BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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

ORDER GRANTING THE DEPARTMENT OF ENVIRONMENTAL QUALITY'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Environmental Quality Council ("Council") upon Powder River Basin Resource Council's ("PRBRC") appeal of the Department of Environmental Quality's ("Department") decision to issue a coal mine permit (PT0841) to Brook Mining Company, LLC ("Brook").

PRBRC disagrees with the Department's decision and challenges multiple aspects of Brook's permit application. PRBRC first challenges Brook's subsidence control plan, contending that Brook's plan lacks sufficient geotechnical analysis to assess the risk of subsidence in future highwall mining areas. PRBRC contends that all subsidence testing/analysis must be done pre-application instead of being performed during the life of the mine. Essentially this dispute centers on whether the Department can address the subsidence testing/analysis issues through permit conditions.

Next, PRBRC argues that Brook's application is incomplete because it does not include off-site facilities that are incidental to mining, nor the roads that connect the Brook Mine to these facilities. Last, PRBRC maintains that Brook's application is defective because it does not include accurate estimates of coal production and does not identify a mine operator.

The parties asked the Council to decide this case through summary judgment because they agreed that there were no genuine issues of material fact—leaving only legal issues to be decided. Brook and the Department filed motions for summary judgment asserting that the Department's action of issuing the permit was proper because the permit application was accurate, complete, and complied with all applicable laws. Conversely, PRBRC filed a motion for summary judgment asking the Council to reverse the Department's decision because the permit application was deficient.

After this matter was fully briefed by the parties, the Council held a hearing on the motions on December 16, 2020 via Zoom video conference.

After hearing and considering the parties' motions and arguments and otherwise being fully advised, the Council voted 5 to 1 (with one member absent) to grant the Department's motion for summary judgment.[1] The Council finds that there are no genuine issues as to any material fact, and concludes that the Department is entitled to judgment as a matter of law. The Council hereby finds, concludes, and orders as follows:

I. LEGAL BACKGROUND

Surface coal mining operations in the United States are governed by the federal Surface Mining Control and Reclamation Act ("SMCRA"). 30 U.S.C. §§ 1201 through 1328. SMCRA also governs the surface effects of underground coal mining. 30 U.S.C. § 1266. SMCRA creates a system of cooperative federalism "in which responsibility for the regulation of surface

[1] Brook joined and adopted the Department's motion for summary judgment.

coal mining in the United States is shared between the U.S. Secretary of the Interior and State regulatory authorities." *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 288 (4th Cir. 2001).

SMCRA establishes baseline national standards and "encouraged the States, through an offer of exclusive regulatory jurisdiction, to enact their own laws incorporating these minimum standards." *Id.* States enjoy flexibility in shaping their regulatory programs, so long as state provisions are no less stringent than, nor inconsistent with, SMCRA and its implementing regulations. 30 U.S.C. § 1255(b). Wyoming's approved SMCRA program consists of the Land Quality article of the Environmental Quality Act ("Act"), the Department's Land Quality-Coal Rules ("Rules"), and portions of the Department's Rules of Practice and Procedure. 30 C.F.R. § 950.10; 30 C.F.R. § 950.15 (listing approved program amendments). The Department enforces these laws.

Under the Act, any person seeking to conduct surface coal mining operations must first obtain a permit from the Department. Wyo. Stat. Ann. § 35-11-401(d). The Department cannot issue a coal mine permit unless the applicant affirmatively demonstrates that its application is accurate, complete, and complies with the Act and all applicable state laws. Wyo. Stat. Ann. § 35-11-406(n). A permit applicant must follow the detailed application requirements in section 406 of the Act and Chapter 2 of the Rules. *Id.* § 35-11-406; *Rules Wyo. Dep't of Envtl. Quality, Land Quality-Coal*, ch. 2.

The Wyoming program implements SMCRA's central purposes, which include ensuring that coal mining operations are "conducted as to protect the environment." 30 U.S.C. § 1202(d). The Act and Rules further this objective through a combination of permit application requirements and ongoing environmental performance standards.

This pattern of an application requirement linked with a performance standard repeats itself throughout the Act and Rules. A coal mine permit applicant must demonstrate through plans and proposals how it will protect environmental resources. *Id.* § 35-11-406(b). But the permit application is only a starting point. Following permit approval, the Act and Rules keep mine operators accountable for environmental protection until, and often after, mining operations are complete. *Id.* § 35-11-415(b); *Rules Wyo. Dep't of Envtl. Quality, Land Quality-Coal*, ch. 4.

A. Application Requirements for Subsidence Control

Applicants proposing underground mining must evaluate the potential for subsidence and must develop plans to mitigate this risk. *Rules Wyo. Dep't of Envtl. Quality, Land Quality-Coal*, ch. 7. The extent of an applicant's subsidence analysis depends, however, on the type of mining. For example, an applicant proposing auger mining methods must demonstrate that the mining activities are "planned and conducted so as to prevent subsidence from causing material damage to structures, the land surface, and groundwater resources." *Id.*, ch. 7, § 2(b)(iii). The Rules impose no other subsidence-related application requirements for auger mining. *See id.*, ch. 5, § 6(d) (directing that subsidence control for auger mining "be provided as required by Chapter 7, Section 2").[2] The Department also has discretion to limit or prohibit auger mining in order to minimize unwarranted subsidence. *Id.*, ch. 5, § 6(b). The Department may impose such limits or prohibitions at the application stage.

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[2] By contrast, applicants proposing traditional underground mining must follow the requirements of Chapter 7, Section 1, which include developing a subsidence control plan and providing additional details on hydrologic control and ventilation within underground mine workings. *Rules Wyo. Dep't of Envtl. Quality, Land Quality-Coal*, ch. 7, § 1.

B. Application Requirements for Mine Facilities and Roads

A coal mine permit applicant must provide "[a] description, plans, and drawings for each mine facility to be constructed, used, or maintained **within the proposed permit area**." *Id.*, ch. 2, § 5(a)(v) (emphasis added). Mine facilities include "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." *Id.*, ch. 1, § 2(ch).

The Rules also require permit applications to include certain off-site processing facilities, grouped under the category of "coal preparation plants." *Id.*, ch. 3, § 6. Coal preparation plants are facilities "where coal is subjected to chemical or physical processing or cleaning, concentrating, or other processing or preparation[,]" which may include: "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." *Id.*, ch. 1, § 2(w). Applicants proposing to construct a coal preparation plant must include "an operation and reclamation plan which specifies plans, including descriptions, maps, and cross-sections, of the construction, operation, maintenance, and removal of the preparation plant and support facilities." *Id.*, ch. 3, § 6(b). The Rules do not require any type of permitting for coal preparation plants "which are located at the site of ultimate coal use." *Id.*, ch. 3, § 6(a).

