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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

In re Brook Mining Co., LLC coal mine
permit – PT0841

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EQC Docket No. 20-4802

**POWDER RIVER BASIN RESOURCE COUNCIL’S REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

In its Response to the Powder River Basin Resource Council's ("Resource Council" or "PRBRC"), the Department of Environmental Quality ("DEQ") raised only a few issues, which are responded to below, as necessary. As such, the Resource Council reaffirms its previous argument raised in the memorandum in support of its motion for summary judgment and the response to the DEQ motion for summary judgment, summarized below. As set forth herein, DEQ's and Brook's motions 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?

There are no disputes about the facts that are material to the Brook permit application when it comes to subsidence. First, all parties agree that the permit application contains information related to subsidence, including a subsidence control plan. DEQ Ex. 5-080 (Sec. MP.13, Subsidence Control). Second, all parties agree that this information and analysis in the permit application does not cover the entire permit area. *See* 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."). Only the TR-1 area had site specific analysis for subsidence. DEQ Ex. 5-348, Addendum MP-6. Third, DEQ's expert Dan Overton made the same conclusion that the Resource Council's expert Dr. Jerry Marino

made: the analysis for the TR-1 area was also deficient to evaluate the risk of subsidence and control for its effect.

With these undisputed facts, the issue turns to a question of law: does the Environmental Quality Act and DEQ's regulations require information and analysis related to subsidence potential and control to be in the permit application, or rather as DEQ and Brook contend, can such information and analysis be submitted later on, as required by DEQ's permit conditions 9 and 10.

As discussed in previous briefs, this issue is not one of first impression for the Environmental Quality Council. Faced with the same situation regarding the 2017 version of the permit application, this Council found that without the necessary evaluation of subsidence risk and control, the permit application was not "accurate" and "complete" as required by the Environmental Quality Act. *In re Brook Mine Application*, EQC Docket 17-4802, Findings of Fact, Conclusions of Law, and Order. This legal analysis was based on a plain reading of section 406 and the Land Quality Coal Rules Chapter 7. Chapter 7 section 1(a)(v) requires 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."

While DEQ argues that the Chapter 7, section 1 requirements are not applicable to auger mining, this is not the case, as all underground mines must include the information required by Chapter 7, section 1 in their permit applications. Moreover, even if

subsidence control is an ongoing performance standard of auger mining, the permit application must ensure that the performance standards will be met; if they won't be met, DEQ must reject the permit application or otherwise limit mining. DEQ Br. at 5-6.

Similarly, DEQ argues that the permit conditions "supplement" the application to make it "complete" as required by the Environmental Quality Act. DEQ Resp. Br. at 4. However, conditions 9 and 10 do not "supplement" the information and analysis in the permit application. Rather, they require information to be submitted at a later date and to be evaluated by DEQ at a later date. Conditions 9 and 10 to the permit cannot remedy any gaps in the permit application information.

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"?

Like the previous issue, there are no disputed facts material to whether condition 10 to the permit requires the information required under condition 9 to the permit to be submitted as a "non-significant" revision.

The issue turns on a question of law: whether DEQ can lawfully determine that the information shall be submitted as a "non-significant" revision. 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.

DEQ claims 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, 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. 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?

The facts material to this issue are also undisputed, mainly that the permit application does not include the proposed iCam coal processing facility or the state highway that will be used for hauling coal between the surface mine location and the iCam. Additionally, inclusive within the permit boundary are several public roads, but the permit application did not include the required buffer or plans to relocate the roads.

The legal issues presented include: (1) does the permit application include all areas of “surface coal mining operations” as defined under the Environmental Quality Act and DEQ regulations; and (2) is the 100-foot buffer between mining operations and public roads required to be enforced at the time of the permit application or later on as a performance standard.

As to the first issue, while DEQ and Brook concede that the iCam facility is a coal processing or preparation plant that is normally required to be permitted, they argue that it is exempt from permitting because it is the location of ultimate coal use. DEQ Br. at 30, *citing* ch. 3 § 6(a). Yet, the iCam is not mentioned once in the permit application, nor was it discussed over the twelve rounds of agency review allowing the DEQ to draw such a conclusion. DEQ possesses 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.

Next, regarding state highway 345, the permit application itself shows that the road will be used to haul coal off-site. 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.

As for the county roads within the permit boundary, the necessary buffer of 100 feet between these public roads and any mining activities will not be met through the current mine plan. DEQ Br. at 37, *citing* DEQ Ex. 5 at 92; DEQ Ex. 11-018. 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 Coal Rules Ch. 12 § 1(a)(v)(D) (emphasis added). Section 1 of the Chapter 12 rules is entitled "Permitting Procedures."

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. Just like any other part of the permit application, an estimate of coal production has to be “current” and “accurate” to comply with subsection 406(n) and Ch. 2 § 1. In permitting the Brook Mine, DEQ did not ensure these requirements were met, especially given the agency was aware of the changing company plans and speculative markets for the coal.

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.

V. Issue 5: Is the Permit Application Deficient Because It Does Not Identify the Coal Mine Operator?

For this issue, there is no dispute that Brook likely plans to hire a contractor to operate the mine. DEQ Ex. 5-015; DEQ Ex. 5-016. There is also no dispute that the name and contact information for such a contractor is not included in the permit application. This is in violation of the requirement that 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).

DEQ's Chapter 2 rules require any operator to be identified in the permit application, not after permit issuance. 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 30th day of November, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was served on the following parties via the Environmental Quality Council's electronic docket system on November 30, 2020.

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