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BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
UPON REFERRAL FROM THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

In re Applications for Coal Mine Permit)	OAH Docket No. 19-004-220
Transfers – PT0214 & PT0428)	
Blackjewel, LLC)	EQC Dockets No. 18-4805 &
)	18-4803
In re Permit Renewal Application)	
Contura Coal West – PT0214)	
)	

**POWDER RIVER BASIN RESOURCE COUNCIL’S “TRIAL” BRIEF ON ISSUES OF
FACT AND LAW TO BE PRESENTED AT THE HEARING**

The Powder River Basin Resource Council (“Resource Council”) hereby files its “Trial Brief” in the above captioned proceedings. This brief summarizes the Resource Council’s issues of law and fact to be considered at the hearing.

BACKGROUND

In response to the required public notices, the Resource Council timely filed objections to the renewal of Contura Coal West, LLC’s (“Contura”) coal mine permit for the Belle Ayr Mine (permit number 214)¹ and the proposed transfer of coal mine permits PT0214 for the Belle Ayr Mine and PT0428 for the Eagle Butte Mine from Contura to Blackjewel, LLC (“Blackjewel”). The objections have since been consolidated into these proceedings before the Environmental Quality Council (“EQC” or “Council”).

¹ Objections to Contura’s permit renewal were filed with the DEQ Land Quality Division Administrator along with a request for an informal conference. The informal conference request was denied and the Resource Council timely filed a request for a hearing before the EQC.

STATEMENT OF ISSUES OF FACT AND LAW

As fully described below, the evidence presented at the hearing will demonstrate three main issues of fact and law:

- (1) The portion of the reclamation bond for the Belle Ayr Mine collateralized with real property does not meet legal standards either to renew the permit or to transfer the permit to Blackjewel;
- (2) Companies associated with the owners and controllers of Blackjewel have outstanding environmental and safety violations, including serious mine cessation orders, that were not disclosed in the applications to transfer the permits, in violation of the legal standards established for permit transfers; and
- (3) These outstanding environmental and safety violations prevent Blackjewel from obtaining a coal mine permit in Wyoming.

BURDEN OF PROOF

1. The Wyoming Environmental Quality Act (“WEQA”) dictates that “[t]he applicant for a surface coal mining permit has the burden of establishing that his application is in compliance with this act and all applicable state laws.” *Id.* at § 406(n). This requirement equally applies to permit renewals and permit transfers.

2. This burden applies to these proceedings because these proceedings are being held pursuant to sections 406(k) and 406(p) of the WEQA, to discuss and settle issues raised by objections to applications related to coal mine permits.²

² As laid out in the petitions for hearing, and paragraph 7 *infra*, the procedural rules and statutes governing new coal mine permit applications equally apply to applications to renew a permit or to applications to transfer a coal mine permit. Wyoming law follows controlling federal law under the Surface Mine Control & Reclamation Act in this regard.

LEGAL BACKGROUND

Law Governing Coal Mine Permit Renewals

3. Requirements for coal mine permit renewals, as well as grounds for approval and denial are governed by Section 405(e) of WEQA and associated regulations found in Chapter 12 of the DEQ's Coal Rules and Regulations.

4. Section 405(e) provides:

Any valid surface coal mining permit issued pursuant to this act is entitled to a right of successive renewal upon expiration with respect to areas within the boundary 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 applicable laws and regulations and if the renewal requested will not substantially jeopardize the operator's responsibility on existing affected land.

(emphasis added)

5. As such, in order to renew a permit, the permit applicant must show, and DEQ must affirmatively find, that the "operation is in compliance with applicable laws and regulations."

6. One of the main requirements of the WEQA for coal mine operations is adequate bonding to cover the full cost of third-party reclamation work should a company default on its obligations at any time during the life of the mine. *See* DEQ Coal Rules & Regulations Ch. 12 § 2; W.S. § 35-11-417. In order to renew a coal mine permit, the mining operation must be in compliance with "applicable laws and regulations" related to bonding. This is especially true for collateral bonding, including real property collateral bonds at issue in these proceedings. Federal regulations require "[t]he bond value of collateral may be evaluated at any time but it shall be evaluated as part of permit renewal and, if necessary, the performance bond amount increased or decreased." 30 C.F.R. 800.21(e) (emphasis added).

Law Governing Coal Mine Permit Transfers

7. Applications for transfer of a coal mine permit follow the same process and procedure as a new coal mine application. DEQ Coal Rules & Regulations Ch. 12 § 1(b) (“All procedural requirements of the Act and the regulations relating to review, public participation, and approval or disapproval of permit applications, and permit term and conditions shall, unless otherwise provided, apply to . . . permit transfer.”). This means, public participation opportunities are governed by section 406(k) of the WEQA.

