

Oct 05, 2012

**BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL**

**Jim Ruby, Executive Secretary
Environmental Quality Council**



STATE OF WYOMING

OCTOBER 5, 2012

**IN THE MATTER OF THE)
PROPOSED REVISION OF)
LAND QUALITY DIVISION)
RULES RELATED TO THE)
REGULATION OF)
COAL MINING)**

**STATEMENT OF PRINCIPAL
REASONS (SOPR) FOR ADOPTON**

DOCKET #: 12-4102

**Coal Rules and Regulations, Chapter 1, 2, 4, 11, 12 and 16
Variable Topsoil, Self-Bonding and Housekeeping Rule Package**

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Introduction to Rule Package

The proposed rules presented in this rule package are intended to address four main issues. First, the proposed rules allow for variable topsoil depths during reclamation. Second, the proposed rules remove language that was disapproved by the Office of Surface Mining (OSM) related to self-bonding. Third, the proposed rules address concerns that the OSM had with the valid existing right package that was formally submitted to the OSM in 2011. Fourth, the proposed rules address concerns the OSM had with the ownership and control rule package that was also submitted in 2011.

Variable Topsoil Depth

The OSM revised its rules regarding topsoil replacement during reclamation on August 30, 2006 (71 FR 51684). Those revisions to the rules allowed for the replacement of topsoil in variable thicknesses during reclamation to encourage species diversity on reclaimed lands. The proposed rules in Chapter 4 of the Land Quality Division's Coal Rules and Regulations add the option to replace topsoil at variable depths to promote the revegetation efforts during reclamation.

Self-bonding Rules

The proposed changes presented in Chapter 11 are intended to bring Wyoming's coal rules into compliance with the OSM's findings regarding rules that were formally submitted to OSM in 2006. The OSM reviewed those rules and disapproved several changes that Wyoming had submitted (74 FR 52678, October 14, 2009). Specifically, the OSM did not approve the raising of self-bond limits for companies who could meet more stringent financial tests and the use of foreign assets in calculating tangible net worth. These self-bonding rules are currently still in place even though the OSM disapproved the amendments. Therefore, to bring Wyoming's rules into compliance with the OSM's decision the proposed amendments remove those rules that were disapproved and leave in place those rules which were originally approved prior to the submittal of the self-bonding package.

Valid Existing Rights

Proposed rules were formally submitted to OSM regarding valid existing rights on April 28, 2011. In response to that submission OSM generated a concern letter that detailed areas of the rules that OSM determined were not as effective as the Federal rules. That letter dated August 17, 2011 detailed 18 revisions that were necessary to the rules as they were submitted in order to bring the rules into compliance with the Federal regulations. Wyoming responded to that letter by stating that the rules would be revised as detailed in the concern letter. The proposed rules in this package include rule language as drafted in response to the concern letter. The statement of reasons includes notations to the concern letter where appropriate.

Ownership and Control Rules

The proposed rules are in response to another concern letter regarding rules that were submitted to the OSM on October 24, 2011. The OSM reviewed the rules as presented and determined that additional rule language was necessary to make Wyoming's submittal at least as stringent as and as effective as the Federal rules on ownership and control issues. The OSM also had concerns about the scope of the corrections required and therefore it was decided that the Land Quality Division would formally withdraw the ownership and control rules from consideration at the time. Wyoming intended to submit corrections to the rules as outlined in the concern letter and package that with the rules that were submitted in October after discussing the issue with OSM. The proposed rules

in this package are intended to address all concerns related to the ownership and control concern letter. It is Wyoming's intent to promulgate these rules so that they can be submitted to the OSM together with the rules which were approved at the State level on September 12, 2011. Notations to the OSM's concerns are detailed in the statement of reasons where appropriate.

Summary of Proposed Amendments

Chapter 1 Rules and Regulations

Changes are proposed to the definitions of “Notice of violation”, “Permit transfer”, “Valid existing rights” and “violation”. The Chapter was also reorganized to reflect the addition of any new definitions.

Chapter 2 Rules and Regulations

Added a requirement to generally swear or affirm to the accuracy and completeness of application materials. Also adds requirement to update information regarding changes in personnel that were submitted as part of the original application materials. General grammatical or typographical errors were also corrected for clarity and consistency.

Chapter 4 Rules and Regulations

Proposed changes allow for replacement of topsoil at variable depths to encourage revegetation efforts. The proposed revisions to Chapter 4 add another type of “unanticipated condition” in relationship to remining operations.

Chapter 11 Rules and Regulations

The proposed revisions to Chapter 11 remove language that was disapproved by OSM and include: removing higher self-bond limits and maintaining the limits as originally approved; and removing of language which allowed for the use of foreign assets to calculate tangible net worth.

Chapter 12 Rules and Regulations

Valid Existing Rights – The proposed revisions make numerous corrections to grammar and add citation cross-references where necessary. The proposed rules also add clarifications to the procedures used to determine whether valid existing rights are applicable. Also added examples and clarifying language related to the valid existing rights process. Statutory references were also added where necessary.

Ownership and Control – The proposed rules clarify that ownership and control findings or listings can occur during the application process as well as after the granting of a permit to mine. Clarifications are also made to what information the Land Quality Division will enter into the AVS database and the effect of those entries. Additional details were added to the eligibility requirements for permits and allow for provisionally issued permits if certain circumstances are met. Clarifies who may challenge a finding or listing of ownership or control. Finally, the proposed rules add cross-references where necessary.

Chapter 16 Rules and Regulations

The proposed changes revise the definition of “willfully” and clarify the procedures related to cessation orders to address OSM concerns.

DEPARTMENT OF ENVIRONMENTAL QUALITY

LAND QUALITY DIVISION

CHAPTER 1

AUTHORITIES AND DEFINITIONS FOR SURFACE COAL MINING OPERATIONS

Section 1. **Authority.** These rules and regulations are adopted by the Environmental Quality Council and the Administrator of the Land Quality Division pursuant to the authority granted the Council and the Administrator by the Wyoming Environmental Quality Act, Sections 35-11-101 through 35-11-1104, Wyoming Statutes, 1977, as amended. These rules and regulations are effective upon filing with the Secretary of State. They become an official part of Wyoming's coal regulatory program when approved by the U.S. Secretary of the Interior or his designee.

Section 2. **Definitions.** The definitions included in the Wyoming Environmental Quality Act, are hereby adopted by this reference. All references to the "Act" herein refer to the Wyoming Environmental Quality Act, as amended.

...

(co) "Notice of violation" means a written notification from Department of Environmental Quality ~~a regulatory authority~~ or other governmental entity as specified in the definition of "violation" in Chapter 1, Section 2 and the procedures outlined in Chapter 16 of the Land Quality Division, Rules and Regulations.

*Concern letter from Office of Surface Mining (OSM) stated that when contextually appropriate "regulatory authority" should be changed to a more descriptive term. (Ownership and Control Concern Letter, 1.a.)
The definition was further revised based on comment received from OSM regarding the need for grammatical corrections and citation to Chapter 1 (Page 13, OSM Informal Review Table).*

...

(cv) "Permit transfer, assignment or sale of permit rights" means a change of a permittee in ownership or control over the right to conduct mining operations under a permit or license to mine.

Revised in response to OSM concern letter dated February 14, 2012, Section 2 which required the definition of permit transfer to be revised as proposed above.

...

(fq) "Valid existing rights (VER)" means a set of circumstances under which a person may, subject to regulatory authority approval, conduct surface coal mining operations on lands where Section 522(e) of P.L. 95-87 (2009) (<http://www.gpoaccess.gov/uscode/>) and 30 C.F.R. §761.11 (2009) (<http://www.gpoaccess.gov/cfr/retrieve.html>) would otherwise prohibit or limit such operations. Possession of valid existing rights only confers an exception from the prohibitions of 30 C.F.R. §761.11 and Section 522(e) of P.L. 98-87. A person seeking to exercise VER shall comply with all other applicable requirements of the Act and rules and regulations promulgated thereunder and meet the standards below.

