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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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

OBJECTOR FISHERS' BRIEF ON THE APPLICATION OF WYOMING STATUTE §35-11-406(n)

Objectors Mary Brezik-Fisher and David Fisher, through their undersigned attorney Jay A. Gilbertz, of Yonkee & Toner, LLP, hereby file this brief addressing the application of Wyoming Statute §35-11-406(n) to these proceedings.

I. Brook Mine's Application for a surface coal mine *must* contain the information which demonstrates that the requirements of §35-11-406(n) have been met. If the Application lacks this proof, it is not a complete application.

Wyoming Statute §35-11-406 provides that when an Applicant for surface coal mining permit and the Department of Environmental Quality (DEQ) believe an application is complete, the application moves to a public participation phase during which interested members of the public can raise questions about, comment on, and object to the application. At this juncture, the back-and-forth between the Applicant and the DEQ about the contents and technical aspects of the application has concluded and the Applicant (Brook Mine) necessarily takes the position that the assessment of

its application is ready to move to a final determination.

In several locations, §35-11-406 requires that the application be "complete" by this stage. In other words, at this point, the Applicant is claiming that it has provided everything which is necessary for the issuance of the mining permit and the application is ready, *as submitted,* to be reviewed for compliance with Wyoming law and ultimately for issuance of a coal mining permit. In order for the application to be "complete" it must demonstrate compliance with all Wyoming statutes, rules and regulations that govern surface coal mines *and* it must contain all the information necessary for the issuance of the permit. Section 35-11-406(n) provides:

> (n) 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.** No surface coal mining permit shall be approved unless the **applicant affirmatively demonstrates** and the administrator finds in writing:

Wyo. Stat. §35-11-406 (LexisNexis 2015) (emphasis added). Subsection (n) goes on to list the required showings which include affirmative proof that application is accurate and complete, that the proposed mining operation has "been designed to prevent material damage to the hydrologic balance outside the permit area" and that the mining activity will not "materially damage the quantity or quality of water in surface or underground water systems" that supply alluvial valley floors. Wyo. Stat. §35-11-406(n)(i), (n)(iii), & (n)(v)(B).

The above quoted portion of the statute clearly and unambiguously requires the applicant to prove that its "*application* in compliance with this act" – meaning the Environmental Quality Act. Subsection (n) cited above is part of that Act and for this reason the *application* must demonstrate compliance with all the requirements of the Environmental Quality Act – including subsection (n). By very definition then, an application cannot be complete unless it contains all the information necessary to prove that the applicant is in compliance with subsection (n) and its sub-parts. If the application and its contents do not contain this information, then it is incomplete.

While it is true that there can be a later assessment by the Director to determine if the Director believes Brook has proven the subsection (n) factors, this later process does not relieve Brook from the current obligation to set forth the necessary facts and proof within the content of the very application that Brook contends is complete and ready for such an assessment. Without detailed and meaningful evidence and analysis proving that the requirements of §35-11-406(n) have been met, the application does not have the information upon which any later finding could be based. Moreover, without this proof being set forth and sufficiently detailed, there is no opportunity for members of the public to gauge or challenge the adequacy or reliability of the claimed proof. Sweeping and conclusory generalities such as "No harm is expected" do not constitute affirmative proof.

In short, an application lacking in this proof is incomplete. This is actually a quite simple and very straightforward matter which warrants no further discussion or analysis. Whether or not the application contains proof of compliance with the §35-11-406(n) requirements must be addressed.

II. Failure to assess whether the permit application contains the necessary information to prove compliance with subsection (n) would constitute a grave error of law and constitute an arbitrary and capricious act.

The "technically adequate" and "technically complete" distraction:

Throughout the proceedings, Brook Mine contended that all it needed to show for these proceedings was that its mining application was "technically adequate" or "technically complete". Surprisingly, the DEQ itself participated in this dissimulation of the applicable standard and adopted this same inaccurate terminology.

Nowhere in the Wyoming Statutes are the terms "technically adequate" or "technically complete" used as a descriptive term for the adequacy of an application for a coal mining permit.

Rather, Wyoming Statute §35-11-406 simply states in several locations that the application must be "complete". Complete means "having all necessary parts, elements, or steps." *Merriam Webster's Collegiate Dictionary,* 10th Ed. (1995). To be complete, the application must contain the elements or parts which reveals information satisfying the essential requirements of §35-11-406(n).

