

FEDERAL REGISTER: 48 FR 30312 (June 30, 1983)

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 816 and 817

Surface Coal Mining and Reclamation Operations Permanent Regulatory Program;
Stream Buffer Zones and Fish, Wildlife, and Related Environmental Values

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) is adopting final rules for protection of stream buffer zones and fish, wildlife, and related environmental resources. The new rules will revise the requirements relative to stream buffer zones and protection of endangered species; clarify the relationship of the Surface Mining Control and Reclamation Act of 1977 to the Endangered Species Act and the Bald Eagle Protection Act; remove several specific design standards; and allow regulatory authorities and operators greater flexibility in protecting stream buffer zones as well as fish, wildlife, and related environmental values from adverse impacts due to surface coal mining and reclamation operations.

EFFECTIVE DATE: August 1, 1983.

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SUPPLEMENTARY INFORMATION:

- I. Background.
- II. Discussion of Comments and Rules Adopted.
- III. Procedural Matters.

I. BACKGROUND

On March 30, 1982 (*47 FR 13466*), OSM published a notice of proposed rulemaking to revise the rules for protection of stream buffer zones and fish, wildlife, and related environmental resources. The rules were proposed to reduce the burdens of existing rules, change the requirements relating to stream buffer zones, wetlands protection, and endangered species protection, and to clarify the relationship between the Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. 1201* et seq. ("the SMCRA" or "the Act"), and the Bald Eagle Protection Act.

Rules governing the hydrologic balance of stream buffer zones were initially published as proposed rules for public comment on September 18, 1978 (*43 FR 41888, 41908*) and were published as final rules on March 13, 1979 (*44 FR 15403, 15430*). Rules for protection of fish, wildlife, and related environmental values were initially published as rules proposed for public comment on September 18, 1978 (*43 FR 41894, 41914*) and were published as final rules on March 13, 1979 (*44 FR 15410, 15437*).

Throughout the development of these final rules, OSM solicited public comments and recommendations. Following the publication of proposed rules in the Federal Register (*47 FR 13466*, March 30, 1982), OSM made provisions to hold public hearings and to schedule public meetings upon request. OSM scheduled public hearings in the Department of Interior Auditorium, Washington, D.C., and in the 2d Floor Conference Room, Brooks Tower, Denver, Colorado, on April 27, 1982. However, no persons requested a hearing or meeting, and therefore none was held.

The Federal Register notice provided for the comment period to close on April 29, 1982. To provide the public with additional opportunity to participate in the rulemaking process, the comment period was reopened on May 13, 1982 (*47 FR 20361*), and extended until August 25, 1982. The comment period was again reopened, on September 7, 1982 (*47 FR 39201*), and remained open until September 10, 1982.

II. DISCUSSION OF COMMENTS AND RULES ADOPTED

OSM received over 175 comments from operators, representatives of industry, environmental groups, State regulatory authorities, and Federal and State fish and wildlife agencies. OSM has reviewed each comment carefully and has considered the commenters' suggestions and remarks in writing these final rules. Since the rules for underground mining activities are identical to those for surface mining activities, the following discussion applies to both Parts 816 and 817.

A. STREAM BUFFER ZONES

GENERAL

Buffer zones are used to protect streams from sedimentation and from gross disturbance of stream channels caused by surface coal mining and reclamation operations. Final Section 816.57 recognizes that stream buffer zones are an effective method, in conjunction with sedimentation ponds and other measures, to prevent excessive sedimentation of streams by runoff from disturbed surface areas. (Tennessee Valley Authority, 1971; Karr and Schlosser, 1978; Grim and Hill, 1974, p. 102 and Appendix D, p. 255; Hardaway and Kimball, 1976, pp. 27-29; Weigle, 1965; U.S. Environmental Protection Agency, 1976, vol. 1, pp. 7, 14, 19, 30, 32, 61-62.) The new rules also recognize that intermittent and perennial streams generally have environmental-resource values worthy of protection under Section 515(b)(24) of the Act. Several commenters agreed with the proposed changes in the rules and believed that OSM's suggested revisions were necessary and cost effective and that they clarified the rules. Commenters strongly endorsed the requirement for stream buffer zones along all perennial and intermittent streams, regardless of a stream's biological communities.

SECTION 816.57(a)

As proposed, Section 816.57(a) provided that no land within 100 feet of a perennial or an intermittent stream could be disturbed by surface mining activities unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream. After considering remarks from commenters and for the reasons discussed below, OSM has adopted the proposed rule as final Section 816.57(a).

Several commenters objected to OSM's proposal to include stream buffer requirements and urged that proposed Section 816.57 be deleted from OSM's final rules. These commenters argued that the concept of stream buffer zones was not specifically supported by the Act and that hydrologic balance and related environmental values were adequately protected by numerous other rules. One commenter contended that Congress would have addressed the issue of buffer zones directly in the Act if it had intended to impose such a drastic requirement on operators. This commenter also claimed that the requirement of buffer zones was an onerous and unnecessary burden that could have serious adverse effects on many operations and preclude the mining of significant reserves.

OSM rejects the position that there is no need for a section dealing with stream buffer zones. Final Section 816.57 implements Sections 515(b)(10) and 515(b)(24) of the Act and is also authorized by Sections 102, 201, 501, 503, 504, 506, 507, 508, 510, and 517 of the Act. Streams are crucial conduits of sediment pollution from mine areas and are often valuable fish and biological habitats. Because of the significance of streams, OSM will specify how streams are to be treated and protected. Section 816.57 establishes the kinds of streams that will trigger direct protection measures. Proposed Section 816.43 would describe how stream channels and surface water must be handled when diversions are justified (see the preferred alternative for Section 816.43 in Volume III of OSM's Final Environmental Impact Statement OSM EIS-1: Supplement (EIS)).

One commenter recommended that the word "significantly" be added before the word "disturbed" in proposed Section 816.57(a) to allow activities such as minimal clearing for drill holes and construction of sedimentation-pond discharge structures to take place. The commenter believed that such activities within the buffer zone would not necessarily alter stream-channel configuration or water quality.

OSM has rejected the change proposed by the commenter. OSM recognizes that some surface mining activities can be conducted within 100 feet of a perennial or an intermittent stream without causing significant adverse impacts on the hydrologic balance and related environmental values. The final rule provides the regulatory authority the flexibility to allow surface mining activities to take place within the 100-foot buffer zone if such activities are conducted in an

environmentally acceptable manner. Under final Section 816.57(a), the use of erosion and drainage-control measures near the stream will be allowed if they are approved by the regulatory authority in accordance with the specified requirements.

Previous Section 816.57(a) required that no land within 100 feet of a perennial stream or a stream with a biological community be disturbed, except where the regulatory authority made certain determinations entitling the operator to an exemption under paragraph (c) of the section. Previous Section 816.57(c) stated that a stream had a biological community if it had an assemblage of at least two species of arthropods or molluscan animals which are adapted to, or are dependent on, flowing water, which reproduce in the stream, and which are longer than 2 millimeters at some stage in their lives. Several commenters supported OSM's proposal to remove reference to streams with a biological community and to add reference to intermittent stream on the grounds that the inclusion of intermittent streams would provide a more appropriate and less confusing description of the streams to be protected by buffer zones, as well as eliminate from consideration insignificant streams containing biological communities. Other commenters urged OSM to continue to require a buffer zone for any stream with a biological community. These commenters failed to appreciate how difficult it was to apply the biological-community concept under previous Section 816.57(a). They argued that the proposed intermittent-stream standard was logically unrelated to the values which the Act sought to protect and that the proposed rule would exclude from coverage many small streams with biological communities worthy of protection.

OMS has rejected the suggestion that it continue to require protection for any stream with a biological community. The final rule will require buffer zones within 100 feet of any intermittent or perennial stream regardless of the existence of a biological community, unless the regulatory authority grants the operator an exemption. The biological-community standard was confusing to apply since there are areas with ephemeral surface waters of little biological or hydrologic significance which, at some time of the year, contain a biological community as defined by previous Section 816.57(c). Thus, much confusion arose when operators attempted to apply the previous rule's standards to springs, seeps, ponding areas, and ephemeral streams. While some small biological communities which contribute to the overall production of downstream ecosystems will be excluded from special buffer-zone protection under final Section 816.57(a), the purposes of Section 515(b)(24) of the Act will best be achieved by providing a buffer zone for those streams with more significant environmental-resource values. Those streams not covered by final Section 816.57 will still be subject to the general requirements for protection of water quality and hydrologic balance under the preferred alternative of Section 816.41 (see volume III of EIS). It is impossible to conduct surface mining without disturbing a number of minor natural streams, including some which contain biota. For this reason, surface coal mining operations will be permissible as long as environmental protection will be afforded to those streams with more significant environmental-resource value.

Several commenters feared that the proposed rule would require buffer zones for insignificant streams, such as manmade drainage ditches and small headwater streams. One commenter recommended that the regulatory authority be allowed to determine what would constitute an intermittent stream according to a minimum drainage area. Two commenters suggested that the regulatory authority be allowed to set a rate of flow figure for streams or, if the regulatory authority chose not to set such a figure, that it be required to use the U.S. Army Corps of Engineers' limit of 5 cubic feet per second as specified by Section 404 of the Clean Water Act. A commenter also suggested that the regulatory authority be required to determine whether the intermittent stream is significant for purposes of protection.

OSM has rejected these suggestions and has retained the definition of intermittent stream provided in 30 CFR 701.5 to avoid problems of interpretation. This definition, coupled with final Section 816.57, will allow the regulatory authority the flexibility to determine the significance of streams and the appropriate measures for their protection. The preamble to Section 701.5 (*44 FR 14932*, March 13, 1979) further explains the rationale for OSM's adoption of its definition for the term.

One commenter thought that rills, gullies, drains, and access roads were intermittent streams for which buffer zones would be required under the proposed rule. This commenter feared that no waivers by the regulatory authority would be allowed for construction of head-of-hollow and valley fills and haul roads and for mountaintop-removal projects. Under Section 701.5, an intermittent stream is defined to mean a stream or reach of a stream that drains a watershed of at least 1 square mile or that is below the local water table for at least some part of the year and obtains its flow from both surface runoff and ground-water discharge. Thus, by definition, rills, gullies, drains, and access roads will be excluded from the rules for intermittent streams under final Section 816.57.

One commenter thought the proposed rule needed clarification and justification since the definition of intermittent stream in Section 701.5 is based solely on hydrologic factors and includes no consideration of a stream's importance for biological or wildlife resources. Asserting that the proposed rule was intended to protect intermittent streams of biological importance, the commenter suggested that the rule be revised to take into account whether or not an intermittent stream has significant enough biological value to warrant protection. Although final Section 816.57 is intended to protect significant biological values in streams, the primary objective of the rule is to provide protection for the hydrologic balance and related environmental values of perennial and intermittent streams. A definition of intermittent streams based on hydrologic considerations helps avoid problems of practical application and will aid in uniform interpretation of the rule.

Commenters recommended that the proposed rule be revised to give the regulatory authority discretion to determine the width of a buffer zone on a site-specific basis. Because some intermittent-stream valleys in Appalachia are less than 100 feet wide at the bottom, one commenter thought it would be impossible to maintain the 100-foot buffer zone even if a diversion were constructed. One commenter added that designation of 100-foot buffer zones would be difficult in areas where the stream meanders or in areas with seasonal changes in channel configuration. Accordingly, he suggested that the 100-foot buffer zone be retained as a general guideline, but urged that flexibility be built into the rule to allow for a case-by-case evaluation of the width of the buffer zone necessary to protect "associated habitat values."

The 100-foot limit is used to protect streams from sedimentation and help preserve riparian vegetation and aquatic habitats. Since the 100-foot zone provides a simple and valuable standard for enforcement purposes, OSM has chosen not to change the general rule. However, OSM recognizes that site-specific variations in the 100-foot standard should be available whenever there is an objective basis for expanding or contracting the width of the buffer zone. Final Section 816.57(a) allows the width of the buffer zone to be modified pursuant to the findings of the regulatory authority.

