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DEPARTMENT OF ENVIRONMENTAL QUALITY  
LAND QUALITY DIVISION

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DRAFT PROPOSED RULES AND STATEMENT OF REASONS  
COAL RULES AND REGULATIONS, CHAPTERS 1, 10, 12 AND 16  
RULE PACKAGE 1-Z: VALID EXISTING AND  
INDIVIDUAL CIVIL PENALTIES

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TRANSCRIPT OF HEARING PROCEEDINGS

PURSUANT TO NOTICE duly given to all parties in  
interest, this matter came on for hearing on the 17th day  
of November, 2008, at the hour of 9:03 a.m., at the Oil  
and Gas Commission Building, 2211 King Boulevard, Casper,  
Wyoming, before the Department of Environmental Quality  
Land Quality Division, Mr. Jim Gampetro presiding, with  
Mr. Robert Green, Mr. Carl Demshar, Jr., Mr. Joe Slattery,  
Board Members.

Mr. Donald McKenzie, Administrator, DEQ Land  
Quality Division, also in attendance.

1 P R O C E E D I N G S

2 (Hearing proceedings commenced

3 9:03 a.m., November 17, 2008.)

4 MR. GAMPETRO: Welcome to all of you. I  
5 think we'll start off, if everybody would just go around  
6 and introduce themselves so we know, and what organization  
7 you're with.

8 MS. ACKERMAN: Laura Ackerman, Buckskin.

9 MR. FLEISHMAN: I'm Jeff Fleishman, OSM.

10 MR. HULTS: Craig Hults with the LQD.

11 MR. DEMSHAR: Carl Demshar, board member  
12 from Rock Springs.

13 MR. GREEN: Bob Green, representing  
14 industry.

15 MR. SLATTERY: Joe Slattery, representing  
16 agriculture, Pine Haven.

17 MR. GAMPETRO: Jim Gampetro, public  
18 representative from Buffalo.

19 MR. MCKENZIE: I'm Don McKenzie,  
20 administrator, Land Quality.

21 MR. GAMPETRO: That's it. That's all of  
22 us.

23 Has everybody had an opportunity to take a look  
24 at the minutes? We would entertain a motion to approve the  
25 minutes from the July 21st meeting.

1 MR. GREEN: I would so move.

2 MR. SLATTERY: I'll second.

3 MR. GAMPETRO: All in favor?

4 MR. DEMSHAR: Aye.

5 MR. GREEN: Aye.

6 MR. SLATTERY: Aye.

7 MR. GAMPETRO: With no opposed, that

8 passes.

9 Rule Package 1-Z.

10 MR. HULTS: All right. I put together a  
11 little PowerPoint just to get us all up to speed. Some of  
12 these are -- the deficiencies are getting older and older,  
13 and the history's going back a little further and further  
14 each time as we try and take care of these.

15 This package today addresses two main areas.  
16 One's valid existing rights. And the second one is  
17 individual civil penalties. I just put citations where  
18 these are for the federal regs.

19 For valid existing rights, December -- this goes  
20 back to December of '99. OSM published a final rule that  
21 defined the valid existing rights, procedures are related  
22 to that, and explained that operation between the SMCRA.

23 Those rules -- first -- let me go back. This  
24 rule -- or the rules that they published relates to SMCRA  
25 at this 30 U.S.C. 1272(e). What that does is it limits

1 and/or prohibits mining on certain lands. This is the  
2 statute here. It gets some prohibitions for federal  
3 systems and national parks, wildlife refuge, the trail  
4 systems, wilderness, scenic rivers, goes on to other areas  
5 like the national forest. Some of the surface impacts that  
6 brings in the Department of Agriculture may have some input  
7 on whether you're able to mine on those lands as well.  
8 They're brought into some of the procedural mechanisms.

9           There's also these other three. And our regs  
10 contain this same kind of language. There's areas where  
11 it's historic places that are on the national register.  
12 Another place where it would be prohibited would be within  
13 100 feet of the outside of a right-of-way. That can be  
14 changed -- the right-of-way can be changed, so there's  
15 opportunity with notice and opportunity to be heard, but  
16 those kind of changes can be made. So it's not a full-on  
17 prohibition on these things.

18           Then the last one's within 300 feet of any  
19 occupied dwelling, public buildings, parks, or within a  
20 hundred feet of a cemetery. So our regs can mirror this,  
21 and these are the areas where it would be limited unless  
22 you had a valid existing right when this became under the  
23 protection of this statute. This deficiency, like I said,  
24 started -- we were first notified of it in 2001. The rules  
25 originally published in '99. The valid existing rights

1 were challenged in court on several fronts, and in that  
2 time OSM said that we could hold off on making any changes  
3 to the rules pending the litigation or results of that.

4           In February of 2008, we were informed that the  
5 federal court cases had been resolved and that we could  
6 move forward with any kind of revisions to our rules.  
7 Another thing they pointed out was we had already received  
8 the letter, 732 letter, which is a -- it goes through and  
9 analyzes our rules compared to the Federal Rules, and sees  
10 where we're less effective than the Federal Rules.

11           They put this out in 2001, because there were no  
12 changes to the Federal Rules, based on the court hearings,  
13 they said that we could go ahead with this original letter  
14 and change -- everything stood the way they had analyzed  
15 our rules initially, so there weren't any changes to the  
16 Federal Rules that had to be readdressed or reexamined. So  
17 we went back and looked at this 2001 letter.

18           This proposed package addresses all the issues  
19 that they brought up in the 732 letter. So it's got a  
20 fairly long history. There's been some going back and  
21 forth a little bit with informal responses.

