



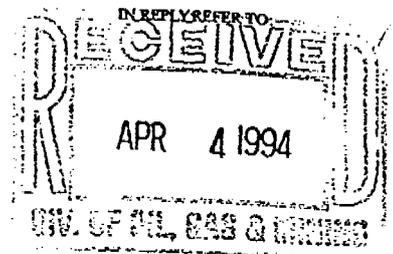
United States Department of the Interior

OFFICE OF SURFACE MINING
Reclamation and Enforcement
Suite 1200
505 Marquette Avenue N.W.
Albuquerque, New Mexico 87102

March 31, 1994

My CC
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cc
to
102

TAKE PRIDE IN AMERICA



Mr. James W. Carter, Director
Division of Oil, Gas and Mining
3 Triad Center, Suite 350
355 West North Temple
Salt Lake City, Utah 84180-1203

Dear Mr. Carter:

The Office of Surface Mining Reclamation and Enforcement (OSM) has completed a review of Utah's November 12, 1993, formally-proposed amendment (Administrative Record No. UT-875; State Program Amendment Tracking System (SPATS) No. UT-025-FOR). The amendment consists of changes to provisions of the Utah backfilling and grading rules pertaining to spoil and waste, refuse piles, previously mined areas, continuously mined areas, and areas subject to approximate original contour (AOC) requirements, and AOC. OSM finds those provisions of the proposed amendment identified in the enclosure to this letter to be less effective than the Federal counterpart regulations and less stringent than the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

The Director of OSM is prepared to delay final rulemaking on the proposed amendment to allow Utah an opportunity to submit draft proposed rule changes, policy statements, clarifying opinions or other evidence that the proposed rules are no less effective than the Federal regulations and no less stringent than SMCRA. Utah must submit such additional information no later than 30 days from the date of this letter. Upon submission by Utah of new material to address the deficiencies, OSM would, as appropriate, reopen the comment period on the new information for 15 days. After the close of the reopened comment period, OSM would then publish a final rule announcing the Director's decision on the amendment. The Director's approval of the rules in proposed form is contingent upon Utah's adoption of the rules in the form in which they were reviewed by OSM and the public. Should Utah indicate that it does not wish to or is unable to submit further modifications to address the identified deficiencies, the Director would not approve those provisions which contain identified deficiencies.

Mr. James W. Carter

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Please advise me, at your earliest convenience, whether Utah wishes to submit materials to address OSM's concerns within the next 30 days. If Utah does not intend to submit additional material, OSM will proceed directly with the publication in the Federal Register of the Director's decision.

We are available to meet with you to discuss our review findings or any matters of concern regarding the proposed rules. Please call me or Vernon Maldonado, Program Analyst, at (505) 766-1486 if you have any questions.

Sincerely,



Robert H. Hagen
Albuquerque Field Office

Enclosure

cc: PSD, WSC
BSP, HQ
Field Solicitor, Denver



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

Hearings Division
6432 Federal Building
Salt Lake City, Utah 84138
(Phone: 801-524-5344)

June 6, 1994

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Max

CO-OP MINING COMPANY,	:	Docket No. DV 94-4-R
	:	
Applicant	:	Application for Review and Temporary Relief
	:	
v.	:	
	:	Notice of Violation
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT (OSMRE),	:	No. 93-020-190-03
	:	
	:	Trail Canyon Mine
	:	
Respondent	:	

DECISION

Appearances: Carl Kingston, Esq., Salt Lake City, Utah, for applicant;

John S. Retrum, Esq., U.S. Department of the Interior, Denver, Colorado, for respondent;

F. Mark Hansen, Esq., Salt Lake City, Utah, for intervenor.

Before: Administrative Law Judge Child

Co-Op Mining (Co-Op) filed an Application for Review and an Application for Temporary Relief regarding Notice of Violation (NOV) No. 93-020-190-03 issued to Co-Op by the Office of Surface Mining Reclamation and Enforcement (OSM) in October 1993. The NOV charges Co-Op, the permittee of the Trail Canyon mine, Emery County, Utah, with "[f]ailure to restore the approximate original contour on all areas disturbed by mining by using all available material" in alleged violation of R645-301-553.300 and R645-301-553.110 of the Utah Division of Administrative Rules (Utah program). As abatement action, the NOV requires Co Op to "[u]se all available materials to eliminate highwalls and cuts to the extent possible."

The Application for Review and Application for Temporary Relief were assigned a single case number. The matter came on regularly for hearing on December 20, 21, and 22, 1993, at Salt Lake City, Utah.¹ At the hearing, Co-Op's Application for Temporary Relief was granted. Thus, only the Application for Review remains at issue. The parties have filed proposed decisions, including proposed findings of fact and proposed conclusions of law, and responses in support of their respective positions. The matter is now ripe for decision. To the extent proposed findings of fact or conclusions are consistent with those entered herein, they are accepted; to the extent they are not so consistent or are irrelevant, they are rejected.

The issues to be here determined are:

- I. Is the specificity of the Federal NOV at issue, and if so, should the Federal NOV be declared invalid for lack of specificity?
- II. Did Co-Op violate the Utah program as charged in the Federal NOV?
 - A. Did Co-Op violate R645-301-553.300?
 - B. Did Co-Op violate R645-301-553.110?

