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STATE OF WYOMING

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

UPON REFERRAL FROM THE WYOMING DEPARTMENT OF ENVIRONMENTAL  
QUALITY

IN THE MATTER OF PERMIT RENEWAL	)	OAH DOCKET NO. 19-004-220
APPLICATION OF	)	CI03
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

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**CONTURA COAL WEST’S RESPONSE TO POWDER RIVER BASIN RESOURCE  
COUNCIL’S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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**INTRODUCTION**

The Powder River Basin Resource Council’s (PRBRC) proposed findings of fact and conclusions of law contend the Council should instruct the Director of the Department of Environmental Quality (DEQ) to deny Blackjewel’s permit transfer applications because they are deficient and do not meet portions of Wyo. Stat. Ann. § 35-11-406(n). (PRBRC FOF & COL at 19.) But as Chairwoman Lally explained at the end of the contested case hearing, “PRBRC did not present any evidence that the violations by Blackjewel were not listed. They also did not—if there’s any evidence of violations that were listed and what they could be. I wish that they would have investigated those further and brought that evidence before us, but they didn’t. I’ve heard

no evidence that Blackjewel has violations that preclude a transfer.” (Tr. Vol. II p. 499.)

Consistent with Ms. Lally’s remarks, the Council should adopt Contura Coal West’s (Contura) proposed findings, Blackjewel, LLC’s (Blackjewel) proposed findings, and DEQ’s proposed findings, or some combination thereof to conclude the permit transfer applications were not deficient and are suitable for publication.

With that said, PRBRC’s proposed findings raise three issues that warrant response. First, PRBRC has overstated the Council’s role in this hearing. The Council does not decide whether to issue a permit or evaluate DEQ’s future 406(n) findings. Second, PRBRC’s findings about Blackjewel’s violations in the Applicant Violator System (AVS) place form over substance, failing to identify any violations or missing information DEQ needs to evaluate. Finally, PRBRC’s requested findings about the real estate collateral bonding are meritless and contrary to the Council’s conclusions on the issue.

#### ARGUMENT

**1. As part of a public hearing, the Council does not make a final decision on a permit transfer or evaluate Section 406(n).<sup>1</sup>**

PRBRC proposes the Council tie its decision on Blackjewel’s application to the Council’s statutory authority to “Order that any permit, license, certification or variance be granted, denied, suspended, revoked or modified.” (PRBRC FOF & COL at 2.) Essentially, PRBRC suggests the Council should make the final decision on the transfer applications under its general grant of authority. *See* Wyo. Stat. Ann. § 35-11-112(c). This is incorrect for two reasons. First, DEQ

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<sup>1</sup> Contura agrees the burden of proof is on the applicant, which is Blackjewel. But once the applicant proves it has met all the statutory and regulatory requirements, the opposing side should present evidence that disproves what the applicant has shown. Here, that did not happen. PRBRC presented no affirmative evidence to support any of their objections. The Council, however, can consider the evidence DEQ presented along with Blackjewel and Contura’s witnesses.

makes the final decision to approve or deny the permit transfer applications after it does additional work, including another AVS check. (Tr. Vol. I, pp 64-75.) Instead, the Council should decide whether DEQ correctly deemed the applications suitable for publication.

Second, section 112(c) says nothing about the Council approving or denying a permit transfer application. Instead, section 112 assumes a permit does not yet exist. But the permits at issue exist. The only specific grant of authority for permit transfers is the Director's authority to "[p]erform any and all acts necessary to promulgate, administer and enforce the provisions of this act..." *Id.* at § 109(a)(i); *See id.* at §§ 109(a)(xiii), 406(p), 801(a). That would have to include taking the steps to transfer existing permits based on the Act and applicable regulations. In short, the Council lacks the authority PRBRC would have it invoke. *Platte Dev. Co. v. State, Env'tl. Quality Council*, 966 P.2d 972, 975 (Wyo. 1998) (explaining the Council does not have the "power to modify, dilute or change in any way the statutory provisions from which it derives its authority"). As a result, the Council should reject PRBRC's proposed findings about Section 112.

PRBRC also proposes the Council find "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.'" (PRBRC FOF & COL at 19.) This refers to a finding DEQ must make under section 406(n). But Kyle Wendtland testified that the applications met all applicable statutes and regulations. (Tr. Vol. I, pp. 92, 270.) He also explained that DEQ would do another AVS check before making any findings under section 406(n). No evidence refutes that testimony. So PRBRC's proposed findings about section 406(n) have no support in the record

and would ask the Council to prematurely make findings on an issue. The Council should reject them.

