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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING

	)	
In re Applications for Coal Mine Permit	)	
Transfers – PT0214 & PT0428	)	EQC Docket No. 18-4805 <sup>1</sup>
Blackjewel, LLC	)	
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**POWDER RIVER BASIN RESOURCE COUNCIL’S PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

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Pursuant to the Environmental Quality Council’s (“Council” or “EQC”) motion and order at the end of the May 15-16, 2019 hearing, the Powder River Basin Resource Council (“Resource Council” or “PRBRC”) hereby files its Proposed Findings of Fact and Conclusions of Law in the above captioned proceedings.

**PROCEDURAL HISTORY**

1. On August 30, 2018, Contura Coal West (“Contura”) filed applications to transfer the Belle Ayr Mine and Eagle Butte Mine permits to Blackjewel, LLC (“Blackjewel”). DEQ Exhibits 2 and 3, respectfully. Amended applications were submitted September 12, 2018, at which time the DEQ accepted and started processing the applications. *Id.*

2. On October 5, 2018, the agency wrote to Contura, informing the company that DEQ found the applications technically complete. DEQ Exhibits 12 and 13.

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<sup>1</sup> Following the EQC’s decision at its hearing, EQC Docket No. 18-4803 is no longer consolidated with this docket.

3. Contura then published notice of the applications in the Gillette News Record, opening a period for comments and objections to be submitted to DEQ. DEQ also circulated the public notice to a list of interested parties via electronic mail and published the notice on its website (<http://deq.wyoming.gov/public-notices/>).

4. In response to the required public notice, the Resource Council timely filed objections to the permit transfer applications. The Resource Council also timely requested a hearing before the EQC, initiating this contested case proceeding.

5. The docket was referred to the Wyoming Office of Administrative Hearings, who assigned a hearing examiner to oversee the proceedings.

6. A scheduling order was issued (and subsequently amended) following a scheduling conference between the parties held on January 14, 2019. The scheduling order included various deadlines for pre-hearing motions and filings, as well as discovery deadlines.

7. A pre-hearing conference was held on May 9, 2019, at which time various exhibits of the parties were admitted and other pre-hearing matters were discussed and decided. An Order following the pre-hearing conference was issued May 10, 2019.

8. A contested case hearing was held in this matter in Cheyenne, Wyoming on May 15-16, 2019.

#### **STANDARD OF REVIEW & BURDEN OF PROOF**

9. After the contested case hearing, the EQC must “issue findings of fact and a decision on the application.” W.S. § 35-11-406(p). This “decision on the application” is consistent with the authority granted to the EQC under the Wyoming Environmental Quality Act (“WEQA”) that the agency may “Order that any permit, license, certification or variance be granted, denied, suspended, revoked or modified.” *Id.* at § 112(c)(ii).

10. In making this decision, the EQC’s review of DEQ’s permitting decisions and of the permit transfer applications is *de novo*. Under *de novo* review, the EQC must look afresh or “from the new” at the permit transfer applications and cannot afford deference to DEQ in issuing any findings of fact or in making the decision on the permit transfer applications.<sup>2</sup>

11. Under Section 406(n), “The applicant for a surface coal mining permit has the burden of establishing that his application is in compliance with [the WEQA] and all applicable state laws.” The Wyoming Supreme Court has held that this burden extends to any hearing before the EQC on a coal mine permit. *Grams v. Env’tl Quality Council*, 730 P.2d 784, 789 (Wyo. 1986).

12. This burden of proof applies to the applications to transfer the permits because these proceedings are being held pursuant to sections 406(k) and 406(p) of the WEQA, to discuss and settle issues raised by objections to applications related to coal mine permits.

13. The burden of proof rests on the permit applicant alone. *Id.* at 406(n). The EQC cannot rely on DEQ’s testimony or evidence production designed to assist the permit applicant in meeting its burden of proof. This is an important requirement because DEQ must remain in a neutral position as the permit transfers have not yet been issued.

14. Through these proceedings, the permit applicant did not meet its burden of proof to demonstrate compliance with the law, including the findings of Section 406(n)(vii), and to prove that no parts of the permit transfer applications are deficient.

