

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF THE)	
PROPOSED REVISION OF)	
THE LAND QUALITY)	STATEMENT OF PRINCIPAL
DIVISION RULES RELATED)	REASONS FOR ADOPTION
TO RECLAIMED SHRUB)	
DENSITY ON COAL MINES)	

At the time the Wyoming Coal Program was approved, Federal revegetation standards (30CFR816.116) required operators to restore the premining density of shrubs and trees. The original Wyoming State Program regulation (LQDR&R Ch.IV.3.d.(6)(a)) paralleled the Federal standard.

In 1981, under Secretary of the Interior Watt, the Federal Office of Surface Mining Reclamation and Enforcement (OSM) rewrote its regulations. OSM was subsequently sued by both the coal industry and several environmental groups. Judge Thomas Flannery of the District Court, District of Columbia decided these suits in a three part ruling that was completed in 1987.

Shortly after OSM rewrote its rules, but before the lawsuits were filed, Governor Herschler appointed a Task Force on Regulatory Reform that proposed a number of changes to the DEQ Land Quality Division Rules and Regulations. One committee of the task force was charged with developing an alternative to the requirement that 100% of the premining shrubs be restored. The committee proposed the existing LQD rule that requires operators to meet a goal of 10% of the premining density. The regulation that effected this change was promulgated in 1986.

As a result of the District Court decisions, OSM promulgated revised federal rules in 1988. The revegetation rules at 30CFR816.116 were rewritten for fish and wildlife habitat, recreation areas, shelter belts, and commercial forests to allow the regulatory authority to specify the postmining stocking rate for shrubs and trees, as long as approval was obtained from the state agencies responsible for forestry and wildlife programs.

Most of the land that is being mined in Wyoming is classified as grazingland. Under the mistaken assumption that fish and wildlife habitat would only be restored after mining if wildlife was declared part of the postmining land use, Wyoming has traditionally prefaced its revegetation performance standards for wildlife with the statement "When wildlife is part of the

post-mining land use..." In fact, the Federal law (Public Law 95-87, Sec.515(b)(24)) requires operators on grazingland as on any mined land, to minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values to the extent possible using best technology available and achieve enhancement of such resources where practicable.

In 1989, assuming once again that grazingland was wildlife habitat because of the traditionally designated joint land use between livestock and wildlife, the WGFD petitioned DEQ/LQD for a new shrub density standard. Claiming approval authority under the new Federal regulation for shrub stocking rates (30CFR 816.116), WGFD sought to increase the rate and specify the composition. They had come to the conclusion, after eight years of reclamation under the State Program, that a 10% goal would only return 3% of the shrubs that existed prior to mining at the ten year bond release deadline. They considered this to be an unacceptable adverse impact on the antelope herd and sagegrouse populations in the Powder River Basin. Therefore, The WGFD and LQD proposed a 20% standard (instead of a goal) that emphasized the premining shrub composition.

The 20% standard was debated extensively at a May 25, 1989 Land Quality Advisory Board (LQAB) meeting in Gillette. A redrafted rule was again presented to the LQAB at their August 10, 1989 meeting in Pinedale. The LQAB voted 3 to 2 to amend the proposed regulation by adopting a 10% standard and a 20% goal. The WGFD did not accept this revised rule and because they had approval authority over stocking and planting arrangements it was decided that the issue would be discussed in front of the LQAB again. Subsequently, the LQAB asked that a committee be formed consisting of WGFD, LQD and Industry personnel to negotiate an acceptable compromise.

A work session of all committee members was held on February 5, 1990 in Cheyenne. After much discussion regarding the WGFD/LQD and industry proposals the LQAB agreed to omit a proposal regarding absent or minor (< 10% of the overall density) plant species and adopt the 20% standard. The deletion of the proposal regarding absent or minor species was intended to simplify the section of the regulation in Appendix A regarding evaluation of shrub density for final bond release purposes. Although the use of absent or minor shrub species is no longer explicitly described in Appendix A, their use in reclamation seed mixtures is still permissible.

The proposed rule was revised and presented to the LQAB at their next meeting held April 30, 1990 in Riverton. The LQAB voted 4 to 1 to accept the deletion of language limiting the amount of absent or minor plant species in the postmining community. The LQAB then voted (3 to 2) against changing the proposed shrub standard from 20% to 10%. The final vote to adopt a proposed density standard of 20% was adopted by a 4 to 1 vote. The LQAB then recommended that the proposed regulation now be forwarded to the Environmental Quality Council (EQC).

Public notice for the proposed rules was provided in the Casper Star Tribune in mid July of 1990. Written comments were accepted from mid July to early September. The EQC held a public hearing on the rule making in Casper on September 5, 1990. The EQC extended the comment period another two weeks after the hearing. The Department has synthesized all of the written and oral information received from the public in the Analysis of Comments.

