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 June 1, 2023, formally proposed amendment (State Amendment Tracking System (SATS No. MT-042-FOR)). The amendment concerns proposed changes to the definition of material damage and changes to permit requirements related to hydrologic information. **OSMRE finds some 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 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 contact me at jfleischman@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
We have completed our review of your June 1, 2023, formal program amendment that proposed changes to §82-4-222(m) and 82-4-203(32) Montana Code Annotated (MCA). The amendment proposes changes to the definition of material damage and changes to permit requirements related to hydrologic. Following our review, we have concerns about the following proposed changes:

(1) Montana’s proposed use of “long-term or permanent” as applied to “Significant… adverse change” is NOT as stringent as SMCRA and NOT as effective as the Federal regulations.

Montana proposes to add the requirement that for an event or condition to be considered “Material damage to the hydrologic balance” there must be “Significant... adverse change...” to water quantity or quality that is “long-term or permanent.” Because there is no counterpart Federal definition, we must use context from SMCRA and the Federal regulations to determine if the use of “long-term or permanent change” is consistent with the Federal regulations.

In 30 CFR 701.5, for the federal definitions of “Material damage, in the context of [subsidence]” and “Materially damage the quantity or quality of water... with respect to alluvial valley floors,” there is no requirement that the damage be “long-lasting or permanent” to be considered “Material Damage.” Similarly, Montana did not include a “long-lasting or permanent” damage requirement in its newly proposed definitions of “Material Damage (b) with respect to an alluvial valley floor” and “Material Damage (c) with respect to subsidence...” That these sections do not contain language equivalent to “long-term or permanent” shows that “material damage” can occur regardless of temporality and permanency.

In the sections of the CFR that contain the term “Material damage to the hydrologic balance,” there is no indication that temporal considerations are used in assessing whether something is “materially damaged.” The closest associations are in 30 CFR 816.41(c) and (e), as well as 817.41(c) and (e), which require groundwater and surface water monitoring data to be submitted to the regulatory authority every 3-months (or more frequently if necessary). A timeline for reporting water data to a regulatory authority, however, does not create a requirement that adverse change to water quality and quantity must be long-term or permanent to be “Material damage to the hydrologic balance.” Thus, the Federal regulations do not require that significant adverse change to water quality or quantity be “long-term or permanent” to be considered “Material damage to the hydrologic balance.”

Additionally, the temporal considerations that Montana proposes would make its program less effective than the Federal regulations. Montana’s proposed regulations would cover a smaller range of adverse change events because short-term events would not be planned for by the permittee, and the permittee wouldn’t be required to conduct its mining operations in such a way that would prevent short-term events. This would limit DEQ’s ability to enforce citations and remedial actions in these short-term, high-pollution events. Accordingly, Montana’s more narrow view of what constitutes “Material damage to the
hydrologic balance” renders the proposed rule less stringent than SMCRA and less effective than the federal regulations.

Furthermore, Montana’s use of “long-term or permanent” can be distinguished from other States who have approved definitions of “Material damage of the hydrologic balance” that include that phrase. Wyoming, for instance, defines “Material damage to the hydrologic balance” as “...a significant long-term or permanent adverse change to the hydrologic regime.” WCWR 020-0006-1 (cf). In the Federal Register announcement discussing Wyoming’s promulgation of this definition, however, Wyoming clarified to OSMRE that this definition was not time-restricted, and that “its regulations and statutes require, by common usage and definition, prevention of long- and short-term adverse changes and uses.” 45 FR 20940 (March 31, 1980). Montana, on the other hand, has provided no similar clarity for its definition, so we must assume that it intends to have a temporal restriction.