The definition of valid existing rights was modified to include the statement that possession of valid existing rights only provides an exception. (August 17, 2011 Concern Letter, Section I.)

(i) Except as provided in subsection (iii) below, a person claiming VER shall demonstrate that a legally binding conveyance, lease, deed, contract, or other document vests that person, or a predecessor in interest, with the right to conduct the type of surface coal mining operations intended and that this right existed at the time the land came under protection of Section 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11 (2009).

(ii) Except as provided in subsection (iii) below, a person claiming VER shall also demonstrate compliance with one of the following standards. Procedures and requirements related to the demonstration are detailed in Chapter 12 of the Division's Coal Rules and Regulations.

(A) "Good faith/all permits standard" means all permits and other authorizations required to conduct surface coal mining operations had been obtained, or a good faith effort to obtain all necessary permits and authorizations had been made, before the land came under the protection of Section 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11 (2009). At a minimum, a permit application was submitted as required in Chapter 2 of these regulations.

(B) "Needed for and adjacent standard" means the land is needed for and immediately adjacent to a surface coal mining operation for which all permits and other authorizations required to conduct surface coal mining operations had been obtained or a good faith attempt to obtain all permits and authorizations has been made, before the land came under the protection of Section 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11 (2009). To meet this standard a person shall demonstrate that prohibiting expansion of the operation onto that land would unfairly impact the viability of the operation as originally planned before the land came under the protection of 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11(2009). Except for operations in existence before August 3, 1977, or for which a good faith effort to obtain all necessary permits had been made before August 3, 1977, this standard does not apply to lands already under the protection of 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11 (2009) when the

Department approved the permit for the original operation or when the good faith effort to obtain all necessary permits for the original operation was made. In evaluating whether a person meets this standard, the agency making the determination may consider factors such as:

(I) The extent to which coal supply contracts or other legal and business commitments that predate the time the land came under the protection of 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11 (2009) depend upon the use of that land for surface coal mining operations;

(II) The extent to which plans used to obtain financing for the operation before the land came under the protection of 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11 (2009) rely upon use of that land for surface coal mining operations;

(III) The extent to which investments in the operation before the land came under the protection of 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11 (2009) rely upon use of that land for surface coal mining operations; and

(IV) Whether the land lies within the area identified on the life-of-mine map submitted under Chapter 2, Section 5(a)(i)(B) of the Land Quality Division Coal Rules and Regulations before the land came under the protection of 30 C.F.R. §761.11 (2009).

The proposed revision above is intended to address a concern that the subsection above was not specific enough and failed to include a reference to Chapter 2 of the Coal Rules and Regulations. (August 17, 2011 Concern Letter, Section 2.)

(iii) Roads. A person who claims valid existing rights to use or construct a road across the surface of lands protected by 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11 (2009) must demonstrate that one or more of the following circumstances exist if the road is included within a surface coal mining operation:

Added the term coal to the above subsection in order to address an OSM concern regarding the use of consistent terms. (August 17, 2011 Concern Letter, Section 3.)

(A) The road existed when the land upon which it is located came under the protection of 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11 (2009) and the person has a legal right to use the road for surface coal mining operations;

(B) A properly recorded right of way or easement for a road in that location existed when the land came under the protection of 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11 (2009) and under the document creating the right of way or

easement, and under subsequent conveyances, the person has a legal right to use or construct a road across the right of way or easement for surface coal mining operations;

(C) A valid permit for use or construction of a road in that location for surface coal mining operations existed when the land came under the protection of 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11 (2009); or

(D) VER exist under subsections (i) and (ii) above.

(iv) The prohibitions and limitations of Chapter 12, Section 1(a)(v) do not apply to surface coal mining operations for which a valid permit issued by the Department exists when the land comes under the protection of 30 C.F.R. §761.11 (2009). This exception applies only to lands within the permit area as it exists when the land comes under the protection of 30 C.F.R. §761.11 (2009).

(v) Interpretation of the terms of the document relied upon to establish valid existing rights shall be based either upon applicable Wyoming case law concerning interpretation of documents conveying mineral rights or, where no applicable case law exists, upon the usage and custom at the time and place where it came into existence.

(fr) “Vegetation community” means a recognizable group of species growing together.

(fs) “Violation”, when used in the context of the permit application information required in Chapter 2 of these rules and regulations or permit eligibility requirements detailed in Chapter 12 of these rules and regulations means:

(i) A failure to comply with an applicable provision of a Federal or State law or regulation pertaining to air or water environmental protection, as evidenced by a written notification from a governmental entity to the responsible person; or

(ii) A noncompliance for which the Office of Surface Mining has provided one or more of the following types of notice or the Department of Environmental Quality has provided equivalent notice under its corresponding ~~statutory and/or regulatory~~ provisions ~~of the Act or its implementing regulations~~:

(A) A “notice of violation” as defined above;

(B) A cessation order under W.S. 35-11-437 (2011) and/or Chapter 16 of the Land Quality Coal Rules and Regulations;

(C) A final order, bill or demand letter pertaining to a delinquent civil penalty assessed under Chapter 16 of the Land Quality Coal Rules and Regulations;

(D) A bill or demand letter pertaining to delinquent reclamation fees owed under 30 C.F.R. part 870 (Abandoned Mine Lands); or

(E) A order of bond forfeiture under W.S. 35-11-421 (2011)
when:

(I) One or more violations upon which the forfeiture was based have not been abated or corrected; or

(II) The forfeited bond is inadequate to cover the cost of the **final** reclamation under W.S. 35-11-421 and 422 (2011);

Subsection (fs) was added in response to the OSM's concern that Wyoming did not submit a state counterpart to the definition of "violation". (February 14, 2012 Concern Letter, Section 3.) This subsection was also revised to address comments on the informal submittal from the OSM that stated that to "alleviate the potential for confusion", subsection (ii) required clarification of applicable statutes or regulations, and add "final" reclamation to be consistent with W.S. §35-11-422 (Pages 13-14, OSM Informal Review Table).

(ft fs) "Warm season" means a plant, which makes most or all its growth during the spring, summer, or fall and is usually dormant during the winter. Warm season plants usually exhibit the C-4 photosynthetic pathway.

(fu ft) "Water table" means the upper surface of a zone of saturation, where the body of groundwater is not confined by an overlying impermeable zone.

The above subsections were renumbered to account for the addition of the "violation" definition above.

DEPARTMENT OF ENVIRONMENTAL QUALITY

LAND QUALITY DIVISION

CHAPTER 2

PERMIT APPLICATION REQUIREMENTS

Section 1. **General Requirements.**

(a) All applications shall be filed in a format required by the Administrator and shall include, at a minimum, all information required by the Act and, for surface coal mining operations, all the applicable information required under Sections 2 through 5 of this Chapter. All applicants must swear or affirm, under oath and in writing, that all information you provide in an application is accurate and complete. The Division may establish a central file to house an applicant's identity information, rather than place duplicate information in each of an applicant's permit application files and this information will be made available to the public upon request.

The subsection above is proposed for revision to include corresponding language to 30 CFR 778.9(b) and (c) as required in the February 14, 2012 OSM Concern Letter at Section 7.

...

Section 2. **Adjudication Requirements.**

(a) In addition to that information required by W.S. § 35-11-406(a), each application for a surface coal mining permit shall contain:

(i) A complete identification of interests, which shall include:

...

(B) The names, addresses and telephone numbers of any operators, if different from the applicant. If the applicant is a business entity other than a single proprietorship, then the names, addresses and telephone numbers of all limited and general partners, officers, members, directors or person performing a function similar to a director and person who owns 2 of record 10 (10) percent or more of the entity or if a corporation then the names, addresses and telephone numbers of principal shareholder, officers and director or other person performing a function similar to a director, and resident agent(s) of the applicant. This shall also include the names under which the applicant, partner or principal shareholder operates or previously operated a surface coal mining operation in the United States within the five years preceding the date of

application;

...

