



United States Department of the Interior

OFFICE OF SURFACE MINING
Reclamation and Enforcement
WASHINGTON, D.C. 20240



Dianne R. Nielson
Director, Division of Oil, Gas and Mining
3 Triad Center
355 West North Temple
Salt Lake City, Utah 84180-1203

JUL 18 1991

Dear Ms. Nielson:

As promised in my letter dated May 2, 1991, I have completed an analysis of your response to my earlier correspondence concerning changes to the Utah program that I believe are necessary to ensure that it is no less stringent than the Surface Mining Control and Reclamation Act (SMCRA) with respect to the elimination of highwalls. After carefully considering the points raised in your April 15, 1991 letter and consulting with the Office of the Solicitor, I remain convinced that changes are still necessary.

I am willing to approve your request to extend the highwall retention provisions of the Utah program to surface mines, provided changes satisfying the concerns identified in my January 9, 1991 letter are also made. While SMCRA repeatedly and consistently requires the elimination of highwalls, it also requires that the mined area be restored to its approximate original contour (AOC). When the area to be mined contains natural cliffs, these apparently contradictory requirements must be harmonized in a reasonable manner. The Secretary used this rationale to approve limited highwall retention provisions in both the Utah and New Mexico programs because of the unique topography found in these States (45 FR 70486, October 24, 1980; 46 FR 5901, January 21, 1981; 47 FR 55672, December 13, 1982; 45 FR 86464, December 31, 1980; and 47 FR 47378, October 26, 1982). Although Utah initially elected to restrict the applicability of these provisions to underground mines, New Mexico did not. There is nothing in the Secretary's findings concerning either of these programs that suggests that such a limitation is necessary to conform to SMCRA.

However, since it is inconsistent with both SMCRA and the preambles to the current Utah regulations, I cannot unconditionally endorse your proposal to restrict highwall retention to those areas of the permit containing steep slopes. Finding 4(b)(i) of the October 24, 1980 Federal Register notice concerning the Utah program (45 FR 70486) limits highwall retention to sites where the terrain of the area to be mined consists of rough, steep, cliff-like escarpments. Furthermore, section 515(b)(3) of SMCRA requires that mined areas be backfilled and regraded to restore the approximate original contour in a stable fashion. Hence, highwalls may be retained only if they are stable and replace natural cliffs of equivalent length that have been reduced or removed by the mining process. Limited vertical enhancement of existing cliffs is permissible provided, as stipulated by Utah Administrative Rule R614-301-553.651, the retained highwall is not significantly greater in height than natural cliffs in the surrounding area. Therefore, Utah needs to revise its program to limit the length of highwall retained to

the length of any natural cliff-like escarpments physically altered by mining on the site. Also, the State must expressly require that all retained highwalls achieve stability equivalent to that required of backfilled areas; i.e., a minimum long-term static safety factor of 1.3. In addition, to be no less stringent than the AOC restoration, land use, and wildlife habitat protection and enhancement requirements of paragraphs (b)(2), (b)(3), (b)(19) and (b)(24) of SMCRA, the Utah program must require that retained highwalls (1) resemble the structure, composition and function of the natural cliffs they replace or enhance, (2) be modified if necessary to restore cliff-type habitats required by the flora and fauna existing prior to mining, and (3) be compatible with both the approved postmining land use and, as already provided by Utah Administrative Rule R614-301-553.652, the visual attributes of the area.

Finally, if the highwall was created prior to the effective date of SMCRA as a face-up area for an underground mine that continued to operate after SMCRA took effect, OSM would be able to approve a program amendment which requires that such highwalls be eliminated only to the extent feasible using all reasonably available spoil. For a detailed explanation of the rationale for such a provision, see Finding 15.2(c), 55 FR 21330-21331, May 23, 1990, concerning the West Virginia program.

I respectfully disagree with your statement that the Secretary has applied a more stringent standard to the Utah program than to other States with respect to highwall retention. New Mexico's program provides that the length of any highwalls retained after mining cannot exceed the length of the premining natural cliffs they are intended to replace. In addition, before any highwalls can be retained, the New Mexico rules require a demonstration that retention is necessary to replace the cliff-type habitats that existed prior to mining. At present, the Utah program contains no corresponding restrictions, although, as noted above, I am requiring that it be amended to include provisions similar to these restrictions. Furthermore, contrary to the assertion in your letter, on December 26, 1989, OSM disapproved Wyoming's "bluff retention" proposal, finding that the creation of bluffs is appropriate only "when necessary to restore the approximate original contour, provided such bluffs closely resemble premining features in extent and function" (54 FR 52958). A copy of this disapproval notice is attached.

Finally, I am unable to accept your statement that the decision of Utah's Board of Oil, Gas and Mining concerning the Blazon Mine does not establish a precedent for interpretation of the Utah program. The transcript of the hearing indicates that the Board found that the remaining portion of the highwall did not have to be eliminated because it met the Utah program's criteria for highwall retention. There is no other legal basis for this decision. As there were no natural cliffs in the area of surface disturbance, the decision clearly establishes an interpretational precedent contrary to SMCRA and the assumptions underlying the Secretary's approval of the Utah program. I appreciate the Division's commitment to develop a program guidance document to assist in determining how the program's highwall retention criteria should be applied. However, given the interpretational ramifications of the Board's decision in this case, any guidance document developed by the Division must be approved by the Board and incorporated into the State program through the amendment process to ensure its enforceability.

Dianne R. Nielson

3
2

Since the Division's proposal does not adequately address the concerns I expressed in my letter of January 9, 1991, I request that, within 30 days of the date of this letter, you submit proposed written amendments (either revised regulations or a combination of revised regulations and a policy statement) to remedy this deficiency, or a detailed description of amendments to be proposed to do so. Your submittal should be accompanied by a timetable for adoption and implementation of the amendments. Because of the policy questions involved, I believe the legal input you requested is best provided through review of proposed program changes by our respective legal counsels. Given the fundamental nature of SMCRA's highwall elimination requirements, I consider resolution of this deficiency to be a matter of highest priority to prevent adverse impacts upon landowners, the public and the environment. If your response indicates that Utah will be unable to promptly and satisfactorily modify its program, it will be necessary to initiate action under section 505(b) of SMCRA and 30 CFR 730.11(a) to preempt and set aside the highwall retention provisions of Utah Administrative Rule R614-301-553.650 and all references thereto. However, I sincerely hope matters will not deteriorate to this extent.

Sincerely,

W. Hord Tipton

W. Hord Tipton
Deputy Director, Operations and
Technical Services

Enclosure

bcc: OSM Subject; OSM Reading; CIMS; DRP; AD/RRP; DD/OTS
DRP:BSP:Rice:be:7/11/91:208-5361 Nielson.2 disk Rice Dsk 14