



United States Department of the Interior

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

Appalachian Region
3 Parkway Center
Pittsburgh, PA 15220



January 12, 2017

Mr. Joe F. Childers
Joe F. Childers & Associates
201 West Short Street, Suite 300
Lexington, Kentucky 40507

Re: Follow-up to Petition dated June 24, 2013, requesting withdraw of approval of West Virginia's surface mining reclamation program pursuant to 30 C.F.R. Part 733.

Dear Mr. Childers:

On December 30, 2013, we first advised you of the Office of Surface Mining Reclamation and Enforcement's (OSMRE) first decision regarding a petition that was filed by you and your constituents on June 24, 2013, under the Federal regulations at 30 CFR 733.12(a)(2) alleging failure of the West Virginia Department of Environmental Protection (WVDEP) to effectively administer its approved permanent regulatory program in 19 specific areas. In that decision document we determined that 14 of the 19 allegations did not warrant further evaluations. We agreed to continue the validation process on five of the allegations. This letter is to provide you the results of the evaluations completed as part of the validation process to determine if the allegations demonstrated programmatic failures in those five areas.

As indicated in this letter and the enclosed reports, we identified where the administration of the State program could be improved in each of the five program areas. However, we did not find that those issues rose to the level which would create a reason to believe that WVDEP is not effectively administering its program, particularly when considering the ongoing State improvement actions. This concludes our activities under the 30 CFR Part 733 process. Please be assured that we will continue our oversight and technical assistance efforts with WVDEP to ensure that all improvement activities will be completed in a timely manner.

The five program areas where OSMRE agreed required further evaluation, pursuant to 30 CFR 733.12(a)(2), included:

- storm water runoff analysis (SWROA) procedures to minimize off-site flooding potential;

- topsoil handling procedures, including topsoil material substitutes;
- proper issuance of Surface Mining Control and Reclamation Act (SMCRA) enforcement actions where exceedences of National Pollutant Discharge Elimination System (NPDES) effluent limitations exist;
- cumulative hydrologic impact assessment (CHIA) procedures, with an emphasis on the cumulative impact area (CIA); and
- identification and prevention of selenium pollutional discharges.

Four joint OSMRE-WVDEP teams, consisting of 37 team members, were formed in January 2014 to evaluate the five allegations. It was determined that the evaluation topic involving selenium would be evaluated in combination with the review of CHIA and the proper citation of NPDES violations. In addition, OSMRE project managers met with you and your constituents to discuss evaluation procedures and to get suggestions on draft work plans.

Although, WVDEP personnel were named to each team and provided input on the work plans, the actual evaluations were conducted by OSMRE personnel with opportunities for state input at all times during the review. This facilitated some of the improvement actions initiated by WVDEP prior to completion of the final reports. The enclosed reports represent factual findings of the teams and do not contain any recommendations. WVDEP had opportunities to comment on these reports. On November 9, 2016, OSMRE and WVDEP officials participated in a meeting to discuss the findings of each report and to discuss possible actions that the State was willing to undertake to resolve any identified issues and to enhance its overall program. WVDEP officials agreed to provide OSMRE a formal response to the findings and propose remedial measures that would satisfy any outstanding issues. WVDEP's written response was submitted to OSMRE on December 29, 2016, a copy of which is enclosed. The State's December 29th response questioned some of data in our reports, but we did not find it necessary to make changes to the reports. The State's comments, even where correct, did not significantly change the evaluation findings or the corrective actions.

A summary of our findings and related State actions follows:

SWROA Procedures: The West Virginia program relative to SWROA is more specific than current Federal regulations, and it requires that permit applicants use hydrologic modeling to demonstrate that during and post mining storm water discharges do not exceed pre-mining conditions. OSMRE reviewed permitting and field activities on those SWROAs approved after the State's last SWROA training effort for the industry in May 2013. OSMRE reviewers found cases where further documentation should have been required to justify the assumptions in the permit applicant's SWROA model. OSMRE reviewers also found instances where the SWROA should have been revised because of changes to the permit or as a result of on-the-ground field conditions. However, in June 2016, West Virginia was subject to storms up to and well beyond the design size storm event required in the SWROA model. OSMRE quickly inspected 84 sites subject to these storm events and concluded that mining was not exasperating peak water discharges. Therefore, while OSMRE has identified areas where the modeling process could be improved, we cannot find that WVDEP is failing to effectively administer a part of its program that is more specific than Federal regulations and is apparently having a positive on-the-ground effect.

In 2014 and again in 2015, WVDEP modified its SWROA procedures to address some of the issues that were being discovered during OSMRE's Part 733 evaluation. WVDEP announced a 2016 reorganization which added management positions and a chief engineer in the central office of the State to improve the quality control in permitting and inspection including SWROA requirements. While not agreeing to all of OSMRE findings, the State's response acknowledged that permits lacked narrative, and agreed in principle that any changes in field conditions or as a result of permit revisions should require a review of the SWROA or an explanation as to why a new SWROA is not required. WVDEP advised it would continue to emphasize SWROA procedural improvements both in training and through guidance.

- **Topsoil and Material Substitutes:** This evaluation identified several issues that impact the implementation of WVDEP's program regarding topsoil and topsoil substitutes. West Virginia's program includes more specificity than found in the Federal regulations regarding the forestry reclamation approach for reforestation. Because of thin topsoil found in much of the State, a topsoil variance is often necessary for the postmining land use. The evaluation found that State permit reviewers inconsistently used terminology such as topsoil, subsoil, substitute material, etc. This led to confusion during the permitting process and the implementation of the approved permits. WVDEP was found to not consistently require the use of topsoil substitution variances when required by its approved program. When a topsoil substitute is requested, the application often fails to properly identify the specific substitute material to be used or demonstrate that the material has been appropriately tested and deemed to be the best alternative. Operators with on-the-ground deficiencies were found to be either selecting improper topsoil substitutes or placing them incorrectly, or both.

WVDEP managers generally agreed with OSMRE findings and began taking corrective action prior to the completion of the report. WVDEP issued a memorandum to State personnel dated June 20, 2014, to clarify some of the confusion over terminology and also held internal training on the requirements for topsoil and topsoil substitutes. In September 2016, WVDEP issued comprehensive guidance which addresses all the concerns in the OSMRE evaluation. OSMRE participated in training State permit reviewers on these requirements in October 2016. In 2016, WVDEP also submitted a State program amendment to clarify topsoil terminology. WVDEP also notes that its reorganization, which adds an Assistant Director for permitting and includes more centralized control of permitting, should help avoid future inconsistencies.

Finally, WVDEP agreed that many of its current permits do not have the proper topsoil substitution waivers and agreed to take corrective action. WVDEP management has agreed that it will reevaluate existing permits that have 300 acres or 35 percent of the permit yet to be disturbed and order the permittee to obtain the proper topsoil variances if deficiencies exist.

- **SMCRA Actions Relative to Self-Reported Exceedances of NPDES Effluent Limitations:** This evaluation was to determine if unabated, self-reported water quality violations identified under the State's Clean Water Act (CWA) program were being adequately addressed under its SMCRA program. The OSMRE evaluation references an Interior Board of Land Appeals (IBLA) decision which advised that self-reported NPDES

exceedances are not SMCRA violations, but the failure to report and/or correct these self-reported exceedances is a SMCRA violation. Therefore, this evaluation includes discussion on the resolution of self-reported exceedances through both the CWA and SMCRA, while making the findings germane primarily to the SMCRA program.

