

Shannon Anderson (Wyo. Bar No. 6-4402)
Powder River Basin Resource Council
934 N. Main St., Sheridan, WY 82801
sanderson@powderriverbasin.org
(307) 672-5809

FILED

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Jim Ruby, Executive Secretary
Environmental Quality Council

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

In re Applications for Coal Mine)	
Permit Transfers – PT0214 & PT0428)	EQC Docket No. <u>18-4805</u>
Blackjewel, LLC)	
)	

**OBJECTIONS AND PETITION FOR HEARING ON THE PROPOSED TRANSFER OF
COAL MINE PERMITS PT0214 (BELLE AYR MINE) AND PT0428 (EAGLE BUTTE
MINE) FROM CONTURA COAL WEST TO BLACKJEWEL, LLC**

INTRODUCTION

1. The Powder River Basin Resource Council (“Resource Council” or “PRBRC”) ¹ respectfully objects to the proposed transfer of coal mine permits PT0214 for the Belle Ayr Mine and PT0428 for the Eagle Butte Mine to Blackjewel, LLC.
2. The Resource Council petitions the Environmental Quality Council (“EQC” or “Council”) to hold a hearing on the objections.²

STATEMENT OF JURISDICTION

3. Applications for transfer of a coal mine permit follow the same process and procedure as a new coal mine application. DEQ Coal Rules & Regulations Ch. 12 § 1(b) (“All

¹ The Resource Council’s address is 934 N. Main St., Sheridan, WY 82801. All correspondence can be addressed to the organization’s undersigned counsel, Shannon Anderson, via the office address or email: sanderson@powderriverbasin.org.

² The current regulations are unclear on how a party can request to bypass the step of an informal conference. In an abundance of procedural caution, this set of objections and petition for hearing are being simultaneously submitted to the DEQ’s Land Quality Division Administrator as instructed in the public notice and the EQC.

procedural requirements of the Act and the regulations relating to review, public participation, and approval or disapproval of permit applications, and permit term and conditions shall, unless otherwise provided, apply to . . . permit transfer.”). This means, public participation opportunities are governed by section 406(k) of the Environmental Quality Act (“WEQA”), which provides that a public hearing before the EQC may be requested.

4. Additionally, section 406(o) of the WEQA affords an opportunity for a hearing on whether the permit applicant or operator “controls or has controlled mining operations with a demonstrated pattern of willful violations of such nature and duration with such resulting irreparable harm to the environment to indicate reckless, knowing or intentional conduct.” Specifically, section 406(o) provides that the EQC has the authority to make this “finding,” in addition to the “director.” W.S. § 35-11-406(o). As discussed below, the Resource Council objects to the transfer of permits to Blackjewel on these grounds and requests a hearing under Section 406(o) because Revelation Energy, a company under common ownership and control with Blackjewel, has a long and severe history of environmental and worker safety violations at its mining operations in Appalachia.

5. These objections and petition for hearing are timely filed within thirty (30) days of the last public notice for the proposed permit transfers.³

STATEMENT OF FACTS AND LAW

6. Applications for a permit transfer are governed by section 408 of the WEQA and associated regulations.

7. Section 408 provides:

³ DEQ’s public notice on the proposed permit transfers sets the deadline for objections as November 29, 2018. See <https://content.govdelivery.com/accounts/WYDEQ/bulletins/217e155> and <https://content.govdelivery.com/accounts/WYDEQ/bulletins/217d82d>

A permit holder desiring to transfer his permit shall apply to the administrator. The potential transferee shall file with the administrator a statement of qualifications to hold a permit as though he were the original applicant for the permit and shall further agree to be bound by all of the terms and conditions of the original permit. The administrator shall recommend approval or denial of the transfer to the director. No transfer of a permit will be allowed if the current permit holder is in violation of this act, unless the transferee agrees to bring the permit into compliance with the provisions of this act.

8. As such, in order to transfer a coal mine permit, the current operation must be in compliance with all of the provisions of the WEQA and its associated regulations applying to coal mines, and the proposed transferee must affirmatively demonstrate that it is qualified to hold a coal mine permit. As explained in detail below, Blackjewel has failed to meet either requirement.