(D) The names, addresses and telephone numbers for each business entity in the applicant's and operator's organizational structure, up to and including the ultimate parent entity of the applicant and operator. For each business entity identified the applicant shall also provide the names, addresses and telephone numbers for every president, chief executive officer, director or other persons performing in similar roles and every person who owns, of record, ten (10) percent or more of the entity;

(E) The name, address, telephone number, position title and relationship to the applicant and operator including percentage of ownership and location in the organizational structure and date the person began functioning in that position for every officer, partner, member, director, person performing a function similar to a director and person who owns, of record, ten (10) percent or more of the ~~operator or applicant or operator for both the operator and the applicant. Within sixty (60) days of any addition, departure, or change in position of any person identified above, the applicant or permittee shall provide the information submitted above and the date of any departure;~~

Subsection (E) above is proposed for revision to include a counterpart to 30 CFR 774.12(c) as required in the OSM's concern letter. (Section 16, February 14, 2012 Concern Letter). Grammatical changes were also made based on comments from OSM on the Land Quality's informal submittal. Additionally, the requirement to update the changes in information provided in subsection (E) was moved from this subsection to Chapter 16 in response to the OSM's comments (Page 25 and 33, OSM Informal Review Table).

(F) A ~~list statement and identification~~ of any pending, current or previous surface coal mining permit applications filed in in the United States held by the applicant, partner or principal shareholder and the operator and operator's partners, principal shareholders who operate or previously operated a surface coal mining operation during the five years period preceding the date of the application. The list must identify each application by its application number and jurisdiction, or by other identifying information when necessary. For any surface coal mining operations that the applicant or the operator owned and controlled within the five year period preceding the application submission date and for any surface coal mining operation that the applicant or operator owned and controlled on that date, the applicant shall provide:

Subsection (F) above is revised to correct a typographical error as pointed out by the OSM (Section 1.b., February 14, 2012 Concern Letter). Subsection (F) was revised further to address comments from OSM on the

LQD's informal submittal that stated further clarification was necessary to describe the list more specifically. Those comments also applied to subsection (ii)(B) below (Page 25-26, OSM Informal Review Table).

...

(ii) A complete statement of compliance which shall include:

(A) A brief statement, including identification and current status of the interest, identification of the regulatory authority, and description of any proceedings and their current status, of whether the applicant, the operator, or any subsidiary, affiliate or entity which the applicant or operator or entities owned or controlled by or under common control with the applicant or operator has:

(I) Had any Federal or State coal mining permit suspended or revoked in the five (5) years period preceding the date of submission of the application;

(II) Forfeited a Federal or State coal mining performance bond or similar security deposited in lieu of bond in connection with surface coal mining and reclamation operations during the five (5) year period preceding the date of submission of the application; or

(III) For each suspension, revocation, or forfeiture identified in subsections (I) and (II) above, the applicant shall provide a brief statement of the facts involved including the permit number, date of action and amount of forfeiture if applicable, responsible regulatory authority and stated reasons for action, current status and identifying information regarding any judicial or administrative proceedings related to the action.

The above revision are in response to Section 9., of the February 14, 2012 Concern Letter that required the addition of clarifying language to make clear that the information required is related to surface coal mining operations.

(B) ~~The listing~~ A list of notices of violation required by W. S. § 35-11-406(a)(xiv) ~~shall that~~ describe or identify the violation, a list of all unabated or uncorrected violation notices incurred in connection with any surface coal mining and reclamation operation that the applicant or operator owns or controls on that date, identify the associated permit and MSHA numbers, the name of person to whom the violation notice was issued, when it occurred, any abatement action taken and if the abatement period has not expired a certification that the violation is being abated or corrected to the satisfaction of the agency with jurisdiction over the violation, the issuing regulatory authority, and any proceedings initiated concerning the violation. This listing shall include only notices issued to the applicant or operator and any subsidiaries, affiliates, or persons owned or controlled by or under common control with the applicant or operator.

DEPARTMENT OF ENVIRONMENTAL QUALITY

LAND QUALITY DIVISION

CHAPTER 4

ENVIRONMENTAL PROTECTION PERFORMANCE STANDARDS

FOR SURFACE COAL MINING OPERATIONS

Section 1. **General.**

This Chapter sets forth the environmental protection performance standards applicable to all coal mining operations. No mining operation shall be conducted except in compliance with the requirements hereof.

Section 2. **General Environmental Protection Performance Standards**

...

(c) Topsoil, subsoil, overburden, spoil, excess spoil, refuse, coal mine waste, acid-forming materials, toxic materials and other wastes.

...

(v) Topsoil, subsoil, and/or an approved topsoil substitute shall be redistributed in a manner that:

(A) Achieves an approximately uniform, stable thickness consistent with the approved permit and the approved postmining land uses, contours and surface water drainage systems. Soil thickness may also be varied to the extent such variations help meet the specific revegetation goals identified in the permit;

The above language is proposed to allow for variable topsoil depth which may increase revegetation success during reclamation as allowed for in 30 CFR 816.22 of the Federal regulations.

(B) Prevents compaction which would inhibit water infiltration and plant growth;

(C) Protects the topsoil from wind and water erosion before and after it is seeded until vegetation has become adequately established; and

(D) Conserves soil moisture and promotes revegetation.

...

(l) Unanticipated conditions.

(i) An operator encountering unanticipated conditions shall notify the Administrator as soon as possible and in no event more than five days after making the discovery.

(ii) An unanticipated condition is any condition encountered in a mining operation and not mentioned by the operator in his mining or reclamation plan which may seriously affect the procedures, timing, or outcome of mining or reclamation. Such unanticipated conditions include but are not limited to the following:

(A) The uncovering during mining operations of any acid-forming, radioactive, inflammable, or toxic materials which must be burned, impounded, or otherwise disposed of in order to eliminate pollution or safety hazards.

(B) The discovery during mining operations of a significant flow of groundwater in any stratigraphic horizon.

(C) The occurrence of slides, faults, or unstable soil and overburden materials which may cause sliding or caving in a pit which could cause problems or delays with mining or reclamation.

(D) The occurrence of uncontrolled underground caving or subsidence which reaches the surface, causing problems with reclamation and safety hazards.

(E) A discovery of significant archaeological or paleontological importance.

(F) For permits that are issued to conduct a surface coal mining operation on lands eligible for remining the purposes of remining operations an unanticipated event or condition is one which arises after permit issuance, is related to prior mining and was not addressed in the permit application.

The proposed revision above is intended to address a concern that Wyoming's rules did not contain a section to address permit eligibility at remining sites as required by 30 CFR 773.13 (February 14, 2012 Concern Letter, Section 4). Subsection (F) was revised further to address comments by the OSM which stated that the informal submittal should be revised to be consistent with terminology used in 30 C.F.R. §§773.13(b) and 785.25 (Page 17, OSM Informal Review Table).

(iii) In the case of the uncovering of hazardous materials, the operator shall take immediate steps to notify the Administrator and comply with any required

measures to eliminate the pollution or safety hazard. Under all conditions the operator must take appropriate measures to correct, eliminate, or adapt to an unanticipated condition before mining resumes in the immediate vicinity of that condition.

DEPARTMENT OF ENVIRONMENTAL QUALITY

LAND QUALITY DIVISION

CHAPTER 11

SELF-BONDING PROGRAM

...

Section 2. **Initial Application to Self-bond.**

(a) Initial application to self-bond shall be made at the time the operator makes written application to the Administrator for a license to mine. The application shall be on forms furnished by the Administrator and shall contain:

...

