



**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... 3  
STATEMENT OF THE ISSUES.....4  
ARGUMENT.....4  
    I. Introduction.....4  
    II. DEQ’s Rules Require an Informal Conference.....5  
    III. An Informal Conference is Required to Afford Public Participation Opportunities.....9  
    IV. A Contested Case Hearing Is Not Appropriate At This Time.....11  
CONCLUSION.....14

**TABLE OF AUTHORITIES**

**Federal Cases**

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).....8  
Kingdomware Technologies, Inc. v. U.S, 136 S.Ct. 1969 (2016).....7  
U.S. v. Gabaldon, 522 F.3d 1121 (10th Cir. 2008).....8

**Wyoming Cases**

Bellamy v. Bellamy, 949 P.2d 875, 876 (Wyo. 2002).....8  
In re LePage, 18 P.3d 1177 (Wyo. 2001).....8  
Wilson v. Tyrell, 246 P.3d 265 (Wyo. 2011).....8

**Cases from Other States**

Daffin v. Oklahoma Department of Mines, 251 P.3d 741 (Okla. 2011).....11  
Rivas v. Chelsea Housing Authority, 982 N.E.2d 1147 (Mass. 2013).....10

**Federal Statutes and Regulations**

30 U.S.C. § 1201.....5  
    § 1253.....5  
    § 1263(b).....5  
30 C.F.R. § 730.5.....5  
    § 773.6(c).....5-6

**Wyoming Statutes and Regulations**

Wyo. Stat. § 35-11-112(a)(iv).....13  
    § 35-11-406(k).....7, 13-14  
    § 35-11-406(p).....12  
Wyo. DEQ Rules of Practice and Procedure Ch. 3 § 3.....7  
    Ch. 1 § 17(b).....12

**Other Authorities**

Letter from Todd Parfitt to Anton Bocek, Jan. 30, 2017.....4  
Public Notice for Brook Mine permit objection period.....12  
EQC Docket No. 15-4801, *In Re Eagle Butte (Alpha West)*.....13

## STATEMENT OF THE ISSUES

On behalf of itself and its members who submitted objections to the permit application, and pursuant to the Environmental Quality Council's ("EQC") February 7, 2017 Order, Powder River Basin Resource Council ("Resource Council") hereby contends that the EQC does not have proper jurisdiction at this time and that proceedings should be remanded to the Department of Environmental Quality ("DEQ") with instructions to hold the required informal conference, as requested by the Resource Council and other parties.

## ARGUMENT

### **I. Introduction.**

On January 27, 2017 over a dozen parties submitted objections to the Brook Mine permit. These parties included the Resource Council and its members who are adjacent landowners and Sheridan County residents concerned about impacts to their property, health, safety, and way of life. On the very next business day, January 30, 2017, the Director wrote to each party that submitted objections to the Brook Mine permit application and notified the objector that the Director was denying requests for an informal conference and was referring the permit application to the EQC "for their review and determination at a contested case hearing." *See, e.g.* Letter from Todd Parfitt to Anton Bocek, Jan. 30, 2017 (available on the EQC Electronic Filing System website for this Docket).

For the reasons discussed below, the Director has a mandatory duty to hold an informal conference and he does not have the authority to refer the matter directly to the EQC. As such, the EQC does not have jurisdiction to hold a contested case hearing at this time and must remand

proceedings back to the Director, with instructions that he must hold an informal conference in the location of the proposed mining operation, as requested by the objecting parties.

Alternatively, should the EQC find that the Director has discretion to deny the request for an informal conference, the EQC should stay proceedings until such time as an objecting party formally petitions for review of the Director's decision and thereby initiates proceedings pursuant to DEQ's Rules of Practice and Procedure.

