

BEFORE THE WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY
INDUSTRIAL SITING DIVISION
STATE OF WYOMING

IN THE MATTER OF REVISIONS TO)
CHAPTERS 1 & 2, RULES AND REGULATIONS) DOCKET DEQ/ISC 13-08
OF THE INDUSTRIAL SITING COUNCIL)

Response to Comments

1
2
3 The following document details the actions taken by the Division to gather public
4 comments regarding the proposed revisions to the Rules and Regulations of the Industrial Siting
5 Council, Chapters 1 and 2. In addition, this document contains the Division’s response to the
6 comments received. The purpose of this document is to provide the Council information
7 regarding the process for soliciting public input and the process for responding to the comments
8 received by the Division.
9

10 **Public Notice**

11 On October 11, 2013, the Division sent a request for publication of the Notice of Public
12 Hearing for the proposed revisions to the Rules and Regulations of the Industrial Siting Council,
13 Chapters 1 and 2. The request for publication was sent to the following newspapers: Casper Star-
14 Tribune, Gillette News-Record, Cody Enterprise, Wyoming Tribune Eagle, Rawlins Daily
15 Times, Rock Springs Rocket-Miner, Pinedale Roundup, Laramie Boomerang, Uinta County
16 Herald, Riverton Ranger, Sheridan Press, and Platte County Record Times. The legal notice is
17 enclosed as **Attachment A**.
18

19 The public notice informed readers that the Industrial Siting Division (Division) was
20 seeking public comments regarding the Proposed Rules and the Statement of Principal Reasons
21 and that the documents were available for review on the Division’s website at:
22 <http://deq.state.wy.us/isd/isdnews.htm>. Further, the notice stated that copies of the documents
23 could be requested by calling or emailing the Division. The Notice also informed readers that the
24 Division would host an Open House in Casper, Wyoming to receive oral comments from the
25 public on October 29, 2013. Finally, the notice communicated that the comment period would
26 end on November 29, 2013, that there would be an analysis of the comments received, and the
27 Council would hold a hearing regarding the proposed rule revisions on December 18, 2013 in
28 Saratoga, Wyoming.
29

1 As of December 6, 2013, all of the newspapers provided an affidavit and invoice that the
2 legal notice ran the week of October 14-20, 2013.

3
4 **Interested Parties Mailing**

5 On October 14, 2013, the Division did a mailing to thirty-one interested parties regarding
6 the proposed revisions to the rules. The interested parties were people that expressed an interest
7 in the rulemaking process in the past as well as individuals that requested to be part of the rule
8 making process since the last rule revisions took place. A list of the participants in the mailing is
9 included as **Attachment B**.

10
11 The mailing packet included a copy of the legal notice, the Statement of Principal
12 Reasons, the Strikethrough copy of Chapters 1 and 2, and the clean copy of Chapters 1 and 2. Of
13 the thirty-one packages sent, three packages were returned as ‘not deliverable.’ The packets
14 returned were addressed to Wasatch Wind Intermountain, LLC and the other two were both to
15 PacifiCorp. The Division contacted Marianne Shanor, attorney for Wasatch Wind
16 Intermountain, LLC. Ms. Shanor indicated she had received the rules package and she offered a
17 new address for the Company. The Division mailed the package to Wasatch Wind on October
18 23, 2013 to the updated address. The Division also contacted Kelly Pearson, attorney for
19 PacifiCorp, and asked her about the packets that were returned to the Division. Ms. Pearson said
20 that she had received the rules packet and would make sure PacifiCorp received a copy and that
21 there was no reason to resend the packets.

22 **Oral Comments Received**

23 On October 29, 2013 the Division hosted an open house for oral public comment at the
24 DEQ office in Casper. The Division had a court reporter that transcribed the meeting. The
25 Division received oral comments from Nancy Vehr of the law firm, Hickey and Evans,
26 representing the interests of PacifiCorp. She commented on six of the proposed revisions. Her
27 comments as well as the Division’s response are included in the Response to Comments section
28 of this document starting on page 3. No other oral comments were received.

29 **Written Comments Received**

30 On October 24, 2013, the Division received a letter from Larry Claypool, Deputy State
31 Director for the Bureau of Land Management (BLM). The letter stated that the BLM had no
32 comments at this time and thanked the Division for the opportunity to comment. The letter is
33 enclosed as **Attachment C**.

34 On November 26, 2013, the Division received a letter from Roxane Perruso, Vice
35 President and General Counsel of Power Company of Wyoming. The letter was five pages long
36 and had seven suggested revisions to the text. The letter is enclosed as **Attachment D**.