#### **STATEMENT OF THE CASE/ ISSUES AND CONTENTIONS**

15. The parties at the hearing presented evidence and testimony related to three main issues of fact and law:

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<sup>2</sup> This standard of review is especially applicable here where the scope of the EQC’s decision is to make the decision on the permit transfer applications, a decision DEQ has not made.

- (1) Whether the portion of the reclamation bond for the Belle Ayr Mine collateralized with real property meets legal standards to transfer the permit from Contura to Blackjewel;
- (2) Whether companies associated with the owners and controllers of Blackjewel have environmental and safety violations that were not disclosed in the applications to transfer the permits, rendering those permit transfer applications deficient; and
- (3) Whether these environmental and safety violations prevent Blackjewel from obtaining a coal mine permit in Wyoming.

**GENERAL CONCLUSIONS OF LAW RELATED TO AN APPLICATION TO  
TRANSFER A COAL MINE PERMIT**

16. Applications to transfer 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 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.”).

17. Applications for a permit transfer are governed by section 408 of the WEQA and associated regulations. Section 408 provides:

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.

18. 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 though he were the original applicant.” The application invokes both a review of the current permit and operations and a review of the transferee’s qualifications under the standards of a new permit pursuant to WEQA Section 406 and its implementing regulations.

19. DEQ implementing regulations further clarify the scope of the review of the transferee’s qualifications to hold a permit. DEQ Coal Rules Ch. 12 §1(b)(ii)(B) and 1(b)(ii)(E)(i).

### **ISSUE 1: THE RECLAMATION BOND FOR THE BELLE AYR MINE IS NOT LEGALLY ADEQUATE**

#### **Findings of Fact<sup>3</sup>**

20. \$26,749,000 of the Belle Ayr Mine’s \$119,090,000 reclamation bond (about 22% of the bond amount for the mine) is guaranteed through a real property collateral bond. DEQ Ex. 2 at 45.

21. Contura’s bond was the first instance of real property collateral bonding for coal mines in Wyoming. Tr. at 229 (Testimony of Casey Robb). It remains the only use of real property collateral bonding in the state.

22. As part of the permit transfer application for Belle Ayr, Blackjewel has proposed to continue Contura’s real property bond, at the same amount. *Id.*

23. An appraisal of the real property proposed to be used for reclamation bond collateral was conducted by Robert J. Brockman on July 7, 2017. Contura Exhibit 1.

24. While the appraisal was “recertified” on July 18, 2018, neither the fair market value nor the bond amount was updated. DEQ Exhibit 15. DEQ did not require an appraisal

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<sup>3</sup> To the extent testimony is cited as the basis for a finding of fact, the Council has resolved any conflicts or dispute between testimony of others in favor of the cited testimony or opinion.

conducted for Blackjewel as part of the permit transfer application. Tr. at 63, lines 18-23 (Testimony of Kyle Wendtland).

25. DEQ did not calculate “any reasonable expense anticipated by the Department in selling the property” as required by the Coal Rules, Ch. 11 § 5(a)(iii)(A).<sup>4</sup> Tr. at 108-109 (Testimony of Mr. Wendtland).

26. Nor did the appraisal include an estimate of these anticipated costs. Tr. at 354 (lines 9-18), 355 (lines 4-9) (Testimony of Robert Brockman that the appraisal did not disclose an estimated marketing time); Tr. at 355, lines 10-16 (Testimony of Robert Brockman that the appraisal does not contain an estimate of the costs an owner of the property would incur in trying to sell the property).

27. Instead, DEQ contends that a generic line item for “unknown costs” in the bond amount calculation incorporates these anticipated costs. Tr. At 56, 60-61; Tr. at 109, lines 2-4 (Testimony of Kyle Wendtland); DEQ Exhibit 7 at 9. However, that 5% contingency line amount is the same for any coal mine reclamation bond, whether or not it is a real property collateral bond. Tr. at 112, lines 6-10 (Testimony of Mr. Wendtland explaining that the 5% unknown costs relates to reclamation work, and is not dependent on the type of financial assurance for the reclamation bond).

