Shannon Anderson (Wyo. Bar No. 6-4402)
Powder River Basin Resource Council
934 N. Main St., Sheridan, WY 82801
sanderson@powderriverbasin.org
(307) 672-5809 or (307) 763-0995

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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

POWDER RIVER BASIN RESOURCE COUNCIL'S COMBINED RESPONSE IN OPPOSITION TO BROOK MINING CO., LLC'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES FOR CROSS MOTION FOR SUMMARY JUDGMENT[1]

[1] In an effort to minimize briefs before the EQC, this is a combined response and cross-motion for summary judgment. The Resource will separately respond to the forthcoming motion from the Department of Environmental Quality.

Table of Contents

PAGE LEFT INTENTIONALLY BLANK

INTRODUCTION

Back in 2017, the Environmental Quality Council gave Brook Mining Co., LLC ("Brook") an important task: amend its permit application to properly evaluate the issue of subsidence. Brook did not complete that task. Instead, it spent its time responding to *five* additional rounds of technical review from the Department of Environmental Quality ("DEQ") without addressing that key issue in a sufficient way.

Now three years later, the DEQ also took a pass on that critical issue and rather than requiring Brook to provide information up front in its permit application as required by the law and regulations, and as instructed by the Council, the DEQ is allowing the company to fulfill the task this Council gave the company at a later, yet to be determined, date. And what's worse, when the information is eventually submitted, the public and interested neighboring landowners will be left without an opportunity to provide comments.

The issue of subsidence is symptomatic of a larger problem in Brook's permit application: after *years* of review, there is still a lack of detail and information about very basic pieces of the company's plan, such as how much coal will be mined, who will be doing the mining, how the coal will be transported, and how and where it will be processed.

For the reasons discussed below, the EQC should grant Powder River Basin Resource Council's ("Resource Council" or "PRBRC") motion for summary judgment on the issues raised in the petition for hearing, as discussed below: (1) Brook's mine permit

application is patently deficient because it does not contain a subsidence control plan that covers the entire area of the permit that will have highwall mining; (2) the DEQ cannot remedy the deficiencies in the subsidence control plan through *future* revision, pre-determined to be "non-significant"; (3) the permit application is deficient because the mine plan does not include all facilities and haul roads incident to mining and does not include a traffic plan for these haul roads; (4) the permit application is deficient because it does not accurately estimate the amount of coal that will be mined; and (5) the permit application is deficient because it does not identify the coal mine operator.

STANDARD OF REVIEW

The Wyoming Supreme Court has explained the standard of review for a motion for summary judgment as follows:

> Summary judgment is appropriate when no genuine issue as to any material fact exists and the prevailing party is entitled to have a judgment as a matter of law. *Kahrs v. Board of Trustees for Platte County Sch. Dist. No. 1*, 901 P.2d 404, 406 (Wyo.1995); see also W.R.C.P. 56(c). 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. *Adkins v. Lawson*, 892 P.2d 128, 130 (Wyo.1995). 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 favorable inferences which may fairly be drawn from the record. *Jack v. Enterprise Rent-A-Car Co. of Los Angeles*, 899 P.2d 891, 893 (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 this burden, the party opposing the summary judgment must come forward with specific facts to demonstrate that a genuine issue of material fact does exist. *Thunder Hawk By and Through Jensen v. Union Pacific Railroad Co.*, 844 P.2d 1045, 1047 (Wyo.1992). General allegations and conclusory statements are not sufficient. *Board of County Comm'rs of County of Laramie v. Laramie County Sch. Dist. Number One*, 884 P.2d 946, 956 (Wyo.1994).

Jewish Community Ass'n of Casper v. Community First Nat. Bank, 6 P.3d 1264, 1266 (Wyo. 2000).

