

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING



February 22, 2023

IN THE MATTER OF THE)
PROPOSED REVISION OF) STATEMENT OF PRINCIPAL
THE LAND QUALITY) REASONS (SOPR) FOR ADOPTON
DIVISION RULES RELATED)
TO THE REGULATION OF) DOCKET #: 23-4101
COAL MINING)

Coal Rules
Chapter 11 – Financial Assurance
Chapter 14 – Exploration for Coal by Drilling

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Introduction to Rule Package

Chapter 11 – Financial Assurance

During the 2022 WY Legislative session, the legislature passed House Bill 0045 (HB0045). HB0045 authorized and required the Department of Environmental Quality (DEQ) and the Environmental Quality Council (EQC) to establish a voluntary assigned trust option for reclamation bonds. The legislation further provided that DEQ and EQC shall specify the requirements for voluntary assigned trusts, that any proceeds held in the voluntary assigned trust are held in trust by the state on behalf of the operator’s permit or license for fulfilling all or a portion of reclamation requirements and required rulemaking by the DEQ and EQC.

HB0045 was signed by the Governor and became effective on July 1, 2022. Wyoming Statute (W.S.) § 35-11-417(h) was revised to state that rules for the program shall apply to coal, bentonite,

trona and uranium permits or licenses. Subsection (h) shall only become operative once rules have been promulgated and signed by the Governor. Subsection (h) also stated that any rules promulgated under that subsection would be subject to the requirements of W.S. § 35-11-417(h)(i) through (xi). The proposed rule changes to LQD’s Coal Chapter 11 in this rule package are intended to comply with those requirements.

Chapter 14 – Exploration for Coal by Drilling

LQD submitted a formal amendment to the Office of Surface Mining Reclamation and Enforcement (OSMRE) on June 4, 2021 which contained revisions to LQD Coal Chapter 14. OSMRE reviewed the formal amendment and noted one deficiency that would need to be addressed through a future rulemaking in their August 12, 2022 review letter. The letter noted that Chapter 14, Section 2(i) had a reference wildlife that did not include the word “fish” from the term “fish and wildlife”. That term has been added to Subsection 2(i). In addition, a formatting change was made to the header for the chapter to comply with the Wyoming Secretary of State’s, Rules on Rules for State Agencies.

The authority to amend these rules is provided by Wyoming Statute (W.S.) §§ 35-11-112(a)(i), 35-11-114(b), 35-11-401(j), 35-11-402(a), and 35-11-417.

Chapter 11

Financial Assurance

Section 1. Definitions

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(i) “Voluntary irrevocable assigned trust” means a permit specific trust account established with the state treasurer for all or a portion of the full cost of reclamation for permits or licenses as determined by the annual Director’s bond letter and funded by the operator through payments to the assigned trust to the permit or license for the benefit of the Department.

A new definition for the assigned trust that makes clear that the full cost of reclamation will be determined annually in the Director’s bond letter and also contains elements of the statutory language found in HB0045 (2022) that requires DEQ and EQC to promulgate rules for the program.

Section 2. Acceptable Financial Instruments.

The following bond instruments are accepted by the Division: corporate surety, irrevocable letters of credit, self-bond, federally insured certificates of deposit, cash, government securities, ~~and~~ real property collateral, and voluntary irrevocable assigned trust.

Section 2 was revised to include voluntary irrevocable assigned trusts to the list of acceptable financial instruments that can be acceptable by the Division for the purposes of reclamation bonds. No additional changes are proposed for Section 2.

Section 3. Irrevocable Letters of Credit.

(a) Letters of credit as authorized by W.S. § 35-11-418, shall be subject to the following conditions and submitted on forms provided by the Administrator:

Section 3 was revised to clarify that irrevocable letters of credit shall be submitted on forms provided by the Administrator. This is consistent with other types of bonds like sureties. No other changes are proposed for Section 3 of this chapter.

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No changes are proposed for Sections 4 or 5 of Chapter 11.

Section 6. Voluntary Irrevocable Assigned Trusts

(a) All coal permits and licenses are eligible for a voluntary irrevocable assigned trust.

Coal permits and licenses are eligible to use assigned trusts in accordance with W.S. § 35-11-417(h) and is voluntary on the part of the operator under W.S. § 35-11-417(h)(i).

