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**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING**

IN RE BROOK MINE APPLICATION)
) **Docket Nos. 17-4802, 17-**
) **4803, and 17-4804**
TFN 6 2-025) **(Consolidated)**

**BIG HORN COAL COMPANY'S REPLY BRIEF REGARDING THE
SCOPE OF THE ENVIRONMENTAL QUALITY COUNCIL'S REVIEW**

Pursuant to the Environmental Quality Council's ("EQC") Briefing Order, dated June 13, 2017, Big Horn Coal Company ("Big Horn"), by and through its undersigned counsel of record, hereby submits this reply brief as to the legal parameters governing the EQC's review in this matter, as well as the appropriate burden of proof standard.¹

¹ Though technically a response brief, this brief is denoted as a reply, which corresponds to the term used in the EQC's June 13th Order.

INTRODUCTION

Big Horn presents this reply in response to the arguments and positions posited by the Wyoming Department of Environmental Quality (“DEQ”) and Brook Mining Company, LLC (“Brook Mine”).

DEQ and Brook Mine have incorrectly argued that the EQC should not consider the requirements from subsection (n) of Wyo. Stat. Ann. § 35-11-406 (sometimes referred to herein as “Section 406”) in reaching its decision in this matter, but rather only review and make a determination as to whether Brook Mine’s permit application is sufficiently complete and suitable for publication. In asserting this position, both DEQ and Brook Mine rely on that fact that Section 406(n) requires its specific findings be made by the Land Quality Division Administrator (the “Administrator”), not the EQC. Brook Mine also makes its argument in heavy reliance on its position that the EQC can only review prior actions of DEQ, and since no permit has been issued or denied, this contested case hearing does not implicate the EQC’s authority to “[c]onduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, . . . authorized or required by [the Environmental Quality Act.]” Wyo. Stat. Ann. § 35-11-112(a)(iv).

The positions asserted by DEQ and Brook Mine, however, neglect to consider the plain language of Section 406 and relevant case law as to the appropriate framework of the EQC’s decision. Section 406(p), the final subsection of Section 406, specifically requires this contested case to culminate with the EQC

issuing “a decision on the permit[.]” *Id.* at -406(p). Moreover, the case of *Grams v. Environmental Quality Council*, 730 P.2d 784 (Wyo. 1986), clearly demonstrates that the EQC is to direct the DEQ in its decision on the permit application, and that the EQC must consider Section 406(n) in directing the DEQ towards its findings and eventual issuance or denial of the requested permit.

For the reasons stated in Big Horn’s brief submitted to the EQC on June 26, 2017, and the reasons stated herein, the EQC must consider the requirements of Section 406(n) in its decision regarding these contested case proceedings.

ARGUMENT

I. Section 406 and Relevant Wyoming Case Law Make Clear the EQC’s Responsibility to Consider Section 406(n).

As all parties appear to agree, Section 406 governs both the process of filing an application for surface coal mining as well as the governing requirements for its eventual issuance or denial. All parties appear to further agree on the role and applicability of subsections (a) through (j).² The disagreement pertains to the role of the EQC in presiding over a contested case hearing contemplated by Section 406(k) and the applicability of the requirements found in Section 406(n) to the EQC’s decision in this matter.

² To be clear, no party appears to disagree with the proposition that the EQC is to evaluate Brook Mine’s permit application in light of the applicable permit requirements in Section 406(a)-(h) as well as the related DEQ Rules and Regulations pertaining to permit requirements.

Section 406 is clear. After a surface coal mining permit application is deemed complete and suitable for publication pursuant to Section 406(h) and publication is made pursuant to Section 406(j), interested persons are given the opportunity to object to “the application.” Wyo. Stat. Ann. § 35-11-406(h) – (k). These objections to “the application” are then heard either in an informal conference by the DEQ or a contested case hearing. These proceedings will result in either DEQ “tak[ing] action on the application” after an informal conference, or the EQC “issu[ing] findings of fact and ***a decision on the application***” after a contested case hearing before the EQC. *Id.* at -406(k), (p) (emphasis added). Nowhere does Section 406 indicate that either form of review is based solely on whether the permit application is complete and suitable for publication, nor does any provision of Section 406 limit objections or the EQC’s resulting review to certain portions of the statute. Rather, the language clearly mandates that in a contested case hearing such as this, the EQC must “issue a decision on the permit,” which must direct the DEQ’s issuance or denial of the permit. *Id.* at -406(p).

In support of their position, DEQ and Brook rely on: (1) the linear progression of Section 406, specifically relying on the fact that 406(n) comes after Section 406(k)’s contemplation of a contested case hearing; and (2) the fact that Section 406(n)’s required findings (which have not been made) must be made by the Administrator, not the EQC. These arguments misconstrue the clear requirements and procedure of Section 406.

It is true that Section 406 proceeds in a linear and step by step fashion. In fact, the statute governs Brook Mine's permit application from its initiation to its eventual issuance or denial. *See id.* at -406(a) – (p). However, the fact that subsection (n) comes after subsection (k) does not mean that Section 406(n) is inapplicable to this contested case hearing. Following DEQ and Brook Mine's argument, it cannot be overlooked that subsection (p), which comes after subsection (n), provides that the EQC's statutory duty following the contested case hearing is to ***issue a decision*** on the application. Section 406(p) is the very last subsection of Section 406 and the culmination of the permit application process resulting in either the permit's issuance or denial. It is axiomatic, then, that the EQC's decision on the permit must pertain to the application's eventual issuance or denial and the EQC must consider all of the legal requirements and burdens placed on Brook Mine in its quest to have its permit application granted.

