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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 BRIEF REGARDING THE SCOPE OF  
THE ENVIRONMENTAL QUALITY COUNCIL'S REVIEW**

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Pursuant to the Environmental Quality Council's ("EQC") Briefing Order, dated June 13, 2017, Big Horn Coal Company ("Big Horn"), by and through its undersigned counsel of record, hereby submits this brief addressing the legal parameters governing the EQC's review in this matter, as well as the appropriate burden of proof standard.

**INTRODUCTION**

This matter involves the surface coal mining permit application of Brook Mining Company, LLC ("Brook Mine") and the numerous objections thereto. After

the permit application was deemed complete and suitable for publication by the Wyoming Department of Environmental Quality (“DEQ”),<sup>1</sup> notice of the application was published pursuant to Wyo. Stat. Ann. § 35-11-406(j). In response, and pursuant to Wyo. Stat. Ann. § 35-11-406(k), numerous parties submitted written objections to the permit application citing various deficiencies and requesting an informal conference to attempt to resolve the disputes without the need for a contested case hearing. DEQ denied the requests for an informal conference and the matter was referred to the EQC for a contested case hearing. Additional proceedings before the EQC eventually led to this contested case hearing.

The EQC’s June 13<sup>th</sup> Order directs the parties to submit briefs as to the appropriate legal framework and burden of proof standard to be applied by the EQC, and to particularly address the applicability of Wyo. Stat. Ann. § 35-11-406(n).

In short, pursuant to Wyo. Stat. Ann. § 35-11-406, the EQC must consider all statutes and regulations regarding permit application requirements and required findings relating to permit issuance. This certainly includes Wyo. Stat. Ann. § 35-11-406(n), as this subsection specifically provides criteria that must be met prior to

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<sup>1</sup> Various decisions, statements or legal requirements referenced herein pertain to specific personnel, divisions or locations within DEQ. Because these specifics generally do not affect the subject matter briefed herein, for the sake of simplicity, in this Brief, Big Horn simply refers to “DEQ” generally.

any permit approval. As to the appropriate burden of proof standard, Wyo. Stat. Ann. § 35-11-406(n) clearly provides that Brook Mine, as the permit applicant, bears the burden to affirmatively establish and demonstrate that its application is “in compliance with the [Environmental Quality Act] and all applicable state laws” and meets each and every requirement under Wyo. Stat. Ann. § 35-11-406(n).

### **ANALYSIS**

Wyoming Statute Annotated § 35-11-406 (sometimes referred to herein as “Section 406”), as the statute governing Brook Mine’s permit application and its eventual issuance or denial, makes clear that the matter at hand is whether Brook Mine’s permit application is suitable for approval and issuance. Under the course of these proceedings, the EQC must render a decision on the permit application following a contested case hearing, which it is empowered to hear pursuant to Section 406 and Wyo. Stat. Ann. § 35-11-112(a)(iv). From this, two conclusions can be drawn: (1) to properly discharge its duties, the EQC must consider all legal requirements pertaining to surface coal mine permit applications, specifically including Wyo. Stat. Ann. § 35-11-406(n); and (2) by clear and unequivocal statutory directive, the burden falls squarely on Brook Mine to affirmatively establish that its application is in compliance with all relevant laws and meets the specific requirements of Section 406(n). Wyo. Stat. Ann. § 35-11-406(n).

In analyzing the EQC’s role, it is helpful to review the applicable statutory procedure governing the processing of Brook Mine’s permit application, the course

of proceedings in this matter, and the powers and duties of the EQC. Additionally, in light of its future decisions, it is important for the EQC to evaluate whether it is required to give deference to DEQ in interpreting statutory provisions, including those related to the permit application's accuracy and completeness.

**I. Procedure Provided for in Wyo. Stat. Ann. § 35-11-406**

Section 406 provides, in a very linear and step-by-step fashion, both the procedure and legal requirements for surface coal mining permit applications and the eventual issuance or denial thereof.