8. Applications for a permit transfer are governed by section 408 of the WEQA and associated regulations. Section 408 provides:

A permit holder desiring to transfer his permit shall apply to the administrator. The potential transferee shall file with the administrator a statement of qualifications to hold a permit as though he were the original applicant for the permit and shall further agree to be bound by all of the terms and conditions of the original permit. The administrator shall recommend approval or denial of the transfer to the director. No transfer of a permit will be allowed if the current permit holder is in violation of this act, unless the transferee agrees to bring the permit into compliance with the provisions of this act.

9. As such, in order to transfer a coal mine permit, the current operation must be in compliance with all of the provisions of the WEQA and its associated regulations applying to coal mines and the proposed transferee must affirmatively demonstrate that it is qualified to hold a coal mine permit “as though he were the original applicant.” In essence an application to transfer a permit is a blend of an application to renew a permit and a new permit application. The application invokes both a review of the current permit and operations and a review of the transferee’s qualifications under the standards of a new permit pursuant to WEQA Section 406 and its implementing regulations.

10. DEQ implementing regulations further clarify the scope of the review of the transferee's qualifications to hold a permit. DEQ Coal Rules & Regulations Ch. 12 §1(b)(ii)(B) and 1(b)(ii)(E)(i).

11. Submission of reclamation bonding is also a core component of any permit transfer: "The potential transferee shall 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." DEQ Coal Rules & Regulations Ch. 12 § 1(b)(ii)(A); *see also* Ch. 12 § 1(b)(ii)(E)(II) (requiring the Administrator to find in writing that the transferee "[h]as submitted a performance bond or other guarantee, or obtained the bond coverage of the original permittee" before approval of the transfer) and DEQ Coal Standard Operating Procedure No. 1.8 at page 5.

ISSUE 1: THE RECLAMATION BOND FOR THE BELLE AYR MINE IS NOT LEGALLY ADEQUATE

12. In the case of Contura's application to renew the permit for the Belle Ayr Mine, \$26,749,000 of the company's \$119,090,000 reclamation bond (about 22% of the bond amount for the mine) is guaranteed through a real property collateral bond. DEQ Ex. 2 at 45.

13. Contura has transferred the real property to secure the bond to Blackjewel, and Blackjewel is proposing to continue Contura's real property bond, at the same amount. *Id.*

14. According to DEQ rules, in order to guarantee reclamation work through a real property collateral bond, an appraisal "selected by the Administrator" must be conducted. The appraisal is used to value the property for purposes of the bond, which is set at "the difference between the fair market value and any reasonable expense anticipated by the Department in selling the property." DEQ Coal Rules & Regulations Ch. 11 §5(a)(iii)(A).³

³ Citations are to the new version of these rules, which became effective May 3, 2019.

15. An appraisal was conducted by Robert J. Brockman on July 7, 2017. PRB Ex. 2, pg. 1.⁴ While the appraisal was “recertified” on July 18, 2018, neither the fair market value nor the bond amount was updated. *Id.*

16. DEQ did not require an appraisal conducted for Blackjewel as part of the permit transfer application.

17. DEQ Coal Rules & Regulations provide “If the Administrator accepts any real property as collateral, the Administrator shall require possession by the Department of the mortgage agreement executed by the operator in favor of the Department of Environmental Quality.” DEQ Coal Rules & Regulations Ch. 11 § 5(a)(iii)(D). This “mortgage shall be executed 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;* see also W.S. § 35-11-417(g) (allowing the Council to enact regulations for real property bonds provided there is a “perfected first lien security interest in the real property in favor of the department”).

18. The DEQ’s rules further require the operator to provide “[e]vidence of ownership of the real property . . . in the form of a clear and unencumbered title.” *Id.* at § 5(a)(iii)(C).

19. These perfection and recording rules, along with the requirement for an unencumbered title, are particularly important in the instant case, where Campbell County has a lien against Blackjewel property because of the company’s failure to timely pay county taxes. Campbell County and Blackjewel recently entered into⁵ an agreement that provides that Blackjewel “specifically consents and agrees that the County shall have a lien against any and all property of Taxpayer and in its sole discretion may exercise any and all statutory lien rights

⁴ This appraisal was submitted to the EQC under protective cover for use in a confidential portion of the hearing.

⁵ The agreement was approved by the Campbell County Board of County Commissioners on April 2, 2019.

which it may possess.” PRB Ex. 3, pg. 3. In other words, Blackjewel’s property is not “clear and unencumbered.”

