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

IN THE MATTER OF PERMIT RENEWAL)	OAH DOCKET NO. 19-004-220
APPLICATION OF CONTURA COAL)	C103
WEST, LLC.: PT0214;)	EQC DOCKET NO. 18-4803
AND IN THE MATTER OF THE)	EQC DOCKET NO. 18-4805
APPLICATIONS FOR COAL MINE)	
PERMIT TRANSERS OF BLACKJEWEL,)	
LLC.: PT0214 & PT0428.)	

**DEPARTMENT OF ENVIRONMENTAL QUALITY’S
TRIAL BRIEF**

The State of Wyoming, Department of Environmental Quality (DEQ), pursuant to the Hearing Examiner’s March 5, 2019, *Amended Order Setting Prehearing Conference, and Setting Hearing* hereby submits the following trial brief to aid the Council in its consideration of the evidence submitted at the hearing:

RELEVANT LEGAL FRAMEWORK

I. Performance Bonds and Real Property Collateral

Every mining operation in Wyoming is required to obtain a mining permit and a license to mine from DEQ prior to commencing operations. Wyo. Stat. Ann. §§ 35-11-405 and -410. Among other requirements, an applicant for a mining permit must submit a detailed mine and reclamation plan “dealing with the extent to which the mining operation

will disturb or change the lands to be affected, the proposed future use or uses and the plan whereby the operator will reclaim the affected lands to the proposed future use or uses.” Wyo. Stat. Ann. § 35-11-406(b). The reclamation plan must include a “projected timetable for accomplishment.” *Id.* at 406(b)(xix). “The reclamation plan shall include a time schedule for each major step in the reclamation which coordinates the operator's reclamation plan with the mining plan in such a manner so as to facilitate reclamation at the earliest possible time ... and the orderly development of the mining property.” Rules Wyo. Dept. of Env'tl. Quality, Land Quality Division-Coal, Chapter 2, § 6(a). This includes a schedule for rough backfilling and grading, which must “follow coal removal as contemporaneously as possible based upon the mining conditions.” Rules Wyo. Dept. of Env'tl. Quality, Land Quality Division-Coal, Chapter 4, § 2(b)(i).

In order to ensure that mine operators faithfully perform all statutory and regulatory requirements, including reclamation as outlined in the approved plan, operators have to post a performance bond. Wyo. Stat. Ann. § 35-11-417(a). The amount of the performance bond is calculated annually and equals the estimated cost of reclaiming the land that has been mined and the land that will be mined over the next year. Wyo. Stat. Ann. §§ 35-11-411(d) and 417(c)(i) and (ii). The amount also includes DEQ's “estimate of the additional cost to the state of bringing in personnel and equipment should the operator fail or the site be abandoned.”¹ *Id.* In lieu of a bond, an operator may deposit with DEQ federally insured

¹ The amount of the bond is calculated using Guideline 12 entitled Standardized Reclamation Performance Bond Format and Cost Calculation Methods. Guideline 12 requires operators to include an additional 5% for unknown costs in the annual bond calculation.

certificates of deposit, cash, governmental securities, or irrevocable letters of credit. Wyo. Stat. Ann. § 35-11-418. In addition, the administrator may accept real property as a collateral bond, “provided that the real property is located in this state, the bond provides a perfected first lien security interest in the real property in favor of the department and the protection provided by the bond is consistent with the objectives and purposes of [the Environmental Quality Act].” Wyo. Stat. Ann. § 35-11-417(g).

Before accepting real property as a collateral bond, an appraiser must determine the fair market value of the property. Rules Wyo. Dept. of Env'tl. Quality, Land Quality Division-Coal, Chapter 11, § 3(c)(i)(A).² The proposed operator must propose one or more appraisers to the administrator. *Id.* The administrator may select one of the proposed appraisers or he may reject any or all of them. *Id.* There is no requirement in the rules that the administrator’s selection of the appraiser be in a specific form. Thus an email or verbal approval is permitted. Once the administrator selects an appraiser, and the appraisal is completed, the property is “valued at the difference between the fair market value and any reasonable expense anticipated by the Department in selling the property.” *Id.* Once real property collateral has been accepted, the administrator may require that the collateral be re-appraised annually. Rules Wyo. Dept. of Env'tl. Quality, Land Quality Division-Coal, Chapter 11, § 4(a)(iv).

² References to Chapter 11 in this brief are to the rules as they existed when the events at issue in these proceedings took place and when these actions were filed. The Council recently voted to amend Chapter 11, and the Governor signed the amended rule on May 3, 2019.

