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April 15, 2016

Jim Ruby, Executive Secretary
Environmental Quality Council

VIA HAND DELIVERY

Wyoming Environmental Quality Council
Attn: Jim Ruby
125 W. 25th Street
Herschler Building 1W, Room 1714
Cheyenne, WY 82002

Re: Docket 16-1601: In re Brook Mine Application
Big Horn Coal Co. Response to
Brook Mine Request for Order in Lieu of Consent

Dear Mr. Ruby:

Big Horn Coal Company (BHC) hereby submits its timely response to Brook Mining Company, LLC's (Brook) Petition for Order in Lieu of Consent (Petition) in the above-referenced docket. Because a scheduling conference has been set in this matter for April 20, 2016, this response does not specifically address Brook's request for expedited hearing. BHC respectfully reserves all rights to address scheduling issues during the April 20th conference call.

I. Introduction

BHC is a non-resident, non-agricultural surface landowner entitled to protections afforded by the Environmental Quality Act (EQA) at W.S. 35-11-406(b)(xii).¹ In 1954, BHC purchased surface land and the right to lease and mine the coal under that land from Brook's predecessor, Sheridan-Wyoming Coal Company (SWC). BHC leased and mined coal on the land for more than thirty years. By 1982, BHC had developed facilities which connected the regional coal reserves to the main rail line. For example, BHC had built a bridge across the Tongue River and a rail spur that allowed coal to be hauled on the BNSF main line. Those facilities provided a base from which BHC mined and transported coal leased from SWC and others. Though BHC is not currently actively mining, BHC maintains valuable improvements and infrastructure and has existing rights and obligations pursuant to its existing Mine Permit No. 213-T8. Approximately 370 acres of land encompassed within BHC's existing mine permit overlap with lands included in Brook's mine permit application. Approximately 1,100 acres of BHC surface lands are within the proposed Brook mine permit area.

¹ BHC is wholly owned by LHR Coal, LLC (f/k/a AE Coal, LLC) and LHR Coal, LLC is wholly owned by Lighthouse Resources, Inc. (f/k/a Ambre Energy North America, Inc.)

II. Relevant Facts

By way of background, prior to Brook submitting its mine permit application, AE Coal, LLC, was party to an exploration agreement with Ramaco.² That July 2012 exploration agreement, together with all associated permissions for Ramaco to conduct pilot hole and core drilling and other related mineral exploratory and coal prospecting activities on BHC surface lands, expired by its own terms on July 19, 2014. Upon receiving preliminary mine plans from Ramaco in late 2012, BHC expressed in writing its general support of coal mining in the area and, specifically, its support for Ramaco's proposed mining beneath BHC's surface lands located north of the Tongue River.

Also prior to Brook submitting its mine permit application, on March 13, 2013, BHC consented to Ramaco conducting baseline environmental studies and surveys on certain BHC surface lands. Notwithstanding the March 2013 Landowner's Consent Agreement, on April 9, 2013, Ramaco sent a letter to BHC declaring that the June 28, 1954 Warranty Deed (the 1954 Deed) between its predecessors and BHC provides Ramaco "the legal right to access the surface land for core drilling, pre-permit monitoring or any other pre mining activities" without any additional approval or consent from BHC.³

Ramaco nevertheless provided BHC with revised, but incomplete, mine plans in the Spring of 2013, and with yet another set of maps and a request for surface owner consent in July 2014. Notably, the surface owner consent request and Form 8 that Ramaco provided BHC on July 23, 2014, did not include a complete mine plan and reclamation plan (collectively, "mine and reclamation plan") as required by W.S. 406(b)(xii)(A). Instead, that request was accompanied by just two maps. The first illustrated mine progression blocks; the second illustrated the Brook mine permit boundary and post mine topography. Based on these materials, BHC understood that Brook's rail spur loadout and facilities would be located on the south side of I-90, along the Tongue River toward the Town of Ranchester. BHC sent a letter to Ramaco on October 9, 2014, confirming that Ramaco's proposed activities on BHC lands south of the Tongue River do not conform to BHC's development plans, that BHC "does not consent to the mining and reclamation plan that is being proposed by the Brook Mine," and that BHC further does not agree with Ramaco's continued assertion that it has the right under the 1954 Deed to make reasonable use of BHC's surface lands for mine planning, mining and mine related facilities and

² Brook is the developer and operator of coal and coal mining interests owned by Ramaco Wyoming Coal Co., LLC (Ramaco).