For roads, the Act requires permit applicants to provide maps identifying all existing roads within the permit area and the haul roads that will be constructed during mining operations. Wyo. Stat. Ann. § 35-11-406(a)(ix); *Id.* § 35-11-406(b)(v). An applicant must also

provide detailed plans for all roads "to be constructed, used, or maintained **within the proposed permit area**." *Rules Wyo. Dep't of Envtl. Quality, Land Quality-Coal*, ch. 2, § 5(a)(xvi)(A) (emphasis added). These plans are geared toward new construction and must include "specifications for road widths, gradients, surfacing materials, cuts, fill embankments, culverts, bridges, drainage ditches, drainage structures and low-water crossings[.]" *Id.* § 5(a)(xvi)(A)(I). Applicants must also describe their "plans to remove and reclaim each road that would not be retained under an approved postmining land use[.]" *Id.* § 5(a)(xvi)(A)(VI). Finally, the permit application must distinguish between primary roads and ancillary roads, the former including those roads: (1) that are used for transporting mineral or spoil; (2) that will see frequent use during any six-month period; and (3) that will be retained for any approved post-mining land use. *Id.*, ch. 4, § 2(j)(i).

C. Application Requirements for Coal Production

The Act and Rules impose only one application requirement pertaining to coal production. An applicant's mine plan must include the "**anticipated** annual and total production by tonnage… ." *Id.*, ch. 2, § 5(a)(i)(A) (emphasis added).

D. Application Requirements for Naming an Operator

The Rules require a permit applicant to provide the "names, addresses and telephone numbers of any operators, **if different from the applicant**." *Id.*, ch. 2, § 2(a)(i)(B) (emphasis added). An operator is defined in the Act as "any person, as defined in this act, engaged in mining, either as a principal who is or becomes the owner of minerals as a result of mining, or who acts as an agent or independent contractor on behalf of such principal in the conduct of mining operations[.]" Wyo. Stat. Ann. § 35-11-103(e)(ix). An operator must have a license

before engaging in mining operations. *Id.* § 35-11-410(b). Licenses to mine are available upon application to the Land Quality Division Administrator at any time. *Id.*

II. STATEMENT OF FACTS

In October 2014, Brook applied to the Department for a permit to conduct surface and underground coal mining at the proposed Brook Mine in Sheridan County, Wyoming. (DEQ Ex. 11 at 1). PRBRC and other parties submitted objections to Brook's permit application, which were eventually considered by the Council in a seven-day contested case hearing. (*Id.*) The Council decided that Brook's initial permit application could not be approved. *In re Brook Mine Application*, Findings of Fact, Conclusions of Law, and Order, No. 17-4802, slip op. 29 (EQC Sept. 27, 2017). The Council identified multiple deficiencies in Brook's permit application and ordered Brook to "complete and revise its permit application" and resubmit it to the Department for further review. *Id.* The Department Director, Todd Parfitt, denied Brook's permit application in accordance with the Council's order. (DEQ Ex. 11 at 1).

In October 2018, Brook submitted its revised permit application to the Department. *Id.* The Department conducted six additional rounds of technical review on Brook's revised application, including a peer review by Nancy Williams, the Land Quality Division's District II Supervisor. (DEQ Ex. 11 at 1; Edwards Aff. ¶ 11). In February 2020, the Department determined that Brook's revised application was technically complete and suitable for publication. (DEQ Ex. 11 at 1). Brook published notice of its revised application and several parties, including PRBRC, filed objections with the Department. (*Id.*; PRBRC Pet. for Hrg., App. A). The Department held an informal conference regarding the objections to Brook's application on May 13, 2020. (DEQ Ex. 11 at 1-2).

After considering the written objections to Brook's application and the oral comments presented during the informal conference, Director Parfitt issued Brook's coal mine permit on July 7, 2020. (DEQ Ex. 9 at 5). The Director granted Brook's permit subject to five standard conditions and twelve conditions unique to Brook's permit. (*Id.* at 4-5). PRBRC filed a timely petition for hearing to the Council challenging the Director's decision to issue the permit. (PRBRC Pet. for Hrg., ¶ 2).

A. Proposed Mining Operations

Brook's approved permit covers 4,548 acres on private land north of Sheridan, Wyoming. (DEQ Ex. 5 at 205; DEQ Ex. 9 at 2). Within this larger permit area, Brook's operations will create surface disturbance on no more than 1,135.1 acres. (DEQ Ex. 9 at 2). Brook's mine plan calls for thirty-nine years of mining, starting with a five-year period of open pit mining. (DEQ Ex. 5 at 104, 150). Brook's open pit mining will target both the Monarch and Carney coal seams in the Taylor Quarry area shown on Mine Plan Exhibit MP.1.1. (*Id.* at 15, 141). After completing the open pit mining, Brook will begin its highwall mining operations, gradually moving from east to west and targeting the Carney seam. (*Id.* at 141). The Carney seam splits near the center of Brook's permit area. (*Id.* at 358). East of the split, the Carney seam is merged. (*Id.* at 350). West of the split, Brook will target the lower Carney seam due to its greater thickness. (*Id.*; Barron Aff. ¶ 8).

In each highwall mining area, Brook must first excavate a trench to reach the underground coal seam. (DEQ Ex. 5 at 13). Brook selected its trench locations to reach the Carney seam where it is closest to the surface. (*Id.*). The floor of each trench will be at least 150 feet wide to create room for mining equipment. (*Id.*). Brook will use a remotely-operated

continuous miner to remove coal in tunnels that run perpendicular to the trench and penetrate the coal seam to depths of 1,500 to 2,000 feet. (*Id.* at 14). The height of the tunnels left by the continuous miner will vary, whereas tunnel widths will typically be set at 11.5 feet. (*Id.* at 15). Between tunnels, Brook will leave protective coal pillars in place to protect against roof collapse. (*Id.*).

Highwall mining is similar to auger mining, as both use remotely-operated machines to extract coal without creating surface disturbance. (*Id.* at 95). In both types of mining, no mine personnel enter the underground workings. (*Id.*). Because of these similarities, the Department regulates highwall mining as a form of auger mining. (Edwards Aff. ¶ 6).

