

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
insupthin@hollandhart.com
jspope@hollandhart.com

STATE OF WYOMING
IN THE OFFICE OF ADMINISTRATIVE HEARINGS
UPON REFERRAL FROM THE WYOMING DEPARTMENT OF ENVIRONMENTAL
QUALITY

IN THE MATTER OF PERMIT RENEWAL)	OAH DOCKET NO. 19-004-220
APPLICATION OF)	C103
CONTURA COAL WEST, LLC.: P20214;)	DOCKET NO. DEQ/EQC 18-4803
)	
AND IN THE MATTER OF THE)	
APPLICATIONS FOR COAL MINE PERMIT)	
TRANSFERS OF)	
BLACKJEWEL, LLC.: PT0214 & PT0428;)	DOCKET NO. DEQ/EQC 18-4805

**CONTURA COAL WEST, LLC'S PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

I. INTRODUCTION

This case should decide a single question: did the Wyoming Department of Environmental Quality (DEQ) correctly decide that the permit transfer applications filed by Blackjewel, LLC (Blackjewel) were suitable for publication under Wyo. Stat. Ann. § 35-11-406(h)? Yes. The Council can and should rely on DEQ's findings from its completeness and deficiency review (commonly known as a technical review) of the transfer applications for three reasons.

First, DEQ is unbiased. It has nothing to gain should the permit transfer applications move forward. Second, DEQ applied the correct standard in reviewing the transfer applications by following DEQ's longstanding protocol in serving as an independent third-party evaluator of

reported violations on the Office of Surface Mining's applicant violator system (AVS). Third, the Powder River Basin Resource Council (PRBRC) has presented no evidence beyond unfounded assertions from its attorney that the permit transfer applications do not meet the applicable statutory requirements and that DEQ should have considered information outside the statutory requirements. The absence of affirmative evidence in favor of PRBRC's position is telling. Contrary to what PRBRC suggests, this case does not require the Council to decide if Wyoming's permit transfer application process should be more stringent or result in different analyses of possible violations in other states. Rather, the Council need only look at the affirmative evidence presented, which all favored approving the permit transfer applications for publication.

Therefore, Contura Coal West, LLC (Contura) respectfully proposes the Council adopt the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. On December 8, 2017, Contura assigned its rights to the Belle Ayr and Eagle Butte mines located south of Gillette, Wyoming to Blackjewel. (DEQ Ex. 2 at DEQ02-00007; DEQ Ex. 3 at DEQ03-00017.) As part of this assignment, Blackjewel assumed responsibility as the licensed operator of both mines. (Tr. Vol. I, p. 268.) Blackjewel has been operating both mines for the last 18 months. (Tr. Vol. I, pp. 261, 268.) The assignment also included the contingent transfer of ownership of two ranches, the Black Thunder Ranch and Belle Ayr Ranch. (Tr. Vol. I, p. 40; DEQ Exhibit 14.) Blackjewel would become the owner of those properties when it completed the permit transfer process and became the permit holder for both mines. (Tr. Vol. I, p. 284.)

2. On August 30, 2018, Blackjewel submitted its application to transfer the mine permit for the Eagle Butte Mine from Contura to Blackjewel. (DEQ Exhibit 3.) The application included:

- Blackjewel’s license to mine;
- Applicable surface owner consents;
- Blackjewel’s corporate information;
- A list of adjacent surface owners;
- A Statement of Compliance and Right to Entry;
- The mine’s three year-violation history, which showed one violation from 2015;
- A list of permits and pending permit applications; and
- Reclamation bonding information and calculations.

(*Id.*) Around the same time, Blackjewel submitted its application to transfer the mine permit for the Belle Ayr Mine from Contura to Blackjewel. (DEQ Ex. 2.) It included the same information as the transfer application for the Eagle Butte Mine.

3. After DEQ received these applications, it conducted a check of the Office of Surface Mining’s Applicant Violator System (AVS) on both Contura and Blackjewel. (Tr. Vol. I, pp. 78-79, 88, 90, 268-69.) The AVS exists for states to see reports on violations of other states’ environmental mining laws and regulations within their respective jurisdictions. (Tr. Vol. I, p. 67.) An AVS report shows whether violations are outstanding or conditional. (*Id.* at 69.) An outstanding violation operates as a permit block, precluding any jurisdiction from issuing a permit to a company with that type of violation. (Tr. Vol. I, p. 69-71; DEQ Ex. 8.) A conditional violation, however, is one that has either been abated, settled, or appealed. (*Id.*) Conditional violations do not preclude a regulatory authority from issuing a permit. (Tr. Vol. I, p. 71.) In

addition to the AVS report showing violations for a specific entity, it also shows violations for any related or commonly owned and controlled entities. (Tr. Vol. I, p. 68.)

4. DEQ's initial AVS check revealed no outstanding violations of any type for Contura. (DEQ Ex. 8.) It also revealed no outstanding violations for Blackjewel. (*Id.*)

5. The initial AVS check did reveal outstanding violations for a company called Revelation Energy, which has ties to Blackjewel. (Tr. Vol. I, p. 77.) Although the AVS report showed 42 violations, DEQ had no concerns about the total number of violations. (*Id.* at 82, 168-69.)

