

**WRITTEN TESTIMONY OF TODD PARFITT, DIRECTOR**  
**WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY**

**BEFORE**  
**THE SENATE ENERGY AND NATURAL RESOURCES COMMITTEE**  
**OVERSIGHT HEARING ON:**

**THE DEVELOPMENT AND POTENTIAL IMPLEMENTATION OF OSMRE'S**  
**PROPOSED STREAM PROTECTION RULE**

**OCTOBER 27, 2015**

Good morning Chairman Murkowski, Ranking Member Cantwell, and members of the Senate Energy and Natural Resources Committee. My name is Todd Parfitt. I am the Director of the Wyoming Department of Environmental Quality (WDEQ). I thank the committee for inviting the State of Wyoming to share our perspective on the development of the Proposed Stream Protection Rule by the Office of Surface Mining Reclamation and Enforcement (OSM). In short, we are deeply disappointed with the development of the proposed rule and the lack of engagement by the states in that process. We are also disappointed in the end result.

Before I provide further detail on those concerns, I want to provide some perspective on why this subject matter is important to Wyoming. Wyoming is home to Yellowstone National Park, Devil's Tower and many more special places. Our natural resources help make Wyoming a truly special destination. Our citizens and visitors expect those resources to have world class environmental stewardship. Wyoming's abundant mineral resources also provide its citizens and the State with the jobs and tax revenue necessary to thrive. In Wyoming, we manage our natural resources exceptionally well, providing for both environmental stewardship and energy production. As our governor, Matt Mead, has stated, "It is a false question to ask: Do we want energy production or environmental stewardship?" In Wyoming, we must and do have both.

Wyoming is the number one exporting state of British Thermal Units (BTU) to the country, contributing 12% of all Btu's produced in the United States in 2013. Wyoming is also the number one producer of coal in the country, representing 40% of the nation's production with deliveries to power plants in 32 states. Wyoming's energy leadership is matched by its leadership in establishing and enforcing strong environmental regulations and enforcement programs to protect the environment that is so important to each of us who call Wyoming home.

Wyoming's dual interests in environmental stewardship and coal production is why the State has closely followed the development of the Stream Protection Rule from its inception. Wyoming supports reasonable, practicable and sensible efforts to improve stream protection. To that end, Wyoming was pleased when OSM reached out to states in 2010 extending an offer for us to become cooperating agencies in the National Environmental Policy Act (NEPA) process associated with the development of the proposed rule. In August 2010, the WDEQ entered into a Memorandum of Understanding (MOU) with the OSM to provide meaningful and timely comments on the draft environmental impact statement (EIS) that OSM intended to prepare in support of the Stream Protection Rule. OSM entered into similar MOUs with nine other states.

The cooperating agency process provided OSM with an opportunity to take advantage of the wealth of knowledge that states have compiled over the past several decades implementing robust surface mining control and reclamation programs. That wealth of knowledge had the potential to shape the development of a meaningful, appropriate and well written EIS and draft rule. Unfortunately, because of the unwillingness of OSM to effectively engage with the states, despite the cooperating agency MOUs, these opportunities were not realized.

Wyoming is very familiar with the cooperating agency process. We have served as a cooperating agency on numerous activities with the Bureau of Land Management. This includes assisting in the development of resource management plans and the development of environmental impact statements on large scale projects. Wyoming has also served as a cooperating agency with the U.S. Forest Service and the U.S. Fish and Wildlife Service on several planning initiatives (most recently in partnership on sage grouse management), and also for the development of EISs for large scale projects. We know and understand the process and are fully aware of the staff and resource commitment that must be made to be an effective cooperating agency. Our past experiences have proven that federal agencies which actively participate in cooperating agency efforts end up with well informed decision documents for federal, state and local government partners.

This is the type of relationship Wyoming expected when we entered into the cooperating agency MOU with OSM on August 24, 2010. Unfortunately, the OSM cooperating agency process failed to meet the principles established in the MOU, in stark contrast to the process Wyoming has enjoyed with other federal agencies over the past few decades.

Initially, the process seemed to follow the spirit and intent of the MOU. OSM provided Wyoming the opportunity to review three draft chapters of the EIS: two in late 2010 and one in early 2011. OSM, however, provided minimal time to review those documents. Even though the review period was exceedingly short, Wyoming DEQ committed the necessary resources to review the documents and provide comments back to the OSM, while still adhering to our mandatory regulatory duties. The problem is that the initial review of those early chapters was the last involvement OSM allowed or provided Wyoming as a cooperating agency.

Now, nearly five years later, OSM has, issued a draft EIS and draft rule spanning over 2,200 pages that in their own words is substantially different than the pre-drafts the states reviewed nearly five



years ago. Included are five new alternatives not seen by the cooperating states. OSM did not engage States or share how or if it considered the States comments and expertise. Wyoming has sent several letters to OSM, in addition to letters submitted by the Interstate Mining Compact Commission, requesting that OSM re-engage in the cooperating agency process and reiterating our willingness to participate. OSM disregarded these repeated requests.

On April 26, 2015, OSM met with the cooperating agency states to update them on the status of the rule development. That meeting was just a broad overview and did not provide any opportunity for cooperating agencies to provide input. Those in attendance were told that the final draft EIS and proposed rule would look nothing like what states reviewed in 2010 and 2011. For example, OSM explained that it had a new contractor working on the documents and that the agency had added additional alternatives for consideration. Essentially, we were told we would not recognize the draft EIS or proposed rule as published, but were assured that they represent "much better work."