1 On November 27, 2013, the Division received a letter from Nancy Vehr of the law firm,
2 Hickey and Evans, representing the interests of PacifiCorp. The letter was four pages long and
3 had fourteen comments, which included the six oral comments given on October 29, 2013 in
4 Casper, Wyoming. The letter is enclosed as **Attachment E**.

5
6 On December 5, 2013, the Division sent a letter to each of the Commenters letting them
7 know that their comments had been received.

8 9 **Response to Comments**

10 This section details the oral and written comments received regarding the proposed
11 revisions to the Rules, the Division's response, and the result to the proposed rules. Below, the
12 Division describes each comment received, then explains the Division's decision to accept, deny,
13 or revise the text due to the comment. The Division begins its response to comments with the
14 comments received from Hickey and Evans since the Division received both oral and written
15 comments from this participant.

16 17 **Comments from Hickey & Evans:**

18 **Comment 1: Chapter 1, Section 2c.** This section defines the proposed new term "Area
19 substantially affected." The proposed definition for this new term is "those counties and
20 municipalities in the area primarily affected including those who chose not to become
21 parties and are entitled to receive the notice of W.S. 35-12-IB(f)." The Council's
22 rationale for this term is that it "provides a definition to a term used in the statute."
23 See Statement of Principal Reasons of Adoption (SOPR), pg. 6. However, after
24 searching within Chapter 12 of Title 35 of the Wyoming Statutes, Rocky Mountain
25 Power was unable to locate the proposed term. The only place this term expressly
26 appears in the proposed regulations is in this definition. The only time this definition is
27 referenced in these regulations is the proposed cross-reference located in Section
28 8(g). Therefore, Rocky Mountain Power proposes that the Council delete this proposed
29 new term and the corresponding numeric cross-reference contained in Section 8(g).
30 See also Chapter I, Section 8(g) comment below.

31
32 **Response 1:** After consideration of these comments, the Division has determined that this
33 definition should be removed. As indicated by Hickey and Evans, the term is not used within the
34 regulations and the Division feels that the statute is sufficiently clear on the process that is
35 required. Therefore, the Division is proposing to delete this definition.

36
37 Proposed text after comments(s):

38 ~~(e) — "Area substantially affected" means those counties and municipalities in the~~
39 ~~area primarily affected including those who chose not to become parties and are~~
40 ~~entitled to receive the notice of W.S. 35-12-113(f).~~

1 **Comment 2: Chapter 1, Section 2(s).** This section includes an orphan quotation mark.
2 Rocky Mountain Power proposes that the Council insert a quotation mark at the end of the
3 term "Job classification."
4

5 **Response 2:** The Division agrees with the suggestion and has revised the proposed regulation
6 to state as follows:
7

8 (s) "Job classification" means those of the 2010 Standard Occupational
9 Classification System of the U. S. Department of Labor.
10

11 **Comment 3: Chapter 1, Section 6(d).** (oral and written) This section internally cross
12 references "Section 16." Rocky Mountain Power proposes that the Council correct this cross
13 reference to "Section 15."
14

15 **Response 3:** The Division agrees with the suggestion and has revised the proposed regulation
16 to state as follows:
17

18 ~~(e)(d) Each application or request for waiver shall be considered to be~~
19 ~~continuing and the applicant is under a duty to immediately notify the division of~~
20 ~~any changes of facts or applicable law materially affecting such application or~~
21 ~~request for waiver up to and including the date on which the permit or request for~~
22 ~~waiver is issued or denied.~~ The ~~a~~Applicant shall notify the ~~d~~Division immediately
23 whenever ~~it submits an application or receives a permit or approval~~ subsequent to
24 submitting an application or waiver request under the Act ~~which would require~~ a
25 material change in the design, ~~or~~ location, schedule, or scope of the industrial
26 facility has occurred. Such notification by the applicant may constitute a request
27 for amendment pursuant to W.S. 35-12-106(c) and Section ~~46~~ 15 of these rules if
28 the ~~D~~ivision determines that such differences materially change the nature,
29 location or impact of the proposed industrial facility.
30
31

32 **Comment 4: Chapter 1, Section 6(i).** (oral and written) Rocky Mountain Power supports
33 this proposed requirement that the application include "a table containing all commitments
34 stated in the application." Such a table should make it easier for all parties and the public to
35 track those commitments.
36

37 **Response 4:** The Division appreciates the comment and support for the proposed change.
38