ARGUMENT

I. Brook's Mine Permit is Patently Deficient Because It Does Not Contain a Subsidence Control Plan That Covers the Entire Area of the Permit That Will Have Highwall Mining

A core component of any permit application that proposes underground mining is an evaluation of subsidence risk and potential, and measures to prevent and control that risk and potential, called a subsidence control plan. Under DEQ's rules, a company that carries out underground mining has an obligation to prevent subsidence and corresponding damage to surface resources. DEQ's Land Quality Coal Rules require a coal mining permit application with underground components, such as this permit application, to include "[e]xcept for areas where planned subsidence is projected to be used, measures to be taken in the mine to prevent or minimize subsidence, including backfilling of voids and leaving areas in which no coal is removed." Ch. 7 § 1(a)(v)(C). Additionally, "[u]nderground mining activities shall be planned and conducted so as to prevent subsidence from causing material damage to structure, the land surface, and groundwater resources." Ch. 7 § 2(b)(iii).

The subsidence risk and control evaluation is necessary prior to permit issuance because the following information must be included in the public notice soliciting comments and objections to any underground mine permit application: "Dates when the underground mining activities could cause subsidence and affect specific structures; and

Any proposed measures which may be taken to prevent or control adverse surface effects." Ch. 7 § 3(a)(i)-(ii). For the reasons discussed below, Brook's permit application is deficient because it cannot be deemed "complete" or accurate" until the subsidence control plan includes geotechnical analysis for the entire area proposed to be permitted.

A. The Council's 2017 Decision

In the September 2017 Order finding the subsidence analysis contained within the 2016 version of the permit application deficient, this Council issued a dozen findings of fact. *In re Brook Mine Application*, EQC Docket 17-4802, Findings of Fact, Conclusions of Law, and Order, attached as Exhibit A.[2] Specifically, based on expert testimony provided at the hearing, this Council determined that "There have been inadequate studies and testing done to draw any scientific conclusions as to the long-term risk of subsidence at the permit area" and that "[t]he permit application does not provide sufficient information to provide a meaningful review with respect to subsidence potential." *Id*. at 16. This Council further found that "There is insufficient information or data in the permit application and very limited analysis of subsidence risk in the documents such that the subsidence potential cannot be assessed." *Id*. These findings led this Council to conclude that "[t]he mine plan is not complete due to a lack of proper testing and analysis to determine the risk of subsidence due to mining activities." *Id*.

[2] Brook may claim that the 2017 Order has been vacated. However, in its legal challenge of the 2017 Order, Brook did not challenge *any* of the factual findings of the Council. Additionally, Brook and the DEQ treated those factual findings as Round 7 of the technical review of the permit application, incorporating the findings into the permit review process. Therefore, the factual findings adjudicated during the first hearing remain valid and in effect and a part of the decision for this permit application.

In the 2017 Order, this Council rejected Brook's argument that the admittedly necessary testing and analysis could be done at a later date, post-permit issuance, to accommodate "permitting efficiency purposes." *Id.* at 17. Instead, this Council determined that without the data and analysis to evaluate subsidence risk and control **prior to permit issuance**, the permit application was deficient because "[t]he risk of subsidence and subsidence control have not yet been properly studied or assessed." *Id.*

Based on these factual findings, this Council then concluded that Brook's permit application could not be approved because "Brook's subsidence plan is incomplete" and therefore "Brook has failed to affirmatively demonstrate that its application is complete and accurate under subsection 406(n)(i)." *Id.* at 28. This Council further found the application deficient under subsection 406(b) and Chapter 7 of the DEQ's Land Quality – Coal Rules for the same reasons. *Id.*

B. Brook's Response to the 2017 EQC Order

Following the September 2017 Order from this Council, Brook submitted a revision to its permit application in October 2018. That permit application then underwent five additional rounds of technical review from DEQ. With the six rounds of review prior to the 2017 hearing, and the EQC Order treated as round seven of review, this amounted to an unprecedented *twelve* rounds of technical review of this permit application. No other coal mine permit application has had so many rounds of review. However, in all of those rounds of technical review, Brook failed to do the work this

Council told the company it had to do before permit issuance to properly and adequately evaluate subsidence risk and control.

Like it did in 2017, Brook acknowledges that a subsidence control plan is a necessary component of the mine plan portion of the permit application. DEQ Ex. 5-080 (Sec. MP.13, Subsidence Control). However, Brook only included a subsidence control plan for the first area of highwall mining, designated TR-1 in the mine plan. *Id*. The subsidence control plan does not cover *any* other areas proposed for highwall mining within the permit area. *Id*.; DEQ Ex. 5-348, Addendum MP-6.

