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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

In re Brook Mining Co., LLC coal mine permit – PT0841	)	EQC Docket No. 20-4802

POWDER RIVER BASIN RESOURCE COUNCIL'S COMBINED RESPONSE IN OPPOSITION TO BROOK MINING CO., LLC'S MOTION FOR SUMMARY JUDGMENT FOR LACK OF STANDING AND MEMORANDUM OF POINTS AND AUTHORITIES FOR CROSS MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF STANDING[1]

[1] In an effort to minimize briefs before the EQC, this is a combined response and cross-motion for summary judgment on the issue of standing. The Resource Council plans to file a separate motion for summary judgment on other issues on or before October 30, 2020 as contemplated in the Scheduling Order.

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INTRODUCTION

The Oxford English Dictionary defines "smoke and mirrors" as "the obscuring or embellishing of the truth of a situation with misleading or irrelevant information." Since the parties first appeared before the Environmental Quality Council ("EQC" or "Council") over three years ago, Brook Mining Co., LLC ("Brook") has done nothing but raise smoke and mirrors arguments – arguments that are designed to obscure and refocus the EQC away from the plain meaning of basic Wyoming environmental law. We know this Council will see through the smoke and mirrors and refrain from accepting Brook's revisionist version of the law and facts.

Standing to bring a claim in court is something very familiar to the Resource Council, but the EQC is not a court. It is an administrative agency and its jurisdiction is not created by judicial precedent but by statutory and regulatory authority, in this case subsection 406(p) of the Wyoming Environmental Quality Act ("WEQA"), which provides that an "objector" who participated in an informal conference, such as the Resource Council here, "may appeal the director's written decision after an informal conference to the council." W.S. § 35-11-406(p) (revised July 1, 2020). In other words, having participated as a party in the informal conference, the Resource Council has standing granted under Wyoming law to appeal the decision of the Director of the Department of Environmental Quality ("DEQ") granting Brook a permit to the EQC.

Regardless, as explained below, the Resource Council also clearly meets any requirements of judicial precedent to demonstrate "case or controversy" standing.

ARGUMENT

I. The Resource Council Has Members

Brook's main argument centers around an unfounded and frivolous claim – that the Resource Council does not have members.[2] Brook's argument, along with Mr. Barron's affidavit, are nothing more than a pretext developed to bring in irrelevant information about the Resource Council's "out of state" funding, information meant to embarrass or intimidate the Resource Council or likely meant to sway the EQC to be biased against the organization.[3] Mr. Barron has no qualifications or expertise to review the Resource Council's tax returns, and in fact because of this lack of qualifications and expertise, Mr. Barron, and in turn Brook, fundamentally misunderstand how a membership-based organization tax-exempt under Section 501(c)(3) of the Internal Revenue Code reports charitable contributions from its members to the IRS. As explained below, in spite of how an engineer may read a Form 990, the Resource Council's

[2] In the multiple decades of participation before administrative bodies, no agency or industry applicant has ever challenged the fact of whether the Resource Council has members, until now.

[3] Brook's extensive irrelevant elaboration on the "out of state" funding needs no response. However, to clarify, as stated in the 990s Mr. Barron reviewed, members decide the activities and projects of the organization, not funders. *See* Brook Ex. C at 38 ("During the annual meeting members of the organization may propose resolutions outlining the activities and projects that they would like the organization to participate in or pursue. The Resolution must be approved by a majority vote of the members and the resolutions are then used as guidance by the Board of Directors to determine the subsequent year's activities or projects."). The Resolutions are also printed each December in the Resource Council's newsletter, the *Powder River Breaks*, which in addition to being sent directly to members is also publicly available on our website.

organizational documents, tax filings, and policy and practice all affirm that the organization has members.

A. The Resource Council Is Legally Created and Organized to Have Members

As admitted in Brook's Brief in support of its motion for summary judgment (hereafter "Brook Br."), the Resource Council's Bylaws include a membership structure for the organization. Brook Br. at 7, *citing* Brook Ex. D, Resource Council Bylaws at 1-2 (Article III "Membership and Dues"). In fact, members are a critical part of the Resource Council's nonprofit corporate governance structure as those members meet annually to elect the Board of Directors and to vote on resolutions that determine the policy and activities of the organization. *Id.* [4]

B. Resource Council Tax Returns Confirm the Organization Has Members

In spite of the governance documents clearly showing that the Resource Council has members, Brook attempts to argue that the organization doesn't in fact have members because no membership dues are reported on Part VIII, Line 1b of the Form 990, depicting revenue of the organization.