39 **Comment 5: Chapter 1, Section 8(g).** The Council states that the change to this section
40 "corrects the regulatory references and also removes unnecessary language which streamlines
41 the rules while keeping the substantive requirements of the regulations in place." *See*
42 *Statement of Principal Reasons of Adoption (SOPR)*, pg. 12 (emphasis added). However,
43 the currently effective regulatory requirement does not include any reference to the term "Area
44 substantially affected." *See Rules and Regulations of the Industrial Siting Council, Ch. I, §*
45 *9(g)* (May 31, 2011). Therefore, by adding the reference to Section 2(c) - the definition for

1 "Area substantially affected"- the Council has increased the substantive requirements of these
2 regulations. Because this is the only regulatory section of the proposed rules that references
3 this proposed new term, Rocky Mountain Power proposes that the Council delete the
4 proposed new term and this cross- reference to Section 2(c).

5
6 **Response 5:** As indicated in Comment #1, the Division proposes to remove the definition for
7 "area substantially affected," therefore; this section will also be modified to remove the
8 reference to that definition. Below is the Division proposed text after comment(s):

9 (g) The applicant shall identify what it deems to be the area of site
10 influence and recommends as the local governments primarily affected by the
11 proposed industrial facility as defined in Sections 2(c) and (b) ~~respectively, of~~
12 ~~these regulations~~. The immediately adjoining area(s) and local governments shall
13 also be identified with a statement of the reasons for their exclusion from the list
14 of area(s) or local governments primarily affected by the proposed industrial
15 facility.

16
17 **Comment 6: Chapter 1, Section 8(i).** The Council states that the change to this section
18 "combines the first and second sentence to streamline the rules but keeps the substantive
19 requirements in place." See SOPR, pg. 12 (emphasis added). However, the last sentence of
20 the first paragraph changes the requirement from "may include" to "shall include." This
21 change increases the stringency of the substantive requirement instead of "keep[ing] the
22 substantive requirements in place." Therefore, in order to maintain the stringency of the
23 current substantive requirement, Rocky Mountain Power proposes that the Council delete the
24 proposed language and retain the current "may include" language.

25
26 **Response 6:** The Division appreciates this comment but believes that the requirements of this
27 section are also required by W.S. 35-12-109. The Division does not believe that this language
28 expands the scope of the material required beyond that which is already required by W.S. 35-
29 12-109(a)(xiii)(A) through (S). The rule simply provides clarity on the information that needs
30 to be present to satisfy 35-12-109. The Division believes that the term 'shall' is the best fit as
31 the application would be incomplete if the items mentioned in this section of the regulations
32 were not provided.

33
34 Proposed text after comment(s):

35 (i) ~~An evaluation of the social and economic conditions in the area of site~~
36 ~~influence~~. The social and economic conditions in the area of site influence shall
37 be inventoried and evaluated as they currently exist, projected as they would exist
38 in the future without the proposed industrial facility and as they will exist with the
39 facility. Prior to submitting its application, each applicant shall confer with the
40 ~~a~~Administrator to define the needed projections, the projection period and issues
41 for socioeconomic evaluation. The evaluation ~~shall~~ ~~may~~ include, but is not limited
42 to:

43
44 **Comment 7: Chapter 1, Section 8(i).** (oral and written) The Council proposes changing the
45 word "evaluation" in the first sentence to "analysis." However, the word "evaluation" was
46 left unchanged in the second sentence. For consistency purposes, Rocky Mountain Power

1 proposes that the Council replace the word "evaluation" in the second sentence with the word
2 "analysis."
3

4 **Response 7:** The Division appreciates the comment and agrees that consistency is the best
5 path forward. Therefore, the Division proposes to use the term "evaluation" throughout this
6 provision. Below is the Division's proposed text after comment(s):
7

8 (j) An evaluation of the environmental impacts. ~~The items shall be noted and~~
9 ~~evaluated~~ as they would exist if the proposed industrial facility were built.
10 Each evaluation should be followed by a brief explanation of each impact and the
11 permit issued that regulates the impact. If the impact is not regulated by a state
12 regulatory agency or federal land management agency, the application must
13 include plans and proposals for alleviating adverse impacts. Cumulative impacts
14 of the proposed industrial facility and other projects in the area of site influence
15 should be addressed separately.
16

17 **Comment 8: Chapter 1, [new] Section 9.** (oral and written) It appears that the Council
18 proposed revisions to this section to address statutory changes adopted by Wyoming's
19 legislature in 2010 and 2011. Of particular interest to Rocky Mountain Power are the
20 proposed regulatory requirements resulting from the 2010 legislation that created Wyo. Stat.
21 § 35-12-105(e). This statute prescribes that the Industrial Siting Council's financial
22 assurance rules and regulations "shall not apply to facilities that are public utilities and
23 regulated by the Wyoming public service commission." Rocky Mountain Power supports the
24 proposed regulatory revisions to the extent that they are consistent with this statutory
25 requirement.
26

