

Shannon Anderson (Wyo. Bar # 6-4402)
Powder River Basin Resource Council
934 N. Main St., Sheridan, WY 82801
(307) 672-5809
sanderson@powderriverbasin.org

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

IN RE BROOK MINE APPLICATION)
) **DOCKET 17-4802**
TFN 6 2-025)

**POWDER RIVER BASIN RESOURCE COUNCIL’S RESPONSE TO THE
DEPARTMENT OF ENVIRONMENTAL QUALITY’S MOTION TO DISMISS PART
OF THE POWDER RIVER BASIN RESOURCE COUNCIL PETITION**

Pursuant to the Environmental Quality Council (“Council” or “EQC”) Order of March 2, 2017, and W.R.C.P. 12(b), the Powder River Basin Resource Council (“Resource Council”) hereby responds to the Department of Environmental Quality’s (“DEQ”) motion to dismiss part of the Resource Council’s petition. On March 7, 2017, DEQ moved to dismiss the Resource Council’s request for review of the DEQ Director’s denial of an informal conference with an associated remedy of remanding the proceeding back to the DEQ Director. For the reasons discussed below, the Resource Council respectfully requests that the EQC deny DEQ’s motion.

ARGUMENT

I. Introduction

On or before the January 27, 2017 deadline, over a dozen parties submitted objections to the Brook Mine permit. These parties included the Resource Council and its members who are adjacent landowners and Sheridan County residents concerned about impacts to their property, health, safety, and way of life. On the morning of the very next business day, January 30, 2017, the Director wrote to each party that submitted objections to the Brook Mine permit application

and notified the objectors that the Director was denying requests for an informal conference and was referring the permit application to the EQC “for their review and determination at a contested case hearing.” *See* Resource Council Pet. for Review, Exhibit 2.

For the reasons discussed below, the Director’s decision to deny the requests for informal conference is reviewable by the EQC and the EQC should not summarily dismiss that portion of the Resource Council’s petition. Argument and testimony regarding whether the Director in fact violated the law by denying the requests for informal conference should be heard as part of the hearing for this matter. At such time, the EQC can also determine what remedy, if any, is appropriate to be granted to the Resource Council and other parties who requested an informal conference.

II. The EQC Has Authority to Review DEQ Permitting Actions, Including Denial of an Informal Conference

The EQC is *the* hearing examiner for all cases related to DEQ orders and decisions. As such, it has authority – and in fact statutory obligation – to hear argument and testimony related to DEQ’s order to deny the requests for an informal conference.

The EQC has broad oversight authority over implementation of Wyoming’s environmental laws and regulations. Pursuant to W.S. § 35-11-112(a), the EQC “shall act as the hearing examiner for the department and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions.” Under subsection (iii) of that section, the EQC shall “Conduct hearings in any case contesting the administration or enforcement of any law, rule, regulation, standard or order issued or administered by the department or any division thereof.” W.S. § 35-11-112(a)(iii); *Platte Development Co. v. Env’t Quality Council*, 966 P.2d 972, 975 (Wyo. 1998) (“The EQC is

the body established by the Wyoming legislature to hear and decide disputes arising from the implementation of the Wyoming Environmental Quality Act.”); *see also* EQC Order Denying Basin Electric Power Cooperative Inc.’s Motion to Dismiss Appeal, EQC Docket No. 07-2801, Aug. 21, 2008 at 6-7 (finding that the general statutory authority in Section 112 was sufficient for jurisdiction to review DEQ’s approval of an air quality permit).

Here, the Resource Council petitioned for a hearing to review, in part, DEQ’s denial of an informal conference requested by the organization related to the Brook Mine permit. The denial of the informal conference is clearly an “. . . order issued or administered by the department . . .” and it has consequences related to public participation and hearing opportunities for the proposed Brook Mine permit. By submitting its petition to the EQC, the Resource Council is clearly “contesting” DEQ’s administration and enforcement of its laws and regulations. As such, the EQC has authority to hold a hearing to review DEQ’s denial of the requested informal conference. In fact, the Environmental Quality Act *requires* the EQC to hold such a hearing “as the hearing examiner for the department.”