28. The bond calculation does not provide any detail on whether, how, and at what amount the anticipated costs of selling the property are incorporated in the “unknown costs” contingency amount. It does not differentiate the anticipated costs of selling the property from any other unknown costs related to reclamation work at the mine or related to the forfeiture of other parts of the bond, such as the third-party sureties. *See, e.g.* Tr. at 111, lines 22-24

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<sup>4</sup> Citations are to the new version of these rules, which became effective May 3, 2019.

(Testimony of Mr. Wendtland: “I will say that every forfeiture is different, and the requirements for those unknown contingencies are different.”).

29. None of the anticipated costs in selling the property are itemized in the bond amount. Tr. at 112, lines 9-12 (Testimony of Mr. Wendtland explaining that miscellaneous contingencies are line-itemed in the bond whereas unknown contingencies are not line-itemed).

30. Under DEQ rules, no other type of bond besides a real property collateral bond requires an estimate of anticipated expenses. Tr. at 114, lines 13-16 (Testimony of Kyle Wendtland).

31. DEQ does not have an abstract title report available for the property. Tr. at 129, lines 15-25 to Tr. at 130, lines 1-18 (Testimony of Mr. Wendtland).

32. DEQ did not produce any evidence or exhibits for this proceeding documenting it received “evidence of ownership of the real property” “in the form of a clear and unencumbered title” as required by the DEQ rules. Coal Rules, Ch. 11 § 5(a)(iii)(C). This title evidence does not exist for Contura or Blackjewel, and DEQ did not obtain any title evidence as part of the permit transfer applications.

33. Nor does DEQ have title evidence related to the mineral ownership and mineral estate rights on the property. This title evidence is required to determine who owns the mineral rights on the property. Tr. at 346, lines 14-17 (Testimony of Robert Brockman).

34. Neither DEQ nor the appraiser reviewed whether the property is encumbered by mineral leases, surface use access and damage agreements, or other valid and pre-existing rights to develop the mineral estate on any of the property. Tr. at 373, lines 1-6 (Testimony of Robert Brockman). The appraisal was limited in scope to the surface rights of the property. Tr. at 101,

lines 9-10, 19-24 (Testimony of Kyle Wendtland); Tr. Vol. II at 345-348 (Testimony of Robert Brockman); Tr. at 444, lines 17-23 (Testimony of John Sherman).

35. The appraisal disclosed that there are operating oil and gas wells on portions of the property, and “remnants of methane wells.” Tr. at 370-371 (Testimony of Robert Brockman). However, the appraisal did not review who the operators of the wells were, or whether any of the wells are idle or orphaned. *Id.*; Tr. at 372, lines 13-17 (Testimony of Robert Brockman).

36. The appraisal did not consider – nor did the DEQ review – whether the oil and gas wells on the property or even mineral leases or drilling permits for future wells negatively affect the value of the property or the state’s interests in that property.

37. After a review from John Sherman, the original appraisal value was decreased by \$630,000. Tr. at 445, lines 22-23 (Testimony of John Sherman); CCW Ex. 2 at 1. However, DEQ did not adjust the real property collateral bond amount in response to the value correction.

### **Conclusions of Law**

38. Submission of reclamation bonding is a core component of any permit transfer: “The potential transferee shall obtain a renewal bond by either transfer of the permit holder’s bond, written agreement with the permit holder, or providing other sufficient bond or equivalent guarantee.” DEQ Coal Rules Ch. 12 § 1(b)(ii)(A); *see also* Ch. 12 § 1(b)(ii)(E)(II) (requiring the Administrator to find in writing that the transferee “[h]as submitted a performance bond or other guarantee, or obtained the bond coverage of the original permittee” before approval of the transfer).

39. According to DEQ rules, in order to guarantee reclamation work through a real property collateral bond, an appraisal must be conducted. The appraisal is used to establish the fair market value the property.



40. After the appraisal is conducted, the value of the bond is established, which is set by the DEQ at “the difference between the fair market value and any reasonable expense anticipated by the Department in selling the property.” DEQ Coal Rules Ch. 11 §5(a)(iii)(A).

41. The “unknown costs” line of the bond amount cannot be used to calculate “any reasonable expenses anticipated by the Department in selling the property” because costs cannot be both “unknown” and “anticipated.” In fact, “unknown” is the opposite of “anticipated.” *See, e.g.* Tr. at 109, line 17-22 (Testimony of Mr. Wendtland explaining that the “unknown contingencies” line is for “unknown or unanticipated expenses.”).

