

The required amendment codified at 30 CFR 938.16(kk) requires Pennsylvania to correct cross-references in two sections of PA SMCRA. In section 3.1(c), the cross-reference to section 4.2(f) was to be changed to 4(b)(f). In section 3.1(d), the cross-reference to 18.6 was to be replaced with Section 24.

In response to the required amendment, Pennsylvania submitted a letter dated November 16, 2001 (Administrative Record No. PA 880.00). Pennsylvania explained that sections 3.1(c) and 3.1(d) of PA SMCRA are part of a numbering system used by the Pennsylvania Legislative Reference Bureau. Likewise the cross-referenced Sections 4.2(f) and 18.6 are also Legislative Reference Bureau numbering. Section 4b(f) is part of a numbering system used in Purdon's Pennsylvania Statutes Annotated (Purdon's). The complete number for Section 4(b)(f) in Purdon's is 52 P.S. 1396.4b(f). Purdon's 52 P.S. 1396.4b(f) is the Legislative Reference Bureau's Section 4.2(f). Section 24 was formerly a Purdon's number. The complete number for Section 24 in Purdon's was 52 P.S. 1396.24. Section 1396.24 was renumbered to 1396.18f in 1993 as a result of amendments to PA SMCRA. Purdon's section 1396.18f is the Legislative Reference Bureau's Section 18.6. Pennsylvania believes that since the cross-references in Sections 3.1(c) and 3.1(d) of SMCRA are the appropriate Legislative Reference Bureau Numbers that should be referenced, 30 CFR 938.16(kk) should be removed.

We agree with Pennsylvania's explanation regarding the cross-references and therefore, we are removing the required amendment codified at 30 CFR 938.16(kk).

#### IV. Summary and Disposition of Comments

##### *Public Comments*

No public comments were received.

##### *Federal Agency Comments*

Four responses were received from Federal agencies in response to Pennsylvania's submission under Administrative Record No. PA 837.101. One response was received from the United States Department of the Interior, Fish and Wildlife Service (FWS), two responses were received from the U.S. Department of Labor, Mine Safety and Health Administration's (MSHA), and one response was from the United States Department of Agriculture, Natural Resources Conservation Service (NRCS).

FWS submitted comments dated February 25, 2002 (Administrative Record No. PA 837.108). FWS indicated that 25 Pa. Code 90.49, Stream Buffer Zone Variance is inconsistent with Federal regulations. FWS indicated that the Federal regulations at 30 CFR 816.57 would prevent disturbance of a stream channel in the ephemeral portion of streams, 100 feet upstream of the intermittent zone and is therefore more protective of water quality and the stream's other environmental resources than PADEP's language. Our review of this section finds that it is similar to the stream buffer zone requirements of 25 Pa. Code 86.102(12) regarding areas not suitable for mining that we previously approved. Additionally, it appears that Pennsylvania's stream buffer zone may protect more area around streams, including the ephemeral zone upstream from an intermittent portion of a stream, because it includes areas 100 feet from an intermittent or perennial stream bank, and not just the stream itself. As a result, we have found that Pennsylvania's regulations regarding buffer zones are no less effective than the Federal regulations.

FWS further indicated that language at 25 Pa. Code 90.49(c)(1) that states that a stream buffer zone variance will only be granted if the operator demonstrates to the satisfaction of PADEP that coal refuse disposal will not adversely affect water quality or other environmental resources of the stream and will not cause or contribute to the violation of water quality standards is not as effective as the requirement of 30 CFR 816.57. FWS indicated that the Federal regulation requires that the regulatory authority must make a finding that the stream will be protected. We find that Pennsylvania's regulation does require it to make a finding that the stream will be protected because it requires that any demonstration by the operator be made to the Department's satisfaction. The Department will not be satisfied with substandard demonstrations and therefore will not allow a variance in those circumstances. We have found Pennsylvania's regulation to be no less effective than the Federal regulation.

Finally, regarding the stream buffer zone regulation at 25 Pa. Code 90.49(c)(1), FWS indicated that the words, "as a result of the variance" are also inconsistent with 30 CFR 816.57(a)(1) which states "[s]urface mining activities will not cause or contribute to \* \* \*" We find that because both 30 CFR 816.57(a)(1) and 90.49(c)(1) are specifically written for stream buffer zones, there is no significant difference between the language of these two sections. In other

words, implicit in the language of the Federal regulation is the required finding that, as a result of the variance, there will be no adverse effects on water quality or quantity or other environmental resources of the stream nor violations of the State or Federal water quality standards. Both 25 Pa. Code 90.49(c)(1) and 30 CFR 816.57(a)(1) indicate the conditions under which a buffer zone variance will be issued and Pennsylvania's language is no less effective than the Federal regulation in communicating those conditions.

FWS's other concern was with threatened and endangered species. FWS indicated that language to ensure the protection of Federally listed threatened or endangered species was removed from the on-line version of PADEP's Technical Guidance Document 563-2113-660 titled, "Coal Refuse Disposal—Site Selection." PADEP indicated that a footnote containing the referenced language was inadvertently removed from the on-line version of the Technical Guidance Document. The footnote has subsequently been restored to the on-line version of the document. The footnote, as it now appears on page 4, reads:

PADEP's Section 4.1 (b) of CRDCA prohibits coal refuse disposal on non-preferred sites that contain federally listed threatened or endangered species. 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.

In our final rule of April 22, 1998 (63 FR 19802), we indicated that the proposed site selection provision at subsection 4.1(b) of the CRDCA was approved to the extent of the provisions contained in the above language. Consequently, we find that FWS's concern has been answered.

MSHA's Wilkes-Barre Office replied on January 14, 2002, (Administrative Record No. PA 837.104) that the amendment did not conflict with existing MSHA regulations. On January 23, 2002, MSHA's New Stanton Office (Administrative Record No. PA 837.105) replied that the amendment did not conflict with its refuse pile regulations.

NRCS replied on January 29, 2002, (Administrative Record No. PA 837.106) that it found no inadequacies with the proposed amendment.