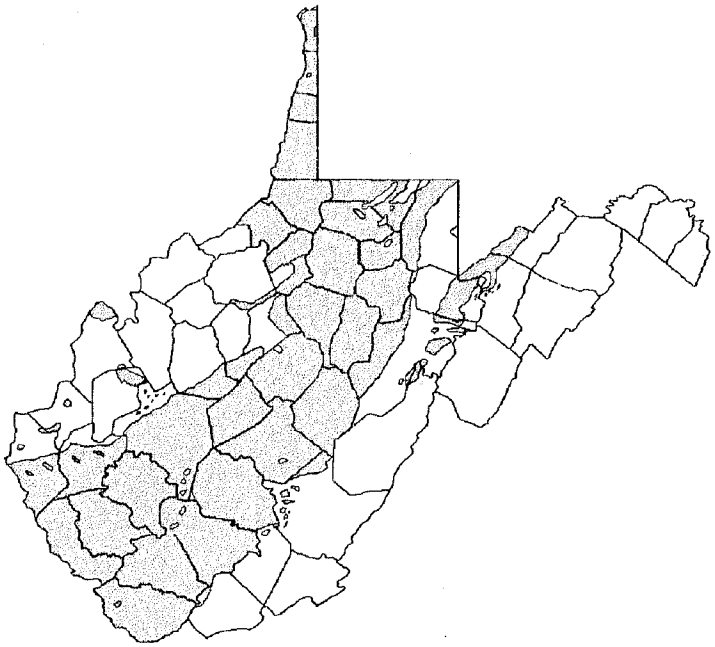
AN EVALUATION OF APPROXIMATE ORIGINAL CONTOUR AND POSTMINING LAND USE IN WEST VIRGINIA



FINAL REPORT

Prepared by
U. S. Department of the Interior
Office of Surface Mining
Charleston, West Virginia

AN EVALUATION OF APPROXIMATE ORIGINAL CONTOUR AND POSTMINING LAND USE IN WEST VIRGINIA

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prepared by the U. S. Department of the Interior,
Office of Surface Mining,
Charleston Field Office

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I. FORWARD

OSM is committed to ensuring that State programs contain requirements that are no less effective than the Federal requirements and that those programs are being properly implemented. State and Federal surface mining laws generally require a site after mining to be returned to its approximate original contour (AOC). However, as discussed in this report, under certain limited circumstances, an applicant may obtain a variance from the AOC requirement. In connection with this variance, a critical issue is the appropriateness of the proposed postmining land use. Consequently, the Office of Surface Mining (OSM) has been working diligently with the West Virginia Division of Environmental Protection (WVDEP) to improve the State's administration of its approved program in two areas: (1) the standards used by the WVDEP in evaluating whether a particular postmining land configuration constitutes a return to AOC; and (2) the postmining land uses which WVDEP approves when it grants a waiver from the AOC requirement. In conjunction with OSM, the WVDEP recently announced proposed new procedures that should both enable the permit reviewer to more easily determine when a site achieves AOC and limit the placement of excess spoil in valleys and streams. In addition, OSM is developing a policy document that will clarify the acceptable postmining land uses for mountaintop-removal and steep slope mining operations with AOC variances. In particular, this document will address the issue of whether "commercial forestry," "agriculture," and "public facilities, including recreational facilities" constitute approvable postmining land uses. These efforts should enable the WVDEP and other State regulatory authorities within the Appalachian Region to improve the effectiveness and administration of their approved State programs in the areas of AOC and postmining land use.

The Federal Surface Mining Control and Reclamation Act of 1977 (SMCRA) provides that a State program may grant variances from AOC for mountaintop-removal and steep slope mining operations, provided the state program requirements are no less stringent than those set forth in §§515(c) and 515(e) of SMCRA. Section 515(c) of SMCRA specifies that a mountaintop-removal AOC variance may be granted by the regulatory authority only if the entire coal seam or seams running through the upper fraction of the hill, ridge, or mountain is removed creating a level plateau or gently rolling contour with no highwalls remaining and capable of supporting postmining land uses of industrial, commercial, agricultural, residential, or public facility (including recreational facilities) use. Section 515(e) of SMCRA provides that a steep-slope AOC variance may be granted by the regulatory authority if (1) the proposed mining is going to occur in a steep-slope area [greater than 20 degrees], (2) the watershed control of the area will be improved by granting such a variance, and (3) the landowner requests in writing that the variance be granted so that the land after reclamation will be suitable for an industrial, commercial, residential, or public use (including recreational facilities).

