

BEFORE THE WYOMING ENVIRONMENTAL QUALITY COUNCIL

Powder River Basin Resource Council Petition	)	
to the EQC for a Hearing on DEQ's Denial of	)	
an Informal Conference on Objections to DEQ's	)	EQC Docket No. _____
Proposed Renewal of the Eagle Butte Mine Permit	)	
held by Alpha Coal West	)	

**PETITION TO THE ENVIRONMENTAL QUALITY COUNCIL  
FOR A HEARING ON DEQ's DENIAL OF AN INFORMAL CONFERENCE ON  
OBJECTIONS TO THE DEPARTMENT OF ENVIRONMENTAL QUALITY'S  
PROPOSED RENEWAL OF THE EAGLE BUTTE MINE PERMIT**

**INTRODUCTION**

1. Powder River Basin Resource Council ("PRBRC" or "Resource Council")<sup>1</sup> respectfully petitions the Environmental Quality Council ("EQC" or "Council") to hold a hearing on the Resource Council's objections to the Department of Environmental Quality's ("DEQ" or "Department") proposed renewal of Alpha Coal West's ("Alpha") Eagle Butte coal mine permit<sup>2</sup> and specifically DEQ's denial of informal conference public participation opportunities and due process rights as provided for under the Environmental Quality Act and the Surface Mining Control and Reclamation Act ("SMCRA").

2. The Resource Council submitted its objections to the DEQ on October 1, 2015, requesting an informal conference before the Department. The objections and request for informal conference are attached as Exhibit 1.

3. Under the Environmental Quality Act and associated regulations, and corresponding federal law and regulations under SMCRA, DEQ was required to hold an informal conference on

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<sup>1</sup> The Resource Council's address is 934 N. Main St., Sheridan, WY 82801. All correspondence can be addressed to Shannon Anderson at the postal address, sanderson@powderriverbasin.org, or (307) 672-5809.

<sup>2</sup> The Eagle Butte Mine Permit is DEQ Permit 428 and the Renewal Application Number is TFN 6 1/152.

the Resource Council's objections. W.S. § 35-11-406(k); DEQ Rules of Practice & Procedure, Ch. 3 § 3(a) ("The conference shall be held in the locality of the operation or at the state capitol, at the option of the requester, within 20 days after the final date for filing objections unless a different period is stipulated to by the parties"); 30 U.S.C. § 1263(b) ("If written objections are filed and an informal conference requested, the regulatory authority shall then hold an informal conference in the locality of the proposed mining, if requested within a reasonable time of the receipt of such objections or request.")

4. However, as explained below, DEQ denied the Resource Council's request for an informal conference, arguing that holding such a conference would violate an agreement Wyoming voluntarily entered into with Alpha Natural Resources, Alpha Coal West's parent company, in a bankruptcy court proceeding considering the Chapter 11 restructuring petition of Alpha.<sup>3</sup> DEQ's letter to the Resource Council is attached as Exhibit 2 and Wyoming's agreement with Alpha (approved in an order by the bankruptcy court) is attached as Exhibit 3.

5. We respectfully ask the EQC to, without undue delay, schedule a hearing on DEQ's denial of the informal conference, and after such hearing, remand the Resource Council's objections to the permit renewal back to DEQ for consideration in an informal conference proceeding.

6. We also respectfully ask the EQC to issue a temporary order preventing the DEQ from approving the permit renewal until such time as the informal conference is held and an order is issued therefrom. As explained below, DEQ Rules of Practice & Procedure, Ch. 3 § 3(b) provide for such temporary relief in hearings related to coal mine permits.

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<sup>3</sup> As discussed in ¶ 17, *infra*, this agreement was negotiated behind closed doors and was not subject to public notice and comment. As such, the Resource Council had no ability to object to the agreement prior to its application in this permit proceeding.

## STATEMENT OF JURISDICTION

7. The EQC has jurisdiction to hold a hearing on DEQ's denial of the informal conference and/or the Resource Council's objections to the permit. DEQ Rules of Practice and Procedure, Ch. 1, § 16(a)-(b).

8. This petition is timely filed within thirty (30) days of receipt of DEQ's decision denying the request for an informal conference.<sup>4</sup> *Id.* at § 16(b).