For the foregoing reasons, the EQC has clear authority to review a DEQ decision to deny the requested informal conference.

III. DEQ’s Arguments Related to Remedy Are Misplaced and Are Not Appropriate for A Motion to Dismiss Proceeding

DEQ conflates the Resource Council’s claim providing grounds for the EQC to review the Director’s denial of an informal conference with the requested remedy of remanding the proceeding back to DEQ. However, the *claim* is what is at issue under Rule 12(b)(6), which allows dismissal only if the petition for review “fail[s] to state a claim upon which relief can be granted.”

Arguing that “this Council cannot grant the requested relief,” the DEQ concludes that the Resource Council’s claim should be dismissed. DEQ Mot. to Dismiss at 8. A generally acceptable remedy for an administrative appeals board is to remand an action back to the issuing agency if that decision was improper, and the EQC could do that here. Regardless, even assuming that the EQC does not have authority to grant the requested relief of remanding the proceeding to the DEQ, it does have statutory authority to (1) review whether the DEQ Director’s decision was made in accordance with relevant laws and regulations; and (2) if it determines a violation exists, order a remedy to address the violation. For instance, the EQC has the power to “Order that any permit, license, certification or variance be granted, denied, suspended, revoked or modified.” W.S. § 35-11-112(c)(ii). Thus, in this case, the EQC could find that Brook Mining’s permit should be denied because the proper procedures were not followed. While the Resource Council sought a less drastic remedy of remand, it will leave it to the EQC to devise an appropriate remedy at the appropriate time. Regardless, arguments related to remedy are not relevant to DEQ’s Motion to Dismiss.

IV. The Resource Council Met Its Burden to State a Claim That Should Proceed to Hearing

What is relevant at this time is the claim itself. Here, the Resource Council argues in its petition that DEQ acted unlawfully and contrary to its own regulations in denying the requested informal conference.

A. DEQ’s Own Regulations Require an Informal Conference

Under the Surface Mining Control and Reclamation Act’s (“SMCRA”) system of cooperative federalism, the state-authorized program as embodied in the Environmental Quality Act and corresponding state regulations must be “no less stringent” and “no less effective” than the federal program. 30 U.S.C. § 1253; 30 C.F.R. § 730.5.

In the case of requests for an informal conference, SMCRA's requirements provide:

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.

30 U.S.C. § 1263(b) (emphasis added). This section creates a clear mandatory obligation on the part of the regulatory authority (in this case DEQ) to hold an informal conference if requested by an objecting party.

These requirements are further spelled out in the Office of Surface Mining Reclamation and Enforcement's ("OSMRE") federal regulations implementing SMCRA:

Informal conferences.

(1) Any person having an interest which is or may be adversely affected by the decision on the application, or an officer or a head of a Federal, State, or local government agency, may request in writing that the regulatory authority hold an informal conference on the application for a permit, significant revision to a permit under § 774.13, or renewal of a permit under § 774.15. The request shall—(i) Briefly summarize the issues to be raised by the requestor at the conference;(ii) State whether the requestor desires to have the conference conducted in the locality of the proposed operation; and(iii) Be filed with the regulatory authority no later than 30 days after the last publication of the newspaper advertisement required under paragraph (a) of this section.

