



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

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 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 100th 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 100th Meridian. For example, alluvial valley floor protection is only applied west of the 100th 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 98th 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

NORTH TISDALE CREEK STREAM RESTORATION

2003 and 2009 OSM Reclamation and Enforcement Director's Awards

Caballo Coal Mine,
Caballo Mining Company



- 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 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)



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

Exhibit 2a
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)



- 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 2b
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
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