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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

In re Brook Mining Co., LLC coal mine Permit – PT0841	)	EQC Docket No. 20-4802

BRIEF IN SUPPORT OF RESPONDENT BROOK MINING, LLC, MOTION FOR SUMMARY JUDGMENT FOR LACK OF STANDING

COMES NOW, Brook Mining Co., LLC, ("Brook") by and through its attorneys, Patrick J. Crank, Abbigail C. Forwood, and Jim D. Seward of the firm Crank Legal Group, P.C., and hereby respectfully requests the Environmental Quality Council ("EQC") to Dismiss the Petition in this case because Petitioner Powder River Basin Resource Council ("PRBRC") lacks the necessary standing to proceed in this litigation.

STATUS OF THIS APPEAL

The PRBRC Petition makes only two factual allegations as to standing. All those allegations are contained in paragraphs five and six of the Petition which provide:

> 5. The Resource Council and its members timely filed objections to Brook's Coal mine permit application and participated in the informal conference held on May 13, 2020. Resource Council members John Buyok,

Gillian Malone, Anton Bocek, Joan Tellez, Joanne Westbrook, and William Bensel filed objections and participated in the informal conference.

6. The objections and concerns of the Resource Council members demonstrate that the Resource Council, through representation of its members, is an "interested person" within the meaning of the Wyoming Environmental Quality Act ("WEQA" or "Act") section 406(p) and a "person with an interest which is or may be adversely affected" within the meaning of Ch.1 § 17(b) of DEQ's Rules of Practice and Procedure. The Resource Council's objections are attached as Appendix A to this petition for hearing and the comments of individual Resource Council members are available on the DEQ's website.

SUMMARY JUDGMENT STANDARD OF REVIEW

The standard for summary judgment under Wyoming Rule of Civil Procedure 56 is well established in Wyoming:

> Summary judgment is appropriate when no genuine issues as to any material fact exists and the prevailing party is entitled to have a judgment as a matter of law, *Eklund v. PRI Environmental, Inc.*, 2001 WY 55 ¶ 10, 25 P.3d 511, ¶ 10 (Wyo. 2001). A genuine issue of material fact exists when a disputed fact, if it were proven, would have the effect of establishing or refuting an essential element of the cause of action or defense which has been asserted by the parties. *Williams Gas Processing-Wamsutter Co. v. Union Pacific Resources Co.*, 2001 WY 57, ¶ 11, 25 P.3d 1064, ¶ 11 (Wyo. 2001). We examine the record from the vantage point most favorable to the party who opposed the motion, and we give that party the benefit of all reasonable inferences that may fairly be drawn from the record. *Id.*

Nuhome Investments, LLC v. Weller, 2003 WY 171, ¶ 7, 81 P.3d 940 (Wyo. 2003) (quoting *Trabing v. Kinko's Inc.*, 2002 WY 171, ¶ 8, 57 P.3d 1248, ¶8 (Wyo. 2002)). *See Davis v. State,* 910 P.2d 555, 558 (Wyo. 1996); *Smith v. Throckmartin,* 893 P.2d 712, 714 (Wyo. 1995). "The party moving for summary judgment bears the initial burden of establishing a *prima facie* case for a summary judgment. If the movant carries the burden, the party opposing the motion must come forward with specific facts to demonstrate that a genuine issue of material fact does exist." *Hiltz v. Robert W. Horn, PC,* 910, P.2d 566, 569 (Wyo. 1996).

An opposition to summary judgment must assert substantiated facts rather than conclusory statements or mere opinions. *See, McClellan v. Britain,* 826 P.2d 245, 247-48 (Wyo. 1992); *Clark v. Industrial Co.,* 818 P.2d 626, 628 (Wyo. 1991). "Categorical assertions of ultimate facts without supporting evidence cannot defeat summary judgment. [citations omitted.]" *Seamster v. Rumph,* 698 P.2d 103, 106 (Wyo. 1985). The material presented to the court as a basis for summary judgment "should be as carefully tailored and professionally correct as any evidence which is admissible to the court at the time of trial." *Lane Co. v. Busch Development, Inc.,* 662 P.2d 419, 426 (Wyo. 1983).

The Wyoming Supreme Court has defined a material fact as a fact which, if proven: "would establish or refute one of the essential elements of a cause of action of a defense which has been asserted." *Wilder v. Cody Country Chamber of Commerce,* 868 P.2d 211, 216 (Wyo. 1994); *Feather v. State Farm Fire & Cas.,* 872 P.2d 1177, 1180 (Wyo. 1994)" *Johnson v. Soulis,* 542 P.2d 867, 871-72 (Wyo. 1985) (A genuine issue of material fact is one which has "some legal significance, that is, under the law applicable to a given case, it would control in some way the legal relations of the parties [citations omitted].").

"If the evidence is subject to conflicting interpretations or reasonable minds might differ as to its significance, summary judgment is improper." *Weaver v. Blue Cross-Blue Shield,* 609 P.2d 984, 987 (Wyo. 1980). However, "[t]he motion for summary judgment should be sustained in the absence of a real and material fact issue considering movant's burden, respondent's right to the benefit of all favorable inferences and any reasonable doubt, with credibility questions to be resolved by trial." *Cordova v. Gosar,* 719 P.2d 625, 640 (Wyo. 1986).

Further, Wyoming Rule of Civil Procedure 56.1 requires a separate statement of facts to be filed with motions for summary judgment or in opposition thereto. *See* Wyo. R. Civ. P. 56.1(a) and (b) ("[I]n addition to the materials supporting the motion, there shall be annexed to the motion a separate, short and concise statement of material facts..."). Failure to file a statement of facts may be, but is not always, fatal. *See RB, Jr. by & through Brown v. Big Horn Cty. Sch. Dist. No. 3,* 2017 WY 13, ¶¶ 8-12, 388 P.3d 542, 545-46 (Wyo. 2017).

