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(970) 375-9231

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF WYOMING,
IN AND FOR THE COUNTY OF LARAMIE

POWDER RIVER BASIN)
RESOURCE COUNCIL,)
)
Petitioner,)
)
v.)
)
WYOMING DEPARTMENT)
OF ENVIRONMENTAL QUALITY,)
)
Respondent.)

Docket No. 191-144

FILED

FEB 05 2019

DIANE SANCHEZ
CLERK OF THE DISTRICT COURT

PETITION FOR REVIEW OF ADMINISTRATIVE ACTION
COMPLAINT FOR ORDER TO SHOW CAUSE

I. Introduction

1. Powder River Basin Resource Council (“Resource Council” or “PRBRC”) hereby petitions the Court, pursuant to W.R.A.P. 12, for judicial review of a January 8, 2019 partial denial by the Wyoming Department of Environmental Quality (“DEQ”) of a request made by the Resource Council pursuant to the Public Records Act, Wyo. Stat. § 16-4-201, *et seq.* and the Environmental Quality Act, Wyo. Stat. § 35-11-1101, related to documents submitted to the DEQ by Contura Coal West. The partial denial and the request are attached as Appendix A.

2. DEQ attempted to justify its failure to disclose the documents based on unsupported and overly broad claims of trade secret or confidential commercial information status. Because DEQ was required to produce these documents under the Environmental Quality Act and the Public Records Act, Wyo. Stat. § 16-4-203, its partial denial of the Resource Council's request was arbitrary, capricious, an abuse of discretion, and not in accordance with the law. See Wyo. Stat. § 16-3-114(c)(ii)(A).

II. Jurisdiction and Venue

3. This Court has jurisdiction to hear the Resource Council's Petition for Review of DEQ's final administrative action pursuant to Wyo. Stat. § 16-3-114 (Wyoming Administrative Procedure Act), W.R.A.P. 12, and Wyo. Stat. § 35-11-1101.

4. Venue in Laramie County is proper pursuant to Wyo. Stat. § 16-4-203(f) (Wyoming Public Records Act) because the documents sought are located in Laramie County.

III. Issues of Law

5. DEQ has unlawfully withheld documents it is required to produce by the Wyoming Public Records Act ("WPRA") and the Wyoming Environmental Quality Act ("WEQA"). The WEQA provides that "[u]nless the information would 'divulge trade secrets'" "[a]ny records, reports or information obtained under this act or the rules, regulations and standards promulgated hereunder are available to the public." Wyo. Stat. § 35-11-1101(a).

6. DEQ's decision to withhold the requested documents was:
- a. arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law;
 - b. in excess of its statutory jurisdiction, authority or limitations or lacking statutory right; and
 - c. without observance of procedure required by law.

IV. Factual and Legal Background

7. Contura Energy, through its subsidiary Contura Coal West (“Contura”), sought to renew its mine permit for the Belle Ayr Coal Mine from the DEQ. The coal mine permit renewal was sought under DEQ’s delegated authority to implement the Federal Surface Mining Control and Reclamation Act (“SMCRA”). DEQ implements SMCRA through the Wyoming Environmental Quality Act (“WEQA”), Wyo. Stat. § 35-11-101, *et seq.*

8. In order to have its coal mine permit renewed, DEQ had to find, in part, that “the operation is in compliance with applicable laws and regulations . . .” *Id.* § 406(e).

9. One of the main requirements of the WEQA for coal mine operations is adequate bonding to cover the full cost of third-party reclamation work should a company default on its obligations at any time during the life of the mine.

10. In the case of the Belle Ayr Mine, \$26,749,000 of the \$119,068,500 reclamation bond (about 22% of the bond amount for the mine) is guaranteed through a real property collateral bond. The DEQ bond approval for the Belle Ayr Mine is attached as Appendix B.

