

**FEDERAL REGISTER: 52 FR 47352 (December 11, 1987)**

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 779, 780, 783, 784, 816, and 817

Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Fish and Wildlife Resources Information; Fish and Wildlife Plan; and Protection of Fish, Wildlife, and Related Environmental Values

ACTION: Final rule.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the U.S. Department of the Interior (DOI) is amending its rules with respect to fish and wildlife resource information and planning requirements, and standards applied to the protection of fish and wildlife values. The amendments are being made to comply with recent court decisions and to revise and clarify the rules. The revised rules amend reinstated fish and wildlife permitting requirements and provide added protection to endangered or threatened species.

EFFECTIVE DATE: January 11, 1988.

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**TEXT: SUPPLEMENTARY INFORMATION:**

I. Background

II. Final Rule and Response to Public Comments on Proposed Rule

III. Procedural Matters

**I. BACKGROUND**

The Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. 1201* et seq. (the Act) sets forth general requirements governing surface coal mining operations and surface impacts of underground coal mining. Sections 515(b)(24) and 516(b)(11) of the Act, *30 U.S.C. 1265(b)(24)* and *1266(b)(11)*, require that surface coal mining and reclamation operations shall: to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable;

In addition, section 515(b)(2) of the Act, *30 U.S.C. 1265(b)(2)*, requires that the operator, in consideration of public health and safety and proposed land use, restore mined land to a condition capable of supporting the uses which it was capable of supporting prior to any mining or higher or better uses. Section 516(b)(10) imposes that same requirement on underground mines with such modifications as are necessary to accommodate the distinct difference between surface and underground coal mining.

To implement the requirements of these provisions and the provisions of the Endangered Species Act of 1973 (ESA), as amended (*16 U.S.C. 1531* et seq.), the Bald Eagle Protection Act, as amended (*16 U.S.C. 668* et seq.), the Fish and Wildlife Coordination Act, as amended (*16 U.S.C. 661* et seq.) and other statutes protecting fish and wildlife resources, OSMRE promulgated 30 CFR 779.20, 780.16, 783.20, 784.21, 816.97, and 817.97 on March 13, 1979, as a part of the permanent regulatory program (*44 FR 15356, 15359, 15364, 15369, 15410, 15437*). Sections 779.20, 780.16, 783.20, and 784.21 were remanded by court decision and suspended by OSMRE (*45 FR 51547*, August 4, 1980).

On June 30, 1983, OSMRE revised Sections 816.97 and 817.97 (*48 FR 30312*) to clarify the relationship of the Act to the ESA and the Bald Eagle Protection Act. On October 1, 1984, the District Court for the District of Columbia remanded portions of these rules to modify requirements pertaining to endangered or threatened species and the

protection of wildlife from toxic ponds. In re: Permanent Surface Mining Regulation Litigation II, No. 79-1144 (D.D.C. 1984). The court also ordered that Sections 779.20, 780.16, 783.20, and 784.21 be reinstated pending a new rulemaking. The sections were subsequently reinstated by OSMRE (50 FR 7274, February 21, 1985). Additional information regarding these actions is provided in the Federal Register as cited and in the preamble to the proposed fish and wildlife rules (51 FR 19498, May 29, 1986).

On May 29, 1986 (51 FR 19498) OSMRE proposed revisions to the fish and wildlife provisions of Sections 779.20, 780.16, 783.20, 784.21, 816.97, and 817.97. The purpose of the proposed revisions was to comply with the court decision and to revise and clarify the rules. Throughout the development of the final rules, OSMRE solicited public comment and recommendations. A 70-day period for public comment was provided, ending August 7, 1986, and the public was given the opportunity to request public hearings. However, no public hearings were requested and therefore none were held.

## **II. FINAL RULE AND RESPONSE TO PUBLIC COMMENTS ON PROPOSED RULE**

OSMRE received over 200 comments from representatives of industry, environmental groups, State regulatory authorities, Federal and State fish and wildlife agencies and private citizens. OSMRE has reviewed each comment carefully and has considered the commenters' suggestions and remarks in writing these final rules.

The majority of the comments received on the proposed rule were specific in nature and are discussed in the section-by-section analysis portion of the preamble. Several comments were received in direct response to OSMRE's request for guidance on questions raised in the preamble to the proposed rules. These comments and general concerns expressed by commenters are addressed in the section that follows.

Hereinafter, unless otherwise noted, references to Sections 779.20, 780.16, and 816.97 (surface mining rules) also apply to the counterpart underground mining rules at Sections 783.20, 784.21 and 817.97.

### **GENERAL COMMENTS**

OSMRE suspended Sections 779.20 and 780.16 on August 4, 1980 (45 FR 51547) and reinstated these same regulations on February 21, 1985 (50 FR 7274). During the period when the Federal rules were suspended State regulatory authorities could omit or, if desired, adopt special permitting rules pertaining to fish and wildlife. In the preamble to the proposed rules (51 FR 19499), OSMRE specifically requested comments on whether the experiences and events of the four and one-half years when the Federal rules were suspended justify Federal regulation requiring either premining resource information or protection and enhancement plans or both. Based upon remarks from commenters and for the reasons discussed below, OSMRE has concluded that such regulations are necessary.

Most commenters indicated that Federal regulation requiring both premining resource information and protection and enhancement plans are necessary for the protection of fish and wildlife resources. One commenter further stated that because OSMRE is the regulatory authority for Indian lands and in Federal program States such as Georgia and Washington, without Federal regulations, the fish and wildlife resources in these States and lands would not be protected as section 515(b)(24) of SMCRA demands. OSMRE agrees with the commenter that Federal rules are needed in Federal program States and for Indian lands.

Three commenters felt that permitting regulations for fish and wildlife resources information are not justified or needed. Two of these commenters stated that fish and wildlife resources were adequately protected under their approved state programs during the four and one-half year period in which the Federal regulations were suspended. One of the commenters cited as an example a situation where a species currently proposed to be listed as threatened had been protected. Although certain states may be protecting fish and wildlife resources, OSMRE has concluded that these rules are needed to define Federal standards regarding the submission of permit information needed to assure minimum standards of protection.