6. After seeing these violations, DEQ sent a letter to Blackjewel informing it that DEQ could not process Blackjewel's application until it resolved the outstanding violations listed on the AVS report. (DEQ Ex. 9.) This was typical for DEQ to give an applicant the chance to correct outstanding violations. (Tr. Vol. I, p. 86.) DEQ then placed the AVS report into the file for Blackjewel's permit application.

7. Shortly after receiving DEQ's letter, Blackjewel informed DEQ that it would resolve those violations. (DEQ Ex. 10.) In the ensuing months, Blackjewel worked to resolve the outstanding violations. DEQ ran later AVS checks to see if Blackjewel made progress on resolving the outstanding violations. (Tr. Vol. I, pp. 79-81.)

8. On October 4, 2018, the AVS check revealed that Blackjewel still had no outstanding violations and Revelation Energy's violations were all conditional. (DEQ Ex. 11.) DEQ placed this AVS report in the permit transfer files.

9. In addition to running multiple AVS checks, Kyle Wendtland, DEQ's Land Quality Division Administrator, spoke with representatives of the Office of Surface Mining

about whether Blackjewel would be a responsible operator in Wyoming. (Tr. Vol. I, pp. 79-80.) The Office of Surface Mining had no concerns with Blackjewel. (*Id.* at 84-85.)

10. In addition to the AVS reports, DEQ also evaluated Blackjewel's performance as operator of the Belle Ayr and Eagle Butte mines. (Tr. Vol. I, pp. 96-88.) During Blackjewel's 18-month operatorship, it had no violations or issues with DEQ. (*Id.* at 268-69.) DEQ also did not believe that Blackjewel or any of the affiliated companies willfully violated environmental laws because

That's a -- that's a very high bar, and it would -- it would be if they were not willing to abate these violations in some form or fashion and come to some agreement or -- or meaningful way to move forward in concluding or somehow resolving the violation, they would never have sought to resolve and do a conditional status. And in this case, the company immediately went in and resolved those issues to conditional status.

(*Id.* at 86-87.)

11. For the application seeking to transfer the permit for the Belle Ayr Mine, Blackjewel proposed to use the same reclamation bonding method as Contura. (DEQ Ex. 2.) This method included the use of real estate as collateral to cover portions of the reclamation bond. (Tr. Vol. I, pp. 283-85.) Specifically, Contura pledged two ranches, Black Thunder Ranch and Belle Ayr Ranch, to cover approximately \$26 million of the total bond amount for the mine. (*Id.* at 39-40.)

12. Before accepting this bonding method, DEQ took several steps. First, DEQ required that Contura have the two ranches appraised. (*Id.* at 50.) During that process, DEQ had to approve the appraiser that Contura selected. (*Id.*) Ultimately, DEQ approved Robert Brockman of Keyhole Land Company to appraise the ranches. (*Id.* at 50-53; *See* DEQ Exs. 5 and 6.) DEQ approved Mr. Brockman because he was a "licensed appraiser, certified, qualified in Wyoming. In addition to that, he has spent a large portion of his career in rural appraisals. He is

an ACA -- or ACR appraiser, which is an accredited rural appraiser, I believe. And he has -- again, meets all the licensed and qualifications and requirements, is in good standing with the real property board, has 40 years, four decades, of experience appraising rural ranch property in Wyoming.” (Tr. Vol. I, pp. 52-53.)

13. In 2017, Mr. Brockman appraised both ranches on Contura’s behalf. (Tr. Vol. II, pp. 320-21.) Mr. Brockman used accepted methods within the appraisal industry, including identifying comparable parcels and sales. (*Id.* at 323-24; 373-74.) He also applied his decades of experience to analyze the market for these types of ranches. (*Id.* at 401-02.) He then researched the specific land, the market, his personal database of land sales, and spoke with other appraisers. (*Id.* at 321-23.) Ultimately, Mr. Brockman concluded that the two ranches together were worth over \$26 million. (Contura Ex. 1, p. CCW 0002.) Mr. Brockman prepared a report explaining how he reached that conclusion and provided supporting data. (*See* Contura Ex. 1.)

14. DEQ received a copy of that report and accepted the appraised value of the two ranches.

15. During the lead up to this case, Contura retained a third-party expert appraiser, John Sherman, to evaluate Mr. Brockman’s appraisal. (Tr. Vol. II, p. 422, 424-25.) Mr. Sherman had some questions about the analysis and supporting data used for Mr. Brockman’s appraisal. (*Id.* at 427-29.) Those questions included the animal unit months, size adjustments, and math errors. (*Id.* at 430-40.) Mr. Sherman and Mr. Brockman met to discuss and resolve Mr. Sherman’s questions, leading to several revisions in the appraisal. (*Id.* at 428.) The revisions decreased the total appraised value of the two ranches by approximately \$600,000. (*Id.* at 445-46.) Based on these revisions, Mr. Sherman concluded that Mr. Brockman conducted a sound appraisal that meets applicable industry standards and supports the appraised value. (*Id.* at 442.)

