

Matt VanWormer, WSB #7-5804
Senior Assistant Attorney General
Wyoming Attorney General's Office
2320 Capitol Avenue
Cheyenne, WY 82002
(307) 777-6199
matt.vanwormer@wyo.gov

**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING**

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

**DEPARTMENT OF ENVIRONMENTAL QUALITY'S RESPONSE
IN OPPOSITION TO THE POWDER RIVER BASIN RESOURCE COUNCIL'S
CROSS MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

The Powder River Basin Resource Council's cross motion for summary judgment and supporting memorandum largely restate the allegations in the Resource Council's hearing petition, without adding any substantial legal authority or analysis. For this reason, and to avoid duplication, the Department of Environmental Quality primarily rests on the points and authorities in the memorandum supporting its motion for summary judgment. (See DEQ Mem.). However, the Department further responds to the Resource Council's unwarranted claim that Brook's failure to analyze the subsidence potential across its entire permit area renders its subsidence control plan "patently deficient." (PRBRC Mem. at 3).

ARGUMENT

The Resource Council maintains that Brook's permit application cannot be accurate and complete unless it includes subsidence-related geotechnical testing and analysis for all permitted mining areas. (PRBRC Mem. at 12). Holding Brook to this standard would not only be practically impossible, but also goes beyond the applicable requirements in the Land Quality-Coal Rules (Rules). These Rules, promulgated by the Department and the Council, authorize operators to submit detailed plans for underground workings "on a schedule approved by the Administrator." *Rules Wyo. Dep't of Env'tl. Quality, Land Quality-Coal*, ch. 7, § 2(c). The operator's plans must include "maps and descriptions of significant features of the underground mine, extraction ratios, measures taken to prevent or minimize subsidence and related damage, areas of full extraction and other information" *Id.* The Rules cannot simultaneously allow these plans to be submitted over time and require the same plans to be included in the initial permit application.

Despite the clear language of Chapter 7, section 2(c), the Resource Council insists that the Department erred by allowing Brook to supplement its subsidence control plan as it conducts additional testing and analysis. According to the Resource Council, the Department's permitting decision conflicts with Chapter 7, section 3 of the Rules, which requires public notice of an operator's proposed subsidence control measures. (PRBRC Mem. at 3-4). The Resource Council also contends that the Department disregarded key recommendations from its own expert, Dan Overton. (*Id.* at 7). Next, the Resource Council argues that Brook's "right of successive renewal" under Wyo. Stat. Ann. § 35-11-405(e) strips the effectiveness from Permit Conditions 9 and 10. (*Id.* at 11-12). Finally, the Resource Council suggests that the Department lacks the technical expertise to meaningfully enforce the permit conditions. (*Id.*, Ex. C at 3-4). For the reasons discussed below, each of these assertions falls flat.

I. The Chapter 7, section 3 public notice provision does not require Brook to conduct up-front subsidence analysis for its entire permit area.

Chapter 7, section 3 of the Rules requires a permit applicant to publish notice of the following: "(i) Dates when the underground mining activities could cause subsidence and affect specific structures; and (ii) Any proposed measures which may be taken to prevent or control adverse surface effects." *Rules Wyo. Dep't of Env'tl. Quality, Land Quality-Coal*, ch. 7, § 3(a). The Resource Council contends that Brook cannot satisfy this requirement, because it did not conduct a full subsidence control evaluation before receiving a permit. (PRBRC Mem. at 3-4). However, the Resource Council misconstrues both the applicability and the import of the public notice requirement.

Chapter 7, section 3's public notice requirement does not apply to Brook's highwall mining activities. The Department regulates highwall mining as a form of auger mining. (DEQ Mem. at 10). Both auger mining and highwall mining rely on remotely-operated machines to extract coal from underground seams, with no personnel present in the underground workings. (DEQ Ex. 5 at 95). The Rules direct that subsidence control for auger mining activities "shall be provided as required by Chapter 7, section 2." *Rules Wyo. Dep't of Env'tl. Quality, Land Quality-Coal*, ch. 5, § 6(d). The Department and the Council could have applied other sections of Chapter 7 to auger mining, but chose not to. For this reason, the public notice requirement in Chapter 7, section 3 does not apply to Brook's highwall mining operations.

Even if Chapter 7, section 3's public notice requirement applied to Brook's operations, the Resource Council is wrong to believe that Brook missed its opportunity to comply. Chapter 7, section 3 allows an operator to provide the required public notice "at a later date if approved by the Administrator." *Rules Wyo. Dep't of Env'tl. Quality, Land Quality-Coal*, ch. 7, § 3(c). This later notice "shall occur at least six months prior to mining." *Id.* Under this timeline, Brook could easily provide public notice in conjunction with its required Condition 10 permit revisions. Because Chapter 7, section 3 explicitly authorizes the public notice to occur **after** permit issuance, it in no way speaks to the required components of an initial permit application.

