Response to Public Comments
on the
October 1999
Draft Policy Guidelines Document:

Postmining Land Use -
Exceptions to Approximate Original Contour Requirements
for
Mountaintop Removal Operations
and
Steep Slope Mining Operations

Office of Surface Mining Reclamation and Enforcement

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OSM s Authority to Issue a Policy Paper on PMLUs

1. Comment: One commenter stated that some of the ideas in the postmining land use (PMLU) policy go beyond the clear provisions of SMCRA. The commenter asserted that, if these guidelines are intended to be binding on the regulatory authority, then the PMLU needs to be published in the Federal Register as a regulation. Otherwise, OSM should defer to the primacy states on these issues.

Answer: The PMLU policy does not create any new regulations or statutes but simply interprets the provisions of SMCRA and the Federal regulations relating to the acceptable PMLUs for mountaintop removal and steep slope mining operations. OSM has found it necessary to issue this policy paper because considerable confusion currently exists in primacy states over how broadly or narrowly to interpret these provisions. The intent of the PMLU policy is simply to afford a clear explanation of statutory and regulatory requirements that already bind regulatory authorities.

2. Comment: One commenter suggested that we remove all portions of the document related to statements that begin with we believe. The commenter asserted that the removal is necessary to assure that the regulatory authority does not exceed its authority to review and evaluate the relevant PMLU criteria for approval.

Answer: The commenter is maintaining that OSM cannot exercise its best judgement as to the meaning of the provisions of SMCRA concerning mountaintop removal mining operations. We disagree with this comment. It is our obligation to clarify the meaning of SMCRA and its implementing regulations. As is stated in the Introduction to the PMLU policy, we developed the policy document to clarify the statutory and regulatory requirements for mountaintop removal and steep slope mining operations.

3. Comment: Four commenters recommended that OSM withdraw the PMLU policy. One of the commenters stated that the PMLU policy is biased against mining, while two of the commenters stated that the PMLU policy is biased in favor of the mining industry. The fourth commenter stated that the PMLU policy is in conflict with SMCRA, or goes beyond OSM s regulatory authority.

Answer: In general, the comments which state that the PMLU policy is biased either for or against mining reflect the tension between competing goals that is inherent in SMCRA. On the one hand, SMCRA recognizes that mining is a temporary use of the land that will result in disturbances to the land, citizens, and efforts to conserve soil, water, and other natural resources (at section 101). On the other hand, SMCRA recognizes that surface mining and reclamation

technology is now so developed that effective and reasonable regulation of mining is possible (also at section 101). SMCRA at section 102 states that its purpose is to both assure a steady supply of coal and to protect the environment. While surface coal mining is destructive by its very nature, SMCRA establishes a nationwide program that both permits and regulates this method of mining. Therefore, the PMLU policy both recognizes that mountaintop removal operations may be approved under SMCRA, and it also requires that certain standards must be met prior to receiving that approval. The PMLU policy is simply trying to clarify the interpretation of the relevant SMCRA provisions.

The General AOC Requirement vs. the Need for Flat or Gently-rolling Land

1. Comment: A commenter stated the belief that Congress did not intend for mountaintop removal/valley fill mining to be the mining method of choice, but the exception only.

Answer: We agree with this comment. The PMLU policy explains that a fundamental requirement of SMCRA (at section 515(b)(3)) is that postmining land must be returned to the approximate original contour (AOC). This means that, normally, AOC is the most desired condition. SMCRA allows an exception only for mountaintop removal mining, and a variance for steep slope mining operations. However, SMCRA authorizes the exception for mountaintop removal, and the variance for steep slope mining operations only if certain specified requirements are met. Essentially, subsection 515(c)(3) of SMCRA requires the applicant to show that the AOC condition is not the most desirable goal for the permitted area, and that the PMLU that the applicant is proposing is a more desirable condition and is obtainable. If Congress had intended that mountaintop removal mining operations could be approved based on a mere request by an applicant, then there would have been no need for Congress to enact the requirements at SMCRA section 515(c)(3). SMCRA at section 515(c)(2) provides that mountaintop removal operations may be approved only if the requirements at section 515(c)(3) and (4) are met. The additional requirements at section 515(c)(3) relate to the development of the reclaimed land for certain equal or better economic or public uses as a tradeoff for not returning the land to AOC.

2. Comment: One commenter expressed concern that the PMLU policy will have a chilling effect on eastern Kentucky s ability to provide usable land for economic development by greatly inhibiting the ability of operators to conduct mountaintop removal operations. The commenter further stated that mountaintop removal operations create valuable usable land for anticipated future development. The PMLU policy will inhibit these development opportunities as well as reduce the economic benefit of these operations to Kentucky.

Answer: The SMCRA requirements make it clear that the mere creation of flat/gently rolling land by mountaintop removal operations is not sufficient to obtain regulatory approval of mountaintop removal operations. If it were, the requirements of section 515(c)(3) would be rendered meaningless. The purpose of the PMLU policy is to help assure that mountaintop removal operations are approved where the postmining land will be used for economic or public

development. SMCRA at section 515(c)(3) authorizes the approval of mountaintop removal operations only where certain specified PMLUs will be deemed to constitute an equal or better economic or public use, and where the additional requirements of section 515(c)(3) are met. It is clear from the SMCRA requirements at section 515(c)(3)(B) that there must be specific plans for the proposed PMLU, and that the applicant must present specified assurances that the proposed PMLU is practicable, obtainable, and supported. Therefore, the requirements of SMCRA are designed to both encourage and ensure that such development for economic or public benefit is needed, supported, and likely to occur. If such assurances cannot be made, the provisions of SMCRA cannot be met.

3. Comment: A commenter stated that in section B. of the Introduction, the PMLU attributes to Congress a desire to minimize both mountaintop and steep slope mining because of the large size of the valley fills that they produce. The commenter suggested that there is little in SMCRA or its legislative history to support such an assertion.

Answer: The commenter appears to have misinterpreted the meaning of the paragraph. The paragraph does not attribute the acknowledgment of this negative side of mining to Congress. In the first paragraph in section B. of the Introduction, the PMLU policy attributes to Congress the desire to minimize the effects of mining. One of the most important SMCRA requirements that is directly related to this is the AOC requirement at section 515(b)(3) of SMCRA. In the second paragraph of section B. of the Introduction, the PMLU policy states that Congress recognized that alternatives to AOC might be justified when certain beneficial PMLUs would result from the mining operation. Congress therefore created the provisions to allow exceptions to the AOC requirements for mountaintop removal and steep slope mining operations. In the third paragraph, the PMLU policy identifies a negative side to the creation of flat land by mining operations - the increased disposal of excess spoil. The paragraph is, however, meant to be instructive by pointing out that increased excess spoil will be created by those operations. In this regard, we have added a footnote which further explains the concept of excess spoil. The third paragraph, therefore, provides the reader with information on one of the common negative aspects of mountaintop removal and steep slope mining operations that we believe Congress considered prior to passing SMCRA. Finally, in the fourth paragraph, the PMLU policy states that Congress considered both the benefits of and the liabilities for mountaintop removal and steep slope mining operations when it created three sets of requirements to prevent misuse of the exceptions to return the land to AOC.

4. Comment: Commenters stated that the PMLU policy is inconsistent with SMCRA because the policy would not allow the approval of a postmining land use if that use could be achieved without a variance. A commenter asserted that the most reasonable reading of the Congressional intent is that AOC variances can be granted even when the proposed postmining land use might be achievable if the land were returned to AOC. In support of this assertion, the commenter noted that the draft PMLU document acknowledges that Congress considered but later abandoned as too restrictive, the notion that an AOC variance should be granted only when the proposed land use could not exist in the absence of flat or gently rolling terrain. Another

commenter stated that the flat land requirement should not be as limiting a factor as the PMLU policy would make it.

Answer: The PMLU policy sets forth our conclusion that, while Congress ultimately deleted the flat land necessity requirement, it did not intend to eliminate consideration of the need for flat or rolling terrain as an important criterion that regulatory authorities should use in determining whether proposed postmining land uses are appropriate. That is, the need for flat or rolling terrain is not the exclusive test to assess proposed postmining land uses. In this sense, we agree with the commenter. However, we continue to believe that the need for flat land is an important criterion that must be considered in conjunction with the requirements of section 515(c)(3) of SMCRA. Our conclusion is based on the existence of the detailed requirements at section 515(c)(3) of SMCRA which clearly require the regulatory authority to judge the applicant s plans for the proposed postmining land use, and the support for those plans. These requirements also support our conclusion that a proposed postmining land use must incorporate an equal or better public or economic benefit.

Our conclusion would not eliminate, as the commenter suggested, the ability of the regulatory authority to approve a postmining land use if it were possible to conduct that use on land reclaimed to AOC or if that use existed on the premining land. On the contrary, the PMLU policy states that the postmining land use may be the same as the premining land use, if the postmining land will be improved to add benefit to the public or the economy. Therefore, for example, if the premining land contained a few structures used as residences, this fact would not prevent the approval of a residential postmining land use if the postmining use were deemed to be an improvement that would add benefit to the public or the economy. If the premining use is forestry, the PMLU can be commercial forestry if, as the commenter suggests, the flat/gently rolling land will substantially improve the ability of the land to achieve the PMLU, and the PMLU incorporates an added economic benefit, such as higher yields of high quality timber.

5. Comment: One commenter stated that the PMLU policy states that the opportunity for flat land is balanced with a significant downside to these operations - the large size of the valley fills that they produce. The commenter does not agree that valley fills are a significant downside. In support of this opinion, the commenter stated that valley fills provide additional usable land, reduce runoff, improve base flow of streams, and provide land for economic development. Overall, the creation of level land is extremely positive and should be strongly encouraged, the commenter asserted.

