



United States Department of the Interior

OFFICE OF SURFACE MINING
Reclamation and Enforcement
Western Region Office
1999 Broadway, Suite 3320
Denver, CO 80202-3050



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DIV. OF OIL, GAS & MINING

Jeremy Nichols
Climate and Energy Program Director
WildEarth Guardians
1536 Wynkoop, Suite 310
Denver, CO 80202

RE: WildEarth Guardians Request for Evaluation of the Utah State Regulatory Program

Dear Mr. Nichols,

The Office of Surface Mining Reclamation and Enforcement (OSMRE) has completed the verification process and reached a determination regarding your December 21, 2015, 30 C.F.R. Part 733 request (733 request). Your December 2015 letter requested action pursuant to 30 C.F.R. Part 733 of the Federal regulations with respect to the Utah surface coal mining regulatory program (the Utah program). Specifically, WildEarth Guardians (WEG) requested a State program evaluation to ensure that the Utah Division of Oil, Gas and Mining (DOGGM) is effectively administering an aspect of the Utah program. Prior to initiating a State program evaluation, the Federal regulations at 30 C.F.R. § 733.12(a)(2) require OSMRE to complete the verification process.

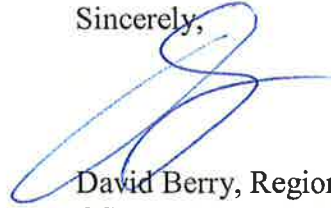
As discussed in the enclosed determination, the verification process entails an initial examination to determine, among other things, the accuracy of the allegations, whether the allegations relate to an existing requirement within the approved program, and whether the weight of the evidence sufficiently supports the need to conduct an evaluation pursuant to 30 C.F.R. § 733.12. The enclosed document provides OSMRE's analysis and determination for the allegations raised by WEG.

After a review of WEG's allegations, information provided by DOGM, and other information available to OSMRE, we have concluded that the allegations set forth in WEG's 733 request do not warrant further evaluation under 30 C.F.R. Part 733 procedures.

Please note that OSMRE will provide a separate determination regarding DOGM's response to the Ten-Day Notices that resulted from WEG's citizen complaint.

If you have any questions related to this matter, please contact me at (303) 293-5001.

Sincerely,



David Berry, Regional Director
OSMRE Western Region

Enclosure: OSMRE Analysis and Determination of the December 2015 WildEarth Guardians
30 C.F.R. Part 733 Request

C: Alan Boehms, Manager, Denver Field Branch
Office of the Solicitor, Rocky Mountain Region

**OSMRE ANALYSIS AND DETERMINATION OF THE DECEMBER 2015
WILDEARTH GUARDIANS 30 C.F.R. PART 733 REQUEST**

I. INTRODUCTION

In a letter to the Director of the Office of Surface Mining Reclamation and Enforcement (OSMRE), the WildEarth Guardians (WEG) requested that OSMRE review a certain aspect of the approved Utah surface coal mining regulatory program (the Utah program) under 30 C.F.R. Part 733 of the Federal regulations (733 request). WEG believes that the Utah Division of Oil, Gas and Mining (DOG M) is inadequately administering portions of the Utah program. In addition to its citizen complaint involving alleged violations at three mine sites, WEG requests a State program evaluation. The procedures for a State program evaluation are outlined in 30 C.F.R. § 733.12(b). In response to the 733 request, OSMRE initiated the procedure outlined in 30 C.F.R. Part 733. OSMRE has completed the first step of this process and has reached a determination as to whether an evaluation of the allegations should be made.¹

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) and its implementing regulations at 30 C.F.R. § 733.12 provide procedures for requiring a State to correct serious failings of its program. Any interested person may petition OSMRE to formally evaluate a State program under the procedures established in 30 C.F.R. § 733.12(a)(2). To invoke these procedures, a petitioner must set forth a concise statement of facts, which they believe establish the need for evaluation. This statement is used by OSMRE to verify the allegations in accordance with 30 C.F.R. § 733.12(a)(2). The verification process is an initial examination to determine, among other things, the accuracy of the allegations, whether the allegations relate to an existing requirement within the approved program, and if the weight of the evidence sufficiently supports the need to conduct an evaluation pursuant to 30 C.F.R. Part 733.12. Thus, a petitioning party must affirmatively demonstrate that, based on the information presented in its allegations, further evaluation under 30 C.F.R. Part 733 is warranted.