22           The proposed changes that we have here, it looks  
23 like a lot of language, and a lot of it's procedural. And  
24 some of the mechanisms that they use, without going back  
25 and trying to create a state system that was either a

1 mirror or some kind of hybrid of that, I basically went  
2 through and took the federal language in those areas where  
3 we were deficient and just plugged that in without  
4 upsetting too many of our rules and creating too many other  
5 issues along the way. And I'm hoping that's what I've  
6 done.

7           So these rules here for VER, it will clarify the  
8 definition we have in Chapter 1. There were some issues  
9 there that we had procedural mechanisms within the  
10 definitions, so those have been moved to Chapter 16. Just  
11 to kind of consistently administer it. You know, actually  
12 Chapter 10 and 12, I'm sorry. It clarifies that lands are  
13 still subject to the remainder of the regulations  
14 applicable to coal mining operations. That means if you  
15 were limited or prohibited from mining on those areas, you  
16 would still -- or you were able to mine in those areas, you  
17 would still be subject to the rest of the LQD rules.

18           The second -- or third one here that we had was  
19 we changed the standards, and that was a major part of the  
20 rule change in '99 on the OSM's. And they had -- we had a  
21 standard that was basically a taking standard in our rules.  
22 The OSM changed that to a good faith and all permit  
23 standard, or a needed for and adjacent standard. And I'll  
24 talk about those a little later.

25           Also clarifies the operation related to roads.

1 Our rules currently, we're just addressing haul roads, this  
2 will include all roads into this. Clarifies the  
3 application of LQD's rules for existing operations.

4           Some of the dates have changed a bit. Our rules  
5 use the enactment of SMCRA as a cutoff date. Well, the way  
6 the rules are set up currently, these valid existing rights  
7 can be -- you can gain these valid existing rights at any  
8 time now. Say Congress put out a new national monument or  
9 things such as this, you could get your ducks in a row, so  
10 to speak, prior to the actual enactment or when this came  
11 under the protection. So if you had some notice that this  
12 might be coming, it would probably be in the operator's  
13 best interest. If it was something that had been  
14 envisioned in the future, but just they hadn't gone through  
15 all the procedural mechanisms to get their permits ready,  
16 that's an option. So this is something that can be created  
17 all along a continuum of time.

18           Let's see what else have we got? The revises of  
19 the current rules to include determination procedures,  
20 including submission requirements, evaluation procedures,  
21 public participation, that would be notice and opportunity  
22 to be heard. The timing of decisions and LQD's  
23 recordkeeping requirement.

24           Also clarifies the procedures applicable to joint  
25 approvals that are some instances like with public parks,

1 where we would have to get the managing agencies of those  
2 parks, or whoever's responsible for managing those, it  
3 would become a joint decision. And so there's  
4 procedural -- procedural mechanisms there.

5           And finally, this revises the procedures  
6 applicable to coal exploration. And some other  
7 requirements for the application changed, and some of the  
8 approval procedures were modified.

9           MR. GAMPETRO: We have two new attendees.  
10 If they'd like to just introduce themselves.

11           MR. RUBY: Hi, I'm Jim Ruby. I'm the new  
12 executive secretary for the Environmental Quality Council.  
13 So I just wanted to come up and say hi.

14           This is my dad.

15           MR. RUBY, SR.: How you doing?

16           MR. GAMPETRO: Mr. Ruby and Dad. Do you  
17 know everybody here?

18           MR. RUBY: I know this one.

19           MR. GAMPETRO: Want to go around the room  
20 just one more time real quick?

21           MR. DEMSHAR: My name is Carl Demshar from  
22 Rock Springs.

23           MR. RUBY: Nice to meet you.

24           MR. GREEN: I'm Bob Green out of Gillette,  
25 industry representative.

1                   MR. SLATTERY: Joe Slattery from Pine  
2 Haven. I'm the farm and ranch representative.

3                   MR. GAMPETRO: Jim Gampetro from Buffalo,  
4 and I'm a public representative.

5                   MR. MCKENZIE: And Jim, I'm your tour guide  
6 for Power Resources.

7                   MS. ACKERMAN: Laura Ackerman, Buckskin  
8 Mine.

9                   MR. FLEISHMAN: Jeff Fleishman, Office of  
10 Surface Mining in Casper.

11                   MR. HULTS: Still Craig with LQD.

12                   MR. RUBY: Still the same Craig.

13                   MR. GAMPETRO: Thank you.

14                   MR. RUBY: Thank you.

15                   MR. GAMPETRO: If you have any comments,  
16 anybody, just speak up and holler out, raise your hand.

17                   MR. HULTS: The second area of proposed  
18 rules that we have, this addresses a civil -- kind of civil  
19 individual penalties deficiency that we had. This one's a  
20 little more historical. Originally we were informed in  
21 1988, or that was when the Federal Rules were published for  
22 civil penalties, individual civil penalties.

23                   In November of that year, we received a 732  
24 letter. And what's important from that letter, I think, we  
25 have a statute, Section 902, that addresses civil

1 penalties. The way it's worded, they come out and say what  
2 a person -- and I'll talk a little bit more about this  
3 later -- and they mention the person, then they go into  
4 corporate officers or employees, and things like that, so  
5 there's kind of a split in our statute. We had rules that  
6 related to the corporate end of it. We didn't have any  
7 regulations or procedures that addressed civil penalties  
8 for the individual.

9           What I've added is addressing those concerns, but  
10 what OSM had stated in that letter is apart from the  
11 general statutory authority to assess such penalties, we  
12 didn't have provisions analogous to the Federal Rules for  
13 running this through the procedural mechanisms. And that's  
14 what we've added today, or are proposing to add.

15           In '89, we sent an informal response which  
16 outlined some proposed language that we were thinking of  
17 doing. It also discussed some areas where we thought we  
18 were at least as efficient -- or as effective as the  
19 Federal Rules. The OSM responded to that, and they didn't  
20 take all of our arguments verbatim, so there were  
21 additional areas that were still deemed less effective than  
22 the Federal Rules.

