

Jay A. Gilbertz, WSB#6-3087
Yonkee & Toner, LLP
319 West Dow Street
P.O. Box 6288
Sheridan, WY 82801
(307) 674-7451
(307) 672-6250 (fax)
jgilbertz@yonkeetoner.com
*Attorney for Objectors,
Mary Brezik-Fisher and David Fisher*

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

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

**FISHERS’ RESPONSE TO BROOK MINE’S MOTION TO DISMISS
OBJECTOR FISHERS’ PETITION FOR A CONTESTED CASE HEARING**

Mary Brezik-Fisher and David Fisher (“Fishers”), by and through their undersigned counsel, hereby submit their Response to Brook Mining Company, LLC’s (“Brook Mine”) Motion To Dismiss Fishers’ Petition For A Contested Case Hearing.

I. Summary of the Fishers’ Response:

The Motion to Dismiss is easily disposed of for very simple reasons under Wyoming Statute §35-11-406. Brook Mine’s motion focuses on a circular discussion of the timing set by the statute for filing objections to the mine plan and the twenty-day time frame for a hearing. The goal of this discussion is to convince the EQC that somehow the Objectors have not timely brought this matter before the EQC and by extension Brook Mine is simply

entitled to have its coal mining permit granted. The fatal trouble with Brook Mine's position is that it ignores the steps mandated by the statute as a *prerequisite* to issuance of any such permit.

In the event any interested party files a written objection (which clearly happened¹) then the statute provides that Brook Mine is only entitled to have its application for a mining permit proceed *after* either 1) the DEQ holds a informal conference *or* 2) the objectors have been provided with a contested case hearing before the EQC. Neither of these two things have happened and as a result Brook Mine is not entitled to have its application proceed until one of them does. Should the EQC accept Brook Mine's invitation to dismiss the petitions without either of these two things happening, then the statutory requirements for issuance of the permit will not have been met. As a result, Brook Mine would be, as a matter of law, precluded from having any permit issued. Brook Mine's only option under those circumstances would be to start the publication process anew. The EQC must decline Brook's invitation to proceed into a procedural blind alley.

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The Fishers timely submitted their written objections to the mine plan to the Administrator of the Land Quality Division as required by Wyo. Stat. 35-11-406 and as the published public notices directed them to do. A copy of the Fishers' Objection is attached hereto as Appendix 1. (In Fishers' objections they raised a concern about a potential conflict of interest relative to Administrator Kyle Wendtland. Fishers have subsequently been informed that Kyle Wendtland has been fully recused from participation in this matter. Assuming this to be true, this topic will not be at issue in the contested case hearing. Fishers did not imply or intend to imply any impropriety by Kyle Wendtland or his brother Anthony Wendtland).

II. The EQC Must Deny Brook Mine's Motion to Dismiss:

A. Wyoming Statute §35-11-406 Requires that After Objections are Filed that the DEQ Hold an Informal Meeting or that the EQC Hold a Contested Case Hearing.

Section 35-11-406(k) provides that after interested persons timely submit written objections the Director of the DEQ may hold an informal conference if one is requested by the objecting parties. It is undisputed that multiple parties, including the Fishers, filed timely objections and requested an informal conference. However, the language of § 35-11-406 provides that the Director can decline to hold an informal conference, in which case the objector's concerns are to be addressed in a full contested case "public hearing" before the EQC. The statute is unequivocal in requiring that any timely objections must be addressed in either an informal conference or a public hearing "conducted as a contested case in accordance with the Wyoming Administrative Procedures Act."

Consequently, after timely objections, either one or both of these procedures can be afforded to the Objectors, but under no circumstances does the statute contemplate or allow a permit moving forward if *neither* one of these necessary steps has occurred. Yet, that is precisely what Brook Mining Company, LLC asks the EQC to sanction by virtue of its motions to dismiss against the objectors.

