

Isaac N. Sutphin (Wyo. State Bar No. 6-3711)
Jeffrey S. Pope (Wyo. State Bar No. 7-4859)
HOLLAND & HART LLP
2515 Warren Avenue, Suite 450
P.O. Box 1347
Cheyenne, WY 82003-1347
Telephone: (307) 778-4200
insutphin@hollandhart.com
jspope@hollandhart.com

ATTORNEYS FOR CONTURA COAL WEST, LLC

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

IN THE MATTER OF PERMIT RENEWAL)	OAH DOCKET NO. 19-004-220
APPLICATION OF)	C103
CONTURA COAL WEST, LLC.: P20214;)	DOCKET NO. DEQ/EQC 18-4803
)	
AND IN THE MATTER OF THE)	
APPLICATIONS FOR COAL MINE PERMIT)	
TRANSFERS OF)	
BLACKJEWEL, LLC.: PT0214 & PT0428;)	DOCKET NO. DEQ/EQC 18-4805

CONTURA COAL WEST LLC’S TRIAL BRIEF

I. Introduction

This hearing consolidates challenges to two Department of Environmental Quality (DEQ) actions: 1) the approval of Contura Coal West, LLC’s (Contura) application to renew the permit for the Belle Ayr Mine; and 2) the approval for Contura and Blackjewel LLC (Blackjewel) to publish their request to transfer the permits for the Belle Ayr and Eagle Butte mines from Contura to Blackjewel. Powder River Basin Resource Council (PRBRC) is the sole objector to these actions.

PRBRC has challenged DEQ’s decision to renew Contura’s permit for the Belle Ayr mine by alleging that a portion of the reclamation bond is insufficient. Contura offered up two ranches in Northeast Wyoming, totaling over 40,000 acres, as collateral for approximately \$26

million of its reclamation bond. PRBRC contends that the real property's appraised value is less than that amount and therefore does not sufficiently cover the relevant portions of the reclamation bond.

PRBRC has objected to the transfers of the Eagle Butte and Belle Ayr mine permits on two grounds. First, it repeats the argument that the real property used as collateral for reclamation bonds appraises too low to cover the relevant portions of the bond. Second, PRBRC alleges that Blackjewel has ties to Revelation Energy, a company that has violated environmental laws as part of operating mines in Kentucky, West Virginia, and Virginia.

To assist the Council in resolving PRBRC's objections, this brief will cover: 1) the procedural history of the Belle Ayr renewal application and the transfer applications for Belle Ayr and Eagle Butte Mines; 2) the process for renewing and transferring permits; 3) the Council's role at the upcoming hearing; 4) the law governing the issues raised by PRBRC; and 5) the evidence relevant to those issues. Based on the law and facts, PRBRC's challenges should fail because no relevant, admissible, or competent evidence exists to support them.

II. Procedural History

1. Contura's Application to Renew the Permit for the Belle Ayr Mine

On May 24, 2018, Contura submitted its application to renew the Belle Ayr Mine's permit. (*See* DEQ Exhibit 1.) The application provided:

- A list of all people and entities with interest in lands, water, or minerals within the permit area;
- A list of all current licenses and permits;
- A three-year history of all violations;
- A list of all permits and pending applications;

- Bonding information;
- A list of all principal officers and directors; and
- The index of change sheet for the original permit file. (*Id.*)

On July 3, 2018, DEQ determined the application complete and ordered Contura to publish notice of the application. (*Id.* at 140.) Contura did so. (*Id.* at 110-11.) On August 10, 2018, DEQ deemed the application “technically complete” and ordered Contura to publish notice of the renewal for public comment. (*Id.* at 135-36.)

After publication, PRBRC objected to the renewal based on the use of real property as collateral for portions of Contura’s reclamation bond obligations, lack of disclosure of the appraisal supporting the use of real property as collateral, and concerns about Contura’s pending sale of its mining assets in Wyoming to Blackjewel. (PRBRC’s Obj. & Pet. for Hearing.) As part of its objections, PRBRC requested an informal conference. (PRBRC’s Obj. & Pet. for Hearing, Ex. 1.) On October 23, 2018, DEQ denied PRBRC’s request for an informal conference and renewed Contura’s permit. (PRBRC’s Obj. & Pet. for Hearing, Ex. 3.) PRBRC then petitioned the Council to hear its objections on the renewal of the permit for the Belle Ayr Mine.