16. DEQ received these revisions; but had no concerns about the state's ability to secure the reclamation of the Belle Ayr mine. (Tr. Vol. I, p. 62.)

17. In addition to these revisions, Mr. Brockman recently completed a new appraisal on the ranches as required by Wyoming law. (Tr. Vol. II, p. 326.) The results of that appraisal indicate that the market value for the two ranches has increased several million dollars. (*Id.* at 411.)

18. As part of approving Contura's use of real estate as collateral for reclamation bonding, DEQ required that Contura execute a mortgage in DEQ's favor. Contura executed that mortgage. (*See* DEQ Ex. 4.) The mortgage is recorded at Page 00296 in Book 3038 of Photos, of the Campbell County Land Records. (*Id.*)

19. The mortgage contains several terms relevant to the Council's findings. Section 1.1 defines Mortgaged Property as "all of Mortgagor's [Contura] interest in (i) the real property described in Exhibit A, together with any greater or additional estate therein as hereafter may be acquired by Mortgagor ("Land")." (*Id.* at DEQ04-00002.) The real property described on Exhibit A includes all the land for Black Thunder and Belle Ayr Ranches and any mineral rights that Contura owns in those lands. (*Id.* at DEQ04-00014.)

20. Section 2 of the Mortgage states: "To secure the full and timely payment of the Indebtedness and the full and timely performance of the Obligations, Mortgagor hereby mortgages, pledges, grants, bargains, assigns, sells, transfers, and conveys with power of sale, to the Department the Mortgaged Property to have and hold, and Mortgagor does hereby bind itself, its successors, and assigns to warrant and forever defend the title to the Mortgaged Property unto the Department for so long as any of the Obligations remain outstanding." (*Id.* at DEQ04-

00004.) Importantly, this section of the mortgage also binds any of Contura’s successors and assigns. (*Id.*)

21. To make Section 2 enforceable, the Mortgage warrants that “Mortgagor owns the Mortgaged Property free and clear of any liens, claims or interests, (b) upon recordation with the appropriate authority, this Mortgage creates valid, enforceable first priority liens and security interests against the Mortgaged Property, (c) the Mortgaged Property does not include any lands in the process of being mined, reclaimed, or the subject of the Bonding Agreements, and (d) the Mortgaged Property shall not be mined while it remains subject to this Mortgage.” (*Id.*)

22. Beyond this provision, DEQ also obtained an opinion from its attorney that Contura had clear title to the two ranches. (Tr. Vol. I, pp. 41-42.) Contura owned the ranches after its predecessor, Alpha Natural Resources, went through bankruptcy. (*Id.*) DEQ’s attorney concluded that the bankruptcy gave Contura free and clear title. (*Id.*) DEQ did not obtain an abstract because the opinion of its attorney provided better information. (Tr. Vol. I, p. 130.)

23. The mortgage also ensures that DEQ as the mortgagee has the first priority rights in the property:

3.2. First Lien Status. Mortgagor shall preserve and protect the first lien and security interest status of this Mortgage. If any lien or security interest is asserted against the Mortgaged Property, Mortgagor shall promptly, and at its expense, (a) give the Department a detailed written notice of such lien or security interest, including origin, amount, and other terms, and (b) pay the underlying claim in full or take such other action so as to cause it to be released.

(*Id.* at DEQ04-00004.)

24. Should DEQ ever need to use the mortgage as a means of collecting on the real estate used as collateral, Section 4.1 grants DEQ broad remedies if Contura defaulted on its

reclamation obligations, including the right to sell the ranches. (*Id.* at DEQ04-00006.) These remedies include the ability to sell the property at a public or private proceeding. (*Id.*)

25. Consistent with DEQ’s statutory and regulatory duty in accepting real estate as collateral, the mortgage creates a security interest:

6.1. Security Interest. This Mortgage constitutes a “security agreement” on personal property within the meaning of the UCC and other applicable law and with respect to the Personalty, Fixtures, Leases, Rents, Deposit Accounts, Property Agreements, Tax Refunds, Proceeds, Insurance, and Condemnation Awards. To this end, Mortgagor grants to the Department a first and prior security interest in the Personalty, Fixtures, Leases, Rents, Deposit Accounts, Property Agreements, Tax Refunds, Proceeds, Insurance, and Condemnation Awards, and all other Mortgaged Property which is personal property to secure the payment of the Indebtedness and performance of the Obligations, and agrees that the Department shall have all the rights and remedies of a secured party under the UCC with respect to such property. Any notice of sale, disposition, or other intended action by the Department with respect to the Personalty, Fixtures, Leases, Rents, Deposit Accounts, Property Agreements, Tax Refunds, Proceeds, Insurance, and Condemnation Awards send to Operator at least thirty (30) days prior to any action under the UCC shall constitute reasonable notice to Operator.

(*Id.* at 00009.)

26. As part of its permit transfer application, Blackjewel relied on many of the same documents and findings. DEQ calculated the reclamation bond amount for the Belle Ayr Mine and included the two ranches as collateral for approximately \$26 million of the bond. (DEQ Ex. 7.)