Consistent with the IBLA decision, WVDEP does not cite violations for an operator's self-reported NPDES exceedances under SMCRA. However, OSMRE noted several instances during the evaluation where an exceedance of an effluent limit was verified by a field or laboratory sample during a SMCRA inspection, but a notice of violation was not issued by WVDEP. Although CWA records include letters explaining actions that operators plan to take to abate significant non-compliances (SNCs), State SMCRA inspection reports seldom discuss whether or not those actions were taken by the operators. In addition, when Court decisions establish new standards or timelines for compliance, this information is often not known by State inspectors. State inspectors were not collecting quarterly water samples, even for those outlets reporting repetitive NPDES exceedances under the CWA's reporting mechanisms. This lack of quarterly sampling led OSMRE reviewers to question whether WVDEP was conducting quarterly complete inspections as provided by its SMCRA program. Finally, there was no independent sampling of underground injection control sites where injection was the chosen method of compliance with the NPDES permit. In general, this evaluation demonstrated that repetitive exceedances of NPDES effluent limitations were not being adequately addressed during SMCRA field inspections.

WVDEP has already initiated a series of actions aimed at improving its inspection and enforcement procedures regarding exceedances of NPDES effluent limitations. WVDEP advised OSMRE that some of these changes initiated in 2015 were in response to requirements of the U.S. Environmental Protection Agency. WVDEP has agreed to identify water sampling protocols and increase water sampling frequency to at least quarterly, with an emphasis on outlets with self-reported exceedances; cite exceedances of NPDES effluent limits and water quality violations observed during State inspections under SMCRA; make State and Federal court orders or other decisions available in electronic format to its staff and other parties; conduct additional water sampling when discharge monitoring reports or field sampling demonstrate exceedances of average monthly limits set forth in NPDES permits; and include inspection portals as a permit requirement for underground injection control sites to allow WVDEP sampling. To implement its new sampling protocol, WVDEP increased its budget for water sampling by \$95,000 to a total \$230,000 for 2017.

While WVDEP agreed it will cite SMCRA violations when it identifies NPDES exceedances of daily maximum limits during a SMCRA inspection, WVDEP's response acknowledges that it will not do so if there is a court order or settlement agreement with stipulated penalties for such exceedances during the period the operator is implementing a water treatment system. We agree that such court action should be given special consideration and any remedial measures should not require SMCRA enforcement action to be taken under those circumstances.

- **CHIA Procedures, Emphasizing the CIA:** In order to conduct a complete CHIA evaluation, OSMRE reviewers examined every hydrologic aspect (Probable Hydrologic

Consequences (PHC) determination, Hydrologic Reclamation Plan (HRP), monitoring plans etc.) of the permit application to determine if it supported the CHIA findings. The evaluation took on a multifaceted approach that reviewed 19 individual permits, conducted interviews with both CHIA writers and managers, and conducted a root-cause analysis of sites where a pollutional discharge did occur. This resulted in a series of about 50 findings per permit, plus findings related to interviews with permit reviewers and a comparison of all findings to a report generated as a result of the CHIA litigation settlement in 2007.

OSMRE found that WVDEP permit reviewers understand the CHIA requirements, but the permits sampled did not contain all of the necessary information needed to support the CHIA. OSMRE also determined that many of the recommendations from the 2007 CHIA Quality Review Panel report have not been implemented. Areas where CHIAs require improvement include: delineation and differentiation of surface and ground water in CIAs; determination of the extent of all historic and anticipated mining in the CIA, including their acreages; detailed hydrologic assessment of the cumulative impacts of all anticipated mining on the hydrologic balance within the CIA; and sufficient information and documentation, e.g. data, calculations, and prediction narrative, as to how the material damage assessment and statement was determined by the CHIA writer. The OSMRE reviewers frequently found there is lack of documentation as to where data may have been derived, how the data were analyzed, and the complete results of those analyses. There is also supporting evidence from ongoing pollutional discharges that the State CHIA process must be improved. Of the nineteen CHIAs that were evaluated during this review, four of them have resulted in discharges that most likely will require long-term treatment. Two of the permits involved selenium discharges that did not meet effluent limits. One permit involved pollutional discharges of selenium and other metals. The fourth permit is likely to have a long term iron discharge. The OSMRE reviewers thought the selenium discharges might not represent an omission in the CHIA as much as related to the fact that selenium is a relatively new parameter of concern, and there was a lack of clear science in the early years of spoil handling for that parameter. However, for the two permits with water quality issues due to other metals, there was evidence of water quality problems on other sites in the area prior to permit issuance.

WVDEP has agreed to update its CHIA policy/guidance document to address OSMRE findings. As part of that effort, WVDEP will require operators who cause unanticipated pollutional discharges to revise their PHCs, HRP's and conduct analyses to determine the causes. WVDEP will revise those CHIAs, accordingly. WVDEP is also committing to completion of the underground mine manual in 2017, which has been under development as a joint OSMRE/WVDEP effort for several years. This manual will serve as a guidance document for CHIA development for underground mines. WVDEP notes it included CHIA in its 2016 training for permit reviewers and will continue to do so. Finally, WVDEP advises that it will conduct a quality review of each CHIA in its central office, instead of relying solely on each State regional office. WVDEP notes that the changes it made in 2016 to its organizational structure to create a permitting director to which all permit reviewers in the regions report will improve permit quality control.

- **Prevention and Control of Selenium Discharges:** Because selenium is a parameter of concern just like any other parameter such as iron and manganese, it was evaluated in

context in both the NPDES and CHIA Part 733 evaluations. Three of the 19 permits that were reviewed for the CHIA evaluation had discharges with elevated selenium concentrations. All three permits were issued prior to the issuance of the State's new selenium guidance in 2013. However, 10 other permits, located in parts of the State where selenium-prone coals and strata are prevalent, did not develop selenium discharges.

Four of the twelve permits that were reviewed as part of the SMCRA/NPDES evaluation had selenium discharges and were under a Court Order. Only one of the four sites was actively treating for selenium. Based on a Court Decree associated with one site, a selenium treatment system was to be operational, but there was no documentation or evidence of it in the permit file or on-site. Selenium sample results from the Part 733 field investigations revealed that discharges at two of the sites exceeded interim effluent limitations. However, WVDEP only took an enforcement action at one of the sites. All four sites with selenium discharges had appropriate modifications to their permits. WVDEP explained in its response to the draft report that a Court Order generally stipulates a penalty that includes the time period until compliance is reached, thus it is not subject to other violations for exceedances of NPDES effluent limitations. OSMRE agrees this would be the proper interpretation of a legal order.

The OSMRE reviewers concluded that the WVDEP administration of its program for selenium discharges was similar to its administration of the program for other regulated parameters. If the State made improvements in its CHIA process and its inspection and enforcement of NPDES effluent limit exceedances, selenium would not need to be a separate consideration.

Both Part 733 evaluations demonstrated that selenium is being considered and evaluated by WVDEP during its permitting process. WVDEP has undertaken a number of efforts to prevent the creation of discharges with elevated selenium concentrations, including the development of guidance documents in 2007 and updates to that guidance in 2013. The guidance documents include threshold levels of selenium in the overburden that may be problematic and thus require special handling, as well as other selenium-related requirements. In 2016, the West Virginia Legislature modified the State's selenium standard from primarily a water quality based limit to a fish tissue based limit. On June 24, 2016, EPA approved the State's revised selenium criteria subject to consultation with the U.S. Fish and Wildlife Service under the Endangered Species Act.

While the 30 CFR 733.12(a)(2) evaluations identified some issues in each of the five program areas, we do not find that these issues rose to the level of systemic program failures, particularly in light of ongoing State improvement activities. We are therefore considering the allegation validation process complete and are not recommending that the Director take further action pursuant to 30CFR 733.12(b), which requires a determination that there is reason to believe a state is failing to effectively implement its program.

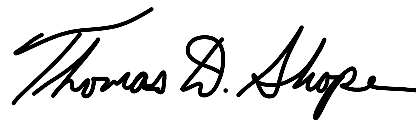
We recognize that the December 29, 2016, WVDEP response letter does not include specific plans and schedules related to the promised program improvements, many of which have not yet occurred. Subsequent to that letter, we have had conversations and clarifying emails (emails attached) with State management officials, and they have agreed to work closely with us on

developing the necessary plans and schedules. Please be assured we will make the program improvements noted in the State's letter a priority for OSMRE's Appalachian Region.