SECTIONS 816.57(a) (1) and (2)

Section 816.57(a), as proposed, provided that the regulatory authority may authorize surface mining activities within 100 feet of a perennial or an intermittent stream only upon finding that: (1) Any temporary or permanent stream-channel diversion will comply with Section 816.44, and (2) such activities will not adversely affect the water quantity and quality of the stream as determined by State and Federal water quality standards. OSM has adopted the proposed rule in final Section 816.57(a) with several changes. First, the cross reference to Section 816.44 in the proposed rule has been changed to Section 816.43 in final Section 816.57(a)(2). If the preferred alternative of Section 816.43 is not adopted (see volume III of the EIS), a technical amendment will be issued to incorporate the correct reference. Second, the phrase "as determined by State and Federal water quality standards" in proposed Section 816.57(a)(2), has been modified and replaced with the requirement that surface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream in final Section 816.57(a)(1). Third, a revision has been made to clarify that the provisions of Section 816.43 relating to stream-channel diversions apply when such diversions occur, but that there does not have to be a diversion for mining to occur inside the buffer zone. In addition, the order of the two paragraphs has been reversed so that proposed paragraph (a)(1) is final paragraph (a)(2) and proposed paragraph (a)(2) is final paragraph (a)(1).

A commenter stated that field sampling of premining aquatic habitats would be necessary to restore aquatic habitats that approximate premining stream-channel characteristics as required by previous Section 816.44. Previous Section 816.44 would be superseded and replaced by a new Section 816.43 (referenced in the preceding paragraph) if the preferred alternative is adopted. However, OSM agrees that in order for an applicant to demonstrate that a proposed temporary or permanent stream-channel diversion will comply with proposed Sections 816.43 and 816.57, sufficient premining field data and plans are necessary to show how important characteristics of stream channels will be restored.

Several commenters asserted that "and," used as a connective between paragraphs (a)(1) and (a)(2) of proposed Section 816.57, implied that operators were required to construct stream-channel diversions to obtain waivers of the general buffer-zone requirements. They requested that the qualifying word "only" be deleted and that the connective "and" be replaced by the word "or" to allow regulatory authorities to consider circumstances on a State- or site-specific basis in making the requisite buffer-zone determinations.

The words "only" and "and" have been retained. However, the second aspect of the commenters' suggestion has been accepted in part. As indicated by another commenter, some minor disturbances such as minimal clearing for drill holes or construction of hydrologic-discharge structures may be appropriate within the 100-foot buffer zone. However, such activities may not be significant enough to justify a diversion of the stream channel. The proposed rule was not intended to prohibit such activities unless the stream channel was going to be diverted, but merely to require that such disturbance be specifically authorized by the regulatory authority on the basis of a finding that water quantity and quality would not be adversely affected. The final rule more accurately reflects this intention by applying the channel-diversion requirements of proposed Section 816.43 only if there will be a stream-channel diversion.

A commenter noted that proposed Section 816.57(a)(1) would not require restoration of the original stream channel affected by mining, but, instead, would require restoration of important stream-channel characteristics (for example, meanders, pool-riffle ratio, gradients, and riparian vegetation) as specified in proposed Section 816.43. The commenter thought this would provide flexibility to the industry in satisfying the requirements of previous Section 816.44(d). OSM concurs with the commenter's remarks.

One commenter suggested that proposed Section 816.57(a) be revised to include additional language requiring a finding that the native community would be kept functional within the 100-foot buffer zone. A commenter also suggested that Section 816.57(a)(1) be revised to contain an explicit provision that disturbed areas in the buffer zone be revegetated with a community of native plants to function as riparian areas.

OSM has rejected the commenter's first suggestion. The Act does not prohibit the disturbance of the native community. Rather, Section 515(b)(19) of the Act requires the reestablishment of vegetation upon completion of mining. The second suggestion has also been rejected as unnecessary since requirements for revegetation are already specified in Section 816.11 and since Section 816.97(g) prescribes additional vegetation requirements for postmining enhancement of fish and wildlife habitat. Also, proposed Section 816.43 requires restoration or approximation of riparian vegetation after stream-channel diversions.

Two commenters thought that the preamble to the proposed rule suggested that restored stream channels had to comply only with requirements for permanent diversions in previous Section 816.44(d), while proposed Section 816.57 encompassed all of previous Section 816.44. These commenters suggested that the proposed rule should also require an operator to reproduce the average stream gradient, channel configuration, meandering, roughness, vegetative habitat, and bank stability in order to minimize disturbances to the sediment-transport process and to restore premining stream habitats.

The reference in the preamble to the proposed rule was intended only to point out that previous Section 816.44(d) specified those characteristics of stream channels which mine operators were required to restore, not to suggest that operators were required to comply only with those criteria. The requirements for operators to restore characteristics of stream channels have been generally carried forward in proposed Section 816.43. However, final Section 816.57(a)(2) will allow the regulatory authority to authorize disturbances within the 100-foot buffer zone only if any stream-channel diversion will comply with proposed Section 816.43. Thus, operators will be required to comply with all the requirements for permanent or temporary diversions provided in proposed Section 816.43, not merely with the rule's requirements for restoration of the important features of altered streams.

One commenter alleged that destruction of aquatic inhabitants would be increased and that natural recovery of altered streams would be delayed because operators would no longer be required to reconstruct the original stream channel under proposed Section 816.57(a)(1). Alteration of streams may have adverse aquatic and ecological impacts on both diverted stream reaches and other downstream areas with which they merge. However, final Section 816.57(a) will minimize these impacts since mining within the 100-foot stream buffer zone will be allowed only in situations where the regulatory authority determines that any proposed diversion will comply with proposed Section 816.43 and that water quantity and quality and related environmental resources will not be adversely affected by these mining activities. Thus, these adverse effects will be short term and natural recovery of the diverted stream will be enhanced.

One commenter felt the requirement for restoration or approximation of the original stream channel would violate a property-owner's rights to achieve a landform compatible with the intended use. He claimed that proposed Section 816.57(a)(1) would eliminate the use of valley fills and require operators to remove culverts and road fills which were properly designed to cross streams although these restrictions were unauthorized by the Act.

Final Section 816.57(a) provides the regulatory authority sufficient flexibility to allow stream disturbances, including permanent crossings, if adequate environmental protection measures will be adopted. Additional requirements pertaining to culverts and other features of roads are specified in Sections 816.150 and 816.151. (See volume III of the EIS.)

One commenter argued that temporary stream diversions should not have to meet the same standards as permanent diversions, since it frequently may not be possible to stabilize the stream banks and surrounding area for a short period of time in a cost-effective manner to ensure that applicable water-quality standards will be met.

OSM has rejected the commenter's argument as inconsistent with the Act's requirements for operators to minimize disturbances to the prevailing hydrologic balance and to the quality and quantity of water. In particular, Section 515(b)(10)(i) of the Act provides that surface coal mining operations shall be conducted so as to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow or runoff outside the permit area. Proposed Section 816.43 would require that any diversion, whether permanent or temporary, remain stable and prevent the conveyance of suspended solids outside the permit area in accordance with Section 515(b)(10) of the Act. Because damage to the prevailing hydrologic balance can result from permanent or temporary alterations of streams, new Section 816.57(a)(2) will require all proposed diversions of perennial or intermittent streams to comply with the criteria specified in proposed Section 816.43.

One commenter thought that the period for comment on deletion of the requirement for restoration of the original stream channel under proposed Section 816.57(a)(1) should have been extended until the time that revisions of existing requirements on channel diversions in Section 816.44 were published. Changes in Section 816.44 were explained in the notice of proposed rulemaking and published on June 25, 1982 (*47 FR 27712*). Although the notice of proposed rulemaking discussing revision of rules on stream buffer zones was published on March 30, 1982 (*47 FR 13466*), the period for comments on both proposed rulemakings was extended until September 10, 1982 (*47 FR 39201*). In view of these facts, commenters were provided sufficient time in which to analyze the interaction of these provisions.

Proposed Section 816.57(a)(2) provided that the regulatory authority may authorize surface mining activities within 100 feet of a perennial or an intermittent stream upon finding that such activities will not adversely affect the water quantity and quality of the stream as determined by State and Federal water quality standards. In response to the remarks of commenters and for reasons discussed below, OSM has modified the phrase "as determined by State and Federal water quality standards" in final Section 816.57(a)(1). Under the final rule, the regulatory authority may authorize mining within the stream buffer zone upon finding that such activities will not adversely affect the water quantity and quality and related environmental resources of the stream.

Several commenters recommended deletion or clarification of the phrase "as determined by State and Federal water quality standards" in proposed Section 816.57(a)(2). Two commenters asked whether the proposed rule would require the operator to "clean up" a stream flowing into the permit area so that it would meet applicable State and Federal water-quality standards even though the operation did not adversely affect the stream's water quantity and quality. A commenter questioned whether the "standards" reference in the proposed rule pertained to drinking-water standards, effluent limitations for the coal-mine point-source category (NPDES), or some other water-quality standards. Several commenters contended that State and Federal water-quality standards would not provide sufficient protection for all streams because standards for smaller streams might be nonexistent, some State standards might not cover various salts and heavy metals released by mining activities, or because quality standards would not minimize disturbance of the quantity of stream water as required by Section 515(b)(10) of the Act. Commenters also argued that water-quality standards are inadequate to ensure that aquatic habitats would be restored to approximate their premining conditions since the standards failed to consider turbidity and streamflow during periods of drought. One commenter claimed that the proposed rule would emasculate the requirements in SECTIONS 515(b)(10)(B)(i) and 515(b)(24) of the Act by allowing the regulatory authority to decrease the width of the 100-foot buffer zone according to the impact on streams under State and Federal water quantity and quality standards. The commenter alleged that reductions in the width of the buffer zone should not be allowed unless the quantity and quality of water in a stream would not be affected.

Under proposed Section 816.41, operators will be required to protect the prevailing hydrologic balance and comply with all applicable non-Act requirements for water-quality protection. To eliminate confusion, OSM has modified the phrase "as determined by State and Federal water quality standards" in final Section 816.57(a)(1) to require mining activities not to cause or contribute to the violation of applicable State or Federal water quality standards and not to

adversely affect water quantity and quality or other environmental resources of the stream. In determining whether an operator should be granted an exemption from the buffer-zone requirement, the final rule requires the regulatory authority to consider whether there will be an adverse effect on water quality and whether mining will inhibit the attainment of applicable water-quality standards.

One commenter thought that OSM should delete the word "quantity" from proposed Section 816.57(a)(2) because water quantity is not determined by State and Federal water-quality standards. The commenter added that water quantity is adequately covered by Section 816.54, but that, in some situations, it would be desirable to separate water flow into several drainage patterns to achieve the most beneficial postmining land use. Another commenter recommended that the quantity aspects of the proposed rule be explored since quantity in water-quality standards usually relates to mixing and dilution capabilities.

OSM recognizes that State and Federal water-quality standards ordinarily do not regulate water quantity. However, instead of deleting the word "quantity" in the final rule, OSM has separated the "quantity" standard from the applicability of State and Federal water quality standards. Under final Section 816.57(a)(1), the regulatory authority will consider impacts on streamflow in making the requisite buffer-zone determination.

The phrase "and related environmental resources" has been added to the language of the final rule to indicate that regulatory authorities will be allowed to consider factors other than water quantity and quality in making buffer-zone determinations. This revision will provide a more accurate reflection of the objectives of Sections 515(b)(10) and 515(b)(24) of the Act.

SECTION 816.57(b)

Section 816.57(b), as proposed, would have provided that the operator must designate the area not be disturbed as a buffer zone and must mark it as specified in Section 816.11. Two commenters contended that the language of the proposed rule went beyond the intent of the Act since it could be interpreted as granting the operator a prerogative to define the limits of the buffer zone. These commenters recommended that the rule be reworded to make it clear that the regulatory authority will have sole responsibility for delineating buffer-zone boundaries.

