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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN RE BROOK MINE APPLICATION)
)
) Docket No. 17-4802
TFN 6 2-025)
)

**POWDER RIVER BASIN RESOURCE COUNCIL’S RESPONSE TO BROOK MINING
COMPANY’S MOTION TO DISMISS**

Pursuant to the Environmental Quality Council’s (“Council” or “EQC”) Order of March 2, 2017, and W.R.C.P. 12(b), the Powder River Basin Resource Council (“Resource Council”) submits this response to Brook Mining Company, LLC’s (“Brook”) Motion to Dismiss. The Resource Council respectfully requests that the EQC deny the motion and allow this matter to proceed to hearing.

STATEMENT OF THE CASE

The Resource Council brought this matter before the EQC to remedy deficiencies in Brook’s coal mine permit application and to raise grounds on which basis the permit application should be denied. The Resource Council did not choose a contested case hearing as its first opportunity for public participation, but was forced to request a hearing only because DEQ denied its request for an informal conference. Additionally, the parties find themselves in this proceeding at this time only because the EQC dismissed the previous proceedings. The procedural posture we find ourselves in is not the creation of the Resource Council, and as such the organization should not be penalized for any deficiencies in the Environmental Quality Act

and DEQ's regulatory framework that have led Brook to question the validity of these proceedings.¹ More importantly, as explained below, the Resource Council properly requested a hearing before the EQC and there are no grounds to dismiss such a hearing as Brook requests.

STANDARD OF REVIEW

Although Brook does not reference Rule 12 in its motion, or for that matter *any* law related to the standard for a motion to dismiss, for purposes of this response, the Resource Council assumes Brook is bringing its motion under W.R.C.P. 12(b)(1). A claim must be dismissed pursuant to W.R.C.P. 12(b)(1) when a court lacks jurisdiction over the subject matter. The Wyoming Supreme Court has held that "A court has jurisdiction when it has the power to hear and determine a matter in controversy." *Nyberg v. Wyoming Military Department*, 2003 WY 43 ¶ 8 (2003) (internal citations omitted). The same principle applies to administrative agencies acting as adjudicatory bodies.

For purposes of review of the motion, the Council should accept the facts alleged in the Resource Council's Petition as true. *Gates v. Richardson*, 719 P.2d 193, 194 (Wyo. 1986); *Wyoming v. Fremont Energy Corp.*, 651 P.2d 802, 804 (Wyo. 1982). Additionally, the EQC should be mindful that "dismissal is a drastic remedy which should be granted sparingly." *Rissler & McMurry, Co. v. Wyoming*, 917 P.2d 1158, 1160 (Wyo. 1996).

ARGUMENT

The EQC should spend little time and effort dispensing with Brook's Motion to Dismiss. It was written to intimidate those wishing to object to its coal mine permit application and force the parties to expend unnecessary resources.

¹ In its motion and brief in the previous docket, the Resource Council carefully reserved all rights to a contested case hearing.

The Resource Council can only assume that to be the case because even Brook seems to question the basis for its motion as Brook’s counsel, Isaac Sutphin, represented to the Sheridan County Board of County Commissioners – and the public in attendance and via the media – that “there will be a public hearing.” Pat Blair, *Group Says DEQ Denied Them Hearing on Ramaco*, Sheridan Media, Mar. 6, 2017, available at <http://www.sheridanmedia.com/news/group-says-deq-denied-them-hearing-ramaco91677>. In the audio recording linked via the Sheridan Media website, Mr. Sutphin represented that “The Environmental Quality Council will be hearing this matter” and referenced the scheduling conference that was set to occur on March 10, 2017. It is disingenuous for Brook to say publicly that “there will be a hearing” and at the same time try to dismiss that hearing with this motion.

Brook’s Motion to Dismiss should be denied for the following reasons.²

I. The Environmental Quality Act Does Not Require Parties to Request a Contested Case Hearing on a Coal Mine Permit by the Deadline for Submitting Objections

Citing no authority for its position, Brook argues that since the Resource Council “did not request a contested case within 30 days of the final publication date” of the public notice for objections on the coal mine permit application, the “Petition is untimely and should be dismissed.” Brook Mot. to Dismiss at 2. Brook argues 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).” *Id.* Brook’s arguments fail for several reasons.

