

Patrick J. Crank (5-2305)  
[pat@cranklegallgroup.com](mailto:pat@cranklegallgroup.com)  
Abbigail C. Forwood (7-4814)  
[abbi@cranklegallgroup.com](mailto:abbi@cranklegallgroup.com)  
Jim D. Seward  
[jim@cranklegallgroup.com](mailto:jim@cranklegallgroup.com)  
CRANK LEGAL GROUP, P.C.  
1815 Evans Ave.  
Cheyenne, WY 82001  
(307) 634-2994  
Fax: (307) 635-7155

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING

In re Brook Mining Co., LLC coal mine )  
Permit – PT0841 ) EQC Docket No. 20-4802  
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**RESPONDENT BROOK MINING CO., LLC, BRIEF IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

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COMES NOW, Brook Mining Co., LLC <sup>1</sup>, 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 submits its Brief in Support of Motion for Summary Judgment before the Environmental Quality Council of the Department of Environmental Quality regarding the Director’s Approval of the Coal Mine Permit Application Submitted by Brook Mining Company, LLC (PT0841).

**STATEMENT OF FACTS**

On August 6, 2020, Petitioner, Powder River Basin PRBRC (“PRBRC”) filed a Petition for Hearing requesting the Environmental Quality Council (“EQC”) to review the Department of Environmental Quality Director’s Approval of the Coal Mine Permit for Brook Mining

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<sup>1</sup> Brook Mining Co., LLC, is the applicant for this permit as it was granted based upon its lease interest in the coal and the relevant property pursuant to that certain October 29, 2014, Lease and Sublease by and between Brook and Ramaco Wyoming Coal Co., LLC, and Ramaco Wyoming Coal Co., LLC’s record mineral and surface interests in this area.

Company, LLC (“Brook”). Brook respectfully submits this Brief in Support of the Motion for Summary Judgment filed simultaneously herewith.

Brook filed their State Coal Mine Permit application with the Land Quality Division (“LQD”) of the Wyoming Department of Environmental Quality (“WDEQ”) on October 30, 2014, and, after full review and six rounds of deficiency responses, it was declared technically adequate and suitable for publication on December 1, 2016, per W. S. § 35-11-406(h) (LexisNexis 2016). State Decision Document (“SDD”) Brook Mining Company, LLC, Brook Mine, Permit to Mine Coal, TFN 6 2/2025 (“Temporary File Number”), July 7, 2020. Brook published notice of its application beginning December 1, 2016 and the public comment period ran through January 27, 2017. *Id.* Several parties objected and requested an informal conference.

WDEQ Director, Todd Parfitt, denied the informal conference requests on January 30, 2017, and, at the same time, referred the objections to the EQC. *Id.* The EQC held a contested case hearing on Brook’s permit application from May 22 through 26, 2017, with the hearing concluding on June 7 and 8, 2017. *Id.* The EQC issued Findings of Fact Conclusions of Law, and Decision on Brook’s permit application on September 27, 2017. The EQC ordered that Brook’s application could not be approved and outlined a process for Brook to supplement their application to WDEQ for further review. *Id.*

Director Parfitt denied Brook’s permit application on October 11, 2017, without prejudice to Brook’s ability to supplement the application in accordance with the EQC’s findings of fact. *Id.* On October 25, 2018, Brook submitted its revised application to WDEQ. Brook and LQD processed six additional rounds of deficiency declarations and responses on the revised application (Rounds 7 to 12), taking place from October 2018 through February 2020. *Id.*

The First Judicial District Court entered an Order Reversing the Decisions of the Environmental Quality Council and the Department of Environmental Quality on October 25,

2019. In this Order, the Court specifically instructed the EQC regarding the EQC's statutory limits of review of Brook's permit application and remanded Brook's initial permit application to WDEQ for a new determination consistent with a plain application of the relevant statutes. With a revised application pending before WDEQ, Brook did not seek a determination on the initial permit application. *Id.* The Order of the First Judicial District Court Reversing the Decisions of the Environmental Quality Council and the Department of Environmental Quality on October 25, 2019 was appealed to the Wyoming Supreme Court by the PRBRC on November 14, 2019. That case, on the initial permit application, has been dismissed by the Wyoming Supreme Court. The Court held that because the revised Brook permit was approved and because the former regulatory scheme under review is no longer in effect, the issues on appeal are now moot. *See, Powder River Basin Resource Council and David Fisher and Mary Bezik Fisher v. Wyoming Department of Environmental Quality and Brook Mining, LLC.*, 2020 WY 127, ¶18 (Wyo. 2020).

WDEQ found Brook's revised permit application technically complete and suitable for publication on February 26, 2020. *See*, State Decision Document ("SDD") Brook Mining Company, LLC, Brook Mine, Permit to Mine Coal, TFN 6 2/2025 ("Temporary File Number"), July 7, 2020. Brook published notice of its revised permit application, beginning on March 3, 2020. *Id.* The public comment period ended on April 23, 2020. *Id.* WDEQ received objections to Brook's application and Director Parfitt scheduled an informal conference on May 13, 2020. *Id.* WDEQ held this informal conference remotely. *Id.* Brook demonstrated that the Brook Mine surface coal mine permit application complied with Article 4 of the Wyoming Environmental Quality Act ("WEQA") and all other applicable State and Federal law and regulations. SDD at 21. *Id.*

The Permit was granted with twelve Conditions in response to the written objections raised in the proceedings or in response to WDEQ expert or other analysis submitted to WDEQ. *Id.* On July 7, 2020, the acting Administrator of WDEQ, LQD, Alan Edwards, recommended the issuance of the coal mining permits to Brook and WDEQ Director Todd Parfitt approved the same with the twelve Conditions mentioned above. *Id.*

In its appeal, filed on July 6, 2020, the PRBRC requests that the EQC now “find that the permit application should be denied.” Petition, 13.