Statement of the Facts

The State of Utah, pursuant to sections 503(a) and 523(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 2353(a) and 1273(c), has assumed primary responsibility for the regulation and control of surface coal mining and reclamation operations on State and Federal lands within its borders. See 30 CFR Part 944. The State's regulatory program for these operations (the Utah program) is administered by the Utah Division of Oil, Gas and Mining (DOG M). (Tr-II. 24, 204-206)

The Trail Canyon mine is an underground mine located on the eastern slope of Trail Canyon, Emery County, Utah. The natural terrain at Trail Canyon, both in mined and unmined areas, is largely steep and rocky, with numerous intermittent natural cliffs and ledges. (Tr-I. 41, 45; Tr-II. 223, 253-254, 286; Exs. R-9, R-16, A-37, A-40)

Mining began at Trail Canyon in 1920. From 1938 to 1981, Co-Op conducted mining operations at the mine. No coal has been extracted from the mine since 1981. (Tr-I. 41-43, 45-47, 61; Exs. R-5, R-6, R-9)

People have resided at the bottom of the canyon since 1920. The number of residences grew from 4 in 1947, to 8 in 1961, to 20 in 1993 with over 100 residents. (Tr-I. 7-9, 61; Tr-II. 183-184, 295; Tr-III. 15, 42-43, 48-50; Ex. R-6)

¹ The transcript of the hearing is comprised of three volumes designated herein as "Tr-I.", "Tr-II.", and "Tr-III."

People have resided at the bottom of the canyon since 1920. The number of residences grew from 4 in 1947, to 8 in 1961, to 20 in 1993 with over 100 residents. (Tr-I. 7-9, 61; Tr-II. 183-184, 295; Tr-III. 15, 42-43, 48-50; Ex. R-6)

In 1947, the mine had three portals accessible by wooden stairs attached to a coal chute. In 1951 and 1962, Co-Op constructed a nearly mile long access road from the public road at the base of the canyon, past the three portals, to a point approximately 300 feet beyond the portals. For the most part the road followed a series of natural ledges, with some levelling and cutting required. Four cuts, totalling approximately 800 feet in length and from 0 to 5 feet in width, were made into the slope of the mountain. The road is only 9 feet wide at its narrowest point. (Tr-II. 295, 298, 300-312; Tr-III. 7, 11-16, 46)

In 1970, at the insistence of the Federal Mine Safety and Health Administration (MSHA), Co Op constructed a safety berm on the outer edge of the access road. Except for a narrow portion of the road, the berm paralleled the entire length of the road. The berm, up to the portal area, was constructed from sloughage taken from the inside of the road; while the berm, from the portal area to the end of the road, was created primarily by digging the road deeper and cutting 3 feet into the mountain on the inside edge, thus leaving a band of material in place on the outer edge to serve as a berm. In most places, the berm was no more than 30 inches high. (Tr-III. 18-21, 45-48, 122-123; Ex. R-9)

In 1971 or 1972, Co-Op extended the access road further beyond the portals to a site to be used for an electrical substation to supply power to the mine. This site became known as the "transformer pad." Co-Op cut into the mountain as much as 6 feet in extending the road to the transformer pad. Co-Op also dug downward, leaving material in place on the outer edge to serve as a berm for the road extension. While the transformer pad was quite level prior to disturbance, Co-Op further leveled it by digging down 2 feet at the inner portion of the pad and moving the 2 feet of material to the outer edge of the pad. (Tr-I. 50, Tr-III. 15-18, 21)

In 1972 or 1973, the residents of Trail Canyon altered somewhat the configuration of an area later known as the "lower pad." This area, prior to the alterations, was exceptionally level and was used by the residents for recreation, including softball and basketball. To enhance access to the area, the residents installed culverts to channel a stream cutting a gully. The residents then covered the culverts with soil taken from the base of a natural cliff face at the eastern end of the lower pad. About 2 years later, Co-Op began using the lower pad as a coal stockpile and loadout area. (Tr-III. 21-24)

After construction of the access road berm, a large rock broke loose from a ledge several hundred feet up the mountainside. The rock rolled down the mountain and hit the access road, where it broke into several pieces. Most of the rock remained on the access road, but one large piece continued down to the residential area, where it hit and rolled through one of the homes, killing a girl inside the home. (Tr-III. 36-37, 61-63; Ex. R-31, A-33)

On other occasions, the access road and berm have stopped falling rocks as large as 20 tons. The berm also prevents water from running over and eroding the access road downslope. (Tr II. 259; Tr-III. 31, 229)

In 1986 Co-Op first submitted to DOGM Co-Op's reclamation plan for the Trail Canyon mine. In 1988, the residents of Trail Canyon petitioned DOGM to permit retention of the access road berm as a safety barrier against falling rocks. As part of the permitting process, DOGM required a reclamation bond from Co-Op. The bond has not been released. On May 30, 1989, DOGM approved Co-Op's reclamation plan and issued to Co-Op, under the Utah program, a permit to conduct reclamation operations at the mine. (Tr-I. 42-43, 58, 137, 140-141, 184 185; Tr-II. 242-245; Tr-III. 230; Ex. A-34)

The permit provides that the most of the access road and the "18 in. to 30 in." access road berm will be left in place as a bermed terrace, with only the lower portion of the road, including the berm, to be returned to the approximate original contour (AOC) by approximating the slope above and below the road. The permit further requires reclamation of the road by backfilling coal outcrops, scarifying the road, and reseeding. (Ex. R-7)

The permit also provides that "highwalls" will be stable and will be reduced to the extent practicable to develop a static safety factor of at least 1.3. However, the permit contemplates reducing only those "highwalls" that can be lessened by reaching with a backhoe to pull back down-cast material. Also, the permit provides that "highwalls" greater than 20 feet in height will be left in place. A May 1991 permit revision provides for the retention of "highwalls" in four areas, including the bermed terrace (reclaimed access road) and the lower pad. A map dated November 1, 1992, and prepared for Co-Op by Charles Reynolds, a mining engineer for Mangum Engineering Consultants, shows the areas where "highwalls" were retained. The term "highwalls" refers not to "highwalls," as that term is defined under the Utah program,² but to any slopes cut by man, as determined by Mr. Reynolds. (Tr-I. 75-81; Tr-II. 11, 53, 182, 184-188; Exs. R-7; R-9; R-31)

