

BEFORE THE  
ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING

IN THE MATTER OF THE PROPOSED )	STATEMENT OF PRINCIPLE
REVISION OF RULES RELATING TO )	REASONS FOR ADOPTION
COAL MINING OPERATIONS; PROPOSED )	
REVISION OF RULES RELATING TO )	
SELF BONDING FOR ALL MINING )	
OPERATIONS; AND PROPOSED )	
REVISION OF RULES PERTAINING TO )	
LIMITED MINING OPERATIONS (TEN )	
ACRE EXEMPTIONS) )	

In order to maintain Wyoming's approved State Program for the environmental regulation of coal mining, as well as maintain Federal funding for Wyoming's Abandoned Mine Land Program, it is required that the State keep its laws, regulations and policies consistent with and as stringent as Federal (OSM) laws and rules. During the past two years OSM has notified Wyoming that numerous portions of its regulations are no longer as effective as OSM regulations. The proposed rule changes presented in this package are intended to address many of the issues raised by OSM.

OSM's own regulations have been undergoing changes for the last seven years. Soon after the Reagan Administration came on board in 1981, OSM made a series of changes to their regulations. Shortly after the OSM rule changes took effect, Wyoming voluntarily began to change its rules to match the new, more flexible OSM regulations. The last of the Wyoming changes were made in the spring of 1986.

While Wyoming was making its rule changes, a series of environmental lawsuits were filed against OSM, alleging that OSM's new rules were contrary to the 1977 Surface Mining Control and Reclamation Act (SMCRA) and too favorable to industry. In a series of 1984 and 1985 court rulings, Judge Flannery declared many of OSM's newer rules invalid, and in response OSM was forced to begin promulgating revised rules. By 1986, when Wyoming had finally completed its rule changes and essentially brought State rules into line with the 1982 OSM rules, OSM's rules had changed dramatically. Wyoming's rules are now less stringent than OSM rules in many areas.

This set of rule change proposals is meant to deal with most of the issues raised in the following OSM "deficiency" notifications:

- 1) October 13, 1988 letter from Jerry Ennis to Roger Shaffer, containing a list of State Program deficiencies remaining after an OSMRE review of the State's July 29, 1988 submittal;

/REASONS/

- 2) August 12, 1988 letter from Jerry Ennis to Roger Shaffer, containing OSMRE comments on the State's May 20, 1988 proposed rule reform package;
- 3) November 13, 1987 letter from Jerry Ennis to Roger Shaffer, containing a list of State Program deficiencies remaining after OSMRE's review of the State's September 15, 1987 submittal;
- 4) May 29, 1986 Federal Register, pp. 19445-19547;
- 5) May 6, 1987 Federal Register, pp. 16845-16847;
- 6) November 24, 1986 Federal Register, pp. 42209-42220;
- 7) March 31, 1986 Federal Register, pp. 10827-10833;
- 8) December 3, 1985 Federal Register, pp. 49544-49550;
- 9) December 23, 1985 letter from Jim Workman, Deputy Director, OSM to Roger Shaffer. This letter was later modified by May 7 and October 9, 1986 letters from Jerry Ennis, OSM Field Office Director, to Roger Shaffer.

Also included in this set of rule change proposals are revisions to the Chapter XII self bonding rules which pertain to non-coal as well as coal operations. The proposals are in part a response to an OSM deficiency notification, and in part a response to a need to clarify the rules and reduce the State's risk in accepting self bonds.

The last rule change proposal in this set pertains to roads serving limited mining operations (ten acre exemptions). The change is intended to make the limited mining service road rules consistent with road rules for regular mining operations.

Most of these proposed rule revisions were originally presented to and discussed with the Land Quality Advisory Board on September 14, 1987. The rest (primarily self bonding) were presented to the Board at their January 8 and February 5, 1988 meetings. As a result of the Advisory Board's comments, OSM and staff comments received during the Fall of 1987, and public comment received in 1988, slight modifications were made to the proposed revisions. What is now before the Council includes those modifications. Sections of the rules not proposed for change were not modified in response to public comments. Such changes will be considered during the next round of rulemaking after they have been published.

