

Wyoming Administrative Rules

Environmental Quality, Dept. of

Land Quality - Non Coal

Chapter 6: Self-Bonding Program

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CHAPTER 6

NONCOAL

SELF-BONDING PROGRAM

Section 1. **Definitions.**

(a) "Self-bond" means an indemnity agreement in a sum certain executed by the permittee and/or the parent company or Federal agency guarantor and made payable to the State, with or without separate surety.

(b) "Collateral" means the actual or constructive deposit, as appropriate, with the Administrator of one or more of the following kinds of property to support a self-bond:

(i) 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;

(ii) Securities backed by the full faith and credit of the United States Government or State Government securities acceptable to the Administrator. These securities must be endorsed to the order of, and placed in the possession of, the Administrator; and

(iii) Personal property located within the State, owned by the operator, which in market value exceeds one million dollars per property unit.

(c) "Comparative balance sheet" means item amounts from a number of the operator's successive yearly balance sheets arranged side-by-side in a single statement.

(d) "Comparative income statement" means an operator's income statement amounts for a number of successive yearly periods arranged side-by-side in a single statement.

(e) "Current assets" means cash and assets that are reasonably expected to be realized in cash or sold or consumed within one year or within the normal identified operating cycle of the business.

(f) "Current liabilities" means debts or other obligations that must be paid or liquidated within one year or within the normal identified operating cycle of the business. This shall also include dividends payable on preferred stock within one quarter if declared, or one year if a pattern of declaring dividends each quarter is apparent from the business' past practices.

(g) "Fixed assets" means plants and equipment.

(h) "Liabilities" means obligations to transfer assets or provide services to other entities in the future as a result of past transactions.

(i) "Parent corporation" means a corporation which owns or controls the applicant.

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

(k) "Net worth" means total assets minus total liabilities and is equivalent to owners' equity.

Section 2. **Initial Application to Self-bond.**

(a) Initial application to self-bond shall be made at the time the operator makes written application to the Administrator for a license to mine. The application shall be on forms furnished by the Administrator and shall contain:

(i) Identification of operator by:

(A) For corporations, name, address, telephone number, state of incorporation, 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

(B) 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.

(ii) Amount of bond required, to be determined in accordance with W.S. § 35-11-417(c)(i). If the self-bond amount is proposed to be less than the full bond amount, the amount which is proposed to be under a self-bond.

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

(iv) 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.

(A) 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.

(B) When calculating the period of continuous operation, the Administrator may exclude past periods of interruption to the operation of the business entity that were beyond the applicant's control.

(v) Information in sufficient detail to show good-faith performance of past mining and reclamation obligations.

(vi) A statement, in detail, so as to show a history of financial solvency. For an initial bond, each operator must provide:

(A) Audited financial statements supporting the following comparative documents, prepared and certified by an independent Certified Public Accountant who, by reason of education, experience or special training, and disinterest, is competent to analyze and interpret the operator's financial solvency. All statements shall be prepared following generally accepted principles of accounting.

(I) A comparative balance sheet which shows assets, liabilities and owner equity for five years. The operator may provide common-size documents for confidentiality.

(II) A comparative income statement which shows all revenues and expenses for five years. The operator may provide common-size documents for confidentiality.

(III) A report for the most recently completed fiscal year containing the accountant's audit opinion or review opinion of the balance sheet and income statement with no adverse opinion.

(IV) Notwithstanding the language in (A) above, unaudited financial statements may be submitted to support the comparative documents where current fiscal year quarters have ended but a CPA opinion has not yet been obtained because the fiscal year has not yet ended.

(vii) For all mining operations, financial information in sufficient detail to show that the operator meets one of the following criteria (the specified criterion relied upon shall be identified).

(A) The operator has a rating for all bond issuance actions over the past five years of "A" or higher as issued by Moody's Investor Service, Standard and Poor's Corporation or any other nationally recognized rating organization that is acceptable to the regulatory authority. Any additional rating organization must be a "nationally recognized statistical rating organization" as approved by the Securities and Exchange Commission. If the additional rating organization uses a different rating system, only ratings that are equivalent to a rating of "A" or higher by either Moody's Investor Service or Standard and Poor's Corporation will qualify (the rating organization should be identified together with any further breakdown of specific ratings).

(B) The operator has a tangible net worth of at least 10 million dollars, and a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater. The two ratio requirements must be met for the past year, and documented for the four years preceding the past year. Explanations should be included for any year where the ratios fall below the stated limits.

(C) The operator's fixed assets in the United States total at least 20 million dollars, and the operator has a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater. The two ratio requirements must be met for the past year, and documented for the four years preceding the past year. Explanations should be included for any year where the ratios fall below the stated limits.

