

APPENDIX C.

**WVDEP/OSM ACTION PLAN FOR RESOLVING
MOUNTAINTOP MINING ISSUES**

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I. PURPOSE

The Office of Surface Mining Reclamation and Enforcement (OSM) and the West Virginia Division of Environmental Protection (WVDEP) recognize that there are outstanding issues and questions related to mountaintop mining practices which need to be addressed as priority items between the two agencies. The following action elements include all issues identified in "OSM's Evaluation of Approximate Original Contour and Postmining Land Use in West Virginia" and some other related issues that have been brought to our attention through litigation, public participation or normal oversight. As a result of this agreement, both parties are committing to activities which should ensure the timely and effective resolution of all known issues relating to mountaintop mining practices in West Virginia.

II. OSM'S EVALUATION OF APPROXIMATE ORIGINAL CONTOUR AND POSTMINING LAND USE IN WEST VIRGINIA

A. Approximate Original Contour

Issue: OSM's oversight evaluation indicated an industry trend toward proposing to return mine sites to approximate original contour (AOC) rather than obtaining AOC variances. 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.

Proposed Action: OSM and WVDEP will form 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. Meetings will be scheduled with the public, industry, environmental representatives and other interested parties to explain the concept. Once fully reviewed and tested, 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 guidance will help the WVDEP achieve more consistent AOC determinations.

OSM will work closely with the WVDEP in implementing the concept and will use what it learns when it determines whether need exists for further action on a national or regional level with

respect to AOC. OSM will continue its review of AOC in States with mining practices similar to those in West Virginia and will consider using the approach that is being developed in the West Virginia pilot project to help resolve any problems it may discover in those States. Kentucky and Virginia, in addition to West Virginia, have already expressed their willingness to participate in AOC discussions with OSM. OSM agrees to participate with any team of States formed to consider AOC or to evaluate the new procedures.

Action Date: WVDEP and OSM have already formed a team to test a new approach for addressing the issue of excess spoil. WVDEP and OSM have jointly developed a description of how the new concept will be applied during the course of AOC determinations. OSM will assist the WVDEP in presenting this concept to the public prior to its implementation. Once fully reviewed and tested, the concept will be adapted and used by the WVDEP during its permit review process. The WVDEP will begin applying the concept to all new permit applications, including the mining applications that are pending WVDEP approval and that, because of the size of the proposed fills, appear likely to require an individual Clean Water Act 404 Permit. Three months after the WVDEP begins applying the new procedures, OSM and WVDEP will evaluate the implementation of the concept in writing to determine if further action on AOC is needed on a national or regional basis.

B. Mine Classification and Inventory

Issue: A major source of confusion over what qualifies as "mountaintop-removal" mining operations, which require a variance from AOC, arises from 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.

Proposed Action: Although State or Federal laws do not require the tracking of mountaintop mining operations and associated waivers, the WVDEP has revised its permitting database to clearly identify which sites should be classified as "mountaintop-removal" operations. Through its inspection workforce, the WVDEP has reviewed all its current permits to assure that the proper classification of mining type and applicable AOC waiver 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.

Action Date: This task has been completed. OSM will continue working with the WVDEP through the normal oversight process to improve the State's data collection efforts.

C. Mountaintop Removal AOC Variances - Approved Program Language Differences

Issue: OSM identified three significant areas in which the language of the approved State program differs from that of the Surface Mining Control and Reclamation Act of 1977 (SMCRA)

and its implementing regulations. The language differences pertain to the following areas regarding mountaintop-removal mining operations with AOC variances: (1) demonstration of the expected 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. WVDEP and OSM plan to address each of these issues separately as follows:

Proposed Action: Expected need and market data - The State believes that its existing program gives it sufficient authority to satisfy this requirement without rulemaking. The WVDEP will consider OSM's oversight report and the recommendations from the "Governor's Task Force on Mountaintop Mining and Related Practices" to develop guidance for its permit reviewers to ensure consideration of expected need and market data requirements. The WVDEP may use the criteria that the State's Economic Development Authority uses to evaluate areas for economic development. The WVDEP agrees not to approve any more mountaintop-removal permits with AOC variances without having the required information regarding expected need and market data.

Proposed Action Date: Develop and distribute procedures for evaluating mountaintop-removal permits with AOC variances to ensure compliance with the expected need and market data requirements by May 28, 1999.

Proposed Action: Commercial Woodlands - OSM will issue a guidance document to clarify which postmining land uses are permissible for AOC variance sites. OSM will clarify the circumstances under which certain commercial tree growing and harvesting practices may justify an AOC variance. The WVDEP will submit other criteria which may demonstrate that "commercial forestry" constitutes a permissible postmining land use on mountaintop-removal and steep-slope mining operations with AOC variances. The State also plans to submit additional clarification as to how it interprets its regulations at CSR 38-2-2.134 regarding mechanical harvesting. OSM and WVDEP anticipate that this information will eventually be used as the basis for a State program amendment. Permits with mountaintop-removal AOC variances that have "woodlands" as a current postmining land use must comply with the existing program requirements until the new standards are developed and approved by OSM.