However, consistent with nonprofit accounting practices (the Resource Council's Form 990 is prepared by a CPA each year), contributions from members are reported on

[4] An organization need not have members with governance power to have "members" for purposes of establishing representational standing. Many organizations who regularly represent their members in state and federal courts have members who are simply donors to the organization and who do not have any say in electing the Board of Directors or other governance powers, such as determining the activities or policies of the organization.

Line 1f of the same part of the Form 990 because they are considered charitable contributions. Membership dues are presented as contributions on the Form 990 if they represent contributions from the public. This is the case for membership dues from all Resource Council members because our members do not receive any "benefits" of membership that disqualifies their dues from being considered a tax-deductible charitable contribution. It is for this reason that dues and any contribution above that amount from the same person are reported on the same line of the 990.[5]

Again, consistent with nonprofit accounting practices, the Resource Council does not separate out "dues" for the purposes of reporting income on the Form 990. However, the Resource Council's internal donor database tracks membership dues and contributions above the dues amount for each member. This helps us to know if a member is in "good standing" or not for the purposes of attending the Annual Meeting or serving on the Board of Directors.

Finally, the Resource Council clearly reports that it has members to the IRS on the Form 990. The Form 990 has two specific questions on page 6, Part VI, question 7a and 7b, that specifically asks if the organization has members. The answer to those questions is marked yes on the Resource Council Form 990. *See* Brook Ex. C at 6. Additionally, multiple parts of the Form 990, including Schedule O, that describe the organization's mission and activities directly mention the role and activities of members of the

[5] The Form 990 is used by organizations that are tax-exempt under other sections of the Internal Revenue Code, such as 501(c)(4), 501(c)(5), and 501(c)(6). Membership dues to those types of organizations are not tax-deductible.

organization. For instance, the 2016 Form 990 states, "Powder River currently has members throughout Wyoming and several other states . . . Board members are elected from and by the Powder River Membership for a Two Year Term. As a grassroots organization, members decide the direction and focus of Powder River's work." Brook Ex. C at 13. The IRS is clearly aware that the Resource Council has members, and the agency has never required any dues or other financial contributions from those members to be reported differently on the Form 990.

C. Production or Non-Production of the Membership List is Irrelevant

Brook further attempts to argue the absence of Resource Council members because in response to a discovery request to produce a membership list to Brook, the Resource Council objected and refused to provide such a list for various reasons. Brook Ex. B at 7-8. In responding to Brook, the Resource Council did not say a membership list does not exist but rather it could not be produced in response to the discovery request. The Resource Council cited the Wyoming Nonprofit Corporation Act, which restricts providing a membership list to anyone but a member, and even then, only in limited situations. W.S. § 17-19-1605. The Resource Council further explained the state and federal constitutional grounds for withholding the membership list and cited to relevant legal authority and judicial precedent. The Resource Council has a need for protecting the privacy of our members, some of whom are employees and contractors of extractive industry companies and government agencies in Wyoming and financial contributions to us could be viewed as averse to their employer. Confidentiality of the membership list is needed to protect the first amendment rights of association and speech of these and other

members and to prevent intimidation that would interfere with the exercise of those rights if a party outside the organization acquired a copy of the list.[6]

Additionally, in the discovery response, the Resource Council said if Brook wished to verify the membership status of the six individuals named in the Petition for Hearing, an affidavit of the Resource Council's Executive Administrator – the individual who updates and reviews information in the membership database – could be provided. Brook Ex. B at 9. Brook did not follow-up and ask for such information and instead chose to file its motion claiming the Resource Council did not have members. As such, Brook didn't do its due diligence to check the facts of the information it provided to the EQC. Moreover, it is unclear even if such a list was produced whether that would satisfy Brook, since what Brook was truly after was a comprehensive list of individual donors, private foundation funders, and the amounts given to the organization – something that is irrelevant to the proceeding and protected by both the U.S. and Wyoming Constitutions.

Brook wrongly inferred that the lack of production of a membership list or donation records meant these internal organizational documents do not exist.