### **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).

### ARGUMENT

The WDEQ is charged by federal law, state law, and relevant rules and regulations adopted to implement those laws, with the investigation and issuance of coal mining permits in the State of Wyoming. This record is clear that over the last 6 years, WDEQ has painstakingly and repeatedly studied Brook’s application to mine coal at the Brook Mine site in Sheridan County, Wyoming. The WDEQ has followed all state statutes, and rules and regulations adopted thereto. After the meticulous and exhaustive effort, appeals to both district court and the Wyoming Supreme Court, multiple rounds of detailed public comment, and the consideration of multiple experts provided through different commenting parties on the operation of a coal mine, the WDEQ, through Director Parfitt, issued a final permit to mine coal to Brook Mining, LLC., on July 7, 2020. It is undisputed that the law requires only that the WDEQ must, when considering the issuance of a permit to mine coal, ensure compliance with the Wyoming Environmental Quality Act. **WEQA requires that the application be complete and accurate, that the reclamation plan can accomplish what it must, and that the proposed operation was designed to ensure the hydrologic balance outside the permit area is not materially damaged. W.S. §35-11-406(n)(i-iii), et seq.** This record shows undisputedly that WDEQ has complied with all of those mandates for this permit.

The PRBRC disagrees with the issuance of this permit. As the sole party having pursued an appeal, the PRBRC has the affirmative burden in this proceeding to show by a preponderance of the evidence that WDEQ has issued this coal mining permit in violation of WEQA. *See*, Scheduling Order, EQC, August 18, 2020. The PRBRC and the EQC cannot substitute their judgment for that of the WDEQ without specific findings and relevant proof that WDEQ has failed in its statutory charge in assessing this application.

Virtually all arguments made by the PRBRC in its Petition are legal arguments regarding language in existing statutes or how that language should be construed. In several instances, the PRBRC creates imaginary legal standards and imaginary legal requirements out of thin air. The permit actions of Brook and WDEQ are memorialized in the approximately 10,000 pages of documents and technical analysis fully supporting the issuance of this permit.

Brook is entitled to judgment as a matter of law in this appeal pursuant to the Summary Judgment Motions filed in this action. There are no contested issues of material fact that need to be decided by the EQC in this matter. The actions of the WDEQ in the issuance of this permit are supported and validated by WEQA, relevant state and federal law, rules and regulations, and the uncontested facts supporting the issuance of the permit.

### **ISSUE ONE**

This issue is a pure legal issue and there are no genuine issues of material fact and Brook is entitled to judgment as a matter of law. The facts necessary to resolve this issue are not in dispute.

Wyoming law is structured to allow mine plans and permits to permit mining to be economically feasible.<sup>2</sup> It is the public policy of the State of Wyoming that coal mines shall be

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<sup>2</sup>All surface coal mining permits issued subsequent to approval of the state program pursuant to P.L. 95-87 shall be issued for a term of not to exceed five (5) years. If the applicant demonstrates that a specified **longer term is reasonably needed to allow the applicant to obtain necessary financing for equipment and the opening of the**

permitted in a manner that makes them economically feasible. *Id.* While the initial permit term is for five years, the permit is valid for the life of the mine; the life of the mine for mining purposes is thirty-nine years. *See*, Mine Plan, MP - 6. The “application shall include a mining plan and reclamation plan dealing with the extent to which the mining operation will disturb or change the lands to be affected, **the proposed future use or uses and the plan whereby the operator will reclaim the affected lands** to the proposed future use or use.” W.S. §35-11-406(b) (LexisNexis 2020). [Emphasis added].

Prior to filing this appeal, the PRBRC already has been granted all the relief it requested, and this appeal should not be available to the PRBRC as a substitute for additional relief that it is not legally entitled. After the application was deemed complete and accurate by WDEQ/LQD, PRBRC was given another opportunity for notice and hearing. The PRBRC hired its own expert, Gennaro G. Marino, President of Marino Engineering Associates, who provided his comments in a report dated April 15, 2020. WDEQ hired Daniel D. Overton, President of Engineering Analytics, Inc., in 2018 to begin performing expert review of subsidence matters for WDEQ/LQD in this application. Overton provided many reports throughout this process for WDEQ/LQD. *See*, Daniel D. Overton Affidavit Exhibit D ¶ 9. Following the completion of the public comment period and the Informal Conference, Overton also provided his comments on June 9, 2020. Overton and Marino both reviewed the work of the Brook subsidence experts, Timothy A. Ross of Agapito Associates, Inc, and the subsidence control plan as well as the remainder of the application. Overton had the benefit of the Marino report and all other public comments and the oral testimony and exhibits and testimony from the Informal Conference at the time of his review. Following the completion of the June 9, 2020 report by Overton,

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**operation and if the application is complete for this specified longer term, the director shall grant a permit for a longer term.** W.S. §35-11-405(c) (LexisNexis 2020). [Emphasis added].



WDEQ/LQD had the benefit of all expert reports as well as their own internal staff expertise in crafting conditions on the permit regarding the issue of subsidence control. Prior to the informal conference, WDEQ/LQD completed a full secondary review of the entire application using another LQD supervisor in a different WDEQ regional office as an independent third party. *See*, Affidavit of Alan Edwards Exhibit B ¶11. That supervisor provided comments as well and helped to craft a permit that was in full compliance with all laws, rules and regulations governing this type of application and permit. *Id.* Last, before the permit was finalized, WDEQ/LQD worked with Mr. Overton, and WDEQ staff, to ensure the comments raised by the experts, the public, the internal reviewers, and in the Informal Conference, were addressed in permit conditions. *See*, Daniel D. Overton Affidavit, Exhibit D ¶10-16; Timothy A. Ross Affidavit, Exhibit E ¶10. At all times, PRBRC had full notice and opportunity to be heard and the information it provided in comments, testimony, documents, and its own expert report, were ultimately used in part to craft the final permit issued on July 7, 2020. *See*, Permit Conditions 9 and 10; Alan Edwards Affidavit, Exhibit B ¶ 15; Daniel D. Overton Affidavit, Exhibit D, ¶15-16; Todd Parfitt Affidavit, Exhibit C, ¶14. While Brook wishes the process would have been completed in a timelier manner, the review system worked as intended, and the PRBRC and the public were granted almost endless comment that resulted in real changes reflected in the final permit that was granted.

