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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 REPLY BRIEF

Oral Argument Requested

Pursuant to the June 13, 2017 Order, the Powder River Basin Resource Council ("Resource Council") hereby files its reply brief in the above captioned proceedings, addressing the applicability of requirements of Section 406(n) of the Environmental Quality Act.

SCOPE OF THE EQC'S DECISION

As discussed in the Resource Council's opening brief on this subject, the scope of the EQC's decision is governed by Section 406(p) of the Environmental Quality Act. Remarkably, neither the Department of Environmental Quality ("DEQ") nor the applicant Brook Mining Company, LLC ("Brook") recognizes this plain fact. Instead, both try to use Section 406(k) as the governing section. *See* DEQ Br. at 2, 7-8; Brook Br. at 7 ("The Council's role in this case comes from section 406(k) . . ."). However, that section only details the format and timing of the public hearing, *not* the decision that comes after it.

In fact, both DEQ and Brook cite Section 406(p) for the sole purpose of noting that the permit is issued or denied by the DEQ. *See* DEQ Br. at 8; Brook Br. at 6. As discussed in its opening brief, the Resource Council does not dispute that the permit is ultimately issued or

denied by the DEQ. Resource Council Br. at 1-2. However, also as discussed, under Section 406(p), that decision is only made *after* and *pursuant to* the Council's "decision on the application." *Id*. at 2. In other words, the decision to be made by the Council is a decision to instruct DEQ to issue or deny the permit, and if to issue it, under what conditions.

The Resource Council's interpretation is consistent with EQC precedent, a Wyoming Supreme Court decision, and the plain language of Section 406(p). DEQ and Brook's interpretations are consistent with none of this authority.

First, EQC precedent demonstrates that the Council's role is to instruct DEQ to issue or deny the permit. In two cases in 1985, the Council held hearings on coal mine permit applications after objections were raised. *In the Matter of the Objections to the Permit Application of Fort Union Mine Partners (TFN 1 6/215)*, Findings of Fact, Conclusions of Law and Order, Mar. 8, 1985*; In the Matter of Objections to the Permit Application of Amax Coal Company, Eagle Butte Mine (TFN 1 6/212)*, Findings of Fact, Conclusions of Law and Order Granting Permit, Nov. 19, 1985.[1] In both decisions, the Council based its decision on Section 406(p) and Section 112(c)(ii), which provides that 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).[2] The Council's decision was to order that the permits be granted.

[1] While there have been several other contested case hearings on new coal mine permit applications, or on renewals or amendments to coal mine permit applications (which also fall under Sections 406(k) and 406(p)), from a review of the EQC website, many of those cases were dismissed and/or settled so there are no final decisions from the Council available. Additionally, documents from some of the earlier cases are not available on the website and were unable to be reviewed by the Resource Council in the time allotted for this brief. However, if necessary, the EQC staff could work with the Council to review the archived files for consistency in precedent.

[2] Brook argues that the Council's authority comes from Section 112(a). Brook Br. at 2-3. However, that is only true if there is not additional, and in this case more specific, authority for the Council's hearing and decision, as there is here with Sections 406(k) and 406(p). Brook also

The Amax case was then appealed to the Wyoming Supreme Court. In its decision, the Supreme Court affirmed the EQC decision. *See Grams v. Envt'l 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.").

In other words, EQC precedent, as affirmed by the Wyoming Supreme Court, demonstrates that the EQC's "decision on the application" under Section 406(p) 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, as DEQ and the permit applicant argue.[3]

Finally, a plain reading of Section 406(p) dictates that the Council makes the "decision on the application," which is the *same* decision under the section the DEQ Director would make if an informal conference was held or if no informal conference or hearing was requested. Additionally, the section specifies that the DEQ action to issue or deny the permit is made a mere fifteen days after the decision of the Council, evidencing that the DEQ action is simply following through on the Council's decision, not making a new decision on different or additional grounds, a decision that would almost certainly require time beyond fifteen days.

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provides a passing cite to Section 112(b)(ii), which does not exist. This is likely a typo for Section 112(c)(ii), but the brief does not cite or explain that text in that location. Later, Brook tries to discount Section 112(c)(ii) by claiming that Section 112(a) controls because it is more "specific." However, Section 406(p) is actually more specific and controls over the more general authority of Section 112(a), and 406(p) instructs that Section 112(c)(ii) applies. Additionally, Brook says Section 112(c)(ii) gives the Council "authority to grant or deny permits," which misses the point, because the authority is to *order* that a permit be granted or denied, with the ultimate grant or denial still being a DEQ decision, as Section 406(p) specifies.

[3] 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."

APPLICABILITY OF SECTION 406(n)[4]

Brook and DEQ's mischaracterization of the Council's decision colors their misinterpretation of whether Section 406(n) applies. They also raise other arguments, which equally fail.

