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BROOK MINING COMPANY, LLC

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

IN RE BROOK MINE APPLICATION)
) Civil Action No. 17-4802
TFN 6 2-025)

**BROOK MINE’S BRIEF ON STATUTES AND REGULATIONS THAT
THE COUNCIL MUST CONSIDER**

INTRODUCTION

The Council’s Briefing Order asks the parties to brief what law applies to the Council’s review of the Brook Mine permit application and why. Like many parts of this permitting process, the Wyoming Supreme Court has not explained the boundaries of the Council’s review pertaining to Wyo. Stat. Ann. 35-11-406(k). Yet, past Wyoming Supreme Court decisions and Wyoming statutes define the Council’s authority and are the Council’s best guide as to its duties concerning the permitting process.

Using settled law and the pertinent statutes, the Council must review whether the Department of Environmental Quality (DEQ) correctly deemed Brook’s Permit application suitable for publication. This means the Council should review whether Brook has proven that its permit application is complete and has no deficiencies as defined in the Wyoming

Environmental Quality Act. Similar to an informal conference, the Council should decide if the objectors raised any deficiencies in Brook’s permit application and issue findings of fact and conclusions of law to answer that question. But the Council should not make the findings required by section 406(n) because only the DEQ administrator can make those findings.

ARGUMENT

I. The Council’s authority allows it to review only DEQ’s administration of Section 406(a)-(h).

The Council’s authority flows from the Wyoming Environmental Quality Act. *Amoco Prod. Co. v. State Bd. of Equalization*, 12 P.3d 668, 673 (Wyo. 2000) (explaining an agency’s power depends upon statutes, so “they must find within the statute warrant for the exercise of any authority which they claim.”) As a result, the Council can exercise only the authority that the Wyoming legislature granted to it. *Id.*; *Platte Dev. Co. v. State, Env’tl. Quality Council*, 966 P.2d 972, 975 (Wyo. 1998). Under the Environmental Quality Act, the Council has authority to determine “all cases or issues” under the Act and conduct hearings in “any case contesting” the administration of the Act. Wyo. Stat. Ann. § 35-11-112(a), (a)(iii), (a)(iv), (b)(ii). *See also Wyo. Dep’t of Env’tl. Quality v. Wyo. Outdoor Council*, 2012 WY 135, ¶ 28, 286 P.3d 1045, 1052-53 (Wyo. 2012) (stating the scope of the Council’s authority).

Specifically, the Act authorizes the Council to conduct a “contested case hearing” for: 1) promulgating rules and regulations required to administer the Act; 2) adopting, amending, or repealing rules or regulations as recommended by advisory boards; 3) contesting “the administration or enforcement of any law, rule, regulation, standard or order issued or administered by the department or any division thereof;” or 4) contesting the “grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act.” Wyo. Stat. Ann. § 35-11-112(a)(i)-(iv).

The first two situations do not apply because this case does not involve rulemaking. The fourth situation also does not apply because Brook's permit has neither been granted nor denied. This leaves the third situation, which is to decide whether DEQ properly administered and enforced the permitting requirements under the Environmental Quality Act.

In deciding what this authority allows the Council to review, the Council should turn to the plain meaning of the statutory language. *In the Interest of JB*, 2017 WY 26, ¶ 12, 390 P.3d 357, 360 (Wyo. 2017) (stating that courts apply the plain meaning of a statute to decide the legislature's intent). The statute states the Council will conduct contested case hearings for laws, rules, regulations, and orders "issued or administered" by DEQ.¹ The word "administered" is past tense of the verb "administer." Administer means "to manage or supervise the execution, use, or conduct of." Merriam-Webster's Dictionary <https://www.merriam-webster.com/dictionary/administer>. Applied to this case, this definition means the Council's review is limited to past actions that DEQ has taken to manage or supervise the execution, use, or conduct of the permit application process as set out in the Wyoming Environmental Quality Act.

For Brook's permit application, DEQ has taken two actions. First, DEQ deemed the permit application complete under Wyo. Stat. Ann. § 35-11-406(e)-(g). Second, DEQ found the application has no deficiencies and was suitable for publication. *See id.* at (a)-(d), (h)-(j). Therefore, the plain language of the Council's authorizing statute means the Council can review these two actions. Given the plain language of the statute, the Council must review whether these

¹ The word "issue" does not matter because DEQ has not issued a state decision document or permit. So no document has issued that the Council can review.

two DEQ actions complied with sections 406(a)-(h) and the regulations implementing those sections.

