

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF THE PROMULGATION)
OF REGULATIONS FOR THE DESIGNATION) STATEMENT OF PRINCIPAL
OF AREAS AS VERY RARE OR UNCOMMON) REASONS FOR ADOPTION
PURSUANT TO W.S. 35-11-112(A)(V))

In 1973, the Environmental Quality Act (the Act) became law. The Act provided that the Environmental Quality Council (the Council) "shall: . . . designate at the earliest date and to the extent possible those areas of the State which are of a unique and irreplaceable historical, archaeological, scenic or natural value. . . ." W.S. 35-11-112(a)(v).

On March 8, 1977, Section 35-11-112(a)(v) was amended to read that the Council "shall: . . . designate at the earliest date and to the extent possible those areas of the State which are very rare or uncommon and have particular historical, archaeological, wildlife, surface geological, botanical or scenic value. When areas of privately owned lands are to be considered for such designation, the council shall give notice to the record owner and hold hearing thereon, within a county in which the area, or major portion thereof, to be so designated is located, in accordance with the Wyoming Administrative Procedure Act."

Since 1974, the Council has designated areas of the state as unique and irreplaceable or very rare and uncommon. The first designation resulted from an inventory of sites in the state the Council found should be designated, such as national and state parks, historic sites, wilderness areas, and other lands similarly designated and used. All designations subsequent to the first designation have been at the request of citizens of the State.

In 1991, a petition to designate specified portions of an area referred to

as Bessemer Mountain was filed with the Council. The Council held a hearing on the petition on April 23 and 24, 1992. At the conclusion of the hearing, the Council, by unanimous vote, designated portions of Bessemer Mountain as very rare or uncommon. The Council issued a detailed statement of reasons for the decision to designate. That statement included findings that several of the particular values set forth in Section 35-11-112(a)(v) were present at Bessemer Mountain and, in addition, that these values were very rare or uncommon.

Rissler & McMurry Inc. petitioned the district court for judicial review of the Council's decision to designate, and the judicial review was certified to the Wyoming Supreme Court (the Court). On July 15, 1993, the Court issued its decision on the judicial review. In the Matter of a Petition to Designate Bessemer Mt. as Rare and Uncommon: Rissler & McMurry v. Environmental Quality Council, 856 P.2d 450 (Wyo. 1993). The Court reversed the decision of the Council and remanded the case to the Council "for future determination to be made in the light of standards encompassing appropriate criteria and factors for the classification, adopted pursuant to a regular rulemaking proceeding in accordance with the Wyoming Administrative Procedure Act."

In accordance with the Court's mandate, the Council set a schedule for the drafting of and the review of new rules for the designations pursuant to Section 35-11-112(a)(v). The Council, through public notice published in 13 Wyoming newspapers and a mailing to a permanent mailing list maintained by the Council, solicited proposals for the new rules. The public submittals were to be received by the Council by October 15, 1993.

The Council's staff prepared proposed rules from the public's suggestions and from the current rules of procedure for hearings on citizen petitions for rulemaking. A hearing on the proposed rules was scheduled for December 14, 1993 in Casper, Wyoming. Notice of the hearing and the availability of the proposed rules for review was published in 13 Wyoming newspapers beginning on October 23, 1993. Notice was mailed to those on the Council's permanent mailing list and to those persons who had submitted proposals for the rules in response to the Council's request for rule proposals.

The public notice issued by the Council also notified interested persons of 3 public meetings to be held by the Council to discuss the proposed rules for designations. The first of the public meetings was held through the use of the State's video conference facilities. This meeting was held on the evening of November 5, 1993 and the towns connected to the conference system were Cheyenne, Laramie, Casper, Gillette, and Sheridan. The Council members and staff were available to answer questions for the public at these locations.

On November 8, 1993 a meeting was held in Jackson, Wyoming and on November 9, 1993 a meeting was held in Rock Springs, Wyoming. A Council member and staff were available at both locations to answer questions regarding the proposed rules.

In addition to providing for oral comments through the public meetings and at the public hearing on December 14, the Council solicited and received numerous written comments on the proposed rules. All comments are contained in the Council's public record for this rulemaking.

At the beginning of the public hearing on December 14, 1993, the Council distributed a copy of modifications to the proposed rules that would be considered by the Council. These proposed modifications were in response to comments received from the public prior to the public hearing. These proposed modifications were reviewed for the public. The public was invited to consider the proposed modifications and comment on those modifications throughout the hearing.