(2) Except as provided in paragraph (c)(3) of this section, if an informal conference is requested in accordance with paragraph (c)(1) of this section, the regulatory authority shall hold an informal conference within a reasonable time following the receipt of the request. The informal conference shall be conducted as follows:(i) If requested under paragraph (c)(1)(ii) of this section, it shall be held in the locality of the proposed surface coal mining and reclamation operation.(ii) The date, time, and location of the informal conference shall be sent to the applicant and other parties to the conference and advertised by the regulatory authority in a newspaper of general circulation in the locality of the proposed surface coal mining and reclamation operation at least 2 weeks before the scheduled conference.(iii) If requested in writing by a conference requestor at a reasonable time before the conference, the regulatory authority may arrange with the applicant to grant parties to the conference access to the proposed permit area and, to the extent that the applicant has the right to grant access to it, to the adjacent area prior to the established date of the conference for the purpose of gathering information relevant to the conference.(iv) The requirements of section 5 of the Administrative Procedure Act, as amended (5 U.S.C. 554), shall not apply to the conduct of the informal conference. The conference shall be conducted by a representative of the regulatory authority, who may accept oral or written statements and any other relevant information from any party to the

conference. An electronic or stenographic record shall be made of the conference, unless waived by all the parties. The record shall be maintained and shall be accessible to the parties of the conference until final release of the applicant's performance bond or other equivalent guarantee pursuant to subchapter J of this chapter.

(3) If all parties requesting the informal conference withdraw their request before the conference is held, the informal conference may be canceled.

30 C.F.R. § 773.6(c) (emphasis added).

For the state program to be “no less stringent” and “no less effective” than the federal program, DEQ’s rules must incorporate these requirements into its state program. And in fact, DEQ has met this requirement by having a rule of practice and procedure specifically related to an informal conference request on any application for a surface coal mining permit. DEQ’s state regulatory language largely mirrors the federal regulation, and provides that an informal conference *shall* be held if requested:

Informal Conference. (a) Any request that the Administrator hold an informal conference on any application for a surface coal mining permit shall briefly state the issues to be discussed, whether the requester desires the conference to be held in the locality of the proposed mining operation, and whether access to the proposed permit area is desired. If requested, the Administrator may arrange with the applicant to grant parties to the conference access to the permit area for the purpose of gathering information relative to the conference. 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. If all parties requesting the conference reach agreement and withdraw their request, the conference need not be held.

DEQ Rules of Practice and Procedure Ch. 3 § 3(a) (emphasis added).¹ While DEQ argues that the *shall* becomes operative only *if* DEQ decides on its own to hold an informal conference, that reading is in direct conflict with the rest of the regulation which explains how parties may request an informal conference, when and where an informal conference shall be held, and

¹ The Resource Council was contemplating requesting access to the permit area at the time the informal conference was denied. The Resource Council reserves its right to request a permit area tour if and when the informal conference is granted.

importantly, that the only basis for not holding a requested informal conference is “[i]f all parties requesting the conference reach agreement and withdraw their request.” Again, this language mirrors the federal regulation and was designed to implement SMCRA’s requirements in Wyoming.

Courts have clearly and consistently held that when a statute or regulation uses the word “shall,” it imposes a mandatory and nondiscretionary duty to act as the statute or regulation requires. See *Kingdomware Technologies, Inc. v. U.S.*, 136 S.Ct. 1969, 1977 (2016)(“When a statute distinguishes between ‘may’ and ‘shall,’ it is generally clear that ‘shall’ imposes a mandatory duty.”); *U.S. v. Gabaldon*, 522 F.3d 1121, 1126 (10th Cir. 2008)(holding that the word “shall” in a regulation indicates a mandatory duty); *Bellamy v. Bellamy*, 949 P.2d 875, 876 (Wyo. 2002)(“There is no judicial license to pick and choose only those words which promote a particular purpose...Faced with a legislative ‘shall,’ the courts must give effect to the legislative prescription and are without authority to carve out exceptions to the mandate.” (citing *State by and Through Dept. of Family Services v. Jennings*, 818 P.2d 1149, 1150 (Wyo. 1991))). As such, the regulation’s use of *shall* imposes a mandatory duty upon DEQ. Any other interpretation is unreasonable and is not entitled to deference as it goes against the plain meaning of the regulation. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

