Shannon Anderson

Please see attached. Many of the attachments to the comments were filed with our submission in March.

ENCOURAGING RESPONSIBLE DEVELOPMENT TODAY ~ FOR TOMORROW

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POWDER RIVER BASIN
Resource Council

September 17, 2018

Land Quality Advisory Board
Attn: Craig Hults, Natural Resources Program Principal
Land Quality Division, Department of Environmental Quality
200 W. 17th Street, Suite 10
Cheyenne, WY 82002
Submitted online via: http://lq.wyomingdeq.commentinput.com

RE: Comments on Proposed Amendments to Chapters 11 and 20 of the Coal Rules and Chapters 6 and 12 of the Noncoal Rules

Dear Chairman Gampetro & Advisory Board Members,

Thank you for the renewed opportunity to submit comments on DEQ's proposed amendments to the coal and non-coal financial assurance rules. These comments are submitted on behalf of our members, many of whom live, work, and/or recreate in areas adjacent to mining operations in the state.

Since DEQ did not significantly alter its proposed rules, we are submitting a modified version of our March 2018 comments for your reconsideration.

We are also attaching a rulemaking petition submitted in April 2018 to DEQ to eliminate self-bonding altogether. In denying the petition on May 18, 2018, DEQ Director Todd Parfitt called it "redundant" with the current rulemaking process and instructed that the petition "should be submitted to the LQD through the current rule making process . . ." We ask the Board and the LQD staff to consider the rulemaking petition as an amendment to the current set of rules proposed by DEQ.

We look forward to answering any questions and presenting more detailed information if needed during your meeting in Casper on Wednesday.

Introduction

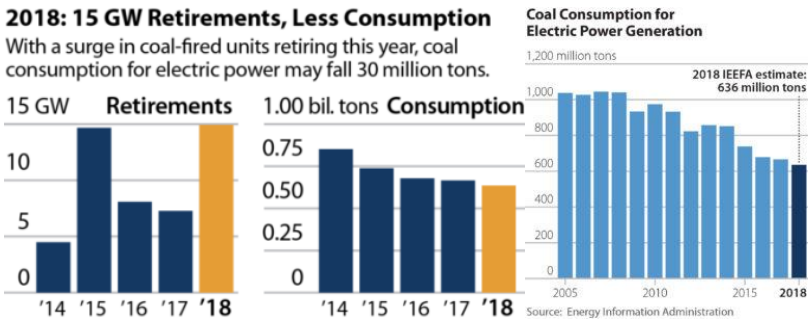
If mines go under without adequate bonding in place, the state will be left with the cleanup tab. Or worse, lands will be left unreclaimed if sufficient funds are not available. Bonding is an effective common sense approach to protecting the state, taxpayers, nearby landowners, and the public. But the right bonding rules have to be in place in order to provide protections at the time the "worst-case scenario" comes to pass. We appreciate the DEQ staff's work on these proposed rules and, with the modifications suggested below, we look forward to their adoption.

The first part of our comments below provides background and information on why it is absolutely necessary that adequate financial assurance is in place to ensure reclamation success

at mines in Wyoming, particularly given the heightened risks presented by current coal and uranium markets and the past failures of current self-bonding rules. The second part of our comments provides feedback on the proposed rules, and in some places, suggests changes in regulatory language.

The Growing Risks of Inadequate Financial Assurance for Coal Mines

It is no secret that the coal industry is in structural decline. Every few weeks, there is a new announcement that another coal-fired power plant using Powder River Basin coal will be retired. Wyoming coal production is down significantly from a few years ago and is expected to continue to decline.



The Institute for Energy Economics & Financial Analysis recently reported that:

> *Competition from cheap natural gas, the growing uptake of solar- and wind-powered generation, and little growth in electricity demand have combined to shrink the market for coal. The total amount of coal-fired capacity likely to be retired this year over 2017 will double, to 15,000 megawatts from about 7,300 megawatts.*[1]

In similar findings, Moody's Investor Service estimates that about 56 gigawatts worth of coal capacity in the Great Plains – an area that consumes a significant amount of Wyoming coal[2] – has an operating cost higher than $30/MWh and faces lower capacity factors going forward, and potentially early retirement.[3] Moody's noted that wind power purchase agreements average around $20/MWh in the Midwest and "This cost difference is causing coal-fired power plants to lower their production, especially during the off-peak hours, and in some cases to retire them."

Texas – the state that consumes the largest amount of Powder River Basin coal – is also facing a number of coal plant retirements in response to cheaper renewable energy and natural gas.[4]

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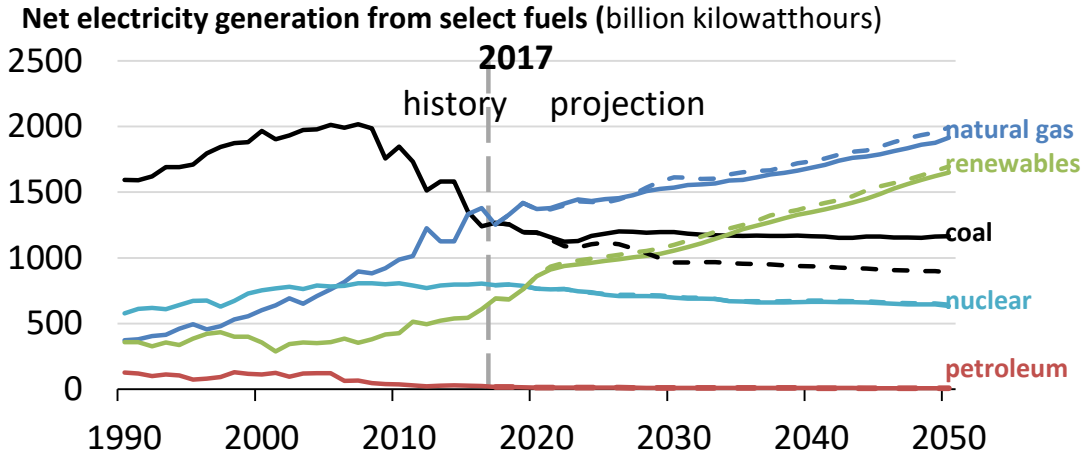
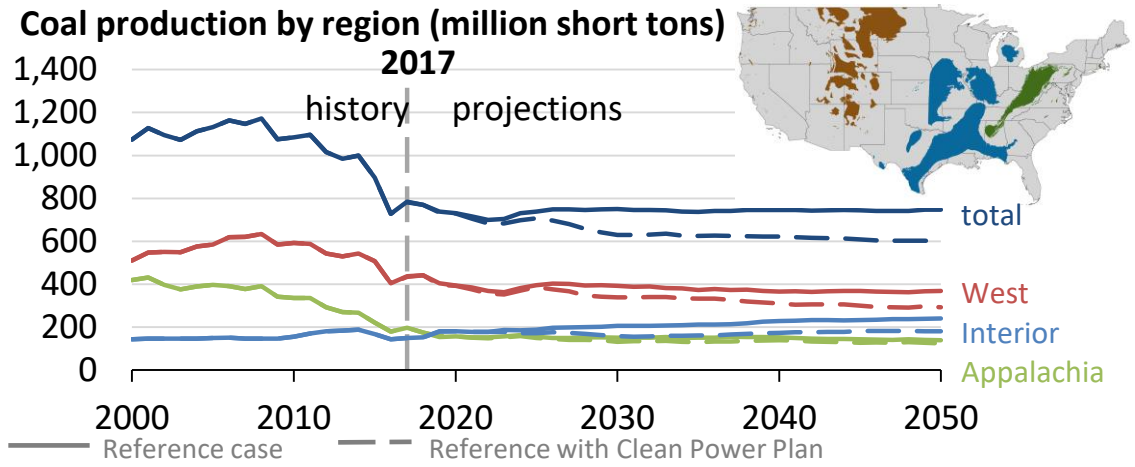
[1] Institute for Energy Economics and Financial Analysis, *U.S. Coal: More Market Erosion Is on the Way*, February 2018 (attached to March 2018 comments)
[2] See map of 2015 deliveries from top 10 mines touched by bankruptcy prepared by S&P Global Market Intelligence (attached to March 2018 comments).
[3] Moody's Investor Service, *Rate-Basing Wind Generation Adds Momentum to Renewables*, March 15, 2018
[4] http://ieefa.org/wind-booms-coal-suffers-oversupplied-texas-grid/ ; http://ieefa.org/ieefa-texas-latest-u-s-coal-plant-shutdown-stems-saga-investors-not-see-change-coming/