Section 406 begins with subparts (a), (b) and (c) which set forth and provide specific requirements that the permit application must contain. Wyo. Stat. Ann. § 35-11-406(a) – (c). These subsections are then supplemented by the various permit requirements provided for in DEQ's Land Quality-Coal Rules and Regulations, found within WY Rules and Regulations ENV LQC Ch. 1 through Ch. 20. Section 406(d) next requires the permit application to be made publicly available in the county in which the proposed permit area resides. Wyo. Stat. Ann. § 35-11-406(d). Subpart (e) pertains to DEQ finding of whether the application is "complete," and subparts (f) and (g) pertain to additional steps to be taken to obtain this "completeness" finding and require publication of the fact that the application has been filed. *Id.* at -406(e) – (g). Subpart (h) then calls for DEQ to again review the filed application for completeness and find either that: (1) the application is complete and suitable for publication; (2) the application is deficient; or (3) the

application is denied. *Id.* at -406(h). As set forth in Wyo. Stat. Ann. 35-11-103(e)(xxii), the designation of completeness as contemplated by Section 406(e) does not mean that an application is substantively adequate for permit issuance or accurate and complete. Instead, by definition, it merely means that “the application contains all the essential and necessary elements and is acceptable for further review for substance and compliance with the provisions of this chapter[.]”

If DEQ determines the application to be complete and suitable for publication, subparts (j) and (k) call for notice of the application to be published, in part to allow for objections to the application. Wyo. Stat. Ann. § 35-11-406(j) – (k).<sup>2</sup>

Subpart (k) also provides for review of the application in the event of objections. If the application is for surface coal mining operations, and if requested, DEQ may hold an informal conference to informally resolve the disputes and subsequently take action on the permit application. *Id.* at -406(k). This decision is then appealable to the EQC for a *de novo* review. *Id.* Additionally, subpart (k) provides for an alternative method of review, in which objections are heard by the EQC in the form of a contested case hearing. *Id.*

Subparts (m) and (n) set forth the requirements for permit approval, with subpart (n) pertaining to surface coal mining permit applications. *Id.* at -406(m) –

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<sup>2</sup> To avoid confusion, Big Horn notes that there is no subpart (i) or (l) to Section 406.

(n). Subpart (n) specifically states that the permit applicant “has the burden of establishing that his application is in compliance with [the Wyoming Environmental Quality Act] and all applicable state laws” and that “[n]o surface coal mining permit shall be approved unless the applicant affirmatively demonstrates and the administrator finds in writing” several requirements, including that:

- (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; . . .

*Id.* at -406(n).

Subpart (o) pertains to the applicant’s past conduct related to environmental harm. *Id.* at -406(o).

Finally, subpart (p) states when a decision on the permit shall be made. Included in this subsection is the requirement that if a contested case hearing is held regarding the application, the EQC “shall issue findings of fact and a decision on the [permit] application within sixty (60) days after the final hearing.” *Id.* at -406(p). DEQ then “shall issue or deny the permit no later than fifteen (15) days from receipt of any findings of fact and decision from the [EQC].” *Id.*

## **II. Procedure in this matter**

In this case, DEQ found Brook Mine’s permit application suitable for publication, public notice was given, and interested parties were required to submit objections to DEQ by January 27, 2017. *See Big Horn’s Response to Brook Mine’s*

*Motion to Dismiss Big Horn Coal Company's Petition for a Contested Case Hearing*, at Exh. D. Big Horn, along with other interested parties filed objections citing various problems and deficiencies with Brook Mine's permit application. Within these objections were several requests for an informal conference as contemplated by Section 406(k). DEQ, however, denied the requests for an informal conference and referred this matter to the EQC for a contested case hearing.

As DEQ has made clear in both its Prehearing Memorandum and at the hearing for this matter, it has not completed several prerequisite requirements necessary for any permit issuance and has not made the findings necessary to issue or deny the permit. See *Department of Environmental Quality's Prehearing Memorandum*, p. 2.<sup>3</sup>

### **III. Role and Powers of the EQC**

Wyoming Statute Annotated § 35-11-112 sets forth the role and powers of the EQC. Included in these powers are the specific provisions that the EQC:

- Shall conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act; and

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<sup>3</sup> While the complete transcript from the contested case hearing is not yet available to the parties, at the hearing DEQ acknowledged that certain requirements, such as the Cumulative Hydrologic Impact Assessment (CHIA), are required before any permit may be issued and have not yet been completed.

- May order that any permit, license, certification or variance be granted, denied, suspended, revoked or modified.

Wyo. Stat. Ann. § 35-11-112(a)(iv), (c)(ii).

#### **IV. Requirements the EQC Must Consider in its Review**

Pursuant to Section 406, the EQC must consider whether Brook Mine has affirmatively established that its permit application meets all legal prerequisites for permit approval. The burden of proof falls upon Brook Mine to affirmatively prove that its permit application is in compliance with all applicable state laws and meets all requirements of Section 406(n).