The only highwalls, as defined by the Utah program, that ever existed in the permit area were the portals. To obtain fill material for the portals during reclamation, Co-Op dug out the upper portion of the access road approximately 4 to 5 feet. In the process, the berm at this upper portion of the access road became taller, approaching 6 feet in height in some areas, due to the lowering of the inner or upslope portion of the road. (Tr-III. 122-124)

² Under R645-100-200, "[h]ighwall' means the face of exposed overburden and/or coal in an open cut of a surface coal mining and reclamation activities or for entry to underground coal mining activities." "Overburden' means material of any nature, consolidated or unconsolidated, that overlies a coal deposit, excluding topsoil." *Id.*

Co-Op also took 2 to 3 feet of material from the transformer pad to reclaim the portals, lowering its original contour by 2 to 3 feet. After bulldozers struck rock at the transformer pad, Co-Op realized it could not meet the requirement of reclaiming the pad with 2 feet of topsoil. Thus, some soil was brought back to the transformer pad. (Tr-III. 30, 76, 97-98, 104-105, 120-122)

Co-Op's reclamation work, which was performed in 1988 and 1989, also included hauling away from the lower pad portions of the topsoil containing high concentrations of coal. Co-Op then pushed the remaining topsoil of the lower pad area into a big pile, removed underlying fill material, and used that material to reclaim the lower pad's vertical slope at the eastern end. Co-Op pushed the material up the vertical slope as steep as Co-Op's equipment would go. It also used some of the lower pad material to reclaim other parts of the mine. Co-Op then pushed back the topsoil. As a result, the lower pad is 4 to 5 feet lower than the original contour and the public road traversing the lower pad. (Tr-III. 25-29, 76, 131-133, 145, 149, 152-153)

The access road was also reclaimed. Co-Op first smoothed the road by blading the road, pushing rocks and debris against the upslope of the road. Then the road was scarified and ripped to a depth of 30 inches. The lowest portion of the road was completely obliterated. Finally, the road, pad areas, and portal area were seeded and planted with trees. (Tr-III. 126-129, 134-136)

By June of 1993, vegetation had been growing and was growing well upon the access road area, including the berm and downslope, lower pad, and transformer pad for approximately 4 years. This vegetation would have to be scraped off to access the material which OSM contends is reasonably available to reclaim the vertical cuts. Also, no fill material exists for revegetating the downslope of the reclaimed access road if the vegetation is removed. (Tr-I. 144-145; Tr-II. 62, 117-118, 256-260; Tr-III. 136-137, 160-161, 164)

On June 23, 1993, DOGM conducted an inspection at the mine to determine whether Co-Op was eligible for Phase I reclamation bond release. The inspection was attended by, among others, OSM Inspectors Thomas W. Wright and Edzel Pugh. (Tr-I. 87, 189-190)

Neither Inspector Wright nor Inspector Pugh had any knowledge of the premining contour of the land, whether from personal visits, photographs, or maps. They determined, based upon the appearance of the slopes, that man-made vertical cuts existed along the access road and at the lower pad and transformer pad. Those cuts included cuts referred to as "highwalls" in Co-Op's approved reclamation plan and permit.

They also observed two areas along the access road where the vertical face had collapsed. Mr. Wright opined that at least one of the slides originated from a cut slope.

One or both of the OSM inspectors observed dark bands of material, presumed to be coal, visible in vertical faces near the northern most portal, in another area along the access road,

and in the cliff face at the eastern end of the lower pad. Inspector Wright opined that the dark band near the portal was a "highwall," as defined under the Utah program, because material purporting to be coal was visible there. However, OSM failed to conduct any tests to determine whether these dark bands do, in fact, contain coal; the inspectors relied upon their experience in adjudging the material to be coal.

Lastly, along the access road, including the berm and the downslope, at the lower pad, and at the transformer pad, including the downslope, they observed material which they believed was available for AOC work. They did not know whether the material from the lower pad was spoil, and conceded that the rest of this material was not spoil. With regard to the berm material, Inspector Pugh believed that it could be safely pulled back to the upslope by a backhoe or excavator without dislodging rocks down the mountain. However, he is not an experienced equipment operator and did not know the track width of the necessary equipment or the width of the access road at its narrowest point. Mr. Wright testified similarly regarding the downslope material, stating that it was available without knowing the size of the equipment necessary to retrieve it or the width of the narrowest point in the road. On the lower pad, Mr. Wright observed the depth of the material in two places where DOGM had dug small holes. Based on these observations, but no actual measurements, they each determined that Co-Op failed to use all reasonably available material for AOC work on vertical cuts in violation of the Utah program. (Tr-I. 88-91, 97-99, 102-103, 109, 111-113, 115, 126-127, 133-134, 150-152, 154-161, 167-168, 170-171, 175, 178-181, 202, 209-210, 213, 218, 223-227, 229-234, 238-239, 243-246, 250-255, 276; Tr-II. 12, 28-30, 40, 106-108, 178-179, 188-189, 300-312; Tr-III. 6-15; Exs. R-9, R-10, R-11, R-16)

