

**APPENDIX A.**  
**DISPOSITION OF PUBLIC COMMENTS**

## **Disposition of Public Comments**

### a. Expressions of General Opposition to Surface Coal Mining and Specifically Mountaintop-Removal Mining

*Comments:* Two commenters were opposed to surface mining, rather than deep mining of coal, because of the impacts on forests and surface land uses and on water resources. One commenter also preferred underground mining methods. Another wrote in general opposition to surface mining. Several commenters expressed concerns with surface mining and its impacts on the environment in general. Several more commenters expressed general opposition to mountaintop removal operations.

*Response:* Both Federal and State laws allow for coal removal by surface mining methods, including mountaintop-removal and steep slope mining. Surface mining activities can be conducted in an environmentally acceptable manner. The purpose of this report was to ensure that mountaintop-removal and steep slope mining activities in West Virginia were being conducted in accordance with the special requirements prescribed by the approved State program and whether the provisions of the State program are in accordance with SMCRA.

### b. OSM Should Ensure Full Compliance with SMCRA and the Approved West Virginia Program

*Comments:* One commenter stated that full compliance is in the best interest of the environment, the citizens, and the coal industry of West Virginia. Similarly, another commenter endorsed full compliance with current standards. One commenter provided several detailed endorsements of requiring better implementation of the West Virginia program as detailed in the report. The commenter also stated that better data is necessary to make sound decisions.

*Response:* OSM agrees that full compliance with an approved State program does ensure better environmental protection. OSM continually works with States to improve their permanent regulatory programs and the implementation of those programs. OSM believes that the proposed action plan described in Appendix C will ensure better implementation of the West Virginia program.

*Comments:* Several commenters indicated the need for OSM to take initiative in ensuring compliance with the regulatory and statutory requirements. One commenter suggested that States are unable to enforce the requirements adequately. One commenter specifically stated that no surface mining should occur unless there is full compliance with the laws. Another commenter also indicated the need for better enforcement of the laws.

*Response:* As mentioned above, OSM is working diligently with the States to ensure full compliance with their approved State programs. OSM firmly believes that States are capable of administering their own programs. At the time of State program approval, each State has to demonstrate its ability to enforce the proposed program. Failure to do so, would result in the

disapproval of the program. Congress recognized when it passed SMCRA and gave States the right to run their own programs that a Federal presence was necessary to ensure that the programs would be properly enforced. Through oversight, OSM strives to ensure proper enforcement of those programs. This is a continual process. OSM is always looking for ways to improve oversight. However, the law does not allow OSM to abolish surface mining within a State because of poor performance by a State in the administration of its program. OSM is obligated to work with the States to improve their performance. It is through the changes that are set forth in the action plan that we hope to accomplish that goal in West Virginia.

*Comments:* One commenter indicated that revision of specific permits is necessary in achieving full compliance with the law and that the entirety of SMCRA's provisions should be considered in determining whether this type of mining is in compliance. One commenter echoed these concerns and indicated OSM's failure to address these problems in its oversight and failure to take action against West Virginia sidesteps its responsibilities. One commenter also raised concerns with OSM's oversight methodology. One commenter also suggests that aerial surveys be conducted to ensure compliance with permit terms and the approved program.

*Response:* OSM agrees that in order to achieve full compliance with the law some permits with identified deficiencies will have to be revised. OSM and the State have agreed to reevaluate all mountaintop-removal and steep-slope mining permits with AOC variances to ensure compliance with the approved State program. OSM acknowledges that, because it primarily examined on-the-ground problems in West Virginia, some permitting problems were not readily identified through oversight. However, prior to requiring a State to take further action, OSM must first produce evidence showing that the State is failing to properly enforce its program. Through the draft oversight report, OSM has demonstrated to the State that there are areas of its program that need to be strengthened. OSM and the State are now taking the required steps to improve its program through the action plan. Furthermore, as suggested, OSM and the State regularly conduct aerial surveys of operations to ensure compliance with permit and program requirements.

*Comment:* One commenter stated that the State has been requiring compliance with SMCRA and the approved program.

*Response:* Overall, the WVDEP does ensure compliance with its approved program. However, as demonstrated by the draft oversight report, there are areas that need improvement. Working together, we hope to improve the State's program and its enforcement.

c. Postmining Land Use Should Focus on Reforestation and Forestry Uses

*Comments:* One commenter was in favor of higher value forestry, including hardwood forests, as an integral part of postmining land uses, and opposed to cattle grazing. Several commenters supported forestry. One commenter was strongly in favor of "commercial forestry" as a postmining land use. Two commenters provided detailed comments related to reforestation and forestry on mined lands in general. One commenter also indicated the need for using native

species in reforestation and reclamation and the need to maximize water available in the backfill for forestry uses. Another commenter encouraged a broader interpretation of requirements for “commercial forestry” postmining land uses.