This same logic means the Council does not consider section 406(n) because the DEQ administrator has not yet issued any findings under that section. Section 406(n) states “[n]o surface coal mining permit shall be approved unless the applicant affirmatively demonstrates **and the administrator** finds in writing” 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;
- (iv) The area proposed to be mined is not included within an area designated unsuitable for surface coal mining pursuant to W.S. 35-11-425, within an area where mining is prohibited pursuant to section 522(e) of P.L. 95-87 [30 U.S.C. § 1272(e)], or within an area under review for this designation under an administrative proceeding, unless in such an area as to which an administrative proceeding has commenced pursuant to W.S. 35-11-425, the operator making the permit application demonstrates that, prior to January 1, 1977, he has made substantial legal and financial commitments in relation to the operation for which he is applying for a permit;
- (v) The proposed operation would:
 - (A) Not interrupt, discontinue, or preclude farming on alluvial valley floors that are irrigated or naturally subirrigated, but, excluding undeveloped range lands which are not significant to farming on said alluvial valley floors and those lands as to which the administrator finds that if the farming that will be interrupted, discontinued or precluded is of such small acreage as to be of negligible impact on the farm’s agricultural production; or
 - (B) Not materially damage the quantity or quality of water in surface or underground water systems that supply these alluvial valley floors. Paragraph (n)(v) of this section shall not affect those surface coal mining operations which in the year preceding August

3, 1977, produced coal in commercial quantities, and were located within or adjacent to alluvial valley floors or had obtained specific permit approval by the administrator to conduct surface coal mining operations within said alluvial valley floors. If coal deposits are precluded from being mined by this paragraph, the administrator shall certify to the secretary of the interior that the coal owner or lessee may be eligible for participation in a coal exchange program pursuant to section 510(b)(5) of P.L. 95-87 [30 U.S.C. § 1260(b)(5)].

(vi) If the area proposed to be surface coal mined contains prime farmland, the operator has the technological capability to restore such mined area, within a reasonable time, to equivalent or higher levels of yield as nonmined prime farmland in the surrounding area under equivalent levels of management and can meet the soil reconstruction standards of this act and the regulations promulgated pursuant thereto;

(vii) The schedule provided in paragraph (a)(xiv) of this section indicates that all surface coal mining operations owned or controlled by the applicant are currently in compliance with this act and all laws referred to in paragraph (a)(xiv) of this section or that any violation has been or is in the process of being corrected to the satisfaction of the authority, department or agency which has jurisdiction over the violation.

Id. (emphasis added). The DEQ administrator has not yet issued any findings under 406(n) because DEQ has not conducted the cumulative hydrologic impact assessment (CHIA) that allows the administrator to make findings under section 406(n)(iii). *See* Wyo. Admin. Code § ENV LQC Ch. 19 sec. 2. So DEQ has neither issued any findings under 406(n) nor administered that portion of section 406. As a result, the Council does not have the authority to conduct a contested case hearing to decide something DEQ has not yet issued or administered. *See Amoco Prod. Co.*, 12 P.3d at 673 (explaining an agency’s power depends upon statutes, so “they must find within the statute warrant for the exercise of any authority which they claim.”).

To be sure, the Council has general authority to grant or deny permits. Wyo. Stat. Ann. § 35-11-112(c)(ii). But in construing that statute and other related statutes, the more specific

statute controls over a general statute if they come into conflict. *Cheyenne Newspapers, Inc. v. Bd. of Tr. of Laramie Cty. Sch. Dist. No. One*, 2016 WY 113, ¶ 23, 384 P.3d 679, 685 (Wyo. 2016). Here, the Council has specific authority when exercising its role in contested cases like this one and that authority does not include granting a permit. *See* Wyo. Stat. Ann. § 35-11-112(a)(iii). Section 406 also specifically defines how the permitting process works and assigns the authority to issue a permit for surface coal mining to the director of DEQ. *See* Wyo. Stat. Ann. §§ 35-11-109(a)(xiii) (stating **the director shall** “issue, deny, amend, suspend, or revoke permits....”); 35-11-406(p) (**the director shall** issue or deny a permit within 15 days after receiving any findings of fact and conclusions of law from the Council). As a result, the Council’s authority to grant a permit does not apply here because two more specific statutes control over the Council’s general authority to grant permits. Thus, the Council’s authority in this contested case is to issue findings of fact and conclusions of law as to the actions taken by DEQ under section 406(a)-(h).