## **II. DEQ's Rules Require an Informal Conference.**

Wyoming DEQ (and in parts, the EQC) implements the federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201, *et seq.* ("SMCRA"). Under SMCRA's system of cooperative federalism, Wyoming's state-authorized program as embodied in the Wyoming Environmental Quality Act ("WEQA") and corresponding state regulations must be "no less stringent" and "no less effective" than the federal program. 30 U.S.C. § 1253; 30 C.F.R. § 730.5.

In the case of requests for an informal conference, SMCRA's requirements provide:

If written objections are filed and an informal conference requested, the regulatory authority shall then hold an informal conference in the locality of the proposed mining, if requested within a reasonable time of the receipt of such objections or request.

30 U.S.C. § 1263(b) (emphasis added). This section creates a clear mandatory obligation on the part of the regulatory authority (in this case DEQ) to hold an informal conference if requested by an objecting party.

These requirements are further spelled out in the Office of Surface Mining Reclamation and Enforcement's ("OSMRE") federal regulations implementing SMCRA:

Informal conferences.

(1) Any person having an interest which is or may be adversely affected by the decision on the application, or an officer or a head of a Federal, State, or local government agency, may request in writing that the regulatory authority hold an informal conference on the application for a permit, significant revision to a permit under § 774.13, or renewal of a

permit under § 774.15. The request shall—(i) Briefly summarize the issues to be raised by the requestor at the conference;(ii) State whether the requestor desires to have the conference conducted in the locality of the proposed operation; and(iii) Be filed with the regulatory authority no later than 30 days after the last publication of the newspaper advertisement required under paragraph (a) of this section.

(2) Except as provided in paragraph (c)(3) of this section, if an informal conference is requested in accordance with paragraph (c)(1) of this section, the regulatory authority shall hold an informal conference within a reasonable time following the receipt of the request. The informal conference shall be conducted as follows:(i) If requested under paragraph (c)(1)(ii) of this section, it shall be held in the locality of the proposed surface coal mining and reclamation operation.(ii) The date, time, and location of the informal conference shall be sent to the applicant and other parties to the conference and advertised by the regulatory authority in a newspaper of general circulation in the locality of the proposed surface coal mining and reclamation operation at least 2 weeks before the scheduled conference.(iii) If requested in writing by a conference requestor at a reasonable time before the conference, the regulatory authority may arrange with the applicant to grant parties to the conference access to the proposed permit area and, to the extent that the applicant has the right to grant access to it, to the adjacent area prior to the established date of the conference for the purpose of gathering information relevant to the conference.(iv) The requirements of section 5 of the Administrative Procedure Act, as amended (5 U.S.C. 554), shall not apply to the conduct of the informal conference. The conference shall be conducted by a representative of the regulatory authority, who may accept oral or written statements and any other relevant information from any party to the conference. An electronic or stenographic record shall be made of the conference, unless waived by all the parties. The record shall be maintained and shall be accessible to the parties of the conference until final release of the applicant's performance bond or other equivalent guarantee pursuant to subchapter J of this chapter.

(3) If all parties requesting the informal conference withdraw their request before the conference is held, the informal conference may be canceled.

30 C.F.R. § 773.6(c) (emphasis added).

For the state program to be “no less stringent” and “no less effective” than the federal program, DEQ’s rules must incorporate these requirements into its state program. To do this, DEQ has a rule of practice and procedure specifically related to an informal conference request on any application for a surface coal mining permit. DEQ’s state regulatory language largely mirrors the federal regulation, and provides that an informal conference shall be held if requested:

Informal Conference. (a) Any request that the Administrator hold an informal conference on any application for a surface coal mining permit shall briefly state the issues to be discussed, whether the requester desires the conference to be held in the locality of the proposed mining operation, and whether access to the proposed permit area is desired. If requested, the Administrator may arrange with the applicant to grant parties to the conference access to the permit area for the purpose of gathering information relative to the conference. The conference shall be held in the locality of the operation or at the state capitol, at the option of the requester, within 20 days after the final date for filing objections unless a different period is stipulated to by the parties. If all parties requesting the conference reach agreement and withdraw their request, the conference need not be held.