Another commenter felt that the proposed regulations appeared to be a rekindling of the ongoing efforts of Federal and State fish and wildlife agencies to gain decision making authority in the permitting process. The commenter believed that such authority was not granted by Congress but would be granted by the final regulations. OSMRE considered the role given the Federal and State fish and wildlife agencies by SMCRA and has adopted a final rule that clarifies that the

various Federal and State fish and wildlife agencies act in an advisory capacity to the regulatory authorities. Regulatory authorities retain their responsibility for making decisions on the completeness and adequacy of applications for SMCRA permits.

OSMRE also requested comments in the preamble to the proposed rules (*51 FR 19499*) on whether fish and wildlife information and planning requirements can be addressed effectively under one section as proposed or whether they should remain as separate and distinct sections as in the existing rules under Parts 779 and 780. OSMRE has decided that the fish and wildlife information and planning requirements can be addressed under one section as has been adopted in the final rule.

Several commenters agreed with the proposal that fish and wildlife information and planning requirements be addressed under one section. One commenter who disagreed stated that existing Part 779 requires specific resource information for each component of the premine environment, including wildlife (Section 779.20). Similarly, the commenter stated, Part 780 requires a resource protection plan for each component of the premining environment, including wildlife (Section 780.16). The commenter contended that if fish and wildlife baseline data collection and protection requirements are to be combined as one section under Part 780, then all other environmental resource components should be similarly treated. Otherwise, the combination of the two fish and wildlife requirements may de-emphasize the importance of baseline data collection, since this requirement is being shifted in the final rule to Part 780 which deals with resource protection. The commenter suggested that OSMRE be consistent in its treatment of each resource component.

OSMRE believes that the combining of Sections 779.20 and 780.16 will not result in a loss of importance attached to the collection of fish and wildlife baseline data. Requirements for data collection for certain resources (such as hydrology and geology) are combined with the requirements for protection plans for those resources, while in other cases the requirements for information collection and the plans remain separate (such as soils and land use). It is OSMRE's intent to combine resource information collection and protection plan requirements whenever possible because of the logical link between baseline information pertaining to a resource and the protection and enhancement of that resource.

In the preamble to the proposed rules (*51 FR 19499*), OSMRE solicited comments on whether or not there are distinct differences between surface and underground mining that would justify differences in the regulations. After considering remarks from commenters, and for the reasons discussed below, OSMRE has determined that the same requirements should apply to both surface and underground mining.

Several commenters indicated that from a fish and wildlife protection and enhancement perspective there are no distinct differences between surface and underground mining that justify differences in the regulations. Three commenters expressed concerns over subsidence-related impacts on fish and wildlife resources. These commenters further suggested that subsidence impacts receive special attention during the permit review and interagency consultation process. OSMRE disagrees with the commenters that the impacts of subsidence on fish and wildlife need special attention because 30 CFR 784.21(b) will cover any problem not covered under OSMRE's regulations at 30 CFR 784.20 which provide for detailed subsidence control plans to protect renewable resource lands. One commenter was concerned that underground mining could temporarily disrupt the flow of alluvial water into a surface drainage and cause adverse impacts to the downstream aquatic ecosystem. OSMRE believes that such concerns are adequately addressed under existing rules concerning hydrology. Studies of the hydrologic regime required under existing 30 CFR 784.14(e) and 784.14(f) would identify any potential adverse impacts to surface drainage from proposed underground mining. 30 CFR 773.15(c)(5) requires that before a permit application is approved, the regulatory authority must find in writing that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Also under 30 CFR 817.57, a buffer zone around streams exists within which most mining disturbances may not occur without a specific finding that environmental resources of such streams will not be adversely affected.

One commenter suggested that the last statement in the Summary of the preamble misleads the public into believing that the proposed rule would provide added protection to endangered or threatened species. The commenter contended that this is not true since the proposed rule does not provide any additional protection, for Federally-listed endangered or threatened species but merely reinstates the original (1979) protection for State-listed species. The commenter is correct in recognizing that the proposed rule would reinstate the protection previously given to State-listed endangered or threatened species in OSMRE's March 13, 1979 rulemaking (*44 FR 15410, 15437*). However, the proposed rule contains other important provisions that provide added protection. The final rule prohibits surface coal mining operations which

are likely to jeopardize the continued existence of endangered or threatened species, not just those operations which are certain to do so, as provided in the existing rules. Also, the final rule clearly establishes the requirement for permit applicants to provide site-specific resource information in their applications when the permit area or adjacent area are likely to include endangered or threatened species.

Two commenters expressed support for the rules as proposed. One commenter stated that the proposed rules contain rather specific requirements on the type of fish, wildlife, and related resource information which must be provided in the permit application by the permit applicant. The commenter further stated that the regulatory authority in his particular state has established a permit review process whereby the State fish and wildlife agencies themselves, not the applicant, provide this information to the regulatory authority. The commenter sought final rules that would have sufficient flexibility to allow for this means of providing wildlife resource information. Although the final rule adopted today would not preclude such a system, the applicant retains the ultimate responsibility for assuring that all the permit application requirements are met.

One commenter questioned how the proposed rule would address the additional protection standards afforded fish, wildlife, and habitats listed under Tribal statutes. The commenter is reminded that OSMRE is the regulatory authority on Indian lands and that Parts 779, 780, 783, 784, 816, and 817 are included in the Indian lands program (30 CFR Part 750) through cross-referencing. When implementing the Indian lands program, OSMRE will treat species and habitats protected under Tribal statutes in a manner similar to those protected by State statutes.

One commenter stated that OSMRE's draft Environmental Assessment (EA) for this rulemaking should be revised to include additional decision alternatives. This suggestion was taken into consideration in the preparation of the final environmental assessment.