³ This position starkly differed from Ramaco's course of conduct when submitting its Notice of Intent to Explore for Coal By Drilling to DEQ/LQD (Mr. Mark Taylor) on September 21, 2012, in which it referenced the now-expired July 19, 2012 exploration agreement between AE Coal, LLC and Ramaco.

activities without surface owner's consent. Rather than negotiate, Ramaco instead chose to litigate.⁴

BHC received Brook's most recent, incomplete mine and reclamation plan from Brook's consultant, Western Water Consultants Engineering (WWC), on February 5, 2016. WWC's correspondence included a Surface Ownership Request cover letter along with an attached Form 8. BHC's response was requested no later than February 19, 2016. Given BHC's long-standing concerns with Brook's ever-changing plans, BHC responded in a letter dated March 9, 2016, that it would not provide surface landowner consent.

III. The Council should deny the requested order in lieu of consent.

BHC refused to consent to the mine and reclamation plan Brook offered for review on February 5, 2016, and the EQC should deny Brook an order in lieu of BHC's consent to that mine and reclamation plan, for the following reasons:

A. Brook's mine and reclamation plan, as most recently submitted for BHC's consideration, was incomplete and differs significantly from those materials previously provided to BHC and WDEQ/LQD, with no explanation.⁵

Brook's plans have changed significantly with each new set of information BHC received. None of the plans BHC received were complete and Brook has provided no explanation regarding what has changed over time and why, or how the various plans relate to Brook's initial and/or amended mine permit application. BHC did not receive a copy of Exhibit 3-3 – Rail Loadout Facility in the materials it received on February 5, 2016. Moreover, to this day, Brook has failed to outline its operations relative to BHC's activity within the overlapping mine permit area. That failure, together with Brook's otherwise incomplete and ever-changing mine and reclamation plan, stands in direct contrast to the cooperation and agreement contemplated by DEQ/LQD SOP 2.1 and the spirit and intent of W.S. 35-11-406(b)(xii)(A).

B. Brook's mine plan and reclamation plan are not sufficiently detailed to illustrate the full proposed surface use, including proposed route of egress and ingress.

Being a mine permit holder and long-standing mine operator, BHC is knowledgeable of the mine and reclamation plan detail necessary for a surface owner to fully and fairly assess the full scope

⁴ Though not disclosed in Brook's Petition, the extent of Brook's right to use BHC surface lands under the 1954 Deed currently is being litigated pursuant to a Declaratory Judgment Complaint filed by Brook in *Brook Mining Company, LLC v. Big Horn Coal Company*, Civil Action No. CV 2014-372 (Fourth Judicial District Court, Sheridan County).

⁵ The various mine and reclamation plan materials Brook has provided to BHC and WDEQ/LQD also differ from the proposed mine operations Brook has documented with the District Court.

of intended surface use and the foreseeable impacts of that use on the surface landowner's operations. Viewing the materials BHC has received from Brook through the lens of its mining experience, BHC would characterize the Brook mine and reclamation plan as generic, with little more than boilerplate, standardized descriptions. Specific insufficiencies in Brook's mine and reclamation plan include, but are not necessarily limited to the following:

1. The Transportation Network Exhibit 3-1 shows haul roads that terminate in the middle of BHC's permit boundary prior to a loadout and/or facilities location. The first materials BHC received from Ramaco indicated Ramaco would build loadout facilities along I-90 near the BNSF mainline. The next set of materials provided to BHC and the District Court indicated that Ramaco intended to build a new rail spur on BHC-owned surface. The most recent information Ramaco provided to BHC shows haul roads that terminate in the middle of BHC's permit boundary with no loadout or rail facilities in proximity. BHC questions how Brook plans to ship coal to its customers without loading coal onto a train. The location of all anticipated haul roads are material to BHC's consideration of the mine and reclamation plan.

2. Exhibit 3-3 – Railroad Loadout Facility is listed in the Table of Contents, but BHC did not receive a copy of Exhibit 3-3 in the materials it received on February 5, 2016. The text of the materials BHC received says coal will be placed in pit crushers to haul off-site. However, the materials provide no explanation or illustration of where or how that haulage will occur other than the reference to a railroad loadout facility in the table of contents. BHC questions how Brook plans to ship coal to its customers without rail loadout facilities and how Brook's mine permit application can be deemed complete without haul roads leading to a rail loadout facility. This omission is material to BHC's consideration of the mine and reclamation plan.

3. The text of the mine and reclamation plan on page MP-7, Section MP.2 – Mine Facilities, discusses the location of a Change House, Equipment Service Shop, Additional Facilities, Fuel Station, Cistern, Septic Tank and Leach Field. However, none of these facilities are identified on Exhibit MP.2-1. Does Brook intend to provide the locations of these key surface mine facilities for review? These omissions are material to BHC's consideration of the mine and reclamation plan.

