



Action Plan # UT-2017-001

Between the
Office of Surface Mining Reclamation and Enforcement
Denver Field Branch
and the
Utah Department of Natural Resources
Division of Oil, Gas and Mining

MAY 3, 2017

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I. INTRODUCTION

As part of its review of a citizen complaint and request for a State program evaluation, the Office of Surface Mining Reclamation and Enforcement (OSMRE) completed an internal technical review that identified separate, minor programmatic deficiencies. This Action Plan is intended to address and resolve these minor programmatic issues. The programmatic issues identified relate to the Utah Division of Oil, Gas and Mining's (DOGM) administration of the approved Utah coal mining regulatory program (the Utah program) and the implementation of its technical guidance with respect to DOGM's bonding practices. Through this Action Plan, both OSMRE and DOGM commit to certain activities as necessary to effectively resolve the issues identified herein. Resolving these programmatic issues will also ensure that DOGM is appropriately implementing its technical guidance and that all directives provided through technical guidance documents are in accordance with the requirements set forth in the Utah program, the Surface Mining Control and Reclamation Act of 1977 (SMCRA), and the Federal regulations.

II. BACKGROUND

In a letter dated December 21, 2015, WildEarth Guardians (WEG) presented information which it believed demonstrated that violations were occurring on three mine sites within the State of Utah. In its letter, WEG alleged site-specific violations through a citizen complaint and requested that OSMRE conduct a State program evaluation under 30 C.F.R. Part 733 to ensure that DOGM was effectively administering, implementing, maintaining, and enforcing a portion of its approved State program. WEG's assertions mostly pertained to DOGM's alleged failure to adequately review and adjust bond amounts to account for the inflated future cost of reclamation, thereby allegedly failing to assure that sufficient bonding exists to carry out the approved reclamation plans in the event of permit revocation and bond forfeiture.

On January 6, 2016, OSMRE issued three Ten-Day Notices (TDNs) to DOGM in response to WEG's alleged violations of reclamation bonding requirements at the three mine sites. DOGM responded to the TDNs on January 22, 2016. OSMRE subsequently requested internal technical assistance as part of its review of the information presented by WEG and of DOGM's TDN response. On August 16, 2016, OSMRE issued a determination in response to WEG's 733 request and concluded that the allegations did not warrant further evaluation under 30 C.F.R. § 733.12(a)(2). On October 11, 2016, OSMRE issued a written determination with respect to DOGM's TDN response and concluded that DOGM had shown good cause for not taking action to correct the potential violations because, under the Utah program, the alleged violations cited did not exist. Even though OSMRE concluded, in both the 733 and TDN determinations, that further action was not warranted under either 30 C.F.R. Part 733 or through the TDN process, the results of OSMRE's internal technical findings identified separate, minor programmatic implementation problems that form the basis of this Action Plan.

The Utah program was conditionally approved by the Secretary of the Interior on January 21, 1981.¹ Utah's approved State program consists of the Utah Coal Mining and Reclamation Act (UCMRA) and the Utah Administrative Code Rules ("UAC" or "the Utah rules").² The Utah rules outlining Utah's bonding requirements are codified at R645-301-800.

¹ 46 Fed. Reg. 5899 (Jan. 21, 1981).

² Utah Code Ann. §§ 40-10-1 to -30 and UAC R645-100 to -403.

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In addition to the OSMRE-approved Utah program, DOGM implements its own technical guidance and policy, which generally sets forth non-binding internal practices and procedures as needed to supplement, or elucidate, its own State program requirements. Specifically, at issue in this Action Plan is DOGM's Technical Directive 007, "Calculation Guidelines for Determining Reclamation Bond Amounts" (Tech-007). Tech-007 establishes specific requirements and procedures for calculating and determining the amounts of reclamation bonds.

OSMRE's technical assistance findings identified minor programmatic implementation problems associated with the use of Tech-007, instances where DOGM appeared to deviate from the direction provided in Tech-007, and language within Tech-007 that conflicts with the Federal minimum standards. On October 19, 2016, a draft of this Action Plan, along with a copy of OSMRE's internal technical findings, was submitted to DOGM for its review and comment. OSMRE received DOGM's comments in response to Issue 1 of the draft Action Plan on January 5, 2017, which were discussed during a teleconference scheduled on January 19, 2017. In addition to teleconferences, OSMRE staff traveled to the DOGM office in Salt Lake City, Utah to discuss calculating reclamation cost estimates from March 27, 2017 through March 29, 2017. DOGM submitted a partial revision of Tech-007 § 8 on March 21, 2017, to which OSMRE provided feedback on April 6, 2017. OSMRE subsequently revised the Action Plan to incorporate discussions and agreements reached during the March 2017 in-person meetings and submitted the revised Action Plan to DOGM for review on April 17, 2017. The Action Plan was finalized on May 3, 2017, and became effective upon signature.

