Dave Freudenthal, Governor

Department of Environmental Quality

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

August 27, 2008

Office of Surface Mining Reclamation and Enforcement
Brent Wahlquist, Director
Administrative Record
Room 252-SIB
1951 Constitution Avenue, NW
Washington, DC 20240

RE: Proposed Rule Change Docket ID OSM-2008-0003

Dear Director Wahlquist:

This letter represents the comments of the Wyoming Department of Environmental Quality, Abandoned Mine Land Division. Wyoming is by far the largest producer of coal in the nation and therefore generates the greatest amount of AML funds. The proposed rules which implement the 2006 amendments to the Surface Mine Control and Reclamation Act are of vital interest to Wyoming.

In the preamble, OSM solicited comments on numerous rules and Wyoming has responded to those that have potential to impact the state. Our major concerns are the restrictions that OSM has placed on certified states. OSM has chosen not to modify Part 875.15 and requires certified States to adhere to the priority list when conducting noncoal reclamation or public facilities projects. This requirement is in direct conflict with the Act which has no such restrictions on Certified In Lieu Funds or Prior Balance Replacement funds. This same section also requires the governor of a state to make a determination as to the need for public facilities projects and submit that determination to OSM for approval. This requirement is also in conflict with the Act.

Following are the specific sections of the proposed rules in bold along with our comments in italics.

RE: §§872.30 and 872.33 Use of grants v. direct payments.

Wyoming maintains OSM's interpretation that the payments to certified States must be accomplished by the grant process is in error and the funds should be distributed by a direct payment.

RE: §872.31 Use of prior balance replacement funds.

OSM states in the preamble on page 35228 that "there is a fundamental distinction between prior balance replacement funds (which are paid from U.S. Treasury funds) and section 402(g) moneys distributed from the Fund. Wyoming supports this statement as it gives greater flexibility how replacement funds are spent.

RE: §872.31(a) Use of prior balance replacement funds.

OSM asked for comments on their proposal to restate the language found in the federal statute. The language states certified States and Indian tribes can only use prior balance replacement funds for the purposes that the state legislature establishes, with priority given to addressing the impacts of mineral development. The language is clear and there is no need for additional explanation or to include the statutory language in the regulations.

OSM also asked if the states desire to have a notice to proceed for the projects selected by the State legislature along with the accompanying NEPA review. We prefer not to have an ATP nor the NEPA review. It is our assumption the reason OSM does not require NEPA review is because moneys granted to certified States are no longer considered to have a Federal nexus unless it is used to address newly discovered coal problems. However, the reason could be that OSM expects the state to be responsible for its own NEPA review. OSM should clarify their intent.

RE: §872.34 Use of certified in lieu funds.

OSM interprets the federal statute to mean the use of the funds is not restricted and Wyoming supports that interpretation. OSM does recognize that the statute language could be interpreted that the other provisions of section 411(b) through (g) apply (i.e. "for the purposes that the State legislature or tribal council establishes, giving priority to addressing the impacts of mineral development"). OSM invites comment which is the better reading of the statute.

The logical interpretation of the statute is as OSM has provided in the proposed regulations. It would be difficult to apply all of ~~the~~ subparts (b) through (g) to a certified State. Subparts (b) and (c) perhaps could apply if interpreted to mean if any newly discovered coal issues are found they must meet the eligible lands, waters, and facilities outlined in (b) and the priorities defined in subpart (c). Subpart (d) could not apply to certified states since it refers to expenditure from the 'Fund' and moneys available to certified States do not come from the 'Fund' but from the

U.S. Treasury. Subparts (e) and (f) would place restrictions on the use of the funds certified States receive. Therefore, they could not apply since use of the funds are not restricted as previously stated.

RE: §874.13 Reclamation objectives and priorities.

OSM proposes that the term "adjacent to" means Priority 3 eligible lands and waters that are "geographically contiguous". OSM is looking for comment on possible alternative definitions of or restrictions to the term "adjacent". The following examples are given and OSM specifically asks if there should be any limitations, monetary or otherwise, that should be tied to adjacent lands and waters.