(D) If the operator chooses (B) or (C), the two ratios shall be calculated with the proposed self-bond amount added to the current or total liabilities for the current year. The operator may deduct the costs currently accrued for reclamation which appear on the balance sheet.

(viii) For noncoal mining operations:

(A) Any rating for bond issuance actions over the past five years (the rating service should be identified);

(B) The value of the operator's fixed assets in the United States and the operator's tangible net worth;

(C) The ratio of total liabilities to net worth and the ratio of current assets to current liabilities, both computed over the past five years. A separate computation for the current year should be made which includes the proposed self-bond amount added to the current or total liabilities for the current year. The operator may deduct the costs currently accrued for reclamation which appear on the balance sheet; and

(D) The criteria listed in (vii) shall be considered in determining whether the operator can qualify to self-bond. However, the criteria in (vii) need not be determinative, based upon other financial demonstrations which may be made by the applicant to meet W.S. § 35-11-417(d).

(ix) A statement listing any notices issued by the Securities and Exchange Commission or proceedings 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.

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

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

(B) A registered agent, which agent must be either an individual resident in this State, whose business office is identical with such registered office, or 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;

(C) 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 principle 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;

(D) 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; and

(E) 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.

(xi) The Administrator may accept a written guarantee for an operator's self-bond from a parent corporation guarantor, a foreign parent corporation guarantor, foreign non-parent corporation guarantor or from a Federal agency, if the guarantor or Federal agency satisfies the financial criteria of this Chapter as if it were the operator. The operator must only supply information addressing requirements not met by the parent corporation guarantor, the foreign parent corporation guarantor or the foreign non-parent corporation guarantor. The terms of the parent corporate, foreign parent corporate, foreign non-parent corporate or Federal agency guarantee shall provide for the following:

(A) If the operator fails to complete the reclamation plan the guarantor shall do so or the guarantor shall be liable under the indemnity agreement to provide funds to the State sufficient to complete the reclamation plan, but not to exceed the bond amount; and

(B) The parent corporate, foreign parent corporate, foreign non-parent corporate or Federal agency guarantee shall remain in force unless the guarantor sends notice of cancellation by certified mail to the operator and to the Administrator at least 90 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 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 W.S. §§ 35-11-417(e) and 423.

(xii) If the operator chooses to include assets outside the United States in their tangible net worth, the Administrator shall require the information required under subsection (xiii).

(xiii) If the Administrator accepts a foreign parent corporate guarantee or a foreign non-parent corporate guarantee, the Administrator shall require:

(A) A legal opinion from a firm recognized to do business in the country of the firm's international headquarters concerning the collectability of the self-bond under the laws of that foreign country. The firm shall be selected by the Administrator from a list provided by the applicant. The applicant shall be responsible for the cost of the opinion;

(B) A separate bonding instrument to cover the estimated cost of recovering the reclamation bond in the foreign country. This separate bond shall be highly liquid such as cash, letters of credit, certificates of deposit or government securities and be redeemable within 90 days of forfeiture. The Administrator may also require additional information that is deemed necessary to support the self-bond;

(C) All audited financial statements shall be in English and shall be prepared with generally accepted accounting principles as adopted by the United States Financial Accounting Standards Board.

(xiv) For a noncoal operator, the obligation shall not exceed 50 percent of the operator's tangible net worth in the United States. For the Administrator to accept a corporate guarantee, the total amount of the parent or non-parent corporation guarantor's present and proposed self-bonds and guaranteed self-bonds shall not exceed 50 percent for noncoal, of the guarantor's tangible net worth in the United States.

Section 3. Approval or Denial of Operator's Self-bond Application.

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

(i) 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); and

(ii) 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.

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

(i) The indemnity agreement shall be executed by all persons and parties who are to be bound by it, including the parent corporation or Federal agency guarantor, and shall bind each jointly and severally;

(ii) Corporations applying for a self-bond or parent corporation guaranteeing a subsidiary's self-bond shall submit an indemnity agreement signed by two corporate officers who are authorized to bind the corporation. A copy of such authorization shall be provided to the Administrator. A Federal agency guaranteeing an operator's self-bond shall submit an indemnity agreement signed by two officers of the agency who are authorized to bind the agency and a copy of their authorization. The agency shall also submit documents supporting the availability of a cause of action against the Federal agency for performance under the indemnity agreement;

(iii) 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; and

(iv) 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) If the application is rejected based on the information required in Section 2, or based on the limitations set in Section 2(a)(xii) through (xiv), then the operator may offer collateral and an indemnity agreement to support the self-bond application. The indemnity agreement shall be subject to the requirements of (b) above.