27. DEQ also included in that bond calculation a contingency amount that would cover any expenses associated with selling the ranches if Blackjewel defaulted on its reclamation obligations. (*Id.*) In approving the bond amount for the Belle Ayr Mine, DEQ built in an unknown contingency amount, calculated at 5% of the total bond. (Tr. Vol. I, p. 56.) DEQ believed that this unknown contingency amount would cover any potential sale because the

projected costs to sell the two ranches was 3-5% of the value of the ranches. (*Id.* at 60-61.) Even if that amount rose to 10% of the value, the potential sale costs would still be less than half of the unknown contingency amount. (*Id.*)

28. In addition to DEQ's efforts, Blackjewel also contacted Mr. Brockman to update his appraisal of the two ranches to see if anything changed since his original appraisal in July 2017. (DEQ Ex. 15.) After a review, Mr. Brockman recertified the appraised value of the two ranches had not changed. (Tr. Vol. II, pp. 324-25.) DEQ received a copy of this recertification. (Tr. Vol. I, pp. 53-54.) DEQ approved the proposed reclamation bond. (*Id.* at 53.)

29. Based on its review of both applications, DEQ found them technically complete and ordered the applicants publish notice of the applications. (DEQ Ex. 12.)

30. DEQ also found the applications technically complete and ordered the applicants to publish notice of the applications. (DEQ Ex. 13.) After publication, PRBRC objected to both applications.

31. On November 30, 2018, PRBRC filed its Objections and Petition for Hearing with this Council. (PRBRC's Obj. & Pet. for Hearing.) PRBRC objected to the transfers of the Eagle Butte and Belle Ayr mine permits on two grounds. First, PRBRC alleged that a portion of the Belle Ayr Mine reclamation bond is insufficient. As part of Contura's permit that Blackjewel seeks to transfer, two ranches in Northeast Wyoming, totaling over 40,000 acres, serve as collateral for approximately \$26 million of the reclamation bond. Blackjewel intends to use the same ranches to cover approximately the same amount of its proposed reclamation bond. PRBRC contends the real property's appraised value is less than the portion of the bond the land would cover and therefore does not sufficiently protect the State. Second, PRBRC alleges that Blackjewel has ties to Revelation Energy, a company it claims has violated environmental laws

at mines in Kentucky, West Virginia, and Virginia. PRBRC contends that the conditional violations that appear on Blackjewel’s AVS report dated October 4, 2018, and possible unknown violations of other laws make Blackjewel ineligible for a permit transfer.

32. On May 15 and 16, 2019, this Council held a consolidated contested case hearing to hear PRBRC’s objections to the proposed permit transfers and PRBRC’s objections to Contura’s renewal of the Belle Ayr Mine permit. (PRBRC Obj. & Pet. for Hrng. filed November 30, 2018.) PRBRC objected to the renewal of the permit on one of the same grounds, the sufficiency of real estate used as collateral for the reclamation bond. (PRBRC Obj. & Pet. for Hrng., ¶ 24. filed November 19, 2018.)

33. At the conclusion of the evidence, the Council deliberated on the renewal of Contura’s permit for the Belle Ayr Mine. The Council found that the renewal should be approved because the appraisal was done correctly, and the remainder of the bonding process complied with the law. (Tr. Vol. II, pp. 491-500.) The Council concluded that the State had sufficient bonding protection.

III. CONCLUSIONS OF LAW

The Permit Transfer Application Process

1. DEQ regulations make the permitting statutes and regulations relating to “review, public participation, and approval or disapproval of permit applications” applicable to permit transfers. Wyo. Admin. Code 020.0006.12 § 1(b). Section 35-11-406 of the Wyoming Environmental Quality Act (Act) sets out the process for issuing a surface coal mine permit:

- A permit application is filed. Wyo. Stat. Ann. § 35-11-406(a)-(c);
- DEQ makes a “completeness” determination. *Id.* at (e). Wyoming statutes define a complete application as “the application 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);

- After informing a permit applicant that the application is complete, “the administrator shall review the application and unless the applicant requests a delay advise the applicant in writing within one hundred fifty (150) days from the date of determining the application is complete, that it is suitable for publication under subsection (j) of this section, that the application is deficient or that the application is deficient or that the application is denied. All reasons for deficiency or denial shall be stated in writing to the applicant.” *Id.* at 406(h). The Act defines a deficiency 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 103(e)(xxiv).

- Once DEQ determines the application is technically complete, the applicant is notified that it should publish the application for public notice and comment. *Id.* at 406(h);

- If anyone objects to the application and requests an informal conference, the director may hold one within 20 days after the end of public comment. *Id.* at (k);

- If a requested informal conference is denied, the Council must hold a public hearing on objections within 20 days after the end of public comment. *Id.* The Council reviews objections to identify whether any objections point to a “deficiency” that “preclude correction or compliance by stipulation in the approved permit to be issued by the director...” *See Id.* at 103(e)(xxiv) (thereby allowing the director to address objections as he sees fit before issuing or denying a permit);

- The Council provides its findings and conclusions on any objections to the director. *Id.* at § 406(p);

- The Administrator makes the required findings under Section 406(n). *Id.* at § 406(n); and

- The Director then decides whether to grant or deny a permit and whether to impose stipulations or conditions on the permit based upon any findings of the Council on permit objections. *Id.*

2. A party seeking to transfer a permit goes through largely the same process. A party must apply to the Administrator of DEQ's Land Quality Division to transfer a permit or permits. *Id.* at 408.

