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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

In Re Brook Mine Permit Application)

TFN 6 2-025)

) EQC Docket No. _____
)
)

**PETITION TO THE ENVIRONMENTAL QUALITY COUNCIL
FOR A HEARING ON DEQ’s DENIAL OF AN INFORMAL CONFERENCE AND ON
OBJECTIONS TO THE BROOK MINE PERMIT**

INTRODUCTION

1. Powder River Basin Resource Council (“PRBRC” or “Resource Council”)¹ respectfully petitions the Environmental Quality Council (“EQC” or “Council”) to hold a hearing on the Resource Council’s objections to Brook Mining Co., LLC’s (“Brook” or “company” or “applicant”) coal mine permit application and the Department of Environmental Quality’s (“DEQ”) denial of informal conference public participation opportunities and due process rights as provided for under the Environmental Quality Act and the Surface Mining Control and Reclamation Act (“SMCRA”).

¹ The Resource Council’s address is 934 N. Main St., Sheridan, WY 82801. All correspondence can be addressed to Shannon Anderson at the postal address, sanderson@powderriverbasin.org, or (307) 672-5809.

2. The Resource Council submitted its objections to the permit application to the DEQ on January 27, 2017, requesting an informal conference before the Department. The objections and request for informal conference are attached as Exhibit 1.

3. Under the Environmental Quality Act and associated regulations, and corresponding federal law and regulations under SMCRA, DEQ was required to hold an informal conference on the Resource Council's objections. DEQ Rules of Practice & Procedure, Ch. 3 § 3(a) ("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"); 30 U.S.C. § 1263(b) ("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.").

4. However, DEQ denied the Resource Council's request for an informal conference, arguing that DEQ is afforded discretion in deciding whether or not to grant an informal conference request. DEQ's letter to the Resource Council is attached as Exhibit 2.

5. We respectfully ask the EQC to, without undue delay, schedule a hearing on DEQ's denial of the informal conference, and after such hearing, remand the Resource Council's objections to the permit application back to DEQ for consideration at an informal conference proceeding.

6. If the EQC is unwilling or unable to do that, we ask that the EQC consider our objections to Brook's coal mine permit application at a contested case hearing. In making a request for

hearing, in no way is the Resource Council waiving any of its rights or remedies related to the denial of the informal conference.²

7. We also respectfully ask the EQC to issue a temporary order preventing the DEQ from approving the permit until such time as the hearing is held and an order is issued therefrom, in accordance with Sections 406(k) and 406(p) of the Environmental Quality Act.

STATEMENT OF JURISDICTION

8. The EQC has jurisdiction to hold a hearing on DEQ's denial of the informal conference and/or the Resource Council's objections to the permit application. DEQ Rules of Practice and Procedure, Ch. 1, §§ 3, 17(b).

9. This petition is timely filed within thirty (30) days of receipt of DEQ's decision denying the request for an informal conference.³ *Id.* at § 17(b).

STATEMENT OF FACTS AND LAW

10. According to the Environmental Quality Act and SMCRA, "No mining operation may be commenced or conducted on land for which there is not in effect a valid mining permit to which the operator possesses the rights." W.S. § 35-11-405(a).

11. Requirements for coal mine permit applications as well as grounds for approval and denial are governed by Section 406 of the Wyoming Environmental Quality Act, along with the Land Quality Division's Rule and Regulations implementing the Environmental Quality Act.

² Separately, 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 failure to hold an informal conference in the location of the proposed mining operation, as requested by the Resource Council.

³ DEQ's decision is dated January 30, 2017, and it was received by the Resource Council via postal mail on February 2, 2017. Although DEQ did not hold an informal conference, and therefore there is no administrative decision following an informal conference to appeal, the Resource Council is still assuming that this appeal of DEQ's decision not to hold an informal conference falls under Ch. 1 § 17(b) related to informal conferences.

12. Specifically, “The applicant for a surface coal mining permit has the burden of establishing that his application is in compliance with this act and all applicable state laws.” *Id.* at § 406(n).

13. Additionally, before a coal mining permit can be approved, DEQ must make certain findings related to the application’s compliance with the Wyoming Environmental Quality Act, DEQ regulations, and SMCRA. *Id.* at §§ 406(n)(i)-(vii). As far as the Resource Council knows, these findings have yet to be made.