Brook's application provides a very detailed sequence of mining operations (*See*, Exhibit MP.4-1.) and the Permit specifically and clearly restricts all highwall mining as described in the Conditions within the sequence. *See*, Conditions 9 and 10, WDEQ Permit No. PT0841, TFN 6 21025, July 7, 2020. Pursuant to the mine plan, as permitted, the mine will be "a conventional surface coal mine during the first term period. The first term period is the first five-year term. After the first five-year term, the mine will convert to a Highwall Recovery Mine. *Id.*

Pursuant to Conditions in the Permit **Brook is not allowed to commence any mining operations** in the second five-year term, TR-1 (years 6-10) “or any subsequent highwall mining panel” [years 6-39] without providing further testing, data, analysis, and without receiving the eventual written approval of WDEQ/LQD. *Id.* The subsidence control plan, as permitted, includes all areas that can be mined pursuant to the permit, and is thus complete for the entire term of the mine, all highwall mining operations, and all highwall mining that can occur in the entire permit area. *See*, Permit, Conditions 9 and 10.

For this appeal issue, the PRBRC claims Brook’s Permit is “patently deficient because it does not include a Subsidence Control Plan that covers **the entire areas of the permit** that will have highwall mining.” Petition, 3. [emphasis added]. This argument is patently disingenuous because it incorrectly implies that such a legal requirement even exists for this Permit – it does not, and this is not an accurate statement of the requirements of the law regarding reclamation or subsidence. WDEQ determined the application to be accurate and complete in accordance with Wyoming law. State Decision Document (“SDD”), 2; W.S. § 35-11-406(n)(i). “All of the information required by the Environmental Quality Act (Act) and its implementing regulations is contained in the application. SDD, 2. Further, “the reclamation plan can accomplish reclamation as required by the Act (W.S. §35-11-406(n)(ii) and Wyoming Department of Environmental Quality (WDEQ), LQD Rules and Regulations (RR), Chapter 4, Section 2. *Id.* WDEQ determined that “the mined land will be restored to a condition to or greater than its highest previous use.” *Id.*, 3.

The Brook Mine will be a conventional **surface coal mine** during its first term period. Subsequent to this, the mining technique will change into a Highwall Recovery Mine, where a single cut or slot is removed from the top of the coal to establish an in-pit staging area of the highwall mining equipment, as described in Section MP.1.1. Because of this mining schema, disturbance to the surface is minimal, primarily focused on those acreages in and near the initial box cuts. **The highwall mining component is designed to not create any areas of subsidence**, given the rock mechanics of the overburden materials, as defined in Section

MP.13. and Addendum MP-6 of the Mine Plan. The final post-mine contours for the reclaimed surface are defined in Section RP.3 of the Reclamation plan and depicted on Exhibit RP.3-1.

SDD, 3.

The “summary of conditions to be applied to the ... approval of the application” include:

**Form 1, Condition 9: Before commencing mining in the TR-1 area or any subsequent highwall mining panel, Brook Mine shall provide WDEQ/LQD with the results from physical property testing of cores from a minimum of at least three geotechnical core holes for each panel to be mined. For the TR-1 area, this will require drilling and sampling at least two more core holes in addition to the previously tested hole 2017-4 core.** The location and number of the core holes to be drilled should be based on a geostatistical algorithm, such as Kriging (Gaussian process regression), to demonstrate the adequacy of the core holes for purposes of characterizing each highwall mining panel. Samples collected from each core hole should include the roof, coal, and floor of the proposed highwall mining panel. For all future core holes, Atterberg limits and consolidated-drained triaxial testing should be performed in addition to the testing procedures performed on core hole 2017-4.

**The results of the core laboratory testing shall be reviewed and analyzed by a Wyoming registered Professional Geologist or Engineer. The Mine Plan and Subsidence Control Plan shall be revised, if necessary, based upon the additional data and analyses.**

**Form 1, Condition 10:** Brook Mine shall submit all data and analysis from the geotechnical testing required in Condition No. 9 to WDEQ/LQD in the form of non-significant revisions to the Mine Plan and Subsidence Control Plan. **Brook Mine shall not commence mining in any new highwall mining panel until WDEQ/LQD has provided written approval of the corresponding non-significant revision.**

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Form 1, Condition 11: “Regardless of its right to subside the surface, the operator acknowledges that, if subsidence due to its mining operation causes material damage or reduces the value of the reasonably foreseeable use of the surface lands, **the land will, to the extent technologically feasible, be restored to a condition capable of supporting the uses it was capable of supporting prior to subsidence.** The operator will continue to perform remediation on any subsidence, detected during or subsequent to the 6-month monitoring period, until bond release is approved.”

WDEQ, Permit No. PT0841, TFN No. 6 2/025, July 7, 2020. [Emphasis added].

Surface coal mine permits issued in accord with the WEQA are “entitled to a right of successive renewal ...” W.S. §35-11-406(e). Petitioner claims the subsidence control plan for high wall mining is regulated by WDEQ/LQD Rules of Practice and Procedure, Ch. 7 §1. That is simply not the law. Auger mining or high wall mining is regulated by Ch. 7 §2. *See*, Alan Edwards Affidavit, Exhibit B, ¶ 6. The plan is clear that this technique is designed to “not create any areas of subsidence” but WDEQ/LQD Rules of Practice and Procedure, Ch. 7 §2(a)(iv) still protects the land and the public should any subsidence occur. SDD, 3, and WDEQ Permit No. PT0841.

