United States Department of the Interior

OFFICE OF SURFACE MINING
Reclamation and Enforcement
Casper Area Office
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Casper, WY 82602

July 11, 2016

Kyle Wendtland
Administrator, Land Quality Division
Wyoming Department of Environmental Quality (WYDEQ)
200 West 17th Street
Cheyenne, WY 82002

RE: Response to Ten Day Notices related to Alpha Natural Resources, Inc. and Alpha Coal West, Inc.'s Mining Operations in Wyoming

Dear Mr. Wendtland:

The Office of Surface Mining Reclamation and Enforcement, Western Region, Denver Field Division (OSMRE) has received and reviewed the Wyoming Department of Environmental Quality's (WYDEQ) letter dated February 12, 2016, responding to the Ten-Day Notices (TDN's) issued on January 21, 2016. Those TDNs regarded the self-bonding of Alpha Natural Resources, Inc. and Alpha Coal West, Inc. (collectively Alpha) mines in Wyoming. OSMRE has also received and reviewed your letter of May 13, 2016, and accompanying information, sent in response to OSMRE's April 1, 2016 request for additional information.

When OSMRE has reason to believe that a permittee is in violation of a state regulatory program, OSMRE must issue a TDN to the appropriate state regulatory authority (RA). 30 U.S.C. § 1271(a)(1) (2000); 30 C.F.R. § 842.11(b)(1)(ii)(B)(*1*). Unless the state regulatory authority takes "appropriate action" to cause the violation to be corrected or shows "good cause" for failure to do so in response to a TDN, OSMRE is required to conduct an immediate Federal inspection of the surface coal mining operation. 30 C.F.R. § 842.11(b)(1)(ii)(B)(*1*). "Appropriate action" is defined as "enforcement or other action authorized under the State program to cause the violation to be corrected." 30 C.F.R. § 842.11(b)(1)(ii)(B)(*3*). The regulation at 30 C.F.R. § 842.11(b)(1)(ii)(B)(*4*) lists five situations that will be considered "good cause" for the RA to fail to take action to have a violation corrected.

An action or response by the RA will be considered appropriate action to correct a violation or good cause for failure to do so if it is not arbitrary, capricious, or an abuse of discretion under the

approved regulatory program. 30 CFR § 842.11(b)(1)(ii)(B)(*2*). OSMRE in its oversight capacity will not substitute its judgment for that of the RA, unless the RA's response is arbitrary, capricious, or an abuse of discretion (further defined below). *See* OSMRE's INE-35 (Jan. 31, 2011). In general, OSMRE will make a finding of appropriate action or good cause if the RA presents a rational basis for its decision, even if OSMRE might have decided differently had it been the RA. *See id.*

Under INE-35, "arbitrary, capricious, or an abuse of discretion" generally means, with respect to an RA response to a TDN, that the RA has acted:

> (1) Irrationally in that the RA's interpretation of its program is inconsistent with the terms of the approved program or any prior RA interpretation recognized by the Secretary of the Interior;
> (2) Without adhering to correct procedures;
> (3) Inconsistent with applicable law; or
> (4) Without a rational basis after proper evaluation of relevant criteria.

OSMRE has evaluated your responses under the aforementioned standards. For the reasons set forth, OSMRE has determined that a violation exists, and WYDEQ has not taken appropriate action to cause the violation to be corrected or shown good cause for failure to do so.

OSMRE recognizes that settlements to resolve objections to Alpha's reorganization plan have been recently presented to the U.S. Bankruptcy Court for the Eastern District of Virginia[1] and that the bankruptcy court has indicated that it will confirm the plan. Under the terms of the settlements and the reorganization plan, Alpha's self-bonding in Wyoming will be replaced on or shortly after the Effective Date of the plan. While OSMRE will take the bankruptcy proceedings into account in assessing any needed corrective action, the plan Effective Date and replacement of bonding have not yet occurred, and the existing, ongoing violations require OSMRE to proceed with this determination. Absent an appeal of this determination, OSMRE may conduct a federal inspection, as required by 30 C.F.R. § 842.11(b)(1)(ii)(B)(*1*).