DEQ Rules of Practice and Procedure Ch. 3 § 3(a) (emphasis added).<sup>1</sup>

These requirements related to “applications for a surface coal mining permit” are distinctive from the general requirements, and corresponding discretion, afforded under W.S. § 35-11-406(k) related to “surface coal mining operations.”<sup>2</sup> Specifically, while the statute uses the word “may,” the regulations related to new surface coal mining applications use the word “shall.” *Id.* (requiring that “[t]he conference shall be held in the locality of the operation or at the state capitol, at the option of the requester, within 20 days after the final date for filing objections unless a different period is stipulated to by the parties.”).

Courts have clearly and consistently held that when a statute or regulation uses the word “shall,” it imposes a mandatory and nondiscretionary duty to act as the statute or regulation requires. See Kingdomware Technologies, Inc. v. U.S., 136 S.Ct. 1969, 1977 (2016)(“When a statute distinguishes between ‘may’ and ‘shall,’ it is generally clear that ‘shall’ imposes a

---

<sup>1</sup> The Resource Council was contemplating requesting access to the permit area at the time the informal conference was denied. The Resource Council reserves its right to request a permit area tour if and when the informal conference is granted.

<sup>2</sup> The Resource Council also contends that the discretion afforded in W.S. § 35-11-406(k) allowing the Director to deny a request for an informal conference related to permit renewals and major modifications of permits is also contrary to SMCRA and its implementing federal regulations, but the EQC need not reach that conclusion here because the provision is not specific to applications for a new surface coal mine permit. Here, the regulations that are specific to the situation before the EQC govern.

mandatory duty.”); U.S. v. Gabaldon, 522 F.3d 1121, 1126 (10th Cir. 2008)(holding that the word “shall” in a regulation indicates a mandatory duty); Bellamy v. Bellamy, 949 P.2d 875, 876 (Wyo. 2002)(“There is no judicial license to pick and choose only those words which promote a particular purpose...Faced with a legislative ‘shall,’ the courts must give effect to the legislative prescription and are without authority to carve out exceptions to the mandate.” (citing State by and Through Dept. of Family Services v. Jennings, 818 P.2d 1149, 1150 (Wyo. 1991)); In re LePage, 18 P.3d 1177, 1180 (Wyo. 2001)(“Where a statute uses the mandatory language ‘shall,’ a court must obey the statute as a court has no right to make the law contrary to what is prescribed by the legislature...The choice of the word ‘shall’ intimates an absence of discretion by the [Department] and is sufficiently definitive of the mandatory rule intended by the legislature.”); See also Wilson v. Tyrell, 246 P.3d 265, 279-80 (Wyo. 2011)(holding that the disclosure requirement in W.R.C.P. 26(a)(2) is mandatory where the rule uses the word “shall.”).<sup>3</sup>

As discussed above, the rule’s embodiment of SMCRA’s mandatory requirement to hold an informal conference is necessary to ensure that the state program is “no less stringent” and “no less effective” than the federal program. Since the Wyoming DEQ Rules of Practice and Procedure are consistent with SMCRA and specific to informal conferences requested on new coal mine permits, while § 406(k) is neither consistent with SMCRA nor specific to the situation at hand, the regulation – not the statute – should control in this situation. The regulation should

---

<sup>3</sup> Should DEQ argue that its interpretation of its Rule of Practice & Procedure is entitled to deference, it is not. It is a common principle of administrative law is that if the plain meaning of a regulation is clear, an agency is not entitled to deference in interpreting that regulation. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). In this case, the plain meaning of “shall” is clear – DEQ must afford an opportunity for an informal conference.



be interpreted as being consistent with the federal “shall” requirement and should prevail over the inconsistent “may” requirement which is found in the statute.