II. The Department followed its expert’s recommendations in developing Permit Conditions 9 and 10.

The Resource Council argues that the Department ignored its own expert’s recommendations by issuing Brook a permit that covers all future highwall mining areas. (PRBRC Mem. at 7). This assertion is unfounded. Dan Overton did suggest, at one point, that Brook’s subsidence control plan “be revised to apply only to the open pit and TR-1 area.” (PRBRC Mem., Ex. B at 5). But Dan Overton made this remark in his June 2020 report, which he created before consulting with the Department on Conditions 9 and 10. (See DEQ Mem., Overton Aff. ¶¶ 15-16). Mr. Overton clarified that the comments in his June 2020 report “do not represent [his] opinion as to Brook’s current overall Subsidence Control Plan, as supplemented by the mine permit conditions adopted on July 7, 2020.” (*Id.* ¶ 18). In light of Brook’s future geotechnical testing and analysis under Conditions 9 and 10, Mr. Overton believes that “Brook will have taken reasonable steps to ensure its highwall mining will be conducted in a manner that prevents subsidence from causing material damage to the land surface **in all of the highwall mining areas identified in Brook’s mine plan.**” (*Id.* ¶ 22) (emphasis added). Thus, the Department’s issuance of a permit for all of Brook’s future mining areas aligns with Dan Overton’s recommendations.

III. Brook’s “right of successive renewal” under Wyo. Stat. Ann. § 35-11-405(e) does not limit the Department’s review of Brook’s permit revisions.

According to the Resource Council, the Department cannot meaningfully review Brook’s subsidence-related permit revisions, because surface coal mining permits carry a “right of successive renewal ... with respect to areas within the boundaries of the existing permit.” (PRBRC Mem. at 11-12); Wyo. Stat. Ann. § 35-11-405(e). However, the section

405(e) renewal provision in no way exempts Brook from satisfying Conditions 9 and 10. In fact, under section 405(e), the “right of successive renewal” is contingent upon the operator providing “any additional revised or updated information.” Wyo. Stat. Ann. § 35-11-405(e). The Department also has an ongoing responsibility under the Rules to evaluate whether Brook’s highwall mining is “planned and conducted so as to prevent subsidence from causing material damage to structures, the land surface, and groundwater resources.” *Rules Wyo. Dep’t of Env’t. Quality, Land Quality-Coal*, ch. 7, § 2(b)(iii). If Brook’s Condition 10 submittals fall short of this standard, the Department has complete authority to prevent Brook from entering a new highwall mining panel. *Id.*, ch. 5, § 6(b) (authorizing the Department to limit or prohibit auger mining in order “to minimize ... unwarranted subsidence”).

IV. The Department’s expertise to review Brook’s permit revisions is not an issue before the Council.

With its cross motion for summary judgment, the Resource Council included an affidavit and a July 30, 2020, report from Dr. Gennaro Marino. (PRBRC Mem., Ex. C at 1-6, 68-69). Both the affidavit and the report include new opinions from Dr. Marino regarding Conditions 9 and 10.¹ (*Id.*). Although Dr. Marino characterizes Conditions 9 and 10 as a “definite improvement,” he concludes that the Department lacks the geotechnical engineering expertise necessary to review Brook’s Condition 10 submissions. (*Id.* at 4).

¹ Brook filed a motion, in which the Department joins, asking the Council to strike Dr. Marino’s affidavit because it includes opinions that were not disclosed in the Resource Council’s September 30, 2020, *Designation of Expert Witness*. (Brook Mot. to Strike).

The central issue before the Council is whether Brook’s subsidence control plan, as supplemented by Conditions 9 and 10, demonstrates that Brook will plan and conduct its highwall mining operations to prevent material damage from subsidence. *Rules Wyo. Dep’t of Envtl. Quality, Land Quality-Coal*, ch. 7, § 2(b)(iii). Brook will submit its first Condition 10 permit revision in approximately five years. (See DEQ Ex. 5 at 141) (showing an initial five-year period of open pit mining). The Department’s staffing during this future timeframe is uncertain and, as the Resource Council acknowledges, irrelevant to this appeal. (PRBRC Resp. to Mot. to Strike at 5) (explaining that Dr. Marino’s staffing recommendation is “not even one for the EQC, but rather the DEQ.”).

For the purpose of evaluating Conditions 9 and 10, the Council should assume the Department will utilize an internal or external reviewer with sufficient geotechnical engineering expertise. Faced with a lack of internal expertise to review the subsidence-related portions of Brook’s permit application, the Department retained Dan Overton as an expert consultant. (DEQ Mem., Overton Aff. ¶¶ 9-13). There is no reason to doubt that the Department would follow the same prudent path in the future.

CONCLUSION

For the above reasons, the Department asks the Council to deny the Resource Council’s cross motion for summary judgment and grant Brook’s and the Department’s motions for summary judgment.

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Dated this 16th day of November, 2020.



Matt VanWormer, WSB# 7-5804
Senior Assistant Attorney General
Wyoming Attorney General's Office
2320 Capitol Avenue
Cheyenne, WY 82002
(307) 777-6199
matt.vanwormer@wyo.gov

*Attorney for the Wyoming
Department of Environmental Quality*

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing *Response* upon the persons listed below, this 16th day of November, 2020, addressed as follows:

Wyoming EQC (Original) – **By Inter-Agency Mail**

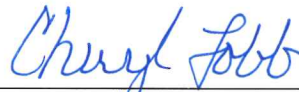
Attn: Joe Girardin
2300 Capitol Ave.
Hathaway Bldg. 1st, Room 136
Cheyenne, Wyoming 82002

Shannon Anderson – **By E-mail**

Powder River Basin Resource Council
934 N. Main St.
Sheridan, WY 82801
sanderson@powderriverbasin.org

Patrick J. Crank – **By E-mail**

Abbigail C. Forwood
Jim D. Seward
CRANK LEGAL GROUP, P.C.
1815 Evans Ave.
Cheyenne, WY 82001
pat@cranklegalgroup.com
abbi@cranklegalgroup.com
jim@cranklegalgroup.com



Cheryl Lobb, Paralegal
Wyoming Attorney General's Office