BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF	)	
TRITON COAL COMPANY, LLC,	)	
BUCKSKIN MINE,	)	**Docket No. 01-4602**
PERMIT NO. 500-T5, TFN 3 5/322	)	

OPPOSITION TO DEPARTMENT OF ENVIRONMENTAL QUALITY, LAND QUALITY DIVISION'S MOTION TO DISMISS

Triton Coal Company, LLC ("Triton") submits the following Opposition to the Department of Environmental Quality, Land Quality Division's ("LQD") Motion to Dismiss Triton's Petition for Review. LQD's Motion to Dismiss does not argue that the Environmental Quality Council ("Council") lacks jurisdiction to consider Triton's Petition for Review of the alluvial valley floor ("AVF") determination, but rather, that the Council must delay its consideration until after the permitting process is complete. As a practical matter, the delay sought by LQD may cause substantial and unnecessary expenditures of time and resources. As a legal matter, the law allows the Council to consider Triton's Petition now.

I. Failure to consider Triton's Petition for Review now may waste time and resources.

This case arises because LQD made a determination that AVFs occur in Triton's proposed Buckskin Mine Amendment Area. This determination immediately subjects Triton to substantially increased legal duties and obligations. LQD's Coal Rules and Regulations require the applicant, prior to receiving a permit, to submit detailed mining and reclamation plans to ensure compliance with stringent performance standards for mining on alluvial valley floors. Coal Rules and Regulations, Chapter 3, section 2(c)(ix); Chapter 5, sections 3(a) and 3(b). Triton anticipates that preparing these plans and otherwise complying with the AVF requirements will cost approximately $10,000 each month until the permitting process is complete.

If the Council considers Triton's Petition now, and overturns LQD's determination, then Triton will not be forced to incur these costs. In contrast, if the Council grants LQD's motion and delays consideration of the AVF issue, Triton will have to invest many hours and thousands of dollars to comply with the AVF requirements. If the Council ultimately rules in Triton's favor, those hours and dollars will simply be wasted.

It is precisely to avoid such waste that the regulations allow a permit applicant to ask LQD for a "pre-application determination of the presence or absence of an alluvial valley floor."

Coal Rules and Regulations, Chapter 3, section 2(a). Triton received LQD's pre-application determination, and disagrees with it. The time to resolve this disagreement is now, when the waste can be avoided. The Council should deny LQD's motion, and consider Triton's Petition promptly, to ensure the most effective use of both LQD's and Triton's time and resources.

II. The law gives the Council jurisdiction to hear this case now.

The Environmental Quality Act (the "Act") grants the Council the power and duty to "hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions." WYO. STAT. ANN. § 35-11-112(a). Consistent with this provision, the Council has authority to "[c]onduct hearings in any case contesting the administration or enforcement of any law, rule, regulation, standard or order issued or administered by the department or any division thereof." WYO. STAT. ANN. § 35-11-112(a)(iii).

LQD's determination that AVFs occur in Buckskin's Amendment Area clearly constitutes a "case or issue arising under the laws, rules, regulations, standards or orders" of the department. It plainly involves the "administration or enforcement of any law, rule, [or] regulation." Thus, pursuant to WYO. STAT. ANN. § 35-11-112, it may be contested before the Council.

In its Motion to Dismiss, LQD argues, "Wyo. Stat. § 35-11-802 requires that the director must refuse to grant a permit prior to Buckskin being able to file a Petition for Review with the EQC. As such, the EQC is without jurisdiction to consider Buckskin's Petition." LQD Motion to Dismiss, ¶ 4. The statute cited, entitled "Refusal to grant permits; **applicant's rights**" (emphasis added), reads: "If the director refuses to grant any permit under this act, the applicant may petition for a hearing before the council to contest the decision." WYO. STAT. ANN. § 35-11-802. This provision does not limit the Council's jurisdiction. Rather, it guarantees an applicant the opportunity to contest the denial of a permit. To suggest, as LQD does, that section 802 requires LQD to deny a permit before the Council has jurisdiction would render section 112(a)(iii) superfluous. LQD's interpretation of the Act would preclude the Council from hearing and determining any case or issue unless it involved the denial of a permit.