In final Section 816.57(b), OSM has adopted the revised language suggested by the commenters. Accordingly, the final rule provides that the area not to be disturbed must be designated as a buffer zone, and, further, that the operator must mark it as specified in Section 816.11.

SECTION 817.57

Final Section 817.57 is essentially the same as final Section 816.57, except that this rule applies the stream buffer-zone requirements to underground mining activities. Interested persons should consult the preamble to final Section 816.57 for a discussion of comments and responses relative to final Section 817.57. In addition to the authorities cited in the preamble to Section 816.57, this rule is also based on Section 516 of the Act.

B. PROTECTION OF FISH, WILDLIFE, AND RELATED ENVIRONMENTAL VALUES

GENERAL

OSM received several general comments on proposed Section 816.97. A commenter objected to the proposed rules, alleging that they failed to provide for development of natural resources in a responsible manner that would guard fish and wildlife from the adverse impacts of coal mining for the benefit of present and future generations. OSM disagrees with this comment. Final Section 816.97 will ensure that harm to fish and wildlife from surface coal mining and reclamation operations will be minimized to the extent possible by requiring operators to use the best technology currently available to protect these resources.

Other commenters favored the proposed rules. One commenter agreed with OSM's proposal to delete certain design requirements specified in previous Section 816.97 since they applied only to coal regions and had limited effectiveness as national standards for fish and wildlife protection. A commenter thought the proposal clarified the operator's obligation to protect fish and wildlife from the adverse impacts of mining by eliminating unnecessary language from the rule.

Another commenter approved of OSM's efforts to allow regulatory authorities to consider conditions of relevance to fish and wildlife protection, which vary according to the locale of the mine site, but added that some of the proposed changes "seemed reactionary" to district court decisions, which were subject to reversal on appeal and had no "beneficial impact" on wildlife.

Proposed Section 816.97 was not simply a reaction to district court decisions. Section 816.97 is intended to satisfy OSM's statutory responsibilities under the Surface Mining Control and Reclamation Act, *30 U.S.C. 1201* et seq.; the Endangered Species Act, *16 U.S.C. 1531* et seq.; and the Bald Eagle Protection Act, *16 U.S.C. 688* et seq.

Representatives of the coal industry, the States of Virginia and Illinois, and certain environmental groups challenged OSM's previous permitting rules as legally inconsistent with the Act, *In re: Permanent Surface Mining Regulation Litigation*, No. 79-1144 (D.D.C., filed March 10, 1979). In that matter, the plaintiffs argued that there was no statutory authorization in Sections 507, 508, or 515(b)(24) of the Act to require fish and wildlife information in the permit application or the reclamation plan. Since Sections 507 and 508 of the Act gave the regulatory authority power to decide on other necessary requirements, plaintiffs contended that the challenged rules usurped the role Congress had delegated to the States by creating a uniform system of permit-data requirements, which left no flexibility for consideration of State-specific conditions.

The district court remanded 30 CFR 779.20 and 780.16, which provided permit requirements for fish and wildlife information. See *In re: Permanent Surface Mining Regulation Litigation*, No. 79-1144, slip op. at 39 (D.D.C. February 26, 1980). OSM subsequently suspended the remanded rules (*45 FR 51547*, August 4, 1980). Informational requirements on fish and wildlife for permit applications are therefore beyond the scope of this rulemaking.

SECTION 816.97(a)

Section 816.97(a), as proposed, provided that the operator must, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of fish, wildlife, and related environmental values and must achieve enhancement of such resources where practicable. In response to remarks from commenters and for reasons discussed below, OSM has adopted the proposed rule in final Section 816.97(a). Commenters urged that the phrase "[t]he operator" in the proposed rule be replaced with the phrase "[a]ny person," which was used in previous Section 816.97(a). They argued that OSM's revision would constrict the scope of protection afforded by Section 515(b)(24) of the Act, since the language of proposed Section 816.97(a) would no longer require all non-operators on permitted mine sites to minimize disturbance on fish and wildlife or impose liability on operators for damage to fish and wildlife as a result of illegal (nonpermitted) mining.

This suggestion has been rejected. Under Section 515(b)(24) of the Act, all surface coal mining and reclamation operations are required to minimize disturbances on fish and wildlife, and related environmental resources to the extent possible by use of the best technology currently available. Final Section 816.97(a) makes the operator responsible for minimizing disturbances on fish, wildlife, and related environmental resources in the permit area. The operator is reasonable for the actions of all persons engaged in the surface coal mining and reclamation operation and for ensuring that the operation is in compliance with the requirements of the Act. In addition, these responsibilities do not supersede those imposed by any other statute or regulation.

Because Section 701.5 treats as a "permittee" any person required by the Act or 30 CFR Chapter VII to have a mining permit, an operator mining without a permit is subject to civil liability for violation of the Act's requirements under Section 518. Persons conducting surface coal mining operations without a permit are also subject to the immediate issuance of a cessation order under 30 CFR 843.11(a)(2). (See *47 FR 16558*, April 29, 1982.) Accordingly, the duty to minimize the adverse impacts of mining on fish and wildlife under final Section 816.97(a) will apply to illegal operators as well as to operators having valid permits.

Commenters found the language of proposed Section 816.97(a) unclear regarding who would make the decision as to what would constitute an acceptable minimization of harm from mining on fish and wildlife. One commenter thought that a handbook of guidelines for fish and wildlife protection, prepared by OSM in conjunction with the U.S. Fish and Wildlife Service (USFWS), should be required to clarify these deficiencies.

Under final Section 816.97(a), the regulatory authority will determine what will constitute an acceptable minimization of harm. As announced in the notice of the proposed rulemaking (47 FR 13468, March 30, 1982), OSM plans to work with USFWS to develop manuals to assist operators in preparing site-specific fish and wildlife protection plans. However, the suggestion that operators be required to comply with the guidelines in OSM's proposed manuals has been rejected. The commenter's suggested requirement would discourage operators from implementing innovative conservation techniques. Furthermore, specific manuals provide only suggestions on appropriate techniques; they are not intended to be used as regulatory requirements. Final Section 816.97(a) will allow an operator to consult any technical authorities on conservation methods to assure their compliance with the statutory requirement for use of the best technology currently available.

SECTION 816.97(b)

Proposed Section 816.97(b) prohibited any surface mining operations likely to jeopardize the continued existence of endangered or threatened species listed by the Secretary or to result in the destruction or adverse modification of designated critical habitats of such species. Under the proposed rule, the operator was required to report promptly to the regulatory authority any endangered or threatened species within the permit area of which he or she became aware. The proposed rule also required the regulatory authority to consult with appropriate State and Federal fish and wildlife agencies upon such notification from an operator and authorized the regulatory authority to identify whether, and under what circumstances, the operator might proceed with mining only after the mandatory consultation. OSM has adopted the proposed rule in final Section 816.97(b) with minor revisions.

Commenters questioned the purpose and source of authority for proposed Section 816.97(b). One commenter claimed that neither the SMCRA nor the Endangered Species Act (ESA) authorized OSM's proposed rule. Another commenter, viewing proposed Section 816.97(b) as a means for OSM to ensure enforcement of the ESA's provisions by States with approved Title V programs, argued that such a provision would be unnecessary since Section 11 of the ESA granted OSM enforcement power under these circumstances.

Final Section 816.97(b), as proposed and adopted, is intended to satisfy OSM's responsibilities under the ESA and to provide protection for endangered or threatened species listed by the Secretary of the Interior and for critical habitats of such species after appropriate consultation with the affected States.

OSM has authority under the ESA to ensure that approved State programs contain appropriate requirements to avoid jeopardy to listed species and to prevent destruction or adverse modification of their critical habitats. Final Section 816.97(b) is authorized by Section 7(a) of the ESA, which requires non-ESA programs to be administered and used to further the ESA's purposes. The rule has been revised to indicate specific reliance on the provisions of the ESA. Other sources of authority for this rule are Sections 515(b)(24), 515(b)(10), 515(b)(17), and 201 of the Act.

A commenter recommended that proposed Section 816.97(b) be revised to include requirements for species "proposed" for listing, as provided in the 1979 amendments to the ESA. The requirements for species proposed for listing have not been incorporated into the final rule. Final Section 816.97(b) provides protection only for endangered or threatened species listed by the Secretary, as was proposed, and for critical habitats of such species designated pursuant to Section 7(a) of the ESA.

One commenter objected to the absolute prohibition of surface mining in proposed Section 816.97(b) and contended that OSM's responsibilities under the ESA could be satisfied by requiring that surface mining operations not be conducted "in such a manner as to jeopardize the continued existence of endangered or threatened species listed by the Secretary or result in the destruction or adverse modification of designated critical habitats of such species" [emphasis added].

Under the commenter's alternative language, mining operations which could affect endangered species or critical habitats would be allowed, but they would have to be conducted so as to avoid destruction of such species or adverse modification of their critical habitats. OSM agrees with the commenter and has revised Section 816.97(b) to prohibit only those operations which would jeopardize endangered or threatened species, by substituting the word "will" for the words "is likely to." Final Section 816.97(b) will prohibit operators from conducting surface mining activities which will jeopardize the existence of endangered species or destroy or adversely modify their critical habitats in violation of the ESA. The final rule is consistent with 30 CFR Section 786.19(o) of the permitting rules, under which approval of a permit application is contingent on a finding by the regulatory authority that the proposed operation would not affect the

existence of listed species or result in destruction of their critical habitats, as determined by the ESA. (See also the preferred alternative for 30 CFR 773.15(c)(10) in volume III of the EIS.)

Previous Section 816.97(b) required that operators report promptly to the regulatory authority sightings on the permit area of any plant or animal listed by the State as threatened or endangered. One commenter supported the proposal to delete this provision from OSM's final rules and agreed that the reporting requirement under previous Section 816.97(b) would be provided in State programs approved under Title V of the Act.

Several commenters took the position that OSM's final rules should retain a specific requirement for reporting species listed by the State in order to promote identification of critical habitats on mine sites and to achieve the objectives expressed in Section 515(b)(24) of the Act. Commenters alleged that the proposed rule would leave considerations regarding the biological status of species listed by the State to the convenience of mine operators. They argued that the reference to State-listed species in previous Section 816.97(b) should be added to the language of OSM's proposed rule to provide endangered species listed by the State the same degree of protection accorded endangered species under Federal law. One commenter believed that operators should be required to continue to report sightings of endangered species listed by the State, since the regulatory authority's responsibility for consultation on the reported sightings under proposed Section 816.97(b) would not involve the same full-scale consultation required of Federal agencies by Section 7(a) of the ESA.

A group of commenters claimed that the absence of explicit reference to State listed species in proposed Section 816.97(b) would preclude regulatory authorities from requiring operators to report the presence of such species on mine sites in any jurisdiction where enactment of provisions more stringent than those contained in the Federal statute or rules is prohibited by State law. Another commenter feared that OSM would lack authority to order the cessation of mining operations conducted pursuant to a Federal program for a State if an express requirement for reporting species listed by the State were omitted from OSM's final rule.

OSM has rejected the commenters' suggestions and has eliminated express reference to State-listed species from final Section 816.97(b). OSM concedes that the consultation required of regulatory authorities under this final rule is not the same formal consultation process required of Federal agencies by the ESA. However, endangered or threatened species listed by the State are not necessarily entitled to protection under Federal law. Additional protection may be required for State-listed species under State law according to Section 505 of the Act.

Previously Section 816.97(b) required operators to report promptly to the regulatory authority the presence in the permit area of any critical habitat of a threatened or endangered species listed by the Secretary. Several commenters urged OSM to retain this requirement in the final rule to ensure identification and verification of critical habitats known to be within the permit area. One commenter contended that a specific duty to report critical habitats coupled with the responsibility to report sightings, would promote identification and verification of critical habitats not known to exist in the permit area before commencement of mining operations. Another commenter, who supported the proposed deletion of the previous requirement, agreed that critical habitats on mine sites would be adequately identified and reported to the regulatory authority during the permitting process pursuant to Section 786.19(o).