D. The Six Individuals Named in the Petition for Hearing Are Members

The Petition for Hearing listed six individual members to demonstrate interest in the proceeding. These members are Gillian Malone, Bill Bensel, John Buyok, Anton Bocek, Joan Tellez, and Joanne Westbrook (hereafter collectively "Members"). As laid

[6] This is not an abstract threat. *See* https://prbrcfacts.com/ which provides much of the same information as in Mr. Barron's affidavit, with some even more inflammatory and inaccurate information.

out in the attached declarations from the Members, these individuals are in fact members who financially contribute to the organization each year to renew his or her individual or family membership. Declaration of Gillian Malone (Ex. A) at ¶ 1; Declaration of Bill Bensel (Ex. B) at ¶ 2; Declaration of John Buyok (Ex. C) at ¶ 1; Declaration of Anton Bocek (Ex. D) at ¶ 1; and Declaration of Joanne Westbrook (Ex. E) at ¶ 1.

The Members support the Resource Council's Petition for Hearing before the EQC and support the Resource Council representing them for the purposes of the hearing. Ex. A at ¶¶ 15-16; Ex. B at ¶ 9; Ex. C at ¶¶ 3, 18; Ex. D at ¶¶ 4, 16, 18; Ex. E at ¶¶ 2, 9-10.

II. The Resource Council's Standing Has Already Been Demonstrated

Brook's motion blatantly ignores the many times over that the Resource Council's standing to proceed with a contested case hearing before the EQC on the Brook Mine permit has been shown and acknowledged. Brook previously participated in a contested case hearing challenging its permit where the Resource Council was a party (EQC Docket No. 17-4802). In that proceeding, Members Anton Bocek, John Buyok, and Gillian Malone testified. Brook filed an unsuccessful motion to dismiss in that proceeding, and sought to unsuccessfully prevent the Members from testifying, but never sought to dismiss the Resource Council as a party based on standing. The previous EQC docket has bearing on this proceeding because the DEQ treated the Order in that docket as "Round 7" of the technical review for *this* permit application, and as such, the Order and hearing docket that led to this hearing docket are inextricably connected.[7]

[7] We understand Brook has a different set of attorneys for this second hearing, but even though the company changed horses mid-race, the race hasn't changed.

Brook also participated in a multi-year judicial appeal of the EQC's Order, where the Resource Council was a party. At no time did Brook attempt to dismiss the Resource Council as a party to its appeal. Additionally, in its final decision on the appeal dismissing the appeal on mootness grounds, the Wyoming Supreme Court acknowledged that there was a new permit decision by the DEQ that was subject of a separate administrative appeal. *Powder River Basin Res. Council v. Wyoming Dep't of Envt'l Quality and Brook Mining Co.*, 2020 WY 127 at ¶¶ 7, 17. In other words, the Court determined that the previous appeal was moot in part based on this new proceeding before the EQC.

Brook also did not attempt to dismiss the Resource Council as a party to the informal conference held May 13, 2020. The relevant statute in effect at the time of the informal conference provided that an "interested person" could file written objections and request an informal conference:

> Any interested person has the right to file written objections to the application with the administrator within thirty (30) days after the last publication of the above notice. For surface coal mining operations, the director may hold an informal conference if requested and take action on the application in accordance with the department's rules of practice and procedure, with the right of appeal to the council which shall be heard and tried de novo.

W.S. § 35-11-406(k) (repealed as of July 1, 2020). While Section 406(k) was repealed on July 1st, the revised subsection 406(p) retains the "interested person" language from the previous subsection 406(k). In other words, by participating in the informal conference and by filing objections to the mine permit application, the Resource Council (and its Members that did the same) have already been determined to be "interested" for the

purposes of proceeding with public participation rights afforded to them under the Wyoming Environmental Quality Act, including requesting the hearing that is the subject of this proceeding. The time for Brook to object to a lack of "interest" has now passed. As further discussed below, Brook's argument is fatally flawed because it ignores that the hearing before the EQC is administrative in nature, and the right to request a hearing is created as part of the public participation opportunities afforded under Wyoming (and federal) law.

