

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:

(i) For the purposes of alluvial valley floors, prior to determining that an application is suitable for publication in accordance with W.S. § 35-11-406(j) and upon the basis of sufficient information, the Administrator shall make a determination in writing as to the existence and extent of an alluvial valley floor within the permit area or on adjacent areas where the mining operation may affect surface water or groundwater that supply an alluvial valley floor unless the preapplication determination in Chapter 3, Section 2(a) has already been made. Any preapplication determination and all information submitted for this determination shall be included in the permit application and shall be available for public notice, opportunity for comment and any conference or hearing. The Administrator shall determine that an alluvial valley floor exists when, in accordance with W.S. § 35-11-103(e)(xviii), it is found that:

(A) Unconsolidated streamlaid deposits holding streams are present; and

(B) There is sufficient water to support subirrigation or flood irrigation agricultural activities.

(ii) The public notice required by W.S. § 35-11-406(j) shall:

(A) Contain detailed information which identifies a USGS map(s) and appropriate landmarks locating and allowing local residents to readily identify the proposed permit area.

(B) Be sent by the Administrator to Federal, State, and local governmental agencies, including planning agencies, with jurisdiction over or an interest in the proposed operation or permit area, and local sewage and water treatment authorities. At a minimum this shall include the U.S. Department of Agriculture Soil Conservation Service District office, the local U.S. Army Corps of Engineers District Engineer, the National Park Service if NPS lands are adjacent, State and Federal fish and wildlife agencies, and the State Historic Preservation Officer. Such entities and any person who filed a comment or objection

shall also receive the final decision on the application. In addition, the Administrator will publish a summary of his decision in a newspaper of general circulation in the general area of the proposed operation.

(iii) Any subsequent revision of the application, or objections or comments to the application, shall be filed in the offices of the county clerks of the counties in which the proposed permit area is located. Copies of comments and objections shall also be transmitted to the applicant.

(iv) In addition to the specific findings required by W.S. § 35-11-406(n), no permit shall be approved unless the Administrator also finds in writing that:

(A) The proposed operation will not be inconsistent with other surface coal mining and reclamation operations proposed or contemplated in pending or approved mining permits;

(B) The effect of the proposed operation on properties listed on and properties eligible for listing on the National Register of Historic Places has been taken into account; and

(I) Mining has been prohibited within 100 feet of any such properties by permit condition; or

(II) The applicant has provided for the protection of such properties in the approved mining and reclamation plan; or

(III) The Administrator has determined, in consultation with the State Historic Preservation Officer, that no additional protection measures are necessary.

(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:

(A) On any lands within the boundaries of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including study rivers designated under Section 5(a) of the Wild and Scenic Rivers Act or study rivers or study river corridors as established in any guidelines pursuant to that Act and National Recreation

Areas designated by Act of Congress;

(B) On any federal lands within the boundaries of any national forest unless the applicant demonstrates compliance with 30 CFR §761.11(b) and submits a finding by the Secretary in his favor using the procedures at 30 C.F.R. §761.13 (2009) (<http://www.gpoaccess.gov/cfr/retrieve.html>);

(C) On any lands where mining will adversely affect any publicly owned park or any properties listed on and any properties eligible for listing on the National Register of Historic Places, unless jointly approved by the Administrator and the Federal, State or local agency with jurisdiction over the park or place;

(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 and an opportunity to request a 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 shall make this finding within 30 days after the hearing or if a hearing is not held the Administrator 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;

(E) Within 300 feet from any occupied dwelling except when the owner has provided a written waiver consenting to operations within a closer distance, clarifying that the owner and signator had the legal right to deny mining and knowingly waived that right. Such a waiver shall remain effective, regardless of when it was obtained, against subsequent purchasers who had actual or constructive knowledge of the existing waiver at the time of purchase. Subsequent purchasers shall be deemed to have constructive knowledge if the waiver has been properly filed in the public property records or if the mining has proceeded to within the 300-foot limit prior to the date of purchase;

(F) Within 300 feet, measured horizontally, of any public building, school, church, community, or institutional building, or public park; or

(G) Within 100 feet, measured horizontally, of a cemetery.