OSM has not reinstated the requirement for reporting critical habitats in new Section 816.97(b). Under Section 786.19(o), approval of an operator's mine permit application is conditional on a determination by the regulatory authority that the proposed operation would not have an adverse effect on critical habitats protected by the ESA. Thus, critical habitats on mine sites will be considered pursuant to Section 786.19(o) before a proposed operation is authorized by the regulatory authority. Critical habitats are designated by the Secretary; therefore, they would not be "discovered" on the mine site after the commencement of mining operations.

One commenter wondered whether the reporting requirement in proposed Section 817.97(b) applied only to species known to reside on the mine site or whether it also included sightings of endangered or threatened birds along migration routes or flyways in the permit area. The commenter recommended that the final rule require an operator to report such sightings only if the species discovered on the permit area is known to reside there or in a similar habitat.

Final Section 816.97(b), as proposed and adopted, requires an operator to report endangered or threatened species within the permit area of which the operator becomes aware. It does not require operators to report species merely

sighted at a distance as they fly near the permit area. However, endangered or threatened species found in the permit area must be reported.

One commenter recommended that the reporting and consultation requirements be eliminated from the rule since these procedures are adequately provided for by the ESA. Citing the attraction of eagles and other raptors to silos as evidence that some mining facilities have no adverse impacts on threatened or endangered species, the commenter characterized the reporting requirement in proposed Section 816.97(b) as inconsistent with the ESA and as onerous to operators.

OSM has rejected the commenter's recommendation. The reporting and consultation duties in final Section 816.97(b) are consistent with Section 7(a) of the ESA, which obligates Federal agencies to use their authority in furtherance of the ESA's objectives.

One commenter advocated that the words "consult" and "consultation" in the proposed rule be changed to "coordinate" and "coordination" to make it clear that the regulatory authority's responsibility for consultation under OSM's rule would not be the same consultation required of Federal agencies by Section 7(a) of the ESA. OSM acknowledges that the consultation required under final Section 816.97(b) will not be the formal consultation provided for in Section 7(a) of the ESA when a Federal agency takes an action which may harm an endangered species. While "coordination" refers to the process of harmonizing and adjusting a set of interrelated requirements, "consultation" denotes the process of conferring with other persons for their advice or opinions in order to reach a decision on a particular matter. OSM continues to believe that the word "consultation" as used in final Section 816.97(b) is appropriate.

A commenter recommended that the phrase "continuing to operate while taking proper precautions to protect such species" be added to the end of the second sentence and that the words "whether and" be deleted from the last sentence of proposed Section 816.97(b) so that mining could continue on the permit area during the interim between the reported sighting and the verification of any threatened species or critical habitat on the mine site.

Another commenter requested that OSM clarify whether proposed Section 816.97(b) would require the regulatory authority to order the shutdown of an entire permitted operation or the cessation of mining only in the area of the sighting during the interim between reporting the sighting and the regulatory authority's determination on continuation of mining.

Final Section 816.97(b) authorizes the shutdown of a permitted operation only after the regulatory authority has determined that the operation may not be allowed to proceed and after consulting with the appropriate fish and wildlife agencies. The language suggested by the commenter is unnecessary since the final rule will allow a permitted operation to proceed with mining during the interim between the reported sighting and the regulatory authority's decision on continuation of the operation. However, final Section 816.97(a) will require the operator to continue to use the best technology currently available to minimize harm to fish and wildlife as a result of mining during that interim.

In addition, OSM has retained the words, "whether and" in new Section 816.97(b). Thus, the final rule authorizes the cessation of a permitted operation after startup upon a determination by the regulatory authority, in consultation with the appropriate fish and wildlife agencies, that such a mining operation will jeopardize the continued existence of federally-listed species or result in destruction or adverse modification of their critical habitats.

One commenter feared that continuation of any mining operation after startup would automatically be jeopardized by the unexpected appearance of any endangered or threatened species, whether migratory or transitory, as a result of the consultation requirement in proposed Section 816.97(b). Because species permanent or indigenous to the areas of the operation would be identified in the operator's permit application, the commenter argued that the consultation requirement should be deleted from proposed Section 816.97(b) to protect the substantial legal and financial commitments of the operator on the permit site.

The commenter has overstated the potential impact of mandatory consultation on the continuation of permitted mining operations. Final Section 816.97(b) requires consultation whenever the regulatory authority receives a report from an operator that any endangered species has been identified on the permit area. The consultation process will lead to the shutdown of a permitted operation only if the regulatory authority, upon consultation with the appropriate fish and wildlife agencies, determines that mining may not proceed on all or part of the site. Final Section 816.97(b) should result

in the cessation of very few permitted operations, since the regulatory authority is required to consider impacts of the operation on threatened and endangered species before permit approval under Section 786.19(o). No permit will be issued to an operator unless the regulatory authority finds that the proposed mining activities will not jeopardize the continued existence of endangered species or result in the destruction or adverse modification of their critical habitats. Even in those situations where mandatory consultation will culminate in the permanent shutdown of permitted operations, provisions for appeal of the regulatory authority's cessation order at 30 CFR Part 775 will provide due-process protection for any substantial legal and financial commitments of the operator in procuring a permit for the site.

SECTION 816.97(c)

Proposed Section 816.97(c) prohibited surface mining operations from being conducted in a manner which would result in the unlawful taking of a golden eagle nest. Under the proposed rule, the operator was required to report promptly to the regulatory authority any golden eagle nest on the permit area of which he became aware. The proposed rule also required the regulatory authority to consult with the appropriate Federal and State fish and wildlife agencies upon such notification from the operator, and authorized the regulatory authority to identify whether, and under what circumstances, the operator may proceed with mining only after the mandatory consultation.

OSM has adopted the language of the proposed rule in final Section 816.97(c), with one change. The phrase "a golden eagle nest" in the first sentence of proposed Section 816.97(c) has been revised to "a bald or golden eagle, its nest, or any of its eggs" in the final rule. This revision will provide protection for bald and golden eagles and their nests or eggs in accordance with the Bald Eagle Protection Act (BEPA), as amended, *16 U.S.C. 668 et seq.* and will clarify the relationship between the SMCRA and the 1978 amendment to the BEPA that authorizes the taking of inactive or abandoned golden eagle nests which interfere with the development and recovery of natural resources.

Since the BEPA authorizes the U.S. Fish and Wildlife Service (USFWS) to protect golden eagle nests, one commenter suggested that operators should be required to report to USFWS any golden eagle nest sighted on the permit area, rather than to State regulatory authorities.

This suggestion has been rejected. The objective of the provision is to ensure that the regulatory authority implementing the SMCRA is provided necessary information to resolve conflicts between the SMCRA and the BEPA, not to create an enforcement or reporting mechanism for the fish and wildlife agencies. The commenter's reporting alternative would require USFWS to notify OSM, State regulatory authorities, or State fish and wildlife agencies of the need for consultation. OSM has no authority to require USFWS to assume or discharge such a duty. Thus, the reporting requirement under final Section 816.97(c) is considered more appropriate to ensure that mining operations are conducted in accordance with Section 515(b)(24) of the SMCRA and the provisions of the BEPA and that the requirements of the two statutes are promptly reconciled.

One commenter recommended that the proposed rule be revised to require prompt reports to the regulatory authority "in accordance with the approved mining and reclamation plan" of the operation. OSM has not accepted this recommendation since addition of the phrase suggested by the commenter could require the operator to report the presence of a golden or bald eagle nest on the mine site only if the eagle had been previously identified by the operator and listed in the operational plan segment of his or her permit application. A broader reporting and consultation provision is warranted. Final Section 816.97(c) will require the operator to submit a prompt report to the regulatory authority of any bald or golden eagle nest, regardless of whether its existence on the mine site was identified during the permitting process or disclosed after commencement of a permitted mining operation.

A commenter suggested that OSM not include the proposed provisions for mandatory consultation in final Section 816.97(c) since the regulatory authority would always consult with the appropriate fish and wildlife agencies upon notice from the operator. The commenter claimed any specification limited the flexibility that the regulatory authority needs in consultation.

OSM disagrees and has retained the proposed consultation requirement in final Section 816.97(c). The final rule requires the regulatory authority to consult the USFWS and also, where appropriate, the State fish and wildlife agency, to ensure that the regulatory authority has the benefit of their concerns and suggestions before instructing the operator

whether and under what conditions, he or she may proceed. This will not impose any undue burden or create additional delay.

SECTION 816.97(d)

Proposed Section 816.97(d) provided that nothing in Chapter VII authorized the taking of an endangered or threatened species or a golden eagle nest in violation of the Endangered Species Act of 1973 (ESA), as amended, *16 U.S.C. 1531* et seq., or the Bald Eagle Protection Act, as amended, *16 U.S.C. 668* et seq.

One commenter suggested that the relationship between the BEPA and SMCRA should be clarified by revising the language of the proposed rule to protect bald eagles as well as golden eagles, their nest, and their eggs. A commenter also recommended that OSM insert a specific reference to the Migratory Bird Treaty Act of 1918, *16 U.S.C. 703* et seq., in the language of the proposed rule to ensure administration of the SMCRA's requirements in accordance with the other act's provisions.

OSM has accepted both suggestions. The language of the proposed rule has been revised to incorporate the commenters' recommendations in final Section 816.97(d) regarding the protection of bald eagles. The final rule provides that nothing in Chapter VII authorizes the taking of an endangered or threatened species, a bald or golden eagle, its nest, or any of its eggs in violation of the ESA or the BEPA. This section makes it clear that in reconciling the requirements of the SMCRA with the acts identified under Paragraphs (b) and (d) of this section, these other acts take precedence over the requirements of the SMCRA. OSM will insert a specific reference to the Migratory Bird Treaty Act of 1918, as amended, *16 U.S.C. 703* et seq., in final 30 CFR 773.12 to recognize the regulatory authority's responsibilities under that act in the permit-application review process.

One commenter suggested that the word "active" be inserted before the phrase "golden eagle nest" in proposed Sections 816.97 (c) and (d). This revision was claimed to be consistent with rules proposed by the USFWS under the BEPA. Since eagles are known to construct several nests simultaneously and since nests not in use may last several years, the commenter argued that operators should not be required to report the presence of inactive or abandoned nests on the permit area. The commenter's suggested language has not been accepted. To the extent that an inactive nest could be disturbed under the BEPA and the fish and wildlife rules, the consultation provisions of Section 816.97 (c) should not impose an undue burden on operators, but instead, may help operators to avoid actions in violation of the BEPA.

Final Sections 816.97 (c) and (d), which require operators to report inactive or abandoned nests on permitted sites, is in accordance with USFWS rules under the BEPA. The rules proposed by USFWS (*45 FR 809*, January 3, 1980) would authorize the taking of nests under limited circumstances and would require permits for removal or disturbance of nests with documented use patterns.

SECTION 816.97(e)(1)

Previous Section 816.97(c) required mine operators to ensure that electric powerlines and other transmission facilities used for, or incidental to, mining activities on the permit area were designed and constructed in accordance with guidelines set forth by the U.S. Departments of the Interior and of Agriculture (1970) or in other manuals approved by the regulatory authority. The previous rule also required that distribution lines be designed and constructed in accordance with criteria specified by the U.S. Rural Electrification Administration (1972), or in the other guidance manuals approved by the regulatory authority. OSM proposed the deletion of these provisions from the rules on the theory that their requirements would be implicit in the operator's duty to use the best technology currently available under Section 816.97(a), as proposed. Only one commenter concurred with OSM's proposal. The overwhelming majority of commenters urged OSM to retain specific criteria for design and construction of powerlines on the permit area.