The revision proposed below are intended to remove from the State program rules related to self-bonding that were disapproved by the OSM. The revisions below reinstate rule language that was part of the approved state program prior to the submission of the self-bonding rules. (See Federal Register, October 14, 2009)

(xii) The following in order:

(A) For the Administrator to accept an operator's self-bond, the total amount of the outstanding and proposed self-bonds of the operator shall not exceed 25 percent of the operator's tangible net worth in the United States; ~~however the Administrator may allow for an increase in the self bond amount to 35 percent of tangible net worth for operators that have a ratio of total liabilities to net worth of 1.5 or less and a ratio of current assets to current liabilities of 1.7 or greater, or~~

(B) For the Administrator to accept a parent corporate guarantee, the total amount of the parent corporation guarantor's present and proposed self-bonds and guaranteed self-bonds shall not exceed 25 percent of the parent corporate guarantor's tangible net worth in the United States; ~~however the Administrator may allow for an increase in the self bond amount to 30 percent of tangible net worth for guarantors that have a ratio of total liabilities to net worth of 1.5 or less and a ratio of current assets to current liabilities of 1.7 or greater, or~~

(C) For the Administrator to accept a non-parent corporate guarantee, the total amount of the non-parent corporate guarantor's present and proposed self-bonds and guaranteed self-bonds shall not exceed 25 percent of the non-parent corporate guarantor's tangible net worth in the United States.

~~(D) If the operator chooses to include assets outside the United States in their tangible net worth, the Administrator shall require the information required under subsection (E).~~

~~(E) If the Administrator accepts a foreign parent corporate guarantee or a foreign non-parent corporate guarantee, the Administrator shall require:~~

~~(I) A legal opinion from a firm recognized to do business in the country of the firm's international headquarters concerning the collectability of the self bond in the foreign country. The opinion shall also provide an estimate of the cost of recovering the self bond under the laws of that foreign country. The firm shall be selected by the Administrator from a list provided by the applicant. The applicant shall be responsible for the cost of the opinion;~~

~~(II) A separate bonding instrument to cover the estimated cost of recovering the reclamation bond in the foreign country. This separate bond shall be highly liquid such as cash, letters of credit, certificates of deposit or government securities and be redeemable within 90 days of forfeiture. The Administrator may also require additional information that is deemed necessary to support the self bond; and~~

~~(III) All audited financial statements shall be in English and shall be prepared with generally accepted accounting principles, as adopted by the United States Financial Accounting Standards Board.~~

DEPARTMENT OF ENVIRONMENTAL QUALITY

LAND QUALITY DIVISION

CHAPTER 12

PROCEDURES APPLICABLE TO SURFACE COAL MINING OPERATIONS

Section 1. **Permitting Procedures.**

(a) In addition to the permitting procedures described in the Act, the following shall be applicable to applications for a permit for a surface coal mine operation:

...

(v) The criteria contained in W.S. § 35-11-406(n)(iv) regarding Section 522(e) of P.L. 95-87 shall mean that, prior to approval of any complete application for a surface coal mining permit, the applicant must demonstrate and the Administrator determine, utilizing the assistance of the appropriate Federal, State or local government agency, if necessary, that the application does not propose a surface coal mining operation on those lands where such operation is prohibited or limited by Section 522(e) of P.L. 95-87; or if one is so proposed, that the applicant either has valid existing rights or was conducting a surface coal mining operation on those lands on August 3, 1977. Subject to the above stated limitations, surface coal mining operations are prohibited or limited:

...

(D) Within 100 feet, measured horizontally, of the outside right-of-way line of any public road, except where mine primary roads join such right-of-way line. Provided, however, the Administrator may specifically authorize operations where the road is to be relocated, closed, or where the area affected lies within 100 feet of a public road. Such specific authorization shall provide a public comment period ~~follow notice~~ and an opportunity to request a ~~for~~ public hearing in the locality of the proposed operation together with a written finding on whether the interests of the public and the affected landowners will be protected from the proposed operation. If a hearing is requested, a public notice shall be published at least two weeks prior to the hearing in a local newspaper of general circulation. If a hearing is held, the Administrator ~~authority~~ shall make this finding within 30 days after the hearing or if a hearing is not held the Administrator ~~authority~~ must make this finding within 30 days after the end of the public comment period. The Administrator may rely upon findings of the public road authority with jurisdiction over the road in specifically authorizing road relocations or closures;

The revisions proposed above are intended to address a concern related to procedures for public road waivers to comply with 30 CFR 761.14. (August 17, 2011 Concern Letter, Section 4.)

...

(vii) VER submission requirements and procedures.

(A) A request for a VER determination shall be submitted to the appropriate agency identified in subsection (vi) above if the applicants intends to conduct surface coal mining operations on the basis of valid existing rights under 30 C.F.R. §761.11 (2009), (<http://www.gpoaccess.gov/cfr/retrieve.html>), or wishes to confirm the right to do so. Requests may be submitted prior to submitting an application for a permit or boundary revision for the land.

(I) Property rights demonstrations required under the VER definition at Chapter 1, Section 2(fq)(i) for requests that rely on the good faith/all permits standard or the needed for and adjacent standard detailed in the VER definition at Chapter 1, Section 2(fq)(ii)(A) and (B) respectively shall include the following:

*The proposed revision above are intended to address the OSM's concern that Wyoming did not submit the additional clarifying language in compliance with 30 CFR 761.16(b)(1) and adds a cross-reference to Chapter 1. (August 17, 2011 Concern Letter, Section 5.) **Additional grammatical corrections were made to be consistent with the OSM's comments on the LQD's informal submittal (Page 6, OSM Informal Review Table).***

...

(IV) If the request relies on one of the standards for roads detailed in the definition of VER at Chapter 1, Section 2(fq)(iii)(A) through (C), the request shall include documentation that:

The revision above is intended to address the concern noted at Section 6., of the August 17, 2011 Concern Letter by adding the cross-reference to Chapter 1, VER definition.

...

(B) Initial review of request.

(I) The responsible agency shall conduct an initial review to determine whether the request includes all applicable components of the submission requirements discussed in subsection (A) above. This review only examines completeness of the request only not the legal or technical adequacy of the materials

submitted.

The additional clarifying language was added to address a concern that Wyoming failed to include the completeness language. (August 17, 2011 Concern Letter, Section 7.) Grammatical changes were made to subsection (I) based on OSM comments on the LQD's informal submittal (Page 6-7, OSM Informal Review Table).

(II) If the request does not include all applicable components of the submission requirements, the responsible agency shall notify the requestor and establish a reasonable time for submitting the missing components.

(III) When the request contains all applicable submission requirements the responsible agency shall implement the notice and comment requirements discussed in subsection (C) below.

(IV) If the information requested in (II) above is not submitted within the time specified or amended the responsible agency shall issue a determination that the VER has not been demonstrated as discussed in Section 1(a)(vii)(D)(IV) below.

Adds a cross-reference to subsection (D)(IV) that discusses how a VER decision will be made. (August 17, 2011 Concern Letter, Section 8.)

(C) Notice and comment requirements and procedures.

(I) When the VER request satisfies the completeness requirements of (B) above, the VER applicant must publish a notice in a newspaper of general circulation in the county in which the land is located. This notice must invite comment on the merits of the request. The applicant must provide the Division with a proof of publication. Each notice shall include:

(1.) Location of land to which the VER request pertains;

(2.) A description of the type of surface coal mining operations planned;

(3.) A reference to and brief description of the applicable standards, found in the definition of VER at Chapter 1, Section 2(fq) of these rules, for which the VER request will be determined;

a. If the request relies upon the good faith/all permits standard or the needed for and adjacent standard found in Chapter 1, Section 2(fq)(ii)(A) ~~or~~ and (B), the notice shall also contain a description of the property

rights claimed and the basis for the claim.