A VIOLATION OF THE APPROVED PROGRAM EXISTS

The TDNs of January 21, 2016, determined that OSMRE has reason to believe that WYDEQ is allowing Alpha to operate in violation of the Wyoming Environmental Quality Act (Wyoming Act), Section 35-11-417 (Bonding Provisions), and WYDEQ Coal Rules and Regulations, Chapter 12, Section 2(b) (Bonding and Insurance Procedures). At that time, OSMRE believed that WYDEQ had allowed the reclamation bond amounts to fall below the amount necessary to assure that the operator will faithfully perform all requirements of the Wyoming Act and will

[1] *In re Alpha Natural Resources, Inc., et al.*, No. 15-33896 (KRH) (Bankr. E.D. Va.).

comply with all rules and regulations and any provisions of the approved permit. In short, the basis for that determination was that Alpha, with WDEQ's assent, has continued coal extraction activities at its formerly self-bonded Belle Ayr and Eagle Butte mines without the posting of any replacement reclamation bonds or collateral acceptable under the Wyoming Act and WYDEQ Rules and Regulations.[2]

The Wyoming Act's reclamation bonding provisions requirements include:

> (a) The purpose of any bond required to be filed with the administrator by the operator shall be to assure that the operator shall faithfully perform all requirements of this act and comply with all rules and regulations of the board made in accordance with the provisions of this act.
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> (c) The amount of any bond to be filed with the administrator prior to commencing any mining shall be:
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> (ii) For renewal bonds the amount equal to the estimated cost of reclaiming the land to be disturbed during that renewal period, and the estimated cost of completing reclamation of unreleased lands and groundwater disturbed during prior periods of time. The estimated cost shall be based on the operator's cost estimate, which shall include any changes in the actual or estimated cost of reclamation of unreleased affected lands, plus the administrator's estimate of the additional cost to the state of bringing in personnel and equipment should the operator fail or the site be abandoned. In no event shall the bond be less than ten thousand dollars ($10,000.00), except for sand and gravel, pumice, scoria or jade mining or any mine, except surface coal mines, the affected land of which, excluding roads, is ten (10) acres or less, in which case the bond amount shall be set by the administrator with approval of the director to cover the cost of reclamation, and in no event less than two hundred dollars ($200.00) per acre, for affected land.
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> *(d) The council may promulgate rules and regulations for a self-bonding program for mining operations under which the administrator may accept the bond of the operator itself without separate surety when the operator demonstrates to the*

[2] The facts leading to those determinations are set forth in the TDN's and are incorporated by reference.

> *satisfaction of the director the existence of a suitable agent to receive service of process and a history of financial solvency and continuous operation sufficient for authorization to self-insure or bond this amount. This subsection shall not become operative until the council has promulgated rules and regulations for the self-bonding program which require that the protection provided by self-bonding shall be consistent with the objectives and purposes of this act.*

Wyo. Stat. § 35-11-417 (Bonding Provisions) (emphasis added).

WYDEQ Coal Rules and Regulations implementing the Wyoming Act's bonding provisions specify:

> For purposes of determining bond amounts, the estimated cost shall include all costs necessary, expedient or incidental to achieve required rough backfilling and reclamation. This shall reflect the probable difficulty of reclaiming the affected lands, giving consideration, as applicable, to such factors as topography, geology of the site, hydrology and revegetation potential. The estimated cost shall be based on the operator's cost estimate submitted with the permit, plus the Administrator's estimate of the additional cost to the State of bringing in personnel and equipment should the operation fail or the site be abandoned, plus an additional amount covering reclamation cost for any land which may reasonably be expected to be affected, as determined by the Administrator's assessment of the applicant's mine plan, prior to filing the renewal bond. *All bonds shall be calculated on, and never fall below, the amount necessary to assure that the operator shall faithfully perform all requirements of the [Wyoming] Act to comply with all rules and regulations and any provisions of the approved permit.*

Wyo. Admin. Code § ENV LQC Ch. 12 § 2(b) (Bonding and Insurance Procedures) (emphasis added).

WYDEQ determined on May 26, 2015, that Alpha was no longer financially qualified under the WYDEQ self-bonding program and that Alpha's self-bonds failed to provide the protection consistent with the objectives and purposes of the Wyoming Act and WYDEQ Rules and Regulations for Coal. Accordingly, WYDEQ decided that, among other matters, Alpha's right to self-bond would terminate by August 24, 2015, and that Alpha was required by that date to post a reclamation bond or substitute collateral of approximately $411 million in order to be allowed to continue its surface coal mining operations in Wyoming.