Instead, Brook maintains its position (rejected by this Council) that it can fill in the gaps to its subsidence control plan after permit issuance.

C. Marino & Overton Expert Review of the Mine Permit Application

Both the Resource Council's expert Dr. Jerry Marino and DEQ's expert consultant Dan Overton concluded two main undisputed facts following their review of the permit application: (1) the subsidence control plan contained within the permit application is limited to the TR-1 area; and (2) additional geotechnical analysis is needed to adequately determine subsidence risk and prevention even for the TR-1 area.

Overton determined that "In our opinion, the single core hole (2017-4) does not adequately characterize the stratigraphy or the geotechnical properties of the rock in the immediate area of the proposed TR-1 highway mining area." Memorandum from Daniel Overton to DEQ, June 9, 2020, at 2, attached as Exhibit B. This is a similar factual conclusion to Dr. Marino, who found: "The one geotechnical boring which was done in the TR-1 area, which is the proposed first area to be highwall mined, indicated the roof

and floor contains anomalous rock conditions compared to all the other boring drilled in the application area. Therefore, applying these rock conditions and associated test data to the mine design for even TR-1, seems inappropriate." Affidavit of Jerry Marino, at ¶ 6, attached as Exhibit C.

Overton further determined that:

> It must be noted that the Agapito Report (AAI, 2020), included in the Subsidence Control Plan as Attachment MP-6-A, evaluated highwall mining in the area of TR-1 only, where the single Carney seam is proposed to be mined. It does not include any analyses of highwall mining outside the TR-1 area, or areas where multiple seams will be mined, or 'pillar stacking.' Therefore, it simply does not apply to proposed mining areas other than TR-1.

Ex. B at 5. Dr. Marino similarly found "This *single* geotechnical boring insufficiently covers the design for only about 68 acres (in the TR-1 area) of the total 1,960 acres planned for highwall mining (HWM)." Ex. C at ¶ 5.

Because of these limitations, the Overton memo concluded that "In our opinion, the Subsidence Control Plan should be revised to apply only to the open pit and TR-1 area that is being permitted at this time." Ex. B at 5.

In contrast to what DEQ's own expert recommended, the agency approved a coal mine permit for the **entire** proposed permit area – while knowing that the analyses and information contained within the subsidence control plan did not justify such an action. DEQ erred in determining that any highwall mining area beyond TR-1 could be permitted based on the information contained within the permit application, and even the TR-1 area was deficient. In other words, DEQ should not have permitted any area beyond TR-1 of highwall mining because by not including the requisite information in its permit

application, Brook did not actually apply to mine any area beyond TR-1. Additionally, for TR-1, the information was found to be deficient based on the review of DEQ's own expert consultant and did not justify permit issuance for that area.

DEQ itself acknowledges that the permit must be designed to prevent subsidence and that such a demonstration is necessary at the time of permit issuance. DEQ's approval of the permit was based on this finding within the State Decision Document: "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." DEQ Ex. 11-003. However, as discussed above, this statement is without technical support, and is in opposition to the findings of DEQ's own expert.

For these reasons, the permit applicant did not meet its burden to justify approval of any highwall mining areas. Therefore, any aspects of the permit application that occur beyond the initial surface mining period must be denied, and Brook's permit boundary should be revised to include only the initial surface mining area.

II. The DEQ Cannot Remedy the Deficiencies in the Subsidence Control Plan Through *Future* Revision, Pre-Determined to be "Non-Significant"

In an attempt to remedy the known and patently evident permit deficiencies, the DEQ imposed two conditions to the permit. DEQ Exhibit 9 at 4-5. Form 1, Condition 9 requires geotechnical analysis "Before commencing mining in the TR-1 area or any subsequent highwall mining panel . . ." *Id.* at 4. Form 1, Condition 10 provides that "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." *Id*. at 5.