*Response:* Federal and State laws dictate what postmining land uses are allowed for mountaintop-removal and steep-slope mining operations with AOC variances. As noted in the draft oversight report, the approved State program only authorizes “woodlands” as an approvable postmining land use for mountaintop-removal operations. “Forestry” is not an authorized postmining land use on sites with AOC variances. However, OSM and the State recognize the benefits of “commercial forestry.” As discussed in this report, we are examining the circumstances under which “commercial forestry” could be an approvable postmining land use. The comments submitted in response to the draft report will aid us in that task.

*Comments:* One commenter was concerned that reclamation forests are inferior to premining woodlands.

*Response:* OSM agrees, that in some situations, postmining reforestation may not be as good as the premining forestland. However, research has shown that mined spoil, properly reclaimed, can be an excellent growth media for forests and may even exceed the productivity of the premining conditions. That is why it is so important that OSM, the State, and industry work together to make sure that requirements are in place to ensure that postmining reforestation is equal to or better than the premining forestlands in tree diversity and growth.

#### d. Postmining Land Uses Should Have Public and Environmental Benefits

*Comments:* Several commenters were supportive of “fish and wildlife habitat” as a preferred postmining land use. One commenter noted the importance of an economic benefit that accrues from the postmining land uses of mountaintop mines with an AOC variance.

*Response:* As discussed in this report and the earlier draft report, “fish and wildlife habitat” is not an authorized postmining land use for mountaintop-removal or steep-slope mining operations with AOC variances. The WVDEP has submitted a program amendment to OSM that would allow “fish and wildlife habitat and recreation lands” to be an allowable postmining land use for mountaintop-removal operations with AOC variances. OSM will be rendering a decision on that amendment within a few weeks. A copy of the decision and OSM’s response to comments concerning that particular postmining land use will be published in the *Federal Register*. In the interim, the WVDEP has agreed not to approve any permits with the postmining land uses of “fish and wildlife habitat” or “fish and wildlife habitat and recreation lands.”

*Comments:* Several commenters were opposed to “fish and wildlife habitat,” “pastureland,” or “rangeland” as postmining land uses. One commenter stated that “fish and wildlife habitat” is an illegal postmining land use. One commenter supported “commercial forestry” or “industrial” postmining land uses.

*Response:* As mentioned in this report, OSM will be providing the States further clarification concerning the postmining land uses that are authorized for mountaintop-removal and steep-slope mining operations with AOC variances. The State has agreed to stop issuing permits with unauthorized postmining land uses, and to amend its program to correct any deficiencies.

*Comments:* One commenter was in favor of a broad ecological assessment of postmining land uses and supported more detailed analysis of postmining land use proposals. Another commenter expressed that there is a need for greater review of postmining land use proposals. Still, another commenter indicated the absolute need for documented economic benefits from postmining land uses as a prerequisite for approval of operations. The same commenter stated that required findings for the need for flatter land and other related findings are essential, but not being made in postmining land use determinations.

*Response:* As mentioned, OSM plans to provide the States more postmining land use guidance for mountaintop-removal and steep-slope mining operations. OSM acknowledges that the current requirements need further clarification. The guidance document, once completed, should assist the States in making sure that the requested postmining land use satisfies all of the requirements of their approved programs. WVDEP's permit form and permit review procedures will be modified to ensure that future permits contain allowable postmining land uses. Revisions to the State's program will ensure that the proposed postmining land uses will be obtainable according to need and market data. In addition, as required by existing State law, the applicant must demonstrate that the postmining land use is practicable with respect to financing and completing the project. OSM will continue to monitor the State's progress in this area to ensure compliance with the approved program. It should be noted that SMCRA does not require a demonstration of "economic benefit" for each postmining land use as a prerequisite for permit approval or require a finding of the "need for flatter land" as one commenter has suggested. However, the limitations of the AOC variances to specific postmining land uses and the findings required to allow these uses do have similar results.

e. Related to or Opposed to Mining on Black Mountain in Kentucky

*Comments:* Several commenters opposed mining on Black Mountain, particularly by mountaintop mining. One commenter included some dissenting views on mining on Black Mountain.

*Response:* As mentioned in the report, 28 percent of the comments received by OSM concerned mountaintop mining in Kentucky. Since that issue is not the topic of this report, those comments have been forwarded to OSM's Lexington Field Office for consideration.

f. Opposed to Fills in Streams

*Comments:* Several commenters expressed specific concerns over the impact of fills on streams. One commenter also expressed concerns with the lack of information on how fills affect water resources, riparian areas, and watershed values.