By purposeful addition of the qualifier "technical" and through avoidance of the actual language of the statute, Brook attempts to reduce its obligated showing to something less than a "complete" application. The EQC must reject Brook's efforts to diminish its required showing through clever semantics and hold Brook to the statutory standard of having a complete application. A complete application must contain the information necessary to demonstrate that the requirements of §35-11-406(n) have been *meaningfully* satisfied in the contents and attachments to the application in its current form.

Rather than addressing the extent to which the application and its attachments satisfied this burden, Brook (and to a large degree DEQ) aggressively fought addressing the topic throughout the proceedings objecting any time the topic was raised. This resistance to squarely addressing the issue is a clear indication the permit is lacking the required proof.

Interpreting §35-11-406 to allow Brook to proceed to the issuance of a mining permit without demonstrating that its application contains the information proving compliance with the standards of §35-11-406(n) is an absurd reading of the Statute and violates the policy of the Act.

Statutes must be interpreted and construed in a way that does not render any portion of the statute meaningless. *Reliance Ins. Co. v. Chevron U.S.A. Inc.,* 713 P.2d 766 (Wyo. 1986). Statutes cannot be construed or interpreted in a "manner producing absurd results." *State v. Sodergren,* 686 P.2d 521, 527 (Wyo. 1984), See also *In re Romer*, 436 P.2d 956 (Wyo. 1968); *Woolley v. State Highway Commission,* 387 P.2d 667 (Wyo. 1963); *Huber v. Thomas,* 19 P.2d 1042 (Wyo. 1933); and *Jones v. State*, 2006 WY 40, ¶ 12, 132 P.3d 162, 166 (Wyo. 2006).

Brook contends that whether it has proven that the requirements of §35-11-406(n) have been met is a determination to later be made by the Director of the DEQ and thus it need not demonstrate that its application contains the information from which that conclusion can be drawn. This contention ignores the fact that at this stage of the process Brook has supplied everything it believes is necessary to support issuance of the permit. If the contents of Brook's application is not capable of meaningfully proving the requirements of §35-11-406(n), then the application is by definition incomplete. It would constitute an absurd reading of the statute to declare that the application can be considered complete without the information necessary to make these required determinations.

Moreover, construing the statute in this way implicates due process concerns and contradicts the underlying goals of environmental protection laws. Like the federal law upon which it was modeled, Wyoming environmental protection laws impose a duty of taking a "hard look" at the environmental consequences of a project and require the meaningful participation of the public in that decision making process. As stated by the U.S. Supreme Court, the goal of environmental protection laws is to ensure that "the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; **it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision.**" *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109; S. Ct. 1835, 1845, (1989) (emphasis added). Wyoming's statutes provide for and echo this notion of the public having detailed and relevant information about the proposed activities, the environmental risks and having the right to a meaningful role in the decision making process.

Under Brook's proffered construction of the statute, it need not demonstrate that its application clearly contains the detailed information necessary to prove that it has satisfied the

requirements of §35-11-406(n) (which are prerequisites to obtaining the permit). According to Brook, this is because the Director of the DEQ can later make his own determination of whether these requirements have been satisfied. This reading effectively freezes-out public participation in the decision making process.

In other words, Brook's position is that it does not need to show that it has provided the detailed and "relevant information" in its application because there is a later decision to be made. The grave upshot of that argument is that this relevant information will only be made known to the public after the permit is issued – if ever. This would put Brook in the position of getting its mining permit with the only recourse or role for the public and "larger audience" to play being an appeal of the permit's issuance. Under this scenario, it would then be the obligation of the objectors to show the permit was improperly granted.

In effect, Brook seeks to cleverly flip the burden of proof from itself to the public and in the bargain gain the right to begin its mining operations and environmental disturbance before any challenges can be addressed. No doubt, Brook would prize such a discrepant outcome, but the EQC cannot allow the operator to shirk its burden of proof. Accepting Brook's construction of the statute would result in an absurdity and undermine the very goals of public review and participation in the process.

III. Conclusion

The requirements of §35-11-406(n) are substantive requirements of the Wyoming Environmental Quality Act and a coal mining applicant must prove its mining activities will be in compliance with these provisions as a prerequisite to any mining permit being issued. Consequently, in order to demonstrate that an application is complete, the relevant information must be contained and set forth in the application documents demonstrating and proving that the proposed mining

operation has met these requirements. The EQC must consider §35-11-406(n) in determining whether Brook's application is complete.

DATED this 26th day of June, 2017.

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CERTIFICATE OF SERVICE

I, Jay A. Gilbertz, hereby certify that on the 26th day of June, 2017, I served a true and correct copy of the above and foregoing *by electronic transmission,* duly addressed as follows:

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