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 RESPONSE IN OPPOSITION TO DEPARTMENT OF ENVIRONMENTAL QUALITY'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In its Motion for Summary Judgment and associated Memorandum of Support of Motion for Summary Judgment (hereafter "DEQ Brief"), the Department of Environmental Quality ("DEQ")[1] parses the words of the Environmental Quality Act and its regulations in a way that may be favorable to the agency's position, but ignores the requirements of the agency and a coal mine permit applicant that must be met before a permit is issued.

For the reasons discussed below, the DEQ's motion should be denied and all matters of law should be resolved in favor of the Resource Council.

ARGUMENT

I. ISSUE 1: Must a permit application for underground mining contain a subsidence control plan or otherwise contain information and analysis to be able to assess subsidence risk and control prior to permit issuance?

As explained in the Resource Council's opening brief, a core component of any permit application that proposes underground mining is an evaluation of subsidence risk, and measures to prevent and control that risk and potential because 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

[1] Brook has incorporated the DEQ's arguments into its response to the Resource Council's motion for summary judgment.

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).

Brook's permit application is deficient and should not have been approved because it cannot be deemed "complete" or accurate" until the information and analysis necessary to evaluate subsidence risk and control includes geotechnical analysis for the entire area proposed to be permitted.

This issue is not one of first impression for the Environmental Quality Council because it was a focal point of the September 2017 Order related to the Brook Mine. That Order found the subsidence analysis contained within the 2016 version of the permit application deficient. *In re Brook Mine Application*, EQC Docket 17-4802, Findings of Fact, Conclusions of Law, and Order. That Order concluded 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*. at 16. The Order 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*.[2]

[2] This legal conclusion was reached based on subsections 406(n) and 406(b) of the Environmental Quality Act and Chapter 7 of the DEQ Land Quality – Coal Rules.

Based on that Order and precedent, the question before the EQC now is whether Brook has since provided the "studies and testing [necessary] to draw any scientific conclusions as to the long-term risk of subsidence at the permit area" and whether "[t]he permit application . . . provide[s] sufficient information to provide a meaningful review with respect to subsidence potential." *Id.*

The answer to that question is no. As explained in the Affidavit of Dr. Jerry Marino *and* the memorandum of DEQ's consulting expert Dan Overton, attached to the Resource Council's motion for summary judgment, and as conceded in DEQ's Brief, the fact that Brook's application lacks the necessary information is an undisputed fact. DEQ Br. at 13-14, 19-21 (explaining "Brook's subsidence control plan, as submitted, does not contain enough testing and analysis to capture the potential for subsidence across Brook's entire permit area.").

However, DEQ contends that Conditions 9 and 10 to the permit remedy any gaps in the permit application information. DEQ Br. at 20-23 (contending "Brook's subsidence control plan, as supplemented by Conditions 9 and 10, clearly satisfies the subsidence control requirements in Chapter 7, section 2 of the Rules."). To draw this conclusion, DEQ raises several defenses to why the agency believes it is acceptable to allow the necessary information required in Condition 9 to be submitted after permit issuance. These defenses include (1) highwall mining is a type of auger mining and is not subject to Chapter 7, section 1 of DEQ's coal rules; and (2) evaluation of subsidence risk and control is an ongoing performance standard and can be evaluated during the operational component of the mine. Both of these defenses fail, as explained below.

A. The Brook Mine Must Comply with Chapter 7, Section 1 of DEQ's Coal Rules

DEQ contends that since highwall mining is a kind of auger mining, the only requirement related to subsidence evaluation and control is Chapter 7, section 2 of DEQ's coal rules. DEQ draws this conclusion by looking at Chapter 5, section 6 of DEQ's coal rules which establish performance standards for auger mining. That section of DEQ's rules specifically says that these ongoing performance standards can be met through compliance with Chapter 7, section 2 of DEQ's coal rules. While this is certainly true with respect to ongoing performance standards that must be met throughout the life of the mine, Chapter 5, section 6 does not otherwise relieve an auger mine from meeting the permitting requirements of Chapter 7, and especially the *permit application content requirements* of Chapter 7, section 1.