Answer: We agree that valley fills can provide all the positive benefits identified by the commenter. These positive benefits do not come without a price, however. Some of the negative aspects are that the original profile of the mountain and the valley will be lost forever, and that excess spoil will be placed into valleys and streams which, consequently, alter flowpaths and aquatic ecosystems in headwater areas. These impacts are more marked in non-AOC reclamation because of the larger valley fills created. Congress has determined via SMCRA that the tradeoff will be allowed if the flat land to be created will result in a PMLU with an economic

or public benefit. The purpose of the PMLU policy is to help assure that the economic or public benefit is likely to be realized.

6. Comment: A commenter noted that in section A. of the Introduction, OSM states that the compensation principle requires that a postmining land use cannot be approved where the use could be achieved without waiving the AOC requirement, except in those rare instances where it is demonstrated that a significant public or economic benefit will be realized.... [emphasis added by the commenter] The commenter asserted that the quoted language is an overstatement. For example, the commenter added, if a proposed PMLU is residential, a PMLU clearly authorized by SMCRA for both mountaintop removal and steep slope operations, and the pre-mining land contained a few primitive residential dwellings, certainly Congress could not have intended that those residences would disqualify the land for a PMLU of residential. Instead, the commenter stated, one should only need to make the property substantially more suitable for the use (of residential) or for providing a more intensive form of the use in order to qualify for the variance - a qualification that may or may not be a rare instance of significant public or economic benefit. Because Congress has already told us what uses are of significant public or economic benefit, OSM s test must concentrate on how far the variance goes to making the land capable of achieving one of the defined uses rather than how much benefit is achieved by the particular use proposed.

Answer: It was not intended that the PMLU policy document would prohibit a PMLU that falls into the same general category as the pre-mining use. Instead, the PMLU policy is intended to clarify that whatever PMLU is approved by the regulatory authority, that PMLU must present some significant benefit either from a public policy or an economic standpoint in compensation for not returning the land to AOC. As the commenter stated, Congress has already told us what PMLU uses may be of significant public or economic benefit. In this case, a residential PMLU could represent an equal or better public or economic benefit. That does not end the matter, for Congress also established the requirements at section 515(c)(3), for mountaintop removal, which are intended to help assure that the added value inherent in the PMLU listed at section 515(c)(3) is actually achieved. It is not enough to merely select a PMLU from the list presented at section 515(c)(3), for the requirements at section 515(c)(3)(A) through (E) must also be met. Meeting these requirements will help assure that the proposed residential PMLU is not residential in name only.

To improve the clarity of the PMLU policy document, we have removed the phrase in those rare instances from paragraph two in subsection A of the Introduction. As revised, corollary (1) states that a postmining land use cannot be approved where the use could be achieved without waiving the AOC requirement, except where it is demonstrated that a significant public or economic benefit will be realized therefrom. It is important to note that the determination of whether or not a significant public or economic benefit will be realized from the proposed PMLU is made following review of the information obtained from compliance with the requirements at section 515(c)(3)(A) through (E).

Equal/Better - Higher/Better; Significant Public/Economic Benefit

1. Comment: Several commenters stated that the draft PMLU policy has gone beyond the requirements of SMCRA by creating a new standard which requires that where an exception or variance from the AOC requirement is sought, the postmining land must always offer a net benefit to the public or the economy. A commenter stated that the PMLU policy totally negates the allowance for approval of an equal use. A commenter stated that the term significant public or economic benefit is an invented term that is not supported by SMCRA, and should be removed from the PMLU policy document. A commenter stated that the PMLU policy erroneously assumes that AOC is always preferable to flat or gently rolling terrain and that compensation must be made for reclaiming the land to this less desirable flattened condition. A commenter challenged the PMLU policy as redefining the language, so that the term equal no longer means equal. The commenter stated that the dictionary defines equal to mean the same.

Answer: SMCRA at sections 515(c)(3)(A) and515(e)(3)(A) provides that a proposed postmining land use (for mountaintop removal and steep slope mining operations, respectively) must be deemed to constitute an equal or better economic or public use of the affected land. The meaning of the term better use is fairly clear, but we concluded that the meaning of the term equal use needed clarification.

We determined from our review of the language of the statute and the legislative history that Congress, in using the word equal, did not intend to allow operators to restore a site to an unimproved condition which, except for its flattened configuration is essentially the same as its premining state.

The provisions of SMCRA show a clear indication that the Congress was trying to ensure that a proposed PMLU is likely to afford some significant benefit either from a public policy or an economic standpoint in compensation for not returning the land to AOC. First, Congress established the equal or better economic or public use standard. Second, it authorized only certain specified PMLUs all of which (except the public facility use) are economic in character. And third, Congress specified specific criteria permit applicants must meet to receive approval for mountaintop removal and steep slope mining. *See* SMCRA section 515(c)(3)(B(i) through (vi). None of these criteria would be needed if the SMCRA intended that the land merely be the same as the premining use. Applicants must provide specific plans and assurances before approval of any proposed use. Specifically, applicants must show that the use will be compatible with adjacent uses, obtainable according to data regarding expected need and market, assured of investment in necessary public facilities, supported by commitments from public agencies where appropriate, practicable with respect to private financial capability for completion of the proposed use, planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining use, and designed by a registered engineer in conformance with professional standards to assure stability, drainage, and

configuration necessary for the intended use. If Congress had intended to allow postmining to be identical to premining uses and to furnish no additional economic benefit, it would not have had to enact the requirements at section 515(c)(3)(B)(i) through (vii). For example, if a postmining use of forestry for mountaintop removal operations merely had to be the same as a premining forest that is occasionally harvested for timber, of what use would the SMCRA requirements be that require data on expected need and market, or assurances that the use will be practicable with respect to private financial capability for completion of the proposed use?

In addition to the SMCRA provisions, the Federal regulations for mountaintop removal mining at 30 CFR 785.14(c)(1)(ii) provide that an applicant for mountaintop removal mining operations demonstrate compliance with the requirements for acceptable alternative postmining land uses at paragraphs (a) through (c) of 30 CFR 816.133. The requirements at 30 CFR 816.133(c) provide that higher or better uses may be approved by the regulatory authority if the listed criteria are met. That is, in addition to the equal or better SMCRA standard at section 515(c)(3)(A), the Federal regulations require compliance with the higher or better use standard at 30 CFR 816.133(c). We discuss the meaning of the terms equal or better and higher or better in section I. B. of the PMLU policy document. We also added a table to section I. B. to help summarize the interaction of the equal or better economic or public use requirement with the requirement for compliance with the alternative postmining land use regulations (higher or better). In summary, the application of both of these standards to each proposed postmining land use could have the effect of disqualifying industrial, commercial, agricultural or residential PMLUs that are of lesser economic value than the premining use. However, PMLUs that are of equal or better economic or public value than the premining uses are allowable if they confer added benefit to the landowner or the community.

2. Comment: A commenter stated that the PMLU policy document (at page 6 of the draft) seemingly presumes that the post-mining land use will always be different than the pre-mining land use. The commenter stated that this presumption is mistaken. Further, the commenter stated that OSM should recognize that a substantial improvement in the ability of land to support a proposed PMLU or a more intensive use can qualify as a higher and better use.

Answer: It is not the intention of the PMLU policy to state categorically that a proposed PMLU cannot fall into the same general category as the premining use. In every case, however, the proposed postmining land use must constitute *a higher or better use* than the premining use and satisfy the principle of compensation for the loss of AOC. With a mountaintop removal operation, for example, if the premining use is forestry of a low intensity type, where the trees are occasionally harvested for timber, the postmining use could be a higher or better kind of forestry such as a commercial operation where the forests are carefully planned and managed to produce increased yields of higher quality timber. We have revised the policy document both at section B. of the Introduction and at section III.B.3. to make this point clearer. Section III.B. of the PMLU policy document presents guidance for a PMLU of Forestry. When these guidelines are followed, a substantial improvement in the ability of the land to support a proposed commercial forestry operation, and a more intensive use and economic value, should be realized. When

authorized under the approved regulatory program, commercial forestry operations of this nature would qualify as a higher and better use than low intensity forestry (lands not actively managed for production of wood products). Within this framework, we agree with the comment that a substantial improvement in the ability of land to support a proposed PMLU or a more intensive use can help a proposed PMLU qualify as a higher and better use. The applicant must still comply, however, with the alternative PMLU requirements of 30 CFR 816.133(a)(through (c). In addition, the application must meet the requirements of section 515(c)(3)(B)(i) through (vii) of the Act, which will provide the regulatory authority with the necessary information to determine whether or not the proposed PMLU is likely to be achieved.

AOC Exceptions

1. Comment: A commenter stated that AOC variances should be approved only where the size of the area receiving the AOC variance is appropriate to the size of the proposed postmining land use. For example, an AOC variance for a hospital (a public facility or public use) should be granted for 50 to 100 acres and not for a full permit area of, for example, 3,000 acres.

Answer: We concur with this comment. Section 515(c)(3)(A) of SMCRA requires a finding that the postmining land use must be deemed to constitute an equal or better use than the premining use. The regulatory authority could appropriately deem that 100 acres out of 2000 acres is not an equal or better use, and therefore could limit the proportion of the minesite that can be left flat to that actually needed to create the flat land required to achieve the approved postmining land use. Failure to limit the acreage to that actually needed to create the flat land needed for the PMLU may render the other mountaintop removal requirements at section 515(c)(3) and (4) meaningless. In addition, the regulatory authority must also ensure that the disposal of excess spoil will be done in a manner that minimizes disturbance to the hydrologic balance within the permit and adjacent areas and prevents material damage to the hydrologic balance outside the permit area. To achieve these objectives, spoil placement must be optimized to accomplish AOC restoration to the extent practicable.

2. Comment: A commenter stated that typically, even where AOC variances are sought, they are not sought for the entire permitted acreage, and operators frequently propose to return some areas to AOC. The commenter recommended that OSM make the policy clearer to reflect that the PMLU policy applies only to the areas that will not be restored to AOC. The PMLU policy should not apply to areas that do not receive an exception or a variance to the AOC requirements.