After completing the verification process, OSMRE determines whether sufficient evidence exists to warrant evaluation of any part of the State program. The results of any evaluation conducted will aid OSMRE in determining whether there is reason to believe a State is not effectively implementing, administering, maintaining, or enforcing any part of its approved program. If, after review of the evaluation, OSMRE has reason to believe a State is not effectively implementing, administering, maintaining, or enforcing any part of its approved program, the procedures set forth in 30 C.F.R. § 733.12(b) will commence.

Specific to this determination, WEG requested that OSMRE conduct a State program evaluation of the Utah program to ensure that DOGM “is appropriately implementing, administ[ering], and maintaining, and enforcing its SMCRA program with regards to its procedures and practices around bond adjustments to ensure that bond amounts are sufficiently and consistently reviewed and increased as necessary.”²

¹ Documentation exchanged as a result of WEG’s citizen complaint is referenced in this 733 determination to the extent that the allegations and correspondence are interrelated. OSMRE shall issue a separate determination regarding the three Ten-Day Notices (TDNs) issued at each mine site as a result of WEG’s citizen complaint.

² WEG Citizen Complaint and 733 Request Letter at page 9 (Dec. 21, 2015).

In response to the 733 request, OSMRE has appropriately implemented the 30 C.F.R. Part 733 procedures by first completing the verification process. After review of WEG's allegations, DOGM's 733 response and the State's TDN response incorporated by reference, and information gathered through OSMRE's normal oversight process, OSMRE determined that the allegations set forth in the WEG letter do not warrant further evaluation.

Provided below is a summary of each allegation along with a summary of DOGM's response to those allegations.

II. OSMRE ANALYSIS OF THE WEG 733 ALLEGATIONS

The basis of WEG's 733 request, as explained in its letter dated December 21, 2015 (the WEG complaint), is DOGM's methodology and procedures pertaining to bond adjustments and review of bond amounts.

As support for its 733 request, WEG presents information specific to three active underground mine sites in Utah. The three mines, owned by Canyon Fuels Co., LLC, include Dugout Canyon, Skyline, and SUFCO mine. WEG assumes that DOGM's alleged failures asserted for these three sites are likely indicative of total programmatic failure. Specifically, WEG claims "there are signs" of DOGM's overall inability to ensure adequate bonding for all coal mine sites within the State of Utah. WEG therefore requests that OSMRE review DOGM's practices and procedures for bond review and adjustment to ensure that DOGM is effectively administering, implementing, maintaining, and enforcing its approved program.

Below, OSMRE addresses the following allegations: (A) DOGM's failure to adjust the posted bond amount to account for inflation; and (B) DOGM's practice of reviewing and adjusting bond amounts randomly, without a set schedule.

A. DOGM's Failure to Adjust the Posted Bond Amount to Account for the Inflation of Reclamation Costs Yields a Bond Amount Lower than that Required

Summary of WEG's Allegations:

WEG asserts that DOGM inappropriately calculates and adjusts bond amounts in violation of SMCRA by failing to account for the inflation of the reclamation costs. WEG bases this allegation on DOGM's information related to the Dugout Canyon, Skyline, and SUFCO mines. WEG claims that this alleged failure is occurring at "likely more" sites.³ Further, WEG contends that DOGM's "[r]ecords, consisting of its inspection reports, midterm reviews, and permit revision documents," indicate DOGM's failure to consistently review the bond adequacy at sites.⁴ According to WEG, DOGM fails to increase the bond amounts to account for inflation

³ WEG complaint at 3.

⁴ *Id.*

and is aware such increase is needed, yet bond increases have either not occurred or the increases made by DOGM fail to reflect “actual inflation rates.”⁵

WEG provides its own recalculations for the Dugout Canyon, Skyline, and SUFCO mines. In its recalculations, WEG applies a Construction Cost Index (CCI), and argues that it is the appropriate source of inflation factors for use in escalating reclamation cost estimates. WEG asserts that the total bond amount yielded from its recalculations and adjustments is higher than the current posted bond amounts at the three sites. Therefore, WEG concludes that the bond amount at the Dugout Canyon, Skyline, and SUFCO mines are lower than required. Collectively, WEG believes that this information indicates a \$6 million shortage caused by DOGM’s failure to appropriately adjust the bonds.