After Alpha voluntarily petitioned for protection in U.S. Bankruptcy Court, WYDEQ sought and obtained a stay of its substitution order and related State District Court proceedings by virtue of the "Stipulation and Order Concerning Debtor's Reclamation Bonding of Their Surface Coal

Mining Operations in Wyoming" (Stipulation), approved in U.S. Bankruptcy Court on October 8, 2015. WYDEQ maintains that no violation of its program exists due to the stay of its bond substitution demand, and that Alpha remains liable under the existing, self-bond, indemnity, and corporate guarantee agreements, and the terms of the Stipulation. Response at 4. Due to those commitments, WYDEQ argues that it has neither allowed the bond amount to fall below that necessary to ensure compliance with Wyoming law, rules, and regulations, nor allowed Alpha to continue to mine without a bond. *Id.*

Currently, Alpha has no adequate or effective bonding instrument in place for its Wyoming operations. WYDEQ determined in May 2015 that Alpha was no longer eligible to self-bond. Alpha did not post a reclamation bond or substitute collateral by the August 24, 2015 deadline required by the Wyoming rules and regulations. Instead, Alpha challenged the WYDEQ's substitution demand administratively and judicially.[3] Ultimately, WYDEQ and Alpha reached agreement and sought and obtained further stay of the bond substitution demand in bankruptcy court.

After WYDEQ deemed Alpha financially ineligible to self-bond, no effective or adequate bonding instrument was in place for Alpha's operations. While Wyoming Coal Rules allow a grace period of 90 days to replace self-bonds, that allowance for an operator to come into compliance does not change the status of self-bond or indemnity agreements. Once deemed ineligible for self-bonding, the operator's ability to fully satisfy the terms of those agreements is highly questionable, if not per se unrealistic. Any doubt over the ability of Alpha to fulfill its commitments under the self-bonding agreements was erased by Alpha's admission in the Stipulation that it presently is unable to comply with WYDEQ's bond substitution demand, and does not anticipate being able to meet its reclamation bonding obligations until confirmation of a plan of reorganization or the sale of its properties. Stipulation at 3; *see also* Response at 9 (stating that Alpha "is obviously unable to [post the full amount of the reclamation bond obligation] during the pendency of the bankruptcy."). Moreover, in the Stipulation WYDEQ agreed to "not seek to enforce the Indemnity Agreements or Guarantees or seek to revoke, terminate, refuse to grant or amend or take any other adverse action with respect to the Debtors' mining permits or licenses on account of the Debtors' non-payment of obligations under the Indemnity Agreements or Guarantees." Stipulation at 2.

In light of Alpha's inability to satisfy the financial fitness requirements for self-bond renewal and WYDEQ's agreement not to enforce the self-bond or indemnity agreements, the assurances of

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[3] On June 24, 2015, Alpha sought review in the Sixth Judicial District Court of Campbell County, Wyoming (Civ. Action No. 35558). On July 24, 2015, the WYDEQ concurred with Alpha's request for a stay of the bond substitution deadline pending further administrative process. On July 29, 2015, the Wyoming Court granted that request and imposed a stay until the conclusion of an informal review process by the WYDEQ. Ultimately, the State Court proceedings were stayed by entrance of the Stipulation by the U.S. Bankruptcy Court.

the self-bond and related agreements are therefore no longer adequate to: 1) provide protection consistent with the objectives and purposes of the Wyoming Act, required of self-bonds, and 2) assure that the operator shall faithfully perform all requirements of the Wyoming Act to comply with all rules and regulations and any provisions of the approved permit. Wyo. Stat. § 35-11-417(d); Wyo. Admin. Code § ENV LQC Ch. 12 § 2(b). WYDEQ has thus allowed the reclamation bond amounts to fall below the amount necessary to assure the operator will satisfy all requirements of the approved program.

