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May 21, 2013

Mr. Chris Yde
Coal Program Supervisor
Industrial and Energy Minerals Bureau
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

By Electronic Mail to cyde@mt.gov

RE: Otter Creek Mine - Need for New Completeness Determination Following Applicant's Response to Deficiency Notice

Dear Mr. Yde:

On behalf of the Montana Environmental Information Center, National Wildlife Federation, Northern Plains Resource Council, Sierra Club (collectively, "the organizations"), and Vanessa Braided Hair, I am writing to inform the Department of Environmental Quality of its legal obligation to make a new determination regarding the completeness of Arch Coal's application for a permit to mine the Otter Creek coal tracts under the Strip and Underground Mine Reclamation Act ("SUMRA"), Mont. Code Ann. § 82-4-201, et seq., and Article II, Section 8 of the Montana Constitution that provides for the public's right to participate.

Arch Coal, through its wholly owned subsidiary Otter Creek Coal LLC, submitted an application for a mining permit for the Otter Creek coal tracts on June 26, 2012. Despite major omissions from the application, some of which the applicant itself acknowledged, DEQ deemed Arch Coal's application "administratively complete" on December 14, 2012. The above organizations and Ms. Braided Hair filed objections to DEQ's completeness determination and requested an informal conference, which was held in Ashland, Montana on March 21, 2013. In both their written objections and their remarks at the informal conference, the organizations and Ms. Braided Hair urged DEQ to reverse its completeness determination. Among other things, they observed that the application: lacked information essential to enable DEQ to assess the presence and scope of alluvial valley floors in and near the mining area; omitted data and contained contradictory information regarding probable hydrologic consequences of the mine; lacked key baseline data regarding wildlife and cultural resources; omitted a wildlife conservation plan; failed to disclose required ownership and control information for the applicant; and failed to include an adequate reclamation plan. Notwithstanding these omissions and deficiencies, DEQ made formal findings on May 17, 2013, rejecting the requests to reverse the determination of completeness.

The agency's rationale for rejecting the requests of the organizations and Ms. Braided Hair was that the agency separately deemed the application technically unacceptable on many of these same grounds in a "First Round Acceptability Deficiency" notice dated April 12, 2013.

However, the agency is incorrect that the acceptability deficiency finding can substitute for an incompleteness determination. As discussed below, the Montana Legislature provided for robust public participation in the completeness-determination phase of the mine-permitting process that is absent from statutory and regulatory provisions governing the acceptability-determination phase. Furthermore, SUMRA is clear that DEQ must restart the clock on its completeness determination when Arch Coal makes significant revisions, as called for by DEQ's April 12, 2013 deficiency notice. Doing so is not only required by SUMRA, it is also demanded to vindicate the public's constitutional right to participate in the affairs of government.

Montana law requires DEQ to make another completeness determination if, in response to DEQ's April 12, 2013 deficiency notice, Arch's revision to the application constitutes a "significant modification." See Mont. Code Ann. § 82-4-231(8)(d) ("Except as provided in 75-1-208(4)(b) [extending the timeframe for acceptability determinations in certain circumstances, not relevant here], if the applicant revises the application in response to a notice of unacceptability, the department shall review the revised application and notify the applicant in writing within 120 days of the date of receipt whether the revised application is acceptable. If the revision constitutes a significant modification under subsection (8)(b), the department shall conduct a new review, beginning with an administrative completeness determination.") (emphasis added). DEQ's regulations confirm this requirement. See ARM 17.24.404(2)(b) ("If the applicant revises the application in response to a notice of unacceptability, the department shall review the revised application and notify the applicant within 120 days of date of receipt, except that if the revision constitutes a significant modification, the department shall conduct a new review, including an administrative completeness determination, public notice, and public review.").

DEQ's April 12, 2013 deficiency notice totaled 41 pages, and additionally incorporated a separate 7-page memorandum prepared by DEQ's hydrologic consultant hired for the MEPA process. While many of the application revisions demanded by that notice may independently constitute a "significant modification" requiring DEQ to make a new completeness determination, perhaps the most glaring deficiency noted was the incompleteness and inadequacy of Arch Coal's discussion of the hydrologic consequences of mining. DEQ noted numerous, significant inconsistencies between the groundwater model provided by Arch Coal and other statements in the application, as well as a failure to provide sufficient detail in critical areas. "DEQ determined that the groundwater model is insufficient to model impacts from the proposed Tract 2 mining operations." Deficiency Notice at 29. Not only did DEQ require Arch Coal to make significant revisions to the groundwater model, DEQ stated that Arch Coal must revise its discussion of the probable hydrologic consequences of the mine to reflect the changes in the model. *Id.* at 25. Until both the groundwater model and the analysis of probable hydrologic consequences are revised, DEQ is unable to assess the potential water quality impacts of the mine. Still further, DEQ determined that an alluvial valley floor determination "cannot be undertaken until first round hydrology comments are addressed and all information regarding water levels, wells, flow budgets, water quality data and vegetative production is updated and complete." *Id.* at 34.

In other words, DEQ demanded significant new information regarding the proposed mine's hydrologic consequences and is unable to complete (or in some areas, even to begin) its

technical review without the new information. The changes demanded by DEQ's deficiency notice will constitute a "significant modification" to Arch Coal's permit application. Accordingly, upon receipt of Arch Coal's revised application, DEQ "shall conduct a new review, including an administrative completeness determination, public notice, and public review." ARM 17.24.404(2)(b).

SUMRA's requirement to reinitiate the completeness-determination process is critical to ensuring the public's constitutional right to participate. Article II, Section 8 of the Montana Constitution provides that "[t]he public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law." DEQ provides for public participation during the completeness-determination phase of mine permitting through a 30-day public-comment period following a four-week publication of notice, for a total of approximately two months for public review of applications. ARM 17.24.401, 402. No further opportunities for public comment are provided while DEQ considers a mining application until after DEQ makes a determination of technical acceptability. At that stage, the public must submit comments within 10 days following a two-week notice period. ARM 17.24.404(3). Thus, unless DEQ reinitiates the completeness-determination process, the public will have no opportunity to comment on the significant new information provided by Arch Coal (as demanded by DEQ) until after DEQ makes a determination that such information is acceptable. This result would defeat the public's right to a "reasonable opportunity" to participate in DEQ's decisionmaking, Mont. Const. art. II, § 8 (emphasis added), because it would "reduce[] what should [be] a genuine interchange into a mere formality." Bryan v. Yellowstone County Elementary Sch. Dist. No. 2, 2002 MT 264, ¶ 46, 312 Mont. 257, 60 P.3d 381. The consequence of failing to provide for adequate public participation is that the agency's decision is rendered void. Id. ¶ 53.

For all of the foregoing reasons, the organizations and Ms. Braided Hair respectfully request that DEQ make a new determination regarding the administrative completeness of Arch Coal's application to mine Otter Creek and allow a full opportunity for public participation in that determination as required by SUMRA and its implementing regulations.

Sincerely,



Jenny Harbine

cc: Anne Hedges and Derf Johnson, Montana Environmental Information Center
Alexis Bonogofsky, National Wildlife Federation
Teresa Erickson and Svein Newman, Northern Plains Resource Council
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