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**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 BRIEF
Oral Argument Requested

Pursuant to the June 13, 2017 Order, the Powder River Basin Resource Council (“Resource Council”) hereby files its brief in the above captioned proceedings. This brief summarizes the specific statutes and rules the Environmental Quality Council (“EQC” or “Council”) is required by law to consider in this matter. Specifically, this brief addresses the requirements of Section 406(n) of the Environmental Quality Act and the corresponding burden of proof an applicant for a surface coal mining permit has in these proceedings.

SCOPE OF THE EQC’S DECISION

Pursuant to Section 406(p), the Council “shall issue findings of fact and a decision on the application” after the hearing. Notably, Section 406(p) specifies that the “decision on the application” made by the Council after a hearing is the same “decision on the application” that the DEQ Director would make if no informal conference or hearing is requested. Therefore, in the case where a hearing on a permit application is held, the Council steps into the place of the DEQ Director to make the “decision on the application.” The permit must still be granted or

denied by the DEQ as the issuing agency; however, that DEQ decision is made pursuant to the “findings of fact and decision of the environmental quality council.”

This means that the scope of the Council’s decision here is to decide the issues of fact and determine whether the Brook Mine permit application meets the requirements of the law and therefore whether the permit should be issued or denied, and if issued, under what conditions. *See Grams v. Env’t Quality Council*, 730 P.2d 784, 786 (Wyo. 1986) (“On November 19, 1985, the EQC entered its order directing the LQD to issue a mining permit to AMAX.”).¹ It is not to merely determine whether the application is “complete” or “suitable for publication” or make other findings that are applicable at earlier stages in the permitting process.² Here, the “decision on the application” is the final decision on the application. Additionally, Section 406(p) does not limit the scope of the Council’s decision to the objections raised by the parties. However, given the evidence and testimony presented, the findings of fact issued by the Council will likely be tailored to the factual issues presented through evidence and/or discussed at the hearing.

The scope of the Council’s decision is particularly applicable here, when DEQ denied any additional public participation opportunities, such as an informal conference. If the informal conference had been held, DEQ would have made the decision on the permit application and issued or denied the permit *before* any contested case proceeding, and in that case, the proceeding before the EQC would have been more similar to an administrative appeal of a DEQ

¹ The Council 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). While DEQ is the agency that implements the Council’s order, the Council has the power – and in this case, the obligation – to make an order directing the DEQ to grant or deny the coal mine permit.

² Although there was testimony as to the “technically adequate” or “technically accurate” determination by DEQ, these phrases do not appear in the Environmental Quality Act. The correct phrase is “suitable for publication.”

decision.³ That is not the case here. The only meaningful reading of Section 406(p) in this proceeding is for the Council to make the “decision on the application” – the *same* decision the DEQ Director would make if an informal conference was held or if no informal conference or hearing was requested.

APPLICABLE LAW⁴

In order to make “a decision on the application,” the Council must fully consider and apply Section 406 of the Environmental Quality Act, which governs the permitting process for new coal (and non-coal) mines. Portions of Section 406 relevant to the Brook Mine permit and the decision pending by the EQC are:

- Section 406(a) – detailing basic contents of the permit application;
- Section 406(b) – detailing substantive contents of the mining and reclamation plan required as part of the permit application;
- Section 406(e) – detailing the process for the initial completeness finding made by DEQ;
- Section 406(h) – detailing the process for DEQ staff review of the permit application and the process for DEQ staff to identify and resolve deficiencies;
- Section 406(j) – detailing the public notice process required;
- Section 406(k) – detailing the objection and hearing process;
- Section 406(n) – detailing the applicant’s burdens to demonstrate compliance with key parts of the state’s surface coal mining laws (further discussed below);
- Section 406(o) – preventing a permit to be issued to an applicant with outstanding violations; and

³ This procedural posture also dictates the burden of proof, discussed *infra*.

⁴ These statutory and regulatory provisions will be discussed in detail in the Resource Council’s forthcoming brief and proposed findings of fact and conclusions of law.

- Section 406(p) – detailing the decisions on the permit application made by the DEQ Director and the EQC (discussed above).

Other portions of the Environmental Quality Act applicable to the Brook Mine permit include Section 415(b), especially Section 415(b)(x) (alluvial valley floor protection), Section 415(b)(xi) (blasting requirements), and Section 415(b)(xii) (replacement of water supply), Section 416 (surface owner bond requirements),⁵ Sections 417(a)-(c) (reclamation bond requirements), and Sections 103(a) and 103(e) (definitions).