**2. DEQ, PRBRC, and the public have all necessary information to evaluate if Blackjewel has violations that would make it ineligible for a permit.**

PRBRC proposes the Council find that Blackjewel's applications are deficient because Blackjewel did not disclose all violations of environmental laws, the AVS reports leave out information like MSHA numbers, and Blackjewel's disclosures do not allow DEQ or the public to evaluate the status of violations on the AVS report. (PRBRC FOF & COL at 11-13.) But as Chairman Lally noted, no evidence supports any of these proposed findings. No party presented evidence of undisclosed violations. No party presented evidence that DEQ lacked the information necessary to evaluate violations. (Tr. Vol. II, pp. 499-500.) Rather, the undisputed testimony showed the opposite. Mr. Wendtland testified he had all the information he needed. (Tr. Vol. I, pp.) He also testified OSM stated it had no concerns about the violations. (Tr. Vol. I, pp. 80-81.)

To the extent the Council has concerns about information like MSHA numbers not appearing on an AVS report, that is a form over substance concern. The violation schedule and AVS reports in the Blackjewel permit transfer files inform DEQ and the public about Blackjewel's violations, their status, and where they occurred. Should DEQ or the public wish to get more information, they can contact OSM or another state's environmental regulatory agency. It is likely PRBRC did just that. It is telling that PRBRC presented no evidence of uncorrected, unabated, or intentional violations of any environmental laws. As a result, the Council should reject PRBRC's proposed findings about violations disclosed in Blackjewel's permit transfer file.

**3. The Council has already concluded that the proposed collateral for portions of the Belle Ayr Mine bond meet all legal requirements.**

Despite the Council unanimously voting to renew Contura's permit for the Belle Ayr Mine over PRBRC's claim that Contura's real estate collateral bond does not protect Wyoming, PRBRC urges the Council to find the opposite for Blackjewel's permit transfer applications. (PRBRC FOF & COL at 19.) On its face, PRBRC's proposal does not make sense. Each Council member has already approved the appraisal for the two ranches. (Tr. Vol. II, pp. 491-500.) Likewise, PRBRC's references to the cost and time of a sale ignores the unrefuted testimony of Mr. Wendtland and Robert Brockman. (PRBRC FOF & COL at ¶¶ 27-28) Simply put, this proposed set of findings lacks support in the record and the Council has already rejected them. The Council should do so again.

**4. The Council does not need to evaluate Blackjewel's bankruptcy.**

While the Council has asked the parties to brief the impact of the automatic stay in Blackjewel's bankruptcy, it is likely PRBRC will suggest the bankruptcy has a substantive effect on the outcome of this hearing. It does not. Contura sold the Belle Ayr and Eagle Butte mines to Blackjewel over 18 months ago. Contura holds only the permits to those mines, meaning the bankruptcy will not affect that transaction. Likewise, the bankruptcy will not affect the issues before the Council. The bankruptcy will not change the value of the ranches used as collateral for bonding. The bankruptcy will not change the status of violations appearing on AVS reports.

To the extent the Council has concerns about the bankruptcy, the Council should take comfort in DEQ's experience with this exact issue. DEQ has worked through the Peabody, Arch, and Alpha bankruptcies. It is currently dealing with the Cloud Peak bankruptcy. The agency has the experience to address issues that may arise. Likewise, DEQ can factor into its final decision

on these permit transfer applications any legal consequence of the bankruptcy. But for the issues before the Council, the bankruptcy has no legal or factual relevance. Based on PRBRC's objections, no Wyoming statute or regulation ties bankruptcy proceedings to the approval of a permit transfer application. Any claim to the contrary by PRBRC is simply speculation—continuing the theme for its objections in this case.

### CONCLUSION

As Contura noted in its opening and closing remarks, PRBRC's case against transferring the permits for the Belle Ayr and Eagle Butte mines to Blackjewel relies on argument from PRBRC's counsel not evidence. PRBRC's proposed findings do the same, making them ill-suited as basis for the Council's decision. Therefore, Contura requests the Council reject PRBRC's proposed findings of fact and conclusions of law.

DATED: July 1, 2019

/s/ Jeffrey S. Pope

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 1, 2019, I served the foregoing by emailing a true and correct copy addressed to the following:

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