#### Chapter I, Authorities and Definitions

Editorial changes are made to the definitions of "complete application," "highwall," "significant imminent environmental harm to land, air or water resources," and "soil horizons," correcting misnumberings, grammar and incorrect citations.

The definition of "applicant" is modified to make it clear that applicant is also one who applies for a License to Explore.

The definition for "coal preparation plant" is modified to bring it into line with Judge Flannery's ruling (Flannery II). Flannery decided any facility which physically or chemically processed coal, whether or not such processing was designed to remove impurities, is a coal preparation plant and therefore, comes under SMCRA jurisdiction. Language is also added to the definition to make it clear that coal preparation plant associated facilities (such as offices, settling ponds) must be regulated along with the plants.

The definition of "revised mining or reclamation operations" is altered to remove the term "substantially" from the description. The change was made in conjunction with changes made to Chapter XIV, Permit Revisions.

### Chapter II, Permit Applications

Four editorial changes are made (Section 2(b)(iii)(A), Section 2(b)(iii)(E)(IV), Section 3(a)(i)(E), Section 3(a)(vi)(G)(1), Section 3(a)(vi)(F), and Section 3(b)(viii)) to correct numbering, grammar and citations.

Changes are made in Section 3(a)(v)(A) to grammatically streamline the language, and to clarify which Water Quality Division permitting and design standards for facilities apply to coal mine operators.

Section 3(a)(vi)(A)-(C) is modified to bring Wyoming geological information requirements into line with OSM rules. Specifically, language is added to require geologic information for areas adjacent to the proposed permit area, the total sulphur and pyritic sulphur content of each stratum present, and geologic information from the land surface to below the coal seam. Section 3(a)(vi)(B) is further modified to specify for what reasons the Administrator may waive geologic test boring requirements.

A paragraph is added to Section 3(a)(vi)(C) to require that baseline information monitoring stations be located on maps. These maps must show elevation information for the stations.

Section 3(a)(vi)(H)(II) is modified to require that water alkalinity be measured during baseline data gathering. Alkalinity is a very basic water quality criterion, and is specifically required by OSM rules.

Section 3(b)(i)(B)(III) is modified to direct an applicant's attention to the specific performance standards in Chapter IV pertaining to waste disposal facilities.

Section 3(b)(xvi)(D) is modified in order to specify what reasons the Administrator can use for waiving geotechnical investigations for proposed out of pit spoil piles. Section 3(b)(xvi)(E) is added to direct an applicant's attention to the special performance standards in Chapter IV for spoil piles constructed on slopes greater than 20 degrees and to require (as in OSM rules) special geotechnical investigations for such structures.

#### Chapter IV, Environmental Protection Performance Standards

Two editorial type changes are made to Section 3(a)(iii) and Section 3(c)(ii)(C). The former was to correct a "typo," and the second was to correct an inconsistency between the provision and Chapter VI language.

Old Section 2(1)(ii)(F) is eliminated. This language, which was added by Wyoming in 1986, was intended by the State to clarify interim mine stabilization's applicability to coal operators. Although Wyoming felt the 1986 addition of the language strengthened the rules, OSM determined they had weakened them. Rather than argue the issue, the language in paragraph (F) is being dropped.

Section 3(a)(ix), "cut and fill terraces," has been eliminated. The language was ordered stricken from OSMRE's rules by Judge Flannery. OSMRE required the State to do the same.

New paragraph (vii) is added to Section 3(b) to conform to OSM's requirement that topsoil substitute must be "the best available in the permit area to support revegetation." "AT THE TIME OF USE" has been added after "BEST AVAILABLE" in response to several industry comments. Previous to this change, only Section 2 of the rules (Section 2(c)(iii)(A)), which deals with all minerals, had anything to say on the subject of topsoil substitutes. Section 2 does not require that the substitute be "the best available in the permit area."