Given the failure to effectively engage with the states throughout the development process, eight of the ten cooperating states withdrew from their MOUs and abandoned the cooperating agency process earlier this year. While tempted, Wyoming did not withdraw from its cooperating agency status at that time. Wyoming did send one last letter to OSM on May 22, 2015, however, expressing our serious disappointment with the process and our concerns that the states' views were being totally ignored by the federal government. OSM finally replied to that letter on October 8, 2015, which I received on October 19. In the letter, OSM thanked Wyoming for our prior, valuable contributions to the DEIS. The letter also stated the OSM values our continued participation in the process of developing a Final Environmental Impact Statement. Finally the letter extended an invitation to review draft responses to public comments received on the draft EIS and rule specific to our state and region. I find this to be a hollow gesture given the loss of trust experienced by Wyoming during the pre-draft process, including OSM's unwillingness to honor the MOU and engage with the states during the past five years.

Wyoming decided not to withdraw from the cooperating agency process for several reasons. First we remain eternally optimistic that OSM will realize the tremendous opportunity of honoring their commitment in the MOU with cooperating states and withdraw the draft EIS and draft rule. OSM should reengage with the states to develop a superior product than what has been put forth. Second, Wyoming is the largest supplier of coal to the country, providing 40% of the coal supply to the nation. We fully expect Wyoming coal to continue to be a major player in meeting the energy demands of the country in the future. Finally, we were concerned that if all states pulled out of the cooperating agency process, states would potentially lose standing in any legal challenges that may arise out of the faulty NEPA process. But to be clear, the proposed rule was published without Wyoming ever hearing from OSM.

To emphasize the long running frustration with the OSM process, I refer you to the testimony of the prior WDEQ Director John Corra before the House Energy and Mineral Resources Subcommittee on September 26, 2011. A copy of his testimony is attached for reference. Among the points he raised are:

- “The OSM has used a court order and an agreement with other federal agencies that were aimed at tackling a problem in Appalachia as an excuse to impose unnecessary and costly over regulation across all coal mining states.”
- “We are unaware of any objective data, scientific or otherwise, that supports this level of change to SMCRA.”

These concerns, now four years old, are unchanged. Wyoming has reviewed the materials distributed by OSM on July 27, 2015, and we simply cannot support the proposed rule. As a threshold matter, OSM released thousands of pages of technical material for review and limited the public comment period to 91 days. There is no way members of the public could reasonably review the materials in that short time period and meaningfully comment on all aspects of the proposed rulemaking. But notwithstanding that limitation, Wyoming has prepared extensive comments on the portions of the proposed rule, draft EIS, and draft regulatory impact analysis (RIA) that we were able to review in the time allowed. Our cover letter transmitting those comments to OSM is attached for your reference. I'll highlight a few of our main concerns here:

- OSM has undertaken a comprehensive rewrite of the core regulations implementing SMCRA, and has not limited itself to focusing on stream protection.
- The proposed rule is a one-size-fits-all regulation that imposes nationwide standards without consideration for the fundamental regulatory, environmental, ecological or economic differences amongst the states.
- The proposed rule fails to consider Wyoming's regulatory program and the best practices, including award-winning reclamation techniques, which our regulatory experts have developed over several decades of running the largest surface coal mining program in the country.
- The proposed rule exceeds OSM's statutory authority and infringes on the authority and ability of states to implement SMCRA.
- The RIA grossly underestimates the financial impact of implementing the new standards. The RIA estimates that the total financial impact on regulatory agencies in the Rocky Mountain Region (CO, WY, MT, ND), for example, to be \$29,000 per year. For Wyoming alone, we estimate the increased cost to be closer to \$550,000 per year.
- The RIA grossly underestimates the impact of the proposed rule on Wyoming and federal tax revenue, understating that impact by over \$1.3 million.
- The proposed rule imposes extensive monitoring and reclamation requirements without sound scientific justification.



In summary, the failure to consider cooperating agency comments in 2010 and 2011 and the failure to engage cooperating agencies throughout this process is reflected in the poor quality of the proposed rule and inaccuracies in the draft EIS and RIA. Wyoming does not believe that the proposed rule, draft EIS or RIA can be modified, amended, or changed to overcome their many problems through the public comment process. OSM's only choice is to withdraw the rule and work with the states, regulated industry, and other members of the public to put forth a more appropriate proposal. I ask this committee for any help that it may provide in securing that outcome.

Thank you for the opportunity to provide Wyoming's perspective on these important matters. I would be happy to answer any questions that you may have.



# Department of Environmental Quality

*To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.*



Matthew H. Mead, Governor

John Corra, Director

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## **Written Testimony of John Corra, Director, Wyoming Department of Environmental Quality before the House Energy and Mineral Resources Subcommittee re Oversight Hearing on "Jobs at Risk: Community Impacts of the Obama Administration's Effort to Rewrite the Stream Buffer Zone Rule" – September 26, 2011**

My name is John Corra. I am the Director of the Wyoming Department of Environmental Quality. I wish to thank the Subcommittee for inviting the State of Wyoming to testify at this hearing today. Wyoming coal mines produced 442 million tons of coal in 2010, over 40% of the nation's total production. This was accomplished by 6,800 miners operating some of the most advanced equipment at 18 mines across the state. Production generates over \$1.8 billion in taxes, royalties and fees for use by federal, state and local governments. The economic impact to the state is much greater. The industry has been recognized many times for both its superior safety programs and its innovative reclamation efforts. We have primacy for the administration of the Surface Mining Control and Reclamation Act (SMCRA) in Wyoming, and year over year receive high marks from the Office of Surface Mining (OSM) for our regulatory programs.

