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

IN RE BROOK MINE APPLICATION)
TFN 6 2-025) DOCKET 17-4801

MOTION TO REMAND PROCEEDINGS TO THE DEQ DIRECTOR
Oral Argument Requested

On behalf of itself and its members who submitted objections to the permit application, Powder River Basin Resource Council (“Resource Council”) hereby moves that the above-captioned proceedings be remanded back to the Director of the Department of Environmental Quality (“DEQ Director” or “Director”) with instructions that he hold an informal conference to hear objections on the Brook Mine permit application.¹

INTRODUCTION

The above-captioned proceedings come before the Environmental Quality Council (“EQC”) as a referral from the Director.

On January 27, 2017 over a dozen parties submitted objections to the Brook Mine permit. These parties included the Resource Council and its members who are adjacent landowners and Sheridan County residents concerned about impacts to their property, health, safety, and way of

¹ The Resource Council will be filing a petition with the Office of Surface Mining Reclamation and Enforcement (“OSMRE”) pursuant to 30 C.F.R. § 733.12(a)(2) to evaluate the state program given the violations of SMCRA’s permitting requirements related to the Brook Mine permit, including the denial of the informal conference and failure to hold a conference in the location of the proposed mining operation, as requested by the Resource Council.

life. The next business day, on January 30, 2017, the Director wrote to each party that submitted objections to the Brook Mine permit application and notified the objector that the Director was denying requests for an informal conference and was referring the permit application to the EQC “for their review and determination at a contested case hearing.” *See, e.g.* Letter from Todd Parfitt to Anton Bocek, Jan. 30, 2017 (available on the EQC Electronic Filing System website for this Docket).

For the reasons discussed below, the Director has a mandatory duty to hold an informal conference and he does not have the authority to refer the matter directly to the EQC. As such, the EQC does not have jurisdiction to hold a contested case hearing at this time and must remand proceedings back to the Director, with instructions that he must hold an informal conference in the location of the proposed mining operation, as requested by the objecting parties.

Alternatively, should the EQC find that the Director has discretion to deny the request for an informal conference, the EQC should stay proceedings until such time as an objecting party formally petitions for review of the Director’s decision and thereby initiates proceedings pursuant to DEQ’s Rules of Practice and Procedure.

ARGUMENT

I. DEQ’s Rules Require an Informal Conference.

Wyoming DEQ (and in parts, the EQC) implements the federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201, *et seq.* (“SMCRA”). Under SMCRA’s system of cooperative federalism, Wyoming’s state-authorized program as embodied in the Wyoming Environmental Quality Act (“WEQA”) and corresponding state regulations must be “no less stringent” and “no less effective” than the federal program. 30 U.S.C. § 1253; 30 C.F.R. § 730.5.

In the case of requests for an informal conference, SMCRA’s requirements provide:

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.

30 U.S.C. § 1263(b) (emphasis added). This section creates a clear mandatory obligation on the part of the regulatory authority (in this case DEQ) to hold an informal conference if requested by an objecting party. For the state program to be “no less stringent” and “no less effective” than the federal program, DEQ’s rules must incorporate these requirements into its state program.

To meet these requirements, DEQ has a rule of practice and procedure specifically related to an informal conference request on any application for a surface coal mining permit:

Informal Conference. (a) Any request that the Administrator hold an informal conference on any application for a surface coal mining permit shall briefly state the issues to be discussed, whether the requester desires the conference to be held in the locality of the proposed mining operation, and whether access to the proposed permit area is desired. If requested, the Administrator may arrange with the applicant to grant parties to the conference access to the permit area for the purpose of gathering information relative to the conference. 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. If all parties requesting the conference reach agreement and withdraw their request, the conference need not be held.

DEQ Rules of Practice and Procedure Ch. 3 § 3(a) (emphasis added).

These requirements related to “applications for a surface coal mining permit” are distinctive from the general requirements, and corresponding discretion, afforded under W.S. § 35-11-406(k) related to “surface coal mining operations.”² Specifically, while the statute uses the word “may,” the regulations related to new surface coal mining applications use the word “shall.” *Id.* (requiring that “[t]he conference shall be held in the locality of the operation or at the

² The Resource Council also contends that the discretion afforded in W.S. § 35-11-406(k) allowing the Director to deny a request for an informal conference is also contrary to SMCRA, but the EQC need not reach that conclusion here because the provision is not specific to applications for a new surface coal mine permit. Here, the regulations that are specific to the situation before the EQC governs.

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.”). As discussed above, the rule’s embodiment of SMCRA’s mandatory requirement to hold an informal conference is necessary to ensure that the state program is “no less stringent” and “no less effective” than the federal program.

Since DEQ’s own rules require DEQ to hold an informal conference, the agency must do so here. DEQ cannot lawfully bypass the informal conference stage, and the EQC should remand proceedings back to DEQ to comply with their rules and regulations (and corresponding federal law).