27 **Response 8:** The Division appreciates the comment and support for the proposed change.
28

29 **Comment 9: Chapter 1, Section 9(d).** (oral and written) This section addresses financial
30 assurance provisions for wind energy facilities subject to regulation by the Public Service
31 Commission and contains an internal cross-reference to Section 8(d). Section 8(d) refers
32 to an unrelated requirement. Rocky Mountain Power proposes that the Council replace
33 this internal cross reference with a cross reference to Section 9(e) addressing Cost
34 Estimation for Decommission and Site Reclamation and Section 9(h) addressing
35 additional financial assurance requirements. Rocky Mountain Power's proposed revision
36 assures that these financial assurance provisions will "not apply to facilities that are public
37 utilities and regulated by the Wyoming public service commission."
38

39 **Response 9:** The Division agrees with the suggestion and has revised the proposed regulation
40 to state as follows:
41

42 (d) Financial Assurance: The applicant shall provide financial assurances for
43 a wind energy facility, sufficient to assure complete decommissioning and site
44 reclamation of the facility in accordance with the provisions of these rules. Wind
45 energy facilities subject to regulation by the Public Service Commission shall be
46 exempt from these financial assurance provisions and from the Cost Estimation

1 for Decommissioning and Site Reclamation provisions of Section 9 ~~8(d)~~ (e) and
2 (h) of these rules.
3

4 **Comment 10: Chapter 1, Section 9(i).** Romanette (iii) of this provision mandates that review
5 comments "will be provided" to affected landowners. However, the provision does not state
6 which entity is responsible for carrying out this mandate. Given that the Council proposes
7 that the Division provide notice of the Application to the affected landowners (*see* §
8 9(i)(ii)), Rocky Mountain Power suggests that the Council similarly and expressly state that
9 the Division is the entity responsible for providing the review comments to the affected
10 landowner.

11
12 **Response 10:** The Division agrees with the suggestion and has revised the proposed
13 regulation to state as follows:

14
15 (iii) All review comments from State agencies pursuant to W.S. 35-12-110(b) and
16 (c) will be provided to the affected landowners by the Division.
17

18 **Comment 11: Chapter 1, Section 14(b).** Section 35-12-106(b) of the Wyoming Statutes
19 authorizes the Council to approve permit transfers "to a person who agrees to comply with
20 the terms, conditions and modifications contained in the permit." (emphasis added). The
21 Act defines "person" to include "an individual, group, firm, partnership, corporation,
22 cooperative, association, or other entity excluding the state, federal government and local
23 government." *See* Wyo. Stat. Ann. § 35- 12-102(a)(xi). "Person" also includes "the parent
24 company, partnership or holding entity for a commercial facility generating electricity from
25 wind." *Id.*

26
27 The Council's proposed language authorizes it to approve permit transfers only to "a
28 different company buying the assets of the permitted facility[.]" (emphasis added). The
29 Council states that this change "establishes a procedure for parties to transfer permits in
30 accordance with W.S. 35-12-106(b)." *See* SOPR, pg. 19. However, use of the specific
31 word "company" limits the Council's transfer approval authority to companies whereas
32 the statute authorizes permit transfers to the much broader category of "persons." In order
33 to provide the Council with the statutory equivalent permit transfer authority, Rocky
34 Mountain Power proposes that the Council replace the word "company" with the word
35 "person" throughout this subsection.

36
37 **Response 11:** The Division agrees with the suggestion and has revised the proposed regulation
38 to state as follows:

39
40 (b) The Council may authorize transfers of permits to a different person
41 buying the assets of the permitted facility if:
42

43 **Comment 12: Chapter 1, Section 17.** The Council states that this section addresses
44 "situations where [the Division] receives a large request for copies of documents.
45 The cost of reviewing documents for confidential material, processing, and copying these
46 documents puts a strain on the resources of the Division. As such, the Division has

1 proposed the above procedures in order to recoup costs incurred in the production of large
2 information requests." *See* SOPR, pg. 19. The proposed regulation provides in relevant part:

3
4 The Department may require reimbursement of costs incurred in producing the
5 requested document(s)... For requests that require processing and review of
6 records, the Department may require reimbursement for the time required to
7 compile, review, and prepare the document(s) for distribution to the person
8 requesting the document(s).