## **A. FISH AND WILDLIFE PERMITTING REQUIREMENTS**

### **RESOURCE INFORMATION -- 30 CFR 780.16(a)/784.21(a).**

As proposed, Section 780.16(a) provided that each application shall include fish and wildlife resource information for the permit area and adjacent area. Furthermore, it required the scope and level of detail for such information to be determined by the regulatory authority in accordance with any written guidance provided by State and Federal agencies with responsibilities for fish and wildlife. The proposed rule required that the information include, at a minimum, the existence of any threatened or endangered species, eagles, migratory birds or other species requiring special protection, and habitats of unusually high value for fish and wildlife. After considering the commenters' remarks, OSMRE has changed Section 780.16(a)(1) in the final rule so that the scope and level of detail for fish and wildlife information will be determined by the regulatory authority in consultation with State and Federal agencies with responsibilities for fish and wildlife. Similarly, a new provision was added to require the information to be sufficient to design the protection and enhancement plan required under paragraph (b). Thus, although the level of detail may vary from permit to permit, the fish and wildlife resource information needed for each permit application will be carefully considered by the regulatory authority and those agencies with expertise in the resource area. This procedure will insure that sufficient information will be included to establish a meaningful protection plan.

Three commenters expressed concern that the proposed rules eliminate the requirement existing in Section 779.20(b) for permit applicants to contact the regulatory authority to determine what fish and wildlife information will be necessary. One commenter felt that such contact increased the chances of receiving a complete and accurate application which could be easily reviewed by the regulatory authority. Another commenter was concerned that the proposed deletion will leave applicants with too little direction regarding site-specific data collection requirements. The third commenter believed that consultation early in the permitting process will give the respective agencies more time to determine whether specific studies should be required and will prevent unnecessary expenditures by permit applicants. OSMRE agrees that advance planning and consultation can help to reduce delays in processing permits and to avoid unnecessary expenses. As stated in the preamble to the proposed rule, however, OSMRE does not believe it is necessary to impose a Federal rule requiring all applicants to contact their respective regulatory authorities since some regulatory authorities may find it more appropriate and cost effective to set forth in either rules or guidance documents specific requirements for fish and wildlife information for mining in certain areas. Applicants should contact the regulatory authority early in the permitting process if they are unable to determine what information will be needed to meet regulatory requirements.

Proposed Section 780.16(a) provided that the scope and level of detail for resource information be determined by the regulatory authority "in accordance with any written guidance" provided by State and Federal fish and wildlife agencies. OSMRE has deleted this provision in the final rule and replaced it with language requiring the regulatory authority to determine the scope and level of detail of resource information in consultation with State and Federal fish and wildlife agencies. This new language was adopted because several commenters requested that the final rule provide for consultation between the regulatory authority and Federal and State fish and wildlife agencies on what information is needed to permit applications to protect fish and wildlife resources. Some of these commenters felt that early consultation with State and Federal fish and wildlife agencies would be an effective means of cooperatively resolving resource issues while others believed that through consultation available information could be shared and determinations could be made on whether site-specific studies would be necessary. One commenter on this topic expressed concern that by specifying that only written guidance be provided by State and Federal fish and wildlife agencies, there would be less interaction between wildlife management and coal permitting. Although OSMRE does not believe that such a result would necessarily occur, OSMRE has changed the rule to provide for consultation. Consultation may include both oral and written advice, participation by these agencies in the development of technical guidance documents, memoranda of understanding, and other communications necessary to protect fish and wildlife resources.

Many commenters suggested that OSMRE more clearly indicate when site-specific fish and wildlife resource information would be required. Accordingly, OSMRE has added new paragraph (a)(2) in the final rule that will require site-specific resource information when the permit area or adjacent area are likely to include listed or proposed endangered or threatened species of plants or animals or their critical habitats; habitats of unusually high value for fish and wildlife; or other species or habitats identified through agency consultation as requiring special protection. One commenter suggested that when any special resource values in proposed Section 780.16(a) (1), (2), or (3) are identified, the regulatory authority should require site-specific, in-depth studies of fish and wildlife and their habitats. OSMRE agrees that site-specific resource information is necessary for such identified species and habitats and has addressed the commenter's concern by the addition of paragraph (a)(2) to the final rule.

One commenter expressed concern over OSMRE's rationale for the substitution of the phrase "resource information" in Section 780.16(a) for the term "study" as required under previous Section 779.20(a). The term "resource information" is intended to allow for the use of existing fish and wildlife information, in addition to any site-specific studies authorized under Section 780.16(a)(2).

One commenter contended that the deletion of the requirement for site-specific data would have deleterious effects on fish and wildlife and that existing information is often out-of-date, incomplete, or not relevant to the site, and/or otherwise of limited value for determining degree of impact. OSMRE is sensitive to this concern and, as stated above, has added new paragraph (a)(2) to address when site-specific information is required.

Another commenter, who is currently developing a computer-based fish and wildlife data system, stated that its data system may not provide enough site-specific information on all proposed permit areas and therefore believed that the responsibility for providing information on fish and wildlife and their habitats should rest with the applicant. OSMRE agrees. As discussed in the preamble to the proposed rule, the authority to require site-specific studies has been retained but the restriction that a study be the only means to achieve compliance is removed. The need for site-specific studies will be determined by the regulatory authority through the consultation process required in the final rule. Site-specific studies could include aquatic sampling of streams to determine their "importance" as one commenter suggested.

One commenter suggested that "minimum standards" be established in the final rules for those areas that are not designated as critical habitat or that are otherwise sensitive, as outlined in proposed Section 780.16(a) (1)-(3). This commenter contended that most mining operations are likely to occur in the "non-critical" fish and wildlife habitats and therefore in the majority of cases, the proposed rules provide no minimum standards to the regulatory authority on what resource information must be part of the permit application. OSMRE has added the requirement in Section 780.16(a)(1) that the resource information be sufficient to design the protection and enhancement plan. Because of the diversity and variability of lands between and within regions, OSMRE cannot establish minimum resource information standards in the Federal rules for "non-critical" fish and wildlife habitat. Instead, OSMRE has determined that a more practical and as protective an approach will be for the regulatory authority to make these decisions within the framework of that information needed to assure an appropriate fish and wildlife management plan.