In addition to working with WVDEP to develop specific schedules for the promised improvement efforts, we will emphasize compliance with SWROA, proper SMCRA citations for NPDES violations, and topsoil handling procedures as part of our normal oversight inspections. We typically conduct around 300 such inspections in West Virginia every year. We will also assign hydrologists to review a sample of new CHIA decisions. Finally we will continue to make subject matter experts available to the State to assist in the development of any procedures related to these topics.

We will post this letter and all associated reports on OSMRE's website at <https://www.odocs.osmre.gov>, so your constituents and the public will have access to them. We will also call you to discuss the reports and offer a meeting with you and your constituents. We appreciate your concerns regarding West Virginia's administration of its approved regulatory program.

Sincerely,

A handwritten signature in black ink that reads "Thomas D. Shope". The signature is fluid and cursive, with the first name "Thomas" being the most prominent part.

Thomas D. Shope
Regional Director, Appalachian Region

Enclosures

Identical letter sent to:

Mr. James G. Murphy
Senior Counsel
National Wildlife Federation
149 State Street
Montpelier, Vermont 05602

cc: Randy Huffman, Cabinet Secretary, West Virginia Department of Environmental Protection
Johanna de Graffenreid, CARE Campaign
Bill Price, Sierra Club
Erin Savage, Appalachian Voices
Rob Goodwin, Coal River Mountain Watch
Elise Keaton, Keeper of the Mountains Foundation
Maria Gunnoe, Ohio Valley Environmental Coalition
Diane Brady, Ohio Valley Environmental Coalition



west virginia department of environmental protection

Division of Mining and Reclamation
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Office: 304-926-0490

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Earl Ray Tomblin, Governor
Randy C. Huffman, Cabinet Secretary
dep.wv.gov

December 29, 2016

Mr. Roger W. Calhoun
Field Office Director
Office of Surface Mining Reclamation and Enforcement
1027 Virginia St., East
Charleston, WV 25301

Dear Mr. Calhoun:

On July 2, 2013, the Office of Surface Mining Reclamation and Enforcement's (OSM) Appalachian Regional Office forwarded a petition from the National Wildlife Federation to the West Virginia Department of Environmental Protection (WVDEP). The petition sought termination of West Virginia's approved SMCRA program and the immediate implementation and promulgation of a federal regulatory program. This petition alleged nineteen specific areas where the WVDEP had failed to properly implement the program. On December 31, 2013, following extensive review of the allegations, OSM initially determined that five of the allegations warranted any additional investigation under 30 U.S.C §521(b) and 30 C.F.R. §733.12. However, OSM subsequently concluded that no differentiation existed between the allegations related to NPDES and Selenium enforcement and therefore provided only one draft addressing those allegations. The resulting four topics identified for further evaluation were:

1. WVDEP Fails to Address Potential Flooding Impacts in the Permitting Process with Storm Water Runoff Analysis (SWROA);
2. WVDEP Fails to Issue SMCRA Violations where National Pollutant Discharge Elimination System (NPDES) Violations Exist;
3. WVDEP Fails to Properly Define Impacted Areas in Cumulative Hydrologic Impact Analysis (CHIA) Results in Harm to Watersheds; and

4. WVDEP Fails to Require Proper Protective Soil Removal and Reclamation Measures for Mining Sites.

In the fall of 2016, OSM provided draft reports on the four allegations. This letter is in response to OSM's draft reports, provided the WVDEP reserves our right to respond formally once the reports are finalized.

After reviewing the drafts, my office found cases where OSM, when unable to immediately find the related information in the permit, frequently assumed a deficiency existed in the individual permit without conducting a full review of all information available. This resulted in several cases where my staff found much of the information OSM has identified as not being included in the permit application. In addition, the WVDEP contends that portions of the drafts stray from a factual evaluation of programmatic implementation and appear to include subjective reasoning from the author(s), some of which we have included in our attached comments. However, it is the WVDEP's opinion that the draft findings, even without consideration to the above noted exceptions, clearly fall short of identifying any deficiencies that could be interpreted as rising to the level of programmatic or systemic failure. Accordingly, WVDEP believes no additional consideration of the petition is warranted.

With the continuing evolution of the mining industry and the new challenges that will accompany these changes, it is imperative that the WVDEP continue to approach regulation of the mining industry in a progressive manner. Seeking work improvement processes, along with our commitment to the necessary program improvements, will fulfill our jurisdictional responsibilities. The following attachments specifically address the remaining topics related to the petition and outline already completed or proposed actions by the WVDEP aimed at providing additional improvements to those parts of the program discussed in each draft report.

As mentioned in previous responses, after internal evaluation of the organizational structure for the Division of Mining and Reclamation (DMR), my office began a formal reorganization process. After much consideration and approval by the Division of Personnel, the reorganization became effective in March of 2016 and provided an Assistant Deputy Director in charge of permitting with the field permit review supervisors now reporting directly to this position in headquarters. In addition, the I&E management restructure added an Assistant Deputy Director for Inspection and Enforcement and an Assistant Director whose primary focus is Article 3 enforcement activity. Also, the position of Chief Engineer for DMR was created to oversee all engineering activities conducted by DMR. The primary reasons for incorporating these positions was to minimize permitting, as well as

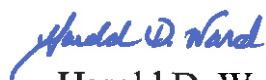
inspection and enforcement inconsistencies throughout the regions, while providing more managerial oversight of our operations. The changes, imposed by the reorganization, have already provided appreciable dividends and without question will result in even more improvements to West Virginia's program.

Another significant program improvement DMR has been working on for years came to fruition during the OSM 733 investigation. The WVDEP obtained approval of and successfully implemented the Inspector Salary Progression Pay Plan which provides a defined pathway for the classifications and pay advancements for our inspection and enforcement staff. The plan is based on advanced training, tenure, and job performance. This plan has greatly reduced the high turnover rate for the inspector job classification allowing the agency to retain more experienced and better trained employees in this key position.

The DMR has and will continue to conduct yearly training of our permitting and inspection and enforcement staffs to improve our implementation of all requirements. Training was most recently conducted in September and October of this year. The reintroduction of a formal training program for DMR staff has proven very beneficial in continuing our mission to effectively enforce the provisions of SMCRA.

Please feel free to contact me at the office if you have any questions. I look forward to working together into the future.

Sincerely,



Harold D. Ward
Acting Director

Attachment 1- SWORA

WVDEP Response to 10/25/16 Draft Decision Memorandum for the [OSMRE] Regional Director

On May 23, 2016, WVDEP provided a partial response addressing specific issues presented in OSMRE's draft report for the SWROA §733 Petition. As we specified, the findings contained in the draft report do not rise to the level of programmatic deficiency that could possibly warrant OSMRE to take over WVDEP's approved program. WVDEP contends that SWROA remains a positive design tool that minimizes off-site hydrologic damage from permits.

To date, we still have not received a finalized report to comment on. Nevertheless, in an effort to resolve this petition in a timely manner, while preserving our future rights to comment on the published final report when available, WVDEP presents both implemented and proposed changes to SWROA that have improved and will continue to advance its effectiveness.