The question of whether the PRBRC has standing to appeal the issuance of the Brook mining permit is almost exclusively a legal question. The only factual question that exists regarding this Summary Judgment Motion is whether the six individuals named in Petition are actually members of the PRBRC. Other than a conclusory statement in the Petition that they are members, there is no evidence in the Petition, the tax returns filed by the PRBRC with the IRS, or in the extensive record of this matter, that the six individuals are members of the PRBRC.

Even if the six individuals named in the Petition are members of the PRBRC, their written comments and testimony at the informal conference fail to establish the type of individual harm and injury flowing from the issuance of the Permit that is necessary to establish standing under Wyoming law. None of these individuals filed a challenge to the Permit and are not parties to this action. The PRBRC has completely and fatally failed to allege in the complaint any damage or injury to the PRBRC itself by issuance of the Permit. The PRBRC failed to factually allege injury to itself and cannot establish standing based on an injury to its members even if the six named individuals are members of the PRBRC. The EQC should grant the Motion for Summary Judgment filed herein because Brook is entitled to judgment as a matter

of law in this matter. No matter how the EQC may decide the factual issue of PRBRC membership, Brook is entitled to judgment as a matter of law and this appeal must be dismissed.

THE EQC MUST DISMISS THE APPEAL BECAUSE THE PRBRC HAS NO STANDING TO BRING THIS APPEAL

It is critical to note that there are only three parties to this Petition. Those parties are Brook, the WDEQ, and PRBRC. No individual, including the six alleged members of the PRBRC named in the Petition has appealed the issuance of the Permit in this matter. The six individuals identified in the brief are not parties to this litigation[1]. Pursuant to Rules of the EQC and the Wyoming Administrative Procedures Act ("WAPA") failure to seek review of any decision in a timely manner is jurisdictional. *Chevron U.S.A. Inc. v. Dept. of Revenue,* 2007 WY 62 (Wyo. 2007) ¶ 7. ("The filing of a timely properly authorized petition for review of administrative action is mandatory and jurisdictional"). Because the six individuals failed to seek review of the permitting decision, they are barred from doing so now.[2]

This result is supported by the fact that WDEQ's General Rules of Practice and Procedure specifically define a "Petitioner" as "... **a person** who submits a written request for relief to the Council in accordance with the Wyoming Environmental Quality Act." (Emphasis added). Chapter 1, Section 8 of the WDEQ Rules of Practice and Procedure, § 1-2. The six alleged members named in the Petition filed by the PRBRC do not meet the definition of a "Petitioner" and most certainly did not file a written appeal of the permitting decision in a timely manner. They cannot do so now because the time to do so has long ago run. When analyzing

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[1] The PRBRC expressly admits and asserts this fact in Exhibit B to this brief where the PRBRC stated: "We request that Brook agents and counsel contact any members identified in the Petition for Hearing only through Ms. Anderson as **these members are not individual parties to this proceeding.** Exhibit B p. 8. (emphasis added).

[2] Pursuant to Chapter 1, Section 8 of the WDEQ Rules of Practice and Procedure, Section 1-17, appeals of administrative decisions after an informal conference for a surface coal mining operation must be filed within 30 days of the notification of the decision. The six individuals named in the Petition filed by PRBRC did not file any appeal.

the Motion to Dismiss in this matter on standing grounds, the EQC can only consider damage or harm that might flow to the six alleged members as allowed by Wyoming law. They are not "petitioner" parties, they did not file a petition, and their ability to now do so has been irretrievably lost. The only issue that remains is whether the corporate and non-breathing entity PRBRC itself has somehow been harmed and can pursue the appeal[3].

On September 10, 2020, Brook requested discovery from the PRBRC. Brook requested that the PRBRC produce copies of five years of 990 corporate IRS tax returns including schedules and attachments, copies of bylaws and Articles of Incorporation, all minutes of Board of Directors or membership meetings for the last five years, a current membership list and list of Board of Directors, and all documents that detail or account for any and all membership fees, dues or contributions to the PRBRC. *See*, Brook Mining Co. LLC.'s First Request for Production of Documents to Powder River Basin Resource Council, attached hereto as Exhibit "A." On September 21, 2020, PRBRC filed a response to the discovery request. In large part the response was nothing more than a long objection to providing the documents requested by Brook. The PRBRC refused to produce a current membership list or list of the Board of Directors of the PRBRC. The PRBRC refused to produce any documents that detail and account for any and all membership fees, dues, or contributions to the PRBRC. The PRBRC produced only three years of 990 IRS tax returns, and based on information and belief, did not produce all accompanying schedules and attachments for the IRS 990 tax returns. The PRBRC did not produce minutes for their meetings other than two excerpts of minutes from May 15, 2020, and

[3] On August 31, 2020, the PRBRC filed its Preliminary Designation of Witnesses and Exhibits with the EQC. **The PRBRC did not list the six individuals identified in the Petition as witnesses.** It is obvious that from this glaring admission that the PRBRC cannot rely on damage to its members to challenge the issuance of the Permit.

July 17, 2020. *See*, Powder River Basin Resource Council's Response to Brook Mining Co., LLC's First Request for Production of Documents, which is attached hereto as Exhibit "B."