Another state, West Virginia, defines "Material damage to the hydrologic balance" within its regulations on Cumulative Hydrologic Impact Assessment (CHIA) as “any long term or permanent change in the hydrologic balance caused by surface mining operation(s), which has a significant adverse impact on the capability of the affected water resource(s) to support existing conditions and uses.” W.VA CSR 38-2-3(22.e). This definition of “Material damage to the hydrologic balance” is limited to CHIAs. In OSMRE’s December 24, 2008 approval of West Virginia’s “Material damage to the hydrologic balance” definition, OSMRE states their approval is partially set on the question of “whether West Virginia’s proposed addition of a sentence defining material damage to the hydrologic balance outside the permit area to its CHIA requirements would leave the State program no less stringent than SMCRA and no less effective than the Federal regulations…” 73 FR 78974 (emphasis added). Since CHIAs are cumulative assessments, it is reasonable that they would look to “long term or permanent” effects on the hydrologic balance. West Virginia’s definition, however, does not apply to the term “Material damage to the hydrologic balance” in other places within the regulations. Montana on the other hand is proposing to use “long-term or permanent” for all iterations of “Material damage to the Hydrologic balance.” Therefore, as discussed above, this would make Montana’s regulations less effective than the Federal regulations.

Lastly, because the term “long-term or permanent” is without definition in the Montana Code Annotated (MCA) and the Administrative Regulations of Montana (ARM), the term is vague and difficult to enforce. Without guidance on what constitutes a “long-term or permanent” event, temporal considerations under this regulation may be arbitrary and capricious.

Thus, Montana’s proposed use of “long-term or permanent” as applied to “Significant… adverse change” is NOT as stringent as SMCRA and is NOT as effective as the federal regulations.

(1) Montana’s use of “long-term or permanent exceedance of a water quality standard,” is NOT as stringent as SMCRA and NOT as effective as the Federal regulations.

Montana proposes to relocate its existing provision that a violation of a water quality standard constitutes “Material Damage to the hydrologic balance,” to a new
Montana proposes to relocate its existing provision that a violation of a water quality standard constitutes “Material Damage to the hydrologic balance,” to a new section in the MCA. The new section would also require that the water quality violation be “long-term or permanent.” For us to determine if this proposed change is as stringent as SMCRA and as effective as the Federal regulations, we must answer: (a) whether a coal mining operations violation of water quality standards is inherently “Material damage to the hydrologic balance,” (b) whether there must always be a violation of a water quality standard for an event or condition to be considered “Material damage to the hydrologic balance,” and (c) whether a violation of a water quality standard must be “long-term or permanent” to be considered “Material damage to the hydrologic balance.”

(2) Montana’s use of “long-term or permanent exceedance of a water quality standard,” is NOT as stringent as SMCRA and NOT as effective as the Federal regulations.

(a) A violation of water quality standard is inherently “Material damage to the hydrologic balance.”

Regulatory authorities set forth and monitor water quality standards to ensure that coal mining operations are preventing “Material damage to the hydrologic balance.” These standards are underpinned by a combination of State and Federal water quality laws and regulations. General effluent limitations for coal mining are promulgated by the U.S. Environmental Protection Agency as set forth in 40 CFR part 434, and individualized standards for an operation are determined by the regulatory authority and based on the information provided in a permit application. As required in 30 CFR 780.21(i) and (j), a coal mining operation permit application must include both a Groundwater monitoring plan and Surface-water monitoring plan. These plans identify the water quality and quantity parameters to be monitored, how often they are to be sampled, and where they are to be sampled. The sampling data are then used to assess the suitability of the water for current and approved postmining land uses and to meet the objectives for protection of the hydrologic balance, as described in 30 CFR 780.21(h), which includes preventing “material damage to the hydrologic balance outside the permit area.” Preamble language from OSMRE’s September 26, 1983, promulgation of 30 CFR 784.14 further cements the relationship between water quality standards and Material damage to the hydrologic balance. In response to comments urging OSMRE to define “Material damage to the hydrologic balance” or establish guidelines to evaluate whether material damage would occur from a proposed
operation, OSMRE stated that it agrees that regulatory authorities should establish guidelines, but “because the gauges for measuring material damage may vary from area to area and from operation to operation, OSM has not established fixed criteria, except for those established under §§ 816.42 and 817.42 related to compliance with water-quality standards and effluent limitations.” (48 FR 43956, 43973; emphasis added). Thus, OSMRE intended the water quality standards set by §§ 816.42 and 817.42 to be used as criteria for determining “material damage to the hydrologic balance,” and an exceedance of those water quality standards is inherently “Material damage to the hydrologic balance.”

