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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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

**POWDER RIVER BASIN RESOURCE COUNCIL’S REPLY IN SUPPORT OF
CROSS-MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF
STANDING**

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INTRODUCTION

In its response to the Powder River Basin Resource Council's ("Resource Council") cross-motion for summary judgment on the issue of standing, Brook maintains its fallacy that the Resource Council does not have members, a fallacy brought forward as a subterfuge attempt to malign the organization and its multi-decade work on behalf of Wyoming people and the environment. The Resource Council's own bylaws and tax statements, as well as the declarations from the Members named in the Petition for Hearing provide concrete evidence that Brook's statement is an outright mistruth.

Moreover, the declarations provided by the Resource Council, relevant statutory and regulatory text, legislative history, and case law all supply ample evidence of the Resource Council's jurisdictional ability to represent the Members in this public participation proceeding.

As further discussed below, subsection 406(p) of the Wyoming Environmental Quality Act ("WEQA"), provides that an "objector" who participated in an informal conference, such as the Resource Council here acting in the role of representing its members, "may appeal the director's written decision after an informal conference to the council." W.S. § 35-11-406(p) (revised July 1, 2020). That is exactly what has happened and the EQC has jurisdiction to hold a hearing on the Brook Mine coal permit application, as the agency has before.

ARGUMENT

I. The Resource Council Has Members

In its response, Brook continues its unfounded claim that the Resource Council does not have members. Brook perpetuates this fallacy based on a single line in the Resource Council's Form 990, the form submitted to the IRS reporting income and expenditures and reporting on activities of the organization each year. Brook blindly ignores many other lines in the Form 990 that provide evidence that the Resource Council has members and ignores the organizational structure of the Resource Council with members who attend an annual meeting and elect members to serve on the Board of Directors.

The arguments, and citation and reference to the same documents used by Brook, contained within the Resource Council's memorandum in support of its cross-motion for summary judgment on the issue of standing provide ample support that the Resource Council is organized as a nonprofit corporation with members. To recap:

- The Resource Council's Bylaws include a membership structure for the organization. Brook Ex. D, Resource Council Bylaws at 1-2 (Article III "Membership and Dues").
- Members are a critical part of the Resource Council's nonprofit corporate governance structure as those members meet annually to elect the Board of Directors and to vote on resolutions that determine the policy and activities of the organization. *Id.*

- While “fees” are not separated out, contributions from members, including annual dues and fees, are reported by the Resource Council on the Form 990 as income of the organization.¹
- The Resource Council’s internal donor database tracks membership dues as well as contributions above the dues amount for each member.
- Other parts of the Form 990 demonstrate that the organization has members, including page 6, Part VI, question 7a and 7b. Brook Ex. C at 6.
- The Form 990 includes narrative about the members of the organization. For instance, the 2016 Form 990 states, “Powder River currently has members throughout Wyoming and several other states . . . Board members are elected from and by the Powder River Membership for a Two Year Term. As a grassroots organization, members decide the direction and focus of Powder River’s work.” Brook Ex. C at 13.
- The Resource Council cannot, and will not, provide a membership list or a database of contributions from members to Brook. However, these documents, records, and programs are not necessary to verify membership of the Members listed in the Petition for Hearing because the Members all represented in their declarations that they are members of the organization. Declaration of Gillian Malone (Ex. A) at ¶ 1; Declaration of Bill Bensel (Ex. B) at ¶ 2; Declaration of John Buyok (Ex. C) at ¶ 1; Declaration of Anton Bocek (Ex. D) at ¶ 1; and

¹ If Brook feels the Resource Council is incorrectly reporting dues or other contributions from members on the Form 990, the dispute is with the IRS, not here before the EQC.

Declaration of Joanne Westbrook (Ex. E) at ¶ 1. The statements from the Members show that the Members contribute to the Resource Council with the specific intent to renew their membership.

