

APPENDIX B.
DISPOSITION OF STATE COMMENTS



**DIVISION OF ENVIRONMENTAL PROTECTION
Office of Mining and Reclamation**

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Ms. Patricia Hairston
Office of Surface Mining
1951 Constitution Avenue
Washington, DC 20240

Dear Ms. Hairston:

The West Virginia Division of Environmental Protection is submitting comments regarding the Draft West Virginia Oversight Evaluation Report entitled Approximate Original Contour and Postmining Land use for evaluation year 1998.

Page A-36 a.: Approximate Original Contour (AOC)

“OSM’s oversight evaluation indicates an industry trend of 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 are either applied inconsistently or are overly broad, resulting in varied interpretations of what constitutes AOC.”

DEP Response: Some of the operations contained in this report were issued prior to West Virginia obtaining primacy in 1981. WVDEP does not believe it is realistic to compare today’s standards to those that were used 20 years ago because rules and interpretations of the rules have changed. Furthermore, OSM did state in the report that there was no record of any objections to the WVDEP’s determination of AOC for a particular permit. The WVDEP believes that it is properly interpreting the AOC requirements of SMCRA.

Due to lack of objective criteria in either the State or Federal Programs, it is inevitable that variations in interpretations and applications will occur. The establishment of objective criteria by the appropriate federal agency with consultation with the various states will resolve the issue.

Mine Classification and Inventory

“A major source of confusion over what qualifies as “mountaintop-removal” mining operations, which require a variance from AOC, can be attributed to WVDEP’s method of classifying, in its permitting database, various mining methods as mountaintop operations regardless of whether an AOC variance has been obtained or not.”

DEP Response: The WVDEP considers mountaintop removal as a “method” of mining. If the post mining land configuration constitutes flat to gently rolling with inward drainage then a variance is required. WVDEP wants to re-emphasize a statement contained in the report that it is not required by State or Federal law to track this type of information. However, the WVDEP revisited the classification issue and updated the database to more accurately reflect actual mine classification.

In addition, the WVDEP has submitted a rule change to the 1999 Legislature to further clarify mountaintop removal and area mine operations.

Approved Program Language Differences

“OSM identified three significant areas in which the language of the approved State Program differs from that of SMCRA and the Federal regulations. These language differences, which may have contributed to some of the other problems addressed in this report, relate to the following areas: (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.”

DEP Response: The WVDEP recognizes approved program language differences. (1) The Governor’s Task Force on mountain-top removal recommended that market needs analyses be conducted in accordance with guidelines set forth by the WV Development Office before mountain-top removal variances are granted. The WVDEP will work with the appropriate agencies to develop this process. (2) The WVDEP will evaluate the procedures used to approve woodlands and ensure that the appropriate findings are made before approval of a woodlands postmining land use on areas where mountain-top removal variances have been requested.

Postmining Land Uses not Authorized by State Program

“The oversight evaluation found that mountaintop-removal permits have been issued with postmining land uses – “forestry” and “fish and wildlife habitat” – not authorized in the approved State Program, although a program amendment to authorize “fish and wildlife habitat and recreation lands” is pending before OSM.”

DEP Response: Prior to OSM’s request that the WVDEP discontinue approving permits with a Fish and Wildlife Postmining Land Use, the WVDEP had stopped issuing permits with a Fish and Wildlife Postmining Land Use. WV Program allows for commercial woodland to be utilized on

mountaintop removal operations with AOC variances. WVDEP does not understand how OSM determined "forestry" is not within the State Approved Program. At mid-term review or renewal, the WVDEP will ensure that all permits will be reviewed for compliance with all requirements of the approved program.

Page A-40 3. **Inadequate Permit Documentation**

OSM found that all of the mountaintop-removal permits with AOC variances lacked at least some of the documentation required for approving the designated postmining land use."

DEP Response: The WVDEP believes that most of the determinations needed to grant AOC variances are implicitly considered in the application review process. However, the WVDEP will revise its facts and findings documentation to address OSM's concerns.

Page A-41 d.1. **Appropriateness of Variance Type**

"In the review, OSM found 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."

and

Page A-41 d.2. **Program Language Differences**

"The approved West Virginia program does not limit approval of an AOC variance for a steep-slope mine to the specific postmining land uses that are specified in SMCRA.