Answer: We concur with the commenter that the PMLU policy document applies only to areas that will not be returned to AOC. We have revised the PMLU document (at section II.C.) to make this point clearer.

3. Comment: A commenter stated that all references to 30 CFR 816/817.133(d) should be deleted in reference to the proposed land uses for areas where a variance to AOC is granted

pursuant to 785.14 - mountaintop removal mining. The standards at (d), for steep slope mining, are similar, the commenter stated, but not identical to the applicable standards at 30 CFR 785.14 for mountaintop mining.

Answer: We agree with the commenter that the PMLU policy document incorrectly cites 30 CFR 816/817.133(d) at three locations related to mountaintop removal mining operations. 30 CFR 816/817.133(d) applies to steep slope mining operations, but not mountaintop removal mining operations. The three incorrect citations appeared at subsections 4 in Section III. A., B., and C. The correct citation is 30 CFR 785.14(c)(1)(v). This provision requires the regulatory authority to provide, in writing, a comment period of not more than 60 days to the governing body in whose jurisdiction the land is located and any State or Federal agency that have an interest in the proposed use of the land that will be mined by mountaintop removal operations.

We have corrected these errors by revising subsections 4 in Section III. A., B., and C. to accord with the requirements of 30 CFR 785.14(c)(1)(v), and have deleted reference to 30 CFR 816/817.133(d). However, mountaintop removal operations must still comply with the requirements at 30 CFR 816.133(a) through (c).

The Role of the Regulatory Authority in Evaluating Proposed PMLUs

1. Comment: A number of commenters questioned the role of the regulatory authority in approving postmining land uses. One commenter asserted that, throughout the draft document, OSM expresses a theme that the regulatory authority can or must decide which postmining land uses are acceptable. The commenter stated that, rather than approving or denying any alternative postmining land use, the regulatory authority is limited to approving or denying the permittee s reclamation plan. This commenter further stated that SMCRA neither prohibits nor requires the restoration of the mined land to any specific use; SMCRA only requires that mined land be made suitable for the proposed use or uses. The commenter also stated that SMCRA contains no duty for the regulatory authority to approve a postmining use. Two commenters asserted that the regulatory authority should not decide on land use planning if no planning agency exists.

Answer: We disagree with the proposition that under SMCRA the regulatory authority lacks authority to approve postmining land uses. SMCRA at section 515(c)(2) authorizes the regulatory authority to grant a mountaintop removal permit without regard to the AOC requirements, *only if* the applicant meets the requirements of section 515(c)(3) and (4). If the requirements are not met, a permit for mountaintop removal cannot be granted. If the applicant proposes a PMLU that is not listed at section 515(c)(3) for mountaintop removal, that use cannot be approved. The SMCRA requirements at section 515(c)(3) provide the requirements that the applicant must address, and the regulatory authority must evaluate, with regard to the proposed PMLU. The regulatory authority does not select or propose the PMLU, but it must in all cases evaluate the applicable criteria prior to deciding whether or not the applicant (and the proposed PMLU) has met the requirements of section 515(c)(3) and (4).

Consequently, we disagree with the comment that the regulatory authority is limited to approving or denying the permittee s reclamation plan rather than approving or denying any alternative postmining land use. SMCRA clearly requires the regulatory authority to evaluate both the proposed PMLU and the proposed reclamation plan. Contrary to the comments, this responsibility rests on the regulatory authority whether or not local planning agencies exist. Moreover, although SMCRA does not require that a particular postmining use actually be implemented at the time of bond release, it does require the applicant to submit, and the regulatory authority to assess, material which will ensure that the proposed PMLU is not simply a ruse. *See* SMCRA section 515(c)(3) and (4), pertaining to mountaintop removal operations and SMCRA section 515(e)(3) and (4), pertaining to steep slope mining operations. Specifically, for mountaintop removal operations, SMCRA requires the applicant, prior to receiving a permit for mountaintop removal operations, to submit specific plans for the proposed postmining land use and the appropriate assurances listed at section 515(c)(3)(B)(i) through (vii). The regulatory authority must review the proposed plans and assurances submitted by the applicant in accordance with section 515(c)(3)(B)(i) through (vii). In addition, the applicant must comply with the requirements of 30 CFR 785.14 for mountaintop removal operations, and the performance standards at 30 CFR 816.133(a) through (c) concerning alternative postmining land uses must be met. The standards at 30 CFR 816.133(c) provide that there must be a reasonable likelihood for achievement of the proposed use, and that the proposed use will not be impractical or unreasonable, or involve unreasonable delay in implementation of the PMLU. It is the regulatory authority s responsibility to assure that those requirements are met.

2. Comment: A number of commenters asserted that the policy document ignores, or would restrict landowner rights. Several commenters stated that the regulatory authority should not select the PMLU; the landowner should.

Answer: It is not the policy document but SMCRA itself that limits the PMLUs that may be approved in connection with AOC variances for mountaintop and steep slope operations. SMCRA restricts the postmining land uses that can approved to those listed at section 515(c)(3), for mountaintop removal operations, and to those listed at section 515(e)(2) for steep slope mining operations. Also, the applicant must assure that the PMLU that is proposed accords with the landowner s wishes. 30 CFR 816.133(c).

3. Comment: A number of commenters expressed concern that the PMLU policy document would require that the regulatory authority interfere, or second-guess land use planning and zoning agencies concerning the use of mountaintop removal mining postmining lands. One commenter stated that, when a land use is chosen by the landowner and deemed by the local government to be consistent with local land use requirements, if there are any, then it is appropriate for the regulatory authority to grant a variance from AOC.

Answer: We disagree with the proposition that the regulatory must defer to the decisions of local land use agencies in approving the postmining land use. SMCRA section 515(c)(3)(A) simply requires the regulatory authority to *consult* with the appropriate land use planning agencies, if

any exist, to determine whether or not the proposed postmining land use constitutes an equal or better economic or public use of the affected land, as compared with premining use. Nowhere does SMCRA make the opinions of the local agencies on that issue binding on the regulatory authority. Hopefully, the regulatory authority and the local land use agency can cooperate to reach results that satisfy both parties. This mutual satisfaction, however, cannot occur if the local agencies insist on PMLUs that are not authorized under SMCRA or the pertinent regulations, or the permit applicants fail to meet the other standards of SMCRA in section 515(c)(3) and (4).

4. Comment: A commenter stated that it is illegal for OSM to require the submittal of documentation, transcripts of meetings, and potential impacts of the proposed mining on adjacent land uses, or to discuss the compatibility with adjacent land uses even in the absence of any appropriate State or local planning or zoning ordinances.

Answer: It is not the intention of the PMLU policy to require the submittal of any specific documentation. However, SMCRA at section 515(c)(3)(B)(i) does require that the applicant for mountaintop removal operations must present appropriate assurances that the proposed use is compatible with adjacent land uses. We discussed this SMCRA requirement in the draft PMLU policy document at sections III. A. 2., III.B.2.(b), and III.C.2.(b). What information would constitute appropriate assurances that the proposed PMLU is compatible with adjacent land uses? In many cases, what is compatible may be self-evident. For example, when commercial forestry is the proposed PMLU for a mountaintop removal operation, and the adjacent lands are forests that are occasionally harvested, forestry is a compatible land use. Such information would be easily obtained from the applicant s permit map, and the explanation would be straightforward. However, if the proposed permit area is subject to a zoning ordinance, it would be appropriate for the applicant to make a showing that the proposed PMLU is in accordance with the zoning provisions. If a zoning hearing had been held, it would be appropriate that the applicant submit a transcript of the hearing (if one exists). However, if no zoning ordinances exist, as may be the case in rural areas, or no hearing took place, it would be appropriate that the applicant s submittal say so. An application would be incomplete without information that addresses this requirement with enough detail to enable the regulatory authority to determine whether or not the applicant has made appropriate assurances that the proposed use is compatible with adjacent land uses.

The Time for Implementation of PMLUs

Comment: One commenter asked whether a contradiction exists between the statement that a proposed use must not involve unreasonable delay in implementation (page 17, paragraph (5) of the draft policy) and the statement that [t]here is no requirement, either in SMCRA or the regulations, that postmining uses be implemented immediately following mining" (page 12, paragraph D of the draft policy). The commenter also asked when should the PMLU be implemented, if not immediately. Finally, the commenter asserted that the language at Section II. D., concerning bond release requirements, is too loose.

Answer: There is no contradiction in the two statements. SMCRA contains no specific requirement for immediate implementation of a proposed mountaintop removal PMLU. SMCRA at section 515(b)(2) and 30 CFR 816.133(c)(3)(iii) provide that implementation of a PMLU must not involve unreasonable delay in implementation. The term unreasonable delay contains some flexibility as to the timeliness of when the PMLU is implemented. For example, a reasonable delay might involve the weather. A completed reclamation site could sit idle throughout the winter and development not begin until the spring. It might also be reasonable to expect some delay in actually securing funding, architectural plans, partners in a joint venture, or the municipal permits required for construction. However, under SMCRA, the permit application should contain enough information to inform the regulatory authority as to when a PMLU is planned to be implemented. For example, section 515(c)(3)(B) requires the applicant to present specific plans for the proposed PMLU, and to present appropriate assurances concerning the provisions listed at section 515(c)(3)(B)(i) through (vi). Section 515(c)(3)(B)(vi) provides that the proposed PMLU must be planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the PMLU. It is the regulatory authority s responsibility to determine if the proposed implementation schedule is reasonable. We expect that most approvals, however, would be for those PMLUs that will be implemented in conjunction with the operator s completion of the reclamation plan.

