

The analysis shows that this final rule is not economically significant under Executive Order 12866 and that the agency has considered the burden to small entities. Based on the above analysis, the agency does not believe that the majority of manufacturers will incur a significant economic impact. However, there may be a few that could incur significant reformulation costs or inventory losses. Thus, this economic analysis, together with other relevant sections of this document, serves as the agency's final regulatory flexibility analysis, as required under the Regulatory Flexibility Act. Finally, this analysis shows that the Unfunded Mandates Reform Act does not apply to the final rule because it would not result in an expenditure in any 1 year by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million.

**V. Environmental Impact**

The agency has determined under 21 CFR 25.31(c) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

**List of Subjects in 21 CFR Part 310**

Administrative practice and procedure, Drugs, Labeling, Medical devices, Reporting and recordkeeping requirements.  
Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 310 is amended as follows:

**PART 310—NEW DRUGS**

- The authority citation for 21 CFR part 310 continues to read as follows:  
**Authority:** 21 U.S.C. 321, 331, 351, 352, 353, 355, 356, 357, 360b–360f, 360j, 361(a), 371, 374, 375, 379e; 42 U.S.C. 216, 241, 242(a), 262, 263b–263n.
- Section 310.545 is amended by adding paragraphs (a)(27) and (a)(28), by revising paragraph (d) introductory text, by reserving paragraphs (d)(26) and (d)(27), and by adding paragraph (d)(28) to read as follows:

**§ 310.545 Drug products containing certain active ingredients offered over-the-counter (OTC) for certain uses.**

- (a) \* \* \*
- (27) *Topical antimicrobial drug products—(i) First aid antiseptic drug products.*  
Ammoniated mercury  
Calomel (mercurous chloride)

Merbromin (mercuochrome)  
Mercufenol chloride (ortho-chloromercuriphenol, ortho-hydroxyphenylmercuric chloride)  
Mercuric chloride (bichloride of mercury, mercury chloride)  
Mercuric oxide, yellow  
Mercuric salicylate  
Mercuric sulfide, red  
Mercury  
Mercury oleate  
Mercury sulfide  
Nitromersol  
Para-chloromercuriphenol  
Phenylmercuric nitrate  
Thimerosal  
Vitromersol  
Zyloxin

(ii) *Diaper rash drug products.*

Para-chloromercuriphenol  
Any other ingredient containing mercury  
(28) *Vaginal contraceptive drug products.*  
Dodecaethylene glycol monolaurate (polyethylene glycol 600 monolaurate)  
Laureth 10S  
Methoxypolyoxyethyleneglycol 550 laurate  
Phenylmercuric acetate  
Phenylmercuric nitrate  
Any other ingredient containing mercury

\* \* \* \* \*

(d) Any OTC drug product that is not in compliance with this section is subject to regulatory action if initially introduced or initially delivered for introduction to interstate commerce after the dates specified in paragraphs (d)(1) through (d)(28) of this section.

\* \* \* \* \*

(28) October 22, 1998, for products subject to paragraphs (a)(27) and (a)(28) of this section.

Dated: April 8, 1998.  
**William K. Hubbard,**  
*Associate Commissioner for Policy Coordination.*  
[FR Doc. 98–10578 Filed 4–21–98; 8:45 am]  
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**DEPARTMENT OF THE INTERIOR**  
**Office of Surface Mining Reclamation and Enforcement**  
**30 CFR Part 938**  
**[PA–112–FOR]**  
**Pennsylvania Regulatory Program**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSM), Interior.  
**ACTION:** Final rule; approval of amendments.

**SUMMARY:** OSM is approving, with certain exceptions, a proposed amendment to the Pennsylvania permanent regulatory program (hereinafter referred to as the Pennsylvania program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendment revises the Pennsylvania program to incorporate changes made by Pennsylvania House Bill 1075 and subsequent Pennsylvania law Act 1994–114. The amendment is intended to provide special authorization for coal refuse disposal in areas previously affected by mining which contain pollutional discharges.

**EFFECTIVE DATE:** April 22, 1998.

**FOR FURTHER INFORMATION CONTACT:** Robert J. Biggi, Director, Office of Surface Mining Reclamation and Enforcement, Harrisburg Field Office, Harrisburg Transportation Center, Third Floor, Suite 3C, 4th and Market Streets, Harrisburg, Pennsylvania 17101, Telephone: (717) 782–4036.

**SUPPLEMENTARY INFORMATION:**

- Background on the Pennsylvania Program.
- Submission of the Amendment.
- Director's Findings.
- Summary and Disposition of Comments.
- Director's Decision.
- Procedural Determinations.

**I. Background on the Pennsylvania Program**

On July 31, 1982, the Secretary of the Interior conditionally approved the Pennsylvania program. Background information on the Pennsylvania program including the Secretary's findings, the disposition of comments, and a detailed explanation of the conditions of approval of the Pennsylvania program can be found in the July 30, 1982, **Federal Register** (47 FR 33050). Subsequent actions concerning the conditions of approval and program amendments are identified at 30 CFR 938.11, 938.12, 938.15 and 938.16.

**II. Submission of the Amendment**

By letter dated September 14, 1995 (Administrative Record Number PA 837.01), Pennsylvania submitted an amendment to the Pennsylvania program. The amending language is contained in Pennsylvania House Bill 1075 and was enacted into Pennsylvania law as Act 1994–124. The amendments change Pennsylvania's Coal Refuse Disposal Act (of September 24, 1968 (P.L. 1040, No. 318) and amended on October 10, 1980 (P.L. 807, No. 154)) to provide for authorization for refuse disposal in areas previously affected by mining which contain pollutional

discharges. The proposed amendments are modeled after Pennsylvania's approved program rules at Chapter 87, Subchapter F. (87.201) and Chapter 88, Subchapter G. (88.501). These subchapters allow previously affected sites with pollutional discharges to be reaffected provided the pollution abatement plan will result in a reduction of the baseline pollution load and represents best technology economically achievable.

The proposed amendment was published in the October 16, 1995, **Federal Register** (60 FR 53565), and in the same notice, OSM opened the public comment period and provided opportunity for a public hearing on the adequacy of the proposed amendment. The comment period closed on November 15, 1995. A public hearing was held on December 5, 1995.

### III. Director's Findings

Set forth below, pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are the Director's findings concerning the proposed amendment to the Pennsylvania program.

The standards by which the proposed amendments will be evaluated are as follows. Section 503(a) of SMCRA provides that State regulatory program laws must be in accordance with the requirements of SMCRA, and that State regulatory program rules must be consistent with the regulations issued pursuant to SMCRA. The terms "in accordance with" and "consistent with" are defined at 30 CFR 730.5. With regard to SMCRA, the proposed State laws and rules must be no less stringent than, meet the minimum requirements of, and include all applicable provisions of SMCRA. With regard to the implementing Federal regulations, the proposed State laws and rules must be no less effective than the Federal regulations in meeting the requirements of SMCRA. The Director's findings are discussed below.

#### 1. Section 1 Findings and Declaration of Policy

This section is amended by adding policy statements that clarify Pennsylvania's rationale for authorizing coal refuse disposal on areas previously affected by mining which contain pollutional discharges. While there is no direct Federal counterpart to the added policy statements regarding coal refuse disposal, the Director finds that Pennsylvania's rationale for encouraging coal mining activities that will result in the improvement of previously mined areas with preexisting pollutional discharges is reasonable and not

inconsistent with SMCRA at section 102 concerning the purposes of SMCRA.

#### 2. Section 3 Definitions

This section is amended to provide definitions for the following terms: "Abatement plan," "Actual improvement," "Baseline pollution load," "Best technology," "Coal refuse disposal activities," "Pollution abatement area," and "Public recreational impoundment." Two of these definitions, "Coal refuse disposal activities" and "Public recreational impoundment," are new to the Pennsylvania program, while the others are similar to approved definitions at Chapters 87.202 and 88.502 concerning remaining areas with pollutional discharges. The proposed definitions will apply to section 6.2 of Pennsylvania's Act 1994-114.

"Abatement plan" is defined as any individual technique or combination of techniques, the implementation of which will result in reduction of the baseline pollution load. The Director finds that this language is identical in substance to the definition of "abatement plan" contained in 25 Pa. Code §§ 87.202 and 88.502, which were approved by OSM as part of Pennsylvania's standards for treatment of preexisting discharges on remined areas. See 51 FR 5997, February 19, 1986.

"Actual improvement" is defined as the reduction of the baseline pollution load resulting from the implementation of the approved abatement plan except that any reduction of the baseline pollution load achieved by water treatment may not be considered as actual improvement: Provided, however, that treatment approved by the department of the coal refuse before, during or after placement in the coal refuse disposal area shall not be considered to be water treatment. This definition, except for the proviso which is new, is identical in substance to definitions at 25 Pa. Code §§ 87.202 and 88.502, which were approved by OSM as part of Pennsylvania's standards for treatment of preexisting discharges on remined areas. See 51 FR 5997, February 19, 1986.

"Baseline pollution load" is defined to mean the characterization of the pollutional material being discharged from or on the pollution abatement area, described in terms of mass discharge for each parameter deemed relevant by Pennsylvania, including seasonal variations and variations in response to precipitation events. This proposal is identical in substance to the definition of "baseline pollution load" found at 25 Pa. Code §§ 87.202 and 88.502, which

was approved by OSM as part of Pennsylvania's standards for treatment of preexisting discharges on remined areas. See 51 FR 5997, February 19, 1986.

"Best technology" is defined to mean measures and practices which will abate or ameliorate, to the maximum extent possible, discharges from or on the pollution abatement area. This proposal is identical in substance to the definition of "best technology" found at 25 Pa. Code §§ 87.202 and 88.502, which was approved by OSM as part of Pennsylvania's standards for treatment of preexisting discharges on remined areas. See 51 FR 5997, February 19, 1986.

"Coal refuse disposal activities" is defined to mean the storage, dumping or disposal of any waste coal, rock, shale, slurry, culm, gob, boney, slate, clay, underground development wastes, coal processing wastes, excess soil and related materials, associated with or near a coal seam, which are either brought above ground or otherwise removed from a coal mine in the process of mining coal or which are separated from coal during the cleaning or preparation operations. The term shall not include the removal or storage or overburden from surface mining activities.

The proposed State definition includes two terms, "coal mine waste" and "underground development waste," which are defined in the Federal regulations at 30 CFR 701.5. The Federal regulations define "underground development waste" to include waste-rock, mixtures of coal, shale, claystone, siltstone, sandstone, limestone, or related materials that are excavated, moved and disposed of from underground workings in connection with underground mining activities. The proposed State definition concerns the disposal of materials similar to those listed in the Federal definition of underground development waste. The Federal regulations define "coal processing waste" as "earth materials which are separated and wasted from the product coal during cleaning, concentrating, or other processing or preparation of coal." The State also limits the definition of "coal refuse disposal activities" by clarifying that overburden from surface mining activities is not included. That is, only materials separated from coal during cleaning or preparation and materials derived from underground workings are included under the definition of coal refuse disposal activities. The proposed definition is unclear, however, in its use of the term "excess soil and related materials."

The remaining terms of the definition do not have Federal counterparts, but the Director finds that this proposed definition is not inconsistent with SMCRA and the Federal regulations in general, and is consistent with the Federal definitions of "coal mine waste" and "underground development waste," except for the reference to "excess soil and related materials." Therefore, the Director is requiring that Pennsylvania further amend its program to clarify the meaning of the term "excess soil and related materials."

"Pollution abatement area" means that part of the permit area which is causing or contributing to the baseline pollution load, which shall include adjacent and nearby areas that must be affected to bring about significant improvement of the baseline pollution load and which may include the immediate location of the discharges.

This proposed definition is identical in substance to the definition of "pollution abatement area" found at 25 Pa. Code §§ 87.202 and 88.502, which was approved by OSM as part of Pennsylvania's standards for treatment of preexisting discharges on remined areas. See 51 FR 5997, February 19, 1986.

"Public recreational impoundment" is defined to mean a closed basin, naturally formed or artificially built, which is dammed or excavated for the retention of water and which is owned, rented or leased by the Federal Government, the Commonwealth or a political subdivision of the Commonwealth and which is used for swimming, boating, water skiing, hunting, fishing, skating or other similar activities. There is no direct Federal counterpart to this definition. The Director finds, however, that the proposed definition is consistent with the definition of "impoundment" contained in the Federal regulations at 30 CFR 701.5, and is not inconsistent with any other provision of SMCRA or the Federal regulations.

### 3. Section 3.2 Powers and Duties of the Environmental Quality Board

New subsection (b) requires Pennsylvania's Environmental Quality Board (EQB) to enact regulations to implement Section 6.2 (concerning coal refuse disposal activities on previously affected areas). Proposed Section 3.2(b) also provides that the new regulations to be developed to implement Section 6.2 must be consistent with the requirements of section 301(p) of the Federal Water Pollution Control Act and the State remaining regulations for surface coal mining activities.

To the extent that the proposed provision requires the EQB to adopt implementing coal refuse disposal regulations, the Director finds the proposed language to be consistent with SMCRA section 503(a)(7) concerning authority of State regulatory programs to enact rules and regulations to carry out the provisions of SMCRA.

The remaining portion of this provision, pertaining to the Federal Water Pollution Control Act, is outside the scope of SMCRA and its implementing regulations. Therefore, the Director's approval of this remaining portion is unnecessary.

### 4. Section 4.1 Site Selection

This new section is added to establish the criteria for selecting sites for coal refuse disposal. Subsection (a) provides that preferred sites shall be used for coal refuse disposal unless the applicant demonstrates to the regulatory authority that another site is more suitable based on engineering, geology, economics, transportation systems and social factors and is not adverse to the public interest. Where, however, the adverse environmental impacts of the preferred site clearly outweigh the public benefits, the site shall not be considered a preferred site. A preferred site is one of the following:

- (1) A watershed polluted by acid mine drainage.
- (2) A watershed containing an unreclaimed surface mine but which has no mining discharge.
- (3) A watershed containing an unreclaimed surface mine with discharges that could be improved by the proposed coal refuse disposal operation.
- (4) Unreclaimed coal refuse disposal piles that could be improved by the proposed coal refuse disposal operation.
- (5) Other unreclaimed areas previously affected by mining activities.