Adds a cross-reference to the definition of VER for purposes of clarity (August 17, 2011 Concern Letter, Section 9). Additional grammatical corrections were made based on the OSM's comments to the LQD's informal submittal (Page 7, OSM Informal Review Table).

b. If the request relies upon the standard in subsection (A)(IV)(1.) above, the notice shall also include a description of the basis for the claim that the road existed when the land came under the protection of 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11 (2009). In addition the notice shall include a description of the basis for your claim that the VER requestor has a legal right to use that road for surface coal mining operations.

c. If the request relies upon the standard in subsection (A)(IV)(2.) above, the notice shall also include a description of the basis for the claim that a properly recorded right-of-way or easement for a road in that location existed when the land came under the protection of 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11 (2009). In addition the notice shall include a description of the basis for the claim that, under the document creating ~~creation~~ the right of way or easement, and under any subsequent conveyances, the VER requestor has a legal right to use or construct a road across the right of way or easement to conduct surface coal mining operations.

d. If the request relies upon one or more of the standards in Chapter 1, , Section 2(fq)(ii), (iii)(A) ~~or~~ and (iii)(B) of the VER definition, a statement that the Division will not make a decision on the merits of the request if, by the close of the comment period under this notice or the notice required below, a person with a legal interest in the land initiates appropriate legal action in the proper venue to resolve any differences concerning the validity or interpretation of the deed, lease, easement or other documents that form the basis of the VER claim.

Adds a cross-reference to the definition of VER for purposes of clarity and fixes a typographical error. (August 17, 2011 Concern Letter, Section 9.) Additional grammatical corrections were made based on OSM comments on the LQD's informal submittal (Page 8, OSM Informal Review Table).

e. A description of the procedures that the agency will follow to process a VER request.

f. The closing date of the comment period, which must be a minimum of 30 days after the publication date of the notice.

g. A statement that interested persons may obtain a 30-day extension of the comment period on request.

h. The name and address of the agency office where a copy of the request is available for a public inspection and to which comments and requests for extension of the comment period should be sent.

(II) The Division shall promptly provide a copy of the notice required under this Section to:

(1.) All reasonably locatable owners of surface and mineral estates in the land included in the VER request.

(2.) The owner of the feature causing the land to come under the protection of 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11 (2009) and, when where applicable, the agency with primary jurisdiction over the feature with respect to the values causing the land to come under the protection of 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11 (2009). For example, both the landowner and the State Historic Preservation Officer must be notified if surface coal mining operations would adversely impact any site listed on the National Register of Historic Places. As another example, both the surface owner and the National Park Service must be notified if the request includes non-Federal lands within the authorized boundaries of a unit of the National Park System.

Addresses an OSM concern that Wyoming did not include the examples above for required notification (Section 10., August 17, 2011 Concern Letter). “National” capitalized to correct typographical error.

(III) The letter transmitting the notice required under subsection (II) above shall provide a 30-day comment period, starting from the date of service of the letter, and specify that another 30 days is available upon request. At its discretion, the Land Quality Division, as the agency responsible for the determination of VER may grant additional time for good cause upon request. The Land Quality Division need not necessarily consider comments received after the closing date of the comment period.

Adds the discretion to allow for more time and states that the LQD need not necessarily consider comments received after the closing date of a comment period in compliance with 30 CFR 761.16(d)(3). (August 17, 2011 Concern Letter, Section 11.)

(D) How a VER decision will be made.

(I) The ~~Land Quality~~ Division shall review the materials submitted under Subsection (A) above, any comments received under Subsection (C) above and any other relevant reasonably available information to determine whether the record is sufficiently complete and adequate to support a decision

on the merits of the request. If not, the Division shall notify the requestor in writing, explaining the inadequacy of the record and requesting submittal, within a specified reasonable time, of any additional information that the agency deems necessary to remedy the inadequacy.

Adds citation cross-references to address OSM's concern that the above subsection was not consistent with 30 CFR 761.16(e)(1). (August 17, 2011 Concern Letter, Section 12.)

(II) Once the record is complete and adequate, the Division shall determine whether the requestor has demonstrated VER. The decision document shall explain how the requestor has or has not satisfied all the applicable elements, shall contain findings of fact and conclusions and shall specify the reasons for the conclusions.

(III) Impact of property rights disagreements. This subsection only applies when the request relies upon on or more of the standards in the Chapter 1, VER definition.

(1.) The Division shall issue a determination that the requestor has not demonstrated VER if the property rights claims are the subject of pending litigation in a court or administrative body with jurisdiction over the property rights in question. A requestor may refile the request once the property rights dispute is finally adjudicated. This subsection only applies if the legal action has been initiated as of the closing date of the comment periods discussed under Subsections (C)(I) and (C)(III) above.

(2.) If the record indicates disagreement as to the accuracy of the requestor's property rights claims, but the disagreement is not the subject of pending litigation in a court or administrative agency of competent jurisdiction, the Land Quality Division ~~responsible agency~~ shall evaluate the merits of the information in the record and determine whether the requestor has demonstrated that the requisite property rights exist under Subsections (i), (iii)(A) or (iii)(B) of the VER definition in Chapter 1 of these Rules and Regulations, as appropriate. The ~~Land Quality Division~~ responsible agency shall then proceed to subsection (D ~~E~~)(II) above.

Clarifying language added to indicate citation cross-references and state which regulatory authority is responsible. (August 17, 2011 Concern Letter, Section 13.)

(IV) The Division must issue a determination that the requestor has not demonstrated VER if the requestor has not submitted the information requested under subsections (B)(II) and (D)(I) above within the time specified or as subsequently extended. A requestor may submit a revised request at any time after that determination has been made.

(V) After making a VER determination, the Division shall:

(1.) Provide a copy of the determination, together with an explanation of appeal rights and procedures to the VER requestor, the owner or owners of the land to which the determination applies, the owner of the feature causing the land to come under the protection of 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11(2009) and when applicable, to the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under the protection of 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11 (2009).

(2.) Require the VER requestor to publish notice of the determination in a newspaper of general circulation in the county in which the land is located and provide the Division with proof of publication. If the initial VER request contained Federal lands with an area listed in subsections (v)(A) and (B) above, the OSM will publish the determination, together with an explanation of appeal rights and procedure in the Federal Register.

(E) Administrative and judicial review. A determination that the VER requestor does or does not have VER is subject to administrative and judicial review under the Wyoming Administrative Procedures Act, W.S. 16-3-101 through 16-3-115 (2011).

Added reference to the Administrative Procedures act. (August 17, 2011 Concern Letter, Section 14.)

(F) Availability of records. When the Land Quality Division (~~LQD~~) is the agency responsible for processing a request subject to notice and comment under subsection (C) above the Division LQD shall make a copy of that request and related materials available to the public in the same manner as public availability of permit applications under these Rules and Regulations. In addition, the Land Quality Division shall make records associated with that request, and any subsequent determination under subsection 1(a)(vii)(D) above available to the public in accordance with the requirements and procedures of W.S. §35-11-1101 (2011).

Proposed language adds a section header and provides that records may be made public upon request. (August 17, 2011 Concern Letter, Section 15.) Subsection (F) was further revised to be consistent with terms previously defined and provides a reference to the appropriate statute for public records based on comments received by the OSM in response to the LQD's informal submittal (Page 11, OSM Informal Review Table).

(G) Procedures for joint approval of surface coal mining operations that will adversely affect publicly owned parks or historic places.

(I) If the regulatory authority determines that the proposed surface coal mining operation will adversely affect any publicly owned park or any place included in the National Register of Historic Places, the regulatory authority must request that the Federal, State, or local agency with jurisdiction over the park or place either approve or object to the proposed operation. The request shall:

(1.) Include a copy of applicable parts of the permit application.

(2.) Provide the agency with 30 days after receipt to respond, with a notice that another 30 days is available upon request.

(3.) State that failure to interpose an objection within the time specified under subsection (2.) above will constitute approval of the proposed operation.

(II) The regulatory authority may not issue a permit for a proposed operation subject to subsection (I) above unless all affected agencies jointly approve.

(III) Subsections (I) and (II) above do not apply to:

(1.) Lands for which a person has VER, as determined under Section 1(a)(vi) and (vii) of this Chapter;

(2.) Lands within the scope of the exception for existing operations contained in the Chapter 1, Section 2(fq)(iv) “valid existing rights” definition.

The proposed revision above adds a cross-reference to the exceptions for existing operations under the definition of valid existing rights. (August 17, 2011 Concern Letter, Section 16.)