Section 3(c)(i)(A)(I) is modified in order to be very specific about special provisions needed for spoil piles built on slopes exceeding 20 degrees. The previous rule language on this subject was very vague about the criteria to be used in allowing pile construction on steep slopes. Section 3(c)(i)(M), concerning construction inspections of out of pit spoil piles, is also changed in order to require that a registered professional engineer perform the inspections. Some of the wording in (M) is also cleaned up. All of these changes are made to bring the rules in line with OSM's.

Section 3(c)(ii)(C) had paragraph (V) added to it to direct an operator's attention to Mine Safety and Health Administration (MSHA) rules about coal mine waste pile construction requirements. The addition of this language brings Wyoming's rules into line with OSM's.

Section 3(c)(iii), which addresses handling the disposal of acid-forming, toxic and combustible, and waste material which are exposed, produced or used during mining is beefed up to clarify the requirements. The language changes also notify operators of the need to comply with all laws and rules pertaining to waste disposal (e.g. RCRA).

Section 3(d)(vi), which pertains to revegetation, had paragraph (E) added to it. The language in (E) was intended to expand on Section 2(d)(vi), which allows the Administrator to consider the use of alternate revegetation success standards. However, the Game and Fish Department objected to the placement of this paragraph, fearing that it would allow more discretion regarding the shrub and tree replacement standards for coal mines. To remedy this, the language of paragraph (E) has been incorporated into Section 3(d)(vi) and (E)

as a separate paragraph has been deleted. The standards in this paragraph also address OSM concerns about the specificity of alternatives that Section 2(d)(vi) lacked.

Considerable changes are made to Section 3(e), which deals with diversions and drainage control, in order to address many problems OSM had with language. These problems concerned certification of design and construction, design capacities of diversions, and design criteria.

All of Section 3(h)(iii)(F)-(H) is changed to clarify impoundment inspection requirements and to bring the requirements into line with OSM's requirements. In particular, OSM felt Wyoming's rules were too loose when it came to specifying who was qualified to perform inspections.

Section 3(i), which addresses hydrologic monitoring during and after mining, is altered to clarify how long such monitoring is to be done (until final bond release). Language is also added to clarify how such monitoring is to be done, and that monitoring results showing noncompliance must be brought immediately to the Administrator's attention.

Section 3(p)(i)(E) is a provision requiring an operator to notify the Administrator upon discovery of any threatened and endangered species, or their habitat, not reported in the permit application. OSM rules, however, require that the Administrator in turn must consult with Game and Fish, and U.S. Wildlife. Language to this effect is therefore added to (E).

Lastly, OSM rules have a provision which, in summary, requires an operator to conduct operations in such a way as to minimize hydrologic impacts. Section 3(u) is added to Chapter IV to provide a parallel Wyoming rule.

#### Chapter V, Performance Standards for Special Categories of Coal Mining

Section 2(a)(ii) is modified to allow soil substitutes in prime farmland reconstruction only if the substitute results in greater productive capacity. Prior to the modification, Wyoming only required equivalent productive capacity, which was less stringent than OSM rules.

Section 2(b) is greatly changed to bring it into line with OSM's prime farmland reconstruction rules. Wyoming rules had very little to say on how reconstruction adequacy would be judged. (Note: currently no Wyoming coal mines are affecting prime farmland, nor is any anticipated at this time.)

Section 6(e), which discusses reclamation of auger mining operations in pre-law mining areas, had language added that requires a professional engineer certification of a minimum safety factor for reclamation backfill. Such a safety factor is called for in OSM rules.

Section 7(a)(ii) is completely removed from Chapter V because OSM's own rules on this subject (backfilling in remined areas) were struck down by Judge Flannery.

## Chapter VI, Blasting for Surface Coal Mining Operations

The public notice lead time for blasting notices is increased in Section 3(a) in order to make Wyoming's rules as stringent as the Federal rules.

Section 4., paragraph (c) is added to reference the requirements for blast designs in Chapter II and the necessity for their approval by the LQD Administrator.

## Chapter VII, Underground Mining

Section 1(b)(i) is rewritten to require that lithologic information be provided by the applicant for the strata overlying and underlying the mined coal seam(s). Applicants now also must supply information on the engineering properties of the overburden and underburden so that subsidence potential can be better assessed for room-and-pillar operations.