Objection 1: The Belle Ayr Mine Does Not Meet Reclamation Bonding Standards

9. One of the main requirements of the WEQA for coal mine operations is adequate bonding to cover the full cost of third-party reclamation work should a company default on its obligations at any time during the life of the mine. *See* DEQ Coal Rules & Regulations Ch. 12 § 2.

10. As discussed in the related EQC Docket No. 18-4803,⁴ in the case of the Belle Ayr Mine, \$26,749,000 of the \$119,068,500 reclamation bond (about 22% of the bond amount for the mine) is guaranteed through a real property collateral bond.

11. Contura has transferred the real property to secure the bond to Blackjewel, and Blackjewel is proposing to continue Contura's real property bond. *See* DEQ Bond Acceptances for PT0214, Aug. 29, 2018, attached as Exhibit 1.

12. According to DEQ rules, in order to guarantee reclamation work through a real property collateral bond, an appraisal "selected by the Administrator" must be conducted. The

⁴ Given common questions of law and fact, the Resource Council supports consolidation of the two dockets for presentation at a single hearing.

appraisal is used to value the property for purposes of the bond, which is set at “the difference between the fair market value and any reasonable expense anticipated by the Department in selling the property.” DEQ Coal Rules & Regulations Ch. 11.

13. As explained in EQC Docket No. 18-4803, an appraisal was conducted for Contura by Robert J. Brockman on July 7, 2017. The appraisal was “recertified” on July 18, 2018, but neither the fair market value nor the bond amount was updated. No public information in the record shows the appraiser was selected by DEQ, as required by the regulations.

14. It does not appear that DEQ required an appraisal conducted for Blackjewel as part of the permit transfer application.⁵

15. Additionally, no evidence is available to show the difference between the fair market value and any reasonable expense anticipated in selling the property.

16. Since the appraisal is held as confidential, the Resource Council searched the Campbell County Assessor’s office website to obtain information on property owned by Contura (proposed to be transferred to Blackjewel). Contura owns two parcels of land in Campbell County – Parcel 10871 and Parcel 12498. Parcel 10871 is a 32,611 acre parcel with no improvements and a market land value of \$1,809,122. Exhibit 2. Parcel 12498 is a 17,390 acre parcel with improvements valued at \$535,005 and land valued at \$1,289,096. Exhibit 3. Together, the market value for these parcels is \$3,633,223 – far below the approximately \$27 million from the appraisal.

17. These parcels are included in Contura’s “Exhibit A to Mortgage,” provided to the DEQ for Bond No. CBC-001, attached as Exhibit 4. While additional surface land and mineral

⁵ The Resource Council has an outstanding public records request for all correspondence between DEQ and the coal companies related to the appraisal(s).

acres are also included, it is unclear how they could make up the over \$20 million difference between the County's estimated market value for the two large parcels and the bond amount.

18. The value of this property is also questioned by the terms and conditions of the sale of Contura's property to Blackjewel. According to Contura's press release, the company did not receive an up-front payment for its sale and instead merely received deferred consideration of \$50 million "through various royalty payments" for the entirety of the mines and associated properties, including all property guaranteeing the reclamation bond for the Belle Ayr Mine. Contura Press Release, Dec. 11, 2017, attached as Exhibit 5. Even the companies have not shown a \$27 million market value for the property.

19. Additionally, the recording of the properties do not meet requirements to ensure the state's interest is secure and protected. Resource Council staff member Robin Bagley physically visited the Campbell County Clerk's Office and was unable to find any filed lien or mortgage on the properties listed in Contura's "Exhibit A." Declaration of Robin Bagley ¶¶ 7-9, filed in Docket No. 18-4803. While it could be that a lien or mortgage on behalf of the state is filed in another county, Campbell County does not have records. *Id.* at ¶ 10. This likely means the state is unprotected and the bond may not meet requirements of DEQ's regulations. DEQ Coal Rules & Regulations Ch. 11 § 1(b)(i), requiring "A perfected, first lien security interest in real property located within the State of Wyoming, in favor of the Wyoming Department of Environmental Quality." *See also* W.S. § 35-11-417(g) (allowing the Council to enact regulations for real property bonds provided there is a "perfected first lien security interest in the real property in favor of the department").⁶

⁶ These DEQ regulations are a part of the self-bonding regulations that will be brought before the EQC in early 2019.