*Response:* As discussed in this report, OSM intends to provide the State further clarification concerning the stream buffer zone requirements and how they apply to streams that are to be filled with excess spoil during mining. In addition, OSM and WVDEP will participate with three other Federal agencies (EPA, COE and FWS) in the completion of an Environmental Impact Statement (EIS) that will assess the effects of fills on intermittent and perennial streams, riparian vegetation, and other environmental values. As noted in the action plan included in Appendix C, OSM and WVDEP have also agreed to review State procedures for the hydrologic related determinations required in the permitting process for areas downstream of the fill.

g. Concerned About Effects of Flatter Lands

*Comments:* One commenter was concerned that the removal of mountaintops removes protection from storms. Another commenter was concerned about the ecological effects of flatter land, while another commenter stated that flatter land may lessen flooding and improve reclamation success.

*Response:* State and Federal laws generally require all sites after mining to be returned to their approximate original contour (AOC). However, as discussed in the report, under certain limited circumstances, the applicant may obtain a variance from the AOC requirements. As the commenters noted, the flattening of land can have both positive and negative effects. That is why it is so important during the permitting process that the regulatory authority take into consideration all of the site-specific facts and ensure that adequate safeguards are in place prior to permit approval. OSM, in cooperation with the U.S. Army Corps of Engineers, has begun a study of the flooding potential of large-scale surface mining activities. This may also be an item to be reviewed in preparation of the EIS mentioned earlier that is to be sponsored by the five agencies.

h. Need for Better Calculation of Excess Spoil

*Comments:* A commenter provided detailed comments on the need for material balance and spoil calculations as a part of mining and reclamation planning and permitting. Another commenter also endorsed better calculation of excess spoil. One commenter stated that excess spoil should be considered only to the extent it affects AOC. While another commenter stated that more control should be placed on allowable spoil swell factors through control of mining techniques.

*Response:* As discussed elsewhere in this report, OSM agrees that accurate excess spoil calculations are an important factor in determining if AOC is going to be achieved. OSM and WVDEP have developed and are testing a concept which can be easily incorporated into the existing permit review process to determine if sites are going to be returned to AOC. This concept will ensure that as much spoil as is technically feasible will be placed back upon the mountain or bench and only spoil that is truly excess will be placed in the fill. Swell factors, blasting, mining

techniques, and other factors that affect excess spoil determinations will have to be given further consideration if the applicant is to demonstrate that a site can achieve AOC as clarified under this new concept.

i. Concerned that the Draft Report was Too Lenient and A Retreat from Earlier Drafts

*Comments:* One commenter expressed grave concerns about changes from the previously reported drafts of the report and that this suggested an unwillingness to take on "big business." Two other commenters echoed similar concerns.

*Response:* OSM has been unfairly criticized by the press and others who allege that the final draft oversight report was a weakened version of the earlier draft. This is simply not true. A comparison of the two reports will reveal that the basic assumptions and conclusions in the final report remained unchanged. As indicated, the earlier draft report contained partial tables, data, and information on postmining land uses and AOC in West Virginia. Some of the earlier statements that were made in the initial draft were based on incomplete information and were simply unfounded. The final draft report contains findings and analyses that support our conclusions. In its evaluation of AOC and postmining land uses in West Virginia, the final report has been viewed by many as being thorough, accurate, and impartial. OSM strives to do similar work in connection with every oversight report it produces.

j. Concerned that More Data Needed Before these Mines Should Be Allowed

*Comments:* Several commenters expressed support for further studies to determine the effects of mountaintop mining operations. Two commenters suggested that mining should be halted until such studies are complete. Two other commenters suggested a cumulative assessment of contiguous areas should be conducted.

*Response:* As discussed above, OSM and WVDEP plan to conduct an EIS with three other Federal agencies to assess the effects of large-scale surface mining operations on the environment. OSM and WVDEP will also be reviewing State procedures related to hydrologic measures considered in the permitting process. However, OSM does not have sufficient grounds to prohibit the processing of existing or future permit applications.

k. Comments Directed at Approximate Original Contour (AOC) Determinations

*Comments:* One commenter does not believe elevation is an appropriate factor in determining whether AOC has been achieved. Other commenters stated that configuration rather than elevation is the key factor in AOC determinations.