What the PRBRC is really trying to do with its argument on this issue is to incorrectly force the WDEQ to try to require complete subsidence designs for the life of the mine before any mining permit was issued and before any mining could even begin. Petitioner is therefore effectively asking for denial of the Permit before Brook or WDEQ/LQD are given a chance to evaluate the information and analysis provided from future planned and mandated testing, and the knowledge that will be gained by Brook and the WDEQ as each highwall panel is mined in future years. That is contrary to the phased plan of a long-term coal mine and is an argument designed to try to make any coal mining under any Wyoming mining permit impossible to actually implement. This argument furthers the PRBRC’s obvious and true goal of trying to totally frustrate any new coal mining in Wyoming.

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 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. **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.** *See*, email chain of October 2, 2020 October 2, 2020 between Shannon Anderson, Brook, and Wyoming Attorney General’s Office attached as Exhibit F. 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. *Id.*

The PRBRC asks the EQC to ignore the clear-cut regulatory format and determine the Permit should not have been granted because of the timing of when the conditions were imposed; following the informal conference. This argument is absurd and ignores the rules that govern the WLQD in the Procedures Applicable to Surface Coal-Mining Operations. WDEQ/LQD Rules and Regulations, Ch. 12. The rules require the Director to impose conditions on the operation. WDEQ/LQD Rules and Regulations, Ch. 12 §1 (a)(xviii). The rules expressly require the Director to impose standard conditions on the operation that include “...**any conditions of the permit...**” WDEQ/LQD Rules and Regulations, Ch. 12 §1 (a)(xviii)(A). [emphasis added] “All operations shall be conducted in accordance with the approved mining and reclamation plan **and** any conditions of the permit or license.” WDEQ/LQD Rules and Regulations, Ch. 12 §1 (a)(xviii)(A). [emphasis added]. Certainly, the WDEQ/LQD was authorized to add Conditions 9 to 11 in the permit. It is expressly required to include the five standard conditions.

The PRBRC has decided to not have Dr. Marino evaluate the Conditions 9 to 11 of the mine permit. Further, the PRBRC has decided to not have Dr. Marino prepare an expert report outlining the PRBRC objections to the stated conditions or the permit. *See*, email chain of October 2, 2020 between Shannon Anderson, Brook, and Wyoming Attorney General’s Office attached as Exhibit F. The PRBRC is merely challenging the timing of the conditions. By doing

so the PRBRC has waived any legal argument or challenge to the substance of the final subsidence control plan.

The PRBRC's argument would make the entire informal conference irrelevant and useless. The informal conference gives the WDEQ Director one last chance to make sure the permit complies with WEQA. If the Director and WDEQ cannot use the comments and analysis gained via the informal conference to improve the permit, there is no need for an informal conference. The PRBRC's failure to challenge the "actual subsidence plan" including conditions 9 to 11 must result in granting summary judgment to Brook and WDEQ in this appeal.

Summary judgment is appropriate in Wyoming when there exist no genuine issues of as to any material fact. 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 or a defense which has been asserted." *Wilder v. Cody Country Chamber of Commerce*, 868 P.2d 211, 216 (Wyo. 1994). "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).

The record could not be clearer that the WDEQ/LQD, through the Permit and Conditions, ensured that the mining and subsidence plan extends throughout the thirty-nine-year life of the mine. The PRBRC incorrectly claims that a subsidence control plan does not exist for "all areas" to be highwall mined. However, even when reading the record from the vantage point most favorable to the PRBRC, it is clear that WDEQ/LQD mandated a subsidence control plan for all areas to eventually be mined. The information contained within the Brook Application and the WDEQ/LQD Permit with Conditions fully satisfies Brook's initial burden of establishing a *prima facie* case for summary judgment. Petitioner has the burden to come forward with specific

facts to demonstrate that a genuine issue of material fact does exist. The PRBRC cannot demonstrate any specific facts to meet this burden. Petitioner glossed over the details of the Conditions and instead chose to only include facts as they existed before the Permit was issued and prior to conditions 9 and 10 being required by the permit. Petitioner mistakenly relied on expert reports that pointed out objections to the subsidence control plan before WDEQ/LQD included conditions to satisfy every issue raised by the reviewing experts.

The public policy of the state of Wyoming is to permit coal mines. Further, it is clear that it is the intent of the legislature to allow coal mines operations to extend well beyond the initial five-year term. This policy is obviously expressly crafted consistent with Federal and State law to specifically allow coal mines to be able to open operations that can require long-term financing and large initial investments. If coal mines were required to invest tens of millions, if not hundreds of millions, of dollars in exchange for a five-year initial term, no coal mines would be in operation today. The history of coal mines and the permitting of coal mines in Wyoming are clear evidence that this policy has remained in effect in this state for many decades. *See*, Todd Parfitt Affidavit, Exhibit C, ¶¶29 and 30.

Further, the PRBRC appears to be asking that WDEQ/LQD be required to examine geotechnical testing data and analysis for the entire area to eventually be mined. This argument, like the PRBRC's other claims, is again put forth without any actual statutory authority. Nonsensically, it appears to be an argument crafted to try to impose a requirement that would effectively deprive WDEQ/LQD of the benefit of information and analysis on an area approved and mined in years 11-15 before approving mining for an area scheduled in years 16-20. Not only would this result in an absurd requirement upon the regulatory staff and agency, but a huge unwarranted expense upon Brook that the law simply does not require.

The facts are undisputed that Brook intends to do highwall mining. The Permit ensures compliance with all applicable legal standards regarding reclamation and subsidence. No highwall mining can be conducted without all appropriate scientific study and analysis required by conditions 9 and 10 of the permit. Those conditions and the subsidence control plan comply with WEQA's mandate that the plan be designed to prevent subsidence and material damage to the land. Even if subsidence does occur, Brook must repair such damage as it becomes evident. There is a \$1.2 million cash bond in place to ensure that Brook follows the mining plan, which includes reclamation obligations and subsidence mitigation.<sup>3</sup> All objections raised by the PRBRC regarding the subsidence control plan have been resolved according to law and in favor of the PRBRC. Brook is entitled to summary judgment on this issue as there are no genuine issues of material fact and Brook is entitled to judgment as a matter of law.