11. During the public comment period for the permit renewal, the Resource Council submitted comments to DEQ objecting to the use of the bond collateralized by real property, raising concerns about the amount of the bond. These comments are attached as Appendix C. In preparing its comments, Resource Council staff reviewed the DEQ’s public file for the permit renewal, and the appraisal for the real property used for the reclamation bond was not included in the public file.

12. At the time of the permit renewal for Contura, DEQ was also in the process of reviewing an application from Contura to transfer its mine permit for the Belle Ayr Mine to a company called Blackjewel. The permit transfer application was made available for public notice

by DEQ, with a comment period ending November 29, 2018. Resource Council staff also reviewed the public file for the permit transfer application for the Belle Ayr Mine, and the appraisal for the real property bond was not included in the public file.

13. Since the appraisal was not included in the public files, the Resource Council submitted a Public Records Act request to the DEQ requesting, in part, “Any appraisal or valuation reports for real property used as collateral for the reclamation bond obligations of Contura and/or Blackjewel.” See Appendix A.

14. DEQ responded to the Resource Council request on January 8, 2019, stating, in part: “Blackjewel has requested that the appraisal be kept confidential. The appraisal qualifies as confidential material under the Wyoming Public Records Act, which requires the custodian of records to deny inspection of any records which are ‘[t]rade secrets, privileged information and confidential commercial, financial, geological or geophysical data furnished by or obtained from any person.’ Wyo. Stat. Ann. § 16-4-203(d)(v).” DEQ’s January 8, 2019 denial of the Resource Council’s records request constitutes final administrative action.

15. The appraisal was provided by Blackjewel, and is being used by DEQ, as evidence of the valuation of property Blackjewel offered to meet a bonding requirement imposed by SMCRA and implemented by DEQ. Appraisals, bills of sale, and other evidence including land valuations are commonly disclosed in public records. On information and belief, the appraisal does not depend on any trade secret or other confidential financial information that enjoys a legally recognized expectation of privacy.

16. Wyoming’s Public Records Act specifically addresses when a custodian may withhold appraisals to protect the public interest. “Except as otherwise provided by Wyoming statutes or for the owner of the property, the contents of real estate appraisals made for the state

or a political subdivision thereof, relative to the acquisition of property or any interest in property for public use, until such time as title of the property or property interest has passed to the state or political subdivision. The contents of the appraisal shall be available to the owner of the property or property interest at any time[.]” Wyo. Stat. § 16-4-203(d)(iv).

17. The requested appraisal does not fall within any recognized exception to Wyoming’s Public Records Act.

18. DEQ did not attempt to provide a redacted version of the appraisal and instead chose to withhold the appraisal from public inspection in full. Even if some portion did involve trade secrets or were otherwise subject to withholding, other portions could be released based on redacted versions.

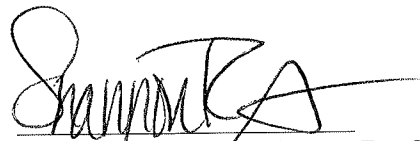
V. Prayer for Relief

Petitioner requests the Court:

- A. Compel the DEQ to show cause, pursuant to Wyo. Stat. § 16-4-203(f), why its partial denial of the Council’s Public Records Act request is lawful;
- B. Compel enforcement of the Public Records Act and Environmental Quality Act by ordering DEQ to release the non-exempt documents, or redacted versions of the documents, for public inspection;
- C. Find that DEQ’s actions were arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law; lacking statutory right; and without observance of procedure required by law;
- C. Grant the Resource Council attorney fees and other litigation costs reasonably incurred in this action pursuant to Wyo. Stat. § 35-11-1101(c); and
- D. Grant the Resource Council such other relief as the Court deems just and proper.

Dated this 5th day of February, 2019.