Importantly, in the event of timely objections such as those lodged in this case, §35-11-406(p) only allows the Director to render a decision on the application after the informal conference or after findings of fact and a decision by the EQC. Consequently, providing the

Objectors with one of these procedures is a mandatory condition precedent to the issuance of a permit. The Director lacks and will continue to lack any authority under the statute to act upon Brook Mine's application until after one of these two things happens.

For this reason, Brook Mine argues itself into a dead-end. If the EQC were to grant the motion to dismiss, the conditions precedent to issuing a permit will not have been met and Brook's mine application stalls and must be begun anew. Ironically, Brook Mine will not be entitled to complain about this result as the problem is one of its own request and making.

B. Brook Mining's Argument that the Objectors Were Obligated to Demand a Contested Case Hearing Prior to the End of the Objection Period is Nonsensical.

Through a rather distorted argument Brook Mine attempts to create a procedural loophole that will allow it to obtain a mining permit without going through the statute's mandated process of having public objections heard in either an informal conference or a contested case hearing. The entire argument pivots on a contention that the Objectors were not only obligated to submit their written objections during the objection period, but also demand a contested case hearing *prior to* the end of that period. This contention has no support in the statute, any case law and is contrary to any logical and reasoned assessment.

The Fishers and other interested parties were first given their opportunity to voice their objections and concerns to the DEQ after Brook Mine published and presented its statutory notice during the Christmas holidays of December, 2016. Prior to that publication,

both the DEQ and most particularly Brook Mine, refused to listen to the concerns of any interested person.

The published notice stated that “written objections” were to be delivered to the “Administrator of the Land Quality Division . . . before the close of business January 27, 2017.”² This aspect of the notice is in accordance and harmony with Wyo. Stat. §35-11-406(k) which states that interested persons are to raise their complaints through presenting “written objections”. Nowhere in either the notice published by Brook Mine nor in the statutory language is there support for Brook Mine’s current argument that complaining parties were required to both file written objections and demand a contested case hearing during the objection period. Indeed, the statute provides just the opposite and states that based upon the timely written objections the matter would then be addressed by the DEQ informally or by the EQC formally.

Brook Mine’s argument hinges on the fatally flawed assumption that in order to obtain a contested case hearing the Objectors were required to request such a hearing before the close of business on January 27, 2017 (the deadline for submitting only objections). There is no legal support for this proposition in the notices provided, the controlling statutory language of §35-11-406 or any case law. It is quite simply a fantasy. The

² Brook Mine’s Notice states “*The Director may hold an informal conference if requested, hear the complaint and take action on the application in accordance with the Department’s Rules of Practice and Procedure. The complainants shall have a right of appeal to the Environmental Quality Council where the complaint will be heard a second time.*” (See copy of Notice attached as Appendix 2).

Objectors were not even entitled to demand a contested case proceeding in that time frame because the DEQ had the discretion to conduct an informal meeting.


The earliest any deadline for requesting a contested case could have started would be the first date the Objectors were made aware they would not be provided the informal conference which they had properly requested. At the absolute earliest, this would have been the date the Director denied the Objectors' request for that informal conference. However, the date the Director denied the request for an informal conference was simultaneous with the date the initial contested case hearing was initiated. As a result, the Objectors were advised by this procedural step that they would be given a contested case hearing before the EQC (which was docketed for February 13 and 14, 2017). There is no need to demand something that has already been given.

Due to procedural concerns, the EQC dismissed the initial proceedings and instructed that any Objector that wished to avail themselves of a contested case hearing with the EQC could then do so. In this fashion the EQC sought to avoid a situation where a person filing an objection was compelled to participate in a contested case hearing simply by virtue of filing an objection. Only after the EQC dismissed the initial proceedings on February 22, 2017 did there become a need to request a contested case hearing. Hence the date from which any deadline to file a demand for a contested case can only be measured from and begin upon February 22, 2017. Under any calculation all the Objectors have timely made that request and Brook Mine's Motions to Dismiss must be denied.

WHEREFORE, the Fishers hereby request that the EQC deny Brook Mining LLC's
Motion to Dismiss.

