

and thus authorized Brook Mining to send direct notice to affected landowners and publish general public notice of the pending application in the newspaper. Both the direct notice to the Fishers and the notice published in the paper stated that *“The Director may hold an informal conference if requested, hear the complaint and take action on the application in accordance with the Department’s Rules of Practice and Procedure. The complainants shall have a right of appeal to the Environmental Quality Council where the complaint will be heard a second time.”* (See copy of Notice attached as Appendix 1). The notice was clearly suggestive that the DEQ would initially hear the complaints of the objectors and that at a later time the EQC would hear any continuing complaints “a second time”.

The Fishers and numerous other parties filed objections and all, or nearly all, objectors requested an informal conference with the Director as they were directed to do in the notices. Rather than providing an informal conference, the DEQ decided to refer this matter directly to the EQC to hear the objectors’ complaints for the first time. For the reasons explained below, this was inappropriate and in violation of the Department’s own Rules and Regulations. The EQC must return this matter to the DEQ with direction that the Director Todd Parfitt or an appropriate Administrator¹ conduct the informal conference.

¹ The Administrator of the Land Quality Division is Kyle Wendtland. Mr. Wendtland is the brother of attorney Tony Wendtland of Sheridan, Wyoming. The Fishers are informed that Tony Wendtland has an attorney-client relationship with RAMACO or Brook Mine and has advocated on behalf of the entities’ plans for the Brook Mine. This creates a clear conflict of interest or at least the appearance of such a conflict and Kyle Wendtland should not be involved in any decisions in relation to this mine application.

II. The Department of Environmental Quality's Rules and Regulations Dictate that the Objecting Parties Must be Given an Informal Conference with the DEQ Prior to this Matter Being Taken up by the Environmental Quality Council.

The Fishers' position on this matter is best understood by addressing the issue in the context of the statutes and regulations which apply, the DEQ's own controlling Rules of Practice and Procedure and the legal arguments of the various objectors.

Wyoming Statute § 35-11-406(k) provides that any party objecting to the coal mining permit must file their written objections within 30 days after the last date that notice of the pending coal mining application is published in the newspaper. That same section of the statute goes on to say that the Director shall hold an informal conference if one is requested by any objector but suggests the DEQ has the discretion to decide if it is "preferable" for the matter to be addressed in an informal conference or to decide to refer the objections to the EQC for a full contested case proceeding. (See Wyo. Stat. 35-11-406(k) LexisNexis 2015.)

Fishers, Powder River Basin Resource Council and other objectors take issue with this assumed discretionary power of the DEQ to forego the informal conference. Fishers and the other objectors contend that Wyoming's statute providing the DEQ with the discretion to forego the informal hearing is contrary to the Federal minimum requirements under these circumstances. Under Federal environmental law, there is no discretion regarding the informal conference associated with a proposed coal mine. The law states that "the regulatory agency *shall* then hold an informal conference in the locality of the proposed mining" 30 U.S.C. § 1263(b) (emphasis added).

It is a basic tenet of environmental law that Wyoming may only exercise control over the application and administration of environmental protection laws *so long as* Wyoming's environmental rules and regulations are drafted and applied in at least as stringent and protective a manner as the federal counterpart law – in this case, the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201, et seq. (“SMCRA”). Therefore, Wyoming DEQ's regulations, application and enforcement must be no less protective, no less stringent and no less effective than the federal rules. 30 U.S.C. § 1253; 30 C.F.R. § 730.5. As stated above, under Federal law, the informal conference is mandatory in nature and not discretionary. (See 30 U.S.C. § 1263(b)).