Subsequently, OSM issued a 10-day notice (TDN) to DOGM, citing Co-Op for, among other things, an alleged "[f]ailure to restore the approximate original contour on all areas disturbed by mining [-] [a]ll areas where highwalls and vertical cuts remain." (Ex. R-17) DOGM responded by stating its belief "that this issue[] was addressed and resolved through a previous TDN Highwall and AOC requirements were discussed at a November 7, 1991 meeting with Mr. Hord Tipton on site and the Division believed the site configuration fulfilled the spirit of the regulations." (Ex. R-20) The previous TDN was issued for "failure to make a written demonstration addressing the required criteria to eliminate highwalls to the maximum extent technically practical." (Ex. R-20; Tr-II. 35-40) In response to the previous TDN, DOGM ordered Co-Op to demonstrate that "the volume of reasonably available spoil is insufficient to completely backfill the highwalls at the Trail Canyon Mine." (Ex. R-20) Co-Op eventually complied with this order and both DOGM and OSM approved of retention of the "highwalls," given the lack of sufficient fill material. (Ex. R-20; Tr-II. 35-40)

Without any oral discussions with DOGM or Co-Op regarding the TDN, OSM found DOGM's response to be arbitrary, capricious, and an abuse of discretion. OSM Inspector Wright then reinspected the mine on October 19, 1993. (Tr-II. 22-27, 266-267, 271; Exs. R-21, R-23, R-24)

Based upon Wright's observations, OSM issued the Federal NOV, alleging that Co-Op violated R645-301-553.300 and R645-301-553.110 of the Utah program by "[f]ail[ing] to restore the approximate original contour on all areas disturbed by mining by using all available material." (Ex. R-25) The areas of concern were identified as "[a]ll areas where highwalls and vertical cut remain" and OSM ordered Co-Op to "[u]se all available material to eliminate highwalls and cuts to the extent possible." (Ex. R-25)

On December 8, 1993, Michael J. Superfesky, an OSM civil engineer, with over 15 years of experience in reclamation work, inspected the mine to determine the amount of reasonably available material for AOC work. Without taking any measurements, he determined that approximately 2,000 cubic yards, 3,700 cubic yards, and 900 cubic yards of available material existed at the lower pad, the berm of the access road, and the transformer pad, respectively. He concluded that Co-Op had not restored the land to AOC to the extent possible, although he had no knowledge of the original contour of the land. (Tr-II. 83, 91-95, 102-104, 116-117, 121, 144, 150-151, 156, 172-174)

Mr. Superfesky based his conclusion, in part, upon his opinion that moving the access road berm material up against the vertical cuts on the upslope would improve the safety and stability of the area. He stated that one of the purposes of the AOC requirement is to restabilize disturbed areas and prevent the collapse of artificially created cut-slopes. He also stated that the berm's location along the outer edge of the road reduced the safety or stability of the downslope because the berm placed a surcharge load on the natural underlying material. He opined that the berm material should be placed against the vertical cuts to eliminate these instability factors and improve the stability of the upslope. The berm material would provide some support for the vertical cut faces and protect them against weathering. He worried that if the material exposed by the cuts was softer than the overlying material, the forces of nature would wear away the softer material, resulting in the overlying material falling down to fill the void. However, he did not know whether such softer material exists. (Tr-II. 99-101, 111-113, 142-143)

He believed the remains of the road could be made passable and the purportedly available material retrieved using a backhoe with a 1/2- or 3/4-quarter yard bucket and a track of 8 to 10 feet wide. He did not know the exact width of the road, however, and acknowledged the danger of operating heavy equipment near the outer edge of the road. (Tr-II. 163-166, 169-170)

Nor did Mr. Superfesky know that the access road berm served as a drainage control structure. No doubt his lack of awareness of many facts was attributable to the fact that he visited the mine only once. At no time, either during the visit or otherwise, did he familiarize himself with the Utah program. (Tr-II. 120, 171, 173)

Through numerous witnesses with greater familiarity with the mine area, including the only witness, Bill Stoddard, with knowledge of the original contour of the mine area, Co-Op refuted much of the evidence presented by OSM. Co-Op showed that the dark bands of material in

the mine area were either or both naturally exposed features prevalent in the area or carbonaceous shale (rather than coal exposed by Co-Op). (Tr-II. 194, 226-228, 254-255, 260; Tr-III. 158-160, 168-170, 189, 199-202)

Co-Op proved that the cliff face at the eastern end of the lower pad is a natural feature slightly enlarged by the Trail Canyon residents, and not by Co-Op. Also, the lower pad elevation is already several feet below original contour because of the removal of material to reclaim other areas. If additional material were taken from the culvert area of the lower pad for reclamation of vertical cuts, as suggested by Mr. Superfesky, the stability of the public road traversing the area would be adversely affected. The removal of the material might cause sloughage of the ground supporting the road. Moving material in the lower pad area would also cause siltation problems in Trail Creek. Finally, moving the material up against the eastern cliff face is not even possible due to the steepness of the slope. (Tr-III. 29, 183-184, 211, 214-215, 221)

Similarly, there are good reasons for not moving the access road berm. DOGM had several reasons for leaving it in place: (1) it is stable, with no sloughing, (2) it protects the residents from the regular occurrence of falling rocks caused by, among other things, frequent seismic activity in the area, (3) it serves as a drainage control, (4) movement of the berm would likely result in some dislodged rocks rolling downhill toward the residents, and (5) movement of the berm material up against the vertical cuts would accomplish only a minimal amount of reclamation. Moreover, Alan Jenkins, an experienced equipment operator, made clear that the narrowness and steepness of the access road prevented access by the equipment necessary to move the berm. (Tr-II. 251, 253, 356, 259, 272-274; Tr-III. 43-44, 70-73, 117-118, 124, 139, 140-142)