(vi) For Federal lands described in subsections (v)(A) and (v)(B) above the Office of Surface Mining Reclamation and Enforcement shall be the responsible agency for making valid existing rights (VER) determinations. For Non-Federal lands described in subsection (v)(A) above the Division is the responsible agency for making VER

determinations and shall make evaluations using the Federal VER definition.

(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:

(1.) A legal description of the land to which the request pertains;

(2.) Complete documentation of the character and extent of the current interests in the surface and mineral estates of the land to which the request pertains;

(3.) A complete chain of title for the surface and mineral estates of the land to which the request pertains;

(4.) A description of the nature and effect of each title instrument that forms the basis of the request, including any provision pertaining to the type or method of mining or mining related surface disturbances and facilities;

(5.) A description of the type and extent of surface coal mining operations that the requestor claims the right to conduct, including the method of mining, any mining related surface activities and facilities, and an explanation of how those operations would be consistent with State property law;

(6.) Complete documentation of the nature and ownership, as of the date that the land came under the protection of 522(e) of P.L. 95-87 (2009), (<http://www.gpoaccess.gov/uscode/>) or 30 C.F.R. §761.11 (2009), (<http://www.gpoaccess.gov/cfr/retrieve.html>), of all property rights for the surface and mineral estates of the land to which the request pertains;

(7.) Names and addresses of the current owners of the surface and mineral estates of the land to which the request pertains;

(8.) If the coal interests have been severed from

other property interests, documentation that the requestor has notified and provided reasonable opportunity for the owner of other property interests in the land to which the request pertains to comment on the validity of the property rights claims made; and

(9.) Any comments that are received in response to the notification discussed in (8.) above.

(II) If the VER determination request relies on the good faith/all permits standard, the request shall include the documentation discussed in (I) above, and:

(1.) Approval and issuance dates and identification numbers for any permits, licenses and authorizations that the person seeking the request or a predecessor in interest obtained before the land came under the protection of 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11 (2009);

(2.) Application dates and identification numbers for any permits, licenses and authorizations that the person seeking the request or a predecessor in interest submitted an application before the land came under the protection of 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11 (2009); and

(3.) An explanation of any other good faith effort that was made by the person seeking the request or a predecessor in interest made to obtain the necessary permits, licenses and authorizations as of the date that the land came under the protection of 522(e) of P.L. 95-87 (2009) or 30 C.F.R. §761.11 (2009).

(III) If the request relies on the needed for and adjacent standard, the request shall include the documentation discussed in (I) above and shall also explain how and why the land is needed for and immediately adjacent to the operation on which the request is based including a demonstration 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).

(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:

(1.) The road existed when the land on 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 that the person making the request has a legal right to use the road for surface coal mining operations;

(2.) 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 any subsequent conveyances the person making the request has a legal right to use or construct a road across the right of way or easement to conduct surface coal mining operations; or

(3.) 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).

(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 not the legal or technical adequacy of the materials submitted.

(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.

(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;

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) and (B), the notice shall also contain a description of the property rights claimed and the basis for the claim.

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 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) 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.

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 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.

(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 Division, as the agency responsible for the determination of VER may grant additional time for good cause upon request. The Division need not necessarily consider comments received after the closing date of the comment period.

(D) How a VER decision will be made.

(I) The 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.

(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 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 Division shall then proceed to subsection (D)(II) above.

(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).