Objection 2: Reclamation Bond Information is Being Illegally Withheld from Public Inspection, Affecting the Rights to Object to the Permit Transfer

20. The appraisal discussed above is being held as confidential by DEQ, upon request by Blackjewel. Exhibit 6. As such, the appraisal was not available for public inspection and review as part of the public participation opportunities for the permit transfer. It is therefore impossible for the Resource Council – or any other interested party – to meaningfully participate and comment on the permit renewal.

21. The appraisal should be disclosed pursuant to the WEQA, which provides that “Unless the information would “divulge trade secrets” “[a]ny records, reports or information obtained under this act or the rules, regulations and standards promulgated hereunder are available to the public.” W.S. § 35-11-1101(a).

22. Here, DEQ failed to comply with legal authority interpreting the Wyoming Public Records Act (“WPRA”) and its own records requirements holding the WPRA should “receive a liberal construction in favor of disclosure and against withholding, and ‘exemptions’ will be ‘construed narrowly.’” Sheridan Newspapers, Inc. v. City of Sheridan, 660 P.2d 785, 794 (Wyo. 1983) (quoting Laramie River Conservation Council v. Dinger, 567 P.2d 731, 733 (Wyo. 1977)). The Wyoming Supreme Court “recognize[s] that the statutory language of the WPRA creates a presumption that the denial of inspection of a public record is contrary to public policy.” Laramie County Sch. Dist. No. One v. Cheyenne Newspapers, Inc., 2011 WY 55, ¶ 2, 250 P.3d 522, 525 (Wyo. 2011).

23. DEQ failed to demonstrate how the appraisal contained “trade secrets” justifying its confidential status. Under the WPRA, a trade secret is “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or

substantial effort.” Pub. Citizen Health Research Group v. Food & Drug Admin., 704 F.2d 1280, 1288 (D.C. Cir. 1983) (addressing parallel federal statutory language). The appraisal meets none of these components.

24. While it is not recognized in the WEQA, DEQ also relies on its determination that the appraisal contains “confidential commercial information” justifying withholding the document from public review and inspection. Even if DEQ can lawfully withhold records based on “confidential commercial information” or “CCI” the appraisal does not meet the standards required by the WPRA.

25. To determine whether commercial information is confidential under the WPRA, this Wyoming Supreme Court adopted the two-part test established in the FOIA context by the United States Court of Appeals for the D.C. Circuit in National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). See Sublette County Rural Health Care Dist. v. Miley, 942 P.2d 1101, 1103-04 (Wyo. 1977). Under this test, the party seeking to justify non-disclosure must demonstrate that the allegedly confidential information “must be likely either: (1) to impair the government’s future ability to obtain necessary information; or (2) to cause substantial harm to the competitive position of the persons providing the information.” Id. at 1103 (citing Nat’l Parks, 498 F.2d at 770). The first prong of this test is inapplicable here because Wyoming’s collateral bonding rules mandates an appraisal of the property to be prepared and submitted to DEQ. Where disclosure is mandatory, there is no danger of impairing the government’s ability to obtain the required information. See Nat’l Parks, 498 F.2d at 770.

26. Accordingly, the appraisal may be withheld only if disclosing the information would likely cause substantial harm to the competitive position of the entity providing the information. See id. In applying this test, “[c]onclusory and generalized allegations of

substantial competitive harm ... are unacceptable and cannot support an agency's decision to withhold requested documents." Pub. Citizen, 704 F.2d at 1291. However, "conclusory and generalized allegations" are exactly what Blackjewel – and in turn DEQ – relies upon. See Exhibit 6.