Kimly Mangum, a licensed engineer, also testified for Co-Op. His company, Mangum Engineering Consultants, continuously consulted with Co-Op since 1987 regarding reclamation of the Trail Canyon mine. (Tr-III. 65-68, 72)

Mr. Mangum presented convincing testimony, based upon measurements, that Mr. Superfesky had overestimated the amount of material available for reclaiming vertical cuts at the transformer pad, access road berm, and lower pad. In fact, the transformer pad contained no available material, as evidenced by striking rock with bulldozers and having to return some material from the portal area to the transformer pad to meet the 2-foot minimum topsoil requirements. (Tr-III. 79-92, 95-99)

Mr. Mangum referenced an analysis performed by Dames & Moore. That analysis shows that the safety factor on the vertical cuts of the upslope is 2.73 when dry, and 2.5 when wet. The berm material, which is mostly undisturbed or consolidated material, has a safety factor of 2.72. If the berm material is moved to the inside of the road, the safety factor of that material would be 1.32, less than half of the safety factor of the upslope. (Tr-III. 93-94)

Mr. Mangum also established that the weight of the berm material is immaterial and insignificant in determining the stability of the access road downslope, given that the road was

built mostly on rock ledges. If the material were moved against the upslope, it would have little or no effect on upslope stability because there is no underlying soft material requiring protection from weathering. Slides and sloughing off would occur just as predictably in the disturbed areas as in the undisturbed areas. Given these facts as well as the dangers to the residents and equipment operators from attempting to move and removing the berm, it is safer to leave the berm at the outer edge of the road rather than moving it against the upslope. (Tr-III. 94, 96-97, 99-101)

Finally, Co-Op showed that the transformer pad, bermed terrace (reclaimed access road), and lower pad all blend in with and complement the surrounding area. For instance, as previously noted, the bermed terrace largely follows preexisting natural benches with steep upslopes. In fact, at least two OSM witnesses had trouble distinguishing between the vertical cuts and the naturally steep cliff faces on the upslope. Moreover, the bermed terrace compliments the surrounding area by protecting the residents against falling rocks and providing a necessary water barrier to prevent runoff over the downslope. (Tr-I. 160-161; Tr-II. 103-104, 107-108, 221-227, 229, 254; Tr-III. 300-312)

Discussion

I.

Is the specificity of the Federal NOV at issue, and if so, should the Federal NOV be declared invalid for lack of specificity?

Co-Op contends that the Federal NOV fails to sufficiently describe the nature of the alleged violation, the remedial action required, and the portion of the mine to which it applies. Intervenors raise a similar contention. OSM correctly points out that neither Co-Op nor intervenors raised this specificity issue in their pleadings, and therefore argues that they are barred from now raising the issue. However, the issue was raised at trial, without objection, both through testimony and an oral motion to dismiss made by Co-Op. (Tr-I. 130-131; Tr-II. 195-196) Under these circumstances, the specificity of the Federal NOV is at issue in this proceeding.

In order to sustain a claim that an NOV is invalid for lack of specificity, the applicant for review must show that it was prejudiced by the lack of specificity. Renfro Construction Co., Inc., 87 I.D. 584, 587 (1980). Neither Co-Op nor intervenors have shown any prejudice to Co-Op and therefore the Federal NOV is not invalid for lack of specificity.

II.

Did Co-Op violate the Utah program as charged in the Federal NOV?

While OSM has the initial burden of going forward to establish a prima facie case as to the validity of the Federal NOV, the ultimate burden of persuasion rests with Co-Op. 43 CFR 4.1171. Assuming, without deciding, that OSM established a prima facie case, Co-Op met its burden of persuasion on the determinative issue of whether it violated the Utah program, as more fully discussed below.

A.

Did Co-Op violate R645-301-553.300?

Co-Op is charged with violating R645-301-553.300 of the Utah program, which provides:

Exposed coal seams, acid- and toxic-forming materials, and combustible materials exposed, used or produced during mining will be adequately covered with nontoxic and noncombustible materials, or treated, to control the impact on surface and ground water in accordance with R645-301-731.100 through R645-301-731.522 and R645-301-731.800, to prevent sustained combustion, and to minimize adverse effects on plant growth and the approved postmining land use.

The basis of OSM's charge that Co-Op violated R645-301-553.300 are the OSM inspectors' observations of dark bands of material, presumed to be coal, exposed in vertical faces near the northern most portal, in another area along the access road, and in the cliff face at the eastern end of the lower pad. However, OSM failed to conduct any tests to determine whether these dark bands do, in fact, contain coal. At least two witnesses, including an OSM witness, Inspector Pugh, testified that the coal seams were completely covered at the portal areas. Another OSM witness, Inspector Wright, admitted that almost all of the areas depicted as "retained highwalls" on Co-Op's map are not, in fact, "highwalls," as no coal exposed by mining exists in those areas.³ Also, Co-Op presented two witnesses, Mr. Reynolds and DOGM Inspector Kelley, who testified that exposed dark bands of carbonaceous material or coal were characteristic of the area in locations undisturbed by mining. Mr. Reynolds sampled one of the bands and concluded that none of the bands identified by Inspectors Wright and Pugh as containing coal actually contained coal. And, OSM presented little or no evidence to show that the exposed coal, if any, was exposed by the mining operation as opposed to

³ As previously noted, "highwall" is defined under the Utah program as "the face of exposed overburden and/or coal in an open cut . . . for entry to underground coal mining activities." R645-100-200. "'Overburden' means material of any nature, consolidated or unconsolidated, that overlies a coal deposit, excluding topsoil." *Id.*

being a naturally exposed band of material. In sum, the preponderance of the evidence shows that Co-Op did not expose a coal seam or other combustible matter and then fail to cover it, and thus that Co-Op did not violate R645-301-553.300.