I would like to talk with you today about how Wyoming protects its waters and why this rule has little value for us. I will also speak to the disappointing process that has been followed to date relative to the Environmental Impact Statement (EIS) for this rule.

The OSM has used a court order and an agreement with other federal agencies that were aimed at tackling a problem in Appalachia as an excuse to impose un-necessary and costly over regulation across all coal mining states. The action OSM is undertaking is a comprehensive rewrite of regulations under SMCRA, not just a stream protection rule. The packaging of this major revision to a law that has served the country well for over 40 years as a "stream protection rule" is misleading. Some of the changes being contemplated have broad implications and deserve thoughtful re-evaluation.

We are unaware of any objective data, scientific or otherwise, that supports this level of change to SMCRA. The agency has not provided any objective data to support such comprehensive regulatory changes. In fact, OSM's most recent evaluation reports for 2010 strongly suggest otherwise. For example, the report for our state says that: "...the Wyoming



program is being carried out in an effective manner.” The report also shows that we have gained much ground in increasing the ratio of acres reclaimed to disturbed acres over the past 12 years. The report also mentions no issues with regard to restoring mined land to approximate original contour or reclamation bonding. The report goes on to say that: “this lack of additional enforcement actions, despite increased inspection frequency, helps illustrate the effectiveness of Wyoming’s regulatory program.” And, inspections increased during the reporting period by a very significant 78%! While we are not perfect, and OSM does at times ask us to correct deficiencies, there is significant evidence from the OSM’s own evaluation reports for Wyoming and other western states that current regulatory programs are working. Wyoming sees no justification for these significant rule changes or for the necessity of applying them nationwide.

OSM’s rush for completing the rulemaking is at the expense of thoughtful discourse as required by National Environmental Policy Act (NEPA). This undue haste is limiting the thoughtful and reasonable “hard look” as required under NEPA. Although OSM had earlier identified an option to apply the regulations only to mountaintop removal and steep slope operations in Appalachia, that alternative seems to have been dropped. One of the primary justifications put forward by the agency in its Federal Register notice is a June 11, 2009 memorandum of understanding (MOU) between the U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers and the Department of Interior. The MOU was specifically targeted at “Appalachian Surface Coal Mining”, and Section 404 of the Clean Water Act (CWA) in the states of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia and West Virginia. Despite this clear limitation in the MOU, the OSM rules are written to apply everywhere, including Wyoming.

NEPA requires an EIS to examine all reasonable alternatives to the proposal. If OSM proceeds with this rulemaking, it should be reminded not only of the MOU, but also its own recognition of differences between east and west and thereby apply the proposed regulations only east of the 100<sup>th</sup> Meridian. This approach would parallel SMCRA’s (30 CFR Chapter VII 785.19) current legal framework and guidance documents reflecting recognition of hydrologic and reclamation changes at the 100<sup>th</sup> Meridian. For example, alluvial valley floor protection is only applied west of the 100<sup>th</sup> meridian. Likewise, the bond release clock is 5 years east of this line and 10 years for the west, which is a recognition of the arid and semi-arid environment in the western U.S.

The Clean Water Act also recognizes the unique differences between the arid west and the eastern part of the U.S. as noted in the National Pollutant Discharge Elimination System (NPDES) surface discharge regulatory program. This rulemaking may also conflict with state authorities under both the state SMCRA programs and under the Clean Water Act (CWA). OSM does not have the authority to attempt to broaden a state’s water quality standards by adding new stream definitions, criteria, and restrictions such as “material damage to the hydrologic balance.” There are no federal water quality standards in Wyoming and OSM lacks the authority to establish any. OSM must work through the State rulemaking process since the authority to establish water quality standards rests solely with the state. OSM cannot do an end run around the prohibition against setting water quality standards by requiring state regulatory authorities to establish more stringent “corrective action thresholds” at the direction of OSM. In addition,



“enhancement” concepts are likely to conflict with mitigation requirements under the Corps’ § 404 program. OSM’s proposals have serious potential to directly conflict with and/or duplicate CWA requirements of the state and/or the Corps.

There are good reasons to make a distinction between the management and regulation of water in the western U.S. as compared to the east. Recognizing differences in water uses, quality and availability, Clean Water Act regulations have historically treated the area of the country west of the 98<sup>th</sup> meridian (arid west) differently than the eastern portions. We can’t help but think that both the Corps and EPA had this historical perspective about the nation’s waters outside of Appalachia in mind when they signed the MOU. If OSM insists upon a national approach, we hope that the parties re-open the MOU and make it available for public comment.

The resource requirements and associated costs of implementing the proposed rules are of particular concern to the states. Proposed concepts regarding stream definitions, expanded biologic criteria, definition of material damage to the hydrologic balance and the replacement of Post Mining Land Uses with “climax communities” as a reclamation requirement all trample on effective and time-proven mining and reclamation efforts by the states. To elaborate on just one of these changes, the use of climax communities as a standard, it is widely recognized that the periodic drought conditions, grazing impacts, and other pre-mining land uses and climatic variables make it nearly impossible to determine what the state of vegetation was, or might be, let alone how to accurately measure it given the scale of variability that exists in the west.

