

FILED

AUG 14 2019

Jim R. Rhy, Executive Secretary
Environmental Quality Council

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL

STATE OF WYOMING

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

**FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER IN DOCKET NO. 18-4803**

The final contested case hearing in this matter occurred before the Environmental Quality Council on May 15 and 16, 2019 at the Wyoming Liquor Division Conference Room, 6601 Campstool Road, Cheyenne, Wyoming. Hearing Examiner, Bernard Haggerty from the Office of Administrative Hearings conducted the hearing.

I. APPEARANCES

Present for the Council was Chairwoman Meghan Lally¹, Vice-Chairwoman Deborah Baumer, Secretary John Corra, and Council members Dr. David Bagley, JD Radakovich, Steve Lenz, and Shane True. Council member Shane True participated via telephone.

Present at the hearing representing Petitioner, Contura Coal West, LLC was Jeffrey S. Pope and Isaac N. Sutphin from Holland & Hart LLP. Counsel representing Petitioner, Blackjewel

¹ Meghan Lally was the Chairwoman at the time of the contested case. Following the contested case, Dr. Bagley became the Chairman.

L.L.C. was Eric Frye, General Counsel for Blackjewel L.L.C. Also present at the hearing representing the Land Quality Division (Division) of the Wyoming Department of Environmental Quality (DEQ) was James Kaste, Deputy Attorney General from the Wyoming Attorney General's Office. Present and representing Powder River Basin Resource Council (PRBRC) was Shannon Anderson.

Present and testifying on behalf of the Division was Kyle Wendtland. PRBRC called Vanessa Romero, Mark Rogaczewski, and Casey Robb as witnesses. Present and testifying for Blackjewel were Mark Thrall and Robert Brockman. Present and testifying for Contura was John Sherman.

The following exhibits were admitted into evidence: DEQ exhibits 1 through 15, PRBRC exhibits 1, 2, 4, 5, 8, and 10, Contura exhibits 1 through 9 (exhibits 1 and 2 are confidential), and Blackjewel exhibit 1.

Immediately following the evidentiary hearing, the Council deliberated and decided this matter on May 16, 2019. The Council, having heard and considered all the evidence in this case and being fully advised, pursuant to the Wyoming Administrative Procedure Act, Wyoming Statute § 16-3-110, finds and concludes (by a 7-0 vote) that the Division's approval of Contura's permit renewal application for the Belle Ayr Mine is affirmed.²

II. JURISDICTION

This case arises from PRBRC's written objections and request for hearing on the Division's decision to renew Contura's existing permit for the Belle Ayr Mine. Under Wyoming Statute § 35-

² Although the Council consolidated Docket No. 18-4803 with Docket No. 18-4805, this final decision only applies to EQC Docket No. 18-4803 and the matter of Contura's permit renewal for the Belle Ayr Mine. The issues that are included within EQC Docket No. 18-4805 are not part of this final decision because the Council stayed those matters on July 10, 2019.

11-406(k) and the DEQ's rules (chapters 1 and 2, Practice and Procedure), if written objections to a permit are filed and a request for hearing is made, a contested case before the Council is required. In this case, PRBRC filed written objections to the Division's renewal of Contura's existing permit along with a request for a hearing necessitating this contested case.

III. STATEMENT OF THE CASE/ISSUES AND CONTENTIONS

On October 23, 2018, the Division approved Contura's application to renew its permit for the Belle Ayr Mine. After having its request for an informal conference with the DEQ director denied, PRBRC filed its petition for a hearing before the Council on its objections to the permit renewal. PRBRC challenges the Division's decision to renew Contura's permit for the Belle Ayr Mine by alleging that a portion of the reclamation bond is insufficient. As part of its reclamation bond, Contura offered up two ranches in Northeast Wyoming, totaling over 40,000 acres, as collateral for approximately \$26 million of its reclamation bond.