## ISSUE TWO

This issue is a pure legal issue and there are no genuine issues of material fact and Brook is entitled to judgment as a matter of law. The facts necessary to resolve the issue are not in dispute.

The PRBRC further claims broadly that because the Permit was "*patently deficient*," and the application failed to have a subsidence control plan for all areas to be mined, that "patent deficiency" cannot be remedied by permit conditions. Again, the PRBRC knowingly argues in a manner that misstates the controlling law and in a way that provides no controlling legal authority for its position.

The WDEQ/LQD strictly complied with the law when it required future information to be submitted as Non-Significant Revisions ("NSR"). The information required to be submitted is

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<sup>3</sup> The PRBRC has not appealed Brook's bonding. This record is clear that Brook has fully and properly bonded for its Permit according to applicable law at this time.



not by definition in the rules a significant revision (“SR”). WDEQ/LQD, Rules and Regulations, Ch. 13 § 2. The WDEQ/LQD must judge every revision at the time it is submitted to determine if it is an SR or an NSR.<sup>4</sup> Because WDEQ/LQD has absolute discretion to decide if any modification to a mine plan constitutes an NSR or SR, there is absolutely no prejudice to any interested person in saying this additional testing information shall be submitted as an NSR. The action by WDEQ/LQD in labeling additional submissions of testing and planning in the permit as an NSR is consistent with the Rules. The rules state that the administrator will state the form of revisions. “Non-significant revisions shall be **submitted in a format** approved by the Administrator.” WDEQ/LQD Rules and Regulations, Ch. 13-1(b). [Emphasis added].

Permit revisions are anticipated and expressly authorized under the Rules: a mine must follow what was contemplated in the approved mining plan. WDEQ/LQD Rules and Regulations, §13-2(b). Reading and applying this requirement plainly and in context of all other applicable regulations means a permit holder can and should submit revisions in accord with the Conditions and other requirements in the approved mining plan. Section 13-1(a) of the WDEQ/LQD Rules and Regulations dictates what is a significant revision. It can only follow logically then that other information (anticipated mining actions, drilling, data, testing on core

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<sup>4</sup> § 13-2. Criteria for Public Notice Requirements (a) **Within 90 days after submission of the application for permit revision** the Administrator shall notify the operator of whether or not the application is complete and **whether notice and opportunity for public hearing is required.** (b) Notice and opportunity for public hearing is required **whenever the application for permit revision proposes the following changes, so long as they constitute significant deviations** from that which was contemplated in the approved mining and reclamation plan. **The following will normally be considered significant deviations, unless otherwise determined by the Administrator:** (i) A change in the approved future land use or uses which affects more than 20 percent of the land within the permit area; (ii) A change in the approved method for insuring that all acid-forming or toxic materials, radioactive materials, or materials constituting a fire, health or safety hazard uncovered during or created by the mining process are promptly treated or disposed of during the mining or reclamation process in a manner designed to prevent pollution of surface or subsurface water or threats to human or animal health and safety; (iii) The construction or relocation of mills and tailings disposal facilities; Page 3 of 4 (iv) A change in the approved method of mining which results in surface disturbance (e.g. underground, surface or in situ mining); (v) A change which would adversely affect the quality, quantity, or distribution of water in surface or groundwater systems; (vi) For surface coal mining operations, continuing operation after cancellation or material reduction of the liability insurance policy, the performance bond or other equivalent guarantee upon which the original permit was approved; or (vii) Any changes which propose significant alterations in the approved mining or reclamation operation, as determined by the Administrator. WDEQ/LQD, Rules and Regulations, Ch. 13 § 2. [Emphasis added].

samples, etc.) required to be reported to WDEQ in a revision and contemplated in the approved mining plan, are not significant revisions. Wyoming DEQ/LQD Rules and Regulations §13-2(b). “Non-significant revisions shall be submitted in a format approved by the administrator.”

Wyoming DEQ/LQD Rules and Regulations §13-1(b). The WDEQ Administrator laid that out in the State Decision Document for this Permit.

If upon filing this information, the Mine has deviated significantly from what was contemplated in the approved mining plan and a submitted a permit revision is deemed to be a significant revision – the SR will trigger “notice and opportunity for public hearing.” Wyoming DEQ/LQD Rules and Regulations, §13-2(b). This is almost exactly like the statutory scheme set forth in 35-11-405(e) for term renewals. The long and tortuous path that led to the approved mining plan and issuance of the permit, has already provided due process, (i.e., opportunity to make public comment and pursue reviews like this appeal) to the public. When something new is contemplated (expansion of mine area) that meets the threshold of the Wyoming DEQ/LQD Rules and Procedures §13-2(b)(i)-(vii), the Administrator then has the authority and obligation to deem them “significant deviations” from the mine plan, and trigger additional notice and hearing opportunities.

WDEQ/LQD did exactly what it was supposed to do under the controlling Rules. WDEQ/LQD has the authority to set conditions for additional information and study and require that information be filed as a revision. Since the Rules state what is a significant revision, the Rules give the Director/Administrator the authority to say what is not significant and to direct the information to be filed as an NSR. This Permit, with its stated Conditions, sets forth the various data/information that is to be filed as a permit revision. The Administrator labeled those items to be filed as NSR because they do not meet the definition of a SR in the Rules. If upon receipt the WDEQ/LQD determines that the information submitted is a “significant deviation” from what

was contemplated in the approved plan, then the Administrator has absolute discretion to trigger the due process requirements. *Id.* WDEQ/LQD had the sole statutory authority to label those future submissions of information as not being a significant deviation from the plan and to require that information to be filed as an NSR.