B.

Did Co-Op violate R645-301-553.110 of the Utah program?

Co-Op is also charged with violating R645-301-553.110 of the Utah program. R645-301-553.110 requires Co-Op to backfill and grade disturbed areas to "[a]chieve the approximate original contour, except as provided in R645-301-553.600 through R64-301-553.642." R645-100-200 defines "approximate original contour" as follows:

that surface configuration achieved by backfilling and grading of the mined areas so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain with all highwalls, spoil piles, and coal refuse piles having a design approved under the R645 Rules and prepared for abandonment. . . .

Exceptions to the AOC requirements are found at R645-301-600 through R645-301-553.642. None of those exceptions apply in this case. R645-301-553.610 does not apply because there is no evidence that Co-Op obtained from DOGM the necessary approval for a variance from AOC. (Tr-II. 46-49) R645-301-55.620 does not apply because no highwalls exist at the mine, as discussed below. R645-301-55.630 has no application because DOGM has not approved a variance for mountaintop removal and the mining operation did not constitute mountaintop removal. (Tr-II. 51-52) R645-301-55.640 to R645-301-55.642 are not applicable because they pertain only to surface, and not underground, coal mining. (Tr-II. 52-53)

Much discussion has focused upon the "highwalls" at the mine and the Utah program requirement to eliminate highwalls. See R645-553.120. However, Co-Op has not been charged with a violation of the requirement that highwalls be eliminated. The concern in this case is whether Co-Op met the AOC requirement, which includes a mandate that all highwalls have a design approved under the Utah program.

Confusion has arisen in this case because the map prepared by Mr. Reynolds refers to all purported vertical cuts as "retained highwalls." The preponderance of the evidence shows that there are no highwalls, as that term is defined in the Utah program, i.e., there is no "face of exposed overburden and/or coal in an open cut . . . for entry to underground coal mining activities." R645-100-200.

Using the term "highwall" loosely to refer to any vertical cuts, DOGM ordered Co-Op to demonstrate in writing that the volume of reasonably available spoil was insufficient to

completely backfill the highwalls at the mine. To both DOGM's and OSM's satisfaction, Co-Op complied with this order. Thus, there is no dispute that Co-Op is not required to completely eliminate the remaining vertical cuts.

However, several OSM witnesses testified that Co-Op failed to achieve AOC because reasonably available material allegedly exists at the transformer pad, access road berm, access road downslope, and lower pad to partially backfill vertical cuts remaining on the access road upslope, transformer pad upslope, and eastern upslope of the lower pad. However, OSM took no measurements of the purported available material and Co-Op presented preponderating evidence that much, if not all, of this material was not reasonably available.

Co-Op showed that no available material exists at the transformer pad, as Co-Op had to return some material from the portals to the pad to meet the requirement of a minimum of 2 feet of topsoil coverage. Indeed, as more fully discussed below, Co-Op repeatedly detailed facts or factors which OSM did not adequately take into account in concluding that AOC had not been achieved.

Co-Op's witness, Alan Jenkins, established that the access road berm material was not reasonably available because the narrowness and steepness of the road precluded access by equipment necessary to move the large rocks in the berm. OSM witnesses opined that the material could be accessed, but Mr. Jenkins' testimony is more persuasive.

His testimony is more persuasive because he was able to support his opinion with much greater factual detail and more cogent reasoning. No doubt he was able to do so because he has far greater experience in operating all forms of equipment.

Even if the berm material were reasonably available, Co-Op presented convincing reasons for retention of the berm. Those reasons are based upon components of the AOC requirement as well as the Utah program backfilling and grading requirements, including provisions in addition to, and sometimes in competition with, the AOC requirement.

First, Co-Op established that the berm serves the important function of diverting water that is otherwise likely to spill over the outer edge of the road and cause erosion of the downslope. The definition of AOC at R645-100-200 as well as R645-301-553, R645-301-553.140, and R645-301-553.410 support consideration of this factor in determining whether the berm should be retained or used for backfill. The definition of AOC contemplates a surface configuration that "complements the drainage pattern of the surrounding terrain." (Emphasis added) R645-301-553 provides:

... nothing in R645-301-553[, including the AOC requirement,] will prohibit the placement of material in road and portal pad embankments located on the downslope, so long as the material used and the embankment design comply with the applicable requirements of R645-301-500 and R645-301-700 and the material is moved and placed in a controlled manner.

"'Embankment' means an artificial deposit of material that is raised above the natural surface of the land and used to contain, divert, or store water, support roads or railways, or for other similar purposes." R645-100-200 (emphasis added). R645-301-553.140 provides that "[d]isturbed areas will be backfilled and graded to . . . [m]inimize erosion and water pollution both on and off the site" (Emphasis added) R645-301-553.410 provides that cut and fill terraces may be allowed by DOGM where "[n]eeded to conserve soil moisture, ensure stability, and control erosion on final-graded slopes" OSM's well-qualified expert, Michael Superfesky, did not consider the berm's drainage control utility and these regulatory provisions in recommending transfer of the berm against the access road upslope.

Mr. Superfesky recommended the transfer because the berm material would protect against erosion of the upslope. While Superfesky's impressive credentials cannot be ignored, his testimony regarding erosion and the added safety of moving the berm was, to a great extent, theoretical and not adequately tied to the particular conditions of the mine site.

For instance, he expressed concern for the possible erosion of softer materials exposed by the vertical cuts, causing harder material from above to fall toward the void, but he had only visited the mine site once and did not know whether such soft materials exist. Mr. Mangum, who visited the mine site regularly from 1987 onward, testified that no such soft materials are present. In light of the particular conditions of the mine, Mr. Mangum reasonably concluded that, without moving the berm, slides and sloughing would occur just as predictably in the disturbed areas as in the undisturbed areas.