Importantly, however, the DEQ's own Rules of Practice appear to resolve the statute's inconsistency with Federal law and afford the same protection and procedure as that afforded under SMCRA. (See DEQ Rules of Practice and Procedure Chapter 3 § 3(a)). Rule 3(a) relates directly and specifically to surface coal mining permits and states that an informal conference *shall* be conducted by DEQ. The only discretionary aspect of the DEQ's own rule is that the DEQ is vested with the discretion to decide whether the objectors will be given access to the proposed mine site itself. DEQ's rule at Chapter 3, §3, also states the conference should be held in “the locality of the proposed mining operation or at the state capitol, at the option of the requester”. This essentially mirrors the Federal rule's requirement that the conference be held in the “locality of the proposed mining”. (See 30 U.S.C. § 1263(b).) Put another way, any “discretion” afforded by Wyo. Stat §35-11-406(k) to the DEQ is negated or removed by DEQ's own Rules and Regulations which make the

informal conference mandatory – just like the Federal law counterpart set forth in SMCRA.

It is likely that the DEQ's own rule, which affords the absolute right to an informal conference, was purposefully constructed to ensure Wyoming's procedure for dealing with coal mining applications was in harmony with the minimum procedure established by Federal law on this same point. The Wyoming Environmental Quality Council must hold the DEQ to its own rules and require that an informal conference be conducted in Sheridan County, Wyoming – the locality of the proposed mining operation.

III. The Rules of Practice and Procedure Provide for a Stay of Proceedings before the EQC for the Purposes of facilitating an Informal Review by the Director.

DEQ's Rules of Practice and Procedure, Chapter 6, provide for an informal review by the Director of the DEQ of any action or proposed action by DEQ during the pendency of an appeal to the EQC. Rules of Practice and Procedure, Chapter 6, §4(a) provides:

(a) Where an appeal to the Council of the Administrator's decision is afforded, a petition should be filed with the Council within the time provided by law. This proceeding will be stayed if an informal conference with the Director is requested until the Director has made his determination. If the petitioner is not satisfied with the Director's determination, he shall inform the Council that he wishes to proceed with appeal to the Council. The Council shall conduct the hearing as if the informal hearing had not occurred, provided however, that the Director's decision may be introduced into evidence.

In this case all (or nearly all) of the Objectors requested an informal conference from the outset. If not clear by their previous written requests on this topic, the Fishers hereby demand an informal conference with the Director on this matter. The Fishers' prior filing of objections otherwise satisfies any requirement for identification of the issues which the Fishers would like to address in the conference. Similarly, the filed objections of the other

objectors outline their concerns which they wanted addressed at the informal conference. As it stands, the EQC has had this matter referred to it – a matter in which the DEQ has not made any determinations as to whether or not to grant the permit. All the objecting parties have requested an informal conference on this coal mining application but such a conference has not been provided contrary to the DEQ's own rules. The DEQ's and EQC's Rules of Practice and Procedure dictate that these proceedings be "stayed" pending the Director of the DEQ conducting an informal conference and making a "determination". A EQC contested case hearing is only appropriate after a determination has been rendered by the Director and after one or more of the objectors request such a hearing in light of the Director's determination.

IV. Enforcement of DEQ's own Rules and Regulations also Helps to Resolve the Procedural Due Process and Other Practical Problems Caused by Disregarding the Mandatory Requirement for an Informal Hearing.

As part of the initial filings with the EQC, the Fishers raised objections based on due process grounds. Fishers and several other objectors who joined in this motion contend that by moving forward with an extremely abbreviated pre-hearing schedule so that a full-blown contested case could be started just a few days after the objections were filed deprived the objectors of any meaningful way to prepare for this important hearing and denied them the right to engage in the discovery otherwise provided by the Administrative Procedure Act. Those arguments and contentions will not be repeated here, but Fishers adopt by reference their prior objections and the brief on this subject filed with the EQC relating to these procedural deficiencies.

There is a fundamental difference between being prepared to present complaints and observations in an informal setting within 20 days and being fully prepared for a contested case trial-like adjudication in just 20 days. If the EQC stays this matter as it must and directs the Department to comply with its own rules by providing the informal hearing, any subsequent contested case hearing would not be subject to this impermissibly truncated pre-hearing procedure. Put another way, these serious due process problems are likely resolved by enforcing the DEQ's own rules.