B. Subsidence Control

Subsidence was one of three main issues the Council addressed in its prior review of Brook's permit application. *In re Brook Mine Application*, slip op. 28 (noting deficiencies in the application's treatment of subsidence, hydrology, and blasting). The Council found Brook's 2017 mine plan incomplete "due to the lack of proper testing and analysis to determine the risk of subsidence due to mining activities." *Id.* at 16. In addition to general concerns about the extent of Brook's subsidence-related testing and analysis, the Council identified three specific omissions in Brook's subsidence control plan: (1) appropriate coal strength data for sub-bituminous coal; (2) certification by a licensed professional engineer; and (3) a "site-specific assessment of the strength and stability of the roof, floor, and pillar materials at the permit area." *Id.*

Brook's current subsidence control plan retains several subsidence-prevention measures from the 2017 version. For example, Brook will reduce subsidence risk by leaving

support pillars with a width "equal to or exceeding the maximum extraction thickness anticipated in a highwall mining hole based on the mine's geologic model." (DEQ Ex. 5 at 351). Brook also proposes 11.5 foot tunnel widths as a conservative measure to reduce subsidence. (*Id.* at 354). Brook selected this width to avoid the mistakes of historic Mine No. 44, where twenty-foot underground roof spans resulted in significant surface subsidence. (*Id.* at 352-54). Brook also explains how the directional precision of its equipment will prevent the intersection of highwall mining tunnels. (*Id.* at 351). Such intersections could "lead to excessive unsupported roof spans and ... subsequent roof collapse or pillar failure." (*Id.*). Finally, Brook will use airborne lidar surveys to monitor surface elevation before and after highwall mining. (*Id.*). Brook will compare any observed subsidence with the location data for its highwall mining tunnels. (*Id.*).

While Brook retained valuable aspects of its original subsidence control plan, it also made important changes in response to the Council's order. For example, Brook's revised subsidence control plan is supported by geotechnical analysis and design recommendations from Agapito Associates, Inc. (DEQ Ex. 5 at 368). Agapito used site-specific analysis to assess the strength and stability of the roof, floor, and pillar materials in the TR-1 area. (*Id.* at 385-89). This analysis included uniaxial compression tests, axial and diametral point load tests, and slake durability tests on a core sample taken from TR-1. (*Id.* at 379). Timothy Ross, a licensed professional engineer, stamped and certified Agapito's work. (*Id.* at 367). Agapito analyzed subsidence potential with an understanding that coal in the Carney seam is sub-bituminous and weaker than other western coals. (*Id.* at 372, 410).

Agapito also provided design recommendations to reduce the likelihood of both trough and sinkhole subsidence. (*Id.* at 410-13). Trough subsidence occurs when large spans of the roof material collapse into a mine void, creating a cave-in that progresses upward to the surface. (*Id.* at 410). Brook's highwall mining plan minimizes the likelihood of trough subsidence by leaving pillars with a minimum 1:1 width to height ratio and a minimum 1.6 stability factor. (*Id.*). Sinkhole subsidence occurs where a smaller chimney cave-in progresses upward to the surface. (*Id.*). The risk of sinkhole subsidence is already low at the Brook Mine, due to the depth of the coal seams. (*Id.* at 410-13). However, Brook will further reduce this risk by limiting tunnel width to 11.5 feet, preventing tunnel intersections, and extracting only thirty-nine percent of accessible coal. (*Id.* at 412-13).

Brook's updated subsidence control plan includes much greater detail and is supported by site-specific geotechnical analysis. Still, several parties expressed concerns about subsidence during the public comment period and informal conference. (*See* PRBRC Pet. for Hrg., App. A at 7; Overton Aff. ¶¶ 13-14). For example, Dr. Gennaro Marino noted that Agapito only sampled a single boring in which the roof and floor materials displayed "anomalous rock conditions compared to other borings drilled in the application area." (PRBRC Pet. for Hrg., App. A at 14). According to Dr. Marino, it would be inappropriate to apply the "[observed] rock conditions and associated test data to all of the application areas or, for the matter, all of TR-1[.]" (*Id.*). Dr. Marino also found Agapito's analysis insufficient to evaluate the long-term strength of the roof and floor layers in Brook's highwall mining areas. (*Id.*).

The Department reviewed the subsidence-related public comments in consultation with Dan Overton, a geotechnical engineering expert. (Parfitt Aff. ¶¶ 8, 13; Overton Aff. ¶ 9). After the informal conference and prior to the issuance of Brook's permit, Mr. Overton prepared a report evaluating Brook's subsidence control plan in light of the public comments. (Overton Aff., Ex. 4). Like Dr. Marino, Mr. Overton expressed concerns regarding the extent of core hole sampling in the TR-1 area:

> 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 highwall mining area. From our review of the maps and geologic cross sections in Appendix D5 ..., we note that most of the existing core holes are located well to the west of the TR-1 area... it appears that the closest core holes to 2017-4 are 578409 and 578415 which are located well outside the proposed TR-1 mining area at a distance of approximately 3,100 and 3,300 feet from core hole 2017-4, respectively ... In our opinion, this distance between core holes is excessive and does not allow an adequate characterization of the TR-1 area. We recommend that additional core holes be drilled within the TR-1 boundary, especially since this area will be the first area to be highwall mined.

(*Id.* at 2-3). Mr. Overton also concurred in Dr. Marino's recommendation that Brook use "Atterberg Limit testing to evaluate the plasticity of the roof and floor units, as well as consolidated-drained triaxial testing to better evaluate the long-term strength of the roof and floor." (*Id.* at 4).

After considering public comment, Dr. Marino's expert report, and input from Mr. Overton, the Department created two permit conditions to strengthen Brook's subsidence control plan. (Parfitt Aff. ¶¶ 14-21). Conditions 9 and 10 provide:

> **Form 1, Condition 9:** Before commencing mining in the TR-1 area or any subsequent highwall mining panel, Brook Mine shall provide WDEQ/LQD with the results from physical property testing of cores from a minimum of at least three geotechnical core holes for each panel to be mined. For the TR-1 area, this

will require drilling and sampling at least two more core holes in addition to the previously tested hole 2017-4 core. The location and number of the core holes to be drilled should be based on a geostatistical algorithm, such as Kriging (Gaussian process regression), to demonstrate the adequacy of the core holes for purposes of characterizing each highwall mining panel. Samples collected from each core hole should include the roof, coal, and floor of the proposed highwall mining panel. For all future core holes, Atterberg limits and consolidated-drained triaxial testing should be performed in addition to the testing procedures performed on core hole 2017-4.

The results of the core laboratory testing shall be reviewed and analyzed by a Wyoming registered Professional Geologist or Engineer. The Mine Plan and Subsidence Control Plan shall be revised, if necessary, based upon the additional data and analyses.

Form 1, Condition 10: 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. Brook Mine shall not commence mining in any new highwall mining panel until WDEQ/LQD has provided written approval of the corresponding non-significant revision.

(DEQ Ex. 9 at 4-5).

Mr. Overton helped the Department develop the substantive requirements described in Condition 9. (Overton Aff. ¶ 16). He believes that Brook's permitted subsidence control plan, "which includes adherence to Conditions 9 and 10, is designed so as to prevent subsidence from causing material damage to the land surface." (*Id.* ¶ 21). According to Mr. Overton, "by supporting future highwall mine design with geotechnical testing and analysis from a minimum of three core samples per highwall mining panel, 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).