The three 990 forms that the PRBRC did selectively produce are attached as Exhibit "C" to this brief. Review of the three IRS 990 tax forms provided show that **PRBRC reported to the IRS under the certification set out above the signature line of these federal tax reporting forms that it received no income from "membership dues" in 2016, 2017, or 2018.**[4] *See,* Exhibit "C", 2016 IRS Form 990 for PRBRC, p.9, Statement of Revenue , line 1(b); 2017 IRS Form 990 for PRBRC, p.9, Statement of Revenue, line 1(b); and 2018 IRS Form 990 for PRBRC, p.9, Statement of Revenue, line 1(b).

The PRBRC entity bylaws provided in response to the discovery request are attached to this brief as Exhibit "D". In pertinent part, those bylaws provide that "[i]n order to remain in good standing, all members of the council **shall pay an annual membership fee**." Exhibit "D", 2012 Amended PRBRC bylaws, Article III, Section 2 (emphasis added). The PRBRC entity bylaws further provide that only members in good standing can serve as a board member and the Directors of the Board shall be chosen from the elected Board Members. *Id.* at Article V, Sections 1-3.

As noted above**, the PRBRC has refused to provide any membership lists and any documents that would show membership fees, dues, or contributions to the PRBRC**. The PRBRC has also refused to produce all schedules or attachments to the 990's that were actually filed. Based on the documents that they have produced (three years of tax returns filed with the IRS), they received no membership fees or dues. It follows from the bylaws and from the documents filed by PRBRC with the federal government, the PRBRC can have no members

[4] "Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete . . ."

because no person can be in good standing as a member because no person has paid any dues. It further follows then that since there are no members of the PRBRC pursuant to the bylaws, there can be no duly elected Board of Directors or Directors of the Board of Directors. The PRBRC, based on their tax filings with the United States government, has no members and no way to function as a corporate entity. Allegations that the PRBRC has members or that the PRBRC is an "interested person" that can pursue this appeal are false pursuant to the documents it repeatedly signed and knowingly filed with the federal government.

In addition to this fatal problem for the PRBRC, it is apparent that the PRBRC is not the wholesome Wyoming based advocacy "landowner" group that it publicly purports to be. Each year, the PRBRC is primarily funded and heavily supported by out of state anti-development groups. In 2016, at least 61.2 percent of the PRBRC's grants and donations came from out of state entities[5]. *See,* Exhibit "E" Jeff Barron Affidavit at ¶45. In 2017, at least 58.9 percent of the PRBRC's grants and donations came from out of state entities. *Id.* In 2018, at least 60.6 percent of the PRBRC's grants and donations came from out of state entities. *Id.* Again, the IRS tax returns filed with the United States government show that the PRBRC received no membership dues or fees between 2016 to 2018. *Id.* at ¶8. Further, since the PRBRC received no membership dues from Wyoming citizens and only shows funding from out of state activist environmental groups, it is not unreasonable to assume that the PRBRC has in fact no financial support from any Wyoming citizens and is indeed nothing more than a local proxy representing out of state interests intent on thwarting any fossil energy development in Wyoming. **Thus the fact that the PRBRC is primarily funded by out of state entities and has apparently not collected**

[5] As noted *supra*, the PRBRC has refused to provide a full accounting of donations, grants, and membership dues. Publicly filed documents show these out of state contributions. The actual records of the PRBRC, if produced, would provide a complete accounting of their funding sources. This complete accounting of funding sources would no doubt show additional out of state contributions.

membership dues or fees is a strong factor showing that the PRBRC has no standing to pursue this appeal.

The PRBRC might have been able to establish standing to pursue this appeal if it had actual members and pursued this appeal in connection with a real human being who could show actual and provable damage flowing from the issuance of the Brook mining permit. They chose not to do so in this appeal. This fatal error by the PRBRC has deprived the EQC of any jurisdiction or power to review the Brook Permit.

The real human beings referenced in the petition, even if they are members of the PRBRC, are not parties to this matter. Their damages, if any, are speculative, conjectural, and unrelated to the claims made by the PRBRC in the Petition. These alleged members cannot be used by the PRBRC to show the damage necessary to have standing to pursue the appeal. As more fully laid out *infra,* the PRBRC and its out of state patrons cannot show that they have any interest (other than political) in regard to the issuance of this permit. The PRBRC, based on the petition they filed in this matter, has no standing to pursue this appeal. The matter must be dismissed.

PRBRC has declared that it has statutory standing under the Wyoming Environmental Quality Act ("WEQA") and the WDEQ Rules of Practice and Procedure. *See,* Petition for Hearing for Environmental Quality Council Review of the Department of Environmental Quality Director's Approval of the Coal Mine Permit Application Submitted by Brook Mining Co., LLC (PT0841), ¶ 5-6.

The PRBRC claims that through its members it is an "interested person." Further, the PRBRC alleges that the PRBRC itself is a "person with an interest which is or maybe adversely affected" pursuant to WDEQ Rules of Practice and Procedure, Ch. 1 §17(b). *See,* generally

Petition for Hearing, Statement of Interest, Paragraph 6. In the Petition, the PRBRC completely fails to allege facts necessary to show actual harm to the PRBRC corporate entity. These arguments ignore longstanding Wyoming precedent and are factually wrong. The PRBRC, according to its own tax records, has no standing to challenge the issuance of the permit to Brook and this appeal must be dismissed.

THE PRBRC, AND THE ALLEGED MEMBERS IDENTIFIED IN THE PETITION, HAVE NO STANDING TO BRING THIS APPEAL

The statutes and rules governing WDEQ permitting actions and EQC review of the same do not adequately answer the question of whether the PRBRC has standing to pursue this appeal. W.S. Section 35-11-112(a)(3) provides that the EQC has authority to conduct hearings in any case contesting the grant of any permit authorized by WEQA. The statutes and rules governing appeals to the EQC do not, however, completely or definitively address who may challenge the grant or a denial of a permit.