(F) Availability of records. When the Land Quality Division is the

agency responsible for processing a request subject to notice and comment under subsection (C) above the Division 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 Division shall make records associated with that request, and any subsequent determination under subsection (D) above available to the public in accordance with the requirements and procedures of W.S. §35-11-1101 (2011), the Wyoming Public Records Act (W.S. §§ 16-4-201 thru 16-4-205 (2013)), W.S. §35-11-406(d) (2013) and the Division's rules and regulations related to public review and participation, and shall at a minimum make copies of those records immediately available to the public in the area of mining until at least five years after the expiration of the period during which the operation is active or is covered by any portion of a reclamation bond so that they are conveniently available to residents of that area in compliance with 30 CFR 840.14(b), (c) and (d), (<http://www.gpo.gov/fdsys/>).

(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.

(viii) Final Compliance Review. After finding the application administratively complete and suitable for publication but prior to permit issuance, the Department of Environmental Quality shall 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 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~~ Division shall determine if the applicant and operator have previous mining experience and if the applicant or operator does not have any previous mining experience additional ownership or control investigations may be conducted under subsection (ix)(E) below to determine if someone else with mining experience controls the mining operation; 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 or controlled by the applicant and operations the operator owns or controls.

(ix) The Division shall enter into AVS:

(A) The information submitted in the application in compliance with Chapter 2, Section 2(a)(i)(B)-(F);

(B) The information submitted pertaining to violations which are unabated or uncorrected after the abatement or correction period has expired; and

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

(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;

(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 Division may identify any person who owns or controls an entire surface coal mining operation or any relevant portion or aspect thereof. If the Division identifies such a person, 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 Division issues a written preliminary finding under this section, the Division will allow, the person subject to the preliminary finding, thirty (30) days in which to submit any information tending to demonstrate that persons lack of ownership or control. If, after reviewing any information submitted, the Division is persuaded that the person is not an owner or controller, the Division will serve a written notice to that effect to the person identified. If, after reviewing any information submitted, the Division still finds that the person identified is an owner or controller, or if the person identified does not submit any information within the 30-day period, the Division will issue a written finding and enter the Division's finding into AVS. If the Division identifies a person as an owner or controller under this section, 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 of permanent permit ineligibility and the time for seeking a hearing has expired, the Division will enter our finding into AVS. 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.

(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 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 event or 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 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 those decisions remains in force.

(IV) A provisionally issued permit will be considered improvidently issued and the 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 or control listing or finding or if the initial judicial review decision discussed above affirms the validity of the violation or the ownership or control listing or finding.

(xi) Following the Director's approval of a permit but prior to issuance of that permit, the applicant shall update, correct or indicate that no change has occurred in the

information provided in Chapter 2, Section 2.

(xii) After the applicant completes the above requirements, the DEQ shall request a compliance history report from AVS to determine if there are any unabated or uncorrected violations that affect the applicant's permit eligibility in subsection (x) above. The DEQ shall request this report no more than five business days before a permit is issued. If the applicant is ineligible for a permit the DEQ shall send you written notification of the decision and will detail the reasons for ineligibility and include notice of appeal rights.

(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

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

(xiv) In order to challenge an ownership or control listing or finding a written explanation shall be submitted to the Department of Environmental Quality 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 control of a surface coal mining operation and the applicant is 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.

(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. The AVS Office will provide a response describing why the person is listed in AVS in accordance with 30 C.F.R. §773.26(e) (<http://www.gpo.gov/fdsys/>).

(D) When a challenge is made to a listing of ownership or control, or a finding of ownership 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 thereof 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:

(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;

(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. The Division will post all decisions made under this section on AVS. Appeals of the written decision will be administered under the Department's Rules of Practice and Procedure. Any person who receives a written decision under this section, and who wishes to appeal that decision shall exhaust all administrative remedies under the procedures of the Wyoming Environmental Quality Act, the Department's Rules of Practice and Procedure, the Wyoming Administrative Procedure Act, W.S. 16-3-101 through 16-3-115 (2013) and Chapter 12 of these Rules and Regulations before seeking judicial review. AVS shall be revised as necessary to reflect these decisions. Following the Division's written decision or any decision by a reviewing administrative or judicial tribunal, the Division must review the information in AVS to determine if it is consistent with the decision. If it is not, the Division shall promptly revise the information to reflect the decision.