WEG asserts that its recalculations, which it presumes would equate to a bond amount accurately accounting for inflation, demonstrate that the present-day value for all three mines has arguably decreased over time. WEG also contends that its recalculations demonstrate a significant decrease in the bond amount held for all three mines “despite a lack of bond release and despite acknowledged increases in reclamation costs.”⁶ WEG anticipates that total bond amounts must increase linearly through time. WEG asserts that the posted bond amounts not being increased as it predicted serves as evidence that each bond should be higher in order to “account for future increases in reclamation costs.”⁷

WEG further explains that even in the few occasions where a bond was escalated, DOGM’s increase was still, according to WEG, below the rate of inflation because the bond increase was based on an outdated baseline amount.

WEG argues that any assertion by DOGM that it is appropriately adjusting and setting bond amounts is refuted by WEG’s findings that the bond amounts do not change over a number of years, bond release has not occurred at Skyline and SUFCO with only nominal release occurring at Dugout Canyon, along with WEG’s assumption that disturbance and reclamation costs have increased at all three sites. WEG believes that its allegations specific to the Dugout Canyon, Skyline, and SUFCO, coupled with “signs that DOGM has similarly inconsistently failed to increase bond amounts to account for inflation of reclamation costs at other mines” sufficiently demonstrates the need to conduct a State program evaluation under 30 C.F.R. § 733.12.

DOGM’s Response:

DOGM contends that the allegations pertaining to the three sites are unfounded as all three sites hold bonds sufficient for completion of the approved reclamation plans. More specifically, DOGM asserts that WEG’s allegations were formed using incorrect assumptions and a different inflation index, and are therefore flawed. DOGM argues that, even though WEG’s complaint failed to identify specific errors or challenge any specific cost calculations, it provided worksheets and a detailed explanation of its methodology for calculating and recalculating reclamation bond amounts. DOGM contends that its procedures reflect the level of time and

⁵ WEG complaint at 3.

⁶ WEG at 7.

⁷ WEG complaint at 4.

professional evaluations dedicated to ensuring that bonding occurs in accordance with the Utah program and Utah's guidelines.

In its response to the 733 allegations, DOGM explains that it reviews reclamation costs and the bond amount during the midterm review process, permit revisions, and actions that cause an increase to the worst-case reclamation scenario. DOGM explains that the "worst case scenario" entails calculating the bond amount "based upon the maximum extent of disturbance allowed within the permit area[.]"⁸ When it reviews bonds, DOGM recalculates and re-escalates reclamation costs and assesses whether the escalated costs require the operator to increase the posted bond amount. During this process, DOGM will escalate the costs five years forward to the next scheduled cost recalculation at midterm review. DOGM also explains that, during permit revision, it also "recalculates the escalation factor and the updated cost is escalated to the point of the next midterm to determine future reclamation costs."⁹

DOGM states that its method for calculating reclamation costs and bond amounts is pursuant to its internal Tech Directives and OSMRE's Handbook for Calculation of Reclamation Bond Amounts (OSMRE Bonding Calculation Handbook). DOGM's Tech Directive 007, "Calculation Guidelines for Determining Reclamation Bond Amounts" (Tech 007) establishes specific requirements and procedures for calculating and determining the amount of the reclamation bonds. DOGM asserts that its index for determining the escalation factor used is consistent with the Utah program, SMCRA, the Federal regulations, and the OSMRE Bonding Calculation Handbook. According to DOGM, its use of the R.S. Means Historical Construction Cost Index (R.S. Means) is appropriate because it includes costs typical for reclamation projects. DOGM states that the use of CCI would incorporate a materials component, a cost that is typically not associated with a majority of reclamation projects. DOGM also argues that use of a specific index is neither required under UAC R645-301-800.300 nor by the OSMRE Bonding Calculation Handbook. DOGM explains it is only required that bonds are adjusted for inflation using an *acceptable* cost index, and WEG failed to argue that DOGM's cost index is inappropriate.

Next, DOGM counters WEG's statement that the posted bond amounts remain unchanged over several years. DOGM clarifies that the cost of reclamation does not necessarily equate to the posted bond amount. Certain circumstances may result in an increase or decrease in the reclamation cost estimate, which is frequently a different number than the posted bond amount. DOGM argues that WEG's allegations fail to account for the fact that the reclamation costs change more frequently than the posted bond amount, and WEG fails to consider that the posted bond amounts may be higher than the estimated cost of reclamation.