3. DEQ then decides if the transfer application is complete and without deficiency. *Id.* at 406(e). If DEQ makes those findings, then the party publishes the application for public comment. *Id.* at (g). After the public comment period expires, the DEQ Director may hold an informal conference or the Council holds a public hearing. *Id.* at (h).

4. After the Council issues findings of fact and conclusions of law, DEQ has additional steps it must take before approving a permit transfer.

5. To approve a transfer application, the Land Quality Division must find in writing that the potential transferee:

- is eligible to receive a permit in accordance with Chapter 12, Section 1(a)(x), (xi) and (xii);

- has submitted a performance bond or other guarantee, or obtained the bond coverage of the original permittee; and

- meets any other requirements specified by the Division. *Id.*

6. Chapter 12, Section 1(a)(x) requires the Land Quality Administrator to determine if an applicant is eligible to receive a coal mining permit, including findings related to: whether the “applicant directly owns or controls has an unabated or uncorrected violation;” “[t]he applicant or his operator indirectly controls has an unabated or uncorrected violation and the applicant's control was established or the violation was cited after November 2, 1988;” or “[t]he applicant or his operator controls or has controlled mining operations with a demonstrated pattern of willful violations as outlined in W.S. § 35-11-406(o).” Wyo. Admin. Code 020.0006.12 § 1(a)(x).

7. Chapter 12, Section 1(a)(xi) states that “[f]ollowing the Director's approval of a permit but prior to issuance of that permit, the applicant shall update, correct or indicate that no change has occurred in the information provided in Chapter 2, Section 2.” Wyo. Admin. Code 020.0006.12 § 1(a)(xi).

8. Chapter 12, Section 1(a)(xii) states that after the applicant meets all other requirements, “the DEQ shall request a compliance history report from AVS to determine if there are any unabated or uncorrected violations that affect the applicant's permit eligibility in subsection (x) above. The DEQ shall request this report no more than five business days before a permit is issued. If the applicant is ineligible for a permit the DEQ shall send you written notification of the decision and will detail the reasons for ineligibility and include notice of appeal rights.” Wyo. Admin. Code 020.0006.12 § 1(a)(xii).

The Council’s Role in a public hearing under 35-11-406(k)

9. The Wyoming Environmental Quality Act (the Act) created the Council and specifies its authority. *Amoco Prod. Co. v. State Bd. of Equalization*, 12 P.3d 668, 673 (Wyo.

2000). The Council must exercise only the authority the Act granted to it. *Id.*; *Platte Dev. Co. v. State, Env'tl. Quality Council*, 966 P.2d 972, 975 (Wyo. 1998).

10. Under the Act, DEQ is the regulatory authority that must evaluate a permit transfer application and decide if it complies with the law. Wyo. Stat. Ann. § 35-11-406(e).

11. The Council serves as a public hearing body that decides “all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions.” *Id.* at 112(a). The Council has the specific authority to conduct hearings: 1) to promulgate rules and regulations required to administer the Act; 2) adopt, amend, or repeal 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.” *Id.* at (i)-(iv).

12. The Council concludes it must exercise the authority listed under (a)(iii) because the case will decide DEQ’s administration and enforcement of the permit transfer process.

13. The Council finds that exercising this authority requires the Council to decide if DEQ correctly administered and enforced the requirements for a permit transfer application to be deemed suitable for publication.

14. The Council notes that before a permit can transfer, the Act requires DEQ make several specific findings discussed above. The Council concludes the future findings DEQ must make are not part of this hearing for several reasons. First, section 406(n) explicitly states “the administrator” makes the findings in that section of the Act. Wyo. Stat. Ann. § 35-11-406(n).

The Act defines “administrator” as “the administrator of each division of the department.” *Id.* at 103(a)(v). That definition does not include this Council. Second, the Act does not require DEQ to issue the section 406(n) findings before it deems an application suitable for publication. *See generally* Wyo. Stat. Ann. § 35-11-406. As a result, DEQ has not administered or enforced that part of the Act. Without DEQ either administering or enforcing section 406(n), the Act does not grant the Council authority to step into the shoes of the regulator. *See id.* at 112(a)(i)-(iv). Third, DEQ must make the findings under Section 406(n) before approving permit transfers. *See id.* at 406(n)(vii). After that decision, any party who disagrees with DEQ’s findings has a right of judicial review, ensuring an appeal. Wyo. Stat. Ann. § 35-11-1001.

15. Rather than make those findings or evaluate potential findings, the Council will consider if the transfer applications contain the necessary information for DEQ to make those future findings. The Council accepts the testimony of Mr. Wendtland that an AVS report showing only conditional violations would meet the statutory and regulatory requirements of section 406(n). (Tr. Vol. I, pp. 71-72.)