Commenters thought specific requirements were necessary in the rules to minimize entanglement and electrocution hazards and to avoid any increase in raptor mortality from mining activities which are inconsistent with the purposes of the Bald Eagle Protection Act and related Federal statutes. A commenter claimed that OSM's elimination of the requirement would leave States without the authority to require mine operators to use raptor-proof powerlines even though 6 golden eagles had been electrocuted on mine sites in Wyoming during the past 2 years as a result of poorly designed powerlines. Commenters argued for reinstatement of specific requirements since the technology-forcing aspect of Section 515(b)(24) of the Act must be coupled with adequate notice and guidance for operators to ensure the

protection of wildlife. One commenter considered the manual that OSM proposed to develop to assist operators in preparing site-specific plans for fish and wildlife protection inappropriate, since it would not empower regulatory authorities to require proper construction of power poles on mine sites. A commenter added that the Act's public-participation requirements would be thwarted if design standards were eliminated from the rule and placed in manuals known only to mine operators. One commenter claimed the lack of specific design criteria would leave mine operators too much discretion and assure inadequate compliance with the best-technology standard. Another commenter contended that the previous rule did not impose excessive burdens on the coal mining industry because costs of compliance with the former requirements for design of powerlines reported by some operators were less than costs for conventionally-designed lines. One commenter advocated express requirements in the rules to make operators aware of potential hazards to large raptors from powerlines on mine sites, inform them of the best technology currently available to protect such species, and ensure effective implementation of the best-technology requirement by regulatory authorities.

OSM has modified the substance of previous Section 816.97(c) and specified revised requirements for design and construction of powerlines in a new Section 816.97(e)(1) to accord with the commenters' concerns and to avoid problems of interpretation. Under the final rule, operators will be required, to the extent possible using the best technology currently available, to ensure that electric powerlines and other transmission facilities used for or incidental to surface mining activities on the permit area are designed and constructed to minimize electrocution hazards to raptors, except where the regulatory authority determines that such requirements are unnecessary. This exemption will provide the regulatory authority discretion to take into account specific conditions on each mine site as well as to eliminate the need for operators to comply with new Section 816.97(e)(1) when eagles or other large birds are not known to frequent the permit area or there is no chance that raptors will be electrocuted on the site.

One commenter suggested that the reference in previous Section 816.97(c) to the U.S. Rural Electrification Administration Bulletin 61-10 (1972) be omitted from the final rules since raptor-proofing powerlines would be less costly than retrofitting problem powerlines. OSM agrees with the commenter's position, and the previously cited reference has been deleted from final Section 816.97(e)(1).

Another commenter recommended that operators be required to construct powerlines on mine sites in accordance with design criteria set forth in a 1981 report on raptor protection from powerlines. However, because specific sources of guidance for wildlife protection may become obsolete or outdated as a result of technical innovations, OSM has eliminated any citations to specific manuals or publications from the final rule. Final Section 816.97(e)(1) will require the regulatory authority to determine which specific measures are necessary to ensure that hazards of electrocution to raptors will be minimized on the permit area. However, mine operators will be free to consult any technical literature for guidance on how to protect large birds from contact with powerlines.

SECTIONS 816.97 (e)(2) and (e)(3)

OSM specifically requested comments on whether requirements for location and use of haul roads, fencing of migratory routes, and fencing of toxic ponds, as provided in paragraphs (d)(1), (d)(2), and (d)(3) of previous Section 816.97, should be retained in the new rules. Several commenters supported OSM's proposal to delete these requirements since they involved issues which should be resolved by State regulatory authorities based on the site-specific needs of local species. They believed OSM's rules should afford regulatory authorities the flexibility to develop specific guidelines for wildlife protection tailored to particular conditions in each State. Other commenters recommended that final Section 816.97(a) include a specific requirement for operators to comply with guidelines for fish and wildlife protection in regional manuals prepared by USFWS, instead of retaining previous Sections 816.97 (d)(1), (d)(2), and (d)(3) in the final rules. One commenter thought that the previous requirements should be specified in the final rules until such time as OSM could issue a technical manual to guide operators in preparing site-specific plans for fish and wildlife protection.

The majority of commenters, however, objected to OSM's proposal to delete previous Sections 816.97 (d)(1), (d)(2), and (d)(3) and advocated their retention in the final rules. One commenter complained that the Act's public-participation requirements would be thwarted if these requirements were eliminated from OSM's final rules and placed in manuals known only to mine operators. Several commenters claimed that specification of the requirements was necessary to provide for effective implementation of the general performance standard in proposed Section 816.97(a) for operators to use the best technology currently available. They argued that the language of proposed Section 816.97(a) merely restated the general mandate in Section 515(b)(24) of the Act and was insufficient to satisfy Section 201(c) of the Act in the absence of specific requirements for protection of fish and wildlife. Another commenter thought OSM should reinstate

the former requirements in the final rules to help States comply with their obligations under Section 515(b)(24) of the Act, since regulatory authorities had tended to overlook many considerations relevant to wildlife protection during the permitting process.

One commenter, characterizing the general mandate in proposed Section 816.97(a) as "very broad," recommended that the final rules expressly provide for the previous requirements "when deemed necessary to wildlife protection by the regulatory authority" to avoid problems of interpretation as well as problems resulting from nationwide application of rules suited only to a particular geographic region. A commenter claimed that elimination of the requirements from OSM's rules would leave States without authority to initiate the development of guidelines and standards for the protection of fish and wildlife. Another commenter argued that OSM's proposal was contrary to the congressional policy expressed in the Act for a consistent nationwide program inasmuch as State regulatory authorities would be allowed to develop guidelines and impose requirements for fish and wildlife protection on a local basis. According to the commenter, these developments would invite the type of varying enforcement that originally made the Act necessary. One commenter contended that the proposal would make mine operators responsible for identification of riparian communities and threatened or endangered species, designation of buffer zones, and evaluation of habitats of unusually high value, even though OSM should be responsible for those functions which require professional judgment and expertise.

Previous Section 816.97(d)(1) required that, to the extent possible using the best technology currently available, mine operators locate and operate haul and access roads so as to avoid or minimize impacts on important fish and wildlife species or other species protected by State or Federal law. Numerous commenters urged OSM to retain this requirement in the final rules as a specific qualification of the operator's general duty to protect fish and wildlife by use of the best technology currently available. Commenters claimed that previous Section 816.97(d)(1) should be retained to inform operators of their specific obligations and emphasize the importance of their compliance since improperly used or located haul roads have the potential to disrupt oxygen, production of plants, destroy fish and benthic macroinvertebrates, and interfere with aquatic reproduction by introducing large amounts of eroded silt and sediment into streams.

Proper use and placement of haul roads are factors of which mine operators should be aware, given the potential of roads to cause environmental damage. For this reason, OSM has reinstated the previous requirements for haul roads in a new Section 816.97(e)(2). However, OSM has rejected the suggestion for addition of the phrase "when deemed necessary to wildlife protection by the regulatory authority" as inappropriate since proper location and operation of haul and access roads is necessary in all parts of the country. New Section 816.97(e)(2) will continue to require mine operators, to the extent possible using the best technology currently available, to locate and operate haul and access roads so as to avoid or minimize impacts on important fish and wildlife species or other species protected by State or Federal law.

Under previous Section 816.97(d)(2), mine operators were required to fence roadways, to the extent possible using the best technology currently available, where specified by the regulatory authority to guide locally important wildlife to underpasses or overpasses and to construct the necessary passages. The previous rule also prohibited the creation of new barriers in known and important wildlife migration routes.

Numerous commenters recommended that a specific requirement for protection of migratory routes be included in OSM's final rules. One commenter found the term "best technology currently available" ambiguous and urged OSM to retain the previous requirements as a means of emphasizing to operators the importance of protecting wildlife-migration routes from the impacts of mining activities. Commenters noted that migratory routes in some areas are extremely important to large mammals which rely on different seasonal habitats, such as elk and mule deer. Other commenters considered obstruction of large-mammal movement to be a major problem only in the Western states, where survival of an entire herd may well depend on the animals' ability to migrate into areas where forage is available and other conditions are favorable for reproduction. A commenter, claiming that State regulatory authorities had not used previous Section 816.97(d)(2) to obstruct mining, alleged that it prescribed cost-effective means for operators to protect Western wildlife from the impacts of mining. One commenter recommended that OSM adopt a new rule prohibiting the development of any mine plan feature that would create new barriers to any corridor important to wildlife movement. Another commenter suggested that OSM adopt a new rule requiring operators to design barriers with a potential for obstructing the movement of wildlife in a manner that would allow wildlife access to important migratory routes.

In response to the commenters' concerns, OSM has adopted a revised requirement for protection of wildlife-migration routes in new Section 816.97(e)(3). Obstruction of wildlife migration is a regional problem with potentially severe impacts on large mammals peculiar to the West. For this reason, the final rule will require mine operators to design fences, overland conveyers, and other potential barriers to permit passage for large mammals, using the best technology currently available to the extent possible. OSM has also added the phrase "except where the regulatory authority determines that such requirements are unnecessary" in new Section 816.97(e)(3) to avoid the problems attendant to nationwide application of rules suited only for a particular geographic region. This will allow the regulatory authority to exempt an operator from the specified requirements on the basis of a finding that compliance is unnecessary for wildlife protection. Additionally, new Section 816.97(e)(3) will provide regulatory authorities the discretion to consider regional or site-specific conditions in determining whether compliance with the rule's requirements is necessary to protect wildlife on a particular permit area.

Previous Section 816.97(d)(3) required mine operators, to the extent possible using the best technology currently available, to fence, cover, or use other appropriate methods to exclude wildlife from ponds containing hazardous concentrations of toxic-forming materials. Numerous commenters urged OSM to retain the previous requirement in the final rules. Several commenters contended that the absence of a specific fencing requirement from the rules would mean that regulatory authorities in those States that do not allow restrictions more stringent than Federal rules in their State programs or other laws would no longer be able to require operators to block wildlife access to toxic ponds. Since various species of wildlife, including big game and waterfowl, that are part of the human food chain in the West are attracted to water sources in an otherwise arid region, a commenter thought that retention of the fencing requirement was necessary to ensure that toxic substances consumed by these species would not eventually be passed on to humans.

Some commenters claimed it was inconsistent with the best-technology standard for OSM to relieve operators of the obligation to fence toxic ponds on mine sites. Although several commenters agreed with OSM's contention that fencing does not totally preclude access to toxic ponds for all wildlife, they thought that elimination of this requirement from the final rule would increase adverse impacts of mining operations on wildlife. One commenter also recommended that OSM adopt a new rule retaining fencing requirements only for large mammals, since the Migratory Bird Act already requires operators to take protective measures to exclude waterfowl and migratory birds from hazardous impoundments on mine sites.

OSM has rejected the commenters' suggestions and has eliminated the fencing requirement in the final rule. Toxic ponds are not ordinarily found on mine sites, even in the West. To date, there is little evidence of specific damage to wildlife as a result of unprotected toxic ponds on the site of any mining operation. In the event that there is a local problem with fish and wildlife being adversely affected by toxic ponds, the regulatory authority will have the authority under final Section 816.97(a) to require the operator to use whatever method is consistent with the requirement to use the best technology currently available to exclude wildlife from those ponds, including fencing. For these reasons, a specific fencing requirement is deemed unnecessary in the final rule.

Previous Section 816.97(d)(7) provided that operators, using the best technology available to the extent possible, must not use persistent pesticides on the permit area unless their use was approved by the regulatory authority. Several commenters recommended that this prohibition be retained in the final rules to qualify the operator's general duty to protect wildlife through use of the best technology currently available. One commenter, claiming that State regulatory authorities tended to overlook many considerations relevant to wildlife protection in the past, thought the prohibition should be restated to assist State regulatory authorities in enforcing Section 515(b)(24) of the Act.

Some commenters favored retention of previous Section 816.97(d)(7) on the grounds that persistent chemicals are not readily degradable and would cause adverse impacts on fish and wildlife as well as on humans by remaining active in the environment for long periods of time after their use. Other commenters supported OSM's coordination efforts, but found the proposed rule inconsistent with OSM's obligations under Section 515(b)(24) of the Act, since the effects of pesticides used in coal mining operations are not specifically addressed by the U.S. Environmental Protection Agency (EPA) rules. See 40 CFR Parts 162-180. A commenter also claimed that specific prohibition on use of persistent pesticides was consistent with OSM's asserted jurisdiction over endangered species in connection with coal mining operations and would assist OSM's effort to coordinate inter-agency requirements.