OSM conditionally approved West Virginia's permanent regulatory program on January 21, 1981. At the time OSM found that the statutory and regulatory requirements of the program governing mountaintop-removal and steep slope mining operations were consistent with the Federal requirements. Subsequent reviews of the State's program, however, have identified postmining land use requirements for steep slope mining operations that are less stringent than the Federal requirements. As discussed in this report, the State is in the process of correcting that deficiency. OSM is actively working with the State of West Virginia and other States in the Appalachian

Region to ensure that these mining methods, which are authorized by SMCRA, are being conducted properly and consistently with the approved State programs. Topical evaluations, as done in West Virginia last year, focus on specific program areas and are done periodically to assess a State's performance. It is through these studies that OSM plans to reassess State mountaintop mining requirements and to ensure that the approved standards are being properly enforced throughout the Appalachian Region. OSM plans to continue its review of AOC and postmining land use in other States with similar mining methods and will consider applying what is being learned in West Virginia in the resolution of issues in those States.

II. INTRODUCTION

In November 1998, OSM completed a draft oversight evaluation on portions of West Virginia's approved surface mining regulatory program. The report focused on AOC and postmining land uses associated with mountaintop and steep slope mining operations in West Virginia.

Given the amount of public interest in this topic, OSM published the draft report and solicited comments on it. OSM's goal was to provide the public an opportunity to comment on the proposed conclusions and recommendations before taking further action to resolve the issues that were identified as a result of the evaluation. The comment period was to close on January 15, 1999, but it was extended through February 12, 1999, at the request of several interested parties.

Comments were received from individual citizens, industry, special interest groups, and the WVDEP. OSM would like to take this opportunity to thank everyone who commented on the draft report. The comments were useful in helping OSM formulate an action plan with the State that addresses all of the issues raised in the draft report. Appendix A contains a summary of all of the public comments received on the report and OSM's response to them. The State's response and OSM's disposition of those comments are contained in Appendix B.

As noted in the earlier draft report, the WVDEP has submitted a program amendment that would allow "fish and wildlife habitat and recreation lands" to be an approved postmining land use for mountaintop-removal mining operations. Because this issue was also the subject of formal rulemaking, OSM reopened the comment period on the proposed State amendment to coincide with the public comment period on the draft report. A *Federal Register* notice will be published in the near future disclosing OSM's decision regarding the State's proposal to allow "fish and wildlife habitat and recreation lands" as an approvable postmining land use for mountaintop-removal mining operations with variances from AOC.

The purpose of this report is to explain how the State and OSM plan to resolve the issues that were mentioned in the earlier oversight report and to examine other issues relating to mountaintop mining that have been brought to our attention which warrant further consideration. None of the comments that were submitted questioned any of the facts or findings that OSM provided in the draft oversight report. Rather than publish the entire report again, OSM decided that it would be more beneficial to focus on how OSM and the WVDEP intend to fix the problems regarding AOC

and unapproved postmining land uses for mountaintop-removal and steep-slope mining operations with AOC variances. The proposed conclusions and recommendations from the earlier draft report are contained in Part III of this report. This is being done so that the reader does not have to refer back to the earlier report, unless he or she wants information concerning specific permits that were evaluated in that report. An electronic version of the draft oversight report is still available on OSM's Web page and can be viewed at http://www.osmre.gov/mtindex.htm. Upon request, hard copies of the report may also be obtained from the Charleston Field Office.

Appendix C of this report contains a copy of the action plan that OSM and the WVDEP have developed to address all known issues regarding mountaintop and steep slope mining. The action plan includes all of the issues raised in the draft OSM oversight report and some other mountaintop mining issues brought to our attention through litigation, public participation, or as a result of the normal oversight process.

III. CONCLUSIONS AND RECOMMENDATIONS

The following restates the conclusions and recommendations of the draft oversight report. The issues as set forth herein are basically unchanged from the previous report. As discussed above, the proposed State and Federal actions to resolve the issues identified in the draft oversight report are the primary focus of this discussion.

a. Approximate Original Contour (AOC)

Issue: OSM's draft oversight evaluation indicated an industry trend toward proposing to return mine sites to AOC rather than obtaining an AOC variance. Also, the evaluation revealed that policies or procedures used for determining when a mining operation's reclamation plan satisfies requirements established for AOC were either applied inconsistently or were too broad, resulting in varied interpretations of what constitutes AOC. Specifically, OSM concluded that large, postmining changes in elevation in relation to the premining relief, the amount and location of material placed off the mined area, and land configuration (land shape or form) should be given more attention in AOC determinations.