There is no direct Federal counterpart to the proposed State language. However, the establishment of criteria to be used for selecting sites for coal refuse disposal is not itself inconsistent with the intent of SMCRA. SMCRA at sections 102(d) and 102(h) encourages both sound coal mining operations that protect the environment, and the reclamation of mined areas left without adequate reclamation prior to the enactment of SMCRA on August 3, 1977. The proposed criteria are reasonable, not inconsistent with the provisions of SMCRA, and will likely encourage the reclamation of environmentally damaged lands. The Director finds, therefore, that subsection (a) can be approved.

Subsection (b) provides that, except if the site is a preferred site, coal refuse disposal shall not occur on prime farmland; in sites known to contain Federal threatened or endangered plants or animals or State threatened or endangered animals; in watersheds designated as exceptional value under 25 PA Code Chapter 93 (relating to water quality standards); in areas hydrologically connected to and which contribute at least five percent of the drainage to wetlands designated as exceptional value under 25 Pa. Code Chapter 105 (relating to dam safety and waterway management) unless a larger percentage is approved by the department in consultation with the Pennsylvania Fish and Boat Commission; and, in watersheds less than four square miles in area upstream of the intake of public water supplies or the upstream limit of public recreational impoundments.

By letter to the U.S. Environmental Protection Agency (EPA) dated March 8, 1996 (Administrative Record Number PA 837.59), the State explained the intent and limitations of proposed subsection 4.1(b). The State explained that while section 4.1(b) does not prohibit coal refuse disposal in sites known to contain Federal threatened or endangered plants or animals, neither does it, by itself, authorize disposal in such areas. That is, in order to receive authorization to conduct coal refuse disposal operations on preferred sites (whether or not the sites contain threatened or endangered species), a coal refuse disposal permit must be obtained in accordance with the Pennsylvania program's permitting process. All coal refuse disposal permit applications must comply with Chapter 86 (regulations that apply to all coal mining activities) and Chapter 90 (regulations that apply to coal refuse disposal operations). One element of the permit review process, the State letter explained, is that a determination must be made that the coal refuse disposal activity will comply with §§ 86.37(a)(15) and 90.150(d), regulations that require compliance with the Federal Endangered Species Act.

Therefore, proposed subsection 4.1(b) categorically prohibits the disposal of coal refuse on non-preferred sites known to contain Federal threatened or endangered plants or animals or State threatened or endangered animals. If the proposed coal refuse disposal site is a preferred site, coal refuse disposal on the site may be possible, but only after a finding by the State that the proposed coal refuse disposal permit application is in compliance with §§ 86.37(a)(15) and 90.150(d) concerning endangered

species. These Pennsylvania program provisions are approved counterparts to the Federal regulations at 30 CFR 773.15(c)(10) and 816/817.97(b), respectively.

By letter dated January 27, 1997 (Administrative Record Number PA-837.61), PADEP submitted a copy of its revised Coal Refuse Disposal Program Guidance. The draft guidance was subsequently revised on April 1, 1997 (Administrative Record Number PA-837.65). The guidance document was finalized and made effective dated February 23, 1998 (Administrative Record Number PA-837.68). The Coal Refuse Disposal Program Guidance is intended to further clarify what PADEP stated in its March 8, 1996, letter concerning the implementation of proposed § 4.1(b). The Coal Refuse Disposal Program Guidance specifically clarifies the intended implementation of § 4.1(b) related to threatened or endangered species. Pennsylvania's policy concerning the implementation of § 4.1(b) is as follows:

With respect to preferred sites, the Department will not approve (via the site selection process) or permit (via the permitting process) a site that is known or likely to contain federally listed threatened or endangered species, unless the Department concludes and the U.S. Fish and Wildlife Service concurs that the proposed activity is not likely to adversely affect federally listed threatened or endangered species or result in the "take" of federally listed threatened or endangered species in violation of Section 9 of the Endangered Species Act.

The Federal regulations at 30 CFR 816/817.97 concerning the protection of fish and wildlife and related values, require the minimization of disturbance and adverse impacts and enhancement where practicable, and consultations with State and Federal fish and wildlife resource agencies. For example, 30 CFR 816/817.97(b) provides that no mining activity, including disposal of coal refuse, shall be conducted which is likely to jeopardize the continued existence of listed endangered or threatened species, 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. 30 CFR 780.16/784.21(a)(1) provide that the scope and level of detail of fish and wildlife information to be provided in the permit application shall be determined by the regulatory authority in consultation with State and Federal agencies with responsibilities for fish and wildlife.

By letter dated July 18, 1996 (Administrative Record Number PA

837.60) the U.S. Fish and Wildlife Service (USFWS) stated that OSM has received no incidental take statement from the USFWS exempting OSM from the "take" prohibitions of § 9 of the Endangered Species Act. USFWS also noted that no consultations on Pennsylvania's coal mining program, including the delegation of the program to the State by OSM, or amendments to the State's mining law or regulations, have occurred between USFWS and OSM. USFWS concluded, therefore, that there are no legal means by which OSM or the State can issue a mining permit which would allow for the take of a Federally listed species. USFWS further concluded that both OSM and the State must interpret the permitting provision in Pennsylvania's mining regulations at 25 Pa. Code § 86.37(a)(15) (relating to Federally listed species) to mean that no proposed activity may be permitted by the State which "may affect" threatened or endangered species, or result in the "take" of threatened or endangered species in violation of § 9 of the Endangered Species Act.

However, by letter dated April 7, 1998 (Administrative Record Number PA 837.70) the USFWS concluded, after informal consultations with OSM, Pennsylvania, and the EPA, and after reviewing the State's Coal Refuse Disposal Program Guidance, that OSM approval of the amendments which are the subject of this rulemaking is not likely to adversely affect federally listed species in Pennsylvania. See the Agency Comments section below for a complete discussion of the USFWS comments.

There is no direct Federal counterpart to the proposed provision. However, based on the information discussed above (including the State's Coal Refuse Disposal Guidance quoted above, and the concurrence letter from the USFWS), the Director finds that the proposed site selection provision at subsection 4.1(b) is not inconsistent with the Federal regulations. The Director is approving subsection 4.1(b), however, only to the following extent:

With respect to preferred sites, the State will not approve (via the Site Selection process) or permit (via requirements in Chapters 86 or 90) a site that is known or likely to contain Federally listed threatened or endangered species, unless the State demonstrates and the USFWS concurs that the proposed activity is not likely to adversely affect Federally listed threatened or endangered species or results in the "take" of Federally listed or endangered species in violation of Section 9 of the Endangered Species Act.

Further, § 86.37(a)(15) of the Pennsylvania program concerning criteria for permit approval or denial, shall still apply to all permits, including coal refuse disposal operations on preferred sites. Section 86.37(a)(15) provides the following:

A permit or revised permit application will not be approved unless the application affirmatively demonstrates and the Department finds, in writing, on the basis of the information in the application or from information otherwise available, which is documented in the approval, and made available to the applicant, that the following exist: \* \* \* (15) The proposed activities would not affect the continued existence of endangered or threatened species or result in the destruction or adverse modification of their critical habitat as determined under the Endangered Species Act of 1973 (16 U.S.C.A. §§ 1531-1544).

In § 86.37(a)(15), the phrase "would not affect the continued existence of" will be interpreted by OSM and Pennsylvania to mean that no mining activity may be permitted by the State which "may affect" threatened or endangered species unless the USFWS concurs that the proposed activity is not likely to adversely affect Federally listed threatened or endangered species or result in the "take" of Federally listed threatened or endangered species in violation of Section 9 of the Endangered Species Act.

The Director also notes that § 87.50, § 88.33, § 89.74, and § 90.18 (concerning Fish and Wildlife Resource Information related to Surface Mining; Anthracite Coal; Underground Mining of Coal and Coal Preparation Facilities; and Coal Refuse Disposal, respectively) still apply to all permits. In order to ensure that accurate and adequate information is obtained to make permit decisions with respect to Federally listed species, and to ensure compliance with § 86.37(a)(15) as interpreted above, review of certain permits by USFWS is necessary to ensure that proposed permits (i.e., new, revised, and renewal) are "not likely to adversely affect" threatened or endangered species. At least annually, the USFWS will provide a listing of those geographic areas (e.g., counties) in Pennsylvania which have known or likely occurrences of Federally listed species. The PADEP shall provide the USFWS's Pennsylvania Field Office with copies of proposed mining permits for review as part of the normal permit review process. The USFWS will provide preliminary endangered species comments to the State, with copies of those comments to OSM. Prior to publication in the *Pennsylvania Bulletin*, the State shall resolve with the USFWS all concerns related to

threatened and endangered species to ensure that Federally listed species are not likely to be adversely affected by the proposed action. This review mechanism will allow for concurrent review by the natural resource agencies, and will also minimize the number of permits to be sent by the State and reviewed by the USFWS.

The Director also notes that § 90.150 (c) and (d) concerning protection of fish, wildlife, and related environmental values continues to apply to all coal refuse disposal permits.

Subsection 4.1(c) requires the identification of alternative sites that were considered within a one mile radius for new refuse disposal areas that support existing mining. Where there are no preferred sites within a one mile radius or where the applicant demonstrates that a nonpreferred site is more suitable, the applicant shall demonstrate the basis for the exclusion of other sites, and shall demonstrate the suitability of the recommended site. Where the adverse environmental impacts of the proposed site clearly outweigh the public benefits, the State shall not approve the site.

The Federal regulations at 30 CFR 816/817.81 through 816/817.84 authorize the storage of coal mine waste (at 30 CFR 817.81 and 817.84) on permitted areas. The storage of coal mine waste can result in large storage structures of potentially hazardous materials, and the Federal regulations provide specific provisions to assure that such storage facilities are constructed in an environmentally sound manner. Pennsylvania has, at Chapter 90, approved counterparts the Federal regulations concerning the storage of coal refuse.

While the proposed Pennsylvania provision provides some incentive to use preferred sites (i.e., environmentally damaged sites) that are close to the existing mining operations, it does not require the use of preferred sites. This is not inconsistent with the Federal regulations if the State authorizes the placement of coal refuse storage piles on permitted areas and in accordance with the rules at Chapter 90 concerning coal refuse disposal. There is nothing in the proposed State language that nullifies the applicability of Chapter 90.

The proposed State provision requires a demonstration of site suitability on the basis of several factors, including environmental factors. Any such demonstration of environmental suitability must, of course, consider factors such as protection of the hydrologic balance and threatened or endangered species as required by the Federal regulations and the counterpart

Pennsylvania rules. The Director notes that there is nothing in the proposed language that would negate the applicability of these approved State rules.

Because Pennsylvania will continue to apply the provisions of 25 Pa. Code Chapter 90, which correspond to the Federal regulations at 30 CFR 816/817.81 through 816/817.84, to the disposal of all coal refuse, the Director finds that the proposed revisions are not inconsistent with SMCRA or the Federal regulations.

Subsection (d) requires the identification, within a 25 square mile area (about a three-mile radius), of alternative sites that were considered, and the basis for their consideration, as new refuse disposal areas that support proposed new coal mining activity. Where there are no preferred sites within the 25-square mile area or the applicant demonstrates that a nonpreferred site is more suitable, this provision requires a demonstration of the basis for the exclusion of other sites, and a demonstration, based on reasonably available data, that the proposed site is more suitable. Where the adverse environmental impacts of the proposed site clearly outweigh the public benefits, the site will not be approved.

There are no direct Federal counterparts to these proposed site selection criteria. However, the Director finds that the proposed revisions are not inconsistent with SMCRA or the Federal regulations, since Pennsylvania will continue to apply the state counterparts to the Federal requirements, at 30 CFR 816/817.81 through 816/817.84, to the disposal of all coal refuse.

Subsection (e) provides that the alternatives analyses required by section 4.1 satisfies the Dam Safety and Encroachments Act (November 26, 1978 (P.L. 1375, No. 325)). Since the Dam Safety and Encroachments Act is outside the scope of the approved State program, the Director's approval of subsection (e) is not necessary.

#### 5. Section 6.1 Designating Areas Unsuitable for Coal Refuse Disposal

a. Subsection (h)(5) is amended to provide for a variance to the 100-foot stream buffer zone provision for coal refuse disposal. This provision provides for a demonstration by the operator that the variance will not result in significant adverse hydrologic or water quality impacts. This provision also provides for public notice of the requested variance, a public hearing concerning the application for a variance, the consideration of comments submitted by the Pennsylvania Fish and

Boat Commission, and a written finding by the regulatory authority that specifies the methods and techniques that must be employed to prevent or mitigate adverse impacts.

While SMCRA itself is silent concerning stream buffer zones, a 100-foot stream buffer zone and variances thereto are authorized at 30 CFR 816/817.57(a). Such stream buffer zone variances are authorized provided: (1) The regulatory authority finds that the mining activities will not cause or contribute to the violation of water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream; and (2) any stream diversions will comply with 30 CFR 817.43 concerning diversions.

The criteria for the variance as proposed in subsection (h)(5) are less effective than the criteria contained in 30 CFR 816/817.57. Specifically, the proposed term, "significant" renders the proposal less effective because it is a lesser standard than the Federal requirement that the proposed activities will not cause or contribute to the violation of water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream. That is, whereas the Federal regulations prohibit any adverse effects on water quality and quantity, or on other environmental resources of the stream, the proposed regulations only prohibit "significant" adverse impacts.