In fact, Brook itself recognized the interest and party status of the Resource Council by granting the organization and its Members access to the mine site as part of the informal conference process. DEQ Rules of Practice & Procedure, Ch. 9 § 2(c) provides: "If requested, the Director may arrange with the applicant to grant **parties to the informal conference** access to the permit area for the purpose of gathering information relevant to the informal conference." (emphasis added). Mine site tours were in fact held on the request of the Resource Council. *See* electronic mail correspondence between Jeff Barron and Resource Council staff and Members, May 6, 2020, attached as Exhibit F. This correspondence explained that "Parties to an informal conference are defined as: (1) Any person having an interest which is or may be **adversely affected** by the decision on the application, or an officer or a head of a Federal, State, or local government agency." *Id*. at 2-3 (emphasis supplied).

In short, after over three years of administrative and legal proceedings, Brook has long waived its ability to raise a standing argument against the Resource Council and its Members.

III. Brook Ignores Appellate Rights Afforded Under Wyoming Law

As discussed above, newly adopted subsection 406(p) of the Environmental Quality Act provides an automatic right of appeal to the EQC from a decision following an informal conference for any objector that participated in the informal conference. As explained above, this is because any party to an informal conference is already determined to be "interested" and "adversely affected" by the proposed mining operation. W.S. § 406(p) provides, in relevant part, "The applicant or objector may appeal the director's written decision after an informal conference to the council." In other words, because the hearing before the EQC is part of the public participation rights afforded to interested parties who submit objections to the permit application, the right to a hearing is automatically afforded following the decision of the Director after an informal conference.

We understand Brook has a lack of clarity around the word "interested" and whether the Resource Council has demonstrated such an "interest," and that issue will be discussed below. But for the purposes of determining whether the Resource Council has a right to appeal the Director's decision to the EQC, after participating as a party to the informal conference, there is no question that the plain language of the Environmental Quality Act provides that right. As such, the plain meaning of the statute should govern. *Cheyenne Newspapers, Inc., v. Building Code Bd. of App. Of City of Cheyenne,* 2010 WY 2, ¶ 9, 222 P.3d 158, 162 (Wyo. 2010) ("When a statute is sufficiently clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not result to rules of statutory construction.").

IV. Resource Council Members Are "Interested" and "Adversely Affected"

At the outset of determining whether a party has standing to pursue this appeal from the Director's decision following the informal conference, it is critical to remember why the hearing is being requested. As discussed above, the EQC hearing process is an essential component of the public participation rights afforded under the Surface Mining Control and Reclamation Act ("SMCRA") and state law implementing that federal law, the Wyoming Environmental Quality Act. SMCRA's legislative history affirms that public participation in permitting proceedings, in both informal and more formal ways such as this administrative hearing, is an essential component of the act. In light of that purpose, the requirements for any standing to participate should be interpreted broadly.

For instance, the Senate Report for SMCRA states, "The success of failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process." S. Rep. No. 95-128, 59 (1977), attached as Exhibit G. The Report adds:

> While citizen participation is not, and cannot be, a substitute for governmental authority, citizen involvement in all phases of the regulatory scheme will help insure that the decisions and action of the regulatory authority are grounded upon complete and full information. In addition, **providing citizen access to administrative appellate procedures** and the courts **is a practical and legitimate method of assuring the regulatory authority's compliance with the requirements of the Act**.

Id. (emphasis added)

Any standing requirements should be interpreted with the legislative purpose of SMCRA and the Wyoming Environmental Quality Act's public participation

opportunities designed to achieve more complete and accurate permits and DEQ's compliance with all legal requirements.

In regard to the term "interested," in spite of Brook's confusion over what it means, "interested" is actually a common phrase in administrative law to specify who can participate in an administrative proceeding. For instance, DEQ's sister agency the Wyoming Oil and Gas Conservation Commission (WOGCC) also uses the term "interested party":

> Matters or proceedings in which an interested party who may be affected by an order of the Commission in the matter or proceeding files a written objection to a matter being heard . . . [t]he written protest must state the grounds of the protest and include information and evidence to demonstrate that:
>
> (i) The protestant is a party **entitled to notice or relief** under Wyo. Stat. Ann. §§ 30-5-101 through 30-5-128, and Wyo. Stat. Ann. §§ 30-5-401 through 30-5-410.
>
> (ii) The protestant seeks a remedy that is within the jurisdiction and authority of the Commission.