23           In June, we sent a second informal response, and  
24 that was in 1990. And that contained the language that is  
25 in this current rule package. Their response to that was

1 we had gotten it down to the level where there was  
2 basically just one issue they had, and it was a procedural  
3 mechanism where it related to notice and comment and  
4 service of notice, and so we made that correction, or  
5 addition to the rules. So hopefully the way this stood it  
6 was informally approved on the OSM's end of it. They  
7 thought the language we provided informally would address  
8 the OSM's concerns, so that's my hopes still. And I know  
9 that's from 1990 but I don't believe any of the rules have  
10 changed since then, so my hope is they'll keep going  
11 forward in that path.

12           In March of 2001, we were going to put this in a  
13 rule package that was rule package 1-0, I believe, and  
14 there was some discussion with the AG's office about the  
15 interaction of 902. In reviewing that kind of discussion,  
16 I don't think it was ever clear that many of the procedural  
17 mechanisms that we were lacking was -- I guess the main  
18 issue, other than the fact that we could assess these  
19 penalties, we just didn't have a procedure. And that  
20 leaves an individual without notice of how am I going to  
21 get through this system should I find myself in this  
22 position. And this, I believe that the rule package that  
23 we're presenting today addresses those and will give notice  
24 of the procedures involved. And it's fairly detailed,  
25 there's quite a bit of language there, but that was the

1 only way I felt that we could get over this deficiency  
2 hurdle, just that it's been out there so long. And so  
3 basically I took the federal language anywhere we were  
4 deficient and plugged that into our rules as much as  
5 possible.

6           Here again is this 35-11-902, which gives us the  
7 authority. And again, the federal regs are split out for  
8 the director, officer or agent of a corporate permittee,  
9 and that's our Section 3 in Chapter 16, which just  
10 addresses civil penalties. The part where you're missing  
11 was this first part, where it says any person who violates,  
12 and that's our attempt to address these rules.

13           The proposed rules that we have here, we have  
14 definitions of willfully, knowingly, and violation, failure  
15 or refusal. We've added when these individual penalties  
16 may be assessed, the amount of civil penalties. And again,  
17 that mirrors our 902. The federal regs are slightly  
18 different, but without causing a conflict with our  
19 statutes, I use the numbers that are in the statutory --  
20 our Wyoming statutes that we didn't have a conflict there.  
21 Added procedures for an assessment of the penalties, and  
22 also procedures for the payment of penalties.

23           And that's it on an intro, and I thought we could  
24 go through the language and see if we have any issues along  
25 the way.

1           Again, we have some of the introduction, some of  
2 the things that went through a little more detailed,  
3 perhaps.

4           The proposed changes, the summary, basically I  
5 went through on the PowerPoint there. And so this first  
6 section that we get into is our definition of valid  
7 existing rights. Our current definition includes a lot of  
8 the kind of procedural mechanisms and were kind of a  
9 hodgepodge and a mix of things. It didn't -- I think maybe  
10 perhaps it was in line with the previous rules, but the  
11 changes they made at the OSM level were pretty big and took  
12 quite a bit of writing to get it all back in order, I  
13 think.

14           So our initial definition here is a set of  
15 circumstances under which a person may, subject to  
16 regulatory authority approval, conduct surface mining  
17 operations on lands where the federal statute would  
18 otherwise prohibit or limit those operations. And again,  
19 this was a deficiency, this second line there, a person  
20 seeking to exercise VER is still required to comply with  
21 all other rules and the act itself. So hopefully that's  
22 addressing it.

23           Basically what I went through and did was took  
24 this 732 letter, which is a very detailed analysis of our  
25 rules and areas where we were deficient. What they had

1 said here was that we did not contain provisions, some of  
2 the procedural mechanisms, but they said we must add the  
3 requirement that we use the federal definition, and so that  
4 was why I tried to stay as true to what the Federal Rules  
5 were. I thought that would create a lot of confusion if we  
6 had a state version of valid existing rights and a federal  
7 version.

8           We move this haul roads that are here. Again,  
9 we -- the letter discussed that it was applicable to all  
10 roads and not just our haul roads. This comes in a little  
11 bit later, but we moved that. And moved it down into the  
12 chapter. Here we have -- these are some of the standards  
13 that you would need to follow for perfecting your existing  
14 rights. So this first part here is that you would have to  
15 have a legally binding conveyance, a lease, a deed, a  
16 contract, something you would be relying on that was in  
17 place already, and that you would have the right to conduct  
18 the surface mining operations.

19           And this has to be when the land came under  
20 protection of the -- when it came under federal protection,  
21 so it would have been one of those five areas I discussed  
22 earlier, whether it's national forest or park or something  
23 like that.

24           Here, this second part, part (ii), here is where  
25 the new standards come in. The first one is this good

1 faith and all permits standard. Here what you need to do  
2 is you would need to have all permits and other  
3 authorizations required to conduct the mining operations,  
4 or that there's been a good faith effort to obtain that.

5           And again, this has to be before it came under  
6 protection. So these things would have had to have been  
7 done before, say, Congress authorized a new public park or  
8 any of those five instances that they talk about in that  
9 statute. At a minimum, a permit application would have had  
10 to have been submitted.

11           The second standard, which we had in our rules,  
12 but in a slightly different form, you'll see a little bit  
13 later it's struck out. And again, I just took the federal  
14 language here. The need for an adjacent standard means  
15 that the land is immediately adjacent to the surface coal  
16 mining operation for which all permits have been garnered,  
17 and/or there's been this good faith effort, again.

