

stocking standards. The only significant change is to the tree and shrub diversity and seasonal variety standards. North Dakota proposes to require that at least 60% of the planted tree species should be present at 50% of the initial planting rate and at least 60% of the shrub species should each comprise at least 10% of the density standard. This means an increase in the percentage of tree species that must be present by 10% and creates a minimum number of stems that must be present for each of these tree and shrub species. To support this change, North Dakota states that the standards for diversity and seasonal variety on reclaimed woodlands have been updated by revising the percentages of species that need to be present in certain quantities in order to meet the requirements for final bond release. The revised percentages were based on data from undisturbed and reclaimed woodlands at the Glenharold Mine. These changes are no less effective than the Federal regulations at 30 CFR 816.111(a)(1) concerning establishment of vegetation that is diverse, effective and permanent.

North Dakota has also added a statement that tree and shrub stems occurring as a result of natural regeneration may be counted. This new statement is consistent with the State rules at NDAC 69-05.2-22-07(4)(f) and provides additional clarification. The proposed change is also consistent with section 515(b)(19) of SMCRA, which requires the operator to establish on the regraded areas, and all other lands affected, a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area; except, that introduced species may be used in the revegetation process where desirable and necessary to achieve the approved postmining land use plan. SMCRA specifically refers to vegetative cover capable of self-regeneration. North Dakota's allowance to include stems of trees and shrubs that are the result of regeneration in meeting vegetation success clearly complies with the intent of SMCRA and is no less effective than the Federal regulations.

#### 5. Section II-G, Shelterbelts

North Dakota proposes to add the following language to the section on Shelterbelts: "The Commission will consider modifying the shelterbelt profile density standard if it is demonstrated that a natural disaster (e.g., disease epidemic, prolonged drought, etc.) has affected the planting.

Any replanting due to a natural disaster will be considered a normal husbandry practice which will not restart the liability period."

The regulations at 30 CFR 816.116(a)(1) require that standards for success and statistically valid sampling techniques for measuring success shall be selected by the regulatory authority and be included in an approved regulatory program.

In support of the proposed new language, North Dakota has stated that without knowing the exact nature of the natural disaster and the effect that it may have upon the profile density standard, it is impossible to develop modified success standards. For example, if a disease has eliminated a certain species, it may be possible to either replant a resistant variety of the same species or to require the replanting of an entirely new species. However, if only part of the planting is lost, then it must be determined for each case what effect has occurred and the possible remedies. It is not possible to spell out in detail all possible scenarios under which some sort of adjustment may be necessary. The State also added language stating that any replanting due to a natural disaster will be considered a normal husbandry practice that will not restart the revegetation liability period.

As written, North Dakota's proposal would allow it to modify the shelterbelt success standards if a natural disaster has affected the planting. The Federal regulations require that success standards be included in the approved program. However, OSM concurs with North Dakota's assessment that it is not possible to anticipate all possible scenarios that could result in a change to the shelterbelt standard. Because of the limited acreage of shelterbelts and the goal of encouraging their establishment some flexibility is necessary. OSM also notes that North Dakota only proposes to allow a change in the profile density success standard, not the requirements for vigor, competition, erosion control, or species diversity, seasonal variety and regenerative capacity.

North Dakota also proposes to allow the replanting within shelterbelts affected by natural disasters as a normal husbandry practice. Review of the NRCS Conservation Practice Standards for Windbreak/Shelterbelt Establishment (Code 380) and Windbreak/Shelterbelt Renovation (Code 650) clearly indicates that replacement of dead trees and shrubs, regardless of how they died, should be continued until the barrier's function is restored. As such the State's proposal to allow replanting without

restarting the liability period is clearly a normal husbandry practice under 30 CFR 816.116(c)(4).

OSM has determined that the proposed language is consistent with and no less effective than the requirements of 30 CFR 816.116.

#### 6. Section II-H, Fish and Wildlife Habitat

North Dakota has revised this section to provide more flexibility in evaluating the effectiveness of the reestablished grassland for providing wildlife habitat. The actual cover standard is unaffected. The specific height requirement is eliminated in favor of a qualitative evaluation. This evaluation demonstrates compliance with the Federal requirement to establish an effective plant community.

North Dakota has also revised the diversity standard for grasslands that are used for Fish and Wildlife habitat. The revised standard requires that at least 60% of the total species composition be comprised of the seeded species. This evaluation demonstrates compliance with and is consistent with the Federal requirement to establish a diverse plant community.

Finally, North Dakota has revised its guidance on regenerative capacity to be a subjective evaluation rather than a quantitative evaluation. The Federal regulations require establishment of a plant community capable of self-regeneration. However, no quantitative evaluation is required. North Dakota's proposed changes are consistent with and no less effective than the Federal regulations requiring establishment of a plant community capable of regeneration.

The proposed changes to this section are consistent with and no less effective than the Federal regulations at 30 CFR 816.111 and 816.116(b)(3).

North Dakota has revised a portion of the Annual Crops Fish and Wildlife Habitat section to provide some additional flexibility. The changes eliminate the requirement that the cover from annual crop be approximately 10 inches in height. North Dakota proposes instead to focus on the presence of an adequate food source and adequate cover for the postmining land use. This ensures that the vegetative ground cover is adequate to achieve the postmining land use. The rule continues to require that erosion be adequately controlled to prevent contribution of suspended solids to runoff. North Dakota's proposed changes are consistent with and no less effective than the requirements of 30 CFR 816.111 and 816.116(b)(3)(iii), which require that vegetative ground cover shall not be less