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United States Department of the Interior

OFFICE OF SURFACE MINING

Reclamation and Enforcement

WASHINGTON, D.C. 20240

JAN 9 1991



Dr. Dianne Nielson
 Director, Division of Oil, Gas and Mining
 Department of Natural Resources and Energy
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 355 West North Temple
 Salt Lake City, Utah 84180-1203

Dear Dr. Nielson: *Dianne*

As part of its oversight responsibilities under the Surface Mining Control and Reclamation Act (SMCRA), the Office of Surface Mining Reclamation and Enforcement (OSM) monitors and evaluates conditions and events affecting each State program and the regulatory authority's ability to implement this program. If, in accordance with 30 CFR 732.17(c) through (e), OSM determines that an approved State program no longer meets all Federal requirements, it may require amendment of that program. For the reasons set forth below, I have concluded that the Utah program now falls within this category and that the State must amend it to restore consistency with SMCRA.

In disposing of several actions initiated by Jack Otani and North American Equities, Ltd. with respect to the Blazon Mine, Utah's formal administrative review body, the Board of Oil, Gas and Mining, recently ruled that Utah Rule R614-301-553.650 allows retention of highwalls even when no similar natural features existed in the disturbed area prior to mining. This interpretation renders the Utah program less stringent than section 515(b)(3) of SMCRA, which requires that an operator backfill and grade the mined area to "restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated." Although paragraphs (b)(3), (c) and (e) of section 515 provide several exemptions from the requirement to restore the approximate original contour (AOC), the language of each exemption specifies that all highwalls still must be eliminated. Except for certain highwalls created prior to the effective date of SMCRA, the Federal courts have repeatedly and consistently ruled that highwall elimination is a fundamental principle of SMCRA that the Secretary has no authority to alter. See In re Permanent Surface Mining Regulation Litigation (PSMRL), No. 79-1144, D.D.C. 1980, 1984, 1985 (especially Round III of In re PSMRL II, 620 F. Supp. at 1572-1574); National Wildlife Federation (NWF) v. Hodel, 839 F 2d 694 (D.C. Cir. 1988); and NWF v. Lujan, Nos. 87-1051, 87-1814 and 88-2788, D.D.C. February 12, 1990, Mem. Op. at 41-51. Since the Secretary cannot alter this requirement, he also cannot approve or continue to recognize State program provisions at variance with this requirement.

The State rule at issue here, R614-301-553.650, provides that the Division may approve retention of highwalls if:

- (1) The retained highwall is not significantly greater in height or length than the dimensions of existing cliffs and the surrounding area;
- (2) The residual highwall is similar in structural composition to the preexisting cliffs in the surrounding area and is compatible with the visual attributes of the area: and
- (3) The residual highwall is compatible with the geomorphic processes of the area.

On its face, this language could be construed as supporting the interpretation adopted by the Board. However, to do so is clearly inconsistent with the assumptions upon which the Secretary based his approval of this provision. Before approving the current language, the Secretary twice disapproved earlier, broader versions of this rule. The criteria for highwall retention eventually adopted by the State are virtually verbatim to those suggested by the Secretary at 46 FR 5902 (January 21, 1981) as a means of resolving the concerns which caused the disapprovals. There is no indication in either the 1981 notice or the notice approving the current language (47 FR 55672, December 13, 1982) that these criteria represent a retreat from the position originally enunciated by the Secretary in Finding 4(b)(i) of the October 24, 1980 notice (45 FR 70486):

The Secretary finds that the mandate of Section 515(b)(3) of SMCRA to restore the land to AOC with all highwalls eliminated contains an inherent internal contradiction when it is applied to the specific areas of Utah described above, with their natural bench[es] and steep topography. In such terrain, elimination of the highwall would not restore the land to AOC, since its original contour was a natural cliff which was similar in its contour to a highwall.

Faced with this contradiction within SMCRA, the Secretary must harmonize the statute in a reasonable manner under his general authority contained in Section 201(c)(2).

* * *

For these reasons, the Secretary agrees with the concept that a carefully limited exception to highwall elimination would be consistent with SMCRA. However, the [Utah proposal] is deficient in that it does not specifically state that the alternative applies only to underground coal mining activities in terrain with steep slopes composed of rough steep escarpments. The provision is also deficient because it allows the Division, as it determines to be "practical and appropriate," to apply the alternative of not eliminating highwalls to all cases. The lack of defined criteria for the Division's determination to apply this alternative makes this provision deficient in that it could allow the retention of highwalls in situations where the unique topographical justification was lacking.

This preamble discussion clearly indicates that, unlike the Board, the Secretary did not envision the presence of cliffs outside the area to be disturbed as being sufficient justification for highwall retention. Rather, he intended this provision to be used only when the requirement for highwall elimination conflicts with the requirement for AOC restoration. In a parallel action closely related in time and subject, he relied on the same rationale to approve a New Mexico program provision which allows the retention of highwalls, but only to the extent that they closely resemble premining features in size, form and function (Finding 4(b), 45 FR 86464, December 31, 1980).

Since the Utah rule as interpreted by the Board no longer meets Federal requirements, the State program must be amended to restore consistency with SMCRA. Specifically, the State must require that all highwalls created or affected by a mining operation be eliminated except to the extent that they qualify for the remaining exemption or replace natural features of a similar nature. Any residual highwalls must closely resemble natural premining features in size, form and function. Also, in the February 12, 1990, decision in NWF v. Lujan, the U.S. District Court for the District of Columbia ruled that regulations which contradict a statutory provision cannot be considered as being of any effect for any portion of the time they existed (Mem. Op. at 35-42). Therefore, since highwall elimination is a fundamental requirement of SMCRA, the amendment must include a provision stating that its requirements apply to all highwalls created or affected after the effective date of SMCRA. Once the amendment is adopted, timely, appropriate action needs to be taken to ensure the reclamation of any highwalls approved for retention under the current rule.

In accordance with 30 CFR 732.17(f)(1), I request that you submit, within 60 days of the date of this letter, either proposed written amendments or a description of amendments to be proposed to remedy the deficiency discussed above, together with a timetable for adoption and implementation. All submittals should be addressed to the Director of OSM's Albuquerque Field Office. If your response to this notification indicates that Utah will be unable to satisfactorily modify its program within the next six months, or if the State subsequently fails to do so within that timeframe, OSM will find it necessary, pursuant to section 505(b) of SMCRA and 30 CFR 730.11(a), to preempt and set aside the provisions of R614-301-553.650 and all references thereto. Finally, given the seriousness of this issue, I request that, to the extent possible, you avoid taking any actions which would be inconsistent with the requirements of SMCRA as set forth in this letter.

Dr. Dianne Nielson

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Should you have any questions or if OSM can be of assistance in resolving this problem, please do not hesitate to contact either Mr. Robert Hagen, Director of the Albuquerque Field Office, or myself.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. Hord Tipton', written in a cursive style.

W. Hord Tipton
Deputy Director, Operations and
Technical Services

cc: Director, Albuquerque Field Office