



Mark Gordon, Governor

Department of Environmental Quality

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



Todd Parfitt, Director

WRITTEN TESTIMONY OF KYLE J. WENDTLAND
WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY,
LAND QUALITY DIVISION ADMINISTRATOR
BEFORE THE
THE HOUSE NATURAL RESOURCE COMMITTEE
SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES

HEARING ON:

"Examining the Biden Administration's Abandoned Mine Lands and Active Mining Programs"

November 14, 2023

Good Morning Chairman Stauber, Ranking Member Ocasio-Cortez, and members of the House Subcommittee on Energy and Mineral Resources. My name is Kyle J. Wendtland and I am the Administrator of the Wyoming Department of Environmental Quality Land Quality Division (WDEQ LQD).

I am here to testify on Examining the Biden Administration's Abandoned Mine Lands and Active Mining Program. More specifically I will address the Office of Surface Mining Reclamation and Enforcement (OSMRE) Title V program Federal Mine Plan Approvals (FMP), National Environmental Policy Act (NEPA) reviews, Program Amendment (PA) approvals, Revisions to the 2020 Ten Day Notice and proposed Dam Safety rules, and Title V funding grants.

Wyoming Coal Background:

The Surface Mining Control and Reclamation Act (SMCRA) was adopted by Congress in 1977 and Wyoming's Title V coal program was approved on November 26, 1980. Wyoming has 43 years of experience in successful coal leasing, mine permitting, reclamation, and successful implementation of the Title V and Title IV SMCRA coal programs. Wyoming's surface coal mines are unique nationally and internationally in both size and scale. Wyoming currently manages 25 active coal permits, and these coal operations are some of the most efficient, low-cost operations in the nation. These mines boast world class safety, reclamation, and environmental performance records. In 2022, Wyoming mines produced 41% of the nation's coal (244,265,803 tons) used for reliable and affordable baseload thermal energy across the nation. Coal contributed \$563 million dollars in taxes, royalties, and fees to Wyoming's economy in 2022. In addition, Lease Bonus Bids have provided additional revenue to the nation and Wyoming. Since 2003, approximately \$4.5 billion has been paid in Bonus Bids to the federal and state governments. These funds are split between the federal and state government, and Wyoming has received approximately \$2.3 billion in Bonus Bid funding for school capital construction since 2003. The Wyoming coal mines also contribute the greatest portion of fee funding for the national coal Abandoned Mine Land (AML) cleanup program, and Black Lung compensation.

OSMRE Federal Mine Plan Amendment Approvals and NEPA:

Wyoming has embraced an all of the above energy strategy. The state recognizes both the need for and value in having a diverse energy production portfolio. This strategy recognizes the clear and continued need for coal produced from Wyoming mines. The coal produced in Wyoming has and will continue to power the nation's baseload thermal energy production for decades to come. Even under the most aggressive energy transition predictions, the need for reliable and affordable thermal coal baseload power will continue well into the 2040 to 2050 timeframe. The need for the nation's security and economy will demand that the power grid remain reliable, stable, affordable, and require the use of dispatchable coal fired power.

It should also be noted, that although Wyoming coal may be initially leased for thermal power generation, other beneficial uses are developing. Coal to fiber, coal to liquids, rare earth mineral extraction, bio char, etc. are all becoming viable alternative uses for coal. In addition to these alternative uses, carbon sequestration programs such as Carbon Safe, and the Inflation Reduction Act (IRA) 45Q program may further extend the use of thermal coal. Wyoming has Class VI injection well primacy from the Environmental Protection Agency (EPA), and is a leader in CCS/CCUS law, policy, regulation and projects. More than a decade ago, the Wyoming Legislature separately enacted a statutory framework for CCS and CCUS projects, including permitting. These developing markets for Wyoming coal further underscore the need for OSMRE to continue to approve Federal Mine Plans in a timely and efficient manner.