(b) An operator may file an application with the Department for a permit or license specific voluntary irrevocable assigned trust managed by the state treasurer for the benefit of the Department. Funds from the assigned trust shall only be available to the Department to cover the cost of completing reclamation in the event of forfeiture.

Assigned trusts will be managed by the state treasurer for the benefit of the Department and funds in the assigned trust may only be used by the Department in the event of forfeiture in accordance with W.S. § 35-11-417(h)(vii).

(c) The assigned trust may bond all or a portion of the full cost of reclamation of a permit or license as determined by the annual Director's Bond Letter (DBL). The operator shall provide other acceptable bonding instruments for any portion of the approved reclamation cost estimate that is not covered by the assigned trust.

Assigned trusts can be funded up to the total cost of an operations reclamation cost as will be determined annually in the DBL under W.S. § 35-11-417(h). Any portion of the reclamation cost not covered by the assigned trust shall be provided through other bond instruments acceptable to the Department under W.S. § 35-11-417(h)(iii)(C). Acceptable instruments are listed in Section 2 above.

(d) Voluntary irrevocable assigned trusts shall be in accordance with the following:

(i) Application forms will be provided by the Department for enrollment and shall include:

(A) A reclamation cost estimate for the permit or license. The estimate shall be determined by the current Director's Bond Letter. Permits or licenses with Underground Injection Control (UIC) bond requirements that are pledged to the Water Quality Division shall be bonded with an alternative acceptable bond instrument;

Applications for participation in the assigned trust will require a reclamation cost estimate as provided in the DBL. This section also clarifies that when a permit or license requires UIC bonding, that portion of the reclamation cost estimate will need to be covered by another acceptable type of bond instrument. The assigned trust option is only available to LQD permits or licenses.

(B) An estimate of the remaining life of mine and reclamation operations as disclosed in the current annual report for the permit or license;

The payment plan under W.S. § 35-11-417(h)(iii)(A) requires that the department provide the treasurer a copy of the annual DBL that discloses the reclamation cost

estimate and life of mine and reclamation timeline. This information is provided by the operator in the annual report and will be incorporated in to the annual DBL templates for operations with an assigned trust.

(C) A proposed amount of the initial deposit to the trust. In no case shall the initial and subsequent deposits in the first year be less than one percent of the total annual reclamation cost estimate as disclosed in the current DBL;

W.S. § 35-11-417(h)(iii)(B) requires annual payments of not less than one percent of the total annual reclamation cost.

(D) A proposed schedule of annual payments;

(E) Approval from federal agencies for permits or licenses that include federal lands with a federal bonding requirement.

Federal agency approval and acceptance of the use of assigned trusts will be required for permits and licenses that have federal lands as required by W.S. § 35-11-417(h)(xi).

(ii) For each approved voluntary assigned trust:

(A) The Department shall provide the state treasurer with a copy of the DBL that discloses the reclamation cost estimate and the estimated remaining life of mine and reclamation operations annually;

(B) Participants shall provide annual payments of not less than one percent of the total annual reclamation cost estimate until the assigned trust is fully funded;

(C) Participants shall provide other acceptable bonding instruments as noted in Section 2 of this chapter to cover the remaining full cost of reclamation until such time as the voluntary assigned trust is fully funded;

(D) Funds received by the Department shall be invested by the state treasurer as authorized by law. The funds shall be invested in a manner that preserves one hundred percent of the corpus;

Subsections (A) through (D) are intended to comply with the requirements of W.S. § 35-11-417(h)(iii) and (iv). Assigned trusts for coal permits and licenses must preserve 100% of the corpus of the trust.

(E) Earnings from investment of the corpus of the assigned trust shall be credited by the state treasurer to the balance of each voluntary assigned trust;

Subsection (E) is intended to comply with the requirement in W.S. 35-11-417(h)(v).

(F) The Department shall provide a statement of account as defined by the treasurer annually at the end of the fiscal year; and

(G) Bond reductions to the permit or license shall be made from any other bond instruments first until the assigned trust is fully funded.

When the reclamation bond estimate is reduced or lands are reclaimed and bond release is approved any reduction in the bond amount held by the Department shall be made from any other acceptable bond instruments when the assigned trust is not fully funded in accordance with W.S. § 35-11-417(h)(viii).

(e) Assigned trust withdrawals.