27. The WPRA requires more. In order to justify its claim of CCI, Blackjewel must show how the appraisal, if disclosed, could be used by a competitor to cause Blackjewel substantial harm.

28. Blackjewel cannot make such a showing because the appraisal was actually prepared for and used by a competitor: Contura. The appraisal is not Blackjewel's and as such the company has no claim to its confidentiality.

29. Furthermore, the Public Records Act provides that final real estate appraisals "made for the state" "relative to the acquisition of property or any interest in property for public use" should be disclosed to the public once the property or property interest has transferred. W.S. § 16-4-203(b)(iv). In this case, a fair reading of that section of the Public Records Act means that since Contura, and now Blackjewel, has finalized its transfer of interest in the property to the state for "public use," the appraisal should be disclosed to the public.

Objection 3: Violations of Surface Mining Operations with Common Ownership and Control Render Blackjewel Unqualified to Receive the Wyoming Permits

29. The WEQA requires a permit applicant for a surface coal mining permit application to include "a schedule listing all notices of violation which resulted in enforcement action of this act, and any law, rule or regulation of the United States, or of any department or agency in the United States pertaining to air or water environmental protection incurred by the applicant in connection with any surface coal mining operation during the three (3) year period prior to the date of application." W.S. § 35-11-406(a)(xiv). This schedule must demonstrate that

“all surface coal mining operations owned or controlled by the applicant are currently in compliance with this act and all laws referred to in paragraph (a)(xiv) of this section or that any violation has been or is in the process of being corrected to the satisfaction of the authority, department or agency which has jurisdiction over the violation.”

30. As discussed above, these requirements apply to a permit transferee because that transferee must demonstrate it is “qualified” to receive a coal mine permit.

31. The DEQ typically checks violations of surface coal mining operations under common ownership and control as the applicant through the Office of Surface Mining Reclamation and Enforcement’s (“OSMRE”) Applicant Violator System (“AVS”). AVS is a computer database updated from all coal mining regulating states and OSMRE itself.⁷ If an applicant fails an “AVS check” it is unable to receive a permit. An “AVS check” is a requirement of SMCRA in addition to the WEQA.

32. Blackjewel has common ownership and control with a company called Revelation Energy. Revelation and Blackjewel are both owned by Jeff Hoops, and as such, all Revelation violations impute to Blackjewel. See Secretary of State registration for Blackjewel, attached as Exhibit 7.

33. Through a search on November 19, 2018, Revelation has 41 violations. Exhibit 8. The vast majority of the violations, including one as recent as October 22, 2018, are significant and severe “state cessation orders,” meaning a state regulator has ordered Revelation to cease part of its operations in order to comply with coal mining laws and regulations.

34. In order to still qualify for a permit with these violations, Blackjewel must demonstrate that all violations are “in the process of being corrected to the satisfaction of the authority, department or agency which has jurisdiction over the violation.” While the AVS

⁷ See <https://www.osmre.gov/programs/avs.shtm>

system identifies the violations as “conditional,” there is no evidence provided in Blackjewel’s application to DEQ to demonstrate if and how the violations are being corrected. The AVS system identifies a violation as “conditional” merely if the violator has appealed the violation, meaning in some cases the operator objects to the violation in the first place and is not correcting it. Blackjewel is not qualified to receive a permit until it demonstrates that the violations have been corrected.

35. In addition to requiring a check of current violations, the WEQA also prevents a coal mine permit to be issued to an operator who “controls or has controlled mining operations with a demonstrated pattern of willful violations of such nature and duration with such resulting irreparable harm to the environment as to indicate reckless, knowing or intentional conduct.” W.S. § 35-11-406(o). This requirement is above and beyond the applicant violator system check described above and it mirrors federal SMCRA regulations contained in 30 C.F.R. § 774.11(c). While the AVS check renders an applicant ineligible to receive a permit on a temporary basis, section 406(o) renders an applicant *permanently* ineligible to receive a permit.

36. Based on information provided in the AVS system, as well as research conducted on Blackjewel’s environmental and worker safety violations, the Resource Council has reason to believe that these requirements have been met and Blackjewel should be ineligible to receive a surface coal mining permit anywhere in the country, including Wyoming.