On a long-term basis, the Energy Information Administration (EIA) estimates that coal's share of U.S. electricity production will continue to decline through at least 2022, even irrespective of carbon regulation. With carbon regulations, declines will be steeper and will continue until at least 2030. The EIA is noted for its conservative estimates and has in the recent past often underestimated the decline in coal vis-à-vis the increase in renewable energy.[5]



This decline in coal-fired power results in corresponding declines in estimated coal production.



While the Trump Administration has proposed to replace the Clean Power Plan with the Affordable Clean Energy Rule ("ACE"), utilities have responded that their plans to retire and replace coal power have not changed.

> S&P Global Market Intelligence identified the top owners of coal generation in the U.S. and attempted to contact each about potential efficiency improvement projects in light of the Affordable Clean Energy rule, or ACE rule, proposal aimed at eliminating barriers to investing in existing coal plants. Responses from about 20 electric utilities had several common themes: they already completed many improvements, remain cautious about the timing of the rule and are committed to shifting to cleaner generation . . .

[5] http://www.energyandpolicy.org/eia-forecasts-are-frequently-wrong/

> Even utilities with coal-heavy generation portfolios are shying away from new investment in the fuel. AEP "has no plans to invest in new coal-fueled generation," company spokeswoman Melissa McHenry said. Duke Energy said it currently has no plans to invest in new coal plants either . . .
>
> Many power generators are simply reacting to customer demand to shift from coal generation to cleaner fuels. For example, CPS Energy, Xcel Energy Inc., Southern and Ameren Corp. subsidiary Ameren Missouri, known legally as Union Electric Co., all responded to S&P Global Market Intelligence's inquiry by highlighting a push to renewable or otherwise low- to no-carbon energy sources regardless of the ACE proposal.[6]

Even as the coal industry declines, the liability associated with outstanding reclamation continues to grow. A 2016 report from Moody's found that "as the industry undergoes a restructuring in the face of a severe demand contraction, and utilities continue to shift to natural gas consumption and away from coal, companies must shut mines amid drops in production, making reclamation liabilities a more pressing issue."[7]

These factors underscore that it is paramount that Wyoming addresses the burgeoning risk from reclamation liabilities head-on by reforming our bonding regulations.

The need to perfect Wyoming's bonding rules will only grow. The risk of inadequate financial assurance practices continues to increase as smaller and less financially secure coal operators come into Wyoming and larger companies look to escape cleanup liability. After the Alpha Natural Resources bankruptcy, the Eagle Butte and Belle Ayr Mines were turned over to a new company (Contura Energy) formed by Alpha's secured creditors, About a year later, Contura transferred the mines and their reclamation liabilities to a privately held company Blackjewel, LLC for essentially no payment. This pattern of transferring mineral assets and their associated liabilities to smaller and smaller operators is a familiar refrain in Wyoming, and it is an underlying cause of the state's current plethora of orphaned oil and gas wells and large state reclamation liabilities. We must learn from past mistakes and ensure that Wyoming prevents an orphan mine problem.

But while risk is growing, so is the opportunity to fix the historic shortcomings of our reclamation financial assurances structure. The time to reform Wyoming's financial assurance regulations is now. Only two years ago, the coal industry posted over $2 billion in self-bonds. Following the three large bankruptcies, coal companies have just under $300 million in self-bonds today. In other words, the impact of the proposed rules on the industry will be significantly less than even a year ago.

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[6] Darren Sweeney, Taylor Kuykendall and Ashleigh Cotting, Trump power plan unlikely to make case for coal, utilities say, September 11, 2018, https://platform.mi.spglobal.com/web/client?auth=inherit#news/article?id=46412604&cdid=A-46412604-13615

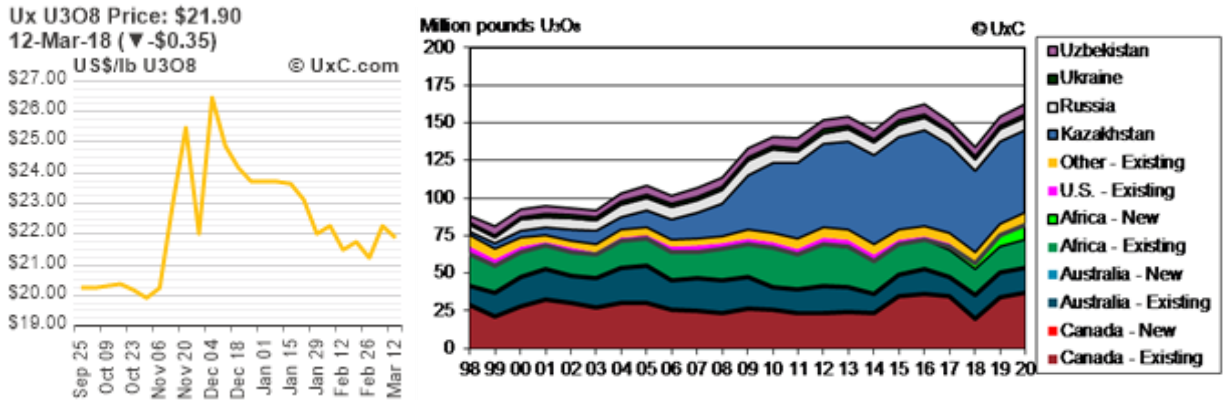
[7] Moody's Investors Service, *Coal Mining - North America: Reclamation Obligations a Mounting Burden on Industry in Restructuring*, August 2016.

