

procedure as well as the fundamental procedural due process rights of the Fishers and other Objectors.

I. Factual Background

Brook Mine has filed for a permit to conduct surface and other coal mining activities in Sheridan County, Wyoming near and within the scenic and historic¹ Tongue River Alluvial Valley. The valley is also the location of many residential homes, agricultural homes and buildings. Likewise the valley is home to many forms of wildlife including elk, deer, turkeys, pheasants, fox, bald eagles, golden eagles, hawks, sandhill cranes and fine trout fishing. According to Brook's Mining Plan, its activities will include blasting, coal seam dewatering, dust, coal storage and heavy truck traffic much of which will infringe on the Tongue River Alluvial Valley. Extremely important environmental issues and policy concerns are at stake. Evidently, in late 2016, Brook Mine and the DEQ believed Brook had prepared its mine application sufficiently to move forward with publishing notice of its mining application and delivering notification to some of the landowners within the affected area. Interestingly, Brook undertook these activities around the Christmas holidays of 2016. Interested persons were obligated to file any objections to the permitting process

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Among a multitude of historical events in this valley, the Connor Battlefield lies in the valley between Dayton and Ranchester where General Patrick Connor attacked Black Bear's village of Arapaho. The running battle that ensued as the Arapaho counter-attacked Connor's troops as they were retreating down the valley is directly below the Brook mine. A year later, General George Crook also bivouacked for several days in the Tongue River Valley not far from this same area to gather his forces in preparation for the Battle of the Rosebud.

by no later than January 27, 2017.

Multiple interested parties, including the Fishers, filed objections and requested that an informal conference be held as provided for by Wyo. Stat §35-11-406 at which time the Wyoming DEQ could hear their comments, concerns and complaints about the permit and proposed mining plan and have the DEQ determine whether further investigation and information were appropriate prior to deciding on the issuance of a mining permit.

Had DEQ consented in the informal conference, the informal proceeding would have needed to occur within 20 days of the deadline for objections. Importantly, if this informal process had been followed as requested by the Fishers and other Objectors, then any resolution by the DEQ would have been subject to a *de novo* appeal to the Environmental Quality Council (EQC). The subsequent Appeal to the EQC **would not have been** subject to the aforementioned 20 day rule.² Rather, an appeal under those circumstances would have been fully processed as a contested case hearing with a full and complete opportunity for written discovery, depositions and pre-hearing investigations and disclosures.

However, DEQ elected to refer the matter directly to the EQC and by-pass the informal hearing which had been requested. Consequently, the agency *by its own actions*

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It is important to note that Fishers agree with and adopt herein the argument presented by Powder River Basin Resource Council that the quirk of construction in Wyo. Stat. §35-11-406 which allowed the DEQ to by-pass the informal meeting requirement is in conflict with federal law on this point which *requires* the informal meeting and thus this portion of the statute is invalid. The procedural due process problem created and exemplified by this case is likely the reason the federal statute does not provide discretion to the agency to by-pass the informal hearing.

forced the Fishers and other Objectors into a situation where a full-blown contested case hearing on the merits of Brook Mine's application had to be scheduled within 20 days after the close of the objection period. Consequently, the EQC has now set the full contested case hearing to begin on February 13, 2017 in Cheyenne (rather than in Sheridan as requested by multiple objectors) and has denied the Fishers any meaningful opportunity for discovery activities guaranteed by the Wyoming Administrative Procedure Act.

II. The Concept of Due Process and Procedural Due Process

The concept of due process in legal proceedings and in relation to governmental action is guaranteed in the U.S. and Wyoming Constitutions. Due process embodies the concept that parties are entitled to a fair and impartial tribunal and that they are entitled to a fundamentally fair procedure in the process both leading up to any hearing and trial as well as during the hearing or trial itself. These concepts apply equally to administrative proceedings.

Parties to administrative proceedings are entitled to due process of law. *Pfeil v. Amax Coal West, Inc.*, 908 P.2d 956, 961 (Wyo.1995); *Amoco Production Company v. Wyoming State Board of Equalization*, 882 P.2d 866, 872 (Wyo.1994). "Procedural due process principles require reasonable notice and a **meaningful opportunity** to be heard before government action may substantially affect a significant property interest." *Pfeil*, 908 P.2d at 961; see also *Whiteman v. Wyoming Workers' Safety and Compensation Division, Department of Employment*, 984 P.2d 1079, 1083 (Wyo.1999). The procedures outlined in the Wyoming Administrative Procedure Act are designed to provide parties in administrative proceedings with due process.