WYDEQ DID NOT TAKE APPROPRIATE ACTION

In its response, WYDEQ asserts that it took appropriate action to cause the self-bonding violations to be corrected by entering into a settlement agreement with Alpha, eventually formalized in the Stipulation. WYDEQ contends that it "chose to exercise its authority under Wyo. Stat. Ann. § 35-11-701(c) to negotiate a settlement that would ultimately eliminate the violation" (i.e., the failure to timely replace self-bonds). Response at 9. In relevant part, the referenced statute provides:

> **(a)** If the director or the administrators have cause to believe that any persons are violating any provision of this act or any rule, regulation, standard, permit, license, or variance issued pursuant hereto, or in case any written complaint is filed with the department alleging a violation, the director, through the appropriate administrator, shall cause a prompt investigation to be made.
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> **(b)** For surface coal mining operations, in the instance of a written complaint by any person which provides a reasonable basis to believe that a violation of article 4 of this act, or of any rule, regulation, standard, order, license, variance or permit issued thereunder, exists, the investigation shall include a prompt inspection. In such event the director shall notify the person when the inspection is proposed to be carried out and the person shall be allowed to accompany the inspector during the inspection, subject to reasonable control by the inspector. The operator shall have a duty to exercise reasonable care for the person's safety only if his presence is known. However, this duty shall not include the duty to inspect the premises to discover dangers which are unknown to the operator, nor giving warning or protection against conditions which are known or should be obvious to the person. The operator or his designee shall be allowed to be present for any such inspection.
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> **(c)** For other than those violations specified under subsection (b) of this section, if, as a result of the investigation, it appears that a violation exists, the administrator of the proper division may, by conference, conciliation and persuasion, endeavor promptly to eliminate the source or cause of the violation:

> **(i)** In case of failure to correct or remedy an alleged violation, the director shall cause to be issued and served upon the person alleged to be responsible for any such violation a written notice which shall specify the provision of this act, rule, regulation, standard, permit, license, or variance alleged to be violated and the facts alleged to constitute a violation thereof, and may require the person so complained against to cease and desist from the violation within the time the director may determine;
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> * * * *
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> **(d)** Nothing in this section shall be interpreted to in any way limit or contravene any other remedy available under this act, nor shall this section be interpreted as a condition precedent to any other enforcement action under this act.

Wyo. Stat. Ann. § 35-11-701.

WYDEQ believes that the settlement embodied in the Stipulation is fair, equitable, and reasonable resolution of a hotly contested issue. Response at 9. That resolution, WYDEQ states, would "ultimately eliminate" the violation but "allow for certain conditions in the short term, so that violation would ultimately be resolved within a reasonable time." *Id.*

OSMRE does not dispute WYDEQ's authority under its approved program to enter into settlement agreements to promptly eliminate the source of a violation. Wyo. Stat. Ann. § 35-11-701(c). But for the following reasons, OSMRE finds that WYDEQ's exercise of that authority in this instance to be arbitrary, capricious, or an abuse of discretion.

Under the Stipulation, WYDEQ agreed that Alpha could "satisfy the bonding requirements for their reclamation obligations without complying with the Wyoming Substitution Demand." Stipulation ¶ 1. WYDEQ agreed it would "not seek additional collateral or revoke, terminate, refuse to grant or amend or take any other adverse action with respect to the [Alpha's] mining permits or licenses on account of [Alpha's] failure to comply with the Wyoming Substitution Demand or reclamation bonding obligations." *Id.* ¶ 2. WYDEQ further agreed to "not seek to enforce the Indemnity Agreements or Guarantees or seek to revoke, terminate, refuse to grant or amend or take any other adverse action with respect to the Debtors' mining permits or licenses on account of the Debtors' non-payment of obligations under the Indemnity Agreements or Guarantees." *Id.* Further, WYDEQ agreed that "any proceedings relating to the Wyoming Substitution Demand or the [Alpha's] self-bonding status, including the informal review process of WYDEQ, shall be stayed." *Id.*

Thus, the Stipulation allows for Alpha to continue coal extraction activities at its Wyoming mines for a "Compliance Plan Period" without posting alternative bonds in the full amount of the estimated $411 million of bond liability. Instead, WYDEQ received only a superpriority status claim in bankruptcy court of $61 million over and above administrative expenses. Stipulation ¶ 1. The "Compliance Plan Period" is defined as the earlier of the date that: (a) the superpriority claim is terminated pursuant to the Stipulation; (b) Alpha's Chapter 11 cases are converted to cases under Chapter 7 of the Bankruptcy Code; (c) the lenders under the Credit Agreement exercise remedies against the Term Facility Collateral; or (d) January 31, 2017. *Id.* ¶ 7.

