



United States Department of the Interior



OFFICE OF SURFACE MINING
Reclamation and Enforcement
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Nancy Nuttbrock, Administrator
Land Quality Division
Wyoming Department of Environmental Quality
122 West 25th St, Herschler Building
Cheyenne 82002

Dear Ms. Nuttbrock:

The Office of Surface Mining Reclamation and Enforcement (OSM) has completed review of Wyoming's January 8, 2013, formally-proposed amendment (administrative record No. WY-50-1; State Amendment Tracking System (SATS) No. WY-045-FOR). The amendment concerns proposed changes to Wyoming's Coal Rules and Regulations including ownership and control, adds a provision concerning variable topsoil depths during reclamation, and addresses four deficiencies that OSM identified in response to Wyoming's formally submitted revegetation rule package (WY-038-FOR). OSM finds those provisions of the proposed amendment identified in the enclosure to this letter to be less effective than the Federal regulations and/or less stringent than SMCRA.

The Regional Director, Western Region, is prepared to delay final rulemaking on the proposed amendment to allow Wyoming an opportunity to submit a revised amendment or draft proposed changes in response to the deficiencies. Please submit such a response no later than 30 days from the date of this letter.

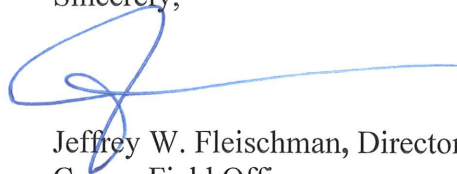
Because the requested revisions of the proposed rules are substantive in nature, OSM will need to reopen the comment period should you elect to respond. Further, if you respond to our comments by making the requested revisions, the Regional Director's approval of the rules in proposed form is contingent upon Wyoming's adoption of the rules in the form in which they were reviewed by OSM and the public.

Should Wyoming indicate that it does not wish to or is unable to submit further modifications to address the identified concerns, the Regional Director will not approve the proposed rule provisions of the amendment identified in the enclosure to this letter.

Please advise me at your earliest convenience whether you wish to submit materials to address OSM's concerns within the next 30 days. If Wyoming does not intend to submit additional material, OSM will proceed directly with the publication in the Federal Register of the Regional Director's decision.

We are available to meet with you to discuss our review findings or any matters of concern regarding the proposed amendment. If you have any questions, please call me at (307) 261-6550 or Frank Bartlett, at (307) 261-6543.

Sincerely,

A handwritten signature in blue ink, consisting of a large, stylized loop followed by a horizontal line extending to the right.

Jeffrey W. Fleischman, Director
Casper Field Office

Enclosure

**CONCERNS IDENTIFIED BY OSM FOR WYOMING'S
January 8, 2013, FORMALLY- PROPOSED AMENDMENT
(ADMINISTRATIVE RECORD NO. WY-50-1; SATS NO. WY-045-FOR)**

We have completed our review of your January 8, 2013, formal amendment that concerns proposed changes to Wyoming's Coal Rules and Regulations including ownership and control, adds a provision concerning variable topsoil depths during reclamation, and addresses four deficiencies that OSM identified in response to Wyoming's formally submitted revegetation rule package (WY-038-FOR). We have concerns about the following proposed rules:

CONCERNS

1. Typographical and Grammatical Errors in Wyoming's Proposed Rules

For purposes of grammatical correctness, clarity, and consistency throughout its rules, OSM recommends that Wyoming make the following changes as identified in its January 2013 amendment resubmittal:

- a. Revise the definition of "Notice of Violation" in proposed Chapter 1, Section 2(co) to read "from the Department of Environmental Quality" on page 1-13 of the January 2013 resubmittal;
- b. Revise the language in Chapter 2, Section 2(a) (ii) (A) (II) by removing the now redundant term "coal mining" so it reads "Forfeited a Federal or State performance bond * * *" since Wyoming has added the phrase "in connection with surface coal mining and reclamation operations" on page 2-4 of the January 2013 resubmittal;
- c. Revise proposed Chapter 2, Section 2(a) (ii) (B) to read "the name of the person to whom the violation notice was issued" on page 2-4 of the January 2013 resubmittal;
- d. Revise proposed Chapter 12, Section 1(a) (x) by removing an extra "that" in the last sentence so it reads "if the LQD determines for any surface coal mining operation that: ..." on page 12-12 of the January 2013 resubmittal;
- e. Revise proposed Chapter 12, Section 1(a) (xiv) (D)(II) to read "relevant portion or aspect thereof during ..." on page 12-15 of the January 2013 resubmittal;
- f. Revise proposed Chapter 16, Section 2(h) to read "... related to ownership or control." on page 16-4 of the January 2013 resubmittal.