Portions of the DEQ Land Quality Rules and Regulations relevant to the Brook Mine permit and the pending decision by the EQC include:

- Chapter 1: Authority and Definitions;
- Chapter 2: Surface Coal Mining Permit Application Requirements, including Section 1 (General Requirements), Section 2 (Adjudication Requirements, including a description of other permits and steps taken to comply with the requirements for those permits, including MSHA permits and permits from other DEQ divisions), Section 3 (Vegetation Baseline Requirements), Section 4 (Other Baseline Requirements, including hydrology and geology baseline requirements that are of particular importance to this proceeding), Section 5 (Mine Plan, including identification and descriptions of mining activities, including processing facilities, blasting plan requirements, requirements for a “plan to ensure the protection of the quantity and quality of, and rights to, surface water and groundwater both within and adjacent to the permit area,” a probable hydrologic consequences determination, “[a]n evaluation of the impact of the proposed mining activities that may result in contamination, diminution, or interruption of the quality and

⁵ This section is applicable here because of the lack of surface use agreement with Big Horn Coal Co.

quantity of groundwater or surface water within the proposed mine permit area or adjacent areas that are used for domestic, agricultural, industrial, or other legitimate purposes,” and a road system plan – all of which are applicable to this proceeding), and Section 6 (Reclamation Plan);

- Chapter 3, Section 2 (Alluvial Valley Floor permit requirements);
- Chapter 3, Section 5 (Auger Mining permit requirements);
- Chapter 4: Environmental Performance Standards for Surface Coal Mining Operations – while these are operating standards, the permit application must contain conditions and information sufficient to demonstrate compliance with these standards;
- Chapter 5: Performance Standards for Special Categories of Coal Mining, including Section 3 (Alluvial Valley Floors) and Section 6 (Auger Mining);
- Chapter 6: Blasting – like Chapters 4 and 5, Chapter 6 contains operating standards, but the permit application must contain conditions and information sufficient to demonstrate compliance with these standards;
- Chapter 7: Underground Mining, including Section 1 (Permit Application Requirements), Section 2 (Performance Standards), Section 3 (Public Notice Requirements), and Section 4 (Surface Owner Protection);
- Chapter 12: Procedures Applicable to Surface Coal Mining Operations, including Section 1(a) (Permitting Procedures) and Section 2 (Bonding and Insurance Provisions); and
- Chapter 19: Required Studies for Surface Coal Mining Permit Applications, including Section 2 detailing requirements for the probable hydrologic consequences determination.

DEQ has also adopted a number of guidelines for coal mining. These guidelines are merely guidance documents that were not subject to notice and comment rulemaking, and as

such, they are not binding on the agency or the applicant and therefore are not requirements “the Council is required by law to consider.”

STANDARD OF REVIEW & BURDEN OF PROOF

The Council’s review of DEQ’s permitting decisions and of the permit application is *de novo*. See Order Denying Basin Electric Power Cooperative Inc.’s Motion to Dismiss Appeal at 7, Docket No. 07-2801; see also Appeal of 4W Ranch Objection to NPDES Permits, Docket No. 04-3801 (EQC Mar. 5, 2007) (“The EQC conducts *de novo* hearings pursuant to the DEQ Rules of Practice and Procedure, the Wyoming Rules of Evidence, and the Wyoming Rules of Civil Procedure.”). Under *de novo* review, the Council must look afresh or “from the new” at the permit application and should not afford deference to DEQ in issuing any findings of fact or in making the decision on the permit application.⁶

Under Section 406(n), “The applicant for a surface coal mining permit has the burden of establishing that his application is in compliance with [the Environmental Quality Act] and all applicable state laws.” The Wyoming Supreme Court has held that this burden extends to any hearing before the Council on a coal mine permit. *Grams*, 730 P.2d at 789 (citing Section 406(n) and holding “the burden of proof rests upon the applicant to show that the application is in compliance with applicable law.”). This burden of proof is especially relevant because, as discussed above, the Council must review the permit application *de novo*, as if reviewing the permit application for the first time. Similar to when DEQ reviews the permit application, the Council’s review must find that the permit applicant has met its burden of proof to demonstrate

⁶ While this standard of review also applies to administrative appeals of DEQ issued permits, it is especially applicable here where the scope of the Council’s decision is to make the decision on the permit application, a decision DEQ has not made.

compliance with the law and that no part of the permit application is deficient. *See* W.S. § 35-11-406(h).⁷

APPLICABILITY OF SECTION 406(n)⁸

As discussed above, the Wyoming Supreme Court has found Section 406(n) applicable to hearings on coal mine permit applications before the Council. Since the burden of proof is not separated from any other part of Section 406(n), a plain reading of the section dictates that the entirety of the section, including Sections 406(n)(i)-(vii), is relevant to the Council’s review and “decision on the application.”