2. Blackjewel’s Application to Transfer the Permits for the Belle Ayr and Eagle Butte Mines.

In 2018, Blackjewel submitted its application to transfer the mine permit for the Eagle Butte Mine from Contura to Blackjewel. (DEQ Exhibit 3.) The application included:

- Blackjewel’s license to mine;
- Applicable surface owner consents;
- Blackjewel’s corporate information;
- A list of adjacent surface owners;

- Statement of Compliance and Right to Entry;
- A list of permits and pending permit applications; and
- Reclamation bonding information.

(*Id.*) DEQ approved the proposed reclamation bond. (*Id.* at 53.) DEQ found the transfer application technically complete and ordered the applicants to publish notice of the application. (DEQ Ex. 12.)

In 2018, Blackjewel submitted its application to transfer the mine permit for the Belle Ayr Mine from Contura to Blackjewel. (DEQ Ex. 2.) It included the same information as the transfer application for the Eagle Butte Mine. DEQ also found this application technically complete and ordered the applicants to publish notice of the application. (DEQ Ex. 13.) After publication, the PRBRC objected to both applications. On November 30, 2018, PRBRC filed its Objections and Petition for Hearing with this Council. (PRBRC’s Obj. & Pet. for Hearing.)

III. The Permit Renewal and Transfer Process.

DEQ regulations make the permitting statutes and regulations relating to “review, public participation, and approval or disapproval of permit applications” applicable to permit renewals and transfers. Wyo. Admin. Code 020.0006.12 § 1(b). Section 35-11-406 of the Wyoming Environmental Quality Act (Act) sets out the process for issuing a surface coal mine permit:

- A permit application is filed. Wyo. Stat. Ann. § 35-11-406(a)-(c);
- DEQ makes a “completeness” determination. *Id.* at (d);
- DEQ considers the technical sufficiency of the application and requires the applicant to submit any additional information required to address any “deficiencies,” as the Act defines that term. *Id.* at (h);

- Once DEQ determines the application is technically complete, the applicant is notified that it should publish the application for public notice and comment. *Id.*;
- If anyone objects to the application and requests an informal conference, the Director may hold one within 20 days after the end of public comment. *Id.* at (k);
- If a requested informal conference is denied, the Council must hold a public hearing on objections within 20 days after the end of public comment. *Id.* The Council reviews objections to identify whether any objections point to a “deficiency” that “preclude correction or compliance by stipulation in the approved permit to be issued by the director....” *See* Wyo. Stat. Ann. § 35-11-103(e)(xxiv) (thereby allowing the Director to address objections as he sees fit before issuing or denying a permit);
- The Council provides its findings and conclusions on any objections to the Director. *Id.* at § 406(p); and
- The Director then decides whether to grant or deny a permit and whether to impose stipulations or conditions on the permit based upon any findings of the Council on permit objections. Wyo. Stat. Ann. 35-11-406(p).

A party seeking to renew or transfer a permit goes through largely the same process.

A valid surface mining permit holder has a right to “successive renewal” of a permit when it expires. Wyo. Stat. Ann. § 35-11-405(e). The permit holder must submit an application that provides any updated or revised information, ensures the mining operations are “in compliance with applicable laws and regulations,” and does not substantially jeopardize existing

responsibilities. *Id.* The party must file its application 120 days before the current permit term expires and include:

- (A) A statement of the name and address of the permittee, the term of the renewal requested, the permit number, a description of any changes to the matters set forth in the original application for a permit or prior permit renewal;
- (B) A copy of the public notice and proof of publication;
- (C) Evidence that the bond and a liability insurance policy will be provided;
- (D) Additional revised or updated information required by the Administrator; and
- (E) If an application for renewal includes any proposed revisions to the mine or reclamation plans, such revisions shall be identified and subject to the requirements of Chapter 13.

Wyo. Admin. Code 020.0006.12 § 1. DEQ then decides if the application is complete and without deficiency. Wyo. Stat. Ann. § 35-11-406(h). If DEQ makes those findings, then the party publishes the application for public comment. *Id.*

A permit holder who wishes to have its permit transferred to another party must also apply to the administrator of DEQ's Land Quality Division. Wyo. Stat. Ann. § 35-11-408. The potential transferee must file "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." *Id.* DEQ regulations require that the statement of qualifications includes obtaining a renewal bond and providing the legal, financial, compliance, and related information required of the original permit applicant. Wyo. Admin. Code 020.0006.12 § 1(b)(ii); *See also* Wyo. Admin. Code 020.0006.2 § 2. DEQ then decides if the

application is complete and without deficiency. Wyo. Stat. Ann. § 35-11-406(h). If DEQ makes those findings, then the party publishes the application for public comment. *Id.* at (h).