W.S. Section 35-11-406(p) provides that any "interested person" can file objections to a permit and that any "objector" may request that an informal conference be held. This provision further states that "[n]otwithstanding W.S. 35-11-1101, only the applicant or an objector who participated in a hearing before the council may obtain judicial review of the council's decision." W.S. Section 35-11-406(p)(iv).

WEQA contains an incredibly broad definition of "person" at W.S. Section 35-11-103(a)(vi). The PRBRC likely fits the definition of a person under this definition. WEQA further defines the term "aggrieved party" in W. S. Section 35-11-103(a)(vii). An "aggrieved party . . . means any person named or admitted as a party or properly seeking or entitled as of right to be admitted as a party to any proceeding under this act because of damages that person

may sustain or be claiming because of his unique position in any proceeding held under this act." *Id.* WEQA does not define the terms "objector" or "interested party." It is unfortunate that WEQA is not clear on the issue of who has standing to appeal a decision made by WDEQ on a coal mine permit. It is even more troubling that WEQA does not define the terms "objector" or "interested party" and fails to use defined terms in provisions relating to hearings before the EQC.

To add even more confusion to the muddled mess of non-defined terms, Chapter 1, Section 17(b) of the Department of Environmental Quality Rules of Practice and Procedure, uses yet another vague term. That rule provides that "...**the applicant or any person with an interest which is or may be adversely affected may appeal** a decision to the Council..." (emphasis added). The EQC in adopting these rules does not define the term "any person with an interest which is or may be adversely affected." The question then becomes who is an "interested party," who is an "objector," and who is a "person with an interest that is or may be adversely effected?"

One thing that seems obvious from WEQA is that a "person" as defined under the act is different from an "aggrieved party." Based on W.S. Section 35-11-103(a)(vii) an "aggrieved party" is: 1. A person who is admitted as a party to a proceeding under WEQA who has been actually damaged or has some unique position under the act.; **or,** 2. A person "properly seeking or entitled as a matter of right to be admitted as a party who has been actually damaged or has some unique position under the act.." (emphasis added). The Wyoming Legislature would have had no need to separately define "person" and "aggrieved party" under WEQA if "person" and "aggrieved party" were one and the same for purposes of WEQA. *See, Delcon Partners, LLC v. Wyoming Department of Revenue,* 2019 WY 106 (Wyo. 2019) ¶11.

W.S. Section 35-11-406(p)(i) provides that "any interested person" may file written objections to a coal mining permit application. The same section provides that the Director of WDEQ must hold an informal conference if an "objector" requests an informal conference. *See,* W. S. Section 35-11-406(p)(ii). Under black letter Wyoming law, State agencies like the WDEQ and the EQC have only such power as is granted to them by the Wyoming Constitution or duly passed statutes adopted by the Legislature. *See, In Re Disciplinary Matter or Billings,* 30 P.3d 557, 568 (Wyo. 2001). If there is authority for the adoption of the rule at Chapter 1, Rule 17(b) discussed above in WEQA, the definition of "aggrieved party" found in W.S. Section 35-11-103(a)(vii) must be the source of that power.

It is clear that to be an "aggrieved party" or someone who has or been "adversely affected" under WEQA, a person must have individually and personally suffered damage or harm or have the real potential to be harmed. While WEQA is muddled and imprecise on the issue of standing, one cannot seriously argue with the premise that in order to appeal the issuance of a coal mining permit to the EQC, the appealing party must show that they have been harmed by the issuance of the permit. To claim that the term "interested person" is any "person" defined under the act who has some generalized or non-specific "interest" in coal mining, and the political debate surrounding coal and its environmental appropriateness, is logically inconsistent with the act as a whole. In addition, defining the term "interested person" in this manner would ignore and wipe out a substantial body of case law that **requires actual damage and harm** to bring claims in front of the Wyoming courts. Defining "interested person" by rule as anyone that wants to express their views on coal mining in fact openly transgresses longstanding rules on statutory construction that prevent interpreting one provision in a manner that nullifies other

provisions of the same statutory scheme. *See, Hede v. Gilstrap*, 107 P.3d 158, 2005 WY 24, ¶ 6 (Wyo. 2005).

Because WEQA is ambiguous on who may appeal a coal mining permit, case law from the Wyoming Supreme Court on standing must decide this issue. The case of *Allred v. Bebout*, 409 P.3d 260 (Wyo. 2018) contains a great summary and analysis of a long line of standing cases decided by Wyoming courts over the years. While the views of the Wyoming Supreme Court on the issue of standing have ebbed and flowed over the years, *Allred* shows that to address standing, the four part "Brimmer Test" must be applied. The Brimmer Test provides that:

> First, a justiciable controversy requires parties having existing and genuine, as distinguished from theoretical, rights or interests. Second, the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument evoking a purely political, administrative, philosophical or academic conclusion. Third, it must be a controversy the judicial determination of which will have the force and effect of a final judgment in law or decree in equity upon the rights, status or other legal relationships of one or more of the real parties in interest, or, wanting these qualities be of such great and overriding public moment as to constitute the legal equivalent of all of them. Finally, the proceedings must be genuinely adversary in character and not a mere disputation, but advanced with sufficient militancy to engender a thorough research and analysis of the major issues. Any controversy lacking these elements becomes an exercise in academics and is not properly before the courts for solution. 521 P.2d at 578 (quoting *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 496 P.2d 512, 517 (1972)).

Id. at 270.