DOGM believes that its response detailing its bonding procedures and practices evidences its compliance with SMCRA requirements. Contrary to WEG's 733 allegations, DOGM states that its response demonstrates that it is not failing to effectively administer its approved State program. DOGM therefore contends that action under WEG's 733 request would be inappropriate.

⁸ DOGM TDN Response at 6 (January 22, 2016).

⁹ DOGM TDN Response at 11.

OSMRE Analysis:

Section 509 of SMCRA, along with the Federal implementing regulations at 30 C.F.R. § 800.14, establish that the bond amount shall be determined by the State regulatory authority and based on the reclamation plan. Both SMCRA and the Federal regulations require that the bond amount be sufficient to cover the cost of reclamation in the event that it must be completed by the regulatory authority.¹⁰ As the State regulatory authority, DOGM “should be able to estimate the cost of all potential reclamation with reasonable accuracy.”¹¹

Where the permittee’s reclamation cost changes throughout time, sections 509(a) and (e) SMCRA and 30 C.F.R. § 800.15(a) require the State regulatory authority to adjust the bond amount. Adjustments can be made in instances where the disturbed area increases or where the cost of reclamation changes due to inflation, among other reasons. In 1983, OSMRE explained in a final rule that:

“The bond amount, in order to be sufficient to assure completion of the reclamation plan by the regulatory authority, must include administrative costs to the regulatory authority. . . . OSMRE does not agree that the operator should necessarily have to post a bond in an amount that incorporates inflation factors for 5 years. This section as written *provides the regulatory authority with the discretion to consider the potential impact of inflation*, but does not require it. Rather, § 800.15 may be used to provide for the adjustment of the bond amount *as necessary to cover such problems as inflation*.”¹²

The approved Utah program – which consists of the Utah Coal Mining and Reclamation Act (UCMRA)¹³ and the Utah Administrative Code rules (the Utah rules)¹⁴ – reads almost identically to its corresponding Federal counterparts.¹⁵ The Utah rules also set forth, at UAC R645-301-830.300, the State requirement that, “[a]n additional inflation factor will be added to the subtotal for the permit term. This inflation factor will be based upon an acceptable cost index.”

While WEG is correct that DOGM must adjust the bond amounts to account for inflation of the reclamation costs, its assertions regarding inflation for the three sites fail for multiple reasons. WEG’s assertions misconstrue how inflation factors are used to project anticipated reclamation costs, confuses reclamation cost estimates with posted bond amounts, and fails to demonstrate that R.S. Means is inappropriate cost index.

First, WEG’s allegations obfuscate the distinction between reclamation cost estimates and posted bond amounts. A reclamation cost estimate must be based upon the reclamation work associated with a particular mine site. This amount is routinely recalculated based upon present-day dollars

¹⁰ *Id.*

¹¹ 48 Fed. Reg. 32932 (July 19, 1983).

¹² *Id.* (emphasis added).

¹³ Utah Code Ann. §§ 40-10-1 to -30.

¹⁴ UAC R645-100 to -403.

¹⁵ Utah Code Ann. § 40-10-9 (Renewal of permit); Utah Code Ann. § 40-10-12 (Revised permit and reclamation plan); Utah Code Ann. § 40-10-15 (Bond adjustments); UAC R645-301-800 (Bonding and insurance); and UAC R645-301-812.700 (Requiring that adequate bond be in effect at all times).

and escalated to ensure adequate bond is held throughout the timeframe between bond recalculations, which is a maximum of five years. The posted bond amount must be sufficient to cover the anticipated costs provided in the reclamation cost estimate. A permittee may post or maintain a higher bond amount than required. In some cases, such as Dugout Canyon Mine's Phase III bond release which occurred as recently as July 26, 2016, DOGM approved a partial phase III bond release where the permittee opted to retain its current surety bond amount. Where the actual bond amount held is more than the reclamation cost estimate, the bond amount may remain constant for many years.