SWROA BACKGROUND

WVDEP voluntarily pursued significant regulatory changes in 2003, including Storm Water Runoff Analysis (SWROA) by amending the West Virginia Surface Mining Reclamation Rules. These rules were subsequently approved by OSMRE later that year. The total effect of these regulatory changes has contributed to and benefited SWROA's effectiveness, as follows:

- More efficient sediment control facilities to prevent downstream sediment deposition (5.6.c.)
- Prohibit windrowed material in certain areas that affect drainage (8.2.e.)
- Limit areas for clearing and grubbing (14.15.a.2.; 14.15.c.; 14.15.g.)
- Maximize reforestation opportunities for all post-mining land uses (9.1.a.)
- Watershed containing excess spoil disposal fills must be assessed for suitable fill siting (3.7.d.)
- Design sediment control systems for the total fill footprint instead of only the fill face (5.4.b.4.)
- No-net increase in runoff demonstration, Surface Water Runoff Analysis (SWROA), based on worst case during mining and Phase III release conditions (5.6)
- Post mining configuration to prevent watershed transfer (5.4.b.11.)
- Limitations on "wing dumping" in fill areas (14.14.g.2.B.1)
- Bottom up or alternatively constructed fills (EPZ) to better control runoff and sedimentation (14.14.g.1.)
- Require a runoff monitoring plan, which includes installation and maintenance of rain gauges, correlation of rainfall to runoff response, and monthly reports of daily precipitation (5.6.b.)
- All operations must report to the agency within 24 hours the results of a permit wide drainage system inspection for any 1 year 24 hour or greater storm event (5.6.b.)

In 2007, OSM conducted an oversight workplan evaluating the effectiveness of our SWROA regulations. On March 6, 2009, OSM finalized the report and provided it to WVDEP with the following conclusions:

- The SWROA concept is valid and should minimize the potential for mining related downstream flood damage.
- The SWROA concept and emphasis on storm water management has resulted in many improvements including surface mine drainage design, timely construction, emphasis on more creative and safer water detention, and better valley fill drainage and construction practices.
- Concerns exist about the assumptions made when designing runoff models. Notably, worst case scenario and runoff values were questionable.
- Concern was raised that WV does not require measurement of actual runoff discharges for comparison with those predicted by the models. *[WVDEP contends that required runoff monitoring plans already provide for correlation of runoff response to rainfall.]*
- It was also noted that SWROAs cannot be expected to control all excessive runoff and off-site damage caused by delayed reclamation and failure of temporary drainage control. Only strict adherence to reclamation standards can help prevent such occurrences.

Consequent to OSMRE's 2007 oversight report, WVDEP agreed to the following:

- Training – both in-house and industry training with emphasis on worst case scenarios, inclusion of narratives in SWROA submissions, consistent numbering of SWROA structures on drainage maps with numbers in SWROA calculations, and that the runoff monitoring plan includes discharge monitoring for representative points of discharge from the site.
- Training – field staff training to ensure that inspections include reviews of indicators related to the effectiveness of the SWROA beyond just compliance. Indicators would include stream scour, sedimentation, boulder movement, etc.
- Monitoring of violation history – used to determine if there are off-site impacts related to excessive peak discharges.

In the OSMRE Evaluation Year 2011 report, entitled “Summary of SWROA Offsite Investigations”, OSMRE provided a summary of SWROA concerns, as follows:

- Require operators to consider multiple stages of the operation when determining the worst case condition, to include clearing and grubbing and fill breakdown stages. *[WVDEP notes that required bottom-up or EPZ fill construction methods now result in the clear/grubbing stage being the worst-case period of disturbance, so this condition is typically used for the during-mining case in hydrologic modeling.]*
- Any computer modeling results submitted must include narratives and thorough descriptions with documentation of any assumptions.

- All drainage structures shall be identified with the same identifiers on all maps and calculations.
- Any changes made during construction or as part of a revision or modification that result in drainage areas, channels, or structures differing from their as-designed configurations shall result in a required evaluation of their effect on SWROA.
- Randomly review operations where precipitation exceeds pre-set levels and monitor any trends related to the SWROA process or monitoring that should be addressed.
- Conduct in-house and industry training to accomplish these goals.
- Train inspection and enforcement staff to ensure inspections include reviews of monitoring plans and indicators related to SWROA effectiveness, such as stream scour, sedimentation, boulder movement, etc.

WVDEP has already agreed to corrective actions to address the above-mentioned SWROA issues. In response to the petition, however, OSMRE criticizes WVDEP for not having reported any comprehensive findings from its reviews of actual offsite damage. Enforcement procedures for offsite damage always include identification of cause. To date, no offsite damage incident has been attributed to SWROA failure. Typical causes of offsite damage occurrences are related to outright structure failure and/or improper drainage routing, instead of SWROA failure due to miscalculation.

The most recent draft of the 30 CFR 733 factual report included the findings from 12 SWROA field reviews, 9 SWROA detailed file reviews, and 10 SWROA brief reviews. OSMRE states that the reviews identified similar issues as concluded in previous SWROA oversight reviews. These findings are summarized, as follows:

- SWROAs are not being revised for changes to the permit affecting permit size, internal reconfiguration of the mining plan, and/or sequence that would affect the drainage plan of the permit. *[WVDEP takes exception to this very broad finding. In most of the cases, we find that the permits just lacked narrative detail justifying why no SWROA was necessary. All drainage and/or permit area changes do not automatically trigger the need for a revised SWROA. For example, a deleted valley fill, which creates a drastic reduction of disturbance within a watershed, most likely will not violate the “no-net increase” criteria. Nevertheless, WVDEP asserts that such permitting transactions should contain a narrative to justify why a revised SWROA is not necessary, or contain a SWROA revision if necessary.]*
- Revised SWROAs were not completed where field conditions changed the size of the permitted area or drainage plan and/or flow directions or patterns, which would cause a disparity between actual and modeled SWROA. *[Likewise, the guiding premise to revise a SWROA is when compliance to the “no-net increase” may be violated. For example, decreasing disturbance within a specific watershed does depart from original SWROA designs, but does not violate this standard, so a revised SWROA isn’t necessary. However, if acreage is increased, a SWROA revision or appropriate rationale should be required.]*
- There is a lack of narrative to support modeling assumptions as well as lack of scientific justification for selecting runoff curve numbers. Without a detailed supporting narrative, many runoff curve numbers are hard to accept as realistic. *[WVDEP does agree that assumptions need to be justified in the permit narratives.]*

However, as we stated in our previous reply letter to the draft petition response, there is no scientific basis for choosing runoff curve numbers. Instead, proper engineering judgement needs to be applied and documented in the permit.]

- Some SWROAs included extremely large drainage areas where any impact to the runoff could be negated by the sheer size of the watershed. *[Recent SWROA policy addresses evaluation point siting and should rectify this issue.]*
- Structures were observed above a SWROA evaluation point (EP). *[WVDEP takes issue with this criticism when considering the specific permit and the structures in question. Prior to our 11/24/15 SWROA policy, no definition existed of “structure” used in the context of SWROA. In its SWROA oversight studies, OSMRE obviously assumed that any structure upstream of an evaluation point required that SWROA’s “no-net increase” protection standard be applied. Had the current policy been effective at the time of inspection and applied, this criticism would not have become an issue. WVDEP points out that current SWROA policy now defines “critical structure” and better elucidates regulatory intent applicable to structures upstream of an EP. Again, better permit documentation in the future can document and justify what is or isn’t to be considered a SWROA structure upstream of an EP.]*

WVDEP Implemented Remedies

In response to preceding SWROA workplan remedies, we have already agreed to conduct training and have fulfilled those requirements. Also, we have focused on improving permit documentation of SWROA assumptions. We admit that some recent SWROA approvals continue to lack proper assumption justifications, i.e., runoff curve numbers and hydrologic soil groups. However, the vast majority of permits have appropriate SWROAs. Continued training will focus upon relevant issues and will further improve the SWROA process. SWROA training and other notable improvements to the SWROA program have been conducted, as follows:

- Various training sessions for industry and in-house personnel has benefitted the SWROA process:
 - 2003 SWROA Presentation at the Surface Mining Symposium
 - 2009 SWROA and Sediment Control Training for I&E
 - 2011 SWROA Training for I&E
 - 2012 SWROA Training for WVDEP Engineers/Permitting Personnel
 - 2013 SWROA Training for Industry
 - 2014 SWROA Training for WVDEP Engineers with NRCS (Robert Pate, et al.)
 - 2015 SWROA Training for I&E (Separate training sessions for Logan, Oak Hill, and Philippi regions)
 - 2015 SWROA Policy Explanation for Industry
 - 2015 SWROA Training for WVDEP Engineers and I&E Staff
 - 2016 SWROA Training for WVDEP Engineers and I&E Staff
- Policy, dated 10/16/14, addressing SWROA verification/evaluation prior to structure removal.
- SWROA policy, dated 11/24/15, to explain various ambiguous issues, provide clarification, and improve consistency.
- Continued evaluation of all off-site damage occurrences to determine if SWROA-related. If related to excessive peak water discharge, appropriate root-cause analyses

will be conducted which could result in further SWROA refinement. To date, no off-site damage occurrences have been attributed to SWROA failure.