20. Other issues related to the appraisal, including property valuation questions, will be brought forward by the Resource Council during the confidential portion of the hearing.

ISSUE 2: THE APPLICATION TO TRANSFER THE PERMITS FROM CONTURA TO BLACKJEWEL FAILED TO INCLUDE NECESSARY INFORMATION RELATED TO BLACKJEWEL’S QUALIFICATIONS AND VIOLATION HISTORY

21. The WEQA requires a permit applicant for a surface coal mining permit application to include “a schedule listing all notices of violation which resulted in enforcement action of this 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 three (3) year period prior to the date of application.” W.S. § 35-11-406(a)(xiv).

22. This schedule must demonstrate 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.* at 406(n)(vii).

23. DEQ regulations further specify that the permit application must include the following information:

- (ii) A complete statement of compliance which shall include:
 - (A) A brief statement, including identification and current status of the interest, identification of the regulatory authority, and description of any proceedings and their current status, of whether the applicant, the operator, or any subsidiary, affiliate or entity which the applicant or operator or entities owned or controlled by or under common control with the applicant or operator has:

(I) Had a Federal or State permit for surface coal mining operations suspended or revoked during the five (5) year period preceding the date of submission of the application; or

(II) Forfeited a Federal or State performance bond or similar security deposited in lieu of bond in connection with surface coal mining and reclamation operations during the five (5) year period preceding the date of submission of the application;

(III) For each suspension, revocation, or forfeiture identified in subsections (I) and (II) above, the applicant shall provide a brief statement of the facts involved including the permit number, date of action and amount of forfeiture if applicable, responsible regulatory authority and stated reasons for action, current status and identifying information regarding any judicial or administrative proceedings related to the action.

(B) A list of notices of violation required by W. S. § 35-11-406(a)(xiv) that describe or identify the violation, a list of all unabated or uncorrected violation notices incurred in connection with any surface coal mining and reclamation operation that the applicant or operator owns or controls on that date, identify the associated permit and MSHA numbers, the name of the person to whom the violation notice was issued, when it occurred, any abatement action taken and if the abatement period has not expired a certification that the violation is being abated or corrected to the satisfaction of the agency with jurisdiction over the violation, the issuing regulatory authority, and any proceedings initiated concerning the violation. This listing shall include only notices issued to the applicant or operator and any subsidiaries, affiliates, or persons owned or controlled by or under common control with the applicant or operator.

DEQ Coal Rules & Regulations Ch. 2§2(a)(ii).

24. As discussed above, these requirements apply to a permit transferee because that transferee must demonstrate it is “qualified” to receive a coal mine permit. DEQ Coal Rules & Regulations Ch. 12 §1(b)(ii)(B).

25. Disclosure of this information is not just for DEQ’s internal review of the application. It is a necessary component of the application, and must be complete at the time of public notice to allow public review and comment on the information contained in the permit transfer applications.

26. The requirements are a fundamental component of our federal and state coal mine regulations. The goal of this part of SMCRA, as implemented in WEQA, is to prevent an

operator with outstanding violations from forming a new legal entity free and clear of those outstanding violations. In essence, the violations trace back and are attributed to not just to the company or mine, but to the owners and controllers of the company or mine. If there are violations, there is a “permit block” for those owners until all violations at *any* mine in the United States is abated or corrected to the satisfaction of the regulatory entity that issued the violation.

27. Here, the applications to transfer the permits only included a violation schedule for the Belle Ayr and Eagle Butte mines. The only violation listed for the Eagle Butte mine transfer application only included two violations that happened at the mine. DEQ Exhibit 2 at page 29.

28. The applications failed to include the required complete schedule for Blackjewel, including any violations by “any subsidiaries, affiliates, or persons owned or controlled by or under common control with the applicant or operator” as required by DEQ’s regulations.

29. Blackjewel is “under common control” with various other companies through Jeffrey Hoops, who is the President & CEO of Blackjewel Holdings, which owns Blackjewel. DEQ Exhibit 2 at 31; *see also* Secretary of State registration for Blackjewel, LLC, listing Jeffrey Hoops as the President and CEO, PRB Exhibit 5.

30. No entities “under common control with the applicant or operator” were listed in the permit transfer application.

31. Revelation Energy and affiliated companies under common control, including Keystone Industries LLC, Lone Mountain Processing LLC, and Dominion Coal Group, have had dozens of cessation orders issued to them over the past three years. As the name implies, a cessation order is an order to stop mining because of the seriousness of the violation. These

violations should have been disclosed and discussed in the transfer applications. As laid out in DEQ's regulations, the discussion of the violations should have included:

- (1) a description of the violation with identity of the issuing regulatory authority
- (2) the associated permit and MSHA numbers
- (3) the name of the person to whom the violation notice was issued
- (4) when it occurred
- (5) a discussion about any abatement action taken, and if the abatement period has not expired, a certification that the violation is being abated or corrected to the satisfaction of the agency with jurisdiction over the violation; and
- (6) a description of any proceedings initiated concerning the violation.