DEQ found Brook Mine's permit application sufficiently complete to be suitable for publication. As demonstrated by Wyo. Stat. Ann. 35-11-103(e)(xxii), this determination is not a substantive determination on the permit application. Instead, as defined by law, such determination indicated that DEQ found that the application "contains all the essential and necessary elements and is acceptable for further review for substance and compliance with the provisions of this chapter[.]" Wyo. Stat. Ann. § 35-11-103(e)(xxii). Hence, this determination of completeness and suitability for publication merely means the permit application contains the requisite pieces, but does not pass judgment as to the substance of the application's contents and its overall compliance with the substantive or legal requirements and



prerequisites to permit issuance. This review comes later, as further outlined in Section 406 and discussed below.<sup>4</sup>

Because objections were filed, Section 406(k) allowed for either an informal conference or a contested case hearing before the EQC regarding the permit application. Wyo. Stat. Ann. § 35-11-406(k). In either event, the result will be a decision regarding the permit and its suitability for issuance. *See id.* at -406(k) (stating that DEQ will “take action on the application” after the informal conference, with the right of review to the EQC); -406(p) (stating that “[i]f a hearing is held, the [EQC] shall issue findings of fact and a decision on the application”) (emphasis added). Section 406(n) then sets forth the criteria reviewed in taking action on the permit application, and provides the specific statutory criteria under which the substance of the permit application for a surface coal mining permit is evaluated. *Id.* at -406(n).

In this case, DEQ elected not to hold an informal conference, and instead referred this matter to the EQC. It is therefore the task of the EQC to conduct the contested case hearing, review the evidence presented along with the permit application and, pursuant to Section 406(p), render a decision on the application pursuant to criteria set forth in Section 406(n). Under Section 406(n), the EQC must

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<sup>4</sup> DEQ admits as much in its Prehearing Memorandum, indicating that it has not completed the final steps to determine whether to issue or deny the permit. *See Department of Environmental Quality’s Prehearing Memorandum*, p. 5.

determine whether Brook Mine has “establish[ed] that [its] application is in compliance with this act and all applicable state laws,”<sup>5</sup> and whether Brook Mine has affirmatively demonstrated that it has met the specific requirements from Section 406(n) including, but not limited to, that:

- The application is accurate and complete;
- The reclamation plan can accomplish reclamation as required by this act;
- 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)-(vii).

Section 406(n) makes it abundantly clear that the burden in these proceedings is on Brook Mine, as the applicant, to establish all requirements in Section 406(n). In fact, Section 406(n) provides the only applicable burden in reviewing Brook Mine’s permit application.

This interpretation of Section 406(n) is in complete accord with not only Section 406 and Wyo. Stat. Ann. § 35-11-103(e)(xxii)’s reference to the “further

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<sup>5</sup> The additional state laws that Brook Mine must establish its application is in compliance with come from the various rules and regulations of the Wyoming DEQ. Many of these rules and regulations have been set forth and described in the parties’ various Prehearing Memoranda and will be further set forth by the parties in their respective Proposed Findings of Fact and Conclusions of Law.

review for substance and compliance” with law, it is also in complete conformity with case law and the statutory powers and duties of the EQC.

The case of *Grams v. Environmental Quality Council*, 730 P.2d 784 (Wyo. 1986), demonstrates the correct procedure and scope of review for the EQC in this matter. In *Grams*, an applicant coal mining entity submitted an application to DEQ for a permit to mine coal. *Id.* at 786. As in this case and pursuant to Section 406, after DEQ determined the application was complete and suitable for publication, objections were filed and a hearing was held before the EQC. *Id.* At the conclusion of the hearing, the EQC did not issue a statement as to whether the application was complete or “technically adequate,” rather the EQC issued a decision on the permit directing DEQ as to whether to issue the permit. *Id.* *Grams* outlines the procedure regarding objections to a surface coal mining permit application, but more importantly, for purposes of this analysis, it demonstrates that, in these proceedings the EQC properly considers the requirements of Section 406(n) and that “the burden of proof rests upon the applicant to show that the application is in compliance with applicable law.” *Id.* at 789 (citing Wyo. Stat. Ann. § 35-11-406(n)).