During the Department's review of the comments, the 1991 Wyoming Legislature passed Enrolled Act No. 57. The bill was signed into law by Governor Sullivan in February, 1991. It added two definitions from the federal surface mining regulations to the Environmental Quality Act (EQA): one for "Fish and wildlife habitat" and one for "Grazingland". The grazingland definition differed slightly from the federal definition in that it specifically included "occasional use by wildlife." The bill also added a section to the EQA which prohibited the WGFD from considering grazingland as fish and wildlife habitat.

The Department determined that the net effect of these changes was to limit the WGFD's approval under the federal stocking rate rule (30CFR816.116(b)(3)) to mined lands that were dedicated to the management of fish and wildlife. However, in its defense of this statutory program amendment the Department recognized that the State Program still required consultation with the WGFD on the stocking rate for shrubs and trees on grazingland to the extent that this element of any reclamation plan is essential for the "protection and enhancement" of wildlife. That is to say, any mined lands used by wildlife (including grazingland) prior to mining must be returned to a condition capable of supporting that use, regardless of whether or not they were managed for wildlife. The OSM concurred with this interpretation in its approval of this program amendment on July 8, 1992 (57FR30121).

As discussed in the Analysis of Comments, the Department recommends approval of the shrub density regulation that was drafted by the LQAB, with one modification resulting from adoption of Enrolled Act No. 57. In keeping with the State's position that land use has no bearing on reclamation for wildlife, the Department recommends that the phrase "when wildlife is part of the postmining land use" be dropped from the proposed rule. The modified text of the rule follows, while the appendix that defines acceptable methods for meeting the standard (Appendix A), is attached to this document.

Chapter IV, Section 2(d)(x)(E) - note: citation revised to reflect reorganized rule citations

(E) Shrubs shall be established on a set percent of the surface to an average density of 1 shrub per square meter in a mosaic of shrub patches. Affected surfaces under long term management as pastureland or cropland prior to mining may be deleted from surfaces subject to the standard; however, surfaces which have reverted to native range must be included. Shrub reclamation procedures shall be conducted through the application of best technology currently available. The percentage and distribution of shrub patches shall be determined through site specific evaluation of

the premining shrub cover, density, distribution, and wildlife use. Except where a lesser density may be justified from premining conditions, 20 percent of the affected lands shall be restored to shrub patches supporting an average density of 1 shrub per square meter. Exceptions may be considered whenever the collective area of premine vegetation communities supporting at least 1 shrub per square meter was less than 20 percent of the affected surface. Specific criteria and procedures for reducing the standard and evaluating postmine shrub species composition are specified in Appendix A. Patches shall be established in a mosaic pattern which will optimize habitat interspersion and edge effect and may be no less than 0.05 acres. Approved shrub species and seeding techniques shall be applied to all remaining surfaces (excluding cropland and pastureland) used jointly by livestock and wildlife. Trees shall be returned to a density equal to the premining conditions. For areas containing designated crucial or important habitat, the Wyoming Game and Fish Department shall be consulted for recommended reclamation standards for shrub density, cover, distribution, and species composition. This standard shall apply to all lands affected after January 1 following filing with the Wyoming Secretary of State.


With adoption of this regulation, the council passed the motion requiring that the definition for "Critical habitat" found in Chapter I Section 2(w) be revised to read "Crucial habitat". Additionally, the definition for "Important habitat" found in Chapter I, Section 2(aw) will be revised to provide additional clarification. Both changes will be addressed in future rulemaking proceedings.

The Environmental Quality Council, in accordance with the authority granted to it by W.S. 35-11-112 As Amended, and having complied with the provisions of the Wyoming Administrative Procedures Act, finds as follows:

1. These rules provide for the regulation of surface coal mining and reclamation operations in accordance with the requirements of P.L. 95-87.
2. These rules and regulations are as effective as those promulgated by the Secretary of the Interior pursuant to P.L. 95-87.
3. These regulations are necessary and appropriate to preserve and exercise the primary responsibilities and rights of the State of Wyoming; to retain for the State the control over its air, land, and water resources and secure cooperation between agencies of the State and Federal Government in carrying out the policy and purposes of the Environmental Quality Act.
4. These regulations are reasonable and necessary for the effectuation of W.S. 35-11-101 through W.S. 35-11-1304, As Amended.

5. These rules and regulations are necessary and appropriate to protect the public health, safety, welfare, and environment of the State of Wyoming.

Dated this 22 day of October, 1992.


Hearing Examiner
Environmental Quality Council