(i) For any collateral offered to support a self-bond, the following information shall be provided:

(A) The value of the property. The property shall be valued at the difference between the fair market value and any reasonable expense anticipated by the Department in selling the property. The fair market value shall be determined by an appraiser or appraisers proposed by the operator. The appraiser or appraisers shall be selected by the Administrator. The Administrator has the option to reject any appraiser proposed by the operator. The appraisal shall be expeditiously made, and copy thereof furnished to the Administrator and the operator. The expense of the appraisal shall be borne by the operator; and

(B) A description of the property satisfactory for deposit to further assure that the operator shall faithfully perform all requirements of the Act. The Administrator shall have full discretion in accepting any such offer.

(I) Real property shall not include any lands in the process of being mined, reclaimed, or the subject of this application. The operator may offer any lands the bonds for which have been released or lands within a permit area which will not be affected. In addition, any land used as a security shall not be mined while it is a security.

(II) Securities shall only include those which are United States Government securities or those State Government securities acceptable to the Administrator. Securities shall meet the requirements specified in the definition of "Securities" found in Section 1(b)(ii).

(III) Personal property shall be in the possession of the operator, shall be unencumbered, and shall not include:

- (1.) Property which is already being used as collateral, or
- (2.) Goods which the operator sells in the ordinary course of his business, or
- (3.) Fixtures, or
- (4.) Certificates of deposit which are not Federally insured or where the depository is unacceptable to the Administrator.

(C) Evidence of ownership submitted in one of the following forms:

(I) If the property offered for deposit is real property, the operator's interest must be evidenced by:

(1.) In the case of a Federal or State lease, a status report prepared by an attorney, satisfactory to the Administrator as disinterested and competent to so evaluate the asset, and an affidavit from the owner in fee establishing that the leasehold could be transferred upon default; and

(2.) In the case of a fee simple interest, a title certificate or similar evidence of title and encumbrances prepared by an abstract office authorized to transact business within the State and satisfactory to the Administrator.

(II) If the property offered for deposit is a security, the operator's interest must be evidenced by possession of the original or a notarized copy of the certificate or a certified statement of account from a brokerage house.

(III) If the property offered for deposit is personal property as defined in Section 1(b)(iii), evidence of ownership shall be submitted in the form satisfactory to the Administrator to establish unquestionable title to the property by the operator.

(ii) In addition to submitting the above information, if the operator offers personal property as collateral to support a self-bond, he must meet the financial criteria contained in (A) or (B) below:

(A) The operator must have a tangible net worth of at least 10 million dollars, a ratio of total liabilities to net worth of 3.0 times or less, and a ratio of current assets to current liabilities of 1.0 times or greater. The two ratios shall be calculated with the proposed self-bond amount added to the current or total liabilities for the current year. The operator may deduct the costs currently accrued for reclamation which appear on the balance sheet; and

(B) The operator must have fixed assets in the United States that total at least 20 million dollars, a ratio of total liabilities to net worth of 3.0 times or less, and a ratio of current assets to current liabilities of 1.0 times or greater. The two ratios shall be calculated with the proposed self-bond amount added to the current or total liabilities for the current year. The operator may deduct the costs currently accrued for reclamation which appear on the balance sheet.

(iii) If the Administrator accepts personal property as collateral to support a self-bond, he shall require:

(A) Quarterly maintenance reports prepared by the operator, and

(B) A perfected, first-lien security interest in the property used, in favor of the Wyoming Department of Environmental Quality. This security interest shall be perfected by filing a financing statement or taking possession of the collateral in accordance with (iv)(B) below. In addition, he may also require quarterly inspections of the personal property by a qualified representative of the Department.

(iv) If the Administrator accepts any property as collateral to support a self-bond, the Administrator shall, as applicable, require possession by the Department of the personal property, or a mortgage or security agreement executed by the operator in favor of the Department of Environmental Quality. The requirement shall be that which is sufficient to vest such interest in the property in the Department to secure the right and power to sell or otherwise dispose of the property by public or private proceedings so as to ensure reclamation of the affected lands in accordance with the Act. Personal property collateral to support a self-bond shall be secured under the provisions of uniform commercial code as required by (B) below.

(A) Any mortgage shall be executed and duly recorded as required by law so as to be first in time and constitute notice to any prospective subsequent purchaser of the same real property or any portion thereof.

(B) Any security interest created by a security agreement shall be perfected by filing a financing statement or taking possession of the collateral in accordance with W.S. §§ 34-21-950 through 34-21-955 (1977). The Department shall have all rights and duties set forth in W.S. § 34-21-926 (1977) when the collateral is in its possession as a secured party, as defined in W.S. § 34-21-905(a)(ix). Any money received from the collateral during this period of time shall be remitted to the operator. When the collateral is left in the possession of the operator, the security agreement shall require that, upon default, the operator shall assemble the collateral and make it available to the Department at a place to be designated by the Department which is reasonably convenient to both parties.