Therefore, the Director is approving subsection (h)(5) only to the extent that it authorizes stream buffer zone variances for coal refuse disposal activities that will not cause or contribute to the violation of water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream. In effect, the Director is not approving the term "significant." Also, the Director is requiring Pennsylvania to amend its program to authorize stream buffer zone variances for coal refuse disposal activities only where such activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect water quality and quantity, or other environmental resources of the stream.

Subsection 6.1(h)(5) also requires public notice in two newspapers of general circulation in the area of the proposed variance for two successive weeks. This notice would be in addition to the public notice required by § 86.31 concerning public notices of filing of permit applications, and is consistent

with the notice required for steam buffer zone variance applications, at 25 Pa. Code § 86.102(12).

The remaining portions of subsection 6.1(h)(5), pertaining to written orders, public hearings, and consideration of comments by the Pennsylvania Fish and Boat Commission, have no Federal counterparts. However, since they are in addition to the public notice requirements for stream buffer zone variance applications, at 26 Pa. Code § 86.102(12), the Director finds that they are not inconsistent with SMCRA or the Federal regulations.

Subsection 6.1(i) is added to provide that all new coal refuse disposal areas shall include a system to prevent adverse impacts to surface and ground water and to prevent precipitation from contacting the coal refuse.

The system for preventing precipitation from contacting the coal refuse shall be installed: as phases of the coal refuse disposal area reach capacity; as specified in the permit; when the operator temporarily ceases operation of the coal refuse disposal area for a period in excess of ninety days unless the State, for reasons of a labor strike or business necessity, approves a longer period that shall not exceed one year, or when the operator permanently ceases operation of the coal refuse disposal area. The system shall allow for revegetation and the prevention of erosion.

The proposed language requiring installation of a system to prevent adverse impacts to surface and ground water and to prevent precipitation from contacting the coal refuse has several counterparts in SMCRA. For example, SMCRA § 515(b)(11), concerning surface disposal of mine wastes, provides that such wastes shall be placed in designated areas and compacted in layers with the use of incombustible and impervious materials if necessary. SMCRA § 515(b)(10), concerning protection of the hydrologic balance, requires the avoidance of acid or other toxic mine drainage. SMCRA § 515(b)(14) requires that acid-forming and toxic-forming materials be treated or buried and compacted or otherwise deposited in a manner designed to prevent contamination of ground or surface waters.

Despite the fact that the proposed language allows delays in completing the installation of the preventive system for reasons such as strikes and business necessity, the State rules at Chapter 90 concerning coal refuse disposal operations continue to apply at all times without delay. For example, § 90.122 continues to provide that coal refuse disposal areas shall be maintained to

ensure that the leachate and surface runoff from the permit area will not degrade surface water or groundwater, or exceed the effluent limitations of § 90.102.

The Director finds the proposed language is consistent with SMCRA § 515(b)(10) concerning protection of the hydrologic balance, and 30 CFR 816/817.81(a)(1) concerning coal mine waste, protection of surface and groundwater from leachate and surface water runoff.

#### 6. Section 6.2 Coal Refuse Disposal Activities on Previously Affected Areas

This is a new section. Subsection (a) provides that a special authorization may be requested to engage in coal refuse disposal activities on areas with preexisting pollutional discharges resulting from previous mining. This subsection also provides that all of the provisions of Pennsylvania's Coal Refuse Disposal Act (P.L. 1040, No. 318, September 24, 1968 and amended October 10, 1980 (P.L. 807, No. 154)) apply to special authorizations to conduct coal refuse disposal activities on areas with preexisting pollutional discharges, except as modified by this new section 6.2.

Subsection (b) provides the criteria under which the State may grant a special authorization to engage in such coal refuse disposal. The State may grant the special authorization if such special authorization is part of:

(1) A permit issued under section 4 of the State's Coal Refuse Disposal Act, except for permit transfers after the effective date of this section, if the request is made at the time of submittal of a permit application or prior to a State decision to issue or deny that permit; or

(2) A permit revision pursuant to State regulation, but only if the operator affirmatively demonstrates to the satisfaction of the State that:

(i) The operator has discovered pollutional discharges within the permit area that came into existence after its permit application was approved;

(ii) The operator has not caused or contributed to the pollutional discharges;

(iii) The proposed pollution abatement area is not hydrologically connected to any area where coal refuse disposal activities have been conducted pursuant to the permit;

(iv) The operator has not affected the proposed pollution abatement area by coal refuse disposal activities; and

(v) The State has not granted a bonding authorization and coal refuse disposal approval for the area.

Subsection (c) provides that the State may not grant a special authorization unless the operator seeking a special authorization for coal refuse disposal demonstrates all of the following:

(1) Neither the operator nor any officer, principal shareholder, agent, partner, associate, parent corporation, subsidiary or affiliate, sister corporation, contractor or subcontractor or any related party:

(i) Has any legal responsibility or liability as an operator under section 315 of the Pennsylvania Act of June 22, 1937 (P.L. 1987, No. 394), known as "The Clean Stream Law," for treating the pollutional discharges from or on the proposed pollution abatement area; or

(ii) Has any statutory responsibility or liability for reclaiming the proposed pollution abatement area.

(2) The proposed pollution abatement plan will result in a significant reduction of the baseline pollution load and represents best technology.

(3) The land within the proposed pollution abatement area can be reclaimed.

(4) The coal refuse disposal activities on the proposed pollution abatement area will not cause any additional surface water pollution or groundwater degradation.

(5) The coal refuse disposal activities on permitted areas other than the proposed pollution abatement area will not cause any surface water pollution or groundwater degradation.

(6) There are one or more preexisting pollutional discharges from or on the pollution abatement area.

(7) All requirements of Pennsylvania's Coal Refuse Disposal Control Act and its implementing rules that are not inconsistent with section 6.2 have been met.

Subsection (d) provides that a special authorization may be denied if granting it will or is likely to affect any legal responsibility or liability for abating the pollutional discharges from or near the pollution abatement area.

Subsection (e) provides that, except as specifically modified by section 6.2, an operator requesting special authorization shall comply with the permit application requirements of sections 4 and 5 of Pennsylvania's currently approved Coal Refuse Disposal Act. The operator must also provide additional information as required by the State, relating to delineation of the pollution abatement area (including the location of preexisting discharges), a description of the hydrologic balance of the pollution abatement area (including water quality and quantity monitoring data), and a

description of the abatement plan that represents best technology.

Subsection (f) provides that an operator who is granted a special authorization shall implement the approved water quality and quantity monitoring program and abatement plan, notify the State immediately prior to the completion of each step of the abatement plan, and provide progress reports to the State within 30 days after the completion of each step of the abatement program in a manner described by the State.

The proposed special authorizations must comply with 40 CFR part 434 concerning performance standards for coal mining point source discharges, and with § 301(p) of the Federal Water Pollution Control Act (33 U.S.C. 1311(p)) concerning modified permits for coal remining operations. The effluent limitation standards will be identified jointly by the EPA and the State on a permit-by-permit basis during the development of the National Pollutant Discharge Elimination System (NPDES) permit. The Director notes that the EPA has provided its concurrence with the proposed amendments. See the Environmental Protection Agency section below for a discussion of all EPA comments and conditions on their approval of these amendments. The Director finds that the proposed provisions at Section 6.2(a) through (f) have no Federal counterparts. However, the Director finds that these subsections are not inconsistent with SMCRA and can be approved, provided that nothing in this approval authorizes the State to adopt revised effluent limitations without approval by the EPA pursuant to the Clean Water Act.

Subsection (g)(1) specifies that an operator granted special authorization under section 6.2 shall be responsible for the treatment of discharges in the following manner:

(i) Except for preexisting discharges which are not encountered during coal refuse disposal activities or the implementation of the abatement plan, the operator shall comply with all applicable regulations of the State.

(ii) The operator shall treat preexisting discharges which are not encountered during coal refuse disposal activities or implementation of the abatement plan to meet the baseline pollution load when the baseline pollution load is exceeded according to the following schedule:

(A) Prior to final bond release, if the operator is in compliance with the pollution abatement plan, where the State demonstrates that the operator has caused the baseline pollution load to be exceeded; the State shall have the

burden of proving that the operator caused the baseline pollution load to be exceeded;

(B) Prior to final bond release, if the operator is not in compliance with the pollution abatement plan, unless the operator affirmatively demonstrates that the reason for exceeding the baseline pollution load is a cause other than the operator's coal refuse disposal and abatement activities; and

(C) Subsequent to final bond release where the department demonstrates that the operator has caused the baseline pollution load to be exceeded; the department shall have the burden of proving that the operator caused the baseline pollution load to be exceeded.

Subsection (g)(1)(ii)(A) allocates the burden of proof in a manner which, at first blush, appears to be inconsistent with the Federal regulations at 43 CFR 4.1171(b).

That Federal provision states that "the ultimate burden of persuasion shall rest with the applicant for review" of any notice of violation or cessation order. In addition, the legislative history of SMCRA clearly states that the applicant for review of a notice or order carries the ultimate burden of proof in the administrative review proceeding. S. Rep. No. 128, 95th Cong., 1st Sess. 93 (1977). However, this proposal shifts the burden of proof to the State Regulatory Authority only where it issues an enforcement action for exceeding the baseline pollution load for a preexisting, unencountered discharge. As noted below, the EPA states in its concurrence that discharges unaffected by and diverted around or piped under fills (not encountered) would not be subject to the effluent guidelines at 40 CFR part 434—subpart B. Because these preexisting unencountered discharges are not subject to the requirements of 40 CFR part 434, they are likewise not regulated under 30 CFR 816/817.42. Moreover, since it proposes to regulate pollutional discharges and take enforcement actions in a manner which is beyond the scope of, but not inconsistent with, SMCRA, Pennsylvania is free to allocate the burden of proof in administrative review proceedings of such enforcement actions in a different manner than is provided for in 43 CFR 4.1171(b). Therefore, subsection (g)(1)(ii)(A) can be approved.

Subsection (g)(2) provides that an allegation that the operator caused the baseline pollution load to be exceeded under subclause (ii) of clause (1) shall not prohibit the State from issuing, renewing or amending the operator's license and permits or approving a bond release until a final administrative

determination has been made of such alleged violation.

This subsection is no less stringent than SMCRA, so long as it applies only to bond releases for permits other than the permit for which the allegation of exceeding the baseline pollution load is pending. If it were interpreted to allow bond release on the permit for which the allegation is pending, subsection (g)(2) would be less stringent than section 519(c)(3) of SMCRA, 30 U.S.C. 1269(c)(3), which allows a final bond release only after all reclamation requirements of SMCRA have been met. However, subsection 6.2(j)(3) of this amendment, discussed below, prohibits final bond release of special authorization permits where the operator has caused the baseline pollution load to be exceeded after phase two of bond release, or within five years of the discontinuance of treatment of a preexisting, unencountered discharge. As such, any allegation that the operator caused the baseline pollution load to be exceeded would, in accordance with subsection 6.2(j)(3), prevent final bond release until the allegation is found to be untrue. Therefore, subsection (g)(2) is approved to the extent that it applies to final bond releases on permits other than the permit for which the allegation that the baseline pollution load has been exceeded is pending.

Subsection (g)(3) provides that, for this subsection, the term "encountered" shall not be construed to mean diversions of surface water and shallow groundwater flow from areas undisturbed by the implementation of the abatement plan which would otherwise drain into the affected area, provided such diversions are designed, operated and maintained in accordance with all applicable regulations of the State.

The Federal regulations at 30 CFR 816/817.42 require that mining operations (including coal refuse disposal operations) comply with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by EPA and set forth in 40 CFR part 434. In order to approve Pennsylvania's program amendment, OSM is required to obtain the concurrence of the EPA in accordance with § 503(b) of SMCRA. On September 20, 1995, OSM requested the concurrence of the EPA with respect to those aspects of the amendment which relate to air or water quality standards promulgated under the authority of the Clean Water Act.

In a letter to OSM dated January 30, 1997 (Administrative Record Number

PA-837.63), EPA conditionally concurred with the proposed Pennsylvania amendment (see Environmental Protection Agency section below for a complete discussion of EPA comments). The EPA provided five conditions for its concurrence with the proposed amendments.

The EPA stated that to emphasize its concern over in-stream refuse disposal, EPA concurrence is conditioned on the following: a.) PADEP notification to EPA within 30 days of receipt of a joint SMCRA/NPDES permit application for an in-stream refuse disposal project, and b.) PADEP submittal to EPA of any joint SMCRA/NPDES application or permit information which EPA specifically requests for an effective review.

The EPA stated that it will not object to PADEP issuance of an NPDES permit for proposed in-stream refuse disposal facilities if (1) compliance with Section 404 permit requirements is assured; (2) there are no feasible alternatives to the coal refuse disposal, protection of existing and designated downstream aquatic life and uses is assured, and provisions are established for adequate mitigation.

Where discharges from refuse disposal activities would cause or contribute to an exceedance of water quality standards, the NPDES permit must contain water quality-based effluent limitations in compliance with 40 CFR 122.44(d). Adequate monitoring and analysis of the background water quality of the receiving stream must be done prior to permit issuance and as part of the permit development process. The EPA also stated that appropriate measures must be planned and implemented for coal refuse disposal facilities which will prevent long term acid drainage after closure.

The proposed statutory revisions adopted by the State comply with EPA's determination regarding the treatment level required under Federal law for unencountered discharges. The proposed standards regarding treatment levels for discharges that are encountered are the applicable regulations of the department (§ 90.102 Hydrologic balance: water quality standards, effluent limitations and best management practices). The Director notes that EPA review of all permit applications related to in-stream refuse disposal and other permit applications identified by the EPA will help assure that the proposed coal refuse disposal operations in Pennsylvania will meet the requirements of the Clean Water Act.