Yet another problem is created by proceeding directly to a contested case proceeding in lieu of an informal conference. Under Wyo. Stat. § 35-11-406(p), after the conclusion of the contested case proceeding before the EQC, the EQC should issue findings of fact and a "decision on the application". Thereafter, the Director shall "issue or deny" the permit within 15 days. However, before any coal mining permit is granted, the Administrator must make *in writing* all findings required by Wyo. Stat. §35-11-406(n). To the best of the Fishers' knowledge these findings have not yet been made by the Administrator. Consequently, if the EQC were to proceed with a contested case hearing at this time, it could face a subsequent appeal as to the Administrator's findings under Subsection (n) of the statute. On the other hand, requiring the DEQ to follow its own rules would alleviate the potential for multiple appeals to the EQC.

WHEREFORE, and for the foregoing reasons set forth above, the Fishers request that the Environmental Quality Council direct the DEQ to follow its own established Rules of Practice and Procedure and direct the DEQ to have the Director Todd Parfitt conduct an

informal conference in Sheridan County, Wyoming.

DATED this 15th day of February, 2017.

YONKEE & TONER, LLP



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CERTIFICATE OF SERVICE

I, Jay A. Gilbertz, hereby certify that on the 15th day of February, 2017, I served a true and correct copy of the above and foregoing *by electronic transmission*, duly addressed as follows:

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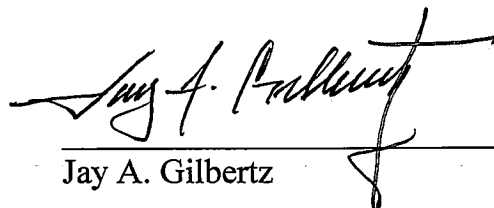
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Jay A. Gilbertz

Public Notice

The Brook Mining Co., LLC of 1101 Sugarview Drive, Suite 201, Sheridan, WY 82801 has applied for a coal mining permit from the Land Quality Division of the Department of Environmental Quality for the State of Wyoming. The coal mining permit area will be located in: Sections 10, 11, 12, 13, 14 and 15 Township 57N, Range 85W, and Sections 7, 8, 9, 10, 15, 17, 18, 20, 21, 22 and 27 Township 57N, Range 84W Sheridan County, Wyoming. The Brook Mine is located approximately 6 miles Northwest of Sheridan, Wyoming. This area can be found on the Acme and Monarch USGS quadrangle maps. The proposed operation is scheduled to begin July 2017 and is estimated to continue until 2032. The land, after mining, will be returned to a grazing land use. Information regarding the proposed mining operation and reclamation procedures may be reviewed in the Office of the Land Quality Division of the Department of Environmental Quality in Cheyenne and Sheridan, Wyoming, the office of RAMACO in Sheridan, WY, or the Sheridan County Clerk's Office Sheridan, Wyoming. Written objections to the proposed mining operation must be received by the Administrator of the Land Quality Division, Department of Environmental Quality, 200 W. 17th Street, Cheyenne, WY 82002, before the close of business January 27, 2017. The Director may hold an informal conference if requested, hear the complaint and take action on the application in accordance with the Department's Rules of Practice and Procedure. The complainants shall have a right of appeal to the Environmental Quality Council where the complaint will be heard a second time. A conference shall be held if the Director determines that the nature of the complaint or the position of the complainants indicates that an attempt to informally resolve the disputes is preferable to a contested case proceeding. An informal conference or a public hearing shall be held within twenty (20) days after the final date for filing objections unless a different period is stipulated to by the parties. The Council or Director shall publish notice of the time, date and location of the hearing or conference in a newspaper of general circulation in the locality of the proposed operation once a week for two (2) consecutive weeks immediately prior to the hearing or conference. The hearing would be conducted as a contested case in accordance with the Wyoming Administrative Procedure Act (W.S. §16-3-101 through §16-3-115), and the right of judicial review would be afforded as provided in that act. All parties as given in W.S. §35-11-406(j) will be mailed a copy of this notice. The Wyoming Oil and Gas Commission will be mailed a copy of the application mine plan map as required by W.S. §35-11-406(j).

Appendix