C. Brook's proposed use of BHC surface lands will substantially prohibit BHC operations.

Given present coal industry market conditions and the resulting uncertainty as to whether, when, and how Brook's mine and reclamation plans might come to fruition, it is inherently difficult for BHC or the EQC to assess the full scope of impact that Brook's mine and reclamation plan will have on BHC operations. Brook is well aware that BHC owns and controls access to valuable infrastructure and improvements on its surface lands. Namely, BHC surface lands within Brook's proposed mine permit area include an industrial shop, a rail spur facility, and a bridge across the Tongue River (collectively, BHC Facilities).

BHC has existing and planned future uses of its infrastructure and improvements – uses which are supported by surface rights BHC claims pursuant to a 1983 Release Agreement under which Ramaco’s predecessor granted specific surface protections and property rights to BHC.⁶ BHC currently leases its shop facility and is negotiating to lease its rail spur to BNSF. In addition, BHC could in the future develop coal it leases from the State of Wyoming – proven economic reserves of 40 million tons. BHC would use its surface lands and BHC Facilities to access the coal and for a rail load-out facility. BHC’s future plans to mine the state coal are as reasonably expected to occur as are Brook’s mine plans.

As BHC understands Brook’s most recent mine plan, Brook will disturb approximately 460 acres near BHC Facilities. By removing and storing topsoil and overburden related to its Phase I highwall mining, Brook would restrict access to and utilization of BHC Facilities, as well as BHC grazing land and additional BHC land north of the Tongue River, for more than twenty (20) years. Accordingly, Brook’s use would substantially prohibit BHC operations.

D. Brook’s proposed reclamation plan would not reclaim the surface to BHC’s proposed future use as soon as feasibly possible.

Brook’s mining plan contemplates beginning highwall mining on BHC surface lands, directly south of BHC’s shop. The disturbance area appears to encompass all of the BHC property south of the Tongue River except for approximately 20-40 acres around the BHC Facilities. The overburden removal sequence for the initial highwall trench TR-1, is proposed to begin twelve (12) months following permit approval. The spoil backfilling sequence for TR-1 is twelve (12) months after overburden removal. The topsoil replacement sequence is contemplated to take an additional twenty (20) years after TR-1 is backfilled. Brook’s reclamation plan would result in the disturbance of BHC surface lands and restricted access to BHC Facilities for 20-30 years. Brook’s reclamation plan not only fails to reasonably accommodate BHC’s existing land use, it also effectively blocks BHC efforts to secure approval for reasonably foreseeable future land use.

E. Brook has overstated the scope of its legal authority.

⁶BHC asserts that the 1983 Release Agreement, not the 1954 Deed, controls the surface rights of BHC and Ramaco. The 1983 Release Agreement states in relevant part: “SWC expressly consents and agrees to allow BHC to leave intact any and all permanent structures, stockpiles, or spoil materials (referred to herein collectively as ‘structures and stockpiles’) currently located in Sections 9, 10, 14, 15, 21, and the N1/2 of Section 22 of T. 57 N., R. 84 W., 6th P.M. ... as more specifically identified in Schedule D attached hereto....” The scope and effect of the 1983 Release Agreement is among the issues to be determined by the District Court in *Brook Mining Company, LLC v. Big Horn Coal Company*, Civil Action No. CV 2014-372.

Brook repeatedly asserts in its Petition that it not only owns the coal but also has broad rights to use BHC surface as necessary or convenient for mining pursuant to the 1954 Deed. Interestingly, however, nowhere in its Petition does Brook disclose that the 1954 Deed, together with the 1983 Release Agreement, is the subject of active litigation. (See footnotes 4 and 6, above.) BHC does not contest Brook's ownership of coal deposits subject to its mine permit application. BHC does, however, ardently dispute Brook's assertion that Brook's proposed mine and reclamation plan contains permitted uses of the surface under the 1954 Deed.

Issues pertaining to the scope of use, if any, permitted by the 1954 Deed are subject to the District Court's jurisdiction. As of this date, the District Court has denied both Brook's and BHC's competing motions for summary judgment; no formal discovery plans have been made and no trial date has been set. For these reasons, and those set forth in the BHC letters to WDEQ/LQD dated March 6, 2015, and to Mr. Andrew Kuhlmann, Senior Assistant Attorney General, dated December 16, 2015 (attached hereto as Exhibits A and B, respectively), it is wholly inappropriate and disingenuous for Brook to suggest that the EQC should give any weight or authority whatsoever to the existence of, or its alleged rights under, the 1954 Deed. BHC's surface owner rights under W.S. 35-11-406(b)(xii) are independent of any interpretation or operation of the 1954 Deed. By Brook's own admission, the Wyoming Attorney General has concluded the same.

F. Brook has not posted a bond as required by W.S. 35-11-416 and any order in lieu of consent should be conditioned upon the prior posting of an adequate surface owner protection bond.

