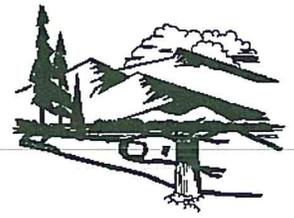




Department of Environmental Quality

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



Matthew H. Mead, Governor



Todd Parfitt, Director

July 15, 2016

SENT VIA OVERNIGHT AND ELECTRONIC MAIL

Glenda Owens
Deputy Director
c/o Jeffrey Fleischman
Chief, Denver Field Division
150 East B St. RM 1018
Casper, WY 82601

RE: Request for Informal Review of July 11, 2016 Determination on Ten Day Notice related to Alpha Natural Resources, Inc., Alpha Coal West, Inc.

Dear Deputy Director Owens,

The Wyoming Department of Environmental Quality (DEQ) requests that you conduct an informal review of the Office of Surface Mining Reclamation and Enforcement's (OSMRE) July 11, 2016 determination on the January 21, 2016 ten-day notice (TDN) related to the Wyoming operations of Alpha Natural Resources, Inc., and Alpha Coal West, Inc. (collectively Alpha). That document states "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." Determination at 2. For the reasons set forth in DEQ's February 12, 2016 response to the TDN which is incorporated herein, and for the reasons set forth herein, OSMRE's determination is in error and its decision in this matter should be reversed.

In evaluating the substance of OSMRE's determination, it is apparent from the timing that this action by OSMRE is political in nature and serves little if any purpose in resolving this complex matter that involves the very livelihood of the miners in Wyoming. As previously noted in DEQ's prior TDN response, OSMRE, its federal solicitors, and attorneys from the Department of Justice were involved early in the discussions leading to the settlement. OSMRE chose to be silent as DEQ negotiated the settlement with Alpha and has continued to do so throughout the bankruptcy proceedings. Only now after the settlement proved to be successful by every possible measure and DEQ had developed a specific plan with Alpha to substitute all of its self-bonds did OSMRE emerge to second-guess DEQ's settlement decision. OSMRE's determination can have no effect in the final resolution of this issue and OSMRE only chose to take action when the agency cannot be held responsible for the many adverse consequences a different settlement would have wrought had it chosen to come forward. Only now that it is safe to do so has OSMRE offered its unreasonable and erroneous criticism of DEQ's settlement.

As a direct result of DEQ's actions, the successor entities to Alpha are on the verge of emergence from bankruptcy. Upon confirmation, Contura Energy, Inc., the purchaser of the Belle Ayr and Eagle Butte mines, will provide surety bonds and collateral sufficient to cover all reclamation costs at those mines. DEQ's settlement ensured that the public has not incurred one dollar in reclamation liability for Alpha's operations in Wyoming. Had DEQ followed OSMRE's proposed course of action,

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the result would have been substantially different. Had DEQ chosen not to settle and taken actions recommended by OSMRE, Alpha would have been forced to cease operations at both mines and proceed directly to Chapter 7 liquidation. Local, state, and federal revenues would have been lost, an estimated 1000 jobs would have been lost, and the public would have been required to pay the closure reclamation costs at these mines. Instead, because of DEQ's actions, the bankruptcy has been successful, Wyoming jobs were saved, reclamation continued at both mines on schedule and in compliance with the permits, there has been no harm to the environment, public health, or public safety, and the people of Wyoming were not left holding the bag for the cost of reclaiming these mines.

OSMRE'S DETERMINATION EXCEEDS ITS AUTHORITY

In addition to being political theater, OSMRE's conveniently timed determination exceeds its authority. OSMRE must uphold "an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program." 30 C.F.R. § 842.11 (b)(1)(ii)(B)(2). OSMRE is not permitted to second-guess DEQ's discretionary decisions, but must "make a finding of appropriate action or good cause if the [regulatory authority] presents a rational basis for its decision, even if OSM[RE] might have decided it differently." OSMRE Directive INE-35 § 4.d. (Jan. 31, 2011). OSMRE acknowledges that DEQ has the discretionary authority under Wyo. Stat. Ann. § 35-11-701 to negotiate settlements to eliminate violations. Determination at 7. That statute provides that if, as a result of DEQ's 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." Wyo. Stat. Ann. § 35-11-701(c).