Several comments were received regarding the qualification requirements of those individuals compiling or reviewing fish and wildlife information. The commenters felt that the required information should be developed and/or reviewed by professional biologists. OSMRE disagrees that there is a need to specify qualifications for the preparers and reviewers of fish and wildlife information. The applicant is responsible for the accuracy and completeness of the submitted information and the regulatory authority is required to consult with agencies which possess the needed resources to competently evaluate the applicant's data.

Proposed rule Section 780.16(a)(1) required permit applications to contain information on listed and proposed endangered or threatened species of plants or animals and their critical habitats listed by the Secretary under the Endangered Species Act of 1973, as amended (*16 U.S.C. 1531 et seq.*), and those species and habitats protected by similar State statutes. Commenters generally supported and endorsed this provision of the proposed rule. One commenter felt that listed or proposed endangered or threatened plants should be protected by separate requirements within the vegetation information requirements in existing Section 779.19. OSMRE believes it appropriate to address both plants and animals that are afforded special protection under the ESA and similar State statutes under one section for administrative and continuity reasons. Another commenter requested clarification with regard to the reference to "state statutes." This commenter asked if an operation is to be located in a particular state, whether the proposed language would require that the fish and wildlife information address species which are not protected under that state's statute but are protected under the statutes of other states? Section 780.16(a)(2)(i) of the final rule would apply to only those species protected under Federal law and to those species protected under the laws of the state where the particular mining operation is located.

One commenter asked OSMRE to define a "proposed" endangered or threatened species. A "proposed species" as defined under existing 50 CFR 402.02 means any species of fish, wildlife, or plant that is proposed in the Federal Register to be listed under section 4 of the Endangered Species Act of 1973, as amended, *16 U.S.C. 1531 et seq.* States with similar statutes may have various definitions for the term "proposed" or may use different terms for species under this classification.

Proposed Section 780.16(a)(2) required information about eagles, migratory birds, and other species identified as requiring special protection under State or Federal law. OSMRE has modified this provision and numbered it in the final rule as Section 780.16(a)(2)(iii). The final rule requires information on other species or habitats identified through agency consultation as requiring special protection under State or Federal law. OSMRE has deleted the specific reference to eagles and migratory birds. Instead, such species would be included in the general requirement to identify other species requiring special protection under State or Federal law.

Proposed Section 780.16(a)(3) required information about habitats of unusually high value for fish and wildlife such as important streams, wetlands, riparian areas, cliffs supporting raptors, areas offering special shelter or protection, migration routes, and reproduction and wintering areas. OSMRE has adopted the proposed rule as final Section 780.16(a)(2)(ii). One commenter requested that the term "wetland" be defined using the U.S. Fish and Wildlife Service's (FWS) Classification of Wetlands and Deepwater Habitats of the United States, 1979 (FWS/OBS-79-31 December 1979). Under the process outlined in the final rule, OSMRE believes it is unnecessary to define the term "wetland" because definitions in common usage by the appropriate State and Federal agencies are applied.

Three commenters suggested that the list of examples of habitat in proposed Section 780.16(a)(3) be expanded to include additional habitat types and areas that they viewed as being of "unusually high value." OSMRE believes that the habitats provided as examples in the final rule are representative and not exclusive of the types that the regulatory authority should consider under this section. One commenter associated the term "migration routes" only with migratory birds and did not consider the term to be a type of habitat. OSMRE included the term "migration routes" under this section because of the different habitat types within migration routes utilized by such species as mule deer and elk in the western states.

#### **PROTECTION AND ENHANCEMENT PLAN -- 30 CFR 780.16(b)/784.21(b)**

As proposed, Section 780.16(b) required that each application shall include a description of how, to the extent possible using the best technology currently available, the operator will minimize disturbances and adverse impacts on fish and wildlife and related environmental values, including compliance with the Endangered Species Act, during surface coal mining and reclamation operations and how enhancement of these resources will be achieved where practicable.

After considering remarks from commenters and for the reasons discussed below, OSMRE has adopted Section 780.16(b) as proposed.

One commenter suggested that the terminology "protection and enhancement plan" be changed to "mitigation and enhancement plan" and that acceptable definitions of "mitigation" and "enhancement" be provided. OSMRE has retained the terminology "protection and enhancement plan" as proposed. The terms "protection" and "enhancement" are consistent with terminology used in sections 515 and 516 of the Act. OSMRE does not believe that the term "enhancement" requires further definition when it is used in context in Section 780.16(b).

Four commenters shared OSMRE's view of that enhancement of fish and wildlife values is practicable for almost all postmining land uses. Other commenters indicated that if a situation arises where fish and wildlife habitat enhancement measures are not practicable, the burden should fall to the applicant to indicate why enhancement is not practicable. OSMRE has reconsidered this provision and agrees that enhancement may not be practicable in all situations. Furthermore, the applicant should be afforded the opportunity to state why enhancement is not practicable. OSMRE has therefore modified Section 780.16(b)(3)(ii) in the final rule to require that, where enhancement measures are not included in the permit application, the applicant shall provide a statement explaining why such measures are not practicable.

One commenter expressed concern that the proposed regulations requiring a protection and enhancement plan are silent on the enforceability of the plan by the regulatory authority. OSMRE reminds the commenter that the plan is a part of the permit application and thus is enforceable by the regulatory authority when the permit is issued.

Proposed Section 780.16(b)(1) required that the description of how the operator will protect and enhance fish and wildlife values be consistent with the requirements of Section 816.97. No comments were received regarding this subsection. OSMRE has therefore adopted the proposed rule as final Section 780.16(b)(1).