C. Mine Facilities and Roads

Brook's mine plan describes the facilities that will support future mining operations, including personnel and equipment facilities, a change house, an equipment service shop, a truck tire shop, a lab/sample building, a substation for power, a fuel station, a crusher facility, a coal storage pad, a scale to measure tonnage, and facilities for explosives storage. (DEQ Ex. 5 at 19-21). Brook will also use a combination of portable in-pit and out-of-pit crushers. (*Id.* at 20). All of these proposed facilities will be located within Brook's approved permit boundary. (*See* DEQ Ex. 5 at 143). Brook's coal storage pad, identified on Mine Plan Exhibit MP.2-1, will be the point of sale for all coal mined within the permit area. (*Id.*; Barron Aff. ¶ 24). 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." (Barron Aff. ¶ 25).

Brook's parent company, Ramaco Carbon, is developing a research center and business park outside of the Brook Mine permit boundary that will market products made from coal-derived carbon. (Barron Aff. ¶¶ 11-16). These facilities will be known as iCam and iPark, respectively. (*Id.* ¶¶ 11-12). Both facilities will conduct some amount of coal processing, but no raw or processed coal will leave iCam and iPark for other destinations. (*Id.* ¶¶ 13, 16). The only materials leaving iCam and iPark will be products made from coal-derived carbon, such as carbon fiber, graphene, and graphite. (*Id.* ¶ 16).

Neither iCam nor iPark will be directly involved with the Brook Mine operations. (*Id.* ¶ 15). Despite sharing a parent company with Brook, iCam and iPark are separate legal entities. (*Id.* ¶ 18). While Brook intends to supply coal to iCam and iPark, these facilities may purchase

coal from other parties. (*Id.* ¶¶ 16, 19-20). If iCam and iPark do source their coal from the Brook Mine, they will purchase and take possession of the coal at the Brook Mine storage pad. (*Id.* ¶¶ 22-25).

Brook's application identifies all of the roads within the permit area, including the public roads that provide access to the mine and the haul roads that Brook will use to bring coal from the open pit and highwall mining areas to the coal storage pad. (DEQ Ex. 5 at 23-25, 145). Brook's mine plan includes detailed designs for the haul roads that Brook will construct during the first five years of operations. (*Id.* at 25, 146-49). Several public roads, including State Highway 345, provide access to Brook's permit area. (*Id.* at 23). Of these, only Ash Creek Road "will facilitate transportation within the Permit Area." (*Id.* at 92).

Brook does not identify any impact to public roads from its mining operations, but does note: "Later in the mine life, county roads will be adjacent to the mining activities. Measures will be taken at that time to ensure the public safety and allow the public to pass through the mine area on the county roads." (*Id.*). Brook also acknowledges the possibility that mining activities may require relocating a county road. (*Id.*). In the event this becomes necessary, Brook explains that "plans will be submitted to and approved by Sheridan County and the affected landowners" and that the new section of the road will be fully constructed before any existing road is disturbed. (*Id.*).

Brook does not consider Highway 345 to be a haul road for its coal mining operations. (*See Id.* at 145). This highway runs parallel to the southern edge of Brook's permit area and connects the Brook Mine to Ramaco's iCam and iPark facilities. (*Id.* at 143). Independent third parties may purchase coal at Brook's storage pad and transport it, via Highway 345, to iCam

and iPark. (Barron Aff. ¶¶ 22-26). Brook, however, will not haul any coal on this public highway. (*Id.*).

D. Coal Production Estimates

Brook's estimated annual coal production is shown on Table MP.1-2. (DEQ Ex. 5 at 105). During the initial five years of open pit mining, Brook's coal production will gradually increase from 100,000 tons to 250,000 tons per year. (*Id.*). Brook expects to produce greater amounts of coal through its highwall mining operations, eventually reaching an average of 500,000 tons in future years. (*Id.*). Brook estimates its coal production over thirty-nine years will total 17,325,000 tons. (*Id.*).

E. The Brook Mine Operator

Brook is the current operator of the Brook Mine, with a permit and license issued by the Department. (DEQ Ex. 9 and 10). Brook did not name another operator in its application, but contemplates hiring a contractor to run the mine in the future. For the initial sequence of open pit mining, Brook explains that it "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 at 15).[3]

[3] The full sentence reads: "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." Here, and throughout its permit application, Brook refers to its parent company, Ramaco, as the mine operator. These references to Ramaco have no practical significance, because only Brook is authorized to operate the mine under the current permit and license.

III. CONCLUSIONS OF LAW

The Council may resolve contested cases through summary disposition under Rule 56 of the Wyoming Rules of Civil Procedure. *Rules Wyo. Dep't of Envtl. Quality, Practice and Procedure*, ch. 2, § 17. Under Rule 56, a court or agency "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter for law." Wyo. R. Civ. P. 56(a). "A material fact is one which, if proved, would have the effect of establishing or refuting an essential element of the cause of action or defense asserted by the parties." *Thornock v. PacifiCorp*, 2016 WY 93, ¶ 10, 379 P.3d 175, 179 (Wyo. 2016) (citation omitted). The materiality of facts must be determined in reference to "the pertinent legal standard[s] for the asserted claim and for the corresponding defense to that claim." *Roussalis v. Wyo. Med. Ctr., Inc.*, 4 P.3d 209, 228 (Wyo. 2000) (internal quotation marks and citation omitted). In deciding whether genuine issues of material fact are present, the Council must review the record "from the vantage point most favorable to the party opposing the motion" and "give that party the benefit of all favorable inferences that may fairly be drawn from the record." *Thornock,* ¶ 10, 379 P.3d at 179 (citation omitted). "If the evidence leads to conflicting interpretations or if reasonable minds might differ, summary judgment is improper." *Abraham v. Great W. Energy, LLC*, 2004 WY 145, ¶ 12, 101 P.3d 446, 452 (Wyo. 2004).

"The party requesting summary judgment bears the initial burden of establishing a prima facie case that no genuine issue of material fact exists and that summary judgment should be granted as a matter of law." *Little Medicine Creek Ranch, Inc. v. D'Elia*, 2019 WY 103, ¶ 14, 450 P.3d 222, 227-28 (Wyo. 2019) (citation omitted). Once the moving party makes

this showing, "the burden shifts to the party opposing the motion to present evidence showing that there are genuine issues of material fact." *Id.* "The party opposing the motion must present specific facts; relying on conclusory statements or mere opinion will not satisfy that burden, nor will relying solely upon allegations and pleadings." *Id.*

In this case, the parties agree that no genuine issues of material fact exist and that only legal issues remain. The Council agrees.