42. Moreover, a flat 5% contingency line that is not specific to real property collateral bonds is not an accurate calculation of anticipated expenses in selling the property.

43. Since the DEQ did not calculate “any reasonable expense anticipated by the Department in selling the property,” it did not – and could not - appropriately set the bond amount. As such, the reclamation bond portion of the application to transfer the Belle Ayr permit is deficient.

44. The DEQ Coal Rules further require the operator to provide “[e]vidence of ownership of the real property . . . in the form of a clear and unencumbered title.” *Id.* at § 5(a)(iii)(C).

45. DEQ does not have this evidence of ownership, and does not know whether the title is clear and unencumbered.

46. DEQ also does not have evidence of who owns the mineral estate or evidence showing that the surface property rights are unencumbered from mineral leases, permits, and/or surface use and damage agreements.

47. This lack of title evidence prevents DEQ from accepting the real property collateral bond proposed by Blackjewel as part of the application to transfer the permit of the Belle Ayr Mine from Contura to Blackjewel. DEQ cannot accept the real property collateral bonds until such title evidence is presented to the agency.

**ISSUE 2: THE APPLICATION TO TRANSFER THE PERMITS FROM CONTURA TO BLACKJEWEL FAILED TO INCLUDE NECESSARY INFORMATION RELATED TO BLACKJEWEL'S QUALIFICATIONS AND VIOLATION HISTORY**

**Findings of Fact**

48. Blackjewel is the proposed transferee. DEQ Exhibits 2 and 3.

49. The applications to transfer the permits only included a violation schedule for the Belle Ayr and Eagle Butte mines. The mine transfer applications only included two violations that happened at the Eagle Butte mine. DEQ Exhibit 2 at page 29; DEQ Exhibit 3 at page 33.

50. No violations were listed or discussed for any other Blackjewel operated coal mines nor for any mines under common ownership and control with Blackjewel.

51. Blackjewel is “under common control” with various other coal mining companies through Jeffrey Hoops, who is the President & CEO of Blackjewel Holdings, which owns Blackjewel. DEQ Exhibit 2 at 31; *see also* Secretary of State registration for Blackjewel, LLC, listing Jeffrey Hoops as the President and CEO, PRB Exhibit 5; Tr. at 277, lines 1-4 (Testimony of Mark Thrall).

52. Revelation Energy and affiliated companies under common control, including Keystone Industries LLC, Lone Mountain Processing LLC, and Dominion Coal Group, have had dozens of cessation orders issued to them over the past three years. DEQ Exhibit 11.

53. These violations attribute back to Blackjewel for purposes of permit eligibility. Tr. at 77, lines 11-35 (Testimony of Kyle Wendtland); Tr. at 281, lines 8-15 (Testimony of Mark Thrall).

54. Many of these violations are cessation orders. As the name implies, a cessation order is an order to stop mining because of the seriousness of the violation. Tr. at 212 (lines 15-25) to 213 (lines 1-6) (Testimony of Mark Rogaczewski).

55. Instead of requiring disclosure of, and information relating to, these violations as part of the permit application, DEQ allowed the permit transfer applications to effectively be amended or supplemented by the Applicant Violator System (“AVS”) report. Tr. at 154 (lines 18-20), 155 (lines 21-25), 156 (lines 2-14) (Testimony of Kyle Wendtland); *see also* Tr. at 160, lines 3-13 (Testimony of Kyle Wendtland that the permit applications and the AVS “together” meet the requirements in the rules).

56. The AVS report does not provide the same level of information on the violations as the schedule contained in the permit transfer applications. *Compare* DEQ Exhibit 2 at 29 *with* DEQ Exhibit 11; *see also* Tr. at 154 (Testimony of Kyle Wendtland describing the information contained in the table at DEQ Exhibit 2 at 29); Tr. at 158-160 (Testimony of Kyle Wendtland describing the AVS report).

57. The AVS administered by the Office of Surface Mining Reclamation and Enforcement (“OSMRE”) labels violations into two categories: “outstanding” and “conditional.” Tr. at 69, lines 6-9 (Testimony of Kyle Wendtland); DEQ Ex. 11.