Several commenters expressed concern that the proposed rule did not contain language which explicitly requires the protection and enhancement plan to cover the permit area and adjacent area. Two commenters requested that "adjacent area" be changed to "portions of the adjacent area where effects may reasonably be expected to occur." OSMRE does not agree that any change is necessary since "adjacent area" is already defined in Section 701.5 to mean that area outside the permit area where a resource is, or reasonably would be expected to be, adversely impacted by proposed mining operations. Furthermore, Section 780.16(b)(2) requires that the protection and enhancement plan apply at a minimum to resource information that is required for both the permit area and adjacent area in Section 780.16(a). One commenter was concerned about substituting the terms permit area and adjacent area for mine plan area. OSMRE no longer uses the term mine plan area in the Federal rules. The revision of areal descriptors is discussed in *48 FR 14814*. This substitution of terms will provide consistency in the terminology used in the Federal rules without affecting the substantive requirements for fish and wildlife plans required by Section 780.16.

Three commenters expressed concern that the language of the proposed rule may leave some ambiguity by the generic reference to paragraph (a) and suggested that the language of Section 780.16(b)(2) should read: "Apply, at a minimum, to species and habitats identified under paragraphs (a)(1), (a)(2), and (a)(3) of this section." OSMRE has rejected the commenters suggested language because, to be consistent with sections 515(b)(24) and 516(b)(11) of SMCRA, the protection and enhancement must not be limited to critical species and habitats.

Proposed Section 780.16(b)(3)(i) required the protection and enhancement plan to describe the protective measures that will be used during the active mining phase of operation. The proposed rule specified that such measures may include the establishment of buffer zones, the selective location and special design of haul roads and powerlines, and the monitoring of surface water quality and quantity. OSMRE has adopted the proposed rule as final Section 780.16(b)(3)(i). One commenter recommended that biological monitoring be added as an example of a protective measure under this section. OSMRE emphasizes that the protective measures provided as examples under this section are not an exclusive list to be considered by the applicant. Other protective measures such as biological monitoring may also be considered.

One commenter argued that the proposed regulations do not establish any minimum protection and enhancement measures. This commenter suggested the proposed rule require that protection and enhancement measures listed as discretionary in proposed Section 780.16(b)(3)(i) and Section 780.16(b)(3)(ii) be required in the plan when a determination is made by either the regulatory authority or the State or Federal fish and wildlife agency that these measures would improve the overall reclamation of the site for fish and wildlife resources. OSMRE believes the final rule

provides the regulatory authority with sufficient guidance in Section 780.16 (a) and (b) to determine what measures are necessary for the protection and enhancement of fish and wildlife. Section 515(b)(24) of SMCRA does not require specific protection and enhancement measures but rather requires each operation, to the extent possible using the best technology currently available, to minimize disturbances and achieve enhancement where practicable.

Proposed Section 780.16(b)(3)(ii) required the protection and enhancement plan to describe the enhancement measures that will be used during the reclamation and postmining phase of operation to develop aquatic and terrestrial habitat. The proposed rule provided that such measures may include restoration of streams and other wetlands, retention of ponds and impoundments, establishment of vegetation for wildlife food and cover, and the placement of perches and nest boxes. One commenter believed that this section was inaccurate because the commenter did not view the restoration of streams and wetlands as a method of fish and wildlife enhancement. In his opinion, the term "restoration" indicated the return to a previous condition. OSMRE disagrees with the commenter since restored streams and wetlands may contain features that were not present during premining conditions. The addition of pools and riffles to a premine channelized stream is one example. Part of the commenter's concern is semantic. For example, one performance standard which the protection and enhancement plan implements, 30 CFR 816.43(a)(3), illustrates how closely the two concepts are and requires restoration or approximation of premining characteristics to promote the recovery and enhancement of the aquatic habitat.

A commenter stated that the establishment of vegetation for wildlife food and cover may not constitute wildlife enhancement. The commenter believed that a comparison of the premining vegetation and habitats and the proposed postmining revegetation plan must be made before one can determine if the revegetation plan would enhance wildlife. OSMRE does not agree that such a comparison must be made; however, a comparison of pre- and postmining vegetative conditions may be one approach to reflect that wildlife enhancement has been realized. Enhancement can also be achieved by developing a postmining land use plan that benefits or promotes a selected or featured fish and wildlife species or a diversity of species.

The same commenter agreed that some enhancement measures -- such as the creation of impoundments -- can be implemented during mining and that proposed Section 780.16(b)(3)(ii) stipulates the enhancement measures to be implemented after mining. OSMRE agrees that impoundments are normally created during the active phase of mining and has used the word "retention" in reference to ponds and impoundments in the final rule.

One commenter suggested that this section of the proposed rules be amended to include consultation with the appropriate fish and wildlife agency to ensure that the premining habitat diversity found in the permit area and adjacent areas is protected as much as possible when reclaiming the site to a postmining land use. OSMRE believes that through the consultation process in Section 780.16(a)(1) the permit review process required by Sections 773.13 and 773.15, habitat diversity will receive adequate consideration.

#### **FISH AND WILDLIFE SERVICE REVIEW -- 30 CFR 780.16(c)/784.21(c).**

Proposed Section 780.16(c) required that upon request, the regulatory authority provide the resource information submitted by permit applicants under paragraph (a) and the protection and enhancement plan submitted under paragraph (b) to the U.S. Department of the Interior, Fish and Wildlife Service (USFWS) Regional or Field Office for their review. The proposed rule required that the information be provided within 10 days of receipt of the request from the Service. After considering remarks from commenters and for the reasons discussed below, OSMRE has adopted paragraph (c) as proposed. Several commenters supported the proposal while others offered suggestions for modifications. One commenter suggested that the final rule be expanded to require other information such as is found in the reclamation, revegetation and hydrologic balance restoration plans be provided to the USFWS if requested. OSMRE and the USFWS have discussed this provision and are in agreement that the resource information required under paragraph (a) and the protection and enhancement plan required under paragraph (b) will in most situations be sufficient for USFWS reviews. In those cases where an inspection of other parts of the permit application is desired, the USFWS can visit the location where the public file copy of the application is kept or make other arrangements with the regulatory authority to obtain the additional information.

Another commenter who acts as a liaison between the USFWS and a regulatory authority requested that the regulatory authority or the State agency charged with the protection of the plant and wildlife resources provide the resource information and the protection and enhancement plan to the USFWS.

