From: Nowakowski, Sonja <Sonja.Nowakowski@mt.gov>
Sent: Thursday, September 7, 2023 11:10 AM
To: Everts, Todd <Todd.Everts@legmt.gov>
Cc: Walsh, Dan <dwalsh@mt.gov>; Dorrington, Christopher <CDorrington2@mt.gov>
Subject: OSMRE Program Amendments Notice to Code Commissioner

Code Commissioner Everts,

The Montana Department of Environmental Quality (DEQ) received notification on August 31, 2023, from the Office of Surface Mining Reclamation and Enforcement (OSMRE) regarding implementation of two pieces of legislation that were passed and approved by the Montana Legislature in 2019 and 2021.

DEQ received notice that that the amendments to the Montana Strip and Underground Mine Reclamation Act (MSUMRA) in Senate Bill 328 (Chapter 337, Laws of 2021) are less stringent than federal requirements. Because of the determination, DEQ's Mining Bureau is unable to implement Senate Bill 328, without risking the loss of primacy over the coal program in Montana. Senate Bill No. 328 revised the definition of an affected drainage basin and bond release requirements. Senate Bill No. 328 did not include contingency language based on OSMRE approval.

DEQ also received notice that the amendments to MSUMRA in Senate Bill 201 (Chapter 484, Laws of 2019) are less effective/less stringent than federal requirements. Because of the determination, DEQ's Mining Bureau is unable to implement Senate Bill No. 201, without risking the loss of primacy over the coal program in Montana. Senate Bill No. 201 related to an applicant's information being updated and approved in the event of bankruptcy or reorganization and providing for financial assurance for employee pensions. Senate Bill No. 201 did include contingency language; however, that contingency was based on a finding by a court that a portion of the amendment was unconstitutional.

Generally, legislation that seeks to modify Title 82, chapter 4, part 2, includes contingent voidness language that addresses federal disapproval in accordance with 30 CFR 732. Neither SB 201 nor SB 208 included such contingencies. However, DEQ is providing these notices for your awareness. Because the two amendments are the result of a legislative action, DEQ is unable to submit further modifications to the proposals for OSMRE's review. DEQ will notify the Regional Director, which means the two amendments will formally be denied by OSMRE, and the denial will be published in the Federal Register.

Please let me know if you have questions or need additional information. Thanks for your time and consideration.

Much appreciated,

Sonja

Sonja Nowakowski | Division Administrator

Air, Energy, and Mining Division

Montana Department of Environmental Quality

Office: 406-444-0496

United States Department of the Interior

OFFICE OF SURFACE MINING
Reclamation and Enforcement
Casper Area Office
PO Box 11018
100 East B Street, RM 4100
Casper, WY 82602

August 31, 2023

Dan Walsh, Chief
Mining Bureau-Coal Section
Montana Department of Environmental Quality
P.O. Box 200901
Helena, Montana 59620-0901

Dear Mr. Walsh:

The Office of Surface Mining Reclamation and Enforcement (OSMRE) has completed review of Montana's February 16, 2023, formally proposed amendment (State Amendment Tracking System (SATS No. MT-041-FOR)). The amendment concerns proposed changes to the Montana Strip and Underground Mine Reclamation Act (MSUMRA) pertaining to the definition of affected drainage basin and bond release requirements. Specifically, the amendment proposes changes to MSUMRA, at 82-4-203 and 82-4-232 resulting from Montana State Senate Bill (SB) 328. OSMRE finds those provisions of the proposed amendment identified in the enclosure less effective than the Federal regulations and/or less stringent than SMCRA.

The Regional Director, Western Region, is prepared to delay final rulemaking on the proposed amendment to allow Montana an opportunity to submit a revised amendment or draft proposed changes in response to the deficiencies. Please submit such a response no later than 30 days from the date of this letter.

Because the requested revisions of the proposed rules are substantive in nature, OSMRE will need to reopen the comment period should you elect to respond. Further, if you respond to our comments by making the requested revisions, the Regional Director's approval of the rules in proposed form is contingent upon Montana's adoption of the rules in the form in which they were reviewed by OSMRE and the public.

Should Montana indicate that it does not wish to or is unable to submit further modifications to address the identified concerns, the Regional Director will not approve the proposed rule provisions of the amendment identified in the enclosure to this letter.