DATED this 20th day of March, 2017.

YONKEE & TONER, LLP



Jay A. Gilbertz, WSB #16-3087

Attorney for Objectors

Mary Brezik-Fisher and David Fisher

319 West Dow Street

P.O. Box 6288

Sheridan, WY 82801

Telephone: (307) 674-7451

Telefax: (307) 672-6250

CERTIFICATE OF SERVICE

I, Jay A. Gilbertz, hereby certify that on the 20th day of March, 2017, I served a true and correct copy of the above and foregoing *by electronic transmission*, duly addressed as follows:

Andrew Kuhlmann
Asst. Attorney General
andrew.kuhlmann@wyo.gov

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

Alan Edwards
Deputy Director, DEQ
Alan.edwards@wyo.gov


Shannon Anderson
Powder River Basin Resource Council
sanderson@powderriverbasin.org

Thomas L. Sansonetti
Isaac Sutphin and Jeff Pope
Attorneys for Brook Mining Co., LLC
TLSansonetti@hollandhart.com
INSutphin@hollandhart.com
jspope@hollandhart.com
jmkelley@hollandhart.com
csvec@hollandhart.com

Brooke Collins
38 Monarch Rd.
Ranchester, WY 82839
bpcharlie@wbaccess.net

Lynne Boomgaarden
Clayton H. Gregersen
Attorneys for Big Horn Coal
lboomgaarden@crowleyfleck.com
cgregersen@crowleyfleck.com

Jim Ruby
Executive Officer, EQC
jim.ruby@wyo.gov



Jay A. Gilbertz

Copy to KW
BJ
AK
AE

January 22, 2017

Via Federal Express (01/24/17)

Kyle Wendtland, Administrator
Department of Environmental Quality
Land Quality Division
200 W. 17th Street
Cheyenne, WY 82002

**RE: Ramaco, LLC/Brook Mine Permit
Sheridan County, Wyoming**

Dear Mr. Wendtland:

Our property in Sheridan County is in the group of potentially affected landowners to the proposed Brook Mine Permit, and we received the Public Notice regarding this action. We have resided in this historic valley since 1996 and have run livestock and haying operations on our property. The purpose of this letter is to issue a written objection to the proposed mine permit based on the following concerns:

1. **Substantially Incomplete Mine Plan.** The mine plan has changed or been revised numerous times. It has gone from an operation purportedly employing 200-400 workers to its current version employing approximately 18-20 workers with initial projections of mining up to ten million tons per year to a revised plan of mining only two million tons in the first few years. In simple terms, local landowners are not clear on exactly what the current mine operation will entail as the current mine plan does not adequately address specific issues (to name a few, as follows): Where will the load-out facility be located? Where will infrastructure facilities be located? What type of "mobile crusher" will be used? How will the coal be transported and where? How many trucks will be on the road, how often, and what route will they take? How often will blasting occur and what are the hours of operation? Who specifically will be conducting the mine operations and what experience do they have in this type of operation (We understand that Mr. Woodring will be merely a "consultant")? Does Ramaco have a buyer/market for its coal?
2. **Ramaco's lack of history in conducting mining operations in Wyoming.** Other coal companies conducting business in Wyoming have a history of operating their mines in cooperation with local landowners and in compliance with local, state, and federal rules, regulations, statutes and procedures. For some landowners in this area, Ramaco has already demonstrated a disregard

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for "the Wyoming way" of conducting business. In our particular case, folks employed by Ramaco were caught trespassing on our property and taking soil samples without authorization. In fact, they were so blatant about it that my husband and a neighbor were out working on a baler in our hay field one afternoon and noticed two people out in our field. Those folks made no effort to come forward and identify themselves. My husband went up to them and asked what they were doing on our property and they told him they had permission to be there on behalf of Ramaco. He responded that he was the owner of the property and had not given them permission. They took the soil samples anyway and then departed. That is just one incident of several we have heard about concerning Ramaco's lack of cooperation with local landowners which does not bode well with their future operations.