Pursuant to W.S. 35-11-416, in addition to the performance bond Brook must post to secure reclamation costs, Brook also must execute a bond with the State for the use and benefit of BHC and other split estate surface owners within the proposed mine permit boundaries "in an amount sufficient to secure the payment for any damages to the surface estate, to the crops and forage, or to the tangible improvements of the surface owner." The statute makes clear that the surface owner protection bond must be in place prior to issuance of a mine permit. The statute does not otherwise specify when the surface owner protection bond must be posted or by what process the administrator will determine the bond amount.

The statute does specify that the amount of the surface owner protection bond "shall be commensurate with the reasonable value of the surrounding land, and *the effect of the overall operation of the landowner,*" and that "[f]inancial loss resulting from disruption of the surface owner's operation shall be considered as part of the damage." (Emphasis added.) The surface owner protections offered by the bond and the determination of the bond amount closely align with certain required elements for an order in lieu of consent (e.g. the effect of the proposed use on the surface owner's operations and the extent to which reclamation accommodates approved future uses as soon as feasibly possible). Accordingly, BHC requests that if the EQC should

conclude that an order in lieu of consent is warranted, any such order be issued only upon Brook's posting of the requisite surface owner protection bond, and that the parties have an opportunity to present further evidence to the administrator and/or EQC to support what bond amount is necessary to provide the surface owner statutory protections, and when such bond should be posted.

IV. Conclusion

The applicable provisions of the EQA say nothing about balancing the rights of mineral owners and surface owners, veto power, or economic leverage as Brook has suggested. Instead, the EQA explicitly requires that Brook's mine permit application include an instrument of consent from the surface landowner, even a non-resident or non-agricultural landowner, if different from the owner of the mineral estate. W.S. 35-11-406(b)(xii). If Brook cannot obtain all necessary surface landowner consent to its proposed mining plan or reclamation plan, or both, the EQC shall issue an order in lieu of consent if, and only if, it finds the statutory elements have been met. *Id.* The EQA, W.S. 35-11-416, further mandates that "a permit shall not be issued without the execution of a bond or undertaking to the state, whichever is applicable, for the use and benefit of the surface owner or owners of the land, in an amount sufficient to secure the payment for any damages to the surface estate, to the crops and forage, or to the tangible improvement of the surface owner." For the reasons stated above, Brook has not satisfied the statutory elements for an order in lieu of consent. Nor has Brook posted a bond for the use and benefit of BHC in an amount sufficient to protect BHC's interests.

BHC will defend its surface landowner rights under the EQA to: (1) receive and have an adequate opportunity to review the complete and accurate mine and reclamation plan that Brook provided to the WDEQ/LQD in support an approved draft mine permit for publication, and which is sufficiently detailed to assess the scope and duration of impact on BHC operations; (2) ensure that Brook's proposed use will not substantially prohibit BHC's operations; (3) ensure that Brook's proposed reclamation will accommodate approved future use of BHC surface as soon as feasibly possible; (4) ensure that Brook is not permitted to use the 1954 Deed to expand its rights as a mine permit applicant under the EQA; and (5) ensure that payment for foreseeable damages to BHC surface lands from Brook's proposed mine operations are appropriately secured. BHC looks forward to a full and fair opportunity at hearing to demonstrate to the EQC that an order in lieu of consent should not issue in this case, including the right to present additional objections, evidence and exhibits, and to cross examine witnesses.

Sincerely,



Lynne Boomgaarden
of Crowley Fleck PLLP

Enclosures

cc: Brook Mining Company, c/o Isaac N. Sutphin, P.C., Holland & Hart, LLP (via email)
Padlock Ranch, c/o Mistee Elliott and Hal Corbett, Lonabaugh & Riggs, LLP (via email)
Dr. David Bagley, Chairman – Wyoming Environmental Quality Council, c/o Jim Ruby
(via hand delivery)
Todd Parfitt, Director – Wyoming Department of Environmental Quality, c/o Jim Ruby
(via hand delivery)

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March 6, 2015

Department of Environmental Quality
Land Quality Division
Attn: Mr. Alan Edwards, Deputy Director and Acting Administrator
122 West 25th Street
Herschler Building
Cheyenne, WY 82002

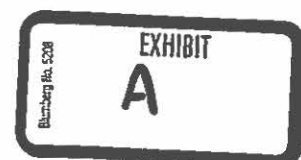
Re: Concerns Regarding Brook Mining Mine Permit Application and Exploratory
Drilling Activity within Big Horn Coal Co. Mine Permit Area:
Permit No. 213-T8

Dear Mr. Edwards:

As you are aware, Brook Mining Company, LLC (“Brook Mining”)¹ submitted an application for a permit to mine, TFN # 62/025, to the Land Quality Division of the Wyoming Department of Environmental Quality (“DEQ/LQD”) on October 31, 2014 (“Brook Mining Application”). My client, Big Horn Coal Company (“BHC”)², did not consent to the mine plan and reclamation plan that Brook Mining provided to BHC for review because the proposed activities will unreasonably interfere with BHC’s extensive surface infrastructure improvements and its existing use and development plans for the area, including but not limited to the exercise of BHC’s rights and obligations under its *existing* Mine Permit No. 213-T8. As you are also aware, Brook Mining, through its agents, representatives and/or contractors, has recently undertaken drilling activity pursuant to a Coal Notification on surface lands owned by BHC in the N1/2N1/2, Section 21, Township 57 North, Range 84 West. BHC was never notified of, did not consent, and, due to its regulatory obligations under Mine Permit No. 213-T8, strenuously objects to any and all such activity without at least having been provided notice and a plan of operations. This letter serves to document BHC’s legal

¹ Brook Mining is the developer and operator of coal and coal mining interests owned by Ramaco Wyoming Coal Co., LLC (“Ramaco”).

² BHC is wholly owned by AE Coal, LLC and AE Coal LLC is wholly owned by Ambre Energy North America, Inc.



and operational concerns with the Brook Mining mine plan, reclamation plan, permit application adjudication and exploratory drilling activity.

Background

Prior to submission of the Brook Mining Application, AE Coal, LLC, was party to an exploration agreement with Ramaco. That exploration agreement, together with all associated permissions for Ramaco to conduct pilot hole and core drilling and other related mineral exploratory and coal prospecting activities on BHC surface lands, expired by its own terms on July 19, 2014. Also prior to submission of the Brook Mining Application, on March 13, 2013, BHC consented to Ramaco conducting baseline environmental studies and surveys on certain BHC surface lands. Notwithstanding the March 2013 Landowner's Consent Agreement, on April 9, 2013, Ramaco sent a letter to BHC declaring that a 1954 deed between its predecessors and BHC provides Ramaco "the legal right to access the surface land for core drilling, pre-permit monitoring or any other pre mining activities" without any additional approval or consent from BHC. This position starkly differed from Ramaco's course of conduct when submitting its Notice of Intent to Explore for Coal By Drilling to DEQ/LQD (Mr. Mark Taylor) on September 21, 2012, in which it referenced the now-expired July 19, 2012 exploration agreement between AE Coal, LLC and Ramaco.

BHC has expressed in writing to Brook Mining its general support of coal mining in the area and, specifically, its support for Brook Mining's proposed mining beneath BHC's surface lands located north of the Tongue River. However, on October 9, 2014, BHC sent a letter to Ramaco confirming that Ramaco's proposed activities on BHC lands south of the Tongue River do not conform to BHC's development plans, that BHC "does not consent to the mining and reclamation plan that is being proposed by the Brook Mine," and that BHC does not agree with Ramaco's assertion that it has the right under the 1954 deed to make reasonable use of BHC's surface lands for mine planning, mining and mine related facilities and activities without surface owner's consent. The extent of Brook Mining's right to use BHC surface lands under the 1954 deed currently is being litigated pursuant to a Declaratory Judgment Complaint filed by Brook Mining in *Brook Mining Company, LLC v. Big Horn Coal Company*, Civil Action No. CV 2014-372, and will be determined by the Fourth Judicial District Court for Sheridan County, Wyoming.³

³ In its district court complaint, Brook Mining also reserved the right to condemn BHC's property, including its surface rail and bridge infrastructure. Brook Mining's apparent intent to condemn BHC's existing surface infrastructure is curiously inconsistent with the Brook Permit Application, which proposes to mine under the existing surface infrastructure, thereby rendering that valuable infrastructure useless.

BHC's Surface Owner Rights under W.S. 35-11-406(b)(xii)

DEQ/LQD has no authority to adjudicate property rights disputes. Conversely, the District Court's determination of Brook Mining's rights under the 1954 deed has no bearing on BHC's rights as a non-resident, non-agricultural landowner under W.S. § 35-11-406(b)(xii). Ramaco admitted this point in its letter to Ambre Energy dated April 9, 2013, wherein Randall W. Atkins, Ramaco CEO, asserted Ramaco's rights under the 1954 deed and further stated,

Ambre, as a surface owner, has the right at the appropriate time to review our plans and consent, or not consent. If Ambre refuses to offer its consent to a compliant mine and reclamation plan, Ramaco can, and will, petition the Wyoming Environmental Quality Council (EQC) for an order in lieu of consent.