Wyoming has the necessary regulations in place to assure stream protection and when necessary, stream diversion and reclamation, as evidenced by successful efforts that have been recognized by OSM over the years. I would like to review just a few examples.

**North Tisdale Creek Stream Restoration, Caballo Coal Mine, Caballo Mining Company.** This area was mined in the 1990’s. The mine was required to record the pre-mining conditions, preserve topsoil, and reclaim the mining area to an approved post mining land use. As can be seen by the photo, restoration of a wetlands area has been successful. In fact the mine received awards in 2003 and again in 2009 for the successful reclamation of the North Tisdale Creek Wetlands, and the creation of wildlife habitat. Please see Exhibit 1.

**Tongue River Stream Restoration, Big Horn Coal Mine, Big Horn Coal Company (subsidiary of Kiewit Mining).** This project won the OSM 2011 Excellence in Surface Coal Mining Award. The Tongue River in northern Wyoming is a trout fishery at this location. As can be seen in the following photos, the mining operation progressed through the intersection of Goose Creek and the Tongue River. Note that the stream had to be relocated to accommodate mining. Stream function was modestly impaired for a period of time until restoration. It is unclear if this would be allowed under OSM’s proposed rules concerning material damage and biologic thresholds for action. Note the reclaimed grasslands on both sides of the stream, and how it is beginning to blend in with the pre-mining vegetation shown in the background. Please see Exhibits 2a and 2b.



**Caballo Creek Restoration, Belle Ayr Mine, Alpha Resources.** This project won the 2007 OSM Reclamation and Enforcement Director's Award. Note the preservation of the stream gradient to ensure against excess erosion. Additionally, rock weirs were incorporated in the reclaimed channel to mimic the pre-mine riffle/pool structure of this intermittent prairie stream. Please see Exhibits 3a and 3b.

Other projects worth noting, but with no exhibits are:

**Wyodak Mine:** ~ 1.7 miles of Donkey Creek reclaimed with water flows returned to reclaimed channel in 2005.

**Cordero-Rojo Mine:** ~ 3.9 miles of Belle Fourche River reclaimed with water flows scheduled to be returned to reclaimed channel in December, 2012. Cordero-Rojo Mine received 2006 Excellence in Surface Mining and Reclamation Award from the WDEQ for design of this river channel reconstruction.

**Eagle Butte Mine:** ~ 2.0 miles of Little Rawhide Creek reclaimed.

**Buckskin Mine:** ~0.90 mile of Rawhide Creek; received the 1997 OSM Reclamation and Enforcement Director's Award for successful reclamation.

**North Antelope Rochelle Mine:** ~ 2.1 miles of Porcupine Creek reclaimed with water flows returned to two of the three reaches.

There are also cases where we refuse mining through important areas that, in our belief have key hydrologic issues or would not be capable of restoration. For example, Wyoming affords a high level of protection to alluvial valley floors, or stream valleys underlain by unconsolidated stream-laid deposits which have sufficient water availability to be important to agriculture.

Each mine application is reviewed carefully and the applicants are required to accurately describe the pre-mining conditions and land uses. An approvable mine permit application must contain a reclamation plan that assures achievement of post mining land uses, and a return of the land to a use equal to or better than before. We are proud of our regulatory efforts, and have had a long history of mine regulation and restoration, even prior to the enactment of SMCRA. We don't believe we would be the nation's largest coal supplier, as well as one of its most beautiful places, without the commitment of both our regulators and our industry. We are perplexed that the EIS process to date has been so distant from Wyoming.

OSM actions consistently appear to avoid or limit public and state comment throughout this rulemaking. Initially the agency tried to avoid rulemaking altogether by asking a federal court to allow it to revise the stream buffer zone rule through a guidance document. This request was denied. Next, OSM denied multiple requests for additional time to comment on their advanced notice of proposed rulemaking on this issue in December, 2009, providing the bare bones minimum period of time required by law for one of the most complicated rulemaking efforts in OSM's history. The agency's initial scoping notice was so deficient that OSM had to issue a second notice providing more information in June 2010. Scoping meetings were a sham, because the public was not even allowed to speak publicly at the agency's public meetings. The public open house meeting in Gillette, Wyoming, which is the center of 40 percent of the coal

production in the US, was held the evening of July 29, 2010. The comment period ended July 30, 2010. This hardly represents time for thoughtful discourse.

The EIS documents provided by OSM have been poorly written, unclear and sometimes internally inconsistent. The unreasonably complex process of 5 alternatives with 11 items for each alternative results in 55 options to evaluate. It has been difficult to follow.

Wyoming is a “cooperating agency” in preparation of the EIS. Yet, we do not believe we have been given meaningful opportunity to comment and participate. Sections of the EIS with 25, 50, and even 100’s of pages were distributed to the States with only a few days to read, review, and provide comment back to the agency. States were forced to withdraw staff from permitting and other critical areas in order to have any opportunity to provide feedback to OSM within the required timeframe. Even when states take such measures, meaningful comments could not be provided in an appropriate manner.

OSM appears to be ignoring the resource implications for these proposed rules. We find this particularly disturbing in light of the fact that OSM has a goal of significantly reducing their share of funding for our regulatory program.