(b) Montana’s assertion that there must always be a violation of a water quality standard for something to be considered “Material damage to the hydrologic balance” is inconsistent with the Federal regulations.

Since a violation of a water quality standard is an established criteria for determining if “Material damage to the hydrologic balance” has occurred, Montana’s program must have regulations that are consistent with, and as effective as this Federal standard. In Montana’s proposal, it moves its requirement that violations of water quality standards are “Material damage to the hydrologic balance” to the newly created 82-4-203(32)(a)(ii). While this requirement still exists in the new section, the structure of the proposed new section makes the rule less effective than the Federal regulations. The two sections of the proposed rule are connected by “; and” which requires that for something to be “Material damage to the hydrologic balance” that it would need to be both 1) a significant, long-term or permanent, adverse change to water quality or quantity, and; 2) a long-term of permanent exceedance of a water quality standard. [emphasis added]. While, as discussed above, a violation of a water quality standard is an established criteria to categorize an event as causing “Material damage to the hydrologic balance” in the Federal regulations, it is incorrect to assume that “Material damage to the hydrologic balance” will always include an exceedance of a water quality standard. As seen in 30 CFR 780.21, the determinations of Probable Hydrologic Consequences (PHC) and Cumulative Hydrologic Impact Assessments (CHIA) both require information on water quantity, along with water quality. The CHIA and PHC are used to determine if a proposed operation is designed to prevent “Material damage to the hydrologic balance,” and the permittee is required to operate the mine in such way that prevents “Material damage to the hydrologic balance.” Looking at the Federal regulations, both water quality and quantity issues can be used to determine if Material damage to the hydrologic balance has occurred. There is nothing in the Federal regulations that suggests a water quantity violation on its own would not be considered “Material damage to the hydrologic balance.” Thus, Montana’s assertion that there must always be a violation of a water quality standard for an event or condition to be considered “Material damage to the hydrologic balance” is inconsistent with the Federal regulations.

(c) Montana’s requirement that a violation of a water quality standard must be “long-term or permanent” to be considered “Material damage to the hydrologic balance” is NOT as stringent as SMCRA and NOT as effective as the Federal regulations.
For the reasons nearly identical to the discussion about “long-term or permanent” as applied to “Significant... adverse change” above, Montana requiring that an exceedance of a water quality standard be “long-term or permanent” to be considered “Material damage to the hydrologic balance” is NOT as stringent as SMCRA and NOT as effective as the Federal regulations. The Federal regulations do not consider a temporal limitation when determining if “Material damage to the hydrologic balance” exists. Likewise, the Federal Register preamble to the rulemaking that established that a violation of a water quality standards is “Material damage to the hydrologic balance” makes no mention of those violations needing to be “long-term or permanent.” (48 FR 43956, 43973).

Requiring that a water quality exceedance be “long-term or permanent” would make the Montana program less effective than the Federal program. Requiring that an exceedance be “long-term or permanent” would unduly restrict Montana’s ability to protect its environment from pollution events and keep operators accountable for those pollution events. Under this proposed amendment, a bad faith operator could repeatedly exceed water quality standards downstream from its permit boundary but evade enforcement by DEQ by starting and stopping pollution events before meeting the vague “long-term or permanent” threshold.

In addition, requiring that a water quality exceedance be “long-term or permanent” ignores the destructive capabilities of short-term pollution events. A large container of a regulated pollutant could be accidently pushed into a river, exceeding the water quality standard. The pollutant would then move downstream with the flow of water, possibly far away from the operation, into another state perhaps. But the pollution event could be so destructive that during its short time in the stream many fish die off, drinking water makes humans and livestock sick, and recreation businesses dependent on the river lose out on significant revenue. With the requirement that the water quality violation be “long-term or permanent,” an operator may not be held liable by DEQ for the large-scale damage they caused in a short period of time. And if this pollution event was instead a continuous leak into a stream instead of a one-time spill, it is still unclear how long it would take for the “long-term” threshold to be met before DEQ could act. In theory, under the proposed rule DEQ’s actions in response to a water pollution event or condition could be unnecessarily delayed, causing greater damage to Montana property and environment than otherwise would occur. Thus, Montana’s proposed requirement that an exceedance of a water quality standard be “long-term or permanent” to be considered “Material damage to the hydrologic balance” is NOT as stringent as SMCRA and NOT as effective as the Federal regulations.