We disagree that Section II. D. is too loose and must be rewritten. This paragraph clarifies that there are no special bond release requirements unique to mountaintop removal or steep slope mining operations with a variance from the AOC requirements. That is, mountaintop removal operations and steep slope mining operations with an AOC variance must comply with all the normal bond release requirements. To obtain full bond release, the permittee must demonstrate successful completion of all reclamation requirements of the permit and regulatory program. 30 CFR 800.40(c)(3). For mountaintop removal operations, the permittee must demonstrate adherence to the schedule that is attached to the reclamation plan (as required by SMCRA at section 515(c)(3)(B)(vi). This schedule must identify how the mining and reclamation operations will be integrated with the PMLU. Therefore, the details of what must be accomplished for bond release will be identified in the reclamation plan with the attached schedule.

Prospective vs. Retroactive Application of the PMLU Policy

Comment: One commenter stated that the PMLU policy should only be implemented prospectively, and not be used to evaluate permits already issued.

Answer: SMCRA authorizes limited exceptions to the AOC requirements for mountaintop removal and steep slope mining operations. Operators wishing to take advantage of one of these exceptions must provide specific information and comply with specific provisions of the Act. SMCRA also specifies requirements for regulatory authorities that will review such permit requests, specifies information that must be obtained and findings that must be made prior to approval of such requests. As an example, for mountaintop removal operations, SMCRA

requires an applicant to submit specific plans, provide specific assurances for the proposed PMLU, and for the regulatory authority to make specific findings regarding the application and the proposed PMLU. SMCRA also limits the PMLU to only those specified in the Act.

The PMLU policy document is intended to help both applicants and State regulatory authorities better understand their obligations and requirements under the Act, and the limits SMCRA places on the PMLUs that can be proposed. The document creates no new requirements, but, rather, reiterates and clarifies the relevant SMCRA requirements and provides examples of how they can best be met. If, during OSM's oversight of a State program, it becomes apparent that a deficiency exists that actually causes a violation of the approved State program with on-the-ground consequences, action will be required of the State to ensure compliance with existing requirements of SMCRA. Such would have been the case even prior to the issuance of the PMLU policy document. For example, if a postmining land use is authorized that is not part of the approved State program, it is anticipated that where practicable (i.e., where the site has not been backfilled, graded and revegetated) the permit would have to be revised. On the other hand, if the deficiency relates only to permit documentation and there is no violation of performance standards, no correction would likely be required. We will deal with deficiencies in the permitting process in accordance with Directive REG-8, which governs oversight of approved State programs. We do not believe that sites which have been backfilled, graded and revegetated should be redisturbed in order to satisfy these requirements. We will work closely with the States on a site-specific basis to ensure that the underlying State program requirements are being properly enforced.

Other General Comments

1. Comment: One commenter stated that the Introduction (at Section I. B.), should clarify the intent of the law on depressions at SMCRA section 515(b)(3). The commenter also stated that OSM should amend the PMLU policy by changing many of its and s to or s or to and/or s. This would help the PMLU policy to encourage innovation and biodiversity, and to avoid boring monocultures. The commenter also recommended that OSM should encourage innovation, new ways to protect water resources, to encourage native species, and make the land more productive.

Answer: The language in Section I. B., to which the commenter is referring pertains to the requirement to return land to its approximate original contour (AOC), and not to mountaintop removal operations. Therefore, this comment will not be addressed here.

In response to the commenter s recommendation that OSM encourage biodiversity, we note that SMCRA s authorization of mountaintop removal mining may, to some degree, be considered a trade of biodiversity for an economic or public benefit. However, while the postmining site may be planned, for example, to be the future location of an industrial operation, there is nothing in the PMLU policy that would prevent the site from also being landscaped with biodiversity in mind. The same can be said for the landscaping design that would accompany any of the

approved PMLUs. In addition, the revegetation requirements at 30 CFR 816.111 and 816.116, as well as the fish and wildlife protection provisions at 30 CFR 816.97 apply to mountaintop removal and steep slope mining operations with a variance from the AOC requirements. These provisions will continue to encourage the reestablishment of diverse native plant species and protection of wildlife.

The commenter did not provide any specific examples for the recommendation that OSM should amend the PMLU policy by changing many of its and s to or s or to and/or s. Therefore, we have not addressed this comment.

Concerning the comment that OSM should encourage innovation and new ways to protect water and other resources, the PMLU policy does not restrict such innovation. Such innovation must, however, be incorporated within one of the approvable PMLUs as set forth in section 515(c)(3) and 515(e)(2) of SMCRA. The Federal regulations provide for the use of such innovation by authorizing experimental practices at 30 CFR 785.13.

2. Comment: Referring to the requirement that a PMLU be compatible with adjacent land uses, one commenter stated that there is hardly anything less compatible with adjacent land uses than mountaintop removal/valley fill strip mining, and that this is especially so compared to the mixed deciduous hardwood forests found in eastern Kentucky.

Answer: It appears the commenter has misinterpreted this requirement. SMCRA at section 515(c)(3)(B)(i) provides that the applicant must provide assurances that the PMLU proposed for mountaintop removal mining must be compatible with adjacent land uses. This provision does not require that the mining itself be compatible with adjacent land uses as the commenter indicates.

3. Comment: One commenter stated that the Congressional history of SMCRA exists in an electronic format, and this should be made available to the public.

Answer: The Congressional history of SMCRA does exist in an electronic format, and is available to the public via LEXIS-NEXIS, a commercial, full-text, online information service (ph:1-800-346-9759).

4. Comment: A commenter addressed the SMCRA provision at section 515(e)(3)(C) which provides that a variance from the AOC requirements may be approved for steep slope mining operations if after approval of the appropriate state environmental agencies, the watershed of the affected land is deemed to be improved. The commenter asked how a watershed can be improved by strip mining it.

Answer: This SMCRA provision specifically relates to approval or denial of a variance from the AOC requirements, and not approval or denial of a permit. That is, even if the AOC variance is not approved, a permit to mine the steep slope area could still be approved.

One of the ways that approval of an AOC variance could conceivably result in an environmental improvement to the affected watershed is if, because of the altered topography (the newly created flat bench area, and associated valley fill), the watershed is less prone to flooding hazard. This benefit could occur because the bench area (the focus of the variance) is less steep than the approximate original contour and can intercept, slow, and/or temporarily store water flow, thereby reducing the rate of runoff as compared to the premining condition. The valley fill slopes may be terraced to slow runoff of rainfall and snow melt. Water that infiltrates the fill might be released slowly, and have the result of helping to reduce rates of flow in nearby streams in the steep slope area, while at the same time helping to improve the consistency of the level of the water in the streams on a year-round basis.

Fish and Wildlife PMLU

1. Comment: Two commenters supported the approval of fish and wildlife habitat as an approvable PMLU. One commenter stated that if fish and wildlife habitat was meant to be excluded as an approvable PMLU, then the Federal regulations would have said that the listed PMLU are the only postmining land uses allowed for mountaintop removal operations. Another commenter stated that it is not correct for the public to make such use of the land and not the family that has lived on the property and paid taxes on it for generations. The commenter stated that the surface owners in eastern Kentucky would appreciate having their surface land reclaimed in such a manner as to leave flat, usable land, with ponds, not only suitable for future development, but presently suitable habitat for elk, white tail deer, wild turkey and fishing. The commenter also thought fish and wildlife habitat should be found to comply with the statutory requirements for AOC variance requests.

The commenter also submitted a published article concerning the reestablishment of elk to eastern Kentucky for the first time in 150 years. The commenter stated that this project had overwhelming public support, and without the grazing lands created by mountaintop removal mining, the success of this project would be doubtful. It is difficult to understand, the commenter stated, why OSM does not whole-heartedly support such projects.

One commenter stated that it was good that OSM dropped fish and wildlife habitat as a PMLU.

Answer: OSM recognizes that the only approvable PMLUs for mountaintop removal and steep slope mining operations are those listed at SMCRA section 515(c)(3) and (e)(2), respectively. The Federal regulations merely restate those same uses. PMLUs that are not listed, and that are not encompassed within a listed PMLU, are not approvable. Therefore, fish and wildlife habitat cannot be approved as a PMLU by itself.

In our discussion at section II. B. of the PMLU policy, concerning which PMLU s qualify for an exemption or a variance from the requirements to restore AOC, we stated that fish and wildlife habitat does not qualify as a PMLU. We also stated, that fish and wildlife habitat can play a

supportive role in an approvable PMLU such as a public facility (including recreational facilities) use. A commenter, in arguing for approval of fish and wildlife habitat for mountaintop removal, stated that it is unfair that the public can use fish and wildlife habitat (via the public/recreational facilities PMLU) on the land, but a family that has lived on the property and paid taxes on it for generations cannot. This comment is not entirely accurate.

The PMLU policy document states that fish and wildlife habitat can play a supporting role in the development of a facility that is authorized under the public facility (including recreational facilities) use. That example is not the only example that we could have used. For example, it might be appropriate to include some fish and wildlife habitat in the design of an industrial park under the industrial use, in the design of a residential area under the residential use, and possibly even in the design of a farm under an agricultural use for mountaintop removal operations. In this same manner, habitat for elk, turkey, or other species can be incorporated into an approvable PMLU. In addition, the Federal regulations at 30 CFR 816.97 concerning the protection of fish and wildlife habitat and related environmental values, encourages the use of fish and wildlife habitat in all PMLUs. The point is, while fish and wildlife habitat can be a supporting component of an approvable PMLU, it cannot be approved as a PMLU by itself for mountaintop removal operations at steep slope mining operations. See the May 14, 1999, Federal Register (64 FR 26288-26295) for an OSM decision not to approve a State program amendment which proposed fish and wildlife habitat and recreation lands as an approvable PMLU for mountaintop removal operations.

2. Comment: A commenter stated that the PMLU of residential listed on page 12 of the PMLU policy is a catch-all to replace fish and wildlife habitat.