A. Legal Analysis

i. Brook's current subsidence control plan meets all applicable requirements.

PRBRC argues that Brook's permit application is patently deficient because it does not contain sufficient geotechnical analysis addressing the potential for subsidence within TR-1 and other highwall mining areas. (PRBRC Pet. for Hrg., ¶¶ 12-13). PRBRC contends that, after receiving input from Dr. Genaro Marino and Dan Overton, "the [Department] staff recognized they could not approve the permit application as [submitted]." (*Id.* ¶ 20). The Department does not dispute this point. 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, Conditions 9 and 10 found in the permit remedy this concern.

a. With Conditions 9 and 10 in place, Brook Mine's highwall mining will be planned and conducted in a manner that prevents material damage from subsidence.

Brook's highwall mining operations must be "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 Envtl. Quality, Land Quality-Coal*, ch. 7, § 2(b)(iii). The Department imposed Conditions 9 and 10 to ensure that Brook's subsidence control plan meets

this standard. While the Department found these conditions necessary, they build upon conservative measures that Brook already proposed for subsidence control.

As a starting point, Brook's subsidence control plan addresses each of the concerns expressed in the Council's 2017 order. Brook not only corrected the problems, such as evaluating the strength of sub-bituminous coal and making sure the plan was stamped and certified by a licensed professional engineer, but also conducted site-specific analysis of the strength and stability of the roof, pillar, and floor materials within the TR-1 area. (DEQ Ex. 5 at 367, 372, 379).

Brook exceeded applicable requirements[4] by creating a subsidence control plan containing each component required for other types of underground mining, namely:

> (A) A description of the mining methods;
>
> (B) Extent and effect of any planned and controlled subsidence;
>
> (C) Except 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; and
>
> (D) Measures to be taken to prevent, lessen, or mitigate material damage or loss of value to property, including reinforcement, relocation, restoration, or replacement of structures and features; monitoring; and purchase of property or insurance. The manner of determining the degree of material damage or loss of value of property shall be described.

Rules Wyo. Dep't of Envtl. Quality, Land Quality-Coal, ch. 7, § 1(a)(v).

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[4] Brook's highwall mining is regulated as a type of auger mining, which is subject to a smaller set of subsidence control requirements. *Rules Wyo. Dep't of Envtl. Quality, Land Quality-Coal*, ch. 5, § 6(d) (directing that subsidence control for auger mining "be provided as required by Chapter 7, Section 2"). For example, Chapter 7, Section 2 does not require a "subsidence control plan."

Brook's subsidence control plan includes design specifications for highwall mining, indicates that no planned subsidence will occur, identifies the areas where coal will remain in place to prevent subsidence, and notes the absence of any structures above underground mine workings. (DEQ Ex. 5 at 91, 355, 410-13). The subsidence control plan also includes specific measures to minimize the risk of trough and sinkhole subsidence, such as keeping highwall openings no wider than 11.5 feet, preventing tunnel intersections, designing pillars at a 1:1 width to height ratio and a minimum 1.6 stability factor, and planning a thirty-nine percent coal extraction ratio. (DEQ Ex. 5 at 410-13; Overton Aff. ¶ 21).

While the subsidence control elements in Brook's application had some clear strengths, the public comment process shed light on some important weaknesses. Dr. Gennaro Marino and Dan Overton each informed the Department that Agapito's testing and analysis on a single core hole does not adequately characterize the subsurface conditions in the TR-1 area, let alone future highwall mine panels. (Overton Aff, Ex. 4 at 2-4). Dr. Marino and Mr. Overton also agreed that Atterberg Limit testing and consolidated-drained triaxial testing should be done on future core samples to "evaluate the long-term strength of the roof and floor." (*Id.* at 4). The Department created Conditions 9 and 10 in response to this input. (Parfitt Aff. ¶ 14).

Conditions 9 and 10 prevent Brook from proceeding into any highwall mining panel, including TR-1, until it fully evaluates the roof, coal, and floor materials in that panel. (DEQ Ex. 9 at 4-5). Condition 9 requires Brook to collect a minimum of three core samples in each proposed panel, using a geostatistical algorithm to show that the sample locations sufficiently characterize the entire panel. (*Id.*). For each core sample, Brook must repeat the full battery of tests it completed on core 2017-4, with additional Atterberg Limit and consolidated-drained

triaxial testing. (*Id.* at 5). Condition 10 requires Brook to revise its mine plan and subsidence control plan to include all data and analysis from this geotechnical testing. (*Id.*). Brook cannot commence mining in any highwall mining panel until the Department reviews Brook's plan revisions and provides written approval. (*Id.*).

Mr. Overton helped the Department draft Conditions 9 and 10, with the aim of establishing "a mechanism by which sufficient geotechnical data must be collected and analyzed with respect to mine subsidence." (Overton Aff. ¶ 22). This mechanism is designed to last for the entire life of the Brook Mine. As Mr. Overton explains, "by supporting future highwall mine design with geotechnical testing and analysis from a minimum of three core samples per highwall mining panel, 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.*) (emphasis added). Brook's subsidence control plan, as supplemented by Conditions 9 and 10, satisfies the subsidence control requirements in Chapter 7, Section 2 of the Rules.

b. The Department appropriately used permit conditions to resolve omissions in Brook's subsidence analysis.

PRBRC maintains that the omissions in Brook's subsidence control plan were so significant that they could not be corrected through permit conditions. (PRBRC Pet. for Hrg., ¶¶ 26-27). To reach this conclusion, PRBRC relies upon the Act's definition of a "deficiency," which includes errors and omissions "serious enough to preclude correction or compliance by stipulation in the approved permit to be issued by the director[.]" Wyo. Stat. Ann. § 35-11-103(e)(xxiv).

The Department acknowledges that Brook's subsidence control plan lacked sufficient data and analysis to show that subsidence risk would be controlled in future highwall mining panels. However, Conditions 9 and 10 force Brook to collect, test, and analyze a sufficient number of core samples to fully evaluate subsidence potential in each panel. By adhering to these conditions, Brook will plan and conduct its highwall mining "so as to prevent subsidence from causing material damage." *Rules Wyo. Dep't of Envtl. Quality, Land Quality-Coal*, ch. 7, § 2(b)(iii). The Director has corrected any omissions in Brook's subsidence control plan through "stipulation in the approved permit." Wyo. Stat. Ann. § 35-11-103(e)(xxiv). In other words, if Conditions 9 and 10 create an adequate subsidence control mechanism, then there can be no remaining "deficiency" in Brook's subsidence control plan.