Despite acknowledging BHC's statutory rights, following BHC's refusal to consent to the mine plan and reclamation plan Brook Mining provided BHC to review (which as noted below was different from the mine plan and reclamation plan Brook Mining submitted to DEQ/LQD with its mine permit application), Brook Mining apparently provided the 1954 deed to DEQ/LQD in lieu of BHC's statutory right of consent. See Adjudication, Appendix A Index, Brook Mining Application. BHC admits that it does not possess the right of consent to entry by definition under W.S. 35-11-406(b)(xi), and by virtue of the surface use reservation in 1954 deed, Nevertheless, *nothing* in the Wyoming surface coal mining statutes permits a mine permit applicant to utilize a deed, with a general reservation of surface rights, to strip a surface owner under W.S. 35-11-406(b)(xii) of its rights to *review* a compliant mine and reclamation plan and to *refuse to consent* to such plan, or to *exempt* a mine permit applicant from its obligation to petition the EQC and provide sufficient evidence upon which the EQC can make the findings necessary under W.S. 35-11-406(b)(xii)(A)-(E) to support an order in lieu of consent.

According to W.S. 35-11-406(b)(xii), the EQC shall issue an order in lieu of consent if it finds that (A) the mining plan and the reclamation plan have been submitted to the surface owner for approval; (B) the mining plan and reclamation plan are detailed so as to illustrate the full proposed surface use, including proposed routes of egress and ingress; (C) the use does not substantially prohibit the operations of the surface owner; (D) the proposed plan reclaims the surface to its approved future use, in segments if circumstances permit, as soon as feasibly possible; and (E) for surface coal mining operations, that the applicant has the legal authority to extract coal by surface mining methods. Absent a specific exception in the statute, it is not reasonable to infer that the Wyoming Legislature intended that a deed executed and recorded long before enactment of Wyoming's surface coal mining statutes, by parties who no longer own the minerals or the surface, should negate the EQC's statutory obligation to consider, among other things, whether a mine plan proposed in 2014 would substantially prohibit the present surface owner's operations.

Federal surface coal mining statutes allow a mine permit applicant to submit a conveyance that *expressly grants or reserves the right to extract the coal by surface mining methods* in lieu of written consent from the surface owner. *See* 30 U.S.C.A. § 1260 (b)(6) (“SMCRA”). Wyoming’s surface coal mining statutes, which preceded SMCRA, contain no such provision, and despite adopting other post-SMCRA amendments, the Wyoming legislature has never seen fit to adopt a similar conveyance in lieu of a consent provision. In *Belle Fourche Pipeline Co. v. Wyoming*, 766 P.2d 537, 548 (Wyo. 1988), the Wyoming Supreme Court noted that “[e]ven though this provision is included in the SMCRA, surface owner consent was not one of the provisions specifically required to be included in a state program.” *Id.* According to the court, “Wyoming went even further than the SMCRA in its effort to provide more specific protection of the surface owner” by imposing a qualified requirement that a non-resident, non-agricultural surface owner be “granted the right to a hearing if they object to the proposed mining activities, after which the EQC still could issue an order in lieu of consent.” *Id.* at 547-48. The requirement set forth in W.S. 35-11-406(b)(xii) is clear and unambiguous. Brook Mining cannot avoid this requirement by providing DEQ/LQD reservation language in a 1954 deed.

Overlapping Permits

As expressly stated in LQD’s Coal Standard Operating Procedure No. 2.1 – Coal Permit Content and Review Procedures Relating to Abutting and Overlapping Coal Permit Area Boundaries, “overlapping permit boundaries create unusual permitting, field inspection, annual reporting, and reclamation performance bonding challenges.” According to SOP No. 2.1 both permittees have joint responsibility and control over shared lands and *“there must be cooperation and agreement between the two permittees. Both permits must have mutually compatible Mine and Reclamation Plans that outline the respective operations within the overlapping permit area.”* SOP 2.1, Section II.D. Brook Mining has been uncooperative. There is no agreement between Brook Mining and BHC; and the mine and reclamation plans provided by Brook Mining to BHC failed entirely to outline the respective operations of Brook Mining and BHC within the overlapping permit area. Indeed, the mine plan Brook Mining provided to BHC for review differs from that presented in the Brook Mine Permit Application.⁴ These varied representations of Brook Mining’s plans stand in direct contrast to the cooperation and agreement contemplated by SOP 2.1.

⁴ Similarly, the map Brook Mining attached to its written offer to purchase 452 acres of BHC’s land is not the same as a supplemental map Brook mining filed in the lawsuit – the map Brook Mining filed with the court shows an area of high wall mining in the north half of Section 22, while the map enclosed with the offer letter does not show any mining in Section 22, but shows the Phase I rail spur being built over the high wall mining area. The map submitted to the DEQ with the Brook Mining permit application shows high wall mining in the north half of Section 22 as well.

