

WRITTEN TESTIMONY OF TODD PARFITT, DIRECTOR OF
THE
WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY
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BEFORE
THE HOUSE NATURAL RESOURCES COMMITTEE
SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES

“Oversight Hearing on the Office of Surface Mining Reclamation and
Enforcement’s Abandoned Mine Lands Program”

JUNE 7, 2017

Good morning Chairman Gosar, Ranking Member Lowenthal, and members of the House Subcommittee on Energy and Mineral Resources. My name is Todd Parfitt. I am the Director of the Wyoming Department of Environmental Quality (DEQ). I thank the committee for inviting the State of Wyoming to share our perspective on the Abandoned Mine Land Program at this hearing.

The mission of the Wyoming DEQ is, “to protect, conserve and enhance the quality of Wyoming’s environment for the benefit of current and future generations”. As we carry out our mission, we do so with the understanding that it must be done in a balanced manner, protecting our natural resources while maintaining the State’s economic strength and stability. Administering a responsible and effective AML program is a key element to achieving the mission of the agency.

The Surface Mining Control and Reclamation Act (SMCRA) was adopted by Congress in 1977. The law includes Title V to address permitting, enforcement and reclamation for coal mines. The law also created Title IV (The Abandoned Mine Land (AML) Program) to address reclamation of coal mines abandoned before 1977 where no responsible party exists.

SMCRA requires that States have an approved Title V regulatory program in order to receive AML funds for a Title IV AML program. Wyoming’s Title V regulatory program was approved on November 26, 1980 and Wyoming’s reclamation plan for its Title IV program was approved by the Department of Interior in 1983. Wyoming became a certified state on May 25, 1984. As a certified state, AML funding must be used first to fund reclamation of newly found coal or non-coal of equal or greater priority. After all coal and non-coal reclamation projects are funded, funds can then be used for public facilities. Wyoming’s AML program has conformed to these requirements of SMCRA and has been consistent with the OSMRE approval of certification.

Wyoming's inventory was small at the time of certification due to limited technology and where sites were identified by on the ground surveys. Dramatic advancements in technology have improved identification of AML sites, Wyoming's library of historic mine maps was created, and use of public lands has increased significantly, all resulting in growing inventories over time. Aging mine features and weathering, primarily from high moisture events, has also contributed to increased subsidence expressions and increasing inventories.

The AML program is funded by a fee assessed to each ton of coal mined. The current assessment rate is \$0.28 per ton for surface mines, \$0.12 per ton for underground mines and \$0.08 per ton for lignite mines. All AML reclamation fees collected since the beginning of the Title IV AML program have been deposited into the AML Reclamation Fund. Interest from the AML Reclamation Fund has been, and continues to be, used to support the United Mine Workers Health Insurance program. To fully understand the appropriate use of AML funds it is useful to consider the process before and after the 2006 amendments to SMCRA.

Pre-2006, certified states were to receive a 50% share of AML reclamation fees collected in their state. These funds were paid out of the AML Reclamation Fund and subject to appropriation by Congress. However, for several years, Congress did not award the full 50% share to states which resulted in an unappropriated balance in the AML Reclamation Fund. Wyoming's share of the unappropriated balance was \$578.9 million.

Per the 2006 amendments to SMCRA, in 2008 Wyoming received the first of what was intended to be seven \$82.7 million installments to make up the \$578.9 million unappropriated balance that had accumulated in the AML Reclamation Fund through 2006. In addition, in accordance with the 2006 amendments to SMCRA, certified states are to use any amounts provided (referred to as Prior Balance funds) for the purposes established by the state legislature with priority given to addressing the impacts of mineral development and subject to OSMRE approval.

Payments of the Prior Balance amounts to certified states came from U.S. Treasury funds and were made via grants administered by the Office of Surface Mining. The certified states share of the prior unappropriated balance remains in the AML Reclamation Fund for distribution to uncertified states after 2022.

Starting in 2008, payment of the 50% "state share" of AML reclamation fees to certified states is no longer subject to congressional appropriation. Further, since 2008, the certified states receive their payments from the U.S. Treasury in lieu of the AML Reclamation Fund. Meanwhile, the AML reclamation fees collected from coal mined in certified states continue to be deposited in the AML Reclamation Fund and are reallocated for use by uncertified states following the year in which they are paid into the Fund.

As a certified state, Wyoming no longer receives any funds from the AML Reclamation Fund. Eighty percent (80%) of the funds collected into the AML Reclamation Fund from coal mined in Wyoming are distributed to uncertified programs. The remaining twenty

percent (20%) of these funds are distributed to the Secretary of Interior for administration of SMCRA.