Section 1(c)(iii), which discusses subsidence and surface damage potential, is rewritten to require a map showing areas of planned as well as potential subsidence. This language, which follows from OSM requirements, is added to make it very clear to the public where subsidence might occur.

Section 4(a)(ii) pertaining to surface owner protection, had the phrase "to the extent required under State law" stricken. OSM's parallel rules had this phrase removed due to an adverse court ruling in 1985.

## Chapter IX, Variances for Surface Coal Mining Operations

Several portions of Chapter IX, Section 1(a)(ii)(C), Section 2(c) and Section 3, which all pertain to variances from approximate original contour, are eliminated. OSM was required to remove similar provisions from their own rules by a 1985 Federal court ruling, and so Wyoming must remove these also. Erroneous references in Section 2(a)(i) to these deleted sections have also been removed.

## Chapter XI, Coal Exploration

Section 1(a) is modified so that all individuals planning to remove 250 tons or less of coal in exploration activities must file a notice of intention with the Administrator. Formerly, those activities which would not "substantially disturb the natural land surface" were exempted from the notice requirements.

Section 1(b)(iii) had language added to it specifying what a notice's exploration area description is to contain.

Section 3 is revised and rearranged to make it clear that the public does have the right to appeal (administratively or judicially) decisions made by the Administrator on License to Explore applications. Subsections 3(b)(i) and (ii) have been combined at the Council's request.

## Chapter XII, Self-Bonding Program

There are five basic types of changes in this chapter. The first is a reorganization of the chapter's provisions, which is intended to make them flow more logically. The second, prompted by an OSM disapproval in 1987, is a strengthening of the property collateral provisions (especially personal property). This is intended to reduce the risk to the State. The third is a change to a financial condition criterion for self bonding. The fourth is a series of wording changes designed to remove the confusion caused by Wyoming's and OSM's different use of the term collateral. The last are editorial changes, such as substituting the word "property" for "securities," "or" for "of," "less or greater" for "better," etc.

The definition of "collateral bond" in Section 1(b) is modified to make it clear that securities which are used as collateral do not necessarily need to be in the physical possession of the Administrator. Minor editorial changes are also made for clarification purposes.

Changes are made in Section 1(b)(iii) to require that personal property must be within the borders of Wyoming, and be owned by the operator. A minimum value (\$1 million per unit) was set so that the State does not end up with small, "hard to keep track of" property as collateral.

Material in Section 2(a)(x), which pertains to collateralized self bonding, is entirely removed from Section 2. Most of it is moved to new Section 3(c) whose subject is "Approval or denial of operator's self bond application." This is being done because the subject material is out of place in Section 2. The remaining Section 2(a)(x) material (Section 2(a)(x)(D) and (F)) is moved to Section 6.

Section 2(a)(xii) is modified so that companies are prohibited from self bonding if the total of all their self bond obligations exceed set percentages. Formerly, the rules considered only self bonding for mining operations.

Old Section 3 material, which pertains to renewal bonds, has been entirely removed from Section 3 and placed in new Section 4 as Section 4, paragraphs (a)(i)-(iv) and (b)-(c). Section 3, which now pertains to approval or denial of self bonds, begins with paragraphs (a)-(b) taken in their entirety from old Section 4. (The net result here is a flip flop of Sections 3 and 4 subjects and contents.)

Section 3(b) is modified to clarify that 3(b) by itself pertains only to uncollateralized self bonds.

Section 3(c) begins a major rewrite of the collateral bond provisions of this chapter. The material in paragraph (c), which comes from old Section 2(a)(x), has language added to it requiring an operator to enter into an indemnity agreement with the State, in addition to posting collateral. Note that this language change, and all other language changes in Section 3(c) will apply to all minerals unless otherwise specified.

The language in Section 3(c)(i), which comes from old Section 2(a)(x)(A), is modified for clarification purposes.