SOP 2.1, Section III.B.1.b., Permit Adjudication Section, further provides that a new permit application “must contain a written statement from Permittee 2 that all application elements addressing shared land are acceptable to Permittee 2.” It appears that the Brook Mine Permit Application Adjudication Section contains no such written statement from BHC.

SOP 2.1, Section III.B.1.c., Mine Plan, further provides that the Mine Plan for each permit containing an overlapping permit area must include a separate section for each permit area boundary configuration that includes a brief discussion of how the mining operations coincide for the joint use areas. The Brook Mine Permit Application Mine Plan provided to BHC for review contained no such discussion.⁵

SOP 2.1, Section III.B.1.d., Reclamation Plan, further provides that the Reclamation Plan for each permit containing an overlapping permit area must include a separate section for each permit area boundary configuration that includes a map specifying the reclamation responsibility of each permittee. The Brook Mine Permit Application Reclamation Plan provided to BHC for review contained no such map. Nor did the Brook Mine Permit Application provided to BHC for review address the respective performance bond obligations of BHC and Brook Mining within the overlapping permit boundaries as required by SOP 2.1, Section III.B.1.e.

SOP 2.1, Section II.B., Definitions, states that where overlapping permit areas occur, the LQD's position is that both permittees have joint responsibility and control over shared lands. BHC's Mine Permit No. 213-T8 expressly provides that BHC shall conduct their operation in a manner which prevents violation of any applicable State or Federal law. If a violation is found to exist in the overlapping permit area, it is uncertain what effect this will have on BHC, BHC's mining permit, and BHC's insurance coverage, especially if the violation cannot be

⁵ The proposed “joint use” of greatest concern to BHC is that area south of the Tongue River and adjacent to BHC's existing shop facilities. The area was mined in the early to late 1970's and has since been backfilled with unconsolidated, saturated spoil materials with a direct connection to the Alluvial Valley Floor (AVF) of the Tongue River. Mining the Carney and Masters coal seams in this area would require a significant amount of de-watering and discharges into the Tongue River, causing catastrophic damage to the hydrologic balance. Additional monitoring wells in the immediate vicinity of the proposed coffin pit trench cut would be necessary to quantify the amount of water that would be intercepted.

In addition, Brook Mining has proposed stockpiling material on BHC lands in the immediate vicinity of wetlands and an AVF, without consulting with BHC regarding alternate locations that would be more environmentally friendly and would also accommodate BHC business development strategies.

Finally, Brook Mining's proposed mine plan would render reclamation of the historic Placheck Pit (AML Project No. 171 – Northeast Wyoming Coal) on BHC surface lands impossible.


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directly associated with one permittee's actions. BHC has many concerns surrounding its potential liability for Brook Mining's activities performed in the overlapping permit area. Additionally, although SOP 2.1 does not specifically address LQD-authorized activities conducted pursuant to a Coal Notification within an existing mine permit boundary, BHC asserts that cooperation between the parties is equally important under those circumstances as the same concerns regarding liability arise for activities performed by Brook Mining pursuant to their Coal Notification in BHC's mine permit area.

Requested Action

BHC sincerely appreciates LQD's responsiveness to BHC's inquiries to date. For the reasons stated above, BHC respectfully requests that DEQ/LQD (1) expressly acknowledge BHC's right, pursuant to W.S. 35-11-406(b)(xii), to review and consent to the mine plan and reclamation plan Brook Mining submitted to DEQ/LQD; (2) absent BHC's consent to a compliant mining plan and reclamation plan, require Brook Mining to petition to the EQC for an order in lieu of consent; and, (3) require that Brook Mining provide BHC (i) a list of wells and plan of operations, and (ii) prior notice of entry, under any existing or future Coal Notification that permits activities within the boundaries of BHC Mine Permit No. 213-T8.

Sincerely,



Lynne Boomgaarden
Crowley Fleck, PLLP

cc: Andrew Kuhlmann
Mark Rogaczewski

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December 16, 2015

Mr. Andrew Kuhlman
Senior Assistant Attorney General
Kendrick Building
2320 Capitol Avenue
Cheyenne, WY 82002
andrew.kuhlmann@wyo.gov

Via Electronic and U.S. Mail

Re: Continued Concerns Regarding Lack of Surface Owner Consent and other
Representations Related to the Brook Mining Mine Permit Application

Dear Mr. Kuhlmann:

As you are aware from prior communications, my client, Big Horn Coal Company (“BHC”), did not consent to the mine plan and reclamation plan that Brook Mining/Ramaco (collectively, “Ramaco”) provided to BHC for review because the proposed activities will unreasonably interfere with BHC’s extensive surface infrastructure improvements and its existing use and development plans for the area, including but not limited to the exercise of BHC’s rights and obligations under its *existing* Mine Permit No. 213-T8. BHC documented its legal and operational concerns with the Ramaco mine plan, reclamation plan, permit application adjudication and exploratory drilling activity in a letter dated March 6, 2015, to Mr. Alan Edwards and copied to you.