While it is important that DEQ conditioned the ability to commence highwall mining on the "written approval of the corresponding non-significant revision," in (1) allowing Brook to fix a permit deficiency through submission of post-permit information and by (2) pre-determining that any such submission would be "non-significant" DEQ violated the Environmental Quality Act in several key ways.

A. A Permit Condition Cannot Remedy a Deficiency

As discussed above, this Council determined in 2017 that unless the information regarding subsidence evaluation and control needed to justify permit issuance was included in the permit application, the permit application was not "complete" or "accurate" as required by the Environmental Quality Act. That 2017 decision should guide the Council now to reach the same result.

As Brook has in its Brief, DEQ will likely contend that the 2016 version of the permit application did not include DEQ's proposed Conditions 9 and 10 and that remedies the problem. But, the same ultimate deficiency remains because the lack of information in the permit application itself does not justify permit issuance for the areas of highwall mining.

Here, like in 2017, there is nothing in the permit application that could be revised at a later date. Instead, the new information required by Conditions 9 and 10 are designed to include completely new information, rather than *revise* information already contained within the permit application. This is especially true for any highwall mining area beyond

TR-1. Therefore, a permit revision is not appropriate here and instead DEQ should have determined that the permit application was deficient because it omitted information necessary for permit issuance, as this Council did in 2017.

Under the Environmental Quality Act, a deficiency is an error or omission in a permit application "serious enough to preclude correction or compliance by stipulation in the approved permit to be issued by the director." W.S. § 35-11-103(e)(xxiv).

The subsidence control plan is a required piece of the permit application and without it, DEQ is without legal authority to approve the highwall mining portions of the permit. There is perhaps nothing more "serious" than the subsidence control plan to prevent environmental damage from highwall mining. As discussed above, the subsidence control plan did not contain the geotechnical analysis necessary to evaluate the risk or prevention of subsidence in any highwall mining panel, a finding made not just by Dr. Marino but by Mr. Overton as well. Since the information and analysis does not exist, and since the information and analysis is required prior to permitting underground mining, the omission is unable to be "correct[ed]" and "compliance by stipulation" is not appropriate.

Brook's argument that it can treat its application as a "living" document, subject to continual revision because it is somehow necessary to permit the entire area without the requisite information to acquire financing is without basis and contradictory to the plain meaning of the Environmental Quality Act and its regulations. Brook's argument turns the up-front "accurate and complete" requirement of section 406 of the Environmental Quality Act on its head. Under Brook's logic, a permit applicant could propose a permit

boundary much larger than it ever has intention of mining and not include any of the necessary analysis to justify approval of that permit simply to look more favorable to potential investors. Such a mine plan could not possibly be "accurate and complete." The requirements are clear – information and analysis must be included for the entire area to be permitted to justify permit issuance for that area.

Coal companies regularly amend their permits to incorporate new acreage; they do not permit the entire area in the beginning and then say they will fill in the gaps in the permit application when they get to that area of the mine. The structure of the Environmental Quality Act allows for a company to come back and amend in new areas when the company is ready to include those areas in the mine plan, and those new areas must meet all requirements of permitting when they are being permitted for the first time. Here, Brook is asking DEQ to permit everything at once, knowing that there is a lack of information to support permit issuance in any of the highwall mining areas. This argument contradicts the plain language of the very section of the statute Brook is relying upon, subsection 405(c), which allows a longer mining term only "if the application is complete for this specified longer term." In this case, the application is not complete for any highwall mining areas and therefore a mining term to include those highwall mining areas cannot be justified and no permit condition can remedy this deficiency.

Even though DEQ's condition prevents highwall mining until the revisions are made, DEQ has given Brook a permit for the entire area, including the highwall mining areas. This is problematic because the permit comes with investment backed expectations and a right of renewal under section 405 of the Environmental Quality Act. W.S. § 35-11-

405(e) ("Any valid surface coal mining permit issued pursuant to this act is entitled to a right of successive renewal upon expiration **with respect to areas within the boundaries of the existing permit**") (emphasis added). It will effectively be very difficult for DEQ to deny approval of the permit revision and prevent mining in the future because the company has a right of renewal for approval of that portion of the mine. This makes the permit condition nothing more than a paperwork exercise to be completed later on, holding form over substance.