The Wyoming Department of Environmental Quality takes its fiduciary responsibilities for all programs seriously and implements its programs consistent with existing applicable law, as is the case with AML funding awards.

A total of \$578.9 million in Prior Balance funds were awarded through grants to Wyoming. As required by SMCRA, the use of those funds was established by the Wyoming state legislature with priority given to addressing the impacts of mineral development. Grant applications for the use of the funds as established by the state legislature were submitted to OSMRE for review and subsequent approval. Expenditures of prior balance funds do not and have not occurred until all required authorizations have been received from OSMRE.

Past AML Reclamation Fund awards and past/current in lieu funding awards have been and continue to be used consistent with SMCRA and OSMRE guidance. Wyoming has abided by the conditions found in the approval of Wyoming certification in 1984. Wyoming prioritizes reclamation funds as follows:

- First, reclamation efforts are directed at correcting or mitigating the problems caused by past coal mining. Certain non-coal mining related problems may also be addressed at the same time, however, if they involve direct threats to the public health and safety.
- Second, following the completion of all coal related impacts, the Wyoming AML program may direct its efforts to alleviating the problems caused by all other types of mining.
- Finally, when all coal and non-coal related impacts have been addressed and if certain other conditions set forth in SMCRA are satisfied, AML funds may be used for construction of specific public facilities in communities impacted by coal mining development.

All AML sites, coal or non-coal are classified/prioritized using the OSMRE inventory handbook which contains the prioritization matrix. All new sites are reviewed and approved by OSMRE before they can be entered into e-AMLIS.

Wyoming has been awarded \$1,573 million, including prior balance funds, from 1983 through June 30, 2016. Of the amount awarded \$1,377 million has been spent or obligated. The balance is committed to projects specifically identified through the grant application. In addition, a total of \$9.7 million has been sequestered from Wyoming's distribution awards.

Under Wyoming's program, funding of reclamation projects has averaged 71% expended on construction (tracked in e-AMLIS) and 29% expended on engineering design, consulting

services, program administration and subsidence insurance. Program administration (i.e. staffing and resources) and subsidence insurance account for approximately 3% of total funding. Consulting services include: NEPA analyses, threatened and endangered species evaluations; cultural surveys; construction management; and management of coal fires.

Since 1983 the Wyoming AML program accomplishments have been significant and include the following:

- Closed and eliminated hazards of 2,296 mine openings
- Reclaimed more than 115 miles of dangerous highwalls
- Restored approximately 127 miles of impaired streams
- Reclaimed 186 acres of lands affected by coal mine fires
- More than 480,000 cubic yards of grout have been injected for underground mine mitigation, alleviating serious hazards from subsidence.
- Restored 27,866 acres of degraded and unproductive abandoned mine land to beneficial use as wildlife habitat and rangeland.

Turning attention now to the recently issued Office of Inspector General (OIG), U.S. Department of Interior report. In October 2015 the Wyoming DEQ/AML program was contacted by the OIG. The OIG stated that they had received a request to conduct an evaluation of OSMRE oversight of certified AML programs. The OIG would not disclose who had made the request. The OIG came to Wyoming and interviewed several DEQ/AML program staff in May 2016. As a result of the OIG interviews with Wyoming and the other certified states (Montana, Texas, Louisiana and Mississippi) the OIG produced a report dated March 2017. The three certified tribes (Crow, Hopi and Navajo) were not reviewed by OIG.

During their visit to Wyoming and through subsequent requests for information, the Inspector General evaluators were provided with extensive information regarding the DEQ/AML program. That information included, among other things, (1) a detailed description of the multiple check points in the process for any project, whether coal or non-coal, (2) the distinction between certified in-lieu reclamation funding and prior balance replacement funds, and (3) OSMRE involvement and specific oversight authority regarding eligibility and prioritization of projects. OSMRE consistently exercises its statutorily mandated oversight authority, is critical to the Wyoming DEQ/AML decision making process for project eligibility and prioritization, and is involved in those decisions for each project.

The State of Wyoming was disappointed that the OIG decided to share their final report with the media prior to sharing or providing copies to the states. This decision by OIG was disappointing because the report is seriously flawed, inconsistent with the facts and misinforms the public and Congress of the true performance of certified states. Wyoming Governor Matt Mead stated that he was disappointed that the Office of the Inspector General did not take the time to fully understand the complex reclamation process. For example, prior balance funding and certified in-lieu funding have separate and distinct requirements and eligibility purposes under SMCRA. The dollar amounts on page 5 of the

OIG report only make sense if one assumes that both types of funds are treated the same, which they are not. In other words, the report combines the in-lieu and prior balance funding and treats expenditures of the prior balance funding as non-coal in-lieu expenditures. This is an incorrect representation of SMCRA.