*Response:* As discussed in detail in the draft report and briefly summarized in this report, legislative history suggests that configuration or shape is a primary element of AOC. Although elevation is also a factor in considering whether AOC has been achieved, the legislative history

shows that it should not be the controlling factor. OSM finds that such factors as configuration, elevation, relief, and the amount of spoil allowed in fills should all be a consideration in determining AOC. As indicated in the action plan included in Appendix C, the WVDEP, with OSM's assistance, will be testing review methods to ensure compliance with AOC requirements.

*Comments:* Several commenters stated that valley fills should be considered in determining whether AOC has been achieved. One commenter expressed concerns over how fills are configured in achieving AOC. Another commenter disagreed and said that fills should not be considered in AOC determinations.

*Response:* Fill configuration is largely a factor of stability and the postmining land use. As noted in the draft report, valley fills hold excess spoil not needed to achieve AOC. Since the Federal definition of AOC provides that valley fills are outside the mined area to which AOC applies, OSM has concluded that valley fills themselves are not subject to the AOC requirement. However, OSM has also concluded that final reclamation of the backstack and valley fill areas should exhibit relief similar to that which existed prior to mining. This is being considered in the new procedures summarized in Appendix D. This issue is presently being litigated in the case, Bragg v. Robertson, Civil Action No. 2:98-0636.

*Comments:* Several commenters stated that more guidance is necessary or appropriate on what constitutes AOC. One commenter, while indicating that flexible guidance may be difficult to develop, stated that it would be appropriate to develop. Another commenter stated that interim guidance and regulations clearly defining AOC may be more appropriate. Still, another commenter disagreed, stating that no further clarification is needed.

*Response:* Although the State program contains a definition of AOC that has been determined by OSM to be no less stringent than the Federal definition, OSM agrees that additional guidance is necessary to further clarify that definition. That is why OSM and WVDEP have agreed to form a joint technical team to develop and test a concept that focuses on excess spoil calculations. Once implemented, it is believed that the proposed concept will ensure that sites without AOC variances will be restored to AOC after mining is completed.

*Comments:* Several commenters stated that a limit in elevation change of 50 feet should be set in determining AOC. One commenter suggested that the elimination of the "50-foot rule" was done improperly. Several other commenters stated that elevation is a key factor in AOC determinations, along with configuration.

*Response:* From 1981 through approximately 1992, the State had an informal "fifty-foot rule" that was outlined in a policy directive in March 1984. The policy required that operators backfill sites to within 50 feet of their original elevations, and the regraded area had to generally conform with the premining configuration. State officials discontinued all use of the "fifty-foot rule" in 1992 and now only enforce the AOC definition as set forth in State law. The "fifty-foot rule" was never a formal rule and was inconsistently applied by the State. The new concept for determining AOC,

as described further in Appendix D, considers such factors as configuration, relief, and elevation, and should provide better environmental protection than the fifty-foot rule, which primarily focused on elevation in determining AOC.

l. Comments Regarding the Implementation of Any Changes Due to the Report

*Comments:* One commenter stated that any new requirements should be applied prospectively, as mining operations already underway have been planned extensively. Several commenters also endorsed prospective application of any new requirements. Another commenter also stated that operators be given very specific guidance on new requirements.

*Response:* As discussed in this report, most new requirements will be applied prospectively. Operators will be provided information concerning any new requirements as a result of this study. In addition, they will be notified of any required changes to their permit applications. Most changes will be done in accordance with the permitting procedures set forth in the approved program.

*Comments:* One commenter stated that changes should be implemented immediately to correct illegal permits. Another commenter stated that changes in postmining land use designations should be made at the time of permit renewal.

*Response:* As noted in this report, operations with improper postmining land uses in their permits will have to be revised to conform with the State's approved program. However, no corrective action is being required for previously issued permits that may be deficient in documentation only. The schedule for revising permits with unapproved postmining land uses is discussed in Part II, Section D of the action plan included in Appendix C.

m. Comments Regarding Applying the Results of the West Virginia Study in Other States

*Comments:* One commenter stated that requirements should be developed on a state-by-state basis, and the West Virginia results should not be applied directly in other States.

*Response:* OSM does not intend to indiscriminately apply the results of the West Virginia study to other States. OSM is conducting studies in other States with similar mining practices to determine if similar problems exist. The results from those studies will be shared among the States. However, OSM will consider using what is being developed in West Virginia in the resolution of any similar issues found in those States.

n. Commenters Believe More Stringent Regulations Are Necessary

*Comments:* One commenter stated that additional environmental protection is necessary, but offered no specific suggestions. Another commenter stated that OSM should issue guidelines for

the reclamation practices associated with various postmining land uses. In addition, one commenter stated that additional regulation is necessary to prevent sedimentation in streams.