II. The rules of statutory construction show that the Council reviews DEQ’s administration of Section 406(a)-(h).

When deciding what a statute means, the Council must seek to give effect to the legislature’s intent. *Chevron, U.S.A. v. Dep’t of Revenue*, 2007 WY 43, ¶ 10, 154 P.3d 331, 334 (Wyo. 2007). This begins with the plain meaning of the words the legislature chose to find the “most likely, most reasonable, interpretation of the statute, given its design and purpose.” *In the Interest of JB*, ¶ 12, 390 P.3d at 360. The Council should consider each statutory section *in pari materia* (sections with the same subject) giving effect to each “word, clause, and sentence according to their arrangement and connection.” *Id.* In this analysis, the “internal structure and the functional relation between the parts and the whole” guide how the Council should interpret a statute. *Id.* at ¶ 16, 390 P.3d at 361. But the Council cannot read words into the statute or render

provisions meaningless. *City of Casper v. Holloway*, 2015 WY 93, ¶ 20, 354 P.3d 65, 71 (Wyo. 2015). Finally, the Council cannot interpret a statute in a way that produces “absurd results.” *Id.* Using these rules to interpret 35-11-406 leads to the same results as applying the Council’s enabling statute.

The Council’s role in this case comes from section 406(k), which states “an informal conference or a public hearing shall be held within twenty (20) days after the final date for filing objections....” Wyo. Stat. Ann. § 35-11-406(k). As described above, the Council serves as the contested case body for DEQ’s administration of laws, rules, and regulations. *Id.* at 112(a)(iii). The public hearing that invokes the Council’s jurisdiction comes after DEQ finds a permit application suitable for publication. *See id.* at 406(j). For a permit application to become suitable for publication, it must be complete and have no deficiencies. *See id.* at (a)-(h). The Environmental Quality Act defines completeness as an application that “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). The Act defines deficiencies 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.” *Id.* at (xxiv). Both processes rely on regulations that flesh out details a permit must have. *See* Table on Page 10.

This sequence and structure suggests the Council should review only what led DEQ to deem Brook’s permit application suitable for publication. *See In the Interest of JB*, ¶ 12, 390 P.3d at 361 (explaining that the Council must give effect to a statute’s arrangement and connection). The legislature chose to structure section 406 so that only a DEQ finding of completeness without deficiency could trigger the Council’s review of comments related to the

permit application. No other part of section 406 states that DEQ's findings will trigger a public hearing. The legislature made a deliberate choice to restrict how a public hearing comes to be; that choice also restricts what the Council reviews. *See id.*

The sequence also shows that the legislature did not intend the Council to review the findings under 406(n). In the structure of the statute, the required findings under section 406(n) come after DEQ deems a permit application suitable for publication and after an informal conference or public hearing has taken place. *Compare* Wyo. Stat. Ann. § 35-11-406(k), (n). Those findings do not have to occur before publication. *See id.* at 406(n). Instead, the findings must occur only before a permit issues, which occurs 15 days after the Council makes its findings of fact and conclusions of law. *Id.* at 406(p). Had the legislature wanted the 406(n) findings to be part of the Council's review, it could have required DEQ make those findings before a permit gets published for public comment. The legislature chose not to do so.

The legislature also expressly stated that the administrator makes the findings under 406(n). The Act defines "administrator" as "the administrator of each division of the department." Wyo. Stat. Ann. § 35-11-103(a)(v). That definition does not include the Council and cannot refer to the Council under any reasonable interpretation. The administrator must also conduct the CHIA, which "shall be sufficient to the make the determination of W.S. § 35-11-406(n)(iii)." WY ADC ENV LQC Ch. 19 § 2. The plain meaning of these sections reinforces the fact that the Council does not make the findings under 406(n).

The federal process for issuing a permit under the Surface Mining Control and Reclamation Act (SMCRA) provides more proof that the legislature intended to have only DEQ make the findings under 406(n). As the Council knows, federal law requires Wyoming's surface mining laws be as stringent as federal law for Wyoming to maintain primacy. 30 U.S.C. § 1255;

30 C.F.R. § 730.11. SMCRA’s regulations require the “regulatory authority” make the exact same findings as those described in section 406(n) of Wyoming’s Environmental Quality Act. *See* 30 C.F.R. § 773.15. The federal regulations define regulatory authority as “the department or agency in each State which has primary responsibility at the State level for administering the Act in the initial program, or the State regulatory authority where the State is administering the Act under a State regulatory program....” *Id.* at § 700.5. So in implementing SMCRA’s requirements, the legislature also required the administrator of the regulating agency to make the findings under 406(n).