This Action Plan seeks to address and resolve each of the four program implementation problems discussed below pertaining to the calculation and determination of reclamation performance bond amounts. OSMRE and DOGM will resolve the cause of each regulatory program implementation problem. This includes reviewing and revising certain language within Tech-007 to ensure that Utah's guidance document – as written, interpreted, and applied – does not render the approved Utah program requirements less stringent than SMCRA or less effective than the Federal regulations.

After defining each of the four programmatic implementation issues in the Problem Descriptions below, OSMRE developed and tailored individual Criteria for Resolution sections to resolve each program problem. Individual Action Sequence and Schedule sections outline milestones for each of the four issues to ensure progress and the successful execution of the contents of this Action Plan. As part of this process, OSMRE, Denver Field Branch (DFB, also referred to as OSMRE) will work with DOGM to accomplish each Criterion for Resolution and ensure the identified problems are successfully resolved in a timely manner in accordance with SMCRA, the Federal regulations, and the approved Utah program.

III. REGULATORY PROGRAM PROBLEMS TO BE RESOLVED

ISSUE 1: Tech-007 Bond Adjustment Guidelines for Structure Removal Circumvent Bond Release Procedures

PROBLEM DESCRIPTION: Tech-007 § 8, entitled “*Building Demolition Prior to Final Reclamation*” as currently written, conflicts with the bond release requirements established in SMCRA, the Federal regulations, and the approved State program. Specifically, Tech-007 § 8 allows the discretion to reduce a bond amount through bond adjustments for structures removed from a disturbed area, rather than proceeding through the mandated bond release procedures for reclamation of work performed.

SMCRA, at section 509(e) requires the regulatory authority to adjust the bond amount to account for changes in the affected land acreages and where the cost of future reclamation changes. The corresponding Federal regulations outline bond adjustment procedures in 30 C.F.R. § 800.15. Subsection (c) of 30 C.F.R. § 800.15 specifically provides that:

A permittee may request reduction of the amount of the performance bond upon submission of evidence to the regulatory authority proving that the permittee's method of operation or other circumstances reduces the estimated cost for the regulatory authority to reclaim the bonded area. Bond adjustments which involve undisturbed land or revision of the cost estimate of reclamation are not considered bond release subject to procedures of § 800.40.

The Utah program language, at Utah Code Ann. § 40-10-15(5) and UAC R645-301-830.430, is substantively identical to the language in SMCRA and 30 C.F.R. § 800.15(c).³

The original written language in Tech-007, however, provides at § 8, that:

The Division at its discretion may release part of the bond amount for structures that have been removed as part of the operational phase. Before such a bond release can be approved, the entire structure must be removed and properly disposed of. The Division must verify the structure's removal with a field visit and a written report and photographs.

Bond reductions that are associated with the removal of structures and facilities during the operational phase may be handled as part of the bond release process as outlined in R645-301-880. If the operator demonstrates

³ Utah Code Ann. § 40-10-15(5) states:

The amount of the bond, surety, or deposit required and the terms of each acceptance of the applicant's bond shall be adjusted by the division from time to time as affected land acreages are increased or decreased or where the cost of future reclamation changes.

UAC R645-301-830.430 provides:

A permittee may request reduction of the amount of the performance bond upon submission of evidence to the Division providing that the permittee's method of operation or other circumstances reduces the estimated cost for the Division to reclaim the bonded area. Bond adjustments which involve undisturbed land or revision of the cost estimate of reclamation are not considered bond release subject to procedures of R645-301-880.100 through R645-301-880.800.

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that the reduced costs of reclamation created by structure or building removal is not related to activities governed by Phase I, II or III bond release, the operator may be eligible for a bond reduction.