With Conditions 9 and 10, the Department not only demonstrated an effective response to public input, but also followed procedures outlined in the Rules. Chapter 7, Section 2 requires auger mining operators to submit plans of underground workings that 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, **as required by the Administrator**." *Rules Wyo. Dep't of Envtl. Quality, Land Quality-Coal*, ch. 7, § 2(c) (emphasis added). Importantly, the Rules do not require the entire set of information at the application stage. Instead, the operator must provide these subsidence-related details "**pursuant to a schedule approved by the Administrator**." *Id.* (emphasis added). Conditions 9 and 10 set forth the criteria Brook must follow to demonstrate subsidence control and the schedule for Brook's submissions.

Extending Brook's Condition 10 submissions over time is not only allowed under the Rules, but also makes practical sense. There is no way an applicant could feasibly assess subsidence potential across an entire 4,548 acre permit area while also providing the level of detail necessary to understand the subsurface conditions in any particular location. Agapito's 107-page report focused exclusively on the TR-1 highwall mining area, with analysis of a single core sample. (DEQ Ex. 5 at 364-470; Overton Aff. ¶ 11). Condition 9 triples the amount of testing Brook must conduct to assess the strength of roof, floor, and coal layers in each highwall mine panel. (DEQ Ex. 9 at 4-5). Brook's highwall mining is planned to involve eleven trenches, with at least sixteen separate highwall mining panels. (DEQ Ex. 5 at 150). To capture roof, floor, and coal strength in all sixteen panels, Brook would need to test and analyze at least forty-seven new core samples (forty-eight minus the core sample previously analyzed by Agapito). 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.

Even if permit-area-wide testing and analysis were feasible, the results would have less value now than they will in future years. Brook's future core sample analysis will build upon the first-hand knowledge Brook gains through its highwall mining operations in all prior panels. For example, Brook will be able to directly observe roof, pillar, and floor strength as it develops individual highwall mining tunnels. Brook will also be able to detect actual subsidence developing on the land surface through airborne lidar surveys. These observations will help Brook plan its future highwall mining and will facilitate the Department's review of Brook's Condition 10 submissions. (Edwards Aff. ¶ 27).

c. The Department did not restrict public participation by classifying Brook's Condition 10 submissions as non-significant revisions.

PRBRC asserts that the Department erred by pre-determining that Brook's future submissions under Condition 10 would constitute "non-significant" permit revisions under Chapter 13 of the Rules. (PRBRC Pet. for Hrg., ¶ 34). Only "significant" revisions require public notice and an opportunity for a public hearing. *Rules Wyo. Dep't of Envtl. Quality, Land Quality-Coal*, ch. 13, § 2. In Condition 10, the Department appropriately designated Brook's future permit revisions as non-significant. This initial designation, however, does not limit the Administrator's authority to evaluate Brook's future submissions and determine, at a later time, that they are in fact significant permit revisions.

The Department must classify proposed permit revisions as significant when they present "significant deviations from that which was contemplated in the approved mining and reclamation plan." *Id.*, ch. 13, § 2(b). Unless the Administrator determines otherwise, the following permit revisions are presumed to be significant:

> (i) A change in the approved future land use or uses which affects more than 20 percent of the land within the permit area;
>
> (ii) A change in the approved method for insuring that all acid-forming or toxic materials, radioactive materials, or materials constituting a fire, health or safety hazard uncovered during or created by the mining process are promptly treated or disposed of during the mining or reclamation process in a manner designed to prevent pollution of surface or subsurface water or threats to human or animal health and safety;
>
> (iii) The construction or relocation of mills and tailings disposal facilities;
>
> (iv) A change in the approved method of mining which results in surface disturbance (e.g. underground, surface or in situ mining);

> (v) A change which would adversely affect the quality, quantity, or distribution of water in surface or groundwater systems;
>
> (vi) For surface coal mining operations, continuing operation after cancellation or material reduction of the liability insurance policy, the performance bond or other equivalent guarantee upon which the original permit was approved; or
>
> (vii) Any changes which propose significant alterations in the approved mining or reclamation operation, as determined by the Administrator.

Id.

The Department correctly presumed that Brook's Condition 10 submissions would not fit within the above categories. The first six are inapplicable. Regarding the seventh, Brook's submissions should not significantly alter its approved mining and reclamations plans. 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.

The Department also has a practical basis for classifying Brook's Condition 10 submissions as non-significant revisions. The Rules allow the Administrator to establish the format for receiving non-significant revisions, so long as they contain: "[a] brief description of the change and why the change is being sought; [a]n outline or index indicating what pages, maps, tables, or other parts of the approved permit are affected by the revision; and [a]dditional information necessary to support or justify the change." *Id.*, ch. 13, § 1(b). The Department

used "non-significant revision" in Condition 10 to guide Brook on the appropriate format for updating its mine plan and subsidence control plan. (Edwards Aff. ¶ 25).

Importantly, 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. Within 90 days of receiving Brook's revisions, the Administrator must "notify the operator of whether ... notice and opportunity for public hearing is required." *Id.*, ch. 13, § 2(a). The Administrator is responsible for making this determination, regardless of the instructions within Condition 10.

Brook's subsidence control plan, supplemented by Conditions 9 and 10, demonstrates that Brook will prevent material damage from subsidence, in accordance with Chapter 7, Section 2 of the Rules. The Department's use of a permit condition complies with the Rules and does not restrict public participation.

ii. Brook's application covers all required mine facilities and roads.

PRBRC asserts that Brook's permit application is incomplete because it excludes certain mine facilities and roads. (PRBRC Pet. for Hrg., ¶ 40). Brook's application, however, includes all mine facilities and roads that must be identified under the Act and Rules.

a. Brook properly excluded the iCam and iPark from its application because they are end users of coal.

PRBRC first contends that Ramaco's iCam and iPark facilities must be included within Brook's permit application because they result from or are incident to Brook's coal mining activities. (PRBRC Pet. for Hrg., ¶ 37). If this were true, then iCam and iPark would be

considered a part of Brook's surface coal mining operations. (*Id.* ¶ 35). The Act defines "surface coal mining operations" as:

> (A) Activities conducted on the surface of lands in connection with a surface coal mine or with the surface impacts incident to an underground coal mine as provided in Section 516 of P.L. 95-87. These activities include excavation for the purpose of obtaining coal including common methods as contour, strip, auger, mountaintop removal, box cut, open pit and area mining, the use of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating or other processing or preparation, and the loading of coal; and
>
> (B) The areas upon which these activities occur or where these activities disturb the land surface. These areas 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, and excavations, workings, impoundments, dams, ventilation shafts, entry ways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, **storage areas, 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.**

Wyo. Stat. Ann. § 35-11-103(e)(xx) (emphasis added).

PRBRC is correct that all surface coal mining operations require a permit from the Department. Wyo. Stat. Ann. § 35-11-401(d). However, while the Act's definition of surface coal mining operations is broad, it does not encompass facilities like the iCam and iPark.