In its evaluation, OSM observed that, in some cases, there was not much difference in the characteristics of mines that had been granted AOC variances and those that were supposed to return the land to AOC. That is, little difference existed between the final grading plans that WVDEP had, for some mines, accepted as AOC, and the final grading plans at other mines that WVDEP had considered as requiring variances from AOC. Additionally, it was found that many sites identified as returning the mined areas to AOC generated nearly as much excess spoil as sites with AOC variances. The result was that some mines have been held to more restrictive postmining land use criteria that other seemingly comparable mines have not had to meet.

As discussed in the draft report, OSM's initial research into the legislative history of SMCRA indicates a congressional understanding that mere change in elevation does not, by itself, trigger a

requirement for an AOC variance. The primary element of approximate original contour is configuration or shape. A mined site must be restored to its original configuration in a manner that fits into the surrounding topography. Therefore, OSM concluded that, although elevation is a factor in considering whether AOC has been achieved, it should not be regarded as controlling. OSM invited public comments on this issue.

Because mountaintop mining operations also exist in surrounding states in the region, OSM invited comments on whether it should issue further guidance on AOC as it relates to mountaintop mining operations throughout the region. OSM also invited comments on whether, if further guidance is deemed appropriate, it should be developed through a formal rulemaking amending OSM's regulations, or through other measures, such as a policy statement or an amendment to the West Virginia program.

Resolution: As provided in Part II, Section A of the action plan included in Appendix C, OSM and WVDEP have formed a joint technical team to refine and test a concept proposed by OSM that shows what portion of spoil material created during mining is excess and what portion must be returned to the mined area to achieve AOC. The proposed concept was recently announced by OSM and WVDEP and is summarized in Appendix D. Meetings are being scheduled to explain the new process to industry, environmental groups, and the public. Once fully tested and reviewed, the concept will be adapted and used by the WVDEP during its permit review process to determine more objectively when a site will be returned to AOC and how much excess spoil may be placed outside the mined area. It is anticipated that the new technical guidance will help the WVDEP be more consistent when making AOC determinations.

b. Mine Classification and Inventory

Issue: A major source of confusion over what qualifies as a *mountaintop-removal mining operation*, which requires a variance from AOC, was attributed to WVDEP's method of classifying, in its permitting database, various mining methods as mountaintop operations, regardless of whether an AOC variance had been obtained or not. Over the years, common usage of various mine type classifications had migrated into the classification system used by the WVDEP for identifying the types of operations being conducted within the State. If the WVDEP had properly concluded that AOC would be achieved within the meaning of SMCRA in granting the permits, the operations would not technically be "mountaintop-removal" operations in the legal sense that they do not need variances from AOC. OSM found, however, that the State permit tracking system labeled operations that return the land to AOC as "mountaintop" operations, while also applying the same designation to operations that obtained variances from AOC.

WVDEP's practice of lumping together operations that are distinct under the regulations led to much confusion within the industry, the public, and the media. The practice also contributed to an incorrect perception by the public that all permits listed by the State as "mountaintop" were creating flat land subject to the special postmining land use provisions of Section 515(c) of

SMCRA. Additionally, due to the classification method, WVDEP's electronic database of mine permits was unable to identify exactly how many mines of each category existed within the State.

Resolution: Although State or Federal laws do not require the tracking of mountaintop-removal operations and associated waivers, the WVDEP has revised its permitting database to clearly identify which sites should be classified as "mountaintop-removal" operations. As discussed in Part II, Section B of the action plan in Appendix C, all tasks relating to mine classification and inventory have been completed. Through its inspection workforce, the WVDEP has reviewed all existing permits to ensure that proper classification of mining type and applicable AOC variance was reflected in the database. The WVDEP has now collected information regarding all types of variances, including mountaintop-removal and steep-slope AOC variances, and the information has been uploaded into WVDEP's Environmental Resources Information Network (ERIN). OSM plans to continue working with the WVDEP through its normal oversight process to improve the State's data collection efforts.

c. Mountaintop-Removal Mining Operations With AOC Variances

1. Approved Program Language Differences

In its draft report, OSM identified three significant areas in which the language of the approved State program regulating mountaintop-removal activities differed from that of SMCRA and the Federal regulations. The language differences relate to: (1) documentation of the need and market for the designated postmining land use, (2) use of "woodlands" as an approved postmining land use, and (3) allowing "public use" instead of "public facility (including recreational facilities) use" as a postmining land use.

Issue: ***Expected Need and Market Data*** - The draft report stated that the West Virginia program lacks a specific reference to the expected need and market data requirement referred to in Section 515(c)(3)(B)(ii) of SMCRA. Under SMCRA, the applicant must supply this information before a chosen postmining land use can qualify for an AOC variance. The draft report explained that the administrative record for the State program does not contain an explanation for not requiring this specific language. OSM's review of sampled permits revealed that the WVDEP was not requiring information in the application process that could be used to meet this requirement.