- Reorganization of headquarters personnel in 2016 will limit inconsistencies in SWROA review and on-ground implementation. New positions were created, including two (2) Environmental Resource Program Manager IIIs who now serve as Assistant Deputy Directors for Permitting and for Inspection & Enforcement, a Chief Engineer, and an Assistant Director overseeing Inspection & Enforcement.

WVDEP Proposed Remedies

SWROA training will continue, as needed, to emphasize current topics of concern for agency personnel, consultants, and industry. The most recent SWROA training sessions have been particularly worthwhile for our newly hired inspectors. WVDEP will implement Quality Assurance/Quality Control measures in headquarters for select SWROAs to ensure that adequate modeling assumptions are being submitted/accepted and that they are appropriately justified and documented in the permits. Resulting feedback to SWROA reviewers should result in overall SWROA improvement. WVDEP believes that performing internal oversight of review activities will further benefit the permit review process, even beyond SWROA.

Attachment 2 - NPDES

On March 25, 2016 WVDEP provided a partial response addressing issues presented in OSMRE's draft report for the NPDES 733 Petition. The draft report has changed several times since our previous comments and contained here are comments to the present draft while preserving our future rights to comment on the published final report when available. We submit these comments in an effort to resolve this petition in a timely manner. As we have stated earlier, the findings of the draft report do not rise to the level of programmatic deficiency that could possibly warrant OSMRE to take over WVDEP's approved program.

- West Virginia Department of Environmental Protection (WVDEP) agrees that defining the scope of differing inspection and enforcement procedures to the same facility (permit) under separate laws is a complex issue. U. S. Office of Surface Mine Reclamation and Enforcement (OSMRE) discusses the percentage of total WVDEP National Pollution Discharge Elimination System (NPDES) coal mine related permits (1360) which showed any exceedance of an effluent limit in 2011 at 24 percent. OSMRE goes on to state that a smaller percentage, 10 %, of these NPDES permits (130) showed a Significant Noncompliance (SNC) in 2011. Violations that meet the definition of SNC for effluent exceedance, among others, are considered Category 1 violations under the U. S. Clean Water Act. Data on Category 1 violations are submitted by states each year to U.S. Environmental Protection Agency (EPA) in required Annual Noncompliance Reports (ANCR) for Non-major (Minor) Facilities as defined by U.S. EPA. All NPDES permits in this study are classified as Non-major facilities. Review of the 2014 CWA Annual Noncompliance Report on EPA website for Minor permits show the Category 1 (Serious) Violation Rate Trends by year for 2008 through 2014. These statistics show the percentage of facilities (NPDES permits) reviewed in this period for both Verified and Non-Verified States Data. The percentage of permits with Verified Data which showed Category 1 violations ranged from 30% in 2014 to 60% in 2008 with 39% in 2011. The percentage of permits in Category 1 violation for Non-Verified state data ranged from 13% in 2011 to 25% in both 2009 and 2010. The combined percentage of NPDES permits in Category 1 violation ranged from 29% in 2010 to 19% in 2014, with 2011 showing 28%. WVDEP agrees that 24% of our mining NPDES permits showing reported exceedance of ANY effluent limit in one year is greater than desired. But comparing the OSMRE reported 10% of mining NPDES permits having a SNC (Category 1 violation) in 2011 with the EPA national statistic in 2011 of 28% of Minor Permits having Category 1 violations show that the findings contained in the Draft Report do not rise to the level of programmatic deficiency that could possibly warrant OSMRE to take over WVDEP's approved program.
- While reporting Discharge Monitoring Report (DMR) data to EPA for Major Facilities has been routine for numerous years, the requirement to electronically submit Minor Facility DMR data to EPA is just now occurring due to the federal eRule being implemented nationwide. WVDEP mining Hydrologic Protection Unit (HPU) has been using electronic submittal of DMR data since 1998. Computer disc input of DMR data occurred from approximately 1998 through 2010. In 2010, WVDEP began conversion to electronic file upload via the internet. This DMR data is submitted through the electronic submission system (eSS) and must go through programed data validations prior to the data being approved for input to the data management system (ERIS) used by WVDEP. Several issues kept occurring from

2011 through 2014/2015 which caused a delay in data being validated for ERIS input, which in turn caused a delay in the analysis of DMR data for possible enforcement under West Virginia Water Pollution Control Act (WPCA). These were problems with the validation process allowing data with errors to be approved for review and final validation by WVDEP staff prior to ERIS input. The DMR electronic submittals had to be sent back for error corrections to the permittees, re-submitted, and re-validated by WVDEP. Unfortunately, the programming did not produce all errors on the first validation so other errors were not discovered and each subsequent submittal would produce “new” errors which started the process again. These were the main factors which caused the eight-month time lag between quarterly DMR submittal and enforcement analysis through the Quarterly Noncompliance Report (QNCR). Changes made in 2014/2015 have addressed these delays. Our current time period between close-of-data submittal, twenty days after the last day in a calendar quarter, and QNCR analysis is forty-eight days, barring computer system problems beyond our control.

- WVDEP agrees that in the past, the inspection procedure seldom discussed, in narrative form, the type and timing of actions taken by the operator to address enforcement actions developed through the QNCR analysis. The inspection procedure was to review the required operator’s report to the SNC enforcement, but was lacking in detail on how to document this review. Since generation of the SNC enforcement is from self-reported DMR data, review of operator submitted reports includes review of subsequent DMRs for effluent compliance, field verification of treatment systems, and/or field sampling and analysis. The need for a better approach was recognized by WVDEP and new inspection/violation procedures were developed to address this in conjunction with requirements in the EPA State Review Framework oversight and the new federal eRule. These were put into effect in 2015 and included specific review of the actions taken by operators in response to the SNC enforcement. WVDEP has included written direction to the inspection staff to address, in narrative form, on SCMRA inspection reports, verification of action taken by operators in response to SNC enforcement under the WVWPCA.

As a point of clarification, WVDEP does not use its SCMRA authorities to cite violations of operators, self-reported NPDES Significant Non-compliances (SNCs), and neither does U.S. EPA cite permittees for SNCs. Per “Complication of EPA Policy and Guidance for Significant Non-Compliance (SNC) May 2015” received from EPA, “SNC is not regulatory, but is defined by EPA in the 1989 EMS in Part 2. SNC is used solely for management purposes...”. “Significant Noncompliance (SNC) is a subset of Reportable Noncompliance (RNC) as defined for the Quarterly Noncompliance Report (QNCR) and is applicable to NPDES Major permittees.” None of the NPDES permits subject to the OSMRE review were Major permits. The May 29, 2008 EPA Clarification of NPDES EMS Guidance on Timely and Appropriate Response to Significant Noncompliance Violations specifically states: “Thus, the purpose of this memorandum is to supplement OECA’s national NPDES guidance by incorporating the attached “Enforcement Response Timeline of SNC Violations at NPDES Major Facilities” into the EMS by reference”.