Amoco Prod. Co. v. Wyoming State Bd. of Equalization, 7 P.3d 900, 905 (Wyo. 2000).

We addressed the problem of the fair hearing requirements of due process in administrative proceedings in *Fallon v. Wyoming State Board of Medical Examiners*, Wyo., 441 P.2d 322, 327, when Justice Gray, speaking for the Court, said: “With respect to a fair hearing, it is fundamental that principles of **justice and fair play require an orderly proceeding appropriate to the case** or adapted to its nature, just to the parties affected, and adapted to the ends to be attained, one in which **a person has an opportunity to be heard, and to defend, enforce, and protect his rights** before a competent and impartial tribunal legally constituted to determine the right involved; representation by counsel; (and) procedure at the hearing consistent with the essentials of a fair trial according to established rules which to do not violate fundamental rights.

Board of Trustees, Laramie School Dist. No. 1 v. Spiegel, 549 P.2d 1161, 1165-66 (Wyo. 1976)(internal citations omitted) (emphasis added).

III. The Wyoming Administrative Procedure Act Controls and Establishes Basic Principles of Procedural Due Process That Apply.

The DEQ’s own agency rules and regulations explicitly recognize that the authority for the promulgation of the rules stems from the Wyoming Administrative Procedure Act (APA). (See DEQ Practice and Procedure Rules, Ch. 1, §1.) The Wyoming APA itself affords basic pre-hearing procedures to protect and comport with due process rights in those activities to which a party is entitled prior to the actual hearing itself. Those rights and procedures include: “In all contested cases the taking of depositions and discovery **shall be available** to the parties in accordance with the provisions of Rules 26, 28 through 37 . . .” Wyo. Stat. §16-3-107(g) (LexisNexis 2015) (emphasis added). These requirements are not just words, the defined pre-hearing procedures designed to provide the parties with a *meaningful* opportunity to prepare for and to protect and defend their rights when the matter proceeds to the contested case hearing itself. Consequently the EQC was obligated to give

the Fishers and the other Objectors a *meaningful* opportunity to exercise these procedural rights.

IV. As a Practical Matter, the Manner in Which the EQC has Scheduled this Contested Case Hearing and Discovery has Denied the Meaningful Pre-Hearing Discovery Guaranteed by the Wyoming APA and Constitutional Due Process.

On Thursday, February 2, 2017, the EQC held a scheduling hearing and announced that it would require the Fishers to issue all discovery they might need to be adequately prepared to defend their rights and advance their position by no later than Monday, February 6, 2017. This schedule provided the Fishers with just two (2) business days to decide what discovery they might need and to issue all of that discovery to the other parties. In addition, the Fishers were required to identify the names of any expert witnesses they might call within the same two (2) business days. The EQC generally disregarded the complaints raised by various parties that their attorneys had other preexisting work loads and other commitments and obligations in this exceedingly short window for discovery and within the short 10-day period prior to the commencement of the contested case hearing.

Indeed, the Hearing Examiner expressed several times that it was his opinion that the Fishers and other parties “Needed to be ready to go when they filed their objections.” This statement reflects a fundamental misunderstanding of legal procedure. The Fishers nor any other party were entitled to engage in discovery activities “before they filed their objections”. Rather those procedural opportunities only existed after objections were filed and the matter referred to the EQC. EQC’s own docket reflects that did not happen until

sometime on January 30, 2017.

V. The Solution which Allows the EQC to Start the Contested Case Hearing Within the Statutory 20 Days and also Provide the Fishers and other Objectors with their Procedural Due Process and the Process Mandated by the Wyoming APA.