If the administrator accepts real property collateral, the operator is required to execute a mortgage in favor of the DEQ. Rules Wyo. Dept. of Env'tl. Quality, Land Quality Division-Coal, Chapter 11, § 3(c)(v). This mortgage must vest in DEQ “the right and power to sell or otherwise dispose of the property by public or private proceedings so as to ensure reclamation of the affected lands[.]” *Id.* The mortgage must be executed by the operator “and duly recorded as required by law so as to be first in time and constitute notice to any prospective subsequent purchaser of the same real property or any portion thereof.” *Id.* at § 3(c)(v)(A).

II. Outstanding Violations

In addition to submitting mine and reclamation plans, applicants for a permit must supply a wide range of information with their initial application. Wyo. Stat. Ann. § 35-11-406. In particular, applicants must submit “a schedule listing all notices of violation which resulted in enforcement action of [the Environmental Quality Act], and any law rule or regulation of the United States, or of any department or agency in the United States pertaining to air or water environmental protection incurred by the applicant in connection with any surface coal mining operation during the [preceding three years].” Wyo. Stat. Ann. § 35-11-406(a)(xiv). This requirement does not require an applicant to list mine safety violations, as any such violations are the responsibility of other agencies.

An applicant for a mine permit must also identify the people and business entities that own or control the applicant including: any operators, if different from the applicant; the applicant’s partners, officers, members, major shareholders and directors as applicable; and business entities in the applicant’s organization including any ultimate parent entity

and their presidents, chief executive officers, directors and major shareholders, as applicable. Rules Wyo. Dept. of Env'tl. Quality, Land Quality Division-Coal, Chapter 2, § 2(a)(i)(B)-(E). The applicant must also identify any pending, current, or previous surface coal mining permit applications filed in the United States held by the applicant and certain individuals and entities associated with the applicant during the preceding five years. *Id.* at § 2(a)(i)(F).

DEQ takes the ownership and control information submitted by the applicant and enters it into the Applicant Violator System (AVS) administered by the Office of Surface Mine Reclamation and Enforcement (OSMRE). Rules Wyo. Dept. of Env'tl. Quality, Land Quality Division-Coal, Chapter 12, § 1(a)(ix). The AVS generates a compliance history report on each person or entity indicating whether those individuals or entities have any violations anywhere in the United States and whether those violations are unabated or uncorrected. According to OSMRE,

Any violation in the AVS is listed as either Outstanding or Conditional. Outstanding means the violation is unabated or uncorrected. Conditional means that based upon an agreement or other circumstance, the violation may not cause the state with jurisdiction to immediately determine permit ineligibility.

AVS Office User Assistance Liasons, published by the Applicant/Violator System Office and available at <https://www.osmre.gov/programs/AVS.shtm>.

Whether a violation is considered by the relevant regulatory authority to be unabated or uncorrected is important, because an applicant is not eligible for a permit if a surface mining operation directly owned or controlled by the applicant has an unabated or uncorrected violation in the AVS. The Surface Mining Reclamation and Control Act of

1977 provides that permits “shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation[.]” 30 U.S.C. § 1260(c). The Environmental Quality Act must be at least as stringent as this provision and, in fact, it contains the same limitation. Wyo. Stat. Ann. § 35-11-406(n)(vii); *see also* Rules Wyo. Dept. of Env'tl. Quality, Land Quality Division-Coal, Chapter 12, § 2(a)(x)(A). Accordingly, if an applicant’s compliance history report reveals “outstanding” violations, the applicant is not eligible to obtain a permit, but if the report only reveals “conditional” violations, the applicant is eligible to obtain a permit.

Under federal law, a violation is considered to be abated or corrected if, among other reasons, the “violation is the subject of a good faith administrative or judicial appeal contesting the validity of the violation[.]” 30 C.F.R. § 773.14. Accordingly, applicants are not precluded from obtaining a permit due to an ongoing dispute with another regulatory authority that could be resolved in favor of the applicant. An applicant can correct and abate violations while a permit application is pending, and if it does so, DEQ must request a new compliance history report from the AVS no more than five days before a permit is issued. Rules Wyo. Dept. of Env'tl. Quality, Land Quality Division-Coal, Chapter 12, § 2(a)(xii). Thus, the final compliance history report obtained by DEQ governs the eligibility determination.

Separate from ascertaining compliance through the AVS, the director of DEQ or the Council can initiate proceedings against an applicant or operator effectively barring them from mining in Wyoming. The Environmental Quality Act provides:

No permit shall be issued to an applicant after a finding by the director or council, after opportunity for hearing, that the applicant or operator specified in the application controls or has controlled mining operations with a demonstrated pattern of willful violations of such nature and duration with such resulting irreparable **harm to the environment** as to indicate reckless, knowing or intentional conduct.

