not dependent upon this statutory definition of "restoration."

NPRC commented on the proposed shortening of time to review permit revisions, at MCA 82–4–221(3); NPRC has reservations that there will be enough staff, or funding for staff, to make the shorter time work. As noted in Finding C.3. above, SMCRA does not require a specific time allowance. We note that the unaltered portion of this Montana provision provides that the Department may not approve a revision application unless it finds that reclamation in accordance with the Montana program would be accomplished. The proposed amendment does not require that revision applications be automatically approved at the end of the time allowance.

NPRC commented on the requirements for the determination of Probable Hydrologic Consequences (PHC) at MCA 82–4–222(1)(m)(iii), noting that the term "beneficial uses" is employed whereas the Federal regulations at 30 CFR 780.21(f)(3)(iii) employ the term "legitimate uses." NPRC is concerned that this language again indicates a shift from looking at the resource to looking at the postmining use. We believe that Montana has chosen the term "beneficial use" because that term is used elsewhere in Montana law; for example:

> MCA 85–1–101. Policy considerations. It is hereby declared as follows:
>
> (1) The general welfare of the people of Montana, in view of the state's population growth and expanding economy, requires that water resources of the state be put to optimum beneficial use and not wasted.
>
> (2) The public policy of the state is to promote the conservation, development, and beneficial use of the state's water resources to secure maximum economic and social prosperity for its citizens.

Some other states use the term "legitimate use" for the same purpose. We believe that State water authorities, and State regulatory authorities under SMCRA, would protect premining water uses and potential postmining water uses (beyond merely the use for the designated postmining land use) under either term, "legitimate use" or "beneficial use." NPRC also commented that this new set of requirements for the PHC does not include a counterpart for the Federal provision at 30 CFR 780.21(e), which requires information on alternative water sources (if the PHC indicates that water diminution or contamination may occur). We respond that this proposal is a non-exclusive list; the existing statute also does not provide for a counterpart to the cited Federal provision. However, the requirement still exists in Montana's regulations, at ARM 17.24.314(4).

NPRC made a similar comment about the term "beneficial use" at MCA 82–4–222(1)(m)(iv)(E). Our response above applies here; we also note that the corresponding Federal provision at 30 CFR 780.21(f)(3)(iv)(E) allows, but does not require, regulatory authorities to require information on additional impacts.

NPRC has the same concern about the hydrologic monitoring plan at subparagraph (1)(n), that it is limited to protecting water use for the designated postmining land use, not protecting the hydrologic balance in general. We note that Montana's wording is equivalent to that used in 30 CFR 780.21(i) and (j).

NPRC commented relevant to proposed MCA 82–4–222 and 82–4–231 that there does not seem to be a requirement for inclusion in the permit application for consultation with the landowner about the postmining land use (other than seeing a newspaper notice, finding and reviewing the permit application, and filing comments as any member of the public can do). We would agree with NPRC that the newspaper notice process does not meet Federal requirements. And we also do not find in the existing Montana program a general requirement for landowner comments on the proposed postmining land use. However, we note that up until this time, when Montana is proposing to delete existing MCA 82–4–231(1) and 82–3–232(7) and (8), the required postmining land use for all mined lands has been "grazing land for livestock and wildlife, fish and wildlife habitat, or both" (ARM 17.24.762). Apparently because the postmining choices were so limited, Montana and OSM decided that landowner comment was not necessary. Any alternate postmining land use had to be approved as "alternate reclamation." ARM 17.24.824(4) requires consultation with the landowner or land management agency for such alternate uses. We note that under this proposed amendment, at proposed new MCA 82–4–232(7) and (8), if an alternate postmining land use is proposed, landowner (or agency) concurrence is required. We note that Montana will have to promulgate new rules to implement these new statutory sections; OSM will ensure that the implementing rules contain counterparts to 30 CFR 780.23(b)/784.15(b).