Applying the controlling law and regulations plainly in context, the WDEQ/LQD correctly determined the matters raised by the PRBRC were not deficiencies and set forth a process for the submission of additional information in future years of the Permit. A mining permit is a living document directing future actions of the operator and the WDEQ over the time periods set in the permit. *See*, Alan Edwards Affidavit, Exhibit B, ¶30. All coal mines in the state of Wyoming operate in a manner as required by this permit and requests for modification of permits and mining plans for both non-significant revisions and significant revisions throughout the lifetime of the mining permit occur frequently. *See*, Alan Edwards Affidavit, Exhibit B, ¶31. The permit issued here is consistent with historical practice of WDEQ and all federal and state rules, regulation, and statutes.

In this argument, the PRBRC again pushes its overall appeal theme of asking the EQC to effectively ignore the controlling language of WEQA and the relevant WDEQ/LQD Rules and Regulations which limit due process to the first time a matter is reviewed and considered, and grant the PRBRC a thirty-nine-year perpetual opportunity to litigate every single issue of compliance under the Permit and Mine Plan. The PRBRC's goal is not a legal and workable mine permit; its goal is to establish a false legal premise that it can use in the future to continually harass and wear down the Brook and the WDEQ once this mine goes into operation. That request is not supported by the controlling law and is highly inconsistent with Wyoming public policy and common sense inherent in the plain language of the WEQA and its implementing WDEQ regulations.

This issue is a pure legal issue. The law does not support the argument of the Petitioner, the law supports and requires the actions of the WDEQ directing that additional information and design shall be submitted as a non-significant revision.

There are no genuine issues of material fact and Brook is entitled to judgment as a matter of law. WDEQ/LQD followed the law approving the permit in question.

### **ISSUE THREE**

This issue is a pure legal issue and there are no genuine issues of material fact and Brook is entitled to judgment as a matter of law. The facts necessary to resolve this issue are not in dispute.

In this issue, the PRBRC incorrectly alleges that the Permit Application was deficient because the Mine Plan did not include enough information regarding facilities and haul roads. The Mine Plan included the documentation necessary for WDEQ/LQD to determine the Plan was complete and accurate. WDEQ/LQD “determined the revised permit application technically complete and suitable for publication on February 26, 2020. SDD, 1. The Mine Plan includes complete sections on “Mine Facilities,” *see*, MP.2, and “Roads, Railroads and Transport Systems,” *see*, MP.3. In addition, corresponding Exhibit, MP.2-1. and MP.3-1., respectively outline in detail the plans of Brook. MP.2-1. was updated in technical revisions Round 11: Response 8, Response 12.

It is evident from the PRBRC’s briefing that it either does not understand or chooses not to recognize the operation of the Brook Mine as conditioned by the Permit and mine plan nor appreciate the distinction of separate legal entities. *See*, Jeff Barron Affidavit, Exhibit A, ¶17. It is undisputed that all facilities and haul roads are properly identified, described, and defined in the plan. Commercial haulage to separate legal entities, after a retail sale at the mine, does not equate to coal mine haul road haulage as is incorrectly alleged by PRBRC. The additional

facilities mentioned by Petitioner are not contemplated in the Mine Plan, are not contained within the permit area, the Permit Application, nor the granted Mine Permit. *See*, Jeff Barron Affidavit, Exhibit A, ¶14-15.

PRBRC mentions a proposed research facility (iCam) and manufacturing center (iPark). Petition, ¶37. The facilities are separate legal entities that are not located within the boundaries of the Mine Permit. These facilities are located on lands outside the Permit area on lands expressly legally zoned for Industrial Development by the Sheridan County Commission. *See*, Jeff Barron Affidavit, Exhibit A, ¶11-15. These facilities are owned by Brook's parent corporation, Ramaco Carbon. *Id.* ¶ 11 and 12. Ramaco Carbon owns all three separate subsidiaries; iCam, iPark and Brook. These separate facilities are end users of any coal produced at the mine. *See*, Jeff Barron Affidavit, Exhibit A, ¶16. If Brook sells coal to a separate legal entity, under the PRBRC contortion of the law, these other legal entities would also be "incident to" the coal mine. According to the PRBRC, this would mean that if Brook sells coal to a city or private party twenty-five miles from the mine, the PRBRC would ask the EQC to try to vastly exceed its statutory authority and somehow "declare" that city "incident to" the mine. This is a preposterous argument again designed to try to ultimately render Brook's Permit unusable over time. Icam and iPark are are not contemplated, nor involved, in the operation of the Brook mine.

All buildings, structures, and facilities of Brook we contemplated on the permit:

*(j) All buildings and structures constructed, used or improved by the operator will be removed and dismantled or the applicant has demonstrated that the buildings and/or facilities will be beneficial use in accomplishing the proposed use of the land after reclamation or for environmental monitoring. All support facilities are designed to achieve the performance required by the applicable standards and should cause no significant harm to the environment or public health and safety (LQD RR Chapter 4, Section 2(m) and (n)).*

The buildings, structures, and facilities can be seen on Exhibit MP .2-1, Facilities Map. Section MP.2 in the Mine Plan covers the narrative describing the mine facilities by type and nature of use. The administration building will be in Sheridan. The administration building will contain offices, a conference room,

and training facilities. The change house includes offices, shower facilities for employees, and a large meeting area and equipment service facility. Additional facilities required for mine operation that will be in the vicinity of the change house and shop facilities will include a truck tire shop, a lab/sample building, and a substation for power. A truck ready line will also be located near the change house. Other facilities will include a fuel station, freshwater cistern, a septic tank, and a leach field. Portable, in-pit crushers will be used at the Brook Mine. Therefore, crusher facilities will not be constructed. The crushed coal will be loaded in the pit and hauled using coal trucks. A coal storage pad will also be used as depicted on Exhibit MP.2-2 of the Mine Plan.

SDD, 10-11.

