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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. 17-4803
TFN 6 2-025)

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

INTRODUCTION

On February 23, 2017, Mary Brezik-Fisher and David Fisher (Fishers) petitioned the Council to hold a contested case hearing on its objections to Brook Mine’s permit application. The Fishers’ request comes 26 days after the final day to object, 26 days after the final day to request an informal conference with the Director of DEQ, and 26 days after the deadline to request a hearing with the Council. The request also comes six days after the deadline to hold a contested case hearing. The Fishers are just too late; and their request should be denied.

The Fishers’ petition is based on Wyo. Stat. § 35-11-406(k). (*See* Fishers’ Petition at 2.) 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 the Fishers' 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). The Fishers' request does not meet that timetable; so the Council has no jurisdiction to hear it. *Id.*

ARGUMENT

I. The Fishers' 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. Thus, whether requesting an informal conference or a public hearing, the deadline is the same.

The Fishers 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. The Fishers objected within that time period and requested an informal conference with the director but waited until February 23, 2017 to request a contested case hearing—26 days after the deadline. (*See* Fishers' Petition for Hearing.) Simply put, the Fishers did not request a

contested case within 30 days of the final publication date. Their Petition is untimely and should be dismissed.

The Fishers 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.

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, the Fishers included, have filed a request for a contested case hearing within the deadlines set out in Section 406(k). (Ex. A, 2.) The Fishers' late request does not excuse their failure to meet the deadline. Therefore, Brook requests the Council dismiss the Fishers' February 23, 2017 Petition for a contested case hearing.

Without waiving any of its arguments, Brook respectfully asserts that if the Council decides to hear the Fishers' 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 the Fishers the benefit of allowing its late-filed

Petition to proceed, the Council is statutorily obligated to hold a hearing on the Fishers' objections by March 15, 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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