(i) No funds shall be withdrawn by the participant from the assigned trust account during the first year after the date of establishment of the assigned trust;

(ii) Assets from the assigned trust may only be withdrawn after complete funding of the trust;

(iii) Funds from the assigned trust shall be withdrawn last after any approved alternative reclamation bonding instruments have been released by the Department;

(iv) The assigned trust may not be substituted by another bonding instrument;

(v) Funds from the assigned trust shall only be released following certification of the requested bond release by the director per the provisions of W.S. 35-11-423 or in the event of bond forfeiture under W.S. § 35-11-421;

(vi) The assets of each assigned trust shall only be available to the Department to cover the cost of completing reclamation in the event of forfeiture; and

(vii) Once the assigned trust fully funded and the balance is in excess of the reclamation costs the operator may request a release of the excess funds using forms provided by the Department and state treasurer.

Subsection (e) above is intended to comply with the requirements of W.S. § 35-11-417(h)(vi), (viii), (ix), and (x)(A).

(f) Assigned trust transfers.

W.S. § 35-11-417(h)(x)(B) requires that any rules promulgated under the statute must provide provisions for the transfer of assigned trusts to a new owner when a permit or license transfer takes place. Subsection (f) details the requirements for assigned trust transfers.

(i) Assets from the assigned trust may be transferred to a new eligible

operator upon approval of a permit or license transfer in accordance with W.S. § 35-11-408.

(ii) Assigned trust transfer requirements shall include:

(A) The assigned trust may not be substituted and shall be transferred along with the permit transfer if the estimated life of mine is equal to five years or less; and

(B) All expenses and penalties associated with the transfer of the assigned trust are the responsibility of the license or permit holder.

(iii) Upon the application for a permit or license transfer no funds in the assigned trust shall be released to either the transferor or transferee until a final decision on the transfer application is made by Department.

(iv) Double bonding shall not be required for any reclamation costs of the permit or license covered by assigned trust funds, however the proposed transferee shall provide additional acceptable bond instruments for that portion of the reclamation costs not covered by the assigned trust prior to the transfer of the permit or license. Bond instruments shall be released to the transferor at the time of acceptance of the transferee's bond instruments and approval of the permit or license transfer.

When transfer applications are processed by the Department the applicant for the transfer will submit the required bond amount with acceptable bond instruments prior to the approval of the transfer. The current permit holder will also have bonds in place that will not be released until the time of approval of the transfer. This can result in an operation being double bonded for a period of time. If a permit or license is bonded by an assigned trust the operation is covered by a cash bond and therefore the new applicant will not be required to post a bond for the amount covered by the trust because that amount will be transferred when the permit or license transfer is approved.

Section 6 Z. Requirements for Forfeiture and Release.

(a) All requirements as to bond forfeiture proceedings and the release of bonds shall be consistent with W.S. § 35-11-417(e) and W.S. §§ 35-11-421 through 424 of the Act, excepting the requirements as to notification to the surety.

(b) The Department shall retain the full value of the real property until the bond liability equal to the value of the real property is released or substituted with another financial instrument.

(c) Forfeitures with reclamation bonds held in an assigned trust shall be processed in accordance with Section 6(e) above.

Chapter 14

Exploration for Coal by Drilling

The header for Coal Chapter 14 has been edited to comply with the requirements of the Secretary of State's Rules on Rules for State Agencies. No changes are proposed for Section 1 of Chapter 14.

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Section 2. General Drill Hole Abandonment Requirements.

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(i) All drill holes shall be backfilled to the surface with dry nonslurry materials or capped with a concreted cap set at least two (2) feet below the ground surface and then backfilled to the surface with native earthen materials to ensure the safety of people, livestock, fish and wildlife, and machinery in the area.

Section 2(i) above was revised in accordance with the OSMRE August 12, 2022 Review letter in response to the LQD's June 4, 2021 submittal of the formal amendment for Coal Chapter 14. The OSMRE stated that the text of the Endangered Species Act and Surface Mining Control and Reclamation Act (SMCRA) consistently demonstrated Congress' intent to use the two words together in reference to fish and wildlife, even though wildlife could include all fauna. Therefore, the section above was considered less effective than the federal regulations at 30 CFR 816.13 and less stringent than SMCRA. LQD has made the correction as requested by OSMRE. No additional changes are proposed to the rest of the chapter.

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 coal 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 right 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 _____, 2023.

Hearing Examiner or Chairperson, Wyoming Environmental Quality Council