Chapter 7, section 1's permit application content requirements apply to all types of underground mining. There is no doubt that auger mining is a kind of underground mining. While auger mining may not be specifically mentioned in Chapter 7, the general permit application content requirements of Chapter 7, section 1 apply to any type of underground mining because there is no text within Chapter 7, section 1 that limits the application content requirements to any particular type of underground mining. While some parts of the rule may be more relevant for other types of underground mining, any permit application could easily explain if portions of the rule are irrelevant for a particular type of mine design. Regardless, those portions of the rule are not at issue here. What is at issue is Chapter 7 section 1(a)(v)'s requirement that "a permit for underground

coal mining operations" include "[i]nformation and evaluations on the potential for and the extent of subsidence, and the effect it may have on structures, the continued use of the surface land and aquifers or recharge areas. Such information shall include a map of all underground workings showing areas of planned and potential subsidence." Whether such information is contained within a subsidence control plan or is otherwise located in the permit application is also immaterial, especially because Brook itself includes a subsidence control plan as a necessary component of the mine plan portion of its permit application. DEQ Ex. 5-080 (Sec. MP.13, Subsidence Control).

Again, there is no dispute that Brook's application, including its subsidence control plan, only evaluated the "potential for and the extent of subsidence" in 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. Additionally, there is no dispute that the "information and evaluations on the potential for and the extent of subsidence" even for TR-1 were incomplete and inaccurate since, because as DEQ admits, the permit application could not be approved but for Conditions 9 and 10.

Brook and DEQ maintain the position, rejected by this Council in 2017, that Conditions 9 and 10 can "supplement" the permit application after permit issuance. The Council must reach the same conclusion it did in 2017 – that the permit application content requirements of Chapter 7, section 1 apply and that until such information is contained within the permit application, the application cannot lawfully be approved.

B. Compliance with Ongoing Performance Standards Is in Addition to, not in Replacement of, Permit Application Requirements

DEQ's next defense lies in its argument that regardless of what is in the permit application, Conditions 9 and 10 will ensure the ongoing performance standards for subsidence evaluation and prevention are met.

DEQ explains that a "pattern of an application requirement linked with a performance standard repeats itself throughout the Act and Rules [and a] coal mine permit applicant must demonstrate through plans and proposals how it will protect environmental resources." DEQ Br. at 4, *citing* Wyo. Stat. § 35-11-406(b). In other words, DEQ infers that if a permit application misses the information necessary, that is forgivable because there will be future opportunities for review with future "plans and proposals." This is simply not the case.

As DEQ notes, if the agency determines a performance standard cannot be met in reviewing a permit application, it has the authority – and in fact the regulatory obligation – to deny the permit application or to otherwise restrict mining. For instance, in the case of auger/highwall mining, under Chapter 5, section 6(b)'s performance standards, DEQ "has discretion to limit or prohibit auger mining in order to minimize unwarranted subsidence." DEQ Br. at 5-6. To this, DEQ says "[t]he Department **may impose such limits or prohibitions at the application stage**." *Id.* at 6 (emphasis added). In other words, DEQ itself admits that if information in the application shows that a performance standard cannot be met, DEQ must prohibit or limit mining at the application stage. Here, the information contained within the permit application is inadequate to determine

whether the performance standard will be met or not. DEQ cannot possibly draw any conclusions and there is simply not enough information contained within the permit application for DEQ to determine whether the performance standard will be met. Importantly, while DEQ characterizes the information required under Conditions 9 and 10 as a "supplement" to the permit application, the information is actually a revision, admitting that the permit application is not being supplemented but rather revised to contain information that was lacking before.