Thus, while OSMRE is not permitted to second-guess DEQ's settlement decisions, this is exactly what OSMRE has done in its determination in this case. The central message of OSMRE's determination is that DEQ should have been able to obtain a better deal. OSMRE measures a better deal by applying subjective criteria developed well after the settlement was reached. OSMRE's assessment of whether DEQ could have secured additional concessions from Alpha is beyond OSMRE's limited and defined oversight role. As set forth below, every argument levied by OSMRE against the settlement is mere disagreement over a matter of degree or the result of OSMRE's ad hoc imposition of requirements that can be found nowhere in the law. Neither of which provide permissible grounds for OSMRE's determination in this matter.

THE SETTLEMENT WAS REASONABLE AND LAWFUL IN EVERY RESPECT

OSMRE first takes issue with the settlement, because the compliance plan period was commensurate with the length of the bankruptcy proceedings, and therefore, not "short term" based on OSMRE's arbitrary unwritten definition of that term. Determination at 8. Of course, "actual abatement of a violation is not the standard for determining whether a state response is appropriate," provided the state response will "lead to abatement within a **reasonable time**." 53 Fed. Reg. 26733, 26734 (July 14, 1988) (emphasis added). What constitutes a reasonable amount of time to abate a violation depends entirely on the circumstances and context. Substitution of hundreds of millions of dollars in self-bonds while under the control of a bankruptcy court takes as long as the bankruptcy proceeding itself. This was not a trivial bill that the debtor in possession could pay in the ordinary course. The amounts at issue were so large in comparison to Alpha's assets that their treatment was tied inextricably to every

other action and decision to be made in the bankruptcy proceedings. Under these circumstances a period of ten months between entry of the settlement and plan confirmation was remarkably fast. Demanding substitution sooner, as OSMRE suggests in its determination, would have been unreasonable and infeasible for the debtor.

Moreover, the debtor in bankruptcy, even a debtor in possession, does not have free reign to act. Many other parties had claims on the collateral or other funds that might be used to post surety bonds. The bankruptcy court likely would not have permitted Alpha to devote so much money to this one purpose until it had fully assessed all the demands on the estate and been in a position to determine that substitution would not unfairly prejudice the rights of other creditors. Recognition of these realities made the decision to extend the compliance plan period through the duration of the bankruptcy eminently reasonable.

OSMRE next takes issue with the settlement because it “imposes no obligation or commitment for Alpha to replace self-bonds—at any level—during this ‘Compliance Plan Period.’” Determination at 8. OSMRE cites no legal authority of any kind for this asserted deficiency in the settlement, because there is no requirement anywhere in either state or federal law that abatement of a violation must occur “incrementally.” OSMRE cannot arbitrarily establish or create new requirements not present in the law out of whole cloth to suit its preferences.

In this regard, OSMRE’s view that the lack of incremental steps in the settlement amounts to a “free pass” or “grace period” is both irrelevant and inaccurate. Determination at 8-9. DEQ is free to enter into settlements that are reasonable and will “lead to abatement within a reasonable time.” 53 Fed. Reg. at 26734. DEQ has the authority to decide when incremental steps are necessary and appropriate. Here, they were not. Even so, DEQ obtained additional security tantamount to substitution in the form of a superpriority claim for \$61 million. This was not free and came at the expense of secured creditors who may have had a superior claim to these funds than Wyoming.

OSMRE next asserts that the financial information provided by DEQ “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.” Determination at 9. Again, there is no requirement that DEQ require Alpha to abate a violation incrementally, and DEQ did obtain an additional financial commitment from Alpha. But, in addition, OSMRE fails to explain how demanding more money up front from Alpha would have made any difference in the ultimate outcome. Demanding partial substitution on the front end of the bankruptcy makes complete abatement at the end of the bankruptcy less rather than more likely, because it threatens the success of the Chapter 11 proceeding.