The proposed rules will result in massive increases of information and data collection that may not even be useful or practical in improving environmental performance. This is a significant resource burden and suggests that OSM pay close attention to the cost/benefits of forcing a solution to an eastern problem upon western states, such as Wyoming. We are hopeful, now that OSM has retained a new contractor and pressed the pause button on the EIS process, that it will comply with its obligations under NEPA and conduct a genuine EIS process where States are engaged in real discussions of the regulatory options and EIS alternatives. They have committed to do so, and I hope we get the chance to share Wyoming’s expertise.

I also suggest that OSM extend its deadline so that it can re-examine the “purpose and need” for these rules, provide appropriate scientific and factual information to support a rule change of this magnitude on a national scale, and engage Wyoming and other states in a more meaningful way. An extension would also allow enough time to thoroughly evaluate the economic impacts of the rule. The analysis that we have seen so far is inadequate especially given the complex decision making process that a customer using a given type of coal uses in fuel-switching decisions. The myriad air and water rules that are either published or pending regarding just the utility industry alone is enough to throw into question any simple assumptions that coal production will simply shift around the country as a result of OSM’s proposal.



**EXHIBITS**

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## NORTH TISDALE CREEK STREAM RESTORATION

*2003 and 2009 O&M Reclamation and Enforcement Director's Awards*

**Caballo Coal Mine,  
Caballo Mining Company**

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- 2003 award for successful reclamation and creation of wildlife habitat along the Tisdale Creek Drainage;
- 2009 award for successful reclamation of the North Tisdale Creek Wetlands

Exhibit 1  
Congressional Hearing on O&M Stream Protection Rule  
September 26, 2011, Charleston, WV



## TONGUE RIVER STREAM RESTORATION

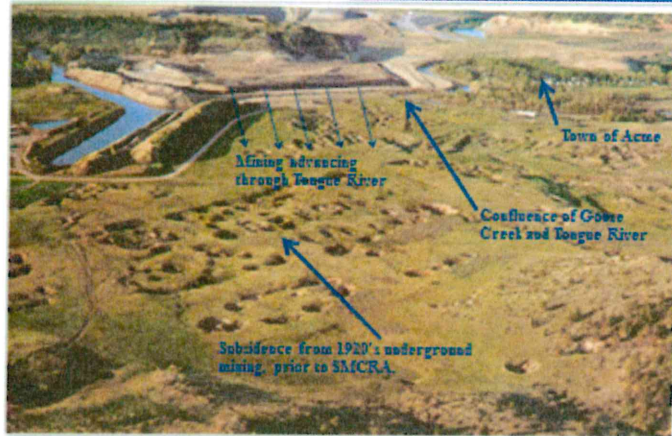
OSM 2011 Excellence in Surface Coal Mining Award

Big Horn Coal Mine,

Big Horn Coal Company (subsidiary of Kiewit Mining)



WYOMING



- Photo illustrating mine conditions during mining operations
- Approximate date of photo - 1970

Exhibit 1x  
Congressional Hearing on OSM Stream Protection Rule  
September 26, 2011, Charleston, WV

## TONGUE RIVER STREAM RESTORATION

OSM 2011 Excellence in Surface Coal Mining Award

Big Horn Coal Mine,

Big Horn Coal Company (subsidiary of Kiewit Mining)



WYOMING



- Photo illustrating reclaimed area of Goose Creek and Tongue River confluence, with reclaimed grasslands on both sides
- Reclamation began in the mid-1980's
- Approximate date of photo - 2010

Exhibit 1b  
Congressional Hearing on OSM Stream Protection Rule  
September 26, 2011, Charleston, WV

**CABALLO CREEK RESTORATION**  
*2007 OSM Reclamation and Enforcement Director's Award*  
**Belle Ayr Coal Mine,**  
**Alpha Natural Resources**



• Photos illustrating pre-mining conditions

Exhibit 3a  
Congressional Hearing on OSM Stream Protection Rule  
September 26, 2011, Charleston, WV

**CABALLO CREEK RESTORATION**  
*2007 OSM Reclamation and Enforcement Director's Award*  
**Belle Ayr Coal Mine,**  
**Alpha Natural Resources**



• Photos illustrating reclaimed Caballo Creek



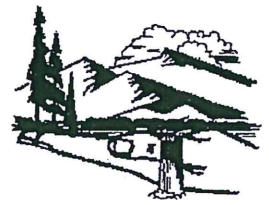
Exhibit 3b  
Congressional Hearing on OSM Stream Protection Rule  
September 26, 2011, Charleston, WV





# Department of Environmental Quality

*To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.*



Matthew H. Mead, Governor

Todd Parfitt, Director

October 23, 2015

Mr. Joseph G. Pizarchik  
Director, Office of Surface Mining Reclamation and Enforcement  
U.S. Department of Interior  
1951 Constitution Avenue, NW  
South Interior Building  
Washington, DC 20240

Re: Wyoming Department of Environmental Quality Comments for Docket Nos. OSM-2010-0018, OSM-2010-0021 and OSM-2015-0002.

Dear Director Pizarchik:

The Wyoming Department of Environmental Quality (WDEQ) appreciates the opportunity to provide the following comments on the proposed Stream Protection Rule, 80 Fed. Reg. 44,436 (July 27, 2015) (Proposed Rule), the Draft Environmental Impact Statement (DEIS), and the Draft Regulatory Impact Analysis (DRIA). WDEQ recognizes the significant work that the Office of Surface Mining Reclamation and Enforcement (OSMRE) has invested in the Proposed Rule, but we ask OSMRE to withdraw the proposal immediately.