Resolution: The WVDEP has informed OSM that it believes that its existing program provides it with sufficient authority to satisfy this requirement without further rulemaking. The State will take into consideration OSM's report and the recommendations from the "Governor's Task Force on Mountaintop Mining and Related Practices" when developing guidelines regarding expected need and market data. Once developed, these guidelines will ensure consideration of expected need and market data requirements during permit review. The WVDEP may adopt criteria the State Economic Development Authority uses to evaluate areas when rating mining sites for future economic development. The State has agreed not to approve any more mountaintop-removal

permits with AOC variances without having the required information regarding expected need and market data.

Issue: ***Woodlands*** - OSM's draft report noted that the State program authorizes "woodlands" as a postmining land use for mountaintop-removal operations with AOC variances [W.Va. Code § 22-3-13(c)(3)]. As approved in the West Virginia program at CSR 38-2-2.134, "woodlands" means commercial woodlands where the postmining land use would result in the development of a commercial product for which flat land is *essential* to facilitate the operation of *mechanical harvesting equipment.* OSM found that the State was allowing "forestry" as a postmining land use without any finding or explanation that this narrow requirement had been met.

Resolution: As discussed in Part II, Section C of the action plan included in Appendix C, OSM has agreed to provide the State further guidance regarding the types of postmining land uses that may be approved for mountaintop-removal and steep-slope mining operations with AOC variances. OSM will clarify the circumstances under which "commercial forestry" as an allowable postmining land use may justify an AOC variance. Furthermore, the WVDEP plans to submit information explaining its existing requirements regarding "woodlands" and setting forth additional criteria which may demonstrate that "commercial forestry" constitutes a permissible postmining land use for mountaintop-removal and steep-slope mining operations with AOC variances. Permits with mountaintop-removal AOC variances that have "woodlands" as a postmining land use must comply with existing program requirements until the new standards are developed by the State and approved by OSM.

Issue: ***Public Facility Use*** - The State program currently allows variances for an "industrial, commercial, woodland, agricultural, residential, or *public use.*" (W.Va. Code §22-3-13(c)(3), emphasis added.) OSM approved "public use" in 1981, without comment, as part of West Virginia's entire comprehensive permanent regulatory program. *See* 46 Fed. Reg. 5915 (January 21, 1981). As discussed in the draft report, OSM did not find "public use" as a postmining land use in the samples it examined, but believes, based on discussions with State officials, that the WVDEP intends its "fish and wildlife habitat and recreation lands" postmining land use to be a form of "public use" as allowed by the State program. The WVDEP had a program amendment before OSM that would allow "fish and wildlife habitat and recreation lands" to be an approvable postmining land use for mountaintop-removal operations with AOC variances. *See* 62 Fed. Reg. 31543-31544 (June 10, 1997), 62 Fed. Reg. 33785 (June 23, 1997), 63 Fed. Reg., 39790-39791 (July 24, 1998), and 63 Fed. Reg. 68221-68222 (December 10, 1998). In light of the way the State was interpreting "public use," OSM proposed to reconsider whether "public use" as a category of acceptable postmining land uses is consistent with "*public facility* (including recreational facilities) *use*" as contained in SMCRA.

Resolution: As mentioned above, OSM has agreed to provide additional postmining land use guidance to further clarify the requirements of §§515 (c) and (e) of SMCRA. OSM will also provide the State additional clarification concerning the scope of the term "*public facility use*" when rendering its decision on the State's pending program amendment concerning "fish and

wildlife habitat and recreation lands." A decision on the amendment will be announced shortly after the release of this report. The WVDEP has agreed not to approve mountaintop-removal AOC variances with a postmining land use of "fish and wildlife and recreation lands," unless the amendment is approved by OSM.

2. Postmining Land Uses not Authorized by the State Program

Issue: The draft oversight evaluation found that mountaintop-removal permits had been issued with postmining land uses—"forestry" and "fish and wildlife habitat"—not authorized in the approved State program. For all current mountaintop-removal permits already issued that have not properly applied the postmining land use provisions of the approved State program, OSM requested that the WVDEP work with operators to ensure, where practicable, final reclamation achieves a postmining land use authorized by the program. OSM acknowledged in the draft report that the approval of the pending program amendment regarding "fish and wildlife habitat and recreation lands" could resolve some concerns mentioned in that report.