Following the bankruptcies and other corporate restructuring, billions of dollars in corporate debt has been eliminated and company asset to liabilities ratios are greatly increased, making surety bonds more available and more affordable.[8] Now is the time to reform the rules, while companies have the financial capability to comply with the new standards.

Finally, strengthening coal mine bonding rules will ensure a financial guarantee that our land will be reclaimed and will also ensure reclamation jobs in our communities into the future.

Risk of Inadequate Financial Assurance for Uranium Mines

The uranium industry is also in a downward spiral. Yellowcake prices are at historic lows, and there is no foreseeable relief. Uranium is an international commodity and the U.S. produces a very small percent of global production and will never be a market maker.



Source: Ux Consulting Company, LLC: https://www.uxc.com/p/prices/UxCPrices.aspx

In 2016, Cameco Resources – Wyoming's largest uranium company – announced that it would be deferring new wellfield development at U.S. operations, and phasing down production at its largest mine in the state.[9] Production in 2017 was 67% lower than 2016 and the company plans to stop production later this year and close its Casper office.[10]

We are greatly concerned about the future of Wyoming's uranium industry, which, even in the best years, has always been at the brink of a bust. The reforms proposed to the financial assurance regulations are needed to limit the risk of this boom-bust industry and ensure the public is not left paying for reclamation work as the companies leave the state and mines close.

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[8] Cloud Peak announced on October 26, 2017 that the company had reduced the collateral held by its surety bond providers from 15% to 5.5% owing to "the improved Company and coal industry conditions." http://investor.cloudpeakenergy.com/press-release/earnings/cloud-peak-energy-inc-announces-results-third-quarter-and-first-nine-months-7

[9] http://www.wyomingbusinessreport.com/industry_news/energy_production/cameco-closing-casper-office/article_80654b50-1cbe-11e8-9576-f3b78179a5aa.html; https://www.camecoresources.com/business

[10] https://www.cameco.com/businesses/uranium-operations/curtailed/smith-ranch-highland

Bentonite, Trona, Sand, Gravel, & Other Types of Mines

Given the size – and associated risk – of many of the smaller mining companies, these proposed rules changes are important. Reducing the risk to Wyoming and taxpayers from all sectors of the mining industry will ensure financial stability for the state and ensure future reclamation and jobs in that sector.

Self-Bonding

Our organization does not believe it is ever appropriate for the state to allow a mine operator to self-bond. Self-bonding is not actually bonding at all and provides no protection for the state and the public in the case of company forfeiture. Wyoming should follow the lead of Montana, which does not allow self-bonding, and of states like Colorado that are phasing out the practice.

While self-bonding is recognized in the Wyoming Environmental Quality Act, it is left to the discretion of the regulator. The law specifically says the administrator "may" accept a self-bond – not that the administrator must or shall. No matter what the regulations are amended to say, we encourage DEQ staff to use that statutorily granted discretion to deny self-bonding applications when there is any question of the operator's true financial strength. This exercise of discretion is consistent with OSMRE's 2016 Policy Advisory on Self-Bonding, which advised:

> *Given the current conditions of the coal market, the announced retirement of a significant amount of coal-fired power plants this year, the forecasted retirements of coal-fired power plants through 2021, and the approximately $2 billion in self-bonded obligations previously held by just three companies now in, or recently emerged from bankruptcy, each regulatory authority should exercise its discretion and not accept new or additional self-bonds for any permit until coal production and consumption market conditions reach equilibrium events which are not likely to occur until at least 2021.*[11]

Self-bonding is a privilege, not a right, and DEQ has significant discretion to use its regulatory authority to limit or deny self-bonding. We do feel that the draft regulations before you are significant exercise of that discretion, and compliment WDEQ for their thoughtful attention to the growing risks of self-bonding defaults.

<u>Affirm Regulatory Discretion to Self Bond</u>

<u>Proposed Amendments</u>

DEQ must amend the language in Section 2 to affirm the regulatory discretion afforded to the agency under the statute. We propose amending the paragraph to read as follows:

The following bond instruments ~~are~~ **<u>may be</u>** accepted by the Division . . .

[11] While the advisory was rescinded on October 12, 2017 by the new administration, the rationale and background information are still persuasive authority for denial of self-bond applications in Wyoming and other coal states. The rescission was based on achieving the new "administration's goal of ending the war on coal" on not on any basis under SMCRA or state law.

Likewise, to maintain regulatory discretion, DEQ should not offer a successive renewal for self-bonds as proposed in Section 4(c)(ii). We recommend striking that entire paragraph.

Guarantee Required from the Ultimate Parent Entity

Although we do not believe self-bonding is appropriate for any mine given the current and projected state of the coal and uranium industries, we appreciate DEQ's efforts to close some loopholes in the current regulations and their attempts to ensure that only companies with a low risk of forfeiture are allowed to self-bond.

We support DEQ's proposal to require all self-bonds to be guaranteed by the ultimate parent entity – the top of the corporate ladder for a mining company subsidiary. This is important because when an ultimate parent entity files for bankruptcy, so will the mid-stream subsidiaries that are backing self-bonds.[12] The mid-stream subsidiaries are pledged as collateral for the ultimate parent entity's corporate debt, an arrangement known as an "upstream guarantee." Therefore, the financial health of the mining operator is inextricably tied to the health of the parent entity, and self-bonding qualifications should be judged on the parent entity, not the subsidiary.

Comments from mining companies have supported this change, and it seems to be a reasonable, easy to implement, step to better protect the public.

