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PETITION TO AMEND WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY RULES

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

PETITIONER

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

INTRODUCTION

The Surface Mining Control and Reclamation Act (“SMCRA”) and its state equivalent Wyoming Environmental Quality Act (“WEQA” or “Act”) established a modern system of coal mine permitting and enforcement. With a backdrop of hundreds of abandoned mines left for

taxpayer cleanup, one of the main goals of these laws was to mandate reclamation of all “post-law” mines.¹ To that end, SMCRA and WEQA require (1) contemporaneous reclamation of mines in accordance with a mine’s reclamation plan; (2) demonstrated reclamation success prior to bond release; and (3) “worst-case” bonding to cover the full cost of third-party reclamation should a company default on its obligations at any time during the life of the mine.

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

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

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

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

SMCRA provides:

The regulatory authority may accept the bond of the applicant itself without separate surety when the applicant demonstrates to the satisfaction of the regulatory authority the

¹ Cleanup of “pre-law” mines is covered through the federal Abandoned Mine Land (AML) fund.

existence of a suitable agent to receive service of process and a history of financial solvency and continuous operation sufficient for authorization to self-insure or bond such amount or in lieu of the establishment of a bonding program, as set forth in this section, the Secretary may approve as part of a State or Federal program an alternative system that will achieve the objectives and purposes of the bonding program pursuant to this section.

30 U.S.C. § 1259(c). Under this authority, Wyoming has elected to allow self-bonding.

However, similar to SMCRA, the WEQA provides that self-bonds *may* be accepted *only if* the operator demonstrates “a history of financial solvency” and *only if* “the objectives and purposes of [the WEQA]” are being fulfilled. Wyo. Stat. § 35-11-417(d).

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

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

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

The objectives and purposes of SMCRA and the WEQA are not fulfilled by allowing companies to self-bond because the public is left at risk for covering reclamation costs should

companies default on obligations through a bankruptcy proceeding or if they otherwise walk away and abandon reclamation obligations.

The self-bonding regulations were supposed to be designed to grant the privilege of self-bonding only to companies with demonstrated financial health – those with a “history of financial solvency.” However, as the Government Accountability Office recently confirmed in an audit,² the current regulations make it difficult for a regulator to truly determine whether a company is financially healthy. Additionally, even if a company is financially stable now, given the complexity and often rapidly-changing dynamics of energy markets, by the time a regulator decides that a company should no longer qualify, it may be too late to require that company to replace its self-bonds.

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

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

In the event of bankruptcy, the regulatory authority would probably be in the position of an unsecured creditor. Typically, the regulatory authority would have to go through bankruptcy proceedings to secure payment on the indemnity agreement. Bankruptcy proceedings are often lengthy and involved, and the regulatory authority could have to settle on less than 100% payment on the indemnity agreement.³

² A copy of this report is attached.

³ See 48 Fed. Reg. 36418 at 36422 (Aug. 10, 1983).

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

While the mines covered by the three Chapter 11 bankruptcies ultimately remained in operation and no bonds were forfeited, the state might not be so lucky during the next round of bankruptcies. With smaller and more risky operators coming in to Wyoming, like Blackjewel, LLC, and Ramaco Carbon, LLC, and with the coal industry continuing to contract, now is the time to eliminate self-bonding to make sure the state is never placed in the position of having to foot even a dollar of reclamation costs for “post-law” mines, as that would go against the purpose of SMCRA and the WEQA. As discussed above, the purpose of bonding is to ensure the funds will be available at the time the regulator needs it most: when the company is in bankruptcy or has forfeited its obligations. Self-bonding simply cannot achieve that purpose.

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

For instance, Linc Energy recently went through Chapter 11 bankruptcy,⁴ but that Chapter 11 turned into liquidation proceedings. Luckily, Linc Energy had surety bonds, not self-bonds, and as such, there were sufficient funds available to carry out the reclamation work in spite of the company forfeiture. Had Linc Energy entered bankruptcy with self-bonds, Wyoming would likely be dealing with an orphan site and no reclamation funds available to the regulator.

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

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

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

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

⁴ See <http://www.kccllc.net/linc>

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

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

PROPOSED RULE AMENDMENTS

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "Shannon Anderson", with a long horizontal line extending to the right.

Shannon Anderson

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

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

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

DEQ Land Quality Division Coal Rules & Regulations

Chapter 11 - FINANCIAL ASSURANCE

Section 1. Definitions

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

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

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

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

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

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

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

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

Section 2. Acceptable Financial Instruments.

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

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

Section 3. Irrevocable Letters of Credit.

[No amendments proposed]

Section 4. Self bonds.

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

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

~~(A) Identification of operator:~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~(J) The following in order:~~

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

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

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

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

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

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

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

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

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

~~agreement is valid under all applicable Federal and State laws. In addition, all corporate guarantors shall provide a copy of the corporate authorization demonstrating that the corporation may guarantee the self bond and execute the indemnity agreement.~~

~~(C) If the applicant is a partnership, joint venture or syndicate, the agreement shall bind each partner or party who has a beneficial interest directly or indirectly, in the operator.~~

~~(D) The indemnity agreement shall provide that the persons or parties bound shall pay all litigation costs incurred by the State in any successful effort to enforce the agreement against the operator.~~

~~(c) Self Bond Renewal.~~

~~(i) Information for the self bond renewal under the self bonding program which shall accompany the annual credit rating evaluation shall include:~~

~~(A) The amount of bond required which is determined by the reclamation cost estimate in accordance with W. S. § 35-11-417(c)(ii) and the amount which is proposed to be under a self bond.~~

~~(B) Financial information in sufficient detail to show that the guarantor still meets one of the criteria in Section 4(a)(i)(F), and the limitation in Section 4(a)(i)(J). The guarantor shall submit the full report from the credit reporting agency or agencies supporting its rating for the current year. Additional information may be requested by the Administrator when a split rating occurs.~~

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

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

~~(d) Self bond Substitution.~~

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

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

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

~~(e) Reporting Requirements.~~

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

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

Section 5. Collateral Bonds.

[No amendments proposed]

Section 6. Securities.

[No amendments proposed]

Section 7. Requirements for Forfeiture and Release.

[No amendments proposed]