- **Should the definition include all disturbances by a single mining operation or company?**

  Not necessarily. Disturbances from a single mining company may be spread over several miles and may incorporate isolated P3 sites that may not be worthy of reclamation.

- **Should it allow for a hydrologic connection, even though there may be great distances between sites?**

  Yes if the connection results in degraded water quality.

- **Should it contain restrictions on the types of P 3 problems or costs than can qualify?**

  It should not contain restriction on the types of P3 sites that are included. To do so would redefine P3 sites into "high" priority 3 sites and "low" priority 3 sites which is not supported by SMCRA.

- **Should expenditures for large acreages of P 3 subsidence be elevated in priority because they are geographically contiguous to a small P 2 subsidence event, regardless of cost?**

  No. Not all subsidence features are deserving of mitigation. It should be up to the state or tribe whether or not to address large areas of subsidence which are not a P1 or P2. To elevate P3 subsidence features to a P2 for non certified programs would mandate that monies be spent on these features when it may not be necessary. The option to mitigate include these features should be the decision of the states.

- **What about small P 2 tipples connected to a large P 3 refuse pile?**

  The intent of the question is not clear since P2 sites are required to be addressed. If the question is whether or not a large P3 refuse pile connected to a small P2 tipple should be elevated to a higher priority, the answer is no. The option to mitigate include these features should be the decision of the states.

- **Should adversely affected water supplies be elevated in priority when adjacent to other kinds of P 1 or P2 reclamation sites?**

  The option to mitigate include these features should be the decision of the states and not mandated by federal rule.

- **OSM has also specifically asked for comment on proposed language that would not specifically preclude allowing Priority 3 work that is adjacent to or within a Priority 1 or 2 site as a separate phase of construction.**

  *OSM should **not** include language that would specifically preclude allowing Priority 3 work that is adjacent to or within a Priority 1 or 2 site as a separate phase of construction. The most efficient method of reclaiming a site should dictate the phasing and not arbitrarily be based on the priority designation.*

RE: **§874.13(b)(2) Priority 3 work "in conjunction with" P 1 and 2 work.**

OSM has asked for comment on possible alternatives or refinements to their proposal which contains only general direction that qualifying Priority 3 work should either 1) facilitate the higher priority work or 2) represent reasonable savings toward the goal of reclaiming all Priority 3 coal problems. Specifically, they ask numerous questions (on page 35232) on this section including an opinion on whether Priority 3 work requested by a property owner as a condition of his or her agreement to provide written entry to address health and safety problems should fall with the scope of paragraph (b)(2)(i). OSM should keep the proposed rules general in nature. Each site may have its own unique situation and the rules should allow the state programs the greatest flexibility in resolving the concerns at each site.

RE: §875 Certification and noncoal reclamation.

*This is a major area of concern to Wyoming and needs clarification. It could be interpreted that certified states are **required** to complete noncoal and to use certified in lieu funds to do so. However, OSM may be stating that if a certified State does decide to do noncoal they are **required** to follow the priority list in the regulations. As discussed below, Wyoming maintains that both are wrong. The preamble on page 35233 acknowledges that certified States are **not** required to spend prior balance replacement funds and certified in lieu funds according to Part 875 (emphasis added). The preamble also states a certified State may elect to do noncoal reclamation outside the framework of this part. These two concepts are not clearly stated in the proposed regulations. The following language from the preamble should be added to Part 875:*

> *Certified States are not required to spend prior balance replacement funds and certified in lieu funds according to Part 875.*
>
> *A certified State may elect to do noncoal reclamation outside the framework of this part.*

The preamble states no changes were made to §875.15 because OSM believes that fund applicability requirements in Part 872 along with any reclamation plan revisions completed

under Part 884 properly defines how the section applies to a project conducted by a certified program under this Part. Part 872.31 states prior balance replacement funds may only be used for the purposes established by the State legislature giving preference to addressing the impacts of mineral development. Part 872.34 states certified in lieu funds may be used for any purpose. These two provisions indicate Part 875.15 does not apply to certified States as this Part clearly places restraints on the use of the funds given to certified States.