The proper way to remedy the deficiency in the subsidence control plan is to not permit any areas of highwall mining. Then, when the company is ready to come back with the geotechnical analysis necessary to permit a highwall mining area or areas, the company can apply for a permit revision that will propose to expand the permit area to include the new mining areas. Here, DEQ is doing it backward – permitting everything at once and allowing the company to fill in the gaps later on. Not only does this violate the requirement for a permit application to be "accurate" and "complete" prior to issuance under subsection 406(n), but as discussed below, this approach is especially problematic because of Condition 10's treatment of any permit revision as "non-significant."

B. DEQ Cannot Pre-Determine the Permit Revision to be Non-Significant

"Non-significant" permit revisions *do not* require public notice and comment opportunities. DEQ Coal Rules & Regulations Ch. 13 § 2. Since they do not afford public participation opportunities available for initial permitting and other revisions, they should be used sparingly and only with strict application to the limited situations for which they were designed. This is not such a situation.

Under DEQ's rules, a "significant" revision is one that "constitute[s] significant deviations from that which was contemplated in the approved mining and reclamation plan." DEQ Land Quality – Coal Rules Ch. 13 § 2(b). In the case of the subsidence control plan, this would include any additional measures required to control or prevent subsidence deemed necessary based on the geotechnical information required to be submitted in Condition 9, which specifically provides "The Mine Plan and Subsidence Control Plan shall be revised, if necessary, based upon the additional data and analyses."

While the Resource Council believes that any submission as critical as the geotechnical information required in Condition 9 should be deemed a significant revision to the permit application, DEQ need not – and in fact should not – decide that issue now. DEQ cannot pre-determine that any permit revision is "non-significant." DEQ rules provide "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." DEQ Land Quality – Coal Rules Ch. 13 § 2(a).

In its Brief, and with support from affidavits from DEQ staff, Brook argues that DEQ has not violated this provision and that the agency retained its discretion to determine that the permit revision required by Condition 10 is "significant." This is simply not the case. Condition 10 clearly uses the word "shall" and the phrase "non-significant." Brook itself would likely argue that should DEQ later on determine that the revision was in fact "significant," the agency would be without basis to do so. There is no guarantee that a future DEQ staff, some thirty years from now, will interpret Condition

10 the same way as the current staff, and Brook could easily rely on the use of "non-significant" within the condition to prevent any opportunity by DEQ of considering the revision to be significant.

Therefore, at the very least, the EQC should require the Condition 10 to be amended to remove the "non-significant" language, as that determination must be made only after the permit revision has been submitted.

III. The Permit Application is Deficient Because the Mine Plan Does Not Include All Facilities and Haul Roads Incident to Mining and Does Not Include a Traffic Plan for These Haul Roads

For the purposes of delineating activities that require a mining permit, the Environmental Quality Act defines "Surface coal mining operation" to mean surface lands where surface coal mining activities take place and/or surface lands "incident" to underground coal mining activities. The operation shall also "include any adjacent land the use of which is incidental to any of these activities, all lands affected by the construction of new roads or the improvement *or use of existing roads to gain access to the site of these activities and for haulage . . . processing areas, shipping areas and other areas upon which are sited structures, facilities or other property or materials on the surface, resulting from or incident to these activities*." W.S. § 35-11-103(e)(xx) (emphasis added). Similarly, DEQ's rules define "Mine facilities" as "those structures and areas incidental to the operation of the mine, including mine offices, processing facilities, mineral stockpiles, storage facilities, shipping, loadout and repair facilities, and utility corridors." DEQ Land Quality – Coal Rules Ch. 1 § 2(ch). The rules also define

"Surface coal mining and reclamation operations" as "surface coal mining operations and all activities necessary or incidental to the reclamation of such operations." *Id*. at § 2(ez).

These definitions guide what lands and facilities must be permitted. Rather than let a permit applicant draw an arbitrary line, the definitions require a permit boundary to be drawn in such a way as to encompass all of the surface coal mining operations, including all facilities and structures **incidental to the operation of the mine**.