The Allred court further clarified what is necessary to satisfy these four elements of the Brimmer Test. With regard to element one (existing and genuine, as distinguished from theoretical, rights and interests), the Court explained that in order for a party to have standing, the party had to show that they had been "aggrieved or adversely affected in fact." *Id.* at 274.[6] A

[6] Brimmer Test element one closely aligns with the definition of "aggrieved party" pursuant to WEQA.

person cannot gain standing by alleging that they have been injured like all other citizens of Wyoming. *Id.* In addition, the actual damage suffered by a plaintiff must be specifically alleged in the complaint. *Id.*

The PRBRC glaringly fails to even attempt to address in the Petition how their members will be specifically harmed or damaged by the issuance of the Permit. The alleged Members are mentioned only in Paragraph 5 of the Petition and the Petition does not allege any particularized damage or harm that these "members" have suffered or may suffer in the future. Likewise, the Petition fails to allege in any way how PRBRC as an entity has suffered or any damage or harm. *Allred* very clearly requires that to have standing, actual damage must be alleged in the complaint. *Allred,* 409 P.3d 274.

With regard to Brimmer element two (Controversy upon which the judgment of the court may operate) *Allred* explained that the first two elements of the Brimmer test were inextricably intertwined and that if a Plaintiff failed to allege it had a specific interest that had been aggrieved or adversely affected in fact that a judicial action cannot remedy a nonexistent harm. *Id.* at 274. Any court or any administrative body can always pick a "winner" between two parties with divergent views of any issue. Picking the "winner" is not the issue. The critical analysis under this element is whether the court (EQC) can actually logically address the specific actual and real harm that the plaintiff has alleged – if any is actually alleged at all.

Here, the PRBRC has not alleged any harm to itself. The PRBRC has not alleged any specific harm to its members. If it has alleged harm, the harm is that the political viewpoint of its alleged members (who have apparently not paid dues for years) has not been recognized in this permitting action. Those members apparently share the political viewpoint that mining coal is bad and harmful to the environment and must be opposed at all costs. Even accepting that

political viewpoint as true, the PRBRC, both on behalf of its members and particularly for itself, has not alleged, nor can they prove, peculiar and individualized damage as a result of this permit being issued.

The PRBRC entity does not live near the mine, there is no possibility that their office will be damaged by blasting, there is no possibility that that their office will fall into a sink hole because the subsidence plan is inadequate. Corporations cannot bleed or cry, do not have feelings, and cannot allege that their quality of life will be disrupted by some industrial activity. Even accepting their charade that they are a small Wyoming advocacy group supporting the interests of their small landowners in Wyoming, none of their members challenged this permit issuance. None of their members are parties to this action. None of their members have alleged actual harm in this matter. **All that is alleged in the petition is that six alleged members of the PRBRC and the PRBRC itself made comments on aspects of the mining permit application.** Those allegations and rejection of their philosophical view points do not magically provide them with legal standing to bring an appeal like this one against the Brook coal mine permit. The PRBRC has utterly failed to satisfy both of the first two elements of the Brimmer Test and cannot show they are aggrieved or adversely affected by the permitting decision. There is no judicial remedy for their nonexistent harm. *Id.* at 275.

The PRBRC also cannot establish the third element of the Brimmer test (controversy for which the determination will have the force and effect of law or involves an issue of such great importance that the court should decide the question). While a decision by the EQC in this matter will have the force and effect of a final judgment as any EQC decision may have, that is not the end of the test. In *Allred*, the court found that "...this element requires that the judgment affect the rights, status or other legal relationships of **one or more of the real parties in**

interest.'" *Id.* at 275. (emphasis added). Here, just as in *Allred*, the PRBRC has not alleged "rights status or other legal relationships of one or more real parties in interest". First, the only possible "real party in interest" is the PRBRC because no member of their entity appealed the decision to issue the permit. As noted above, the PRBRC, a corporation apparently funded primarily by non-Wyoming environmental activists, and a corporation that exists only by operation of statute, has not alleged, nor can it show, any damage to itself as an entity. They have not asserted any facts nor can they prove that the corporation itself has been adversely affected or harmed by this WDEQ action. They seek review by the EQC of a purely political question regarding their view that coal mining is environmentally harmful and must be stopped at all costs regardless of compliance with regulatory permitting requirements. Having failed to satisfy injury (Brimmer element one), redressability (Brimmer Element two) they also fail to establish this element. Courts do not allow a party to seek redress for the harm allegedly suffered by another. The party to any lawsuit must show individual harm to their own interests. *See*, *In Re Adoption of L-MHB,* 431 P.3d 560, 567, 2018 WY 140, ¶19.

The Wyoming Supreme court has dramatically backed away from the proposition that some issues are of such great import that courts should decide issues despite lack of standing. *See, Allred,* 409 P.3d at 277. Even if the court had not backed away from this "great public importance" standing concept, the issues raised by the PRBRC in its petition are not issues of great public importance. A state regulatory agency applied detailed regulatory standards passed by the state legislature and reached a decision to issue a permit after six years of painstaking review of a mining permit application. Those conclusions of the agency charged with performing these duties by Wyoming law are not issues of great public import.

There is no human being in this matter alleging that unless the EQC corrects perceived and unsupported wrongs with the Permit issued to Brook that they will be harmed. There were a number of folks that could have filed an appeal of this matter including those named as members of the PRBRC in the petition. Those human beings, who could have brought their own challenge and sought to remedy whatever damage they could prove, chose not to bring an appeal. Giving the PRBRC every benefit of the doubt, an out of state funded political advocacy group can be damaged only if their members interests or the entity itself has been damaged. The petition filed by the PRBRC alleges only that its alleged members made comments on the mining permit allegation. Those folks who commented on the application are not real parties in interest nor are they parties to this proceeding. The PRBRC does not allege, nor can it prove, that this corporate entity has suffered any damage and cannot establish that the corporation itself has been adversely effected or is an aggrieved party under WEQA. They could be considered an "interested party" under WEQA because they have strong views on environmental issues. Being an interested party on some issue does not give one standing under Wyoming case law. Because they have no standing, this matter must be dismissed. Courts do not allow a party to seek redress for the harm allegedly suffered by another. The party to any lawsuit must show individual harm to their own interests. *See*, *In Re Adoption of L-MHB,* 431 P.3d 560, 567, 2018 WY 140, ¶19.