37. A compilation of a sampling of this research is provided as Exhibit 9 to this petition. The information shows a long history, and pattern and practice, of knowing and intentional violations. It also shows a pattern and practice of unsafe workplace conditions, resulting in at times death of miners. This information provides a sufficient basis for the EQC to hold an evidentiary hearing under section 406(o).

ISSUES PRESENTED FOR REVIEW AT THE HEARING

38. Paragraphs 1-37 above are hereby incorporated.

39. DEQ cannot lawfully renew the permit for the Belle Ayr Mine unless the application demonstrates that the coal mine operation is in compliance with all applicable laws and regulations, including compliance with reclamation bond requirements. The agency has failed to do so in this case and cannot do so until the appraisal is provided to the public.

40. The WEQA requires that unless the information would “divulge trade secrets” “[a]ny records, reports or information obtained under this act or the rules, regulations and standards promulgated hereunder are available to the public.” W.S. § 35-11-1101(a). DEQ cannot lawfully withhold the appraisal report – or at the very least it has an obligation to make available a redacted version of the report to the public.

41. Blackjewel is ineligible and unqualified to receive a coal mining permit because of a pattern or practice of willful violations.

42. The Resource Council reserves the right to supplement its objections and grounds for hearing based on discovery provided by DEQ and Blackjewel as part of this hearing process.

43. The Resource Council also reserves the right to provide additional evidence and support for its objections.

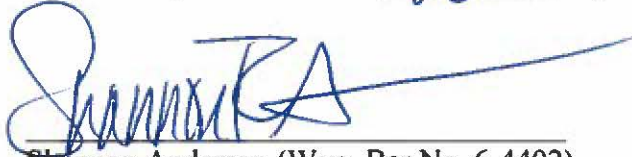
PRAYER FOR RELIEF

44. For the reasons set forth above, the EQC should schedule and hold a hearing on the Resource Council’s objections.

45. After the hearing, the EQC should deny the transfer of the Belle Ayr and Eagle Butte coal mine permits and should submit that decision to DEQ for its action under 406(p) of the WEQA.

46. The EQC should also require the DEQ to publicly disclose the appraisal and make it available for public inspection under the WEQA and the Wyoming Public Records Act.

Respectfully submitted this 25th day of November, 2018.

A handwritten signature in blue ink, appearing to read "Shannon Anderson", with a long horizontal line extending to the right.

Shannon Anderson (Wyo. Bar No. 6-4402)
Powder River Basin Resource Council
934 N. Main St., Sheridan, WY 82801
sanderson@powderriverbasin.org
(307) 672-5809

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of November, 2018, the foregoing PETITION was served on the following parties via USPS registered mail, return receipt requested.

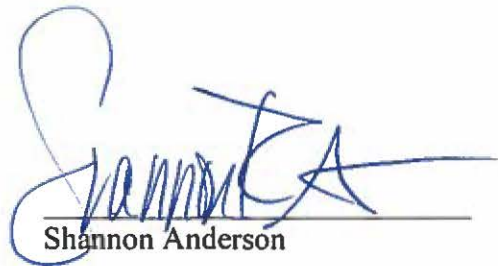
Meghan Lally, Chair
Wyoming EQC
2300 Capitol Ave.
Hathaway Bldg. 1st, Room 136
Cheyenne, WY 82002
eqc-all@wyo.gov

Todd Parfitt, Director
Wyoming DEQ
200 W. 17th St.
Cheyenne, WY 82002
Todd.parfitt@wyo.gov

Kyle Wendtland, Administrator
DEQ Land Quality Division
200 W. 17th Street, Suite 10
Cheyenne, WY 82002

James Kaste
Wyoming Attorney General's Office
Pioneer Building, 2nd Floor
2424 Pioneer Avenue
Cheyenne, WY 82002

Eric Thomas Frye
General Counsel
Blackjewel, LLC
1051 Main St.
Milton, WV 25541



Shannon Anderson