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BIG HORN COAL COMPANY

**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING**

IN RE BROOK MINE APPLICATION)
) Civil Action No. 16-1601
)

**RESPONDENT BIG HORN COAL COMPANY'S RESPONSE TO
PETITIONER'S MOTION TO STRIKE SURFACE OWNER BOND
AFFIRMATIVE DEFENSE**

The facts and law in support of Respondent Big Horn Coal Company's (BHC) request that the Environmental Quality Council (EQC) consider Petitioner's obligation to post a bond for the protection of BHC under W.S. § 35-11-416(a) in conjunction with any decision of the EQC to issue an order in lieu of consent, (BHC Response to Petition at pp. 6-7), are indeed straightforward. It is important, however, to apply the correct law to the facts and unique procedural posture of this case. The application of W.S. § 35-11-416¹ to

¹ Petitioner seems to confuse Surface Owner Protection Bond requirements and reclamation performance bond requirements as demonstrated by its reliance on DEQ staff communication related to the reclamation performance bond requirement pursuant to W.S. § 35-11-417. (Pet. Motion to Strike at pp. 2-3 and Exhibit A, Email from Bj Kristiansen.) As expressly noted in W.S. § 35-11-416, the Surface Owner Protection Bond

the facts of this case, in the context of Petitioner's request that the EQC issue an order in lieu of consent pursuant to W.S. § 35-11-406(b)(xii), instructs that Petitioner's Motion to Strike must be denied.

Wyoming Statute § 35-11-416 expressly requires that Petitioner execute a bond or undertaking to the state, for the use and benefit of the surface landowner(s) (the "Surface Owner Protection Bond"), in an amount sufficient to secure payment for any damages to the surface estate, crops and forage, or the surface landowner's tangible improvements, unless an agreement is negotiated between the mineral owner and surface landowner that waives the bond requirement. Petitioner has made no genuine effort to reach such an agreement with BHC.²

is separate and distinct from the performance bond required by W.S. § 35-11-417 ("This bond is in addition to the performance bond required for reclamation by this act."). DEQ/LQD Rules related to the reclamation performance bond provisions in W.S. § 35-11-417 (*see, e.g.*, DEQ/LQD Rules Chapter 11, Section 2(a)(ii); Chapter 12, Section 2; and Chapter 15) simply do not reference the Surface Owner Protection Bond under W.S. § 35-11-416.

² BHC is confused by Petitioner's statement at page 2 of its Motion to Strike, wherein it claims "Padlock has no legal authority to waive the bond requirement," because W.S. § 35-11-416(a) states, "[a] bond for surface damage shall not be required when the agreement negotiated between the surface owner and the mineral owner or developer waives any requirement therefor." The statute clearly contemplates that, in a split estate situation, the surface owner and mineral owner may negotiate a surface use/damage agreement wherein the surface owner can contractually waive imposition of the Surface Owner Protection Bond requirement under W.S. § 35-11-416(a) as against the mineral owner.

In determining the appropriate amount of the Surface Owner Protection Bond, the Wyoming Department of Environmental Quality (DEQ) Land Quality Division (LQD) Administrator is instructed to consider the reasonable value of the surrounding land, the effect of the overall operation of the landowner, and any financial loss resulting from disruption of the surface owner's operation. W.S. § 35-11-416(a). The evidence required for a determination of the appropriate amount of a Surface Owner Protection Bond – damages to the surface estate, forage, and tangible improvements; surrounding land value; and economic impacts to surface operations – is strikingly similar to the evidence the EQC will consider in determining whether an order in lieu of consent is warranted – the details of Petitioner's full proposed surface use including proposed routes of egress and ingress; the extent to which Petitioner's proposed use will substantially prohibit surface operations; and, whether the proposed plan will reclaim the surface to approved future use as soon as feasibly possible. *See* W.S. § 35-11-402(b)(xii)(B), (C), and (D) and -416(a).

Citing W.S. § 35-11-403, Petitioner concludes that bonding decisions “belong exclusively to the Department of Environmental Quality” (Pet. Motion to Strike at p. 1), and that the EQC is without any authority to address BHC's request that the EQC consider Petitioner's obligation to post a bond for the protection of BHC under W.S. § 35-11-416(a) in conjunction with any decision of the EQC to issue an order in lieu of consent. Petitioner's conclusions are misguided. While W.S. § 35-11-416 instructs the Administrator to determine the amount of the Surface Owner Protection Bond as noted above, the provisions governing the Surface Owner Protection Bond are separate and independent from the provisions governing the Administrator's role as described in W.S.