PRBRC contends that the ranch properties' appraised value is less than that amount and therefore does not sufficiently cover the relevant portion of the reclamation bond. As a result, PRBRC contends that the Division erred in approving Contura's permit renewal. The issue here is whether Contura's real property collateral bond is in accordance with law and sufficient to cover the relevant portion of the reclamation bond.

IV. FINDINGS OF FACT³

1. In May 2018, Contura applied for a permit renewal for its Belle Ayr Mine. (Tr. – Wendtland testimony, 64; DEQ Ex. 1). The Belle Ayr Mine is about 13 to 17 miles south on Highway 59 from Gillette, Wyoming. (Tr. – Wendtland testimony, 40; DEQ Ex. 14). Following

³ To the extent testimony is cited as the basis for a finding of fact, the Council has resolved any conflicts or disputes between the testimony of others in favor of the cited testimony.

its review of the permit renewal application, the Division, on October 23, 2018, approved the permit renewal. (Tr. – Wendtland testimony, 90; DEQ Ex. 1, bates 122-23). As part of its renewal application, Contura used two ranch properties it owned as real property collateral for \$26,749,000 of its total reclamation bond. (DEQ Ex. 2, bates 45; DEQ Ex. 4; PRBRC Ex. 1).

2. The two ranch properties are near the Belle Ayr Mine and total about 48,000 acres. (Tr. – Wendtland testimony, 40, 97-98; DEQ Exs. 4, 14).

3. In 2017, Mr. Robert Brockman performed an appraisal of the surface estate of the ranch properties. Mr. Brockman is a certified and qualified Wyoming appraiser who has 40 years of experience. The Division approved Mr. Brockman to perform the appraisal. (Tr. – Wendtland testimony, 50-54, 98, 101; Thrall testimony, 272; Brockman testimony, 317- 319, 343-44; DEQ Exs. 5-6; Contura Ex. 1 (confidential exhibit)).

4. Mr. Brockman appraised the surface estate of the ranch properties at \$26,749,000. However, the appraisal stated that the high end of the “Property Basis (Value Range)” was \$28,070,000. Mr. Brockman completed the appraisal using methods that are accepted in the appraisal industry. Mr. Brockman used the sales comparison approach to value the ranch properties. Mr. Brockman’s appraisal was compliant with the Uniform Standards of Professional Appraisal Practice. (Tr. – Wendtland testimony, 54; Brockman testimony, 323-24, 344-46, 352-54, 388; Contura Ex. 1 (confidential exhibit)).

5. In 2018, the Division approved Mr. Brockman to review the value of the ranch properties again—Mr. Brockman issued a recertification letter and determined that the value had not changed. Mr. Brockman once again valued the surface estate of the land at \$26,749,000. (Tr. – Wendtland testimony, 53-54, 124; Thrall testimony, 273; Brockman testimony, 324-25; DEQ Ex. 15).

6. Based upon the appraisal and recertification letter, the Division, in 2018, valued the ranch properties at the appraised value of \$26,749,000 for purposes of Contura's reclamation bond. (Tr. – Wendtland testimony, 55; DEQ Ex. 2, bates 45).

7. Accordingly, the Division gave Contura credit in the amount of \$26,749,000 against the reclamation bond that it was required to post. For the year 2018, Contura's reclamation bond total was \$118,147,500. (Tr. – Wendtland testimony, 55; DEQ 2, bates 45; DEQ 7, bates 9).

8. When the Division valued the ranch properties, it took into account the anticipated expenses in selling the properties. The Division accounted for the potential expenses of selling the properties as part of the line item titled "Unknown Costs" in Contura's 2018 reclamation bond summary. That line item was calculated at \$4,676,900. The estimated cost of selling the ranch properties, if necessary, would be around \$1,200,000 to \$2,600,000. The funds included within the "Unknown Costs" line item exceed the potential expenses associated with selling the ranch properties. (Tr. – Wendtland testimony, 55-56, 59-61, 109-11, 113, 115, 121, 184-85, 195; Brockman testimony, 384-385; DEQ Ex. 7, bates 9).