The reclamation cost estimate may decrease when phased bond release is approved or when the cost of future reclamation changes. In a 2007 Office of Hearings and Appeals decision, OSMRE explained that:

“once the bond amount is prescribed under the auspices of the underlying permit and, once the bond is actually posted and in place, there are only two procedures available for changing the face amount of the bond. First, the formal permit revision process may be initiated by application filed by the permittee under the provisions of 30 C.F.R. § 774.13. Second, OSM may periodically review the current bond amount and make adjustments thereto based on inflation, such as changes in fuel costs or changes in the costs of other reclamation activities.”¹⁶

Thus, adjustments including increases and decreases are always reflected in the reclamation cost estimate, but may not impact the actual posted bond amount. The posted bond amount may remain constant so long as DOGM holds sufficient funds to cover anticipated costs of reclamation at all times in accordance with the Utah program.¹⁷

As DOGM referenced in its TDN response, WEG's recalculations yielded predictably different outcomes. This was caused by WEG's attempt to recalculate what it considered to be the total bond amount by applying a different escalation factor to the posted bond amount, rather than applying an appropriate inflation factor to the reclamation cost estimate.

As its recalculations are based on error, WEG fails to demonstrate that DOGM is not effectively implementing its program. In addition to confusing the posted bond amount with the reclamation cost estimate, WEG indicated its recalculations apply a CCI escalation rate, while DOGM uses R.S. Means. WEG fails to consider the full reading of the OSMRE Bonding Calculation Handbook. The OSMRE Bonding Calculation Handbook outlines the process for applying an inflation factor and uses CCI in its example calculations. However, the OSMRE Bonding Calculation Handbook expressly states that its use of CCI is only referenced for example purposes.¹⁸ OSMRE acknowledges that other inflation factors may be appropriate and recognizes the State regulatory authority's role in determining its bonding procedures in a primacy state. The OSMRE Bonding Calculation Handbook was developed as a reference for

¹⁶ *Tenn. Consolidated Coal Co. v. OSMRE*, NX2007-1-BA, at 3-4 (OHA Sept. 26, 2007).

¹⁷ UAC R645-301-812.700.

¹⁸ See OSMRE Bonding Calculation Handbook, at 21-22 (2000), available at <http://www.osmre.gov/LRG/docs/directive882.pdf>.

OSMRE personnel and was not intended to “be used to compel States to adhere to the methods in the Handbook.”¹⁹

OSMRE’s verification process indicated that while WEG references CCI, it appears to have actually applied CPI inflation factors. Application of CPI is inappropriate in this context because CPI is based on the spending habits of private individuals and families, rather than construction costs. Beyond its use of an inappropriate inflation factor in its recalculations, WEG also fails to demonstrate that DOGM’s cost index is inappropriate. DOGM argues that its use of R.S. Means is appropriate as it includes costs typical of reclamation projects. OSMRE agrees that R.S. Means is an appropriate measure. However, the results of OSMRE’s technical findings, explained further below, indicated that DOGM is applying an inflation factor, but could not verify whether it was R.S. Means. Under the Utah rules, DOGM is only required to apply an inflation factor based on an acceptable cost index.²⁰ OSMRE determined that this allegation does not warrant further review under 733 as it does not indicate that DOGM is failing to apply an inflation factor based on an acceptable cost index. However, OSMRE will follow up on DOGM’s use of inflation factors, along with other issues identified through internal technical assistance, through oversight procedures.

Next, WEG’s argument that DOGM’s bond amounts are based on an outdated cost index is incorrect. WEG misconstrues bond inflation procedures by presuming that each recalculation of a bond amount uses a previously inflated bond cost calculation as a baseline. WEG’s assumption that actual bond amounts will increase linearly through time or that previous escalation factors will have any bearing on future reclamation costs is erroneous. Previous escalation estimates become obsolete when the cost estimate is updated to account for present-day costs. The reclamation cost estimate is routinely recalculated using present-day dollars and inflated to the next anticipated recalculation date, a maximum of five years into the future. Previous inflation estimates will not propagate into subsequent reclamation cost estimates because accurate present-day values are employed. Therefore, WEG’s recalculations which use previously inflated bond amounts as the baseline for setting future bond amounts are incorrect.

Furthermore, OSMRE requested internal technical assistance during its initial review of the information presented by WEG and in DOGM’s responses. The result of the technical assistance identified areas where WEG’s allegations were erroneous or based on inaccurate information. Additionally, the technical findings identified separate, minor issues associated with DOGM’s implementation of Tech 007. Technical assistance determined that the overall process presented in Tech 007 is sound and its use would yield consistent and defensible cost estimate calculations when followed. However, at the time of review, technical assistance indicated that DOGM’s implementation of Tech 007 could be improved. Implementation of Tech 007 includes the instances where DOGM seemingly deviates from the direction provided in its technical guidance. While OSMRE acknowledges that this, among other findings, is a matter that must be resolved, these issues are not indicative of program-wide failure and are appropriately addressed through OSMRE’s oversight of DOGM’s program. OSMRE does not approve State guidance documents. OSMRE is, however, required to oversee a State’s implementation of its program to

¹⁹ *Id.* at 2.