OSM has rejected the suggestions that the prohibition on use of pesticides in previous Section 816.97(d)(7) be included in this final rule. Operators will no longer be specifically prohibited from using pesticides on mine sites without

prior regulatory authority approval. However, a regulatory authority will be able to impose necessary conditions concerning pesticides under final Section 816.97(a). Also, pesticides used on the mine area will have to conform to Federal and State laws, including the Federal Insecticide, Fungicide, and Rodenticide Act, 7 *U.S.C. 136a* et seq., which allows the use of only those chemicals registered or cleared by the EPA. For most circumstances, EPA regulations provide adequate restrictions on the use of pesticides during mining operations. See 40 CFR Parts 162-180.

Previous Section 816.97(d)(8) required mine operators, to the extent possible using the best technology currently available, to prevent, control, and suppress range, forest, and coal fires not approved by the regulatory authority as part of a management plan. Several commenters urged OSM to retain this requirement in the final rules as an express qualification of the operator's duty to use the best technology currently available to protect wildlife. However, another commenter argued that the fire-prevention requirement should be specified because it was logically unrelated to the operator's responsibilities under proposed Section 816.97(a). Other commenters disputed OSM's contention that the requirement was implicit in proposed Section 816.97(a). They favored its specification in the final rules to ensure compliance with Sections 201(c)(2) and 515(b)(24) of the Act because 30 CFR 816.86 did not address all types of fires potentially incidental to coal mining operations. OSM has rejected the commenters' suggestions and has omitted the requirement from the final rules, since coal-refuse fires are already addressed by Section 816.86. Furthermore, final Section 816.97(a) will allow the regulatory authority to require operators to prevent fires by using the best technology currently available where site-specific conditions make such a requirement necessary and where local regulation might be insufficient. In addition, fire prevention is standard procedure for most mines.

SECTION 816.97(f)

Proposed Section 816.97(e) required the operator conducting surface mining activities to avoid disturbances to, enhance where practicable, restore, or replace wetlands, riparian vegetation along rivers and streams, and littoral-zone vegetation bordering ponds and lakes. The proposed rule also required that surface mining activities avoid disturbances to, enhance where practicable, restore, or replace habitats of unusually high value for fish and wildlife. OSM has adopted proposed Section 816.97(e) as final Section 816.97(f), but has not adopted the phrase "littoral zone vegetation" in the language of the final rule. Operators will be required to avoid disturbances to, enhance where practicable, restore, or replace wetlands and riparian vegetation along rivers and streams and bordering ponds and lakes.

Specific comments were requested and received on whether it was necessary or appropriate to include the proposed references to wetlands in OSM's final rules, given the U.S. Army Corps of Engineers' (Corps) regulatory authority over wetlands under Section 404 of the Clean Water Act, 33 *U.S.C. 1344*, and Section 10 of the Rivers and Harbors Act, 33 *U.S.C. 403*. Several commenters believed that references to wetlands should be eliminated from OSM's new rules since these areas would be protected from the impacts of coal mining under the Corps' permit program. One commenter found wetlands requirements unnecessary in OSM's rules on the grounds that these areas are already protected from damage as a result of surface mining activities by Section 404 of the Clean Water Act. Another commenter thought that OSM's proposal would provide mine operators more flexible standards for wetlands preservation than those provided by the previous rules, but argued that wetlands protection involving surface mining activities should be left to State regulatory authorities under 33 CFR 330.5(a)(21) of the Corps' permit rules (44 *FR 31833*, July 22, 1982). A commenter found the Corps' permit program preferable to OSM's proposed Section 816.97(e), which included no definition of wetlands and failed to specify the duties required of operators for compliance.

Among commenters who favored adoption of OSM's proposed wetlands provisions in its final rules, one claimed the provisions are necessary to implement OSM's statutory responsibilities under Section 515(b)(24) of the Act. Several commenters thought that OSM's proposed rules would provide greater protection for wetlands than would the Corps' permit program. One commenter noted that proposed Section 816.97(e) would omit the 5-cubic-feet-per-second (cfs) limitation in the Corps' nationwide general permits and would include wetlands, including both riparian- and littoral-vegetation zones, while the commenter believed that the Corps' rules would protect only wetlands below the ordinary high-water line. A commenter recommended that references to wetlands be retained in OSM's final rules until the Corps resolves the issue of blanket permit status for surface mining activities nationwide under Section 330.5(a)(21), as in its interim final rules. One commenter also suggested that OSM apply proposed Section 816.97(e) only where neither the State nor the Corps has clear cut permit jurisdiction over the mining operation under Section 404 of the Clean Water Act. In situations where their regulatory responsibilities clearly overlap, the commenter thought that OSM or the Corps should waive jurisdiction.

OSM has decided to retain specific reference to wetlands protection in the final rules. These had been proposed at Section 816.97(e) and are included under Section 816.97(f) of the final rule.

In establishing special provisions for wetlands under Section 515(b)(24) of the Act, OSM recognizes that there will be some duplication between the requirements imposed by OSM under the Surface Mining Act and those imposed by the Corps under Section 404 of the Clean Water Act. OSM will continue to work with the Corps to minimize this duplication through the development of general permits under the Clean Water Act and, where appropriate, through future OSM rulemaking. Inclusion of specific wetlands-protection provisions in these final rules should help expedite the development of general permits by the Corps, since wetlands will always be ensured of regulatory protection. OSM has not developed a new definition for wetlands in Section 816.97(f). Instead OSM intends to rely upon the wetlands definition developed by EPA and the Corps for the Section 404 program. Under the definition at 40 CFR 230.3, "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated-soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. This same definition of wetlands also appears in the Corps' interim final rules on dredging permits at 33 CFR 323.2(c) (*47 FR 31811*, July 22, 1982).

Several commenters sought reinstatement of the reference to "[e]ach person" under previous Section 816.97(d) on the grounds that use of "[t]he operator" in proposed Section 816.97(e) narrowed the scope of protection afforded by Section 515(b)(24) of the Act by allowing for unchecked wetlands degradation. For reasons discussed above under Section 816.97(a), OSM disagrees and has used the term "[e]ach operator" in final Section 816.97.

Several commenters requested that OSM reinstate the language of previous Section 816.97(d)(10) that "[w]etlands shall be preserved or created rather than drained or otherwise permanently abolished" to effectuate the purposes of Section 515 (b)(24) of the Act. OSM has rejected this suggestion as unnecessary. Final Section 816.97(f) will require that wetlands not be permanently abolished and that equivalent wetlands replace wetlands harmed by mining. These requirements are implicit in the duty to "restore, or replace wetlands . . ." under the final rule.

One commenter felt it was impracticable and infeasible to require an operator to "restore or replace" wetlands disturbed by mining. Another commenter suggested that "where practicable" be added after "restore" and that "where practicable or desirable" be inserted after "replace" in the first sentence of proposed Section 816.97(e), since land would be more economically productive in postmining uses other than wetlands in many cases. Another commenter suggested that wetlands and habitats of unusually high value for fish and wildlife be restored "where consistent with a surface owner's post mining land use and if removal of such wetlands will have significant hydrological consequences on surrounding lands."

The value of wetlands has been recognized under the Clean Water Act and Executive Order 11990. These authorities indicate a strong presumption in favor of restoration of wetlands. OSM recognizes that restoration of the land to a higher and better use is also specifically allowed under Section 515(b)(2) of the Act. This provision is implemented under Section 816.133 to allow for alternative postmining land uses. However, when no alternative postmining land use is allowed, restoration of wetlands must proceed in accordance with final Section 816.97(f).

One commenter recommended that the term "avoid" in proposed Section 816.97(e) be replaced by the term "minimize," since the Act nowhere requires the operator to "avoid" disturbances. OSM has rejected this recommendation and retained the term "avoid" in final Section 816.97(f). The final rule does not prohibit disturbance of wetlands. However, it does recognize that avoiding such disturbances would be consistent with the requirements of Section 515(b)(24) of the Act to protect fish, wildlife, and related environmental values.

Another commenter advocated the revision of proposed Section 816.97(e) to require that riparian vegetation be restored "where practicable" or replaced "where practicable or desirable." According to this commenter, riparian vegetation cannot be replaced in its premining location whenever the postmining land use does not require restoration of a diverted stream or requires the stream to be replaced in another location. No change is necessary to accommodate the commenter's concern. The final rule is not intended to require restoration of riparian vegetation in locations other than near where the stream is ultimately located.

Several commenters urged OSM to reinstate "riparian" as the modifier of "vegetation bordering ponds and lakes" in proposed Section 816.97(e), since the reference to "riparian vegetation" would include vegetation at the end of the

waterline as well as vegetation in ponds and lakes. They contended that the proposed rule would not require mine operators to "avoid disturbances to, enhance where practicable, restore or replace" vegetation beyond the waterline because "littoral zone vegetation" is generally defined to include only aquatic vegetation.

The term "littoral zone vegetation" refers only to vegetation that exists in the interval between the high- and low-water marks, while "riparian zone" vegetation denotes vegetation growing at any place along the banks of a body of water. Accordingly, OSM has omitted the proposed reference to "littoral zone" as unnecessary. Under final Section 816.97(f), mine operators will be required to avoid disturbances to, enhance where practicable, restore, or replace wetlands and riparian vegetation along rivers and streams and bordering ponds and lakes.

One commenter, who found proposed Section 816.97(e) vague for not including a definition of "riparian vegetation," requested clarification on this point. Another commenter suggested that "riparian vegetation" be defined in the final rule to avoid confusion over the scope of the term.

It is unnecessary to include a definition of "riparian vegetation" in final Section 816.97(f). Riparian vegetation varies considerably from site to site, but generally includes aquatic vegetation as well as other vegetation on the banks of a body of water.

One commenter requested that OSM clarify how far riparian vegetation would extend and whether operators would be required by proposed Section 816.97(e) to enhance, restore, or replace riparian vegetation beyond the 100-foot buffer zone. Another commenter recommended addition of the terms "perennial and intermittent" before the words "rivers and streams" in proposed Section 816.97(e) so that individual States would be responsible for determining what are "perennial and intermittent rivers and streams." As previously stated, riparian vegetation means aquatic vegetation as well as other vegetation on the banks of a body of water. This could include any body of water and need not be limited to perennial and intermittent streams. If existing riparian vegetation extends beyond the 100-foot zone before mining, then restoration of riparian vegetation beyond that limit could also be warranted. This determination will have to be made on a site-by-site basis.

Several commenters asked who would determine habitats of unusually high value for fish and wildlife under proposed Section 816.97(e). One commenter recommended that consultation with Federal and State fish and wildlife agencies be required in making this determination. Another commenter suggested that the phrase "as determined by the regulatory authority" be added at the end of the second sentence of proposed Section 816.97(e) to make it clear that the regulatory authority will be responsible for determining what constitutes a habitat of unusually high value for fish and wildlife.

It is unnecessary to add the provision "as determined by the regulatory authority" to final Section 816.97(f). For purposes of clarification, the regulatory authority will be responsible for determining what will constitute a habitat of unusually high value under final Section 816.97(f). OSM agrees that the regulatory authority should consult with Federal and State fish and wildlife agencies in determining habitats of unusually high value. However, a specific requirement for consultation has not been added to final Section 816.97(f) since the regulatory authority may use other means to identify habitats of importance and need not be limited to any particular form of consultation.

Commenters agreed that determinations of habitats of unusually high value for fish and wildlife should depend on site-specific conditions, but suggested that OSM adopt a generic definition for the term to provide operators some certainty regarding the scope of their duties under proposed Section 816.97(e). OSM has rejected the commenters' suggestion and omitted any specific definition from final Section 816.97(f) to provide the regulatory authority maximum flexibility in determining what constitutes a habitat of unusually high value for fish and wildlife. Under the final rule, the determination may be established on the basis of conditions peculiar to the region where the mining operation is located. OSM will monitor application of these requirements and, if the provision proves to be unnecessarily confusing, OSM will consider providing additional guidance.