(G) Improvidently issued coal mining permits.

(I) If the 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 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 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 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) 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.

(IV) The 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 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.

(V) Appeals regarding the notice shall be governed by the Wyoming Environmental Quality Act, 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.

(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 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 Administrator finds that:

- (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;
- (3.) The 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.

(VII) If an administrative review is requested of a notice of proposed suspension or rescission, the DEQ will not suspend or rescind the permit unless and until the finding is affirmed that the permit was improvidently issued.

(VIII) When a permit is suspended or rescinded under this section, the DEQ shall:

(1.) Issue a written notice requiring that the permittee and operator shall cease all surface coal mining operations under the permit; and

(2.) Post the notice in the District office closest to the permit area.

(IX) If the Administrator suspends or rescinds your permit under this section, you may request administrative review of the notice 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, or alternatively you may request judicial review of the notice provided all other administrative remedies have been exhausted.

(xv) If the Administrator is unable to determine whether or not the proposed operation is on lands where surface coal mining operations are prohibited, lands described in (v) immediately above, then a copy of relevant portions of the application shall be sent to appropriate State, Federal and local government agencies with an interest or jurisdiction in the lands in question. Along with the copy a notice shall be sent asking for clarification or determination of relevant boundaries or distances, and stating that the agency has 60 days from receipt of the notice to respond. If no response is received, the Administrator may make a determination based on the information available.

(xvi) The criteria for permit approval where prime farmland will be affected by the mining operation shall be that, upon the basis of the complete application:

(A) The postmining land use of the prime farmland will be capable of supporting crop yields equivalent to the surrounding nonmined prime farmland under equivalent levels of management.

(B) Adequate consideration has been given to any soil reconstruction revisions recommended by the local conservation district and Soil Conservation Service.

(C) The applicant has the technological capability to restore the prime farmland.

(xvii) In addition to the specific findings required by W.S. § 35-11-406(n), no permit authorizing a delay in the contemporaneous reclamation requirements for a proposed combined surface and underground mining operation shall be approved unless the Administrator finds that:

(A) The proposed underground mining activities will assure maximum practical recovery of the resource and avoid multiple future disturbances of surface land or waters.

(B) The permit for the surface mining activities contains specific conditions:

(I) Delineating the particular surface area for which a delay in reclamation is authorized; and

(II) Identifying the alternative reclamation standards in lieu of those otherwise applicable, together with a detailed schedule for timely compliance.

(xviii) In granting surface coal mining permits, the Director shall impose the following conditions on the operation:

(A) All operations shall be conducted in accordance with the approved mining and reclamation plan and any conditions of the permit or license;

(B) The rights of entry shall be provided as described by the Act and any regulations promulgated pursuant thereto;

(C) The operation shall be conducted in a manner which prevents violation of any other applicable State or Federal law;

(D) All possible steps shall be taken to minimize any adverse impact to the environment or public health and safety resulting from noncompliance with the approved mining and reclamation plan and other terms and conditions of any permit or license, including monitoring to define the nature of the noncompliance and warning of any potentially dangerous condition; and

(E) All reclamation fees shall be paid as required by Title IV, P.L. 95-87, for coal produced under the permit for sale, transfer or use.

(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 transfer, assignment or sale of permit rights. In addition, the following requirements are applicable.

(i) All requirements imposed by W.S. § 35-11-405(e) for permit renewals. The application shall be filed at least 120 days before the expiration of the permit term and shall include at a minimum:

(A) A statement of the name and address of the permittee, the term of the renewal requested, the permit number, a description of any changes to the matters set forth in the original application for a permit or prior permit renewal;

(B) A copy of the public notice and proof of publication;

(C) Evidence that the bond and a liability insurance policy will be provided; and

(D) Additional revised or updated information required by the Administrator.