16. For the permit renewal and transfer applications at issue, DEQ deemed them complete and found them without deficiencies (also known as technically adequate) and suitable for publication. *See id.* at (a)-(j). DEQ also approved Contura’s renewal application. Thus, the Council’s authority in this contested case is to issue findings of fact and conclusions of law on PRBRC’s objections about DEQ’s past actions for the relevant applications. The Council, however, does not consider potential future DEQ action.

17. As a result, the Council must issue findings of fact and a decision on the relevant issues as described above within 60 days of the final hearing. *Id.* at 406(p).

The General Requirements of a Permit Transfer Application

18. A party seeking to acquire a permit via transfer must 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.” Wyo. Stat. Ann. § 35-11-408.

19. The statement of qualifications shall contain “all legal, financial, compliance and related information required by Chapter 2, Section 2(a)(i) through (iii) which would be required if the potential transferee were the original applicant for the permit and, in addition, the name, address and permit number of the existing permit holder.” Wyo. Admin. Code 020.0006.12 § 1(b)(ii)(B).

20. The requirements of Chapter 2, Section 2 include basic company and ownership information:

- list of owners for the property to be mined;
- names, addresses, telephone numbers of operators and additional information on owners of the operator;
- taxpayer identification number for the applicant and operator;
- list of any pending, current, or previous surface coal mining permit applications filed in the United States;
- updated AVS information for existing permits or applications; and
- statement of all lands, interests in lands, or pending interests for lands included in the permit area.

Wyo. Admin. Code 020.0006.2 § 2(a)(i).

21. Chapter 2 also lays out what a statement of compliance should 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.

Wyo. Admin. Code 020.0006.2 § 2(a)(ii).

22. Section 35-11-406(a)(xiv) states an applicant must provide 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.” Wyo. Stat. Ann. § 35-11-406(a)(xiv).

23. Finally, the applicant must also provide documents that show a right of entry onto the property to mine and all legal rights the applicant claims. Wyo. Admin. Code 020.0006.2 § 2(a)(iii).

24. The potential transferee also must 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.” Wyo. Admin. Code 020.0006.12 § 1(b)(ii)(A).

25. Pursuant to that bonding program, the Council and DEQ promulgated regulations that “allow the administrator to accept real property posted as a collateral bond without separate surety, 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 this act.” Wyo. Stat. Ann. § 35-11-417(g).

26. Those regulations allow for real property to be used as collateral. Wyo. Admin. Code 020.0006.11 § 2.¹

27. If an applicant wishes to use real property as collateral, it must provide:

(A) The value of the real property. The property shall be valued at the difference between the fair market value and any reasonable expense anticipated by the Department in selling the property. The fair market value shall be determined by a market analysis that may be conducted by an appraiser or qualified agent proposed by the operator. The appraiser shall be selected by the Administrator. The Administrator has the option to reject any appraiser proposed

¹ The parties agreed that the current version of Chapter 11 applies to Blackjewel’s permit applications. (Tr. Vol. I, pp. 11-14.)

by the operator. The expense of the appraisal shall be borne by the operator. The real property shall be appraised every three (3) years.

(B) A description of the property satisfactory for deposit to further assure that the operator shall faithfully perform all requirements of the Act. The Administrator shall have full discretion in accepting any such offer.

(I) Real property shall not include any lands in the process of being mined, reclaimed, or the subject of this application. The operator may offer any lands within the permit boundary which have received phase 3 bond release or which will not be disturbed while pledged as collateral. The acceptance of real property within the permit boundary shall be at the discretion of the Director.

(C) Evidence of ownership of the real property shall be in the form of a clear and unencumbered title.

Wyo. Admin. Code 020.0006.11 § 5(a)(iii)(A)-(C).

28. Should an applicant provide that information and the Administrator accept the 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. The requirement shall be sufficient to vest such interest in the property in the Department to secure 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 in accordance with the Act. Any 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.” Wyo. Admin. Code 020.0006.11 § 5(a)(iii)(D).

29. The resulting security interest must be “perfected by filing a financing statement or taking possession of the collateral in accordance with W.S. §§ 34.1-9-401 through 406.”

Wyo. Admin. Code 020.0006.11 § 5(a)(iii)(E).

30. Ultimately, “[t]he 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”. Wyo. Stat. Ann. § 35-11-408.

31. As part of its required findings for a permit transfer, DEQ cannot award a permit if “[t]he applicant or operator controls or has controlled mining operations with a demonstrated pattern of willful violations as outlined in W.S. § 35-11-406(o).” Wyo. Admin. Code 020.0006.12 § 1(a)(x)(C). Section 406(o) states:

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). Violation, as it appears in the regulations and statute, refers to a failure to comply with federal or state law “pertaining to air or water environmental protection,” a notice of violation, or state cessation orders. Wyo. Admin. Code 020.0006.1 § 2(fs). While the Environmental Quality Act does not define willful, the regulations implementing the Surface Mining Control and Reclamation Act (SMCRA) distinguish between the way violations occur. *See* 30 C.F.R. 723.13(b)(3). Those include no negligence, negligence, and a greater degree than negligence. *Id.* A violation by itself does not mean intentional.