- The Members support the Resource Council’s participation in this proceeding on their behalf. Ex. A at ¶¶ 15-16; Ex. B at ¶ 9; Ex. C at ¶¶ 3, 18; Ex. D at ¶¶ 4, 16, 18; Ex. E at ¶¶ 2, 9-10.²

Nevertheless, to clear up any miscommunication and confusion on the topic, Jill Morrison, Executive Director of the Resource Council, now supplies a declaration on the topic. Declaration of Jill Morrison, attached as Exhibit H. Ms. Morrison explains “How [the Resource Council] report[s] membership donations, dues, or fees to the IRS isn’t what determines whether or not someone is a member of the organization. Rather, we use the amounts and policies set by the Board of Directors, which I discussed above, to determine what donations from what individuals make them a member.” Ex. A at ¶ 15, *referencing id.* at ¶¶ 9-11.

II. The Resource Council’s Standing Has Already Been Demonstrated

In its response, Brook continues to ignore that the Resource Council’s standing to participate in this proceeding before the EQC did not start with the Petition for Hearing. Rather, it started at the time of filing objections to Brook’s permit application with the

² Brook makes much ado about nothing that the Members did not themselves request a hearing, after participating as individual parties to the informal conference. That does not matter – for purposes of this hearing, the Members are represented by the Resource Council, as is their choice.

DEQ.³ The objections submitted to the DEQ in April 2020, and attached to the Petition for Hearing, included a section entitled “Organizational Interest in the Coal Mining Permit.” The objections requested the DEQ to hold an informal conference and to grant the Resource Council an opportunity to visit the proposed mine site, both of which are public participation rights provided to parties with the *same* standing necessary to petition the EQC for this hearing: “any interested person.” W.S. § 35-11-406(k) (prior to July 1, 2020), W.S. § 35-11-406(p) (after July 1, 2020). This “interest” is further clarified under the rules as “any person with an interest which is or may be adversely affected.” DEQ Rules of Practice & Procedure Ch. 1 § 17(b).

With its focus on a litany of judicial cases, none of which have anything to do with coal mines, Brook continues to ignore that this hearing before the EQC is not initiated in a court but is rather administrative in nature, and the right to request a hearing is created as part of the public participation opportunities afforded under the Environmental Quality Act. Jurisdiction of the EQC is not determined by case law, but rather the jurisdiction is established through the Environmental Quality Act.

As discussed in the Resource Council’s memorandum in support of its motion for summary judgment, the EQC hearing process is an essential component of the public participation rights afforded under the Surface Mining Control and Reclamation Act

³ As discussed in the Resource Council’s memorandum, standing was also shown time and time over throughout the three-year objection, hearing, and appeal process that preceded the current public participation opportunity. In the previous hearing before the EQC, Members Anton Bocek, John Buyok, and Gillian Malone testified as members, on behalf of the Resource Council.

("SMCRA") and state law implementing that federal law, the Wyoming Environmental Quality Act. In fact, until the revised subsection 406(p) statutory language, along with any necessary amendments to DEQ's Rules of Practice and Procedure to implement the new law, are submitted to and approved by the Office of Surface Mining Reclamation and Enforcement ("OSMRE"), the old 406(k) language is what is included in the state SMCRA program approved by OSMRE. OSMRE has previously determined "Wyoming's statute provides two avenues for review when written objections are submitted [informal conference and contested case before the EQC], with regulatory discretion on how to proceed in light of the nature and positions contained in the comments." OSMRE concluded, "Thus, the Wyoming provision provides opportunities for public participation to address comments and concerns regarding pending permit applications, in the manner that will most expeditiously and practically address the nature of the comments raised." Letter from David Berry, OSMRE, to Shannon Anderson, Powder River Basin Resource Council, Sept. 8, 2017, attached as Exhibit I. In other words, OSMRE views the EQC hearing process as a necessary component of the public participation process required under SMCRA.

By submitting objections with a statement of interest, requesting and then participating as a party in an informal conference held by the DEQ, and requesting and then participating as a party in a mine site tour arranged by the DEQ and held by Brook,⁴

⁴ The transcript for the informal conference provides: "Per the rules of practice and procedure, several parties to the informal conference requested and were granted access to the permit area relevant to the informal conference." Transcript of Informal

the Resource Council already demonstrated it has “an interest which is or may be adversely affected” by the Brook Mine, such that it “may appeal the director’s written decision after an informal conference to the council.” W.S. § 35-11-406(p).