The Proposed Rule exceeds OSMRE's statutory authority, infringes on state sovereignty, fails to recognize existing best practices developed and implemented by states like Wyoming, lacks clarity, is scientifically unsound, and imposes significant economic and regulatory burdens without appreciable environmental benefit. WDEQ also objects to the process by which the Proposed Rule was developed. Members of the public, including WDEQ, were not given sufficient time and opportunity to review and comment on the massive rulemaking. Nor were the states appropriately consulted during the development of the Proposed Rule, including those states who signed agreements with OSMRE to serve as cooperating agencies for the development of the DEIS. We therefore ask OSMRE to withdraw the Proposed Rule and work with the states to develop a more appropriate regulatory proposal.

This letter summarizes WDEQ's core concerns with the Proposed Rule and the process by which it was developed. Detailed comments on the Proposed Rule, the DEIS, and the DRIA are provided in Attachment 1. Additional comments from the Air Quality Division of WDEQ are provided in Attachment 2. WDEQ also supports and endorses the technical, economic and legal comments submitted by the Interstate Mining Compact Commission (IMCC) on behalf of its members, which include the State of Wyoming.

## Failure to Consult

The Land Quality Division (LQD) of WDEQ is the delegated regulatory authority for regulating coal mining in Wyoming and has received numerous awards from OSMRE for its regulatory program. Given its vast experience regulating coal mining in Wyoming, WDEQ/LQD accepted OSMRE's invitation in 2010 to become a cooperating agency in the development of the DEIS pursuant to the National Environmental Policy Act (NEPA). Wyoming

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ADMIN/OUTREACH (307) 777-7758 FAX 777-7682	ABANDONED MINES (307) 777-6145 FAX 777-6462	AIR QUALITY (307) 777-7391 FAX 777-5616	INDUSTRIAL SITING (307) 777-7369 FAX 777-5973	LAND QUALITY (307) 777-7756 FAX 777-5864	SOLID & HAZ. WASTE (307) 777-7752 FAX 777-5973	WATER QUALITY (307) 777-7781 FAX 777-5973
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expected a meaningful role in the development of the DEIS and the Proposed Rule, and was willing to commit significant resources to the effort. But it immediately became clear that OSMRE was not interested in cooperative federalism and meaningful participation by the states. In fact, OSMRE provided little opportunity for WDEQ/LQD to participate and began to develop the Proposed Rule and supporting documentation in a vacuum.

WDEQ/LQD objected to OSMRE's closed-door approach numerous times. *See* Attachment 3 (providing a timeline of Wyoming's cooperating agency status and related correspondence). Despite letters from WDEQ/LQD, the Governor of Wyoming, and Wyoming's congressional delegation, OSMRE ignored its obligations under NEPA and shut Wyoming out of the process. In fact, WDEQ/LQD has not had any meaningful input since at least 2011, as acknowledged by OSMRE in the DEIS. The result of OSMRE's failure is a complete lack of understanding on its part – as evidenced throughout the proposal – of the regulatory program, environmental conditions, successes, and challenges in the country's most productive coal producing state. The failure also violates NEPA, the Council on Environmental Quality's NEPA regulations, and Executive Order 13,132 (Aug. 4, 1999).

### **Insufficient Opportunity to Comment**

The federal Administrative Procedure Act requires the federal government to provide the public with ample time and opportunity to comment on proposed rules, and to consider and respond to those comments prior to finalizing any such rules. *See* 5 U.S.C. § 553. On July 27, 2015, OSMRE released more than 2,200 pages of highly technical and complex regulatory information in support of the Proposed Rule. The released documentation also contained citations to thousands of pages of additional scientific and technical information in support of the Proposed Rule and associated studies. Despite the sheer enormity of the proposal, OSMRE expects the public to review and meaningfully comment on that information within 91 days. The review period is wholly inadequate, and appears designed to purposefully evade meaningful public participation.

WDEQ has made its best efforts to review as much of the information as possible in the time allowed, but we have not had sufficient time to review the entire proposal and supporting documentation. WDEQ has reviewed enough of the Proposed Rule and associated documents, however, to know that the proposal is unsound and should be withdrawn.

### **Failure to Consider Wyoming's Regulatory Program**

WDEQ's LQD has developed and implemented a strong and effective coal permitting and regulatory program in Wyoming. Our regulations require extensive baseline monitoring, detailed ground and surface water data collection for development of cumulative hydrologic impact assessments, and effective post-mining reclamation, among others factors. Wyoming mines have won numerous national awards for reclamation practices, including stream restoration. *See* Attachment 4 and Attachment 5. There are currently 82,000 acres in Wyoming in various bond-release phases of reclamation, and 50% (38,000) of those acres are now back in agricultural production. *See* Attachment 6. Productive post-mining land use is increasing annually under Wyoming's program.

Given the strength of Wyoming's program, it is no wonder that OSMRE has never questioned the efficacy of our regulatory efforts, much less issued any notice of program failure. And yet, despite this programmatic success, OSMRE now wants to impose a prescriptive national one-size-fits-all regulation, with nationwide standards, on coal mining operations in Wyoming. The Proposed Rule does not fit Wyoming's program or its landscape and ecology.