The OSMRE Deputy Director Ms. Glenda H. Owens testified to this committee on May 16, 2023 that "the proposed FY 2024 budget focuses on funding OSMRE's core mission responsibilities and supporting the highest priority efforts and activities". As noted in the discussion above, coal is and will continue to be needed now and into the future as the country balances the need for affordable, reliable, and dispatchable energy as power generation transitions are made. The continued approval of mining the nation's coal reserves in a responsible manner to ensure reliability and affordability of electricity is clearly one of the core and high priority functions of the OSMRE. However, OSMRE is not providing support for or approving these core activities in a timely, predictable, and prioritized manner.

Wyoming continues to see Federal Mine Plan (FMP) approval delays at the OSMRE headquarters level. The state is currently waiting for two FMP approvals. To provide the committee with context and foundation it is important to first outline the process of amending a coal lease to an existing mine permit. Prior to OSMRE review of a FMP, the coal leasing action and permit application has been through multiple legal, regulatory, and NEPA reviews. The Bureau of Land Management (BLM) oversees the federal coal leasing activities in Wyoming. The BLM conducts a Resource Management Plan (RMP) and NEPA analysis that outlines and discloses to the public the coal reserves available for lease and issues a Record of Decision (ROD). When a coal lease or amendment action is applied for, BLM conducts a separate NEPA analysis and ROD on the individual coal lease. Once the operator has successfully completed the coal sale process and has ownership of the leased coal, a permit amendment is applied for through the WDEQ LQD Title V coal program. The permit goes through a rigorous technical review and additional public notice in order to complete the state permitting process. Upon completion of the state permitting process, the amended permit is then sent to OSMRE regional office for oversight review. The OSMRE regional office reviews the technical aspects of the FMP for compliance with state regulation and subjects the FMP to an additional, third NEPA analysis. By the time the amendment package reaches OSMRE headquarters for issuance of a Right of Entry Letter

(REL), the FMP has undergone three NEPA reviews and three legal reviews (e.g. the BLM RMP, the Coal Lease EIS, the state permitting process, the OSMRE Federal Mine Plan EA/EIS, the state Attorney General and federal BLM and OSMRE regional Solicitor legal reviews) and multiple public notice and comment periods. In order to best outline the impacts of OSMRE's current review process of a FMP, the Black Butte Mine (BBM) FMP is a keystone example.

- *January 15, 2021: the BBM received approval from WDEQ to amend the existing permit to include the additional coal reserves.*
- *On February 16, 2021: OSMRE sent BBM a Mine Plan Decision Document questionnaire, and BBM submitted the completed form to OSMRE on February 21, 2021.*
- *On March 23, 2021: OSMRE notified BBM that the NEPA analysis completed by BLM in 2017 would be sufficient for the project to receive OSMRE approval and no further Environmental Assessment (EA) would be required.*
- *On April 14, 2021: OSMRE informed the BBM that given changes in the Federal Administration and directive under Executive Order (EO) that further NEPA analysis would now be required. BBM was encouraged to hire a third-party contractor to assist OSMRE with the NEPA process in order to reduce approval time. BBM hired one of the three contractors recommended by OSMRE.*
- *June – September, 2021: multiple project delays were incurred during this timeframe. The list of reasons noted during bi-weekly meetings included a lack of personnel at OSMRE, additional projects on OSMRE staff work lists, and lost paperwork by OSMRE.*
- *September 24, 2021: the EA was completed and submitted to OSMRE staff for review and on October 27, 2021 OSMRE region submitted the EA to the regional DOI Solicitor (SOL) for review.*
- *December 20, 2021: the regional SOL completed review and the EA was sent back to OSMRE staff for review prior to final editing by the third-party contractor.*
- *February 25, 2022: the EA was provided to the third-party contractor for revisions.*
- *March 2, 2022: third party contractor completed its responses and edits to the SOL comments and provided the revised EA back to OSMRE. On April 6, 2022 a second round of comments were generated from the SOL and responded to by the BBM third party contractor.*
- *April 13, 2022: a new timeline was approved by OSMRE for the project. The thirty-day Public Comment Period was scheduled to begin on April 19, 2022.*
- *April 14, 2022: OSMRE notified BBM and the third-party contractor that OSMRE leadership informed OSMRE region that the Public Comment Period could not begin until April 27, 2022. OSMRE further informed BBM that in order to process the MPDD BBM would first need to fill out a Questionnaire. This is the same Questionnaire that was provided to OSMRE one year prior on February 21, 2021.*
- *April 20, 2022: during the bi-weekly update call with OSMRE, the third-party contractor and BBM received approvals to proceed with Public Comment Period on April 27, 2022. Notice was published in the local newspaper and paid for by BBM.*
- *May 3, 2022: OSMRE notified BBM that the Assistant Secretary of Land and Mineral Management (ASLM) had notified OSMRE headquarters that they will not initiate the public comment period until they have written and approved a National Press Release for the project. The ASLM provided BBM with no timeline for this press release and no reason as to why the change and need for this requirement.*
- *May 11, 2022: OSMRE sent notice to BBM that the new Federal Administration had informed OSMRE that all public-facing NEPA documents would be reviewed by four solicitors above the regional SOL. OSMRE refers to this group as Front Office SOL's. No further information was provided to BBM as to who these new solicitors would be or how long the process would take.*