9. If the ranch properties had to be sold, they would sell within twelve months. (Tr. – Brockman testimony, 384, 394-95).

10. In 2019, Mr. John Sherman, a Wyoming certified real estate appraiser reviewed Mr. Brockman's appraisal. Based upon Mr. Sherman's review, Mr. Brockman, in March 2019, provided supplemental data that reduced his 2017 appraisal of the ranch properties to \$26,119,000. The appraisal, with the supplemental data, provided that the high end of the "Property Basis (Value Range)" was \$28,070,000. (Contura Ex. 2 (confidential exhibit)). Mr. Sherman agreed with Mr. Brockman's appraisal and opined that Mr. Brockman properly supported his appraisal valuation. (Tr. – Sherman testimony, 424-42).

11. Contura has granted the DEQ a first lien mortgage and security interest in the surface estate as well in the mineral rights of the ranch properties. (Tr. – Wendtland testimony, 41-50, 100-01, 128-29; DEQ Ex. 4). Under the mortgage, Contura is required to preserve and protect the DEQ’s first lien and security interest status. (DEQ Ex. 4). The mortgage was properly recorded in Campbell, Crook, and Weston counties. (Tr. – Wendtland testimony, 42-44).

12. The first lien mortgage grants the DEQ the right and power to sell or otherwise dispose of the ranch properties by public or private proceedings. (Tr. – Wendtland testimony, 48, 100-01, 128-29; DEQ Ex. 4).

V. CONCLUSIONS OF LAW

A. Principles of Law

13. Paragraphs 1 through 12 of the findings of fact are fully incorporated herein.

14. Wyoming Statute § 35-11-405 states, in part:

(e) 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 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 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).

15. Wyoming Statute § 35-11-406 states, in part:

....

(k) Any interested person has the right to file written objections to the application with the administrator within thirty (30) days after the last publication of the above notice. For surface coal mining operations, the director may hold an informal conference if requested and take action on the application in accordance with the department’s rules of practice and procedure, with the right of appeal to the council which shall be heard and tried de novo. A conference shall be held if the director determines that the nature of the complaint or the position of the complainants indicates that an attempt to informally resolve the disputes is preferable to a contested case proceeding. An informal conference or a public

hearing shall be held within twenty (20) days after the final date for filing objections unless a different period is stipulated to by the parties. The council or director shall publish notice of the time, date and location of the hearing or conference in a newspaper of general circulation in the locality of the proposed operation once a week for two (2) consecutive weeks immediately prior to the hearing or conference. The hearing shall be conducted as a contested case in accordance with the Wyoming Administrative Procedure Act, and right of judicial review shall be afforded as provided in that act.

....

(p) The director shall render a decision on the application within thirty (30) days after completion of the notice period if no informal conference or hearing is requested. If an informal conference is held, all parties to the conference shall be furnished with a copy of the final written decision of the director issuing or denying the permit within sixty (60) days of the conference. If a hearing is held, the council shall issue findings of fact and a decision on the application within sixty (60) days after the final hearing. The director shall issue or deny the permit no later than fifteen (15) days from receipt of any findings of fact and decision of the environmental quality council.

Wyo. Stat. Ann. § 35-11-406 (k), (p).

16. Wyoming Statute § 35-11-417 states:

(a) The purpose of any bond required to be filed with the administrator by the operator shall be to assure that the operator shall faithfully perform all requirements of this act and comply with all rules and regulations of the board made in accordance with the provisions of this act.

....

(c) The amount of any bond to be filed with the administrator prior to commencing any mining shall be:

....