3. **Soil Subsidence Issues and Sinkholes.** There have been geological surveys conducted in this area regarding the effects of coal mine subsidence in Sheridan County, specifically with respect to the area where Ramaco's mine operation will occur. Landowners are very concerned about subsidence, soil disturbance, and sinkhole issues considering how extensively this area has been mined. The mine plan does not adequately address these issues, including the possibility of re-igniting underground coal fires and measures to be taken for coal fire suppression. It is apparent that blasting within such close proximity to the old mines could further worsen the ongoing subsidence issues in this area.
4. **Damage to Water Wells and Foundations.** Affected landowners have substantial concerns that blasting operations may cause damage to the structural integrity of their water wells and foundations of homes and buildings on their property, including increasing drawdown in domestic wells. It is well-documented that previous mine operations in this same area caused damage to water wells and some were so extensive they had to be replaced. There are inadequate provisions in the current mine plan which protect landowners' ground and surface water.
5. **Air Quality, Noise and Light, and Other Health and Environmental Concerns.** The Tongue River Valley where many of the affected landowners live regularly sustains high winds in the area. The mine plan does not adequately address dust suppression measures and how mining operations will control the coal dust, dust from trucks and crushers, toxic fumes, emissions from increased truck traffic and potentially unhealthy air quality emissions due to mining operations. (Apparently no coal will be transported via rail...is that correct?) Will there be any restrictions on hours of operation, especially during high wind events? There is no provision in the mine plan for creating

a sound barrier to minimize the noise. There are concerns about coal dust blanketing the area leaving layers of dust and grime on homes, buildings, vehicles, ranch equipment, etc. Many local landowners/ranchers have livestock and horse farms which could be affected. In addition, there are health concerns regarding asthma and respiratory conditions which could arise due to mining operations. Light from the mine site will adversely affect the quality of life for residents in this area. The mine plan does not adequately address these health and safety issues.

6. **Proximity of Mine Operations to Interstate 90.** The mine operations are in very close proximity to Interstate 90, a major US highway. The mine plan does not address issues concerning potential damage to highway infrastructure and bridges, dust storms, effects of blasting, etc. on this heavily traveled major thoroughfare.
7. **Potential Pollution and Water Degradation to Tongue River and Adjacent Creeks.** The Wyoming Attorney General's Office has been involved in water law litigation with the State of Montana for well over 7 years which is finally reaching a conclusion. This involved irrigation rights and disputes between the two states regarding the Yellowstone River Compact, including the Tongue River. Given the close proximity of the Tongue River to Ramaco's mining operations, there are serious concerns about sediment runoff, wastewater issues, and potential pollution of waterways. If the Tongue River or adjacent creeks and tributaries are adversely affected by these mining operations, then the State of Wyoming could face further costly and protracted litigation over these issues. The current mine plan does not adequately address this.
8. **Inadequate Bonding and Reclamation Concerns.** It is our understanding that the bond for Ramaco's permit is only \$375,000. This seems wholly insufficient considering the potential for major impacts on air quality, pollution of Tongue River, creeks, irrigation, livestock waterway systems, etc. In addition, the bond as currently proposed does not take into account subsidence issues into the future and reclamation of the facilities and the pits. Considering the substantial increase in truck traffic, damages to county roads (including the Frontage Road) and other paved roads could be very costly to maintain and repair for the county. The approximately ten-mile long trenches associated with this mine plan could certainly require costly reclamation efforts and the current bond surely would not provide compensation to cover anywhere near those costs. Similarly, with the tremendous increase in truck traffic and other traffic from the mines on county roads, including the Frontage Road, and other paved roads in the area, safety concerns for local landowners and members of the public are huge. The potential of someone being injured

or killed as a result of the increased truck traffic is a high probability. Hwy. 345 (Frontage Road to Ranchester) recently was designated with a highway speed of 70 mph. With members of the public (including motorcyclists) traveling at that high rate of speed and slow-moving mine trucks and heavy equipment utilizing that two-lane road with great frequency, the possibility of highway accidents is imminent. The mine plan does not address these issues.

9. **Accidents or Environmental Harm.** Ramaco does not have a history of operating a highwall coal mine such as what is being proposed. How can adjacent landowners and members of the public be assured that Ramaco is capable of rectifying any potential serious accidents or harm that may occur as a result of its operations?

We understand that Ramaco faced stiff opposition to a similar plan of operation in Nottingham, Pennsylvania. Legislators, affected landowners, and members of the public (en masse) have been very vocal in expressing their concerns about deleterious effects the mining operation there could have on their quality of life, water and soil issues, and public health and safety.

10. **Impacts on Irrigation, Livestock, Wildlife, Hunting, Fishing, Recreational Activities.** The Tongue River Reservoir is located in close proximity to the mine operations and there is a very real potential that this area could be adversely affected which will have an impact on members of the public (from Wyoming and Montana) who recreate at the reservoir, including swimming, boating, fishing. A substantial number of ranchers in the area within close proximity to the mining operations have irrigation rights and conduct agricultural operations. If the waterways, ditches, drainages, reservoirs become polluted then the livelihood of a great many people in the area will be drastically affected, including impacts on livestock watering systems. In addition, the area has abundant wildlife which will also suffer.

11. **Black Diamond Trail Designation.** In addition to the prospect of the mining operations affecting the area valley designated as an alluvial valley floor, in September, 2012 the area along the frontage road between Sheridan and Ranchester (Hwy. 345) was designated as the Black Diamond Historic Mine Trail by the Sheridan Community Land Trust and the Wyoming Historic Preservation Work Group in conjunction with the Wyoming State Historic Preservation Office and Wyoming State Parks and Cultural Resources. Although not clearly defined in the mine plan, this area (Hwy 345) along the frontage road will sustain substantial truck traffic and will be impacted by dust, other air quality issues, road damage, etc. and may have an effect on this historic trail designation. There are no provisions in the current mine plan

addressing this historic designation to ensure its protection.

12. **Kleenburn Recreation Area.** This area which is in extremely close proximity to the mine operations (just east of the Acme exit off Interstate 90) is owned and operated by Sheridan County. The Wyoming Game and Fish is involved in stocking the ponds which provide members of the public the opportunity to fish for trout, largemouth bass, catfish and perch. Since its inception a few years ago, this recreation area has provided a countless number of folks, including tourists, with many hours of recreation, fishing, field trips for local school children, canoeing adventures, hiking, and many other forms of recreation. Potential pollution (air and water), noise, light, dust and truck traffic will greatly impact this area and pose adverse effects on the health and safety of not only local residents but members of the public at large. The mine plan does not adequately address this issue.
13. **Conflict of Interest.** The area landowners are concerned about a potential conflict of interest concerning Kyle Wendtland, Administrator for the Land Quality Division, whose brother, Tony Wendtland (Sheridan, Wyoming), is an attorney for Randall Atkins, CEO of Ramaco. Even if Kyle Wendtland recused himself from presiding over certain aspects of this mine plan, what assurances can be given to affected landowners that this process will be conducted, reviewed and monitored without bias or preference given to Ramaco's interests over the legitimate concerns of the public before, during, and after the mine operation? The very fact that landowners are required to submit objections to Kyle Wendtland is disconcerting. We have heard that Tony Wendtland may no longer be local counsel for Ramaco. Regardless of the current relationship between Attorney Wendtland and Ramaco, the fact is that Mr. Wendtland has provided legal representation to Ramaco throughout this critical mine permitting process.
14. **Adverse Effect On Property Values and Quality Of Life.** Local landowners are very worried about serious impacts on property values if the current mine plan is approved and they are equally concerned about threats to their quality of life. There are quite a number of landowners in this area whose property values could substantially diminish causing a significant reduction in the tax base for the county. Adverse effects from the mining operation will not only diminish property values but more importantly will endanger public health and safety and create a public nuisance.
15. **Viability of the Mine Operation.** Is the extraction of 10 million tons of coal per year even viable? Folks in this area are quite skeptical. Some who have worked in the coal mines here state that in the years of prime production, the

most that Big Horn Coal ever extracted was approximately 4 million tons. Given the potential for major detrimental impacts of Ramaco's proposed operation, is it really worth it?

CONCLUSION


We are not attempting to preclude Brook Mining Company from operating a coal mine in the proposed area, but we have legitimate concerns about the mining operation under its current plan causing permanent and irreparable harm to a pristine area rich in history which has been enjoyed by Wyoming families for generations. This area has such a documented history that a number of books and articles have been published in attempts to enlighten folks about its history and preserve the heritage of this region. Local historians and others have frequently conducted lectures and presentations highlighting the history of the area. In addition, the local museum in Sheridan has devoted specific exhibits and dioramas to exemplify the historical significance of this longstanding mining community.


Initial projections gauging an economic boom to this community (and the State as a whole) as a result of the proposed Brook Mine have proven to be substantially distorted and misleading, and promises to provide an unrealistic number of jobs in an economically depressed area should not be the incentive for approving a mining operation which may result in devastation to this community and the State of Wyoming in the long run. Several of the issues and concerns identified above have not been addressed, and they represent a public nuisance to local property owners as well as significant threats to public health and safety.

We are hereby requesting an informal hearing with the director of DEQ on this matter.

Thank you for your attention.

Sincerely,


Mary Brezik-Fisher


David Fisher

(32 Slater Creek Lane, Ranchester, WY 82839)

cc: Steve Maier, Chairman
Sheridan County Board of Commissioners

Public Notice

The Brook Mining Co., LLC of 1101 Sugarview Drive, Suite 201, Sheridan, WY 82801 has applied for a coal mining permit from the Land Quality Division of the Department of Environmental Quality for the State of Wyoming. The coal mining permit area will be located in: Sections 10, 11, 12, 13, 14 and 15 Township 57N, Range 85W, and Sections 7, 8, 9, 10, 15, 17, 18, 20, 21, 22 and 27 Township 57N, Range 84W Sheridan County, Wyoming. The Brook Mine is located approximately 6 miles Northwest of Sheridan, Wyoming. This area can be found on the Acme and Monarch USGS quadrangle maps. The proposed operation is scheduled to begin July 2017 and is estimated to continue until 2032. The land, after mining, will be returned to a grazing land use. Information regarding the proposed mining operation and reclamation procedures may be reviewed in the Office of the Land Quality Division of the Department of Environmental Quality in Cheyenne and Sheridan, Wyoming, the office of RAMACO in Sheridan, WY, or the Sheridan County Clerk's Office Sheridan, Wyoming. Written objections to the proposed mining operation must be received by the Administrator of the Land Quality Division, Department of Environmental Quality, 200 W. 17th Street, Cheyenne, WY 82002, before the close of business January 27, 2017. The Director may hold an informal conference if requested, hear the complaint and take action on the application in accordance with the Department's Rules of Practice and Procedure. The complainants shall have a right of appeal to the Environmental Quality Council where the complaint will be heard a second time. A conference shall be held if the Director determines that the nature of the complaint or the position of the complainants indicates that an attempt to informally resolve the disputes is preferable to a contested case proceeding. An informal conference or a public hearing shall be held within twenty (20) days after the final date for filing objections unless a different period is stipulated to by the parties. The Council or Director shall publish notice of the time, date and location of the hearing or conference in a newspaper of general circulation in the locality of the proposed operation once a week for two (2) consecutive weeks immediately prior to the hearing or conference. The hearing would be conducted as a contested case in accordance with the Wyoming Administrative Procedure Act (W.S. §16-3-101 through §16-3-115), and the right of judicial review would be afforded as provided in that act. All parties as given in W.S. §35-11-406(j) will be mailed a copy of this notice. The Wyoming Oil and Gas Commission will be mailed a copy of the application mine plan map as required by W.S. §35-11-406(j).

Appendix