Respectfully submitted,

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

Shannon Anderson (Wyo. Bar No. 6-4402)
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Powder River Basin Resource Council
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(*Pro Hac Vice* admission pending)

Certificate of Service

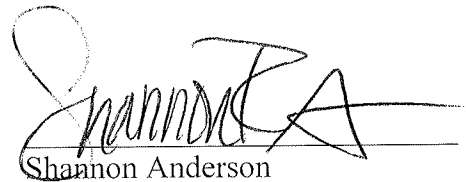
I certify that on the 5th day of February, 2019, I caused to be served a true and correct copy of the foregoing PETITION FOR REVIEW OF ADMINISTRATIVE ACTION AND COMPLAINT FOR ORDER TO SHOW CAUSE by first-class and electronic mail to:

James Kaste
Wyoming Office of Attorney General
Pioneer Building, 2nd Floor
2424 Pioneer Avenue
Cheyenne, WY 82002
james.kaste@wyo.gov
Counsel for DEQ

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

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Counsel for Contura

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Throne Law Office
P.O. Box 6590
Sheridan, WY 82801
tthrone@thronelaw.com
Counsel for Blackjewel, LLC



Shannon Anderson

APPENDIX A

Request #18-271

CLOSED

As of January 14, 2019, 8:40am

Details

On behalf of the Powder River Basin Resource Council, and pursuant to W.S. 35-11-1101 and the Wyoming Public Records Act, we request access to the following public records held by DEQ:

- 1) Any appraisal or valuation reports for real property used as collateral for the reclamation bond obligations of Contura and/or Blackjewel
- 2) Any correspondence, including electronic correspondence, between Contura and/or Blackjewel and DEQ staff regarding the real property bonds, the property appraisals, and/or records confidentiality.

We look forward to your response within seven days on whether these records are available to the public.

Thank you,

Shannon Anderson

[Read less](#)

Received

October 4, 2018 via web

Departments

Land Quality Division, Industrial Siting Division

Documents

[Emails Released 18-271.pdf](#)

Staff

Point of Contact

Keith Guille

Timeline

Request Closed

Public

In regard to item #1: Blackjewel has requested that the appraisal be kept confidential. The appraisal qualifies as confidential material under the Wyoming Public Records Act, which requires the custodian of records to deny inspection of any records which are "[t]rade secrets, privileged information and confidential commercial, financial, geological or geophysical data furnished by or obtained from any person." Wyo. Stat. Ann. § 16-4-203(d)(v).

All responsive documents pertaining to item number 2, have been released pursuant to the State of Wyoming Public Records Act.

January 8, 2019, 1:33pm

Request Reopened

Public

January 8, 2019, 1:32pm

Request Closed

Public

All responsive documents have been released pursuant to the State of Wyoming Public Records Act.

January 7, 2019, 2:47pm

Request Published

Public

January 7, 2019, 2:47pm

Document(s) Released

Public

Emails Released 18-271.pdf

January 7, 2019, 2:45pm

Department Assignment

Public

Added: Land Quality Division.

October 4, 2018, 8:32am

Department Assignment

Public

Added: Industrial Siting Division.

October 4, 2018, 8:32am

Request Opened

Public

Request received via web

October 4, 2018, 8:28am

APPENDIX B



Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.



Matthew H. Mead, Governor

Todd Parfitt, Director

Mark Thrall
Blackjewel LLC
PO Box 3039
Gillette, WY 82717

RE: Bond Acceptances – Permit No. PT0214
New Bond: Endurance American Insurance Company Surety No. EAIC179000048
New Bond: Endurance Assurance Corporation Reinsurance for Surety No. EAIC179000048
New Bond: Atlantic Specialty Insurance Company Surety No. 800036605
New Bond: Indemnity National Insurance Company Surety No. N-7001125
New Bond: XL Specialty Insurance Company Surety No. US00085571SU18A
Held On Permit: Contura Coal West LLC Collateral Bond No. CBC-001

Dear Mr. Thrall:

The above referenced bonds have been accepted by the Wyoming Department of Environmental Quality, and copies are enclosed. This permit's total aggregate bond amount provided by and for Blackjewel LLC is now \$119,068,500.00 in accordance with the June 5, 2018 Director's Bond Letter. **Please be advised this is only an approval for the above referenced bonds, and not an approval for the permit transfer.** The details of the bonding for the permit are on the back side of this page.