(ii) For renewal bonds the amount equal to the estimated cost of reclaiming the land to be disturbed during that renewal period, and the estimated cost of completing reclamation of unreleased lands and groundwater disturbed during prior periods of time. The estimated cost shall be based on the operator's cost estimate, which shall include any changes in the actual or estimated cost of reclamation of unreleased affected lands, plus the administrator's estimate of the additional cost to the state of bringing in personnel and equipment should the operator fail or the site be abandoned. In

no event shall the bond be less than ten thousand dollars (\$10,000.00), except for limited mining operations authorized and bonded under W.S. 35-11-401(e) or any noncoal mine the affected land of which, excluding roads, is ten (10) acres or less, in which case the bond amount shall be set by the administrator with approval of the director to cover the cost of reclamation, and in no event less than two hundred dollars (\$200.00) per acre, for affected land.

....

(g) The council may, consistent with the requirements of 30 CFR 800.21(c), promulgate rules and 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 (a), (c), (g).

17. Chapter 12 (Procedures Applicable to Surface Coal Mining Operations) of DEQ's Land Quality – Coal rules state, in part:

Section 1. Permitting Procedures.

....

(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 revisions, amendments, renewals and permit transfer, assignment or sale of permit rights. In addition, the following requirements are applicable.

(i) All requirements imposed by W.S. § 35-11-405(e) for permit renewals. The application shall be filed at least 120 days before the expiration of the permit term and shall include at a minimum:

(A) A statement of the name and address of the permittee, the term of the renewal requested, the permit number, a description of any changes to the matters set forth in the original application for a permit or prior permit renewal;

(B) A copy of the public notice and proof of publication;

(C) Evidence that the bond and a liability insurance policy will be provided; and

(D) Additional revised or updated information required by the Administrator.

(E) If an application for renewal includes any proposed revisions to the mine or reclamation plan, such revisions shall be identified and subject to the requirements of Chapter 13.

DEQ's Land Quality – Coal rules, Chapter 12 (Procedures Applicable to Surface Coal Mining Operations), Section 1.

18. Chapter 11 (Self-Bonding Program) of DEQ's Land Quality – Coal rules state, in part:

Section 3. Approval or Denial of Operator's Self-bond Application.⁴

....

(i) For any collateral offered to support a self-bond, the following information shall be provided:

(A) The value of the 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 an appraiser or appraisers proposed by the operator. The appraiser or appraisers shall be selected by the Administrator. The Administrator has the option to reject any appraiser proposed by the operator. The appraisal shall be expeditiously made, and copy thereof furnished to the Administrator and the operator. The expense of the appraisal shall be borne by the operator.

(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.

⁴ The Council cites to the DEQ's rules that existed when the events at issue in this proceeding took place and when PRBRC filed its objections on October 2, 2018. DEQ's Chapter 11 rules relied upon by the Council were effective from December 17, 2012, to May 3, 2019. The Council recently approved amendments to DEQ's Chapter 11 rules, however, those revised rules were not in effect until May 3, 2019 and are not relied upon for this order.

(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 the bonds for which have been released or lands within a permit area which will not be affected. In addition, any land used as a security shall not be mined while it is a security.

....

(C) Evidence of ownership submitted in one of the following forms:

(I) If the property offered for deposit is real property, the operator's interest must be evidenced by:

....

(2.) In the case of a fee simple interest, a title certificate or similar evidence of title and encumbrances prepared by an abstract office authorized to transact business within the State and satisfactory to the Administrator.

....

(v) If the Administrator accepts any property as collateral to support a self-bond, the Administrator shall, as applicable, require possession by the Department of the personal property, or a mortgage or security agreement executed by the operator in favor of the Department of Environmental Quality. The requirement shall be that which is 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. Personal property collateral to support a self-bond shall be secured under the provisions of uniform commercial code as required by (B) below.

(A) 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.

DEQ's Land Quality – Coal rules, Chapter 11 (Self-Bonding Program), Section 3.