In many ways, Section 406(n) is the heart of requirements for a surface coal mining permit as the requirements of the section were put in place to comply with the Surface Mining Control and Reclamation Act’s (“SMCRA”) main requirements for reclamation and protection of water resources.

Section 406(n)(i) dictates that the application must be “accurate and complete.” This ensures compliance with Sections 406(a) and 406(b), as well as corresponding DEQ regulations, listed above, that spell out what must be included in a permit application.

However, 406(n) does not stop there. There is a not a period or an “or” after 406(n)(i). Instead, Sections 406(n)(ii)-(vii) must be considered as well. The only portion of Section 406(n) not relevant to this proceeding is Section 406(n)(vi) regarding requirements related to prime farmland, which is not present in the permit area.

⁷ “Deficiency” is defined in the Environmental Quality Act as “an omission or lack of sufficient information serious enough to preclude correction or compliance by stipulation in the approved permit to be issued by the director.” W.S. § 35-11-103(e)(xxiv).

⁸ Like the rest of Section 406, this brief merely discusses the applicability of Section 406(n). Discussion of the applicant’s compliance with this section will be included in the Resource Council’s forthcoming brief and proposed findings of fact and conclusions of law.

While Section 406(n) explains that the “administrator” must find in writing that the requirements of the section have been demonstrated, in this proceeding, the Council will need to make those findings as DEQ has admitted that the administrator has not yet made any findings pursuant to the section. Moreover, DEQ witnesses testified that the administrator has a conflict of interest for the permit application and is therefore unable to make the findings. *See* Tr. at 283-84. These findings need to be made *before* the Council can make a “decision on the application,” as without them, the Council’s job will be impossible. A “decision on the application” cannot be made without first determining whether the requirements of Section 406(n) have been met. Therefore, since DEQ has yet to make the findings, the Council will have to make the findings as part of its review of the permit application and as part of its “decision on the application.”

Furthermore, DEQ’s overtures that the agency’s yet-to-be-finalized cumulative hydrologic impact assessment (“CHIA”) somehow prevents the DEQ or the Council from making any determinations regarding material damage to the hydrologic balance outside the permit area (Section 406(n)(iii)) or in determining impacts to alluvial valley floor hydrologic systems (Section 406(n)(v)) at this time is a red herring argument. DEQ’s CHIA is just that – a *cumulative assessment* – and it is a document separate from the permit application. *See* Tr. at 413.^{9,10} As such, it does not abdicate the applicant’s requirements to provide a probable

⁹ Of course, a DEQ witness admitted that normally the CHIA is finalized by the time of a public comment to afford an opportunity to raise objections on the CHIA – a process that did not happen here. Tr. 423-25. Had DEQ finalized the CHIA at a time to afford the public an opportunity to submit objections to it as part of this process, the parties likely would not be briefing this issue at all.

¹⁰ At times, DEQ conducts a CHIA regionally, while taking into account each mine’s individual contributions to the cumulative impacts. *See* Ogle, K.M., and M. Calle, 2006, *Cumulative Hydrological Impact Assessment (CHIA) of Coal Mining in the Southern Powder River Basin, Wyoming*, WDEQ-CHIA-19 (cited in the Bureau of Land Management’s Final Environmental Impact Statement for the Wright Area Coal Lease Applications, available at

hydrologic consequences analysis and determination under Chapters 2 and 19 of the coal program rules, nor does it excuse the applicant from its burden under 406(n) to design a coal mining operation that will prevent material damage to the hydrologic balance. To think otherwise would turn the *permit* requirements of Section 406 on their head, would threaten the state's compliance with SMCRA, and would effectively render the rather lengthy and expensive hearing process held by the Council meaningless.

Section 406(p) dictates that once there is a hearing before the Council, it is the Council that makes the "decision on the application," not the DEQ. Thus, there is no later opportunity for the DEQ to review the permit's compliance with Section 406(n). Compliance with Section 406(n) must be done now, as part of the Council's "decision on the application."

CONCLUSION

For the foregoing reasons, the Council should find that the permit applicant, Brook Mining Co., LLC, has the burden of proof in these proceedings to demonstrate that the permit application is not deficient and that it meets all of the relevant requirements of the law, including compliance with Section 406(n).

Dated this 26th day of June, 2017.

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https://eplanning.blm.gov/epl-front-office/eplanning/docset_view.do?projectId=67033¤tPageId=96927&documentId=82290

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2017, I served a copy of the foregoing **BRIEF** 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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