9
10 Ch. 1, § 17(b) (emphasis added). However, Wyoming's Public Record Act expressly prohibits
11 agencies from charging fees as a condition of making public records available for inspection:
12 "Nothing in this section shall be construed as authorizing a fee to be charged as a condition of
13 making a public record available for inspection." Wyo. Stat. Ann. § 16-4-204(a).

14
15 Rocky Mountain Power recognizes that the Division and the Department face resource
16 constraints to respond to certain public records requests. Therefore, Rocky Mountain Power
17 proposes that the Council revise this provision to align with the statutory requirements so that the
18 Division and the Department may be reimbursed for statutorily authorized costs and fees. *See*
19 Wyo. Stat. Ann. § 16-4-204(a) ("furnished copies, printouts or photographs"), Wyo. Stat. Ann. §
20 16-4-204(b) ("services rendered by [the official custodian] or his deputy in supervising the
21 copying, printing out or photographing"). Rocky Mountain Power also proposes that the Council
22 consider a future rulemaking effort to set the "reasonable fees and charges that may be assessed
23 for the [statutorily authorized] costs and services." *See* Wyo. Stat. Ann. § 16-4-204(d).

24
25 **Response 12:** The Division considered the comment and agrees that revisions are appropriate to
26 clarify the Division's intent. Public records are always available for review at the Industrial
27 Siting Office free of charge. The Fee section is necessary for those instances where a person
28 requests a personal copy of the information aside from the copy available for viewing in the
29 office. In these instances, there is a burden of time and cost to the Division that is beyond
30 normal business procedures. In these instances, a regulation is necessary for reimbursement for
31 the costs associated with such requests. The language is proposed to be revised as follows:

32
33 (b) Public records may be inspected and copies provided upon written request
34 specifying the document(s) requested. The Department may require
35 reimbursement of costs incurred in reproducing the requested document(s). Costs
36 will be the actual costs incurred to process the request.

37
38
39 **Comment 13: Chapter 2, Section 5(a).** (oral and written) This section addresses application
40 submissions and includes an internal cross reference to Chapter 1, Section 4(a). However,
41 Section 4(a) appears to be a reference to an unrelated requirement. Rocky Mountain Power
42 proposes that the Council replace this internal cross reference with a cross reference to Chapter
43 1, Section 6(a) which prescribes the required number of application copies.

44
45 **Response 13:** The Division agrees with the suggestion and has revised the proposed regulation
46 to state as follows:

1
2 (a) Upon filing a notice of an intent to be a party by a person or organization
3 described in W.S. 35-12-111(a)(iii), the division shall immediately provide such a
4 person or organization with a complete copy of the application. To the extent that
5 there are copies available from the copies supplied by the applicant under Chapter
6 1, Section 4-6(a) of the Industrial Development Information and Siting Rules, the
7 copy will be provided without cost to such persons in the order of filing such
8 notice of intent. All other copies will be supplied by the division upon payment by
9 such person or organization of the smaller of \$100.00 or the actual cost of
10 preparing duplicate copies.

11
12
13 **Comment 14: Chapter 1 and 2.** General Typographical Corrections. Rocky Mountain Power
14 noted that the Council proposed capitalizing the first letter of several words such as "Act",
15 "Administrator", "Director", and "Division" within several Sections of Chapters 1 and 2.
16 However, in certain sections, the Council left the first letter formatted as lower case. For
17 consistency, Rocky Mountain Power proposes that the Council update all of these lower case
18 formatted words to the new upper case format.

19
20 **Response 14:** The Division agrees that all instances should be capitalized.

21
22 **Comments from Power Company of Wyoming:**

23
24 **Comment 15: Chapter 1, Section 2 (c).** Section 2(c) "Area substantially affected" means those
25 counties and municipalities in the area primarily affected including those who chose not to
26 become parties and are entitled to receive the notice of W.S. 35-12-113(f).

27
28 Section 2(c) is being added to define language used in W.S. 35-12-113(f) requiring
29 service of a copy of the council's decision and findings on "local governments to be
30 substantially affected" by the proposed facility.

31
32 We recommend the following revision: "Local governments to be substantially
33 affected," as used in W.S. 35-12-113(f), shall mean counties and municipalities located in the
34 "area primarily affected" as defined in Section 2(b)(i).

35
36 **Response 15:** After consideration of these comments, the Division has determined that this
37 definition should be removed. As indicated by Hickey and Evans, the term is not used within
38 the regulations and the Division feels that the statute is sufficiently clear on the process that
39 is required. Therefore, the Division is proposing to delete this definition.

