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ATTORNEY FOR OBJECTORS  
BIG HORN COAL COMPANY

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

**IN RE BROOK MINE APPLICATION** )  
 ) **Docket Nos. 17-4802, 17-**  
 ) **4803, and 17-4804**  
**TFN 6 2-025** ) **(Consolidated)**

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**BIG HORN COAL COMPANY’S PREHEARING MEMORANDUM**

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Big Horn Coal Company (“Big Horn”), by and through its undersigned counsel of record, hereby submits this Prehearing Memorandum. This contested case hearing, set for May 22, 2017, arises from the surface coal mining permit application of Brook Mining Company, LLC (“Brook”) and the numerous objections thereto.

Brook has prepared and submitted a mine permit application pursuant to Wyo. Stat. Ann. § 35-11-406. After published notice of the application, numerous parties filed objections raising concerns with the proposed mine and the significant

deficiencies in the permit's mine and reclamation plans. Many of these objections pertain to the lack of critical detail and analysis in the permit application, which in turn raises various questions and concerns regarding possible irreparable harm to surface and ground water, land and human health and safety. This hearing followed.

This Prehearing Memorandum provides a summary of the single issue before the Environmental Quality Council ("Council") and Big Horn's position on that issue.

### **ISSUE BEFORE THE COUNCIL**

Pursuant to Wyo. Stat. Ann. § 35-11-406, the sole issue before the Council is **whether Brook can affirmatively establish**: that its permit application (1) is in compliance with the Wyoming Environmental Quality Act, Wyo. Stat. Ann. §§ 35-11-101, *et seq.* (the "Act") and all applicable state laws; and (2) satisfies, among others, the following requirements:

- (i) The application is accurate and complete;
- (ii) The reclamation plan can accomplish reclamation as required by this act;
- (iii) The proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

Wyo. Stat. Ann. § 35-11-406(n)(i)-(iii).

A copy of Wyo. Stat. Ann. § 35-11-406 and several relevant provisions of the Wyoming Department of Environmental Quality ("DEQ"), Land Quality

Division (“LQD”) rules and regulations are attached hereto as **Exhibit A** and **Exhibit B**, respectively. Big Horn respectfully requests that the Council take official (judicial) notice of the statutes and rules attached hereto as **Exhibit A** and **Exhibit B** in order to avoid the need to offer proof of each statutory or regulatory provision and thereby expedite the hearing proceedings.

### FACTS

Brook proposes to highwall mine through a previously mined area consisting of unconsolidated, saturated and reclaimed backfill material immediately next to the Tongue River, the largest perennial stream in northeast Wyoming, and in the vicinity of the confluence of the Tongue River and Goose Creek (the TR-1 area). The maps provided in Brook’s permit application indicate that mining and surface disturbance will occur less than 100 feet from the bank of the Tongue River; however, the maps are inconsistent as to just how close to the river mining will occur. Typically, the area in a mine plan shown to be affected by operations extends well beyond the actual mining panel and surface disturbance boundaries. Brook’s permit application, however, inexplicably indicates that the affected area near the Tongue River corresponds exactly to the boundary of the mine panel and the surface disturbance boundary.

The strata overlying the coal Brook intends to mine in the TR-1 area is known to include a thick layer of unconsolidated, saturated backfill that exhibits shallow groundwater elevations of 20 feet or less, and is hydrologically connected to and

directly recharged by, both the Tongue River and Goose Creek. The permit application further proposes to highwall mine through areas containing known and documented underground coal seam fires that have been burning for over 100 years. Contrary to Brook's assumptions in its mine and reclamation plan, the proposed mine area does not exhibit the characteristics of native overburden strata. Absent an analysis of the proposed highwall mining operations using sufficient site-specific data, these factors alone present significant risk of irreparable harm to surface and ground water, land, and human health and safety.

#### **SUMMARY**

Big Horn's concerns with Brook's permit application involve the clear lack of sampling, data analysis, and even acknowledgement of critical site specific conditions at the proposed mine site. Brook's mine and reclamation plans fail to adequately study highwall mining through previously mined materials and the associated, foreseeable hydrologic risks, particularly given the historical coal seam fires and subsidence events in this area, all of which will undoubtedly impact mining operations, land and water conditions, reclamation efforts, and Big Horn's current and future operations. Big Horn is primarily concerned with Brook's proposal to conduct its mining operations through previously mined and saturated backfill material on lands within Big Horn's own mine permit boundary, absent adequate site specific data or meaningful study or analysis.

Big Horn does not seek to deny Brook the opportunity to mine coal in Sheridan County. As a mining entity itself, Big Horn supports this industry and the ability to mine within the bounds of Wyoming law. However, the lack of site-specific data and analysis in Brook's permit application is unprecedented and falls far short of satisfying industry standards, DEQ's typical expectations, and the requirements under the Act and DEQ/LQD Rules and Regulations. As a landowner and a party owning infrastructure, coal rights and reclamation responsibilities within and directly adjacent to the Brook permit boundary, and as a party who may mine coal adjacent to Brook's proposed operations; Big Horn is entitled to expect that Brook's permit application will comply with the applicable laws and that it will not be approved unless Brook demonstrates required studies have been completed and appropriate, site-specific precautions have been taken to protect Big Horn's property and the environment from irreparable environmental harm.

In response to the numerous objections, Brook has stubbornly advocated a "Shoot First, Ask Questions Later" approach. According to Brook, obtaining a permit application and the right to begin mining requires very little detail, and Brook can rely on subsequent, more detailed operation plans, permit amendments and DEQ oversight to address any problems or issues when they are encountered. This is not the Wild West. The Wyoming legislature enacted the original version of the Wyoming Environmental Quality Act over forty years ago, in 1973. The land quality provisions in the Act established new permit and licensing requirements, and

mining and reclamation standards. Wyoming's efforts in this area even preceded Congress' enactment of SMCRA. *See Belle Fourche Pipeline Co. v. State*, 766 P.2d 537, 544-48 (Wyo. 1988). Brook's approach undermines the very intent of these long-standing laws and the purpose of the permitting process. While DEQ oversight and future permit amendments provide flexibility to address *unforeseen* issues and risks during operations, this operational flexibility does not exonerate the requirements in state law to gather sufficient site-specific data to assess the probable environmental risks of the proposed operations *prior to DEQ approving a permit*.

The law is clear. Brook must submit a mine and reclamation plan, with supporting site-specific data and studies addressing the probable cumulative hydrologic impacts to both surface and groundwater, within and outside of the permit area, as well as the ability to reclaim the affected lands after mining operations are concluded. Without sufficient site-specific data and analysis, neither Brook, DEQ, nor any interested party can assess the potential impacts from the mining operations or the ability to reclaim or otherwise mitigate these impacts.

As a result, Brook has failed to gather and analyze sufficient data to assess pre-mine site conditions and foreseeable risks of environmental harm, and cannot meet its burden under Wyo. Stat. Ann. § 35-11-406(n).

## LEGAL DISCUSSION

For the reasons stated herein, and reserving the right to raise additional arguments supported by relevant evidence at hearing, the evidence at hearing will establish that:

1. Brook cannot affirmatively establish that its permit application is in *compliance with all applicable state laws*, and *is accurate and complete* pursuant to Wyo. Stat. Ann. § 35-11-406(n)(i) because the mine and reclamation plans do not contain:

- a. A plan “consistent with the objectives and purposes of this act and of the rules and regulations promulgated” that addresses “the extent to which the mining operation will disturb or change the lands to be affected, the proposed future use or uses and the plan whereby the operator will reclaim the affected lands to the proposed future use or uses,” Wyo. Stat. Ann. § 35-11-406(b);<sup>1</sup>
- b. A plan “to minimize the disturbances to the prevailing hydrologic balance at the minesite and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after mining operations and during reclamation,” Wyo. Stat. Ann. § 35-11-406(b)(xviii);<sup>2</sup>
- c. Adequate “procedures proposed to avoid constituting a public nuisance, endangering the public safety, human or animal life, property, wildlife and plant life in or adjacent to the permit area,” Wyo. Stat. Ann. § 35-11-406(b)(xiii);<sup>3</sup>

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<sup>1</sup> See Exhibit A.

<sup>2</sup> See Exhibit A.

<sup>3</sup> See Exhibit A.

- d. Adequate “methods of reclamation for effective control of erosion, siltation, and pollution of affected stream channels and stream banks by the mining operations,” Wyo. Stat. Ann. § 35-11-406(b)(xv);<sup>4</sup>
- e. Studies determining the projected result of the proposed mining and reclamation operations, both on and off of the mine site, as to the expected change to “the quantity or quality of the surface and groundwater; the surface and groundwater flow, timing and availability, the surface and groundwater quality under seasonal flow conditions, including dissolved and suspended solids; the effect of acid-forming and toxic material on surface and groundwaters; the stream channel conditions; and the aquatic habitat in the permit area and other affected areas” all in “*sufficient detail to enable the Administrator to determine the probable cumulative hydrologic impacts on surface and groundwater systems* including the impacts resulting from the proposed operation and their interaction with the impacts of all anticipated mining upon all affected hydrologic systems,” WY Rules and Regulations ENV LQC Ch. 19 § 2;<sup>5</sup>
- f. A showing that “[b]ackfilled materials [will] be replaced in a manner which minimizes water pollution on and off the site,” WY Rules and Regulations ENV LQC Ch. 4 § 2(b)(ii);<sup>6</sup>
- g. A showing that “the operator [will] conduct all operations in such a manner as to minimize disturbance of the hydrologic balance outside the permit area,” WY Rules and Regulations ENV LQC Ch. 4 § 2(w);<sup>7</sup>
- h. “Complete information on groundwater which may be affected in the permit area and adjacent areas,” which must include “an estimate of the depth and quantity of any groundwater existing in the proposed permit area down to an including the strata immediately below the lowest

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<sup>4</sup> See **Exhibit A.**

<sup>5</sup> See **Exhibit B.**

<sup>6</sup> See **Exhibit B.**

<sup>7</sup> See **Exhibit B.**



mineral seem to be mined,” WY Rules and Regulations ENV LQC Ch. 2 § 4(a)(xii)(A);<sup>8</sup>

- i. A description of the geologic strata, the lower of the stratum or any aquifer below the lowest coal seam to be mined and which may be adversely impacted by mining, which must include “***a statement of the results of test borings or core samples***” that show the location of any groundwater, ENV LQC Ch. 2 § 4(a)(viii)(A);<sup>9</sup> or
- j. Plans and studies to “ensure the protection of the quality and quantity, and rights to, surface and groundwater,” including adequate surface and groundwater monitoring plans to address the potential adverse hydrologic consequences, and “[a]n evaluation of the impact of the proposed mining activities that may result in contamination, diminution, or interruption of the quality and quantity of groundwater or surface water” all within the proposed mine permit area and adjacent areas, WY Rules and Regulations ENV LQC Ch. 2 § 5(a)(ix)-(xi).<sup>10</sup>

2. Brook’s permit application does not affirmatively establish that Brook can ***accomplish reclamation as required by the Act*** pursuant to Wyo. Stat. Ann. § 35-11-406(n)(ii),<sup>11</sup> which based on WY Rules and Regulations ENV LQC Ch. 4 § 2(a),<sup>12</sup> requires the permittee to “restore the land to a condition equal to or greater than the “highest previous use.””

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<sup>8</sup> See **Exhibit B.**

<sup>9</sup> See **Exhibit B.**

<sup>10</sup> See **Exhibit B.**

<sup>11</sup> See **Exhibit A.**

<sup>12</sup> See **Exhibit B.**

3. Brook cannot affirmatively establish that its proposed operations have been *“designed to prevent material damage to the hydrologic balance outside the permit area”* pursuant to Wyo. Stat. Ann. § 35-11-406(n)(iii).<sup>13</sup>

Accordingly, at the conclusion of the hearing Big Horn will request that the EQC require Brook to gather, analyze and submit to DEQ for review all required site-specific data and studies prior to DEQ preparing the written findings required by Wyo. Stat. Ann. § 35-11-406(n) and issuing a state decision document approving Brook’s mine permit application. Big Horn will further request that DEQ approve Brook’s mine permit application only with inclusion of certain permit conditions designed to mitigate foreseeable risks of irreparable harm.

#### **WITNESSES**

Big Horn intends to call the following witnesses, each of whom were previously disclosed and deposed by Brook:

1. Jordan Sweeney
2. Paul (Joe) Gerlach

Big Horn reserves the right to call any witness listed by any other party to this matter, as well as additional witnesses as necessary for impeachment, rebuttal, or foundation for exhibits.

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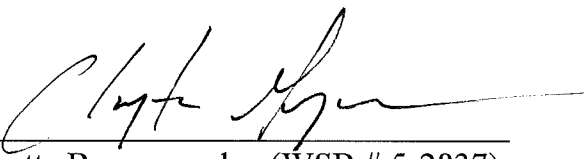
<sup>13</sup> See **Exhibit A.**

## EXHIBITS

Big Horn's list of exhibits are identified in **Exhibit C** attached to this Prehearing Memorandum. Copies of the exhibits listed on **Exhibit C** will be provided to counsel for each party simultaneously with the provision of this Prehearing Memorandum and have been filed online with the Council. Big Horn will bring a paper copy of these exhibits to the final hearing to be included in the record by the court reporter.

Big Horn reserves the right to use any exhibit designated by any other party to this matter, as well as the right to designate additional exhibits as necessary for impeachment or rebuttal. Big Horn reserves the right to enlarge any exhibit or portion thereof at the final hearing and further reserves the right to use or present any exhibit in electronic format.

DATED: May 17, 2017.

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## CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2017, a true and correct copy of the foregoing was served by email to the following:

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