To approve a transfer application, the Land Quality Division must find in writing that the potential transferee:

- is eligible to receive a permit in accordance with Chapter 12, Section 1(a)(x), (xi) and (xii);
- has submitted a performance bond or other guarantee, or obtained the bond coverage of the original permittee; and
- meets any other requirements specified by the Division.

Id. The findings under Chapter 12, Section 1 include evaluating whether the transfer applicant has any unabated violations of environmental laws, including violations tied to subsidiaries or related entities. Wyo. Admin. Code 020.0006.12 § 1(a)(x). If the applicant has violations, DEQ can grant a provisional permit under certain circumstances, including if the applicant is pursuing a good faith challenge to the validity of the alleged violation. *Id.* at (x)(D)(I)-(III); *See* 30 C.F.R. § 773.14 (allowing the same provisional permits under the same circumstances).

Here, the parties' applications have reached the final step in the process, a hearing before the Council.¹

¹ DEQ has approved Contura's permit renewal. So it is unclear if the Council should approach that part of the hearing as an appeal from a final DEQ decision. Should it do so, then PRBRC bears the burden of proving that DEQ should NOT have approved the renewal application. If the Council treats this as a public hearing under Section 406(k), Contura bears the burden of proof. As explained in Contura's disclosure statement, the objections to the renewal and transfer are the same so, it does not matter who has the burden because Contura will carry it regardless.

IV. The Council's role at a public hearing.

The Council's authority flows from the Wyoming Environmental Quality Act. *Amoco Prod. Co. v. State Bd. of Equalization*, 12 P.3d 668, 673 (Wyo. 2000) (explaining an agency's power depends upon statutes, so "they must find within the statute warrant for the exercise of any authority which they claim.") As a result, the Council can exercise only the authority that the Wyoming legislature granted to it. *Id.*; *Platte Dev. Co. v. State, Env'tl. Quality Council*, 966 P.2d 972, 975 (Wyo. 1998). Under the Environmental Quality Act, the Council conducts hearings in "any case contesting" the administration of the Act. Wyo. Stat. Ann. § 35-11-112(a), (a)(iii), (a)(iv), (b)(ii). *See also Wyo. Dep't of Env'tl. Quality v. Wyo. Outdoor Council*, 2012 WY 135, ¶ 28, 286 P.3d 1045, 1052-53 (Wyo. 2012) (stating the scope of the Council's authority).

Specifically, the Act authorizes the Council to conduct a hearing in which a party contests "the administration or enforcement of any law, rule, regulation, standard or order issued or administered by the department or any division thereof...." Wyo. Stat. Ann. § 35-11-112(a). In deciding what this authority allows the Council to review, the key words for the Council are "issued or administered." Both are past tense, meaning they refer to actions DEQ has already taken. *See Merriam-Webster's Dictionary.*² As a result, the Council reviews past actions DEQ has taken to administer the renewal and transfer application process.

For the permit renewal and transfer applications at issue, DEQ deemed them complete and found them without deficiencies (also known as technically adequate) and suitable for publication. *See id.* at (a)-(j). DEQ also approved Contura's renewal application. Thus, the Council's authority in this contested case is to issue findings of fact and conclusions of law on

² <https://www.merriam-webster.com/dictionary/administer>; <https://www.merriam-webster.com/dictionary/issue>.

PRBRC's objections about DEQ's past actions for the relevant applications. The Council, however, does not consider potential future DEQ action, including the state decision document.

As a result, the Council does not need to consider the entire universe of statutes and regulations applicable to the coal mine permit renewal or transfer process. The Council need only consider those related to PRBRC's objections.