Since DEQ’s own rules require DEQ to hold an informal conference, the agency must do so here. DEQ cannot lawfully bypass the informal conference stage, and the EQC should remand proceedings back to DEQ to comply with their rules and regulations (and corresponding federal law).

### **III. An Informal Conference is Required to Afford Public Participation Opportunities.**

An informal conference is required, if requested, as it affords affected landowners and other members of the public the opportunity to be heard. The informal conference is akin to a public comment hearing for an air or water permit. It not only affords the opportunity for adversarial presentations by the parties, but also provides a public comment opportunity for any members of the public that wish to attend the conference and provide comments – either positive or negative – about the permit application or the proposed mining operation.<sup>4</sup>

Here, when adjacent landowners and other impacted citizens have requested an informal conference in Sheridan County, the informal conference becomes a critical component of their public participation opportunities. By denying the informal conference, the Director has denied the rights of objecting landowners and citizens – and other members of the public who would have provided comments at the informal conference – who are unable to participate in the expensive and burdensome contested case hearing in Cheyenne the opportunity to be heard. In

---

<sup>4</sup> While DEQ’s Rules of Practice and Procedure afford opportunities for intervention in a hearing related to surface coal mining operations, that does not solve the public participation problem presented here because should a party wish to intervene it would still be burdened with participation in a contested case hearing in Cheyenne. There is no “public comment” opportunity at a contested case hearing.

doing so, the Director has bypassed an important public participation opportunity of our surface coal mining laws and regulations.

While there is no Wyoming case law specific to the subject of informal conferences for surface coal mining applications, two cases from other jurisdictions are instructive as they hold that public participation rights, and specifically informal conference opportunities, must be honored to afford impacted citizens' due process rights.

First, a case decided by the Massachusetts Supreme Court arose when a plaintiff was denied an informal conference after the Chelsea Housing Authority terminated the plaintiff's public housing benefits. Rivas v. Chelsea Housing Authority, 982 N.E.2d 1147 (Mass. 2013). The Court in Rivas recognized that the Housing Authority's grievance procedures "shall provide...[an] informal conference" before denying a tenant their property interest in public housing "to give the tenant an opportunity to resolve the dispute before it becomes a formal grievance. It is focused on resolving the problem, not adjudicating the allegation." Id. at 1155. Accordingly, the Rivas Court held that although the plaintiff received two other opportunities to present her case to the relevant authority, "as long as the settlement conference requirement remains in effect, the authority may not arbitrarily disregard it to the prejudice of an individual's rights." Id.

Rivas reinforces that when regulations require that an agency "shall" hold an informal conference, the agency does not have the discretion to deny it because that conference is a necessary part of public participation and due process rights – even if (like here) other more formal complaint resolution processes are available.

Second, the Oklahoma Supreme Court recently struck down a rule that limited participation in informal conferences before the Oklahoma Department of Mines regarding a

pending mine application to residents or property owners within one mile of the proposed mining location. Daffin v. Oklahoma Department of Mines, 251 P.3d 741, 746 (Okla. 2011).<sup>5</sup>

The plaintiff did not live within a mile of the mining site, but he lived within the projected flood plain that would be affected by mining operations and would possibly be damaged by blasting at the mine site. Id. at 745. The Oklahoma Supreme Court held that the informal conference rule under Oklahoma’s Mining Lands Reclamation Act did not provide sufficient procedural due process to the plaintiff to protect his property rights in connection with the pending mine permit application. Id. at 748. In its holding, the Court reasoned that the

...state’s interest in having a smooth administrative process for issuing mining permits is not outweighed by according due process to plaintiff and other property owners by allowing them to appear and be heard at an informal conference. Allowing the current procedures to stand, however, threatens the interest of individual property owners and deprives them of due process. Formality at the conference is not required, but they are entitled to appear and be heard.