BHC recently became aware of certain assertions made by Ramaco to the Wyoming Attorney General and the Department of Environmental Quality Land Quality Division (“DEQ/LQD”) in a letter to you from Mr. Tom Sansonetti dated October 13, 2015, and in Ramaco’s Round 2 permit review responses.



Accordingly, today's letter is being provided for the purpose of reaffirming BHC's concerns and position regarding the necessity of obtaining the surface owner's consent to mining as required by the Wyoming Environmental Quality Act ("WEQA").

First, notwithstanding Mr. Sansonetti's assertion on behalf of Ramaco that "[t]he 1983 release agreement does not affect any of the rights reserved in the 1954 Deed," and "[t]he 1954 Deed controls the surface use mining rights of Ramaco relative to both Big Horn Coal and Padlock Ranch," the Wyoming district court denied Ramaco's and BHC's competing motions for summary judgment as to those assertions by an order dated September 21, 2015. This matter remains the subject of active litigation before the Fourth Judicial District Court for Sheridan County, Wyoming, in *Brook Mining Company, LLC v. Big Horn Coal Company*, Civil Action No. CV 2014-372. As of this date, no formal discovery plans have been made and no trial date has been set. BHC continues to ardently dispute Ramaco's assertion that it has the right under the 1954 deed to use BHC's surface lands to conduct all "necessary or convenient" coal mining activities and that the Ramaco Mine Plan application contains permitted uses of the surface under the 1954 Deed.

Second, as outlined in our March 6, 2015 letter to Mr. Edwards, BHC's surface owner rights under W.S. 35-11-406(b)(xii) are independent of any interpretation or operation of the 1954 deed because *nothing* in the WEQA permits a mine permit applicant to utilize a deed, with a general reservation of surface rights, to strip a surface owner under W.S. 35-11-406(b)(xii) of its rights to *review* a compliant mine and reclamation plan and to *refuse to consent* to such plan, or to *exempt* a mine permit applicant from its obligation to petition the Environmental Quality Council ("EQC") and provide sufficient evidence upon which the EQC can make the findings necessary under W.S. 35-11-406(b)(xii)(A)-(E) to support an order in lieu of consent. Ramaco erroneously relies on *WYMO Fuels, Inc. v. Edwards*, 723 P.2d 1230 (Wyo. 1986) to dispute this fact (see Adjudication, Response AG 1-Round 1). The Supreme Court in *WYMO Fuels* addressed the narrow issue of "whether condemnation of a way of necessity for a railroad spur track and a mine truck haul road ... dispenses with the statutory requirement that a resident or agricultural landowner or a surface landowner consent to mining operations." *Id.* at 1231. In answer to this narrow question, the Supreme Court "afford[ed] efficacy to the condemnation statute," by holding that two parties whose lands had been condemned were no longer surface owners and accordingly, "were left with no interest which required protection pursuant to the Wyoming Environmental Quality Act." *Id.* at 1236. The *WYMO Fuels* decision has no application here. BHC's fee surface interests have not been condemned and neither Ramaco nor DEQ/LQD may ignore BHC's surface consent rights under the WEQA.

For these reasons, BHC respectfully renews its request that DEQ/LQD expressly acknowledge BHC's right, pursuant to W.S. 35-11-406(b)(xii), to review and consent to any mine plan and reclamation plan that Ramaco submits to DEQ/LQD for consideration. Absent BHC's consent to a compliant mining plan and reclamation plan, BHC requests that DEQ/LQD require Ramaco to petition to the EQC for an order in lieu of consent.

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Finally, Ramaco has failed to provide BHC (either directly or through its court filings) any mine and reclamation plans it has submitted to DEQ/LQD for review. To the best of BHC's knowledge, Ramaco still has not outlined the respective operations of Ramaco and BHC within the overlapping permit area. Moreover, Ramaco's mine plans as represented to the court appear to differ substantially from its filings with DEQ/LQD. As previously stated, these varied representations of Ramaco's plans stand in direct contrast to the cooperation and agreement contemplated by DEQ/LQD SOP 2.1 and undermine any credible foundation upon which Ramaco's permit application might succeed.

Thank you for your consideration of BHC's concerns. Please contact me if you have questions or would like to discuss this matter further.

Sincerely,


Lynne Boomgaarden
Crowley Fleck, PLLP