With all of this in mind, DEQ’s proposed addition of 82-4-203(32)(a)(ii) “long-term or permanent exceedance of a water quality standard,” would render the Montana program less stringent than SMCRA and less effective than the Federal regulations. Because of the structure of the section using “; and,” the entire section is denied, and the phrases “water quality standards are violated,” and “Violation of a water quality standard, whether or not an existing water use is affected, is material damage,” must be reinstated in section 82-4-203(32)(a) as previously approved.

(3) Montana’s omission of “facilities” is NOT as stringent as SMCRA and NOT as effective as Federal regulations.
The proposed addition of 82-4-203(32)(c) defines “Material Damage” in the context of subsidence. In Montana’s proposed definition of “Material Damage” caused by subsidence, a coal mining operation is considered to have caused “Material Damage” if there is i) any functional impairment of surface lands, features, or structures; ii) any physical change that has a significant and adverse impact on the subsided lands ability to support current or reasonably foreseeable uses or causes significant loss in production or income; or iii) any significant change in condition, appearance, or utility of any structure or facility, when compared to its pre-sub-sidence condition. This definition is nearly identical to the Federal Definition of Material Damage at 30 CFR 701.5. But, unlike the federal regulations, Montana’s definition doesn’t include “facilities” in its list of features that can be considered functionally impaired by subsidence. Montana provided no further clarification as to why “facilities” was omitted from this proposed paragraph. In deciding whether this proposed regulation can be approved, we must determine if grouping the term “facilities” within the term “structure” would make this paragraph as effective as the federal regulations.

Neither the Federal nor Montana regulations formally define “facility” or “structure,” so we use the plain language definition of both terms, as well as how they are used throughout the federal regulations to determine their meanings. “Structure” generally is used to refer to a standalone, human-made formation that performs an intended job, such as a diversion, sediment pond, refuse pile, or road. Examples in the federal regulations of defined terms at 30 C.F.R. §701.5 that use “structure” in their definitions but not “facility” include: “head-of-hollow fill,” “impoundments,” and “valley fill.” “Facility,” on the other hand, generally is used to describe a place, or collection of structures that performs a more complex task. Examples in the federal regulations of defined terms that use “facility” in their definitions but not “structure” include: “public office” and “coal preparation plant.” The two terms have distinct and separate meanings, and the plain language definition of “structure” does not fully encapsulate the meaning of “facilities” as there are facilities that are places, and not made up of structures. Thus, grouping “facilities” within the definition of “structures” makes Montana’s proposed paragraph less effective than the federal regulations.

Furthermore, Montana uses the phrase “structure or facility” in (c)(iii). Listing both terms here, and using ‘or’ to connect them, indicates that Montana understands the two terms have distinct and separate meanings. Thus 82-4-203(32)(c) is less effective than the Federal regulations, and OSMRE is denying the proposed addition of 82-4-203(32)(c).

As a final note, we cannot approve this section in part because the removal of 82-4-203(32)(c)(i), where the inconsistency occurs, would make the rest of the section ineffective. Thus, we must deny the entirety of 82-4-203(32)(c) at this time.

(4) The proposed removal of the rule that the DEQ’s determination of probable hydrologic consequences is not required until hydrologic information of the pre-mining area is made available from an appropriate federal or state agency is less stringent than SMCRA and less effective than the federal regulations.