While the Resource Council is certainly aware of the “may” language in Section 406(k) of the Environmental Quality Act, the regulation is the operative requirement. In fact, for the history of the Wyoming program, DEQ has granted informal conferences when requested. OSMRE has relied on this regulation – and DEQ action under the regulation – to hold that DEQ

is in compliance with the federal requirements.² As discussed above, the rule’s embodiment of SMCRA’s mandatory requirement to hold an informal conference is necessary to ensure that the state program is “no less stringent” and “no less effective” than the federal program. With federal law informing the interpretation and application of the state program (not replacing it as DEQ argues the Resource Council is trying to do), the regulation should be interpreted as being consistent with the federal “shall” requirement and should prevail over the inconsistent “may” requirement which is found in the statute.³

Since DEQ’s own rules require the agency to hold an informal conference, DEQ must do so here. DEQ cannot lawfully bypass the informal conference stage.

B. Even Assuming Section 406(k) Controls, DEQ Has Not Provided Sufficient Basis for Denying the Informal Conference Requests

In its Petition for Review, the Resource Council “reserve[d] the right to supplement its objections and ground for hearing based on discovery provided by DEQ and Brook as part of this hearing process.” Pet. for Review at ¶ 38. One of the issues that the Resource Council will seek

² As some of the longer serving Council members will understand, although the state program is “approved,” there has been a long history of program amendments that have been required by OSMRE for DEQ to bring the state SMCRA program into compliance with federal standards. See 30 C.F.R. § 950.16. In reviewing the state program, OSMRE has often focused on regulations as the agency understands the difficulty of amending the state statute given the limited duration of Wyoming legislative sessions. This has, at times, created inconsistencies between the statutory and regulatory requirements – inconsistencies which OSMRE has ignored as long as the regulatory requirements are being met. Unfortunately, given DEQ’s reliance on the “may” language in Section 406(k), the Resource Council was left with no choice but submit a petition to review the state program to OSMRE, and by failing to hold an informal conference, DEQ has placed the compliance of the Wyoming state program at risk.

³ Applying the regulation and its incorporation of the mandatory “shall” language is not necessarily inconsistent with DEQ’s authority under Section 406(k) as the statute clearly articulates the power of DEQ to hold an informal conference. DEQ could, based on its discretion, determine that an informal conference is “preferable to a contested case proceeding” because an informal conference is necessary to maintain primacy under SMCRA.

discovery on is the basis for DEQ's decision to deny the informal conference requests. The Resource Council anticipates being able to supplement its petition and the claim raised related to the denial of the informal conference request with additional evidence based on the arbitrary and capricious nature of DEQ's denial of the informal conference requests.

However, given this issue is now subject to the DEQ's motion to dismiss, the Resource Council will explain the grounds it believes exist that show that DEQ's actions were arbitrary and capricious and an abuse of discretion afforded under Section 406(k) and therefore in violation of the Wyoming Administrative Procedure Act ("APA"). W.S. § 16-3-114(c)(ii)(A) ("[t]he reviewing court shall ... hold unlawful and set aside agency action, findings and conclusions found to be ... [a]rbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.")

Here is what the Resource Council knows:

1) Objections were due on January 27, 2017. That afternoon, the Resource Council hand-delivered its objections, along with the objections of some of the landowners and citizens, to DEQ's office in Cheyenne.

2) *That same day*, the EQC opened a docket to review the Brook Mine Permit Application. See <https://eqc.wyo.gov/Public/Pleadings.aspx?DocketId=3247>. It is unclear whether the docket was opened before or after the Resource Council delivered its objections to DEQ, but it is highly likely the docket was opened *prior* to DEQ staff having time to fully review and assess the objections and to determine whether the "nature" of the objections "indicate[d] that an attempt to informally resolve the disputes

[was] preferable to a contested case proceeding” under Section 406(k) and thus whether the objections were appropriate or not for an informal conference.⁴

