

CHAPTER VII

DESIGNATION OF AREAS PURSUANT TO W.S. §35-11-112(a)(v)

Section 1. Authority.

These rules are promulgated by authority of the Environmental Quality Act, W.S. §35-11-112 and W.S. §16-3-103.

Section 2. Purpose.

These rules are intended to provide a process to implement W.S. §35-11-112(a)(v) of the Environmental Quality Act which provides that the Council shall designate those areas of the state that are very rare or uncommon and have particular historical, archaeological, wildlife, surface geological, botanical or scenic value. These rules apply only to the Land Quality Article, Article 4., of the Environmental Quality Act. The scope of these rules is limited to areas sought to be designated for purposes related to the permit approval and denial process contained in W.S. §35-11-406(m) for noncoal mining operations. Included in these rules are criteria to be used in evaluating lands of the state that are being considered for this designation. The hearing procedure is similar to that of Chapter III of these rules, and is authorized by W.S. §16-3-103.

Section 3. Applicability.

(a) Areas designated pursuant to these rules are subject to the limitation contained in Section §35-11-406(m). A designation under Chapter VII shall not bar issuance of a coal mining permit under Section §35-11-406(n).

(b) No areas subject to existing mining operations for which the Department of Environmental Quality shall have issued a permit shall be affected by a designation so long as the permit remains in effect.

(c) No area subject to an application for a noncoal mining permit shall be considered for designation if the petition to designate is filed after the close of the public comment period allowed by Section §35-11-406(k).

(d) A designation as very rare or uncommon shall not restrict non-mining agricultural operations. Nor shall such designation restrict activities excluded from the Environmental Quality Act, Section §35-11-401(e) and Section §35-11-1104.

Section 4. Definitions.

(a) “Critical habitat” as defined in Section §35-11-103(e)(xxix) means only that fish and wildlife habitat designated as critical by the United States Secretary of the Interior or Secretary of Commerce, for the survival and recovery of listed threatened and endangered species.

(b) “Important habitat” or “Crucial habitat” as defined in Section §35-11-103(e)(xxx) means

that fish and wildlife habitat, exclusive of agricultural lands, which in limited availability, increases the species diversity of a localized area and fulfills one (1) or more of the essential living requirements of important wildlife species.

(c) “Fragile lands” means geographic areas containing natural, ecologic, scientific or aesthetic resources that could be damaged or destroyed by mining operations. For examples of fragile lands see Section 1.(a), Chapter XXVIII, Land Quality Rules and Regulations.

Section 5. General Procedure.

(a) The rules in this Chapter shall supersede the rules of Chapter III, Section 1.e. for petitions for designation of lands pursuant to W.S. §35-11-112(a)(v).

(b) The hearing under this chapter is not a contested case proceeding but is a non-adversarial legislative proceeding except where the surface and/or mineral owner objects to the designation. Under those circumstances all parties shall be entitled to cross-examine witnesses and proceed under contested case procedures.

(c) The Council, on its own motion or on the motion of any person, in the interests of developing information about the area considered for designation, may adopt one or more of the provisions contained in Chapter II of the rules governing procedures in contested cases. Such action by the Council shall not constitute a finding that the proceeding before the Council is in the nature of a contested case.

Section 6. Initiation of Proceedings.

(a) Any person may file a petition to designate lands as very rare or uncommon pursuant to W.S. §35-11-112(a)(v) or a petition to modify or terminate an existing designation. The petition shall contain the following:

(i) The name, address, phone number, and fax number for the petitioner;

(ii) The location by legal description, including section, township and range, of the area the petitioner is proposing for designation;

(iii) The names, if any, by which an area may be known locally;

(iv) The distance of the area to the nearest city or town, and the county in which the area is located;

(v) An original USGS topographic map showing the area in question which reflects the surface land ownership pattern (private, state, federal) in the area;

(vi) A list of the names and addresses of the surface and mineral owners whose lands are included within the area proposed for designation, modification, or termination with a description of the ownership interest of each surface and mineral owner, including a legal description of the lands in which each person has an interest;

(vii) A concise statement of the reasons the area is alleged to be very rare or uncommon and a description of the archaeological, surface geological, historical, wildlife, botanical, or scenic attributes of the area, or, if the petition seeks to modify or terminate an existing designation, a concise statement of the reasons for the modification or termination including an explanation of the substantial change in circumstances that has occurred since the designation;

(viii) A description of the current and historical land use in the area;

(ix) A list of any special designations or descriptions of the area made by other governmental agencies, including, but not limited to, designations by the Department of Interior Bureau of Land Management or Office of Surface Mining, designations by the U.S. Fish and Wildlife Service, and designations by the Wyoming Department of Game and Fish;

(x) The names and addresses of all expert witnesses whose work or whose testimony may be offered by the petitioner to support the petition;

(xi) The names and addresses of the surface owners of lands contiguous to the area proposed for designation, modification, or termination;

(xii) A list of any scientific documents to be offered by the petitioner to support the petition that discuss the area to be designated, modified, or terminated; and

(xiii) At the time of filing, eight (8) copiers of the petition shall be submitted to the Chairman of the Environmental Quality Council at the Council's office in Cheyenne, Wyoming. The petition shall be considered to be filed in the Council's office as of the date it is received in that office.