18           To meet the standard you would have to  
19 demonstrate that prohibiting the expansion would unfairly  
20 impact the viability of the operation as originally  
21 planned. These are instances where perhaps your mine plan  
22 stretched out beyond something that you don't perhaps have  
23 the permits in place or you've made this good faith effort,  
24 but now you're in a position that, wow, if we don't get  
25 this part of the property as we planned, it's going to

1 pretty severely negatively impact the viability of that  
2 business. So it accounts for that. It allows for this  
3 preplanning that's been done and accounts for that.

4           And again, it includes this good faith effort,  
5 again, and so it's similar, except that it's as is needed  
6 for and adjacent portion of it. So those are two standards  
7 either/or would have to be met.

8           The next section of rules that are put in here  
9 were things that the regulatory agency will consider in  
10 making that determination: Whether it is needed for and  
11 adjacent; the extent to which supply contracts or business  
12 commitments have been made; financing that's been procured  
13 or relied on; investments that have been made; whether this  
14 map -- or whether this land was part of the plan as the  
15 life of a map -- or life of a mine map, excuse me.

16           Third part here, now this is a bit different. We  
17 had originally the struck-out language here. Again, that  
18 was just for haul roads. What this does is it expands it  
19 to all roads that might be included in the permit area or  
20 the area you're seeking to exercise these valid existing  
21 rights. So it wouldn't just be a haul road. Some of the  
22 factors that are considered here is whether the road was --  
23 existed when the land came under protection, and that seems  
24 to be a critical portion. A lot of these rights that  
25 you're relying on need to be in place before it comes under

1 protection of the federal government. A properly recorded  
2 right-of-way or easement. A valid permit for the use or  
3 construction of that road. And so those are the three  
4 things that would be considered to show that the roads were  
5 included in this as well.

6           Again, here was -- in (iii), that's struck out  
7 there, that was the needed for and adjacent standard.  
8 Again, it was slightly different than the federal regs, so  
9 it was changed. I included the current standard as it's  
10 written in the Federal Rules, and struck out this portion  
11 of it.

12           This (iv) here, this dealt -- this was a  
13 deficiency related to valid -- or keep throwing that word  
14 in there, but existing operations that were already in  
15 place. We had in there this August 3rd date. What that  
16 didn't allow for is moving forward from that date, it would  
17 be possible to perfect these rights after that date. It's  
18 something that Congress could create a new park or national  
19 monument, or something like that. And that could be in  
20 between that time, from '77 to the current date. So there  
21 could be things that you've done to secure permits, or  
22 whatnot, that may come under this protection. And so you  
23 need to allow for that, and that was the attempt to fix  
24 that, I guess.

25           And those are the changes I made to Chapter 1,

1 just the definition. Now, there's further procedural  
2 mechanisms that play into Chapter 12 here. And if there's  
3 any questions on Chapter 1, please feel free to interject.

4 MR. RUBY: Craig, I have one. When you're  
5 talking about the valid existing rights back there, do they  
6 have to exist in me, as the person who wants to exercise  
7 them, or does that valid existing right just happen to  
8 exist as a deed or something and say Mr. McKenzie has it  
9 and I buy it from him?

10 MR. HULTS: You could do that transfer, I  
11 believe. The key is that whoever wants to exercise it,  
12 typically it's going to be perhaps the company, or the  
13 person -- an individual person could secure those rights.  
14 Most of these coal operations you're talking about large  
15 operations, not your mom & pop kind of store. So it would  
16 typically be coming from a corporate entity that --

17 MR. RUBY: I only have to show chain of  
18 title.

19 MR. HULTS: Correct.

20 MR. RUBY: I don't have to show I had the  
21 deed at the time prior to the time of the federal action?

22 MR. HULTS: If that was -- let me make sure  
23 before I -- except as provided, a person claiming VER  
24 da-da, da-da, da-da -- shall demonstrate that a legally  
25 binding conveyance, lease, deed, contract or other document

1 that vests that person or predecessor in interest, so --

2 MR. RUBY: Okay.

3 MR. HULTS: -- with the right to conduct  
4 that type of mining, so --

5 MR. RUBY: Okay. Thanks.

6 MR. HULTS: -- I think that answers it.

7 Again, this is Chapter 12. These are some of the  
8 special permitting procedures that relate to the coal  
9 operations. In (a), I didn't change anything through i  
10 through iv. I included (v). And again, this is that --  
11 the mirror of the federal language, and shows where things  
12 are prohibited or limited.

13 One area here that we were deficient in was that  
14 we didn't have the procedures for making some of these  
15 determinations. And this was one area where I thought it  
16 was best to just include a reference to the Federal Rules  
17 without including all of the procedures that were listed  
18 there.

19 The second part with the roads here. This one  
20 was that we were lacking some of the procedural  
21 requirements, again, for time limits, written findings.  
22 And so what this does is adds a public notice requirement,  
23 if a request for a hearing had -- is made, there is 30  
24 days, again, for a comment period. So just adds some  
25 procedural mechanisms that we were deficient in.

1           This one here in (vi) was in relationship to -- a  
2 new element that the OSM added in part of the 1999 rules,  
3 and it defines which agency is responsible for making the  
4 VER determinations. For nonfederal lands, the Division  
5 would be responsible, LQD. For anything that's a federal  
6 property, there would be the OSM or the federal managing  
7 agency. There might be incidences where it would be a  
8 codecision again the OSM and the managing agency.

9           What's important here is we'll always be using  
10 the federal definition. We had a deficiency related to  
11 that, and we never spelled out which definition would  
12 apply, and we had our own definition that wasn't similar to  
13 the federal definition. And again, that was one of these  
14 areas where I tried for consistency to not create a  
15 separate state rule, but to just take the federal rule and  
16 make that our own to avoid some confusion, hopefully.