Resolution: At OSM's request, the WVDEP has agreed to discontinue approving permits for the unauthorized postmining land uses of "fish and wildlife" and "forestry." The WVDEP has also agreed to review the postmining land uses of all existing mountaintop-removal mining permits with AOC variances and require permit revisions to ensure that the postmining land uses allowed under the approved State program will be achieved prior to final bond release. As provided in Part II, Section D of the action plan included in Appendix C, the permitting requirements in the approved State program will determine the completion dates for these actions. At a minimum, the permit revisions are to be ordered by the WVDEP within nine months after OSM provides further clarification concerning postmining land uses for operations with mountaintop-removal AOC variances and renders a final decision on the State program amendment regarding "fish and wildlife habitat and recreation lands."

3. Inadequate Permit Documentation

Issue: The draft report concluded that all of the mountaintop-removal permits with AOC variances reviewed by OSM lacked at least some documentation required for approving the designated postmining land use. In addition to lacking sufficient information relating to the expected need for, and market data concerning, proposed postmining land uses, a number of permits in the sample also lacked other information about the following regulatory criteria: that the proposed land use be compatible with the adjacent land uses; practicable with respect to financing and completing the proposed use; supported by commitments from public agencies where appropriate; planned pursuant to a schedule that will integrate the mining operation and reclamation with the postmining land use; and, designed by an approved person to assure the stability, drainage, and configuration necessary for the intended use, were addressed in some but not all of the permit documents.

As discussed in the draft report, the problems with some permits related not to the legitimacy of particular postmining land use that had been approved but simply to the lack of adequate documentation for that use. In such cases, OSM does not believe that the effort to obtain additional documentation for permits, some of which were issued many years ago, would justify the expenditure of scarce regulatory resources and consequently finds that existing permits need not be revised. This conclusion, however, does not relieve the WVDEP of its responsibility to revise its permitting procedures to ensure that the problems will not recur.

Resolution: After considering all comments regarding this matter, OSM still concludes that no corrective action is required for previously issued permits that may be deficient only in documentation. However, permits that have postmining land uses not allowed by the approved program, in addition to lacking the required documentation, will have to be revised to comply with the approved State program.

The WVDEP has agreed to evaluate its permit application form and permit review process to ensure that its permitting requirements relative to AOC variances are being fully implemented. To ensure that the permit documentation problems mentioned in the draft report do not recur, the WVDEP has agreed to revise its permit application form and expand the variance section of its permit approval document to specifically address mountaintop-removal and steep-slope mining AOC variances.

d. Steep-Slope Mining Operations With AOC Variances

1. Appropriateness of Variance Type

Issue: In the draft report, OSM identified four situations where steep-slope AOC variances had been granted, but where mountaintop-removal AOC variances would have been more appropriate because the entire coal seam or seams had been removed. This distinction is important because the postmining land uses authorized for a steep-slope AOC variance are different from those authorized for a mountaintop-removal AOC variance.

The draft report noted that documentation obtained by the WVDEP, as required for steep-slope AOC variances, had improved in recent years, but there was still confusion in particular cases as to whether a steep-slope or mountaintop-removal AOC variance should be authorized. The current State program allows for an "equal to or better than" land use standard to be applied to steep-slope AOC variances, while mountaintop-removal AOC variances are limited to specific land uses. OSM requested the WVDEP to implement proper classification procedures for operations seeking AOC variances and review the appropriateness of AOC variances issued to all steep-slope operations with current permits.

Resolution: As provided in Part II, Section F of the action plan included in Appendix C, the WVDEP has agreed to review all permits with steep-slope AOC variances to determine if a mountaintop-removal AOC variance had been more appropriate. In those cases where a

mountaintop-removal AOC variance should have been issued, the WVDEP will determine if the permit's postmining land use would still be allowable for a mountaintop-removal AOC variance. If the postmining land use is allowable, then no further action will be required. If the change in the type of AOC variance makes the postmining land use inappropriate, the State will require corrective action through an ordered permit revision.

2. Program Language Differences

Issue: As explained in the draft OSM report, the approved West Virginia program does not limit approval of an AOC variance for a steep slope mine to the specific postmining land uses specified in Section 515(e) of SMCRA. The State standard conflicts with SMCRA's requirement that, in order to approve a steep-slope AOC variance, an "industrial, commercial, residential, or public use, including recreational facilities" must be proposed. In February 1996, OSM requested that the WVDEP submit either a proposed amendment or a schedule with a description of an amendment to resolve this deficiency.

Resolution: As provided in Part II, Section G of the action plan contained in Appendix C, the WVDEP has filed a proposed rule with the West Virginia Legislative Rulemaking Review Committee to address OSM's required amendment. The revision is to be acted upon during the current legislative session. If approved, the WVDEP will submit it to OSM for consideration. Until its program is revised, the WVDEP has agreed not to issue any more steep-slope AOC variances which would violate the proposed rule that was presented to the Legislature.