The standing case most similar to this matter is *Northern Laramie Range Foundation v. Converse County Board of Commissioners, et al*, 290 P 3d 1063, 2012 WY 158 (Wyo. 2012). There, three litigants appealed a decision of the Converse County Commission's decision granting a wind permit to a developer. The district Court upheld the Commission's decision and found that that Northern Laramie Range Foundation ("NLRF") and Northern Laramie Range Alliance ("NLRA") did not have standing to challenge the Commission's decision. ¶ 1.

The District Court found that White Creek Ranch, **a party to the appeal to the District Court**, did have standing to appeal the Commission's decision. ¶ 21. The District Court had found that the two corporate entities, NLRF and NLRA, did not have standing to appeal the Commissioner's decision. *Id.*

The court first affirmed the standing question as to White Creek Ranch finding that White Creek had standing because it had alleged that it owned land bordering the permit area and that the wind farm threatened the ranch's scenic views, wildlife habitat and migration. ¶ 27.

The court then addressed the standing of the NLRF and NLRA noting that an association can establish standing on its own throughout the association rights of its members. The court stated:

> [A]n association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy. Moreover, in attempting to secure relief from injury to itself the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational rights.
>
> Even in absence of injury to itself, an association may have standing solely as the representative of its members.... [However,] [t]he association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.

Id at ¶30.

The court concluded that because the owner of White Creek Ranch was actually identifiable in the record as a member of NLRA at the time of the appeal, that NLRA had standing through the court record based on its member, White Creek Ranch. ¶ 30.

The court went on to analyze whether another member of NLRA (Sarvey) had standing and whether Sarvey's membership in NLRA conferred standing to NLRA. The court found that Sarvey's email to the Commissioners making generalized complaints about the scenic effects of

the Wind Farm did not and could not provide Sarvey, nor NLRA, with legal standing to participate in the case. ¶31. The court stated:

> Even putting aside the irrelevant reference to the gravel quarry which apparently has nothing to do with the wind energy project, it is clear from this excerpt that Ms. Sarvey does not make the requisite connection between an individual harm to herself or her property and the project. There is no indication that the wind farm will threaten her with any harm beyond that the general public would incur. These general assertions do not aid her or NLRA in establishing standing.

Id at ¶32.

The *NLRA* Court found that:

> A litigant is "aggrieved or adversely affected in fact" by an agency action if he has a "legally recognizable interest in that which will be affected by the action." *Roe v. Bd. of County Comm'rs, Campbell County,* 997 P.2d 1021, 1023 Wyo. 2000) (citation omitted). In order to establish standing for judicial review of an agency action, **a litigant must show injury or potential injury by" ' alleg[ing] a perceptible, rather than speculative, harm resulting from agency action**.' "*Hoke v. Moyer,* 865 P.2d 624, 628 (Wyo.1993), quoting *Foster's Inc. v. City of Laramie,* 718 P.2d 868, 872 (Wyo.1986). " **'The interest which will sustain a right to appeal must generally be substantial, immediate, and pecuniary. A future, contingent, or merely speculative interest is ordinarily not sufficient.'** "*L Slash X Cattle Co., Inc. v. Texaco, Inc.,* 623 P.2d 764, 769 (Wyo.1981), quoting 4 Am.Jur.2d *Appeal and Error* § 180. Specifically in the context of zoning or land use planning, A litigant is "aggrieved or adversely affected in fact" by an agency action if he has a "legally recognizable interest in that which will be affected by the action." Specifically, in the context of zoning or land use planning, [a[n aggrieved or adversely affected person having standing to sue is a person who has a legally recognizable interest that is or will be affected by the action of the zoning authority in question. An individual having standing must have a definite interest exceeding the general interest in community good shared in common with all citizens.

Id at ¶24.

The court, however, did find alternatively that Sarvey had standing based on her comments at a public hearing concerning traffic usage associated with the wind farm. *Id.* at ¶ 33. This finding is suspect and pure *dicta*. The court notes that Sarvey's claim she lived "near" the wind farm was not recognized by prior cases but still found she had standing. Having already found that NLRA and White Creek Ranch, the other named party in the litigation, had standing,

the court's decision to make a suspect finding on standing for Sarvey is advisory and highly questionable. It is doubtful that the Court would reach the same conclusion in the future if the only possible standing an association has is that a member who allegedly lives "near" the project is concerned about increased traffic.