40
41 **Comment 16: Chapter 1, Section 2 (aa).** "Safety" shall mean freedom from fear of injury
42 or threat of injury. Such injury or threat of injury may be premised on crime rates, traffic
43 accident rates, dangers of industrial accidents or mishaps or other similar considerations.

44
45 We recommend that the definition of Safety be revised as follows:
46

1 “Safety” shall mean freedom from ~~fear of~~ injury or threat of injury. Such
2 injury or threat of injury may be premised on crime rates, traffic accident rates,
3 dangers of industrial accidents or mishaps or other similar considerations.
4

5 This revision would make the first sentence of the definition of the term “Safety”
6 consistent with the second sentence, which uses “injury or threat of injury.” Next, this
7 revision makes the definition of “Safety” more consistent with the way the term is used in the
8 statute. Under W.S. 35-12-109(a)(xii) the applicant must address “procedures proposed to
9 avoid . . . endangering the public health and safety.” The term endangering means to “bring
10 into danger or peril” or “to create a dangerous situation.” Thus, a threat of injury or injury
11 would fall under endangering the public safety. *Merriam Webster*. In contrast, a person
12 could have a fear of injury where there is no real threat; therefore, “threat of injury” should
13 be used instead of “fear of injury” when defining the term safety.
14

15 **Response 16:** The Division agrees with the suggestion and has revised the proposed regulation
16 to state as follows:
17

18 (y) “Safety” shall mean freedom from ~~fear of~~ injury or threat of injury. Such
19 injury or threat of injury may be premised on crime rates, traffic accident rates,
20 dangers of industrial accidents or mishaps, or other similar considerations.
21

22 **Comment 17: Chapter 1, Section 6 (i).** The application shall contain a table containing all
23 commitments stated in the application and provide the page number where each commitment
24 is discussed in the body of the application. The table shall also provide a narrative of all the
25 commitments made to local governments in accordance with W.S. 35-12-107(b)(xi) and
26 W.S. 35-12-109(a)(xiii).
27

28 The requirement that the table reflect “all commitments stated in the application” is
29 overly broad and lacks definition. In contrast, the requirement for a table of the commitments
30 made to local governments along with the statutory reference that sets out a list of discrete
31 topics is narrowly tailored and defined.
32

33 Therefore, we recommend that Section 6(i) be revised as follows: The application
34 shall contain a table ~~containing all commitments stated in the application and~~
35 ~~provide the page number where each commitment is discussed in the body of the~~
36 ~~application. The table shall also provide~~ing a narrative of all the commitments
37 made to local governments in accordance with W.S. 35-12-107(b)(xi) and W.S.
38 35-12-109(a)(xiii).
39

40 **Response 17:** The Division appreciates the comment but feels that it is important for the
41 regulation to remain as proposed. The Division believes that the table is an important tool to
42 allow for better monitoring and oversight of permits by the Division as construction continues at
43 facilities. Furthermore, the table allows for local communities and interested persons to better
44 locate and understand the commitments that are intended to lessen the impacts of the facility.
45

1 **Comment 18: Chapter 1, Section 9 (d)(iii)(C).** Section 9(d)(iii)(C) (based on the new
2 numbering) Other forms of assurance such as corporate guarantee, letter of credit, insurance
3 policy, or other forms as may be acceptable to the Director.
4

5 The only proposed revision in this section was to capitalize Director. We would like
6 to propose the following additional revision: Other forms of assurance such as corporate
7 guarantee, letter of credit, insurance policy, separate bonding required by federal law with
8 respect to federal lands, or other forms as may be acceptable to the Director.
9

10 This revision recognizes that where federal lands are involved in a project there may
11 be separate requirements for bonding those lands. Specifically providing that this separate
12 bonding requirement may be considered and accepted by the Director should prevent
13 requiring the Applicant to unnecessarily double-bond portions of the Project.
14

15 **Response 18:** The Division appreciates the comment but believes the language should
16 remain as proposed. It is the Division's position that W.S. 35-12-105(e) requires that the
17 bond for the entire facility to be held by the Division. Furthermore, it is the Division's
18 position that the language as proposed provides enough flexibility for alternate forms of
19 bonding that are proposed by Applicants.
20
21

22 **Comment 19: Chapter 1, Section 9 (d)(iv)(A) and (B).** Section 9(d)(iv)(A) and (B) (based
23 on the new numbering). This new subsection addresses financial assurance forfeiture
24 where the Permittee fails to decommission and reclaim as described in its permit.
25 Specifically, Section 9(d)(iv)(B) provides that the Division: Notify the Permittee in
26 writing of the failure to perform reclamation in accordance with its approved reclamation
27 plan and demand that justification be provided to the Division within 15 days.
28