Wyo. Stat. Ann. 35-11-406(o) (emphasis added). Mine safety violations cannot form the basis of an adverse finding under this provision. Any such violations are the responsibility of other agencies.

III. Permit Renewals and Transfers

Mine permits are granted for a term of five years. Wyo. Stat. Ann. § 35-11-405(c). Once granted, a mine permit is “entitled to a right of successive renewal upon expiration with respect to areas within the boundaries of the existing permit if public notice has been given, any additional revised or updated information has been provided and the operation is in compliance with the applicable laws and regulations, and if the renewal requested will not substantially jeopardize the operator’s responsibility on existing affected land.” Wyo. Stat. Ann. § 35-11-405(e). Operators seeking to renew their mine permit must submit an application on a form supplied by DEQ. This application incorporates the existing permit, including the mine and reclamation plans and is therefore much less extensive than a new application. However, all of the procedural requirements relating to review, public participation, and approval or disapproval of permit applications, and permit term and conditions generally apply to permit renewals. Rules Wyo. Dept. of Env’tl. Quality, Land Quality Division-Coal, Chapter 12, § 1(b).

Mine permit holders can also transfer their permit to another entity if they so desire so long as the proposed transferee demonstrates that it is qualified to hold the permit “as though he were the original applicant for the permit” and he agrees “to be bound by all the terms and conditions of the original permit.” Wyo. Stat. Ann. § 35-11-408. Among other requirements, the proposed transferee must show that they are not in violation of the Environmental Quality Act or the laws of the United States and post a sufficient bond or other collateral to ensure the mine can be fully reclaimed. A potential transferee can “obtain a renewal bond by either transfer of the permit holder’s bond, written agreement with the permit holder, or providing other sufficient bond or equivalent guarantee.” Rules Wyo. Dept. of Env’tl. Quality, Land Quality Division-Coal, Chapter 12, § 1(b)(ii)(A). Thus, a potential transferee can transfer both the permit and any real property collateral securing a performance bond.

IV. Public Comment and Objections

DEQ notifies the public of all permit applications, renewals, and transfers before approval, and any interested person has the right to file written comments and objections to the application. Wyo. Stat. Ann. § 35-11-406(j) and (k). Interested persons generally have the right to inspect the contents of permit applications, renewals, and transfers, and of course, notice of the application must be published twice during DEQ’s review process to advise the public of the opportunity inspect the application. *Id.* at § 406(g) and (j). However, interested persons do not have the right to inspect documents that the Legislature has determined should be protected under the Wyoming Public Records Act, including documents containing confidential commercial or financial data supplied by any person.

Wyo. Stat. Ann. § 16-4-203(d)(v) (requiring the custodian of public records containing confidential commercial or financial data to deny the right of inspection to any person requesting them).

If an interested person believes that DEQ has improperly withheld a document related to an application, they must challenge that determination under the Wyoming Public Record Act in district court.³ Wyo. Stat. Ann. § 16-4-203(f). The Council does not have jurisdiction to resolve that dispute. Similarly, a claim that a permit application should be denied because a person was denied the ability to inspect a document withheld under the Wyoming Public Records Act necessarily asks the Council to resolve the same issue—was inspection properly denied under the Wyoming Public Records Act. And such a claim is similarly beyond the Council’s jurisdiction. *See, e.g., Powder River Basin Res. Council v. Wyo. Oil & Gas Conservation Comm'n*, 2014 WY 37, ¶ 28, 320 P.3d 222, 230 (“Proceedings to challenge denial of access to documents claimed to be public must follow procedures established by the WPRA[.]”).


V. Burden of Proof

At issue in these proceedings, are three separate agency actions—the renewal of Contura Coal West’s existing permit for the Belle Ayr Mine issued on October 23, 2018, and the proposed permit transfers of the permits for the Belle Ayr Mine and the Eagle Butte Mine from Contura Coal West to Blackjewel, LLC. Under Wyoming Statute § 35-11-

³ The Powder River Basin Resource Council filed an action in the district court challenging the denial of its request for the real property appraisal. That matter is set for hearing before the district court on May 29, 2019.

406(m) and (n), BlackJewel bears the burden of proving the permit transfers should be granted. Conversely, because Contura Coal West's permit renewal was approved by DEQ, and the Powder River Basin Resource Council is appealing that decision, the burden of proving arbitrary or unlawful administrative action falls on the complainant. *Knight v. Env'tl. Quality Council*, 805 P.2d 268, 273 (Wyo. 1991).

DATED this 7th day of May, 2019.



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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing upon the persons below via e-mail and by depositing the same in the United States mail, first-class postage prepaid, this 7th day of May 2019, addressed as follows:

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