The Council has never been limited to hearing cases only after a permit has been denied. In fact, it often considers cases where a permit has been granted, but where an existing or

proposed permit condition is disputed. Thus, LQD's assertion that the Council may hear cases only after permit denial is inconsistent with the Act as well as long-established practice.

Finally, LQD makes the argument that the opportunity for public notice and comment during the permit approval process precludes Council review now. This argument is untenable, because public notice and comment are available during the permit approval process regardless of the outcome of Triton's Petition. LQD has not articulated any process through which the notice and comment provision of the permit approval process affects this proceeding, nor cited any authority to support the argument that the availability of public notice and comment in the permit process somehow prevents the Council from considering Triton's Petition.

The Act grants the Council jurisdiction to consider this case now. LQD's contrary argument ignores the Council's broad jurisdiction under WYO. STAT. ANN. § 35-11-112, and relies on inapplicable provisions that are not meant to, and do not, limit the Council's authority.

III. LQD's motion relies on the Wyoming Administrative Procedure Act, which applies to judicial review, not to review by the Council.

LQD's Motion to Dismiss argues that its pre-application AVF determination "is not 'final agency action' nor is it other 'agency action' ripe for review by the [Council] as contemplated by Wyo. Stat. § 16-3-114(a)." LQD Motion to Dismiss, ¶ 3. The cited statute is part of the Wyoming Administrative Procedure Act ("WAPA"), and provides that "any person aggrieved or adversely affected in fact by a final decision of an agency in a contested case, or by other agency action or inaction, [...] is entitled to **judicial review** in the **district court**." WYO. STAT. ANN. § 16-3-114(a) (emphasis added).

Triton is not seeking judicial review. It is seeking review by the Council. The Council is not a Wyoming district court, and its jurisdiction is based on the Environmental Quality Act, not WAPA. LQD's reliance on the provisions of WAPA is misplaced. As discussed above, the Environmental Quality Act does grant the Council jurisdiction in this case.

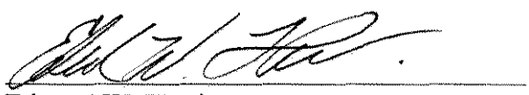
However, even assuming for the sake of argument that WAPA applied to this Petition, LQD's pre-application AVF determination would still constitute sufficiently final action to allow Council review. The pre-application AVF determination constitutes LQD's final decision on the existence of AVFs in the permit area. LQD will not reconsider this decision in the permitting process. As LQD's final determination, the AVF determination imposes immediate additional legal duties and obligations on Triton.

Very little Wyoming case law exists articulating what constitutes final agency action. However, the United States Supreme Court established a two part standard for determining if agency action is "final," and therefore subject to review under the federal APA. First, the action must mark the "consummation" of the agency's decision-making process. Second, the action must be one by which "rights or obligations have been determined or from which legal consequences flow." Bennett v. Spear, 520 U.S. 154, 178 (1997). As discussed above, LQD's AVF determination is the consummation of its decision-making on the existence of AVFs in the permit area. It determines Triton's rights and obligations with regard to AVFs, and has specific legal consequences. It therefore constitutes final agency action, and is subject to appeal. See Hawaiian Electric Co., Inc. v. United States Environmental Protection Agency, 723 F.2d 1440, 1442 (9th Cir. 1984) ("Its classification of the fuel switch as a major modification represents EPA's final statement on the legal issues. . . . [A]lthough the application of the major modification definition is an interim step in the PSD permitting process, it has immediate legal consequences, i.e., the requirement of PSD review"). Therefore, as the pre-application AVF determination constitutes LQD's final decision regarding the presence of AVFs in the permit area and the applicability of the statutory exclusions, and has immediate legal consequences, it would constitute final agency action if that determination were necessary in this proceeding.

IV. Conclusion.

As discussed above, now is the proper time for the Council to consider Triton's Petition for Review. There are no legal reasons to delay, and many practical reasons to proceed promptly. Triton therefore requests the Council to deny LQD's Motion to Dismiss, and proceed to a hearing on Triton's Petition for Review.

DATED this 30th day of April, 2001.



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