Answer: The PMLU of residential is approved in SMCRA for both mountaintop removal (at 515(c)(3)) and steep slope mining operations (at 515(e)(2)). Fish and wildlife habitat was not approved in SMCRA for either mountaintop removal or steep slope mining operations with AOC variances. One of our reasons for developing the PMLU policy is to help assure that the SMCRA requirements at section 515(c)(3)(B) are better understood and complied with. Compliance with these provisions should prevent implementation problems with the residential and other approvable PMLUs.

Forestry

1. Comment: Two commenters stated that the Forestry PMLU should also be authorized for steep slope mining. These commenters suggested that Forestry could be approved under the Commercial PMLU for steep slope mining operations. One of the commenters explained that the dictionary defines commercial as an adjective which designates goods, often unrefined, produced and distributed in large quantities for use by industry. The commenter asserted that a person could not reasonably argue that saw timber and rough sawed lumber do not fit the definition of goods, unrefined or partially refined, intended for use by the furniture and/or

construction industries. Agriculture, however is defined as the science, art and business of cultivating the soil, producing crops, and raising livestock, and farming. A commenter suggested that OSM revise its regulations to authorize Forestry as a PMLU for steep slope mining operations.

Answer: As stated in section III.B. of the PMLU policy document, the preamble to the Federal rules specifically categorizes forestry as an agricultural land use. See 48 FR 39893, September 1, 1983. Therefore, it is not possible to approve forestry as a commercial land use without first revising the Federal regulations to incorporate commercial forestry within the commercial PMLU category. However, as discussed below, we do not believe that revision of the rules in this manner would be consistent with the intent of Congress.

As amended on the floor of the Senate, S. 7, the Senate version of SMCRA, would have allowed all surface coal mining operations to request an exception from AOC restoration requirements on the basis of a number of postmining land uses, one of which was agriculture. However, in crafting the steep slope AOC variance provisions at section 515(e) of SMCRA, the conference committee restricted this variance provision to industrial, commercial, residential, and public postmining land uses, with the clarification that public uses include recreational facilities. *See* H.R. CONF. REP. NO. 95-493, at 55-56 (1977).

Congressman Udall provided the following explanation of the conference committee s action:

> Both the House and Senate bills provided for regrading to approximate original contour including the complete backfilling of the highwall.
>
> The Senate bill however provided a variance to the [requirements for] approximate original contour and backfilling highwalls completely for a wide range of postmining land uses. * * * [*Discussion of highwall elimination variance omitted.*]
>
> The conference report includes a modified variance to the approximate original contour standard which requires however that in every instance all highwalls are to be completely backfilled. This amounts to a variance from the configuration aspects of the approximate original contour regrading standard. This gives an opportunity for a potential range of postmining land uses from those operations which would result in a very wide bench accommodating both the stable and complete backfilling of the highwall as well as additional areas for the planned land uses. This variance however is only for developed land uses such as industrial, residential or commercial sites. **Agricultural, open space and similar types of land uses do not qualify.**

123 CONG. REC. H7584 (July 21, 1977), emphasis added.

Given this statement and the committee s deletion of agriculture from the list of acceptable

postmining land uses for AOC restoration variances for steep slope mining operations, the legislative history does not appear to support classification of commercial agriculture and commercial forestry as subsets of the commercial land use category in section 515(e) of SMCRA.

2. Comment: Two commenters urged OSM to look carefully at the Forestry PMLU, because it could easily result in more misuse of the exceptions. One commenter stated that forestry is the biggest loophole of all, because the mixed deciduous hardwood forests already in place are far more valuable than anything that could be planted on such sites. The commenter further stated that there is no way that managed forests can be grown on mountaintop removal sites that are more valuable (better than) the natural forests there prior to mining. Mountaintop removal sites are notoriously poor for growing anything, the commenter asserted. One commenter suggested that the applicant must show that the reclamation would make the property substantially more suitable for the proposed use, or for providing a more intensive form of the use.

Answer: We agree with the commenters concern that the approval of a forestry PMLU could be misused. As we stated in the PMLU policy document, a PMLU approved for mountaintop removal or steep slope mining operations must represent a net benefit to the public or the economy over the pre-mining use. When an applicant appropriately addresses the SMCRA requirements at section 515(c)(3) and the Federal regulations at 30 CFR 785.14, the regulatory authority should have the necessary information to make a make an informed decision as to whether or not the proposed PMLU represents a net benefit to the public or the economy over the pre-mining use. If a PMLU of commercial forestry is proposed when the pre-mining land is forested and occasionally harvested, the information provided by the applicant must demonstrate how the postmining forestry operations represent a net benefit over the pre-mining forestry use.

Since Congress already listed the uses that may constitute equal or better economic or public use, OSM s test must concentrate on how far the variance goes to making the land suitable of achieving one of the defined uses, including how much benefit is achieved by the particular proposed use . Therefore, to prevent abuse of a proposed commercial forestry use, or any PMLU, the regulatory authority must assure that the requirements of section 515(c)(3) of SMCRA are properly met.

Public use/Public Facilities use

1. Comment: One commenter stated that if OSM wishes to define public use and public facilities, it should do so by promulgating new rules.

Answer: The PMLU policy document uses common dictionary definitions of public, and facilities in its explanation of the public facility (including recreational facilities) and public use (including recreational facilities) PMLUs. As a result of our review of the legislative history of SMCRA, we concluded that Congress did not intend any difference in the meaning of

the terms public use and public facilities. Therefore, a promulgated rule is not necessary. In addition, see the May 14, 1999, Federal Register (64 FR 26288-26295) for an OSM decision not to approve a State program amendment which proposed fish and wildlife habitat and recreation lands as an approvable PMLU for mountaintop removal operations. That decision presents additional discussion concerning public use and public facilities.

2. Comment: A commenter stated that if the PMLU policy interpretation of public use was used, each private surface owner would have to give up their land to the public in order to get an approved post mining land use with an AOC variance, and we know this is not what Congress intended. The commenter also stated that the PMLU definition of public should only apply to public-owned State or Federal lands.

Answer: We disagree. A private landowner can maintain ownership of land that receives PMLU approval for a public facility (including recreational facilities) or public use (including recreational facilities) use. For example, a private owner could maintain ownership of land that is developed and used for a shopping center, an airport or other public facility and lease the land to the developer or end user. Some public facilities, such as a drinking water reservoir, while they may constitute a public facility, may not allow the general public access to the sites. If the commenter is saying that a private owner must allow public access to private land in order to receive approval of a public facility (including recreational facilities) and public use (including recreational facilities) PMLU, the commenter is correct. For example, if a public recreation facility is approved, and the land would be developed for hiking, fishing, camping, and the like, the general public must have access to that recreational facility. If an applicant applies for a public use, the use must actually be open to the public or benefit the general public in some way (e.g., the water reservoir example above). A public use cannot benefit just a few individuals.

SMCRA allows for only limited exceptions from the requirements to restore mined land to AOC. Mountaintop removal operations and steep slope mining operations with variances from the AOC requirements may be approved, but Congress limited the PMLUs that can be approved for those variances. However, if the land is returned to AOC, fish and wildlife, recreation, and other uses could be approved, and access to the land can be restricted.

3. Comment: One commenter stated that the language at section III. A. concerning public facility use is too broad and loose. The commenter asked how big is a park? How big is a reservoir? Practically every strip job around, the commenter stated, has a full, unwanted stable of ATVs, ORVs, and dirt bikes.

Answer: Each of the approvable PMLUs are sufficiently broad that valuable PMLUs will not be excluded. The SMCRA provisions at section 515(c)(3), however, are intended to help assure that a proposed use is indeed, a valuable economic or public use compared with the premining use, and that the applicant presents assurances that the use will be compatible, obtainable, practicable, and planned to integrate the mining operation and reclamation to achieve the postmining land

use. It is the regulatory authority s responsibility to see that these requirements are met. The PMLU policy document is designed to provide the regulatory authority with guidance on how to interpret the provisions at section 515(c)(3).

The commenter s reference to an unwanted stable of ATVs, ORVs, and dirt bikes actually refers to *de facto* uses of reclaimed land. The presence of ATVs, ORVs, and dirt bikes does not necessarily mean that the approved PMLU is public facility (including recreational facilities) use. Rather, the ATV or ORV use may represent unauthorized use of a landowner s property. Such unauthorized use could occur with any of the approvable PMLUs.

Grazing/Pasture - Low Intensity Agriculture

1. Comment: One commenter stated that the draft PMLU policy document misquotes and misreads the legislative history at H.R. 95-218 page 109. The Committee did not, the commenter stated, conclude that grazing or pastureland would not be better suited to flatter land or that an AOC variance could not be granted for such uses.

Another commenter stated that OSM should encourage grazing and pastureland. In Appalachia, any transition of steep inaccessible terrain into a productive use should be heartily encouraged, the commenter said. The commenter also urged OSM to delete any language from the PMLU policy that discourages the use of grazing and pastureland, because it serves no legitimate purpose. This commenter and another stated that the draft PMLU policy is wrong where it states that, we cannot foresee a situation where the requirements of section 515(c)(3) of the Act [SMCRA] are applied and a low-intensity agricultural use could be approved. The commenter asserted that the quoted language represents an arbitrary reversal of over 20 years of an accepted postmining land use under SMCRA.

Another commenter stated that it was not the intent of Congress to restrict the postmining land use of agriculture.

One commenter, however, stated that the agricultural exemption should be looked at carefully. Allowing for types of low density, low maintenance agricultural activities such as pastureland is another way around reclamation that could be useful to the public if properly done.

Answer: Basically, most of the commenters above feel that the PMLU policy is mistaken in its interpretation of the intent of Congress regarding the acceptability of low intensity agriculture as an approvable agricultural PMLU. Therefore, it is important to review the PMLU policy s rationale concerning low-intensity agriculture.

