

**WRITTEN TESTIMONY OF TODD PARFITT, DIRECTOR**  
**WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY**

**BEFORE**  
**THE SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE**  
**OVERSIGHT HEARING ON:**

**THE STREAM PROTECTION RULE: IMPACTS ON THE ENVIRONMENT AND**  
**IMPLICATIONS FOR ENDANGERED SPECIES ACT AND CLEAN WATER ACT**  
**IMPLEMENTATION**

**FEBRUARY 3, 2016**

Good morning Chairman Inhofe, Ranking Member Boxer, and members of the Senate Environment and Public Works Committee. My name is Todd Parfitt. I am the Director of the Wyoming Department of Environmental Quality (WDEQ). I thank the committee for inviting the State of Wyoming to share our perspective on the development of the Proposed Stream Protection Rule by the Office of Surface Mining Reclamation and Enforcement (OSM). In short, we are deeply disappointed with the development of the Proposed Rule and the lack of engagement with the states in that process.

Before I provide further detail on those concerns, I want to provide some perspective on why this subject matter is important to Wyoming. Wyoming is home to Yellowstone National Park, Devil's Tower and many more special places. Our natural resources help make Wyoming a truly special destination. Our citizens and visitors expect these places to have world class environmental stewardship. Wyoming's abundant mineral resources provide its citizens and the State with the jobs and tax revenue necessary to thrive. In Wyoming, we manage our natural resources exceptionally well, providing for both environmental stewardship and energy production. As our governor, Matt Mead, has stated, "It is a false question to ask: Do we want energy production or environmental stewardship?" In Wyoming, we must and do have both.

Wyoming is the number one exporting state of British thermal units (BTU's) in the country, contributing 12% of all BTU's produced in the U.S. in 2013. Wyoming is also the number one

producer of coal in the country, mining 40% of the nation's production and delivering coal to over 30 states. Wyoming's energy leadership is matched by its leadership in establishing and enforcing strong environmental regulation and enforcement programs to protect the environment that is so important to each of us who call Wyoming home. Wyoming also coordinates on mine permitting with all appropriate federal agencies, including the US Fish and Wildlife Service for endangered species review and consultation.

Wyoming's dual interests in environmental stewardship and coal production is why the State has closely followed the development of the Stream Protection Rule from its inception. Wyoming supports reasonable, practicable and sensible efforts to improve stream protection. To that end, Wyoming was pleased when OSM reached out to states in 2010 extending an offer for us to become cooperating agencies in the National Environmental Policy Act (NEPA) process associated with the development of the Proposed Rule. In August 2010, the WDEQ entered into a Memorandum of Understanding (MOU) with OSM to provide meaningful and timely comments on the draft environmental impact statement (EIS) that OSM intended to prepare in support of the Stream Protection Rule. Nine other states participated as cooperating agencies.

The cooperating agency process provided OSM with an opportunity to take advantage of the wealth of knowledge that states have compiled over the past decades implementing robust surface mining control and reclamation programs. That wealth of knowledge had the potential to shape the development of a meaningful, appropriate and well-written EIS and Proposed Rule. Unfortunately, because of the unwillingness of OSM to effectively engage with the states, despite the cooperating agency MOU's, these opportunities were not realized.

Wyoming is not opposed to changes being made to the Stream Protection Rule. Wyoming supports regulations that protect our environment but only those that are reasonable, practicable, and sensible. What Wyoming is critical of is a Proposed Rule and process that is seriously flawed. OSM excluded states from the process, failed to recognize the regional differences that affect mining and reclamation, and is attempting to impose one-size-fits-all regulations on Wyoming based upon science related to Appalachia.

Wyoming is very familiar with the cooperating agency process. We have served as a cooperating agency on numerous activities with the Bureau of Land Management. This includes assisting in the

development of resource management plans and the development of environmental impact statements on large-scale projects. Wyoming has also served as a cooperating agency with the U.S. Forest Service and the U.S. Fish and Wildlife Service on several planning initiatives (most recently in partnership on sage grouse management), and also for the development of environmental impacts statements for large scale projects. We know and understand the process and are fully aware of the staff and resource commitment that must be made to be an effective contributing cooperating agency. Our past experiences have proven that federal agencies which actively participate in cooperating agency efforts end up with well-informed decision documents for federal, state and local government partners.