The Proposed Rule was clearly developed to target mountaintop mining in Appalachia. It does not account for regional or natural variability in stream types, water quality condition, natural vegetation types, climate, groundwater and surface water hydrology, or mining methods. It requires extensive monitoring before mining, during mining, and after mining until full bond release, regardless of whether such monitoring is scientifically



justified. The Proposed Rule also requires establishing 200-foot wide riparian zones on all streams, including ephemeral, regardless of whether a stream has the natural hydrology to support riparian vegetation or has a natural channel shape with a floodplain.

These and other regulatory elements in the Proposed Rule are not needed in Wyoming, particularly because Wyoming's existing regulatory program is robust and appropriately designed to address all environmental and reclamation concerns. The proposal may even undermine the success of our existing program. OSMRE has not articulated, nor can it demonstrate, the need for such a far-reaching rule. Wyoming has developed extensive best practices for surface coal mining and reclamation, none of which appear to have been considered in the development of the Proposed Rule. The proposal should therefore be withdrawn and reworked in consultation with the states to more appropriately tailor any new regulatory requirements to the actual facts and circumstances in each state.

### **Exceeds Statutory Authority and Infringes on State Sovereignty**

The Proposed Rule exceeds OSMRE's statutory authority and infringes on state sovereignty. The Surface Mining Control and Reclamation Act (SMCRA) established "a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981). According to Congress, "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States . . ." 30 U.S.C. § 1201(f) (emphasis added). The Proposed Rule disrupts this directive from Congress.

Wyoming received SMCRA program authority in 1980. Since that time, Wyoming has implemented an effective surface coal mining control and reclamation program, tailored to meet the needs of Wyoming's arid landscape and our regulatory climate. Once states have gained program approval, exclusive jurisdiction over surface coal-mining operations transfers to the states. *See id.* § 1253(a). No state law or regulation of an approved program shall be superseded by any provision of SMCRA or any regulation issued thereunder unless the state law or regulation is found to be inconsistent with SMCRA. *Id.* § 1255(a). Wyoming's program is consistent with the statutory mandates in SMCRA, and OSMRE has never indicated a problem with WDEQ's program. Indeed, Wyoming's reclamation efforts have been award-winning. OSMRE has not demonstrated the need for a modification in the federal minimum standards, and to attempt to apply new minimum standards to Wyoming's program without that demonstration would undermine the statutory scheme crafted by Congress.

In addition, the Proposed Rule creates new standards for water quality that conflict with the federal Clean Water Act (CWA) and Wyoming's right to implement a delegated program under that Act. For example, OSMRE is attempting to make CWA permit requirements subject to enforcement under SMCRA permits. OSMRE is also proposing to take enforcement action if a mine operator fails to obtain all CWA authorizations prior to obtaining the necessary SMCRA permits. OSMRE lacks the authority to enforce the CWA, as it expressly recognized in 2008: "nothing in SMCRA provides the SMCRA regulatory authority with jurisdiction over the [CWA] or the authority to determine when a permit or authorization is required under the [CWA]. . . . In addition, nothing in the [CWA] vests SMCRA regulatory authorities with the authority to enforce compliance with the permitting and certification requirements of that law." 73 Fed. Reg. 75,814, 75,842 (Dec. 12, 2008). The Water Quality Division of WDEQ is the permitting and enforcement authority for the CWA in Wyoming, with oversight by the U.S. Environmental Protection Agency (EPA). The Proposed Rule should not conflate separate regulatory programs.



OSMRE should also drop any reference in the Proposed Rule and associated documentation to the recently promulgated definition of “waters of the United States” by EPA and the U.S. Army Corps of Engineers. See 80 Fed. Reg. 37,054 (June 29, 2015) (generally referred to as the “Clean Water Rule”). That definition is subject to legal challenge by 31 States, including Wyoming, and two courts have already held in response to preliminary injunction motions that the new definition likely violates the jurisdictional reach of the CWA. The Clean Water Rule is enjoined nationwide, and likely will not survive legal challenge. OSMRE should avoid future confusion by deleting any reference to the Clean Water Rule in the Proposed Rule and associated documents.

### **Grossly Understates Regulatory Impact**

OSMRE has grossly understated the projected impacts of the Proposed Rule in the DEIS and the DRIA. The DRIA in particular indicates a complete lack of understanding and recognition by OSMRE of WDEQ’s regulatory program and, by extension, the impacts that the Proposed Rule would have on Wyoming’s economy.

The DRIA estimates that the total annual cost impact to regulatory programs in the Rocky Mountain Region would be \$29,000. On its face, that figure is laughable. WDEQ has spent more than that simply reading and analyzing the Proposed Rule and associated documents, an effort that is not even remotely close to being finished. The DRIA attempts to explain how the \$29,000 estimate – again, for the entire Rocky Mountain Region – was derived, but the explanation and approach indicates a clear failure to recognize how state programs are required to operate to meet our delegated responsibilities under SMCRA. WDEQ conservatively estimates that the Proposed Rule will impose up to \$550,000 per year in additional costs on the LQD, through additional staffing and technical resources needed to implement and monitor the new regulatory program.