In the case of the Brook Mine, the permit application fails to include associated facilities necessary or incidental to coal mining, including all roads and coal processing facilities.

A. The Permit Application Fails to Include the iCam Coal Processing Facility

Ramaco Carbon is the common owner of the Brook Mine and the iCam research facility that will process coal mined at the Brook Mine. In its application for funding to the Department of Energy, the company stated "Ramaco is the supplier of coal or coal-based feedstock to the process, owner operator of the **process facility** and marketer of the products generated." Ramaco Carbon, DE-FOA-0001992 Narrative submitted to the Department of Energy, at 13, attached as Exhibit D (emphasis added). Later in the application, the company specifies:

> Ramaco Carbon, LLC (Ramaco) is a private Wyoming-based company focused on "Coal to Products." Ramaco Carbon is a vertically integrated coal technology company pursuing an integrated resource, technology and manufacturing based approach to new coal uses. Ramaco Carbon owns a 1.1 billion ton coal resource in Wyoming and specifically intends to develop this to commercialize coal-based carbon products.

Id. at 22. In contrast to how Brook's consultant at WWC describes the facilities, Ramaco itself refers to the Brook Mine and the iCam as being "vertically integrated" with the iCam a "process facility" and the Brook Mine the "feedstock" to the iCam.

DEQ's rules define a "Coal preparation plant" as

> a facility where coal is subjected to chemical or physical processing or cleaning, concentrating, or other processing or preparation. It includes facilities associated with coal preparation activities, including, but not limited to the following: loading facilities; storage and stockpile facilities; sheds, shops, and other buildings; water treatment and water storage facilities; settling basins and impoundments; and coal-processing and other waste disposal areas."

DEQ Land Quality – Coal Rules Ch. 1 § 2(w). Under Ramaco's own description, the iCam must be considered as a coal processing facility because it is the location where coal from the Brook Mine will be processed, cleaned, or prepared for use to convert to carbon products. As such, the iCam facility requires a coal mining permit. This permit must either be included in the Brook Mine permit or permitted separately on its own, but since it is a coal preparation and processing plant, the facility requires a mine permit.

Additionally, the iCam is a facility *incidental* to the Brook Mine. The company's only stated source of coal for iCam facility is the Brook Mine. Meaning, but for the Brook Mine, the facility would not exist. These requirements have been interpreted by various courts, and judicial opinions provide instruction for including the facilities here. For instance, in 1992, the Alaska Supreme Court found that an eleven-mile access/haul road and adjacent conveyor from the mine site to a port, port facilities, a solid waste disposal facility, gravel pits, and a housing facility with an air strip and access road

should have been considered as "incident" to coal mining activities. *Trustees for Alaska, Alaska Center for Environment v. Gorsuch*, 835 P.2d 1239 (1992).

While Brook tries to discount it by relying on a case about non-coal mining, this case is instructive to the situation here because it involves a coal mine and the very same regulatory definitions at issue here. In that case, the Alaska Supreme Court held that the facilities, including the port facilities and other facilities that stored or processed coal from the mine required a mine permit based on the definitions from SMCRA incorporated into the Alaska state SMCRA program. The definitions – the same ones used in the Wyoming state program – are designed to be broadly interpreted to require permitting for all coal mine facilities. Otherwise, loopholes would exist where a company has a mine and then builds all of its processing, storage, and waste facilities somewhere else to avoid the permitting requirements. In fact, that is exactly what Brook is trying to do here. Simply because the iCam is not immediately adjacent to the mining pit does not exempt it from being a facility incidental to the mine where coal processing will occur.

Brook attempts to justify that the iCam processing facility should not be included in the Brook Mine permit by arguing that the iCam and the Brook Mine will be operated by separate LLCs. This practice also does not exempt the iCam from obtaining the required coal mining permit. This is especially true because both the Brook Mine and the iCam processing facility are under the same ownership and control through Ramaco.

/// /// ////

B. The Permit Application Fails to Include the State Highway, Which Will Be Used as Haul Road

The Environmental Quality Act requires identification in the mine plan of any haul roads. W.S. § 35-11-406(b)(v). As discussed above, since the iCam is a processing facility incidental to the Brook Mine, the next question is what haul roads will be carrying coal between the mine pit and the processing facility because those roads must be included in the mine plan.