The final report strongly implies that Wyoming AML funds are being inappropriately used and that neither Wyoming DEQ/AML nor OSMRE staff are complying with the requirements of SMCRA. This is not a correct representation of the Wyoming AML program, nor is it consistent with the facts. If the OIG or OSMRE had afforded Wyoming DEQ/AML the opportunity to review the draft report, the factual inaccuracies and incorrect representations could have been avoided.

With respect to specific recommendations in the OIG report, numbered as they appear in the report, Wyoming has the following responses:

1. **Recommendation:** Ensure that States are properly giving first priority to coal-related reclamation projects.

Response: Wyoming DEQ/AML has placed, and continues to place, the proper emphasis on newly discovered coal AML sites. The use of the in-lieu funding is guided by SMCRA Section 411(b)(1) and 411(c). Section 411(b)(1) identifies eligible lands, waters, and facilities as being those *“which were mined or processed for minerals or which were affected by such mining or processing, and abandoned or left in an inadequate reclamation status prior to August 3, 1977;”*. Section 411(c) establishes the priorities for expenditure of funds for projects relating to the *“effects of mineral mining and processing practices”*. SMCRA does not restrict the use of AML funding solely to coal reclamation.

It is clearly understood that a condition of certification is for Wyoming DEQ/AML to place emphasis on funding for any newly discovered coal AML sites. (See Federal Register for Friday, May 25, 1984, page 22139 and 22140, for OSMRE’s approval of certification for the Wyoming AML program.) The approval for certification listed the order of funding for projects. The first priority is *“reclamation efforts are to be directed at correcting or mitigating the problems caused by past coal mining.”* The first priority also states that *“certain non-coal mining-related problems may also be addressed at the same time, however, if they involve direct threats to the public health and safety.”* This condition of the certification approval clearly recognizes the ability to address high priority non-coal sites above lower priority coal sites (i.e. sites that involve direct threats to the public health or safety versus others that do not). Lower priority non-coal projects would be funded under the second condition or priority as defined in the OSMRE approval of certification for Wyoming’s program. Notably, OSMRE has agreed with our interpretation.

Wyoming DEQ/AML acknowledges that some high priority non-coal projects are being funded above lower priority coal reclamation. Even so, the majority of grant

funding commitments for in lieu reclamation and grant expenditures have been for coal reclamation.

There are several steps in the Wyoming DEQ/AML process where prioritization and approval for project funding is addressed. In general, those steps are in the following order:

- Wyoming AML conducts a site investigation and prepares an eligibility package of information.
 - All sites are reviewed by the Wyoming Attorney General's office to verify eligibility. That determination is in writing and included in the record.
 - Sites are then submitted to OSMRE for final decision on eligibility as part of the data entry process in e-AMLIS.
 - All projects, both coal and non-coal, and their associated design and project management costs that are proposed for funding under a grant are specifically identified in the grant application, which must be approved by OSMRE.
 - When a project design is complete and the project is ready to proceed to reclamation, Wyoming AML requests Authorization to Proceed (ATP) from OSMRE. Reclamation does not proceed for either coal or non-coal projects until an ATP has been received from OSMRE.
 - When projects are completed, a completion notice and completion data for those sites are entered into e-AMLIS.
 - In addition to the above, Wyoming AML and OSMRE staff meet at least twice a year to discuss projects completed, projects underway and project planning and scheduling for the future.
 - OSMRE staff perform annual field inspections at AML project sites to evaluate AML's progress and success as part of an annual review process.
 - As noted above, OSMRE is involved in every step of the process and exercises their statutory responsibility at each step.
2. **Recommendation:** Require certified States to update their reclamation plans and continue to do so at periodic intervals.

Response: Wyoming DEQ/AML is in the process of updating the Wyoming AML Reclamation Plan.

After the passage of the 2006 Amendments to SMCRA, the OSMRE Director issued a letter to all AML programs, including Wyoming, to update their reclamation plans. Wyoming DEQ/AML updated its reclamation plan and submitted it to OSMRE for review. During the review period, the OSMRE Director withdrew his letter and indicated that guidance would be provided for updating the reclamation plans. Consequently, in 2010 Wyoming DEQ/AML withdrew the revised plan with the intent of ensuring the revised plan would conform to the OSMRE guidance. OSMRE never provided the guidance. The determination was made at that time, due to the lack of guidance, the best and most effective use of Wyoming DEQ/AML staff resources and grant funds would be for reclamation to address the public health and safety threats that remain at AML sites.