- *May 23, 2022: the new submission process required that the BBM EA and unsigned FONSI first be sent back again to the regional SOL for review. This re-review was completed by the same SOL that had already reviewed and signed off on the EA in late 2021 and early 2022.*
- *July 2022: OSMRE informs BBM that a change and new requirement in the EA will be needed to address the Social Cost of Carbon Greenhouse Gas (SC-GHG) analysis that they use for all new NEPA documents and that this change will need to be validated by DOI prior to being implemented.*
- *December 22, 2022: regional SOL granted authority to load the EA into DTS for the Front Office SOL review. On January 3, 2023 the BBM EA and unsigned FONSI were uploaded into DTS for Front Office SOL review.*
- *February 8, 2023: OSMRE informed BBM that the fourth and final Front Office SOL had not signed off or provided any comments. In hearing no response, BBM engaged state and congressional staff for assistance and to discuss the two plus years of project delays by OSMRE headquarters.*
- *October 3, 2023: BBM received notification from OSMRE that the BBM would now be required to re-start the entire process and complete an EIS in place of the EA for the BBM Federal Mine Plan Modification.*

OSMRE has taken three years to determine that the BBM FMP must now restart the NEPA process completely and conduct a new EIS in place of the EA. Wyoming is experiencing similar unconscionable delays related to a second FMP approval for the Antelope Mine, and neighboring states are having similar difficulties and delays in receiving FMP approvals. Based on the BBM example Wyoming has legitimate concerns over OSMRE headquarters' ability to approve the BBM and pending Antelope Mine (AM) FMP amendments in an efficient and timely manner. Because of these concerns, the Honorable Governor Gordon sent a letter on April 25, 2023 to Secretary of Interior Deb Haaland, outlining the continued delays and concerns in the approval of the BBM FMP. Review of the BBM timeline, and OSMRE headquarters delays, further underscores that the FMP approval process through OSMRE is broken and no longer completed per the regulatory requirements. It is concerning that the OSMRE process has become politicized and the NEPA process weaponized. The delays by OSMRE are resulting in costly permitting delays, increased land disturbance, increased costs to mining, delayed reclamation, fuel supply reliability concerns for the nation's baseload dispatchable power, and lost revenue to the federal and state governments.

OSMRE and State Program Amendments:

Wyoming and other states continue to see excessive delays in the review and approval of Program Amendments (PA). The need to process and approve a PA can be the result of a state initiative, or an OSMRE oversight initiative. However, the fundamental process for submission and approval is similar. The process typically begins with a state statute or rule change. The state then develops rules through the rule making process to develop regulations that are as effective as the federal SMCRA provisions. In Wyoming, new or revised rules are first submitted and public noticed to the Land Quality Advisory Board (LQAB) for review; the rule package is then moved to the Environmental Quality Council (EQC), public noticed and then a decision by the EQC to promulgate the rule package is made; if approved by the EQC, the rule package is then moved to the Governor's office for review and final signature. Following the Governor's signature, the state prepares a PA to the Title V program rules and regulations for submission to OSMRE. The PA submission is first sent to the regional OSMRE office for review. Following the regional OSMRE review and approval, the PA is sent to OSMRE headquarters for final review, Federal Register (FR) publication, public comment, and final processing. Through the course of this process, the PA is public noticed a minimum of three times and has received legal review from a state Attorney General, and regional OSMRE solicitors (SOL), prior to final review at OSMRE headquarters. In order to add context to the processing of a PA by OSMRE, the Wyoming Wind Turbine Blade Disposal PA provides a recent example:

- *July 1, 2020: the Wyoming Legislature and the Governor enacted HB0129 to address the wind waste issue and provide for the responsible disposal of damaged and outdated inert wind turbine blades and towers in the final pit voids and end walls of surface coal mines in Wyoming.*
- *April 29, 2021: Wyoming developed and signed new rules into law that are as effective as the SMCRA requirements. These rules went through the required Wyoming rulemaking administrative process as outlined above.*
- *June 4, 2021: the WDEQ submitted the required formal PA to the OSMRE regional office for technical and regional solicitor (SOL) review.*
- *July 22, 2021: Wyoming received a letter from OSMRE region stating “we have not identified any issue of particular concern to the public or industry in this rule making” and the PA was made available for public notice.*
- *August 4, 2021: the PA was published in the FR (WY-049-FOR Proposed Rule Notice) on August 4, 2021. The comment period ended on September 3, 2021 and OSMRE received no public comment on this PA.*
- *OSMRE headquarters has not acted on approving this PA since September of 2021. As of the date of this testimony, OSMRE has had this PA in review for 843 days.*

Wyoming determined the need and proposed a solution to address the growing issue of responsible disposal of damaged or outdated wind turbine blades and towers. Disposal of the inert blades and towers in municipal landfills is not a viable long term or sustainable option because of the volume of landfill space required. In addition, there are no known scalable recycling uses for these waste materials. At the time Wyoming HB0129 was passed in 2020, there were approximately 70,000 turbine blades awaiting final disposal and the number has only increased since that time. The University of Cambridge estimates that there will be 43 million tons of blades needing to be disposed of by 2050. Wyoming HB0129, proposed rules, and FR publication received no adverse public comments, and have been endorsed by the coal and wind industries as a responsible and sustainable solution. Approval of this PA is a win for the coal industry, the wind industry, and the public. The lack of communication from OSMRE and the delay in approval of this Wyoming PA raises concerns as to the priorities of the agency. Wyoming congressional staff has also inquired as to the status and approval of this PA. OSMRE’s last correspondence with Wyoming staff occurred in December of 2022. The continued silence from OSMRE regarding this PA approval after 843 days of review has been deafening. It is unfortunate that the Wyoming example outlined above is not an isolated event related to OSMRE PA approvals. The Interstate Mining Compact Commission (IMCC) has also engaged OSMRE on this issue. IMCC on behalf of its member states has requested a copy of the “Status Sheet” that OSMRE maintains to determine the point in the process of each state’s respective pending PA’s. OSMRE staff has stated that IMCC would be provided a copy of this status sheet for the past 356 days. To date, IMCC has not received this information. This further demonstrates OSMRE’s lack of communication and the unwillingness of OSMRE to be transparent in its process with primacy states and the public. The OSMRE Deputy Director has stated that there are currently fifty-five PA’s awaiting approval at headquarters. It should also be noted that during the past decade, there have been no fewer than forty PA’s waiting for approval. Based on the lack of transparency and communication by OSMRE, Wyoming has legitimate concerns over OSMRE headquarters’ ability to approve the two pending PA’s in anything resembling a reasonable time frame. The inability for OSMRE to process and approve a state PA’s is problematic on several fronts, and most importantly prevents states from updating and implementing new regulatory requirements in a timely manner. OSMRE currently has PA’s that have not completed processing for more than a decade, and the best response time of a Wyoming PA approval has been four years. It is clear that the approval of PA’s is not considered a “core mission responsibility” as stated by OSMRE’s Deputy Director’s public testimony on May 16, 2023.