(b) Upon receipt of a petition under these rules, the Council shall consider the petition at a regularly scheduled Council meeting and shall notify the petitioner and surface and mineral owners whose lands or minerals are within the area proposed for designation of the time, date, and location of the meeting. The Council's consideration shall be limited to whether the petition should be accepted or dismissed.

(c) The Council may dismiss a petition if, after a review of the petition, the Council determines that it does not provide the information required by these rules or that the petition does not provide sufficient information to support the conclusion that the area may be designated, modified, or terminated if the Council were to proceed.

(d) If the Council votes to dismiss the petition, a brief statement of the reasons for dismissal of a petition shall be served on the petitioner. The petitioner may file an amended petition at any time.

(e) If the Council votes to consider a petition, the Council shall initiate formal hearing procedures in accordance with these rules.

Section 7. Hearing and Notice.

(a) The Council shall:

- (i) Set the time, date, and location of a hearing on the petition, and
 - (ii) Schedule the hearing within the county in which the lands or a major portion thereof are located.
- (b) Subject to the review and approval of the form of the public notice by the Council, the petitioner shall:
- (i) Publish notice of the hearing once per week for 4 consecutive weeks with the notice beginning 45 days in advance of the hearing in a newspaper of statewide circulation and a newspaper of general circulation in the vicinity of the area proposed for designation, modification, or termination;
 - (ii) Serve notice of the hearing by personal service or by certified mail, which notice shall include a copy of the petition, to all surface and mineral owners whose lands and/or mineral interests are included within the area proposed for designation, modification, or termination;
 - (iii) Serve notice of the hearing by regular mail to all surface owners whose lands are contiguous to the area proposed for designation, modification, or termination;
 - (iv) Serve notice of the hearing by regular mail to the county commissioners of the counties wherein lands proposed to be designated, or a designation may be modified or terminated, lie, the Attorney General's Office, and the Governor's Office; and
 - (v) Except as otherwise provided in these rules, notice shall be served in accordance with the Wyoming Rules of Civil Procedure.
- (c) Costs of the publication and mailing of notice of the proceedings shall be borne by the petitioner.

Section 8. Witnesses.

- (a) Any person may comment on a proposed designation, modification, or termination either by appearing at the hearing and entering comments into the record orally, or by submitting written comments within a time period set by the Council.
- (b) Witnesses submitting testimony in writing shall submit one (1) copy, and are requested to submit 8 copies, of their complete testimony to the Council.
- (c) Witnesses will not be cross-examined except by the Council, the Council's staff, or other persons designated by the Council.
- (d) Whenever the Council allows testimony to be submitted in writing, the testimony shall be considered to be timely filed if it is received in the office of the Environmental Quality Council by the end of the business day on the date set by the Council. Late submittals shall not be considered by Council members unless the Council votes to reopen the record.

(e) Witnesses may be called by the Council, and expenses of these witnesses will be paid by the Council.

(f) The Council may impose time limitations on oral presentations at hearings.

Section 9. Record.

The hearing proceedings including all testimony shall be reported verbatim stenographically or by other appropriate means determined by the Council. A copy of the proceedings will be furnished to any person upon written request and the payment of a reasonable fee. If a person elects to have the hearing transcribed by a certified court reporter, he or she must make the necessary arrangements and bear the cost thereof.

Section 10. Decision.

(a) The Council, in its discretion, may direct the petitioner, the Council's staff, or others to analyze the oral and written comments.

(b) An analysis of comments shall be in writing, shall be submitted at a time to be set by the Council, and shall be a part of the record of the designation proceedings. The analysis may include recommendations to modify the petition to designate.

(c) The Council shall issue a written decision. The decision may be to designate all or a portion of the area or to deny the petition. The Council shall issue a written statement of reasons for the decision.

(d) The petitioner shall be served with a copy of the Council's decision and statement of reasons.

Section 11. Criteria for Designation.