V. Law applicable to the issues raised by PRBRC.

For both the permit renewal and permit transfers, PRBRC argues that the real property used as collateral for portions of the reclamation bond for the Belle Ayr Mine is not worth enough to cover that portion of the bond. This requires the Council to evaluate the regulations governing appraised property under the state's self-bonding program, which includes the use of collateral in place of surety or cash bonds. *See* Wyo. Stat. Ann. § 35-11-417(d) (allowing for bonding other than surety bonds). If a permit holder or applicant will use property as collateral, the Land Quality Administrator may have the property appraised. Wyo. Admin. Code 020.0006.11 § 4(a)(iv). The Administrator may appoint the appraiser or appraisers that are "mutually acceptable to the Administrator and the operator." *Id.* "The findings of the appraisal shall be final and binding unless both parties agree to a reappraisal." *Id.*

For the permit transfer applications, PRBRC argues that Blackjewel has ties to a company, Revelation Energy, that has willfully violated environmental laws. This objection requires the Council to consider a single regulation. As part of its required findings for a permit transfer, DEQ cannot award a permit if "[t]he applicant or his operator controls or has controlled mining operations with a demonstrated pattern of willful violations as outlined in W.S. § 35-11-406(o)." Wyo. Admin. Code 020.0006.12 § 1(a)(x)(C). Section 406(o) states:

No permit shall be issued to an applicant after a finding by the director or council, after opportunity for hearing, that the applicant or operator specified in the application 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.

Wyo. Stat. Ann. § 35-11-406(o). Violation as it appears in the regulations and statute refers to a failure to comply with federal or state law “pertaining to air or water environmental protection,” a notice of violation, or state cessation orders. Wyo. Admin. Code 020.0006.1 § 2(fs). While the Environmental Quality Act does not define willful, the regulations implementing the Surface Mining Control and Reclamation Act (SMCRA) distinguish between the way violations occur. *See* 30 C.F.R. 723.13(b)(3). Those include no negligence, negligence, and a greater degree than negligence. *Id.* Put simply, a violation by itself does not mean intentional.

VI. The Relevant Evidence applicable to PRBRC’s objections.

To resolve the issues raised by PRBRC, the Council need only consider a limited set of evidence. To resolve whether the real property used as collateral is worth enough to cover portions of the reclamation bond, the Council must evaluate the appraisal done on that real property. The Council will see the appraisal, hear the method used, and review the data supporting the conclusion reached in the appraisal. The Council, however, will not hear evidence to dispute the appraisal. PRBRC has no evidence that the appraisal is incorrect. PRBRC has no evidence of the actual value of the real property. Furthermore, PRBRC has no expert to contradict the appraisal.

The evidence necessary to resolve PRBRC’s claims about violations of environmental laws is equally clear and uncontested. The Council will see the reports from the Office of Surface Mining’s Applicant Violator System (AVS), which tracks reported violations in all

states. The most recent report shows that neither Blackjewel nor Revelation Energy have any outstanding violations. Instead, the AVS indicates only conditional violations, which, as discussed above, does not preclude granting a permit transfer. Contrary to PRBRC's assertion, the Council does not have to consider the nature of the violations or whether DEQ investigated them. No Wyoming statute or regulation requires DEQ to investigate the nature of a violation. Rather, DEQ can rely on AVS reports to decide if an applicant's violations disqualify it from receiving a permit, as can the Council.

VII. Conclusion

The Council has a straightforward task in this case—evaluate the appraisal and AVS reports. If the appraisal proves sound and the AVS report shows only conditional violations, then DEQ acted lawfully and the permit renewal and transfer applications should proceed.

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/s/ Jeffrey S. Pope

Isaac N. Sutphin (Wyo. State Bar No. 6-3711)

Jeffrey S. Pope (Wyo. State Bar No. 7-4859)

HOLLAND & HART LLP

2515 Warren Avenue, Suite 450

P.O. Box 1347

Cheyenne, WY 82003-1347

Telephone: (307) 778-4200

insutphin@hollandhart.com

jspope@hollandhart.com

ATTORNEYS FOR
CONTURA COAL WEST, LLC

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2019, I served the foregoing by placing a true and correct copy via E-mail to the following:

Wyoming Environmental Quality
Council - (ORIGINAL)
Attn: Joe Girardin
2300 Capitol Avenue
Hathaway Building, Room 136
Cheyenne, WY 82002

Shannon Anderson
Powder River Basin Resource Council
934 N. Main Street
Sheridan, WY 82801
*Attorney for Powder River Basic Resource
Council*

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

(Email and Hand Delivery)
Bernard Haggerty, Hearing Examiner
State of Wyoming
Office of Administrative Hearing
2020 Carey Avenue, Fifth Floor
Cheyenne, WY 82002

Eric T. Frye
General Counsel
Blackjewel L.L.C.
1051 Main Street
Milton, WV 25541
Eric.frye@blackjewel.us
Attorney for Blackjewel

/s/ Jeffrey S. Pope