Brook plans to use the frontage road state highway, highway 345, for its haul road. As described in the mine plan, "Wyoming State Highway 345 provides general access to the Brook Mine entrance." DEQ Ex. 5 at 023. The mine plan discusses that the coal will be hauled offsite, and while the mine plan does not specifically name the iCam, based on the company's plans, the iCam is the only user for coal offsite. DEQ Ex. 5-017, 5-020, 5-033; *see also id*. at 5-138 (depicting the haul truck used for hauling offsite).

Since the highway will be used for hauling coal between the mine pit and the processing facility, it must be included in the mine plan and encompassed within the permit boundary.

Brook may argue that the highway does not need to be included because it is a public road, as defined in DEQ's Land Quality – Coal Rules Ch. 1 § 2(di). However, while public roads are defined, they are not exempted from the general definition of "roads" in DEQ's Land Quality – Coal Rules Ch. 1 § 2(ds), which defines a "road" as "a surface corridor of affected land associated with travel by land vehicles used in surface coal mining and reclamation operations or coal exploration." The definition further

clarifies that "[t]he term includes access and haulroads constructed, used, reconstructed, improved, or maintained for use in surface coal mining and reclamation operations or coal exploration, including use by coal hauling vehicles to and from transfer, processing, or storage areas." Some states do exempt public roads from inclusion within the mining permit, but Wyoming's state SMCRA program does not. Rather, Wyoming's program requires a buffer of mining activities within 100 feet of a public road, except when that road is relocated or closed. Land Quality – Coal Rules Ch. 12 § 1(a)(v)(D).

Taken together the rules require Brook to (1) include the highway in its mine plan and within its permit boundary; (2) conduct all operations with a buffer around the road; or (3) at the very least, include the road in its traffic plan to mitigate impacts to other users of the public road. Until these actions are taken, Brook's mine plan will be deficient.

C. The Permit Application Fails to Include Slater Creek & South Ash Creek Roads in Its Transportation Plan and Fails to Provide the Required Buffer Around These Roads

The same requirements for buffering around a public road discussed above are also true for any county road within the permit boundary, including the South Ash Creek Road and Slater Creek Road. A buffer of 100 feet is required between the county roads and any mining activities (under the broad definition discussed above).

Alternatively, the mine plan must include a plan to relocate the road, approved by Sheridan County after a public hearing. At the very least, the mine plan should accurately estimate truck traffic on the county roads, disclose any impacts to these public county

roads, and include a traffic plan or any agreements with Sheridan County on road use, repair, and compensation.

Buffering and/or mitigation regarding Slater Creek Road is especially important for Powder River Member Joanne Westbrook because the road is the sole access to her family ranch. Resolution of this issue is critical to prevent impacts to neighboring landowners from the mine and its operations.

DEQ's State Decision Document states, "Although the proposed operation is within one hundred (100) feet of the outside right-of-way line of a public road, the road may be relocated or the area affected because the applicant has obtained the necessary approvals of the authority with jurisdiction over the public road prior to the term-of-permit within which the road will be reconstructed." DEQ Ex. 11-018. This is not the case and Brook has not met these requirements. In fact, DEQ's own conclusion is contradicted by the next paragraph, which says:

> There are no indications within the current Mine Plan or Reclamation Plan of the Brook Mine that any public roads will be relocated or reconstructed by the mining operation**. Should public roads be included as access points and travel corridors** later in mine life, affected roads will be designed and certified by a professional engineer and brought into the Mine Plan at that time.

Id. (emphasis added). Public roads are included as access points and travel corridors for the mine, including the state highway discussed above and the county roads, but the DEQ did not require Brook to provide a buffer or relocation plan for those roads. This violates a very basic, yet critical, part of the Environmental Quality Act and DEQ's coal rules designed to protect public safety and to minimize impacts to neighboring landowners.