- As stated in the previous section WVDEP response to SNC analysis through the issuance of Notice to Comply (NtC) letters was modified in 2015. This new procedure included field sampling of outlets where NtC’s under WVWPCA has occurred. WVDEP has expanded this procedure with policy directing issuance of

violations under WVSCMRA for hydrologic balance conditions found to be in violation on SCMRA inspections. Inspectors have been instructed to cite West Virginia Code 22-3-13(b) for effluent conditions that may affect the disturbance to the prevailing hydrologic balance in conjunction with WV CSR 38-2-14.5 for effluent violations discovered during WVSCMRA inspections.

- The WVDEP has been working to address EPA State Review Framework (SRF) oversight direction, the 2014 NPDES Compliance Monitoring Strategy (CMS), and the 2015 Electronic Reporting Rule (eRule). EPA's 2014 CMS sets the minimum inspection frequency for traditional non-major (Minor) facilities once every five years with the type of inspection depending on the receiving stream listing. SRF findings recommended the WVDEP "develop and plan to ensure that facilities receive comprehensive inspections covering all NPDES requirements annually". As part of meeting these oversight directions, the WVDEP initiated sampling procedures to meet the "annual comprehensive NPDES inspections" which would require once per year sampling of NPDES outlets. This NPDES inspection frequency, as recommended in the SRF, exceeds the EPA CMS required inspection frequency for minor NPDES permits. For the 42 month OSMRE study period, this would have amounted to approximately 4+ samples per permit per outlet, since only the first six months data of 2014 were examined. The OSMRE study included seven outlets that were underground injection inlets and WVDEP has acknowledged no sampling has taken place on these closed-system points. WVDEP is taking action to address the inclusion of sampling ports on these systems in the permitting procedure. Sampling each flowing outlet one time per year exceeds the minimum inspection frequency required under EPA CMS threefold. WVDEP sampling procedure shall be that one-fourth of all flowing outlets on a permit be laboratory tested per quarter. All other outlets will be inspected with field sampling taking place on those found with flow during that quarterly inspection. A different set of one-fourth of flowing outlets will be laboratory tested on each quarterly inspection to ensure all flowing outlets are sampled one time per year while all other outlets are field sampled.
- The OSMRE study recorded field sample results during SCMRA inspections on twelve facilities. There were 156 samples and 158 reported no flows on outlets associated with the twelve facilities recorded on the SCMRA inspections. Of the 156 samples taken, 32 samples showed a violation of NPDES daily maximum effluent limits. Of the 32 samples, one laboratory sample exceeded the limit by .03 mg/L, one sample had a violation in effect at the time of the re-sample, and one was an oversight by the inspector and a violation should have been issued. Of the remaining 26 samples, nineteen were subject to State and/or State/Federal WV Water Pollution Control Act/Clean Water Act formal enforcement actions. Between 2008 and 2016, WVDEP issued 1000 SCMRA violations for effluent limit exceedance of NPDES permits. In 2011, WVDEP issued 186 SCMRA violations for effluent limit exceedance statewide. These numbers only reflect SCMRA violations of NPDES effluent limit exceedance and do not include violations of related conditions, such as sediment control structure maintenance, which would increase the number of SCMRA violations issued for hydrologic condition violations.
- WVDEP agrees it does not send SNC NtC letters generated from QNCR analysis to operators where a formal enforcement under WVVPCA and/or combined formal enforcement in a Federal/State action is in-place with Order Limits. Formal enforcement, such as a court ordered consent decree, may result in Order Limits (OL). OLs supersede the issued "Permit Limits" (PL) during the duration of the

formal enforcement action. QNCR analysis, which produces NtC letters for all NPDES limit exceedances, is based on the PLs placed into the ERIS database. WVDEP Business and Technology Office has consistently advised that it is impossible to place OLs into the ERIS database and run a QNCR analysis. The only choice for WVDEP, if it is to continue to run QNCR, is to not send NtCs because the SNCs produced would not be analyzing reported DMR results with the legal effluent limits in effect from a formal enforcement action. It is also correct in the OSMRE report that NPDES permits are not “changed” due to a formal enforcement action to include consent decree OLs, compliance schedules, etc. To do so would be a violation of the Clean Water Act. In fact, consent decrees issued as part of formal enforcement actions usually contain a clause stating that nothing in the consent decree alters or modifies the existing NPDES permit. It has been the procedure for WVDEP-Hydrologic Protection Unit to send copies of all relevant formal enforcement actions issued to the Inspector Supervisor and Inspector which contain any OLs, compliance schedules, or other aspects that affect the permit. A new document management system, now being developed for WVDEP, will allow copies of formal enforcement actions to be placed so field staff will have access without the need to send copies directly.

- WVDEP has hired an Analyst who is currently working to address coordination in permitting and inspection of Underground Injection Control permits and SCMRA permits. Currently being addressed in the UIC permitting process is the inclusion of dedicated and safe sampling ports. WVDEP will continue to address this issue.
- Inspection and enforcement of selenium standards has been and continues to be a complicated issue. There exists daily reporting of selenium discharge at permit outlets, coupled with daily stipulated penalties for reported exceedances in some consent decrees. This can place the agency in a double-jeopardy situation where WVDEP is a party to the decree and receives part of the daily stipulated penalties if WVDEP then issues a SCMRA violation and receives civil penalties for the same discharge violation. WVDEP continues to make progress on field coordination and has been issuing field violations where daily reporting/penalties do not apply or exceed OLs and there are no corresponding stipulated penalties. The SCMRA inspection/violation procedure, previously discussed, will apply to these cases.
- Of the four permits that showed selenium as a SNC in 2011, three were under a combined State/Federal Consent Decree.
 - Independence Coal Company permit WV1029711 outlet 001 is subject to case 2:14-cv-11609, and per Appendix B2 required a treatment system to be constructed by June 1, 2014. Appendix B2 of the CD also includes permit WV1016890 (S502396) outlets 002 and 004 as outlets to be treated by a constructed selenium basin-based biologic treatment system (BBTS). Revisions and plans for this plant are included in permit S502396, WV1016890, and WV1029711. On the June 19, 2014, SCMRA inspection report of S502396 the inspector states “Notify inspector when selenium plant begins operation”. The CD covered multiple NPDES permits which covered multiple SCMRA permits. Clearly the plant which controlled WV1029711 outlet 001 was constructed by the date specified in the CD. Selenium compliance at these outlets were to be achieved by December 1, 2014. There have been no discharge monitoring report exceedances of selenium at outlet 001 since July 31, 2014. Table 4 of the OSMRE report also states under

Penalty that there was None Assessed. This CD assessed a divided civil penalty totaling \$27,500,000 to address past violations of effluent exceedences.

- ICG Eastern LLC permit WV0094889, in addition to being subject to state civil action 10-C-20, is also subject to combined States/Federal case 2:15-cv-11838 which subjected this permit to daily stipulated penalties for effluent violations. As stated in the OSMRE draft report an operating selenium treatment plant was in-place and all samples met limits.
- Hobet Mining LLC permit WV1020899 outlets 001 and 005 are subject to both state and State/Federal cases. Case 2-09-0099 subjects these outlets to category 1 daily violations. Per the CD issued in this case “Upon notification of the first Daily Violation at any Outlet, Defendants shall begin daily monitoring and sampling of discharges and implement treatment measures until the Outlet returns to compliance”. Field samples taken during the OSMRE study at this permit which showed exceedence of the “order limits” in effect were not written a SCMRA violation. Per the CD notification to the company of the violation required daily sampling and daily stipulated penalties per the sampling requirements. For WVDEP to have written a SCMRA field violation with the resulting SCMRA civil penalty when WVDEP is a party to the existing CD, and receives stipulated civil penalty for the same violation places the agency in a position of two separate enforcement actions with separate civil penalty receipt for the same violation of NPDES effluent limits. Both the separate state and combined State/Federal cases are currently undergoing modification before the court(s) now.