17           (vii), there's quite a bit of procedural. This  
18 is what you would do to submit, and some of the  
19 decision-making processes along the way. So here requests  
20 that would be submitted of property rights demonstrate as  
21 required. This would include a legal description of the  
22 land; complete documentation of the interests of the  
23 surface and mineral estates; complete chain of title for  
24 surface and mineral estates for which the request pertains;  
25 description of the nature and effect of each title

1 instrument, so you would be talking about what kind of  
2 documents are you relying on. I see a typo at the moment.  
3 It says forms the bas, B-A-S, it should be I-S on the end,  
4 if that is --

5 MR. GAMPETRO: What is the word? Basis  
6 or --

7 MR. HULTS: Basis, yes.

8 Another thing, description of the type and extent  
9 of surface coal mining operations that you claim are right  
10 to conduct. So you'd be talking about the full extent of  
11 kind of what you're trying to do, and how you believe that  
12 ties into this chain.

13 You'll also be supplying complete documentation  
14 on the nature and ownership as of the date that that land  
15 came under protection. And this is all -- of all the  
16 property rights, surface and mineral estates, and again, to  
17 which this request pertains; the names and addresses of all  
18 current owners of the surface and mineral estates; if the  
19 coal interests have been severed from other property  
20 interests, you would provide documentation that you've  
21 notified it and provided reasonable opportunity for the  
22 owner of the property interest of the land to comment on  
23 the validity of those severed rights; any comments -- this  
24 adds to some of the procedural mechanisms -- any comments  
25 in response to the notification above, those would be

1 provided as well.

2           If the valid existing rights determination  
3 request relies on the good faith and all permits standard,  
4 you would include the documentation discussed above; and  
5 this additional approval and issuance dates and  
6 identification numbers for any permits, licenses,  
7 authorizations that came as part of you trying to secure  
8 those -- permits that are required to do the surface mining  
9 operation.

10           You would provide all the application dates for  
11 the permits, license, authorizations. And this would be  
12 the predecessor in interest. Say somebody went in and got  
13 these -- or has gotten these permits, and there's a change  
14 in ownership of some of that, you would provide this chain  
15 of custody, basically your chain of title; an explanation  
16 of any other good faith efforts that have been made.

17           (III) is if you're relying on the needed for and  
18 adjacent standard, again you would be required to submit  
19 everything in (I) above, and then detail why the request is  
20 being made that prohibiting the expansion of this operation  
21 would unfairly impact the business itself.

22           A third category -- a fourth category is for  
23 roads. Here, again, if the road existed and was part of  
24 the operation or at least the person had the legal right to  
25 use the road for the surface coal mining operations, you

1 would want to show that. You can show a properly recorded  
2 right-of-way or easement for a road that existed when the  
3 land came under protection. It may not be that the road is  
4 developed, but you have the proper documentation that you  
5 would be able to.

6 A second -- or third category, a valid permit for  
7 use or construction of a road in that location.

8 (B) -- I know I'm going fast, so if there is  
9 anything you want to comment about, feel free -- this would  
10 be the procedures for requesting the VER review. The  
11 request comes in to a responsible agency. Again, this  
12 could be the federal government or the state agency. Here  
13 this examination is just a completeness review. The  
14 initial review is just to make sure that you now have all  
15 the components that you need. It's not going to make any  
16 determinations on whether the existing rights are there or  
17 not. It's just whether you've provided the appropriate  
18 documentation to make that decision.

19 The agency making the decision will notify the  
20 person requesting that information, if there's any missing  
21 components, and allow for enough time to get those sent in.  
22 In (IV), if the information that's requested in (II) above,  
23 those would be the missing components, if those aren't  
24 submitted in a timely fashion, then the determination will  
25 be made that it has not been demonstrated, valid existing

1 rights has not been demonstrated; however, there is an  
2 opportunity to cure those kind of things. This isn't a  
3 decision that is ultimately final. If it's final meaning  
4 that based on the information you provided, we do not see  
5 these valid existing rights, or the federal government  
6 doesn't make that determination, you would still have the  
7 right to go back at a later time and resubmit things, so it  
8 gives you that opportunity.

9           There are notice and comment procedures that are  
10 new. Again, this follows the federal system. This would  
11 be -- the OSM sends out a -- or publishes a similar notice,  
12 but this would be that you would be inviting comments from  
13 the local constituents, people that would be interested in  
14 whatever move that was being tried to be made at this  
15 point.

16           So here you would provide -- and this is what the  
17 notice should provide, the location of the lands;  
18 description of the type of mining; a reference to and a  
19 brief description of the applicable standards for the VER,  
20 and that would be again the good faith and all permits or  
21 the needed for and adjacent to, or the roads standard; and  
22 some more detail for the good faith and all permits or  
23 needed for and adjacent standard.

24           You would want to include -- or would need to  
25 include a description of the property rights claimed and

1 the basis for the claim. Again, if the road was the basis  
2 of your request, to include that information. Again, the  
3 legal rights to use that road, permits you've tried to  
4 obtain for that road.

5 Let's see, this one, in (c), again, this is  
6 roads. And this would be if it was a right-of-way or  
7 easement, when the road wasn't in place. (d), if this  
8 relies on one -- one or more of the standards in the  
9 definition Chapter 1 -- hang on, let me read this quick.  
10 And this part relates to whether -- if somebody had an  
11 issue with perhaps the rights that you were claiming, this  
12 would open it up to fully vet those type of issues prior to  
13 making the decision.

14 (e) is a description of the procedures that will  
15 be followed to make the decision. Closing date in (f), and  
16 has to be a minimum of 30 days; a statement that a request  
17 can be made for an extension, 30-day extension can be made  
18 to lengthen the comment period.

19 MR. GAMPETRO: Question here.

20 MR. HULTS: Sure.

21 MR. GAMPETRO: One or more such extensions?

22 It says --

23 MR. HULTS: The way it is listed right now  
24 is one; however --

25 MR. GAMPETRO: Doesn't say that. It says

1 "a."