Proposed Amendments

To maintain DEQ's regulatory discretion, in Section 4(a)(i)(H) we propose the language to be amended as follows:

(H) A written guarantee **acceptable to the Administrator**

In the following paragraph we propose the following:

. . . but not to exceed the actual reclamation costs, **including all indirect and contingency costs**

We propose to amend (J)(II) to include a national look at self-bond liability:

(II) For the Administrator to accept an ultimate parent entity guarantee, the total amount of the ultimate parent entity guarantor's outstanding self-bonds and guaranteed self-bonds **in Wyoming or in any other state** shall not exceed 25 percent of the ultimate parent entity guarantor's tangible net worth in the United States.

[12] This is the situation that occurred in the Peabody and Arch bankruptcies, with bond guarantors Peabody Investments Corporation and Arch Western Resources being a part of the parent entity bankruptcies. Alpha Coal West's self-bonds were already guaranteed by the ultimate parent Alpha Natural Resources prior to bankruptcy.

Limiting self-bonding to a percentage of the required bond amount

We strongly agree with DEQ's proposal to limit the portion of a bond that can be covered by self-bonds. This will reduce the regulatory risk and ensure that at least a portion of the bond amount will be immediately available to regulators in the case of forfeiture.

Demonstrated financial solvency

We support DEQ's proposed use of credit ratings to determine eligibility for self-bonding. As recent history clearly demonstrates, the financial fitness metrics in the current regulations do not properly ensure that only healthy, stable companies with low risk of bankruptcy can self-bond. Credit ratings recognize an operator's history of financial solvency but also provide a forward-looking and more "real-time" view of a company's financial status. We believe switching to bond ratings or other financial ratings issued by recognized third-party entities will allow regulators to identify problems and replace self-bonds before it is too late (e.g. the company is already in, or on the verge of, bankruptcy). As the references cited above indicate, credit rating companies like Moody's are actively monitoring the coal industry and evaluating the ever-changing risk of coal companies.

Proposed Amendments

For ease of reading, and to clarify that the credit rating used to qualify for self-bonding must be current, we recommend amending the proposed language to read:

> (I) Have a rating for all bond issuance actions and long term credit rating **issued** within the current year . . .

We support DEQ's proposal to further limit self-bonding by companies with lower bond ratings. However, we believe no company with a bond rating below an "A" should be self-bonded, and we recommend striking the proposed Section 4(a)(i)(F)(III) on page 8 of the statement of basis.

In the following paragraph dealing with split ratings, we recommend amending the language to select the lowest rating. We propose that paragraph to read as follows:

> (IV) In the event of a split rating, the Administrator will apply the lowest rating under (I), (II), or (III) of this subsection.

As a result of this amendment, the language in (c)(B) that provides "Additional information may be requested by the Administrator when a split rating occurs" should be removed.

We also propose requiring reporting of credit rating devaluations within ten days in (e)(i) because the reporting is a mere paper exchange and can easily be accomplished in that timeframe, so that paragraph would be amended to read as follows:

> (i) If a devaluation in ~~the~~ **any** credit rating occurs, the Administrator shall be notified within ~~thirty (30)~~ ten **(10) days** of the change . . .

Inclusion of off-balance-sheet liabilities

We support DEQ's proposed language adding off-balance-sheet liabilities to the definition of "liabilities" under the rules. Coal companies maintain a variety of liabilities off their balance sheets. These liabilities are not covered in the current definition and should be included.

Proposed Amendments

We ask DEQ to define "off-balance sheet liabilities" so it is clear to the operators – and the regulators – what exactly they include.

We also propose amending the definition of "net worth" in Section 1(d) to read as follows:

> (d) "Net worth" means total assets minus total liabilities including on and off-balance sheet liabilities, **including, but not limited to all self-bonds held by the company in any state.**

We propose the definition of "tangible net worth" to read as follows:

> (g) "Tangible net worth" means net worth minus intangibles, ~~such as~~ **including, but not limited to** goodwill, patents, or royalties.

Letters of Credit

We also support DEQ's amendments to clarify letter of credit requirements, and strongly support DEQ's elimination of standby letters of credit.

Proposed Amendments

We propose adding qualifications for the certified public accountant in (a)(ii). Not all CPAs would be able to make this certification.

We propose amending paragraph (a)(v)(C) to read as follows:

> (C) Upon the incapacity of a bank ~~by reason of~~ **for any reason including** . . .

In that same paragraph, and in the paragraphs that follow, we suggest changing all of the references to the "Director" to "Administrator" to be consistent with who at DEQ is doing the review. The regulations as they currently read switch back and forth between "Director" and "Administrator."

Finally, and perhaps most importantly, we propose a review period for the letters of credit. We suggest that DEQ add a provision that will require the letters of credit to be reviewed at the time of the operator's annual report and annual bond review. This will ensure that all requirements remain met throughout the life of the mine.

Elimination of Personal Property Collateral Bonds

We support DEQ's proposed elimination of personal property collateral bonds. Personal property of the mine – mining equipment and machinery – will not provide adequate funding for reclamation work. This equipment and machinery is difficult to value at any time, but it is particularly problematic in the "worst-case scenario" situation of mine closure or liquidation. Once a company is in bond forfeiture it is highly likely that the value of their mining equipment on site at the closed mine will be at liquidation level, much less than the recorded "fair market value" of such equipment. We know from past estimates during coal company bankruptcies that liquidation prices of this equipment often realize only pennies on the dollar. This means that at the time the state would need the money the most, the equipment would likely be sold for much less than the cost of reclamation, if it is able to be sold at all.

For instance, during its bankruptcy Peabody disclosed that:

> "Machinery and equipment reflect the value of all other fixed assets owned by the Debtors, net of accumulated depreciation or amortization. This category primarily consists of mining and support equipment, preparation plants, vehicles, power distribution equipment and office equipment. As the market continues to be filled with new equipment, combined with the large scale of Peabody's operations, which would result in a substantial amount of equipment being added to an already saturated market, the Debtors anticipate that the liquidation values of machinery and equipment would range between 23% and 37% of the net book values, consistent with recent appraisals."[13]

Outside of the bankruptcy context, the Beulah Mine in North Dakota recently reported results from selling some of its equipment as part of a planned reduction at the mine:

> The auction brought in 146 bidders willing to stand out in the muggy, sweat-inducing sunshine and another 35 online bidders, far away from the scene. Dozers worth $1 million and change new, sold for $140,000 used, oiled and well-maintained by the shop crew. Coal haul trucks with tires that dwarf a grown man sold for $60,000 and on down. Cranes went for $8,000.[14]

While somewhat anecdotal, these stories paint a cautionary tale that Wyoming should not be in the business of accepting personal property collateral bonds.[15]

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[13] Peabody Energy Corporation, Liquidation Analysis and Projections, Exhibits B and C to Disclosure Statement with Respect to Joint Plan of Reorganization of Debtors and Debtors in Possession dated December 22, 2016, filed with the Eastern District of Missouri Bankruptcy Court

[14] http://bismarcktribune.com/news/state-and-regional/coal-mine-ends-days-at-auction/article_dc252254-aef8-54ad-849c-8ede77af2b7b.html

[15] Additionally, the economic conditions most likely to drive a company into bankruptcy will impact the entire industry, thus destroying or significantly limiting the market for mining equipment. We suspect that the past decade of declining mine production in the PRB has produced a surplus of mining equipment at active mines. Therefore, we do not believe there would be a robust market for used mining equipment held by the state as bond collateral.

