

DEPARTMENT OF ENVIRONMENTAL QUALITY

LAND QUALITY DIVISION

CHAPTER 16

INSPECTIONS, ENFORCEMENT AND PENALTIES FOR

SURFACE COAL MINING OPERATIONS

Section 1. **Inspections.**

(a) Frequency and extent of inspection: The Director's designated authorized representative shall inspect:

(i) On an irregular basis active surface coal mining and reclamation operations and any other areas outside the permit area which are or may be affected by the surface coal mining and reclamation operation every month, averaging at least one quarterly review of the operator's compliance with all conditions and requirements of the permit, Article IV, and these regulations within the entire affected land. Inspections of coal exploration operations and inactive surface coal mining operations shall occur periodically so as to determine compliance or noncompliance with the permit conditions, Article IV and these regulations; provided that a complete inspection shall occur each calendar quarter for inactive coal mines. All inspections shall occur without prior notice, except as the representative deems necessary, to the person being inspected. The representative shall promptly submit all inspection records, reports or other materials to the head of the district office and the Director for public inspection and enforcement action purposes.

(ii) Immediately to enforce the Act, the regulations, or any condition of a permit or an exploration approval when he has reason to believe that enforcement action under W.S. § 35-11-437(a) or (b) is required.

(b) Aerial inspections may satisfy the monthly/partial inspection requirement if:

(i) It is conducted in a manner which reasonably ensures the identification and documentation of conditions at the coal mining and reclamation site inspected, and

(ii) Any potential violation observed is investigated on site within three days, and any potential condition, practice or violation constituting cause for a cessation order is investigated on site immediately.

(c) Inactive surface coal mining operations are ones for which the Administrator has received a request for temporary cessation under Chapter 4, Section 2(l)(ii) and (u), or ones which have completed the reclamation requirements of Chapter 15, Section 5(a)(ii) and

the liability of the permittee has been reduced in accordance with Chapter 15.

(d) Any person who is or may be adversely affected by a surface coal mining or coal exploration operation may notify the Administrator in writing, alleging sufficient information to create a reasonable belief that the Division has failed to comply with the requirements of (a) above. Within 15 days of the receipt of such notification the Administrator shall determine whether there has been compliance and, if not, order an inspection to correct the noncompliance. The Administrator shall furnish a written statement explaining his determination and actions, if any, to the complainant. The identity of the person providing the information shall be held confidential, if requested by that person unless disclosure is required under the Freedom of Information Act.

(e) If an inspection results from a person's written complaint, only the person who submitted the written complaint or, in case of hardship, his designee, has a right of entry to, upon and through the exploration or surface coal mining operation about which he supplied the information, and only if he is in the presence of and is under the control, direction and supervision of the designated authorized representative while on the permit area. In the event that a group submitted the written complaint, only a designated representative of that group may accompany the inspector. The right of entry does not include a right to enter buildings without a search warrant or the consent of the person in control of the building. All persons supplying the complaint shall promptly receive from the Division copies of any inspection report and a description of any enforcement action taken, or reasons why an inspection was not conducted or enforcement action was not taken. The Division shall also inform the person of his right to informal review of the action on the complaint by the Director. If requested, the Director shall review and inform the complainant of the results of the review within 30 days of the request. The Director's decision is final action for purposes of any appeal to the Council.

Section 2. **Enforcement.**

(a) All violations or minor violations that are observed must be identified in the inspection report, including comments on the abatement of all previously noted minor violations or violations. The enforcement options available to the Department range from the least severe, notation in an inspection report, to the most severe, criminal sanctions.

(b) Formal notices of violation for abatement shall direct the correction of a cited violation. Formal notices of violation will be routinely issued where site conditions constitute an existing or potential danger to the health and safety of the public, or cause or can be expected to cause environmental degradation. Formal notices of violation will be issued where minor violations previously identified in an inspection report are not satisfactorily resolved within the time frame specified in the inspection report as long as the failure to resolve the minor violation is not due to lack of diligence. If the reason is lack of diligence, a failure to abate cessation order will be issued. The total abatement time where a minor violation has been modified to a formal notice of violation shall not exceed 90 days

unless allowed by Section 2(j) of this Chapter.

(c) Violations noted only in inspection reports shall be limited only to minor violations as noted in (f)(i) through (f)(ix). A formal notice of violation will be issued to all other violations. The required abatement measures and a reasonable abatement time not to exceed 35 days shall be included in the inspection report. Minor violations will not be tracked for withholding permit approvals, and other permit actions. A handwritten description of the minor violation will be given to the operator on site and will contain the information listed under item (g) of this Section. The operator has the right to appeal any minor violation as outlined in W.S. § 35-11-901.