2 MR. HULTS: Yeah, "a 30-day" -- and I can  
3 see where a person requests that, they get their 30 days.  
4 Well, there's somebody else that during that period has  
5 become aware. So I think that allows for that for multiple  
6 requests to be made. And each one would be an individual  
7 30 days. And I think the timing of that would have to be  
8 maybe that if we had multiple requests at the same time, or  
9 can we tack these on, I think that just allows us the  
10 flexibility to create that amount of time, whatever it's  
11 going to take to get these things vetted within reason,  
12 knowing that the operation is also going to have an  
13 interest to get this wrapped up as soon as possible.

14 In (g), that was the 30-day request. Where  
15 copies of the requests can be found, that would be either  
16 our agency or OSM. This notice will go out to all  
17 reasonable -- reasonably locatable owners of the subsurface  
18 and mineral estates. The owner of the feature causing the  
19 land to come under the protection, again, that would be a  
20 cemetery, public building, all the way up to the national  
21 parks.

22 Third one here is a letter transmitting the  
23 notice, and provides this 30-day, starting at the date of  
24 the service of the letter, and again, another 30 days  
25 available on request.

1           (D) is how the decision will be made. In (I),  
2 the agency, the responsible agency -- again that could be  
3 the federal government or the state -- will review all the  
4 materials submitted, comments that were made, and determine  
5 whether record is sufficiently complete, again, to make a  
6 decision on the merits. If not, again, the requestor  
7 can -- or the agency can seek more information. And again,  
8 this is written fairly loosely within a specified  
9 reasonable time, so I think the important part of it would  
10 just be a discussion back and forth, not letting things lag  
11 too long.

12           Once the record's complete, shall -- the agency  
13 will determine whether the requestor has demonstrated this  
14 valid existing right. The decision document will explain  
15 how the requestor has or hasn't met the standards. There  
16 will be an analysis of any impact of property rights,  
17 disagreements. And to determine this, a responsible agency  
18 is going to show that there has not been a demonstrated  
19 VER. If there is a subject of pending litigation to the  
20 properties or an administrative body, in this case it would  
21 probably be the EQC, had jurisdiction over some of these  
22 issues. At that point, the requestor may refile request  
23 once that property right has been fully adjudicated. So  
24 this subsection only applies if the legal action has been  
25 initiated as of the closing date of the comment period.

1           If the record indicates that there's a  
2 disagreement to the accuracy of the property rights, but  
3 the disagreement is not subject to litigation, the agency  
4 shall evaluate the merits of the information in the record  
5 and determine whether you've demonstrated this -- it will  
6 be left to determining agency.

7           The responsible agency will issue a determination  
8 that the requestor has not demonstrated valid existing  
9 rights, if they haven't met the time frames for getting  
10 information in.

11           And after making a determination here the  
12 Division will provide a copy of the determination. And  
13 this would be -- even though the OSM might be the one  
14 making the determination, we would still be the ones  
15 providing the notice to the person making the request. So  
16 this would be -- show what the decision was, an explanation  
17 of appeal rights and procedures available.

18           And here, this would be for if -- this is a  
19 notice of the determination that's been made. There's a  
20 public notice that would go out, the OSM also publishes a  
21 notice as well, whatever the decision was made.

22           Here administrative and judicial review, just  
23 states that it's open to an administrative review or  
24 judicial review.

25           In (F), the responsible agency will make copies

1 of and materials available to the public, much like we do  
2 for our rules packages or other things.

3           Procedures for joint approval. Now, these are  
4 cases where you would have a publicly owned park or  
5 historic place. This here -- well, this decision would be  
6 made in cooperation, then, with the regulatory authority  
7 that has jurisdiction over that public park or historic  
8 place.

9           Again, procedural mechanisms to make that joint  
10 decision. I believe that's it for Chapter 12, other than  
11 just renumbering of the letters. That's Chapter 12. Any  
12 questions on that?

13                   MR. GREEN: Mr. Chairman, if I might, just  
14 a brief question.

15                   MR. HULTS: Sure.

16                   MR. GREEN: Just looking through this, I  
17 did have one question that was given to me by one of the  
18 operators.

19                   MR. HULTS: Uh-huh.

20                   MR. GREEN: They basically wanted to know  
21 if they've got a current lease that predates SMCRA, and the  
22 leases are in an LMU, a logical mining unit, set of  
23 documents with BLM, but not yet in -- within any LQD  
24 permit, that these rules basically are simply procedural,  
25 fine-tuning of the definition, there would really be no

1 change in the status of that -- of that situation --

2 MR. HULTS: No.

3 MR. GREEN: -- under these rule changes,  
4 correct?

5 MR. HULTS: Not as I would read that, no.  
6 Because particularly where you have your permits in place,  
7 and you could show -- I think these standards would allow  
8 that kind of operation to move forward. And the date here  
9 for SMCRA's enactment, I don't think anything has changed  
10 since that point, so these would be preSMCRA. These, I  
11 think, fine-tune the fact that in the future, or has  
12 happened since '77, but could still happen today if they  
13 make it a new designation, you would still have the  
14 opportunity to secure that. Perhaps it isn't secured as  
15 far as the OSM or the regulatory agency's concerned because  
16 there's never been an official showing of that. And there  
17 hasn't been a need to, really. So this would be just a  
18 matter of showing the documents that you're relying on, I  
19 think. So it wouldn't change the actual property right  
20 associated with that, then.

21 MR. GREEN: Great. Appreciate that, then.  
22 Thank you.

23 MR. HULTS: The third area where this  
24 impacts is the -- scroll down to it -- is Chapter 10. This  
25 is our exploration regulations. Again, we had deficiencies

1 that related to the exploration and the valid existing  
2 rights rules.

