Thomas L. Sansonetti (Wyo. State Bar # 43354)
Isaac N. Sutphin, P.C. (Wyo. State Bar # 6-3711)
Jeffrey S. Pope (Wyo. State Bar # 7-4859)
HOLLAND & HART LLP
2515 Warren Avenue, Suite 450
P.O. Box 1347
Cheyenne, WY 82003-1347
Telephone: (307) 778-4200
tlsansonetti@hollandhart.com
insutphin@hollandhart.com
jspope@hollandhart.com

ATTORNEYS FOR PERMIT APPLICANT
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 RESPONSE TO OBJECTOR FISHERS' BRIEF ON THE APPLICATION OF WYOMING STATUTE § 35-11-406(n) AND REQUEST FOR ORAL ARGUMENT

INTRODUCTION

In a recurring theme, Fishers assert Brook has taken positions that require the Council to make findings under 406(n) to prevent Brook from flipping the process on its head. For example, Fishers assert "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." (Fishers Br. at 6.) Where Fishers believe Brook took this position or any others is unknown and unexplained. Contrary to this assertion, Brook has agreed it must prove its permit application is complete. (Brook. Br. at 10.) Brook has agreed that its permit application must contain the information necessary for DEQ to make the required findings under section 406(n). *Id.* Brook also agreed it has to provide DEQ with a complete application without deficiencies for DEQ to deem the application suitable for publication. *Id.*

Brook diverges from Fishers and the other objectors on whether the Council or the administrator must make the findings under 406(n). Like the other objectors, Fishers brief is long on assertions but short on law. But the law matters. It defines the Council's authority and how the Council must interpret the statutes governing the permitting process. Applying that law means the Council reviews whether DEQ correctly decided Brook's permit application was complete and without deficiencies. (Brook Br. at 1-2.) After the Council issues findings of fact and conclusions of law on those issues, the administrator makes the required findings under 406(n), including the cumulative hydrologic impact assessment. (*Id.* at 5-6.) Fishers' assertions otherwise fail for the two reasons discussed below.

ARGUMENT

I. The plain language of Section 406(n) and this Council's limited review do not allow the Council to make the 406(n) findings.

Like a court, the Council must give a statute's words their plain meaning to find the "most likely, most reasonable, interpretation of the statute, given its design and purpose." *In the Interest of JB*, 2017 WY 26, ¶ 12, 390 P.3d 357, 360 (Wyo. 2017). 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).

As Brook's opening brief explained, the Council would have to violate these principles to make the 406(n) findings. (Brook Br. at 2-6.) The plain language of section 406(n) states that the administrator makes the findings. Wyo. Stat. Ann. § 35-11-406(n) ("the administrator finds in writing..."). To insert the Council into this process would ignore the word "administrator" and read the word "Council" into 406(n). Wyoming law permits neither approach. *In the Interest of JB*, ¶ 12, 390 P.3d at 360; *Holloway*, ¶ 20, 354 P.3d at 71. Beyond changing section 406(n), inserting the Council in the place of the administrator would render the administrator's specific

statutory and regulatory authority to "enforce and administer [the Environmental Quality Act]" moot. *See* Wyo. Stat. Ann. § 35-11-110(a); Wyo. Admin. Code § ENV LQC Ch. 12 § 1(a)(iv) ("In addition to the specific findings required by W.S. § 35-11-406(n), no permit shall be approved unless the Administrator also finds in writing...").

The Surface Mining Control and Reclamation Act (SMCRA) again provides a good foil to Fishers' position. Under SMCRA, the "regulatory authority" makes the findings for the federal counterpart of 406(n). *See* 30 U.S.C. § 1260(b). Here, the regulatory authority is DEQ; so having the DEQ administrator make the findings under 406(n) ensures Wyoming's compliance with SMCRA.

Section 406(o), which deals with operators with previous violations, erases any doubt about 406(n)'s plain meaning. Section 406(o) states, "[n]o permit shall be issued to an applicant after a finding **by the director or council**...." *Id.* This language demonstrates that the legislature could allow either the administrator or the Council to make findings if it had wanted. But the legislature chose not to put language in 406(n) that specified the Council.

Fishers' position would also ask the Council to exceed its statutory authority. (*See* Brook Br. at 2-6.); *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.") Under the Environmental Quality Act, the Council has authority to conduct contested cases about "the administration or enforcement of any law, rule, regulation, standard or order issued or administered by the department or any division thereof." Wyo. Stat. Ann. § 35-11-112(a)(iii). This means the Council's review is limited to what DEQ has administered; in other words, whether DEQ correctly deemed the permit application complete, without deficiencies, and suitable for

publication. (Brook Br. at 3-4.) 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. (*Id.* at 4-5.)

Fishers, however, do not make any attempt to reconcile their arguments with relevant law. Instead, Fishers argue that the Council must consider section 406(n) because that is necessary to prove Brook has a complete application. (Fishers Br. at 1-3, 6-7.) This distorts how the permitting process works. The Environmental Quality Act defines a complete application as one 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(a)(xxii). DEQ has a duty to review an application for completeness before it reviews for deficiencies and before it deems the application suitable for publication. *Id.* at 406(e)-(f). Here, DEQ did that and after 6 rounds of comments and responses deemed Brook's permit application without deficiencies and suitable for publication. No part of the Environmental Quality Act requires DEQ to make the 406(n) findings before Brook published its permit application. Instead, the Act only requires the administrator make the findings before a permit is issued. *See id.* at 406(n).