In fact, the Resource Council’s interest and participation in these proceedings has been well-recognized. As both the DEQ and Brook discuss in their briefs in support of their motions for summary judgment on issues other than standing, the Resource Council’s participation in this process has already been an important part of the DEQ’s decision on Brook’s coal mine permit. The DEQ imposed Conditions 9 and 10 to the permit directly in response to comments brought forward by the Resource Council’s expert at the informal conference.

In making this argument about statutory jurisdiction, the Resource Council is not representing that standing is automatic, as Brook characterizes the argument. Rather, that the Resource Council has **already** demonstrated any standing necessary, and that such demonstration was not challenged by Brook through the objection and informal conference process. As a result, the plain language of subsection 406(p) of the Environmental Quality Act provides a right to request this hearing before the EQC.

III. Resource Council Members Are “Interested” and “Adversely Affected”

Brook fails to respond to the Resource Council’s argument that DEQ’s regulations **presume** that a landowner with lands within ½ mile of a coal mine permit area is

Conference held May 13, 2020, at 8, lines 10-13. The transcript repeatedly refers to the Resource Council as a “party” to the informal conference.

“adversely impacted by mining or reclamation operations” and is therefore “interested” to be able to file an objection to that permit and exercise the public participation rights of an informal conference and EQC hearing. DEQ Land Quality – Coal Rules Ch. 1, Sec. 2(c). As discussed in the Resource Council’s memorandum, the DEQ’s regulatory presumption of interest is similar to other state agencies, like the Wyoming Oil and Gas Conservation Commission (WOGCC). *See* WOGCC Rules, Ch. 5 § 11(b). Agencies like the DEQ and the WOGCC presume that parties that were required to receive notice of an application have the right to protest/object and request a hearing. Under agency rules, the very purpose those individuals receive notice is to inform them of the opportunity to protest or object to the application. That is exactly what happened here because this presumption of interest and adverse impact applies directly to the Resource Council Members as all of the Members either live within ½ mile of the Brook Mine permit area or use and/or recreate on lands within the permit boundary itself or adjacent areas. Ex. A at ¶¶ 11-14; Ex. B at ¶ 6; Ex. C at ¶ 4; Ex. D at ¶¶ 5, 8; Ex. E at ¶¶ 3-5. As discussed in the Resource Council’s objections:

Given their proximity to the mine’s proposed location, some of our members received personal notice of the opportunity to submit objections and will be submitting their own objections. Other members with recreational and aesthetic interests in the area will also be submitting objections. Our organizational objections are intended to supplement, not supplant, the individual objections of our members. However, their own stated objections and interests further support our organizational interest in the proceeding.

Resource Council objections at 1-2; *see also* DEQ Ex. 1-239 and 1-482 (showing Anton Bocek as a landowner with a residence within ½ mile of the permit), DEQ Ex.1-245, 1-483 (showing John and Vanessa Buyok as landowners with a residence within ½ mile of

the permit). Based on this representation of interest, the DEQ granted the Resource Council's request for an informal conference and allowed the Resource Council to participate as a party in both the informal conference and the mine site tour.

Therefore, the Members, and in turn the Resource Council itself through representation of the Members, are presumptively deemed to be "interested" and "adversely affected" for purposes of objecting to the mine permit and participating in any public participation opportunities, including this proceeding before the EQC.

IV. The Resource Council Meets All Requirements of Constitutional Standing

Brook argues that the federal Constitutional test for standing discussed by the Resource Council is irrelevant and not the determining test for a state proceeding. However, as the Resource Council's memorandum shows, the very phrase at issue here -- "any person having a valid legal interest which is or may be adversely affected" is defined under SMCRA "as coterminous with the broadest standing requirement enunciated by the United States Supreme Court." Ex. G, S. Rep. No. 95-128, at 87 (1977).

The issue not whether federal standing law determines whether the Resource Council has standing to initiate a case before a state court, because the EQC is not a court, but rather what the phrase means and how it should be interpreted by the EQC. As such the federal cases cited by the Resource Council are applied to interpret the operative phrase at issue as intended by Congress, and intended by Wyoming by adopting the phrase contained within SMCRA. Such an interpretation is required because the

Wyoming state program must be “no less stringent” and “no less effective” than SMCRA and its federal implementing regulations. 30 U.S.C. § 1253; 30 C.F.R. § 730.5.