2. Wyoming's omission of the term "surface" in Chapters 1 and 2

In a previous rulemaking action, Wyoming proposed to delete the definition of "surface coal mining and reclamation operations" in Chapter 1, Section 2, as well as the word "surface" throughout its rules in Chapters 1, 2, 4 and 5, respectively. OSM subsequently disapproved Wyoming's proposed deletions in a June 14, 2011, Federal Register notice (76 FR 34816, 34821).

Wyoming now proposes to reinsert its regulatory definition of "surface coal mining and reclamation operations," which was approved in its November 26, 1980 original program approval, and is substantively identical to the Federal definitions found at Section 701(27) of

SMCRA and 30 CFR §700.5, respectively. Wyoming also proposes to reinsert the term “surface” in its rules where it was previously removed. However, Wyoming does not include the term “surface” in its newly-proposed definition of “Control or Controller” at Chapter 1, Section 2(aa). In addition, Wyoming must reinsert the phrase “For Surface Coal Mining Operations” in the title for Chapter 2, and it needs to insert the term “surface” in its revised rule at Chapter 2, Section 2(a) (ii) (A) (I) regarding the requirement that permit applications contain a complete statement of compliance. Wyoming’s omission of the term “surface” in its rules is inconsistent with Wyoming’s reinsertion of its regulatory definition of “surface coal mining and reclamation operations,” and renders its program less stringent than SMCRA and less effective than the corresponding Federal regulations at 30 CFR §§701.5 and 778.14(a)(1). Thus, Wyoming must revise its rules as directed above.

3. Adjudication Requirements – Identification of Interests at Chapter 2, Section 2(a)(i)(B)

Item K.3 of OSM’s October 2, 2009, 732 letter instructs the reader to “See LQD Rules and Regulations, Chapter 1, Section 2 and Chapter 2, Section 2” regarding counterpart rules to the Federal requirements for providing applicant and operator permit history information at 30 CFR §778.12. The 732 letter indicates that this section was newly added in the 2000 rule and it was constructed from provisions in previous §778.13.

In response to the 732 letter, Wyoming proposes to revise its rules at Chapter 2, Section 2(a) (i) (B) to identify additional organizational members in an application for a surface coal mining permit including owners of record of ten (10) percent or more of the business entity in question, as required under 30 CFR §778.11(b).

Wyoming’s proposed rule at Chapter 2, Section 2(a) (i) (B), includes counterpart provisions to §778.11(b)(1)-(3). In addition, the counterpart language to §778.11(b)(4) is found in proposed subsection (D). The language in these provisions, taken together, address the requirements set forth in are consistent with and no less effective than the Federal regulations at 30 CFR §778.11(b). However, Wyoming’s existing rule language in subsection (B) warrants the inclusion of additional clarifying language to be consistent with and no less effective than both the Federal counterpart rule at 30 CFR §778.12(a) and its proposed rule language in subsection (F). Specifically, Wyoming needs to revise the language in subsection (B) to read “* * * This shall also include a list of all the names under which the applicant, partner or principal shareholder, and the operator and the operator’s partners or principal shareholders operates or previously operated a surface coal mining operation in the United States within the five years period preceding the date of submission of the application; * * *” Wyoming’s failure to include this additional language in subsection (B) renders its program less effective than the Federal regulations at 30 CFR §778.12(a) and fails to satisfy the requirements specified in Item K.3 of OSM’s October 2, 2009, 732 letter.