Should you have any questions regarding your bond instrument, please feel free to contact Casey Robb (307-777-6910 or casey.rob2@wyo.gov).

Sincerely,

Todd Parfitt
Director
Department of Environmental Quality
Enclosures

Date: 8/29/18

TP:CR

cc: District 3 – Mark Rogaczewski
cc: District 3 – Pat Seurer

Permit No.	Bond Provided By	Bond Action	Bondor	Bond No.	Bond Type	Previous Bond Amount	Change	Direct Writing Surety Coverage Amount	Reinsurance Amount	Current Bond Amount	Total Required Bond Amount
						A	B	C	D	E+B+C	F
PT0214	Blackjewel LLC	Acceptance	Endurance American Insurance Company	EAC179000048	Surety		\$52,068,500.00	\$40,000,000.00	\$12,068,500.00	\$52,068,500.00	\$52,068,500.00
PT0214	Blackjewel LLC	Acceptance	Endurance Assurance Corporation	EAC179000048	Reinsurance				\$12,068,500.00	\$0.00	\$0.00
PT0214	Blackjewel LLC	Acceptance	Atlantic Specialty Insurance Company	800096605	Surety		\$10,000,000.00			\$10,000,000.00	\$10,000,000.00
PT0214	Blackjewel LLC	Acceptance	Indemnity National Insurance Company	N-7001125	Surety		\$5,000,000.00			\$5,000,000.00	\$5,000,000.00
PT0214	Blackjewel LLC	Acceptance	XL Specialty Insurance Company	US00086571SU18A	Surety	\$26,749,000.00	\$25,251,000.00			\$25,251,000.00	\$25,251,000.00
PT0214	Contura Coal West LLC	Held on Permit	Contura Coal West LLC	CBC-001	Collateral	\$26,749,000.00	\$92,319,500.00	\$40,000,000.00	\$12,068,500.00	\$119,068,500.00	\$119,068,500.00
Totals For	Blackjewel LLC										

Permit No.	Bond Provided By	Bond Action	Bondor	Bond No.	Bond Type	Current Bond Amount
PT0214	Contura Coal West LLC	None	Aspen American Insurance Company	SU08198	Surety	\$30,807,767.00
PT0214	Contura Coal West LLC	None	XL Specialty Insurance Company	US00079864SU17A	Surety	\$12,500,000.00
PT0214	Contura Coal West LLC	None	North American Specialty Insurance Company	2181552	Surety	\$16,585,233.00
PT0214	Contura Coal West LLC	None	Atlantic Specialty Insurance	800031980	Surety	\$10,000,000.00
PT0214	Contura Coal West LLC	None	U.S. Specialty Insurance Company	1000963307	Surety	\$12,450,000.00
PT0214	Contura Coal West LLC	None	Liberty Mutual Insurance Company	01905878	Surety	\$10,000,000.00
PT0214	Contura Coal West LLC	Held on Permit	Contura Coal West LLC	CBC-001	Collateral	\$26,749,000.00
Totals For	Contura Coal West LLC					\$119,090,000.00

APPENDIX C



Via priority mail

October 2, 2018

Kyle Wendtland, Administrator
Land Quality Division of the Department of Environmental Quality
200 W. 17th Street, Suite 10
Cheyenne, WY 82002

RE: Objections to the proposed Contura Coal West, LLC - PT0214 Coal Permit Renewal Application

Dear Mr. Wendtland,

On behalf of the Powder River Basin Resource Council ("Resource Council") and its members, we hereby file the following objections to the proposed renewal of mining permit PT214 for the Belle Ayr Mine, currently held by Contura Coal West, a subsidiary of Contura Energy (collectively "Contura"). As discussed below, the Resource Council has significant concerns and objections to the bond instruments for the permit. Contura has not met its requirements under the Wyoming Environmental Quality Act ("WEQA") and its implementing regulations related to financial assurance requirements and the permit should not be renewed until such requirements are met.