In addition, EPA recommended that proposed disposal of potentially acidic refuse in valley fills on non-impacted

(virgin) areas be subject to reviews under individual § 404 permits, rather than coverage under the nationwide 404 permit.

The EPA has clarified that its understanding of § 6.2(g)(1)(i) is that coal refuse disposal operations that encounter a preexisting discharge shall comply with the effluent limitations that will be described in the NPDES permit, and which will be consistent with the effluent guideline limitations for coal preparation plants and associated areas as identified at 40 CFR Part 434—Subpart B. However, the EPA notes that discharges unaffected by and diverted around or piped under fills (not encountered) would not be subject to the effluent guidelines at 40 CFR Part 434—Subpart B. Such discharges that are not encountered shall meet the baseline pollution load standard as defined at § 3(1.3), and shall be treated in accordance with the provisions at § 6.2(g)(1)(ii). The EPA will, as part of its review of all NPDES permits related to in-stream refuse disposal and other permits, help assure that adequate monitoring and analysis of the background water quality of the receiving stream will be done prior to permit issuance. In addition, the EPA will be able to provide guidance to the State to help assure the prevention of long term acid drainage after closure.

The Director notes that the proposed provisions at § 6.2(g)(1)(ii) address the possibility that coal refuse disposal operations (or implementation of the abatement plan) may cause the baseline pollution load to be exceeded. As a consequence of exceeding the baseline pollution load, the operator must comply with the proposed provisions at § 6.2(g). The Director recognizes the possibility that such coal refuse disposal operations (or implementation of the abatement plan) could affect a preexisting discharge to such a degree that, in effect, the operations have "encountered" that discharge. In such a circumstance (i.e., a discharge is encountered) an operator would be required to treat the preexisting discharge not to baseline, but to the applicable Pennsylvania water quality standards at Chapter 90.102. Proposed § 6.2(g)(1)(i) provides that for preexisting discharges that are encountered, the operator shall comply with all applicable regulations of the department.

The Director also recognizes the difficulty and complexity of making such a determination. By necessity, these determinations would have to be made by the State on a case-by-case basis after a thorough analysis of the circumstances and variables involved.

For example, under the proposed provisions, coal refuse may be placed upon a preexisting coal refuse deposit with a pre-existing pollutional discharge. Under such circumstances, the surface of the pre-existing coal refuse deposit may be prepared (modified) to accept deposition of a new coal refuse deposit so that the resulting deposit is stable. The surface preparation activities on the pre-existing deposit will not, of itself, be considered an "encounter" of the pre-existing pollutional discharge.

During coal refuse disposal operations, pollutional discharges from the pre-existing coal refuse deposit that is being buried under the new coal refuse deposit, will be treated to baseline standards. Pollutional discharges flowing from the newly placed coal refuse that lies above the pre-existing coal refuse deposit will be subject to the State effluent standards for disposal operations at Chapter 90, subchapter D at 90.102. However, if during its inspections of the operations, it becomes apparent to the State that pollutional waters from the new coal refuse disposal fill are co-mingling with (i.e., encountering) the pollutional discharge from the pre-existing coal refuse deposit, then the State must apply the effluent limitations at Chapter 90, subchapter D at 90.102 to the pre-existing discharge, as well as to the "new" discharge, rather than the baseline pollution load standard.

With the exceptions noted above for subsections (g)(1)(ii)(A) and (g)(2), the Director finds that 6.2(g) is consistent with the requirements of the Federal regulations at 30 CFR 816/817.42, provided that nothing in this approval authorizes the State to adopt revised effluent limitations without approval by the EPA pursuant to the Clean Water Act.

Subsection (h) provides that an operator who is required to treat preexisting discharges under subsection (g) will be allowed to discontinue preexisting discharges when the operator demonstrates that all of the conditions identified below have been satisfied.

(1) The baseline pollution load is no longer being exceeded as shown by all ground and surface water monitoring;

(2) All requirements of the permit and the special authorization have been or are being met;

(3) The operator has implemented each step of the abatement plan as approved in the authorization; and

(4) The operator did not cause or allow any additional surface water pollution or groundwater degradation



by re-affecting the pollution abatement area.

The Director notes that the proposed language at subsection 6.2(h) could be misinterpreted. The proposed language in the first sentence of this subsection which states that "an operator required to treat preexisting discharges under subsection (g) will be allowed to discontinue treating . . ." is unclear. Subsection 6.2(g) pertains to both discharges that are encountered and those that are not encountered, and the treatment standards are different for each.

The Director interprets the proposed language in the first sentence of § 6.2(h) to pertain only to subsection 6.2(g)(1)(ii), which governs discharges that are not encountered. Therefore, the Director is approving the proposed provision to the extent that it provides that an operator may only discontinue treating preexisting discharges that are not encountered when the operator demonstrates that the "baseline" pollution load is no longer being exceeded. Preexisting discharges that are encountered must be treated to the State water quality standards at Chapter 90, subchapter D at 90.102. Also, the Director is requiring that the State further amend the Pennsylvania program to clarify that Subsection 6.2(h) of the Coal Refuse Disposal Act pertains to preexisting discharges that are not encountered.

Subsection (i) provides that if any condition set forth in subsection 6.2(g) occurs after discontinuance of treatment under subsection 6.2(h), the operator shall reinstitute treatment in accordance with subsection 6.2(g). An operator who reinstates treatment under this subsection shall be allowed to discontinue treatment if the requirements of subsection 6.2(h) are met. This provision will help assure that treatment will be restarted as necessary to comply with the provisions of subsection 6.2(g).

To the extent that subsection 6.2(g), (h), and (i) are applied as discussed in this finding, the Director finds that the proposed provisions are not inconsistent with SMCRA, and are consistent with the Federal regulations at 30 CFR 816/817.42. The Director is making this finding with the understanding that the regulations to be developed by Pennsylvania to implement Section 6.2 (as is required by the proposed provisions at Section 3.2(b) of the Coal Refuse Disposal Act) will clarify that preexisting discharges that are encountered must be treated to the State effluent standards at Chapter 90, subchapter D at 90.102.

Subsection (j) provides that for pollution abatement areas subject to a grant of special authorization under subsection 6.2, the operator shall comply with all requirements relating to bonds set forth in section 6 of Pennsylvania's existing Coal Refuse Disposal Act, except that the criteria and schedule for release of bonds shall be as follows:

(1) Up to fifty-percent of the amount of bond if the operator demonstrates that:

(i) All activities were conducted in accordance with all applicable requirements;

(ii) The operator has satisfactorily completed installing the water impermeable cover, grading, planting and drainage control in accordance with the approved abatement plan;

(iii) The operator has properly implemented each step of the approved abatement plan;

(iv) The operator has not caused the baseline pollution load to be exceeded for a period of a minimum of six months prior to the submittal of a request for bond release and until the bond release is approved as shown by all ground and surface water monitoring; and

(v) The operator has not caused or contributed to any ground or surface water pollution by re-affecting the pollution abatement area.

(2) Up to an additional thirty-five percent of the amount of bond if the operator demonstrates that:

(i) The operator has replaced topsoil, completed final grading and achieved successful vegetation in accordance with the approved reclamation plan;

(ii) The operator has not caused or contributed to any ground or surface water pollution by re-affecting the pollution abatement area; and

(iii) The operator has achieved the actual improvement of the baseline pollution load described in the abatement plan and shown by all ground and surface water monitoring for the period of time provided in the abatement plan, or has achieved all of the following:

(A) At a minimum, the operator has not caused the baseline pollution load to be exceeded as shown by all ground and surface water monitoring for a period of twelve months from the date of initial bond release under clause (1) or from the date of discontinuance of treatment under subsection 6.2(h).

(B) The operator has conducted all measures provided in the abatement plan and any additional measures specified by the State in writing at the time of initial bond release under clause (1).

(C) The operator has caused aesthetic or other environmental improvements and the elimination of public health and safety problems by engaging in coal refuse disposal activities and re-affecting the pollution abatement area.

(D) The operator has stabilized the pollution abatement area.

(3) The remaining amount of bond if the operator demonstrates that:

(i) The operator has not caused the baseline pollution load to be exceeded from the time of bond release under clause (2) or, if treatment has been initiated any time after release of the bond, for a period of five years from the date of discontinuance of treatment under subsection 6.2(h); and

(ii) The applicable liability period of section 6 has expired and the operator has successfully completed all coal refuse disposal and reclamation activities.

In accordance with the Federal regulations at 30 CFR 800.40, the State's amendment provides for Phase I bond release after the completion of refuse placement and grading; Phase II bond release after revegetation has been established; and Phase III bond release after the expiration of the extended liability period.

In addition, the State's bond release provisions establish special criteria to ensure that final bond release will not be granted unless the operator at a minimum, is satisfying the effluent limitations established by PADEP and approved by EPA for areas with preexisting pollutional discharges, the operator has fully implemented the approved abatement and reclamation plan and the operator has not caused degradation of the baseline pollution load for a specified period of time.

Therefore, the Director finds that proposed § 6.2(j) provides sufficient guarantees to ensure that final release of the bond will not occur until the operation has satisfied the water quality standards established by EPA and met all other reclamation requirements that apply to any surface mining operation. The Director finds subsection (j) to be no less effective than the Federal bond release standards at 30 CFR 800.40.

Subsection 6.2(k) sets forth the standard of successful revegetation for reclamation plans approved as part of a special authorization. The proposed standard of successful revegetation shall be, as a minimum, the establishment of ground cover of living plants not less than can be supported by the best available topsoil or other suitable material in the re-affecting area, shall not be less than ground cover existing before disturbance and shall be adequate to control erosion: Provided,

however, that the State may require that the standard of success comply with section 5(c) and (e) of the current Coal Refuse Disposal Act where it determines compliance is integral to the proposed pollution abatement plan.

The Director finds proposed subsection (k) to be consistent with 30 CFR 816.115(b)(5), except as noted below. The Federal provision at 816.116(b)(5) provides the minimum revegetation standards for areas that were previously disturbed by mining, and that were not reclaimed to the requirements of Subchapter K (performance standards). The proposed State provision, however, lacks the requirement that to qualify for the revegetation standards, the area that was previously disturbed by mining must not have been reclaimed to the State's performance standards. To be no less effective than 816.116(b)(5), the State needs to limit the application of the proposed standards to areas that were previously disturbed by mining and that were not reclaimed to the State reclamation standards.

Therefore, the Director is approving subsection (k) only to the extent that it is applicable to areas previously disturbed by mining that were not reclaimed to the standards of the Pennsylvania program. In addition, the Director is requiring that the State further amend the Pennsylvania program to be no less effective than 30 CFR 816.116(b)(5), by limiting the application of the revegetation standards under Subsection 6.2(k) of its Coal Refuse Disposal Act, to areas that were previously disturbed by mining and that were not reclaimed to the State's reclamation standards.

Subsection 6.2(l) provides that forfeited funds in the Surface Mining Conservation and Reclamation Fund (Fund) shall be applied as a credit to the bond required for a special authorization. In addition, special authorization areas shall be exempt from permit reclamation fees.

The Director notes that any forfeited Fund moneys to be used would have originally come from a form of bond which is approved under the Pennsylvania program. As such, the use of these forfeited Fund moneys to "rebond" the site is not, *per se*, inconsistent with section 509 of SMCRA, 30 U.S.C. 1259, and 30 CFR 800.12, pertaining to the requirement of a performance bond and the acceptable forms thereof. However, if the forfeited moneys for a particular site are sufficient to perform all outstanding reclamation obligations for the site, then the site should not be reclaimed to lesser reclamation standards under a

special authorization. For example, if the forfeited moneys in the Fund were used to reclaim the site, and that reclamation would result in the elimination of a pollutional discharge or revegetation of the site to the level required to support the land use approved in the original permit, then it would be inappropriate and a loss to the environment to reclaim the site to lesser standards under special authorization. Under these circumstances, the State should not approve the special authorization.

The Director finds that the proposed provisions, concerning the use of previously forfeited funds in establishing an appropriate bond amount for a special authorization area, are not inconsistent with the Federal forfeiture of bond provisions with the following exception. The Director is approving 6.2(l) to the extent that the PADEP will not approve a special authorization when such an authorization would result in the site being reclaimed to lesser standards than could be achieved if the forfeited bond moneys were used to reclaim the site to the standards approved in the original permit under which the bond moneys were forfeited. In addition, the Director is requiring that the State further amend the Pennsylvania program to clarify that under Subsection 6.2(l) of its Coal Refuse Disposal Act, a special authorization for coal refuse disposal operations will not be granted, when such an authorization would result in the site being reclaimed to lesser standards than could be achieved if the moneys paid into the Fund, as a result of a prior forfeiture on the area, were used to reclaim the site to the standards approved to the original permit under which the bond moneys were forfeited.

Subsection (m) provides that an operator granted special authorization under section 6.2 shall be permanently relieved from the requirements of subsection 6.2(g) and the act of June 22, 1937 (P.L. 1987, No. 394), known as "The Clean Streams Law," for all preexisting discharges, identified in subsection 6.2(e), to the extent of the baseline pollution load if the operator complies with the terms and conditions of the pollution abatement plan and the baseline pollution load has not been exceeded at the time of final bond release. Relief of liability under this subsection shall not act or be construed to relieve any person other than the operator granted special authorization from liability for the preexisting discharge; nor shall it be construed to relieve the operator granted special authorization from liability under

subsection 6.2(g)(1)(ii) if the baseline pollution is exceeded.