Id. Daffin reinforces the importance of informal conferences as an avenue for landowners near a proposed mine operation to protect their property and other legally cognizable interests. Like in Daffin, the DEQ here should not have the discretion to deny the right to appear and be heard at an informal conference, notwithstanding the permissive language of state law, if denying such an opportunity would not sufficiently protect the interests of the Resource Council and other objecting parties.

In summary: (1) DEQ’s Rule of Practice and Procedure should prevail and control over the discretion afforded under § 406(k) because it is consistent with SMCRA’s mandatory requirement to hold an informal conference; (2) the “shall” in SMCRA and federal and state implementing regulations is unambiguous in that it imposes a mandatory duty; and (3)

---

<sup>5</sup> While not at issue in the case, the Oklahoma rule also requires that the agency “shall” hold an informal conference if properly requested.

SMCRA's purpose of providing ample public participation and due process opportunities supports a reading that the regulation – not the statute – is controlling as it creates a mandatory requirement for an informal conference.

#### **IV. A Contested Case Hearing Is Not Appropriate At This Time.<sup>6</sup>**

Furthermore, there are no provisions in the WEQA or DEQ's Rules of Practice and Procedure that authorize the Director to "refer" an objection to a surface coal mining permit to the EQC for a contested case hearing when that objecting party has requested an informal conference. Section 17(b) of the Rules of Practice and Procedure provide for appeals of "any administrative decision following an informal conference relating to a surface coal mining operation" to the EQC by the applicant or "any person with an interest" but there is no such provision that provides for referrals to the EQC by the Director or Administrator. Similarly, the public notice for the Brook Mine permit application instructs that "The complainants shall have a right of appeal to the Environmental Quality Council where the complaint will be heard a second time."<sup>7</sup>

By remanding these proceedings back to the DEQ for an informal conference, the parties will be able to present information to the DEQ and a decision will be made. While that decision may still result in a contested case hearing, the parties have a right to both public participation opportunities, and have the right to choose to appeal the DEQ decision to the EQC rather than the DEQ referring the matter to the EQC without consultation of the objecting parties.

---

<sup>6</sup> By making this argument, in no way is the Resource Council waiving its rights to participate in a contested case hearing should one be held.

<sup>7</sup> See W.S. §§ 35-11-406(p) which specifies the timing of decisions of the Director after informal conferences and hearings. It should be noted that both § 406(k) and § 406(p) apply to coal and non-coal permit applications and only objectors to coal permit applications are afforded the opportunity to request an informal conference. Therefore, the reading of these statutory sections can be misleading in regards to how they apply specifically to coal permits.

Additionally, an informal conference will benefit the EQC because an informal conference may resolve some of the objections and thus allow the parties to limit the scope of issues (or possibly parties) on appeal to the EQC. Regardless, as discussed above, it is the right of the parties to request an informal conference and to have the right to appeal a decision made in relation to the request for an informal conference to the EQC.

DEQ has once before denied an informal conference requested by the Resource Council. In that case, involving an objection to a renewal permit of the Eagle Butte Mine, the DEQ denied the informal conference request but did not refer the case to the EQC. *See* EQC Docket No. 15-4801, *In Re Eagle Butte (Alpha West)*, available at <https://eqc.wyo.gov/Public/ViewPublicDocument.aspx?DocumentId=10918> . In response to the denial of the informal conference, the Resource Council petitioned the EQC for review of the decision denying the informal conference and requested a contested case hearing on the objections to the permit.<sup>8</sup> While that hearing was ultimately stayed for other reasons specifically related to Alpha’s bankruptcy proceedings at the time, no party – including DEQ – raised procedural concerns about the petition and how the case found its way to the EQC. Additionally, that proceeding was not treated as a “20 day” hearing under W.S. § 35-11-406(k).