This is the type of relationship Wyoming expected when we entered into the cooperating agency MOU with OSM on August 24, 2010. Unfortunately, the OSM's cooperating agency process failed to meet the principles established in the MOU, in stark contrast to the processes Wyoming enjoyed with other federal agencies over the past few decades.

Initially, the process seemed to follow the spirit and intent of the MOU. OSM provided Wyoming the opportunity to review three draft chapters of the EIS, two in late 2010 and one in early 2011. OSM, however, provided minimal time to review those documents. Even though the review period was exceedingly short, Wyoming DEQ committed the necessary resources to review the documents and provided comments back to OSM, while still adhering to our other mandatory regulatory duties. Unfortunately, the initial review of those early chapters was the last involvement OSM allowed or provided to Wyoming.

Now, nearly five years later, OSM has issued a Proposed Rule, draft EIS and Regulatory Impact Statement (RIA) spanning over 2,200 pages that in their own words is substantially different than the pre-drafts the states reviewed nearly five years ago. Included are five new alternatives not seen or reviewed by the cooperating states. OSM did not engage states or share how or if it considered the states' comments and expertise. Wyoming has sent several letters to OSM, in addition to letters signed by all of the cooperating states, requesting that OSM re-engage in the cooperating agency process and reiterating our willingness to participate. OSM disregarded these repeated requests.

On April 26, 2015, OSM met with the cooperating agency states to update them on the status of the rule development. That meeting was simply a broad overview of the draft EIS and did not provide

any opportunity for cooperating agencies to provide input. Those in attendance were informed that the final draft EIS and Proposed Rule would look nothing like what states reviewed in 2010 and 2011. For example, OSM explained that it had a new contractor working on the documents and that the agency had added additional alternatives for consideration. Essentially, the states were told they would not recognize the draft EIS or Proposed Rule as published, but were assured that the documents represent “much better work.”

Given OSM’s failure to effectively engage with the states throughout the development process, eight of the ten cooperating states withdrew from the cooperating agency process in 2015. While tempted, Wyoming did not withdraw from its cooperating agency status at that time. However, Wyoming did send one last letter to OSM on May 22, 2015, expressing our serious disappointment with the process and our concerns that the states’ views were being ignored. OSM finally replied to that letter on October 8, 2015. In the letter, OSM thanked Wyoming for our prior, valuable contributions to the draft EIS. The letter also stated that OSM values our continued participation in the process of developing a final EIS. Finally the letter extended an invitation to review draft responses to public comments received on the draft EIS and the Proposed Rule specific to our state and region. I find this to be a hollow gesture given the loss of trust experienced by Wyoming during the pre-draft process, including OSM’s unwillingness to honor the MOU and engage with the states during the past five years.

Wyoming decided not to withdraw from the cooperating agency because we remain optimistic that OSM will realize the tremendous opportunity of honoring their commitment to cooperating states and withdraw the draft EIS and Proposed Rule. OSM should reengage with the states to develop a superior product than has been put forth. In addition, we were concerned that if all states pulled out of the cooperating agency process, states would potentially lose standing in any legal challenges that may arise out of the faulty NEPA process.

OSM’s failure to engage Wyoming and the other cooperating states in the drafting process clearly violated the commitment by Secretary Salazar to the Western Governors’ Association on April 15, 2011 that “all cooperating agencies will have an additional opportunity to review and comment on a Preliminary Draft EIS before it is published for public review and comment”. For the record, the Draft EIS and the Proposed Rule were published by OSM without ever providing Wyoming or other state cooperating agencies the opportunity to review and comment on a Preliminary Draft EIS.