²⁰ UAC R645-301-830.300.

ensure its policies or guidance documents are consistent with and not less stringent than SMCRA, or less effective than the corresponding Federal regulations.

OSMRE Determination:

WEG's assertion that DOGM is failing to adjust bond amounts and account for the inflation of reclamation costs is incorrect. As explained in OSMRE's analysis, WEG bases this assertion on its recalculations performed for three specific mine sites. However, WEG's recalculations are formulated using an inappropriate cost index and confuse the posted bond amount with the reclamation cost estimate. As a result, WEG's allegation that each bond for the Dugout Canyon, Skyline, and SUFCO mines are not adjusted to incorporate inflation, or other increases of the reclamation cost, also fails. WEG's assertions misconstrue how inflation factors are used to project anticipated reclamation costs and fail to demonstrate that DOGM uses an inappropriate cost index. No support exists for an allegation that DOGM is not effectively administering, implementing, maintaining, or enforcing this aspect of its approved State program.

For the reasons detailed above, OSMRE determined this allegation does not warrant further review under 30 C.F.R. Part 733.

As noted in OSMRE's analysis, OSMRE's technical assistance identified minor deficiencies surrounding DOGM's implementation of its technical guidance, Tech 007. While these issues do not demonstrate that DOGM is failing to administer the Utah program, OSMRE acknowledges that these issues must be remedied. These issues will be appropriately addressed through OSMRE's oversight and OSMRE will work with DOGM to ensure that Tech 007 is implemented in accordance with the approved State program.

B. DOGM Fails to Consistently Review and Adjust the Bond Amount on a Set Schedule

Summary of WEG's Allegations:

The WEG complaint alleges that DOGM inconsistently reviews bond amounts and addresses bond adjustments on a random basis with no specific schedule.

DOGM's Response:

As explained above, DOGM states that it reviews reclamation costs and the bond amount during midterm permit review, permit revisions, and when an increase in the worst-case reclamation scenario occurs. In accordance with R645-301-830.410, DOGM adjusts each bond periodically throughout the life of the mine as the cost of future reclamation changes.

As provided by R645-301-830.410, DOGM established a set review schedule for reevaluating and adjusting bond amounts in its Administrative Directive 002, "Mid-Term Reviews" (ADM 002). ADM 002 outlines DOGM's procedures and the regulatory basis for conducting its midterm review process, which includes review of the bond amount. DOGM states that it adopted ADM 002 and the midterm review process for reevaluations with the intent to avoid and

prevent delaying permit renewals. Consequently, DOGM believes that reevaluating and adjusting bond amounts during the midterm review process is more efficient. DOGM also clarifies that adjustments to the reclamation cost are performed “for every amendment submitted to [DOGM] that could trigger an increase or revision to the bond amount (e.g., additional surface disturbance or construction).”²¹

Therefore, DOGM argues that WEG’s allegation that no specific schedule exists for adjusting bond amounts is incorrect as these very procedures are located in ADM 002 and satisfy the requirements in R645-301-830.410.

OSMRE Analysis:

WEG’s assertion that DOGM fails to consistently review, and has failed to establish a set schedule for review, and reevaluate bond amounts is incorrect.

As explained above, SMCRA, the Federal regulations, and the Utah program requires adjustment of the bond amount to occur “from time to time” where the cost of future reclamation changes.²² With regard to establishing a schedule for reviewing the bond amounts, SMCRA and the Federal regulations provide a State regulatory authority with the discretion to establish and specify its own fixed review schedule as needed to fulfill the bond adjustment requirement.²³ OSMRE has explained in past rulemakings, that “[s]uch a *schedule could be tied to permit review . . . if such a schedule related to the likely need for adjustments.*”²⁴

DOGM opted to establish such a schedule through a technical guidance document. As DOGM clarified in its 733 and TDN response, ADM 002 provides that part of DOGM’s midterm review encompasses an evaluation of “the reclamation bond to ensure that coverage adequately addresses permit changes approved subsequent to permit approval or renewal . . . , and to ensure that the bond amount is appropriately escalated in current-year dollars.”²⁵