Please advise me at your earliest convenience whether you wish to submit materials to address OSMRE's concerns within the next 30 days. If Montana does not intend to submit additional material, OSMRE will proceed directly with the publication in the Federal Register of the Regional Director's decision.

We are available to meet with you to discuss our review findings or any matters of concern regarding the proposed amendment. If you have any questions, please call me at (307) 261–6550 or Frank Bartlett, at (307) 261–6540.

Sincerely,

Jeffrey W. Fleischman**,** Chief
Denver Field Division - Casper Area Office

Enclosures:

Concerns Identified by OSMRE for Montana's February 16, 2023, Formally Proposed Amendment (SATS No. MT-041-FOR)

cc: Denver Field Branch, Western Region
Regional Solicitor, Rocky Mountain Region

CONCERNS IDENTIFIED BY OSMRE FOR MONTANA'S FEBRUARY 16, 2023, FORMALLY PROPOSED AMENDMENT (SATS NO. MT-041-FOR)

We have completed our review of your February 16, 2023, formal program amendment that proposed changes to Montana's MSUMRA pertaining to the definition of affected drainage basin and bond release application requirements (MT-041-FOR). We have concerns about the following proposed changes:

1. Proposed definition of Affected Drainage Basin in MCA at 82-4-203(3)

As proposed, the definition of affected drainage basin, in MCA 82-4-203(3), is unclear. The federal definition of hydrologic balance (30 CFR 701.5) does include the term drainage basin and means the relationship between the quality and quantity of water inflow to, water outflow from, and water storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. The federal definition further defines hydrologic balance as encompassing the dynamic relationships among precipitation, runoff, evaporation, and changes in ground and surface water storage and that a drainage basin is therefore one example of a hydrologic unit in terms of the hydrologic balance.

The Administrative Rules of Montana (ARM) at 17.24.1116(6)(d)(i), which pertain to phase IV bond release, require all disturbed lands within any *designated drainage basin* to have been reclaimed in accordance with phase I, II, and III requirements. The term designated drainage basin, affected drainage basin, or drainage basin are not defined in the ARM. Senate Bill 328, by way of the MCA, proposes to define and use affected drainage basin, which could introduce question and confusion between State rule and statute because this term differs than designated drainage basin as used in the ARM. Better defining affected drainage basin would help the effectiveness of the Montana program, as would consistent definitions between the MCA and the ARM, especially since achieving phase IV bond release pursuant to the ARM requires all disturbed lands within any designated drainage basin to have been reclaimed in accordance with Phase I, II, and III requirements.

No direct Federal counterpart statute or regulation for affected drainage basin exists, but a clearer

definition of affected drainage basin and consistent use of terminology between the MCA and the ARM is required to be as effective as the Federal regulations and as stringent as SMCRA.

Because we would not be approving the definition of affected drainage basin, the following definition recodifications in the MCA, from 82-4-203(4) through 82-4-203(59) would also not be approved or would not be necessary.

2. Incorporating the definition of affected drainage basin into the MCA at 82-4-232(6)(k)

The incorporation of the definition of affected drainage basin in the MCA, at 82-4-232(6)(k). As discussed above, consistent terminology is needed between Montana State rule and statute to be as effective as Federal regulations and as stringent as SMCRA. Further, if these proposed changes are approved, there would appear to be conflict between the MCA and the ARM, in that the ARM confines phase IV bond release to be within a designated drainage basin; with the MCA proposing to allow for any phase bond release, including phase IV, to occur within or across affected drainage basins.

3. Striking the words "it is satisfied" from the MCA at 82-4-232(6)(k)

Counterpart Federal statute at SMCRA Section 519(c) states that the regulatory authority may release in whole or in part said bond or deposit if the authority **is satisfied** the reclamation covered by the bond or deposit or portion thereof has been accomplished as required by this Act according to the following schedule. Similar language found in 30 CFR 800.40(c) states that the regulatory authority may release all or part of the bond for the entire permit area or incremental area if the regulatory authority **is satisfied** that all the reclamation or a phase of the reclamation covered by the bond or portion thereof has been accomplished in accordance with the following schedules for reclamation of Phases I, II, and III. Montana's proposed changes at 82-4-232(6)(k) strike the words "it is satisfied", meaning the regulatory authority in this case. This could be interpreted as though the regulatory authority loses the discretion to make the determination that the reclamation covered by the bond or portion of the bond has been accomplished as required. In other words, if the permittee submits a bond release application package, Montana could

