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BIG HORN COAL COMPANY

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

IN RE BROOK MINE APPLICATION )  
 ) Docket No. 17-4801  
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TFN 6 2-025 )

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**OBJECTOR BIG HORN COAL COMPANY’S BRIEF ADDRESSING WHETHER  
THE ENVIRONMENTAL QUALITY COUNCIL PRESENTLY HAS  
JURISDICTION OVER THIS MATTER**

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Big Horn Coal Company (“Big Horn”), by and through its undersigned counsel, timely submits this brief pursuant to the Environmental Quality Council’s (the “Council”) February 7, 2017 Order Vacating Contested Case Hearing and Setting Oral Argument (the “Order”).

**INTRODUCTION**

This matter involves the current, unique procedural posture of Big Horn’s and other interested parties’ objections to Brook Mining Company, LLC’s (“Brook Mine”) surface coal mining permit application under the Wyoming Environmental Quality Act (the “Act”) and the Department of Environmental Quality’s (“DEQ”) Rules of Practice and Procedure

(the “Rules”). The Order specifically requested that the parties brief the following issue: “whether there is a proper appeal before the Council at this time that necessitates a contested case.”<sup>1</sup> Wyo. Stat. Ann. § 35-11-406, read as a whole, answers the question posed: Absent a request for hearing from an interested person, the Council has no jurisdiction over this matter. Accordingly, there is no proper appeal before the Council at this time that necessitates a contested case.

### **PROCEDURAL BACKGROUND**

Pursuant to Wyo. Stat. Ann. § 35-11-406(j) and (k), notice of Brook Mine’s permit application was published and interested persons were afforded the right to file written objections to the application with the Administrator through January 27, 2017. *See Exhibit A, Public Notice of Brook Mining Co., LLC Permit Application.*

Numerous parties, including Big Horn, filed written objections to the application and specifically requested an informal conference as provided by the Rules and Wyo. Stat. Ann. § 35-11-406(k). *See EQC Dkt. No. 17-4801.* No party requested a contested case hearing before the Council. *Id.* On January 30, 2017, DEQ Director Todd Parfitt informed Big Horn and the other objectors that he had determined an informal conference was unlikely to be successful in resolving the disputes and that he was “referring this permit application to the [Council] for their review and determination at a contested case hearing.” *See e.g. Exhibit B, DEQ Letter to Big Horn.* On that same date, following numerous informal email communications from Council staff concerning the immediate scheduling

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<sup>1</sup> Because no decision has been made regarding Brook Mine’s permit application, any contested case at this stage would need to flow from a request for a hearing/protest to a permit, not an appeal. *See Wyo. Admin. Code ENV PP Ch. 1 § 3.*

of a pre-hearing conference, and prior to Big Horn's receipt of Director Parfitt's decision regarding its request for an informal conference, the Council ordered the parties to appear for a pre-hearing conference in the docketed contested case, on February 2, 2017. **Exhibit C, Pre-hearing Conference Order.** The parties were informed that "[f]ailure to appear at the pre-hearing conference may result in dismissal from this case." *Id.* Following the pre-hearing conference, the Council issued a Scheduling Order setting a contested case hearing for February 13 and 14, 2017, with all motions, responses, discovery and disclosures to occur in the week leading up to the hearing. **Exhibit D, Amended Order for Contested Case Hearing.** Big Horn and other objectors responded to the Scheduling Order by raising due process concerns. *See* EQC Dkt. No. 17-4801. Objector Powder River Basin Resource Council further specifically challenged the Council's jurisdiction to hold a contested case hearing at this time and requested a remand of the proceedings back to the Director, with instructions to conduct an informal conference, as requested. *Id.*

The Council then issued the Order vacating the contested case hearing, requesting briefs on the jurisdictional issue, and setting oral argument for February 21, 2017. **Exhibit E, Order Vacating Contested Case Hearing and Setting Oral Argument.**

## **ARGUMENT**

### **I. Absent a Request by an Interested Person, the Council has No Jurisdiction over this Matter.**

For surface coal mining operations, the Act provides interested persons the right to file written objections to a permit application with the Land Quality Division Administrator for a period of thirty (30) days, and if requested, the Director may hold an informal

conference to take action on the permit application in accordance with DEQ's rules of practice and procedure. Wyo. Stat. Ann. § 35-11-406(k). The statute further provides that "[a]n 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," and that a hearing shall be conducted as a contested case hearing. *Id.* Subsection (k), read alone, suggests that after the time for filing objections has expired either an informal conference or a contested case hearing must be held. Subsection (k) does not address the possibility that a request for an informal conference might be denied, the timing or communication of such decision to the requesting party within the 20-day window, or otherwise set forth what would necessarily trigger a hearing under those circumstances and when. Wyo. Stat. Ann. § 35-11-406(p) sheds important additional light on this issue by stating that "if no informal conference or hearing *is requested*" the Director must render a decision on the application within thirty (30) days of the notice period. *Id.* (emphasis added). Read as a whole, then, the statutory language makes clear that both an informal conference and a hearing before the Council must be initiated on the request of an interested person. *See id.*