First, they argue that the statute is laid out in chronological order and since (n) follows (k), and since, according to them, (k) governs here, (n) cannot yet apply. Brook Br. at 6-8 ("This sequence and structure suggests that the Council should review only what led DEQ to deem Brook's permit application suitable for publication"; "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."); DEQ Br. at 3-4 ("The statute is laid out in a specific order and the Department takes steps in accordance with that order."; "In accordance with the order in which the statute is laid out, Wyoming Statute §35-11-406(n) only comes into play *after* the Director or the Council resolve the objections to the permit application." (emphasis in original)). However, as discussed above, Section 406(p) controls the scope of the EQC's decision after a contested case hearing is held, not 406(k). As such, applying their rationale would *necessarily* dictate that that the findings of 406(n) occur *before* the decision in 406(p) based on the sequence of the statute.

Second, DEQ and Brook argue that the Council cannot apply Section 406(n) because the "administrator" makes the findings under 406(n)(i)-(vii). Brook Br. at 8; DEQ Br. at 7. These arguments miss the point that the 406(n) findings must be made *prior* to "a decision on the application" – the very decision that the Council must make in this case. All parties agree that a

[4] While there were minor disagreements between the parties on what statutory sections and regulations apply beyond Section 406(n), the bulk of the disagreement is over Section 406(n) and therefore this reply focuses there. The other disagreements will likely be covered in the Resource Council's forthcoming proposed findings of fact and conclusions of law.

"decision on the application" cannot be made without first determining whether the requirements of Section 406(n) have been met and all parties agree that these findings have not yet been made. Additionally, the DEQ and Brook's argument ignores past Council precedent where the Council applied Section 406(n). For instance, in the Amax case discussed above, the Council found that "Amax Coal Company has met its burden of proof demonstrating that the Eagle Butte Mine is in compliance with W.S. 35-11-406(n), and all other applicable state laws." *In the Matter of Objections to the Permit Application of Amax Coal Company*, Findings of Fact, Conclusions of Law and Order Granting Permit, at 6. More specifically, the Council issued findings of fact that quoted 406(n)(ii) and 406(n)(iii) verbatim, clearly evidencing that the Council made findings pursuant to 406(n) as part of its decision.[5] *Id*. at 4-5.[6]

Third, DEQ and Brook are fixated on the fact that the cumulative hydrologic impact assessment ("CHIA") has not been finalized at this time and argue that this prevents applying 406(n) to this proceeding. DEQ Br. at 4; Brook Br. at 8-9. Irrespective of the fact that testimony at the hearing showed that a CHIA is normally finalized before a public hearing, this is also a self-flawed argument as they previously argued that the "administrator" must make the findings of 406(n) and yet the CHIA is a document issued by the DEQ Director *and* the State Engineer[7] – not the administrator or even the DEQ exclusively. Thus, under their own logic, the CHIA cannot be a "finding" under Section 406(n) because it is not a finding made by the administrator.

[5] The findings were that "The reclamation plan will accomplish reclamation as required by the Environmental Quality Act" and that "The proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area."

[6] The EQC also made findings related to alluvial valley floors and prime farmland, finding that those sections of 406(n) did not apply.

[7] *See* POW Exhibit 24 at 3 ("The final CHIA must be signed by the DEQ Director and the Wyoming State Engineer prior to issuance of the permit.").

More importantly, as discussed in the Resource Council's opening brief, the CHIA is a document separate from the permit application, and it does not abdicate the need for considering whether the permit applicant has met its burden to demonstrate that the requirements of Section 406(n) are met at this time. Resource Council Br. at 8-9.[8]

STANDARD OF REVIEW & BURDEN OF PROOF

There is no dispute that the permit applicant bears the burden of proof in this proceeding. *See* Brook Br. at 10. There is naturally some dispute about what the permit applicant must prove given the disagreements discussed above, but if 406(p) applies – as it clearly does – Brook's burden *must* be to demonstrate that it complies with all applicable laws and regulations, and that its permit application does not have any deficiencies, and therefore that the Council can make "a decision on the application" to order the DEQ to grant the permit.[9] This interpretation is fully consistent with section 406(n) and Wyoming Supreme Court precedent. *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.").

CONCLUSION

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."

[8] Brook (but not DEQ) also argues that SMCRA's federal minimum standards requirement provides additional authority for its argument. Brook Br. at 8-9. It is interesting that now the company finds SMCRA's provisions relevant when in past aspects of this hearing process, the company has argued that they are irrelevant. Nevertheless, this argument should be summarily dismissed because for purposes of the Wyoming state SMCRA program, approved by OSMRE, the EQC clearly has an important role, both in rulemaking and in contested case hearings.

[9] The Resource Council's forthcoming proposed findings of fact and conclusions of law will demonstrate this is not the case.

Alternatively, should the Council determine that the administrator (or a substitute DEQ staff member because of the conflict of interest) must make the findings of 406(n), the Council must hold that since these findings are not yet made, and since they must be made before a "decision on the application," the application should be denied. Similarly, if the CHIA is a necessary component to making the findings, since the CHIA is not yet complete, the application should be denied because "a decision on the application" cannot be made.

Either way, Section 406(n) and the findings required by that section cannot be ignored in these proceedings.

Dated this 30th day of June, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2017, I served a copy of the foregoing **REPLY 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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