4. Unanticipated events or conditions at remining sites at Chapter 12, Section 1(a)(x)(D)(I)

Item E.7 of OSM’s October 2, 2009, 732 letter under “application and permit review requirements” instructs the reader to “See LQD Coal Rules and Regulations, Chapter 5, Section 7” regarding unanticipated events or conditions at remining sites. Chapter 5, Section 7 of

Wyoming's rules includes a section on remining but does not address permit eligibility and unanticipated events or conditions at remining sites. The 732 letter states that 30 CFR §773.13 was created in the 2000 rule from previous provisions to contribute to the improved organization of Part 773 (65 FR 79664). Consequently, OSM required Wyoming submit counterpart rules to the Federal regulations at §773.13.

In response to the 732 letter, Wyoming revised its rules at Chapter 4, Section 2(l)(ii)(F) to include a State counterpart to the Federal regulations at 30 CFR §773.13(b) that addresses permit eligibility and unanticipated events or conditions at remining sites. Wyoming's newly-proposed rule language at subsection (F) is consistent with and no less effective than the Federal regulations.

Wyoming also revised its rules at Chapter 12, Section 1(a)(x)(D)(I) to include a State counterpart to the Federal regulations at 30 CFR §773.13(a) which provides an exception to permit ineligibility for applicants with unabated violations that result from unanticipated events or conditions on lands eligible for remining. However, unlike its newly-proposed rule at Chapter 4, Section 2(l)(ii)(F), Wyoming does not include the phrase "event or" in its proposed rule language at Chapter 12, Section 1(a)(x)(D)(I) which reads "from an unanticipated condition at a surface coal mining and reclamation operation ...". Wyoming's failure to include this phrase is both inconsistent with its own rules and less effective than the corresponding Federal regulation at 30 CFR §773.13(a). Thus, Wyoming must add the phrase "event or" to its proposed rule as directed above.

5. Final Compliance Review at Chapter 12, Section 1(a)(viii)(B)

Item E.4 of OSM's October 2, 2009, 732 letter required Wyoming to adopt a State counterpart to the Federal requirements for reviewing an applicant or operator's permit history at 30 CFR §773.10. (2000 rule, 65 FR 79664 and 2007 rule, 72 FR 68029)

In response to the 732 letter, Wyoming revised its rules at Chapter 12, Section 1(a)(viii)(B) to include State counterpart language to the Federal regulations at 30 CFR §773.10(a)-(c) that address an applicant or operator's permit history. Wyoming's newly-proposed rule language is consistent with and no less effective than the Federal regulations at §773.10(a) and (b). However, Wyoming's proposed rule at subsection (B) warrants the inclusion of additional clarifying language with respect to conducting additional ownership and control investigations to be consistent with and no less effective than the Federal counterpart rule at 30 CFR §773.10(c). Specifically, Wyoming needs to revise its proposed rule to read "*** if the applicant or operator does not have any previous mining experience additional ownership and control investigations may be conducted under subsection (ix)(E) below to determine if someone else with mining experience controls the mining operation; and ***." Subsection (ix)(E) of Wyoming's proposed rules includes counterpart language to 30 CFR §774.11(f) which is referenced in §773.10(c). Wyoming's failure to include this additional language in the proposed rule change renders its program less effective than the Federal regulations. In addition, Wyoming needs to replace the term "regulatory authority" in proposed subsection (B) with the appropriate State reference (e.g., "Division") in order to maintain consistency throughout its rules.

6. Written Agency Decision on Challenges to Ownership & Control Listings or Findings at Chapter 12, Section 1(a) (xiv)(F)

Item F.4 of OSM's October 2, 2009, 732 letter required Wyoming to adopt a State counterpart to the Federal requirements regarding written agency decisions on challenges to ownership and control listings or findings at 30 CFR §773.28. (2000 rule, 65 FR 79666 and 2007 rule, 72 FR 68030).

In response to the 732 letter, Wyoming revised its rules at Chapter 12, Section 1(a)(xiv)(F) to include State counterpart provisions to the Federal regulations at 30 CFR §773.28(a)-(f) that address the requirements for written agency decisions on challenges to ownership and control listings or findings. Wyoming's newly-proposed rule language is consistent with and no less effective than the Federal regulations at §773.28(a)-(d). However, Wyoming's proposed rule requires additional clarifying language with respect to appeals of written decisions to be consistent with and no less effective than the Federal counterpart rule at 30 CFR §773.28(e). Specifically, Wyoming's proposed language merely states that "appeals of written decisions will be administered under the Department's Rules of Practice and Procedure," but does not require that "all administrative remedies be exhausted under the procedures of the Wyoming Environmental Quality Act, the Department's Rules of Practice and Procedure, the Wyoming Administrative Procedure Act and Chapter 12 of these Rules and Regulations before seeking judicial review."