(v) The operator may, with written consent from the Administrator, substitute for any of the property held hereunder other property upon submittal of all information required under this subsection and compliance with all requirements of this subsection so as to secure all obligations under all periods of time as they relate to mining operations.

(vi) For collateral posted to support a self-bond, all persons with an interest in the collateral shall be notified by the operator of the posting, and of all other actions affecting the collateral.

Section 4. **Renewal Bonds.**

(a) Information for the renewal bond under the self-bonding program which shall accompany the annual report shall include:

(i) Amount of bond required, which shall be determined in accordance with W.S. § 35-11-417(c)(ii). If the self-bond amount is proposed to be less than the full bond amount, the amount which is proposed to be under a self-bond;

(ii) Financial information in sufficient detail to show that the guarantor still meets the information in Section 2(a)(viii), and the limitations in Section 2(a)(xii) through (xiv). The Administrator may request financial statements for the most recently completed fiscal year together with an independent certified public accountant's audit opinion or review opinion of the financial statements with no adverse opinion. Additional unaudited information may be requested by the Administrator;

(iii) If the Administrator has accepted a mortgage, any changes in evidence of value, title and possession of the property shall be submitted; and

(iv) If the Administrator deems it necessary to value any asset, he may appoint the appraiser or appraisers mutually acceptable to the Administrator and the operator. Any such appraisal shall be expeditiously made, and a copy thereof furnished to the Administrator and the operator. The expense of the appraisal shall be borne by the operator. The findings of the appraisal shall be final and binding unless both parties agree to a reappraisal.

(b) Any valid initial self-bond shall carry the right of successive renewal as long as the above-listed information is submitted which demonstrates that the guarantor remains qualified under W.S. § 35-11-417(d).

Section 5. Substitution of the Operator's Self-bond.

(a) The Administrator may require the operator to substitute a good and sufficient corporate surety licensed to do business in the State 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 this substitution if the financial information submitted or requested under Section 4(a)(ii) indicates that the operator 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 to 424) of the Act. If these requirements are met, the Administrator shall accept substitution.

(b) If the operator fails within 90 days to make a substitution for the revoked self-bond with a corporate surety, cash, governmental securities, or Federally insured certificates of deposit, or irrevocable letters of credit, 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.

(c) All methods of substitution shall be made in accordance with the bonding provisions (W.S. §§ 35-11-417 to 35-11-424) of the Act. The Administrator shall either:

(i) Require substitution of a good and sufficient corporate surety licensed to do business in the State that will stand as surety so as to cover all periods of time as they relate to the mining operations, or

(ii) Retain from the operator sufficient assets within the Department so as to cover that period of time of the mining operation which is not covered by the substituted surety. Those assets not retained shall be returned to the operator within 60 days free from the Department's encumbrances, liens, mortgages or security interests.

Section 6. Requirements for Forfeiture and Release.

(a) All requirements as to bond forfeiture proceedings and the release of bonds shall be consistent with W.S. § 35-11-417(e) and W.S. §§ 35-11-421 through 35-11-424 of the Act, excepting the requirements as to notification to the surety. When the Administrator has required a mortgage, and the bond has been forfeited, foreclosure procedures shall be in accordance with W.S. §§ 34-4-101 through 34-4-113.

(b) For self-bonds supported by collateral, upon bond release property returned shall be of that form sufficient for the Department to release that portion of the interest or mortgage commensurate with

the amount of the bond released less any disposed of in accordance with the mortgage or indemnity agreement.

Section 7. Existing Operations.

(a) An operator conducting an existing, ongoing operation may at any time submit to the Administrator an application to self-bond. The application shall contain all information required in Section 2 of this Chapter except Section 2(a)(ii) shall read: "Amount of bond required to be determined in accordance with W.S. § 35-11-417(c)(ii)."

(b) If the Administrator determines that the operator qualifies for self-bonding, then the operator shall execute all required agreements or instruments and sign a new bond payable to the State of Wyoming which covers all periods of time as they relate to the mining operation. At this time, the prior bond shall be released. This release shall not be governed by any requirements as to the release of bonds which occur upon completion in whole or in part of the reclamation program.

(c) Any operation which holds a self-bond on the effective date of this Chapter shall be presumed to meet the requirements of this Chapter. To continue the self-bond, within one year from the effective date of this Chapter an application for a renewal self-bond shall be filed with the Administrator which meets all requirements in Section 3. A new indemnity agreement shall be executed which includes the requirements in Section 4(b).