potentially lose the ability to deny the bond release package or portions thereof if Montana determines that the reclamation covered by the bond or portion of the bond hasn't been accomplished. Read plainly, if the permittee requests bond release, then by removing the phrase "it is satisfied", Montana would be required to release the bond in whole or in part if the reclamation has been accomplished (according to the requirements later in the proposed statute). Striking this language would render this provision less stringent than counterpart Federal statute at SMCRA 519(c).

4. Striking language from the MCA at 82-4-232(6)(k)(ii)

The proposed changes to the MCA, at 82-4-232(6)(k)(ii) are as stringent as counterpart statutes in SMCRA Section 519(c)(2) and as effective as counterpart Federal rules at 30 CFR 800.40(c)(2), when coupled with subsequent proposed changes in the MCA at 82-4-232(6)(k)(iii). However, with not approving MCA 82-4-232(6)(k)(iii) (see issue #5 below), which as proposed would have included language that would have been struck from the proposed revisions to the MCA at 82-4-232(6)(k)(ii), we cannot approve the changes to this provision as proposed.

5. Referencing MCA 82-4-232(6)(k)(iv) in MCA at 82-4-232(6)(k)(iii)

The proposed changes to the MCA, at 82-4-232(6)(k)(iii) are as stringent as counterpart statutes in SMCRA Section 519(c)(2) and as effective as counterpart Federal rules at 30 CFR 800.40(c)(2). However, this provision would reference MCA 82-4-232(6)(k)(iv) (see issue #6 below). Because we are not approving Montana's proposed changes to the MCA at 82-4-232(6)(k)(iv), this provision wouldn't exist and would render this provision unworkable and less effective than counterpart Federal rules and statute.

6. Additional language included in subpart C of MCA 82-4-232-(6)(k)(iv)

MCA 82-4-232(6)(k)(iv) includes the requirement to retain the portion of the bond sufficient for a third party to fully satisfy remaining permit conditions if: "(A) the disturbed areas eligible for release are contributing suspended solids to streamflow or runoff outside of the affected drainage basin or permit boundary in excess of requirements of MCA 82-4-231(10)(k), and (B) soil productivity for prime farmlands eligible for release is not returned to equivalent levels of yield as nominated land of the same oil type in the surrounding area under equivalent management practices, as determined by the soil survey; or".

In addition to retaining the "(A) and (B) subpart" language above, Montana proposes to add the following "(C) subpart" requirement to this provision – "**The department shall retain a portion of the bond sufficient for a third party to fully satisfy remaining permit conditions if (C) the permittee has not successfully completed all reclamation activities, including water replacement, in the designated area."** If this section is the implied Phase II bond release section, then the addition of the "(C) subpart" language renders this provision less stringent than the Federal counterpart at SMCRA Section 519(c)(2) as the remaining bond held could be released if the permittee meets subparts A, B, and C (successfully completed all reclamation activities, including water replacement, in the designated area) of this provision. Additionally, it is not entirely clear what the terms "all reclamation activities" and "water replacement" mean.

7. Omission of period of operator responsibility language in the MCA at 82-4-232(6)(k)(v)

Montana's proposed changes to the MCA at 82-4-232(6)(k)(v) are less stringent than counterpart Federal statute found in Section 519(c)(3) (implied Phase III bond release requirements). Section 519(c)(3) of SMCRA again applies the period specified for operator responsibility (Section 515(20)(A)). Federal counterpart rules at 30 CFR 800.40(c)(3) also apply this standard and no bond can be released under this corresponding provision unless the period of operator responsibility has passed. Montana proposes to remove the period specified for operator responsibility in this section, rendering this provision less stringent than Federal counterpart statute in SMCRA Section 519(c)(3) and less effective than Federal counterpart rules at 30 CFR 800.40(c)(3).

At this time, the only provision that we could approve with this amendment as submitted would be the proposed changes to the MCA at 82-4-232(6)(k)(i).