As pointed out by the undersigned during the scheduling conference, Wyoming Statute §35-11-406 does require that the EQC commence a contested case hearing within 20 days after the objection period, but it does not state when the proceedings must be concluded. The EQC could start the hearing as planned on February 13, 2017 and receive evidence from the DEQ as to why it believes the application is complete and it is appropriate for it to be granted. To the extent time allows, Brook Mine could also present its evidence as to why it believes its application and associated mine plan are complete and why it is appropriate to consider the permit at this time. The proceedings could then be called to a recess and continued to allow the Fishers and other Objectors to meaningfully conduct the discovery they are entitled to under the APA and as a matter of their respective procedural due process rights. After a reasonable and meaningful opportunity for that discovery, the hearing could be reconvened to take all remaining evidence. This would satisfy both the statutory deadline and the constitutional due process requirements without sacrificing one to serve the other³. With this simple and practical way to solve the conflict between the

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During the scheduling conference, the Objecting Parties stated that the contested case hearing in this matter would take at least 3-4 full days to present. The EQC was only able to facilitate two days starting February 13th. By proceeding as outlined above, this scheduling problem is also solved in a more reasonable fashion than EQC's suggestion that efforts be undertaken to constrict a hearing requiring four days into just two days.

statute's mandate and the constitutional and APA rights of the other parties, it would be reversible error for the EQC to proceed as it has proposed.

The Wyoming DEQ and EQC are tasked with protecting the environmental quality of the State of Wyoming. A surface coal mine (particularly one located in direct proximity and adjacent to a scenic, historic and important alluvial valley) presents a myriad of potential environmental and other problems. The DEQ, the EQC, and the citizens of Wyoming are entitled to a very carefully crafted mining plan with detailed information on the environmental safeguards and the financial security that will protect Wyoming's environmental resources. The matter deserves careful consideration and a full and complete exploration of the potential environmental risks both during the operational phase of the mine and as to reclamation risks and complications before a decision to allow these activities is made. It is not a matter that should be hurried through the system only to discover the deficiencies when it is too late.

WHEREFORE, and for the foregoing reasons, Mary Brezik-Fisher and David Fisher on behalf of themselves and the other Objectors request that the EQC enter an order directing that on the hearing dates of February 13-14, 2017 the EQC will hear evidence from the DEQ and from Brook Mine as to how the application for a permit to mine coal at this location is complete and is proper to consider it at this time, and that the EQC further order that after this evidence has been heard the hearing will be called to a recess and continued to allow the parties to engage in meaningful discovery with the object of satisfying their

procedural due process rights. The EQC can then reconvene at a later date to continue the hearing and take all further evidence.

DATED this 6th day of February, 2017.

YONKEE & TONER, LLP



Jay A. Gilbertz, WSB# 6-3087

Attorney for Objectors

Mary Brezik-Fisher and David Fisher

319 West Dow Street

P.O. Box 6288

Sheridan, WY 82801

Telephone: (307) 674-7451

Telefax: (307) 672-6250

CERTIFICATE OF SERVICE

I, Jay A. Gilbertz, hereby certify that on the 6th day of February, 2017, I served a true and correct copy of the above and foregoing *by electronic transmission*, duly addressed as follows:

Andrew Kuhlmann
Asst. Attorney General
andrew.kuhlmann@wyo.gov

Todd Parfitt
Director, DEQ
Todd.Parfitt@wyo.gov

Alan Edwards
Deputy Director, DEQ
Alan.edwards@wyo.gov

Shannon Anderson
Powder River Basin Resource Council
sanderson@powderriverbasin.org

Isaac Sutphin and Jeff Pope
Attorneys for Brook Mine, LLC
INSutphin@hollandhart.com
jspope@hollandhart.com
jmkelley@hollandhart.com
csvec@hollandhart.com

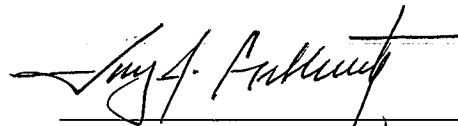
Brooke Collins
38 Monarch Rd.
Ranchester, WY 82839
bpcharlie@wbaccess.net

Lynne Boomgaarden
Attorney for Big Horn Coal
lboomgaarden@crowleyfleck.com
jwacker@crowleyfleck.com
wdrake@crowleyfleck.com

Jim Ruby
Executive Officer, EQC
jim.ruby@wyo.gov

Via U.S. Mail:

Joe Girardin
Council Business Coordinator
Environmental Quality Council
122 W. 25th Street
Herschler Bldg., Rm. 1714
Cheyenne, WY 82002



Jay A. Gilbertz