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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 TRANSFERS OF BLACKJEWEL,)	
LLC.: PT0214 & PT0428.)	

**DEPARTMENT OF ENVIRONMENTAL QUALITY'S
REPLY TO PRBRC'S PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

The State of Wyoming, Department of Environmental Quality (DEQ), hereby submits the following reply to the Powder River Basin Resource Council's (PRBRC) proposed findings of fact and conclusions of law regarding the permit transfer applications of Blackjewel, L.L.C., for the Belle Ayr and Eagle Butte surface coal mines:

All of the evidence introduced during the hearing of this matter demonstrated that DEQ properly processed the permit transfer applications, that the applications are complete, and that the permit transfers should be granted subject to the results of the final

AVS compliance history report.¹ Over the course of two days PRBRC raised the mere specter of technical noncompliance without providing any proof in support of its assertions. Despite having every opportunity, both in discovery and during the hearing, to establish that Blackjewel has other applicable violations that it has not disclosed, PRBRC failed to bring one witness or show the Council one document that substantiated its allegations. The Council should demand more of the litigants that appear before it.

PRBRC's proposed findings and conclusions are legally incorrect and lack evidentiary support. This is true both for its claims related to the real property collateral and its claims related to the list of notices of violation. Because the Council has already rejected PRBRC's claims of error with regard to the real property collateral when it granted Contura Coal West's permit renewal, DEQ will not take any more of the Council's time responding to PRBRC's proposed findings and conclusions on that issue. However, there is one matter that DEQ must address before replying to the specific findings and conclusions offered by PRBRC related to the completeness of the list of notices of violation.

¹ Blackjewel's subsequent bankruptcy filing is not part of the evidence before the Council in these proceedings, nor does it have any bearing on the Council's determination of the issues raised by PRBRC in these proceedings. In fact, federal law prohibits an agency like the Council from discriminating against a debtor in bankruptcy because they have filed for bankruptcy protection. *See* 11 U.S.C. § 525 (providing that "a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, ... a person that is or has been a debtor under this title [11 USCS §§ 101 et seq.] ... solely because such bankrupt or debtor is or has been a debtor under this title [11 USCS §§ 101 et seq.]."). The ramifications of Blackjewel's bankruptcy will be addressed in due course in the appropriate proceedings. These are not those proceedings, and the Council cannot deny the permit transfers because of the bankruptcy filing.

In its recitation of the burden of proof, PRBRC alleges that “[t]he EQC cannot rely on DEQ’s testimony or evidence designed to assist the permit applicant in meeting its burden of proof.” PRBRC Proposed Findings at ¶ 13. Notably, PRBRC cites no authority for the novel proposition that DEQ’s evidence somehow does not count in these proceedings. In fact, the law is the opposite. For example, juries across America are routinely instructed that, “In determining whether an issue has been proved by a preponderance of the evidence, you should consider all of the evidence bearing upon that issue regardless of who produced it.” Wyoming Civil Pattern Jury Instruction 3.01.² This elementary evidentiary principle applies equally in contested cases where “[o]ppportunity shall be afforded all parties to respond and present evidence and argument on all issues involved[,]” and no order shall issue “except upon consideration of the whole record.” Wyo. Stat. Ann. §§ 16-3-107(j) and 16-3-108(a). DEQ is a party to these proceedings and the evidence it submitted counts.

PRBRC contends that DEQ must be neutral in these proceedings, but again points to no authority for that proposition. It is true that DEQ is an objective party in these proceedings with no stake in the outcome. But it is also true that DEQ’s evidence supports granting the permit transfers, because that is the outcome objectively dictated by the facts. After all, DEQ did determine that the transfer applications were technically sufficient on

² See also, e.g., the District of Columbia Standard Jury Instructions – Evidence Produced by Adversary which provides, “In determining whether any fact has been proved by a preponderance of the evidence, you should consider all the evidence bearing upon that fact, regardless of who produced it. A party is entitled to benefit from all evidence that favors that party whether that party produced it or it was produced by that party's adversary. That a witness was called by one party rather than another is irrelevant.” SL018 ALI-ABA 1319.

October 5, 2018, *see* DEQ Exs. 12 and 13, and it has the right and duty to defend that determination from PRBRC's unsubstantiated allegations of error.