After the close of the public hearing on December 14, the Council opened a public meeting to discuss the public comments and the proposed rules. The Council meeting continued to the next day, December 15. The Council proceeded to discuss the proposed rules for designation by reviewing each section of the rules and the comments thereon.

At the conclusion of the Council meeting on December 15, the Council members voted to adopt the proposed rules as modified during the meeting. These new rules include changes to Chapter III of the DEQ Rules of Practice and Procedure and a new Chapter VII of the DEQ Rules of Practice and Procedure.

The Council believes these new rules on designation of areas as very rare or uncommon meet the directive of the Court to establish, by regulation, the criteria that will be the standard for designations. The Council has articulated the procedure to be followed in submitting and processing a petition to designate and the criteria to be used in evaluating the petition. The Council has included provisions for notification of the owners of the surface and minerals of the lands proposed to be designated and the surface owners of lands contiguous to the area proposed for designation. The Council has established a rulemaking process for designations except where a private landowner objects to the designation. In such circumstances contested case procedures will be used to supplement the rulemaking procedures.

The Council's new rules adopt the two tier decision process followed in the Bessemer Mountain case. These rules require a finding of one or more of the particular values set forth in the statute (historical, archaeological, wildlife, surface geological, botanical, or scenic) and a finding that the area is very rare or uncommon. Thus, although an area may exhibit a particular value, that value must also be very rare or uncommon.

Persons commented during the public review process for these new rules that the entire state could qualify for designation. The Council's response to this comment was stated at the public hearing. Although prior to the adoption of these rules there were statutory and procedural limitations on the designation of areas of the state, the subsequent adoption of these rules narrows the scope of designations, and these rules represent some limitations on the designation process.

The Council received several requests that the Council put a moratorium on the adoption of designation rules. The Council did not postpone consideration of the rules for the reasons that the Court mandated the adoption of such rules and the Council must adopt such rules before it can proceed with cases on the Council's docket. It would be unfair to the persons petitioning for designation and the applicants for non-coal mining permits to postpone the adoption of these rules. In addition, the Council noted during its discussions that the designation process has been used

for two decades. Any impact on the assessed valuation of lands within Wyoming occurred on the date of enactment of the statute in 1973 and not on the date of adoption of these rules. The designation process is not new; only these rules which articulate the criteria to be used for designations are new.

The Council also rejected requests to postpone the adoption of these rules based on the projected impacts of designation on oil and gas permits, grazing permits, and permits issued by other state or federal agencies. The Council's jurisdiction is established by the Environmental Quality Act, and the Council has no role in the issuance of permits by other state or federal agencies. The Council cannot limit or expand the permitting authority of other state or federal agencies. The Council found it could not base its decision on speculation about the future activities of other state or federal agencies, or on the possible actions of future legislatures. A designation of very rare or uncommon is advisory only, and does not prevent any of the above activities from taking place on lands so designated. The impact of a designation is set forth in Section 406(m) of the Act, and that section concerns the issuance of non coal mining permits.

The Council is obligated to consider designations of areas of the state pursuant to Section 35-11-112(a)(v) and the Council is obligated to adopt criteria for the designation process pursuant to the Court decision in the Bessemer Mountain designation case. The Council cannot ignore the directives of the Wyoming legislature and the Wyoming Supreme Court. Although members of the public expressed fears about the abuse of the designation process, the Council found that the process has not been abused in the 20 years since it was created. The Council has received few petitions to designate areas of the state since 1973, and only three areas are currently designated pursuant to such petitions.

To meet its statutory obligation to designate those areas of the state "which are very rare or uncommon and have particular historical, archaeological, wildlife, surface geological, botanical, or scenic value" and to comply with the order of the Wyoming Supreme Court in *In the Matter of a Petition to Designate Bessemer Mountain as Rare and Uncommon: Rissler & McMurry v. Environmental Quality Council*, 856 P.2d

450 (Wyo. 1993), the Environmental Quality Council adopted the revisions to Chapter III of the DEQ Rules of Practice and Procedure and the new Chapter VII of the DEQ Rules of Practice and Procedure.

Done this 27th day of December, 1993.

ENVIRONMENTAL QUALITY COUNCIL

A handwritten signature in black ink, appearing to read "Vincent R. Lee", is written over a horizontal line.

Vincent R. Lee
Hearing Examiner