As Brook is well aware since it brought this argument to state court in its appeal, the provisions of the state program must be interpreted consistent with SMCRA because when Wyoming passed the Environmental Quality Act, it “implemented the policy” of SMCRA. *Powder River Basin Res. Council v. Wyo. Env'tl. Quality Council*, 869 P.2d 435, 438 (Wyo. 1994). This makes SMCRA “persuasive authority” in construing the Environmental Quality Act. *See Apodaca v. State*, 627 P.2d 1023, 1027 (Wyo. 1981) (holding, when the legislature adopts a statute derived from another jurisdiction, case law followed in that jurisdiction construing the statute is persuasive authority). This is because the federal regulations implementing SMCRA require states with an approved program to “implement, administer, enforce and maintain it in accordance with the Act, this chapter and the provisions of the approved State program.” 30 C.F.R. § 733.11. In this case, the Act, the federal rules, and the state program statute and rules all use exactly the same phrase “any person having a valid legal interest which is or may be adversely affected.”⁵ In order for the state program to be implemented and administered in accordance with and consistent with SMCRA, that phrase must have the same meaning in both state and federal law.

⁵ This is not the case where the state program has different requirements or uses a different phrase than SMCRA and federal regulations. Nor is it the case of reliance on federal rules over state rules because again the state rules and the federal rules in this instance are exactly the same. As such, *Bragg*, cited by Brook, does not apply. As an aside, when the DEQ cited *Bragg* to the Wyoming Supreme Court, Brook attempted to strike the DEQ brief. Brook itself disagreed with the DEQ and its position on *Bragg*.

In order to interpret the phrase consistent with SMCRA, no better source exists than Congress explaining its intent. *See, e.g. Chevron U.S.A., Inc. v. Dep't of Revenue*, 2007 WY 43, ¶ 10, 154 P.3d 331, 334 (Wyo. 2007) (holding when deciding what a statute means, a court must give effect to the legislature's intent).

For these reasons, the EQC's counterpart in Montana, the Montana Board of Environmental Review, relied upon the same U.S. Supreme Court case cited by the Resource Council, *Friends of the Earth v. Laidlaw*, to determine that a group similar to the Resource Council in Montana had standing to participate in a hearing on the Rosebud Mine. Board of Environmental Review of the State of Montana, In the matter of: Appeal Amendment AM4, Western Energy Company, Rosebud Strip Mine Area B Permit No. C1984003B, Case No. BER 2016-03 SM, June 6, 2019, at 73, attached as Exhibit J.

Using federal case to interpret the same phrases in state law is a normal practice. For instance, the Wyoming Supreme Court has applied case law under the Freedom of Information Act ("FOIA") to interpret the same provisions contained within the Wyoming Public Records Act ("WPRA"). *Laramie River Conservation Council v. Dinger*, 567 P.2d 731, 733 (Wyo. 1977); *Sublette County Rural Health Care District v. Miley*, 942 P.2d 1101, 1103 (Wyo. 1997); *Powder River Basin Res. Council v. Wyo. Oil & Gas Conservation Comm'n*, 2014 WY 37 (Wyo. 2014). Like SMCRA and the Environmental Quality Act, FOIA and the WPRA have legislative intent and history supporting openness and public participation in agency decision-making. Like FOIA and the WPRA, where the exemptions to public access are construed narrowly, in SMCRA and the Environmental Quality Act, standing is construed broadly, favoring the ability of

citizens to participate in the process. Like Wyoming Courts do with FOIA, the EQC can apply federal standing law to interpret and define federal law terms that are coterminous with those in state law. Even Brook’s citation to *Allred v. Bebout* explains that Wyoming courts find “guidance in federal standing law.” *Allred v. Bebout*, 2018 WY 18 (Wyo. 2018), ¶ 35.⁶

Like was the case for the Rosebud Mine hearing in Montana, *Laidlaw* and other cases cited by the Resource Council demonstrate that the Members, and in turn the organization through representation of the Members, has standing as that phrase is defined as “any person having a valid legal interest which is or may be adversely affected.”