## STATEMENT OF FACTS AND LAW

9. Under the Environmental Quality Act, any valid coal mining permit "is entitled to a right of successive renewal upon expiration" *provided* "the operation is in compliance with applicable laws and regulations." W.S. § 35-11-405(e).

10. Alpha's Eagle Butte Mine is not in compliance with applicable laws and regulations because the operator has not posted a valid bond for its \$191,370,000 in reclamation liability in compliance with the Environmental Quality Act and associated regulations. Alpha's bonds are currently self-bonds and the operator no longer qualifies for self-bond status in Wyoming, making its self-bonds no longer sufficient as a matter of law. Under the Environmental Quality Act and DEQ regulations, "An acceptable reclamation performance bond instrument must be in place before renewal" of a permit can be approved. Memo from Kurt King, DEQ, Aug. 6, 2015 at 3, attached as Exhibit 4; *See also* W.S. § 35-11-406(m)(ix) (prohibiting issuance of a mining permit to an operator who is "unable to produce the bonds required") and 30 C.F.R. § 800.11

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<sup>4</sup> DEQ's decision is dated October 15, 2015, and it was received by the Resource Council via electronic and overnight mail on October 19, 2015. Although DEQ did not hold an informal conference, and therefore there is no administrative decision following an informal conference to appeal, the Resource Council is still assuming that this appeal of DEQ's decision not to hold an informal conference falls under Ch. 1 § 16(b) related to informal conferences.

(prohibiting issuance of a mining permit or disturbance of a mining area “prior to acceptance by the regulatory authority of the required performance bond”).

11. On May 26, 2015, the DEQ issued an order determining that Alpha no longer qualifies for self-bond status and ordered Alpha to substitute other financial assurance documents for its self-bonds within ninety days of the order. This order is attached as Exhibit 5.

12. DEQ’s order requiring bond substitution and requiring such substitution within ninety days was consistent with the rules related to self-bonds. LQRR, Ch. 11 § 5(a) (“The Administrator shall require this substitution if the financial information submitted or requested under Section 4(a)(ii) indicates that the operator no longer qualifies under the self-bonding program.”).<sup>5</sup>

13. Under DEQ’s rules, the only acceptable bond substitutes allowed are “a corporate surety, cash, governmental securities, or federally insured certificates of deposit, or irrevocable letters of credit.” *Id.*

14. DEQ’s rules also provide that if the operator fails to make the substitution, “the Administrator shall suspend or revoke the license of the operator to conduct operations upon the land described in the permit until such substitution is made.” *Id.* (emphasis added).<sup>6</sup>

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<sup>5</sup> Regardless, Alpha’s declaration of bankruptcy in August irrefutably settled the question of whether the company should qualify for self-bond status. *See* W.S. § 35-11-417(d) (providing that “the administrator may accept the bond of the operator itself without separate surety when the operator demonstrates,” among other requirements, “a history of financial solvency.”).

<sup>6</sup> This requirement is needed to ensure compliance with the federal minimum standards of SMCRA. *See* 30 C.F.R. § 800.16(e) (providing that if an operator fails to replace an inadequate or defective bond within 90 days it “shall cease coal extraction and . . . shall immediately begin to conduct reclamation operations in accordance with the reclamation plan”).

15. Alpha did not meet the ninety day deadline, and to date has yet to make a substitution for its self-bonds, putting the operator in noncompliance with Wyoming's and SMCRA's financial assurance obligations.

16. Instead, Alpha and Wyoming entered into an agreement, filed with and now approved by the judge<sup>7</sup> overseeing Alpha's Chapter 11 bankruptcy proceedings, that stipulates:

Wyoming shall not seek additional collateral or revoke, terminate, refuse to grant or amend or take any other adverse action with respect to the Debtors' mining permits or licenses on account of the Debtors' failure to comply with the Wyoming Substitution Demand [of May 26, 2015] or reclamation bonding obligations.

Exhibit 3 at 5.

17. The agreement was negotiated behind closed doors and was not subject to public notice and comment. Therefore, it cannot be considered an effective SMCRA program amendment or permit revision, and it cannot be used to circumvent or amend current permitting requirements under Wyoming's laws and regulations.<sup>8</sup> Moreover, given the private nature of the agreement, the Resource Council had no ability to object to its contents, prior to its use and application in this permitting proceeding.