Similarly, in assessing the instability likely to be caused by the weight of the berm on the outer edge of the road, Mr. Superfesky did not consider certain factors. One such factor, as detailed by Mr. Grubaugh-Littig and Mr. Mangum, is that the underlying material appears stable and is largely solid rock. Considering the relevant factors, Mr. Mangum reasonably concluded that the minimal weight of the berm was immaterial and insignificant in determining the stability of the access road downslope.

Nor did Mr. Superfesky adequately consider the danger to the residents of dislodging rocks if the berm were moved. His bare assertion that the move could be done safely evidenced no thoughtful consideration of the danger. Convincing evidence was presented in contradiction of his assertion.

The foundation of Mr. Superfesky's recommendation to move the berm suffers from additional defects. He overestimated the amount of material in the berm, which did not average 4 feet in height as he asserted but did not measure. Also, there is no indication he was aware that much of the berm consists of original contour material left in place. These facts are relevant to the assessment of the berm material's effect on the stability of the downslope if the material is left on the outer edge of the road, and to the assessment of the berm material's effect on the stability of the upslope if the material is moved.

In sum, Mr. Superfesky's knowledge of the particular conditions of the mine and the Utah regulations was simply far less comprehensive than that of Co-Op's witnesses. Co-Op's witnesses presented convincing practical reasons for retaining the berm in accordance with, and after consideration of, the full range of regulatory provisions bearing upon the determination of whether to retain the berm.

Co-Op also presented preponderating evidence that the lower pad area met the AOC requirement in light of all relevant facts and factors. In recommending movement of material from over the culvert to the eastern cliff face, neither Mr. Superfesky nor the OSM inspectors were aware of the original contour of the land. They either did not know or seemed to ignore the fact that the eastern cliff face of the lower pad is a natural feature. They did not know that the residents of Trail Canyon, and not Co-Op, enlarged the cliff face. Nor did they know that the lower pad was already several feet lower than its original contour.

The factual ignorance of the OSM witnesses is exemplified by OSM Inspector Pugh's suggestion that Co-Op should have hauled off coal material on the lower pad and used the lower pad topsoil to cover the cliff face, rather than using the topsoil to cover the coal material. (Tr-II. 218-220) In fact, Co-Op did haul off much coal material and used lower pad soils or materials to reclaim various other areas, including the cliff face. This effort resulted in the lowering of the pad's original contour.

While Mr. Mangum concurred with OSM's witnesses that some material is available over the culvert, it is questionable whether this material is reasonably available in light of several facts. First, due to the steepness of the eastern slope of the lower pad, Co-Op would not be able to push any more material up against the eastern cliff face. Second, removal of material in the culvert area would jeopardize the stability of the public road. Third, removal of such material would cause siltation of the stream.

Even if there is lower pad material reasonably available, movement of this material is not mandated by the AOC requirement. To the contrary, moving the material would render the lower pad less like the original contour of the land.

The pad already closely resembles the original contour of the land, being relatively flat to the west, and steeper with a cliff face to the east. Moving material from west to east would lower an area already several feet lower than the original contour. Movement would not complement the drainage pattern, but would cause drainage problems and possibly destabilize the public road. Finally, movement is not necessary to reduce a highwall because the eastern cliff face is not a highwall.

The last area that purportedly contains reasonably available material is the downslope of the access road and transformer pad. OSM Inspectors Wright and Pugh concluded that available material existed there, but gave no indication as to the amount of material available. Mr. Superfesky, whose task was to determine the amount of available material, did not

mention the downslope as an area with available material. Also, Mr. Mangum testified that the downslope contained no available material.

Without any indication as to the amount of material available, if any, and with little or no demonstrated benefit to placing small amounts of material against the vertical cuts, there is little, if any benefit, to be gained by moving this material. The evidence does not illuminate whether moving this undetermined amount of material will move the mine closer to its original contour in any material way. Moreover, moving the material is nearly certain to cause harm in that both downslope and road vegetation will be destroyed, likely causing erosion. Also, the testimony regarding movement of the berm raises questions as to whether the downslope material can be retrieved and retrieved safely. These factors must be taken into account in assessing whether AOC has been achieved.

In sum, the evidence preponderates in favor of a finding that the AOC requirement has been met for all areas of the mine, taking into account all relevant facts and factors. The photographs and video received as evidence demonstrate that the lower pad, transformer pad, and access road blend into and complement the drainage pattern of the surrounding terrain and closely resemble the general surface configuration of the land prior to mining, as recounted by Mr. Stoddard. No highwalls exist on the mine and the Utah program, considered as a whole, dictates that no further reclamation of the vertical cuts is warranted.