United States Department of the Interior

OFFICE OF SURFACE MINING
Reclamation and Enforcement
Casper Area Office
PO Box 11018
100 East B Street, RM 4100
Casper, WY 82602

August 31, 2023

Dan Walsh, Chief
Mining Bureau-Coal Section
Montana Department of Environmental Quality
P.O. Box 200901
Helena, Montana 59620-0901

Dear Mr. Walsh:

The Office of Surface Mining Reclamation and Enforcement (OSMRE) has completed review of Montana's February 16, 2023, formally proposed amendment (State Amendment Tracking System (SATS No. MT-040-FOR)). The amendment concerns proposed changes to §82-4-222 Montana Code Annotated related to an applicant's information being updated and approved if a bankruptcy or reorganization results in a change of ownership for the applicant and permit owners providing financial assurance for employee pensions. **OSMRE finds those provisions of the proposed amendment identified in the enclosure to this letter to be less effective than the Federal regulations and/or less stringent than SMCRA.**

The Regional Director, Western Region, is prepared to delay final rulemaking on the proposed amendment to allow Montana an opportunity to submit a revised amendment or draft proposed changes in response the deficiencies. Please submit such a response no later than 30 days from the date of this letter.

Because the requested revisions of the proposed rules are substantive in nature, OSMRE will need to reopen the comment period should you elect to respond. Further, if you respond to our comments by making the requested revisions, the Regional Director's approval of the rules in proposed form is contingent upon Montana's adoption of the rules in the form in which they were reviewed by OSMRE and the public.

Should Montana indicate that it does not wish to or is unable to submit further modifications to address the identified concerns, the Regional Director will not approve the proposed rule

provisions of the amendment identified in the enclosure to this letter.

Please advise me at your earliest convenience whether you wish to submit materials to address OSMRE's concerns within the next 30 days. If Montana does not intend to submit additional material, OSMRE will proceed directly with the publication in the Federal Register of the Regional Director's decision.

We are available to meet with you to discuss our review findings or any matters of concern regarding the proposed amendment. If you have any questions, please contact me at jfleishchman@osmre.gov or (307) 261–6550; or Haley Hampstead at hhampstead@osmre.gov or (303) 236–3982.

Sincerely,

Jeffrey W. Fleischman, Chief
Denver Field Division - Casper Area Office

Enclosure

cc:

Denver Field Branch, Western Region
Regional Solicitor, Rocky Mountain Region

CONCERNS IDENTIFIED BY OSMRE FOR MONTANA'S February 16, 2023, FORMALLY PROPOSED AMENDMENT (SPATS NO. MT-040-FOR)

We have completed our review of your February 16, 2023, formal program amendment that proposed changes to §82-4-222 Montana Code Annotated, related to an applicant's information being updated and approved if a bankruptcy or reorganization results in a change of ownership for the applicant and permit owners providing financial assurance for employee pensions. (MT-040-FOR). We have concerns about the following proposed rules:

1. **Requiring a change in ownership information resulting from a bankruptcy to be "approved" by DEQ is inconsistent with the federal regulations:**

Montana's proposed changes to 82-4-222(1)(g)(i) conflicts with the federal regulations because it would require all changes to ownership and control information to trigger a permit approval. The proposed language gives Montana's Department of Environmental Quality approval authority over changes in a permittee's officers, partners, directors, or individuals owning of record or beneficially, alone or with associates, 10% or more of any class of stock of the applicant, and compliance history info. Under the federal regulations, while a regulatory authority has approval authority over transfer, assignment, or sale of permit rights (TAS), they do not have approval authority over changes in applicant and operator information. This was further clarified in OSMRE's December 3, 2007, rule which states that "a change of a permittee's owners or controllers does not constitute a transfer, assignment, or sale" (72 FR 68000, 68008-09). While there could be situations related to bankruptcy that would trigger a TAS, like the conveying of permit rights to a new person or a reorganization resulting in a new type of business entity, not all changes from bankruptcy, like a change in individual owners, would trigger a TAS. Thus, the proposed regulation creates a situation where all changes resulting from bankruptcy trigger a TAS, even when those changes do not effectuate a transfer, assignment, or sale of permit rights, which conflicts with the federal regulations.

We do note that this permittee information is still required to be updated anytime there is a change of ownership or control, despite the reason for the change. And while the regulatory authority should require changes to ownership and control information to be updated in the Applicant Violator System, it cannot require all ownership and control information caused by bankruptcy changes to trigger a permit approval.