As discussed above in the finding for Section 6.2(g), the Director has determined that, with the exceptions noted for subsections (g)(1)(ii)(A) and (g)(2), proposed Section 6.2(g) is consistent with the requirements of the Federal regulations at 30 CFR 816/817.42 concerning water quality standards and effluent limitations. Under the proposed provisions, an operator with a special authorization would be required to comply with the Pennsylvania program performance standards for all preexisting pollutional discharges encountered by their operations and for all new pollutional discharges resulting from their operations, and to treat preexisting pollutional discharges in accordance with subsection 6.2(g). However, upon final bond release under subsection 6.2(j), an operator granted a special authorization would no longer be responsible for the preexisting pollutional discharges identified in the special authorization. To qualify, the operator with a special authorization must have complied with the terms and conditions of the pollution abatement plan and the provisions of Subsection 6.2(g) concerning the exceedence of the baseline pollution load.

As further discussed in the finding for Subsection 6.2(g), the EPA has concluded that discharges unaffected by and diverted around or piped under fills (not encountered) would not be subject to the effluent guidelines at 40 CFR part 434—subpart B. Such discharges that are not encountered shall meet the baseline pollution load standard as defined at § 3(1.3), and shall be treated in accordance with the provisions at § 6.2(g)(1)(ii). The Director finds, therefore, that the proposed subsection 6.2(m) is not inconsistent with the Federal regulations at 30 CFR 816.42 concerning water quality standards and effluent limitations.

#### 7. Section 6.3 Experimental Practices

This new section sets forth criteria established to encourage advances in coal refuse disposal practices and advance technology or practices that will enhance environmental protection with respect to coal refuse disposal activities, and authorizes the State to grant permits approving experimental practices and demonstration projects. The State may grant such permits if:

(1) The environmental protection provided will be potentially more protective or at least as protective as required by this act and State regulations;

(2) The coal refuse disposal activities approved under the permits are not larger or more numerous than necessary to determine the effectiveness and economic feasibility of the experimental practices or demonstration projects; and

(3) The experimental practices or demonstration projects do not reduce the protection afforded public health and safety below that provided by this act and state regulations.

SMCRA section 711 provides that the regulatory authority may, with approval by the Secretary, authorize departures in individual cases on an experimental basis from the environmental protection performance standards of sections 515 and 516 of SMCRA. The proposed provisions are substantively identical to the provisions of SMCRA section 711 concerning experimental practices, except that they are silent concerning the requirement to obtain approval from the Secretary for each experimental practice, and do not clarify that such practices are only approved as part of the normal permit approval process and only for departures from the environmental protection performance standards. The Director notes that the Pennsylvania rules developed to implement these provisions must be consistent with and no less effective than the Federal regulations at 30 CFR 785.13 concerning experimental practices mining.

The Director is approving the proposed amendments concerning experimental practices. In addition, the Director is requiring that the State further amend the Pennsylvania program by adding implementing rules no less effective than 30 CFR 785.13, and no less stringent than SMCRA Section 711 and which clarify that experimental practices are only approved as part of the normal permit approval process and only for departures from the environmental protection performance standards, and that each experimental practice receive the approval of the Secretary.

#### 8. Section 15.1 Suspension of Implementation of Certain Provisions

This new provision provides for the suspension of any provision of Act 1994-114 found to be inconsistent with SMCRA or section 402 of the Federal Water Pollution Control Act (FWPCA) (62 Stat. 1155, 33 U.S.C. section 1251 *et seq.*). This new provision also provides that the State shall develop a regulatory program and program amendments under SMCRA and the FWPCA that are consistent with the requirements of section 301(p) of the FWPCA and the State remaining regulations for surface mining activities. The Director finds the

proposed language to be consistent with SMCRA section 503(a)(7) concerning State programs, and with the Federal regulations at 30 CFR 732.17 concerning State program amendments.

#### IV. Summary and Disposition of Comments

##### Federal Agency Comments

Pursuant to 30 CFR 732.17(h)(11)(i), the Director solicited comments on the proposed amendment from various Federal agencies with an actual or potential interest in the Pennsylvania program.

The U.S. Fish and Wildlife Service (USFWS) expressed concern that the proposed amendments at § 4.1(b) concerning site selection, may lead to adverse impacts on Federally listed threatened or endangered species in violation of the Federal Endangered Species Act of 1973 (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*). Specifically, the concern is with language at § 4.1(b) which states, "Except if it is a preferred site, coal refuse disposal shall not occur \* \* \* in sites known to contain Federal threatened or endangered plants or animals." USFWS interpreted the quoted language as allowing the disposal of coal refuse on preferred sites known to contain Federally listed endangered or threatened species. USFWS believed that such activity would reasonably be expected to adversely affect threatened and endangered species.

The USFWS comment stated that OSM has received no incidental take statement from the USFWS exempting OSM from the "take" prohibitions of § 9 of the Endangered Species Act, 16 U.S.C. § 1538. USFWS also noted that no consultations on Pennsylvania's coal mining program, including the delegation of the program to the State by OSM, or amendments to the State's mining law or regulations, have occurred between USFWS and OSM. USFWS concluded, therefore, that there are no legal means by which OSM or the State can issue a mining permit which would allow for the take of a Federally listed species. USFWS further concluded that both OSM and the State must interpret the permitting provision in Pennsylvania's mining regulations at 25 Pa. Code § 86.37(a)(15) (relating to Federally listed species) to mean that no proposed activity may be permitted by the State which "may affect" threatened or endangered species, or result in the "take" of threatened or endangered species in violation of § 9 of the Endangered Species Act.

In a letter dated March 8, 1996 (Administrative Record Number PA 837.59) the Pennsylvania Department of Environmental Protection (PADEP) attempted to address the concerns raised regarding § 4.1(b). PADEP stated that § 4.1(b) is part of a site selection process that is separate and in addition to the approved permitting process.

That is, the proposed amendments must be read in concert with the requirements of the existing Pennsylvania program. Specifically, § 4.1(b) prohibits refuse disposal on non preferred sites. The State also contends that, while § 4.1(b) does not prohibit nor does it by itself authorize coal refuse disposal on preferred sites known to contain Federally listed species, a proposed permit for coal refuse disposal on preferred sites must also comply with all the applicable permitting statutes and regulations. Consequently, coal refuse disposal activities on preferred sites must comply with § 86.37(a)(15) and § 90.150(d). Section 86.37(a)(15) specifically prohibits the PADEP from issuing a permit to conduct coal mining activities if the proposed activities would violate the Federal Endangered Species Act. Section 90.150(d) prohibits coal refuse disposal activities which are likely to jeopardize the continued existence of endangered or threatened species, or which are likely to destroy or adversely modify the designated critical habitats of such endangered or threatened species.

Despite the State's assurances described above, the USFWS stated that it does not agree that the PADEP's March 8, 1996, letter adequately supports a conclusion that the proposed amendments are "not likely to adversely affect" threatened or endangered species. As a remedy, USFWS recommended that PADEP revise the State's Coal Refuse Disposal Policy (see Finding 4 above). After reviewing the final Policy Guidance document, USFWS agreed that the revised Policy, in conjunction with OSM's interpretation of the Endangered Species Act protections already contained in Pennsylvania's program, adequately clarify the requirements to comply with the Federal Endangered Species Act and has provided its concurrence with the proposed amendments (Administrative Record Number PA-837.70).

In addition, however, the USFWS indicated that the site selection criteria at § 4.1 (c) and (d) are weak in that they too easily allow a company to select non-preferred sites based on criteria such as environmental, economic, technical, transportation, and social factors. The result, USFWS predicted,

will be that using "previously affected areas" will be a rare occurrence (Administrative Record Number PA-837.15).

In response, the Director notes that neither SMCRA nor the Federal regulations contain site selection criteria which distinguish between "preferred" (previously mined) sites and "alternate" (undisturbed) sites. So long as Pennsylvania also continues to apply its State program counterparts to the Federal regulations governing coal refuse disposal, and imposes these site selection criteria as additional requirements, the criteria constitute more stringent environmental controls, which are not inconsistent with SMCRA or the Federal regulations. See SMCRA Section 505(b), 30 U.S.C. § 1255(b).

The USFWS's Clean Water Act comments concern the proposed variance to the 100-foot stream buffer zone provision at § 6.1(h)(5). The USFWS stated that the removal of the buffer zone would allow the use of valley fills, and this would result in the violation of EPA's antidegradation policy at 40 CFR 131.12(a)(1) which provides that existing uses of the waters of the United States, and the water quality necessary to protect that use, must be maintained and protected. The USFWS asserted that valley fills will result in the elimination of perennial streams with their aquatic communities and their nutrients and food organisms. Therefore, the filling of valleys with coal refuse would eliminate existing uses, thereby violating 40 CFR 131.12(a)(1).

In response, the Director notes that the EPA has provided its conditional concurrence with this proposed amendment. Condition number one is that EPA will review all applications for in-stream coal refuse disposal projects. Condition number two is that EPA will not object to the issuance of a permit for in-stream coal refuse disposal if, among other things, the existing uses of the stream will be protected. See EPA concurrence section, below.

The U.S. Department of Labor, Mine Safety and Health Administrative (MSHA) commented on language at § 1 of the proposed amendments concerning the State's perception that a few large coal refuse disposal areas would be better than numerous small coal refuse disposal sites. MSHA stated agreement with the language as long as refuse piles are constructed properly. The Director agrees that proper construction of refuse piles is essential, and notes that nothing in the proposed provisions limits the applicability of the approved State provisions concerning

the construction of coal refuse piles at Pa. Code Chapter 90.

#### Public Comments

A public comment period and opportunity to request a public hearing was announced in the October 16, 1995, **Federal Register** (60 FR 53565). The comment period closed on November 15, 1995. A public hearing was held on December 5, 1995. The public comments received and the Director's responses are presented below.

#### 1. Definition of "Coal Refuse Disposal Activities"

One commenter asserted that this definition is over broad and appears to include excess spoil under the definition. In response, the Director notes that the proposed definition specifically excludes the removal or storage of overburden from surface mining operations. The Federal regulations at 30 CFR 701.5 define "spoil" to mean overburden from surface coal mining operations. Therefore, the proposed definition is not inconsistent with the Federal definition.

The commenter also asserted that the definition is over broad in that it would allow topsoil and overburden to be handled and disposed of as coal refuse material, because the definition includes "excess soil and related materials." In response, the Director agrees that neither overburden nor topsoil may be handled or disposed of as though it were coal refuse, and notes that in Finding 2 above, he is requiring the State to add regulations that clarify the meaning of the term "excess soil and related materials."

#### 2. Threatened or Endangered Species

Numerous commenters object to the provision at § 4.1(b) that would allow coal refuse disposal in preferred sites that are known to contain prime farmlands or Federal threatened or endangered plants or animals or State threatened or endangered animals. The commenters stated that the proposed provision would violate section 9 of the Endangered Species Act, 16 U.S.C. 1538, and 30 CFR 817.97 concerning protection of fish, wildlife, and related environmental values.

Neither 16 U.S.C. 1538 nor 30 CFR 817.97 address prime farmland, so the Director disagrees with the commenter that coal refuse disposal on prime farmlands violates those provisions.

As discussed above in Finding 4, while § 4.1(b) does not prohibit coal refuse disposal in sites known to contain Federal threatened or endangered species, it does not, by itself, authorize disposal in such areas

either. What § 4.1(b) does, is allow for the possibility of coal refuse disposal in such areas if all the Pennsylvania program provisions concerning threatened or endangered species are complied with. This includes compliance with § 90.150(d) which provides that coal refuse disposal activities may not be conducted which are likely to jeopardize the continued existence of threatened or endangered species. Moreover, in response to comments from the USFWS, Pennsylvania has clarified the intent and implementation of the proposed provision by revising its coal refuse disposal policy. Specifically, the policy revisions clarify that coal refuse disposal must meet the permitting requirements of 25 PA Code Chapters 86 and 90. Both of these chapters have provisions that require compliance with the Federal Endangered Species Act.

Finally, the Director notes that the USFWS now agrees that OSM approval of this proposed amendment is not likely to adversely affect Federally listed endangered and threatened species in Pennsylvania, given the adoption of the amended State policy document and the interpretation, set forth in Finding 4, of Pennsylvania's existing program requirements pertaining to endangered and threatened species.

#### 3. Variance to Stream Buffer Zones

Numerous commenters object to the provision at § 6.1(h)(5) that allows a variance to the 100-foot stream buffer zone provision. Specifically, commenters stated that the variance violates the regulations of the Clean Water Act at 40 CFR 131.12, which provides for the protection of existing instream water uses and the water quality necessary to protect existing uses, and 30 CFR 715.17(d), which allows stream channel diversions only if they comply with both State and Federal statutes and regulations.

The commenters also argue that OSM approval of § 6.1(h)(5) would violate Section 702(a) of SMCRA, 30 U.S.C. 1292(a), which requires that SMCRA not be construed to supersede, amend, modify or repeal certain other Federal statutes, including the Federal Water Pollution Control Act.

In response, the Director notes that the Federal regulations at 30 CFR 816/817.57 authorize variances to stream buffer zones, and the approved Pennsylvania rules at § 86.102(12) currently contain provisions authorizing variances to stream buffer zones. Therefore, variances to the 100-foot buffer zone are permitted. Also, the EPA has conditioned its concurrence with this amendment on numerous grounds,

including a requirement that it review any applications for in-stream disposal of coal refuse. Furthermore, EPA has stated that it will object to the issuance of any such permit application if it does not provide for protection of the existing uses of the stream. See EPA concurrence section, below.

However, as discussed in Finding 5, above, the Director is not approving § 6.1(h)(5) to the extent that it authorizes stream buffer zone variances so long as the coal refuse disposal activities will not cause "significant" adverse hydrologic or water quality impacts. Also, the Director is requiring Pennsylvania to amend its program to authorize stream buffer zone variances for coal refuse disposal activities only where such activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect water quality and quantity, or other environmental resources of the stream.

Some commenters also stated that the two-week public notice requirement is less effective than the Federal four-week requirement at 30 CFR 773.13(a). The Director disagrees. As discussed in Finding 5 above, the proposed two-week newspaper notice is in addition to the four-week newspaper notice required by the approved program at § 86.31(a).