RE: §875.11 Applicability.

The proposed rules state a certified State may use prior balance replacement funds or certified in lieu funds to address eligible coal problems to maintain certification. The preamble asks for comment concerning an alternative approach where this would be restricted to certified in lieu funds. A certified State should be able to use either prior balance replacement funds or certified in lieu funds to maintain certification. However, to use prior balance replacement funds, a certified AML program would be required to gain state legislature approval to do so. §875.11(b) should be rewritten to clarify if prior balance replacement funds can be used for the purposes stated only if approved by the state legislature.

Under the alternative approach presented in the preamble, certified States would continue to conduct noncoal reclamation under this Part and would be mandated to use certified in lieu funds for lands or water affected by the mining of minerals and materials other than coal. This alternative is contrary to the Act as it mandates the use of the funds received by a certified State. The decision to do noncoal reclamation should be up to the individual States as noncoal reclamation is an option in SMCRA and not a requirement. Likewise certified AML programs should not be required to follow all of Part 875 to enjoy the protection of the limited liability provisions of §875.19. See also the discussion above and concerning §875.19 below.

RE: §875.14 Eligible lands and water subsequent to certification.

The preamble solicits comments on OSM's revisions to this section and how they might review plans submitted to address newly discovered coal sites. It is appropriate that a certified State submit to OSM a notice that an eligible coal problem has been discovered. The notice should contain an estimated time frame for addressing the problem and the source of funding. OSM's review should be limited to the reasonableness of state's approach to address the problem. To conduct an investigation, obtain clearances, and to physically mitigate the problem may take several years. The notice should not be required to be submitted as a formal reclamation plan amendment. The reclamation plan should already contain a commitment to address any newly discovered eligible coal problems as part of the certification process. Therefore a revision to the reclamation plan is not required.

RE: §875.15 Reclamation priorities for noncoal program.

There is a discussion on page 35232 of the preamble, the bottom of the middle column where OSM did not change 875.15 and still requires a determination from the Governor before a certified State may do public facilities projects. Section 875.15 goes on to list priorities that a

certified State must meet to gain approval from OSM. Given the clear wording in the 2006 amendment to the Act that other than responding to newly discovered coal sites and doing projects as directed by the state legislature, there are no restrictions on certified States. To require a certified State to comply with all provisions of this section is contrary to the Act. This whole section needs to be revised to reflect the freedom certified States have regarding use of the funds. See also the comment above regarding §875 and §875.11.

RE: §875.16 Exclusion of certain noncoal reclamation sites.

Wyoming supports OSM's interpretation allowing certified States to use prior balance replacement funds or certified in lieu funds for the reclamation of UMTRCA or CERCLA sites provided they comply with the general statutory language and restrictions of those funds. The proposed rules currently only dictate noncertified states may not use money from the Fund or from the prior balance replacement fund for those purposes. The proposed rules should include language that allows certified States may use funds for these purposes.

RE: §875.19 Limited liability.

The preamble on page 35236 states the following

> [I]n addition, if certified States and Indian tribes choose to conduct noncoal reclamation in accordance with part 875 using certified in lieu funds or prior balance replacement funds, their reclamation plan must continue to provide all of the information and the assurances that are central to operating under part 875 umbrella. Only under these circumstances could State or Indian tribe noncoal reclamation activities continue to enjoy the protection of the limited liability provisions of §875.19 for those efforts.

Wyoming disagrees that all parts of §875 needs to be followed by a certified State to gain the protection of §875.19. It is also not clear what OSM means by 'all of the information and assurances'. As discussed previously, certified States should not have to follow the noncoal priority list in §875.15 nor require the governor's determination before doing public facilities projects. To require certified States to do so is contrary to the plain language of the Act.