Proposed Action Date: By June 14, 1999, the WVDEP will submit for OSM's consideration additional information further explaining its existing program requirements regarding "woodlands" and setting forth any additional criteria relating to "commercial forestry" as an approvable postmining land use. After considering this information, OSM will determine whether the WVDEP must submit a formal program amendment to implement the suggestions. OSM intends to publish its position on all postmining land uses related to AOC variances by July 12, 1999.

Proposed Action: Public Use/Public Facility - The OSM guidance document on postmining land use will further clarify the use of these terms as set forth in Subsections 515 (c) and (e) of

SMCRA. OSM will also provide some clarification of the term "public use" in its decisions on a pending State program amendment concerning "fish and wildlife habitat and recreation lands." The WVDEP will not allow the postmining land use of "fish and wildlife habitat and recreation lands" unless OSM first approves the State program amendment that seeks to establish this use.

Proposed Action Date: OSM will publish its decision on the pending program amendment on fish and wildlife habitat and recreation lands" by April 28, 1999. OSM intends to publish additional guidance on postmining land uses related to AOC variances by July 12, 1999.

D. Postmining Land Uses

Issue: OSM's oversight evaluation found that the WVDEP has issued mountaintop-removal permits with postmining land uses—"forestry" and "fish and wildlife habitat"—not authorized in the approved State program.

Proposed Action: The WVDEP will immediately discontinue approving permits with unauthorized postmining land uses of "forestry" and "fish and wildlife habitat." In addition, the WVDEP will not release bonds at sites where the postmining land use is unauthorized. The WVDEP will 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 use clearly allowable under the State program will be achieved prior to bond release. Permit renewals or any significant revisions with unauthorized postmining land uses that come due or are submitted during the interim period that these clarifications are being developed will be conditioned to provide that the postmining land use may have to be revised as contemplated by this agreement.

Action Date: As discussed above, both OSM and WVDEP have committed to further efforts to clarify requirements for postmining land uses related to "commercial forestry" and "public use" and OSM is reviewing a State program amendment for "fish and wildlife habitat and recreation lands."

Permit revisions will be ordered within nine months of these clarifying actions as follows:

Within three months of these clarifying actions, the WVDEP will identify all applicable permits with postmining land uses not exactly specified by the approved program. Within six months after identification of permits with questionable postmining land uses, the WVDEP will complete a more detailed review of each permit to determine if the questionable land use and AOC variance applied to all or just a portion of the permit. The WVDEP will then require operators, through an official order, to revise all or portions of the permit to reflect an approvable postmining land use. The permitting requirements of the approved State program will determine the completion date of these efforts, but in no event, will bonds be released where the postmining land use is not allowed by the State program.

E. Inadequate Permit Documentation

Issue: 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. OSM has requested WVDEP to initiate an immediate review of its permit application and permitting process to ensure that the program requirements are being fully implemented.

Proposed Action: No corrective action will be required for previously issued permits. The State will review and, if necessary, revise its permit application form and expand the section of the permit review document (blue book) that addresses AOC variances. This section of the blue book will be expanded to include specific language from the regulations regarding variances or, where the information can be found, to refer to the applicable sections of the permit application.

Action Date: The State will review its application form and revise the facts and findings section of its blue book by May 21, 1999.

F. Steep-Slope Mining Operations with AOC Variances

Issue: 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.

Proposed Action: The WVDEP will review all permits with steep-slope AOC variances to determine if a mountaintop-removal AOC variance would have been more appropriate. In those cases where a mountaintop-removal 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 would be required. If, however, 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. Permit renewals or any significant revisions with unauthorized postmining land uses that come due or are submitted during the interim period while these policy clarifications are being developed will be conditioned to provide that the postmining land use may have to be revised as contemplated by this agreement.

Action Date: As discussed above, both OSM and WVDEP have committed to further efforts to clarify requirements for postmining land uses related to "commercial forestry" and "public use" and OSM is reviewing a State program amendment for "fish and wildlife habitat and recreation lands."

Permit revisions will be ordered within nine months of these clarifying actions as follows:

Within three months of the program clarifications, the WVDEP will identify all permits

with steep-slope AOC variances. Within six months of identification, the WVDEP will complete its review of the permits to determine if the variance type was appropriate and, if not, whether the change in variance type would also affect the type of postmining land use allowed. The WVDEP will then order operators with inappropriate steep-slope AOC variances and related postmining land use concerns to revise the permits. The completion date for these efforts will be determined by the permitting process set forth in the approved State program, but in no event, will bonds be released where the postmining land use would be inappropriate for the actual type of AOC variance which should be required.