The process failed to comply with one of the basic principles of the Surface Mining Control and Reclamation Act of 1977. Public Law 95-87 (SMCRA) makes the following statement under TITLE I – STATEMENT OF FINDINGS AND POLICY, SEC. 101(F);

“(f) because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States;” (emphasis added)

Turning to the comments Wyoming submitted on the proposed documents, we commend Assistant Secretary Janice Schneider for recently reaching out to Wyoming. She has expressed interest in making sure that she understands our comments on the Proposed Rule, and we have taken her up on the offer to discuss them. Open dialogue and exchange of information is what should have been occurring since the start of the process under the MOU. While we acknowledge the Assistant Secretary’s efforts in this regard, it does not eliminate the need to withdraw the draft EIS and Proposed Rule and fully engage the states in a meaningful way. The development of the draft EIS and Proposed Rule occurred with no input from the states that have special expertise and jurisdiction in these matters. The two recent meetings with OSM and the Department of Interior have only been focused on specific areas and questions by OSM and the Department of Interior with no detailed discussions about the Proposed Rule, draft EIS, RIA or the other questions and concerns raised by Wyoming. Yes, Wyoming’s comments are critical of the Proposed Rule, but they are critical for good reason.

The Proposed Rule makes no distinction between mining in Appalachia and mining in Wyoming even though the Proposed Rule would apply uniformly to all states. The Proposed Rule would establish regulations that do not reflect the specific environment and ecology of the west, are unnecessary, would greatly increase the cost to the Wyoming coal regulatory program, and in some cases would be impossible to implement or comply with. Review of the documents cited in the Proposed Rule, EIS and RIA also seems to demonstrate that the main sources of scientific information used to develop the Proposed Rule were directly referencing Appalachia. The vast majority of the cited documents directly related to Appalachia and only a very small number of cited documents reference the West, much less Wyoming. Since the majority of coal production is

in the West and mining in the West is vastly different from mining in Appalachia, it is concerning that OSM used minimal science related to the West to develop the Proposed Rule. The result is a rule that applies Appalachian standards to Wyoming without a scientific basis for doing so. This again is inconsistent with the language of SMCRA that recognized “the diversity of terrain, climate, biologic, chemical and other physical conditions in areas subject to mining operations”.

OSM fails to recognize Wyoming’s primacy in implementing its federally-delegated programs, and in fact seems committed to eroding Wyoming’s rights under those programs. The fact that OSM failed to engage Wyoming as stipulated in the MOU or the development process can only be interpreted as disregard for the fact that Wyoming is the delegated regulatory authority under SMCRA. OSM’s failure to engage Wyoming or the other coal programs dismisses the expertise and best practices developed by states. This failure to recognize Wyoming’s primacy is exemplified by the language establishing water quality standards under the Proposed Rule for areas already delegated to states. This represents a clear attempt to duplicate existing regulatory jurisdiction and state authority under the Clean Water Act. The incorporation of the new Clean Water Rule – the implementation of which has been stayed by two federal courts – into the Proposed Rule also appears to be an effort to impose new restrictions on state programs under SMCRA, such as protection of ephemeral streams. Authority for stream protection, including all classes of streams, already rests with Wyoming for Wyoming waters under state law, and is augmented by Wyoming’s additional Clean Water Act program authorities.

In our most recent conversation with the Assistant Secretary and her team we noted that the Proposed Rule, EIS and RIA were so large that, even in the 90-day comment period, Wyoming was not provided with sufficient time to go through much of the public documents. One area that we were unable to review was the reference documents cited in the Proposed Rule, EIS and RIA. At our last meeting with the Assistant Secretary we requested hyperlinks to, or digital copies of, all of the documents so that we can review them. We were told that those documents were cited in the proposed documents and could be accessed there. We then attempted to access the documents using the citations in the documents. The results of this investigation were concerning. Many of the scientific articles cited can only be accessed by subscribing to the journals that they were published in. That clearly represents a cost and time implication for states and anyone else attempting to review the documents during the short comment period. Numerous documents were cited with URL links to access the material where those URL links are no longer valid. There were supportive

citations for newspaper articles which are clearly not peer reviewed. In addition, other questionable reports were also cited. OSM did not seek information from Wyoming even though we are the delegated regulatory authority under SMCRA. As a result OSM ignored the experience, scientific knowledge and best practices that directly relate to Wyoming and western coal mining.