Wyoming DEQ/AML recognizes the need to update the reclamation plan, which was last updated in 1992. Wyoming DEQ/AML and OSMRE staff entered into discussions in early 2016 about steps to update the reclamation plan. It was jointly decided at that time to wait until 2017 to begin the update. There were proposals to accelerate funding out of the AML Trust fund under RECLAIM and reauthorization for AML fee collection was being discussed nationally. It seemed prudent to wait until those initiatives became clearer as they would potentially impact reclamation plans. In early 2017, Wyoming DEQ/AML indicated to OSMRE that we would begin the process of updating the plan in April 2017.

It is unclear what is meant by the OIG statement “*continue to do so at periodic intervals*”. Updates to the reclamation plan would only be necessary if there were significant changes to SMCRA or the federal regulations, or if there are significant changes to the Wyoming AML program. At those times, Wyoming DEQ/AML will review the reclamation plan to determine if updates are necessary.

3. **Recommendation:** Develop and implement an agreed-upon prioritization matrix and goals with timelines that will ensure coal hazards are addressed first and clearly defines when a non-coal project may be selected ahead of a coal project.

Response: Wyoming’s matrix conforms to the classification and prioritization matrix published by OSMRE as part of the Inventory Handbook and which is used by all AML programs to prioritize projects. As noted above in number 2, all projects, coal and non-coal, are selected each year for grant funding based upon their priority and readiness to proceed. OSMRE approves all projects during the grant application review process. This information was provided to the OIG evaluators who visited Wyoming.

Wyoming DEQ/AML periodically is faced with emergencies where quick reclamation action is necessary. All emergency projects are documented and coordinated with OSMRE before proceeding. This is to address the implications for other priority projects. No emergency projects begin without prior approval from OSMRE including the receipt of an ATP.

4. **Recommendation:** Require Authorizations to Proceed for all projects and approve in accordance to prioritization matrix.

Response: No change is necessary. The Wyoming DEQ/AML program has historically and consistently submitted all AML projects – coal and non-coal – to OSMRE Casper Field Office for Authorization to Proceed (ATP). Reclamation for projects does not begin until an ATP is issued by OSMRE.

6. **Recommendation:** Develop and implement an enforcement plan to ensure updated reclamation plans are carried out.

Response: This recommendation relates to OSMRE. However, it is worth noting that for Wyoming, OSMRE conducts annual performance reviews to evaluate conformance with all statutory and regulatory requirements of SMCRA.

7. **Recommendation:** Require States to review and certify that coal projects in e-AMLIS are accurate and complete.

Response: The OIG correctly recognizes that there are flaws with e-AMLIS. However, the recommendation suggests that OIG does not have a clear understanding of how e-AMLIS works and the history of AMLIS. The recommendation also does not consider the resource commitment required of AML programs to comply with the recommendation.

Wyoming DEQ/AML already enters all data accurately and completely. The problem with e-AMLIS is internal to e-AMLIS. For example, the conversion of historical AMLIS data into the new e-AMLIS did not correctly capture all of the historical data. Another serious defect in e-AMLIS is the process and protocol of accessing e-AMLIS and developing reports from the system. On many occasions, reports generated from e-AMLIS have been incorrect and require extensive manual verification and correction of data to obtain accurate reports.

Rather than requiring state AML programs to expend significant resources reviewing and certifying past entries, diverting funds away from construction projects, Wyoming DEQ/AML suggests that the recommendation focus on certifying that the data being entered going forward is accurate and complete. That being said, a more appropriate focus of OSMRE resources should be to correct the querying and reporting functions of e-AMLIS and any other inventory processing errors to ensure that reports drawn from e-AMLIS are an accurate reflection of the data in e-AMLIS.

8. **Recommendation:** Require States to enter non-coal projects into e-AMLIS.

Response: This recommendation will not require any change by the Wyoming DEQ/AML program. Non-coal data is already entered into e-AMLIS and will continue to be entered.

- 9. Recommendation:** Ensure all appropriate information for program management is collected and tracked to include engineering and design costs.

Response: The Wyoming AML program currently tracks all engineering and design costs as part of the state program based inventory. OSMRE would need to establish an appropriate data entry protocol for this data to be accurately entered into e-AMLIS. If the recommendation is to provide that information to OSMRE for their tracking purposes, that would not require extra effort by the Wyoming DEQ/AML program since those costs are already tracked.

In summary, Wyoming DEQ/AML takes its reclamation and fiduciary responsibilities for implementing the DEQ/AML program seriously and with great pride. Since the inception of the State's AML program, Wyoming DEQ/AML has adhered to the requirements of SMCRA and has maintained a solid relationship with the regional OSMRE office.

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.