Subject to its agreement not to take adverse action with respect to Alpha's permits on account of a failure to meet reclamation bonding obligations, WYDEQ did not limit or impair its rights to enforce all applicable environmental and reclamation laws and regulations against Alpha. *Id.* ¶ 4. WYDEQ also did not waive any claims or causes over and above the superpriority claim, but the debtors reserved all defenses to any such claims. *Id.* ¶ 3. During the Compliance Plan Period Alpha also agreed to comply with their reclamation obligations as required by applicable law. *Id.* The agreement also contained provisions under which the superpriority claim would terminate, including if WYDEQ "breaches" the Stipulation or if "OSMRE revokes, terminates, refuses to grant or amend or takes any other adverse action with respect to the Debtors' Wyoming mining permits or licenses on account of the Debtors' failure to comply with the Wyoming Substitution Demand or reclamation bonding obligations." *Id.* ¶ 6.

OSMRE did not endorse WYDEQ's entrance into the Stipulation. Indeed, in response, OSMRE filed in U.S. Bankruptcy Court a reservation of its rights to enforce SMRCA. *In re Alpha Natural Resources*, Dkt. 542 (Sept. 29, 2015).

In short, under the Stipulation, WYDEQ allowed Alpha to continue mining activities without bond replacement until completion of the bankruptcy proceedings, and possibly until January 31, 2017. It is approximately 13 months since WYDEQ determined that Alpha was no longer financially fit to self-bond, and approximately 10 months since the August 24, 2015, deadline of WYDEQ's original bond substitution demand. From filing the Stipulation on September 29, 2015 to the present alone, WYDEQ has allowed Alpha to engage in mining activities for over 9 months without adequate bond.[4] These actions are not appropriate because they are not short-term. *See* 52 Fed. Reg. 34050, 34051 (Sept. 9, 1987). The Stipulation imposes no obligation or commitment for Alpha to replace self-bonds—at any level—during this "Compliance Plan Period." At base, WYDEQ has given Alpha a "free-pass" from regulatory compliance by allowing the continuance of mining activities for a lengthy period without adequate bond, and

[4] As explained, no adequate bond exists because Alpha is operating without satisfactory financial assurance in an amount necessary to ensure completion of all reclamation requirements under the approved program and permit. Wyo. Stat. § 35-11-417; Wyo. Admin. Code § ENV LQC Ch. 12 § 2(b).

without any interim measures towards abating or otherwise correcting the violation.[5] The Stipulation is not so much a compliance plan as it is a grace period to allow the operator to develop one. Although the Compliance Plan Period is not open-ended, the Stipulation simply imposes no interim measures whatsoever towards replacing self-bonds or reducing the bond liability during that time (*e.g.*, no substitution with cash, surety bond, or acceptable collateral at any level at any time).[6]

For example, WYDEQ did not consider whether further tangible interim steps could be obtained throughout the compliance plan period. WYDEQ also failed to provide any requirement that Alpha exercise its best efforts throughout the compliance plan period to come into compliance with bonding requirements.

The financial information reviewed or analyzed by WYDEQ prior to entering the Stipulation, provided to OSRME on May 13, 2016, does not indicate that Alpha was prevented from providing additional financial or other commitments to reduce its self-bond liability, either incrementally or at some level, during the Compliance Plan Period. As noted elsewhere in this determination, after entering into the Stipulation, Alpha was able to commit to financial and other measures to reduce outstanding self-bond liability in West Virginia during the bankruptcy proceeding. The supplemental financial information provided by WYDEQ provides little explanation of WYDEQ's failure to secure tangible interim steps towards correcting the bonding violation during the Compliance Plan Period, including a specific transition from self-bonds to collateralized financial assurances designed to ensure that sufficient assets are available for reclamation.

Thus, through this matter, WYDEQ has failed to "endeavor promptly to eliminate the source or cause of the violation." Wyo. Stat. Ann. § 35-11-701(c). WYDEQ's action has no mechanisms to "lead to abatement within a reasonable time." 53 Fed. Reg. 26733, 26734 (July 14, 1988) (leading to abatement of a violation within a reasonable time, not actual abatement, is standard for appropriate action). WYDEQ's interpretation of the Wyoming Act to allow for "conciliation" that provides no means to correct the source or the cause violation, is

> (1) Irrational in that its interpretation of its program is inconsistent with the terms of the approved program;
> (2) Without adherence to correct procedures;

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[5] Alpha's "agreement" in the Stipulation to comply with their reclamation obligations during the Compliance Plan Period as required by applicable law does not constitute any step towards correction of the bonding violation, as the two issues are separate legal requirements under the law.