One of the Proposed Rule sections establishes new standards for blasting. Blasting had never been previously noted as an area to be addressed in the Stream Protection Rule so the inclusion was a surprise. As a threshold matter, we understand that OSM is currently rewriting its stand-alone blasting regulations under SMCRA, without input – at least at this stage – from the delegated state regulatory programs. We sincerely hope that OSM is not repeating its prior failure to engage with the states while reworking the blasting or any other regulations. Regarding the inclusion of the blasting provisions in the Stream Protection Rule, we were recently informed by OSM that the blasting rule language was a “printer error” in the Proposed Rule and should not have been included. This item represents a significant procedural problem that does little to instill confidence in the Proposed Rule. OSM was asked if they were aware of any additional “printer errors”. I was surprised by the response which was that Wyoming should let OSM know of any additional printer errors. The obvious question is how would Wyoming know since OSM is in charge of the document preparation? Since OSM had not engaged Wyoming throughout the process we would have no knowledge of OSM’s intent. The proposed blasting provisions, to our knowledge, have not been removed from the Proposed Rule, as no public notification of the error has been provided by OSM.

To emphasize the long running frustration with the OSM process, I refer you to the testimony of the prior WDEQ Director John Corra before the House Energy and Mineral Resources Subcommittee on September 26, 2011. A copy of his testimony is attached for reference. Among the points he raised were:

- “The OSM has used a court order and an agreement with other federal agencies that were aimed at tackling a problem in Appalachia as an excuse to impose unnecessary and costly over regulation across all coal mining states.”
- “We are unaware of any objective data, scientific or otherwise, that supports this level of change to SMCRA.”

These concerns, now more than four years old, are unchanged. Wyoming prepared extensive comments on the Proposed Rule, EIS, and RIA, and simply cannot support the Proposed Rule as written. Our cover letter transmitting those comments to OSM is attached for your reference. I'll highlight a few of our main concerns here:

- OSM has undertaken a comprehensive rewrite of the core regulations implementing SMCRA, and has not limited itself to focusing on stream protection.
- The Proposed Rule is a one-size-fits-all regulation that imposes nationwide standards without consideration for the fundamental regulatory, environmental, ecological or economic differences amongst the states.
- The Proposed Rule fails to consider Wyoming's regulatory program and the best practices, including award-winning reclamation techniques, which our regulatory experts have developed over several decades of running the largest surface coal mining program in the country.
- The Proposed Rule exceeds OSM's statutory authority and infringes on the authority and ability of states to implement SMCRA.
- The RIA grossly underestimates the financial impact of implementing the new standards. The RIA estimates that the total impact on regulatory agencies in the Rocky Mountain Region (CO, WY, MT, ND), for example, to be \$29,000 per year. For Wyoming alone, we estimate the increased cost to be closer to \$550,000 per year.
- The RIA grossly underestimates the impact of the Proposed Rule on Wyoming and federal tax revenue, understating that impact by over \$1.3 million.
- The Proposed Rule imposes extensive monitoring and reclamation requirements without sound scientific justification.

Wyoming has recently written to Assistant Secretary Schneider following our last discussions to once again express our frustrations and concerns regarding the Proposed Rule and the process that

brought us to this point. In summary, the failure to engage cooperating agencies throughout this process is reflected in the poor quality of the Proposed Rule and inaccuracies in the draft EIS and RIA. Wyoming does not believe that the Proposed Rule, draft EIS or RIA can be modified, amended, or changed to overcome their many problems through the public comment process. The only reasonable and logical decision is to withdraw the rule and work with the states, regulated industry and other members of the public to put forth a more appropriate proposal.

Wyoming remains willing to commit staff time and resources to fully engage in a meaningful cooperative agency process. If the new direction articulated by the Assistant Secretary to establish open, meaningful exchanges of information with the states, allowing OSM to benefit from the strong experience and best practices of states like Wyoming, is serious, OSM should pull back the Proposed Rule and work directly with the states to develop a reasonable, practicable and sensible rule. This would move the process in the direction envisioned by SMCRA, collaborative partnership led by the special expertise of the states. I ask this committee for any help that it may provide in securing this outcome.

Thank you for the opportunity to provide Wyoming's perspective on these important matters. I would be happy to answer any questions that you may have.