Here, the EQC conducted the proceedings contesting the issuance of Brook Mine’s requested permit and it is the duty of the EQC to render a decision on the permit application based on a consideration of Section 406(n), which incorporates all other applicable laws and regulations. Wyo. Stat. Ann. § 35-11-112(a)(iv) (stating the EQC shall “conduct hearings in any case contesting the grant, denial,

suspension, revocation or renewal of any permit”); Wyo. Stat. Ann. § 35-11-406(n),(p) (mandating the EQC issue a decision on the permit application and setting forth the criteria for that decision); *Grams*, 730 P.2d at 789. Moreover, because the EQC is vested with power to “order that any permit, license, certification or variance be granted, denied, suspended, revoked or modified,” it is within the power of the EQC to direct that DEQ not issue any permit based on the application unless or until certain additional studies have occurred, or to direct that condition(s) be imposed on any issued permit to ensure compliance with all applicable laws and regulations. Wyo. Stat. Ann. § 35-11-112(c)(ii) (emphasis added). The EQC may also determine what it finds inaccurate or incomplete within the application so that Brook Mine and DEQ can address such deficiencies.

**V. Deference Afforded to EQC Finding Regarding the Permit’s Technical Adequacy/Completeness**

One final consideration for the EQC in this matter is regarding the deference or weight to be afforded to the statement or position from DEQ that the Brook Mine application is “technically adequate.” The term “technically adequate” is not found anywhere in Section 406, nor is it found in any of the relevant DEQ Rules and Regulations. To the extent that DEQ may consider the term “technically adequate” to be synonymous with the requirement in Section 406(n)(i) that the application be “accurate and complete,” such position is not based in statute or regulation, and is not entitled to any deference under case law or other legal precedent. It is within

the EQC's powers and duties to makes its own interpretation of whether Brook Mine's permit application is "accurate and complete" in light of all applicable requirements from Section 406 and DEQ's Rules and Regulations.

The case of *Platte Development Co. v. State, Environmental Quality Council*, 966 P.2d 972 (Wyo. 1998), demonstrates that the EQC properly considers the plain language of statutes rather than deferring to DEQ's interpretation of specific terms. In *Platte Development*, the issue presented to the Court involved the interpretation of the statutory term "overburden." 966 P.2d at 975. The Environmental Quality Act limited "small" mines, such as the mine at issue, to removing not more than 10,000 yards of overburden in any one year. *Id.* at 975-976. The Environmental Quality Act defined overburden as "all earth and other materials which lie above the mineral deposit," but DEQ followed an industry custom which considered topsoil distinct and not included in its overburden calculations. *Id.* The EQC, however, found that the statutory language was clear and topsoil was to be included in the overburden amount. *Id.* at 976. According to the Court, because the statutory language was clear, the EQC correctly applied the plain language of the statute as to the meaning of "overburden." *Id.*

Similarly, in this case, the EQC must consider the plain language of Section 406(n) and its requirement that Brook Mine affirmatively prove that its permit application is "accurate and complete" without deference to DEQ's position that the permit application is "technically adequate." The statutory mandate of Section

406(n) unambiguously states that the permit cannot be approved unless Brook Mine meets this burden. Wyo. Stat. Ann. § 35-11-406(n). It is therefore incumbent upon the EQC to determine if the permit application contains all necessary legal requirements, is free from errors and conforms exactly to the applicable standards. (Merriam-Webster Dictionary defining “accurate” as “free from error especially as the result of care” and “conforming exactly to truth or to a standard,” and “complete” as “having all necessary parts, elements, or steps”).<sup>6</sup> The legally undefined classification of “technically adequate” has no bearing on the EQC’s determination of “accurate and complete.”

### **CONCLUSION**

In sum, Section 406 and the relevant case law conclusively demonstrate that the EQC must render a decision on Brook Mine’s permit application in light of the relevant and applicable state laws, which undoubtedly include Section 406(n). Section 406(n) is the guiding principle for the EQC’s review in that matter, and unambiguously demonstrates that the burden of proof rests on Brook Mine to affirmatively establish that its permit application is in compliance with all applicable state laws, specifically including those from Section 406(n).

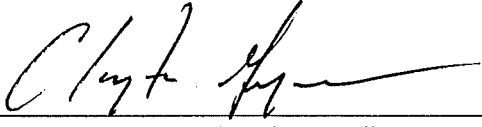
In making its determination and rendering a decision on the permit application, the EQC may direct that DEQ modify or impose conditions upon any

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<sup>6</sup> See <https://www.merriam-webster.com>.

permit as necessary to ensure compliance with the all applicable state laws and to ensure that any application is accurate and complete. Finally, the EQC owes no deference to any determination of the application being “technically adequate” in the context of evaluating whether the permit application is “accurate and complete” for purposes of Section 406(n).

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## CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2017 a true and correct copy of the foregoing was served by email to the following:

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