Brook on the other hand seeks to apply an impossible standard, one by which no party would qualify. This high bar runs directly counter to the policy and purpose of public participation in SMCRA and the Environmental Quality Act, which provides that standing requirements must be interpreted in the “broadest” extent possible. Take for instance, Brook’s attack on the declaration of John Buyok. As discussed above, Brook ignores that Mr. Buyok lives in close proximity to the mine. If Mr. Buyok does not have

⁶ Regardless, the difference between state and federal law is largely a distinction without a difference. State law provides similar tests, and again state courts can use federal precedent as persuasive authority. As Brook explains in its brief, the “aggrieved or adversely affected in fact” test present in the Wyoming Administrative Procedure Act means that a person has “legally recognizable interest in that which will be affected by the action.” *Roe v. Bd. Of County Commissioners, Campbell County*, 997 P.2d 1021, 1023 (Wyo. 2000). However, a difference with the SMCRA/Environmental Quality Act standard is the inclusion of **may be** adversely affected, which is particularly important to consider in the case of a permit for a new mine, such as the Brook Mine, where impacts do not currently exist.

standing to challenge a proposed mine next to his property, who would? Brook seeks to diminish Mr. Buyok's assertions of adverse effects, arguing he is not an expert to prove such assertions beyond any doubt, or that the impacts will not be as bad as Mr. Buyok says. But that is not the legal standard for standing, especially as interpreted broadly as SMCRA and the Environmental Quality Act require. While no standing declaration is perfectly aligned with the legal standards as they are after all written by regular lay people, Mr. Buyok's declaration meets the test for Constitutional standing, which involves asserting adverse effects (here, noise and vibration impacts to his property from blasting,⁷ traffic and quality of life impacts,⁸ potential loss or degradation of water, and loss of scenic beauty and aesthetic impacts), a causation nexus tying these impacts back to the mine, and a redressability nexus showing that should the permit be denied or significantly modified as called for in the Resource Council's petition for hearing the injuries may be lessened or prevented.

While asserting without any discussion that the declarations from other Members suffer the same alleged flaws as Mr. Buyok's declaration, Brook ignores that one of the

⁷ Since Mr. Buyok's residence is within the ½ mile boundary, he has requested a pre-blast survey. Brook's consultants have since visited Mr. Buyok's residence and conducted the survey. The pre-blast survey is specifically designed to address any impacts to Mr. Buyok's residence that may occur from blasting.

⁸ Brook is now asserting that perhaps the mine would only produce an occasional pickup of coal to transport from the mine pit and highwall areas to the iCam facility. This is without basis since its own permit allows mining estimates coal mining up to 500,000 tons per year and 17,325,000 tons over the entire thirty-nine year estimated mine life. DEQ Ex. 5-105. As the Resource Council has maintained, should Brook seek to lessen the potential impacts from its mining operations to more closely align with company plans, it must modify the estimate of coal production.

Members, Anton Bocek, has one of the closest residences to the initial area of mining. Mr. Bocek will be sharing the highway every day with increased traffic from Brook Mine workers and coal transportation between the mine pit and the iCam facility. Ex. D at ¶ 10. Living so close to the mine, Mr. Bocek asserts injury from noise, pollution, and vibrations that will occur from the mining operations. *Id.* at ¶¶ 11-14. If Mr. Bocek does not have standing to participate in a hearing before the EQC (represented by the Resource Council) who does? Brook's impossible standard is too high and is a bar to public participation rights afforded by SMCRA and the Environmental Quality Act.

Finally, while Brook claims that the Resource Council did not address organizational standing distinct from its members, Brook Resp. Br. at 19, this is not the case as the Resource Council's memorandum discussed procedural injury that will result to the organization if public participation opportunities are not afforded for mine plan revisions in the future. Resource Council memorandum at 15.

CONCLUSION

For the foregoing reasons, the EQC should determine that the Resource Council has standing to proceed with its Petition for Hearing as a matter of law.

Respectfully submitted this 29th day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF STANDING** was served on the following parties via the Environmental Quality Council's electronic docket system.

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