58. The words “conditional” and “outstanding” related to violations do not appear in the DEQ regulations. Tr. at 142 (lines 1-14), 156 (lines 15-21) (Testimony of Kyle Wendtland).

Instead, the AVS itself defines the terms. Tr. at 69, lines 10-23; Tr. at 71, lines 1-12 (Testimony of Kyle Wendtland); DEQ Ex. 8 at 4.

59. The term “conditional” can mean a variety of things, including that the violation is in some step in the process of being abated or corrected, or merely that the operator has administratively appealed the violation. *Id.*

60. The AVS does not further describe the status of the violation or specify what “conditional” means for each violation. Tr. at 158, lines 1-4 (Testimony of Kyle Wendtland) Instead, the AVS provides contact information for state regulators and OSMRE staff that have the information for each violation. DEQ Ex. 8; Tr. at 71 ( lines 10-12), 144 (lines 19-24), and 148 (lines 16-19) (Testimony of Kyle Wendtland).

61. The AVS report does not include violations that have been issued by the Environmental Protection Agency or violations issued by state regulators related to air and water violations. Tr. at 170, lines 12-19 (Testimony of Kyle Wendtland).

62. DEQ did not obtain any information from EPA or air and water regulators to assess whether those agencies may have issued violations that have not been abated or corrected. Tr. at 169-70 (Testimony of Kyle Wendtland). Instead, DEQ solely relied on the AVS report, while knowing the AVS report did not include the information on any air or water violations. Tr. at 171-173 (Testimony of Mr. Wendtland).

63. DEQ is aware of violations of the Clean Water Act that have been issued to companies under common ownership and control as Blackjewel. Tr. at 171, lines 1-4 (Testimony of Kyle Wendtland).

64. DEQ does not check to see whether the permit transferee or any mines under common ownership and control have unabated or uncorrected violations issued by the Mine

Safety Health Administration (“MSHA”). Tr. at 175 (Testimony of Kyle Wendtland). Nor did DEQ consult with MSHA or the State Mine Inspector in assessing the violation history of the permit transferee. *Id.*

65. Some mine safety violations have environmental implications and should be considered during coal mine permitting. Tr. at 175, line 25, to 176, lines 1-2 (Testimony of Kyle Wendtland); Tr. at 176, lines 13-18.

66. Pursuant to its rules, DEQ must issue a “provisionally issued permit” if a permit applicant is “contesting the validity of a violation unless there is an initial judicial decision affirming the . . . violation.” DEQ Coal Rules Ch. 12 § 1(a)(x)(D)(III).

67. However, DEQ is not aware of whether the violations that are listed as “conditional” in the AVS report fall into this category. Tr. at 164, lines 8-13 (Testimony of Kyle Wendtland).

68. Additionally, DEQ was not aware of the process that would occur to check back on a provisionally issued permit to determine if such a permit should be suspended or rescinded pursuant to the DEQ rules. Tr. at 166 (Testimony of Kyle Wendtland discussing DEQ Coal Rules Ch. 12 at § 1(a)(x)(D)(IV)). In fact, DEQ has never issued a provisionally issued permit before. Tr. at 161, lines 13-16 (Testimony of Kyle Wendtland).

69. DEQ did not contact regulators in any other state to determine the status of the violations and what judicial or administrative processes are occurring, if any. Tr. at 143-147 (Testimony of Kyle Wendtland).

### **Conclusions of Law**

70. 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).

72. 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.” *Id.* at 406(n)(vii). Importantly, this section requires a permit applicant to “affirmatively demonstrate” compliance with these requirements. *Id.* at 406(n).

73. DEQ regulations further specify that the permit application must include the following information:

(ii) A complete statement of compliance which shall include:

(A) A brief statement, including identification and current status of the interest, identification of the regulatory authority, and description of any proceedings and their current status, of whether the applicant, the operator, or any subsidiary, affiliate or entity which the applicant or operator or entities owned or controlled by or under common control with the applicant or operator has:

(I) Had a Federal or State permit for surface coal mining operations suspended or revoked during the five (5) year period preceding the date of submission of the application; or

(II) Forfeited a Federal or State performance bond or similar security deposited in lieu of bond in connection with surface coal mining and reclamation operations during the five (5) year period preceding the date of submission of the application;

(III) For each suspension, revocation, or forfeiture identified in subsections (I) and (II) above, the applicant shall provide a brief statement of the facts involved including the permit number, date of action and amount of forfeiture if applicable, responsible regulatory authority and stated reasons for action, current status and identifying information regarding any judicial or administrative proceedings related to the action.