(viii) Final Compliance Review. After finding the application administratively complete and suitable for publication but prior to permit issuance, the Department of Environmental Quality regulatory authority shall ~~reconsider its approval based on a review of~~ conduct a review of the following before making a permit eligibility determination under (x) of this section:

(A) The information the applicant submitted regarding applicant, operator and ownership ~~and or~~ control information AVS information and any other available information to review the applicants and operators organizational structure and ownership or control relationships;

(B) The information the applicant submitted regarding applicant permit history, AVS information and any other available information to review the applicant and operator's permit history. In addition, the regulatory authority shall determine if the applicant and operator have previous mining experience and if the applicant or operator does not have any previous ~~previous~~ mining experience additional ownership ~~and or~~ control investigations may be conducted; and

(C) The information the applicant submitted regarding compliance history, AVS compliance report and any other available information to review histories of compliance with the Wyoming Environmental Quality Act and regulations promulgated thereunder and any other air or water quality laws for the applicant, operator, operations owned ~~and or~~ controlled by the applicant and operations the operator owns ~~and or~~ controls.

(ix) The ~~Land Quality Division (Division)~~ regulatory authority shall enter into AVS:

(A) The information submitted in the application in compliance with Chapter 2, Sections 2(a)(i)(B)-(F) ~~regarding business entity type; tax identification numbers, the name, address and phone numbers for the applicant, resident agent, operators if different from the applicant and the applicant's and operator's business organizational structure;~~

...

(C) The Land Quality Division regulatory authority shall update the information above upon verification of any additional information submitted or discovered during the ~~regulatory authority's~~ Division's permit application review.

The revisions above indicate the responsible agency and add a cross-reference to Chapter 2 to clarify what information is necessary. Additional revisions were made to correct grammatical errors and the use of consistent terms based on the OSM's comments on the LQD's informal submittal (Pages 21-22, OSM Informal Review Table).

(D) For the purposes of future permit eligibility determinations and enforcement actions:

(I) All permit records within 30 days after the permit is issued or subsequent changes are made;

(II) All unabated or uncorrected violations within 30 days after the abatement or correction period for a violation expires~~d~~;

(III) All changes to information initially required to be provided by the applicant as part of the application process within 30 days after receiving notice of a change; and

(IV) All changes in violation status within 30 days after abatement, correction, or termination of a violation or a decision from an administrative or judicial tribunal.

(E) At any time, the DEQ Division may identify any person who owns or controls an entire surface coal mining operation or any relevant portion or aspect thereof. If the DEQ Division identifies such a person, we the Division must issue a written preliminary finding to the person and the applicant or permittee describing the nature and extent of ownership or control. The written preliminary finding must be based on evidence sufficient to establish a prima facie case of ownership or control. After the DEQ Division issues a written preliminary finding under this section, the DEQ Division will allow you, the person subject to the preliminary finding, thirty (30) days in which to submit any information tending to demonstrate your that persons lack of ownership or control. If, after reviewing any information you submitted, the DEQ Division is persuaded that you the person is are not an owner or controller, we the Division will serve you a written notice to that effect to the person indentified. If, after reviewing any information you submitted, the DEQ Division still finds that you the person identified is are an owner or controller, or if you the person identified does not submit any information within the 30-day period, we the Division will issue a written finding and enter our the Division's finding into AVS. If the DEQ Division identifies you a person as an owner or controller under this section above, you that person may challenge the finding using the provisions of Chapter 12, Section 1(a)(xiii) and (xiv)(A)-(E). If a hearing is not requested regarding preliminary findings on of permanent permit ineligibility and the time for seeking a hearing has expired, the DEQ Division will enter our finding into AVS. only if that finding is upheld on administrative appeal. If a hearing is requested, the Division will enter the finding into AVS only if that finding is upheld on administrative appeal.

(F) The Land Quality Division need not make a finding as provided for under (E) above before entering into AVS the information required to be disclosed in compliance with Chapter 2, Section 2(a)(i)(B) – (E); however, the mere listing in AVS of a person identified in Chapter 2, Section 2(a)(i)(B) – (E) does not create a presumption or constitute a determination that such person owns or controls a surface coal mining operation.

Subsections (E) and (F) are added to address OSM concerns. The proposed revisions add that entry into AVS does not create a presumption of ownership and control and also clarifies that post permit issuance of permit information to demonstrate the applicant's lack of ownership or control. (February 14, 2012 Concern Letter, Section 8.) Subsection (E) was further revised to remove the use of pronouns and promote consistent

use of terms previously defined. Subsection (E) was also revised to include the alternative outcome that was inadvertently left out of the original draft document based on the OSM's comments on the LQD's informal submittal (Page 22, OSM Informal Review Table).

(x) In addition to the specific findings required by W.S. § 35-11-406(n) and based on the reviews required in subsection (viii) above, the Land Quality Division (LQD) shall determine whether the applicant is eligible for a coal mining permit. An applicant is not eligible for a permit if the LQD determines that for any surface coal mining operation that:

(A) The applicant directly owns or controls has an unabated or uncorrected violation;

(B) The applicant or his operator indirectly controls has an unabated or uncorrected violation and ~~you~~ the applicant's control was established or the violation was cited after November 2, 1988; or

(C) The applicant or his operator controls or has controlled mining operations with a demonstrated pattern of willful violations as outlined in W.S. § 35-11-406(o).

(D) Exceptions

(I) An applicant is eligible for a permit if an unabated violation occurred after October 24, 1992 and resulted from an unanticipated condition at a surface coal mining and reclamation operation on lands that are eligible for remining under a permit that was held by the person applying for the new permit.

(II) An applicant may be eligible for a provisionally issued permit if the applicant owns or controls a surface coal mining and reclamation operation with a notice of violation issued under Chapter 16 of these rules and regulations for which the abatement period has not yet expired or a violation that is unabated or uncorrected beyond the abatement or correction period.

(III) An applicant is eligible for a provisionally issued permit if the applicant is pursuing a good faith challenge to all pertinent ownership or control listings or findings under Chapter 12, Section 1 or administrative or judicial appeal of all pertinent ownership ~~and~~ or control listings/ or findings or contesting the validity of a violation unless there is an initial judicial decision affirming the listing or finding ~~or the violation~~, and ~~that those~~ decisions remains in force.

(IV) A provisionally issued permit will be considered improvidently issued and the ~~Land Quality~~ Division will begin procedures to suspend or rescind the permit as described in Section 1(a)(xiv)(G) if the violations are not abated

within the specified abatement period, or the applicant, operator or operations that the operator or applicant own or control do not comply with the terms of an abatement plan or payment schedule for fees or penalties assessed. Suspension or rescission proceedings will also be initiated if, in the absence of a request for judicial review, the disposition of a challenge and any subsequent administrative review as discussed above affirms the validity of the violation or the ownership ~~and~~ or control listing or finding ~~in the absence of a request for judicial review~~ or if the initial judicial review decision ~~discussed~~ above affirms the validity of the violation or the ownership ~~and~~ or control listing or finding.

The proposed revisions above address concerns that OSM had regarding requirements related to provisionally issued permits. Subsection (III) also clarifies when a provisionally issued permit will be declared improvidently issued and procedures to suspend or rescind the permit will be initiated. (February 14, 2012 Concern Letter, Section 5.) Subsection (x) was further revised to address grammatical errors and lack of consistency with the Federal regulations as identified by the OSM in their informal review of the LQD's informal submittal (Page 15-16, OSM Informal Review Table).

...

(xiii) A person may challenge a listing or finding of ownership or control using the procedures detailed below if that person is:

(A) Listed in a permit application or in AVS as an owner or controller of an entire surface coal mining operation, or any portion or aspect thereof; or

(B) Found to be an owner or controller of an entire surface coal mining operation, or any portion or aspect thereof, under Chapter 12, Section 1(a)(xiv)(G) or Section 1(a)(ix)(E); or

The subsection above was added to address an OSM concern that Wyoming did not provide cross-references to ownership or control findings which may be challenged; including challenges to listings or findings that are related to improvidently issued permits or submission of post permit issuance information. (February 14, 2012 Concern Letter, Section 11.)