In defense of its decision to not require adequate testing and analysis prior to permit issuance, DEQ contends that "Brook could not reasonably be expected to prepare this much information in an initial permit application, nor could the Department be expected to review it." DEQ Br. at 25. The basis of this conclusory statement is unclear and neglects the fact that this permit application underwent review for a period of five and a half years, presumably more than enough time to carry out and review the necessary information. It was certainly enough time to conduct a suite of other testing and analysis related to hydrology and other issues of the permit. Regardless, the application is for the *entire* area, not just the surface mine portion or not just the surface mine portion with TR-1. That was Brook's choice and DEQ must have sufficient information within the permit application to justify permit issuance in the entire permit area. In this case, it did not have that necessary information.

DEQ also claims that "[e]ven if permit-area-wide testing and analysis were feasible, the results would have less value now than they will in future years." DEQ Br. at 25. This too is no excuse for not requiring the necessary information prior to permit

issuance. Brook could have proposed an initial permit area that was more limited, allowing it to come back and amend its permit to bring in new areas of the mine after mining in TR-1. Or it could even amend its previous analysis to build upon experiential lessons from mining. Either approach would allow the company – and the DEQ – to build upon the sequential mining plan to improve the mine going forward. But either approach does not excuse Brook from including the necessary information in its permit application for *all* areas it wishes to permit.

II. Issue 2: Can the DEQ remedy the deficiencies in the permit application related to subsidence evaluation and control through *future* revision, pre-determined to be "non-significant"?

DEQ claims that any revision required under Conditions 9 and 10 will likely be non-significant and therefore the agency was correct using that term.[3] As DEQ explains:

> Under Condition 10, one of two outcomes will result for each highwall mine panel: (1) Brook's geotechnical analysis will show a controlled risk of subsidence, in which case the Department allows Brook to move forward with its approved mine plan; or (2) Brook's geotechnical analysis will show an elevated subsidence risk, in which case the Department may prevent Brook from mining a particular panel. Neither outcome would significantly alter Brook's approved mining and reclamation plans.

DEQ Br. at 27.

To the contrary, preventing mining of a particular panel, or requiring Brook to relocate a planned highwall mining panel, or otherwise change its mining and reclamation plans to add in new subsidence controls in response to DEQ review would be

[3] As explained in briefs from all parties, whether a revision is significant or not determines whether public participation opportunities, including public notice, comment, and hearing rights, are afforded.

a significant revision to the mine and reclamation plans. Nevertheless, as opposed to deciding whether the revision would be significant or not now, DEQ must allow the possibility to exist and cannot predetermine the non-significance of a permit revision many years before it is submitted to the agency.

To this, DEQ contends that "the Department's decision to classify Brook's Condition 10 permit revisions as non-significant does not restrict the Administrator's freedom to treat these revisions as significant in the future." DEQ Br. at 28. However, that is exactly what the language of Condition 10 does by using the word "shall." The language of Condition 10 does not provide flexibility for DEQ to re-consider the permit revision application as "significant." This violates the plain language of Chapter 13, section 2(a) of DEQ's coal rules, which requires the DEQ to determine whether a permit revision application is significant or not within 90 days of submission.

As noted in the Resource Council's opening brief, should DEQ later determine that a revision is in fact "significant," Brook would likely argue the agency would be without basis to do so. There is also 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. At the very least, the Council should require Condition 10 to be amended to meet the process requirements of Chapter 13 of the rules which require DEQ review to determine whether a permit revision is significant *after* a permit revision application is submitted to the agency.

III. Issue 3: Does the Permit Application Include All Facilities and Haul Roads Incident to Mining and 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); *see also* DEQ Land Quality – Coal Rules Ch. 1 § 2(ch). These definitions guide what lands and facilities must be permitted and included within the boundary of a permit.

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

While DEQ admits that the iCam coal processing facility could be considered a "coal preparation plant" and therefore could be subject to permitting, DEQ says permitting is not necessary in the case of the iCam because "under the coal preparation plant rule, the Department does not regulate or require any permitting for plants 'located at the site of ultimate coal use.'" DEQ Br. at 30, *citing* ch, 3 § 6(a).