[6] In no way does a mere claim in bankruptcy court, whatever its priority, serve as an acceptable replacement bonding instrument under the Wyoming program. Wyo. Admin. Code § ENV LQC Ch. 11 § 5(b).

(3) Inconsistent with applicable law; and
(4) Without a rational basis after proper evaluation of relevant criteria.

Accordingly, its interpretation of its program, and ultimate action thereunder, is arbitrary, capricious, or an abuse of discretion. Therefore, WDEQ's entry into the Stipulation was not appropriate action to cause the violation to be corrected. 30 C.F.R. § 842.11(b)(1)(ii)(B)(*1*)-(*3*).

In arguing otherwise (Response at 4-5), WYDEQ places great weight on a self-bonding agreement between Alpha and the State of West Virginia regulatory authority, the West Virginia Department of Environmental Protection (WVDEP). In brief, on September 1, 2015, WVDEP, confirmed that Alpha was no longer financially qualified to self-bond, and like WYDEQ issued self-bond substitution orders. And eventually, like WYDEQ, Alpha reached a settlement agreement (Consent Order) with WVDEP that was approved by the U.S. Bankruptcy Court. Like the Stipulation, OSMRE did not endorse the Consent Order and in response reserved its enforcement rights under SMCRA. *In re Alpha Natural Resources*, Dkt. 1080 (Dec. 14, 2015).

Under the Consent Order, Alpha continues to engage in coal extraction activities at its various operations in West Virginia without posting alternative bonds in the full amount of the estimated over $244 million of self-bonded liability. WVDEP received a superpriority claim over and above administrative expenses of $24 million. Importantly, and distinguished from the Stipulation, the Consent Order provided for a "schedule of compliance and take specific steps to reduce the Alpha Self-Bonds" during the term of the order. Consent Order ¶ 18. Among those steps was the posting of a $15 million collateral bond to replace a portion of the self-bond liability. The Consent Order also required certain reclamation activities to reduce the bond liability. *Id.* Unlike the Stipulation entered into by WYDEQ, the Consent Order provided for interim measures to correct or abate the underlying violation within its compliance plan period.

In addition, the nature of Alpha's outstanding bond liability is different in West Virginia due to the approved Alternative Bonding System in that state. That system includes a Special Reclamation Fund made up of a production based fee that is available to pay for reclamation of lands subject to permitted surface mining operations, including Alpha's, where the bond posted is insufficient to cover the cost of reclamation.

Due to these differences between the Stipulation and the Consent Order, and between the approved state programs, WYDEQ's reliance on the WVDEP Consent Order to establish that it (WYDEQ) took appropriate action is misplaced.[7]

WYDEQ DOES NOT DEMONSTRATE GOOD CAUSE

[7] OSMRE takes no position on the appropriateness of WVDEP actions in this decision.

WYDEQ contends in the alternative that the stay of its substitution demand by the U.S. Bankruptcy Court, as requested by Alpha and WYDEQ in the Stipulation, is "good cause" for not taking appropriate action. Response at 10.

Under OSMRE's regulations, good cause includes situations where

> (i) Under the State program, the possible violation does not exist;
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> (ii) The State regulatory authority requires a reasonable and specified additional time to determine whether a violation of the State program does exist;
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> (iii) The State regulatory authority lacks jurisdiction under the State program over the possible violation or operation;
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> (iv) The State regulatory authority is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible violation, where that order is based on the violation not existing or where the temporary relief standards of section 525(c) or 526(c) of the Act have been met; or
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> (v) With regard to abandoned sites as defined in § 840.11(g) of this chapter, the State regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions of the State program.

30 C.F.R. § 842.11(b)(1)(ii)(B)(*4*).

Specifically, WYDEQ asserts that the bankruptcy court's order satisfied the fourth criteria, that a court of competent jurisdiction applied the temporary relief standards of section 526(c) of SMCRA to prevent correction of the violation. Response 10 ("These standards were met when the bankruptcy court entered the stay.") Section 526(c) provides for temporary relief of certain decisions or orders of the Secretary (here delegated to OSMRE) if:

> (1) all parties to the proceedings have been notified and given an opportunity to be heard on a request for temporary relief;
> (2) the person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and
> (3) such relief will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air, or water resources.