29 We recommend that when the Permittee is notified of the alleged violation of the
30 terms of the permit, the Permittee be allowed 60 days in which to either cure the alleged
31 violation or provide justification to the Division.
32

33 Suggested revision to Section 9(d)(iv)(B): Notify the Permittee in writing of the
34 failure to perform reclamation in accordance with its approved reclamation plan
35 and demand that within 60 days the Permittee must either cure its failure to
36 perform or provide justification ~~be provided~~ to the Division. ~~within 15 days.~~
37

38 **Response 19:** The Division appreciates the comment and agrees that 15 days may not be enough
39 time for Permittees to prepare a response to such a notification. Therefore, the Division has
40 proposed to change this from 15 days to 30 days to allow for additional time to prepare a response
41 or justification for the failure to maintain compliance with the reclamation plan. It is the Division's
42 position that 60 days to respond, as suggested, is too long and would further delay the reclamation
43 process. In response to this comment, the Division proposes to change the regulation as follows:
44

45 (iv) If the Permittee fails to decommission and reclaim as described in
46 its permit, the Director may determine that the financial assurance be forfeited to
47 the Division to arrange for the decommissioning and reclamation to be conducted

1 by a third-party. In order for the Director to determine that the financial assurance
2 be forfeited, the Director shall:

3
4 (A) Determine that decommissioning or reclamation has not started
5 or it has fallen behind the approved schedule for more than six (6) months.

6
7 (B) Notify the Permittee in writing of the failure to perform
8 reclamation in accordance with its approved reclamation plan and demand that
9 justification be provided to the Division within 30 days.

10
11 **Comment 20: Chapter 1, Section 9 (d)(iv)(B)(I).** Section suggested revision to Section
12 9(d)(iv)(B)(I): If the failure to perform is not cured and no justification acceptable to the
13 Director is made by the Permittee within the time provided, ~~or if the Director rejects the~~
14 ~~justification~~, the Director shall provide the Permittee written notice that the Division intends
15 to pursue forfeiture of the financial assurance.

16
17 **Response 20:** The Division appreciates the comment but proposes to keep the regulation as
18 proposed. It is the Division's position that the action of curing a failure to perform and providing
19 justification are essentially the same because notifying the Division of the Permittee's action of
20 curing the failure would have to be contained in the justification as to why the bond should not
21 be forfeited. Therefore, the Division proposes to keep the language as proposed.

22
23 **Comment 21: Chapter 1, Section 9 (h).** Section 9(h) (based on new numbering) regarding the
24 applicant's financial capability. This section requires the applicant to provide information
25 demonstrating its financial capability to construct, maintain, operate, decommission, and
26 reclaim the proposed facility. The section then states that if the Division requests "such
27 documentation" it shall be held confidential to the extent authorized by Wyoming law and
28 *shall* include the following specific documents: (i) commitment letters from the principal
29 investors of the project, (ii) for applicants whose securities are publicly traded, publicly
30 available financial statements or other public financial information, or (iii) for privately held
31 applicants, financial statements of the majority of financial contributors to the project.

32
33 The main revision to Section (h) is to relocate it within Chapter 1 because it only applies to
34 Wind Energy Facilities. We would like to propose one additional minor revision – that
35 would allow the Division, if documentation is requested, flexibility in the type of
36 documentation it may consider with respect to demonstrating the applicant's adequate
37 financial capability.

38
39 Suggested revision to second sentence of Section 9(h):

40
41 Such documentation, if requested, shall be held confidential to the extent
42 authorized by Wyoming law and ~~shall~~ may include: [].

43
44 Support for the suggested revision:
45

1 The Industrial Development Information and Siting Act requires the applicant provide
2 information demonstrating its financial capability to construct, maintain, operate,
3 decommission, and reclaim the proposed facility. See W.S. 35-12-109(a)(xxi); W.S. 35-12-
4 113(a)(iv). The Act, however, does not specify what information is required to make this
5 demonstration, and does not require the documents specified in Section 9(h). To the contrary,
6 W.S. 35-12-105(e) states that “the elements to consider when establishing adequate levels of
7 financial assurance shall include credit worthiness, financial strength, credit history, credit
8 rating and any other factors that reasonably bear upon the decision to accept a financial
9 assurance.” See *Northern Laramie Range Foundation v. Wasatch Wind Intermountain LLC*,
10 2012 WY 158 (Dec. 14, 2012) at ¶¶71-75 (construing the requirement to demonstrate financial
11 capability). The problem with Section 9(h) as written is that if the Division requests
12 documentation of the applicant’s financial capability, the applicant *must* provide financial
13 documents specified in the rule, which are only a narrow subset of the possible kinds of
14 documentation that can demonstrate the applicant’s adequate financial capability.