(~~C~~ B) An applicant or permittee affected by an ownership or ~~and~~ control listing or finding.

Typographical error corrected (February 14, 2012 Concern Letter, Section 1f.)

(xiv) In order to challenge an ownership ~~or and~~ control listing or finding a written explanation shall be submitted to the Department of Environmental Quality regulatory authority regarding the basis of the challenge along with any evidence or explanatory materials outlined in subsection (E) below. If the challenge concerns a pending permit application the written explanation shall be submitted to the regulatory authority with jurisdiction over the application. If the challenge concerns the applicant's ownership ~~or and~~ control of a surface coal mining operation and ~~the applicant is are~~ not currently seeking a permit the written explanation shall be submitted to the regulatory authority with jurisdiction over the surface coal mining operation. The provisions of this section and of subsections D through F below apply only to challenges to ownership or control listings or findings and may not be used to challenge liability or responsibility under any other section of the Wyoming Environmental Quality Act or the Land Quality Division, Coal Rules and Regulations.

The proposed revision above clarifies the applicable regulatory authority and also states that the procedures applicable to challenges regarding ownership or control may not be used for other purposes (February 14, 2012 Concern Letter, Section 12). Subsection (xiv) was further revised to be consistent with the Federal regulations (Page 27, OSM Informal Review Table).

(A) When a challenge concerns a violation under the jurisdiction of a different regulatory authority, the regulatory authority with jurisdiction over the permit application or permit shall consult the regulatory authority with jurisdiction over the violation and the AVS Office to obtain additional information.

(B) The regulatory authority responsible for deciding a challenge under this section may request an investigation by the AVS Office.

(C) At any time a person listed in AVS as an owner or controller of a surface coal mining operation may request an informal explanation from the AVS Office as to the reason they are shown in the AVS in an ownership or control capacity.

(D) When a challenge is made to a listing of ownership ~~and or~~ control, or a finding of ownership ~~and or~~ control, the challenger must prove by a preponderance of the evidence that they either:

(I) Do not own or control the entire surface coal mining operation or relevant portion or aspect thereof; or

(II) Did not own or control the entire surface coal mining operation or relevant portion or aspect during the relevant time period.

(E) In order to meet the burden of proof in subsection (D)

above, the challenger must present reliable, credible, and substantial evidence and any explanatory materials to the regulatory authority. The materials presented in connection with your challenge will become part of the permit file, an investigation file or another public file. A request to hold materials submitted under this Section confidential may be made to the Administrator subject to Land Quality Division Rules and Regulations and the Wyoming Public Records Act. Acceptable materials include, but are not limited to:

The proposed revision above indicates that materials presented as evidence in a challenge will become part of the permitting files. (February 14, 2012 Concern Letter, Section 13.)

(I) Notarized affidavits containing specific facts concerning the duties that were performed for the relevant operation, the beginning and ending dates pertaining to ownership or control of the operation, and the nature and details of any transaction creating or severing ownership or control of the operation in question;

(II) Certified copies of corporate minutes, stock ledgers, contracts, purchase and sale agreements, leases, correspondence, or other relevant company records;

(III) Certified copies of documents filed with or issued by any State; municipal, or Federal government agency;

Typographical error corrected (February 14, 2012 Concern Letter, Section 1h.)

(IV) An opinion of counsel, when supported by evidentiary materials, a statement by counsel that they are qualified to render the opinion and a statement that counsel has personally and diligently investigated the facts of the matter.

(F) Within sixty (60) days of receipt of a challenge as described above, the Division will review and investigate the evidence and explanatory materials submitted and any other reasonable available information bearing on the challenge and issue a written decision. The decision shall state whether the challenger owns or controls the relevant surface coal mining operation, or owned or controlled the operation during the relevant time period. Decisions regarding the challenge will be promptly provided to the challenger by either certified mail, return receipt requested or by any alternative means consistent with rules governing service under the Wyoming Rules of Civil Procedure. Service of the decision will be complete upon delivery and is not incomplete if acceptance of delivery is refused. Appeals of the written decision will be administered under the ~~DEQ's~~ Department's Rules of Practice and Procedure. AVS shall be revised as necessary to reflect these decisions.

Typographical error corrected (February 14, 2012 Concern Letter, Section 1i.)

(G) Improvidently issued coal mining permits.

(I) If the DEQ Administrator has reason to believe that a permit was improvidently issued to the permittee a review shall be conducted of the circumstances under which the permit was issued. The DEQ Administrator shall make a preliminary finding that the permit was improvidently issued if under the permit eligibility requirements in effect at the time of permit issuance the permit should not have been issued because the applicant or operator owned or controlled a surface coal mining and reclamation operation with an unabated or uncorrected violation.

(II) The DEQ Administrator will make a finding under subsection (I) above only if the applicant or operator:

(1.) Continue to own or control the operation with the unabated or uncorrected violation;

(2.) The violation remains unabated or uncorrected; and

(3.) The violation would cause the permittee to be ineligible under the permit eligibility criteria under the current rules and regulations.

(III) When a preliminary finding under subsection (I) above is made, a written notice shall be served on the permittee which must be based on evidence sufficient to establish a prima facie case that the permit was improvidently issued. Within thirty (30) days of receiving a written notice the permittee may challenge the preliminary finding by providing the DEQ Administrator with evidence as to why the permit was not improvidently issued under the criteria of subsections (I) and (II) above. Challenges under subsections (I) and (II)(1.) above shall use the procedures outlined in subsections (xiii) and (xiv)(A) through (E) ~~(D) through (F)~~ above when the challenge is related to whether the permittee or operator currently own or control, or owned or controlled, a surface coal mining operation.

The proposed revision above corrects an incorrect cross-reference. (February 14, 2012 Concern Letter, Section 14.) The above subsections were also revised to consistently use terms that were previously defined.

(IV) The DEQ Administrator shall serve the permittee with written notice of a proposed suspension or rescission together with a statement of the reasons for the proposed suspension or rescission, if after considering any evidence submitted under subsection (III) above the DEQ Administrator finds that a permit was improvidently issued under the criteria of subsections (I) and (II) above or the permit was

provisionally issued under Chapter 12, Section 1(a)(x)(D)(II) and one or more of the conditions in Chapter 12, Section 1(a)(x)(D)(III) exists. If a permit suspension is proposed, sixty (60) days notice shall be provided and if a permit rescission is proposed one hundred twenty (120) days notice shall be provided. If the permittee wishes to appeal the notice, the permittee must exhaust administrative remedies under the procedures of the Wyoming Environmental Quality Act, the Department's Rules of Practice and Procedure, the Wyoming Administrative Procedure Act and Chapter 12 of these Rules and Regulations.

The proposed revision above adds a state counterpart to 30 CFR 773.22(a)(2) which requires that the LQD must provide written notice of a proposed suspension or recession for provisionally issued permits when one or more of the conditions at Chapter 12, Section 1(a)(x)(D)(III) exists. (February 14, 2012 Concern Letter, Section 14.) The final sentence in subsection (IV) was added in response to the OSM's comments on the LQD's informal submittal (Page 29-30, OSM Informal Review Table).

(V) Appeals regarding the notice shall be governed by the Wyoming Environmental Quality Act, DEQ Department's Rules of Practice and Procedure, the Wyoming Administrative Procedure Act and Chapter 12 of these Rules and Regulations. All administrative remedies shall be exhausted if a permittee wishes to appeal the notice under the above statutes and regulations. The times specified in subsection (IV) above shall be applicable unless the Environmental Quality Council has granted a stay for temporary relief to provide the administrative review in subsection (VII) below.

The proposed revision above is intended to address an OSM concern regarding the requirement that administrative remedies must be exhausted prior to appeal. (February 14, 2012 Concern Letter, Section 14.)