(a) In considering designations, the Council shall follow a two-tiered review process. First, the Council must determine whether the area is eligible for designation by virtue of the existence of one or more of the particular values specified in the statute. Secondly, the Council must determine whether any particular value that is found to exist is very rare or uncommon.

(b) For an area to be eligible for designation, the Council must make an initial finding that the area at issue possesses particular historical, archaeological, wildlife, surface geological, botanical or scenic value. For purposes of making the initial finding, or refusing to make the initial finding, the Council shall consider the significance and the weight of all specifically identified factors that are set forth in these criteria.

(c) For purposes of determining whether an area of the State may be considered to have particular historical, prehistorical, or archaeological value the Council shall consider the following factors:

- (i) Whether the area is mentioned prominently in historic journals or other historic literature;
 - (ii) Whether the area is important because it is associated with cultural or religious traditions and practices;
 - (iii) Whether the area has received designation pursuant to state or federal laws that provide for special protection and management due to outstanding historic or prehistoric values such as national historic landmarks, national historic sites, or the National Register of Historic Places; or
 - (iv) Whether the area contains buildings, structures, artifacts, or other features that are significant in the history or prehistory of the state.
- (d) For purposes of determining whether an area has particular wildlife value the Council shall consider the following factors:
- (i) Whether the area includes lands that are considered irreplaceable fish or wildlife habitat;
 - (ii) Whether the area includes preserves or easements which have been established and used for the protection for habitat for wildlife;
 - (iii) Whether the area includes lands that the Game and Fish Department has designated as crucial or vital habitat for resident species;
 - (iv) Whether the area contains or may affect fisheries classified as class I by the Wyoming Game and Fish Department;
 - (v) Whether the area includes fragile lands that offer unique wildlife or scientific values;
 - (vi) Whether the area includes federally designated critical habitat for threatened or endangered plant or animal species which is determined by the U.S. Fish and Wildlife Service or the Wyoming Game and Fish Department to be of essential value and where the presence of threatened or endangered species has been scientifically documented;
 - (vii) Whether the area contains a bald or golden eagle nest or nest site that is determined to be active and includes all or a portion of a buffer zone of land around the nest which has been evaluated and approved by the U.S. Fish and Wildlife Service;
 - (viii) Whether the area includes bald and golden eagle roost and concentration areas used during migration and wintering;
 - (ix) Whether the area contains a falcon (excluding kestrel) cliff nesting site with an active nest and a buffer zone around the nest site which has been evaluated and approved by the U.S. Fish and Wildlife Service; or

(x) Whether the area includes lands which are high priority habitat for migratory birds of high federal interest on a regional or national basis as determined by the U.S. Fish and Wildlife Service.

(e) For purposes of determining whether an area has particular surface geological value the Council shall consider the following factors:

(i) Whether the area has unique surface geological formations that expose upheavals and faults that are indicative of sub-surface geological features;

(ii) Whether the area has significant paleontological resources; or

(iii) Whether the area has geologic features with unusual or substantial recreational, aesthetic, or scientific value.

(f) For purposes of determining whether an area has particular botanical value the Council shall consider the following factors:

(i) Whether the area is critical habitat for endangered or threatened plant species as designated by state or federal agencies;

(ii) Whether the area contains stands of a rare native vegetation type, or contains stands of a native vegetation type that is now rare, or contains stands of a native vegetation type in pristine condition for which pristine stands are unusual; or

(iii) Whether the area contains plant species and habitat determined to be crucial or vital for resident wildlife species.

(g) For purposes of determining whether an area has particular scenic value the Council shall consider the following factors:

(i) Whether the area includes lands within or adjacent to a corridor for a river designated as a National Wild and Scenic River or a corridor for a National Scenic Byway;

(ii) Whether the area has been the subject of substantial artistic attention in the works of artists, sculptors, photographers, or writers; or

(iii) Whether the area has substantial aesthetic value and its value would be apparent to a reasonable person.

(h) An area shall be designated pursuant to W.S. §35-11-112(a)(v) if, in addition to finding that the area is eligible for designation pursuant to Section 11.a., the Council finds that the area is very rare or uncommon. For purposes of determining if an area is very rare or uncommon the Council shall consider the following:

(i) Whether the area exhibits historical, archaeological, wildlife, surface geological, botanical, or scenic values that are very rare or uncommon when compared with other areas of the state or a region therein;

(ii) Whether the area contains historical, archaeological, wildlife, surface geological, botanical, or scenic values seldom found within the state or a region therein; or

(iii) Whether the area contains historical, archaeological, wildlife, surface geological, botanical, or scenic values known or suspected to be declining which, if left unprotected, could become extinct or extirpated.