*Response:* As discussed throughout this report, OSM will be issuing additional guidance concerning requirements relating to AOC, postmining land uses, and stream buffer zones. It is believed that these guidelines will clarify and ensure better implementation of existing requirements. OSM is not aware of any need to promulgate additional regulations to prevent sedimentation in streams. The current requirements regarding sediment control, if implemented properly, already afford this protection. Part of the EIS process mentioned earlier will address whether current protection measures need to be strengthened.

o. Comments Regarding Contemporaneous Reclamation

*Comments:* One commenter stated that contemporaneous reclamation is not occurring at mountaintop mining operations. Another commenter stated that there should be a limit of 250 acres disturbed at one time.

*Response:* As discussed in this report, OSM recently approved a program amendment that establishes revised standards for contemporaneous reclamation of mountaintop-removal operations. The revised standards at CSR 38-2-14.15.b.6.A provide that disturbed and unreclaimed acreage, including the excess disposal site, cannot exceed 35 percent of the total permit acreage, or 300 acres, whichever is less. However, the Director may grant a variance not to exceed 500 acres on operations which consist of multiple spreads of equipment. In addition, subsections 14.15.f and 14.15.g provide for variances to those requirements due to technical or economic reasons. As provided in the Part II, Section E of the action plan included in Appendix C, OSM and WVDEP will conduct a special study of some mountaintop-removal mining operations to ensure that the State is applying its contemporaneous reclamation requirements consistently and is granting variances in accordance with its approved program.

p. Comments Regarding Water Flow

*Comments:* One commenter expressed concern that the preference for "rock flumes" creates unnatural watercourses and water discharge problems. In addition, the commenter stated that current water management techniques in reclamation are not conducive to reclamation practices involving trees.

*Response:* Rock flumes are sometimes necessary to control surface runoff, prevent erosion, and minimize disturbance to the hydrologic balance. Discharge structures for sediment control ponds, impoundments, and diversions are designed using standard engineering design procedures and are based to a large extent upon site conditions. OSM is not aware of any instances where the existing requirements for discharge structures are causing problems when the requirements are implemented as called for in the permit. The detailed comments concerning reclamation practices involving trees were very informative. OSM has shared those comments with the WVDEP and

intends to give them additional consideration when developing further guidelines regarding postmining land uses.

*Comment:* Another commenter concluded that current reclamation practices result in high sediment loading to streams, which cannot be addressed purely through oversight.

*Response:* OSM does not believe that current reclamation practices result in high sediment loading to streams. Existing sedimentation control requirements and the revegetation standards, if properly implemented, should afford adequate environmental protection during and after mining. As discussed earlier, this issue will be considered in the completion of the EIS. It is through oversight that OSM monitors State performance to ensure that sites comply with the approved State program. The successful implementation of an approved program requires the cooperation of all parties.

q. Other Related Comments

*Comments:* One commenter stated that the U.S. Environmental Protection Agency (EPA) and the United States Army Corps of Engineers should conduct oversight of the State with regard to implementation of the Clean Water Act. The commenter also stated that OSM should expand the report to include an overview of blasting complaints associated with mountaintop mining. The commenter expressed concerns with stability of valley fills as a consequence of nearby underground mining operations and the relationship of the subsidence regulations to valley fills and streams. There was also a concern with regard to bond adequacy for mountaintop mining operations raised by the commenter.

*Response:* EPA currently monitors the State's administration of its approved program under the Clean Water Act. Comments relating to that program should be directed to EPA.

The other issues relating to blasting, fill stability in relation to underground mining and subsidence, and bonding of mountaintop mining operations were not addressed in the draft report. OSM is aware of those issues and may incorporate them into future studies that are being planned. As mentioned in this report, bonding of mountaintop-removal operations will be a special consideration in the proposed study on contemporaneous reclamation.

*Comments:* One commenter stated that regulations requiring or encouraging self-auditing by operators should be developed. In addition, the commenter suggested that the findings of the report call into question OSM's process for approval of State programs.

*Response:* Both State and Federal surface mining laws provide for mandatory enforcement. Therefore, regulations providing for self auditing cannot be promulgated under the approved program. However, voluntary compliance with the approved program is encouraged. OSM recently approved changes to the State's program which allow State inspectors to conduct

compliance audits or reviews of mine sites at the operator's request to ensure compliance with State regulations. Operators are encouraged to participate in this program.

As discussed in the draft oversight report, some differences were identified in State and Federal law which may have accounted for some of the problems that OSM identified in the report. OSM does not believe that these problems warrant a change in OSM's State program approval process. The current program approval process is dynamic and allows for continual change and improvement in State programs. It is through this process that OSM will continue to monitor and, if necessary, notify the State whenever a revision to its approved program is required.