Concerns with Real Property Collateral Bonds

We recognize that the risk of these bonds is quite different than that of personal property bonds. However, we still have concerns about real property collateral bonds, and how their use will likely grow as more companies replace self-bonds.

First, the property must be valued in a way that will allow the state full recovery even in the "worst-case scenario" situation. Peabody disclosed during its bankruptcy that "Based on the Debtors' recent appraisals and current market conditions, it is estimated that the recovery related to land and coal interests would range between 24% and 35% of the net book values." This is concerning especially as DEQ is proposing to allow lands within the permit boundary to be used as collateral.

Property values are not stable for any property and could present a risk that the state would not be able to sell the property to cover reclamation costs. A recent cautionary tale from Utah exemplifies this. A mine there posted a condominium as collateral. The condo was sold for $498,000 – almost a $100,000 less than its original $585,000 appraisal. The $498,000 did not cover the $520,000 reclamation bond.[16] We appreciate DEQ's proposed requirement to appraise the property every three years, but still have concerns about whether this would be sufficient in the case of a rapidly declining company or a rapidly busting geographic area where the mine is located.

Second, while the rules limit self-bonding to 75% of reclamation liability, they do not similarly limit property collateral bonds to 75% of the bond amount. To ensure some easily accessible funds are available immediately in the case of bond forfeiture, we propose adding in a provision to limit real property bonds to 75% of the bond amount. Additionally, real property bonds should not be available to make up the 25% difference between self-bonds and the bond amount.

Third, we believe it should be clarified that coal should not be considered as part of the value for any property within the permit boundary.

Concerns with Securities

We understand that the current regulations allow government securities to be used as a bond instrument. However, we question whether a State government security affords the appropriate protection to the public.

<u>Proposed Amendments</u>

We suggest either requiring investment-grade securities, limiting acceptable bonds to federal treasury bonds, or including a similar qualification to ensure that there will be adequate funds available for reclamation work in the case of company forfeiture. If government bonds are not currently used, we suggest striking the section altogether.

[16] See attached news article.

We also propose adding a requirement for annual re-valuation of the securities, with a requirement similar to: "The operator must submit proof of the current value of the securities on an annual basis." This is standard language for reserve accounts in most bond indentures.

Thank you for considering these comments. We look forward to discussing the proposed rules with you at your upcoming meeting.

Sincerely,

Shannon Anderson

Shannon Anderson, Wyo. Bar # 6-4402
Powder River Basin Resource Council
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sanderson@powderriverbasin.org

PETITION TO AMEND WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY RULES

Pursuant to Wyo. Stat. § 16-3-106, and Chapter 3 of the Wyoming Department of Environmental Quality ("DEQ" or "Department") rules of practice and procedure, Powder River Basin Resource Council ("Resource Council" or "Petitioner") hereby petitions the Department to approve amendments to the Land Quality Division rules and regulations to eliminate coal mine self-bonding and to strengthen the coal financial assurance rules.

PETITIONER

The Resource Council, along with its over 1,000 members throughout the state, advocates for the conservation of Wyoming's unique land, mineral, water, and clean air resources consistent with responsible use of those resources to sustain the livelihood of present and future generations. Since its founding in 1973, the Resource Council has worked on coal mining issues in Wyoming, advocating for responsible reclamation and bonding policies, reduced air pollution, and better water management. Petitioner's members include Wyomingites who live, work, ranch and farm, and/or recreate near or adjacent to coal mines.

INTRODUCTION

The Surface Mining Control and Reclamation Act ("SMCRA") and its state equivalent Wyoming Environmental Quality Act ("WEQA" or "Act") established a modern system of coal mine permitting and enforcement. With a backdrop of hundreds of abandoned mines left for taxpayer cleanup, one of the main goals of these laws was to mandate reclamation of all "post-

law" mines.[17] To that end, SMCRA and WEQA require (1) contemporaneous reclamation of mines in accordance with a mine's reclamation plan; (2) demonstrated reclamation success prior to bond release; and (3) "worst-case" bonding to cover the full cost of third-party reclamation should a company default on its obligations at any time during the life of the mine.

In many ways, bonding is the backbone of our coal mining laws. A properly designed bonding regulatory framework will ensure that the regulatory authority will have sufficient funds to reclaim the site if the permittee fails to complete the reclamation plan approved in the permit. On its surface, the law is clear and simple, but in practice it is complicated by certain regulatory loopholes that thwart the very purpose of reclamation bonding.

One of these loopholes is self-bonding, which in reality is not a bond at all, but merely a promise to pay from the company. A company's self-bonding promise is broken through bankruptcy and forfeiture – the very times when a regulatory authority needs to collect on a bond.

Weaker coal markets both incentivize self-bonding and render it more dangerous to the public interest. As evidenced by recent bankruptcies, self-bonding no longer fulfills the objectives and purposes of SMCRA and WEQA, and it should be eliminated from Wyoming's regulations.

SELF-BONDING DOES NOT FULFILL THE OBJECTIVES AND PURPOSES OF THE WYOMING ENVIRONMENTAL QUALITY ACT

SMCRA provides:

> The regulatory authority may accept the bond of the applicant itself without separate surety when the applicant demonstrates to the satisfaction of the regulatory authority the existence of a suitable agent to receive service of process and a history of financial solvency and continuous operation sufficient for authorization to self-insure or bond such amount or in lieu of the establishment of a bonding program, as set forth in this section, the Secretary may approve as part of a State or Federal program an alternative system

[17] Cleanup of "pre-law" mines is covered through the federal Abandoned Mine Land (AML) fund.

> that will achieve the objectives and purposes of the bonding program pursuant to this section.