3) The morning of the following business day, on January 30, 2017, DEQ sent a letter to objecting parties denying the requests for an informal conference. The DEQ’s letter did not include any supporting basis for the Director’s decision.⁵ It merely stated, “I have carefully considered the objections received and determined that an attempt to informally resolve the disputes is unlikely to be successful through the informal conference process.” See Pet. for Review Exhibit 2. Again, it is unclear how “carefully” DEQ could have reviewed the objections given they received them the day before and almost immediately determined that requests for an informal conference should be denied.⁶

4) DEQ’s decision denying requests for an informal conference was made for all objectors and for all objections and did not differentiate between any objectors or any objections in regard to whether those objections would be appropriate or not for informal conference review.

4) DEQ does not have any implementing regulations or to our knowledge even informal agency guidance or criteria that explain on what bases DEQ should deny a request for an informal conference.

⁴ It is arbitrary for an agency to act without “having before it sufficient information upon which to make a proper decision.” *Monahan v. Bd. of Trustees, Elementary School Dist. No. 9*, 486 P.2d 235, 237 (Wyo.1971).

⁵ “The arbitrary or capricious test requires the reviewing court to determine whether the agency reasonably could have made its findings and order based upon all the evidence before it.” *Veile v. Bryant*, 2004 WY 107, ¶ 10, 97 P.3d 787, 792 (Wyo. 2004); see also *Holding’s Little Am. v. Bd. of County Comm’rs of Laramie County*, 670 P.2d 699, 703 (Wyo. 1983) (“In determining whether the action of an agency is arbitrary, capricious, or an abuse of discretion, the court ascertains whether the decision is supported by the evidence contained in the record.”)

⁶ As stated above, based on the date of the opening of the EQC docket, it is likely DEQ made its decision to deny all informal conference requests on January 27 not January 30.

Based on this information, it is probable that DEQ acted unlawfully by arbitrarily and capriciously denying the requests for an informal conference, in an abuse of the discretion afforded under Section 406(k), thereby violating the Wyoming APA. At this point, the Resource Council is merely asking the EQC to allow the claim of DEQ's denial of the informal conference requests to proceed, allowing the parties to further explore the issues presented.

Conclusion

For the foregoing reasons, the EQC should deny DEQ's motion to dismiss and should hold a hearing on the issue of whether the DEQ Director violated relevant law and regulations in denying the requests for an informal conference.

Dated this 17th day of March, 2017.

/s/ Shannon Anderson

Shannon Anderson
Powder River Basin Resource Council
934 N. Main St., Sheridan, WY 82801
(307) 672-5809
sanderson@powderriverbasin.org

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2017, I served a copy of the foregoing **RESPONSE TO THE DEPARTMENT OF ENVIRONMENTAL QUALITY'S MOTION TO DISMISS PART OF THE POWDER RIVER BASIN RESOURCE COUNCIL PETITION** on the following parties by electronic mail, and through the EQC's electronic filing system, which will send a notice of electronic filing to all counsel and parties of record.

Andrew Kuhlmann
James LaRock
Wyoming Attorney General's Office
andrew.kuhlmann@wyo.gov
james.larock@wyo.gov
Attorneys for DEQ

Todd Parfitt
Director, DEQ
todd.parfitt@wyo.gov

Jeff Pope
Isaac Sutphin
Thomas Sansonetti
Holland and Hart, LLP
JSPope@hollandhart.com
INSutphin@hollandhart.com
tlsansonetti@hollandhart.com
Attorneys for Brook Mining Co., LLC

Lynne Boomgaarden,
Clayton Gregersen
Crowley Fleck PLLP
lboomgaarden@crowleyfleck.com
cgregersen@crowleyfleck.com
Attorneys for Big Horn Coal Co.

Jay Gilbertz
Yonkee & Toner, LLP
jgilbertz@yonkeetoner.com
Attorney for Mary Brezik-Fisher & David Fisher

/s/Shannon Anderson
Shannon Anderson