15
16 Moreover, the current requirement for “commitment letters from the principal investors
17 of the project” can be construed to mean a contractual obligation to invest in the project, which is
18 an unlikely obligation to exist prior to the issuance of a permit. Indeed, in *Laramie Range*
19 *Foundation*, the Division was concerned that the potential investor of the wind energy project
20 was not so contractually obligated and therefore conditioned the permit upon a later
21 demonstration of financial capability prior to construction. The Wyoming Supreme Court
22 upheld the Division’s decision, making it clear that a contractual obligation to finance the facility
23 is not required in order to issue the permit.

24
25 Finally, if the applicant is privately held, or if the majority of the project’s financial
26 contributors are privately held, then such private companies will very likely view their
27 financial statements to be highly confidential and will likely not risk their disclosure to a
28 governmental agency because the agency cannot guarantee they will remain confidential.
29 Thus, Section 9(h) can place the privately-held applicant in a difficult position, even when
30 such applicant can provide documentation other than confidential financial statements to
31 demonstrate adequate financial capability. Such a narrow requirement does not comport with
32 the flexibility provided by the Act or with the Court’s reading of the financial capability
33 requirement in *Northern Laramie Range Foundation*.

34
35 **Response 21:** The Division appreciates the comment but proposes to leave the regulation as
36 proposed. This requirement was moved verbatim from the previous section in accordance with
37 the legislative change that financial capability demonstration apply to wind projects alone. There
38 have not been any changes proposed to this section from that which was approved in 2011 by the
39 Council.

40
41 **Comment 22: Chapter 1, Section 14 (b)(ii) and (iii).** Section 14(b) (based on new
42 numbering) addresses permit transfers and terminations. The new provisions allow for
43 transfer of a permit if three conditions are satisfied. The last two conditions are:

- 44
45 (ii) The matter is heard by the Council at its next meeting after notice is
46 published and the parties are notified.

1 (iii) Appropriate officers of the current permit holder and the acquiring
2 company are present for examination by the Council.

3
4 Clarification as to how to properly comply with these two conditions is requested.
5

6 With respect to Section 14(b)(ii)'s requirement that the "notice is published," it would
7 be helpful to have additional detail with respect to: (a) the required content of the notice; (b)
8 where the notice must be published; and (c) how many days the notice must be published.

9 With respect to Section 14(b)(ii)'s requirement that the "parties are notified," it would
10 be helpful to have additional information with respect to: (a) the parties to be notified; and (b)
11 the required form of notification.
12

13 With respect to Section 14(b)(iii)'s requirement that the appropriate officers be
14 present for examination by the Council, it would be helpful in ensuring the appropriate
15 officers are in attendance to have additional detail with respect to the subject or subjects on
16 which the Council may examine the officers for purposes of determining whether to approve
17 the transfer of a permit.
18

19 **Response 22:** The Division appreciates the comment but proposes to leave Section 14(b)(ii) as
20 proposed. Details regarding Notices are listed in the Rules Chapter 2 Section 6, titled Notices
21 and Other Actions. The Division feels the information available is sufficient and does not require
22 more detail.

23 The Division appreciates the comment and the request for such information, however, the
24 Division does not accept the recommendation for Section 14(b)(iii) at this time. The transfer of a
25 permit involves social, political, and environmental issues that change over time and the Division
26 could not place into regulation all the potential scenarios. Thus identifying a common set of
27 subjects that could be determined with reasonable certainty goes beyond the Division's goals for
28 this rule revision process. Permittee should consult the Division for the unique circumstances of
29 a specific permit prior to the meeting of the Council regarding this issue.
30

31 **Proposed Rules for Council's Consideration**

32 **Attachment F** contains the strike through version of the proposed Chapter 1 and Chapter
33 2 of the Rules and Regulations of the Industrial Siting Council after the Division's consideration
34 of the comments received. Black text indicates no change in the current language of the Rules,
35 Red text was the originally proposed revisions to the Rules, and Blue text indicates a further
36 revision of the Rules due to the comments received.
37

38 **Attachment G** is the clean version of the proposed Chapter 1 and Chapter 2 of the Rules
39 should the revisions be accepted.
40