When Congress enacted SMCRA, it chose to allow exceptions from the AOC requirements only in situations where beneficial postmining land uses could compensate for not returning the land to AOC. The policy document refers to this idea as an overarching principle of compensation.

This overarching principle of compensation forms the backbone of much of the PMLU policy.

If Congress had intended that mountaintop removal mining operations be automatically exempt from the AOC requirements or that the listed PMLUs constitute on equal or better use, there would be no need for the requirements of SMCRA section 515(c)(3) and (4). In that case, section 515(c)(2) would only need to explain what constitutes mountaintop removal (as it currently does) and then exempt such operations from the AOC requirements if they achieve certain PMLUs. Instead, section 515(c)(2) states that mountaintop removal operations may be approved, but only if the additional requirements at section 515(c)(3) and (4) are met.

SMCRA at section 515(c) does not explicitly state why the requirements at 515(c)(3) and (4) are required. Therefore, we looked carefully at what is required at section 515(c)(3) and (4) of SMCRA, and reviewed the pertinent parts of the relevant Congressional record.

Concerning the SMCRA requirements, Congress has required three things. First, at section 515(c)(3) only certain, specific PMLUs are authorized for mountaintop removal operations. Ignoring for a moment the public use component of equal or better economic or public use, all of the PMLUs listed that can be approved for mountaintop removal operations are economic in nature.

Second, a PMLU proposed for a mountaintop removal operation must constitute an equal or better economic or public use than the premining use (515(c)(3)(A)). Again ignoring the public use component, a proposed postmining use must be deemed to be an equal or a better economic use. The Federal regulations concerning mountaintop removal operations (at 30 CFR 785.14(c)(1)(ii)) also state that the applicant must demonstrate compliance with the alternative postmining land use requirements at 30 CFR 816.133(a) through (c). 30 CFR 816.133(c) provides that a higher or better standard must be met. Therefore, if grazing and pasture land use and other forms of low intensity agriculture are proposed for postmining use at a mountaintop removal operation, that use must be deemed to be a higher or better use than the premining use.

Third, Congress added the requirements at 515(c)(3)(A) and (B). These SMCRA requirements are specific and detailed, and represent a standard to which a proposed PMLU must rise if it is to be approved by the regulatory authority.

Let us take a look at the requirements at 515(c)(3) from the perspective of a proposed low intensity agricultural use such as pasture and grazing. First, the regulatory authority must consult with any existing land use planning agencies to obtain their opinions concerning whether or not the proposed low intensity agricultural use is deemed to constitute an equal or better use than the premining use. And, to meet the requirements of 30 CFR 816.133(c), the use must be deemed to be a higher or better use than the postmining use. In making its recommendation, the land use planning agency would likely reflect on the relative value of a premining forest that is occasionally harvested for its timber value, with the value of the proposed low intensity

agricultural use of, for example the grazing of cattle. If no appropriate land use planning agencies exist that could be consulted, the regulatory authority must still make the judgment as to whether or not it deems the proposed low intensity agricultural use, a higher or better use than the premining use of forest that is occasionally harvested.

In addition to the equal/better and higher/better determinations, the regulatory authority must also evaluate the specific plans and assurances submitted by the applicant for the proposed postmining use as is required by SMCRA section 515(c)(3)(B)(i) through (vi). The draft PMLU policy document provides guidance concerning these provisions at section III. C.

The draft PMLU policy quotes the Congressional record at H.R. Rep. No. 95-218, at 109 (1977), concerning pasture, grassland, and similar agricultural land uses at section I. B. 1. According to the quoted language, Congress concluded that such agricultural activities are not considered intensive uses, and can be conducted on reclaimed mine slopes without requiring variances from the approximate original contour and spoil placement standards. Based on this quoted Congressional language, there might be little reason for a regulatory authority to conclude that a low-intensity agricultural use represents a higher or better use than a premining use of forestry.

However, one commenter stated that OSM has misquoted and misinterpreted Congress intent here. We disagree. The quote in the PMLU policy does not contain an error. There is, however, more to the Congressional statement than the draft PMLU policy has quoted. The House Report also stated that, [t]he committee recognizes that in some areas and under some conditions, intensive agricultural activity such as row crop cultivation are suitable, postmining land uses. That is, it was the House s opinion in the quoted language that intensive row crop cultivation might, in some areas and under some conditions be a suitable PMLU. The House then clarified that pasture, grassland, and similar agricultural land uses are not considered intensive uses, and that such uses can be conducted on reclaimed slopes without requiring variances from the AOC requirements. Therefore, the draft PMLU policy statement under Agriculture at section II.B., that low-intensity agricultural uses is discouraged is consistent with the Congressional intent, and is also consistent with the SMCRA provisions at section 515(c)(3) which require a proposed PMLU to constitute an equal or better economic or public use.

Section 515(c)(3)(A)

Comment: Two commenters addressed the requirement to consult with land use planning agencies, if any exist, to help determine if the proposed postmining land use is deemed to constitute an equal or better economic or public use of the affected land, as compared to the premining use (SMCRA 515(c)(3)(A)). One commenter stated that the draft PMLU policy completely leaves the land owner out of this determination and, in effect, leaves the land owner with no say in what he/she wants for their land. The commenter also disagrees with the PMLU policy where it indicates that if there are no land use planning agencies to consult with, the regulatory authority must, nevertheless, address the requirement to determine if the proposed

postmining land use represents an equal or better use than the premining use. The commenter stated that OSM should not impose this duty on the regulatory authority. This is clearly not the intent of SMCRA, the commenter stated. A second commenter stated, What land use planning agency? thus indicating that there are not likely to be any such land use planning agencies.

Answer: The requirement that the regulatory authority must consult with land use planning agencies does not leave the land owner without a voice concerning the PMLU of his or her land. None of the existing avenues for the land owner to interact with the regulatory authority concerning the use of his or her land is affected by this requirement. And, of course, the permit applicant is expected to collaborate with the landowner concerning the PMLU. Thus SMCRA merely requires the regulatory authority to consult with land use planning agencies, if any exist, concerning a determination of whether or not the proposed PMLU is deemed an equal or better use of the land as compared to the premining use, and to determine if the proposed use would be consistent with adjacent land uses, and existing State and local land use plans and programs.

Despite the fact that there may be no relevant land use planning agency, the regulatory authority must still make a determination as to whether or not it deems the proposed PMLU an equal or better use than the premining use. SMCRA authorizes mountaintop removal operations only if the requirements at section 515(c) are met. Under SMCRA, it is the regulatory authority s responsibility to approve or deny a permit application for mountaintop removal operations. The requirements at section 515(c)(3) and (4) are additional standards that must be met before the regulatory authority can issue a permit for mountaintop removal operations. The regulatory authority is required to consult with the appropriate land use planning agencies, if any exist, prior to making its decision. It may be likely, as a commenter suggested, that in rural areas no such land use planning agencies exist. Despite a lack of an appropriate land use planning agency, the judgement must still be made. With or without the existence of an appropriate land use planning agency, the regulatory authority must make the final judgment as to whether or not the proposed PMLU is deemed an equal or better use.

515(c)(3)(B) Specific plans for the PMLU

1. Comment: One commenter stated that the PMLU policy requires that the management plan for the PMLU of forestry will allow efficient harvest of the timber. The commenter stated that OSM should be mindful of the SMCRA mandate that the PMLU be capable of supporting the PMLU. The commenter suggested that it is inappropriate to identify a management plan for efficient harvesting when such harvesting will not take place until far into the future. The commenter also questioned whether or not a violation would be written if, far in the future, the timber is harvested in a manner not predicted in the application.

Answer: The commenter s statements are addressing two separate SMCRA provisions. First, the commenter references SMCRA as mandating that a permittee must make the land capable of supporting the postmining land use. The commenter is correct that SMCRA requires that a

mountaintop removal operation must leave the affected land capable of supporting postmining uses (515(c)(2)). With regard to commercial forestry, this would place considerable focus on minimizing compaction.

Second, the commenter asserts that it is inappropriate to identify a management plan for efficient harvesting when such harvesting will not take place until far into the future. We disagree. SMCRA at section 515(c)(3)(B) provides that the applicant must provide specific plans for the proposed PMLU. If the proposed PMLU is to be forestry, then a forest management plan prepared by a professional forester would be appropriate. Harvesting timber would be just one component that would be addressed in a forest management plan. Such a management plan should address the proposed mining and reclamation activities and their impact on tree establishment and growth, and the planting, maintenance, and harvesting of the forest product. The plan should also address the periodic evaluation of the tree stand for disease and insect infestation and treatment if necessary, thinning, fire control, erosion control, soil supplements, control of competing species, harvesting, reforestation, and transportation of the final product. The PMLU policy also states that the forest management plan should be presented to the appropriate State agency for review of the technical aspects of the management plan. We anticipate that over the life of the PMLU, the landowner will review and possibly revise the management plan to reflect changes in forest management and harvesting practices.

2. Comment: A commenter states that the PMLU policy requires too much information concerning the specific plans for an agricultural PMLU. The regulatory authority s duty stops with evaluation of the permittee s plan to return the land to a condition capable of supporting the selected agricultural use. There is no need to evaluate the use of the land beyond that point, the commenter stated. Finally, the commenter stated that there is no need to scrutinize or attempt any control of the farming practices of the landowner or to place any informational burden on land use agencies.

Answer: This comment addresses two SMCRA provisions. First, the commenter is correct that under SMCRA at section 515(c)(2), the regulatory authority does have a duty to evaluate the permittee s plan to return the land to a condition capable of supporting the selected PMLU. However, the commenter is not correct when stating that there is no need to evaluate the use of the land beyond that point. Under SMCRA at section 515(c)(2), the regulatory authority may approve mountaintop removal operations only after it has determined that the requirements of section 515(c)(3) and (4) of SMCRA have been met. That is, prior to approving a permit for mountaintop removal operations, the regulatory authority must assure, for example, that the proposed PMLU is deemed to constitute an equal or better use of the land (515(c)(3)(A)), that the applicant presents specific plans for the PMLU (515(c)(3)(B)), and that the applicant has provided the specific assurances required in section 515(c)(3)(B)(i) through (vi).