One commenter asserted that allowing the placement of mine wastes within 100 feet of streams would likely pose a violation of § 404 of the Clean Water Act, which prohibits fills in waters of the United States, including wetlands. In response, the Director notes that the EPA has provided its conditional concurrence with the proposed amendment; See the EPA concurrence section below, Condition #1. Under 40 CFR § 123.24(d)(6) and the 1991 Memorandum of Agreement (MOA) between EPA and PADEP, EPA has the authority to review and comment on draft National Pollutant Discharge Elimination System (NPDES) permits for all coal mining activities, including refuse disposal. As part of the MOA, EPA waived review of routine mining permit applications. However, EPA will now review all permit applications that involve in-stream refuse disposal, and other permit applications as identified by the EPA to the PADEP.

The EPA review of all permit applications related to in-stream refuse disposal and other permit applications identified by the EPA will help assure that the proposed coal refuse disposal in Pennsylvania will meet the requirements of the Clean Water Act. In addition, the EPA condition will provide the EPA with the appropriate mechanism to monitor situations where

potentially acidic refuse might be placed in valley fills on non-impacted areas. This will ensure that the EPA and the U.S. Army Corps of Engineers will have an opportunity to determine whether the proposed filling activity should be subject to reviews under individual Section 404 permits (see EPA concurrence section below, EPA Comment #2). The Director will continue to coordinate with EPA to understand how EPA has implemented this condition of its approval.

Numerous commenters stated that the practice of enclosing streams in pipes under coal refuse valley fills would violate the Federal provisions at 40 CFR 131.12 concerning the protection of existing instream water uses and wetlands. In response, the Director notes that the EPA has provided its conditional concurrence with the proposed amendment. Condition number one provides for EPA review of all proposed in-stream coal refuse disposal operations, while condition number two provides that EPA will not object to the approval of any such operation only if it is convinced that the existing uses of the stream will be protected (see the EPA concurrence section, below).

#### 4. Identification of Alternative Sites—Mileage Standard

One commenter noted that the siting of new coal refuse areas is barely constrained under § 4.1(c), since the applicant is allowed to choose a site on the basis of factors entirely unrelated to the geologic and hydrologic suitability of the site, including such factors as "economic" and "social" factors. The commenter further stated that any attempt to interject a cost-benefit analysis into the site suitability requirements of 30 CFR 816 and 817 concerning disposal of coal refuse and siting and construction of valley and head-of-hollow fills must be rejected, to the extent that it attempts to waive any of those requirements.

The Director agrees. To be no less effective than the Federal requirements concerning coal mine waste disposal, the proposed siting considerations (such as "economic" and "social" factors) must be in addition to, rather than in place of the site suitability requirements of 30 CFR parts 816 and 817. The proposed language at § 4.1(c) does not, however, prevent the application of the approved State provisions that are counterparts to the Federal requirements concerning coal refuse disposal. Therefore, the proposed site selection criteria do not render the Pennsylvania program less effective than the Federal regulations.

Several commenters stated that the one mile radius criterion does little to encourage coal refuse disposal on preferred sites. In response, the Director notes that neither SMCRA nor the Federal regulations require coal refuse disposal operations to be placed on "preferred" sites, as that term is defined in § 4.1(a) of this amendment. Therefore, the site selection criteria contained in § 4.1(c) are applied in addition to Pennsylvania's State program counterparts to the Federal coal refuse disposal regulations at 30 CFR 816/817.81 through 816/817.84. As supplementary measures, the site selection criteria are not inconsistent with SMCRA or the Federal regulations.

#### 5. Preventing Adverse Impacts to Surface and Groundwater

One commenter stated that § 6.1(i), which provides for a system to prevent adverse impacts on the hydrologic balance, should be in addition to any other specific design, location and operational requirements contained in 30 CFR 816/817 relating to coal waste and coal refuse disposal. The Director agrees. The Pennsylvania regulations at Chapter 90, Subchapter D, continue to provide the performance standards for coal refuse disposal, to which the proposed provision at Subsection 6.1(i) adds an additional requirement.

The commenter further stated that there is no basis for deferring reclamation and final cover on each lift of a coal refuse disposal area for the extended period of time provided in Subsection 6.1(i), and to the extent that toxic or acid-forming material is present, such material must be immediately isolated from water to prevent AMD. The Director understands the commenter's concern with this comment and notes that despite the provision's authorization of a deferral in completing the system to prevent adverse hydrologic impacts, as noted above in Finding 5, the State regulations at Chapter 90 concerning coal refuse disposal continue to apply, and without delay. For example, § 90.122 continues to provide that coal refuse disposal areas shall be maintained to ensure that the leachate and surface runoff from the permit area will not degrade surface water or groundwater, or exceed the effluent limits of § 90.102.

#### 6. Alternate Effluent Limitations

One commenter stated that the proposed amendments (under § 6.2) are not consistent with the 1992 Energy Policy Act amendments, or the alternate effluent limitations of § 301(p) of the Clean Water Act, because the amendments appear to inappropriately

authorize the disposal of coal refuse materials under relaxed water quality standards and relaxed reclamation and bonding responsibility.

In response, the Director notes that as discussed above in Finding 6, the EPA has given its concurrence (with conditions) of the proposed amendments. See the EPA section below for information on all EPA comments and conditions. The proposed amendment distinguishes between preexisting discharges that are encountered by the proposed operation, and discharges that are not encountered. The EPA also recognizes such a distinction. In its concurrence with the proposed amendments, the EPA stated that the proposed amendments at § 6.2(g)(1)(i) require that discharges resulting from any refuse disposal activities, including instream valley fills, must comply with PADEP regulations that include the same effluent limitations as described in NPDES effluent guideline regulations for coal preparation plants and associated areas (40 CFR 434—Subpart B). EPA also stated that “[u]naffected water diverted around or piped under fills would not be subject to effluent guideline regulations under 40 CFR 434. That is, EPA is concurring with the proposed State provisions at § 6.2(g)(1)(ii) that authorize the treatment of discharges that are not encountered to the “baseline pollution load” and not to the State regulatory counterpart to 40 CFR 434.

Therefore, it is OSM’s understanding that proposed § 6.2(g)(1)(ii) is not, as the commenter asserts, over broad and is not inconsistent with Section 301(p) of the Clean Water Act.

EPA’s involvement in the Pennsylvania permitting process for coal refuse disposal operations will help assure compliance with the provisions of the Clean Water Act.

The EPA will assist the State in identifying the appropriate effluent limitation standards on a permit-by-permit basis during the development of NPDES permit.

With regard to the commenter’s reference to the 1992 Energy Policy Act, the Director notes that the Pennsylvania amendment does not propose to alter or diminish the “land reclamation” or bond release standards imposed under SMCRA, with one exception. At subsection 6.2(k), Pennsylvania proposes to allow operators with special authorizations to revegetate the sites merely by establishing ground cover which is not less than that existing before disturbance, so long as said ground cover is adequate to control erosion. As noted above in Finding 6,

the Director is approving subsection (k) only to the extent that it is applicable to areas previously disturbed by mining that were not reclaimed to the standards of the Pennsylvania program. With the exception noted above, however, the Director has determined that the proposed provisions are no less stringent than SMCRA and can be approved, provided that nothing in the approval authorizes the State to implement the provisions with respect to revised effluent limitations without approval by the EPA pursuant to the Clean Water Act.

The commenter also stated that the term “pollution abatement area” is vaguely defined and not consistent with the definition of “coal remining operation” (which is defined by the Clean Water Act to be only that area on which coal mining was conducted before August 3, 1977). In response, the Director notes that the proposed definition of “pollution abatement area” is intended to identify areas that are part of the permit area and which are causing or contributing to the baseline pollution load. As stated above in Finding 6, the proposed provisions must comply with 40 CFR part 434 concerning performance standards for coal mining point source discharges, and with § 301(p) of the Federal Water Pollution Control Act (33 U.S.C. 1311(p)) concerning modified permits for coal remining operations. The effluent limitation standards will be identified jointly by the EPA and the State on a permit-by-permit basis during the development of the NPDES permit. Also, since unencountered discharges are not within the purview of § 301(p) anyway, the proposed amendment is not inconsistent with that provision of the Clean Water Act.

#### 7. Perpetual Treatment of Acid Mine Drainage

One commenter asked how the coal industry will be responsible for any perpetual treatment of acid mine drainage from poorly constructed valley fill operations. In response, the Director notes that proposed Section 6.2(g) contains the provisions governing the treatment of discharges. Specifically, where a coal refuse disposal operation creates a new discharge or encounters a preexisting discharge, the refuse disposal operations shall comply with all applicable regulations of the department. That includes complying with the approved State effluent limitations, treatment requirements, and bond release requirements.

Where coal refuse disposal operations cause the baseline pollution load to be exceeded, the operator must treat that

discharge according to § 6.2(g)(ii), (h), and (i). In addition to treating the discharge, the bond release criteria at § 6.2(j) must be met prior to bond being released. Therefore, if the applicable effluent limitation standards are not met, treatment is required and bond will not be released.

#### 8. Experimental Practices

One commenter stated that this provision is over broad, and would allow an entirely different permit than would be issued under the Pennsylvania program for other surface coal mining operations. The commenter also stated that the provision should be disapproved because it doesn’t require approval by the Secretary of each experimental practice.

In response, the Director disagrees that the proposed language is over broad and represents an alternative permitting system. The proposed language authorizes, under the Pennsylvania program, the approval of permits which contain experimental practices. The amendments do not authorize a separate permitting system as the commenter suggests. While the proposed language is silent concerning approval of experimental practices by the Secretary, the Director is requiring, in Finding 7, that Secretarial approval be required by the implementing regulations which Pennsylvania will subsequently develop and submit for OSM approval.

#### 9. Implementation Prior to Approval

Numerous commenters asserted that the amendments should be disapproved because the State is currently reviewing and issuing permits under the proposed statutes without approval of OSM. For example, commenters assert that the State is inappropriately approving variances to stream buffer zones to allow the implementation of valley fills. In response, the Director notes that these comments do not bear on the issue which must be decided in this rulemaking, which is whether the proposed amendment is consistent with SMCRA and the Federal regulations.

One commenter asserted that the amendments will encourage the use of abandoned coal refuse areas and mine sites rather than the use of virgin lands for coal refuse disposal operations. The use of such abandoned mine lands will eliminate hazards, improve water quality and enhance environmental conditions. In support of this assertion, the commenter stated that Pennsylvania Act 158, to which Act 114 is similar, provides incentives to remine abandoned mine lands, and has resulted in 218 special authorization permits and the successful reclamation of all but two

of those abandoned mine lands. The Director agrees that the proposed amendments have the potential to result in the reclamation of the environmentally damaged preferred sites.

#### 10. Miscellaneous Comments

One commenter stated that Pennsylvania's rivers and streams belong to its citizens, and that to allow for "private concerns" to damage or destroy these resources seems to be an unconstitutional taking, without just compensation. In response, the Director notes that only "takings" by governmental entities, rather than by "private concerns," are addressed by the United States Constitution.

Another commenter stated that this amendment does not prohibit the placement of coal refuse on sites, preferred or otherwise, that contain "state threatened plants." In response, the Director notes that the Federal regulations at 30 CFR 8.16/817.97(b) prohibit surface mining activities which are likely to jeopardize the continued existence of endangered or threatened species listed by the Secretary of the Interior, pursuant to the Federal Endangered Species Act of 1973. This prohibition does not apply to species listed as endangered or threatened under only the state counterpart to the Federal Endangered Species Act.

Other commenters stated that the amendment violates the guarantee of clean water provided for in the Pennsylvania State Constitution. The Director notes that these comments are outside of the scope of this rulemaking, since they are not relevant to the issue of whether the proposed amendment is consistent with SMCRA or the Federal regulations.

Another commenter stated that the site selection provisions of § 4.1, which prohibit the disposal of coal refuse on prime farmland unless it is on a preferred site, fail to define "prime farmland." In response, the Director notes that the Pennsylvania approved program already defines prime farmland, at 25 Pa. Code § 90.1, as "lands which are defined by the Secretary of the United States Department of Agriculture in 7 CFR 657 (relating to prime and unique farmlands) and which have been historically used for cropland \* \* \*."

A commenter asked if the proposed legislation provides terms to deny a permit for various reasons. The commenter also asked if the proposed legislation contains enough teeth to obtain compensation for the failure to comply with provisions of a permit or whether the State will be left with

another debt from a failed permit. In response, the Director notes that the proposed coal refuse disposal amendments are an addition to the full requirements of the Pennsylvania program, and do not replace those requirements. Therefore, the State's authority to deny permits and withhold bond for applicable reasons still remains in effect.

A commenter asked if the proposed legislation protects the entire watershed from the headwaters to the end. In response, the Director reiterates that all the applicable provisions of the approved Pennsylvania program continue to apply to all permit decisions concerning coal refuse disposal in addition to the proposed coal refuse disposal provisions. In addition, the Director notes that both the EPA and the USFWS have concurred with the proposed amendments. The EPA has concurred with the proposed amendments upon specifying several conditions that must be complied with concerning the protection of downstream water quality. The USFWS has concurred with the proposed amendments after obtaining assurance that the proposed provisions will not negatively affect the protection of threatened and endangered species as is currently provided for in the approved Pennsylvania program. As discussed above in the findings, the Director has determined that the proposed coal refuse disposal provisions are not inconsistent with the provisions of SMCRA.

A commenter asked if the proposed provisions require the proper testing practices to determine amount, type, kinds, and species of life forms within the permitted area and adjacent areas, as well as the testing to determine the content of the refuse material so that one knows what is being buried. The commenter also asked if the proposed amendments contain provisions to sufficiently protect high quality as well as exceptional value rated streams, and if the proposed amendments address non-point pollution as well as single-point pollution in these permitted areas. In response, the Director reiterates that the proposed provisions are in addition to and do not replace the provisions of the approved Pennsylvania program. Therefore, the approved requirements for the protection of fish and wildlife, the protection of the hydrologic balance, the chemical analysis of the coal as well as strata above and below the coal, and the construction of the coal refuse disposal site continent to apply to coal refuse disposal areas.