In making this determination, DEQ relies upon a statement from Brook's consultant, Jeff Barron, that coal from the Brook Mine "will be transferred, at the pad, by a retail sale, sold freight on board ("FOB") at the mine and will be transported off the mine site by the independent third-party purchaser." DEQ Br. at 15, *quoting* Barron Aff. ¶ 25. DEQ admits that the iCam and iPark "facilities will conduct some amount of coal processing," but based on the Barron Affidavit that "no raw or processed coal will leave iCam and iPark for other destinations." DEQ. Br. at 16, *citing* Barron Aff. at ¶¶ 13, 16.

However, DEQ neglects to consider that Mr. Barron and his employer WWC is not the permit applicant. He does not work for Brook or its parent company Ramaco Carbon and there is no information in the affidavit that demonstrates Mr. Barron is qualified and possesses sufficient authority to make any statements about the company's retail plans or use of the iCam facility. Additionally, Mr. Barron's affidavit provided no supporting information of company plans, coal contracts, licensing agreements, or other documents to provide evidence that the iCam facility is a site of ultimate coal use.

Equally important, no information about the iCam exists in the permit application to allow DEQ to make any determinations about coal processing activities at the iCam or to be able to determine whether the iCam will in fact be the end use of coal from the Brook Mine. After many rounds of technical review questioning, DEQ did not ask a *single* question about the iCam and whether it is a site of ultimate coal use. DEQ cannot fix that problem now through a post-permit justification. Rather, in order to successfully claim the iCam does not need to be included in the permit, the agency must demonstrate

it conducted adequate review to determine the answer to this very important question within the scope of the permit application itself.

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

A permit application must include designation all roads affected by mining operations, not just roads that are constructed for use in mining operations. DEQ's coal rules require an applicant to provide detailed plans for all roads "to be constructed, used, or maintained within the proposed permit area." DEQ Land Quality-Coal Rules, ch. 2, § 5(a)(xvi)(A); *see also* DEQ Br. at 7.

In its brief, DEQ argues that state highway 345 need not be included in the permit application because "Brook, however, proposes no coal hauling beyond the present boundary of its mine permit." DEQ Br. at 32. However, this statement is contradicted with information in the permit application that coal will be hauled off-site. 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). DEQ's rules define roads to "include[] 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." DEQ Land Quality – Coal Rules Ch. 1 § 2(ds). In the case of the Brook Mine, this includes Highway 345.

DEQ further argues that the Brook Mine will not affect Highway 345 and therefore the road should not be considered in the scope of permitting. DEQ Br. at 34-35. But, heavy truck traffic will affect the road. The Environmental Quality Act does not limit haul roads to those constructed through mining operations. Instead, all roads used by mining operations are considered affected under the Act. Regardless, DEQ did not do the analysis prior to permitting to determine whether the highway would or would not be affected and cannot make a post-hoc determination to the contrary now. Since Brook itself infers that the highway will be used for hauling coal off-site in its permit application, this necessitated a review of the road's use and impacts by the DEQ and inclusion of the road within the traffic plan for the mine 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

A buffer of 100 feet is required between public roads, such Slater Creek and South Ash Creek county roads, and any mining activities.

There is no dispute this requirement is likely not met in the case of the Brook Mine. DEQ notes "Brook discloses that its future highwall mining will be adjacent to county roads [and] Brook also explains that it will use Ash Creek Road for transportation within the permit area." DEQ Br. at 37, *citing* DEQ Ex. 5 at 92. Similarly, DEQ's State Decision Document states, ". . . the proposed operation is within one hundred (100) feet of the outside right-of-way line of a public road . . ." DEQ Ex. 11-018.