14. Requirements for mine reclamation bonds are governed by Section 417 of the Environmental Quality Act and corresponding DEQ regulations.

15. In response to the required public notice, the Resource Council timely filed objections to Brook’s coal mine permit application. The objections included a variety of issues ranging from incomplete and inaccurate information in the permit application to more technical issues such as hydrology and subsidence concerns and reclamation bond requirements.

16. Members of the Resource Council also timely filed objections to Brook’s coal mine permit application. John and Vanessa Buyok, Gillian Malone, Sadie Clarendon, Jane Buyok, Anton Bocek, Joan Tellez, Wendy Condrat, and William Bensel filed objections and their objections are hereby incorporated, to the extent possible into the Resource Council’s objections. Exhibits 3-10. Their objections also demonstrate that the Resource Council, through representation of its members, is an “interested person” within the meaning of the Wyoming Environmental Quality and Section 406(k) and a “person with an interest which is or may be adversely affected” within the meaning of Ch.1, § 17(b) of DEQ’s Rules of Practice and Procedure.

17. The objections of the Resource Council, along with objections of our members, included a request for an informal conference.

18. DEQ denied the requests for an informal conference on January 30, 2017 and referred all of the submitted objections to the EQC (regardless of whether the objecting party requested an informal conference, hearing, or neither type of proceeding). *See* Exhibit 2.

19. The EQC subsequently opened Docket 17-4801, held a scheduling conference, and entered into a scheduling order for a hearing.

20. However, after motions from the parties, including the Resource Council, filed February 6, 2017, the EQC vacated the hearing and requested additional briefing from the parties regarding the EQC's jurisdiction and authority to hear the case.

21. On February 21, 2017, after briefing and argument from the parties, the EQC voted to dismiss Docket 17-4801. However, in doing so, EQC members acknowledged that the parties could come back and file a petition for a hearing.⁴

ISSUES PRESENTED FOR REVIEW AT THE HEARING

22. Paragraphs 1-21 above are hereby incorporated.

23. DEQ cannot lawfully issue a permit for the Brook Mine unless the application demonstrates that it meets the requirements of applicable laws and regulations *and* unless DEQ makes the required findings of Section 406(n).

24. Additionally, DEQ cannot lawfully issue a permit for the Brook Mine unless the agency follows the required public participation process afforded under its rules and corresponding federal law and regulations pursuant to SMCRA. DEQ is under legal obligation to hold an informal conference on the Resource Council's objections. DEQ Rules of Practice & Procedure

⁴ At this time, the transcript is unavailable for specific citation.

Ch. 3 § 3(a); 30 U.S.C. § 1263(b); 30 C.F.R. § 773.6(c). DEQ is also under legal obligation to hold such an informal conference in the location of the proposed mining operation (i.e. Sheridan County) and to provide access to the proposed mine site, if requested. *Id.*

25. DEQ cannot waive these requirements because only Congress can exempt companies from compliance, through an amendment to SMCRA. DEQ's regulations provide mandatory – not discretionary – actions on the part of the agency in relation to its obligations to afford public participation opportunities.

26. DEQ regulations require information in a permit application to be “current” . . . “accurate and complete.” DEQ Land Quality Division Rules and Regulations, Ch. 2 § 1. The mine plan must include “[a] complete operations plan proposed to be conducted during the life of the mine” with an accurate estimate of “the number of acres that will be affected annually” and the “anticipated annual and total production by tonnage.” *Id.* at § 5(a)(i). As discussed in Sections 1 and 2 of the Resource Council's objections, the mine plan at issue here does not contain current, accurate, or complete information and does not meet the requirements of DEQ's regulations.

27. The mining and reclamation plan does not include “a plan to minimize the disturbances to the prevailing hydrologic balance at the minesite and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after mining operations and during reclamation” as required by the Environmental Quality Act and corresponding DEQ regulations. W.S. § 35-11-406(b)(xvii).

28. The proposed mine has not “been designed to prevent material damage to the hydrologic balance outside the permit area” are required by the Environmental Quality Act and corresponding DEQ regulations. *Id.* at § 406(n)(iii). DEQ is unable to make this finding until its Cumulative Hydrologic Impacts Assessment (“CHIA”) is completed.