Now, having observed the demeanor of the witnesses and having weighed the credibility thereof, there are here entered the following:

Findings of Fact

1. Factual findings set forth elsewhere in this decision are here incorporated by reference as though again specifically restated at this point.
2. The issue of the specificity of the Federal NOV was raised at trial, without objection, both through testimony and an oral motion to dismiss made by Co-Op. (Tr-I. 130-131; Tr-II. 196-196)
3. Co-Op was not prejudiced by any lack of specificity in the Federal NOV.
4. The natural and premining terrain at Trail Canyon is largely steep and rocky, with numerous intermittent natural cliffs and ledges and exposed bands of coal and carbonaceous shale. (Tr-II. 223, 226-228, 253-255, 260, 286; Tr-III. 158-160, 168-170, 199-202)

5. In 1988 and 1989, Co-Op, having been issued a reclamation permit by DOGM, reclaimed the mine, including completely backfilling and covering the portals and revegetating the disturbed areas. As a result, there are no coal seams, acid- and toxic-forming materials, combustible materials, or overburden exposed by Co-Op in any vertical cuts or entries to underground coal mining activities not adequately covered with nontoxic and noncombustible materials. (Tr-I. 41-43, 144-145; Tr-II. 62, 117-118, 194, 228, 256-259; Tr-III. 125-126, 136-137, 160-161, 164, 189)

6. The only witness produced with knowledge of the original contour of permit area is Bill Stoddard. (Tr-I. 127, 175, 238-239, 243; Tr-II. 121, 150-151, 156, 293-312)

7. There is no reasonably available material at the transformer pad for further reclamation of vertical cuts because the pad contains only 2 feet of topsoil upon solid rock, the minimum amount of topsoil required. (Tr-III. 30, 76, 97-98, 104-105, 120-122)

8. There is no reasonably available material at the access road berm for further reclamation of vertical cuts because: (1) the narrowness and steepness of the road precluded and still precludes access by equipment necessary to move the large rocks in the berm, and (2) movement of the berm will likely dislodge rocks, sending the down the mountain and endangering the Trail Canyon residents. (Tr-II. 272-273; Tr-III. 72, 117-118, 124, 139, 140-142)

9. In recommending transfer of the berm material against the access road upslope, Mr. Superfesky did not adequately consider or assess: (a) the berm's drainage control utility, (b) the provisions of the Utah program pertaining to erosion and drainage control, (c) the lack of soft material exposed by the vertical cuts, (d) the stability and solid rock composition of the material underlying the berm, (e) the danger to the Trail Canyon residents of dislodging rocks if the berm were moved, (f) the substantial amount of original contour material in the berm, (g) the amount of material purportedly available in the berm, and (h) the inability to access the berm with equipment necessary to move the berm. In addition thereto, the berm completes a catch basin to prevent rock falling from upslope into the residential area. (Tr-II. 120, 142-143, 163-166, 169-173, 251-253, 256, 259, 272-273; Tr-III. 19-21, 45-46, 70-73, 96-97, 100, 117-118, 122-124, 139, 140-142)

10. Even if the berm remains on the outer edge of the access road terrace, slides and sloughing are likely to occur on the upslope just as predictably in the disturbed areas as in the undisturbed areas. (Tr-III. 99-101)

11. The weight of the berm is immaterial and insignificant in determining the stability of the access road downslope. (Tr-III. 96-97)

12. There is no reasonably available material at the lower pad for further reclamation of vertical cuts because: (a) Co-op would not be able to push any more material up against the eastern cliff face of the lower pad due to the steepness of the eastern slope of the pad,

(b) removal of the material in the culvert area would jeopardize the stability of the public road, and (c) removal of such material would cause siltation of the stream. (Tr-III. 29, 211, 214-215)

13. In recommending movement of lower pad material from over the culvert to the eastern cliff face, OSM's witnesses failed to adequately consider: (a) that the eastern cliff face is a natural feature, (b) that the lower pad is several feet lower than the original contour of the land, (c) that the enlargement of the eastern cliff face was accomplished by the residents of Trail Canyon and not Co-op, (d) that Co-op hauled off much coal material from the lower pad and used lower pad soils or materials to reclaim various other areas, including the cliff face to the extent feasible by pushing the material up the face with a bulldozer, (e) that removal of the material in the culvert area would jeopardize the stability of the public road, and (f) that removal of such material would cause siltation of the stream. (Tr-III. 21-29, 76, 131-133, 145, 149, 152-153, 211, 214-215)

14. There is no reasonably available material at the downslope of the transformer pad and reclaimed access road for further reclamation of vertical cuts because: (1) there is insufficient evidence of the amount of material purportedly available, (2) movement of this material, if any, will destroy vegetation and likely cause erosion of the downslope, and (3) it is questionable whether this material can be retrieved or retrieved safely. (Tr-II. 117-118; Tr-III. 98-99, 160-161; see also Finding 8)

15. The transformer pad, including the downslope, the reclaimed access road (bermed terrace), including the upslope and downslope, and the lower pad closely resemble the general surface configuration of the land prior to mining and blend into and complement the drainage pattern of the surrounding terrain. (Tr-II. 221-227, 229, 254)

16. DOGM's response to the TDN was not arbitrary, capricious, or an abuse of discretion.

Conclusions of Law

1. The Hearings Division of the Department of the Interior has jurisdiction of the parties and of the subject matter of this proceeding.

2. Conclusions of law set forth elsewhere in this decision are here incorporated by reference as though again specifically restated at this point.

3. The specificity of the Federal NOV is at issue in this proceeding because the issue was raised at trial without objection from OSM.

4. The Federal NOV is not invalid for lack of specificity because Co-Op was not prejudiced by the lack of specificity, if any.

5.Co-Op did not violate R645-301-553.300 of the Utah program because the preponderance of the evidence shows that Co-Op did not expose a coal seam or other combustible matter and then fail to cover it.

6.Co-Op did not violate R645-301-553.110 because the preponderance of the evidence shows that the AOC requirement was met for all areas of the mine, taking into account all relevant facts and factors.

7.Because Co-Op did not violate the Utah program as charged in the Federal NOV, the Federal NOV is invalid.

Order

It is hereby ordered that the Federal NOV is invalid.



Ramon M. Child
Administrative Law Judge

Appeal Information

Any party adversely affected by this decision has the right of appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 CFR Part 4 (see enclosed information pertaining to appeals procedures).

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