DEQ argues that the buffer is an ongoing performance standard and need not be met at the time of permitting. However, in drawing this conclusion, DEQ illegally ignores that the buffer is a requirement that makes lands unsuitable for coal mining activities and therefore prevents those lands from being permitted under subsection 406(n). DEQ's coal rules provide:

> (v) The criteria contained in W.S. § 35-11-406(n)(iv) regarding Section 522(e) of P.L. 95-87 shall mean that, prior to approval of any complete application for a surface coal mining permit, the applicant must demonstrate and the Administrator determine, utilizing the assistance of the appropriate Federal, State or local government agency, if necessary, that the application does not propose a surface coal mining operation on those lands where such operation is prohibited or limited by Section 522(e) of P.L. 95-87; or if one is so proposed, that the applicant either has valid existing rights or was conducting a surface coal mining operation on those lands on August 3, 1977. **Subject to the above stated limitations, surface coal mining operations are prohibited or limited**: . . . (D) **Within 100 feet, measured horizontally, of the outside right-of- way line of any public road**, except where mine primary roads join such right-of-way line. Provided, however, the Administrator may specifically authorize operations where the road is to be relocated, closed, or where the area affected lies within 100 feet of a public road. Such specific authorization shall provide a public comment period and an opportunity to request a public hearing in the locality of the proposed operation together with a written finding on whether the interests of the public and the affected landowners will be protected from the proposed operation. If a hearing is requested, a public notice shall be published at least two weeks prior to the hearing in a local newspaper of general circulation. If a hearing is held, the Administrator shall make this finding within 30 days after the hearing or if a hearing is not held the Administrator must make this finding within 30 days after the end of the public comment period. The Administrator may rely upon findings of the public road authority with jurisdiction over the road in specifically authorizing road relocations or closures;

DEQ Coal Rules Ch. 12 § 1(a)(v)(D) (emphasis added). Section 1 of the Chapter 12 rules is entitled "Permitting Procedures." In other words, the rules recognize that compliance with the 100-foot buffer must be met at the time of permitting, not after the fact through

performance standards. Public roads are included as access points and travel corridors for the mine, and highwall mining panels are located underneath and in close proximity to these 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. Issue 4: Is the Permit Application Deficient Because It Does Not Accurately Estimate the Amount of Coal That Will Be Mined?

Without any basis, Brook estimates its coal production over thirty-nine years will total 17,325,000 tons, with annual production ranging from 100,000 to 500,000 tons.

DEQ contends it has no regulatory obligation to question these numbers. However, an estimate of production cannot just be any random number; rather, it has to be "current" and "accurate" to comply with subsection 406(n) and Ch. 2 § 1. Just like any other portion of the permit application, DEQ can ask questions about the coal estimate during the rounds of technical review the staff does for the permit. Here, DEQ never raised any questions or asked for any supporting information on the estimate of coal production. It was incumbent upon the applicant to provide "accurate" information and it was incumbent upon DEQ to ensure that the application is as "accurate" as possible

As explained in the Resource Council's opening brief, accurately estimating coal production is not a minor issue for a permit – it is the very foundation for which every other part of the mine and reclamation plans are constructed. The timetable for production leads to analysis of water and air impacts, a plan for revegetation and

reclamation, estimates of truck and other traffic, planning for facilities, and everything else in the permit. In other words, these other parts of the permit cannot also not be "accurate" unless the estimate of coal production is "accurate."

DEQ claims that if the estimate of coal production is inaccurate, that is ok because any errors will be remedied and correct through the annual report requirements. DEQ Br. at 40. However, the annual report requirements discussed in DEQ's brief, do not excuse an applicant's obligation to be "accurate" in the initial application as required by subsection 406(n) of the Act and Chapter 2, sec. 1 of the rules.

The mine plan must be revised to accurately estimate the true level of production that will occur in year 1 through the end 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. Issue 5: Is the Permit Application Deficient Because It Does Not Identify the Coal Mine Operator?

A mine permit application must contain "complete identification" of "[t]he names, addresses and telephone numbers of any operators, if different from the applicant." Land Quality – Coal Rules Ch. 2 § 2(a)(i).

In the case of the Brook Mine, 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 DEQ 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 16th day of November, 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 **RESPONSE IN OPPOSITION TO DEPARTMENT OF ENVIRONMENTAL QUALITY'S MOTION FOR SUMMARY JUDGMENT** was served on the following parties via the Environmental Quality Council's electronic docket system on November 16, 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