G. Program Language Differences on Postmining Land Uses for Steep-Slope Mining Operations

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

Proposed Action: The WVDEP, as required by OSM, has filed a proposed rule with the West Virginia Legislative Rulemaking Review Committee to address this issue [30 CFR 948.16 (mmm)]. The State has agreed not to issue any more steep-slope AOC variances that would violate the proposed amendment presented to the Legislature. The WVDEP will propose to expand the postmining land use requirements for steep-slope mining operations to include "commercial forestry."

Action Date: The proposed program amendment is anticipated to be submitted by May 14, 1999.

III. OTHER AREAS OF CONCERN REGARDING MOUNTAINTOP MINING

Both parties acknowledge that there are other issues relating to mountaintop mining not addressed in OSM's draft report that have been brought to their attention through litigation, public participation or normal oversight and which require further consideration. These issues relate not only to the administration of the approved State program, but also to the interpretation of various SMCRA provisions and State program requirements. This part of the agreement is intended to promote better understanding of these additional issues and of the proposed actions that will be taken by both agencies in order to ensure that the State program and its implementation are consistent with the Federal requirements.

A. Stream Buffer Zone Findings and Variances

Issue: There are concerns that the WVDEP has been approving permit applications without first making the findings required to permit land within the buffer zones of intermittent and perennial

streams to be disturbed. In addition, it is alleged that the 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 the stream.

Proposed Action: OSM agrees to provide its interpretation of how the Federal buffer zone requirements apply to streams which are to be filled with excess spoil during a mining operation. In addition, the WVDEP will reevaluate its permit review process to ensure that permit applications requesting variances contain the appropriate demonstrations regarding stream protection.

Action Date: July 2, 1999.

B. Riparian Vegetation

Issue: There are concerns that valley fills violate the State program provisions requiring protection of riparian vegetation.

Proposed Action: OSM agrees to provide its interpretation of how this requirement applies to riparian vegetation in areas covered with excess spoil during a mining operation.

Action Date: July 2, 1999

C. Damage to Natural Watercourses

Issue: There are concerns that allowing valley fills in streams violates the requirement prohibiting the approval of mountaintop-removal operations that will damage natural watercourses.

Proposed Action: OSM agrees to provide its interpretation of how the statutory requirement applies to streams which are to be filled with excess spoil during a mountaintop-removal mining operation with an AOC variance.

Action Date: July 2, 1999

D. Hydrologic Reclamation Plan

Issue: There are concerns 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: 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 will develop an oversight work plan during the current evaluation year which specifically reviews WVDEP decisions relating to probable hydrologic consequences, cumulative hydrologic impact assessments and hydrologic reclamation plans for large mountaintop mines.

Action Date: A separate agreement will establish the schedule for the EIS. OSM and WVDEP will complete the review of the State's hydrologic permitting practices by September 30, 1999.

E. Contemporaneous Reclamation

Issue: There are concerns that the WVDEP has been approving permit applications that do not meet the contemporaneous reclamation requirements of CSR 38-2-14.15 and that it has been 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 program amendment which establishes revised standards for contemporaneous reclamation of mountaintop-removal mining operations. OSM will ensure that its field representatives have a complete understanding of the State program requirements and that they will apply those standards during all future oversight inspections. In addition, OSM and WVDEP will conduct a special study of selected mountaintop-removal mining operations to ensure that the State is applying its contemporaneous reclamation requirements consistently and is granting variances in accordance with the requirements of CSR 38-2-14.15.f and 14.15.g. This evaluation will enable both agencies 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. To ensure reclamation in the event of forfeiture, OSM will give special consideration to the amount of permitted area that is being disturbed at any given time and the amount of performance bond that is required to be posted.

Action Date: In cooperation with the WVDEP, OSM will develop a work plan to evaluate contemporaneous reclamation in the State within 30 days of the execution of this agreement. OSM and WVDEP will complete the evaluation by September 30, 1999.

IV. OSM Oversight and Technical Assistance

OSM and WVDEP agree that OSM oversight of compliance with the actions in this agreement will be conducted through spot sampling of activities in the permitting process. OSM intends that this verification will be done primarily as technical assistance before permits are issued or revisions required.

V. Modification to this Agreement

Both parties recognize that such outside factors as litigation or further negotiation with other State or Federal agencies may impact on the actions or dates in this agreement. Therefore, either party may initiate modifications to this agreement with the written concurrence of the other party at any time.

Concurrence by:

/s/ Michael P. Miano

Michael P. Miano, Director
West Virginia Division of Environmental Protection

April 27, 1999

Date

/s/ Roger W. Calhoun

Roger W. Calhoun, Director
Charleston Field Office
Office of Surface Mining

April 27, 1999

Date