

**Navajo Mine
Area IV North Permit Revision
Application**

Responses to Public Comment

March 16, 2012

COMMENT RESPONSE SUMMARY

Consistent with 30 C.F.R.774.13(c), responses included in this report address the substantive¹ comments received on BHP Navajo Coal Company's (BNCC's) Area IV North significant permit revision application. Each letter and email was read and analyzed.

All comments and any agency responses, are part of OSM's administrative record , and have been considered during OSM's review of the significant permit revision application.

The purpose of this document is to provide responses to comments received on the significant permit revision application during the public comment period, which ended on June 30, 2011.

Comment Analysis Process

A standardized content analysis process was conducted to analyze the public comments on the permit revision application. Each comment letter or email received was read by OSM to ensure that all comments were identified.

The comments were not weighted by organizational affiliation or status of respondents, and the number of duplicate comments did not add more bias to one comment more than another. The process was not one of counting votes, and no effort was made to tabulate the exact number of people for, or against any given aspect of the significant permit revision application. Rather, emphasis was placed on the content of each comment provided.

Comment Overview

All comments were reviewed for occurrences of similarity or replication. There were three categories of comments received: (1) Letters of support from community members and interested local businesses, (2) An objection letter that included groups identifying themselves as the 'San Juan Citizens Alliance', 'Diné CARE' and 'Center for Biological Diversity', and (3) 20 comments given at the Informal Conference held at Nenahnezad Chapter House on June 15, 2011.

No technical² comments were identified in the support letters received. These letters included statements supporting the proposed permit revision. Most comments cited economic impact benefits to the local community and to the Navajo Nation, as the primary reason for support.

OSM's review of the letter from the San Juan Citizens Alliance, Diné CARE and Center for Biological Diversity confirmed the document contained a variety of comments and objections. This letter included comments on the significant revision application as well as the Environmental Assessment (EA). The comments on the EA are discussed in the 'OSM Response to Public Comments on the Environmental Assessment' document that have been posted on OSM's Western Region web site. The comments applicable to the significant permit revision application are discussed below.

¹ Substantive comments include those which challenge the significant permit revision application as being inadequate or inaccurate, develop and evaluate alternatives not considered by the agency, or offer specific information that may have a bearing on the decision

² Support letters did not contain any information that challenged any material in the significant revision application.

Comment Summary 1: SMCRA requires each applicant for a mining permit to submit a reclamation plan in sufficient detail to demonstrate compliance with the reclamation standards of the applicable regulatory program. 30 USC § 1257(d), 30 CFR § 780.18-38. SMCRA and the regulations further require that the reclamation bond be “sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority.” 30 USC § 1259(a); 30 CFR § 800.14(b).

SMRCA regulations provide that OSM, not BHP, has the responsibility for setting the amount of the reclamation bond. As the regulatory authority on Indian Lands, 30 CFR § 750.6(a), OSM has the responsibility for determining the amount of the reclamation bond at the Navajo Mine. 30 CFR § 800.14(a)(1). In determining the bond amount, OSM may consider, but may not rely on, the cost estimates submitted by BHP. 30 CFR. § 800.14(a)(4); Handbook for Calculation of Reclamation Bond Amounts. However, OSM must set the bond at an amount sufficient to assure completion of the reclamation plan if the work were to be performed by OSM in the event of BHP’s forfeiture. 30 CFR § 800.14(b).

In sum, OSM failed to set the amount of a bond at a reasonable level to account for full remediation of the CCW pits at the Navajo Mine. We respectfully assert that an EIS which analyzes the costs of such clean-up would aid OSM and the public. See e.g., 40 CFR §1502.15, 1502.16. 1508.20.

Comment Response 1: OSM has reviewed the reclamation bond applicable to the Area IV North permit revision application. The current mine-wide reclamation bond has been increased to account for the reclamation required in the disturbances to occur within the Area IV North mining area.