(d) Civil penalties will not be issued to minor violations. They will, however, be reviewed to determine if a civil penalty would be appropriate. If it is found a civil penalty is appropriate, the minor violation will be upgraded to a formal notice of violation and a formal assessment issued.

(e) Failure to abate a minor violation will result in the issuance of a formal notice of violation and assessment of a civil penalty. Operators who consistently receive minor violations for similar infractions (more than two in a 12 month period) will be issued a formal notice of violation for subsequent similar violations for the remainder of the period. Once an operator receives two similar minor violations within a 12 month period, any subsequent similar violations will be counted toward a pattern of violations.

(f) Examples of minor violations which will be identified in the inspection report but may or may not be subject to a formal notice of violation are the following:

(i) Failure to provide or maintain signs or perimeter markers;

(ii) Reclamation deficiencies such as inadequate topsoil replacement depth, incorrect seeding practices, or improper sampling technique where there is no immediate potential for adverse environmental impact;

(iii) Failure to perform necessary routine maintenance of surface water diversions or erosion control facilities where there is no immediate potential for adverse environmental impact;

(iv) Failure to perform necessary routine maintenance on treatment facilities provided that the matter is referred to the Water Quality Division (WQD) and the WQD finds that effluent limits are being met and there is no immediate potential for adverse water quality impacts;

(v) Required record keeping is unsatisfactory, except where there is a deliberate falsification of records or results;

(vi) Minor construction deficiencies where there is no threat of structural failure or serious harm;

(vii) Noted necessary corrections to maps, plans or other permit materials;

(viii) Failure to comply with other laws applicable to the mine through permit conditions, where the agency with primary jurisdiction has instituted action to obtain compliance pursuant to its laws and regulations; and

(ix) Rills on reclaimed lands or partially blocked culverts which are the result of a recent storm or runoff event.

(g) Any cessation order, notice for abatement or order to show cause issued under the Act shall be signed by the Director or authorized representative and shall contain:

(i) The nature of the violation;

(ii) All affirmative obligations necessary to completely abate the violation or imminent danger or harm in the most expeditious manner possible;

(iii) The time established for abatement, if appropriate; and

(iv) A reasonable description of that portion of the operation to which it applies.

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

(i) Any notice or order shall be terminated by written notice to the person to whom it was issued, when it is determined that all violations or conditions listed in the notice or order have been abated. This determination may be made by conducting an investigation to confirm the abatement, by accepting the information obtained from a government agency or by accepting a signed statement from a permittee that the violation in a notice of violation

has been abated. The Division reserves the right to confirm the information included in a signed statement. Termination shall not affect the right to assess civil penalties.

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

(k) The specified time for abatement of the violation may be extended up to 90 days from issuance of the notice, if the failure to meet the time previously set was not caused by lack of diligence on the part of the person to whom it was issued (W.S. § 35-11-409(c)).

(i) The total time for abatement shall not exceed 90 days from the date of issuance, except upon establishing by clear and convincing proof that the permittee cannot feasibly abate the violation within 90 days due to one or more of the following:

(A) The permittee of an ongoing permitted operation has timely applied for and diligently pursued a permit renewal or other necessary approval of designs or plans but such permit or approval has not been or will not be issued within 90 days after his valid permit expires or is required, for reasons not within the control of the permittee;

(B) There is a valid judicial order precluding abatement within 90 days as to which the permittee has diligently pursued all rights of appeal and as to which he or she has no other effective legal remedy;

(C) The permittee cannot abate within 90 days due to a labor strike;

(D) Climatic conditions preclude abatement within 90 days, or where due to climatic conditions abatement within 90 days clearly would cause more environmental harm than it would prevent; or

(E) Abatement would require the operator to violate a requirement or regulation established under the Mine Safety and Health Act of 1977.

(ii) Whenever an abatement time in excess of 90 days is permitted, interim abatement measures shall be imposed to the extent necessary to minimize harm to the public or the environment.

(iii) An extension beyond 90 days may not be authorized without the concurrence of the Administrator or person acting in this capacity, and the abatement period granted shall not exceed the shortest possible time necessary to abate the violation. The authorized representative shall promptly and fully document in the file the reasons for granting or denying the request. The Administrator or designee shall review that document before concurring in or disapproving the extended abatement period and shall promptly and

fully document the reasons for concurrence or disapproval in the file. An extended abatement date shall not be granted when the permittee's failure to abate within 90 days has been caused by a lack of diligence or intentional delay.