With regard to the NLRF, the court affirmed the District Court's finding that NLRF had no standing to challenge the Commission decision. ¶ 34. The Court noted that:

> Finally, we consider NLRF, a nonprofit corporation which apparently has tax exempt (§ 501(c)(3)) status under the Internal Revenue Code. It has no members and cannot, therefore, establish standing through its members. It must establish that, as an organization, it will potentially be injured by the project. In *Warth,* 422 U.S. at 511, 95 S.Ct. at 2211, the United States Supreme Court explained that "an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy."
>
> NLRF does not claim that it owns property adjacent to the project, but argues, instead, that the project will thwart its purposes. The foundation's articles of incorporation recite that it was organized "exclusively for charitable, educational, and scientific purposes." In its pleadings, it makes various representations such as, its "purpose is to sponsor, engage in and promote activities on public and private lands in the Northern Laramie Range, including those areas adjacent to Applicant's project boundaries. The programming, mission and purpose of NLRF would be adversely affected by the destruction of the scenic views and natural beauty, and the degradation of the environment, natural habitat, wildlife and biological resources." These allegations are extremely general and do not show a causal relationship between these perceived threats and the project. There is no description of the foundation's planned programs, where specifically they will be located, or how the programs would actually be harmed by the wind project. In establishing a true interest sufficient to warrant a finding of standing, the "pleadings must be something more than an ingenious academic exercise in the conceivable.' "*Warth,* 422 U.S. at 509, 95 S.Ct. at 2211, quoting *United States v. SCRAP,* 412 U.S. 669, 688, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973). There is nothing in NLRF's claims which separates its asserted injury from that of the general public who enjoys the Northern Laramie Range. As such, NLRF has failed to establish an injury or potential injury sufficient to warrant judicial intervention on its behalf.

Id. at ¶34.

In summary, *NLFR* recognizes that an entity like PRBRC can establish standing via situational harm to its members or harm directly to the entity itself. One critical difference from *NLRF* that exists here is that no member of PRBRC actually appealed the WDEQ's issuance of the permit. In *NLRF,* the White Creek Ranch, whose owner was a member of the NLRF and an actual party to the appeal and real party in interest, clearly had standing. There is no real human being or entity here that has standing because none of the alleged members of PRBRC appealed the issuance of the permit. *NLRF* does not overrule the significant number of cases including *Allred* that dictate that standing is determined by the Brimmer Test. Here, the PRBRC has failed to allege individualized harm to either its alleged members named in the Petition and to PRBRC itself.

Considering hypothetically for the moment, and only for purposes of argument, that the six individuals named in the Petition are actually members of the PRBRC somehow, the comments that those six persons gave in writing and at the informal conference do not give the PRBRC standing in this matter.

Only two of these individuals-Anton Bocek and John Buyok-even live near the mine. All others referenced in the Petition live at a distance to the mine. *See,* Transcript May 13, 2020 Informal Conference attached as Exhibit "F".

Bill Bensel, who lives 2.6 miles from one boundary of the mine, and who did not testify he was a member of the PRBRC, vaguely mentioned concern about subsidence issues in his written comments and only commented that he was concerned about subsidence in his testimony at the informal conference. *See,* Exhibit F, Transcript of May 13, 2020 Informal Conference p.12. Mr. Bensel's comments certainly do not support the legal arguments of the PRBRC in the Petition that the WDEQ could not modify the

subsidence plan by permit conditions after the informal conference. Mr. Bensel provided no testimony to support specific individual harm and he expressed, at best, only general sentiments concerning harm that are no different in degree or magnitude than the harm that could possibly occur to the general public. *Northern Laramie Range Foundation*, 2012 WY 158 at ¶32. Mr. Bensel has no standing himself to challenge the permit nor does he, even if he is a member of the PRBRC, provide standing to the PRBRC as an entity.

Joan Tellez does not claim use of the area where mining will occur and does not in either her written comments or testimony at the informal conference claim to be a member of the PRBRC. In her written comments, she expressed only vague nonspecific comments on road maintenance and stated her obviously unfounded lay-opinion that, there did not appear to be "enough" testing to accurately predict subsidence possibilities. At the informal conference, however, Ms. Tellez chose not to mention any subsidence issues. *See,* Exhibit F, Transcript of May 13, 2020 Informal Conference at pp.38-45. Ms. Tellez lives across the interstate highway from the mine. *Id.* Despite that, Ms. Tellez did not in her written comments or testimony at the informal conference identify any specific individual harm other than what might occur to the general public. Ms. Tellez has no standing and, even if she is a member of the PRBRC, she does not identify individualized harm to provide standing to the PRBRC as a corporate entity.

Joanne Westbrook likewise shows no individual and particularized harm from the issuance of the mine permit greater than the general public. In her written comments and testimony at the informal conference, she does not claim to be a member of the PRBRC, does not mention subsidence, and she complained exclusively regarding her unfounded

fears about water issues associated with the mine. *See*, Exhibit F, Transcript of May 13, 2020 Informal Conference at pp.20-22. She clams no usage of the area in question and states that she is a landowner in the Ranchester area. Ms. Westbrook has no standing and, even if she is a member of the PRBRC, she does not identify any individualized harm to provide standing to the PRBRC as a corporate entity because the PRBRC clearly did not appeal any water related issues in the Petition.

Gillian Malone mentioned historical subsidence problems in the area and makes a vague, general, and again unfounded complaint regarding not having a "an adequate subsidence control plan" in her written comments. At the informal conference, Ms. Malone chose not to reference subsidence, briefly mentioned public road usage, and focused her comments almost exclusively on public use of the areas within the permit boundary. *See,* Exhibit F, Transcript of May 13, 2020 Informal Conference at pp.33-38. She did indicate that she uses areas within the permit boundary for recreation but did not testify that she was a member of the PRBRC. Ms. Malone has no standing and, even if she is a member of the PRBRC, she does not and cannot identify any specific individualized harm to provide standing to the PRBRC as a corporate entity. When addressing Ms. Malone's standing it is also important to note that no one, including the PRBRC, has challenged this mine permit because it might impact public usage of the area in this appeal. Ms. Mallon has not alleged she lives anywhere in the vicinity of the mine and will be impacted even if the mine causes some increased traffic on the public roadways in the area.