WVDEP continues to meet requirements under the EPA State Review Framework oversight which specified several procedures that have been instituted. In 2015, the EPA Electronic Reporting Rule placed changes in how the collection and recording of data associated with NPDES permitting and enforcement is to be documented. This has slowed our implementation of NPDES inspections, single-event violation tracking, discharge monitoring report data analysis and informal/formal enforcement procedures to meet the new electronic data tracking/submittal requirements.

While WVDEP wishes to comply with OSMRE’s view of their oversight responsibilities, we also have a responsibility to meet EPA oversight requirements as they related to the Clean Water Act and NPDES permits. Unfortunately, this may result in further conflicting views of enforcement requirements of NPDES permits between OSMRE and EPA due to differing oversight viewpoints.

Attachment 3 - CHIA

This is in response to your current draft report on “Cumulative Hydrologic Impact Assessments and Selenium Issues” provided October 3, 2016. Although we feel nothing in this report rises to the level of OSM withdrawing approval of the state program, we agree there is room for improvement in our CHIA process.

Also, after a cursory review of the report and some of the more detailed individual reports drafted after three years of OSM review, we found numerous cases where OSM reviewers did not locate pertinent information contained in the permit. Instead, they simply answered the questions on their checklist, usually with just a “yes” or “no”, without looking throughout the permit to find the particular information. Also, the reviewers posed questions about items that were not even required by the approved program or were not programmatic in nature.

One permit, for example (Brooks Run Mining Company, LLC, S201002), actually contained volume weighted ABA that OSM overlooked and didn’t find. Obviously, to properly answer some checklist questions, a more thorough review of the permit file should have been performed. Further examples of missed information are determining acreage of the permit, number of permits in the cumulative impact area (CIA), and the delineation/explanation of CIA that WVDEP found in other parts of the permit or in other write-ups. In one permit, the permitted acreage was described as a percentage of the CIA. Consequently, a simple (in-your-head) calculation would have provided the CIA’s acreage, but OSM still checked this box “no”. Another instance of unwarranted criticism resulted from some checklist questions involving topics not even required by our approved SMCRA program. As an example, there is no requirement to discuss trend stations in a CHIA. WVDEP acknowledges that trend station data can sometimes provide useful information and benefit a CHIA, but we feel that we are being unjustly criticized for not using a discretionary tool that may not be relevant to all CHIAs.

Nonetheless, and in the spirit of program improvement and cooperation, the Division of Mining and Reclamation (DMR) agrees to take actions to further improve CHIAs. We outline some of those improvements in the following paragraphs.

The existing and draft CHIA policy/guidance document will be updated, as follows:

- Inclusion of language requiring a revision of the PHC, HRP and CHIA where unpredicted pollutorial discharges occur
- Analyses to determine the cause of any unpredicted pollution
- Insure that volume weighted acid base accounting is included, if required. However, permits with no or very little acid producing or toxic material or where that material will be hauled off, may not need volume weighted ABA.
- Require that CIA acreage be calculated and a CIA depiction/explanation be provided for both surface and groundwater areas.
- Require watershed trend analyses, where appropriate.

Also, the DMR has asked the Quality Control group to review the existing CHIA policy and make further recommendations. Additionally, OSM and DMR have been working on the Underground Mine Manual and it is anticipated to be completed within the next year. When

completed, this manual will become a useful tool to improve upon PHC/CHIA long-term predictions.

The DMR has and will continue to conduct yearly training of our permitting staff to implement any changes to and improve upon our CHIA program. Training was most recently conducted in October of 2016.

A reorganization has taken place in the Division with the field permit supervisors now reporting directly to the Assistant Deputy Director in charge of permitting. This new position was created specifically to improve quality control and consistency between regional offices. As part of this quality control, all CHIAs will be reviewed before approval of the application in headquarters.

Attachment 4 - Topsoil

This is in response to your revised final draft on the “Evaluation of West Virginia’s Topsoil Protection, Removal, and Redistribution Procedures, including Topsoil Substitutes” provided December 16, 2016. The Executive Summary of the draft report appears to express concerns similar to items the Division of Mining and Reclamation previously identified and has taken and is taking action to accomplish program improvements that will be sufficient to address any concerns that may exist.

The first item of concern, in the Executive Summary, is the interchangeable use of the terms topsoil, soil, mine soil, subsoil, native soil, growth medium and topsoil substitutes not only by the rule, but by industry and regulators alike. This has led to confusion and contradictions in implementing the program requirements. The first step WVDEP-DMR took, in hopes of resolving the confusion and contradictions, was a clarification memo dated June 20, 2014 to DMR personnel. Secondly, at the 2014 annual statewide permitting training, training was provided to the staff on the program requirements for topsoil and topsoil substitutes. Thirdly, DMR has submitted to the state legislature, during their last session, rule changes to clarify these terms and their applicability. Lastly, on September 28, 2016, the DMR implemented “Topsoil & Topsoil Substitute Guidance”. This guidance was distributed and discussed with our permit review staff at their annual statewide permitting training the first week of October 2016. Additionally, at this training, OSM representatives provided training to the permitting staff on topsoil and topsoil substitutes requirements.

The second item is that an applicant did not always request a topsoil substitute variance that would be needed to comply with the proposed post mining land use. For instance, a proposed post mining land use of Forestry or Fish and Wildlife has certain requirements for growth medium depth that site conditions do not allow for the volume of topsoil to comply with those requirements. Therefore, a variance would need to be requested. Our new guidance document outlines what the agency will require from an applicant when they demonstrate there is insufficient topsoil to meet the post mining land use. Also, this information was discussed by the OSM representatives at the training.

The third item is not all of the permits clearly identify the proposed topsoil substitute material. Our new guidance document outlines for the reviewers to ensure that the proposed topsoil substitute material is clearly identified and consistent in all applicable application sections. Consideration will be given to the identified material to be incorporated into the mining and reclamation plan portion of the permit to ensure that sufficient material is available in each mining sequence.

The fourth item is some of the permits did not contain all of the information required by regulation to certify that the topsoil substitute material was acceptable. Training was provided at the 2014 permitting training to address what is required for a certification of a topsoil substitute. This is also outlined in the new guidance document and was again emphasized at the 2016 permitting training. The quantity of the substitute material will be required to be provided to ensure adequacy to complete the reclamation. We are currently working on guidance to standardize the format of a certification of analysis for our reviewers and the industry.

The fifth item is the operations were not utilizing the proper topsoil substitute material or not properly placing the material. The operations, not utilizing the proper topsoil substitute material,

did not request a substitute waiver and therefore by default would not be using the proper substitute material. The new guidance document and training of our staff will ensure the program requirements will be met.

We would like to express our concerns with Appendix I (OSMRE's Disposition of State Comments) and Part VIII Summary and Conclusions of the report where OSM acknowledged that information submitted with DEP's initial response to the April 11, 2016 draft report, in cases where a topsoil variance was requested, was not "missing" from the permit application, but OSM states that "the substitute material failed to meet the regulatory requirements of a certificate of analysis". The information in the permits met the regulatory requirements, with the exception of one, as no information was provided. However, while the information was included in the permit it was not summarized and included in the summary titled "certification of analysis" and specifically attesting to the items outlined in 38-2-14.3.c.1 through 14.3.c.3. When reviewing the information one can readily see the intent to comply with the regulatory requirements is there. One should logically conclude the analyzed strata information, provided in the topsoil substitute section of the permit, would only be provided as suitable substitute material for sustaining vegetation as required under the approved program. The laboratories providing the information are certified by the state of West Virginia, and therefore deemed qualified. When reviewing the permits, it was found the labs used the terminology "standard operating procedures" instead of "standard testing procedures" as stated in 38-2-14.3.c.3. This appears to be just word semantics. We are currently working on guidance to standardize the format of a certification of analysis for our reviewers and the industry.