Moreover, small amounts of additional financial commitments make little sense for the two Wyoming mine sites. It made sense for West Virginia to seek some additional security in the form of letters of credit to help protect some of its small and closed mines. Those properties were most at risk of abandonment during the bankruptcy. The Belle Ayr and Eagle Butte mines were not similarly at risk of abandonment as they are among the most valuable core asset properties in Alpha’s portfolio. In addition, in proportion to total reclamation liability at the Wyoming mines, the amount West Virginia was able to secure by letter of credit would not make a meaningful difference in Wyoming’s overall

security. Demanding it from Alpha would however, adversely affect the progress of the bankruptcy. In light of these realities, DEQ's decision to accept a superpriority claim in the amount of \$61 million was reasonable.

OSMRE next mistakenly asserts that the settlement "provides no means to correct the source or the cause [of the] violation[.]" Determination at 9. Here OSMRE seems to be arguing that the settlement must set forth in some specific order or command that Alpha abate the violation. This assertion ignores the context and interim nature of the settlement. At the conclusion of the bankruptcy, Alpha, or its successor, is required to comply with Wyoming statutes and regulations governing bonding. These legal requirements provide the mechanisms that lead to abatement, and there is no need to reiterate those requirements in the settlement agreement.

Finally, OSMRE argues that DEQ's reliance on the bankruptcy court's endorsement of a similar settlement with West Virginia is misplaced. DEQ concedes that there are some differences in the two settlements addressing the very different risks in each state. But the agreements are more similar than different as DEQ explained in its initial response. Moreover, there is no provision in state or federal law that would favor one state's settlement decisions over the others. While OSMRE may believe that West Virginia got more than Wyoming, it offers no legal authority supporting its view that DEQ was required to demand the deal most oppressive to the debtor. OSMRE's view of the relative merit of the two agreements is the kind of rank second-guessing of DEQ's discretionary settlement decisions that OSMRE's own regulations strictly prohibit.

THE BANKRUPTCY STAY PROVIDES GOOD CAUSE

Turning to whether the bankruptcy stay provides good cause for DEQ's decision not to take further enforcement action, OSMRE misconstrues the relevant provision of law and then grafts new requirements onto the law that do not exist. OSMRE regulations provide a court order precluding the regulatory authority from taking further action provides good cause where the temporary relief standards of section 526(c) of SMCRA have been met. *See* 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv); 30 U.S.C. § 1276(c). That section governs temporary injunctions of Secretarial acts so long as the following three standards are met:

- (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.

In its initial response, DEQ showed that these standards were met when the bankruptcy court entered the stay. In response, OSMRE contends that the judicial determination of the bankruptcy court does not bind OSMRE. Determination at 12. Regardless of whether OSMRE's reservation of rights effectively reserves anything at all, whether OSMRE is precluded from acting is not the issue. The issue is whether the court's order precludes further action by DEQ. It clearly does.

Glenda Owens
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Determination on Ten Day Notice

Further, OSMRE claims that the bankruptcy court did not make the “requisite findings” under section 526(c). Determination at 12. Here OSMRE is again arbitrarily establishing new requirements not found in the law. Nowhere in section 526(c), is there a requirement that the tribunal make specific findings in the order. Of course, such a requirement would make no sense when applying 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv), because that section does not contemplate proceedings pursuant to section 526(c), but other proceedings in various venues on various topics that meet the standards set forth in section 526(c). Thus, the salient question is not whether the tribunal made the “requisite findings,” but rather whether the standards were objectively met. Here they were, and the bankruptcy court order staying further enforcement proceedings by DEQ constitutes good cause.

CONCLUSION

In your informal review, DEQ encourages you to take a hard look at the substance of the determination to ascertain whether any portion of the document amounts to more than simple disagreement heightened by disagreements between DEQ and OSMRE in other areas. DEQ’s settlement was well informed and reasonably balanced the competing considerations in a way that led to substitution in a period that made sense for the endeavor without adversely impairing the success of the bankruptcy proceedings. In the end, a successful bankruptcy is the most effective and expeditious mechanism available to force substitution without injuring the public. The proof is in the result, and DEQ notes that OSMRE does not take issue with the result.

DEQ requests that OSMRE’s determination be reversed and we look forward to your written response within 15 days pursuant to 30 C.F.R. § 842.11(b)(1)(iii)(C).

Sincerely,



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Administrator, Land Quality Division

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