Placement of Coal Combustion By-Products (CCB) into pits at Navajo Mine occurred in Area I on pre-law, interim and permanent program lands. Pre-law lands are lands that were disturbed by mining activities prior to the enactment of SMCRA in 1977. The Navajo Mine has been in operation since 1963 but was not permitted under SMCRA until 1989. Lands that were disturbed between the enactment of SMCRA in 1977 and when the Navajo Mine Permit was issued by OSM are referred to as Interim lands. Lands disturbed after the SMCRA permit was issued are referred to as Permanent Program lands. Permanent program lands are the only lands that are required to be covered by a reclamation bond. The areas of CCB placement at Navajo Mine are in Area I. As indicated above, Area I is comprised of pre-law, interim and permanent program lands. The majority of CCB’s were placed in pits located on pre-law lands although some CCB’s were disposed of on interim and permanent program lands under the requirements of SMCRA. As of 2008 BNCC no longer disposes CCB’s at the Navajo Mine.

Reclamation bonds are calculated based on earthwork (backfilling & grading) and re-vegetation required to restore drainage patterns and approximate original contour to the land surface, to ensure topsoil is replaced and use re-established as specified by the reclamation plan in the permit application package. The reclamation plan is approved based upon the environmental protection standards of SMCRA having been met so that reclamation can proceed as scheduled. Posting a bond for the mitigation of CCB disposal independent of the above required reclamation costs is not envisioned or required by SMCRA. Additionally, there is no evidence that past CCB disposal at the Navajo Mine has caused environmental degradation and requires remediation.

Comment Summary 2: SMCRA requires the operator to restore the affected land to a condition capable of supporting pre-mining uses or “higher or better uses.” Additionally, SMCRA requires that reclamation of mined land be “as contemporaneous as possible.” 30 USC § 1202(e). However, contemporaneous reclamation is not happening at the Navajo Mine. The rate of tribal lands being reclaimed by BHP compared to the rate of disturbance is unknown. Ideally the ratio should be 1 to 1.

The lack of contemporaneous reclamation at the mine has contributed to significant environmental problems, including the spread of invasive vegetative species and noxious weeds, increased fugitive dust and other air pollution problems, and longer periods of wildlife and livestock habitat loss. OSM must assess reclamation goals and achievements prior to issuing any further permit renewals. If contemporaneous reclamation is not occurring, OSM must delay the permit until reclamation consistent with SMCRA objectives and requirements occurs at these mines.

Comment Response 2: 30 CFR 816.100 ‘Contemporaneous reclamation,’ states that reclamation efforts, including but not limited to backfilling, grading, topsoil replacement, and revegetation, on all land that is disturbed by surface mining activities shall occur as contemporaneously as practicable with mining operations. A rate of “1 to 1” as the comment suggests, is arbitrary and is not practical when considering all factors such as the need to continually use roads and other support facilities during ongoing mining operations.

OSM finds no evidence, nor does the commenter provide any evidence of “... significant environmental problems, including the spread of invasive vegetative species and noxious weeds, increased fugitive dust and other air pollution problems, and longer periods of wildlife and livestock habitat loss,” as the comment alleges.

A total of 2,258 acres of Interim Program lands disturbance has been backfilled and graded, and 2,246 acres have been top-soiled and seeded. As addressed within BNCC’s 2010-2011 BNCC Annual Report, BNCC has fully reclaimed and OSM has agreed to the release of its jurisdiction on 1,131 acres out of 2,471 acres of disturbance on Interim Program lands, based on a finding that the Interim lands performance standards have been met. Under the Permanent Program, a total of 7,090 acres have been disturbed with 2,845 acres backfilled and graded, and 2,105 acres have been top-soiled and seeded. OSM finds that BNCC’s reclamation schedule is in accordance with 30 CFR 816.100 based on detailed maps in the approved permit showing the planned timing of spoil grading activities, as well as subsequent placement of top-soil, and re-vegetation establishment.