2023 Ten Day Notice Rule Revision:

Wyoming has had exclusive regulatory authority over coal mining under Title V of SMCRA since 1980. Wyoming is concerned about the April 25, 2023 proposed rule changes to the Ten Day Notice (TDN) and Corrective Action for State Regulatory Issues and Regulations. As published by OSMRE, the proposed revisions will fundamentally alter the federal-state cooperative federalism relationship under SMCRA in ways that are inconsistent with the exclusive regulatory authority SMCRA confers on states. Wyoming also has great concern that the factual basis OSMRE provided for the proposed rules (less than two years of experience and data collection) in the Federal Register, as it is significantly different than the state experience under existing law.

The OSMRE has attempted to justify the proposed rulemaking by stating that the 2023 proposed rules will “*increase efficiency and make it easier for citizens to report possible violations*” and “*simplify the processes for filing a citizen complaint and requesting a Federal inspection*”. Wyoming disagrees with this conclusion. The proposed rules add unnecessary administrative overhead, deadlines and required formalized documents to address each complaint in the event OSMRE has “reason to believe” a potential violation exists. In contrast, with the existing 2020 Federal Register (FR) notification discussing the Ten-Day Notice (TDN) rules, a major focus and justification for the revised rules was that instead of expending resources on paperwork exercises, the State and OSMRE should work cooperatively to address issues, and in particular, resolve any “on the ground” actions that are necessary to protect public health and safety in a timely manner. Unfortunately, the 2023 TDN rules, as written, take a step backwards and OSMRE proposes to insert itself as the singular lead regulator in place of the State Regulatory Authority (SRA). This places the state in a position of merely justifying its response to any issue a citizen may present to OSMRE regardless of the merits of a citizen’s complaint. It is important to note, that OSMRE has come to these conclusions with two years or less of experience with the 2020 finalized rules. OSMRE has stated that there has been a “wave of citizen complaints” that show the State Regulatory Authorities (SRA’s) have been inadequately addressing citizen’s complaints or not implementing their programs effectively. However, this OSMRE claim appears to be baseless as OSMRE has provided no evidence to support the claim nor has Wyoming been able to verify this claim. Further, OSMRE has to date not responded to a public records request to obtain these data filed by the Interstate Mining Compact Commission (IMCC) on May 31, 2023.

The SRA’s were not consulted as a cooperator prior to, or during the 2023 rule development. The first opportunity the SRA’s had to review the 2023 rule revisions was the publication of the draft rule on April 25, 2023 (88 FR 24944). To be a meaningful partner, OSMRE should have engaged the SRA’s early in the rule development process, rather than a meager sixty-day comment period following the publication of the proposed rule. OSMRE has unilaterally revised a functional, efficient, and cooperative process, without clear evidence of need. The OSMRE has ignored its requirement and responsibility to engage the SRA’s as a partner in a meaningful manner that represents cooperative federalism. For example, the 2020 rules used the term “*cooperative federalism*” nineteen times when discussing the rules; in contrast the 2023 proposed rules use the term only three times. The 2023 proposed TDN rules simply do not achieve the goals of being more efficient or effective than the existing 2020 rules. For the reasons stated above and those identified in Wyoming’s letter dated June 23, 2023, this proposed rulemaking should be abandoned and OSMRE should engage in meaningful dialogue with the states to determine if there is a factual need to make any adjustments to the existing 2020 TDN rule.