30 U.S.C. § 1276(c); *see also* Wyo. Stat. § 35-11-1001 (state counterpart).

Without reaching the issue of whether Section 526(c) applies to this situation or the scope of a bankruptcy court's authority (as opposed to a District Court),[8] here OSMRE's reservation of rights as to whether the compliance plan was sufficient under SMCRA means that the Stipulation is not a judicial determination that in any way precludes OSMRE's review under this TDN.

Moreover, because the Stipulation was not presented to the bankruptcy court as a matter under 526(c) of SMCRA, the bankruptcy court's order did not, and cannot be considered to have, made the requisite findings under that statutory provision. WYDEQ's arguments over good cause and application of the temporary stay criteria are particularly problematic because WYDEQ entered into an inadequate "compliance plan" and then itself agreed to the stay of its enforcement action. OSMRE's regulations do not contemplate for good cause to exist by voluntary or affirmative action by a regulatory authority to cease enforcement actions or abatement of violations. *See* 30 C.F.R. § 842.11(b)(1)(ii)(B)(*4*); *see also* 53 Fed. Reg. 26728 (discussing preclusion of appropriate action by injunction).

CONCLUSION AND DETERMINATION

OSMRE has evaluated your responses and for the foregoing reasons determines that a violation of the approved state program exists (Wyoming Act, Section 35-11-417 and WYDEQ Coal Rules and Regulations, Chapter 12, Section 2(b)). OSMRE finds that WYDEQ's response is arbitrary, capricious, or an abuse of discretion under your approved regulatory program because it is 1) irrational in its interpretation of its program; 2) without adherence to correct procedures; 3) inconsistent with applicable law; and 4) without a rational basis after proper evaluation of relevant criteria. WYDEQ's response also fails to demonstrate good cause for its failure to take appropriate action.

As stated earlier, OSMRE recognizes that settlements to resolve objections to Alpha's reorganization plan have been recently presented to the U.S. Bankruptcy Court and that the bankruptcy court has indicated that it will confirm the plan. Under the terms of the settlements and the reorganization plan, Alpha's self-bonding in Wyoming will be replaced on or shortly after the Effective Date of the plan. While OSMRE will take the bankruptcy proceedings into

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[8] For example, the mere entrance of an injunction by a state administrative body does not automatically amount to good cause; it must have a proper basis. *See Marion Docks, Inc. v. OSMRE*, 168 IBLA 47 (2006) (administrative body's decision to not enforce state rules did not provide good cause to explain state's failure to cite violation and could not act as bar to OSMRE enforcement); *Appolo Fuels, Inc. v. OSMRE*, 144 IBLA 142 (1998) (administrative decision simply excused alleged violations, therefore ruling did not provide good cause to explain state's failure to cite the violation and could not operate as a bar on enforcement action by OSMRE); *aff'd Appolo Fuels, Inc. v. Babbitt*, 270 F.3d 333 (2001); *Pittsburg & Midway Coal Mining Co. v. OSMRE*, 132 IBLA 59, 80-81 (1995) (ruling by administrative body would be arbitrary and capricious if "it did not have a proper basis, or if administrative body were acting outside the scope of its authority under the state program in making such a ruling.").

account in assessing any needed corrective action, the plan Effective Date and replacement of bonding have not yet occurred, and the existing, ongoing violations require OSMRE to proceed with this determination. Absent an appeal of this determination, OSMRE may conduct a federal inspection as required by 30 C.F.R. § 842.11(b)(1)(ii)(B)(*1*).

As provided in 30 C.F.R. § 842.11(b)(1)(iii)(A), if WYDEQ disagrees with this determination, it may file a request, in writing, for informal review by the OSMRE Deputy Director. Such a request for informal review may be submitted to the OSMRE Casper Area Office, PO Box 11018, 150 East B Street, Room 1018, Casper, WY 82602 or to the OSMRE Deputy Director, 1951 Constitution Avenue NW, Washington, DC 20240. The request must be received by OSMRE within 5 days from receipt of OSMRE's written determination.

If you have any questions about this determination, please contact me at (307) 261-6550.

Sincerely,

Jeffrey Fleischman, Chief
Denver Field Division