Language in Section 3(c)(i)(A), which comes from old Section 2(a)(x)(A)(II), is modified so that the value attached to property takes in consideration costs the State might incur in selling it. An editorial change is also made, striking out the adjective "reasonable," which is superfluous.

Language in Section 3(c)(i)(B), which comes from old Section 2(a)(x)(A)(I), has the reference "(in accordance with (B) below)" removed. This reference is no longer appropriate with the reorganized language.

Language in Section 3(c)(i)(B)(1), which comes from old Section 2(a)(x)(B)(1)(3) is modified slightly to make it clear that only real property is the subject of this paragraph.

Language in Section 3(c)(i)(B)(1), Section 3(c)(i)(B)(11) and Section 3(c)(i)(C)(1)(1) and (2), which comes from old Section 2(a)(x)(B)(11), is modified to make it fit together in the new format and organization.

Section 3(c)(i)(C)(1) contains entirely new language on how an operator demonstrates ownership of securities.

Language in Section 3(c)(i)(C)(11), which comes from old Section 2(a)(x)(B)(11), is modified so that personal property must be in the operator's possession, and the operator's interest must be unencumbered. Minor editorial changes are made to make the language flow according to the new format.

Section 3(c)(ii) contains entirely new language requiring that coal operators who wish to post personal property as collateral must meet minimum financial requirements.

Section 3(c)(iii) contains entirely new language pertaining to personal property collateral for all minerals. It requires quarterly maintenance reports by an operator, and a perfected first-lien security interest for the property.

Language in Section 3(c)(iv), which comes from old Section 2(a)(x)(C), is changed to require the Administrator to physically possess collateral, or as applicable, security agreement or mortgage. Other language has also been added for clarification. Subparagraphs (A) and (B) under Section 3(c)(iv) come unchanged from old Section 2(a)(x)(C)(I) and (II).

Section 3(c)(v) comes unchanged from old Section 2(a)(x)(E).

Section 3(c)(vi) is entirely new language requiring that third parties (such as a property leasee) be made and kept aware of the fact that property is being used as collateral.



Section 4 (new) contains all the language from old Section 3. All language that was in old Section 4 is transferred to new Section 3.

New language at Section 4(a)(v) is added to require coal operators with self bonds supported by personal property to report their financial condition in the self bond renewal information.

The reference in Section 5(a) to Section 3(a)(ii) is changed to Section 4(a)(ii) to reflect the chapter's new organization scheme.

Section 6(a) is modified to include language from old Section 2(a)(x)(D). It was determined that this language fit more logically under Section 6.

New Section 6(b) is added. The language comes from old Section 2(c)(x)(F). It was determined that this language fit more logically under Section 6.

#### Chapter XIII, Procedures Applicable to Surface Coal Mining Operations

Subsection 1(a)(ii)(A) has been modified to include a reference to appropriate landmarks in response to Mr. Schiffer's request for a "non-legal" description of the permit area.

Subsection 1(a)(ii)(B) has been modified to read in part "IF NPS LANDS ARE ADJACENT" rather than "close by." Adjacent is defined in the regulations as within one half mile and strengthens the rule, as Mr. Park suggested.

Section 1(a)(ii)(B) had language added to clarify to which agencies and entities the notice required by W.S. 35-11-406(j) is to be sent.

Section 1(a)(v)(C) is modified to extend protection to all places on the National Register of Historic Places. This is in keeping with a recent court decision.

Section 1(a)(vi) is added to clarify what procedures must be used by the Administrator to determine if an area proposed for coal mining is in an area where mining is limited or prohibited. It also sets time restrictions on other governmental agencies for supplying input to the Administrator on this subject.

Section 1(b)(i)(C) has the term "or adequate self insurance" removed because the State of Wyoming does not regulate self insurance. The Department, therefore, has no basis for judging the adequacy of an operator's self insurance.

Section 1(b)(i)(D) is changed to correct the chapter reference. "Chapter XXII" is corrected to read "Chapter XXIII." The authority to require updated "probable hydrologic consequences" (PHC) from the operator duplicates the federal requirement that cumulative hydrologic impact assessments (CHIA) commissioned by the Department will depend on the PHC's for data.