In its TDN response, DOGM explained that its method of reevaluating and adjusting the bond amounts during midterm review was primarily adopted in order to prevent any potential delay of permit renewal. This decision is in accordance with ADM 002, the Utah program, and is supported by the 1979 preamble to the Federal regulations. The preamble clarifies that:

“The regulations require the regulatory authority to review the bond amount no more frequently than the regulatory authority is required to review the permit under Part 788 *unless acreage increases and or changes in operations or standards trigger a more frequent review. The mandatory review is required by Section 509(e) of the Act.* A review of bond amounts was tied to the review of permits in order to accommodate administrative convenience and to ensure that changes in the operating requirements required as a result of the permit review are

²¹ DOGM TDN Response at 5.

²² See SMCRA § 509(e), 30 C.F.R. § 800.15(a), Utah Cod Ann. § 40-10-15(5), and UAC R645-301-830.410.

²³ *Id.*

²⁴ 48 Fed. Reg. 32932 (emphasis added).

²⁵ ADM 002 at 2, section 4 subparagraph (E).

reflected in the performance bond liability applicable to that permit. More frequent reviews may be made by the regulatory authority at its discretion.²⁶

In addition to reevaluating the bond amount during the midterm permit review, DOGM explains that it reviews the bond amount as part of its permit revision process. This is a requirement under Utah's program. Specifically, Utah's rules require DOGM to assess bond adequacy once a permit is revised, and if necessary, requires "adjustment of the bond to conform to the permit as revised."²⁷

Contrary to WEG's assertion that DOGM inconsistently reviews and adjusts the bond amounts, OSMRE's review of DOGM's documentation at all three mines demonstrates otherwise. Consistent with its response, ADM 002, and the Utah program, DOGM reevaluated the bond amounts at Dugout Canyon, Skyline, and SUFCO mines during midterm permit reviews and made the required adjustments to the bond amounts when necessary.²⁸

In addition to routine midterm reviews, DOGM recently reevaluated the bond amounts at Skyline and SUFCO mines as part of its permit revision process. On June 28, 2016, DOGM recalculated the reclamation cost estimate at the SUFCO mine due to a permit revision. Because the new cost estimate exceeded the posted bond amount, the permittee was required to post additional bond. On July 19, 2016, DOGM adjusted the reclamation cost estimate for the Skyline mine to account for changes resulting from a permit revision and to correct historical errors in demolition, earthwork, and revegetation costs. As the posted bond amount for Skyline was greater than the reclamation cost estimate, the face of the bond did not change.

OSMRE Determination:

The information presented by WEG fails to demonstrate that DOGM is not effectively administering its approved State program with regard to establishing a fixed schedule and consistently reviewing and reevaluating the bond amounts. The allegations made by WEG do not consider the schedule of review provided in the State's rules or the process outlined in its technical guidance. DOGM's response gave a clear explanation of the procedures and scheduling used to adjust the bond amounts as necessary and in accordance with the Utah program and its ADM 002. Additional information available to OSMRE indicates that DOGM is following its schedule outlined in its technical guidance and as required under the Utah program, SMCRA, and the Federal regulations.

For the reasons detailed above, following the verification process, OSMRE determined that this allegation does not warrant further evaluation pursuant to the procedures outlined in 30 C.F.R. § 733.12(a)(2).

²⁶ 44 Fed. Reg. 14902, 15113 (Mar. 13, 1979)(emphasis added).

²⁷ UAC R645-301-830.440.

²⁸ The prior midterm review occurred at each mine in the following order: Skyline Mine (conditionally approved on February 26, 2015); SUFCO (conditionally approved on July 6, 2015); and Dugout Canyon (conditionally approved on April 13, 2016).

III. CONCLUSION

In its letter dated December 21, 2015, WEG requested that OSMRE evaluate the approved Utah program. The Federal regulations at 30 C.F.R. Part 733, however, establish threshold processes to which OSMRE must first complete before conducting a comprehensive evaluation of a State program. Prior to the initiation of actions requested by WEG, the regulation-mandated verification process, as detailed in 30 C.F.R. § 733.12(a)(2), must be performed.

Following the procedure established in the Federal regulations, OSMRE has completed the 30 C.F.R. § 733.12(a)(2) verification process. After review of the information presented by WEG, the information provided by the State in response to those allegations, and other information made available through oversight, OSMRE has determined that WEG's 733 allegations do not warrant further evaluation under 30 C.F.R. Part 733.