(E) If an application for renewal includes any proposed revisions to the mine or reclamation plan, such revisions shall be identified and subject to the requirements of Chapter 13.

(ii) All requirements imposed by W.S. § 35-11-408 and this section provision for shall be applicable to a permit transfer, 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. For purposes of this section, potential transferee, means any person who succeeds to rights granted under a permit, by transfer, assignment, or sale of those rights.

(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.

(C) The applicant for a transfer, assignment or sale of permit rights shall advertise the filing of the application in a newspaper of general circulation in the locality of the operations involved once a week for four (4) consecutive weeks, indicating the name and address of the applicant, the permittee, the permit number, the geographic location of the permit and the address to which written comments may be sent.

(D) Public Participation. Any person having an interest which is or may be adversely affected by a decision on the transfer, assignment or sale of permit rights, including an official of any Federal, State, or local government agency, may submit written comments on the application to the Division within a time specified by the Division.

(E) Criteria for Approval. The Division may allow a permittee to transfer, assign or sell permit rights to a potential transferee, if the Administrator finds in writing that the potential transferee:

(I) Is eligible to receive a permit in accordance with Chapter 12, Section 1(a)(x), (xi) and (xii);

(II) Has submitted a performance bond or other guarantee, or obtained the bond coverage of the original permittee as required in Subsection (A) above; and

(III) Meets any other requirements specified by the Division.

(F) Notification.

(I) The Administrator shall notify the permittee, potential transferee, commenters and the Office of Surface Mining of its findings.

(II) The potential transferee shall immediately provide notice to the Division of the consummation of the transfer, assignment or sale of permit rights.

(G) Continued operation under existing permit. The potential transferee shall assume the liability and reclamation responsibilities of the existing permit and shall conduct the surface coal mining and reclamation operations in full compliance with

the Environmental Quality Act, the Division's rules and regulations, and the terms and conditions of the existing permit, unless the applicant has obtained a new or revised permit under the Environmental Quality Act and the Division's rules and regulations.

Section 2. **Bonding and Insurance Procedures.**

(a) For surface coal mining operations, the following two types of bond calculations shall be required for setting a single bond amount:

(i) **Area Bond:** This bond calculation shall be no less than the estimated cost of completing the maximum amount of rough backfilling during the annual bonding period set forth in W.S. §§ 35-11-411 and 35-11-417(c), in order to meet the applicable rough backfilling standards in Chapter 4 of these regulations and any other rough backfilling requirements of the approved permit.

(ii) **Incremental Bond:** This bond calculation shall be no less than the estimated cost of performing all reclamation requirements other than those covered by (a)(i) above, during the annual bonding period in order to meet the standards of the Act, the regulations, and the provisions of the permit.

(b) For purposes of determining bond amounts, the estimated cost shall include all costs necessary, expedient or incidental to achieve required rough backfilling and reclamation. This shall reflect the probable difficulty of reclaiming the affected lands, giving consideration, as applicable, to such factors as topography, geology of the site, hydrology and revegetation potential. The estimated cost shall be based on the operator's cost estimate submitted with the permit, plus the Administrator's estimate of the additional cost to the State of bringing in personnel and equipment should the operation fail or the site be abandoned, plus an additional amount covering reclamation cost for any land which may reasonably be expected to be affected, as determined by the Administrator's assessment of the applicant's mine plan, prior to filing the renewal bond. All bonds shall be calculated on, and never fall below, the amount necessary to assure that the operator shall faithfully perform all requirements of the Act and comply with all rules and regulations and any provisions of the approved permit.

(c) Upon receipt of the annual report required by W.S. § 35-11-411, the Administrator shall publish a notice in a newspaper of general circulation in the locality of the mining operation, notifying all interested persons that the annual report is available for review, and that the renewal area and incremental bond calculations will be determined. Interested persons may submit information relating to the bond amounts within 30 days of the notice. This information, together with information submitted by the operator and developed by the Division, shall be considered by the Administrator and Director in setting bond amounts.