3. Comment: One commenter stated that the problem with obtaining one of the approvable PMLUs such as commercial, industrial, or residential uses is that OSM and the State Regulatory Agency have put such stiff requirements on the prior financing and the commitment to construct

these facilities prior to the permit being approved that it is useless to apply for these alternate PMLUs. The commenter further stated that in the mountains of eastern Kentucky, until an area has been mined it cannot be shown to potential developers as an area to build a factory or subdivision, nor is it possible to get a loan institution to guarantee the financing for such development.

Answer: It is SMCRA itself that restricts the categories of approvable PMLUs. And, it is SMCRA that requires the submittal of assurances that a proposed use will be compatible, supported, practicable, and planned. SMCRA also requires that these assurances be provided to the regulatory authority prior to the approval of the proposed use. These SMCRA provisions are intended to help assure that land that has been mined and left flat or gently rolling by mountaintop removal operations will actually be developed for one of the PMLUs that is listed at section 515(c)(3) of SMCRA.

515(c)(3)(B)(i) Compatible with adjacent land uses

1. Comment: One commenter stated that the draft PMLU policy document does not place in the proper context the requirement to evaluate the applicant s proposed PMLU. The evaluation of the compatibility of the proposed land use with the adjacent land uses requirement should be made in context of the consultation with the landowners, the public notice of the application and intent, and the local land use planning agencies. There is no basis in SMCRA, the commenter stated, to expand the evaluation to the level of requiring the permittee to provide transcripts of public meetings or potential impacts upon adjacent land uses (absent any State or local planning or zoning ordinance).

Answer: We agree that the evaluation of the compatibility of the proposed land use with the adjacent land uses requirement could be made in context of consultation with the landowners, the public notice of the application and intent, and the local land use planning agencies. The draft PMLU policy document recommends that [t]ranscripts of all pertinent public meetings and hearings pertaining to the permit application should be required. This recommendation is intended to identify the types of information that could be submitted to document compliance with the SMCRA requirement at section 515(c)(3)(B)(i) and 515(c)(3)(C) concerning adjacent land uses. Such transcripts may not exist. The PMLU guidelines do not intend that the regulatory authority hold or sponsor special meetings to in order to obtain such transcripts. Rather, if a pertinent hearing is held by a land use planning agency, and a transcript is created, a copy of the transcript should be included in the application. Certainly, as the commenter suggests, some of the information that is required for all permit applications can appropriately be used to satisfy this requirement.

It is not the intention of the guidelines for implementing section 515(c)(3)(B)(i) to require the regulatory authority to second-guess or influence the decisions of local or State land use planning agencies. The intent of the guidelines is to encourage the collection of information, including documentation when it exists, that can be used show compliance with section 515(c)(3)(B)(i). It

is the State regulatory authority that has the obligation to decide whether or not the requirement of section 515(c)(3)(B)(i) has been satisfied. Such a decision would be made much easier, and more easily defended by the regulatory authority if the basis for the decision is properly documented.

2. Comment: A commenter addressed the compatibility with existing uses requirement concerning a forestry PMLU in section III. B.2(b)(i), and stated that in rural southern West Virginia, there are few county or state-wide zoning restrictions. In addition, the commenter stated, those agencies that might have a role in land use rarely, if ever, transcribe meetings. These agencies operate through their actions rather than their transcripts, the commenter added. In addition, if an agency has any jurisdiction that might create a conflict with the proposed use, all that should be required of that agency is a statement or resolution that it has reviewed and does not object to the proposed use. The commenter also stated that it is difficult to imagine too many adjacent land uses that will be incompatible with commercial forestry in southern West Virginia.

Answer: While it is true that in rural areas there may be no zoning agencies or zoning restrictions, the regulatory authority is still required to assess an application s compliance with the section 515(c)(3)(B)(i) and 515(c)(3)(C) requirements that a proposed PMLU be compatible with adjacent land uses. It may also be true that even if an appropriate zoning agency exists, it is unlikely that it would transcribe its meetings. Nevertheless, the permit applicant is still required to show, and the regulatory authority must evaluate, compliance with the section 515(c)(3)(B)(i) requirement.

The PMLU policy is intended to encourage the collection and documentation of information that the regulatory authority can use to satisfy its obligation to decide whether or not the requirement of sections 515(c)(3)(B)(i) and 515(c)(3)(C) have been met. Information that is required for all permit applications, such as the identification of adjacent landowners on the permit map, and the recording of public responses to the required newspaper notice concerning the proposed permit, can appropriately be used to help satisfy this requirement. If transcripts of zoning hearings or meetings are non-existent, other information may be used. This may include letters that a planning agency may send to the regulatory authority on behalf of the applicant. In addition, the regulatory authority is required to request comments on the proposed application from appropriate State and Federal agencies. The State regulatory authority has the obligation to decide whether or not the requirements of section 515(c)(3)(B)(i), and 515(c)(3)(C) and (D) have been satisfied by the applicant. Such a decision would be made much easier, and more easily defended by the regulatory authority if the basis for the decision is properly documented.

515(c)(3)(B)(ii) Obtainable - data on expected need and market

1. Comment: Commenters stated that the PMLU policy guidelines place an unreasonable burden on the surface owner concerning data on expected need and market. One commenter stated that this burden places an unfair restriction on the surface owner s right to choose how the

land is to be left after mining. To expect the surface owner to have a business lined up prior to reclamation is totally unreasonable, the commenter asserted. Coal mining, the commenter stated, can work hand-in-hand with land development leaving Appalachia with a hope for future development.

One commenter indicated that there is an obvious need for some PMLUs. In rural areas, for example, a public facility would be welcome. Another commenter asserted that for a PMLU for which the need is obvious, there should be required no consideration beyond the landowner statement of intent. Most uses will be well established by the goals and objectives of the local land use planning agencies and economic development authorities, the commenter stated. The regulatory authority has no statutory authority to second-guess or influence such analysis. Even when the conclusion is not apparent with regard to need, the landowner statement of need will be part of the permit application and will be open to regulatory and public scrutiny. Absent a contradiction to the declaration of need, the regulatory authority should be free to accept the landowner information, the commenter stated.

Answer: SMCRA at section 515(c)(3) limits the PMLUs that can be approved for mountaintop removal operations to the uses listed. In addition, SMCRA at section 515(c)(3)(B)(ii) requires that the applicant provide appropriate assurances that the proposed postmining use will be obtainable according to data regarding expected need and market. The PMLUs that can be approved for mountaintop removal operations are mostly those that can foster economic development. For any new business venture or economic development, information on the marketability of products to be produced and sold lends credibility to a proposed project. The PMLU policy guidelines at section III.B.2.(b)(ii), for example, presents examples of what might be needed to satisfy this requirement. If a need is indeed obvious, it should not be difficult to provide information to confirm the need. For example, if a public facility is desired, the local land use planning agencies and economic development authorities could provide their written support for such a facility. If a proposed use is commercial forestry, a demonstration of the demand and market for lumber or pulp products should be relatively straightforward. The bottom line is, however, that SMCRA requires a showing that the proposed PMLU is obtainable according to data on expected need and market. In addition, this information must be included in the application, and the regulatory authority must use this information in its evaluation of the proposed PMLU.

2. Comment: One commenter stated that no one can predict the long term demand for forestry products. Another commenter suggested that the need for forestry products in Appalachia is obvious and a requirement to provide data on need and market is unnecessary and irrelevant. The commenter also stated that for agriculture, there is very little data on need and market for agricultural products. If this data does not exist, the commenter asked, does this preclude agriculture as a postmining land use? The commenter also asked for an example of what would be substantial and credible information that agriculture would be a practicable investment in the area. How can OSM expect a coal operator to adequately address the demand and markets for a particular agricultural product when the vast majority of Kentucky farmers, who are trying to find

an alternate crop to tobacco, cannot do this now, the commenter asked.

Another commenter stated that the requirement for marketing and other data is a concern. The commenter referred to a current sawdust composting project on 45 acres of land left with less than 15 percent slopes by past mining. The commenter stated that is unlikely that a similar, highly worthwhile project could ever make it through the hurdles being created by the PMLU policy.

Another commenter, however, stated that it is vital to obtain this information if the intent of SMCRA is to be met.

Answer: No one can guarantee the long-term need for forestry or any other products. However, one can indeed make a credible prediction concerning a need. For example, it is certainly plausible that as the population of the U.S. continues to grow, the need for lumber for furniture, houses, and other wood products will also grow. Such information and projections should not be difficult to find. However, despite the fact that a need might be obvious, an application must provide sufficient and credible information that the regulatory authority can use to make its judgement concerning approval of the permit. Without such information an application would be incomplete.

A commenter asked what could be done if no data on need and market for agricultural products is available. In response, if no such data is available, on what would a developer or landowner base his or her proposal for an agricultural PMLU to raise farm products for profit? Would there be any credibility to such a proposal if there is no indication whatsoever that there is a market for the products? Again, a guarantee is not asked for, but credible information on need and market is. As for agriculture, population growth and other demographic information, product demand trend information, supply shortage information (such as the need for hay by local dairy farms), information on local, State, national and international markets all could be considered sources of useful information to support expected need and market data for agricultural products.

515(c)(3)(B)(iii) Investment in necessary public facilities

Comment: A commenter stated that a simple acknowledgment that the needed public facilities are reasonably available to the site or can be made available should be sufficient. No governing body is likely to be able to affirmatively commit resources to a site that will not be developed for the several years that it may take to complete mining. Another commenter stated that compliance with this requirement is vital if the requirements of SMCRA are to be met.