WOGCC Rules, Ch. 5 § 11(b) (emphasis added). WOGCC's rules infer than a party that receives notice of an application is "interested" for the purposes of being able to protest that application. WOGCC's rules provide that: "In addition to any other notice required by the statutes or these rules, the applicant shall notify those owners, as defined by the Wyoming Conservation Act, of the subject lands and other lands within one-half (1/2) mile of the boundaries of the subject lands or location where the operation is to be undertaken." WOGCC Rules, Ch. 5 § 5. Therefore, land and minerals within ½ mile of the land subject to the application are presumed to be "interested" for purposes of protesting the application.

DEQ's regulations provide a similar standard through the definition of "adjacent areas":

> Adjacent areas means land located outside the permit area upon which air, surface water, groundwater, fish, wildlife, or other resources protected by the Act **may reasonably be expected to be adversely impacted by mining or reclamation operations**. Unless otherwise specified by the Administrator, this area shall be presumptively limited to lands within one-half mile of the proposed permit area.

DEQ Land Quality – Coal Rules Ch. 1, Sec. 2(c) (emphasis added). This regulatory definition of lands that are presumptively adversely impacted corresponds directly to the list of landowners that must be notified of a new coal mine permit application available for public comment, landowners that may request a pre-blast survey, lands where vegetation and water sampling must occur, and many other pieces of the coal mine regulatory system. Similar to the WOGCC rules, DEQ's rules **presume** that a landowner with lands within ½ mile of a coal mine permit area is "adversely impacted by mining or reclamation operations" and is therefore "interested" to be able to file an objection to that permit and exercise the public participation rights of an informal conference and EQC hearing.

This presumption applies directly to the Resource Council Members as all of the Members either live within ½ mile of the Brook Mine permit area or use and/or recreate on lands within the permit boundary itself or adjacent areas. Ex. A at ¶¶ 11-14; Ex. B at ¶ 6; Ex. C at ¶ 4; Ex. D at ¶¶ 5, 8; Ex. E at ¶¶ 3-5. Therefore, the Members, and in turn the Resource Council itself through representation of the Members, are presumptively deemed to be "interested" and "adversely affected" for purposes of objecting to the mine

permit and participating in any public participation opportunities, such as this proceeding before the EQC.

V. The Resource Council Meets All Requirements of "Case or Controversy" Standing

As discussed above, each of the Resource Council Members and the organization itself are presumed to be an "adversely affected" "interested person" under SMCRA and the Wyoming Environmental Quality Act for the purposes of an administrative proceeding challenging the Brook mine permit. This presumption of "interest" began with submitting objections to the mining permit, was carried through the informal conference, and automatically transfers to this administrative appellate proceeding.

Nevertheless, should the EQC determine that the judicial concept of "case or controversy" standing is required, the analysis should be based on federal constitutional standing, not the case law cited by Brook. The legislative history of SMCRA clarifies that the right to judicial review under the federal law and approved state programs is "coterminous" with federal constitutional standing. Ex. G, S. Rep. No. 95-128, at 87 (1977). The Senate Report specifically explained what Congress meant by the term "adversely affected": "It is the intent of the Committee that the phrase 'any person having a valid legal interest which is or may be **adversely affected**' shall be construed to be coterminous with the **broadest** standing requirement enunciated by the United States Supreme Court." *Id*. (emphasis added).

It may seem strange to apply U.S. Constitutional precedent in a state proceeding. However, that is exactly what Wyoming's state program implementing SMCRA requires.

Therefore, if the Resource Council can demonstrate the organization or its Members have Constitutional standing, it has demonstrated the organization is "adversely affected" for the purposes of SMCRA and in turn the Wyoming Environmental Quality Act.

A. Organizational Standing

Under U.S. Supreme Court and federal court precedent, an organization can have standing in its own right if it asserts a procedural injury. *Lemon v. Geren*, 514 F.3d 1312, 1315 (DC Cir. 2008). "It is well established that an organization 'may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.' The question is simply whether the organization satisfies the usual requirements for standing." *American Federation of Government Employees Local 1 v. Stone*, 502 F.3d 1027, 1032 (9th Cir. 2007) (quoting *Warth v. Seldin*, 422 U.S. 490 (1975)).

Here, the Resource Council is challenging the DEQ's pre-determination that any supplement to the Subsidence Control Plan will be a "non-significant" permit revision. If DEQ proceeds with its proposal to treat any new information as "non-significant," the Resource Council will not be afforded the right to submit comments or objections to the permit revision. Conversely, if the Resource Council is successful in its appeal of DEQ's pre-determination, a comment period will be afforded. As such, the Resource Council has demonstrated procedural injury as a result of DEQ's action and has standing in its own right to pursue that claim (called "Issue for Hearing 2" in the Petition for Hearing).