IV. OTHER AREAS OF CONCERN REGARDING MOUNTAINTOP MINING

As a result of concerns and allegations raised by ongoing litigation, pubic comments, and normal oversight, OSM and WVDEP have agreed to work together on other issues relating to mountaintop mining in addition to AOC and postmining land use. Part III of the action plan included in Appendix C sets forth these concerns by category and our proposed actions for resolving them. This part of the agreement, as summarized below, is being done to improve both agencies' understanding of the issues and to ensure that the State's program and its implementation are consistent with the Federal requirements.

a. Stream Buffer Zone Findings and Variances

State Requirements: The State regulations at CSR 38-2-5.1 provide in part that overburden placement and haulageways constructed across natural drainways cannot materially increase the sediment load or materially affect stream quality. The State regulations at CSR 38-2-5.2.a also provide that no land within 100 feet of a perennial or intermittent stream can be disturbed by surface mining activities, including roads, unless specifically authorized by the Director. The Director may authorize such operations only upon finding that the surface mining activities would not adversely affect the normal flow or gradient of the stream, adversely affect fish migration or related environmental values, materially damage the water quantity and quality of the stream, and

will not cause or contribute to the violation of applicable State or Federal water quality standards. These requirements have been found by OSM to be no less effective than the Federal requirements at 30 CFR 816/817.57(a).

Area of Concern: Some concern has been expressed that the WVDEP is approving permit applications without first making the findings required to permit land within the buffer zones of intermittent or perennial streams to be disturbed. In addition, it has been alleged that variances allowing surface coal mining operations to disturb land within stream buffer zones should be granted only for minor incursions into a stream, not for activities that bury substantial portions of a stream.

Proposed Action: As provided in Part III, Section A of the action plan included in Appendix C, OSM has agreed to provide the WVDEP its interpretation of how the buffer zone requirements apply to streams which are to be filled with excess spoil during mining operations. The interpretative guidelines will further clarify the buffer zone requirements under SMCRA. In addition, the WVDEP will reevaluate its permit review process to ensure that permit applications requesting variances contain the appropriate demonstrations regarding stream protection.

b. Riparian Vegetation

State Requirements: The State regulations at CSR 38-2-8.2.a, like the Federal requirements at 30 CFR 816/817.97, provide that mine operators must avoid disturbances to, enhance where practicable, restore, or replace, wetlands and riparian vegetation along rivers and streams and bordering ponds and lakes.

Area of Concern: Some have alleged that the creation of valley fills violates the State program requirements concerning the protection of riparian vegetation.

Proposed Action: As provided in Part III, Section B of the action plan included in Appendix C, OSM has agreed to clarify how the provisions of SMCRA protecting riparian vegetation, natural watercourses, and the buffer zones of intermittent or perennial streams may be applied while still allowing the disposal of excess spoil in streams.

c. Damage to Natural Watercourses

State Requirement: Section 22-3-13(c)(4)(D) of the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA), like Section 515(c)(4)(D) of SMCRA, provides that, in granting a permit for a mountaintop-removal mining operation, the Director must require that "no damage will be done to natural watercourses."

Area of Concern: It has been alleged that WVDEP's approval of mountaintop-removal operations that allow valley fills in streams violates the statutory requirement prohibiting the approval of mountaintop-removal operations that will damage natural watercourses.

Proposed Action: As provided in Part III, Section C of the action plan included in Appendix C, OSM has agreed to provide the State its interpretation of how the statutory requirement applies to streams that are to be filled with excess spoil during a mountaintop-removal mining operation.

d. Hydrologic Reclamation Plan

State Requirements: The State regulations at CSR 38-2-3.22.f, like the Federal regulations at 30 CFR 780.21(h) and 784.14(g), provide that each permit application must contain a hydrologic reclamation plan. The plan must be specific to the local hydrologic conditions. It must contain, in the form of maps and descriptions, the steps to be taken during mining and reclamation up to the time of bond release to minimize disturbances to the hydrologic balance within the permit and adjacent areas; to prevent material damage outside the permit area; to meet applicable Federal and State water quality laws and regulations; and to protect the rights of present water users. The plan must include measures to be taken to: avoid acid or toxic drainage; prevent, to the extent possible, using the best technology currently available additional contributions of suspended solids to streamflow; provide water treatment facilities when needed; control drainage; restore, protect, or replace water supplies of present water users; address the potential adverse hydrologic consequences identified in the probable hydrologic consequences determination and include preventive and remedial measures; and restore approximate premining recharge capacity, provided that underground mining operations are exempt from this requirement.

Area of Concern: Some allege that the WVDEP has been approving permit applications without hydrologic reclamation plans that describe the steps to be taken to minimize disturbances to the hydrologic balance.