18. Wyoming entered into its agreement with Alpha voluntarily, and in doing so, violated DEQ's regulations requiring the agency to suspend or revoke the license of a company that fails

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<sup>7</sup> DEQ argues that it is subject to a Judge's order. However, the Bankruptcy Court merely signed the proposed order attached to the motion and stipulation submitted by Alpha, on behalf of Alpha and Wyoming. The Judge did not amend the language in the proposed order and therefore the language was the stipulation entered into voluntarily by Wyoming. Additionally, it should be noted that the Judge did not examine any of the stipulation through the bankruptcy proceedings and did not specifically examine the requirements of SMCRA and whether the agreement was lawfully entered into.

<sup>8</sup> As discussed in paragraph 21, *infra*, DEQ does not have the authority to amend the requirements of SMCRA or exempt the company from complying with those requirements. Nevertheless, should DEQ argue that the agreement modifies the requirements of Wyoming's state program or the permit, it does not because the agreement was not subject to notice and comment.

to make a bond substitution within the ninety day time period, LQRR, Ch. 11 § 5(a), violated DEQ's regulations that require adequate financial assurance to be in place for any coal mine permits, and violated the Environmental Quality Act provisions that require an operator to be in compliance with all applicable laws and regulations at the time of permit renewal.

19. Equally troubling, the agreement has since been used to deny the Resource Council's public participation opportunities and due process rights afforded under the Environmental Quality Act and SMCRA. *See* Exhibit 2.

20. While acknowledging that it is legally bound to hold a hearing, DEQ says it is prevented from doing so because of the agreement. *See* Stephanie Joyce, *State, Advocacy Group Spar Over Permit for Bankrupt Miner*, Oct. 23, 2015, Wyoming Public Media, attached as Exhibit 6.

21. Bankruptcy does not exempt Alpha from compliance, nor does it afford DEQ the flexibility to waive enforcement of these non-discretionary duties via a contract with the company.<sup>9</sup> Under federal law, "States with an approved State program shall implement, administer, enforce and maintain it in accordance with" SMCRA and its implementing regulations. 30 C.F.R. § 733.11; *see also Northern Plains Resource Council v. Fidelity*, 325 F.3d 1155 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 434 (2003) (holding that states or EPA cannot create exemptions to the Clean Water Act's permitting requirements and only Congress can create exemptions from regulation)<sup>10</sup>; *Wildlands CPR v. U.S. Forest Service*, 558 F.Supp.2d

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<sup>9</sup> As discussed in note 7, *supra*, the Judge's order approving the stipulation does not change this as the Judge merely signed the proposed order brought forth by the company.

<sup>10</sup> Like SMCRA, the Clean Water Act requires state programs to be no less stringent than federal law and regulation. The Court in *Northern Plains* used this requirement to hold that the state could not exempt the company from requirements of federal law. See 33 U.S.C. § 1370 (states may not adopt or enforce standards that are less stringent than federal standards).

1096, 1100 (D.Mont., May 14, 2008) (NO. CV-06-101-M-DWM) (holding that “The parties cannot circumvent the law by contract.”).

22. In fact, federal bankruptcy law requires debtors to maintain compliance with applicable state laws and regulations and provides that government agencies may pursue enforcement actions against the debtor for violations of such laws and regulations, notwithstanding the bankruptcy proceedings. 28 U.S.C. § 959(b); *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 865-66 (4th Cir. 2001). These requirements were explained in OSM’s Reservation of Rights filed in response to the agreement between Alpha and Wyoming. OSM states, “notwithstanding the Motion or Stipulation, Debtors must at all times during this Bankruptcy Case act expeditiously to bring themselves into full compliance with applicable law, which includes SMCRA’s reclamation bonding requirements.” This Reservation of Rights is attached as Exhibit 7.

#### **ARGUMENT**

23. Paragraphs 1-22 above are hereby incorporated.

24. It is clear that Alpha is in noncompliance with state laws and regulations requiring legally sufficient reclamation bonds. W.S. § 35-11-417(a); 30 U.S.C. § 1259(a); LQRR Ch. 12 § 2(b). DEQ itself has made the finding that Alpha no longer qualifies for self-bonds; yet, self-bonds are all the company has posted for its mines, including the Eagle Butte Mine.