30 U.S.C. § 1259(c). Under this authority, Wyoming has elected to allow self-bonding. However, similar to SMCRA, the WEQA provides that self-bonds *may* be accepted *only if* the operator demonstrates "a history of financial solvency" and *only if* "the objectives and purposes of [the WEQA]" are being fulfilled. Wyo. Stat. § 35-11-417(d).

Self-bonding does not achieve the main objectives and purposes of the WEQA's bonding system to (1) ensure available funds to complete reclamation work and (2) to encourage timely and effective reclamation practices.

1. Self-Bonding Does Not Make Funds for Reclamation Available at the Time of Forfeiture

First, one of SMCRA's fundamental requirements is that reclamation bonds "shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture." 30 U.S.C. § 1259(a). The WEQA mirrors these requirements by requiring a bond amount to include "the administrator's estimate of the additional cost to the state of bringing in personnel and equipment should the operator fail or the site be abandoned." Wyo. Stat. § 35-11-417(c)(i). In other words, the purpose of reclamation bonding under SMCRA and the WEQA is to ensure sufficient funding for the regulatory agency to complete reclamation work in the event of forfeiture.

The objectives and purposes of SMCRA and the WEQA are not fulfilled by allowing companies to self-bond because the public is left at risk for covering reclamation costs should companies default on obligations through a bankruptcy proceeding or if they otherwise walk away and abandon reclamation obligations.

The self-bonding regulations were supposed to be designed to grant the privilege of self-bonding only to companies with demonstrated financial health – those with a "history of

financial solvency." However, as the Government Accountability Office recently confirmed in an audit,[18] the current regulations make it difficult for a regulator to truly determine whether a company is financially healthy. Additionally, even if a company is financially stable now, given the complexity and often rapidly-changing dynamics of energy markets, by the time a regulator decides that a company should no longer qualify, it may be too late to require that company to replace its self-bonds.

This situation is not just hypothetical. It has played out three times over during the recent coal company bankruptcies. In all three cases, companies entered Chapter 11 bankruptcy with self-bonds. The self-bonds amounted to roughly $1.5 billion in reclamation work with no third-party backing for that amount. During the bankruptcies, had the companies liquidated the mines or otherwise forfeited their obligations, regulators would have only obtained pennies on the dollar - or perhaps nothing at all - because of the lower priority of the companies' self-bonds respective to other more senior and secured debt.

This situation was forewarned by OSM in the promulgation of self-bonding regulations in 1983:

> In the event of bankruptcy, the regulatory authority would probably be in the position of an unsecured creditor. Typically, the regulatory authority would have to go through bankruptcy proceedings to secure payment on the indemnity agreement. Bankruptcy proceedings are often lengthy and involved, and the regulatory authority could have to settle on less than 100% payment on the indemnity agreement.[19]

This means that the purpose of bonding to ensure sufficient funds for the regulator to carry out reclamation work in the case of forfeiture will not be achieved through self-bonding.

While the mines covered by the three Chapter 11 bankruptcies ultimately remained in operation and no bonds were forfeited, the state might not be so lucky during the next round of

[18] A copy of this report is attached.

[19] *See* 48 Fed. Reg. 36418 at 36422 (Aug. 10, 1983).

bankruptcies. With smaller and more risky operators coming in to Wyoming, like Blackjewel, LLC, and Ramaco Carbon, LLC, and with the coal industry continuing to contract, now is the time to eliminate self-bonding to make sure the state is never placed in the position of having to foot even a dollar of reclamation costs for "post-law" mines, as that would go against the purpose of SMCRA and the WEQA. As discussed above, the purpose of bonding is to ensure the funds will be available at the time the regulator needs it most: when the company is in bankruptcy or has forfeited its obligations. Self-bonding simply cannot achieve that purpose.

In contrast, third-party surety bonds, cash bonds, and even collateral bonds are available to regulators during forfeiture. When a surety company writes a surety bond, it guarantees the mining company's completion of the reclamation plan approved in the permit. If the permittee does not reclaim the site, the surety company must pay the bond sum to the regulatory authority. The regulatory authority may allow the surety to perform the reclamation in lieu of paying the bond amount, but the surety must comply with all reclamation requirements of the approved permit and regulatory program, including the revegetation responsibility period (at least 10 years in Wyoming). Under SMCRA, corporate surety bonds posted to meet the bonding requirements are non-cancellable, even for the failure to pay premiums or bankruptcy of the permittee.

For instance, Linc Energy recently went through Chapter 11 bankruptcy,[20] but that Chapter 11 turned into liquidation proceedings. Luckily, Linc Energy had surety bonds, not self-bonds, and as such, there were sufficient funds available to carry out the reclamation work in spite of the company forfeiture. Had Linc Energy entered bankruptcy with self-bonds, Wyoming would likely be dealing with an orphan site and no reclamation funds available to the regulator.

[20] *See* *http://www.kccllc.net/linc*

These recent bankruptcy examples underscore a simple fact: self-bonds will not be available to cover the full cost of reclamation work at the time of bankruptcy or forfeiture. Therefore, self-bonding does not achieve a primary purpose of the WEQA's bonding requirements.

2. Self-Bonding Does Not Provide the Required Incentive for Reclamation and Bond Release

The second main purpose of reclamation bonding is to create an incentive for timely and effective reclamation practices. The theory behind this is also simple: if bond amounts are high enough, a company will have an incentive to get that bond amount back by carrying out reclamation work.

For instance, the WEQA states: "The purpose of any bond required to be filed with the administrator by the operator shall be to assure that the operator shall faithfully perform all requirements of this act . . ." Wyo. Stat. § 35-11-117(a). These requirements include "reclaim[ing] the affected land as mining progresses in conformity with the approved reclamation plan." Wyo. Stat. § 35-11-415(b)(ix). This reclamation plan is required to have "[a] time schedule encouraging the earliest possible reclamation program consistent with the orderly and economic development of the mining property." Wyo. Stat. § 35-11-402(a)(iii).

Self-bonding does not create an incentive to comply with these requirements because mining companies do not actually post any cash or collateral for their bonds. The wide use of self-bonding prior to the three major bankruptcies is one reason why only around 10% of lands disturbed by mining have been released from final bond across the state, and why particularly large mines like Peabody Energy's North Antelope Rochelle Mine have not achieved any final bond release.

With such low bond release amounts, clearly Wyoming's bonding system is not achieving its desired purpose of incentivizing and encouraging compliance with contemporaneous reclamation practices, including bond release.

PROPOSED RULE AMENDMENTS

Petitioners propose amendments to the Land Quality Division regulations to 1) eliminate self-bonding; and 2) require at least 25% of the operator's bond to be a cash bond. Our proposed amendments are attached to this Petition.