The same analysis applies to section 406(m). Section 406(m) states that the “director” cannot deny a permit application, except for the reasons stated. *See* Wyo. Stat. Ann. § 35-11-406(m). Again, the plain language means the legislature did not intend for the Council to make the decision under 406(m), leaving the Council to review only the findings that DEQ made leading to publication of the permit application.

This view is also the only way to overcome a practical dilemma. While the completeness and deficiency reviews that DEQ conducts are necessary to make findings under section 406(n), they are not sufficient for all of the required findings because DEQ has to assess cumulative impacts independent of the permit application. *See* WY ADC ENV LQC Ch. 19 § 2. As mentioned above, DEQ has not yet conducted the CHIA. No Wyoming statute or regulation requires that DEQ conduct that assessment before it deems a permit application suitable for publication. Here, DEQ has not yet done that assessment. So it is impossible for the Council to review those findings because they do not exist. To require the Council to review 406(n) would create an absurd and illogical result where the Council would have to review something that is neither completed nor yet required. *See Holloway*, ¶ 20, 354 P.3d at 71 (stating that the Council

should not read a statute to create an absurd result); *In the Interest of JB*, ¶ 12, 390 P.3d at 360 (stating that the Council must find the “most likely, most reasonable, interpretation of the statute, given its design and purpose.”) As a result, the Council should not consider section 406(n).

III. Brook bears the burden of proof.

Brook does not dispute that as the permit applicant it must provide the information necessary for DEQ to find the permit application suitable for publication. *See* Wyo. Stat. Ann. § 35-11-406(a)-(h). Brook also does not dispute that it continues to have the burden of proving to this Council that its application is complete and without deficiencies. *Id.* The Council should also weigh heavily the regulatory and technical expertise of DEQ. Although the Council may not have to defer to their expertise, DEQ personnel are the true experts on permit applications.

IV. The law the Council should review

Although the Council should review only whether Brook has proven that its permit application is complete, non-deficient, and suitable for publication, that review involves multiple statutes and regulations. For the Council’s benefit, Brook has set out the applicable statutes and their associated regulations in the table below. Brook will incorporate these statutes and regulations into its proposed findings of fact and conclusions of law.

Statutes	Regulations
35-11-406(a)	<p>Wyoming Administrative Rules Department of Environmental Quality Land Quality – Coal:</p> <p>Ch. 2, §§ 2(a)(i), (ii), (iii), (v) § 3(b) §§ 4(a)(i), (ii), (iii), (vi), (vii), (viii), (ix), (x), (xi)(A)-(B), (xii), (xiii), (xiv) § 5(a)(viii), (xiii), (xvi) §§ 6 (b)(ii), (vi), (x)</p> <p>Ch. 4, §§ (2)(a), (d), (f), (j), (l)(C)-(D), (n), (r), (t), (w), (x) Ch. 5 § 6 Ch. 7, §§ 1, 2 Ch. 12, §§ 1(a)(v)(D), (E)-(F), (viii), (xi), (xii) Ch. 19, § 2</p> <p>Wyoming Administrative Rules Department of Environmental Quality Land Quality – Coal, Appendix B</p>
35-11-406(b)	<p>Wyoming Administrative Rules Department of Environmental Quality Land Quality – Coal:</p> <p>Ch. 2, § 2(a)(v) §§ 4(a)(i), (ii), (iii), (v), (xii), (viii), (ix), (x), (xi), (xii), (xiv), (xv), (xvi), (xvii), (xviii) §§ 5(a)(i), (iv), (vii), (ix), (x), (xi), (xvi), (xviii), (xix) §§ 6(a), (b)(ii), (v), (vi), (x);</p> <p>Ch. 3, § 2 Ch. 4, §§ 2(i), (iii), (iv), (a), (b), (c)(xii)(F), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (q), (r), (w), (x) Ch. 5, § 3 Ch. 6, § 3(a) Ch. 12, §§ 1(a)(i), (v) § 2 Ch. 19, § 2</p> <p>DEQ Land Quality Division Guideline 12</p>
35-11-406(c)	Wyoming Administrative Rules Department of Environmental Quality Land Quality – Coal, Ch. 2, § 2 Section 1.(e)
35-11-406(d)	Wyoming Administrative Rules Department of Environmental Quality Land Quality – Coal, Ch. 2, § 2 Section 4.(a)(xvii)
35-11-406(e)	
35-11-406(f)	

Statutes	Regulations
35-11-406(g)	
35-11-406(h)	
35-11-406(j)	
35-11-406(k)	
35-11-406(p)	

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CERTIFICATE OF SERVICE

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

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