DEP Response: The pending regulation change submitted to the 1999 legislature will clarify the differences between AOC variances on steep slope operations and AOC variances on mountaintop removal operations. The WVDEP will, upon passage by the legislature, submit a program amendment to OSM concerning this issue and the WVDEP will not issue any permits with steep slope variances that don't comply with proposed program language.

In closing, the WVDEP agrees that these issues need clarification to insure consistency between the states. Please be assured that we will be readily available to provide assistance in any area that may be required or requested by OSM.

Sincerely,

John C. Ailes

John C. Ailes, Chief
Office of Mining and Reclamation

Disposition of WVDEP's Comments

a. Approximate Original Contour

OSM acknowledged in the draft report that none of the comments from the public objected to any particular AOC determinations made by the WVDEP. In addition, OSM recognized that some of the permits under review had been initially issued prior to the effective date of SMCRA. State and Federal law, however, require that all permits be revised to conform with new program requirements. While the State believes that it has been properly interpreting its AOC requirements, the oversight report revealed that the State has not been consistent in its application of those requirements. OSM also agrees that the lack of specific criteria in the program may have led to variations in interpretation and application of the State's AOC requirements. Therefore, OSM believes that it is necessary to clarify the existing AOC requirements further. The development and implementation of the 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 and that is discussed both in the action plan included in Appendix C and in Appendix D should enable us to achieve that goal.

b. Mine Classification and Inventory

As discussed in the draft report, neither State nor Federal law requires a regulatory authority to track mountaintop-removal operations and associated waivers. OSM acknowledges that the State has revisited this issue and updated its database to reflect mine classification types and variances more accurately. OSM appreciates the State's efforts in this area. OSM will continue to work with the WVDEP in improving its database to track State permitting, inspection, and enforcement actions.

c. Approved Program Language Differences

OSM has acknowledged that differences between language of SMCRA and the approved program pertaining to mountaintop-removal mining may have contributed to some of the problems identified in the draft oversight report. The WVDEP recognizes these differences and has agreed to develop additional guidelines for assessing market need and on whether "commercial forestry" constitutes a permissible postmining land use. Part II, Section C of this report and the action plan included in Appendix C contain detailed discussions of the program differences and both agencies' plans for resolving those issues.

d. Postmining Land Uses not Authorized by State Program

OSM acknowledged in the draft oversight report that some mountaintop-removal permits had been issued with unauthorized postmining land uses of "forestry" and "fish and wildlife habitat." The WVDEP notes that it had already stopped issuing permits with a "fish and wildlife"

postmining land use before OSM requested it to do so. In addition, the WVDEP questioned how OSM determined that "forestry" is not within the approved program, but it agreed to review all permits at mid-term review or renewal to ensure compliance with approved program requirements. OSM agrees that "forestry" is an allowable postmining land use for mountaintop mining operations that intend to restore the land to approximate original contour (AOC) after mining, but "forestry" is inappropriate for mountaintop-removal operations with AOC variances. "Woodlands," as defined by CSR 38-2-2.134, is allowable provided that it is demonstrated that the flat land is essential for the operation of mechanical harvesting equipment. As discussed in this report and the action plan included in Appendix C, OSM and WVDEP have committed further to clarify the circumstances under which commercial tree growing and harvesting practices may justify an AOC variance.

e. Inadequate Permit Documentation

The WVDEP stated that although it believes that most of the AOC variance determinations are implicitly considered in the application review process, it will revise its fact and findings documentation to address OSM's concerns with respect to permit documentation. As discussed in this report and in the action plan included in Appendix C, OSM does not propose to require corrective action in cases where the only problem with an outstanding permit is that it was issued without adequate documentation. However, the WVDEP may have to revise its permit application form and permit review documents to ensure that, in the future, the WVDEP issues permits only in cases where the documentation is adequate.

f. Appropriateness of Variance Type and Program Language Differences Involving Steep-Slope Mining

As discussed in the draft oversight 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. In addition, OSM concluded that the State program does not limit the approval of AOC variances for steep slope mining operations to the postmining land uses specified in SMCRA. The WVDEP informed OSM that it has submitted revised regulations to the Legislature that should clarify the differences between steep-slope and mountaintop-removal AOC variances. Furthermore, the WVDEP has agreed not to issue any permits with steep-slope AOC variances that do not comply with the proposed program language. As discussed in this report and 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 would have been more appropriate. The State will also require corrective action for those steep-slope mining operations with inappropriate postmining land uses.