A commenter recommended that the second provision of proposed Section 816.97(e) be deleted from the final rule, since habitats of unusually high value were already protected as "critical designated habitats" of endangered or threatened species under proposed Section 816.97(b). Habitats of unusually high value for fish and wildlife under final Section 816.97(f) are not intended to be limited to the "designated critical habitats" of endangered or threatened species under final Section 816.97(b). Rather, this provision is intended to provide the regulatory authority the flexibility to require

protection of certain locally important habitats even though they may not be critical habitats of any threatened or endangered species.

SECTION 816.97(g)

Proposed Section 816.97(f) specified vegetation requirements for enhancement of lands that will be used for postmining fish and wildlife habitat. Paragraphs (f)(1), (f)(2), and (f)(3) of the proposed rule required that the plant species to be used on such reclaimed areas be selected on the basis of their proven nutritional value for fish or wildlife, their use as cover for fish or wildlife, and their ability to support and enhance fish or wildlife habitat after the release of performance bonds. In addition, proposed Section 816.97(f)(3) required that the selected plants be grouped and distributed in a manner which optimizes edge effect, cover, and other benefits to fish or wildlife. OSM has adopted the proposed provisions in final Sections 816.97 (g)(1), (g)(2), and (g)(3).

A commenter thought that microsities would be necessary to maximize plant diversity and develop a mixture of plant species capable of supporting postmining fish or wildlife habitat under proposed Section 816.97(f). He conceded that topographic irregularities and selective soil salvage and replacement would promote the successful growth of various plant species, but claimed that wildlife species would not use areas of diverse vegetation for habitat when other conditions, such as rock or brush cover and snags or perches, are nonexistent in those areas.

Under final Section 816.97(g), the regulatory authority will approve the mixture and distribution of plants required to optimize the reclaimed areas for use as postmining fish and wildlife habitats. OSM intends that operators create microsities only where the regulatory authority determines these conditions are necessary to support or enhance postmining habitat uses on the basis of site-specific factors.

A commenter stated that operators should be required to use only species native to the mined area in revegetation unless scientific research could clearly demonstrate that non-native plant species would have no impact upon surrounding native vegetation. He recommended addition of such a requirement to the language of proposed Section 816.97(f). OSM has rejected this suggestion. Provisions for approval of the use of introduced species are included in the existing revegetation rules at 30 CFR 816.112 and in proposed 30 CFR 816.111, as set forth in Volume III of the EIS.

SECTION 816.97(h)

When cropland is to be the postmining land use, proposed Section 816.97(g) required operators, where appropriate for wildlife- and crop-management practices, to intersperse the fields with trees, hedges, or fence rows throughout the harvested area to break up large blocks of monoculture and diversify habitat types for birds and other animals. After considering remarks from several commenters, OSM has adopted the proposed rule in final Section 816.97(h).

One commenter found the proposed rule unnecessary and impractical because it would require areas for fish or wildlife habitats to be designed and included on reclaimed lands even where no fish or wildlife habitat existed before mining. The commenter suggested that operators be required to enhance cropland to support postmining fish and wildlife habitat only on areas diverted from use as premining fish and wildlife habitat.

This suggestion has been rejected. Final Section 816.97(h) will allow the regulatory authority to require enhancement for fish or wildlife of all lands which will be used for postmining agriculture, not just those which were diverted from a premining fish or wildlife use. The general mandate of Section 515(b)(24) of the Act will be achieved more readily by final Section 816.97(h) than by previous Section 816.97(d)(10).

Another commenter claimed that the proposed requirement of enhancement for wildlife would impair the primary agricultural postmining land use unless crop-management practices were carefully planned. OSM agrees that careful planning by operators will be necessary to ensure that measures for enhancement of wildlife habitat are consistent with appropriate crop-management practices. The enhancement requirement in final Section 816.97(h), however, will not impair agricultural postmining land uses. In situations where the specified enhancement measures are inconsistent with agricultural management practices, the final rule will allow the regulatory authority to exempt operators from the requirement to intersperse croplands with trees, rows, and hedges for wildlife habitat.

SECTION 816.97(i)

For postmining land uses which are residential, commercial, or industrial, proposed Section 816.97(h), which has been renumbered as final Section 816.97(i), required operators to intersperse the reclaimed lands with greenbelts utilizing species of grass, shrubs, and trees useful as food and cover for wildlife where such greenbelts are consistent with the approved postmining land use.

Commenters recommended that the phrase "public service" in former Section 816.97(d)(11) be retained as a substitute for the word "commercial" in the proposed rule. They asserted that the reference to "public service" uses in the previous rule included both public and private uses, while the reference to "commercial" uses under proposed Section 816.97(h) encompassed only private uses.

OSM has accepted this recommendation and replaced the proposed reference to "commercial" uses with the reference to "public service" uses in final Section 816.97(i). Under the final rule, "public service" uses will encompass both private and public uses. Where the primary postmining land use is to be residential, public service, or industrial, final Section 816.97(i) will require the operator to intersperse the land with greenbelts where these areas are consistent with the approved postmining land use.

One commenter contended that Sections 816.97 (f), (g), and (h), as proposed, amounted to an unconstitutional taking of private property by government regulation. In addition, the commenter suggested that these provisions be deleted from OSM's final rules because they prescribe requirements too specific for nationwide application and are inconsistent with Section 508(a)(3) of the Act in failing to allow for any consideration of surface-owners' preferences on postmining land uses.

OSM has rejected the commenter's suggestion and adopted the proposed requirements in final Sections 816.97 (g), (h), and (i). These rules are authorized by Sections 515(b)(24) and 515(b)(2) of the Act. Neither Section 508(a)(3) nor any other provision of the Act makes the operator's reclamation responsibilities contingent on surface-owner consent. Section 508(a)(3) of the Act merely authorizes the regulatory authority to approve alternative proposed postmining land uses after mandatory consultation with the landowner, as recognized in Section 816.133(c).

OSM also disagrees with the commenter's contention that the proposed requirements are too specific to include in national rules. The new rules are general in nature and cover anticipated categories of approved postmining land uses, including mixed postmining land uses. They require enhancement of reclaimed lands for postmining fish or wildlife uses only where enhancement is consistent with the specific proposed postmining land use. Certainly, this is not an unconstitutional taking of private property. In addition, regulatory authorities will be allowed to consider site- or region-specific factors in applying the general standards contained in the rules. Thus, final Sections 816.97 (g), (h), and (i) will provide requirements which are sufficiently flexible for nationwide application.

One commenter recommended that proposed Sections 816.97 (g) and (h) be revised to allow surface-owner preferences on postmining land use to prevail over the specified reclamation requirements. Another commenter suggested that a requirement for prior surface-owner consent be included in Paragraph (g) to provide explicit recognition of the surface-owner's right to state a preference on postmining land uses. The commenter argued that the proposed rules would not enhance wildlife protection in a cost-effective manner unless the operator's reclamation responsibilities were contingent on the surface-owner's prior consent, since any postmining reclamation not mutually agreed upon could be eliminated or reversed by the surface owner once he or she regained control of the property if it interfered with his or her normal land uses. A commenter also noted that the reclamation measures required of the operator under proposed Section 816.97(g) would be costly to implement on cropland even though it could be destroyed by the surface owner following bond release.

OSM has rejected the suggestion that surface-owner preferences on postmining land use be allowed to negate the operator's reclamation responsibilities. The suggestion is unauthorized by the Act and inconsistent with OSM's obligation to enforce SECTIONS 515(b)(24) and 515(b)(2) of the Act. Final Sections 816.97 (h) and (i) will require operators to enhance reclaimed lands to support fish and wildlife habitats only where the specified methods of enhancement are appropriate for wildlife- and crop-management practices or are consistent with the approved postmining land use, respectively.

In the event that the specified enhancement measures are inappropriate to agricultural management practices or inconsistent with the approved postmining land use, the final rules allow the regulatory authority to exempt operators from requirements of enhancement to support postmining fish and wildlife habitats.

The suggestion to add a requirement of prior surface-owner consent to proposed Section 816.97(g) has also been rejected. Under Section 508(a)(3) of the Act, the reclamation plan submitted as part of each permit application must explain the use proposed for the affected land following reclamation and include the comments of any surface landowner, who will have to approve or authorize the proposed postmining land use following reclamation. Section 508(a)(3) also empowers the regulatory authority to approve alternative proposed postmining land uses after mandatory consultation with the landowner. The landowner's right to mandatory consultation on the proposed postmining land use is already recognized in Section 816.133(c).

A commenter recommended that "shall" in proposed Sections 816.97 (g) and (h) be replaced by "may" to ensure consistency of the operator's postmining enhancement with future land uses consented to by the surface owner. OSM has rejected this suggestion. The revisions advocated by the commenter are unnecessary. Final Sections 816.97 (h) and (i) will achieve the commenter's objective by requiring operators to intersperse reclaimed lands with the specified vegetation only when such vegetation is appropriate for agricultural management practices or consistent with the approved postmining land uses.

One commenter suggested that proposed Sections 816.97 (g) and (h) specify a minimum percentage of land that must be restored by the operator and include provisions for uniform dispersal of fish or wildlife habitats over the reclaimed areas to reduce the chance that the rules' requirements could be satisfied by token, but ineffective, plantings.

OSM has rejected both suggestions. Specification of a minimum percentage of land that must be restored to support postmining fish or wildlife uses is an inappropriate requirement to include in national rules. Because conditions vary according to site and region, only the local regulatory authority will be in a position to determine how much land will be required to restore a specific site to a condition capable of supporting postmining fish or wildlife habitat. Hence, final Sections 816.97 (h) and (i) will allow the regulatory authority to dictate the minimum percentage of land which an operator must restore to support postmining fish or wildlife habitats on the basis of site- or State-specific factors. A provision for uniform dispersal of requisite habitats over the reclaimed area will be unnecessary. Final Section 816.97(g)(3) will allow the regulatory authority to direct the operator to plant species uniformly throughout the reclaimed area, whenever site-specific factors require uniform dispersal to optimize edge effect, cover, and other benefits to fish and wildlife.

A commenter recommended that OSM delete Paragraphs (f), (g), and (h) from proposed Section 816.97 and include them with the standards for postmining land use proposed by OSM on April 14, 1982 (*47 FR 16152*). He claimed that the proposed requirements for postmining enhancement of fish and wildlife habitats could jeopardize the operator's ability to achieve bond release under the terms of the approved reclamation plan unless they were treated as requisite elements of the operator's revegetation plan.

Because these rules will implement the obligation in Section 515(b)(24) of the Act for operators to achieve enhancement of environmental resources where practicable by use of the best technology currently available, OSM rejects this suggestion and has included the enhancement requirements in final Sections 816.97 (g), (h), and (i).

SECTION 817.97

Final Section 817.97 is essentially the same as final Section 816.97, except that this rule applies the requirements for protection of fish, wildlife, and related environmental values to underground mining activities. Interested persons should consult the preamble to final Section 816.97 for a discussion of comments and responses relative to final Section 817.97. In addition to the authorities cited in the preamble to Section 816.97, this rule is also based on Section 516 of the Act.

C. REFERENCE MATERIALS

Reference material (on file in OSM's Administrative Record) used to develop these final rules are as follows:

Grim, E. C., and Hill, R. D., 1974, Environmental protection in surface mining of coal: U.S. Environmental Protection

Agency Publication EPA-670/2-74-093, 276 pp.

Hardaway, J. E., and Kimball, D. B., 1976, Trip report, Environmental Protection Agency research and development activities: Savage mine, Rosebud mine, Big Sky mine, Decker No. 1 mine, proposed East Decker and North Decker mines (Montana), Public Service of Oklahoma No. 1 mine, Bighorn mine, Wyodak mine, Black Thunder mine, Jacobs Ranch mine, proposed Coal Creed mine, Belle Ayr mine, Dave Johnston mine, and Highland uranium mine and mill. Memorandum dated July 10, 1976.