Pursuant to Section 406(k), objections to a surface coal mining permit can lead to either an informal conference or contested case hearing, which then will result in a decision on the application. *Id.* at -406(k),(p). The provisions following Section 406(k) provide the applicable criteria in the contested case or informal conference and direct the outcome of these proceedings, i.e., the decision regarding the approval or denial the permit application. For a surface coal mining permit application such as this, Section 406(n) specifically provides a portion of this criteria

and the EQC must consider it in reaching its “decision on the application[.]”³ *Id.* at -406(n),(p). This is only further supported by the fact that DEQ must “issue or deny the permit” within fifteen (15) days of the EQC’s decision on the application. *Id.* at -406(p).

Notwithstanding that the DEQ must actually issue any permit and the Administrator must make the required written findings under Section 406(n), in the event of a contested case hearing, this decision and these findings must be made at the direction of the EQC and pursuant to the EQC’s “decision on the application[.]” *See id.* at -406(p). This is the exact procedure outlined by the Wyoming Supreme Court in *Grams*, 730 P.2d at 786-89 (outlining the process leading to contested case hearings under Section 406 and stating that the EQC directed the DEQ as to whether to issue the requested permit after the EQC considered whether the permit applicant met its burden to establish that its application was in “compliance with W.S. § 35-11-406(n) and all other applicable state laws”).

Critical for the EQC’s consideration, in arguing for the purported limitations on the scope of EQC’s review in this matter, neither DEQ nor Brook Mine present any authority or precedent showing similar proceedings in which the EQC’s review

³ In applying Section 406(n), the EQC is inherently tasked with reviewing all permit requirements as Section 406(n) requires the applicant to establish that the application is “in compliance with [the Environmental Quality Act] and all applicable state laws” and is “accurate and complete[.]” Wyo. Stat. Ann. § 35-11-406(n).

was limited in the manner they assert, or in which the EQC's decision resulted in anything other than a directive to the DEQ regarding permit issuance after consideration of Section 406(n). As noted, *Grams* stands in opposition to this argument. *Id.*; see also *Pfeil v. Amex Coal West, Inc.*, 908 P.2d 956, 959 (outlining the same process under Section 406, but in the context of a revision to a mine permit, and noting that after hearing the EQC issued a decision on whether to grant the permit revision).

Therefore, in conducting this contested case hearing and issuing its decision, the EQC must consider the specific requirements of Section 406(n), and all laws and regulations incorporated therein. The DEQ must then ultimately issue or deny the permit and make the Section 406(n) findings in writing at the direction of and pursuant to the EQC's decision.

II. The EQC's Delegated Authority allows it to hear this Case Contesting the Grant of Brook Mine's Permit Application.

The EQC's delegated powers and functions under Wyo. Stat. Ann. § 35-11-112 allow it to “[c]onduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, . . . authorized or required by [the Environmental Quality Act.]” *Id.* at -112(a)(iv).

The EQC's power to conduct hearings contesting the grant or denial of a permit application does not require that a permit application have been previously denied or approved by the DEQ. Rather, the statute simply requires a hearing

“contesting the grant, [or] denial” of a permit “authorized or required” by the Environmental Quality Act. This is exactly the issue before the EQC in this matter. Under the Environmental Quality Act, a permit is “required” before Brook Mine can conduct its proposed coal mining operations.⁴ Brook Mine has submitted a permit application that it seeks to have approved, and interested parties have filed objections and provided evidence at the contested case hearing citing deficiencies and thus contesting the grant of the permit application in its current condition.

CONCLUSION

In sum, although the Administrator must make the required written findings from Section 406(n) and DEQ must issue or deny the permit application, in the case of a contested case proceeding before the EQC such as this, these requirements are made at the directive of the EQC. The form and structure of Section 406 clearly outlines the process of an application for surface coal mining operations. When objections to the permit application are raised, Section 406(k) requires that either an

⁴ In its principle brief, Brook Mine argues that the terms used in Wyo. Stat. Ann. § 35-11-112(a) such as “issued or administered by” refer to prior actions by arguing that the words “issued” and “administered” are past tense forms of the underlying term. To the extent that Brook Mine would argue this same position regarding section -112(a)(iv)’s use of “authorized or required by this act” and argue that section -112(a)(iv) only applies to a hearing concerning previously granted or denied permits, this argument fails. The form of the words “authorized” and “required” do not refer to the past tense of the words “authorize” and “require.” Rather, the language of the statute clearly demonstrates that they simply refer to the fact that the relevant authorization or requirement stems from the Environmental Quality Act.

informal conference or contested case hearing must occur. In either event, the remaining portions of Section 406 clearly indicate that in either of these proceedings will result in the ultimate decision as to the issuance or denial of the permit and provide for the criteria in making this decision. *See* Wyo. Stat. Ann. § 35-11-406(k) – (p). As a contested case hearing before the EQC regarding an application for surface coal mining operations, it is the role of the EQC to review Section 406(n) and issue a decision on the application. Then, pursuant to the direction of the EQC’s decision, the DEQ must perform its duties to either issue or deny the permit within fifteen (15) days and issue any required Section 406(n) findings in writing. This process and procedure is in complete accord with not only Section 406, but also relevant case law and the statutory powers and duties of the EQC.

Finally, Brook Mine admits that it bears the burden of proof in this matter and acknowledges that the EQC may independently weigh the evidence presented without particular deference to DEQ’s positions. *See Brook Mine’s Brief on Statutes and Regulations that the Council must Consider*, p. 10.

For the reasons stated herein, and those presented in Big Horn’s principle brief addressing this topic, the EQC should reject the limited review asserted by DEQ and Brook Mine.

[Signature page to follow.]

DATED: June 30, 2017.

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CERTIFICATE OF SERVICE

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