Pursuant to W.S. § 35-11-406(k), the Resource Council requests an informal conference with the Director to discuss our objections and hopefully resolve them to the benefit of our members, the company, and the Department. With the company's recent sale of the mine to Blackjewel, its planned re-merger with Alpha Natural Resources, and other complicating factors, this renewal permit present issues of first impression for our organization, the public, and the Department. We believe these issues would be well suited to be addressed in an informal conference with the Director.

Organizational Interest in the Permit Renewal

The Resource Council is a member-based organization that has worked to address the impacts of coal mining on people and the environment since our founding in 1973. Our core membership lives in the Powder River Basin and many of our members work, live, and recreate near the coal mines of the area. We have members who live near and regularly travel by the Belle Ayr Mine. These members suffer legally cognizable injury from the mine, including aesthetic injury and impact to quality of life and recreational opportunities. The renewal of this permit will prolong this harm. We are therefore an "interested person" within the meaning of W.S. § 35-11-406(k).

Objections and Concerns

The standard of review for a permit renewal is:

Any valid surface coal mining permit issued pursuant to this act is entitled to a right of successive renewal upon expiration with respect to areas within the boundary of the existing permit if public notice has been given, any additional revised or updated information has been provided and the operation is in compliance with applicable laws and regulations and if the renewal requested will not substantially jeopardize the operator's responsibility on existing affected land.

W.S. § 35-11-405(e) (emphasis added).¹

One of the main requirements of the WEQA is adequate reclamation bonding to cover the full cost of third-party reclamation should a company default on its obligations at any time during the life of the mine.² The WEQA's implementing regulations specifically provide that an application for a renewal of a mine permit requires "Evidence that the bond and a liability insurance policy will be provided." Wyoming Coal Rules and Regulations Chapter 12 § 1(b)(i)(C).

After careful review of Contura's financial assurance instruments, we have concerns and objections to the continued use of its real property collateral bond. We also have objections to the continued nondisclosure of information related to this real property collateral bond. Finally, we are concerned about the continued reliance on Contura's real property bond since Blackjewel is the operator of the mine and Contura is re-merging with Alpha Natural Resources.

1. Objections to Contura's Real Property Collateral Bond

Since the time it took over as the permit holder for the Belle Ayr Mine, Contura has guaranteed its reclamation work partly through a real property collateral bond. The property covers \$26,749,000 of the company's \$119,090,000 reclamation bond, or about 22% of the bond amount for the mine.³

According to current Department rules:

The property shall be valued at the difference between the fair market value and any reasonable expense anticipated by the Department in selling the property. The fair market value shall be determined by an appraiser or appraisers proposed by the operator. The appraiser or appraisers shall be selected by the Administrator. The Administrator has the option to reject any appraiser proposed by the operator.

¹ It is clear from the language in SMCRA that Congress intended an affirmative finding that the operation is in compliance a necessary component of permit renewals. See 30 U.S.C. § 1256(d); 30 C.F.R. § 744.15 (permits carry a right of successive renewal unless findings are made that the operator is in noncompliance with the environmental protection standards of the Act or that the terms and conditions of the permit are not being satisfactorily met).

² See Wyoming Coal Rules & Regulations Chapter 12 § 2.

³ This information is current as of June 30, 2018.

Unfortunately, as discussed below, the appraisal report for this piece of property is being held as confidential by the Department and we are unable to review it. Nevertheless, even without reviewing the appraisal report, we can raise valid concerns about the amount of the real property bond.