Similarly, the last sentence of proposed subsection (F) is very general and only states that "AVS shall be revised as necessary to reflect these decisions." Consequently, to be consistent with and no less effective than the Federal counterpart rule at 30 CFR §773.28(f) Wyoming needs to further revise subsection (F) to state that, "following the Division's written decision or any decision by a reviewing administrative or judicial tribunal, the Division must review the information in AVS to determine if it is consistent with the decision. If it is not, the Division must promptly revise the information to reflect the decision."

Wyoming's failure to revise and include the additional language discussed above in proposed Chapter 12, Section 1(a)(xiv)(F) renders its program less effective than the Federal regulations at 30 CFR §773.28(e) and (f).

7. Transfer, assignment, or sale of permit rights (TAS) at Chapter 12, Section 1(b)(ii)

Item I. of OSM's October 2, 2009, 732 letter instructs the reader to "See W.S. 35-11-408" regarding TAS. The 732 letter states that the 2007 rule clarifies at (a) and (d) [of 30 CFR §774.17] that at the regulatory authority's discretion a prospective successor in interest, with sufficient bond coverage, may continue to mine during the TAS process. Also noted is that a successor in interest remains the *prospective* permittee until the approval process for the new permit is complete.

In response to the 732 letter, Wyoming proposes to revise its existing rule at Chapter 12, Section 1(b) to apply all procedural requirements of the Act and the regulations relating to review, public participation, and approval or disapproval of permit applications, and permit term and conditions to permit transfer, assignment or sale of permit rights.

Similarly, Wyoming proposes to revise subsection (b)(ii) by applying the requirements imposed by W.S. §35-11-408 regarding procedures for permit transfers to the assignment or sale of permit rights.

Finally, Wyoming revises subsection (b)(ii)(B) by adding a cross reference to its rules at Chapter 2, Section 2(a)(i) through (iii), which is the counterpart to 30 CFR §778, regarding permit application requirements for all legal, financial, compliance and related information. Wyoming also adds language to require that a potential transferee's statement of qualifications include the name, address and permit number of the existing permit holder, which is the counterpart to 30 CFR §774.17(b)(1)(i).

Notwithstanding Wyoming's reference to the terminology used in its definition of "permit transfer, assignment or sale of permit rights," Wyoming's attempt to apply the "permit transfer" requirements in its statute at W.S. §35-11-408 to its proposed revisions to Chapter 12, Section 1(b)(ii) is very awkward and the rules do not address many of the specific application approval requirements for a transfer, assignment, or sale of permit rights at 30 CFR §774.17. For example, Wyoming's proposed rule changes do not include counterpart provisions to 30 CFR §774.17(b)(2) regarding advertisement requirements for newly-filed applications, subsection (d) regarding criteria for approval by the regulatory authority that allows a permittee to transfer, assign, or sell permit rights to a successor, and subsection (e) regarding notification requirements.

In addition, the language in W.S. §35-11-408 and subsections (b)(ii) (A) and (B) of Wyoming's rules all refer to a "potential transferee" and do not address the assignment or sale of permit rights. Wyoming does not define "potential transferee" in its rules, nor does it have a counterpart to the Federal definition of "successor in interest" at 30 CFR §701.5 as it relates to transfer, assignment or sale of permit rights in 30 CFR §774.17. Accordingly, Wyoming's proposed rule changes, as submitted, are less effective than the Federal rules at 30 CFR §774.17 and they do not satisfy the requirements specified in Item I of OSM's October 2, 2009, 732 letter.

Based on the discussion above, Wyoming must submit counterpart provisions to the specific transfer, assignment, or sale of permit rights requirements at 30 CFR §774.17(a)-(f) (2000 rule, 65 FR 79668 and 2007 rule, 72 FR 68030). Wyoming would also be well served by submitting a counterpart to the Federal definition of "successor in interest" at 30 CFR §701.5.