Proposed Action: As explained in Part III, Section D of the action plan included in Appendix C, OSM and WVDEP have signed a separate agreement with three other Federal agencies [U.S. Environmental Protection Agency (EPA), U.S. Army Corps of Engineers (COE), and U.S. Fish and Wildlife Service (FWS)] to study the effects of valley fills through an Environmental Impact Statement (EIS). In addition, OSM and WVDEP have agreed to develop a work plan for the current oversight year that specifically provides for the review of WVDEP decisions relating to probable hydrologic consequences, cumulative hydrologic impact assessments, and hydrologic reclamation plans for large mountaintop mines.

e. Contemporaneous Reclamation

State Requirements: The State requirements governing contemporaneous reclamation are set forth at CSR 38-2-14.15. The specific requirements for multiple seam and mountaintop-removal mining operations are set forth in Subsections 14.15.b.5 and 14.15.b.6, respectively. Subsections 14.15.f and 14.15.g allow the WVDEP to grant variances to the contemporaneous reclamation requirements of Subsection 14.15 if, on the basis of site-specific conditions and sound scientific and/or engineering data, the applicant can demonstrate that compliance with one or more of the standards is not technologically or economically feasible.

Because the Federal time and distance requirements at 30 CFR 816.101 have been suspended indefinitely (57 Fed. Reg. 33875, July 31, 1992), there is no specific Federal time frame for reclamation against which to judge a State program. The Federal contemporaneous reclamation requirements, as set forth in 30 CFR 816/817.100, merely provide that reclamation efforts, including backfilling, grading, topsoil replacement, and revegetation, must occur as contemporaneously as practicable. OSM has advised the State that, upon the promulgation of new Federal rules, the State may have to amend its contemporaneous reclamation requirements to conform with the revised Federal standards.

Area of Concern: It has been alleged that the WVDEP is approving permit applications that do not meet the contemporaneous reclamation requirements of CSR 38-2-14.15 and that it is granting variances from these provisions that do not comply with the requirements of CSR 38-2-14.15(f).

Proposed Action: OSM recently approved a State program amendment that establishes revised standards at CSR 38-2-14.15.b and 14.15.c for contemporaneous reclamation of mountaintop-removal mining operations. As provided in Part III, Section E of the action plan included in Appendix C, OSM will ensure that its field representatives have a complete understanding of the revised State program requirements and that they will apply those standards during all oversight inspections. In addition, OSM will conduct a special study of selected mountaintop-removal operations to ensure that the State is applying its contemporaneous reclamation requirements consistently and is granting variances in accordance with the requirements of Subsections 14.15.f and 14.15.g. This evaluation will be conducted to gain a better understanding of the State's contemporaneous reclamation rules and whether their application and any variances thereto satisfy the intent and purpose of both State and Federal requirements. When assessing the State's contemporaneous reclamation requirements, OSM will give special consideration to the amount of permitted area that is being disturbed at any one time and the amount of performance bond that is required to be posted to ensure reclamation in case of forfeiture.

V. IMPLEMENTATION OF REFORMS

OSM proposed that any reforms that resulted from the draft report would be applied prospectively, and that existing mining operations, some of which were initially permitted many years ago, would be altered only to the extent practicable. OSM requested that, in addition to those permits which were examined for the draft report, the WVDEP review all existing permits with AOC variances and apply the reforms prospectively. For example, OSM proposed that the WVDEP require revisions of any permits or portions thereof that have not been reclaimed in order to ensure that final reclamation leads to an approvable postmining land use. OSM did not recommend that any areas that have been regraded or that have established vegetation be disturbed in order to address the concerns raised in the report.

Some industry representatives agreed that all reforms should be applied prospectively. They contend that operators obtained the permits after extensive review and public comment. To apply the reforms retroactively is simply not fair and could cause needless paperwork and potentially

environmentally damaging consequences. Others commented that to limit the reforms resulting from the report to prospective application is both illegal and unwise. These commenters stated that any proposal to allow operations that are engaged in mining under permits which do not satisfy the mandates of State law and to continue such operations indefinitely is unlawful.

After consideration of all comments, OSM has decided that the various levels of technical deficiencies in existing permits must be addressed differently depending on the extent that the deficiency would actually cause a violation of the State program with "on-the-ground" consequences. Where the deficiency relates only to permit documentation, no retroactive correction will be required. Where the deficiency actually authorizes a postmining land use that is not provided for by the approved program, OSM and WVDEP have agreed to require that the permit and, to the degree practicable, the actual mining operation be revised. However, OSM still maintains that sites which have been backfilled, regraded, and revegetated should not be disturbed to satisfy the concerns raised in the draft report. Disturbances of this kind do not always benefit the environment. OSM and the WVDEP will examine each permit on a site-specific basis to make sure that the State's approved program is being properly enforced and any on-the-ground environmental problems identified are corrected to our mutual satisfaction.