(iv) No extension granted under this provision may exceed 90 days in length. Where the condition or circumstance which prevented abatement within 90 days exists at the expiration of any such extension, the permittee may request a further extension in accordance with the procedures of this subsection.

(l) Order to show cause for the suspension or revocation of a permit pursuant to W.S. § 35-11-409(c):

(i) For the purpose of this subsection:

(A) Willful violation means an act or omission which violates this Act or any regulation, and which is committed or omitted with knowledge or reason to know of its unlawfulness.

(B) Unwarranted failure to comply means the failure to prevent or abate the occurrence of any violation due to indifference, lack of diligence, or lack of reasonable care.

(C) Pattern of violations means the occurrence of similar violations not appearing to be isolated departures from lawful conduct as determined during two or more inspections of the permit area within any 12 month period, unless exceptional factors present in the particular case otherwise account for such violations.

(ii) The Director shall make a written explanation for declining to issue an order to show cause or vacating an outstanding order, once he determines that there were violations of the same or related requirements of the Act, regulations, or the permit during three or more inspections within any 12 month period. The explanation shall include that, after taking into account exceptional factors present in the particular case, it would be demonstrably unjust to issue or fail to vacate the show cause order. This shall be included and documented in the records of the case.

(iii) Notice, hearing and any decision by the Council on whether to suspend or revoke the permit shall be the equivalent of that required for permit applications. If the Council suspends or revokes the permit, the operator shall cease operations, continue reclamation, and complete all affirmative obligations as specified in the order.

(m) All cessation orders, notices for abatement and orders to show cause shall be served on the operator either by tendering a copy at the operation or sending it by certified mail or by hand to the operator. All orders to show cause shall issue forthwith upon a determination that the factors exist which justify its issuance.

(n) Pending completion of the investigation and hearing on any enforcement action taken by the Department, the operator may file with the Council a request for temporary relief. The Council shall expeditiously issue an order or decision granting or denying such relief, which shall be within five days from any request for relief from a cessation order. The Council may grant such relief, under such conditions as it may prescribe, if:

(i) A hearing has been held in the locality of the permit area on the request for temporary relief in which all parties were given an opportunity to be heard;

(ii) The operator shows that there is a substantial likelihood that the findings of the Council will be favorable to him; and

(iii) Such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources.

(o) Inability to comply shall not be a proper factor for consideration in any decision to vacate, or terminate any notice or order under this subsection or to determine whether a pattern of violation exists. It may only be a factor for the duration of the suspension of a permit and in mitigation of the amount of civil penalty, when not caused by lack of diligence.

(p) Surface coal mining operations conducted by any person without a valid permit constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources. For those operations which are an integral, uninterrupted extension of previously permitted operations, and where the person conducting such operations has filed a timely and complete application for a permit to conduct such operations, the cessation order shall be limited to the unpermitted operation.

Section 3. **Civil Penalties.**

(a) Amount - In determining the amount of the penalty, if any, to be assessed, consideration shall be given to:

(i) The operator's history of previous violations at the particular surface coal mining operation, regardless of whether any led to a civil penalty assessment. Special consideration shall be given to violations contained in or leading to a cessation order. However, a violation shall not be considered if the notice or order containing the violation:

(A) Is or may become the subject of pending administrative or judicial review; or

(B) Has been vacated.

(ii) The seriousness of the violation based on the likelihood and extent of the potential or actual impact on the public or environment, both within and outside the permit or exploration area.

(iii) The degree of fault of the operator in causing or failing to correct the violation, either through act or omission. Such degree shall range from inadvertent action causing an event which was unavoidable by the exercise of reasonable care to reckless, knowing or intentional conduct.

(iv) The operator's demonstrated good faith, by considering whether he took extraordinary measures to abate the violation in the shortest possible time, or merely abated the violation within the time given for abatement. Consideration shall also be given to whether the operator gained any economic benefit as a result of a failure to comply.

(v) Inability to comply, unless caused by lack of diligence.

(vi) Any information submitted to the Director by the operator within 15 days of the service of the notice or order relating to the facts surrounding the violation or the amount of penalty.

(b) In determining the amount of the penalty, consideration shall not be given to whether a reduction in the amount of a penalty could be used to abate violations of the Act or regulations.