NPRC commented on proposed MCA 82–4–231(10)(k), noting that hydrologic balance protection was being limited to protecting postmining land uses. We agree; as noted in Finding C.6. above, we are not approving the language proposed for addition in the introductory subparagraph. NPRC further commented on proposed subparagraph (10)(k)(vii), saying that there is problem with definitions of intermittent stream and perennial stream. We wonder if NPRC was commenting on an earlier version of the legislation; in the official administrative record document provided to OSM, "intermittent stream" and "perennial stream" are defined, and there are not definitions of "drainageways" other

than ephemeral drainageways. We also note that Montana has long had regulatory definitions of "intermittent stream" and "perennial stream" at ARM 17.24.301. NPRC commented further on proposed subparagraph (10)(k)(viii), saying that again, protection of the hydrologic balance is being limited to that needed by the postmining land use. We agree; as discussed in Finding C.7. above, we are not approving the proposed additional language in this subparagraph.

NPRC commented on proposed MCA 82–4–232(1), noting that (1)(a)(i) is much too broad; total discretion would be given to the equipment operator or his boss. Also, the Federal regulations (30 CFR 816.102) allow for only specific variances from AOC under specific conditions, and those Federal limitations are not contained in the proposal. We might agree regarding 30 CFR 816.102; however, OSM's Directive INE–26, as cited in Finding C.9. above, instructs us to allow this much flexibility. Since the concept of AOC is this flexible, Montana's proposal need not be considered a variance from AOC. Additionally, we note that this provision states that "the operator may propose and the Department may approve * * *" such topography. We interpret this to mean postmining topography proposed and approved in the permit application or a revision application. Hence, these matters could not be determined by an equipment operator. NPRC gave a further comment on proposed (1)(a)(ii); however, the comment is confusing because it seems to address an AOC variance for higher or better land uses in steep slope mining, but the cited provision ("MCA 82–4–232(1)(a)(ii)") is only a general performance standard for backfilling and grading. Again, we wonder if NPRC was reviewing an earlier version of the legislation.

NPRC had three comments on proposed new MCA 82–4–232(8). First, NPRC noted that this section would be better located in the permit application section, expressing concern that the landowner might not want this, and that the operator might propose this at the last moment before bond release. In response, we note that the corresponding SMCRA provision (515(b)(2)) is also in the performance standard section. However, we agree with NPRC that the land use must be approved in the permit application, or possibly changed in a subsequent permit revision. [Relevant here and to the last response, we note that permit revisions that change the postmining land use or postmining drainage pattern are considered "major revisions" that must receive public notice under ARM 17.24.301 and 17.24.409.]

Second, NPRC suggested that the expanded definition of "landowner" be moved to the definitions section. We note that localizing the expanded definition here provides the additional persons concurrence rights for alternative postmining land uses, but might not provide them with other rights (for example, bond release notifications). We also respond that SMCRA and the Federal regulations recognize the legal and equitable owners of record of the surface, the holders of record of any leasehold interest, and purchasers of record under a real estate contract (see 30 CFR 778.13(a)). These same parties are listed in the Montana program at ARM 17.24.303(3). To the extent that the parties added here ("a person who has sold the surface estate to the operator with an option to repurchase the surface estate after mining and reclamation are complete") are included under those parties, they receive SMCRA rights and protections; to the extent that these "option holders" are not included in the Federal regulations, this proposal is a right and protection that goes beyond SMCRA minimums, and we cannot require Montana to apply the expanded definition to other parts of the program.

Third, NPRC stated that these standards are less stringent than those at SMCRA "515(3)(B)(i) through (vii) [sic]." We reply that the provisions proposed here are near duplicates of SMCRA 515(b)(2) and 30 CFR 816/817.133. The SMCRA provisions cited by NPRC are apparently those of SMCRA 515(c)(3)(B)(i)–(vii), and refer to the requirements for alternative postmining land uses to be approved with AOC variances for mountaintop removal operations; therefore they are not applicable here.