Karr, J. E., and Schlosser, I. J., 1978, Water resources and the land-water interface: Science, Vol. 2301, pp. 229-234. Tennessee Valley Authority, 1971, Surface mining reclamation and conservation requirements, in Appendix A of Environmental statement: Policies relating to sources of coal used by the Tennessee Valley Authority for electric power generation: Tennessee Valley Authority Report TVA-OHES-EIS-71-4, pp. A-1 through A-10.

U.S. Department of the Interior and U.S. Department of Agriculture, 1970, Environmental criteria for electric transmission systems, 52 pp.

U.S. Environmental Protection Agency, 1976, Erosion and sediment control-Surface mining in the eastern United States; Vol. 1, Planning; Vol. 2, Design: U.S. Environmental Protection Agency Technology Transfer Seminar Publication EPA-625/3-76-006. Vol. 1, 102 pp.; Vol. 2, 137 pp. (Available from U.S. Department of Commerce, NTIS PB 261-343.)

U.S. Rural Electrification Administration, 1972, Powerline contacts by eagles and other large birds: U.S. Rural Electrification Administration Bulletin 61-10, 6 pp.

Weigle, W.K., 1965, Designing coal-haul roads for good drainage. U.S. Forest Service, 23 pp.

III. PROCEDURAL MATTERS

Agency Approval

OSM has obtained all necessary comments and concurrences from other agencies. Sections 501 (a)(B) and (b) of the Act require the written concurrence of the Administrator of the U.S. Environmental Protection Agency in rules relating to air- or water-quality standards promulgated under the Clean Air Act, as amended, and the Federal Water Pollution Control Act, as amended. The Administrator of the Environmental Protection Agency has concurred in the issuance of these rules. Section 516(a) of the Act requires the written concurrence of the head of the department that administers the Federal Mine Safety and Health Act of 1977, the successor to the Federal Coal Mine Health and Safety Act of 1969, in rules concerning the surface effects of underground mining. OSM has obtained the written concurrence of the Assistant Secretary for Mine Safety and Health, U.S. Department of Labor.

Federal Paper Reduction Act

There are no information-collection requirements established by these rules requiring the approval of the Office of Management and Budget under *44 U.S.C. 3507*.

Executive Order 12291

The U.S. Department of the Interior has determined that this document is not a major rule and does not require a regulatory impact analysis under Executive Order 12291.

Regulatory Flexibility Act

The U.S. Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities and therefore does not require a regulatory flexibility analysis under Public Law 96-354. The rules will allow small coal operators increased flexibility in meeting performance standards and should especially ease the regulatory burden on small coal operators in Appalachia.

National Environmental Policy Act

OSM analyzed the impacts of these final rules in its "Final Environmental Impact Statement OSM-EIS-1: Supplement" (FEIS) according to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA) (*42 U.S.C. 4332(c)(C)*). The EIS is available in OSM's Administrative Record, Room 5315, 1100 L Street, NW., Washington, D.C.,

or by mail request to Mark Boster, Chief, Branch of Environmental Analysis, Room 134, Interior South Building, U.S. Department of the Interior, Washington, DC 20240. This preamble serves as the record of decision under NEPA. A number of modifications from the proposed rules which are discussed in this preamble also differ from the draft final rules published in Volume III of the EIS. These changes do not affect the analysis in the EIS except to the extent discussed earlier in this preamble. The order of final Sections 816.57 (a)(1) and (a)(2) has been reversed from the order of those paragraphs in the EIS, as has the order of Sections 817.57(a) (1) and (2)). The substantive requirements of final paragraph (a)(2) are the same as those in paragraph (a)(1) of the EIS. Final paragraph (a)(1) does not include the specific references to the "normal flow or gradient of the stream," to "fish migration," and to "material damage" that appeared in Volume III of the EIS. The removal of these terms does not affect the EIS analysis as it applies to these final rules because they are all subsumed in the final proscription against causing or contributing to the violation of applicable State or Federal water quality standards and against adversely affecting the water quantity and quality or other environmental resources of the stream.

LIST OF SUBJECTS

30 CFR Part 816

Coal mining, Environmental protection, Reporting requirements, Surface mining.

30 CFR Part 817

Coal mining, Environmental protection, Reporting requirements, Underground mining.

For the reasons set forth in the preamble, 30 CFR Parts 816 and 817 are amended as set forth herein.

Dated: April 15, 1983.

William P. Pendley, Acting Assistant Secretary, Energy and Minerals.

PART 816 -- PERMANENT PROGRAM PERFORMANCE STANDARDS -- SURFACE MINING ACTIVITIES

1. Section 816.57 is revised to read as follows:

SECTION 816.57 - HYDROLOGIC BALANCE: STREAM BUFFER ZONES.

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

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

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

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

2. Section 816.97 is revised to read as follows:

SECTION 816.97 - PROTECTION OF FISH, WILDLIFE, AND RELATED ENVIRONMENTAL VALUES.

(a) The operator shall, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and shall achieve enhancement of such resources where practicable.

(b) Endangered and threatened species. No surface mining activity shall be conducted which will jeopardize the continued existence of endangered or threatened species listed by the Secretary or which will result in the destruction or

adverse modification of designated critical habitats of such species in violation of the Endangered Species Act (*16 U.S.C. 1531 et seq.*). The operator shall promptly report to the regulatory authority any endangered or threatened species within the permit area of which the operator becomes aware. Upon notification, the regulatory authority shall consult with appropriate State and Federal fish and wildlife agencies and, after consultation, shall identify whether, and under what conditions, the operator may proceed.

(c) Bald and golden eagles. No surface mining activity shall be conducted in a manner which would result in the unlawful taking of a bald or golden eagle, its nest, or any of its eggs. The operator shall promptly report to the regulatory authority any golden or bald eagle nest within the permit area of which the operator becomes aware. Upon notification, the regulatory authority shall consult with the U.S. Fish and Wildlife Service and also, where appropriate, the State fish and wildlife agency and, after consultation, shall identify whether, and under what conditions, the operator may proceed.

(d) Nothing in this chapter shall authorize the taking of an endangered or threatened species or a bald or golden eagle, its nest, or any of its eggs in violation of the Endangered Species Act of 1973, as amended, *16 U.S.C. 1531 et seq.*, or the Bald Eagle Protection Act, as amended, *16 U.S.C. 668 et seq.*

(e) Each operator shall, to the extent possible using the best technology currently available --

(1) Ensure that electric powerlines and other transmission facilities used for, or incidental to, surface mining activities on the permit area are designed and constructed to minimize electrocution hazards to raptors, except where the regulatory authority determines that such requirements are unnecessary;

(2) Locate and operate haul and access roads so as to avoid or minimize impacts on important fish and wildlife species or other species protected by State or Federal law; and

(3) Design fences, overland conveyers, and other potential barriers to permit passage for large mammals, except where the regulatory authority determines that such requirements are unnecessary.

(f) Wetlands and habitats of unusually high value for fish and wildlife. The operator conducting surface mining activities shall avoid disturbances to, enhance where practicable, restore, or replace, wetlands, and riparian vegetation along rivers and streams and bordering ponds and lakes. Surface mining activities shall avoid disturbances to, enhance where practicable, or restore, habitats of unusually high value for fish and wildlife.

(g) Where fish and wildlife habitat is to be a postmining land use, the plant species to be used on reclaimed areas shall be selected on the basis of the following criteria:

(1) Their proven nutritional value for fish or wildlife.

(2) Their use as cover for fish or wildlife.

(3) Their ability to support and enhance fish or wildlife habitat after the release of performance bonds. The selected plants shall be grouped and distributed in a manner which optimizes edge effect, cover, and other benefits to fish and wildlife.

(h) Where cropland is to be the postmining land use, and where appropriate for wildlife- and crop-management practices, the operator shall intersperse the fields with trees, hedges, or fence rows throughout the harvested area to break up large blocks of monoculture and to diversify habitat types for birds and other animals.

(i) Where residential, public service, or industrial uses are to be the postmining land use, and where consistent with the approved postmining land use, the operator shall intersperse reclaimed lands with greenbelts utilizing species of grass, shrubs, and trees useful as food and cover for wildlife.

PART 817 -- PERMANENT PROGRAM PERFORMANCE STANDARDS -- UNDERGROUND MINING ACTIVITIES

3. Section 817.57 is revised to read as follows:

SECTION 817.57 - HYDROLOGIC BALANCE: STREAM BUFFER ZONES.

(a) No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by underground mining activities, unless the regulatory authority specifically authorizes underground mining activities closer to, or through, such

a stream. The regulatory authority may authorize such activities only upon finding that --

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

(2) If there will be a temporary or permanent stream-channel diversion, it will comply with Section 817.43.

(b) The area not to be disturbed shall be designated a buffer zone, and the operator shall mark it as specified in Section 817.11.

4. Section 817.97 is revised to read as follows:

SECTION 817.97 - PROTECTION OF FISH, WILDLIFE, AND RELATED ENVIRONMENTAL VALUES.

(a) The operator shall, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and shall achieve enhancement of such resources where practicable.

(b) Endangered and threatened species. No underground mining activity shall be conducted which will jeopardize the continued existence of endangered or threatened species listed by the Secretary or which will result in the destruction or adverse modification of designated critical habitats of such species in violation of the Endangered Species Act (*16 U.S.C. 1531 et seq.*). The operator shall promptly report to the regulatory authority any endangered or threatened species within the permit area of which the operator becomes aware. Upon notification, the regulatory authority shall consult with appropriate State and Federal fish and wildlife agencies and, after consultation, shall identify whether, and under what conditions, the operator may proceed.

(c) Bald and golden eagles . No underground mining activity shall be conducted in a manner which would result in the unlawful taking of a bald or golden eagle, its nest, or any of its eggs. The operator shall promptly report to the regulatory authority any golden or bald eagle nest within the permit area of which the operator becomes aware. Upon notification, the regulatory authority shall consult with the U.S. Fish and Wildlife Service and also, where appropriate, the State fish and wildlife agency and, after consultation, shall identify whether, and under what conditions, the operator may proceed.

(d) Nothing in this chapter shall authorize the taking of an endangered or threatened species or a bald or golden eagle, its nest, or any of its eggs in violation of the Endangered Species Act of 1973, as amended, *16 U.S.C. 1531 et seq.*, or the Bald Eagle Protection Act, as amended, *16 U.S.C. 668 et seq.*

(e) Each operator shall, to the extent possible using the best technology currently available --

(1) Ensure that electric powerlines and other transmission facilities used for, or incidental to, underground mining activities on the permit area are designed and constructed to minimize electrocution hazards to raptors, except where the regulatory authority determines that such requirements are unnecessary;

(2) Locate and operate haul and access roads so as to avoid or minimize impacts on important fish and wildlife species or other species protected by State or Federal law; and

(3) Design fences, overland conveyors, and other potential barriers to permit passage for large mammals, except where the regulatory authority determines that such requirements are unnecessary.

(f) Wetlands and habitats of unusually high value for fish and wildlife. The operator conducting underground mining activities shall avoid disturbances to, enhance where practicable, restore, or replace, wetlands, and riparian vegetation along rivers and streams and bordering ponds and lakes. Underground mining activities shall avoid disturbances to, enhance where practicable, or restore, habitats of unusually high value for fish and wildlife.

(g) Where fish and wildlife habitat is to be a postmining land use, the plant species to be used on reclaimed areas shall be selected on the basis of the following criteria:

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(2) Their use as cover for fish or wildlife.

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(h) Where cropland is to be the postmining land use, and where appropriate for wildlife- and crop-management practices, the operator shall intersperse the fields with trees, hedges, or fence rows throughout the harvested area to break up large blocks of monoculture and to diversify habitat types for birds and other animals.

(i) Where residential, public service, or industrial uses are to be the postmining land use, and where consistent with the approved postmining land use, the operator shall intersperse reclaimed lands with greenbelts utilizing species of grass, shrubs, and trees useful as food and cover for wildlife.

(30 U.S.C. 1201 et seq.)

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