A commenter asked if the proposed provisions requires the site to be

properly recovered within a set time and maintained for a sufficient period of time. In response, the Director notes that coal refuse disposal operations are subject to both bonding and bond release requirements of the approved Pennsylvania program. While the proposed amendment provide specific provisions for the release of bonds for pollution abatement areas, those provisions continue to require time requirements with which the operator must comply, including compliance with the five-year liability period.

A commenter asked whether or not a permit should be obtained from the EPA under Section 402 due to water quality degradation caused by a valley fill operation. In response, the Director notes that the proposed amendments do not alter Section 402's requirements. If a permit is required under Section 402, it must still be obtained.

#### *Environmental Protection Agency*

Pursuant to 30 CFR 732.17(h)(11)(ii), OSM is required to obtain the written concurrence of the EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

On September 20, 1995, OSM solicited EPA's concurrence and comments on the proposed amendment (Administrative Record No. PA-837.02). EPA responded on January 30, 1997 (Administrative Record No. PA 837.63). The EPA provided the following comments and conditions on the proposed amendments.

##### (a) Comments.

(1) The EPA commended the portion of the proposed amendment which targets previously impacted areas for refuse disposal and requires reclamation of these areas.

(2) The EPA recommended that proposed disposal of potentially acidic refuse in valley fills on non-impacted areas be subject to reviews under individual Section 404 U.S. Army Corps of Engineers permit, rather than coverage under the nationwide 404 permit. Although PADEP regulations require project reviews and alternatives analyses similar to that of Section 404(b)(1) guidelines, individual 404 permit reviews would allow more detailed and formal inputs by USFWS and the EPA.

The Director concurs with this comment. The placement of potentially acidic refuse in valley fill could lead to serious water quality problems for downstream areas, and involvement of the USFWS and EPA through Section

404 permitting would strengthen the review process. The U.S. Army Corps of Engineers is responsible for the decision on whether a specific filling activity falls under an individual permit or under a nationwide 404 permit. EPA must work with the PADEP through its NPDES program, and with the U.S. Army Corps of Engineers through its joint responsibilities under the Clean Water Act, to establish a system where proposed disposal of potentially acidic refuse in valley fills on non-impacted areas would be subject to reviews under individual Section 404 U.S. Army Corps of Engineers permits. The Director will continue to coordinate with EPA to understand how EPA has implemented its recommendation.

(3) The EPA supports a cautious review of the factors that can be considered to decide if coal refuse disposal is to occur on "alternative sites," rather than on previously impacted areas (preferred sites), to assure that undue weight is not placed on alternative sites at environmental expense.

The Director concurs with this comment. As stated above, PADEP is commended for developing a process to encourage the placement of fills on previously affected lands. However, under the program, the applicant's search radius for preferred sites (previously impacted lands) is controlled in a manner that limits the effectiveness of the process. Process effectiveness is limited because the applicant only must consider topographic conditions, transportation routes, and other economic and environmental factors on a site specific basis up to a one mile radius for existing operations and within a 25 square-mile area (approximately a 2.8 mile radius) for new operations. As a result, the search process may ignore sites outside the search radius that are economically and technically sound, and environmentally superior to areas inside the search radius. Therefore, OSM encourages PADEP to consider proposing statutory changes to this amendment which will increase the distance limitations, in order to increase the possibility that "preferred sites" will be used for coal refuse disposal.

(4) The EPA stated that, based on its review, the proposed amendment does not appear to lessen the protection provided by PADEP regulations governing threatened and endangered species. However, the EPA stated, the USFWS is the authority on such matters and has indicated concern to the EPA that there may not be sufficient assurance of protection in previously impacted areas. EPA stated that an

agreement between USFWS and OSM is necessary for resolution.

The Director acknowledges, and shares EPA's concern for threatened and endangered species. As discussed above in Federal Agency comments, the PADEP has addressed USFWS concerns by revising the State's coal refuse disposal program guidance. In addition, on September 24, 1996, the USFWS issued a Biological Opinion and Conference Report on surface coal mining regulatory programs under SMCRA. In that report, the USFWS stated that surface coal mining and reclamation operations conducted in accordance with properly implemented Federal and State regulatory programs under SMCRA are not likely to jeopardize the continued existence of listed or proposed species, and are not likely to result in the destruction or adverse modification of designated or proposed critical habitats (Administrative Record Number PA 837.64). By letter dated April 7, 1998, the USFWS concurred that the revised Pennsylvania guidance document's provisions have satisfied USFWS concerns (Administrative Record Number PA 837.70).

(5) The EPA stated that it supports stringent State reviews of measures for preventing acid formation and seepage on refuse disposal sites, and urged the prohibition of any project where the effectiveness or such measures is questionable. The EPA stated that past refuse disposal sites located in valley fills have resulted in acid seeps after closure. This possibility in the future is a major concern EPA has with the proposed amendment. The EPA also stated that recent discussions with PADEP have indicated that improved preventive measures will be required. Success of refuse disposal projects would depend on incorporation of such preventive measures as alkaline addition, piping streams under fills, capping fills to reduce infiltration, and installing diversion drains around the fills. Long-term treatment bonds also have been indicated by PADEP as a requirement in case preventive measures prove not to be completely effective. The EPA further stated that, according to PADEP, specifics on many decision factors affecting water quality would be determined on a case-by-case basis, included in policies or regulations, or a combination of these.

The Director concurs with the need for stringent State reviews of measures for preventing acid formation and seepage on refuse disposal sites. The Director notes that new section 6.1(i) provides that new coal refuse disposal areas shall include a system to prevent

adverse impacts to surface and ground water and to prevent precipitation from contacting the refuse. In addition, the Director notes (as discussed below at "Conditions") that the EPA will be reviewing all Pennsylvania permit applications that involve in-stream refuse disposal, and other permit applications as identified by the EPA to the PADEP. Such review of permit applications by the EPA should add an additional measure of protection for preventing acid formation and seepage on refuse disposal sites.

(6) The EPA urged the PADEP to evaluate potential cumulative downstream impacts of proposed refuse disposal sites in combination with mines and other facilities in affected watersheds. This could be addressed as part of the Cumulative Hydrological Impact Assessment required by SMCRA for mining-related permits.

The Director concurs with this comment and notes that the Pennsylvania surface and underground coal mining regulations 25 Pa. Code, Chapter 86.37(a)(4) require such a cumulative hydrological impact assessment. Section 86.37(a)(4) provides that the regulatory authority must find in writing that an assessment of the probable cumulative impacts of all anticipated coal mining in the general area on the hydrologic balance has been made by the PADEP. In addition, section 90.35 (concerning coal refuse disposal, protection of the hydrologic balance) provides that an application must contain a determination of the probable hydrologic consequences of the proposed coal refuse disposal activities on the proposed permit area and adjacent area.

(7) The EPA recommended that the EPA and USFWS be invited to contribute to any mitigation policy work group. The EPA stated that it is the EPA's understanding that a mitigation policy for placement of refuse in valley fills has not yet been determined by Pennsylvania. Such mitigation should take into consideration the value and unspoiled nature of running streams in areas not previously impacted and the irreplaceable nature of such streams to Pennsylvania and the United States.

The Director concurs with this comment, and encourages the State to include the EPA and USFWS in any mitigation policy work group that is created.

(b) Conditions.

(1) EPA stated that to emphasize its concern over in-stream refuse disposal, its concurrence is conditioned on the following: (a) PADEP notification to EPA within 30 days of receipt of a joint SMCRA/NPDES permit application for



an in-stream refuse disposal project, and (b) PADEP submittal to EPA of any joint SMCRA/NPDES application or permit information which EPA specifically requests for an effective review. EPA also stated that it will send a letter to PADEP identifying the categories of mining related permits which EPA will request for review.

Under 40 CFR 123.24(d)(6) and 1991 Memorandum of Agreement (MOA) between EPA and PADEP, EPA has the authority to review and comment on draft National Pollutant Discharge Elimination System (NPDES) permits for all coal mining activities, including refuse disposal. As part of the MOA, EPA waived review of routine mining permit applications. However, EPA will not review all permit applications that involve in-stream refuse disposal, and other permit applications as identified by the EPA to the PADEP.

The Director concurs with this condition, and believes that EPA review of all permit applications related to in-stream refuse disposal and other permit applications identified by the EPA will help assure that the proposed coal refuse disposal in Pennsylvania will meet the requirements of the Clean Water Act. In addition, the EPA condition will provide the EPA with the appropriate mechanism to monitor situations where potentially acidic refuse might be placed in valley fills on non-impacted areas. This will ensure that the EPA and the U.S. Army Corps of Engineers will have an opportunity to determine whether the proposed filling activity should be subject to reviews under individual Section 404 permits (see discussion under EPA comment number 2 above). The Director will continue to coordinate with EPA to understand how EPA has implemented this condition of its approval.

(2) EPA identified the following conditions under which it will not object to PADEP issuance of NPDES permits for proposed in-stream refuse disposal facilities: (1) Compliance with § 404 permit requirements; (2) no feasible alternatives; (3) protection of existing and designated downstream aquatic life and uses; and (4) adequate mitigation. Under 40 CFR 122.4(d), NPDES permits must comply with state water quality standards, including non-degradation requirements. However, the EPA recognizes that there may be certain circumstances which may limit alternatives to in-stream refuse disposal facilities.

The Director concurs with these four conditions. The Director recognizes that the responsibility for assuring compliance with these conditions is with the EPA and the U.S. Army Corps

of Engineers under the applicable provisions of the Clean Water Act. The EPA will review all proposals for in-stream disposal of coal refuse (see Condition #1 above). In addition, EPA will work with the PADEP through its NPDES program and with the U.S. Army Corps of Engineers through its joint responsibilities under the Clean Water Act, to establish a system where proposed disposal of potentially acidic refuse in valley fills on non-impacted areas would be subject to reviews under individual § 404 permits (see Comment #2 above).

The Clean Water Act NPDES program and § 404 permit program contain the requirements for considering alternatives, establishing mitigation, and protecting existing and designated aquatic life and uses. As provided under Condition #1 above, EPA review of NPDES permits will necessarily consider factors that could affect existing uses of streams, such as the identification of the potential for acid discharges, the feasibility of implementation methods such as the piping of streams beneath fills, and the validity of proposed measures to protect the existing uses of streams. Through their joint responsibilities and authorities under § 404, the U.S. Army Corps of Engineers and EPA will be involved in the approval of in-stream refuse disposal. Accordingly, OSM expects that EPA and the Corps of Engineers will immediately notify OSM whenever any of these four conditions has not been implemented. The Director will continue to coordinate with EPA to understand how EPA has implemented its conditions of approval.

(3) The EPA stated that OSM must undertake appropriate consultation with the USFWS to ensure compliance with § 7 of the Endangered Species Act. Such consultation must be undertaken whenever disposal of coal refuse is proposed in any previously impacted area containing Federal threatened or endangered plants or animals, as allowed under proposed § 4.1(B) of the amendment. Under the Endangered Species Act, the USFWS must provide approval and issue a requisite incidental take permit whenever the proposed activities would affect the continued existence of endangered or threatened species or result in the destruction or adverse modification of their critical habitats.

The Director concurs with this condition and has, accordingly, consulted with USFWS. As a consequence of these consultations, OSM has asked the PADEP to amend their State Policy concerning coal refuse disposal program guidance to address

the USFWS concerns. The PADEP subsequently amended the coal refuse disposal policy (Administrative Record Number PA-837.68), and USFWS has agreed that the current State policy guidance document concerning coal refuse disposal has satisfied its concerns (Administrative Record Number PA-837.70).

(4) The EPA stated that where discharges from refuse disposal activities would cause or contribute to an exceedence of water quality standards, the NPDES permit must contain water quality-based effluent limitations in compliance with 40 CFR 122.44(d). Adequate monitoring and analysis of the background water quality of the receiving stream must be done prior to permit issuance and as part of the permit development process.

The Director concurs with this condition and notes, as discussed in condition #1 above, that the EPA will review all proposed permit applications that concern in-stream disposal of coal refuse, as well as other selected permits identified by the EPA. Therefore, EPA will, as part of its review, help assure that appropriate water quality standards are properly set for every permit related to in-stream coal refuse disposal.

The EPA also stated that it is its understanding that § 6.2(g)(1)(i) of the proposed amendment requires that discharges resulting from any refuse disposal activities, including in-stream valley fills, must comply with PADEP regulations that include the same effluent limits as described in NPDES effluent guideline regulations for coal preparation plants and associated areas (40 CFR part 434—subpart B). The EPA stated that unaffected water diverted around or piped under fills would not be subject to effluent guideline regulations under 40 CFR part 434.

The Director concurs with this condition. In this condition, the EPA is clarifying that EPA's understanding of § 6.2(g)(1)(i) is that coal refuse disposal operations that encounter a preexisting discharge shall comply with the effluent limitations that will be described in the NPDES permit, and which will be consistent with the effluent guideline limitations for coal preparation plants and associated areas as identified at 40 CFR part 434—subpart B. However, the EPA notes that discharges unaffected by and diverted around or piped under fills (not encountered) would not be subject to the effluent guidelines at 40 CFR part 434—subpart B. Such discharges that are not encountered shall meet the baseline pollution load standard as defined at § 3(1.3), and shall be treated in accordance with the provisions at § 6.2(g)(1)(ii). The EPA will, as part of

its review of all NPDES permits related to in-stream refuse disposal and other permits, help assure that adequate monitoring and analysis of the background water quality of the receiving stream will be done prior to permit issuance.