Pursuant to DEQ Rules of Practice and Procedure Chapter 3 we respectfully request that you initiate rulemaking proceedings in accordance with this petition as soon as practicable.

Sincerely,

Shannon Anderson

With copies to: Environmental Quality Council Chair Meghan Lally, David Berry (OSMRE Denver), and Jeff Fleischmann (OSMRE Casper)

Since the DEQ has already proposed amended rules, our proposal further amends Chapter 11 from the DEQ draft dated March 5, 2018. Proposed rule language is provided in tracked changes (underlined is new language; ~~strikethrough~~ is language proposed to be deleted).

If DEQ wishes to proceed with these changes instead of its proposal, it could simply delete the current Chapter 11 and make minor amendments to the current Chapter 20.

DEQ Land Quality Division Coal Rules & Regulations

Chapter 11 - FINANCIAL ASSURANCE

Section 1. Definitions

(a) "Collateral" means the actual or constructive deposit of a perfected, first lien security interest in real property located within the State of Wyoming, in favor of the Wyoming Department of Environmental Quality which meets the requirements of this Chapter. The property may include land which is part of the permit area; however, land pledged as collateral for a bond shall not be disturbed under any permit while it is serving as security.

(b) "Irrevocable letter of credit" is a negotiated financial instrument that is used to pay a beneficiary issued by a banking institution to guarantee payment.

(c) "Liabilities" means obligations to transfer assets or provide services to other entities in the future as a result of past transactions including off-balance sheet liabilities.

(d) "Net worth" means total assets minus total liabilities including on and off-balance sheet liabilities.

(e) "Real property" means land and appurtenances as defined in Wyoming Statute (W.S.) §39-15-101(a)(v).

~~(f) "Self-bond" means an indemnity agreement in a sum certain made payable to the State, with or without separate surety. The indemnity agreement is signed by the permittee and, if applicable, the ultimate parent entity guarantor.~~

(g) "Tangible net worth" means net worth minus intangibles such as goodwill, patents or royalties.

(h) "Ultimate parent entity" means an entity not controlled by any other entity and is the topmost responsible entity which owns or controls the applicant ~~and is the guarantor for a selfbond~~.

Section 2. Acceptable Financial Instruments.

The following bond instruments ~~are~~ may be accepted by the Division: corporate surety, irrevocable letters of credit, ~~self-bond~~, federally insured certificates of deposit, cash, government

securities, and real property collateral. At all times, the operator must maintain at least 25% of its reclamation bond as a cash bond.

Section 3. Irrevocable Letters of Credit.

[No amendments proposed]

~~Section 4. Self-bonds.~~

~~(a) Application to Self-bond.~~

~~(i) Initial application to self-bond shall be made at the time the operator makes written application to the Administrator for a license to mine. An operator conducting an existing operation with greater than a 10-year life of mine remaining may submit an application to self-bond to the Administrator. The application shall be on forms furnished by the Administrator and shall contain:~~

~~(A) Identification of operator:~~

~~(I) For corporations, name, address, telephone number, state of incorporation, a description of the corporate structure, principal place of business and name, title and authority of person signing application, and statement of authority to do business in the State of Wyoming, or (II) For all other forms of business enterprises, name, address and telephone number and statement of how the enterprise is organized, law of the state under which it is formed, place of business, and relationship and authority of the person signing the application.~~

~~(B) Amount of bond proposed to be under a self-bond in accordance with W.S. § 35-11-417(c)(i). The proposed self-bond maximum amount shall not exceed seventy-five percent (75%) of the required bond amount.~~

~~(C) Type of operation and anticipated dates performance is to be commenced and completed.~~

~~(D) Brief chronological history of business operations conducted within the last five years which would illustrate a continuous operation for five years immediately preceding the time of application. The Administrator may allow a joint venture or syndicate with less than five years of continuous operation to qualify under this requirement, if each member of the joint venture or syndicate has been in continuous operation for at least five years immediately preceding the time of application.~~

~~(E) Information in sufficient detail to show good faith performance of past mining and reclamation obligations. The compliance information in the permit and/or annual reports may be referenced to satisfy part of this requirement.~~

~~(F) Financial information in sufficient detail to show that the operator and ultimate parent entity:~~

~~(I) Have a rating for all bond issuance actions and long term credit rating within the current year of "Aa3" or higher as issued by Moody's Investor Service, "AA-" or higher as issued by Standard and Poor's Corporation or "AA-" or higher as issued by Fitch Ratings. The operator is eligible for a maximum of seventy-five percent (75%) of the approved reclamation cost estimate in the most recent Director's bond letter.~~

(II) Have a rating for all bond issuance actions and long term credit rating within the current year of "A2" or higher as issued by Moody's Investor Service, "A" or higher as issued by Standard and Poor's Corporation or "A" or higher as issued by Fitch Ratings. The operator is eligible for a maximum of seventy percent (70%) of the approved reclamation cost estimate in the most recent Director's bond letter.

(III) Have a rating for all bond issuance actions and long term credit rating within the current year of "Baa2" or higher as issued by Moody's Investor Service, "BBB" or higher as issued by Standard and Poor's Corporation or "BBB" or higher as issued by Fitch Ratings. The operator is eligible for a maximum of fifty percent (50%) of the approved reclamation cost estimate in the most recent Director's bond letter.

(IV) In the event of a split rating, the Administrator has the discretion to determine which rating would be accepted and applied to (I), (II) or (III) of this subsection.

(G) A statement identifying by name, address and telephone number:

(I) A registered office which may be, but need not be, the same as the operator's place of business.

(II) A registered agent, which agent must be either an individual resident in this State, whose business office is identical with such registered office, a domestic corporation, or a foreign corporation authorized to transact business in this State, having a business office identical with such registered office. The registered agent so appointed by the operator shall be an agent to such operator upon whom any process, notice or demand required or permitted by law to be served upon the operator may be served.

(III) If the operator fails to appoint or maintain a registered agent in this State, or whenever any such registered agent cannot be reasonably found at the registered office, then the Director shall be an agent for such operator upon whom any process, notice or demand may be served. In the event of any such process, the Director shall immediately cause one copy of such process, notice or demand to be forwarded by registered mail, to the operator at his principal place of business. The Director shall keep a record of all processes, notices, or demands served upon him under this paragraph, and shall record therein the time of such service and his action with reference thereto.

(IV) Should the operator change the registered office or registered agent, or both, a statement indicating such change shall be filed immediately with the Land Quality Division.