ISSUE 3: THE PERMIT APPLICANT OR OPERATOR CANNOT LAWFULLY OBTAIN A PERMIT UNDER SECTION 406(N)(VII) OR SECTION 406(O)

32. As discussed above, under Section 406(n)(vii), any violation required to be identified in Section 406(a)(xiv) must be shown to be “in the process of being corrected to the satisfaction of the authority, department or agency which has jurisdiction over the violation.”

33. Also as discussed above, Blackjewel failed to disclose the violations in the permit transfer applications, let alone include the required description to demonstrate if and how the violations are being corrected.

34. The DEQ typically checks violations of surface coal mining operations under common ownership and control as the applicant through the Office of Surface Mining Reclamation and Enforcement's (“OSMRE”) Applicant Violator System (“AVS”). *See* DEQ Coal Standard Operating Procedure 1.8 at 5, PRB Exhibit 4. AVS is a computer database

updated from all coal mining regulating states and OSMRE itself.⁶ If an applicant fails an “AVS check” it is unable to receive a permit.

35. During the course of its review of the permit transfer applications, DEQ conducted AVS checks. One such check on June 12 revealed sixty violations from companies under common control with Blackjewel, many of which were “outstanding,” and a check on July 12 revealed thirty-two violations, four of which were “outstanding.” PRB Exhibits 7 and 8 (provided by DEQ to the Resource Council through a Public Records Act request); *see also* PRB Exhibit 10.

36. However, merely conducting an AVS check is not enough to demonstrate compliance with the WEQA and its implementing regulations. For instance, the AVS system identifies a violation as “conditional” merely if the violator has appealed the violation, meaning in some cases the operator objects to the violation in the first place and is not correcting it.

37. According to OSMRE, “Conditional means that based upon an agreement, appeal, or other circumstance, it is possible the violation may not affect permit eligibility.” OSMRE, AVS Users Guide, Sept. 2018, <https://www.osmre.gov/programs/AVS/AVS-usersGuide-maintenanceRights.pdf> at 64 (emphasis added); *see also* DEQ Exhibit 8 at 4.

38. In other words, the AVS system is not sufficient to be the only source for DEQ to determine whether a violation has in fact been “corrected to the satisfaction” of the regulatory authority that issued the violation.

39. There is no evidence in the permit files (DEQ Exhibits 2 and 3) that DEQ contacted the citing regulatory agencies or otherwise did due diligence to determine whether the violations were being corrected to the satisfaction of those agencies. Additionally, as discussed

⁶ See <https://www.osmre.gov/programs/avs.shtm>

above, the permit transfer applications failed to include the necessary information to discuss and disclose the status of the violations and any regulatory proceedings.

40. Moreover, the AVS system does not check compliance with “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.” Violations of air or water environmental protection *or* other U.S. law must also be disclosed in the application and found to be in compliance by the DEQ.

41. Entities under common ownership with Blackjewel also have outstanding and serious violations issued by the Environmental Protection Agency (“EPA”) and state agencies enforcing water protection laws, such as the Clean Water Act.

42. These entities also have violations issued by the Mine Safety Health Administration (“MSHA”), an agency which enforces laws, rules, and regulations of the United States. Some of the MSHA violations have been issued for safety violations causing the death of coal miners. Jeffrey Hoops owns fifty mines with outstanding MSHA fines, amounting to almost a \$1 million in delinquent fines. PRB Exhibit 14 at 7.

43. None of this information was disclosed in the permit transfer applications, nor was the compliance with these laws and regulations checked by DEQ during its review.

44. In addition to requiring a check of recent violations, the WEQA also prevents a coal mine permit to be issued to an operator who “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.” W.S. § 35-11-406(o). This requirement is above and beyond the applicant violator system check described above and it mirrors federal SMCRA regulations contained in 30 C.F.R. § 774.11(c).

45. While the AVS check renders an applicant ineligible to receive a permit on a temporary basis, section 406(o) renders an applicant *permanently* ineligible to receive a permit.

46. At issue in this proceeding is whether the EQC has sufficient basis to hold an evidentiary hearing under section 406(o).

Respectfully submitted this 10th day of May, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of May, 2019, the foregoing **TRIAL BRIEF** was mailed to:

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And was served on the following parties via postal mail, electronic mail, and the EQC online docket system:

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