Since 1983, OSMRE has consistently required that any reduction of the bond amount, for activities characterized as reclamation work performed, must occur through the bond release process. In 1983, OSMRE revised the language in 30 C.F.R. § 800.15(c) “to clarify that bond adjustments which involve only undisturbed land or revision of the cost estimate of reclamation are not considered bond release subject to procedures of § 800.40.”⁴

In the early 1990s, OSMRE addressed the issue of bond reductions subsequent to structure removal in Colorado. In 1991, OSMRE Headquarters provided an internal memorandum consistently deeming bond adjustments under 30 C.F.R. § 800.15 appropriate where justification for the bond reduction included changes to acreage to be affected or a permittee’s showing that the reclamation cost estimate is “no longer valid for reasons other than the performance of reclamation work.”⁵ The 1991 memorandum also explained that while “an argument could be made that performance of reclamation obligations reduces the cost of future reclamation, the structure of SMCRA, the language of the Federal regulation and the preambles to this rule clearly indicate that this is not the interpretation envisioned by Congress or [OSMRE].”⁶

By implementing this section of Tech-007, DOGM inappropriately allows a bond reduction through bond adjustment procedures for the removal of structures from disturbed areas, rather than through the required bond release process. This not only conflicts with the SMCRA mandate at 509(e) and Federal regulations at 30 C.F.R. § 800.15(c), but also contradicts the approved State program requirements as the provisions mirror the Federal regulations at Utah Code Ann. § 40-10-15(5) and the Utah rules at UAC R645-301-830.430.

Thus, bond reductions requested as a result of reclamation work performed must be processed as an application for bond release under 30 C.F.R. § 800.40. The request cannot be approved unless the criteria specified in 30 C.F.R. § 800.40(c) and section 519(c) of SMCRA, or in DOGM’s case, the Utah rules at UAC R645-301-880, are satisfied.

Moreover, SMCRA and the Federal regulations distinguish between instances where the operator revises its reclamation plan to replace a structure on a disturbed area and where a structure is simply demolished under an approved reclamation plan. When an operator submits a permit revision application to alter the reclamation plan, such as to replace one structure with another or to construct a materials storage area on a former building pad, the costs of future reclamation may change and the bond amount may be properly adjusted to reflect the changing costs of future reclamation. In this case, the area is still considered a long-term facility and is not subject to contemporaneous reclamation requirements until it is no longer needed in support of mining or

⁴ 48 Fed. Reg. 32945 (July 19, 1983).

⁵ OSMRE Internal Memorandum at 1 (Jan. 9, 1991).

⁶ *Id.* (clarifying that “To be approved under the bond adjustment provisions of 30 C.F.R. § 800.15(c), a proposed bond reduction must be justified solely upon either changes in the acreage to be affected (not the acreage remaining to be reclaimed) or a demonstration that the reclamation cost estimates upon which the current bond amount is based are no longer valid for reasons other than the performance of reclamation work. Any bond reduction requested as a result of reclamation work performed must be processed as an application for bond release under 30 C.F.R. § 800.40 . . .”).

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reclamation operations. OSMRE agrees with DOGM that this is authorized by the plain language of 30 C.F.R. § 800.15 of the Federal regulations and UAC R645-301-830.410 of the Utah rules because the cost of implementing the reclamation plan has in fact changed. DFB is distinguishing this concept from the structure removal issue discussed above.

CRITERIA FOR RESOLUTION: DOGM shall revise the language in Tech-007 § 8 to indicate the appropriate distinction between structure removal actions that may be processed as a bond adjustment and those that must undergo bond release procedures. Structure replacement and revision of a reclamation plan may be processed as a bond reduction as long as the disturbed area remains classified as a long-term disturbance which must be retained in support of mining and reclamation operations. Structure removal which occurs under an existing reclamation plan, where the disturbed area is no longer required in support of mining and reclamation operations and should therefore be contemporaneously reclaimed, must undergo bond release procedures. Upon finalization of the revisions to Tech-007 and notification to operators, DOGM shall consistently implement the new guidance in accordance with its approved State program.

ACTION SEQUENCE:

- DOGM and OSMRE will hold teleconferences to discuss interpretation of programmatic requirements pertaining to bond adjustment and bond release.
- DOGM will propose revisions to Tech-007 and submit those changes to DFB for review.
- DFB will review proposed revisions to Tech-007 to ensure consistency with established interpretation and resolution of Issue 1.
- DFB shall provide any comments on DOGM's revisions to Tech-007 guidance.
- If necessary or desired, DOGM shall further revise Tech-007.
- DOGM shall finalize Tech-007 and obtain the necessary internal approvals required to finalize and implement the revised guidance document.
- DOGM shall subsequently draft and send a letter to coal mine operators and permittees notifying them of anticipated changes following the formal adoption of the revised Tech-007 document.