The additional cost to Wyoming will be accentuated by the reduction in state revenue as a result of the Proposed Rule. For example, the DRIA attempts to project lost tax revenues in Wyoming through implementation of the Proposed Rule. The estimate is grossly understated, and fails to recognize the relevant tax revenue streams tied to coal production in Wyoming. The DRIA only discusses coal severance tax revenue. The DRIA projects that the severance taxes lost in Wyoming would be \$360,000 annually. As a threshold matter, that number is understated because it relies on 2012 coal production forecasts. The current conditions in the coal sector are far worse than what existed in 2012, the base year used in the DRIA. Coal companies are struggling to maintain market share in light of changing regulatory and market conditions. Economic and market forecasters are predicting that the coal industry will need to shed up to one-third of existing coal production capacity in order for the industry to begin to stabilize. Any market impacts, and by extension revenue impacts, based on 2012 data have no validity in the current market.

Setting aside the flaws in OSMRE’s base year calculations, the annual \$360,000 tax loss projection is grossly understated. The estimate fails to consider the additional loss of ad valorem taxes in Wyoming, which would be \$350,200 per year based on the \$360,000 coal severance tax estimate. In addition, the DRIA assessment does not acknowledge federal mineral royalty taxes. Based on the projected severance tax loss in the DRIA, there would be an additional \$269,000 per year in federal mineral royalties lost to Wyoming. An additional \$291,000 will be lost annually to the federal government. The DRIA also fails to acknowledge and evaluate the impact on the budget of OSMRE to implement and oversee the significant regulatory changes imposed by the Proposed Rule. Finally, the Abandoned Mine Land fee collection would be reduced by \$142,500 per year, and Black Lung fee collections would be reduced by \$260,000 annually in Wyoming alone.

The financial and regulatory impacts on industry also must be evaluated in light of the current and present market conditions. For example, one additional alternative that needs to be incorporated and evaluated in the DRIA and DEIS is whether the impact of the costs to implement the Proposed Rule would result in a decision to close a mine instead of a mine operator attempting to comply with the new regulatory program. The Proposed Rule increases costs and regulatory uncertainty, particularly in the area of bonding. These factors, coupled with the current market conditions, may result in a decision to close a mine that is or may become marginally competitive. This would represent a completely different set of financial impacts and regulatory burdens for both the regulated



industry and WDEQ. But this scenario was not evaluated in the proposal in sufficient detail, and must be analyzed before any regulatory decision can be finalized.

In short, the impact of the Proposed Rule on state expenses, state and federal tax revenues, and on local and regional economies is grossly underestimated in both the DRIA and DEIS. This flaw demonstrates that OSMRE simply does not recognize the true impacts of the Proposed Rule. It also highlights the fact that OSMRE does not understand and failed to consider key state and regional differences when developing the Proposed Rule. This reality calls into question the basic support and foundation for the entire proposal.

### **Not Supported by Sound Science**

The Proposed Rule has several requirements that have no scientifically defensible justification, such as requiring biological monitoring and the development of biological index values of intermittent and ephemeral streams.

The Water Quality Division of WDEQ has been conducting bioassessments using multimetric bioassessment protocols on perennial streams and rivers for over 20 years and has one of the nation's most robust bioassessment programs, with numerous peer reviewed publications. It is widely recognized in peer-reviewed scientific literature that the highly variable and naturally harsh conditions of intermittent and ephemeral systems in the West support native biological communities that are spatiotemporally variable and naturally tolerant to a broad range of environmental conditions. Thus, the use of biological communities from intermittent or ephemeral waters as diagnostic aquatic indicators of anthropogenic stress is limited at best; the cost and resources required to develop indices, in addition to actual monitoring of these highly variable systems, would be substantial. Biological monitoring of any stream with less than perennial flows imposes a regulatory burden that will provide little to no scientifically defensible data as it pertains to the implementation of the Proposed Rule.

The Proposed Rule also does not account for regional or natural variability in stream types, water quality conditions, natural vegetation types, climate, groundwater and surface water hydrology, or mining methods. Most ephemeral streams in the West naturally have no riparian vegetation because by their ephemeral nature, they lack the natural hydrology for maintaining riparian vegetation. In addition, many perennial and intermittent streams naturally do not have 100 feet of riparian vegetation on each side of the stream channel due to hydrology and valley type. Requiring establishment of 100 feet of riparian vegetation on each side of a stream as a reclamation standard, regardless of natural hydrologic or riparian conditions, not only has no scientific basis, is likely impossible to accomplish in Wyoming.

Baseline monitoring of an entire suite of water quality parameters, as mandated by the Proposed Rule, may be valuable in understanding what parameters of concern may be present. However, requiring continued monitoring of that full suite of parameters, regardless of whether a parameter is ever detected or is detected consistently at low levels, has no scientific basis and will not result in water quality improvement or protections. The result is increased regulatory and financial burdens without corresponding environmental benefit.

## Conclusion

In summary, WDEQ remains committed to effective regulation and control of surface mining operations in Wyoming. We believe in our core mission of environmental protection through effective and efficient governance. OSMRE's Proposed Rule is not effective or efficient governance. It is a one-size-fits-all national regulation that is divorced from the realities of differing regulatory and environmental climates amongst the states. We ask you to withdraw the Proposed Rule and work with your state partners to craft a regulatory proposal that works for state regulators and our regulated industries, while simultaneously protecting the environment within the statutory mandates established by Congress.

Sincerely,

A handwritten signature in black ink, appearing to read "Todd Parfitt", is written over a horizontal line.

Todd Parfitt  
Director

Attachments (6)

cc: Office of Wyoming Governor Matt Mead