3           We had one that was in here, I believe, before  
4 the -- there was a note from OSM that it may have been  
5 prior to the enactment of these '99 rules. That's been  
6 included in here. And what it was was here in (a), the  
7 only time that we said things would be designated  
8 unsuitable would be under this Chapter 17. That didn't  
9 account for any of the things that we discussed previously,  
10 those five things, like the national parks, or things like  
11 that. And so this was just out there. The Chapter 17  
12 involves petitions for declaring areas unsuitable for  
13 mining. So this adds to those five areas: national parks,  
14 cemeteries, public lands, those sorts of things.

15           Here, in (xiii), this here is a -- again, it  
16 falls into the -- it's the -- I'm at a loss for a word  
17 here. This has the same kind of standard. The extent that  
18 it's technologically and economically feasible that the  
19 proposed activities had been designed to minimize the  
20 interference with these things. Basically that you'll be  
21 providing information that's -- you're doing as little harm  
22 as possible, and taking into account and protecting those  
23 things, which land has come under protection for, knowing  
24 that exploration activities will be somewhat less.

25           Again in Section 3, there weren't a lot of

1 changes until we get to (c), and this states that the  
2 administrator shall approve a complete application and  
3 issue the license only if he finds -- here, again, we had a  
4 deficiency. We needed to add this same kind of analysis to  
5 make sure that we were protecting those interests as part  
6 of this exploration activity.

7           That is it for the valid existing rights. The  
8 other area that we are addressing was the individual civil  
9 penalties, again. What this does is adds some definitions.  
10 And again, this was the package and rules that developed  
11 over time in cooperation with OSM. Some drafts were  
12 submitted back and forth.

13           The language that's here is very close to the  
14 federal language. Places that it changed were areas where  
15 perhaps it said the OSM was the agency, they were talking  
16 about our case, it's because the state regulatory authority  
17 that's making those decisions. So there are minor changes  
18 to it, but for the most part, it was an attempt to mirror  
19 the federal language as best as possible.

20           Here we added those definitions, knowingly; the  
21 violation, failure, or refusal. A failure or refusal to  
22 comply with these orders, that's part of the violation.  
23 And the third one is willfully.

24           Just to clarify, (b) is when an individual  
25 penalty may be assessed. (c) is the amount of civil

1 penalty. And again, I took that statutory -- the statutory  
2 numbers that we have and used those. This is another area  
3 where we would probably actually be more stringent than the  
4 federal regulations. I believe our numbers are slightly  
5 higher than the federal regulations. However, to keep  
6 consistency with our statutes, those numbers are plugged in  
7 here.

8           Some of the procedures for the assessment of an  
9 individual civil penalty, we have notice. There's a final  
10 order, an opportunity for review. And again, I think what  
11 needs to be made clear here is we've always had the ability  
12 to assess these kind of penalties.

13           What we're trying to provide here is an  
14 explanation of the procedures that will be used and give  
15 notice that this is the procedure that we will be using. I  
16 think it clarifies things for people. Again --

17           MR. FLEISHMAN: You have a --

18           MR. HULTS: What's that?

19           MR. FLEISHMAN: You have a typo in (ii)(A).

20           MR. HULTS: (ii)(A), eh. Oh, yes.

21           MR. FLEISHMAN: Yeah --

22           THE REPORTER: I'm sorry. You're going to  
23 have to speak up.

24           MR. FLEISHMAN: I'm sorry. I was just  
25 pointing out a typographical error.

1                   MR. HULTS: I will say that needs to be the  
2 environmental quality. Thank you. The final order after  
3 an individual is served with their notice, 30 days.

4                   You have -- there's this service requirement.  
5 This is in the area where we had our final deficiency. As  
6 we sent these things back and forth, this was one area  
7 where we had stated that, well, our Federal Rules of Civil  
8 Procedure or State Rules of Civil Procedure are basically a  
9 mirror of what you're asking us to do, but we didn't have a  
10 reference to.

11                   In (C) there, that it -- the attempt is made to  
12 correct that error or deficiency by just making a reference  
13 to our current procedure rules. And the issue there was  
14 the service. What they wanted was a certified receipt that  
15 you had sent it out and had received it.

16                   Final section here is a payment of penalty.  
17 There's no abatement or appeal if the assessment becomes a  
18 final order in the absence of a petition for review. An  
19 appeal can be had if the individual named in the notice of  
20 proposed individual penalty files for a petition of review  
21 with EQC.

22                   And finally, in (iii), an abatement agreement,  
23 where the department or the corporate permittee or  
24 individual have agreed in writing on a plan to abate  
25 whatever issue is brought up, the penalty phase or

1 assessment.

2           And that's it for this section. There's a lot of  
3 procedural mechanisms for notice, opportunity to be heard.  
4 I think it just spells out an area of rules that we didn't  
5 have a lot of direction, and my hope here is that it's a  
6 little more clear and so people are on notice.

7           MR. MCKENZIE: Mr. Chairman.

8           MR. GREEN: Mr. Chairman.

9           MR. MCKENZIE: Mr. Chairman, I would like  
10 to propose the board consider a change in Section 4(d).  
11 This is the procedure for assessment of individual civil  
12 penalty. When I looked at the CFR component, they actually  
13 list three elements which is notice, final order, and  
14 service. I believe service, which is currently (C) should  
15 become (iii).

16           MR. HULTS: I have it highlighted up on the  
17 screen. (C) would just get bumped over to a iii instead of  
18 C.

19           MR. GREEN: Mr. Chairman, if I might ask a  
20 question. In the statement of reasons, it's outlined that  
21 the AG representative had some issues with the former  
22 package relative to -- relative to the statutes and you  
23 already outlined that as well.