In contrast to that previous case, in these proceedings, DEQ has referred the matter directly to the EQC. This renders its decision to deny the informal conference effectively unreviewable. Additionally, it prevents the objecting parties the opportunity to petition the EQC for review of DEQ’s permitting actions, which is the normal procedure and process for an appeal of a permit. *See* W.S. § 35-11-112(a)(iv) (The EQC shall “[c]onduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license,

---

<sup>8</sup> *See* <https://eqc.wyo.gov/Public/ViewPublicDocument.aspx?DocumentId=10912>.

certification or variance authorized or required by this act.”).<sup>9</sup> Here, should DEQ have chosen to deny the request for an informal conference, it should have just told the objecting parties that and should not have referred the matter directly to the EQC. This would have afforded the objecting parties the opportunity to petition for review of DEQ’s decision regarding the informal conference, and the permit application itself, within thirty (30) days of DEQ’s decision, and procedurally would have created a different posture before the EQC as the hearing would not be bound by the “20 day” hearing requirements of W.S. § 35-11-406(k).

Therefore, should the EQC find against us that DEQ had discretion to deny the requests for an informal conference, it should at the very least stay proceedings until such time as an objecting party (or parties) petitions for review and initiates proceedings in accordance with DEQ’s Rules of Practice and Procedure.<sup>10</sup>

### **Conclusion**

For the foregoing reasons, the EQC must remand the proceedings back to the DEQ Director with instructions to hold an informal conference pursuant to Chapter 3, Section 3(a) of the Rules of Practice and Procedure.

Dated this 15th day of February, 2017.

/s/ Shannon Anderson

---

Shannon Anderson  
Powder River Basin Resource Council  
934 N. Main St., Sheridan, WY 82801  
(307) 672-5809  
[sanderson@powderriverbasin.org](mailto:sanderson@powderriverbasin.org)

---

<sup>9</sup> In such proceedings, the Council has the authority to “[o]rder that any permit, license, certification or variance be granted, denied, suspended, revoked or modified.” *Id.* at § 112(c)(2).

<sup>10</sup> The Resource Council notes that such a deadline would be February 28, 2016. If the EQC does not decide the jurisdictional questions before that time, we ask for a continuance on that deadline.

## CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2017, I served a copy of the foregoing **BRIEF REGARDING ENVIRONMENTAL QUALITY COUNCIL JURISDICTION** on the following parties by electronic mail, and through the EQC's electronic filing system, which will send a notice of electronic filing to all counsel and parties of record.

Andrew Kuhlmann  
James LaRock  
Wyoming Attorney General's Office  
[andrew.kuhlmann@wyo.gov](mailto:andrew.kuhlmann@wyo.gov)  
[james.larock@wyo.gov](mailto:james.larock@wyo.gov)  
*Attorneys for DEQ*

Todd Parfitt  
Director, DEQ  
[todd.parfitt@wyo.gov](mailto:todd.parfitt@wyo.gov)

Jeff Pope  
Isaac Sutphin  
Thomas Sansonetti  
Holland and Hart, LLP  
[JSPope@hollandhart.com](mailto:JSPope@hollandhart.com)  
[INSutphin@hollandhart.com](mailto:INSutphin@hollandhart.com)  
[tlsansonetti@hollandhart.com](mailto:tlsansonetti@hollandhart.com)  
*Attorneys for Brook Mining Co., LLC*

Lynne Boomgaarden,  
Clayton Gregersen  
Crowley Fleck PLLP  
[lboomgaarden@crowleyfleck.com](mailto:lboomgaarden@crowleyfleck.com)  
[cgregersen@crowleyfleck.com](mailto:cgregersen@crowleyfleck.com)  
*Attorneys for Big Horn Coal Co.*

Jay Gilbertz  
Yonkee & Toner, LLP  
[jgilbertz@yonkeetoner.com](mailto:jgilbertz@yonkeetoner.com)  
*Attorney for Mary Brezik-Fisher & David Fisher*

Brooke Collins  
[bpcharlie@wbaccess.net](mailto:bpcharlie@wbaccess.net)

\_\_\_\_\_/s/Shannon Anderson\_\_\_\_\_  
Shannon Anderson