(V) Nothing herein contained shall limit or affect the right to serve any process, notice or demand required or permitted by law to be served upon an operator in any other manner now or hereafter permitted by law.

(H) A written guarantee for an operator's self-bond from the ultimate parent entity guarantor if the guarantor meets the conditions of subsections (a)(i)(D), (a)(i)(F) and (a)(i)(G) of this Section as if it were the operator. Such a written guarantee may be accepted by the Administrator and shall be referred to as an "ultimate parent entity guarantee." The terms of the ultimate parent entity guarantee shall provide for the following:

(I) If the operator fails to complete the reclamation plan, the ultimate parent entity guarantor shall do so or the ultimate parent entity guarantor shall be liable under the indemnity agreement to provide funds to the state sufficient to complete the reclamation, but not to exceed the actual reclamation costs.

(II) The ultimate parent entity guarantee shall remain in force unless the ultimate parent entity guarantor sends notice of cancellation by certified mail to the operator and to the Administrator at least 120 days in advance of the cancellation date, and the Administrator accepts the cancellation. The cancellation shall be accepted by the Administrator if the operator obtains a suitable replacement bond before the cancellation date, if the lands for which the self-bond, or portion thereof, was accepted have not been disturbed, or if the lands have been released under Chapter 15 or W.S. §§ 35-11-417(e) and 423.

(I) The Administrator shall require the operator to submit any information specified in subsection (a)(i)(F) of this Section in order to determine the financial capabilities of the operator.

(J) The following in order:

(I) For the Administrator to accept an operator's self-bond, the total amount of the outstanding self-bonds of the operator shall not exceed 25 percent of the operator's tangible net worth in the United States; and

(II) For the Administrator to accept an ultimate parent entity guarantee, the total amount of the ultimate parent entity guarantor's outstanding self-bonds and guaranteed self-bonds shall not exceed 25 percent of the ultimate parent entity guarantor's tangible net worth in the United States.

(b) Approval or Denial of Operator's Self-bond Application.

(i) The Administrator, within 60 days of operator's submission of all materials necessary to base a decision on the application shall:

(A) Approve or reject such application and declare in writing his reasons for such action to the operator or his registered agent. The decision shall be based on all the information submitted and shall be sufficient to meet the demonstrations required by W.S. § 35-11-417(d).

(B) If a rejection is based on inadequate information or failure of the operator to supply all necessary material, the Administrator shall allow the operator 30 days to remedy the deficiencies. Such corrections must be made to the satisfaction of the Administrator. The Administrator shall have an additional 60 days to approve or reject the corrected application.

(ii) If the Administrator accepts self-bond, an indemnity agreement shall be submitted subject to the following requirements:

(A) The indemnity agreement shall be executed by all persons and parties who are to be bound by it, including the ultimate parent entity guarantor, and shall bind each jointly and severally.

(B) Corporations applying for a self-bond or ultimate parent corporations guaranteeing an operator’s self-bond shall submit an indemnity agreement signed by two corporate officers who are authorized to bind their corporations. A copy of such authorization shall be provided to the Administrator along with an affidavit certifying that such an

agreement is valid under all applicable Federal and State laws. In addition, all corporate guarantors shall provide a copy of the corporate authorization demonstrating that the corporation may guarantee the self-bond and execute the indemnity agreement.
(C) If the applicant is a partnership, joint venture or syndicate, the agreement shall bind each partner or party who has a beneficial interest directly or indirectly, in the operator.
(D) The indemnity agreement shall provide that the persons or parties bound shall pay all litigation costs incurred by the State in any successful effort to enforce the agreement against the operator.

(c) Self-Bond Renewal.
(i) Information for the self-bond renewal under the self-bonding program which shall accompany the annual credit rating evaluation shall include:

(A) The amount of bond required which is determined by the reclamation cost estimate in accordance with W. S. § 35-11-417(c)(ii) and the amount which is proposed to be under a self-bond.
(B) Financial information in sufficient detail to show that the guarantor still meets one of the criteria in Section 4(a)(i)(F), and the limitation in Section 4(a)(i)(J). The guarantor shall submit the full report from the credit reporting agency or agencies supporting its rating for the current year. Additional information may be requested by the Administrator when a split rating occurs.

(ii) Any valid initial self-bond shall carry the right of successive renewal as long as the above listed information is submitted and demonstrates that the guarantor remains qualified under W.S. § 35-11-417(d) and there is a minimum 10-year life of mine remaining.

(iii) Renewal of self-bonds approved prior to the effective date of these rules shall require the bond and credit ratings described in Section 4(a)(i)(F) and shall meet the limitations in Section 4(a)(i)(J). Operators with self-bonds approved prior to the effective date of these rules shall submit a new application to self-bond within eighteen (18) months of the effective date of these rules.

(d) Self-bond Substitution.
(i) The Administrator may require the operator to substitute a good and sufficient bond instrument if the Administrator determines in writing that the self-bond of the operator fails to provide the protection consistent with the objectives and purposes of this Act. The Administrator shall require full or partial substitution if the financial information submitted or requested under Section 4(c)(i)(B) indicates that the operator and/or the ultimate parent entity no longer qualifies under the self-bonding program. Substitution of an alternate bond shall be made within 90 days. The operator may also request substitution. This request is contingent upon the operator meeting all the requirements of the bond provisions (W.S. §§ 35-11-417 through 424) of the Act. If these requirements are met, the Administrator shall accept substitution.

(ii) If the operator fails within 90 days to make a substitution for the revoked self-bond the Administrator shall suspend or revoke the license of the operator to conduct operations upon the land described in the permit until such substitution is made. (iii) All methods of substitution shall

~~be made in accordance with the bonding provisions (W.S. §§ 35-11-417 through 418) of the Act. The Administrator shall require substitution of a good and sufficient bond.~~

~~(e) Reporting Requirements.~~
~~(i) If a devaluation in the credit rating occurs, the Administrator shall be notified within thirty (30) days of the change and a copy of the rating report shall be provided to the Administrator.~~

~~(ii) A statement listing any notices issued by the Securities and Exchange Commission or proceedings against the operator or the ultimate parent entity initiated by any party alleging a failure to comply with any public disclosure or reporting requirements under the securities laws of the United States. Such statement shall include a summary of each such allegation, including the date, the requirement alleged to be violated, the party making the allegation, and the disposition or current status thereof. The Administrator shall be notified within thirty (30) days of the filing.~~

Section 5. Collateral Bonds.

[No amendments proposed]

Section 6. Securities.

[No amendments proposed]

Section 7. Requirements for Forfeiture and Release.

[No amendments proposed]