25. Therefore, DEQ cannot lawfully issue a permit renewal because the operation is not in compliance with applicable laws and regulations. W.S. § 35-11-405(e).

26. Additionally, DEQ is under legal obligation to hold an informal conference on the Resource Council’s objections. W.S. § 35-11-406(k); DEQ Rules of Practice & Procedure Ch. 3 § 3(a); 30 U.S.C. § 1263(b).

27. As discussed above, DEQ cannot waive these requirements through a voluntary agreement with the company because only Congress can exempt companies from compliance, through an amendment to SMCRA. DEQ's regulations provide mandatory – not discretionary – actions on the part of the agency in relation to its obligations to require compliance with bonding requirements and to afford public participation opportunities, as mandated by both state and federal law. Moreover, during bankruptcy proceedings, Alpha maintains an obligation to comply with all applicable state laws and regulations. 28 U.S.C. § 959(b).

### **REQUEST FOR TEMPORARY RELIEF**

28. Paragraphs 1-27 above are hereby incorporated.

29. The Resource Council requests that the EQC prevent DEQ from issuing the permit renewal until such time as there is a final order from an informal conference held by DEQ on the Resource Council's objections to the permit renewal.

30. The EQC may grant temporary relief in relation to coal mine permit hearings. DEQ Rules of Practice and Procedure Ch. 3 § 3(b). The Council may grant such temporary relief if (1) all parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief; and (2) the person requesting that relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding; (3) such relief will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air or water resources; and (4) the relief sought is not the issuance of a permit where a permit has been denied by the Administrator. Each of these requirements will be discussed below.

31. As for the first requirement – that notice and opportunity be heard be given – the Resource Council does not object to further briefing and argument on the issue of the temporary



relief. Should the DEQ, or the applicant, respond to the Resource Council's request, the Resource Council requests that the EQC afford it an opportunity to reply.

32. As for the second requirement, as discussed above, the legal requirements are clear and therefore the Resource Council has a high likelihood of succeeding on the merits of its petition. The Resource Council has shown that DEQ violated requirements to hold an informal conference – and violated underlying requirements related to coal mine reclamation bonds on which the Resource Council's request for informal conference are based. When these standards are applied here, it is clear that the Resource Council has raised a serious substantial legal issue, as required to justify issuance of emergency injunctive relief. *See Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 844 (D.C. Cir. 1977). In interpreting similar requirements for injunctive relief, federal courts have held plaintiffs “need not promise a certainty of success, nor even present a probability of success, but must involve a ‘fair chance of success on the merits.’” *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9<sup>th</sup> Cir. 1988), *citing National Wildlife Fed'n v. Coston*, 773 F.2d 1513, 1517 (9<sup>th</sup> Cir.1985).

33. As for the third requirement, such relief will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air or water resources. In fact, if such relief is granted, the opposite will occur as the requirements of the Environmental Quality Act – requirements whose very purpose is to protect public health and safety and to reduce environmental harm to land, air and water resources – will be achieved. <sup>11</sup>

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<sup>11</sup> DEQ may attempt to argue that if the agency upholds the law, the mine's permit would no longer be valid and the mine would be forced to shut down. However, the Resource Council is merely attempting to get DEQ to the table to hold an informal conference to resolve its concerns. As discussed in the Resource Council's objection letter, the organization believes there may be creative and novel mechanisms to bring the company into compliance through conditions placed on the permit renewal that would avoid a mine shut down. Additionally, federal and state law

34. As for the fourth requirement, the Resource Council is not seeking the issuance of a permit.

### CONCLUSION

35. For the reasons set forth above, the EQC should immediately issue an order remanding the Resource Council's objections to the DEQ and ordering the agency to hold an informal conference on the objections, held pursuant to the Environmental Quality Act, SMCRA, and associated state and federal regulations.

36. Prior to such decision, the EQC should grant temporary relief to the Resource Council by ordering a stay on any permitting action by DEQ pending the outcome of the requested hearing and informal conference.

Respectfully submitted this 12<sup>th</sup> day of November, 2015.



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provides that reclamation work can generally proceed even if the underlying mine permit is no longer valid.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 17<sup>th</sup> day of November, 2015, the foregoing PETITION TO THE ENVIRONMENTAL QUALITY COUNCIL FOR A HEARING was served on the following parties via overnight mail, with delivery confirmation, return receipt requested:

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