VI. SUMMARY AND CONCLUSION

This report focuses on the resolution of those issues identified in OSM's draft report on AOC and postmining land use. As discussed in this report, there are other issues concerning mountaintop mining that go beyond what was initially identified in the OSM draft report. Therefore, OSM and the WVDEP have decided that it is in the best interest of the citizens of West Virginia to execute an action plan that will not only address the issues relating to AOC and postmining land use, but also those other oversight and technical issues relating to mountaintop mining that have been brought to our attention.

In summary, the WVDEP has agreed to:

- Continue developing, with OSM assistance, criteria for assessing excess spoil calculations in determining AOC and implementing the concept on a pilot basis in West Virginia with the participation of industry, environmental representatives, and the public;

- Continue working with OSM through the normal oversight process to improve its data collection efforts;

- Develop procedures or revise the West Virginia program to resolve differences relating to "expected need and market data," "woodlands" and "public use" when allowing mountaintop-removal AOC variances;

- Revise existing permits that allow for unauthorized postmining land uses of "forestry" and "fish and wildlife;"

- Modify permit application forms and review documents to include specific findings for mountaintop-removal and steep-slope mining AOC variances;

- Review permits with steep-slope mining AOC variances to determine the appropriateness of the variance and the postmining land use;

- Modify the West Virginia program to limit approval of steep-slope AOC variances to the specific postmining land uses authorized under SMCRA;

- Work with OSM to further clarify how SMCRA and WVSCMRA are to be applied with regard to protecting riparian vegetation, natural watercourses, and the buffer zones of intermittent or perennial streams while still allowing the disposal of excess spoil in streams;

- Participate with OSM in the evaluation of the probable hydrologic consequences determinations, cumulative hydrologic impact assessments, and hydrologic reclamation plans of large mountaintop mining operations to ensure that adequate steps are being taken to minimize disturbances to the hydrologic balance;

- Participate with OSM in the evaluation of mountaintop mining permits to ensure compliance with the contemporaneous reclamation requirements of the approved State program; and

- Cooperate with OSM to allow oversight and technical assistance activities to occur prior to actual issuance of permits.

Again, OSM would like to express its sincere appreciation to everyone who commented on the draft report. OSM received sixty-four letters, E-mail messages, or comments on the draft report. Appendix A contains a summary of all of the comments submitted to OSM with our responses. Eighteen of the letters or messages submitted to OSM concern mining practices in Kentucky. Those documents have been copied and forwarded to the OSM Lexington Field Office for consideration. Of the forty-six documents received by OSM that pertain to West Virginia, 55 percent were submitted by private citizens, 24 percent were from environmental groups, 17 percent were from industry, and governmental agencies submitted the remaining 4 percent. The WVDEP and the National Park Service were the only State or Federal agencies to comment on the report. Fifty-four percent of the letters or messages provided specific comments on the draft oversight report, while most of the remaining comments were protesting mountaintop-removal mining.

Some commenters have asked that mountaintop-removal mining be stopped. Congress, however, specifically authorizes this form of mining under certain limited circumstances. Based on these statutory provisions, OSM has promulgated regulations which, if properly implemented, should assure that mountaintop-removal mining can be conducted in an environmentally sound manner.

As provided in Section 102 of SMCRA, a basic purpose of the Act is to assure that the coal supply essential to the Nation's energy requirements and to its economic and social well-being is provided and strike a balance between protection of the environment . . . and the Nation's need for coal as an essential source of energy. OSM, in cooperation with the State of West Virginia, is striving to achieve that balance between our need for coal and the protection of the environment with the adoption of the action plan contained in Appendix C.

Public participation is an important component of SMCRA. The Act provides for public involvement in the development, revision, and enforcement of the regulations or standards established by OSM or a State. As discussed in this report and the Appendices, issues have arisen concerning the regulation of mountaintop-removal mining that have gone unnoticed until now. OSM acknowledges that the resolution of those issues will require the collective efforts of the State, other Federal agencies, and the public. This report is the first step in that process. Once the process is completed, we believe that the environment, the public, and the coal industry will all benefit.

To encourage more public involvement, a copy of this report is being provided to all persons who commented on the draft oversight report. Copies of the final report are also being made available to the public free of charge upon request to the Charleston Field Office. In addition, the final report is being posted on OSM's web page at http://www.osmre.gov/mtindex.htm. Pursuant to OSM's oversight directive, copies of the draft and final oversight reports have also been included in the OSM oversight evaluation file at the Charleston Field Office and are available for public review.