19. When analyzing the language of a statute, the “paramount consideration is the legislature’s intent as reflected in the plain and ordinary meaning of the words used in the statute.” *Horse Creek Conservation Dist. v. State ex rel. Wyo. Att’y Gen.*, 2009 WY 143, ¶ 14, 221 P.3d 306, 312 (Wyo. 2009) (citing *Krenning v. Heart Mountain Irrigation Dist.*, 2009 WY 11, ¶ 9, 200 P.3d 774, 778 (Wyo. 2009)). “A statute is clear and unambiguous if its wording is such that reasonable persons are able to agree on its meaning with consistency and predictability.” *Id.* “When a statute is sufficiently clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of statutory construction.” *Cheyenne Newspapers, Inc. v. Building Code Bd. of App. of City of Cheyenne*, 2010 WY 2, ¶ 9, 222 P.3d 158, 162 (Wyo. 2010) (quoting *BP Am. Prod. Co. v. Dep’t of Revenue*, 2005 WY 60, ¶ 15, 112 P.3d 596, 604 (Wyo. 2005)).

20. Courts interpret rules in the same manner as statutes, looking first to the plain language. *RME Petroleum Co. v. Wyoming Department of Revenue*, 2007 WY 16, ¶ 44, 150 P.3d 673, 688 (Wyo. 2007). An agency’s interpretation of its own rules and regulations is entitled to deference “unless that interpretation is clearly erroneous or inconsistent with the plain language of the rules.” *Office of State Lands & Invs. v. Mule Shoe Ranch, Inc.*, 252 P.3d 951, 954 (Wyo. 2011)(citing *Powder River Basin Res. Council v. Wyo. Dep’t of Envtl. Quality*, 226 P.3d 809, 813 (Wyo. 2010)).

21. Although there is disagreement among the parties about who has the burden of proof in this case, the Council believes it is appropriate that Contura bear the burden and is responsible for producing sufficient evidence that the Division’s decision to approve the permit renewal was appropriate and in accordance with law.

B. Applications of Principles of Law

22. The Council finds and concludes that it has jurisdiction over this matter under Wyoming Statute § 35-11-406(k).

23. The Council is required to determine whether the Division appropriately approved Contura's permit renewal application, specifically, whether the Division properly approved the use of Contura's ranch properties as collateral for a portion of its reclamation bond.

24. The Council finds and concludes that based upon the testimony and exhibits provided during the contested case hearing, Contura has met its burden of proof.

25. The Council finds and concludes that the Division properly and professionally processed and analyzed Contura's permit renewal application. The ranch properties used as collateral were sufficient to cover the relevant portion of Contura's reclamation bond.

26. The Council finds and concludes that the requirements under the law to approve and accept the ranch properties as collateral have been met. Specifically, the Council finds that:

a) The fair market value of the ranch properties was determined by a qualified appraiser approved by the Division.

b) The ranch properties were properly valued at the difference between the fair market value and any reasonable expenses anticipated by the DEQ in selling the property.

c) The value of the ranch properties was sufficient to cover the relevant portion of Contura's reclamation bond.

d) Contura executed a first lien mortgage on the ranch properties in favor of the DEQ.

e) The DEQ has a properly perfected first lien security interest in the ranch properties.

f) The first lien mortgage was duly recorded with the appropriate counties.

g) The first lien mortgage grants the DEQ the authority to sell or otherwise dispose of the ranch properties by public or private proceedings so as to ensure reclamation of the affected lands.

27. Although there was no abstract performed on the ranch properties, it is undisputed that the DEQ is in first lien status on these ranch properties – the failure to obtain an abstract is not a reason to deny the permit renewal application. The undisputed evidence reveals that Contura owns the ranch properties and that the DEQ has a properly perfected first lien mortgage and security interest in the ranch properties.

28. The Council finds and concludes that the Division properly processed and analyzed Contura’s permit renewal application—the permit renewal application complied with the laws of Wyoming. Contura’s reclamation bond, including the real property collateral bond, assures that Contura will faithfully perform all requirements of the Wyoming Environmental Quality Act.

VI. ORDER AND DECISION

IT IS HEREBY ORDERED that the Division’s decision to renew Contura’s permit is affirmed.

DATED this 14 day of August 2019.



Meghan Lally
Environmental Quality Council