IV. The Permit Application Is Deficient Because It Does Not Accurately Estimate the Amount of Coal That Will Be Mined

As discussed above, DEQ regulations require information in a permit application to be "current" . . . "accurate and complete." DEQ Land Quality Division Rules and Regulations, Ch. 2 § 1. The mine plan must include "[a] complete operations plan proposed to be conducted during the life of the mine" with an accurate estimate of "the number of acres that will be affected annually" and the "anticipated annual and total production by tonnage." Id. at § 5(a)(i). Accurately estimating the amount of coal to be mined is a critical component of any mine plan as it establishes the time period of the permit and the level of anticipated impacts, provides transparency to the public, and allows for enforcement by DEQ once a permit is issued.

After several years of trying to unsuccessfully market its coal to third-party buyers, the company has shifted to using the coal solely for its proposed research and industrial facilities. Company representatives have represented that only very small amounts of coal would be needed for the research and processing facilities at the iPark and iCam. This very small amount is confirmed by similar facilities such as Atlas Carbon in Gillette, which produces carbon products for air and water treatment systems from coal and currently uses around 30,000 tons of coal per year.[3]

Yet, following this shift in company planning, the mine plan was not updated to reduce the volume of coal that will be mined. The mine plan must be revised to accurately estimate the true level of production that will occur in year 1 through the end

[3] See http://www.energycapitaled.com/wp-content/uploads/2016/10/Presentation-6-Atlas-Carbon-Jim-Dye.pdf

of the life of the mine, whenever that may be. Until that accurate estimate is included in the permit application, the mine plan will be deficient.

V. The Permit Application is Deficient Because It Does Not Identify the Coal Mine Operator

As early as March 2015, the Resource Council wrote to DEQ to express concern that the mine permit application did not contain "complete identification" of "[t]he names, addresses and telephone numbers of any operators, if different from the applicant" as required by the DEQ's rules. Land Quality – Coal Rules Ch. 2 § 2(a)(i).

However, throughout the entire time the permit application was under review by DEQ, DEQ did not require Brook to remedy this deficiency. Brook has still not identified who the operator of the coal mine will be. The permit application refers to contractors or consultants but these parties are left unnamed. For instance, the mine plan says, "RAMACO will either directly hire personnel for the movement of overburden, or will hire an independent contractor who will operate under a license to mine." DEQ Ex. 5-015. Later, it says, "The overburden will be pushed with bulldozers, loaded into trucks using rubber-tired front-end loaders or a shovel, or transported using a scraper fleet, depending upon RAMACO's or an independent contractor's choice." DEQ Ex. 5-016.

DEQ's rules require any operator to be identified in the permit application, not after permit issuance as Brook claims can happen. This is critical because the operator must be listed on any signage posted at the permit boundary. The information is also needed as part of the application to allow the public to be able to review and comment on any proposed operator.

CONCLUSION

For the foregoing reasons, the EQC should issue a decision on the Brook mine permit application to deny the permit application.

Respectfully submitted this 27th day of October, 2020.

/s/Shannon Anderson
Shannon Anderson (Wyo. Bar #6-4402)
Powder River Basin Resource Council
934 N. Main St., Sheridan, WY 82801
Telephone: (307) 672-5809
sanderson@powderriverbasin.org

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **COMBINED RESPONSE IN OPPOSITION TO BROOK MINING CO., LLC'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES FOR CROSS MOTION FOR SUMMARY JUDGMENT** was served on the following parties via the Environmental Quality Council's electronic docket system on October 27, 2020.

Wyoming EQC
2300 Capitol Ave.
Hathaway Bldg. 1st, Room 136
Cheyenne, WY 82002

Patrick Crank
Abbigail Forwood
Jim Seward
Crank Legal Group
1815 Evans Ave.
Cheyenne, WY 82001
pat@cranklegalgroup.com
abbi@cranklegalgroup.com
jim@cranklegalgroup.com
Counsel for Brook Mining Co., LLC

Matthew VanWormer
Senior Assistant Attorney General
Wyoming Attorney General's Office
2320 Capitol Avenue
Cheyenne, WY 82002
matt.vanwormer@wyo.gov

/s/Shannon Anderson