Dam Safety Proposed Rulemaking:

The OSMRE planned rulemaking regarding dam safety, specifically to address the findings of the Interior Department’s Inspector General in its December 27, 2012 Report No. WR-EV-MOA-0015-2011 (Inspector General’s Report) regarding Emergency Action Plans (EAPs) and After Action

Reports (AARs), is an item of concern to Wyoming. There is no requirement or need for a nationally applicable OSMRE regulation regarding EAP's for dams. The Inspector General's Report (IGR) identifies the absence of an EAP requirement as a deficiency in OSMRE's federal regulatory program. However, just because the Inspector General identified this as an item for review by OSMRE, it does not mean that this is an issue for the states. In fact, this is not an issue at the state level. In the event OSMRE determines a need to take action and develop rules to resolve concerns raised by the IGR, its action should be limited to whatever is necessary to correct any deficiencies that exist at the federal level, without interfering with state emergency response functions.

If OSMRE adopts a rule that mirrors existing state EAP requirements, which may be impossible as minor differences may exist from state to state, this will establish separate and competing lines of authority over EAP's and their execution. The proposed rules have the potential to cloud the lines of jurisdiction of state emergency preparedness response and management agencies and the Department of Homeland Security's Federal Emergency Management Agency (FEMA). If OSMRE inserts itself into this process, there is real risk that two inconsistent and competing plans will be implemented in the event of a real emergency. There must be one single plan for response to a dam emergency, with one single set of clear directions for communication channels and government authority vested in only one place.

The states should be engaged by OSMRE in a cooperative and meaningful manner to promote cooperative federalism before any draft dam safety rule is finalized and released for public comment. The IMCC has offered to serve as a facilitator between the states and OSMRE to ensure that meaningful and preferably in-person engagement occurs on this topic prior to the drafting of any rule for these purposes. However, OSMRE has to date elected not to engage the states and has stated that the proposed dam rules are expected to be released by the agency as early as the second quarter of 2024.

Title V Grant Funding:

Wyoming, as well as other states, have passed legislation to increase base pay for employees to account for the rise in the cost of living and inflationary pressure. These pay raises are also an attempt by the state(s) to remain competitive in the marketplace and continue to attract high quality and talented personnel. Wyoming has approved pay increases in each of the past two years. At the same time these raises have been enacted, the Title V program grants to the state have remained flat. There is a funding gap that continues to grow, as the Title V grant is not keeping pace with these inflationary budget adjustments. Wyoming recommends that OSMRE work cooperatively with the states in evaluating and addressing this funding gap in the 2025 budget process.

Summary:

In summary, the need for reliable and affordable thermal coal fired baseload power will continue at least into the 2040 to 2050 timeframe. Current and potential new uses of coal are most promising, both in economic and environmental terms. Actions, or rather lack of action by OSMRE has imperiled critical access to the nation's vital coal reserves. The lack of cooperative federalism in the approval of Federal Mine Plans, NEPA reviews, Program Amendment approval, rule development, and Title V program funding has and continues to erode the trust between the state and OSMRE. In Wyoming, with an approved and successful primacy program over the last 43 years, OSMRE's role should be confined to oversight through a limited audit program, research requested by the state, and technical assistance at the request of the state. OSMRE headquarters is unnecessarily re-reviewing regional

approvals, implementing new and continuous duplicative requirements, continues to delay needed state actions, and question regional OSMRE technical staff and solicitor decisions. This lack of confidence and trust within the OSMRE agency itself is at best concerning. The OSMRE decision making process has become mired in political agenda and administration policy, not sound regulatory requirements, technical merit, and fact-based science. This has paralyzed the OSMRE decision making abilities and created mistrust within the agency. The OSMRE is no longer functional nor is it working cooperatively with the states and in the public best interest.

I acknowledge that much of the above information came from a variety of sources, including, but not limited to, the WDEQ, the IMCC, the Wyoming Mining Association, and the Black Butte Mine. I would again like to thank the committee for the opportunity to submit this testimony and appear before you today.

Please find the following reference material attachments to this document:

- *Governor's letter of April 25th on Black Butte Mine and OSMRE July 10, 2023 response*
- *WDEQ Program Amendment Submission Letter Dated June 4, 2021*
- *OSMRE Program Amendment Transmittal Memo*
- *Wyoming Program Amendment Federal Register Publication Dated August 4, 2021*
- *Wyoming Letter of June 23, 2023 comments on the Ten Day Notice Rulemaking*