32. As explained above, the Council will not evaluate this portion of the process because it is yet to come. DEQ will make these findings after the Council issues its findings of fact and conclusions of law. Still, the Council concludes that there is no evidence of any violations that would allow DEQ to make a negative finding against Blackjewel. The Council

credits the uncontroverted testimony of Mr. Wendtland and Mr. Thrall that neither Blackjewel nor any operator would seek to willfully violate the law. (Tr. Vol. I, pp. 267-68.)

Decision on the Permit Transfer Applications

33. Applying the findings of fact to this law, the Council concludes the permit transfer applications are complete as defined in the Act. *See* Wyo. Stat. Ann. §§ 35-11-103(e)(xxii), 406(e)-(f). The applications include all the information the Act and applicable regulations require. The Council is also convinced by DEQ's comprehensive and unrefuted testimony that the permit applications are complete. (Tr. Vol. I, pp. 82-86, 92.)

34. The Council concludes the transfer applications are also not deficient because they meet the requirements of all applicable statutes and regulations. *See* Wyo. Stat. Ann. §§ 35-11-103(e)(xxiv), 406(h). Likewise, the Council accepts DEQ's unrefuted testimony that its technical review of the transfer applications met the applicable statutes and regulations. (Tr. Vol. I, pp. 80-81; 163-64; 214-15; 218-19.)

35. PRBRC argues the real property used as collateral for portions of the reclamation bond for the Belle Ayr Mine is not worth enough to cover that portion of the bond. (PRBRC Obj. & Pet. for Hrng., ¶¶ 16-19, filed November 30, 2018.)

36. As to that objection, the Council concludes the same as it did for the renewal of the permit for the Belle Ayr mine—the appraisal was done well and to industry standards. The appraisal method supports the value and ensures the state has sufficient collateral in place. The Council also concludes the mortgage DEQ holds on the two ranches meets all legal requirements for using real estate as collateral. (Tr. Vol. II, pp. 491-500.)

37. The Council also credits the testimony of Mr. Brockman who the Council accepted as an expert. Mr. Brockman explained his method and experience in great detail. That testimony went unrefuted.

38. Likewise, the Council credits the unrefuted testimony of Mr. Sherman that Mr. Brockman supported his appraised value with data. Although Mr. Sherman found some relatively small errors in the initial appraisal, Mr. Brockman provided data to answer those questions or revised the appraisal to address Mr. Sherman's concerns. The Council credits the testimony that the two experts reached consensus on the appraisal.

39. Specifically, the Council concludes that DEQ approved a qualified expert appraiser to evaluate each ranch. (Tr. Vol. II, pp. 491-500.) The Council concludes, and has already concluded, the appraisal meets the applicable industry standards and provides a thorough analysis of each ranch. (*Id.*)

40. The Council also takes comfort in knowing that the new appraisal shows a higher value for the two ranches.

41. DEQ already holds a recorded, valid first mortgage on both ranches that meets the perfected security interest requirement under the Act. (Tr. Vol. I, pp. 41-48.) Both the mortgage and an opinion from the Wyoming Attorney General's Office verify that Contura, and in the future Blackjewel, holds clear title to both ranches. (*Id.*) The mortgage provides all the remedies that Wyoming law requires DEQ to have in the event of a default on required reclamation. (*Id.* at 46-47.)

42. PRBRC also argues that Blackjewel has ties to a company, Revelation Energy, that has willfully violated environmental laws, which prevents Blackjewel from receiving a permit. (PRBRC Obj. & Pet. for Hrng., ¶¶ 4, 32-33, filed November 30, 2018.) At the hearing,

PRBRC also suggested that Blackjewel did not include its entire violation history as required by certain statutes and regulations. (Tr. Vol. I, pp. 154-55.)

43. As to those objections, the Council concludes that DEQ has all available information necessary to determine whether Blackjewel can receive a permit. *See Wyo. Stat. Ann. § 35-11-408.* This includes the ultimate issue before the Council, whether DEQ had enough information to find the transfer applications suitable for publication.

44. DEQ ran multiple AVS checks and informed Blackjewel that it could not publish its application until all violations that appeared, even for related entities, were conditional. DEQ also has the violation history for the mines, which allows it to evaluate the operating history in Wyoming. In addition, DEQ contacted the Office of Surface Mining to see if it had any concerns with Blackjewel as an operator. The Office of Surface Mining had none.

45. The Council concludes that DEQ's current practice of having the applicant submit the three-year violation history for the mines with DEQ running all AVS checks complies with the Act. The combined information allows DEQ to determine whether an applicant has unabated violations or a pattern of willful violations. The AVS report also informs DEQ of the current status of each violation, meaning DEQ can see if the violation is outstanding or conditional.

46. Moreover, DEQ has stated it will conduct another AVS check within a few days of any planned permitting decision. (Tr. Vol. I, pp. 72, 75.) This will allow DEQ to assess if any new outstanding violations have appeared.