The additional roads mentioned by Petitioner are not contemplated as part of the Mine Plan. Further, it is undisputed in this record that they are not and cannot be: “incident to underground mining activities.” Petitioner argues that any road or rail line outside the permitted area is “incident to” the operation and must be included in the application. If that were the law, any applicant would be required to include a rail line to Chicago as “incident to the mine”, if the coal being mined was to be transported east. If that coal was then loaded on trucks to be transported via interstate highway system to another community outside Chicago, in the retail market, Petitioner’s theory asks the WDEQ/LQD to evaluate and approve those roads as well under the permit. In the case at hand, the point of sale is the Mine. *See*, Jeff Barron Affidavit, Exhibit A, ¶20-26. That location is identified on the exhibits as a coal storage pad. *See*, MP.2-1, Facilities Map. Once the sale has been completed at the mine, any haulage thereafter is and can only be commercial haulage. *Id.* WDEQ and the EQC have no jurisdiction to regulate the hauling of coal outside of the mine.

(i) *All constructed or upgraded roads and railroad spurs are included within the permit area from that point where they provide exclusive service and are covered by the reclamation bond (LQD RR Chapter 4, Section 2(j)).*

**Narrative on roads and transportation systems can be found in the Mine Plan in Section MP.3.** All roads will be classified in one of two general road categories according to the WDEQ/LQD road classification system in Chapter 4, Coal Rules and Regulations. They will be designated primary roads or ancillary roads. Primary roads are any road used for transporting mineral or spoil, or

frequently used for access or other purposes for a period more than six months, or roads to be retained for post-mining use. Ancillary roads are all other roads not classified as primary roads. **The road system at and adjacent to the Brook Mine will consist of public access roads, primary access roads, primary haul roads, and ancillary roads. All roads within the permit boundary will be reclaimed as they are no longer of service. They will also be reclaimed at the end of the mine life, should they be of service, even on a limited basis, throughout the life of the mine.**

SDD, 10. [Emphasis added].

The PRBRC is asking EQC to declare roads outside the permitted area to be in the application. That is directly contrary to the rules that govern such applications. *See*, WDEQ/LQD Rules and Regulations, Ch. 2 §5 (a) (xvi). “Each applicant shall submit plans and drawings for each road...to be constructed, used, or maintained **within the proposed permit area.**” *Id.* [emphasis added]. As discussed above, if the EQC were to adopt the logic of the PRBRC in this instance it will result in absurd regulatory overreach. The PRBRC asks the EQC to regulate roads or rail lines to Chicago, or any other end user, regardless of its location on the globe.

The PRBRC cites two out of state cases for the premise that any road outside the permit area that is “incident to” the operation is to be included in the permit. These cases are inapposite; nothing in the WEQA requires such analysis by WDEQ/LQD. The EQC has addressed a similar issue of “truck traffic” outside of a mine site in the Bentonite mining context. There the EQC found that the LQD did not have the regulatory authority over county roads and state highways outside of the mine site. *In Re: Wilson Brothers Construction*, TFN 56/125, Docket 18-4804, Wyoming EQC, April 11, 2019. That finding must be reaffirmed here.

The rules promulgated under SMCRA in establishing the legal regulatory framework at the federal level are persuasive authority as to the intent of the Wyoming Environmental Quality Act. “Each applicant for a surface coal mining and reclamation permit shall submit plans and drawings for each road, as defined in §701.5 of this chapter, to be constructed, used, or maintained **within the proposed permit area.**” 30 CFR, VII, G, 780, § 780.37(a) [emphasis

added]. The State of Wyoming has established its own equally or more restrictive legal and regulatory framework to regulate mining in Wyoming and it does not require what Petitioner is requesting here.

SMCRA and WEQA are focused on roads in the permit area to ensure that reclamation is completed at the cessation of mining operations. What the PRBRC is asking the EQC to do is to regulate roads outside the permitted area, not for reclamation purposes, but in an attempt to deceive the EQC in hopes that it derails a complete and accurate application and a compliant mine plan and legally compliant permit.

Once again, the law that the PRBRC chooses to ignore in its advocacy is clear. Road and facility plans are required and the same have been provided. There are no genuine issues of material fact regarding Issue Three. Again, this is a pure legal issue and the only applicable controlling law fully supports the issuance of this Permit. The relevant roads or facilities within the permit area are detailed in the Mine Plan and that is what was approved by WDEQ/LQD. Brook is entitled to a judgment as a matter of law as there are no genuine issues of material fact. The application, including all roads and facility locations, submitted by Brook, and found to be complete by WDEQ, complies with all WEQA state and federal rules, regulations, and statutes.

#### **ISSUE FOUR**

This issue is a pure legal issue and there are no genuine issues of material fact and Brook is entitled to judgment as a matter of law. The facts necessary to resolve the issue are not in dispute.

The PRBRC claims that the Permit Application is deficient for not accurately estimating the amount of coal that will be mined. The Application has accurate estimates of the anticipated coal tonnage to be mined. Table MP.1-2. The estimated annual production (in tons) is set forth in detail in the Mine Plan in a table format as well.



During the pendency of this application over the last six-plus years, the international and domestic coal market has changed dramatically. The original estimates of coal to be mined were based on a dramatically different coal market and the changes in that market were not “knowable” when this process began. Those original estimates are now totally irrelevant and cannot result in rejection of the permit.

The law could not be clearer. Accurate initial estimates were required and the same have been provided. *Id.* There are no genuine issues of material fact regarding Issue Four. The only relevant estimates are set forth in the Mine Plan and that is what was approved by WDEQ/LQD.

Brook outlined its operations and intentions in the application and in the many rounds of technical revisions, all of which are part of the application and bind Brook to the statements and commitments therein. Brook intends to operate the mine as permitted.

The WDEQ/LQD correctly determined that the information provided regarding coal mining tonnage was sufficient and such decision complies with all state and federal rules, regulation, and statutes. All coal mines, including this mine, are authorized by law to revise mining plans to adjust for market conditions via revisions to the Permit and Mining Plan to recognize existing market conditions. Brook properly revised its estimate of produced coal during this drawn out permitting process and Brook is entitled to judgment as a matter of law.