Anton Bocek, who lives close to the permit area, expressed several general concerns in both his written comments and testimony at the informal conference. He did

not testify that he was a member of the PRBRC in any of his comments. Overall, his main concern was how blasting at the mine might affect water wells on his property. This is not an issue raised by the PRBRC in the Petition. With regard to subsidence, he focused on subsidence from historical mines in the area and did not identify any specific or individualized harm to himself with regard to subsidence. He may have vaguely raised one issue being pursued by the PRBRC in this petition, i.e., that the subsidence plan "seems quite inefficient for the life of the mine." *See*, Exhibit F, Transcript of May 13, 2020 Informal Conference at pp.49-52.

While Mr. Bocek could have likely established standing if he had filed his own challenge to the Permit being issued, **he did not challenge the Permit and is not a "petitioner" party to this proceeding.** The issues he complains about-blasting and some possible effect on his water wells-are not issues before the EQC because no one, including and especially the PRBRC, has raised those issues in this appeal. His challenge regarding the "inefficient" subsidence plan, whatever that might mean, is far too vague on its face to provide standing with regard to subsidence issues. Mr. Bocek has no standing **with regard to the issues raised by the PRBRC in its Petition**, and even if he is a member of the PRBRC, he does not identify individualized specific harm to provide standing to the PRBRC as a corporate entity.

John Buyok, who lives close to the Permit area, also expressed general concerns regarding subsidence and increased traffic on public roads. Mr. Buyok did not testify that he was a member of the PRBRC. Like Mr. Bocek, he expressed general and unfounded concerns that blasting at the mine might affect water wells on his property. Mr. Buyok's objections regarding subsidence included both a complaint in his written comments

regarding technical and factual subsidence issues obviously parroting comments of the PRBRC subsidence expert from the prior proceedings for this mine area, Genarro Marino. In addition, he generally commented on sink holes appearing on his property from prior historical mines in the area and how blasting might cause additional sinkholes. *See*, Exhibit F, Transcript of May 13, 2020 Informal Conference at pp.46-49.

While Mr. Buyok likely would have had standing as a nearby landowner if he had filed his own challenge to the issuance of the Permit, **he did not file a Petition and he is not a party to this Petition.** The issues he raised in his comments on the Permit, i.e. increased public road usage, blasting affecting his water wells, a technical and factual challenge to the subsidence plan, and possible increased subsidence on previously mined areas, are not being pursued by the PRBRC. Because PRBRC has failed to challenge the issuance of the Permit for the harm that Mr. Buyok raised, even if Mr. Buyok is a member of the PRBRC, his speculative harm does not give the PRBRC standing in this matter to raise other arguments and concerns that Mr. Buyok did not raise himself.

The only comment that Mr. Buyok made that could possibly give rise to standing for the PRBRC might involve increased road usage. Regarding that issue, Mr. Buyok has no greater harm than that possessed by the general public and he has no standing nor does the PRBRC. While several persons commented on the general topic of possible increased road use, none of the six individuals made comments or supported the argument made by the PRBRC in the Petition. In issue three of the Petition, the PRBRC claims that public highways near the mine will be used as "haul roads" for the mine and are therefore "incident to the mine." None of the six alleged members voiced this concern. The argument made by PRBRC is a pure legal argument and does not address the basic

complaint made by their members that increased traffic on public roads might affect public safety. Again, only for purposes of argument, hypothetically accepting the PRBRC arguments in Issue 3 as entirely accurate,[7] the remedy to solve the alleged permit problem would be to include the public roadways in the mine plan. The relief would not include banning all mine traffic from the identified roads. The remedy for the alleged legal problem raised by the PRBRC in Issue 3 would not even address the concerns of the PRBRC's alleged members. Because the argument raised by the PRBRC cannot remedy the speculative injury raised by alleged members, the speculative "injury" provides the PRBRC no legal standing.

The PRBRC has informed the WDEQ and Brook that they will offer no testimony on the sufficiency of the subsidence plan as it exists in the issued Permit. The PRBRC's challenge is whether, as a matter of law, the WDEQ could use the comments at the informal conference and other expert analysis to create a subsidence plan as required by WEQA. *See,* email chain of October 2, 2020 between Shannon Anderson, Brook, and Wyoming Attorney General's Office attached as Exhibit "G". Basically, the PRBRC is trying to thwart the six years of hard work that led to issuance of the Permit with an argument regarding technicalities on whether WDEQ could add conditions to the Mine Permit. This argument would void the informal conference and its utility to modify the Mine Permit. In the Petition, the PRBRC is not challenging the subsidence plan as required and controlled by Conditions 9 to 11 of the Mining permit. The sole challenge raised by the PRBRC in this Petition is the legal issue of whether the WDEQ could address the subsidence plan via permit conditions as the WDEQ did in adding Conditions

[7] The argument in Issue 3 is wrong both factually and legally and the EQC will have to dismiss this claim when Brook files an additional Summary Judgment Motion in this matter.

9, 10, and 11 to the Permit. The PRBRC is also alleging in its Petition that Brook should have been forced to provide finite mining area subsidence design for the entire area of the permit before the Permit could issue.

None of the named individuals in the Petition have alleged nor shown the type of individualized harm from the issuance of the Permit to have standing to pursue a Petition before the EQC. Even if these individuals are members of the PRBRC, their alleged and generalized "harm" simply does not and should not provide any legal standing for the PRBRC entity to pursue this appeal. The Petition filed by the PRBRC must be dismissed forthwith.

Conclusion

For the reason's argued in this filing, the EQC should grant the Motion for Summary Judgment filed by Brook and find the PRBRC has no standing to pursue an appeal in this matter. The appeal must be dismissed forthwith.

Respectfully submitted this 8th day of October, 2020.

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CERTIFICATE OF SERVICE:

This is to certify that on the 8TH day of October, 2020, a true and correct copy of the foregoing was served upon the following:

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