Even so, Brook agrees that the information and data in the permit application is necessary for the administrator to make the 406(n) findings. But that information alone is not sufficient to make the findings because DEQ must perform the cumulative hydrologic impact assessment and other analyses before it makes the 406(n) findings. *See* Wyo. Stat. Ann. § 35-11-406(n)(iii); Wyo. Admin. Code § ENV LQC Ch. 19 sec. 2; Wyo. Admin. Code § ENV LQC Ch. 12 § 1(a)(iv). Those assessments use information and data from the permit application along with internal DEQ information and data. The Council, however, does not have DEQ's internal

information or data, or the statutory authority to conduct the required assessments, making Fishers' argument legally and practically impossible.

Fishers also contend that Brook attempts to duck some or all of the permitting requirements because DEQ's witnesses discussed technical adequacy. (Fishers Br. at 3-4.) This is just another attempt to manufacture support without facts. Brook has never claimed the phrase "technical adequacy" substitutes for the statutory and regulatory requirements. Instead, DEQ testified that technical adequacy is its way of describing the review to determine if a permit application is without deficiencies. DEQ's use of jargon does not change the statute or change that DEQ conducted the required review for deficiencies. It also does not provide a legal basis for the Council to conduct the 406(n) findings.

Fishers' lone legal support for any arguments comes from a quote in a United States Supreme Court case about the National Environmental Policy Act. (Fishers Br. at 5.) That case addresses a statutory requirement under federal law that has nothing to do with requirements under the Environmental Quality Act or its federal counterpart, SMCRA.

II. The public can still participate in the process if the Council does not make the 406(n) findings.

Fishers claim that the public may never have the chance to learn about the 406(n) findings or comment on them without the Council making the findings now. (Fishers' Br. at 5-6.) This wrongly implies Fishers or other objectors have no means to challenge DEQ's findings under 406(n). Any objector can appeal the Council's decision, including a decision not to make the 406(n) findings. Objectors can appeal the DEQ Director's decision to issue a permit to Brook. The objectors will also have access to DEQ's 406(n) findings and the cumulative hydrologic impact assessment because they will be publically available documents.

Even so, the public's right to participate in the permitting process is not unlimited. The Act sets out a single chance for the public to comment—after DEQ deems a permit suitable for publication. *See* Wyo. Stat. Ann. § 35-11-406(k). The Act does not give the public the right to comment or object at every stage of the process. The public does not even get the right to comment after DEQ deems a permit application complete and the applicant publishes notice. *Id.* at 406(g). While the Fishers may want more chances to comment, they do not have the statutory right or the due process right to do so. If the Fishers wish to change that, the legislature not the Council is the body who has the sole legal authority to help them.

CONCLUSION

The legislature chose not to include a hearing specific to 406(n) or state that the 406(n) findings must occur before the public comment process. Likewise, section 406 does not grant the Council authority to make these decisions or render a final decision. Fishers clearly dislike this reality and assert that the Council should find otherwise. But the Fishers have no law to support their claims and no logic to connect the sections of 406 and the statutes governing this Council's authority into a cohesive whole. As said at the start, the law matters. And it shows that Brook's reading of what the Council should decide is the most logical, coherent reading of all relevant statutes.

Brook requests the Council schedule oral argument on the parties' briefings relating to statutes and regulations the Council must consider.

DATED: June 30, 2017.

Thomas L. Sansonetti (Wyo. State Bar # 43354)
Isaac N. Sutphin, P.C. (Wyo. State Bar # 6-3711)
Jeffrey S. Pope (Wyo. State Bar # 7-4859)
HOLLAND & HART LLP
2515 Warren Avenue, Suite 450
P.O. Box 1347
Cheyenne, WY 82003-1347
Telephone: (307) 778-4200
tlsansonetti@hollandhart.com
insutphin@hollandhart.com
jspope@hollandhart.com

ATTORNEYS FOR PERMIT APPLICANT
BROOK MINING COMPANY, LLC

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2017, I served a true and correct copy of the foregoing by email to the following:

Lynnette J. Boomgaarden
Clayton H. Gregersen
Crowley Fleck, PLLP
237 Storey Boulevard, Suite 110
Cheyenne, WY 82009
lboomgaarden@crowleyfleck.com
cgregersen@crowleyfleck.com
Attorneys for Big Horn Coal

Todd Parfitt
Director, DEQ
200 W. 17th Street
Cheyenne, WY 82002
Todd.Parfitt@wyo.gov

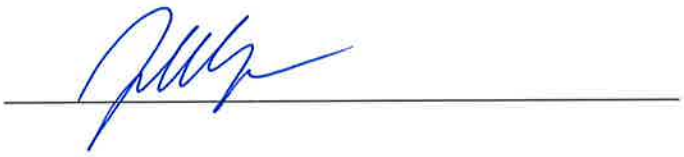
Andrew Kuhlmann
Assist. Attorney General
andrew.kuhlmann@wyo.gov
james.larock@wyo.gov
Attorneys for DEQ

Shannon Anderson
Powder River Basin Resource Council
sanderson@powderriverbasin.org

Alan Edwards
Deputy Director, DEQ
Alan.edwards@wyo.gov

Jay Gilbertz
Attorney for Mary and David Brezik-Fisher
jgilbertz@yonkeetoner.com

David Bagley
Jim Ruby
Environmental Quality Council
Jim.ruby@wyo.gov



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