In Table 2 of the report (Summary Table of Topsoil Evaluation) in the column O-9, comments of "no - tracking in on some areas with <30% slope" and "no - material not placed per plan, and tracking in on some areas with <30% slope" are made. This is reference to 38CSR2-7.6.c.3. and 7.7.c.3 under forestry and wildlife PMLU's. We would like to state that slope measurements were not taken during any of the field visits to verify slopes less than thirty percent (<30%). We do acknowledge there were areas observed, but not measured, that appeared <30% and the company representatives and DMR inspection staff were advised during the site visit that excessive tracking on those slopes may require ripping to meet program requirements.

Currently, DMR staff is determining which permits lack topsoil waivers to comport with post mining land use requirements. When it is determined that a permit requires a topsoil substitute DMR will order the permittee to submit and obtain approval with a permit revision. Remaining disturbance of 300 acres or thirty-five percent (35%) or more will require such evaluation. Surface mine permits with a status of "Not Started" that will require a permit revision, will be ordered to do so at the next Mid-Term review or Renewal, whichever comes first.

Again, unlike the federal regulation, West Virginia's rules do not have the guidelines for thin topsoil occurrences that are prevalent in our state. In the federal regulations, if the topsoil is less than six inches thick, the operator may remove the topsoil and the unconsolidated materials directly below the topsoil and treat the mixture as topsoil. We have addressed this in a rule change submitted to the legislature during the 2016 regular session. This rule change was approved by the legislature and is currently pending approval by OSMRE.

Additionally, reorganization within DMR in the spring of 2016 made regional permit supervisors reporting directly to the Assistant Deputy Director in charge of permitting in headquarters. This new position was created specifically to improve quality control and consistency between regional offices. Assistant Deputy Director of enforcement and an Assistant Director, Article 3

Enforcement Coordinator, positions were also created to improve consistency and quality control across the state.

After review, we do not believe the findings of this "Evaluation of West Virginia's Topsoil Protection, Removal, and Redistribution Procedures, including Topsoil Substitutes" draft report show a systemic program failure that rises to the level of OSMRE withdrawing approval of the state program. Again, WVDEP-DMR has taken the steps outlined above and along with continued training of the DMR staff, the implementation of quality assurance/quality control measures in headquarters and additional guidance and policy, we believe the implementation of the program requirements will be consistent and correct.

OSM has evaluated the State program annually since SMCRA was established, so it obviously would have the opportunity to oversight this topic as always.

Please feel free to contact this office should you have any additional questions or require any clarification. I look forward to working with you and your staff to resolve any concerns that you may have.



Calhoun, Roger <rcalhoun@osmre.gov>

RE: Clarification needed on 733 response NPDES

1 message

Ward, Harold D <Harold.D.Ward@wv.gov>

Wed, Jan 4, 2017 at 3:18 PM

To: "Calhoun, Roger" <rcalhoun@osmre.gov>

Cc: "Vernon, John T" <John.T.Vernon@wv.gov>, "Flesher, John L" <John.L.Flesher@wv.gov>, "Hunter, Russ M"

<Russ.M.Hunter@wv.gov>, "Halstead, Lewis A" <Lewis.A.Halstead@wv.gov>

Roger:

Your recollection of the November meeting is correct. Our sampling guidelines are the minimum number of samples an inspector is required to take during a complete SMCRA inspection and in no way intended to limit the inspector from taking additional samples during the course of routine partial inspections or inspections conducted in response to citizen complaints. Our inspection staff has complete discretion to sample any outfall they determine necessary to maintain full compliance with the terms and conditions of the SMCRA permit. Accordingly, we will continue to stress that outfalls with known compliance issues are sampled and otherwise evaluated at the frequency necessary to achieve this goal.

As you are aware, in addition to the any sample taken by our I&E staff during the course of a SMCRA inspection, DMR makes use of the self-reported sampling required under the CWA. As explained in our response, when a SNC is indicated via self-reporting, the inspector is required to field check the outfall for compliance with the reported parameter(s), including monthly averages. The guidelines we are developing will include a prescribed mechanism for dealing with exceedances of monthly averages when the sampling data obtained during an inspection demonstrates noncompliance with the terms and or conditions of the permit. This requirement alone assures that outfalls with known compliance issues, including exceedance of the monthly average, will routinely be subject to additional field sampling.

I hope this provides the clarity needed. Please feel free to contact me if you require any additional information.

From: Calhoun, Roger [mailto:rcalhoun@osmre.gov]**Sent:** Wednesday, January 04, 2017 12:12 PM**To:** Ward, Harold D <Harold.D.Ward@wv.gov>**Cc:** Vernon, John T <John.T.Vernon@wv.gov>**Subject:** Clarification needed on 733 response NPDES

Harold:

I am hoping you can quickly provide some clarity in your response to the 733 evaluation regarding SMCRA violations for NPDES exceedances.

I believe in our November meeting with Tom Shope, you advised that your inspectors would use the various NPDES reports such as the SNC list to ensure that they monitored specific outlets for the parameters found to be exceeded in those reports. Your December 29th letter advises that WVDNR now has a procedure to ensure flowing outlets will be sampled under a quarterly procedure that ensures all get checked during the year on a SMCRA inspection. However, the letter does not address the potential for additional sampling at outlets with a potential problem.

In other words – would the State sample an outlet where there is reason to believe (based on self-reported exceedances) that it could be discharging non-compliant water even if the outlet is not due on the quarterly rotational schedule for sampling?

In addition, the December 29th response does not address the evaluation finding concerning the exceedance of average monthly limits found during a SMCRA field inspection. We agree that a single WVDNR sample measurement exceeding the monthly limit is not a SMCRA violation and do not need further discourse on how proving that it is a violation would be costly or difficult. Our position is that the exceedance of an average limit is just another indicator that a particular outlet should be sampled for the potential problem parameter even if it is not in the normal quarterly rotation cycle.

So will WVDNR's new procedure require additional sampling (beyond once per year if it is on the normal quarterly cycle) when self-reported exceedances or field sampling demonstrate exceedance of average monthly limits in NPDES permits?

We are briefing the Regional director tomorrow so any clarity you can provide soon would be appreciated.

—
Roger Calhoun

Field Office Director

Office of Surface Mining Reclamation and Enforcement

Charleston, WV

304-347-7158

Calhoun, Roger <rcalhoun@osmre.gov>

Re: CHIA response- Quality Control group

1 message

Ward, Harold D <Harold.D.Ward@wv.gov>

Mon, Jan 9, 2017 at 8:44 AM

To: "Calhoun, Roger" <rcalhoun@osmre.gov>Cc: "Halstead, Lewis A" <Lewis.A.Halstead@wv.gov>

It is an internal review team that we plan to put together. Primary function will be QA/QC of prepared CHIA before being submitted to Director for consideration on new SMAs. Will also be task with developing in house training for all writers and recommending improvements to protocols/procedures related to the CHIA

Sent from my iPhone

> On Jan 9, 2017, at 8:28 AM, Calhoun, Roger <rcalhoun@osmre.gov> wrote:

>

> The CHIA response refers to a Quality Control group. Is that an internal group or are you referencing the QA/QC team?

>

> --

> Roger Calhoun

> Field Office Director

> Office of Surface Mining Reclamation and Enforcement

> Charleston, WV

> 304-347-7158

Calhoun, Roger <rcalhoun@osmre.gov>

Re: CHIA response- Quality Control group

1 message

Ward, Harold D <Harold.D.Ward@wv.gov>

Mon, Jan 9, 2017 at 8:46 AM

To: "Calhoun, Roger" <rcalhoun@osmre.gov>Cc: "Halstead, Lewis A" <Lewis.A.Halstead@wv.gov>

We have also asked the QAQC panel to develop recommendations

Sent from my iPhone

> On Jan 9, 2017, at 8:28 AM, Calhoun, Roger <rcalhoun@osmre.gov> wrote:

>

> The CHIA response refers to a Quality Control group. Is that an internal group or are you referencing the QA/QC team?

>

> --

> Roger Calhoun

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