(5) The EPA stated that appropriate measures must be planned and implemented for coal refuse disposal facilities which will prevent long term acid drainage after closure.

The Director concurs with this condition. As discussed in condition #1 above, the EPA will review all proposed permit applications that concern in-stream disposal of coal refuse, as well as other selected permits identified by the EPA. Consequently, the EPA will be able to provide guidance to the State to help assure the prevention of long term acid drainage after closure.

#### V. Director's Decision

Based on the above findings, and except as noted below, the Director is approving the proposed amendment as submitted by Pennsylvania on September 14, 1995.

As discussed in Finding 2 above, the definition of "coal refuse disposal activities" at section 3(2.1) is approved with the requirement that the Pennsylvania program be further amended to clarify the meaning of the phrase "excess soil and related materials."

As discussed in Finding 4 above, the Director is approving subsection 4.1(b) only to the following extent. With respect to preferred sites, the State will not approve (via the Site Selection process) or permit (via requirements in Chapters 86 or 90) a site that is known or likely to contain Federally listed threatened or endangered species, unless the State demonstrates and the USFWS concurs that the proposed activity is not likely to adversely affect Federally listed threatened or endangered species or result in the "take" of Federally listed or endangered species in violation of Section 9 of the Endangered Species Act.

As discussed in Finding 5 above, the Director is approving subsection 6.1(h)(5) only to the extent that it authorizes stream buffer zone variances for coal refuse disposal activities that will not cause or contribute to the violation of water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream. Also, the Director is requiring Pennsylvania to amend its program to authorize stream buffer zone variances for coal refuse disposal activities only where such activities will not cause or

contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect water quality and quantity, or other environmental resources of the stream.

As discussed in Finding 6 above, Section 6.2 is approved, except as noted below, provided nothing in this approval authorizes the State to implement these provisions with respect to revised effluent limitations without approval by the EPA pursuant to the Clean Water Act.

Subsection 6.2(g)(2) is approved to the extent that it applies to final bond releases on permits other than the permit for which the allegation that the baseline pollution load has been exceeded is pending.

Subsection 6.2(h) is approved to the extent that the proposed language in the first sentence of § 6.2(h) pertains only to subsection 6.2(g)(1)(ii), which governs discharges that are not encountered. Also, the Director is requiring that the State further amend the Pennsylvania program to clarify that Subsection 6.2(h) of the Coal Refuse Disposal Act pertains to preexisting discharges that are not encountered.

Subsections 6.2(g), (h), and (i) are approved with the understanding that the implementing regulations to be developed by Pennsylvania (as is required by Section 3.2(b) of the Coal Refuse Disposal Act) to implement the provisions at Section 6.2 will clarify that preexisting discharges that are encountered must be treated to the State effluent standards at Chapter 90, subchapter D at 90.102.

Subsection 6.2(k) is approved only to the extent that it is applicable to areas previously disturbed by mining that were not reclaimed to the standards of the Pennsylvania program. In addition, the Director is requiring that the State further amend the Pennsylvania program to be no less effective than 30 CFR 816.116(b)(5), by limiting the application of the revegetation standards under Subsection 6.2(k) of its Coal Refuse Disposal Act, to areas that were previously disturbed by mining and that were not reclaimed to the State reclamation standards.

Subsection 6.2(l) is approved to the extent the PADEP will not approve a special authorization when such an authorization would result in the site being reclaimed to lesser standards than could be achieved if the forfeited bond moneys were used to reclaim the site to the standards approved in the original permit under which the bond moneys were forfeited. In addition, the Director is requiring that the State further amend the Pennsylvania program to clarify that under Subsection 6.2(l) of its Coal

Refuse Disposal Act, a special authorization for coal refuse disposal operations will not be granted, when such an authorization would result in the site being reclaimed to lesser standards than could be achieved if the moneys paid into the Fund, as a result of a prior forfeiture on the area, were used to reclaim the site to the standards approved in the original permit under which the bond moneys were forfeited.

As discussed above in Finding 7 concerning Section 6.3—Experimental Practices, the Director is requiring that the State further amend the Pennsylvania program by adding implementing rules no less effective than 30 CFR 785.13, and no less stringent than SMCRA Section 711 and which clarify that experimental practices are only approved as part of the normal permit approval process and only for departures from the environmental protection performance standards, and that each experimental practice receive the approval of the Secretary.

The Federal regulations at 30 CFR Part 938, codifying decisions concerning the Pennsylvania program, are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

#### *Effect of Director's Decision*

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Similarly, 30 CFR 732.17(a) requires that any alteration of an approved State program be submitted to OSM for review as a program amendment. Thus, any changes to the State program are not enforceable until approved by OSM. The Federal regulations at 30 CFR 732.17(g) prohibit any unilateral changes to approved State programs. In his oversight of the Pennsylvania program, the Director will recognize only the statutes, regulations and other materials approved by him, together with any consistent implementing policies, directives and other materials, and will require the enforcement by Pennsylvania of only such provisions.

#### VI. Procedural Determinations

##### *Executive Order 12866*

This rule is exempted from review by the Office of Management and Budget

(OMB) under Executive Order 12866 (Regulatory Planning and Review).

*Executive Order 12988*

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

*National Environmental Policy Act*

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program

provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

*Paperwork Reduction Act*

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

*Regulatory Flexibility Act*

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon corresponding Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the date and assumptions for the corresponding Federal regulations.

*Unfunded Mandates*

This rule will not impose a cost of \$100 million or more in any given year on any governmental entity or the private sector.

**List of Subjects in 30 CFR Part 938**

Intergovernmental relations, Surface mining, Underground mining.

Dated: April 14, 1998.

**Allen D. Klein,**

*Regional Director, Appalachian Regional Coordinating Center.*

For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations is amended as set forth below.

**PART 938—PENNSYLVANIA**

1. The authority citation for Part 938 continues to read as follows:

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

2. Section 938.15 is amended in the table by adding a new entry in chronological order by "Date of Final Publication" to read as follows:

**§ 938.15 Approval of Pennsylvania regulatory program amendments.**

\* \* \* \* \*

| Original amendment submission date | Date of final publication | Citation/description   |
|------------------------------------|---------------------------|--|
| *                                  | *                         | *  |
| September 13, 1995 ..              | April 22, 1998 .....      | Pennsylvania law Act 1994-114 concerning the special authorization for refuse disposal in areas previously affected by mining which contain pollutional discharges: Title and 1; 3; 3.2(b); 4.1; 6.1(h)(5), (i); 6.2; 6.3; 15.1. |

3. Section 938.16 is amended by adding new paragraphs (vvv) through (bbb) to read as follows:

**§ 938.16 Required regulatory program amendments.**

\* \* \* \* \*

(vvv) By July 1, 1998, Pennsylvania shall amend the Pennsylvania program to clarify the meaning of the term "excess soil and related materials" as that term is used in the definition of "coal refuse disposal activities."

(www) By July 1, 1998, Pennsylvania shall amend the Pennsylvania program to authorize stream buffer zone variances for coal refuse disposal activities only where such activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect water quality and

quantity, or other environmental resources of the stream.

(xxx) By July 1, 1998, Pennsylvania shall amend the Pennsylvania program to clarify, in the regulations to be developed to implement the provisions of section 6.2 of the Coal Refuse Disposal Act (as is required by Section 3.2)(b) of the Coal Refuse Disposal Act), that preexisting discharges that are encountered must be treated to the State effluent standards at Chapter 90, subchapter D at 90.102.

(yy) By July 1, 1998, Pennsylvania shall amend the Pennsylvania program to clarify that Subsection 6.2(h) of the Coal Refuse Disposal Act pertains to preexisting discharges that are not encountered.

(zzz) By July 1, 1998, Pennsylvania shall amend the Pennsylvania program to be no less effective than 30 CFR

816.116(b)(5), by limiting the application of the revegetation standards under Subsection 6.2(k) of its Coal Refuse Disposal Act, to areas that were previously disturbed by mining and that were not reclaimed to the State reclamation standards.

(aaa) By July 1, 1998, Pennsylvania shall amend the Pennsylvania program to clarify that under Subsection 6.2(l) of its Coal Refuse Disposal Act, a special authorization for coal refuse disposal operations will not be granted, when such an authorization would result in the site being reclaimed to lesser standards than could be achieved if the moneys paid into the Fund, as a result of a prior forfeiture on the area, were used to reclaim the site to the standards approved in the original permit under which the bond moneys were forfeited.

(bbbb) By July 1, 1998, Pennsylvania shall amend the Pennsylvania program by adding implementing rules no less effective than 30 CFR 785.13, and no less stringent than SMCRA Section 711 and which clarify that experimental practices are only approved as part of the normal permit approval process and only for departures from the environmental protection performance standards, and that each experimental practice receive the approval of the Secretary.

[FR Doc. 98-10632 Filed 4-21-98; 8:45 am]  
BILLING CODE 4310-05-M

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 943

[SPATS No. TX-040-FOR]

#### Texas Regulatory Program and Abandoned Mine Land Reclamation Plan

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

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

**SUMMARY:** OSM is approving a proposed amendment to the Texas regulatory program and abandoned mine land reclamation (hereinafter referred to as the "Texas program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendment consists of recodification of the Texas Coal Mining Regulations into the Texas Administrative Code at Title 16, Chapter 12. The amendment is intended to conform the Texas Coal Mining Regulations to Texas Administrative Code formatting syntax, to correct typographical errors, and to allow for the publication of the rules in the Texas Administrative Code in full text rather than by reference.

**EFFECTIVE DATE:** April 22, 1998.

**FOR FURTHER INFORMATION CONTACT:** Michael C. Wolfrom, Director, Tulsa Field Office, Office of Surface Mining Reclamation and Enforcement, 5100 East Skelly Drive, Suite 470, Tulsa, Oklahoma 74135-6548, Telephone: (918) 581-6430.

#### SUPPLEMENTARY INFORMATION:

- I. Background on the Texas Program
- II. Submission of the Proposed Amendment
- III. Director's Findings
- IV. Summary and Disposition of Comments
- V. Director's Decision
- VI. Procedural Determinations

### I. Background on the Texas Program

On February 16, 1980, the Secretary of the Interior conditionally approved the Texas program. Background information on the Texas program, including the Secretary's findings, the disposition of comments, and the conditions of approval can be found in the February 27, 1980, **Federal Register** (45 FR 12998). Subsequent actions concerning the conditions of approval and program amendments can be found at 30 CFR 943.10, 943.15, and 943.16.

On June 23, 1980, the Secretary of the Interior approved the Texas plan. Background information on the Texas plan, including the Secretary's findings, the disposition of comments, and the approval of the plan can be found in the June 23, 1980, **Federal Register** (45 FR 41937). Subsequent actions concerning the Texas plan and amendments to the plan can be found at 30 CFR 943.25.

### II. Submission of the Proposed Amendment

By letter dated January 23, 1998 (Administrative Record No. TX-645), Texas submitted a proposed amendment to its program pursuant to SMCRA. Texas submitted the proposed amendment at its own initiative. Texas proposed to repeal § 11.221 at Title 16 of the Texas Administrative Code (TAC), which adopts by reference the Texas Coal Mining Regulations (TCMR), and to recodify these regulations into the Texas Administrative Code at Title 16, Chapter 12 in full text.

OSM announced receipt of the proposed amendment in the February 13, 1998, **Federal Register** (63 FR 7356), and in the same document opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the proposed amendment. The public comment period closed on March 16, 1998. Because no one requested a public hearing or meeting, none was held.

During its review of the amendment, OSM identified concerns relating to minor wording errors, typographical errors, and citation reference errors. OSM notified Texas of these concerns by fax dated March 5, 1998, and by letter dated March 10, 1998 (Administrative Record Nos. TX-645.05 and TX-645.07, respectively). By letter dated March 25, 1998 (Administrative Record No. TX-645.10), Texas responded to OSM's concerns by submitting revisions to its proposed program amendment that correct all of the errors identified. Because the revisions pertained to the correction of nonsubstantive editorial-type errors,

OSM did not reopen the public comment period.

### III. Director's Findings

Set forth below, pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are the Director's findings concerning the proposed amendment.

*Recodification of Texas' Regulations.* Texas proposed to codify TCMR Parts 700 through 850, pertaining to surface coal mining and reclamation operations, at 16 TAC §§ 12.1 through 12.710. Texas also proposed to codify TCMR §§ 051.800 through 051.817, pertaining to the Texas abandoned mine land reclamation program, at 16 TAC §§ 12.800 through 12.817. Texas proposed the simultaneous repeal of 16 TAC § 11.221 and adoption of the new sections at 16 TAC Chapter 12 for the purpose of renumbering the existing regulations and incorporating the text into the Texas Administrative Code. No requirements were proposed to be added to or deleted from the existing regulations. Minor changes to the existing regulations were proposed to conform them to the Texas Administrative Code formatting syntax; to update information on addresses; to correct grammar, punctuation, and capitalization errors; and to update internal references.

The Director finds that the proposed recodification is nonsubstantive in nature and Texas' proposed regulations at 16 TAC Chapter 12 are no less effective than the Federal regulations. Therefore, the Director is approving the recodification of Texas' regulations.

### IV. Summary and Disposition of Comments

#### Public Comments

OSM solicited public comments on the proposed amendment, but none were received.

#### Federal Agency Comments

Pursuant to 30 CFR 732.17(h)(11)(i), the Director solicited comments on the proposed amendment from various Federal agencies with an actual or potential interest in the Texas program (Administrative Record No. TX-645.03). On February 23, 1998 (Administrative Record No. TX-645.08), the U.S. Army Corps of Engineers' commented that the proposed amendment was satisfactory.

#### Environmental Protection Agency (EPA)

Pursuant to 30 CFR 732.17(h)(11)(ii), OSM is required to obtain the written concurrence of the EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated