

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 PRE-HEARING MEMORANDUM

The Powder River Basin Resource Council (“Resource Council”) hereby files its Pre-hearing Memorandum in the above captioned proceedings. This memorandum summarizes the legal and technical issues before the Environmental Quality Council (“EQC” or “Council”) and presents the Resource Council’s issues of law and fact to be considered at the hearing.

BACKGROUND

In response to the required public notice, the Resource Council timely filed objections to Brook Mining Company, LLC’s (“Brook” or “applicant” or “company”) coal mine permit application. The objections included a variety of issues ranging from incomplete and inaccurate information in the permit application to more technical issues such as hydrology and subsidence concerns, blasting mitigation, and reclamation bond requirements.

Members of the Resource Council also timely filed objections to Brook’s coal mine permit application. John and Vanessa Buyok, Gillian Malone, Sadie Clarendon, Jane Buyok, Anton Bocek, Joan Tellez, Wendy Condrat, and William Bensel filed objections. Resource Council member Phil Klebba and his family will also be impacted by mining operations as

discussed below.¹ Their objections and concerns demonstrate that the Resource Council, through representation of its members, is an “interested person” within the meaning of the Wyoming Environmental Quality Act’s Section 406(k) and a “person with an interest which is or may be adversely affected” within the meaning of Ch.1 § 17(b) of DEQ’s Rules of Practice and Procedure. Members Anton Bocek, John Buyok, and Gillian Malone will also provide testimony at the hearing to reinforce the Resource Council’s “interest.”

ISSUES OF FACT AND LAW

In this case, the evidence presented at the hearing will demonstrate:

1. According to the Wyoming Environmental Quality Act (“WEQA” or “Act”), “No mining operation may be commenced or conducted on land for which there is not in effect a valid mining permit to which the operator possesses the rights.” W.S. § 35-11-405(a).
2. Requirements for coal mine permit applications as well as grounds for approval and denial are governed by Section 406 of the Wyoming Environmental Quality Act, along with the Land Quality Division’s Rule and Regulations implementing the Environmental Quality Act.
3. Specifically, “The applicant for a surface coal mining permit has the burden of establishing that his application is in compliance with this act and all applicable state laws.” *Id.* at § 406(n).
4. DEQ regulations require information in a permit application to be “current” . . . “accurate and complete.” DEQ Land Quality Division Rules and Regulations, Ch. 2 § 1. The mine plan must include “[a] complete operations plan proposed to be conducted during the life of the mine” with an accurate estimate of “the number of acres that will be affected annually” and

¹ The Klebbas did not file objections as they were not aware of the opportunity to do so at the time given they live outside of ½ mile from the permit boundary and were thus not provided notice. They subsequently became aware of the proposed project from reading an article in the Casper Star Tribune.

the “anticipated annual and total production by tonnage.” *Id.* at § 5(a)(i). As discussed in Sections 1 and 2 of the Resource Council’s objections, the mine plan and permit application at issue here does not contain current, accurate, or complete information and does not meet the requirements of DEQ’s regulations.

5. For instance, the permit application fails to:

(a) Identify and include all incidental facilities: For the purposes of delineating a permit boundary, the WEQA defines “Surface coal mining operation” to mean surface lands where surface coal mining activities take place and/or surface lands “incident” to underground coal mining activities. The operation shall also “include any adjacent land the use of which is incidental to any of these activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of these activities and for haulage . . . processing areas, shipping areas and other areas upon which are sited structures, facilities or other property or materials on the surface, resulting from or incident to these activities.” W.S. § 35-11-103(e)(xx). The permit application fails to include associated facilities necessary to get coal to a point of sale, including necessary roads and facilities, and does not include the coal “processing areas” associated with the proposed industrial park and manufacturing facilities, which are incidental to the mine.²

(b) Include accurate and complete information about coal storage and hauling:

Similarly, the mine plan lacks the necessary specificity about the locations of coal storage in the

² The Resource Council became aware of the industrial park processing facilities only after our petition was filed with the EQC. However, exhibits filed by the Resource Council, produced by DEQ and the company during discovery, demonstrate DEQ was fully aware of these facilities *before* the permit went to public notice and therefore they should have been considered by the agency in its review.

pit, in the permit area, or off- site and does not identify any associated facilities (e.g. silos, stockpiles, etc.) that will be necessary for storage.

(c) Accurately estimate the amount of coal that will be mined: Accurately estimating the amount of coal to be mined is a critical component of any mine plan as it establishes the time period of the permit and the level of anticipated impacts, provides transparency to the public, and allows for enforcement by DEQ once a permit is issued. In the case of this mine, the company is asking DEQ to let them figure it out as they go along. At times, company representatives have stated publicly that they anticipate mining 6-8 million tons per year, and at other times they anticipate mining a small amount of coal. The project keeps shifting, but meanwhile the estimated annual production in the mine plan has not been updated since 2013. The only thing that is clear is the mine plan is not really a plan at all and is too vague or unrealistic to be considered a basis to anticipate impacts or to allow DEQ to adequately enforce the facility should a permit be granted.

Moreover, for years four and five, estimated annual production exceeds the two million ton per year limit established in the company's air quality permit.³ Additionally, should production ramp up to 6-8 million tons per year as has been stated publicly by company representatives, this would surely exceed the two million ton per year limit.

(d) Include accurate and complete information about traffic and road impacts: The mine plan does not estimate truck traffic, disclose any impacts to public or private roads used by the public, and does not include a traffic plan, even though according to the mine plan those "plans" have been "previously formulated." Additionally, the mine will directly impact

³ The air quality permit is mentioned in the mine plan but says the permit will be submitted. It does not disclose that there is a final air quality permit that was received *prior* the coal mining permit going to public notice nor does it explain any limits of on coal production that result from the air quality permit.

Slater Creek Road, a county road that is the only access point for the property of Resource Council member Phil Klebba and his family at the Klebba Ranch. The mine plan does not provide the required buffer around Slater Creek Road or alternatively it does not provide a plan, approved by the Sheridan County Board of County Commissioners, to move the road.

(e) Include accurate and complete information about impacts to conservation easements and recreation access: The mine plan does not discuss or disclose any impacts to conservation easements and recreation access or recreation facilities within or adjacent to the permit area. The Wyoming Game & Fish Department has agreements with landowners for “walk-in” areas for hunting and recreation, areas which are likely to be impacted by mining operations. Additionally, the associated “industrial park” is located within eyesight of the Kleenburn Recreation Area, an area frequently used for recreation activities, including fishing, picnicking, and hiking.

(f) Include accurate and complete information about blasting activities and projected impacts: The mine plan does not describe how frequently blasting will occur and in what amounts, and it does not provide sufficient restrictions to ensure that the requirements of Chapter 6 of the Land Quality Regulations will be met during mining and that offsite impacts resulting from pollution and seismicity will be prevented. Blasting is of particular concern to members of the public who recreate in the area given pollution and other impacts and to nearby homeowners and landowners whose structures could be impacted from blasting activities.

(g) Include information on MSHA requirements and permits: The subsidence control plan references a “ground control plan” that is approved by MSHA and is commonly included for DEQ review in a subsidence control plan. However, no such plan exists. DEQ regulations require “[a] list identifying the Mine Safety and Health Administration identification

number for all mine facilities that require MSHA approval and licenses, permits or approvals needed by the application to conduct the proposed operation, whether and when they have been issued, the issuing authority, and the steps to be taken to comply with the requirements” as part of the permit application. Ch. 2 § 2(a)(v). This information is not included in the permit application and responses to discovery questions raised by the Resource Council confirm that the company has yet to apply for any MSHA permits.

(h) Include accurate and complete information about measures to prevent and remediate coal fires: The mine plan does not include an appropriate plan to prevent and/or put out coal fires or properly treat or dispose of other “materials constituting a fire, health, or safety hazard.” W.S. § 35-11-406(b)(ix). Coal fires are of particular concern to nearby landowners given the history of coal fires in the area and the presence of active coal fires *within* the permit boundary, a fact confirmed by the company’s answers to Resource Council discovery questions.

6. As our hydrogeology expert will explain at the hearing, the mining and reclamation plan does not include “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” as required by the WEQA and corresponding DEQ regulations. W.S. § 35-11-406(b)(xvii). DEQ must deny the permit application *unless* it is sufficiently demonstrated that the proposed operations will not materially damage the hydrologic balance outside the permit area and will minimize disturbances to the prevailing hydrologic balance at the minesite. Again, the applicant has the burden of proof to demonstrate these requirements have been met.

7. Our hydrology expert will also explain that the mine plan does not sufficiently include “[t]he methods of diverting surface water around the affected lands where necessary to

effectively control pollution or unnecessary erosion” as required by the Environmental Quality Act and associated DEQ regulations. W.S. 35-11-406(b)(xv).

8. As discussed in the expert report submitted with the Resource Council’s objections, and as will be explained by our expert at the hearing, the subsidence control plan does not achieve its required objective: to control and prevent subsidence at the mine site. The expert report concludes that “There is a serious risk of surface subsidence from roof collapse in the proposed mining area.”

9. Nearby landowners are particularly concerned about subsidence because it can “constitute[] a public nuisance or endanger[] the public and safety” of local landowners. W.S. § 35-11-406(m)(vii). As discussed above, the company is proposing to mine under at least one county road and will be mining in close proximity to numerous home and business structures, agricultural lands and associated structures, water wells, and public rights of way. Subsidence also has implications for whether the “reclamation plan can accomplish reclamation as required.” *Id.* at § 406(n)(ii). And it has implications for creating damage to the hydrologic balance both within the permit area and in outside areas. *Id.* at §§ 406(b)(xvii), 406(n)(iii).

10. The company has an obligation to prevent subsidence. DEQ Land Quality Regulations require a coal mining permit application with underground components, such as this permit application, to include “[e]xcept for areas where planned subsidence is projected to be used, measures to be taken in the mine to prevent or minimize subsidence, including backfilling of voids and leaving areas in which no coal is removed.” Ch. 7 § 1(a)(v)(C). Additionally, “[u]nderground mining activities shall be planned and conducted so as to prevent subsidence from causing material damage to structure, the land surface, and groundwater resources.” Ch. 2 § 2(b)(iii).

11. Further, “Auger mining may be limited or prohibited to minimize disturbance of the prevailing hydrologic balance, unwarranted subsidence, or if the prohibition is necessary to maximize the utilization, recoverability or conservation of the solid fuel resources.” Ch. 5 § 6(b). This regulation is critical because at various times in the mine plan, the company refers to highwall mining as auger mining or “a similar method to auger mining.” The law treats auger mining distinctly given the particular impacts that can result from this type of mining.

12. The permit application includes a commitment to replace only adjudicated water wells that will be impacted by mining activities. This is not sufficient to meet the requirements of the law and the application must be amended to include all permitted wells. In answers to discovery questions, DEQ has admitted that this amendment needs to be made, however there is no process for that to happen until *after* the hearing.

13. Additionally, before a coal mining permit can be approved, DEQ must make certain findings related to the application’s compliance with the WEQA and DEQ regulations. *Id.* at §§ 406(n)(i)-(vii).

14. These findings have not yet been made, and DEQ has stated, in answers to the Resource Council and other parties through discovery questions, that these findings will only be made *after* the hearing.

15. Specifically, as our hydrogeologist expert will explain at the hearing, the proposed mine has not “been designed to prevent material damage to the hydrologic balance outside the permit area” as required by the WEQA and corresponding DEQ regulations. *Id.* at § 406(n)(iii). Regardless, DEQ is unable to make this finding until its Cumulative Hydrologic

Impacts Assessment (“CHIA”) is completed, and DEQ has stated in answers to discovery questions that its CHIA will only be completed *after* the hearing.⁴

16. Likewise, DEQ is unable to make a finding that “the proposed operation would . . . [n]ot interrupt, discontinue, or preclude farming on alluvial valley floors” as required by Section 406(n)(v). Land Quality Rules and Regulations, Ch. 12 § 1(a)(i). This finding cannot be made because, as the Resource Council’s hearing exhibits will show, DEQ has not finished mapping potentially affected alluvial valley floors, and because, as our hydrogeologist expert will explain, the alluvial valley floors that have been mapped will in fact be impacted by proposed mining activities.

17. Requirements for mine reclamation bonds are governed by Section 417 of the WEQA and corresponding DEQ regulations. The proposed reclamation bond does not cover the *entire* cost of surface and water reclamation, as required to be posted *prior* to any mining on the site. *See* W.S. § 35-11-417(c)(i) (the bond should equal the “cost of reclaiming the affected land disturbed” . . . “plus the administrator’s estimate of the additional cost to the state of bringing in personnel and equipment should the operator fail or the site be abandoned.”). In particular, the proposed bond amount does not include the costs of certain contingency factors, costs that are necessary *regardless* of the scope or extent of mining activities.

18. Like the necessary findings of Section 406(n), DEQ has stated that it has yet to calculate the bond amount and will only do *after* the hearing. This prevents adequate public review and comment on the proposed bond amount, which is a critical requirement of the law.

⁴ The CHIA is not separately subject to public notice and comment provisions under the WEQA or SMCRA. However, it is normal practice for the CHIA to be finalized at the time of public notice to afford the public an opportunity to review and comment as part of any public process on the permit application, such as this hearing.

19. DEQ cannot lawfully issue a permit for the Brook Mine unless the application demonstrates that it meets the requirements of applicable laws and regulations *and* unless DEQ makes the required findings of Section 406(n) and ensures receipt of a sufficient reclamation bond posted in the amount calculated *by DEQ* pursuant to Section 417.

REQUEST FOR RELIEF

20. Given the deficiencies in the permit application described above, and the absence of specific regulatory findings necessary to issue a permit, the permit applicant has not met its burden to demonstrate that the application “is in compliance with this act and all applicable state laws” pursuant to Section 406(n).

21. As a result, the EQC must find that the permit application should be denied. The EQC should issue findings of fact and law and “a decision on the application” to correspond with a recommendation to the DEQ to deny the permit application within fifteen days of receipt of the EQC’s decision pursuant to Section 406(p).

22. At the very least, the EQC should (1) make a finding that DEQ cannot issue the permit until all required findings under Section 406(n) are made, until the reclamation bond amount is calculated pursuant to Section 417, and until deficiencies in the permit application raised by the parties are addressed; (2) stay proceedings until DEQ makes its required findings; and (3) allow the parties’ time to respond and present additional evidence and testimony, as needed. Staying proceedings will afford DEQ time beyond the statutorily provided 15 days to finalize the CHIA and other needed documents and reviews and to respond to public comments and make any needed changes to the permit.

WITNESSES

The Resource Council has named witnesses in the attached Witness Designation List (Exhibit A). The Resource Council reserves the right to call any of the witnesses identified by any other parties, or other witnesses necessary for foundation and impeachment purposes.

EXHIBITS

The Resource Council has identified exhibits in the attached Exhibit List (Exhibit B). The Resource Council reserves the right to use any of these exhibits, or exhibits designated by another party, as demonstrative exhibits at the hearing. The Resource Council also reserves the right to designate additional exhibits necessary for foundation or impeachment purposes.

Dated this 17th day of May, 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 May 17, 2017, I served a copy of the foregoing **PRE-HEARING MEMORANDUM** 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