



Office of the Attorney General

Governor
Matthew H. Mead

Attorney General
Peter K. Michael

Water and Natural Resources Division
Kendrick Building
2320 Capitol Avenue
Cheyenne, Wyoming 82002
307-777-6946 Telephone
307-777-3542 Fax

Chief Deputy Attorney General
John G. Knepper

Division Deputy
James Kaste

June 6, 2016

Mr. Aaron Clark
Hearing Examiner
Wyoming Environmental Quality Council
122 W. 25th Street
Herschler Bldg., 1W, Room 1714
Cheyenne, WY 82002

RE: DEQ's Response to May 20, 2016, *Order for Hearing* in *In re Brook Mine Application*, EQC Docket No. 16-1601

Dear Hearing Examiner Clark,

The Department of Environmental Quality and Director Parfitt have received and reviewed your *Order for Hearing*, entered May 20, 2016. I am writing to you in response to the order on Director Parfitt's behalf.

The order set a hearing for June 7, 2016, to discuss two issues. The first regards the Director's duty to serve as an advisor to the Council in this matter. The second is regarding whether the Department has any evidence that would assist the Council in making its determinations on the requested order in lieu of landowner consent.

As noted in your order and in Director Parfitt's letter to you, dated May 13, 2016, Wyoming Statute § 35-11-109(a)(x) in the Environmental Quality Act directs him to, "[s]erve as an advisor to the council, without vote, on all matters other than the consideration of rules proposed by the department or contested case proceedings in which the department is a party." In practice, matters of this kind very rarely come before the Council. Fortunately, although an infrequent event, the Director's involvement (or in this

case, his designee's involvement) is a simple matter and should not complicate the Council's proceedings.

The Act uses the term, advisor. This differentiates the Director's role and advice from a witness giving testimony or a party advocating a position. Because of this limited role, the only principle that the Council needs to keep in mind with regard to the Director's advice is to allow the parties an opportunity to make statements in response to advice given by the Director or requests for advice made by the Council. This includes the opportunity for the parties to place objections on the record. To ensure that the parties have this opportunity, the Director's advice and the Council's requests for advice should be provided prior to the Council closing the record and beginning its deliberations.

To the extent that the Department has any evidence that may be necessary for the Council's determinations in this case, the parties have not yet requested evidence from the Department. The Department understands that the discovery request deadline in this case has already passed. However, the Department remains ready to assist the parties and the Council in accordance with the Council's orders in this case, its rules of practice and procedure, and the Wyoming Rules of Civil Procedure.

According to the *Order for Hearing*, the hearing on June 7 will be to discuss procedures for this case, similar to the purposes of a pre-hearing scheduling conference. The hearing is not evidentiary in nature, and therefore witnesses are not required or appropriate to resolve the issues involved. As such, I will be attending the hearing to represent the Director and the Department and to assist the Council in considering these procedural matters.

The *Order for Hearing* ordered Director Parfitt to "appear and be present in person" at the June 7 hearing. The Council does not have a roving show cause authority to demand the presence of any individual it chooses. The Council's subpoena authority is limited to parties, witnesses, and the production of documents, and is governed by the Wyoming Administrative Procedures Act and the Rules of Civil Procedure. The Director is not a party or a witness in this case and, in any event, the *Order for Hearing* did not purport to be a subpoena or contain the required information under the Rules of Civil Procedure to constitute a subpoena. Therefore, the Director has been advised by counsel that he is not legally required to attend the hearing. However, the Director has indicated that he will attend.

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Fortunately for all involved, the issues scheduled for the upcoming hearing are straightforward. I look forward to a productive discussion of them with you and counsel for the parties.

Sincerely,



Andrew J. Kuhlmann
Senior Assistant Attorney General
*Counsel for the Department of
Environmental Quality*

cc: Todd Parfitt, DEQ Director (via email)
Alan Edwards, DEQ Deputy Director (via email)
Brook Mining Company, c/o Isaac Sutphin, Holland & Hart LLP (via electronic filing)
Big Horn Coal Company, c/o Lynne Boomgaarden, Crowley Fleck PLLP (via electronic filing)
Padlock Ranch Company, c/o Mistee Elliott and Hal Corbett, Lonabaugh and Riggs, LLP (via electronic filing)