#### Chapter XIV, Permit Revisions

Section 1(a) is completely revised to clarify the differences between significant and nonsignificant mine plan changes, and how these are administratively handled. In conjunction with this change, the definition for "revised mining or reclamation operations" in Chapter 1, is modified to remove the undefined term "substantially." This term has caused some confusion in the past.

Section 1(b)(iv)(5) is modified to underscore the fact that, depending on the magnitude to a proposed mine plan change, the administrator may have to revise the cumulative hydrologic impact assessment (CHIA) for the mining operation.

Section 2(b)(vii) has the term "the capability of self insurance" removed. As described above under Chapter XIII, the State of Wyoming does not regulate self insurance, hence, the Department cannot accept self insurance in lieu of a liability insurance policy.

#### Chapter XVI, Release of Bonds or Deposits for Surface Coal Mining Operations

Section 1 is rewritten to provide more of a step-by-step process for bond release, and to clarify what sort of information needs to be included in a request.

Section 3 is modified so that the Administrator is required to inspect a proposed bond release area within 60 days of notification of a complete request. Previous to this, the Administrator was required to inspect within 60 days of receipt of the request, even though the request may have been incomplete.

Section 4 had two changes made. The first makes it clear that the Director's bond release decision "clock" does not start running until the bond release application is complete. The second gives the Director 75 days (unless there is a hearing) to make the decision, allowing time for public notice and comment (Section 1(c)) as well as the Administrator's inspection.

#### Chapter XVII, Inspections, Enforcement and Penalties for Surface Coal Mining

Section 1 contains changes designed to provide a more logical route of appeal for complainants. The previously approved language required the Director to respond to complaints and allowed the complainant the right to appeal the Director's response to the Administrator. The changes will reverse this procedure. Some clarifying language has also been added in response to industry comments.

Section 2 had language added to it to accomplish the following:

- 1) To more clearly define the types of violations which do not require a formal notice of violation.
- 2) To make it clear that repeated similar minor violations, or failure to abate minor violations, will result in formal notice of violation.
- 3) To make it clear that a string of minor violations will be considered in determination of "a pattern of violations."

#### Chapter XVIII, Designation of Areas Unsuitable for Surface Coal Mining

The definition of "fragile lands" in Section 1(a) is modified by removing the phrase "beyond an operator's ability to repair or restore." This phrase in the OSM rule was remanded by Judge Flannery in 1984.

Section 3(a)(iii) and Section 3(a)(viii) are eliminated. These provisions allowed the Administrator to suspend lands unsuitable petitions if it was determined there was no real or foreseeable potential for coal mining. OSM's own rules allowing such suspensions were remanded to OSM by Judge Flannery in 1985.

#### Chapter XX, Limited Mining Operations for Ten (10) Acres or Less of Affected Land

Section 1(a)(vi)(III) is altered to make this rule consistent with Chapter IV, Section 2(j). The previously approved language required any roads serving ten acre exemptions (other than those maintained by county, state, or federal government) to be included in a ten acre exemption. This was more stringent than the Chapter IV, Section 2(j) road rule for larger mining operations.

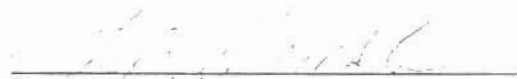
#### Conclusion

The Environmental Quality Council, in accordance with the authority granted to it in Section 35-11-112, W.S. 1977 As Amended, and having complied with the provisions of the Wyoming Administrative Procedure Act, finds as follows:

- 1) The rules and regulations provide for the regulation of surface coal mining and reclamation operations in accordance with the requirements of P.L. 95-87.
- 2) The rules and regulations are as effective as the regulations issued by the Secretary of 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 to the effectuation of §35-11-101 through §35-11-1304, W.S. 1977 As Amended.
- 5) These regulations are necessary and appropriate to protect the public health, safety, and welfare, and the environment of the State of Wyoming.

Dated this 25<sup>th</sup> day of January, 1989.

  
Fred Carr  
Hearing Examiner  
Environmental Quality Council