47. PRBRC argues that the application should include the AVS report and additional information about each reported violation. But this is form over substance. DEQ can and does run the AVS check multiple times. DEQ files the AVS reports in the permit transfer application file, making them available for public review. The LQD Administrator reviews the AVS reports

and determines if a permit transfer can move forward. Together, these steps ensure the public availability of the information and analytical review by DEQ.

48. The AVS report does not include things like MSHA numbers. But the Council concludes this again is form over substance. The applicant's violation history and AVS report provide both DEQ and the public with enough information to seek out and learn more about an entity's violation history. The requirement to disclose information about violations exists to allow a regulatory authority to find out more about a violation. Blackjewel's existing disclosure and the AVS report allow DEQ to call OSM or state regulatory authority to obtain additional information about a violation. Likewise, the public has access to the same AVS report and schedule because they are part of the permit transfer files.

49. The Council also notes that DEQ's historic practice includes running the AVS report. It would be unfair to an applicant like Blackjewel who has followed every required step from DEQ to hold them to a different standard from every other application.

50. Further, the Council concludes that DEQ's view that it can act more independently by running the AVS check makes sense. DEQ can run the AVS check and objectively analyze the results, knowing it completed an accurate search. The Council also notes that DEQ will conduct another AVS check before issuing any permit to Blackjewel. (Tr. Vol. I, pp. 72, 75.) The last AVS check will provide additional protection to ensure a responsible operator holds the permits to these two mines. (*Id.* at 76-78.)

51. Here, the Council concludes that DEQ reviewed the AVS report and did not deem the applications suitable for publication until the AVS report showed all conditional violations. (*Id.* at 75-77.) A conditional violation does not preclude a transfer applicant from receiving a

permit because the operator has resolved or is working to resolve the relevant regulatory authority's concerns. (*Id.* at 69.)

52. While PRBRC's counsel suggested in questioning that entities affiliated with Blackjewel or under common ownership may have violated the Clean Water Act, Mine Safety and Health Administration (MSHA) regulations, or other laws that the United States Environmental Protection Agency administers, PRBRC presented no evidence of these alleged violations. The Council cannot and will not accept the implied allegations from an attorney as evidence.

53. The Council also credits Mr. Wendtland's testimony that he is unaware of any MSHA violations or violations of any kind that would warrant denying Blackjewel's permit transfer applications. (Tr. Vol. I, pp. 179-81.)

54. PRBRC also argued that DEQ should investigate each violation that appears on an AVS report even if the violation occurred outside Wyoming. The Council finds no statute or regulation that would require this of DEQ. Likewise, the Council credits the testimony of Mr. Wendtland that in his experience as the Administrator of the Land Quality Division, he is not aware of any statute that would require DEQ to investigate. (*Id.* at 183.) The Council also notes that DEQ lacks the resources to undertake that investigation. (*Id.* at 183-84.)

55. Rather, the Council concludes that DEQ can rely on the AVS reports because the system exists for states with jurisdiction over a violation to inform other states of the violation and its status. Likewise, the Council concludes that DEQ can rely upon OSM's statements about Blackjewel's suitability as a permit holder.

56. Ultimately, the Council credits the unrefuted testimony of Mr. Wendtland that the permit transfer applications are complete and meet all applicable statutes and regulations. (Tr. Vol. I, pp. 82-86, 92.)

57. Therefore, the Council concludes that PRBRC's objections to Blackjewel's permit transfer applications are without merit. The Council reaffirms its previous decision on the real estate used as collateral for portions of the Belle Ayr mine from the application of Contura's permit renewal. Likewise, the permit transfer applications are complete and without deficiency. DEQ was correct in determining that the transfer applications are complete and without deficiency. DEQ has all the information it needs to determine whether Blackjewel can receive permits under Wyoming law after this Council issues its findings of fact and conclusions of law. The Council concludes that DEQ can proceed to the next stage of the permit transfer process and make its written findings.

DATED: June 21, 2019

/s/ Jeffrey S. Pope

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

insupthin@hollandhart.com

jspope@hollandhart.com

ATTORNEYS FOR CONTURA COAL WEST,
LLC

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2019, I served the foregoing by placing a true and correct copy thereof via E-mail to the following:

Wyoming Environmental Quality
Council - (ORIGINAL)
Attn: Joe Girardin
2300 Capitol Avenue
Hathaway Building, Room 136
Cheyenne, WY 82002

Shannon Anderson
Powder River Basin Resource Council
934 N. Main Street
Sheridan, WY 82801
sanderson@powderriverbasin.org
*Attorney for Powder River Basin Resource
Council*

James Kaste, Deputy Attorney General
Wyoming Attorney General's Office
Pioneer Building, 2nd Floor
2424 Pioneer Avenue
Cheyenne, WY 82002
James.kaste@wyo.gov
Attorney for DEQ

Bernard Haggerty, Hearing Examiner
State of Wyoming
Office of Administrative Hearing
2020 Carey Avenue, Fifth Floor
Cheyenne, WY 82002

Eric T. Frye
General Counsel
Blackjewel L.L.C.
1051 Main Street
Milton, WV 25541
Eric.frye@blackjewel.us
Attorney for Blackjewel

/s/ Jeffrey S. Pope