This is a pure legal issue and there are no disputed issues of material facts. The PRBRC objects to Brook changing its plan over the course of the last six years of review and contested permitting applications. The PRBRC claims in its Petition that Brook will never accomplish what it was permitted to do, thus, the Permit should not have been granted. Petition, ¶ 47. The PRBRC conveniently chooses not to believe Ramaco Carbon or Brook will be able to carry out the business plan it has developed for the use of its property. While that may fit with the PRBRC’s hope to stop all mining in Wyoming, it is totally irrelevant to the legal validity of this Permit on

appeal before the EQC now. Brook has chosen to spend many years and many millions of dollars to purchase its land and minerals and to apply for and obtain its mining Permit. That is its clear right and when it has done so in compliance with the WEQA and its implementing regulations, the EQC must deny the PRBRC's appeal.

#### ISSUE FIVE

This issue is a pure legal issue and there are no genuine issues of material fact and Brook is entitled to judgment as a matter of law. The facts necessary to resolve this issue are not in dispute.

Having run out of crooked arrows to launch in Brook's direction, the PRBRC lobbs this last twisted dart at the EQC, in a vain hope that something will stick and that its true desire of thirty-nine more years of harassing litigation can continue. The PRBRC mistakenly, or perhaps even deceitfully, incorrectly claims that the Permit application is deficient for not identifying the Coal Mine Operator. In the Petition, PRBRC clearly admits the requirement that the name and address of the operator **only need be included "if different from applicant."** WDEQ/LQD Rules and Regulations Ch. 2 § 2(a)(i), quoted in Petition, 12, ¶ 52. [emphasis added]. PRBRC cited the law that states the name of the Operator only need be provided if it is different from the applicant. The PRBRC then knowingly twists the plain language in the law to try to somehow claim Brook is in violation of the same.

Pursuant to the Permit issued on July 7, 2020, to Brook Mining Co. LLC., Brook was the applicant. Brook is a wholly owned subsidiary of Ramaco Wyoming Coal, LLC. The law is clear that the "operator" only need be included if different from the applicant. The application will be supplemented, in accordance with the proper regulatory framework, should the Operator ever change in the future.

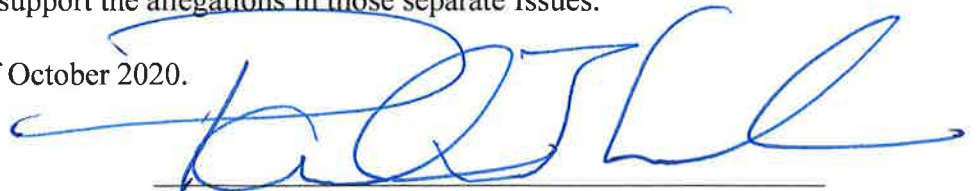
The WDEQ/LQD correctly determined that the information provided regarding the coal mining operator was sufficient and such decision complies with all state and federal rules, regulations, and statutes. The summary judgment standard described above is clear and concise and need not be repeated here. Brook has satisfied the requirements of the law, even as quoted in paragraph 52 of the Petition. Because of the six-year permitting and litigation process Brook has not yet hired a contractor. The application only requires a separate operator to be named if different from the applicant. At some point, when a contractor is needed, the application will be revised under the current regulatory scheme. Pursuant to the regulations, Brook has complied with the law and there are no genuine issues of material fact. This is a pure legal issue and there are no disputed facts. Petitioner's argument is not supported by Wyoming law or WEQA and enabling rules. Brook is entitled to summary judgment on Issue Five.

### CONCLUSION

For the reasons set forth above, Brook prays for the following relief:

1. That the EQC grant Brook summary judgment on all of Petitioner's claims as set forth in the Petition on the basis that there are no genuine issues of material fact to support the allegations.
2. That, in the alternative, the EQC grant Brook summary judgment, where appropriate, on any of Petitioner's claims as set forth in the Petition on the basis that there are no genuine issues of material fact to support the allegations in those separate Issues.

DATED this 14<sup>th</sup> day of October 2020.



Patrick J. Crank, 5-2305  
Abbigail C. Forwood, 7-4814  
Jim D. Seward, SD #2689  
1815 Evans Ave.  
Cheyenne, WY 82001  
(307) 634-2994

**CERTIFICATE OF SERVICE:**

This is to certify that on the 14<sup>th</sup> day of October 2020, a true and correct copy of the foregoing **RESPONDENT BROOK MINING CO., LLC, BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was served upon the following:

Shannon Anderson  
Powder River Basin PRBRC  
934 N. Main Street  
Sheridan, WY 82801  
[sanderson@powderriverbasin.org](mailto:sanderson@powderriverbasin.org)

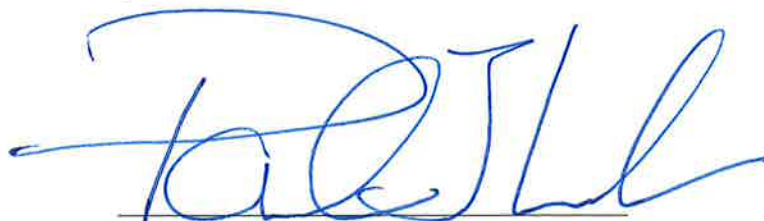
- U.S. Mail
- Fed Ex
- EQC's electronic docket system
- Hand Delivered

Wyoming EQC - Original  
2300 Capitol Ave.  
Hathaway Building 1<sup>st</sup>. Room 136  
Cheyenne, WY 82002

- U.S. Mail
- Fed Ex
- Email
- Hand Delivered

Matt VanWormer  
Senior Assistant Attorney General  
Wyoming Attorney General's Office  
Kendrick Building  
2320 Capitol Avenue  
Cheyenne, WY 82002  
[Matt.vanwormer@wyo.gov](mailto:Matt.vanwormer@wyo.gov)

- U.S. Mail
- Fed Ex
- EQC's electronic docket system
- Hand Delivered



Patrick J. Crank