(VI) Service. For purposes of this Section, service of the notice shall be performed on the permittee by certified mail, or by any alternative means consistent with the rules governing service of a summons and complaint under Rule 4 of the Wyoming Rules of Civil Procedure. Service shall be complete upon tender of the notice of proposed suspension or recession and any attached information or of the certified mail and shall not be deemed incomplete because of refusal to accept. Except as provided in subsection (VII) below, the DEQ Administrator shall suspend or rescind the permit upon expiration of the notice periods provided in subsection (IV) above unless the permittee has submitted evidence and the DEQ Administrator finds that:

The proposed revisions above are intended to address a concern noted by the OSM regarding service of notice. (February 14, 2012 Concern Letter, Section 14,)

(1.) The violation has been abated or corrected to the satisfaction of the agency with jurisdiction over the violation;

(2.) The permittee or operator no longer owns or controls the relevant operation;

Typographical error corrected (February 14, 2012 Concern Letter, Section 1j)

(3.) The ~~DEQ's~~ Administrator's finding for suspension or rescission was in error;

(4.) The violation is the subject of a good faith administrative or judicial appeal, unless there is an initial judicial decision affirming the violation and that decision remains in force;

(5.) The violation is the subject of an abatement plan or payment schedule that is being met to the satisfaction of the agency with jurisdiction over the violation; or

(6.) The permittee is pursuing a good faith challenge or administrative or judicial appeal of the relevant ownership or control listing or finding unless there is an initial judicial decision affirming the listing or finding and that decision remains in force.

...

(IX) If the ~~DEQ~~ Administrator suspends or rescinds your permit under this section, you may request administrative review of the notice under the procedures of Appeals regarding the decision shall be governed by the Wyoming Environmental Quality Act, ~~DEQ~~ the Department's Rules of Practice and Procedure, the Wyoming Administrative Procedure Act and Chapter 12 of these Rules and Regulations, or alternatively you may request judicial review of the notice provided all other administrative remedies have been exhausted.

Subsection (IX) above includes revisions that are intended to address the OSM concern that the current rules did not include counterpart requirements related to the notice of suspension or rescission. (February 14, 2012 Concern Letter, Section 14.) Subsection (IX) was also revised in response to the OSM's comments on the LQD's informal submittal (Page 31, OSM Informal Review Table).

...

(b) All procedural requirements of the Act and the regulations relating to review, public participation, and approval or disapproval of permit applications, and permit term and conditions shall, unless otherwise provided, apply to permit revisions, amendments, renewals and permit transfers, assignment or sale of permit rights. In addition, the following requirements are applicable.

...

(ii) All requirements imposed by W.S. § 35-11-408 and this provision for permit transfers, assignment or sale of permit rights. These requirements shall be met, as evidenced by the written approval of the statement of qualifications by the Administrator and Director, prior to any permit transfer, assignment or sale of permit rights. ~~Permit transfers shall not be subject to the requirements of W.S. § 35-11-406(g).~~

(A) The potential transferee shall obtain a renewal bond by either transfer of the permit holder's bond, written agreement with the permit holder, or providing other sufficient bond or equivalent guarantee.

(B) The statement of qualifications shall contain all legal, financial, compliance and related information required by Chapter 2, Section 2(a)(i) through (iii) which would be required if the potential transferee were the original applicant for the permit and, in addition, the name, address and permit number of the existing permit holder.

The revisions above were drafted in response to the OSM's comments provided in response to the LQD's informal submittal which required further clarification of the procedures applicable to "permit transfer, assignment or sale of permit rights" (Page 19, OSM Informal Review Table).

DEPARTMENT OF ENVIRONMENTAL QUALITY

LAND QUALITY DIVISION

CHAPTER 16

INSPECTIONS, ENFORCEMENT AND PENALTIES FOR

SURFACE COAL MINING OPERATIONS

...

Section 2. **Enforcement.**

(h) Within sixty (60) days after issuing a cessation order, the DEQ will notify in writing the permittee, the operator, and any person who has been listed or identified by the applicant, permittee, or OSM as an owner or controller of the operation as defined in Chapter 1 of these rules and regulations. All cessation orders remain in effect and, unless otherwise ordered, do not affect continuing reclamation operations, until the condition, practice or violation has been abated, or until vacated, modified or terminated in writing by the designated representative, Administrator, Director, or Council. Within 30 days after the issuance of a cessation order the permittee must provide or update all the information required under Chapter 2 related to ownership and control. Information does not need to be provided if a court of competent jurisdiction granted a stay of the cessation order and that stay remains in effect. [Within sixty \(60\) days of any addition, departure, or change in position of any person identified in Chapter 2, Section 2\(a\)\(i\)\(E\), the applicant or permittee shall provide the information required by that section and the date of any departure.](#)

The February 14, 2012 OSM Concern Letter stated that Wyoming needed to add the clarifying language above in order to be consistent with 30 CFR 774.12(b). (February 14, 2012 Concern Letter, Section 16.) Subsection (h) was further revised to add the last sentence above in response to the OSM's comments on the LQD's informal submittal. The OSM stated that the above language was more appropriate to Chapter 16, rather than Chapter 2 as originally proposed (Pages 25 and 33, OSM Informal Review Table).

...

(j) If at any time, the DEQ discovers that any person owns or controls an operation with an unabated or uncorrected violation, the LQD will determine whether enforcement action is appropriate under this Chapter. Results of each enforcement action, including administrative and judicial decisions, shall be entered into AVS.

Typographical error corrected (February 14, 2012 Concern Letter,

Section 1k)

...

Section 4. **Individual Civil Penalties**

(a) For purposes of this section:

(i) “Knowingly” means that a person who authorized, ordered, or carried out an act or omission knew or had reason to know that the act or omission would result in either a violation or a failure to abate or correct a violation;

(ii) “Violation, failure or refusal” means:

(A) A violation of a condition of a permit issued pursuant to the State program or Federal lands program; or

(B) A failure or refusal to comply with any order issued under Section 2 of this Chapter, or any order incorporated in a final decision issued by the Director under the Act, except for failure to pay a civil penalty.

(iii) “Willfully” means that a person who authorized, ordered or carried out an act or omission that resulted in either a violation or a the failure to abate or correct a violation ~~an individual~~ acted:

(A) Intentionally, voluntarily or consciously; and

(B) With intentional disregard or plain indifference to legal requirements.

The proposed revisions above are intended to clarify the definition of “willfully” as required in the August 17, 2011 OSM Concern Letter. (August 17, 2011 Concern Letter, Section 17.)

...

(b) An individual civil penalty may be assessed when:

(i) The Director may assess an individual civil penalty as outlined in W.S. §35-11-902(b), against any corporate director, officer or agent of a corporate permittee who knowingly and willfully authorized, ordered or carried out a violation, failure or refusal, except as provided in subsection (ii) below.

The above revision was made in response to the August 17, 2011 Concern Letter, Section 18.

CONCLUSION

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 provision of the Wyoming Administrative Procedures Act, find as follows:

1. These rules provide for the regulation of noncoal mining and reclamation operations in accordance with the requirements of W.S. § 35-11-101 through W.S. § 35-11-1803, As Amended (Wyoming Environmental Quality Act), and the requirements of the Surface Mining Control and Reclamation Act, (P.L. 95-87, As Amended).
2. These rules and regulations are as effective as those promulgated by the Secretary of the Interior pursuant to P.L. 95-87, As Amended.
3. The Department of Environmental Quality, Land Quality Division, Coal Rules and 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 Land Quality Division Coal Rules and Regulations are reasonable and necessary for the effectuation of the Wyoming Environmental Quality Act, W.S. § 35-11-101 through W.S. § 35-11-1803, As Amended.
5. These Land Quality Division Coal Rules and Regulations are necessary and appropriate to protect the public health, safety, welfare, and environment of the State of Wyoming.

Dated this _____ day of _____, 2012.

Environmental Quality Council