B. Representational Standing

To establish standing, a party must show that (1) it has suffered an injury-in-fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action; and (3) a favorable decision could redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The Resource Council has standing to bring this action on behalf of its adversely affected Members, *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977), because these Members have demonstrated an injury that is both "traceable" to the challenged action and likely to be redressed by a favorable decision. *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015).

The declarations of the Members demonstrate the environmental and economic harm that would result in injury to the interests of the Members. As laid out in the attached Declarations, the Resource Council's Members live, work, travel, and recreate throughout the area affected by the proposed Brook Mine. The Resource Council's Members have established "regular" and "continuing" use of areas inside and immediately adjacent to the permit boundary that is sufficient to provide standing, as well as specific plans to return to the affected areas. *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1148-49 (9th Cir. 2000) (citing *Friends of the Earth v. Laidlaw*, 528 U.S. 167 (2000)). [8]

[8] Even if the EQC determines that each and every Member has not adequately demonstrated all requirements of standing, so long as one Member has, that is sufficient for the Resource Council to have standing. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 n.2 (2006) ("[T]he presence of one party with

Specifically, John Buyok and Anton Bocek are landowners who live adjacent to the proposed Brook Mine. Mr. Bocek's family farm is one of the closest properties to the proposed strip mine, where the first area of mining will be. Ex. D at ¶ 8. In addition to being in close proximity to the mine itself, Mr. Buyok's property neighbors the iCam facility, where coal from the Brook Mine will be transported to and processed. Ex. C at ¶ 7.

Members John Buyok, Anton Bocek, and Bill Bensel regularly travel on the state highway proposed to haul coal between the Brook Mine and the iCam coal processing facility, and they will be adversely affected by the increased truck traffic on the road. Ex. B at ¶ 7; Ex. C at ¶ 10; Ex. D at ¶¶ 9-10.[9]

Member Joanne Westbrook travels to and from her family ranch via Slater Creek Road, a portion of which directly lies within the permit boundary. Ex. E at ¶¶ 3-5. Ms. Westbrook is injured from a lack of buffer between the permit and Slater Creek Road, as required by Wyoming coal mining regulations. *Id*. Alternatively, she will be further harmed if Brook chooses to move the road to avoid the buffer requirements. *Id*.

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standing is sufficient to satisfy Article III's case-or-controversy requirement."); *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

[9] For purposes of determining the injury of the Members caused by the coal hauling, the EQC need not rule in favor of the Resource Council on its claim related to the haul road and iCam facility requiring a coal mine permit. The EQC can find injury merely because without the Brook Mine, the coal would not be hauled on the road and therefore the mine is the direct cause of the injury.

Members Gillian Malone and Bill Bensel use areas within and immediately adjacent to the mine site for recreation purposes. Ex. A at ¶¶ 11-14; Ex. B at ¶ 6. Coal mining activities at the Brook Mine will adversely affect the recreational activities of Ms. Malone and Mr. Bensel. *Id*. The U.S. Supreme Court has held that such aesthetic and recreational injury is sufficient for the purposes of establishing standing: "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 183 (2000). Federal law also does not require a declarant to exactly list each and every time they have visited, or plan to visit, a site. "[R]ecreational use itself, accompanied by a credible allegation of desired future use, can be sufficient, even if relatively infrequent, to demonstrate that environmental degradation of the area is injurious to that person." *Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3d 1141, 1150 (9th Cir. 2000), citing *Laidlaw*, 528 U.S. at 183.[10]

Brook contends that the harm described by the Members is somehow rendered inadequate merely because others may share the same sort of injury. However, courts have squarely addressed this issue and have ruled against Brook's position. For instance,

[10] This is significantly different from a rule that a plaintiff must have utilized the exact construction location. Indeed, the affected area certainly may include areas outside of a project's precise footprint. *See, e.g.*, *Great Basin Mine Watch v. Hankins*, 456 F.3d 955 (9th Cir. 2006). This is consistent with DEQ's definition of adjacent areas and the presumption of those areas being adversely affected by coal mining and reclamation activities.