The proposed removal of the rule that the DEQ’s determination of probable hydrologic consequences is not required until hydrologic information of the pre-mining area is made available from an appropriate federal or state agency is less stringent than SMCRA and less effective than the federal regulations.
The federal counterparts to this requirement are found in 30 USCS 1257(b)(11), 30 CFR 780.21(e)(1), (e)(2), (f)(1), and (f)(2). 30 USCS 1257(b)(11) requires that a determination of probable hydrologic consequences of a mining operation “shall not be determined until hydrologic information on the general area prior to mining is made available from an appropriate Federal or State agency…” 30 CFR 780.21(e)(1) states that hydrologic and geologic information are necessary to assess probable cumulative hydrologic impacts, and that if the necessary hydrologic and geologic information is available from an appropriate Federal or State agency, then that information shall be provided to the regulatory authority in order for it to assess probable cumulative hydrologic impacts. 30 CFR 780.21(e)(2) states that if the necessary hydrologic and geologic information is not available from a Federal or State agency, the operator may submit hydrologic and geologic information it has collected on its own. 30 CFR 780.21(f)(1) states that an application shall have a determination of probable hydrologic consequences, and (f)(2) goes on to say that this shall be determined using hydrologic and geologic information which is collected for the permit application.

82-4-222(m) MCA is a near copy of 30 USCS 1257(b), so the removal of the requirement that the DEQ’s determination of probable hydrologic consequences is not required until hydrologic information is available from an appropriate federal or state agency would mean that the Montana program would no longer meet all the requirements set forth in 30 USCS 1257(b)(11). Furthermore, the removal of this requirement would make the Montana program less effective than 30 CFR 780.21(f)(2). 30 CFR 780.21(f)(2) requires that a determination of Probable Hydrologic consequences (PHC) be made using the baseline hydrologic information that was collected for the permit application. By proposing to remove the requirement that DEQ’s determination of probable hydrologic consequences is not required until hydrologic information of the pre-mining area is made available from an appropriate federal or state agency, Montana’s program would allow DEQ to make a determination of PHC before all the necessary hydrologic information is gathered, which would possibly make the PHC futile.

Thus, Montana’s proposed removal of the requirement that the DEQ’s determination of probable hydrologic consequences is not required until hydrologic information of the pre-mining area is made available from an appropriate federal or state agency is less stringent than SMCRA and less effective than the Federal regulations.

(5) The proposed removal of the requirement that the permit may not be approved until the hydrologic information is available and incorporated into the application is less effective than the federal regulations in 30 CFR 780.21(c)(3).

The proposed removal of the requirement that the permit may not be approved until the hydrologic information is available and incorporated into the application is less effective than the federal regulations in 30 CFR 780.21(c)(3). 30 CFR 780.21(c)(3) states that a permit shall not be approved until the necessary hydrologic and geologic information is available to the regulatory authority. Since the federal regulation requires hydrologic and geographic information to be provided to a regulatory authority before an application is approved, Montana’s proposed removal of the same requirement in 82-4-222(m) would make it not as effective as the Federal regulations.
Amendments to Montana’s coal program cannot go into effect until it is approved by OSMRE and the Secretary of the Interior and Amendments to Montana’s coal regulations cannot be applied retroactively.

Sections 6 and 7 of HB 576 are inconsistent with the requirements of 30 CFR 732.17(g). 30 CFR 732.17(g) states that any amendment to a state’s program must be approved by OSMRE, and no changes to the laws or regulations shall take effect until OSMRE approves the amendment. Sections 6 and 7 of HB 576 are thus less effective than the Federal regulations because:

Section 6 of HB 576 make the proposed changes to 82-4-203(32) and 82-4-222(m) effective immediately upon passage of the bill by the State legislature and approval by the Governor. This is less effective than the federal regulations because it forces the changes to be effective before OSMRE reviews and approves the amendment, as required by 30 CFR 732.17(g).

Section 7 of HB 576 make the proposed changes to 82-4-203(32) and 82-4-222(m) apply retroactively to pending issues that have not been decided on or after the effective date. Like Section 6, this is inconsistent with and less effective than the federal regulations because it makes the changes effective before OSMRE reviews or approves the amendment. The federal regulations at 30 CFR 732.17(g) mandate that no changes to laws shall take effect until OSMRE approves the amendment, and retroactive application would allow the amended law to apply to pending issues that started before OSMRE’s approval of the changes.