The Department has authority to regulate some off-site processing facilities under the Act. *See Nat'l Wildlife Found. v. Hodel,* 839 F.2d 694, 745 (D.C. Cir. 1988) (finding, under SMCRA's surface coal mining operations definition, that "the Secretary may reasonably construe the meaning of 'processing areas … resulting from or incident to such activities' to include processing facilities that are not at or near the mine site."). However, because of the "resulting from or incident to" language, there must be a significant connection between the

mine operations and the off-site processing facilities. *Id.* This decision of whether facilities are sufficiently connected to a mine is rooted in policy considerations and must be delegated in the first instance to the regulatory authority. *Id.* (finding jurisdiction over off-site facilities to be "an obvious example of the ... delegation of policy choices to an agency").

The Department has chosen to exercise jurisdiction over some off-site facilities by creating a special application requirement for coal preparation plants. *Rules Wyo. Dep't of Envtl. Quality, Land Quality-Coal*, ch. 3, § 6. However, 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." *Id.*, ch, 3 § 6(a). The Department has clearly established that the processing activities conducted by an end user of coal neither "result from" nor are "incident to" a particular coal mine.

This decision not to regulate end users of coal matches the Office of Surface Mining and Reclamation Enforcement's (OSMRE) early regulations for coal preparation plants. OSMRE also exempted facilities "located at the site of ultimate coal use," recognizing that its jurisdiction did not "extend[] to facilities which are operated solely in connection with the end user of the coal product." Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Support Facilities and Coal Preparation Plants, 48 Fed. Reg. 20392, 20393, 20401 (May 5, 1983). Despite later changes to the language of this exemption, OSMRE maintains its position that "regulation of facilities operated by or for the end user of coal at the point of such use is not required under SMCRA." Permanent Regulatory Program; Coal Preparation Plants Not Located Within the Permit Area of a Mine, 53 Fed. Reg. 47384, 47385 (Nov. 22, 1988).

The Department's only option for regulating the iCam and iPark facilities – if they could be regulated at all – is to treat them as coal preparation plants. However, the iCam and iPark are also the sites of "ultimate coal use" and therefore exempt from permit requirements. The purpose of both iCam and iPark is to create products from coal-derived carbon. (Barron Aff. ¶ 16). No raw or processed coal will leave these facilities for other destinations. (*Id.*). Instead, the only materials leaving the iCam and iPark will be manufactured products like carbon fiber, graphene, and graphite. (*Id.*). Because iCam and iPark are end users of coal, Brook appropriately excluded them from its permit application.

b. Brook properly excluded State Highway 345 from its application.

State Highway 345 connects the main entrance to the Brook Mine with the iCam and iPark facilities. For this reason, PRBRC contends that Highway 345 is a "primary haul road for the mine" and "must be included within the boundary of the coal mine permit." (PRBRC Pet. for Hrg., ¶ 42). Brook, however, proposes no coal hauling beyond the present boundary of its mine permit. Moreover, Brook's operations will not impact Highway 345. Because it is not a haul road and will not be affected by mining operations, Brook appropriately excluded Highway 345 from its coal mine permit application.

PRBRC contends that State Highway 345 is a haul road because trucks will bring coal from the Brook Mine to the iCam facility. (PRBRC Pet. for Hrg., ¶ 42). PRBRC points to the Department's definition of roads, which includes those "use[d] by coal hauling vehicles to and from transfer, processing, or storage areas." *Rules Wyo. Dep't of Envtl. Quality, Land Quality-Coal*, ch. 1, § 2(ds). For several reasons, this definition does not apply to Highway 345.

First, PRBRC's argument depends on classifying iCam and iPark as "transfer, processing, or storage areas" that must be included in Brook's permit area. As described above, iCam and iPark are end users of coal, which the Department does not regulate as surface coal mining operations. Because iCam and iPark are not included in Brook's permit area, Highway 345 cannot be considered a haul road.

Further, Brook does not actually plan to haul coal on Highway 345. (Barron Aff. ¶¶ 25-26) ("Any mine haulage that takes place within the mine will terminate at the pad."). Brook's coal storage pad is the point of sale for all coal leaving the permit area. (*Id.* ¶ 24). While independent parties may transport coal from the Brook Mine to the iCam and iPark, this use of Highway 345 does not make it a haul road for the Brook Mine.

Finally, no portion of Highway 345 lies within Brook's permit area. Brook's exclusion of Highway 345 fits with the requirement that permit applicants identify all roads "to be constructed, used, or maintained **within the proposed permit area**." *Rules Wyo. Dep't of Envtl. Quality, Land Quality-Coal*, ch. 2, § 5(a)(xvi)(A) (emphasis added). The Department does not regulate roads outside of the permit area. Brook's application, which excludes roads beyond the permit boundary, is consistent with the Rules.

Even if Highway 345 were somehow considered a haul road, it does not belong in Brook's permit application. When it comes to roads, Brook's surface coal mining operations include only the "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[.]" Wyo. Stat. Ann. § 35-11-103(e)(xx)(B) (emphasis added). Similarly, under the Rules, a road is a "surface corridor of **affected land** associated with travel by land vehicles used in surface coal mining

and reclamation operations[.]" *Rules Wyo. Dep't of Envtl. Quality, Land Quality-Coal*, ch. 1, § 2(ds) (emphasis added). The Act defines "affected land" as the "area of land from which overburden is removed, or upon which overburden, development waste rock or refuse is deposited, or both, including access roads, haul roads, mineral stockpiles, mill tailings ..., mill facilities ..., impoundment basins ..., and all other lands whose natural state has been or will be disturbed as a result of the operations[.]" Wyo. Stat. Ann. 35-11-103(e)(xvi).

This concept of identifying and regulating "affected lands" is rooted in Congress's recognition that surface mining operations "result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes." 30 U.S.C. § 1201(c). One of SMCRA's central purposes is to ensure that "procedures are undertaken to reclaim surface areas" affected by mining. 30 U.S.C. § 1202(e). To implement this SMCRA objective, the Department requires operators to report the extent of surface disturbances, reclaim all disturbed lands to an approved future use, and provide financial assurances guaranteeing that reclamation will be accomplished. Wyo. Stat. Ann. § 35-11-406(b); *Id.* § 35-11-415(b)(v) through (vii); *Id.* § 35-11-417(c).

Highway 345 will not be affected by the Brook Mine. It is an existing state highway. Neither Brook nor any other party will regrade, resurface, relocate, change, improve, or otherwise disturb the land surface around this highway. With no surface disturbance, Brook could not be reasonably expected to conduct future reclamation work on Highway 345. Because Brook will not affect Highway 345, it does not belong in Brook's permit.