SCHEDULE:

- On November 9, 2016, and January 19, 2017, DFB and DOGM will hold teleconferences to discuss interpretation of programmatic requirements.
- By March 31, 2017, DOGM will draft proposed revisions to Tech-007 § 8 and submit to DFB for review.
- By April 15, 2017, OSMRE will review proposed revisions to Tech-007 and provide feedback to DOGM as appropriate.
- By June 15, 2017, DOGM will make final adjustments to Tech-007 § 8.
- By July 17, 2017, DOGM will draft and send a letter to coal mine operators and permittees informing them of changes to its bonding practices.
- By July 18, 2017, DOGM will begin implementing its revised bonding procedures.

ISSUE 2: Tech-007 “Five Percent Rule” Introduces Unnecessary Risk of Underfunding Reclamation Performance Bonds

PROBLEM DESCRIPTION: Through its use of the “Five Percent Rule,” DOGM’s calculations introduce additional uncertainty which could result in a posted bond amount lower than that required to ensure the cost of reclamation is covered in the event of bond forfeiture.

The “Five Percent Rule” is established and implemented by DOGM through Tech-007. Specifically, Tech-007 § 7, sets forth the “Five Percent Rule” which allows DOGM to use its discretion with respect to adjusting the bond amount “if the cumulative difference between the revised reclamation cost and the approved bond amount is less than 5%.”⁷ Further, this provision explains that DOGM “believes those increases in the reclamation costs of up to 5% can be made without compromising reclamation success.”⁸

No federal provision or state counterpart exists to authorize this discretion provided to DOGM. However, SMCRA, the Federal regulations, and the Utah program ultimately require the bond amount to be “sufficient to assure the completion of the reclamation plan if the work had to be performed by [DOGM] in the event of forfeiture. . . .”⁹ Additionally, the Utah rules establish that DOGM “will require in the permit that adequate bond coverage be in effect *at all times*.”¹⁰

The problem arises where a permittee’s revised reclamation cost exceeds the posted bond amount. When this situation occurs, as applied, the “Five Percent Rule” contradicts the requirements under SMCRA, the Federal regulations, and the Utah program by providing DOGM with discretion to deem the posted bond amount as sufficient, when State and Federal law would require a bond adjustment to ensure sufficient funds exist to cover the revised cost of reclamation, regardless of the performance bond amount being within five percent of the reclamation cost estimate. DOGM’s implementation of the “Five Percent Rule” is without statutory or regulatory basis and conflicts with SMCRA and the Utah program requirements by introducing unnecessary risk, beyond the inherent uncertainty associated with reclamation cost estimation, that the posted bond amount will be insufficient to complete the reclamation plan.

CRITERIA FOR RESOLUTION: DOGM shall remove the “Five Percent Rule” provision within Tech-007. Upon finalization of the revisions to Tech-007 and notification to operators, DOGM shall consistently implement the new guidance in accordance with its approved State program.

ACTION SEQUENCE:

- DOGM shall remove the “Five Percent Rule” provision from Tech-007.
- DOGM shall incorporate all changes into a final version of Tech-007 and submit it to DFB for review.
- DFB shall review the document to ensure consistency and resolution of issues outlined within this Action Plan.
- DFB shall provide any comments on DOGM’s Tech-007 guidance, as revised.

⁷ Tech-007 at 11.

⁸ *Id.*

⁹ 30 U.S.C. § 1259(a), 30 C.F.R. § 800.14(b), Utah Code Ann. § 40-10-15, and UAC R645-301-830.200.

¹⁰ UAC R645-301-812.700 (emphasis added).

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- ❑ If necessary or desired, DOGM shall further revise Tech-007.
- ❑ DOGM shall finalize Tech-007 and obtain the necessary internal approvals required to finalize and implement the revised guidance document.
- ❑ DOGM shall subsequently draft and send a letter to coal mine operators and permittees notifying them of anticipated changes following the formal adoption of the revised Tech-007 document.
- ❑ DOGM will begin implementing its revised procedures.