OSMRE believes there is sufficient flexibility in the final rule to provide for this transfer as suggested by the commenter. One commenter expressed concern that the implementation of this provision could relegate State fish and wildlife agencies to a role where their comments are solicited but are never implemented. OSMRE does not believe that this will happen. Under Section 780.16(a)(1), the regulatory authority is required to consult with both State and Federal agencies in setting information requirements. Regulatory authorities that are provided comments by fish and wildlife agencies must consider all comments in their decisions to issue permits. To be defensible, these decisions must be well-reasoned and consistent with the State regulatory program.

One commenter questioned how many days the Service would have to review and comment on the permit application. Section 773.13(b)(1) requires each regulatory authority to establish a reasonable time for the submittal of written comments or objections on permit applications by State and Federal fish and wildlife agencies and other public entities.

Two commenters opposed Section 780.16(c) as proposed and urged deletion of the proposal from the final rule. The commenters contended that there was no basis in the statute for this provision. OSMRE does not agree. Sections 201(c)(2), (6), (12), and (13), 501(b), and 510(b) of the Act provide authority. Moreover, in order for the USFWS to discharge its responsibilities under the Endangered Species Act, Bald Eagle Protection Act and the Fish and Wildlife Coordination Act, and to assure that sections 515(b)(24) and 516(b)(10) of SMCRA are implemented, the USFWS must have access to information supplied under Section 780.16.

## **B. PERFORMANCE STANDARDS**

### **SECTIONS 816.97(b)/817.97(b)**

OSMRE proposed to amend Section 816.97(b) to provide for the protection of endangered and threatened species by requiring that no mining activity shall be conducted which is likely to jeopardize the continued existence of endangered or threatened species listed by the Secretary or which is likely to result in the destruction or adverse modification of designated critical habitats of such species in violation of the Endangered Species Act of 1973, as amended (*16 U.S.C. 1531 et seq.*). The previous rule was more limited in that it prohibited only mining activity which will jeopardize the existence of endangered or threatened species or which will result in the destruction or adverse modification of designated critical habitats. OSMRE also proposed to require the operator to promptly report to the regulatory authority any State- or Federally-listed endangered or threatened species within the permit area of which the operator becomes aware. The proposed rule added the requirement to report State-listed species to the existing requirement that the operator report Federally-listed species. OSMRE has adopted Section 816.97(b) as proposed.

Several commenters expressed support for this proposal. One commenter, however, noted that a number of states do not maintain state endangered species lists and instead classify certain species as "rare." OSMRE is aware that classification or terminology may differ in the various States; however, it is the protection afforded these special species under similar State statutes that is intended. This commenter further stated that it is not necessary or desirable to report immediately every threatened or endangered species observed within the permit area and cited an example of wintering bald eagles foraging over coal permit areas on a daily basis. Sections 515(b)(24) and 516(b)(10) require that disturbances to fish and wildlife and related environmental values be minimized. Accordingly, OSMRE has required, since 1979, that the operator promptly report the presence of certain species in the permit area. In the example provided, the eagles may be nesting or resting off the mine site but could be dependent upon a food source on the mine site and, thus, be adversely impacted by the mining operations. The reporting provision enables the regulatory authority to ensure compliance with the Endangered Species Act and with the Bald Eagle Protection Act.

One commenter suggested that the reporting requirement be expanded to include not only the permit area but also the adjacent area. The rule is sufficiently flexible to allow the regulatory authority to require reports of sightings on adjacent areas if it wishes to do so. This commenter further suggested that the rule be expanded to mandate consultation when the regulatory authority receives sighting reports from any person, unless the sightings are deemed to be frivolous. While the rule requires the operator to notify the regulatory authority whenever the operator becomes aware of an endangered or threatened species in the permit area, it does not preclude other persons from so notifying the regulatory authority. The regulatory authority would have discretion on whether to initiate the consultation process.

Two commenters objected to the inclusion of the term "any State" in the proposed rule. The commenters further stated that SMCRA does not extend protection to State-listed species. As discussed in the preamble to the proposed rule, OSMRE proposed to amend the existing rule to include "State-listed" species in response to the District Court's decision of October 1, 1984. In re: Permanent Surface Mining Regulation Litigation II, No. 79-1144, slip op. at pp. 58-63 (D.D.C. 1984). The deletion of a reference to State-listed species from the previous rule was found by the court to be contrary to section 515(b)(24) of the Act. The commenters objected to the requirement to report the presence of endangered or threatened species within the permit area because they believed it would require duplicative reporting inasmuch as an operator will have already reported in the permit application the existence of any endangered or threatened species. The commenters cited for support the District Court's decision upholding the Secretary's regulation which requires identification of critical habitats in the permit application but not during the mining operation. In Re: Permanent Surface Mining Regulation Litigation II, No. 79-1144 (D.D.C. October 1, 1984) Slip op. at 60-1. OSMRE does not agree with the commenter's reasoning that the court's decision regarding critical habitats also applies to the reporting of threatened or endangered species. Unlike critical habitats which are designated by the Secretary after an administrative proceeding, threatened and endangered species are mobile rather than stationary and may enter the permitted area after a permit is approved.

### **SECTIONS 816.97(e)/817.97(e)**

Sections 816.97 (e)(2) and (e)(3) of the existing regulations were republished in the proposed rule solely for editorial reasons to reflect the addition of Section 816.97(e)(4) and not to make substantive changes. OSMRE has therefore adopted these proposed rules as final Sections 816.97(e)(2) and 816.97(e)(3).

As proposed, Section 816.97(e)(4) required each operator to fence, cover, or use other appropriate methods to exclude wildlife from ponds which contain hazardous concentrations of toxic-forming materials. After considering remarks from commenters and for the reasons discussed below, OSMRE has adopted the proposed rule as final Section 816.97(e)(4). One commenter expressed support for the rule as proposed. Five commenters asked for clarification as to what constitutes "hazardous concentrations of toxic-forming materials" and one suggested that OSMRE work with the U.S. Environmental Protection Agency (EPA) to develop a standard definition for this term, consistent with the existing regulations for toxic-forming materials found in EPA's regulations at 40 CFR 261.2 and 40 CFR 261.3. OSMRE does not believe that further regulatory changes are necessary since OSMRE already defines "toxic-forming materials" in 30 CFR 701.5.