NPRC comments on proposed MCA 82–4–232(9) that there is a concern that this section is an attempt to evade the need to plant forbs, trees, and shrubs, and asks if this meets the standards for protecting threatened and endangered species. We reply that this provision requires the reclamation plan to incorporate enhancement features; these are defined in the proposal at MCA 82–4–203(55) as including tree and shrub plantings, *etc.* So we do not agree that incorporating such enhancements might lead to grass monocultures. We further reply that this proposal, like SMCRA itself, does not specifically address the required protections for threatened and endangered species; in both cases, these requirements are in the regulations (for Montana, at ARM 17.24.312 and 17.24.751). NPRC further asks whether under this proposal, land that premining had dual uses, could one prior use be dropped postmining? We assume that NPRC is addressing the usual Montana situation where premining use is both grazing and wildlife habitat. We reply that under both the definition and under this section, it is clear that wildlife habitat enhancement features do not make up a postmining use of wildlife habitat, and that enhancements are different than habitat land use and are applied to other land uses. In the premining grazing/wildlife scenario, postmining the land use would also have to be either: (1) A dual use (all of the area could be reclaimed to the dual use, or part could be reclaimed to wildlife and the other part to grazing, which would have to have enhancements); or (2) a higher or better use, which probably would also require wildlife enhancement features.

NPRC also commented on proposed MCA 82–4–233, expressing concern that in promulgating implementing rules, Montana will allow the use of naturalized introduced species as a substitute for native species. We reply, as noted in a response to a comment above, that under the language in this proposal, introduced species are allowed only when "desirable and necessary" to achieve the postmining land use. NPRC further comments that this proposal only requires control of erosion to the extent required by the postmining land use. We agree; as discussed in Finding C.14.a. above, OSM's regulations pertaining to revegetation success standards at 30 CFR 816.116 require the postmining revegetation to be equivalent not to the premining vegetation, but rather equivalent to the natural vegetation of unmined lands of that same land use in the vicinity of the mine. In essence, the "reducing siltation to normal background levels" mentioned in Federal regulation preambles (cited at Finding C.16.b.), means normal background levels for that postmining land use, not background levels of that particular parcel as it was prior to mining. Therefore we are approving the proposal. NPRC further commented on the encouragement at proposed subparagraph (3)(b) that carrying capacity of pastureland and grazing land be "enhanced when practicable." NPRC is concerned that this might re-initiate failed old efforts using introduced species, fertilizer, and irrigation. We note that the use of introduced species, irrigation, and fertilizer is what distinguishes pastureland from grazing land; they would be appropriate for the

first, but we agree they may not be used for the second (grazing land).

NPRC commented on proposed MCA 82–4–235, inquiring how certain success standards fit in with the 10-year bond release period, and how suitable plants and erosion control are determined. We reply that SMCRA also has no such detail; compare SMCRA 515(b)(19) and (20). Such detail is usually in the regulations. Many of these questions are addressed in the Montana regulations at ARM 17.24.711–17.24.733. Generally, the 10-year period (and we note that this is a minimum, not a maximum) starts when the operator completes planting and any supplemental watering or fertilizer needed to get the revegetation going well. If there is a subsequent failure or decline of the revegetation, and the operator must repeat some of that work, the time clock starts over again. There are some exceptions for replanting trees and shrubs; also for some cultivation work on pastureland, which is normal husbandry practice for that land use. NPRC further expressed a concern that the land uses described in subparagraph (1)(c) [wildlife habitat, forestry, dispersed recreation, using trees and shrubs] will never be used as postmining land uses, even if those uses existed premining. We reply that under this proposal, mined land must be restored to conditions capable of supporting those premining land uses, meaning those land uses would have to be selected as postmining land uses, unless a "higher or better" use can be approved.

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–21–03). We received no comments.

Environmental Protection Agency (EPA) Concurrence and Comments

None of the revisions that Montana proposed to make in this amendment pertains to air or water quality standards. Under 30 CFR 732.17(h)(11)(i), OSM requested comments on the amendment from EPA (Administrative Record No. MT–21–04). EPA did not respond to our request.

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

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. We requested comments on Montana's amendment (Administrative Record No. MT–21–03). SHPO responded that it had no comments (Administrative Record No. MT–21–05). No response was received from the ACHP.

V. OSM's Decision

Based on the above findings, we approve, with the following exceptions, Montana's July 29, 2003, amendment.

We do not approve the following provisions or parts of provisions.

1. As discussed in Finding No. D.2., we do not approve MCA 82–4–202(3)(d), concerning legislative policy on the standard for successful reclamation.

2. As discussed in Finding No. D.2., MCA 82–4–202(3)(e), concerning legislative policy on standards for successful reclamation, we do not approve the words "and attainable."