SCHEDULE:

- ❑ By May 15, 2017, DOGM will delete the “Five Percent Rule” from Tech-007 and submit the revised guidance document to DFB for review.
- ❑ By May 30, 2017, DFB will review the revisions to Tech-007 and provide feedback to DOGM, as appropriate.
- ❑ By June 15, 2017, DOGM will make final adjustments to Tech-007.
- ❑ By July 17, 2017, DOGM will draft and send a letter to coal mine operators and permittees informing them of changes to its bonding practices.
- ❑ By July 18, 2017, DOGM will begin implementing its revised bonding procedures.

ISSUE 3: Tech-007 Guidelines and DOGM’s Use of Inflation Factors

PROBLEM DESCRIPTION: OSMRE seeks to ensure that DOGM is consistently applying an acceptable construction cost index as the basis for calculating inflation rates when evaluating and escalating performance bond amounts as required under R645-301-830.300 of the Utah rules. DOGM’s TDN response states that it uses a different range of R.S. Means Historical Construction Cost Index (R.S. Means) values (previous five years of January values)¹¹ than what is established in Tech-007 (three-year average)¹² for calculating escalation factors. OSMRE’s technical findings indicated that the reviewer was unable to re-create DOGM’s inflation factors based upon R.S. Means values from the given time periods.

Neither SMCRA nor the Federal regulations set forth requirements or methodologies for using inflation factors. However, the Utah rules establish the use of an inflation factor and require that “an additional inflation factor will be added to the subtotal for the permit term. This inflation factor will be based upon an acceptable Cost Index.”¹³

In addition to escalating the bond amount to account for inflation, sections 509(a) and (e) SMCRA and 30 C.F.R. § 800.15(a) require the State regulatory authority to adjust the bond amount where the cost of reclamation changes. This section of the Federal regulations also allows the regulatory authority to adjust the bond amount to address issues such as inflation of the reclamation cost.¹⁴

In its TDN response, DOGM contends that its use of R.S. Means is appropriate because it includes costs typically associated with reclamation work. OSMRE’s technical findings agreed

¹¹ DOGM’s TDN Response at 12.

¹² Tech-007 at 10.

¹³ UAC R645-301-830.300.

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

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that DOGM's use of R.S. Means is appropriate. However, OSMRE's technical findings indicated that the reviewer also could not verify that DOGM consistently used any one acceptable construction cost index such as the R.S. Means. For instance, the inflation rates that DOGM used at the mid-term permit review bond escalation for the Dugout Canyon, Skyline, and Sufco mines were significantly lower than the corresponding rates OSMRE calculated from the R.S. Means indices over the same (or near-same) timeframe. OSMRE notes that some discrepancy may have arisen from the use of different R.S. Means values such as three year averages as set forth in Tech-007, and five year averages as set forth on page 12 of DOGM's TDN response.¹⁵ Therefore, OSMRE initiated discussions with DOGM pertaining to its practices for calculating inflation factors. OSMRE's goal is to clarify, and ensure consistent use of inflation factors, in accordance with the approved Utah program requirements.

During the OSMRE-DOGM meeting in Salt Lake City, Utah on March 28, 2017, DOGM indicated the R.S. Means historical cost index value it employs is based solely on demolition costs. PSD suggested using the general cost index which includes all construction divisions rather than a demolition-based index. After discussing the merits of each value, OSMRE and DOGM agreed that the general cost index is a more appropriate number to employ in calculating reclamation cost estimate escalation factors. DOGM agreed to adopt and implement this change in its bond calculation procedures.

CRITERIA FOR RESOLUTION: DOGM must revise Tech-007 to reflect actual escalation factor calculation practices (five year averages) and must consistently apply the general cost index which includes all construction divisions from the R.S. Means Book.

ACTION SEQUENCE:

- DOGM and OSMRE will discuss use of R.S. Means values and determine which historical cost index is most appropriate for use in reclamation cost escalation factors.
- DOGM shall revise Tech-007 § 6(D)(1) to direct use of five year averages, rather than the three year averages currently listed, to reflect DOGM's standard calculation practices.
- DOGM shall submit Tech-007 revisions to DFB for review.
- DFB shall review the document to ensure consistency and resolution of Issue 3.
- DFB shall provide any comments on DOGM's Tech-007 guidance, as revised.
- If necessary or desired, DOGM shall further revise Tech-007.
- DOGM shall finalize Tech-007 and obtain the necessary internal approvals required to finalize and implement the revised guidance document.
- DOGM shall subsequently draft and send a letter to coal mine operators and permittees notifying them of anticipated changes following the formal adoption of the revised Tech-007 document.
- DOGM will begin implementing its revised procedures. DOGM shall then apply the general cost index, which includes all construction divisions, from R.S. Means as discussed and agreed upon during the March 2017 meeting.

