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ATTORNEYS FOR PERMIT APPLICANT
BROOK MINING COMPANY, LLC

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

IN RE BROOK MINE APPLICATION)
) Docket No. 17-4804
TFN 6 2-025)

**BROOK MINE’S MOTION TO DISMISS OBJECTOR POWDER RIVER BASIN RESOURCE
COUNCIL’S PETITION FOR A HEARING ON THEIR OBJECTIONS BEFORE THE ENVIRONMENTAL
QUALITY COUNCIL**

INTRODUCTION

On February 24, 2017, Powder River Basic Resource Council (PRBRC) petitioned the Council to hold a contested case hearing on its objections to Brook Mine’s permit application. PRBRC’s request comes 27 days after the final day to object, 27 days after the final day to request an informal conference with the Director of DEQ, and 27 days after the deadline to request a hearing with the Council. The request also comes seven days after the deadline to hold a contested case hearing. PRBRC is just too late; and its request should be denied.

PRBRC’s petition is based on Wyo. Stat. §§ 35-11-406(k), (p). (*See* PRBRC’s Petition, 3.) As this Council recently held, objectors wishing to have their case heard by the Council must request a petition for contested case pursuant to Section 406(k). *See* Council’s February 22, 2017 Order of Dismissal, 2 filed in Docket 17-4801 (Ex. A). Only then will the Council hear

objections to a surface coal mining permit application. In dismissing the previously-docketed contested case involving all objections to Brook's application, including PRBRC's objection, Civil Action No. 17-4801, the Council decided that before it has jurisdiction to hear a contested case, an objector must request a hearing. *Id.* The Council's decision means that a hearing request filed with the Council must occur on the same timetable as a request to the DEQ for an informal conference under Section 406(k). PRBRC's request does not meet that timetable; so the Council has no jurisdiction to hear it. *Id.*

ARGUMENT

I. PRBRC's request for a contested case hearing is untimely.

Under the Act, the public had 30 days after the final publication date of Brook's permit application to object or comment. Wyo. Stat. Ann. § 35-11-406(j), (k). Section 406(k) allows anyone who comments or objects to request an informal conference with the DEQ Director. *Id.* That request must occur within the 30-day statutory period because the informal conference with the director shall take place within 20 days "after the final date for filing objections..." *Id.* at (k); DEQ Rules of Practice and Procedure Ch. 3 § 3.

Because the Council decided that an objector must request a contested case hearing, the same deadlines and procedures in Section 406(k) apply. (Ex. A, 2.) Section 406(k) creates deadlines to ensure the permit application process moves forward in a timely manner. PRBRC did not meet this deadline. (Ex. A, 2.) Brook's final day of publishing its permit application was December 27, 2016. The public had until January 27, 2017 to object or comment. PRBRC objected within that time period and requested an informal conference with the director but waited until February 24, 2017 to request a contested case hearing—27 days after the deadline. (*See* PRBRC's Petition for Hearing.) Simply put, PRBRC did not request a contested case within 30 days of the final publication date. Its Petition is untimely and should be dismissed.

PRBRC may contend that the statute does not set a deadline to request a contested case. That's the problem. The statute contemplates either an informal conference or a hearing within 20 days of the final date to file objections. Although the Council decided that the statute also requires an objector request a contested case before the Council has jurisdiction, that process must follow the deadlines set forth in the statute because the Council has no authority to create new procedures or deadlines not already provided in the statute. *Amoco Production Co. v. State Bd. of Equalization*, 12 P.3d 668, 673 (Wyo. 2000) (explaining an agency's power depends upon statutes, so "they must find within the statute warrant for the exercise of any authority which they claim.") Under the statute, the deadline for the 20-day hearing has long passed, let alone the deadline to ask for one.

II. PRBRC's request that the Council consider whether the director must hold an informal conference is baseless.

As an alternative to a contested case hearing on Brook's permit application, PRBRC requested a hearing on "DEQ's denial of the informal conference." (PRBRC's Petition for Hearing, 2.) PRBRC also requested the Council remand the case to DEQ for an informal conference because the Surface Mining Control and Reclamation Act (SMCRA) and DEQ regulations require an informal conference. (*Id.*) The Council should dismiss PRBRC's request because it lacks legal support.

DEQ's Director has no duty to hold an informal conference. The Director "**may** hold an informal conference" if he thinks that a conference will resolve the dispute. But if he does not think an informal conference will resolve the dispute, then he is not required to hold one. Wyo. Stat. Ann. § 35-11-406(k). Contrary to PRBRC's argument, the regulations governing an informal conference do not change the Director's discretion. Regulations cannot force an optional statutory power to become a mandatory one. *Joy Techs., Inc. v. Secretary of Labor*, 99

F.3d 991, 996 (10th Cir. 1996) (rejecting an interpretation of a regulation that would not be “reasonable and consistent with the statute’ that the regulation is meant to implement.”). Besides, the regulations governing informal conferences do not say they are mandatory. Rather, it makes the location of an informal conference mandatory **if** the director chooses to hold an informal conference at all. DEQ Rules of Practice & Procedure Ch. 3 § 3(a). When the Director chooses not to hold an informal conference, the regulation does not apply.

Likewise, an informal conference does not need to occur to comply with SMCRA’s standard that state law be “no less stringent” than federal law. (PRBRC’s Petition for Hearing, 2.) The agency that enforces SMRCA, the Office of Surface Mining Reclamation and Enforcement, said so. 37 years ago, the Office of Surface Mining approved the Environmental Quality Act and all associated regulations—including Section 406(k)’s optional informal conference. 30 CFR § 950.10. In its most recent annual report, the Office of Surface Mining said Wyoming’s regulatory program “has **no programmatic deficiencies.**” (Ex. B, Annual Report.) The Wyoming Supreme Court summed it up, saying “[t]here can be **no question** that Wyoming implemented the policy of the SMCRA.” *Belle Fourche Pipeline Co. v. State*, 766 P.2d 537, 548 (Wyo. 1988) (emphasis added). The Director not holding an informal conference does not threaten Wyoming’s compliance with SMCRA.

CONCLUSION

The Council has spoken on the need for objectors to request a contested case. (Ex. A, 2.) But that has consequences for all objectors. None of the objectors, PRBRC included, have filed a request for a contested case hearing within the deadlines set out in Section 406(k). (Ex. A, 2.) PRBRC’s late request does not excuse its failure to meet the deadline. Therefore, Brook requests the Council dismiss PRBRC’s February 24, 2017 Petition for a contested case hearing.

Without waiving any of its arguments, Brook respectfully asserts that if the Council decides to hear PRBRC's objections, the Council must proceed expeditiously. The Environmental Quality Act unequivocally sets out a 20-day timeline for holding an informal conference or a public hearing. Even giving PRBRC the benefit of allowing its late-filed Petition to proceed, the Council is statutorily obligated to hold a hearing on PRBRC's objections by March 16, 2017.

DATED: March 1, 2017.



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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2017, I served a true and correct copy of the foregoing by email to the following:

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