Because Brook is not using Highway 345 as a haul road or affecting Highway 345 with its mining operations, Brook appropriately excluded this road from its permit application.

c. Brook sufficiently described its use of county roads.

PRBRC also argues that Brook did not disclose its use of county roads to haul coal within the permit area. (PRBRC Pet. for Hrg., ¶ 43). PRBRC contends that Brook should have estimated truck traffic on these roads, disclosed potential impacts to the roads, and described Brook's arrangements with state and county authorities for road use, repair, and compensation. (*Id.* ¶ 44). However, Brook has disclosed its use of county roads. The additional requirements described by PRBRC do not exist in the Act or Rules.

The Act and Rules require identification of roads within the permit area, as well as plans for new road construction. *See*, e.g., Wyo. Stat. Ann. § 35-11-406(a)(ix) (calling for a "map based on public records showing ... all roads … on or immediately adjacent to the land to be affected"). Brook satisfied its application requirements by identifying the roads within its permit area, classifying their use, and describing the future reclamation of those that will not be retained for an approved post-mining land use. (DEQ Ex. 5 at 23-25; 145). Brook discloses that its future highwall mining will be adjacent to county roads. (DEQ Ex. 5 at 92). Brook also explains that it will use Ash Creek Road for transportation within the permit area. (*Id.*). Where required, Brook will implement measures to facilitate the public's continued use of county roads. (*Id.*). Nothing further is required under the Act or Rules.

d. Brook was not required to provide buffers or a road relocation plan at the application stage.

Finally, PRBRC maintains that Brook's application must establish a buffer around public roads or include an approved plan to relocate any roads impacted by mining operations. (PRBRC Pet. for Hrg., ¶ 45). Mine operators cannot conduct surface coal mining operations within 100 feet of the right-of-way line of any public road, not counting areas where mine roads meet up with a public road. 30 U.S.C. § 1272(e)(4); Wyo. Stat. Ann. § 35-11-406(n)(iv) (incorporating SMCRA restrictions by reference). However, under certain conditions, the Department can authorize an operator to relocate, close, or disturb lands within 100 feet of a public road. *Rules Wyo. Dep't of Envtl. Quality, Land Quality-Coal*, ch. 12, § 1(a)(v)(D). Before authorizing such impacts, the Department must provide public notice, an opportunity for public comment, and, upon request, a hearing in the locality of the mining operations. *Id.* The Administrator must find in writing that "the interests of the public and the affected landowners will be protected from the proposed operation." *Id.*

The Department has not authorized Brook to relocate, close, or disturb lands within 100 feet of any public road. Brook's application does not propose any of these specific scenarios, but recognizes they could occur in the future: "If mining activities require relocating a county road, plans will be submitted to and approved by Sheridan County and the affected surface land owners, if applicable. Any approved road relocation will be constructed and approved prior to the existing road being disturbed by mining operations." (DEQ Ex. 5 at 92). In addition to Brook's planned mitigation measures, the Department must adhere to Chapter 12's procedural requirements. If and when Brook proposes to relocate, close, or disturb lands within

100 feet of a public road, the public will receive notice and an opportunity to be heard. Nothing requires Brook to initiate this process before receiving its coal mine permit.

iii. Brook's application includes the required estimates of coal production.

The Rules require coal mine permit applicants to describe their "anticipated annual and total production by tonnage[.]" *Rules Wyo. Dep't of Envtl. Quality, Land Quality-Coal*, ch. 2, § 5(a)(i)(A). PRBRC argues that an applicant must prove these figures are accurate by identifying "proposed buyers or opportunities to use the coal." (PRBRC Pet. for Hrg., ¶ 51). Nothing in the Act or Rules requires such justification.

Brook provided its estimated annual and total production in Table MP.1-2. (DEQ Ex. 5 at 105). PRBRC may question these numbers based on past statements of Brook representatives, but nothing in the Act or Rules lets the Department do the same. The Rules require nothing more than an estimate of annual and total production. *Rules Wyo. Dep't of Envtl. Quality, Land Quality-Coal*, ch. 2, § 5(a)(i)(A). Brook satisfied this application requirement.

iv. Brook was not required to name an operator at the application stage.

According to PRBRC, Brook does not currently have the staff it needs to operate the Brook Mine. (PRBRC Pet. for Hrg., ¶ 54). PRBRC asserts that if any party apart from Brook operates the mine, "that party must be identified in the permit application." (*Id.*).

Neither the Act nor the Rules required Brook to name an operator at the application stage. An applicant must only provide the "names, addresses and telephone numbers of any operators, **if different from the applicant**." *Rules Wyo. Dep't of Envtl. Quality, Land Quality-*

Coal, ch. 2, § 2(a)(i)(B) (emphasis added). Brook is currently the only operator for the Brook Mine. (*See* DEQ Ex. 5, 11).

Brook acknowledges that, to run the mine, it 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 at 15). The Act clearly allows Brook to select a new operator after the permit is issued. "Any operator desiring to engage in a mining operation shall make a written application to the administrator on forms furnished by the administrator for a license to mine." Wyo. Stat. Ann. § 35-11-410(b). This application process is available at any time. The Act specifically authorizes the Administrator to issue licenses to applicants "other than **the permit holder**," contingent on an "instrument of permission from **the permit holder** granting to the applicant the rights thereto[.]" *Id.* § 35-11-410(b)(ii) (emphasis added). By using the term "permit holder," this section explicitly authorizes the Administrator to issue licenses to mine after the initial permit issuance. Brook, as the permit holder, can grant a new operator the right to mine under its approved permit.

IV. CONCLUSION

Over the past six years, Brook's permit application has been through twelve rounds of technical review, two rounds of public comment, a seven-day contested case hearing, and an informal conference. Following the Council's 2017 decision, the Department conducted a top-to-bottom peer review of Brook's application and solicited extensive feedback from a geotechnical engineering expert.

Where the Department found problems with Brook's permit application, it took appropriate steps under the Act and Rules to fix them. The Department has taken every

available measure to ensure that Brook's permit application is accurate, complete, and complies with all applicable laws. The Department has demonstrated that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter for law. The Council finds and concludes that Brook's permit application is accurate, complete, and complies with all applicable laws.

V. ORDER

IT IS HEREBY ORDERED that the Department's motion for summary judgment is granted.

IT IS FURTHER ORDERED that as a result, PRBRC's motion for summary judgment is denied.

IT IF FURTHER ORDERED that the Department's determination that Brook's permit application is accurate, complete, and complies with all applicable laws is affirmed.

IT IS FURTHER ORDERED that the Department Director's decision to issue the permit to Brook is affirmed and upheld in its entirety.

DATED this 12TH day of February, 2021

John Corra, Chairman
Environmental Quality Council