Answer: SMCRA at section 515(c)(3)(B)(iii) requires that the applicant provide assurances that the proposed PMLU will be assured of investment in necessary public facilities. Simple acknowledgments such as those the commenter referred would not completely satisfy this SMCRA requirement. The public agencies must provide written commitments that they will support the proposed PMLU.

515(c)(3)(B)(iv) Commitments from public agencies

1. Comment: A commenter stated that it does not make sense that, for a PMLU such as forestry, the application must contain letters from State or local governments, water and sewer authorities, or other public agencies committing those agencies to supplying the necessary roads, water and sewer lines .... This might make sense for an office park PMLU, but not for forestry. A commenter questioned whether or not the absence of such letters in the application makes the application deficient.

Another commenter, in referring to the PMLU policy at page 13, stated that the policy speaks of making sites capable of supporting the postmining uses. Capable, the commenter asserted does not infer guarantees that the postmining land use will occur, only that the land is left capable of supporting that postmining use.

A commenter stated that compliance with this requirement is vital if the requirements of SMCRA are to be met.

Answer: The first two commenters are mistaken in what the PMLU policy guidance is saying concerning compliance with section 515(c)(3)(B)(iv) of SMCRA. First, the SMCRA provision requires assurances that the proposed PMLU will be supported by commitments from public agencies where appropriate. For example, if an airport, residential complex, or industrial park is proposed, water, sewer, and electric facilities would likely be needed. The application should identify these needs, and the needs identified should be supported by commitments from public agencies where appropriate. Therefore, assurances are not needed for any facilities or support that are not needed. For example, as a commenter suggested, sewer lines aren t needed for a commercial forestry PMLU. Consequently, an application would not be incomplete simply because it did not contain an assurance for sewer lines. It is important, however, that an application clearly identify what assurances are necessary, and to provide documentation of such assurances.

The comment is correct which asserts that the permittee s responsibility is to reclaim the permit area to a condition capable of supporting the approved PMLU.

515(c)(3)(B)(v) Private financing

1. Comment: A commenter stated that the PMLU policy is clearly exceeding the expressed requirement of SMCRA in requiring documentation that indicates a reasonable expectation that private financing of the development and operation of an agricultural postmining land use would be available. The commenter further stated that the operator is not required to achieve the postmining land use, only to make the land capable of supporting the postmining use. The commenter also asserted that what the landowner decides to do with his or her property after bond release is of no concern to OSM. Another commenter asked from where in SMCRA does OSM derive authority to require proof that a landowner has the financial capability to farm his

own land? The legislative history and SMCRA use terms such as practicable and reasonable, but the draft uses such terms as proof, estimates of cost, and letters from banks indicating willingness to loan money, the commenter stated.

Answer: The commenters statements are addressing two separate SMCRA provisions. First, the commenter s statement that an operator is not required to achieve the postmining land use, but only to make the land capable of supporting the postmining use is a reference to section 515(c)(2) of SMCRA. In this instance, the commenter is correct that SMCRA requires that a mountaintop removal operation must leave affected land capable of supporting postmining uses.

Second, a commenter has asserted that the PMLU policy is clearly exceeding the expressed requirement of SMCRA in requiring documentation that indicates a reasonable expectation that private financing of the development and operation of an agricultural postmining land use would be available. This assertion is in error. Section 515(c)(3)(b)(v) clearly provides that the applicant for a mountaintop removal operation provide assurances that the proposed postmining use will be practicable with respect to private financial capability for completion of the proposed use. This requirement and the other SMCRA requirements at section 515(c)(3)(B) are intended to provide the regulatory authority with sufficient information that will allow it to make a judgement as to whether or not the proposed PMLU is practicable, obtainable, and supported. That is, prior to approving a mountaintop removal mining operation, the regulatory authority must be reasonably assured by the permit applicant that the proposed PMLU will be achieved. This does not mean to say that the regulatory authority must receive a guarantee that the proposed PMLU will be achieved. SMCRA does not require such a guarantee, but it does require assurances that the proposed PMLU is likely to be achieved.

The commenter s assertion that what the landowner decides to do with his or her property after bond release is of no concern to the regulatory authority is also in error. In accordance with the provisions of section 515(c)(3) of SMCRA, the regulatory authority must be concerned that a proposed postmining land use represents an equal or better use as compared to the premining use, and must be concerned that the proposed postmining use is reasonably obtainable. That is, the regulatory authority must be reasonably assured by the information that is supplied by the permit applicant that the proposed postmining land use will actually be achieved.

Finally, regarding the financial information that may be provided to comply with section 515(c)(3)(v) of SMCRA, the draft uses such terms as proof, estimates of cost, and letters from banks indicating willingness to loan money. As the draft PMLU policy states, these letters are not required, but are listed as examples of the type of information that could be submitted to satisfy this requirement.

2. Comment: A commenter stated that the PMLU policy goes too far and is impracticable in what it would require for evaluating the private financial capability to complete the proposed use. It will be extremely difficult if not impossible, the commenter added, to convince a private

landowner that his finances are anyone s business, especially when the permit applications containing his or her financial information will be available for public review. Most surface landowners are very well paid for the use of their surface. However, the commenter stated, the PMLU policy wants a guarantee that the PMLU will occur.

Answer: Section 515(c)(3)(B)(v) requires information that will assure the regulatory authority that the proposed PMLU is practicable with respect to private financial capability for completion of the proposed use. This requirement doesn t necessarily require a disclosure of private financial information. As the PMLU policy document states at section III.A.2.(v) and subsections (2)(b)(v) at sections III.B. and III.C., letters from banks or other lending institutions indicating a willingness to loan money for the type of project proposed could satisfy this requirement. These letters from banks or other lending institutions need not be actual commitment of such funds. Such letters would, however, provide the regulatory authority with an assurance that the proposed PMLU is seen by a financial institution as representing a viable economic venture.

We disagree with the comment which states that the PMLU policy seeks a guarantee that the PMLU will occur. Rather, the PMLU policy is indicating credible methods that may be used to comply with the SMCRA requirement at section 515(c)(3)(B)(v) which provides that the permit applicant must provide assurances that the proposed PMLU is practicable with respect to private financial capability for completion of the proposed use.

3. Comment: Referring to the requirement to provide assurance with respect to private financial capability for completion of a proposed agricultural use, a commenter stated that the regulatory authority has a bonding process to ensure the land is returned to a condition capable of supporting the postmining land use. To also require letters from banks or other lending institutions to verify the institution s willingness to loan money is not necessary, the commenter stated.

Answer: We disagree with this comment, because the reclamation performance bond and compliance with the requirement to provide financial assurance under section 515(c)(3)(B)(v) serve two different purposes. The bond satisfies the permittee s obligation to provide financial assurance that the permit area will be reclaimed in accordance with the approved reclamation plan. The financial assurance under section 515(c)(3)(B)(v), however, serves to provide the regulatory authority with an assurance (as part of the assurance requirements at section 515(c)(3)(B)(i) through (vi)) that a PMLU proposed for mountaintop removal operations is practicable, obtainable, and supported. Without these assurances, a regulatory authority cannot approve a proposed PMLU for mountaintop removal operations. For clarification, the letters from banks or other lending institutions indicating a willingness to loan money for the type of project proposed could satisfy this requirement but are not required. Other forms of financial assurance would also satisfy this assurance.

4. Comment: A commenter stated that Appalachia has only two viable industries - coal and

timbering. The commenter asked why the PMLU policy requires that the applicant provide substantial and credible information that suggests that forestry is a practical investment for this area?

Answer: Yes, forestry is an important industry in Appalachia. However, an approved forestry PMLU should result in a significant improvement over the premining use (typically forestry), such that a net benefit to the economy or the public is realized. For example, a premining use of unmanaged forest that may or may not be harvested for timber would be replaced by a postmining forest that is carefully managed to produce higher yields of better timber. SMCRA and the Federal regulations require that the applicant provide the regulatory authority with certain assurances related to a proposed forestry PMLU. The PMLU policy clarifies that a proposed forestry use should be practicable, obtainable, and supported. To achieve the net benefit to the economy or the public, the use would need to be a carefully managed forest

515(c)(3)(B)(vi) Planned pursuant to a schedule

Comment: One commenter stated that the PMLU policy speaks of specific landforms, but does not identify what it means. The commenter also stated that it is very difficult for a mining operation to furnish specific plans showing in detail what the final configuration of the land would be after final grading. There are simply too many variables encountered during the mining operation, the commenter asserted.

Answer: Section 515(c)(3)(B)(vi) of SMCRA requires an applicant to provide assurances that the PMLU will be planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining use. In accordance with this requirement, the PMLU policy states that the reclamation plan must require creation of the specific landforms and site configuration needed for the proposed land use, along with any necessary roads or utility corridors. The term specific landforms (at section III.A.2.(vi), and subsections (2)(b)(vi) of sections III.B. and III.C.) means the site configurations that will be needed by the proposed use. For example, if the PMLU development plan calls for a flat surface in a specific area for the location of a future building, the creation of that flat surface should be planned for and integrated into the mining and reclamation plan. If the PMLU plan lacks such detail, integration into the mining and reclamation plan and, therefore, compliance with SMCRA at section 515(c)(3)(B)(vi), would not be possible.

We disagree with the commenter that it is very difficult for a mining operation to furnish specific plans showing in detail what the final configuration of the land would be after final grading. All permits require a reclamation plan. For example, the Federal regulations at 30 CFR 780.18(b)(3) requires the submittal of a plan for backfilling, soil stabilization, compacting, and grading, with contour maps or cross sections that show the anticipated final surface configuration of the proposed permit area. Therefore, the final landforms for all permits are known in advance. We recognize that unusual circumstances could arise that may alter the submitted plans. However, an applicant should know which areas must be left flat and which should be gently rolling to

properly accommodate the proposed PMLU.