(c) The procedure for any requested assessment conference, as provided for in W.S. § 35-11-902(d) shall be the equivalent of the informal conference procedure described by the Act and regulations applicable to permit applications excepting that the Director, not the Administrator, shall conduct the conference.

(d) If the operator requests and receives the review proceeding provided for by W.S. § 35-11-437(c), the fact of the violation may not be further contested under this Section.

(e) If any party requests judicial review of a final order of the Council on the penalty, the proposed penalty shall continue to be held in bond or escrow until completion of the review. If any review results in an order increasing the penalty, the person to whom the notice or order was issued shall pay the difference within 15 days after notification.

(f) The civil penalty prescribed by W.S. § 35-11-902(n) shall be assessed for a maximum of 30 days, except that, if the person to whom the notice or order was issued initiated review proceedings with respect to the violation, the abatement period shall be extended as follows:

(i) If suspension of the abatement requirements of the notice or order is

ordered in a temporary relief proceeding, the period permitted for abatement shall not end until the date on which the Council issues a final order with respect to the violation in question; and

(ii) If the persons to whom the notice or order was issued initiate judicial review proceedings with respect to the violation, in which the obligations to abate are stayed by the court pending full review, the daily assessment of a penalty shall not be made for any period before entry of a final order by the court.

Section 4. **Individual Civil Penalties**

(a) For purposes of this section:

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

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

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

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

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

(A) Intentionally, voluntarily or consciously; and

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

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

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

(ii) The Director shall not assess an individual civil penalty in situations resulting from a permit violation by a corporate permittee until a cessation order has been

issued by the Department to the corporate permittee for the violation, and the cessation order has remained unabated for thirty (30) days and the procedures for assessment in subsection (d) below have been complied with.

(c) Amount of Civil Penalty.

(i) In determining the amount of an individual civil penalty assessed under this Section, the Director shall consider the criteria specified in Section 3 of this Chapter, including:

(A) The individual's history of authorizing, ordering or carrying out previous violations, failures or refusals at the particular surface coal mining operation;

(B) The seriousness of the violation, failure or refusal (as indicated by the extent of damage and/or the cost of reclamation), including any irreparable harm to the environment and any hazard to the health or safety of the public; and

(C) The demonstrated good faith of the individual charged in attempting to achieve rapid compliance after notice of the violation, failure or refusal.

(ii) The penalty shall not exceed the limits prescribed in W.S. 35-11-902(b) for each day during which a violation, failure or refusal continues, or, for multiple violations, a penalty not to exceed the limits prescribed in W.S. 35-11-902(b) for each violation for each day during which a violation, failure or refusal continues from the date of service of the underlying notice of violation, cessation order or other order incorporated into a final decision issued by the Director, until abatement or compliance is achieved.

(d) Procedure for assessment of individual civil penalty.

(i) Notice. The Director shall serve on each individual to be assessed an individual civil penalty a notice of proposed individual civil penalty assessment, including a narrative explanation of the reasons for the penalty, the amount to be assessed and a copy of any underlying notice of violation and cessation order.

(ii) Final order and opportunity for review. The notice of proposed individual civil penalty assessment shall become a final order of the Director thirty (30) days after service upon the individual unless:

(A) The individual files within 15 days of service of the notice of proposed individual civil penalty assessment a petition for review with the Environmental Quality Council, or

(B) The Department and the individual or responsible corporate permittee agree, within thirty (30) days of service of the notice of proposed individual civil

penalty assessment, to a schedule or plan for the abatement or correction of the violation, failure or refusal.

(iii) **Service.** For purposes of this Section, service shall be performed on the individual to be assessed an individual civil penalty, 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 assessment and any attached information or of the certified mail and shall not be deemed incomplete because of refusal to accept.

(e) **Payment of Penalty**

(i) **No abatement or appeal.** If a notice of proposed individual civil penalty assessment becomes a final order in the absence of a petition for review or abatement agreement, the penalty shall be due upon issuance of the final order.

(ii) **Appeal.** If an individual named in a notice of proposed individual civil penalty assessment files a petition for review in accordance with the Environmental Quality Council, the penalty shall be due upon issuance of a final administrative order affirming, increasing or decreasing the proposed penalty.

(iii) **Abatement agreement.** Where the Department and the corporate permittee or individual have agreed in writing on a plan for the abatement of or compliance with the unabated order, an individual named in a notice of proposed individual civil penalty assessment may postpone payment until receiving either a final order from the Department stating that the penalty is due on the date of such final order, or written notice that abatement or compliance is satisfactory and the penalty has been withdrawn.