3. As discussed in Finding No. C.1., MCA 82–4–203(4)(c), concerning the definition of approximate original contour, we do not approve the phrase "as necessary to support postmining land uses within the area affected and the adjacent area" in the clause regarding hydrologic balance protection.

4. As discussed in Finding No. C.2., MCA 82–4–203(24), concerning the definition of hydrologic balance, we do not approve the final phrase "as they relate to uses of land and water within the area affected by mining and the adjacent area."

5. As discussed in Finding No. C.6., MCA 82–4–231(10)(k), concerning protection of the hydrologic balance, we do not approve the added phrase "as necessary to support postmining land uses and to prevent material damage to the hydrologic balance in the adjacent area."

6. As discussed in Finding No. C.7., MCA 82–4–231(10)(k)(viii), concerning protection of the hydrologic balance, we do not approve the added phrase "to protect the hydrologic balance as necessary to support postmining land uses within the area affected and to prevent material damage to the hydrologic balance in adjacent areas."

7. As discussed in Finding No. C.16.c., we do not approve MCA 82–4–235(1)(d), concerning diversity in the determination of successful revegetation.

8. As discussed in Finding No. C.16.d., we do not approve in MCA 82–4–235(1)(g) the phrase "are introduced species that have become naturalized."

As discussed in Finding No. D.1., we are taking no action on MCA 82–4–202(1), as the adequacy of this legislation under the Montana Constitution is beyond the power and scope of our review.

As discussed in Finding No. D.9., we are taking no action on MCA 82–4–239 because it does not apply to Montana's regulatory program under SMCRA.

As discussed in Finding C.14.a., we are approving MCA 82–4–233(1) with the proviso that the exemption for "and other constructed features" not be applied until Montana promulgates implementing rules to limit the exemption and OSM has approved those rules.

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 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. Additionally, we have been informed that Montana is in the process of developing implementing regulations for these statutory revisions; making this rule effective immediately will allow Montana to focus that work on the correct provisions. SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. For most of the State provisions addressed, this determination is based on the analysis performed for the counterpart Federal regulation. For the remaining State provisions, this determination is based on the fact that the rule will not have an impact on the use or value of private property and so, does not result in significant costs to the government.

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. Additionally, we note that we provided the proposed amendment to the Crow Tribe for comment, but we did not receive any comments from it.

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 largely 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. For those State provisions submitted that are not based on counterpart Federal regulations, we note that the coal mining industry in Montana consists of a few large companies, and that the industry commenters urged approval of the submittal.

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. For the reasons stated above, 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.

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 was made at the State's initiative, and was not the result of any action mandated by us.

List of Subjects in 30 CFR Part 926

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 23, 2004.

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

* * * * *

Original amendment submission date	Date of final publication	Citation/description
*	*	* * * * *
July 29, 2003	February 16, 2005.	MCA 82–4–202(3)(c); (3)(e) except for the phrase "and attainable"; 82–4–203(2); 82–4–203(4) except at (4)(c) the phrase "as necessary to support postmining land uses within the area affected and the adjacent area"; 82–4–203(13), (16), (17), (20) through (23); (24) except the phrase "as they relate to uses of land and water within the area affected by mining and the adjacent area"; (26), (27), (28), (30), (37), (38), (42) through (44), (46), (47), (50), (55); 82–4–221(3); 82–4–222(1)(m)–(p); 82–4–231(10)(k) except the phrase "as necessary to support postmining land uses and to prevent material damage to the hydrologic balance in the adjacent area"; 82–4– 231(10)(k)(vii); (viii) except the phrase "to protect the hydrologic balance as necessary to support postmining land uses within the area affected and to prevent material damage to the hydrologic balance in adjacent areas"; 82–4–232(1) through (10); 82–4–233; 82–4–234; 82–4–235(1)–(1)(c); 82–4–235(1)(e)–(f); 82–4–235(1)(g) except the phrase "are introduced species that have become naturalized"; 82–4–236; HB 373 Section 11; 82–4–252(2); HB 684 repeal of Sec. 5, Chapter 522, Laws of 2001; also all editorial and codification changes. We are taking no action on: MCA 82–4–202(1); 82–4–239.

[FR Doc. 05–2905 Filed 2–15–05; 8:45 am]
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