



# United States Department of the Interior

## OFFICE OF SURFACE MINING

Reclamation and Enforcement

Casper Area Office

PO Box 11018

150 East B Street, RM 1018

Casper, WY 82602



June 24, 2013

Filed: 5/23/2014 12:16:51 PM WEQC

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 4, 2013, formally-proposed amendment (administrative record No. WY-49-1; State Amendment Tracking System (SATS) No. WY-044-FOR). The amendment concerns proposed changes to Wyoming's Coal Rules and Regulations including valid existing rights and individual civil penalties. 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, Chief  
Denver Field Division

Enclosure

cc: Denver Field Division, Western Region  
Regional Solicitor, Rocky Mountain Region

**CONCERNS IDENTIFIED BY OSM FOR WYOMING'S  
JANUARY 4, 2013, FORMALLY- PROPOSED AMENDMENT  
(ADMINISTRATIVE RECORD NO. WY-49-1; SATS NO. WY-044-FOR)**

We have completed our review of your January 4, 2013, formal amendment that concerns proposed changes to Wyoming's Coal Rules and Regulations including valid existing rights and individual civil penalties. 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 December 2012 amendment resubmittal:

- a. Revise the language in Chapter 12, Section 1(a)(vii)(A) to read "if the applicant intends" from "if the applicants intend" on page 12-4 of the December 2012 resubmittal document;
- b. Revise the language in Chapter 12, Section 1(a)(vii)(B)(IV) by removing an extra "the" in phrase "determination that the VER" so it reads "determination that VER" on page 12-6 of the December 2012 resubmittal document;
- c. Revise the language in Chapter 12, Section 1(a)(vii)(E) by removing the "s" from the word "Procedures" on page 12-9 of the December 2012 resubmittal document;
- d. Correct a typographical error at Chapter 16, Section 4(c) (i) to read "... Section, the Director shall" instead of "The Director" on page 16-9 of the December 2012 resubmittal document.

**2. Amount of Civil Penalty at Chapter 16, Section 4(c)(i)(A)**

In a November 7, 1988, 732 letter, OSM notified Wyoming that its rules concerning individual civil penalties were deficient. In a previous rulemaking action (WY-040-FOR), Wyoming proposed new rules at Chapter 16, Section 4(c)(i) imposing criteria that shall be considered when determining the amount of an individual civil penalty to be assessed. Proposed subsection (A) requires the Director to consider the "individual's history of authorizing, ordering or carrying out previous violations, failures or refusals at the particular surface mining operation." OSM subsequently disapproved proposed subsection (A) in a February 14, 2013, Federal Register notice (78 FR 10512, 10518) because the Federal counterpart provision at 30 CFR 846.14(a)(1), as well as the remainder of Wyoming's rules refer to "surface coal mining operations." As a result, we required Wyoming to revise its proposed rule language at Chapter 16, Section 4(c)(i)(A) to include the term "coal." Unfortunately, Wyoming did not address this disapproval in its January 4, 2013, amendment and our original decision remains outstanding.

### **3. Availability of records at Chapter 12, Section 1(a) (vii) (F)**

Item G-4 of OSM's April 2, 2001, 732 letter required Wyoming to submit counterpart provisions to 30 CFR 761.16(g) regarding availability of records requirements. In response, Wyoming proposed to revise its rules at Chapter 12, Section 1(a)(vii)(F) in a previous rulemaking action (WY-040-FOR) by requiring that the Division or agency responsible for processing a VER request shall make a copy of the request and related materials available to the public. OSM subsequently disapproved proposed subsection (F) in a February 14, 2013, Federal Register notice (78 FR 10512, 10517) because Wyoming did not specify in the heading that the rule pertains to "Availability of records" and did not provide counterpart language to the Federal requirements in 30 CFR §761.16(g) explaining that, in addition to the VER request and related materials, records associated with any subsequent VER determination shall also be made available to the public. As a result, we required Wyoming to revise its proposed rule language at Chapter 12, Section 1(a)(vii)(F) by making the aforementioned changes.

In response to the February 14, 2013, disapproval, Wyoming now proposes to revise its rules at Chapter 12, Section 1(a)(vii)(F) by specifying that the rule pertains to "Availability of records." In addition, Wyoming proposes language explaining that, in addition to the VER request and related materials, records associated with any subsequent VER determination under subsection (D) of its rules shall be made available to the public in accordance with the requirements and procedures of W.S. § 35-11-1101.

30 CFR 761.16(g) requires the agency responsible for processing VER determination requests to make a copy of the request available to the public in the same manner as it makes permit applications available under 30 CFR 773.6(d). The responsible agency must also make records associated with the VER request and any subsequent determination available to the public in accordance with the requirements and procedures of 30 CFR 840.14.

Wyoming's proposed rule language requires the Division to make a copy of a VER request and related materials available to the public in the same manner as public availability of permit applications under its rules and regulations. Wyoming's regulatory counterpart to 30 CFR 773.6(d)(1) regarding public availability of permit applications is found at Chapter 12, Section 1(b) and requires, in pertinent part, that 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 shall, unless otherwise provided, apply to permit revisions, amendments, renewals and permit transfer, assignment or sale of permit rights.

Wyoming's statutory provisions regarding availability of records to the public and confidentiality are found at W.S. § 35-11-1101(a) and (b) of the Wyoming Environmental Quality Act. Subsection (a) holds that any records, reports or information obtained under the Wyoming Environmental Quality Act or the rules, regulations and standards promulgated thereunder are available to the public, unless a satisfactory showing is made to the director by any person that his records, reports or information or particular parts thereof would divulge trade secrets if made public. If such a showing is satisfactory, the director and administrators shall consider the records, reports or information or particular portions thereof confidential in the administration of the Act. Subsection (b) states that nothing shall be construed to prevent disclosure of any records, reports or information to federal, state or local agencies necessary for

the purposes of administration of any federal, state or local air, water or land control measures or regulations or when relevant to any proceedings under the act.

While W.S. § 35-11-1101 meets some of the requirements of 30 CFR 840.14, it fails to satisfy all of them. In particular, 30 CFR 840.14(b) specifies that the regulatory authority shall make copies of all records immediately available to the public in the area of mining until at least five years after the expiration of the period during which the operation is active or is covered by any portion of a reclamation bond. Since W.S. § 35-11-1101 fails to include a similar provision, Wyoming's reference to the statute does not satisfy the requirements of 30 CFR 840.14 as referenced in 30 CFR 761.16(g). Based on the discussion above, newly-proposed subsection (F) remains less effective than the Federal regulations at 30 CFR 761.16(g).