24           MR. HULTS: Yeah.

25           MR. GREEN: But the statement of reasons

1 doesn't outline what the current status is with the  
2 Attorney General. Have --

3 MR. HULTS: I have since --

4 MR. GREEN: Have they changed their minds?

5 MR. HULTS: I have sent the package down  
6 for review, typically at the Advisory Board level, unless  
7 there's something very glaring there. And I did point out  
8 to them, same person, it was John Burbridge had the initial  
9 comments to this. I will say it sat since 1990 after that  
10 determination was made, and I don't know how, because these  
11 are so -- just what I would say is more procedural and kind  
12 of gap filling to what our statutes currently says. I  
13 don't know how we would get around that. His initial  
14 concern that there was some redundancy there. And in one  
15 of our responses, we had sent back that we thought that  
16 Section 902 covered some of these issues, but then it  
17 became now you have this small area that's deficient, and  
18 to write that in the rule would be very difficult and would  
19 be standing alone, kind of not filling the gap, but just  
20 this -- it would fill the gap, but it would be filling the  
21 gap by itself. So it didn't seem to flow well without  
22 pulling in all of these procedures.

23 And if there is some redundancy there, I think it  
24 dovetails fairly nicely. Again, we had the numbers and  
25 things like that of the fines that may be assessed. I will

1 be looking for a more formal comment from him certainly,  
2 but, again, I just don't see how we would have gotten  
3 around having some overlap between the statute and to  
4 address these OSM deficiencies.

5 MR. GREEN: That's just main -- my question  
6 is that in its final form the statement of reasons will  
7 provide some status at -- some closeout status --

8 MR. HULTS: Yeah.

9 MR. GREEN: -- with the AG?

10 MR. HULTS: Yeah, absolutely. I'll make  
11 sure to include that.

12 MR. GREEN: It begs the question currently.  
13 Thanks. Appreciate that.

14 MR. HULTS: Let me look. I may have the  
15 actual commentary that was made, or at least interpretation  
16 on the commentary. This language that I pulled, this -- we  
17 had a package that was developed and we had side by sides.  
18 Basically it was we had taken their language from the  
19 Federal Rules, the way this was stated, that it was removed  
20 from the proposed package because it appeared that 902 may  
21 already contain some of the provisions being proposed in  
22 this rule adoption, and they said they wanted to further  
23 investigate. And they pulled it out because they didn't  
24 want to hold up the whole package.

25 To my knowledge, it hasn't gone any further than

1 that with the AG's office, and my hope is, again, yes, to  
2 get this -- a final comment from the AG's office. The way  
3 the EQC is doing the formal rulemaking now, it allows for  
4 commentary before a notice of a public meeting, so  
5 certainly we would get that into the chain of custody for  
6 this package, definitely.

7 MR. GREEN: Great. Appreciate that.

8 And, Mr. Chairman, if I might, just one more  
9 item.

10 Just reviewing the package, there might be a few  
11 additional typos that we can provide to you after this, if  
12 that --

13 MR. HULTS: That would be wonderful.

14 MR. GREEN: -- rather than take up time,  
15 that would be great.

16 MR. HULTS: I may have missed that, yes.

17 MR. GREEN: Just helpful. Just trying to  
18 be helpful.

19 MR. HULTS: Appreciate the extra eyes.

20 MR. GAMPETRO: Any other changes or  
21 renumbering or comments?

22 MR. MCKENZIE: No.

23 MR. GAMPETRO: Are we ready to vote on  
24 this? Entertain a motion.

25 MR. SLATTERY: I make a motion we approve

1 the changes.

2 MR. GREEN: I'll second.

3 MR. GAMPETRO: All those in favor.

4 MR. DEMSHAR: Aye.

5 MR. GREEN: Aye.

6 MR. SLATTERY: Aye.

7 MR. GAMPETRO: None opposed.

8 Well, any other new business to come before this  
9 body? Any other items for discussion?

10 MR. MCKENZIE: Mr. Chairman, I would  
11 request the Board consider electronic submittals of rule  
12 packages. We're currently sending those out hard copy. We  
13 can continue to do so, but I wonder if we might be able to  
14 reduce some expense, if that would be acceptable to the  
15 Board.

16 MR. GAMPETRO: You're talking about to us?

17 MR. MCKENZIE: Yes.

18 MR. GAMPETRO: I have no problem.

19 MR. GREEN: I think it's great idea.

20 MR. SLATTERY: Yes.

21 MR. GAMPETRO: Talking about e-mail?

22 MR. MCKENZIE: Yes, thank you.

23 MR. GAMPETRO: That's fine.

24 MR. MCKENZIE: Mr. Chairman, I have one

25 other item. I'm still searching for a political

1 subdivision representative for the Board. That's been  
2 going very slowly. If there is anyone that has any  
3 thoughts or ideas of someone that might be interested, I  
4 would sure be interested in contacting those folks.

5 MR. GAMPETRO: If anybody does, if you  
6 would bring it forward after the meeting. I'll think on it  
7 myself, see if I can come up with anything.

8 MR. MCKENZIE: Thank you.

9 MR. GAMPETRO: Any comments or anything  
10 else from our visitors today?

11 I guess we can entertain a motion to adjourn.

12 MR. DEMSHAR: So moved.

13 MR. GREEN: I'll second.

14 MR. GAMPETRO: All those in favor.

15 MR. DEMSHAR: Aye.

16 MR. GREEN: Aye.

17 MR. SLATTERY: Aye.

18 MR. GAMPETRO: None opposed.

19 (Hearing proceedings concluded

20 10:13 a.m., November 17, 2008.)

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C E R T I F I C A T E

I, KATHY J. KENDRICK, a Registered Professional Reporter, do hereby certify that I reported by machine shorthand the foregoing proceedings contained herein constituting a full, true and correct transcript.

Dated this \_\_\_\_ day of \_\_\_\_\_, 200\_.

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KATHY J. KENDRICK  
Registered Professional Reporter