We also note that the proposed amendment to MCA 82-4-222(1)(g)(i) has only been interpreted in terms of whether the section conflicts with SMCRA and its regulations. There has been no official determination as to whether MCA 82-4-222(1)(g)(i) conflicts with other federal laws, such as the federal bankruptcy law under 11 USCS.

2. **Requiring a mine operation to provide financial assurance for employee pensions is not in compliance with SMCRA and is inconsistent with the federal regulations:**

Montana's proposed changes to 82-4-222(1)(g)(iii) are not in compliance with SMCRA and are inconsistent with the federal regulations for the following reasons:

First, SMCRA does not grant authority for regulatory authorities to require bonds other than reclamation performance bonds under 30 USC 1259(a). 30 USC 1259(a) states that a performance bond, payable to the United States, is required after a permit application is approved but before the permit is given. The bond shall cover the area of land within the permit area that the permittee will conduct surface coal mining and reclamation operations on. The amount of the bond shall be determined by and sufficient to complete the reclamation required for the area. Because SMCRA only speaks to performance bonds, other bonds, including pension bonds, are outside SMCRA's authority to regulate. Additionally, using SMCRA to regulate other bonds such as pension bonds, could potentially weaken the requirements set forth for performance bonds.

Second, requiring pension bonds could hurt Montana's ability to fully collect on a performance bond. In a situation where both bonds are forfeited at the same time, like a bankruptcy, there is potential that fulfilling a pension bond could interfere with Montana's ability to fully collect the mining operation's performance bond, especially if an operation is self-bonded, or if both the performance and pension bond come from the same Surety company.

Third, MCA 82-4-222(1)(g)(iii) is ambiguous as to who the obligee of a pension bond is. As stated in 30 USC 1259(a), a performance bond, where appropriate, is payable to the United States or State. The pension bond under MCA 82-4-222(1)(g)(iii) does not state who the bond must be payable to. Performance bonds under MCA 82-4-222(1)(g)(iii) are made payable to Montana under MCA 82-4-223, but it is not clear from the language of MCA 82-4-222(1)(g)(iii) if that would apply to the pension bonds as well. This leads to an ambiguity of whether the bond would be paid out to Montana or to the Pension fund. If it was paid to Montana, what regulations govern how Montana would use the bond to fulfill the financial obligations for the pension program? If it was paid directly to the pension program, who would oversee making the fulfillment of the pension program? The ambiguity and subsequent questions as to how the payment would be processed to fulfill the financial obligations of the pension program make the proposed section confusing and possibly ineffective.

Fourth, MCA 82-4-222(1)(g)(iii) is inconsistent with the liability period requirement for performance bonds under 30 USC 1259(b). 30 USC 1259(b) states that the liability under a bond runs for a period that covers an operator's requirement to revegetate the permitted area (5 or 10 years of meeting vegetation parameters- 30 CFR 816.116(c)). For a pension bond to adequately cover a pension program, it would need to cover the lifetime of all eligible employees (and possibly their spouses). If the pension bond was held for the lifetime of the pension fund, it would almost certainly violate 30 USC 1259(b) by not releasing the bond once revegetation requirements are met, and if the pension bond was released in accordance with 30 USC 1259(b) at the end of the revegetation period, it is very likely it would not meet the financial obligations

prescribed in MCA 82-4-222(1)(g)(iii). Thus, a pension bond is inconsistent with the liability period requirement.

Fifth, while we have not made an official determination as to whether a prohibition on passing costs associated with bonds, reclamation, or otherwise, onto purchasers who generate electricity conflicts with SMCRA or our regulations, we believe the proposed prohibition on passing costs associated with pension bonds onto purchasers who generate electricity conflicts with SMCRA because pension bonds conflict with 30 USC 1259(b) (see above). Since this proposed prohibition is applicable to pension bonds only, it cannot be approved in part.

Lastly, we note that the proposed amendment to MCA 82-4-222(1)(g)(iii) has only been interpreted in terms of whether the section conflicts with SMCRA and its regulations. There has been no official determination as to whether MCA 82-4-222(1)(g)(iii) conflicts with other federal laws, like the Employee Retirement Income Security Act (ERISA).