SCHEDULE:

- By March 29, 2017, DOGM and OSMRE will discuss and agree upon which historical

¹⁵ Tech-007 § 6(D)(1).

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- cost index is most appropriate for use in reclamation cost escalation factors.
- By May 15, 2017, DOGM shall draft revisions to Tech-007 § 6(D)(1) to indicate a 5-year average will be used and submit those changes for DFB review.
- By May 30, 2017, DFB will review proposed revisions to Tech-007 and provide feedback to DOGM as appropriate.
- By June 15, 2017, DOGM will make final adjustments to Tech-007.
- By July 17, 2017, DOGM will draft and send a letter to coal mine operators and permittees informing them of changes to its bonding practices.
- By July 18, 2017, DOGM will begin implementing its revised bonding procedures.

ISSUE 4: Cost Estimate Calculations and DOGM's Tech-007 Guidance

PROBLEM DESCRIPTION: Although Tech-007 is a non-binding state guidance document formed for the purpose of standardizing line-item bond calculations, OSMRE requested clarification of several apparent discrepancies identified through PSD's internal technical findings. OSMRE communicated that discrepancies may detrimentally impact overall reclamation cost estimates and resultant bond amounts. The specific questions and discrepancies identified here were outlined in PSD's technical findings document, entitled "Cost Estimate Review Findings for Dugout Canyon, Skyline, and Sufco Mines." For this specific problem description, please refer to those technical findings in addition to the information presented here.

SMCRA, the Federal regulations, and the Utah program require that each bond is set in an amount sufficient to cover the cost of reclamation in the event that the bond is forfeited.¹⁶ Because a bond forfeiture would result in the reclamation responsibility shifting to the State regulatory authority, the bond amount must be determined "based on the estimated reclamation cost to the regulatory authority of completing all work at an operation in order to bring the site into full compliance with the Act, and not on the estimated cost to the permittee"¹⁷ Consequently, the Utah program and the minimum Federal requirements set forth in SMCRA and the Federal regulations expressly state that the bond amount must depend on the reclamation requirements of the approved permit and must "[r]eflect the probable difficulty of reclamation[.]"¹⁸

The Utah rules at UAC R645-301-830.140 provide that the amount of each bonded area must "[b]e based on, but not limited to, the detailed estimated cost, with supporting calculations for the estimates, submitted by the permit applicant."

Moreover, in the 1983 final rule published in the Federal Register, OSMRE briefly addressed the inclusion of administrative costs to the State regulatory authority as a factor to be considered in determining bond amounts. In the 1983 final rule, two commenters stated that, in addition to the cost estimate provided by the operator, a State regulatory authority should also consider the "administrative overhead in contracting for the reclamation work[.]"¹⁹ In response to this

¹⁶ 30 U.S.C. § 1259(a); 30 C.F.R. § 800.14(b); Utah Code Ann. § 40-10-15(1); and UAC R645-301-830.200.

¹⁷ 44 Fed. Reg. 14902, 15111 (Mar. 13, 1979).

¹⁸ Utah Code Ann. § 40-10-15(1); UAC R645-301-830.130; *see also* 30 U.S.C. § 1259(a) and 30 C.F.R. § 800.14(a)(3).

¹⁹ 48 Fed. Reg. 32932, page 22 (July 19, 1983).

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comment, OSMRE explained that “[t]he 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.”²⁰ Thus, the total bond amount determined should incorporate certain costs to the State regulatory authority, such as overhead and profit, on the chance that the bond is forfeited and the State regulatory authority becomes responsible for completing the reclamation plan.