§ 35-11-403 with regard to the reclamation performance bond requirements set out in W.S. § 35-11-417. Moreover, the legislature has given EQC broad authority to “hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by” the LQD. W.S. § 35-11-112(a). This authority extends to a review of any LQD interpretation or determination regarding the timing and amount of a Surface Owner Protection Bond required under W.S. § 35-11-416. *See Platte Dev. Co. v. Env'tl. Quality Council*, 966 P.2d 972, 975 (Wyo. 1998).

Nothing in W.S. § 35-11-416 or in the DEQ/LQD Rules and Regulations mandates the Surface Owner Protection Bond cannot or should not be posted until after a mine permit is approved and issued. The statute simply mandates a “permit shall not be issued” without the execution of the bond or undertaking to the state. W.S. § 35-11-416(a). Petitioner asserts that “[t]he Department does not set the bond ‘until the permit application is finalized and a permit is issued.’” (Pet. Motion to Strike at pp. 2-3 and Exhibit A, Email from Bj Kristiansen.) Even if Mr. Kristiansen was referring in his email to the timing of the Surface Owner Protection Bond rather than the reclamation performance bond, DEQ’s interpretation of W.S. § 35-11-416 does not control. *See Platte Dev. Co.*, 966 P.2d at 975 (the EQC has jurisdiction to review the DEQ’s interpretation of the law). Given EQC’s broad statutory authority, the cloud of uncertainty associated with Petitioner’s mine and reclamation plans and the extent of compensable damage Petitioner’s proposed operations may cause, and the well-established concerns of Wyoming citizens and lawmakers regarding the nature and adequacy of bonding to protect surface resources from unreclaimed damage, BHC asserts it is entirely within the EQC’s authority and discretion to

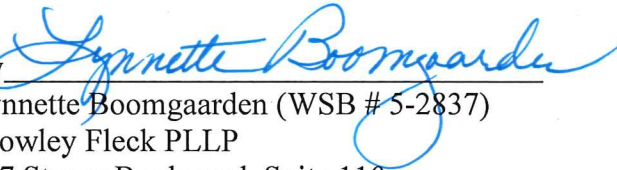
consider Surface Owner Protection Bond requirements when determining whether and when to issue an order in lieu of surface owner consent.

The purpose of BHC's request that the EQC consider the status of the Surface Owner Protection Bond is wholly in line with the order in lieu of consent elements set forth in W.S. § 35-11-406(b)(xii) and the stated purpose of the bond requirement set forth in W.S. § 35-11-416 – protection of the surface owner. BHC maintains valuable improvements and infrastructure on surface lands within Petitioner's proposed mine disturbance area. BHC's current and future operations within that area include reclamation activity, maintenance of the property for potential future use in the development of BHC's state coal lease, industrial and commercial use of the shop and other facilities, grazing, and industrial, agricultural, and public recreation access across the Tongue River.

Petitioner provided BHC incomplete mine and reclamation plans that lack detailed information regarding the full impact Petitioner's proposed operations will have on the above described improvements, operations, and uses. The significantly incomplete information Petitioner did provide to BHC indicates that Petitioner's proposed operations will have significant adverse impacts on access to BHC's existing improvements and infrastructure, and its existing and planned mining, industrial, and agricultural uses of its surface estate. At hearing, BHC will present evidence to demonstrate that: (A) the inadequacies in Petitioner's mine and reclamation plan are grounds to deny Petitioner an order in lieu of consent; and (B) a Surface Owner Protection Bond is warranted, though the lack of information in Petitioner's mine and reclamation plan prevents full assessment of the required bond amount.

Wyoming statutes clearly authorize the EQC to consider the close alignment of these facts and issues arising under the Wyoming Environmental Quality Act when determining whether and when to issue an order in lieu of consent and when Petitioner must post a Surface Owner Protection Bond and for how much. For these reasons, Petitioner's Motion to Strike should be denied.

Respectfully submitted June 10, 2016.

By 
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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2016, I served a true and correct copy of **Big Horn Coal Company's Response to Petitioner's Motion to Strike Surface Owner Bond Affirmative Defense** by electronic filing with the Environmental Quality Council and by United States mail, postage prepaid and addressed to the following:

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A handwritten signature in blue ink, reading "Lynette Boongarda", is written over a horizontal line.