in *Federal Election Commission v. Atkins*, the Supreme Court held that ". . . where a harm is concrete, though widely shared, the [Supreme] Court has found 'injury in fact.'". *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 496-97 (7th Cir. 2005); *Covington v. Jefferson County*, 358 F.3d 626, 651 (9th Cir. 2004) ("A concrete actual injury, even though shared by others generally is sufficient to provide injury in fact."); *Baur v. Veneman*, 352 F.3d 625, 635-36 (2d Cir. 2003); *Pye v. U.S.*, 269 F.3d 459, 469 (4th Cir. 2001) ("[T]the fact that the Pyes' aesthetic concerns pertaining to the integrity and cohesiveness of the historic district and individual sites are also widely held by the populace of the County does not render them any less concrete and particularized as to the Pyes."); *NEDC v. Owens Corning*, 434 F. Supp. 2d 957, 965-66 (D. Or. 2006) ("Plaintiffs' injuries are not diminished by the mere fact that other persons may also be injured by the Defendant's conduct. Standing has never required proof that the plaintiff is the only person injured by the defendant's conduct . . . injury to all is injury to none does not correctly reflect the current doctrine of standing.").[11]

Members also allege injury from subsidence at the mine site, if not properly evaluated and controlled. Ex. C at ¶¶ 13-14; Ex. D at ¶ 16; Ex. E at ¶ 8.

[11] The Court in *NEDC* went on to hold "If Defendant's theory of standing were correct, no person could have standing to maintain an action aimed at averting harm to the Grand Canyon or Yellowstone National Park, or threats to the giant sequoias and blue whales, as the loss of those treasures would be felt by everyone. For that matter, if the proposed action threatened the very survival of our species, no person would have standing to contest it. The greater the threatened harm, the less power the courts would have to intercede. That is an illogical proposition." *Id*. at 970.

Additionally, like the organization itself as explained above, the Members will also experience procedural injury from DEQ's decision to restrict public comment on future permit revisions. The Members all express a desire to participate in such a comment process and support the Resource Council's claim to require public participation opportunities. Ex. A at ¶¶ 9-10, 15; Ex. B at ¶ 8; Ex. C at ¶ 15; Ex. D at ¶ 17; Ex. E at ¶¶ 8-10.

Brook is also wrong in its interpretation of redressability requirements. Redressability is about the case and the ultimate remedy, not each individual claim. Article III Constitutional standing "does not demand a demonstration that victory in court will without doubt cure the identified injury. . . . cases require more than speculation but less than certainty." *Teton Historic Aviation Found. v. U.S. Dep't of Defense*, 785 F.3d 719, 727 (D.C. Cir. 2015). Here, the Resource Council has standing because, if the permit application is remanded or revoked, DEQ will be required to undertake further analysis that "*could*" spur DEQ to protect the "concrete interests" of its Members. *Cottonwood Envtl. Law Ctr. v. USFS*, 789 F.3d 1075, 1082-83 (9th Cir. 2015), *cert denied*, 137 S. Ct. 293 (2016) (emphasis in original) (quoting *NRDC v. Jewell*, 749 F.3d 776, 783 (9th Cir. 2014)).

It is well settled that an organization may challenge an agency's decision on one ground by relying on any injuries to members caused by the agency action. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306-307 (D.C. Cir. 2013); *accord MEIC v. BLM*, 615 F. App'x 431, 432-33 (9th Cir. 2015). Here, the Resource Council Members' use and enjoyment of the area, aesthetic and recreational injuries, and other impacts to property

and safety follow from the inadequate permit application "whether or not the inadequacy concerns the same environmental issue that causes their injury." *WildEarth Guardians*, 738 F.3d at 307. A decision overturning Brook's mine permit or limiting its area by excluding the highwall mining portions of the permit would redress these injuries regardless of the ultimate rationale used to render the permit application inadequate.

CONCLUSION

For the foregoing reasons, the EQC should determine that the Resource Council has standing to proceed with its Petition for Hearing as a matter of law. The EQC should also award any other relief it deems proper, including any relief consistent with W.R.C.P. 56(h) for an affidavit brought in bad faith.

Respectfully submitted this 16th day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **COMBINED RESPONSE OF POWDER RIVER BASIN RESOURCE COUNCIL IN OPPOSITION TO BROOK MINING CO., LLC'S MOTION FOR SUMMARY JUDGMENT FOR LACK OF STANDING AND CROSS MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF STANDING** was served on the following parties via the Environmental Quality Council's electronic docket system.

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