In order to elucidate State interpretation of bonding requirements and standardize line-item bond cost calculations, DOGM developed its internal technical guidance document Tech-007. Upon reviewing DOGM’s cost estimate procedures as a result of the WEG citizen complaint, PSD’s internal technical findings indicated that the direction provided in Tech-007 for cost estimate calculations was sound and innovative overall. However, PSD’s technical findings also identified questions regarding DOGM’s cost calculation practices where the State appeared to deviate from the guidance provided in Tech-007. Specifically, PSD’s findings noted that:

- Variability exists between equipment operating costs for similar pieces of equipment in the cost estimates completed for different mines within six months of each other.
- Equipment productivity calculations were omitted from an earthwork cost estimate. Equipment productivity information is integral to estimating earthwork costs.
- Revegetation units costs were inconsistent with (20% lower than) R.S. Means values. Where local costs were used, those costs were inconsistent between mines and documentation to support those cost amounts was not always available.
- Structure demolition costs were based upon mixed-material urban building demolition, and were reduced by 50% to account for structures without walls. These values are likely not representative of demolition of specialized mine structures in remote rural environments and appear to be based on the lowest available unit costs.
- Demolition costs do not include overhead and profit despite direction in Tech-007 to do so.
- General inconsistencies and potential mistakes in demolition calculations.

Altogether, the technical findings state that these discrepancies could result in a cost estimate and resultant bond amount that is lower than that required to complete the reclamation plan in the event of bond forfeiture. This is in conflict with the guidance provided in Tech-007 and the regulatory mandate to ensure sufficient bond is held for each mine. Generally, PSD determined that departure from Tech-007 guidance led to non-conservative assumptions and unit costs.

OSMRE acknowledges that primacy states are responsible for determining the reclamation bond amounts. If, after OSMRE-DOGM discussions are held, it is determined that cost estimate calculations can be improved, OSMRE will assist DOGM in this process.

CRITERIA FOR RESOLUTION: Following clarifications and changes made to Tech-007 and notification to operators, DOGM will implement improved practices and methods to ensure adequate reclamation cost estimates.

ACTION SEQUENCE:

- ❑ DFB and DOGM will conduct an in-person meeting to review and discuss PSD’s

²⁰ *Id.*

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findings and come to agreement on whether the identified questions represent areas for improvement in DOGM's cost estimation practices. Discussions will lead to a better understanding of DOGM's current practices, DFB's concerns and recommendations, and opportunities for improvement.

- DFB shall tailor Issue 4 of this Action Plan to address such areas of concern initially provided in PSD's findings and confirmed as an area in need of improvement during the DFB-DOGM in-person meeting.
- DOGM will make process improvements and ensure internal consistency among cost estimators and in a manner consistent with Tech-007 and the Utah program. Through the course of developing this Action Plan, DFB and DOGM have identified the following opportunities for improvement:
 - Including overhead and profit in demolition costs per Tech-007.
 - Ensuring equipment productivity rates and operating costs are used consistently.
 - Ensuring structure demolition costs are representative of actual activities and reflect probable difficulty (e.g. size and reinforcement of footers, buildings with or without internal walls, conveyor systems, etc.) including haulage (number of trips and distance) and disposal costs.
 - Improving accuracy of numbers by using local and rental costs in lieu of R.S. Means numbers where available (e.g. local seed sources, local disposal sites, etc.).
 - Retaining documentation to support use of local cost amounts.
 - Ensuring costs units are appropriate and consistent throughout a calculation (e.g. per acre or per square foot).
 - Consider implementing peer review or other quality control checks to ensure consistent application of bond cost estimation procedures.
- If DOGM so chooses, it may incorporate any changes resulting from Issue 4 discussions into its internal procedures within Tech-007. If DOGM opts to revise Tech-007, it shall submit those revisions to DFB for review.
- DFB shall review any proposed changes to Tech-007 to ensure resolution of identified concerns and will provide feedback to DOGM as appropriate.
- DOGM shall further revise Tech-007 as appropriate to ensure resolution of identified concerns.
- DOGM shall finalize Tech-007 and obtain the necessary internal approvals required to finalize and implement the revised guidance document.
- DOGM shall prepare a letter notifying the regulated community of changes to its cost estimation procedures following the formal adoption of the revised Tech-007.
- DOGM shall implement all changes upon adoption of the revised Tech-007 after notifying operators of such changes.

SCHEDULE:

- On March 27 through March 29, 2017, DFB and DOGM will meet in Salt Lake City to discuss items identified in Issue 4.
- By April 28, 2017, DFB will revise Issue 4 to remove invalid concerns and clarify remaining areas for improvement.
- By May 30, 2017, DOGM will review the revised Action Plan and develop internal protocols for improving implementation of Tech-007.