(B) A list of notices of violation required by W. S. § 35-11-406(a)(xiv) that describe or identify the violation, a list of all unabated or uncorrected violation notices incurred in connection with any surface coal mining

and reclamation operation that the applicant or operator owns or controls on that date, identify the associated permit and MSHA numbers, the name of the person to whom the violation notice was issued, when it occurred, any abatement action taken and if the abatement period has not expired a certification that the violation is being abated or corrected to the satisfaction of the agency with jurisdiction over the violation, the issuing regulatory authority, and any proceedings initiated concerning the violation. **This listing shall include only notices issued to the applicant or operator and any subsidiaries, affiliates, or persons owned or controlled by or under common control with the applicant or operator.**

DEQ Coal Rules & Regulations Ch. 2§2(a)(ii) (emphasis added).

74. DEQ guidance documents further specify that the statement of compliance required for a coal mine permit application must include detailed information on each violation: (a) description and identification of the violation; (b) the date the violation occurred; and (c) description of the abatement action taken and the date the abatement was approved. DEQ Land Quality Guideline 6A, FORMAT AND GENERAL CONTENT GUIDELINE PERMIT APPLICATIONS, AMENDMENTS AND REVISIONS COAL MINING OPERATIONS, at page 10.<sup>5</sup> This guidance document applies to applications to transfer permits. Tr. at 217 (testimony of Mark Rogaczewski).

75. These requirements apply to a permit transferee because that transferee must demonstrate it is “qualified” to receive a coal mine permit. DEQ Coal Rules & Regulations Ch. 12 §1(b)(ii)(B).

76. Disclosure of this information is not just for DEQ’s internal review of the application. It is a necessary component of the application, and must be complete at the time of public notice to allow public review and comment on the information contained in the permit transfer applications.

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<sup>5</sup> Available at [http://deq.wyoming.gov/media/attachments/Land%20Quality/Guidelines/Guideline%206A\\_Coal\\_Permit\\_Applications\\_\(8\\_2018\).pdf](http://deq.wyoming.gov/media/attachments/Land%20Quality/Guidelines/Guideline%206A_Coal_Permit_Applications_(8_2018).pdf) (last accessed June 14, 2019)

77. The requirements are a fundamental component of our federal and state coal mine regulations. The goal of this part of SMCRA, as implemented in WEQA, is to prevent an operator with outstanding violations from forming a new legal entity free and clear of those outstanding violations. In essence, the violations trace back and are attributed to not just to the company or mine, but to the owners and controllers of the company or mine. If there are violations, there is a “permit block” for those owners until all violations at *any* mine in the United States is abated or corrected to the satisfaction of the regulatory entity that issued the violation.

78. The applications failed to include the required complete schedule for Blackjewel, including any violations by “any subsidiaries, affiliates, or persons owned or controlled by or under common control with the applicant or operator” as required by DEQ’s regulations.

79. No violations from any entities “under common control with the applicant or operator” were listed in the permit transfer application.

80. These violations should have been disclosed and discussed in the transfer applications. As laid out in DEQ’s regulations, the discussion of the violations should have included:

- (1) a description of the violation with identity of the issuing regulatory authority;
- (2) the associated permit and MSHA numbers;
- (3) the name of the person to whom the violation notice was issued;
- (4) when it occurred;
- (5) a discussion about any abatement action taken, and if the abatement period has not expired, a certification that the violation is being abated or corrected to the satisfaction of the agency with jurisdiction over the violation; and
- (6) a description of any proceedings initiated concerning the violation.

81. The DEQ’s AVS report, while also required by the regulations, is not a substitute for the information that is required to be included in the permit transfer applications. The DEQ’s AVS report is required to make a permit eligibility determination, but this permit eligibility



determination is separate from and after the “administratively complete and suitable for publication” finding the DEQ must make on the permit application itself. DEQ Coal Rules Ch. 12 § 1(a)(viii).