Section 406(k) merely states that “Any interested person has the right to file written objections to the application with the administrator within thirty (30) days after the last publication of the above notice.” W.S. § 35-11-406(k) (referencing Section 406(j) regarding

² The Resource Council hereby incorporates into this response arguments made by Big Horn Coal Company and the Fishers as part of their responses in this now-consolidated docket.

public notice of a surface coal mine permit application). Section 406(k) then goes on to discuss informal conferences and contested case hearings but gives no instruction regarding a deadline to request either. Section 406(k) discusses that an informal conference may be “requested,” but does not contain similar language regarding contested case hearings before the EQC, except in cases where a party exercises its “right of appeal to the council.”

Similarly, the public notice *published by Brook* does not contain any instructions on how a party should request a contested case hearing or what the deadline for that request is. Like Section 406(k) itself, the public notice discusses that an informal conference may be “requested” but does not contain similar language inferring that a contested case hearing may also be requested. Importantly, neither the public notice nor Section 406(k) dictates that an interested person loses his or her right to request a contested case proceeding if they don’t do so within the time period afforded for the filing of objections.

Here, the Resource Council requested an informal conference, in compliance with DEQ’s rules of practice and procedure.³ DEQ subsequently denied the request for an informal conference, and the Resource Council has now timely exercised its “right of appeal” to the EQC for review of DEQ’s decision and the coal mine permit application in the exact manner that Section 406(k) contemplates. DEQ’s rules of practice and procedure afford a period of thirty days to exercise the “right of appeal” in Section 406(k). DEQ Rules of Practice & Procedure, Ch. 1 § 17(b). Additionally, the Resource Council complied with all other requirements of Chapter 1, Section 3 and therefore properly initiated proceedings before the EQC.

³ DEQ’s rules of practice and procedure also do not include a deadline for the informal conference request; however, the public notice’s “if requested” language infers that such request should be made by the same deadline as written objections. This reading is consistent with SMCRA’s implementing regulations, which require a request for an informal conference to “[b]e 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.”

Although this is a case of first impression, it seems clear that the Resource Council has timely petitioned for review of DEQ's action to deny the informal conference request *and* to review Brook's coal mine permit application. Brook cannot cite any supporting law to the contrary and its motion to dismiss should be denied.

II. Due Process and the Public's Right to Participate in Coal Mine Permitting Proceedings Require a Hearing to be Held

The Environmental Quality Act contemplates robust public participation opportunities for permitting proceedings, and in the case of coal mine permits, Section 406(k) provides that "An informal conference or a public hearing shall be held." The Act requires a proceeding and clearly contemplates that either an informal conference or a contested case proceeding will be held if requested.

Brook argues that such a proceeding must be held within twenty days and therefore the Resource Council is too late; however, Section 406(k) affords a different time period if it is stipulated to by the parties. Brook has participated willingly in the proceedings thus far, has not objected to the scheduling orders issued in either docket, and did not challenge the EQC's decision in the previous docket, which placed the parties in the procedural posture we are in. In other words, Brook has "stipulated" to a hearing outside the twenty day window because it has willingly participated in the proceedings thus far and, unless the company owns a time machine, it is impossible to go back and hold the now-required hearing in that time period.

III. The EQC Has Authority – and Statutory Obligation – to Review DEQ's Denial of the Informal Conference Requests

Calling it "baseless," Brook also seeks to dismiss the Resource Council's claim related to the denial of its request for an informal conference.

Given that Brook raises many of the same arguments as DEQ, and in an effort to avoid duplication of responsive arguments, the Resource Council hereby incorporates by reference its response to DEQ's motion to dismiss filed March 17, 2017.

Respectfully submitted this 20th day of March, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2017, I served a copy of the foregoing **RESPONSE TO BROOK MINING COMPANY'S MOTION TO DISMISS** 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.

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