The final rules also amend Sections 779.10 and 783.10 which pertain to Federal information collection by deleting references to Sections 779.20 and 783.20 respectively. This amendment was necessary because Sections 779.20 and 783.20 have been deleted in the final rules.

### **EFFECT IN FEDERAL PROGRAM STATES AND ON INDIAN LANDS**

The final rules apply through cross-referencing in those States with Federal programs. This includes Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States appear at 30 CFR Parts 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively. The final rules also apply through cross-referencing to Indian lands under the Federal program for Indian Lands as provided in 30 CFR Part 750.

### **III. PROCEDURAL MATTERS**

#### **Federal Paperwork Reduction Act**

The information collection requirements of Parts 780 and 784 have been submitted to the Office of Management and Budget under *44 U.S.C. 3507*. The following clearance numbers were assigned: 30 CFR Part 780 (OMB Control No. 1029-0036) and 30 CFR Part 784 (OMB Control No. 1029-0039). The information is needed to meet the requirements of sections 515(b)(24) and 516(b)(11) of Pub. L. 95-87, and will be used by the regulatory authority to assess the impact of proposed mining operations on fish and wildlife resources and the adequacy of proposed protection and enhancement plans. The obligation to respond is mandatory.

#### **Executive Order 12291 and the Regulatory Flexibility Act**

The Department of the Interior has determined that this document is not a major rule under E.O. 12291 and certifies

that it will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The rule does not distinguish between small and large entities, and will make no change in the threshold for determining whether to approve permits for surface coal mining operations because of fish and wildlife considerations. No incremental economic effects are anticipated as a result of the rule.

#### National Environmental Policy Act

OSMRE has prepared an environmental assessment (EA) on the impacts on the human environment of this final rulemaking and has made a finding that the rules would not have a significant impact under section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). The EA and finding of no significant impact are on file in the OSMRE Administrative Record Room 5131, 1100 L Street NW., Washington, DC.

#### Author

The author of this rule is Bruce Klein, Office of Surface Mining Reclamation and Enforcement, Knoxville Field Office, Knoxville, Tennessee 37902; telephone 615-673-4330.

#### LIST OF SUBJECTS

##### 30 CFR Part 779

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

##### 30 CFR Part 780

Coal mining, Reporting and recordkeeping requirements, Surface mining.

##### 30 CFR Part 783

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

##### 30 CFR Part 784

Coal mining, Reporting and recordkeeping requirements, Underground mining.

##### 30 CFR Part 816

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

##### 30 CFR Part 817

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

For the reasons set out in this preamble, 30 CFR Parts 779, 780, 783, 784, 816, and 817 are amended as set forth below.

Dated: April 9, 1987.

J. Steven Griles, Assistant Secretary for Land and Minerals Management.

Editorial Note: This document was received at the office of the Federal Register December 10, 1987.

#### **PART 779 -- SURFACE MINING PERMIT APPLICATIONS -- MINIMUM REQUIREMENTS FOR INFORMATION ON ENVIRONMENTAL RESOURCES**

1. The authority citation for Part 779 continues to read as follows:

Authority: 30 U.S.C. 1201 et seq., Section 115 of Pub. L. 98-146, (30 U.S.C. 1257), and 16 U.S.C. 470 et seq.

#### **SECTION 779.10 [Amended]**

2. Section 779.10 is amended by removing the term "779.20,".

### **SECTION 779.19 [Amended]**

3. Section 779.19, paragraph (b) is amended by removing the words "30 CFR 779.20" and adding in their place the words "30 CFR 780.16."

### **SECTION 779.20 [Removed]**

4. Section 779.20 is removed.

## **PART 780 -- SURFACE MINING PERMIT APPLICATIONS -- MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN**

5. The authority citation for Part 780 continues to read as follows:

Authority: *30 U.S.C. 1201* et seq., Section 115 of Pub. L. 98-146, (*30 U.S.C. 1257*), and *16 U.S.C. 470* et seq.

6. Section 780.16 is revised to read as follows:

### **SECTION 780.16 - FISH AND WILDLIFE INFORMATION.**

(a) Resource information. Each application shall include fish and wildlife resource information for the permit area and adjacent area.

(1) The scope and level of detail for such information shall be determined by the regulatory authority in consultation with State and Federal agencies with responsibilities for fish and wildlife and shall be sufficient to design the protection and enhancement plan required under paragraph (b) of this section.

(2) Site-specific resource information necessary to address the respective species or habitats shall be required when the permit area or adjacent area is likely to include:

(i) Listed or proposed endangered or threatened species of plants or animals or their critical habitats listed by the Secretary under the Endangered Species Act of 1973, as amended (*16 U.S.C. 1531* et seq.), or those species or habitats protected by similar State statutes;

(ii) Habitats of unusually high value for fish and wildlife such as important streams, wetlands, riparian areas, cliffs supporting raptors, areas offering special shelter or protection, migration routes, or reproduction and wintering areas; or

(iii) Other species or habitats identified through agency consultation as requiring special protection under State or Federal law.

(b) Protection and enhancement plan. Each application shall include a description of how, to the extent possible using the best technology currently available, the operator will minimize disturbances and adverse impacts on fish and wildlife and related environmental values, including compliance with the Endangered Species Act, during the surface coal mining and reclamation operations and how enhancement of these resources will be achieved where practicable. This description shall --

(1) Be consistent with the requirements of Section 816.97 of this chapter;

(2) Apply, at a minimum, to species and habitats identified under paragraph (a) of this section; and

(3) Include --

(i) Protective measures that will be used during the active mining phase of operation. Such measures may include the establishment of buffer zones, the selective location and special design of haul roads and powerlines, and the monitoring of surface water quality and quantity; and

(ii) Enhancement measures that will be used during the reclamation and postmining phase of operation to develop aquatic and terrestrial habitat. Such measures may include restoration of streams and other wetlands, retention of ponds and impoundments, establishment of vegetation for wildlife food and cover, and the replacement of perches and

nest boxes. Where the plan does not include enhancement measures, a statement shall be given explaining why enhancement is not practicable.