Turning to PRBRC's specific claims related to the list of notices of violation, PRBRC asserts that the applicant has to supply the all the information related to notices of violation. PRBRC Proposed Findings and Conclusions at ¶ 55. But the rules do not specify who must or who may put this information in the application. Rather, the rules simply say "each application for a surface coal mining permit shall contain" this information. Wyo. Dept. of Env'tl. Quality, Land Quality Division-Coal, Chapter 2, § 2(a). Accordingly, DEQ's longstanding practice of inserting the AVS compliance history report into the application rather than relying on the applicant to provide that report is consistent with the rules. And, in fact, the practice is mandated by the rules which require DEQ to obtain the compliance history report from AVS. Wyo. Dept. of Env'tl. Quality, Land Quality Division-Coal, Chapter 12, § 1(a)(xii).

PRBRC next claims that the AVS compliance history report does not contain all the information required by the rules. PRBRC Proposed Findings and Conclusions ¶¶ 56 and 80. This is also incorrect. The AVS compliance history report shows: (1) the violation type, which is a sufficient description of the violation; (2) the violation number; (3) the violating entity's name; (4) the permit number; (5) the state where the violation occurred, which also identifies the issuing regulatory authority; (6) the violation status, which demonstrates that the violation is being abated or corrected to the satisfaction of the relevant regulatory authority; and (7) the date of the violation. DEQ Ex. 11. DEQ also requested, and the report at issue also includes a narrative report from OSM. DEQ Ex. 11; Tr. 79-80. The narrative

report indicates that all of the violations were being resolved through payment plans, settlements, or pending challenges as allowed by law, which is a sufficient description of any proceedings initiated concerning the violation. DEQ Ex. 11. As DEQ explained in its Proposed Findings and Conclusions, DEQ does not require a more detailed description of the violations, because its statutory duty is to ascertain if the regulatory authority who issued the notice of violation is satisfied that the violation is being corrected or abated, and this information is in the AVS compliance history report. Accordingly, the AVS compliance history report contains all of the information required by Chapter 2, § 2(a)(ii)(B). Tr. 84; DEQ Ex. 11.

PRBRC next claims that DEQ erred by not contacting regulators at the Environmental Protection Agency or in other states to investigate Blackjewel. PRBRC Proposed Findings and Conclusions at ¶¶ 62 and 69. But DEQ is not required to investigate Blackjewel by any statute or rule. *See, e.g.*, Tr. at 183. Under the rules, DEQ must consider the information submitted by the applicant and DEQ must obtain and review the AVS compliance history report. *See, e.g.*, Wyo. Dept. of Env'tl. Quality, Land Quality Division-Coal, Chapter 12, §§ 1(a)(viii)(C) and (xii). Accordingly, any other applicable notices of violation issued by other regulatory authorities not on the AVS compliance history report must be reported by the applicant. According to Blackjewel, it did not report any additional notices of violation, because there are none, and PRBRC has not shown that there was a specific notice of violation that should have been on the list that was not reported by Blackjewel.

PRBRC asserts that DEQ is aware of other notices of violation, based on one ambiguous response from Mr. Wendtland that he was “generally aware” that Revelation Energy had Clean Water Act violations “out there.” Tr. at 171; Proposed Findings and Conclusions at ¶¶ 63 and 89. Of course, PRBRC has repeatedly alleged as much throughout this proceeding which is likely the reason Mr. Wendtland responded the way he did. When Mr. Wendtland was asked directly if he had “firsthand personal knowledge of any other violations by Blackjewel or any of its affiliated entities that he should have done something about[,]” he said unequivocally, “No, I do not.” Tr. at 197. He similarly responded when asked if PRBRC or anyone else had given him “documents that show EPA or MSHA violations that give you any [p]ause about the renewal or transfer applications,” “No, not at this point.” Tr. at 184. Thus, when asked directly if he knew about other violations from other entities, including the EPA, Mr. Wendtland’s testimony was clear. He does not know of any other violations and PRBRC has not shown him or this Council that any other violations exist. Accordingly, PRBRC’s claims that the lists of notices of violation in the pending transfer applications are incomplete are without merit.

The remaining misstatements of fact and law in PRBRC’s Proposed Findings and Conclusions are inconsequential and thoroughly addressed in the Proposed Findings and Conclusions of the other parties. Accordingly, no further reply is necessary.

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WHEREFORE DEQ requests that the Council conclude that the permit transfer applications should be granted subject to the results of the final compliance history report from AVS.

DATED this 1st day of July, 2019.



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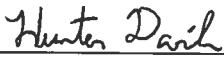
CERTIFICATE OF SERVICE

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 1st day of July 2019, addressed as follows:

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