First, we have compared the property amount – almost \$27 million – with property for sale in Crook, Weston, Campbell, and Sheridan counties. As the attached documents show, we find it highly unlikely that Contura would own a ranch worth \$27 million. For instance, the attached brochure for the Holy Cow Ranch in Sheridan County details that this large acreage, prime agricultural and recreational area ranch, is about \$3 million less than Contura's. The Holy Cow Ranch borders the Bighorn National Forest, has water rights in place for irrigation and a sizeable cow/calf operation, and has modern buildings including a 6,300 square foot residence and a lodge. We cannot imagine Contura's property has similar attributes.

Larger acreage ranches in Crook, Weston, and Campbell Counties are valued at under \$20 million, if not mostly under \$10 million. Based on this information, we find it difficult to believe that Contura could own a ranch that is valued at what they say it is.

Additionally, we do not believe that Contura has updated its appraisal since the original submission, and we have reason to believe that the appraisal was not updated for the annual report nor was it updated for this renewal application. At the very least, an updated appraisal should be required before the permit can be renewed.

2. Objections to Lack of Public Disclosure of the Appraisal Report

As part of our objections related to Contura's original bonding proposal when it obtained the permits from Alpha Natural Resources, we submitted a public records request for all appraisal reports and correspondence related to the company's collateral bonds. The Department withheld the appraisal reports as confidential. The appraisal report is also not a part of the public file on the permit renewal application. It is therefore impossible for us to comment on whether the appraisal requirements are properly being met, and we object to the lack of public information and denial of public participation opportunities stemming from the lack of disclosure. We contend withholding this information violates the WEQA's requirements under Section 1101(a) (Unless the information would "divulge trade secrets" "[a]ny records, reports or information obtained under this act or the rules, regulations and standards promulgated hereunder are available to the public.").

3. Questions and Concerns about the Future of Contura

Almost a year ago, in announcing the sale of the Belle Ayr and Eagle Butte Mines to Blackjewel, Contura stated: "Blackjewel L.L.C. will assume all permit and reclamation obligations associated with the assets acquired."⁴ In its 2017 audited financial statement, Contura

⁴ <https://conturaenergy.com/news/contura-subidiaries-sell-powder-river-basin-assets/> (attached)

similarly reported: “The transfer of mining permits to the Buyer is estimated to be completed in the first half of 2018” and that “Per the terms of the asset purchase agreement, as promptly as practicable after closing, the Buyer shall use its best efforts to replace the Company’s reclamation performance bonds and collateral bonds relating to the purchased permits.”⁵ Contura has since announced it plans to re-merge with Alpha Natural Resources.

In spite of this “promptly as practicable” language, to our knowledge, the permit transfer application has not proceeded to public notice and comment. We remain very concerned about the future of the Belle Ayr Mine. While we reserve the right to further comment and object to Blackjewel’s operation of the mine if and when the permit transfer goes to public notice, for the purposes of this renewal application, the uncertain situation further underscores the need for the Department to heavily scrutinize the adequacy of Contura’s reclamation bonds. Importantly, Blackjewel has proposed to retain the real property collateral bond posted by Contura as part of its bonding package for the Belle Ayr Mine (see attached). We have questions and concerns related to Blackjewel’s use of Contura’s real property – questions and concerns we hope to have addressed through an informal conference.⁶ These questions and concerns include:

- 1) Will Blackjewel obtain ownership of the real property or will Contura hold it indefinitely to meet Blackjewel’s reclamation bond requirements?
- 2) Have Blackjewel and Contura amended the terms of their sale agreement to allow Blackjewel to use the real property collateral bond (noting that the sale agreement quoted above required replacement of Contura’s collateral bond)?
- 3) Has Blackjewel conducted an appraisal of the property?
- 4) Has Contura told the Department what will happen to the property when Contura re-merges with Alpha?

Thank you for your time and consideration of these objections. We look forward to your scheduling of an information conference to discuss these objections and your responses.

Sincerely,



Shannon Anderson
Staff Attorney

⁵ See attached.

⁶ We reserve the right to raise similar questions and objections on the permit transfer once it goes to public notice.