82. DEQ Rules require the permit eligibility determination to be based, in part, on:

**The information the applicant submitted regarding compliance history**, AVS compliance report and any other available information to review histories of compliance with the Wyoming Environmental Quality Act and regulations promulgated thereunder and any other air or water quality laws for the applicant, operator, operations owned or controlled by the applicant and operations the operator owns or controls.

*Id.* at § 1(a)(viii)(C) (emphasis added). In other words, the AVS report is separate from the permit application compliance history required by the rules.

83. The AVS report is also not sufficient to determine the status of the violations. The AVS report merely says if a violation is “outstanding” or “conditional” but neither of those words are used or defined in the WEQA or DEQ rules and regulations. Instead, DEQ must determine whether a 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.”

### **ISSUE 3: THE PERMIT APPLICANT OR OPERATOR CANNOT LAWFULLY OBTAIN A PERMIT UNDER SECTION 406(N)(VII)**

#### **Findings of Fact**

84. As discussed above, under Section 406(n)(vii), any violation required to be identified in Section 406(a)(xiv) must be shown to be “in the process of being corrected to the satisfaction of the authority, department or agency which has jurisdiction over the violation.”

85. Also as discussed above, Blackjewel failed to disclose the violations in the permit transfer applications, let alone include the required description to demonstrate if and how the violations are being corrected or abated.

86. The DEQ typically checks the status of violations of surface coal mining operations under common ownership and control as the applicant through AVS. *See* DEQ Coal Standard Operating Procedure 1.8 at 5, PRB Exhibit 4. If an applicant fails an “AVS check” it is unable to receive a permit.

87. 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. According to OSMRE, “Conditional means that based upon an agreement, appeal, or other circumstance, it is possible the violation may not affect permit eligibility.” OSMRE, AVS Users Guide, Sept. 2018, <https://www.osmre.gov/programs/AVS/AVS-usersGuide-maintenanceRights.pdf> at 64 (emphasis added); see also DEQ Exhibit 8 at 4.

88. Also as discussed above, the AVS system does not check compliance with “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.”

89. DEQ was aware of Clean Water Act violations, but was not aware of the status of the violations and whether the violations have been “corrected to the satisfaction” of the regulatory authority that issued them. Tr. at 171, lines 1-4 (Testimony of Kyle Wendtland).

### **Conclusions of Law**

90. For the reasons explained above, the AVS report is not sufficient to be the only source for DEQ to determine whether a violation has in fact been “corrected to the satisfaction” of the regulatory authority that issued the violation. *See* conclusions 80, 83 above.

91. DEQ does not have sufficient information in either the permit application or the AVS report to determine if any of the violations are “in the process of being corrected to the satisfaction of the authority, department or agency which has jurisdiction over the violation.”

92. If a violation has merely been appealed, but has not yet been fully corrected or abated, a permit must be provisionally issued. DEQ Coal Rules Ch. 12 § 1(a)(x)(D)(III).

## **ORDER AND DECISION**

IT IS HEREBY ORDERED that the permit transfer applications are deficient because they contain “omission[s] or lack of sufficient information serious enough to preclude correction or compliance by stipulation in the approved permit to be issued by the director.” W.S. § 35-11-103(e)(xxiv).

IT IS FURTHER ORDERED that the neither the permit transferor applicant nor the permit transferee applicant has not met its burden of proof to demonstrate compliance with key parts of the law, including the findings of Section 406(n)(vii) and bonding.

IT IS FURTHER ORDERED that because the permit transfer applications contain deficiencies, and are not in compliance with the law, the EQC instructs the Director to deny the permit transfer applications. *Id.* at §§ 406(h), 406(n), 406(p).<sup>6</sup>

Respectfully submitted this 21st day of June, 2019.

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<sup>6</sup> If after the permit transfer applications are supplemented with information on the status of the violations, the status shows that one or more violations are “conditional” merely because they have been appealed by Blackjewel or a company under common ownership and control, the DEQ may need to issue a provisionally issued permit. DEQ Coal Rules Ch. 12 § 1(a)(x)(D)(III).

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of June, 2019, the foregoing **PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** was served on the following parties via electronic mail and the EQC online docket system:

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