II. An Informal Conference is Required to Afford Public Participation Opportunities.

An informal conference is required, if requested, as it affords affected landowners and other members of the public the opportunity to be heard. The informal conference is akin to a public comment hearing for an air or water permit. It not only affords the opportunity for adversarial presentations by the parties, but also provides a public comment opportunity for any members of the public that wish to attend the conference and provide comments – either positive or negative – about the permit application or the proposed mining operation.³

Here, when adjacent landowners and other impacted citizens have requested an informal conference in Sheridan County, the informal conference becomes a critical component of their public participation opportunities. By denying the informal conference, the Director has denied the rights of objecting landowners and citizens – and other members of the public who would

³ While DEQ’s Rules of Practice and Procedure afford opportunities for intervention in a hearing related to surface coal mining operations, that does not solve the public participation problem presented here because should a party wish to intervene it would still be burdened with participation in a contested case hearing in Cheyenne. There is no “public comment” opportunity at a contested case hearing.

have provided comments at the informal conference – who are unable to participate in the expensive and burdensome contested case hearing in Cheyenne the opportunity to be heard. In doing so, the Director has bypassed an important public participation opportunity of our surface coal mining laws and regulations.

III. A Contested Case Hearing Is Not Appropriate At This Time.⁴

Furthermore, there are no provisions in the WEQA or DEQ’s Rules of Practice and Procedure that authorize the Director to “refer” an objection to a surface coal mining permit to the EQC for a contested case hearing when that objecting party has requested an informal conference. Section 17(b) of the Rules of Practice and Procedure provide for appeals of “any administrative decision following an informal conference relating to a surface coal mining operation” to the EQC by the applicant or “any person with an interest” but there is no such provision that provides for referrals to the EQC by the Director or Administrator. Similarly, the public notice for the Brook Mine permit application instructs that “The complainants shall have a right of appeal to the Environmental Quality Council where the complaint will be heard a second time.”⁵

By remanding these proceedings back to the DEQ for an informal conference, the parties will be able to present information to the DEQ and a decision will be made. While that decision may still result in a contested case hearing, the parties have a right to both public participation opportunities, and have the right to *choose* to appeal the DEQ decision to the EQC rather than

⁴ By making this argument, in no way is the Resource Council waiving its rights to participate in a contested case hearing should one be held.

⁵ See W.S. §§ 35-11-406(p) which specifies the timing of decisions of the Director after informal conferences and hearings. It should be noted that both § 406(k) and § 406(p) apply to coal and non-coal permit applications and only objectors to coal permit applications are afforded the opportunity to request an informal conference. Therefore, the reading of these statutory sections can be misleading in regards to how they apply specifically to coal permits.

the DEQ referring the matter to the EQC *without* consultation of the objecting parties.

Additionally, an informal conference will benefit the EQC because an informal conference may resolve some of the objections and thus allow the parties to limit the scope of issues (or possibly parties) on appeal to the EQC. Regardless, as discussed above, it is the right of the parties to request an informal conference *and* to have the right to appeal a decision made in relation to the request for an informal conference to the EQC.

DEQ has once before denied an informal conference requested by the Resource Council. In that case, involving an objection to a renewal permit of the Eagle Butte Mine, the DEQ denied the informal conference request but did not refer the case to the EQC. *See* EQC Docket No. 15-4801, *In Re Eagle Butte (Alpha West)*, available at <https://eqc.wyo.gov/Public/ViewPublicDocument.aspx?DocumentId=10918> . In response to the denial of the informal conference, the Resource Council petitioned the EQC for review of the decision denying the informal conference and requested a contested case hearing on the objections to the permit.⁶ While that hearing was ultimately stayed for other reasons, no party – including DEQ – raised procedural concerns about the petition and how the case found its way to the EQC. Additionally, that proceeding was not treated as a “20 day” hearing under W.S. § 35-11-406(k).

In contrast to that previous case, in these proceedings, DEQ has referred the matter directly to the EQC. This renders its decision to deny the informal conference effectively unreviewable. Additionally, it prevents the objecting parties the opportunity to petition the EQC for review of DEQ’s permitting actions, which is the normal procedure and process for an appeal

⁶ *See* <https://eqc.wyo.gov/Public/ViewPublicDocument.aspx?DocumentId=10912>.

of a permit.⁷ Here, should DEQ have chosen to deny the request for an informal conference, it should have just told the objecting parties that and should not have referred the matter directly to the EQC. This would have afforded the objecting parties the opportunity to petition for review of DEQ's decision regarding the informal conference, and the permit application itself, within thirty (30) days of DEQ's decision, and procedurally would have created a different posture before the EQC as the hearing would not be bound by the "20 day" hearing requirements of W.S. § 35-11-406(k).

Therefore, should the EQC find against us that DEQ had discretion to deny the requests for an informal conference, it should at the very least stay proceedings until such time as an objecting party (or parties) petitions for review and initiates proceedings in accordance with DEQ's Rules of Practice and Procedure.

Conclusion

For the foregoing reasons, the EQC must remand the proceedings back to the DEQ Director with instructions to hold an informal conference pursuant to Chapter 3, Section 3(a) of the Rules of Practice and Procedure.

Dated this 6th day of February, 2017.

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⁷ Even in the case of non-coal mine permit challenges, where an informal conference is not afforded, the objecting parties choose to request a hearing before the EQC.

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2017, I served a copy of the foregoing **MOTION TO REMAND PROCEEDINGS TO THE DEQ DIRECTOR** on the following parties by electronic mail, and through the EQC's electronic filing system, which will send a notice of electronic filing to all counsel and parties of record.

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