(d) **Liability.**

(i) Liability under the bond(s) shall be for the entire permit area.

(ii) Liability under the area bond shall be for a duration sufficient to assure that all rough backfilling has been achieved pursuant to the applicable standards of Chapter 4, Section 2.(b) and the approved permit.

(iii) Liability under the incremental bond shall be for the entire duration of the operation and for the ten-year period of revegetation responsibility described in Chapter 4, Section 2(d). The liability period and area for an incremental bond may be limited if it is posted and approved to guarantee only specific increments of reclamation within the permit. Actions of third persons to implement an approved alternative postmining land use, which are beyond the control of the permittee or operator need not be covered by the bond.

(iv) Isolated increments of bonded land.

(A) Isolated and clearly defined portions of the permit area requiring extended liability or limited areas or increments being assessed a specific bond amount may be separated from the original area and bonded separately with the approval of the Administrator.

(B) Such areas shall be of sufficient size and configuration and not constitute a scattered, intermittent, or checkerboard pattern to provide for efficient reclamation operations should reclamation by the Administrator become necessary pursuant to Section 2(b) of this Chapter.

(C) Access to the isolated areas for remedial work may be included in the area under extended liability if deemed necessary by the Administrator.

(e) A permittee may request reduction of the amount of either the area or incremental bond upon submission of evidence to the Administrator proving that the permittee's method of operation or other circumstances will reduce the estimated cost to the State for reclamation. This reduction of bond shall be deemed a bond adjustment if the reduction is based on a change in method of operation or a decrease in the number of acres projected to be disturbed. If the reduction is due to a decrease in the number of acres that have already been disturbed to account for areas partially reclaimed, then the request for reduction will be considered a request for partial bond release in accordance with the procedures of Chapter 15.

(f) A corporate surety shall not be considered good and sufficient for purposes of W.S. § 35-11-417(b) unless:

(i) It is licensed to do business in the State;

(ii) The estimated bond amount does not exceed the limit of risk as provided for in W.S. § 26-5-110, nor raise the total of all bonds held by the applicant under that surety above three times the limit of risk;

(iii) The surety agrees:

(A) Not to cancel bond, except as provided for in W.S. § 35-11-419 or where the Administrator approves a good and sufficient replacement surety with transfer of the liability that has accrued against the permittee on the permit area;

(B) To be jointly and severally liable with the permittee; and

(C) To provide notice to the Administrator and operator once it becomes unable or may become unable due to any action filed against it to fulfill its obligations under the bond.

(g) The provisions applicable to cancellation of the surety's license in W.S. § 35-11-420 shall also apply if for any other reason the surety becomes unable to fulfill its obligations under the bond. Upon such occurrence the operator shall provide the required notice. Failure to comply with this provision shall result in suspension of the permit.

(h) The Administrator shall not accept an individual certificate of deposit in an amount in excess of \$100,000 or the maximum insurable amount as determined by the FDIC or the Federal Savings and Loan Insurance Corporation. Such certificates of deposit shall be made payable to the Department both in writing and upon the records of the bank issuing these certificates. The Administrator shall require the banks issuing these certificates to waive all rights of setoff or liens against the certificates. The bond amount may be calculated to include any amount which would be deducted as a penalty for payment before maturity.

(i) Minimum insurance coverages for the public liability insurance policy required in W.S. § 35-11-406(a)(xiii) shall be \$300,000 for each occurrence of bodily injury or property damage, and \$500,000 aggregate.

(j) The public insurance liability policy shall include a rider requiring that the insurer notify the Administrator whenever substantive changes are made in the policy, including any termination or failure to renew. The policy shall be maintained in full force during the life of the permit or any renewal thereof, including the liability period necessary to complete all reclamation operations.