The Council is a creature of statute and may only exercise those powers given to it by the legislature. In other words, the Council "must find within the statute warrant for the exercise of any authority which it claim[s]." *Exxon Mobil Corp. v. Wyoming Dept. of Revenue*, 266 P.3d 944, 951 (Wyo. 2011) (citing *Amoco Prod. Co. v. Wyo. State Bd. of Equalization*, 12 P.3d 668, 673 (Wyo.2000)). Here, nothing within the statute warrants a conclusion that the Council may exercise any authority over the Brook Mine permit

application simply on a referral from the Director following his denial of the objectors' requests for an informal conference. To the contrary, as illustrated above, the legislature understandably gave the objectors the right to request (or decline to request) a hearing before the Council. As of the date of the Order, no such request had been made and the Council presently has no jurisdiction over this matter.

**II. Given the Unique Course of Events in this Matter, Big Horn Coal Respectfully Renews its Request for an Informal Conference, or in the Alternative Requests a Contested Case Hearing before the Council, in Order to Preserve All Its Rights as an Interested Person.**

Beyond the jurisdictional issue addressed above, the statutes and Rules do not set forth a clear procedural path or timeline in the event DEQ denies a request(s) for an informal conference. For example, Wyo. Stat. Ann. § 35-11-406(k) indicates the Director has sole discretion whether to hold an informal conference and that the Director would conduct the informal conference. Chapter 6, §1 of the Rules speaks to the Director's authority to *review* by informal conference any decision, order or notice by the Administrator, but does not provide that the Director may conduct an informal review in the first instance. Moreover, section 5 of this same chapter expressly prohibits the Director from reviewing "any informal conference proceeding requested and held pursuant to [Wyo. Stat. Ann.] § 35-11-406(k)."

The Rules imply that the authority to conduct an informal conference requested pursuant to Wyo. Stat. Ann. § 35-11-406(k) has been delegated to the Administrator with a direct appeal of any action following the informal conference to the Council. See Wyo.

Admin. Code ENV PP Ch. 1 §17(b) (an interested person may appeal any administrative decision *following* an informal conference related to a surface coal mining operation to the Council within 30 days of notice of the decision). Consistent with the timeline set forth in Wyo. Stat. Ann. § 35-11-406(k), Chapter 3, § 3 of the Rules further provides that any informal conference requested of *the Administrator* on a surface coal mining permit be held “within 20 days after the final date for filing objections unless a different period is stipulated to by the parties.” The Rules simply fail, however, to address what occurs following the Director’s or Administrator’s denial of a request for an informal conference, and when. No amount of briefing can fill these gaps or rectify these uncertainties.

Big Horn staunchly believes that its objections to Brook Mine’s permit application - critical, technical issues primarily related to hydrologic data and impacts, material testing and data, sloughing, existing subsurface fire activity and related controls, and subsidence - would be most efficiently and effectively addressed in the context of an open, candid, informal conference with Big Horn Coal representatives, Brook Mine and its consultants, and the DEQ technicians who reviewed Brook Mine’s mine and reclamation plans and any accompanying data; not in the context of a hotly contested, “battle of the experts” presentation to the Council. If DEQ is willing to revisit this issue, Big Horn will defer to the DEQ whether any informal conference on the Brook Mine permit application would be conducted by the Administrator or the Director.

For these reasons, contemporaneous with filing this brief, Big Horn has submitted to the Administrator a renewed request for an informal conference pursuant to Wyo. Stat. Ann. § 35-11-406(k) and the Rules, Chapter 3, § 3. *See Exhibit F.* Given the referenced

uncertainties and the possibility no informal conference will be held, contemporaneous with filing this brief and within 20 days after the final date for filing objections, Big Horn also has filed with the Council and served upon the Director and the parties, a petition for hearing in accordance with the Rules, Chapter 1, § 3. *See Exhibit G.* Big Horn further asserts that because no party timely objected to the Council’s briefing and oral argument schedule, and because the statute allows the parties to stipulate to a different period, any claim asserting a failure to comply with the 20-day hearing/conference requirement under Wyo. Stat. Ann. § 35-11-406(k) or any prejudice arising therefrom has been waived. *See Amoco Production Co., 7 P.3d at 906 (Wyo. 2000)* (holding that “[i]f a party has an opportunity to object to the administrative tribunal's procedural rulings and fails to do so, it waives its right to challenge the administrative tribunal's procedure on appeal”).

### **CONCLUSION**

For the reasons set forth above, an informal conference before the Director or Administrator is the best context for discussion and possible resolution of all or at least some of Big Horn’s and other objectors’ concerns with Brook Mine’s mine permit application. The Council may exercise jurisdiction over this matter only: (1) if an appeal is filed following an informal conference, or (2) no informal conference is held and pursuant to Big Horn’s or any other party’s request for a contested case hearing.

[Signature page to follow.]

DATED: February 15, 2017.

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## CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2017, a true and correct copy of the foregoing was served by email to the following:

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