(c) Fish and Wildlife Service review. Upon request, the regulatory authority shall provide the resource information required under paragraph (a) of this section and the protection and enhancement plan required under paragraph (b) of this section to the U.S. Department of the Interior, Fish and Wildlife Service Regional or Field Office for their review. This information shall be provided within 10 days of receipt of the request from the Service.

## **PART 783 -- UNDERGROUND MINING PERMIT APPLICATIONS -- MINIMUM REQUIREMENTS FOR INFORMATION ON ENVIRONMENTAL RESOURCES**

7. The authority citation for Part 783 continues to read as follows:

Authority: *30 U.S.C. 1201* et seq., Section 115 of Pub. L. 98-146 (*30 U.S.C. 1257*), and *16 U.S.C. 470* et seq.

### **SECTION 783.10 [Amended]**

8. Section 783.10 is amended by removing the term "783.20,".

### **SECTION 783.19 [Amended]**

9. Section 783.19, paragraph (b) is amended by removing the words "30 CFR 779.20" and adding in their place the words "30 CFR 784.21."

### **SECTION 783.20 [Removed]**

10. Section 783.20 is removed.

## **PART 784 -- UNDERGROUND MINING PERMIT APPLICATIONS -- MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN**

11. The authority citation for Part 784 continues to read as follows:

Authority: *30 U.S.C. 1201* et seq., Section 115 of Pub. L. 98-146 (*30 U.S.C. 1257*), and *16 U.S.C. 470* et seq.

12. Section 784.21 is revised to read as follows:

### **SECTION 784.21 - FISH AND WILDLIFE INFORMATION.**

(a) Resource information. Each application shall include fish and wildlife resource information for the permit area and adjacent area.

(1) The scope and level of detail for such information shall be determined by the regulatory authority in consultation with State and Federal agencies with responsibilities for fish and wildlife and shall be sufficient to design the protection and enhancement plan required under paragraph (b) of this section.

(2) Site-specific resource information necessary to address the respective species or habitats shall be required when the permit area or adjacent area is likely to include:

(i) Listed or proposed endangered or threatened species of plants or animals or their critical habitats listed by the Secretary under the Endangered Species Act of 1973, as amended (*16 U.S.C. 1531* et seq.), or those species or habitats protected by similar State statutes;

(ii) Habitats of unusually high value for fish and wildlife such as important streams, wetlands, riparian areas, cliffs supporting raptors, areas offering special shelter or protection, migration routes, or reproduction and wintering areas; or

(iii) Other species or habitats identified through agency consultation as requiring special protection under State or Federal law.

(b) Protection and enhancement plan. Each application shall include a description of how, to the extent possible using the best technology currently available, the operator will minimize disturbances and adverse impacts on fish and wildlife and related environmental values, including compliance with the Endangered Species Act, during the surface coal mining and reclamation operations and how enhancement of these resources will be achieved where practicable. This description shall --

(1) Be consistent with the requirements of Section 817.97 of this chapter;

(2) Apply, at a minimum, to species and habitats identified under paragraph (a) of this section; and

(3) Include --

(i) Protective measures that will be used during the active mining phase of operation. Such measures may include the establishment of buffer zones, the selective location and special design of haul roads and powerlines, and the monitoring of surface water quality and quantity; and

(ii) Enhancement measures that will be used during the reclamation and postmining phase of operation to develop aquatic and terrestrial habitat. Such measures may include restoration of streams and other wetlands, retention of ponds and impoundments, establishment of vegetation for wildlife food and cover, and the placement of perches and nest boxes. Where the plan does not include enhancement measures, a statement shall be given explaining why enhancement is not practicable.

(c) Fish and Wildlife Service Review. Upon request, the regulatory authority shall provide the resource information required under paragraph (a) of this section and the protection and enhancement plan required under paragraph (b) of this section to the U.S. Department of the Interior, Fish and Wildlife Service Regional or Field Office for their review. This information shall be provided within 10 days of receipt of the request from the Service.

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

13. The authority citation for Part 816 is revised to read as follows:

Authority: Pub. L. 95-87 (*30 U.S.C. 1201 et seq.*), unless otherwise noted.

14. In Section 816.97, paragraphs (b), (e)(2), and (e)(3) are revised and paragraph (e)(4) is added to read as follows:

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

\* \* \* \* \*

(b) Endangered and threatened species. No surface mining activity shall be conducted which is likely to jeopardize the continued existence of endangered or threatened species listed by the Secretary or which is likely to result in the destruction or adverse modification of designated critical habitats of such species in violation of the Endangered Species Act of 1973, as amended (*16 U.S.C. 1531 et seq.*). The operator shall promptly report to the regulatory authority any State- or federally-listed 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.

\* \* \* \* \*

(e) \* \* \*

(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;

(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; and

(4) Fence, cover, or use other appropriate methods to exclude wildlife from ponds which contain hazardous concentrations of toxic-forming materials.

\* \* \* \* \*

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

15. The authority citation for Part 817 is revised to read as follows:

Authority: Pub. L. 95-87 (30 U.S.C. 1201 et seq.), unless otherwise noted.

16. In Section 817.97 paragraphs (b), (e)(2), and (e)(3) are revised and paragraph (e)(4) is added to read as follows:

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

\* \* \* \* \*

(b) Endangered and threatened species. No underground mining activity shall be conducted which is likely to jeopardize the continued existence of endangered or threatened species listed by the Secretary or which is likely to result in the destruction or adverse modification of designated critical habitats of such species in violation of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.). The operator shall promptly report to the regulatory authority any State- or federally-listed 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.

\* \* \* \* \*

(e) \* \* \*

(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;

(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; and

(4) Fence, cover, or use other appropriate methods to exclude wildlife from ponds which contain hazardous concentrations of toxic-forming materials.

\* \* \* \* \*

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