In addition, the limited liability provisions are tied to a State following its approved reclamation plan not to the other provisions of §875. As stated in the preamble on page 35236 the reclamation plan for certified programs will potentially show an even greater range of variability with ***little*** *specificity required beyond undertaking the coal work necessary to maintain certification. Wyoming agrees that beyond a commitment to undertake coal work to maintain certification very little information is required and this includes information concerning noncoal reclamation.*

RE: §879.11 Land eligible for acquisition.

OSM seeks comment on how this Part would apply to certified States. This section should only apply if a certified State, in doing coal reclamation work to maintain certification, commits

certified in lieu funds and/or prior balance replacement funds to acquire eligible lands. It should not apply if the funds are used by a certified program to acquire lands that are not necessary for coal reclamation work. Disposition of property which was not acquired to conduct coal reclamation work should not be held to the disposition requirements. Moneys gained from the sale of property acquired for any reason should be placed in the State's own reclamation fund account and not go back to the federal government. To require the funds to go back to the federal government just to be given back to the State at a later date is unnecessary bureaucratic paper shuffling.

RE: §884 State Reclamation Plans.

OSM seeks input how they should implement the Part 884 requirements for certified States. A certified State should include in the Reclamation Plan a commitment to address newly discovered coal issues beginning with the next grant period. The next grant request would include the information concerning the newly discovered coal issue and the approximate time to obtain clearances, design and actual mitigation of the coal issue and if available a cost estimate. All other projects directed by the legislature of a certified state would be part of the simplified grant process and does not need to be part of the Reclamation Plan other than a statement that the state will do projects as directed by the legislature. The same is true of noncoal reclamation projects. Very little information would be required to be in the reclamation plan other than noncoal reclamation projects will be undertaken as selected. The specific projects would be included as part of the simplified grant process.

See also the discussion regarding §875.19.

RE: §884.13 Content of proposed State reclamation plan.

OSM has not proposed to revise §885.13(c)(2) where there is a requirement to provide a description of the policies and procedures to be followed consistent with section 403 of the Act. Section 403 of the Act with the exception of (c) does not apply to certified states. This section should be revised to clarify the different requirements for certified States.

RE: §884.17 Other uses by certified States and Indian tribes.

OSM proposes to modify part (b) to indicate that grant applications for uses other than coal reclamation by certified States and Indian tribes may be submitted in accordance with §885.15 of this chapter. However, OSM has elected to retain in the rules subparagraph (a) which places restrictions and requirements on a certified State concerning the construction of public facilities. These restrictions and requirements are in direct conflict with the Act where prior balance replacement funds can be used at the discretion of the state legislature and certified in lieu funds may be used for any purpose. The existing subparagraphs (a) and (b) should be deleted and replaced by the language proposed for the new part (b).

RE: §885.14 How long is my grant?

The proposed rule would allow States to change the pattern under part 886 of annual rewards of new grants with one year for administrative costs and three years for project costs. OSM is concerned about the administrative burden of managing grants which are open for very long periods. Extending a grant for longer periods of time is not a burden. The performance period of the grant should be at the discretion of the individual states.

RE: §885.15 How do I apply for a grant?

OSM seeks suggestions for further streamlining the Grant procedures. Our experience so far indicates the process to be streamlined and we are not sure how much more it could be streamlined and still be considered a grant. If OSM wants to really streamline the process they should change it from a grant to a payment.

RE: §885.16 After OSM approves my grant, what responsibilities do I have?

Subpart (b) requires the certified State to ensure compliance with any applicable laws, clearances, permit, or requirements prior to initiating projects other than coal reclamation. It is our assumption that a certified State will not be responsible for NEPA since NEPA must have a federal nexus before being required and OSM maintains in the preamble that no Federal decision authorizing individual expenditures will be made and that there is no Federal involvement. This should be clarified in the regulations.

Thank you for considering our comments. If any of the comments require clarification, please feel free to contact me.

Sincerely,

Richard A. Chancellor
Administrator, AML

RAC/jn