29. DEQ is unable to make a finding that “the proposed operation would . . . [n]ot interrupt, discontinue, or preclude farming on alluvial valley floors” as required by Section 406(n)(v) as DEQ has yet to finish its mapping and determinations related to alluvial valley floors in adjacent areas as required by DEQ regulations. Land Quality Rules and Regulations, Ch. 12 § 1(a)(i).

30. The mine plan does not sufficiently include “[t]he methods of diverting surface water around the affected lands where necessary to effectively control pollution or unnecessary erosion” as required by the Environmental Quality Act and associated DEQ regulations. W.S. 35-11-406(b)(xv).

31. The mine plan does not include an appropriate plan to put out coal fires or properly treat or dispose of other “materials constituting a fire, health, or safety hazard.” W.S. 35-11-406(b)(ix).

32. The proposed reclamation bond does not cover the *entire* cost of surface and water reclamation, as required to be posted *prior* to any mining on the site. *See* W.S. § 35-11-416(c)(i) (the bond should equal the “cost of reclaiming the affected land disturbed” . . . “plus the administrator’s estimate of the additional cost to the state of bringing in personnel and equipment should the operator fail or the site be abandoned.”).

33. As discussed in the expert report submitted with the Resource Council’s objections, the subsidence control plan does not achieve its required objective: to control and prevent subsidence at the mine site. The expert report concludes that “There is a serious risk of surface subsidence from roof collapse in the proposed mining area.” Subsidence “constitutes a public nuisance or endangers the public and safety” of local landowners. W.S. § 35-11-406(m)(vii). It also has implications for whether the “reclamation plan can accomplish reclamation as required.”

Id. at § 406(n)(ii). And it has implications for creating damage to the hydrologic balance both within the permit area and in outside areas. *Id.* at §§ 406(b)(xvii), 406(n)(iii).

34. The company's application does not comply with DEQ requirements that the application include "[a] list identifying the Mine Safety and Health Administration identification number for all mine facilities that require MSHA approval and licenses, permits or approvals needed by the applicant to conduct the proposed operation, whether and when they have been issued, the issuing authority, and the steps to be taken to comply with the requirements." Land Quality Rules and Regulations, Ch. 2 § 2(a)(v).

35. The Resource Council reserves the right to raise any additional issues brought forth in its objection letter or in other objection letters submitted to DEQ.

36. The Resource Council also reserves the right to provide additional evidence and support for its objections.

37. The Resource Council further reserves the right to supplement its objections and grounds for hearing if and when DEQ makes any findings pursuant to Sections 406(n)(i)-(vii).

38. The Resource Council further reserves the right to supplement its objections and ground for hearing based on discovery provided by DEQ and Brook as part of this hearing process.

REQUEST FOR TEMPORARY RELIEF

39. Paragraphs 1-38 above are hereby incorporated.

40. The Resource Council requests that the EQC prevent DEQ from issuing the permit until such time as there is a final order from an informal conference held by DEQ or from a hearing by the EQC on the Resource Council's objections to the permit.

41. Preventing DEQ from issuing a decision on the permit until after the hearing is consistent with W.S. § 35-11-406(p) (requiring the DEQ Director to "issue or deny the permit no later than

fifteen (15) days from receipt of any findings of fact and decision of the environmental quality council.”) Additionally, as discussed in paragraph 13, *supra*, DEQ has yet to make findings required before the permit can be issued.

PRAYER FOR RELIEF

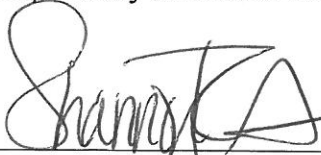
42. For the reasons set forth above, the EQC should immediately issue an order remanding the Resource Council’s objections to the DEQ and ordering the agency to hold an informal conference on the objections, held pursuant to the Environmental Quality Act, SMCRA, and associated state and federal regulations.

43. However, if the EQC declines to issue such an order, we request that the EQC hold a contested case hearing to consider the objections of the Resource Council and other parties.

44. The EQC should grant temporary relief to the Resource Council by ordering a stay on any permitting action by DEQ pending the outcome of the requested hearing.

45. After the hearing, the EQC should issue a decision to deny the permit application and should submit such decision to the DEQ for its action.

Respectfully submitted this 21st day of February, 2017.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of February, 2017, the foregoing PETITION TO THE ENVIRONMENTAL QUALITY COUNCIL FOR A HEARING was served on the following parties via electronic and USPS certified mail, return receipt requested:

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