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ATTORNEYS FOR BASIN ELECTRIC
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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

In the Matter of:	)	
Basin Electric Power Cooperative	)	Docket No. 07-2801
Dry Fork Station,	)	
Air Permit CT – 4631	)	

BASIN ELECTRIC' S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Basin Electric has moved to dismiss because Protestants have no statutory right to appeal Basin Electric's final air quality permit to the Council. In response, Protestants primarily contend that Section 112 of the Environmental Quality Act (EQA) (W.S. § 35-11-112) is a broad grant of statutory authority for this Council to hear "any case" challenging a permit, and makes up for the lack of any statute giving Protestants a specific right to appeal Basin Electric's permit to the Council rather than directly to district court.

Whether this is true is the question presented by Basin Electric's Motion: is Section 112 a statutory grant of authority **to the public** to file appeals over any permit issued by the Department, as Protestants argue; or is Section 112 instead a statutory grant of authority **to the Council** to hear appeals that are authorized elsewhere in the EQA, as Basin Electric contends? Answering this question requires straightforward construction of the EQA, and the answer is easily found.

Basin Electric contends that, with the exception of mine and solid waste permits, all other permits including air permits issued by the Director are final agency action that must be appealed directly to district court by any third parties who might have standing to object to the permit. Only permit applicants have the right to appeal directly to the Council. Protestants argue, on the other hand, that this Council is "the final permitting authority for all permits," Protestants' Brief at 1, and therefore any permit issued by the DEQ is not final unless and until this Council first conducts a *de novo* contested case hearing and then issues findings and conclusions which have to be incorporated by the Director into the final permit. According to Protestants, only at this point, and not before, is agency action on a permit complete. If Protestants' view is correct, then this Council is Wyoming's only final permitting authority and all permits potentially may have to be written by the Council, one contested case hearing at a time.

Basin Electric contends that Protestants' view of the EQA is fundamentally incorrect, as demonstrated by numerous different provisions of the Act.

I. ARGUMENT.

A. Protestants misconstrue W.S. § 35-11-112 and seek to re-write the entire EQA.

The EQA, when construed in its entirety, demonstrates that Section 112 is not a statute that opens all permits to an appeal to the Council by any person for any reason. Nor is this Council the "final permitting authority for all permits issued by" the DEQ. This is apparent from the plain language of the statutes and is revealed by the misstatements and misquotes set forth in Protestants' Brief.

The starting point is Section 112 itself. Section 112 is entitled: "Powers and duties of the environmental quality council." That is pretty clear. The statute is empowering the Council, not empowering the public. Protestants concede that Section 112 does not actually grant appeal

rights to any specific persons or parties who might object to a permit. Protestants' Brief at 4. Protestants therefore merely assume, without any basis for doing so, that the Council's **power to hear an appeal** is the same thing as granting every person or party **the right to file an appeal**. They are not the same thing. Under Wyoming law, the "[a]ctions of an administrative agent [in this case the Director's "final action" on the air permit] are not reviewable unless made so by statute."[1] There is no statute that makes final air quality permits reviewable by the Council at Protestants' request. Only disappointed applicants have that power. W.S. §§ 35-11-802; 35-11-208.

Second, Section 112 states that the Council's power to grant any of the relief described in subsection 35-11-112(c)(ii) is "subject to the right to appeal." If Section 112 itself creates a right to appeal to the Council then the language "subject to the right to appeal" in Section 112(c) is meaningless verbiage. This "subject to the right to appeal" language must be referring to a right to appeal to the Council, not to the courts, because the EQA already has a separate statute preserving the right to judicial review of Council decisions. W.S. § 35-11-1001. The plain language of Section 112 therefore answers the question presented by Basin Electric's Motion: the Council's power to hear an appeal is "subject to" the existence of a "right to appeal" found elsewhere in the EQA.

Another factor emphasizing the difference between a statute which grants the Council authority to hear appeals and statutes which create the right to file an appeal is the location of Section 112 in the EQA. Article One of the EQA is entitled "General Provisions" and contains a number of statutes which create and then define the powers of the various bodies that function

[1] *Holding's Little America v. Bd. of County Comm'rs of Laramie County*, 670 P.2d 699, 702 (Wyo. 1983).

under the Environmental Quality Act's umbrella. These include the DEQ as a separate agency, the duties and responsibilities of the Director, the duties and responsibilities of the administrators, the duties and responsibilities of the Council, and the duties and responsibilities of the Advisory Board. Each of the statutes in Article One address and then define the powers and responsibilities of the agencies at issue. They do not purport to empower the public or third parties to invoke any particular section of the Act. Nor do they purport to give persons authority to invoke the powers generally granted. Section 112 is plainly limited to defining the powers and duties of the Council; it is not a statutory grant of powers and rights to Protestants. If Protestants have any right to appeal permits issued by the Director then those rights must be found elsewhere in the statutes. There are none.

In fact, Protestants' argument conflicts with the entire structure of the EQA and renders meaningless a number of important provisions. As Basin Electric pointed out in its Motion to Dismiss, the Legislature expressly authorized parties to petition the Council in certain specific cases. (Motion at 13.) These statutes are all unnecessary if Section 112(a) gives the Council the right to conduct hearings on behalf of the public regarding "any case" involving permits. The Council should also note the language of Section 112(a)(iii), which gives the Council authority to conduct hearings in "any case contesting the administration or enforcement of any law ... administered by the department." Under Protestants' reasoning, this would allow any person at any time to demand a contested case hearing before the Board over **anything** the DEQ does, thus swallowing whole and rendering completely meaningless all of the many other provisions of the EQA providing for appeal rights to the Council in defined situations.[2] Clearly, the Legislature

[2] For example, W.S. § 35-11-406(k) (right to appeal to the Council specifying a hearing, regarding mining permits); W.S. § 35-11-211(d) (right to appeal to the Council specifying a contested case hearing, regarding fee assessment for construction and operating permits,); W.S.

did not intend Section 112 itself to define the "cases" that can be brought. Other statutes must do that. Protestants admit the legal principle that every clause and word of a statute be given effect, but then offer an argument that violates that principle by rendering all of the statutes creating specific and limited appeal rights, like Section 35-11-802, meaningless. That cannot be done under the law.[3]

Perhaps the best illustration of Protestants' fundamentally erroneous view of the EQA is to compare the role Protestants urge this Council to take for air permits with the role specifically created for the Council with mine and solid waste permits. For example, Section 406 applies to mine permits and describes how the final mine permit decision is made:

> The director shall render a decision on the application within thirty (30) days after completion of the notice period if no informal conference or hearing is requested. If an informal conference is held, all parties to the conference shall be furnished with a copy of the final written decision of the director issuing or denying the permit within sixty (60) days of the conference. If a hearing is held, the council shall issue findings of fact and a decision on the application within sixty (60) days after the final hearing. The Director shall issue or deny the permit no later than fifteen (15) days from receipt of any findings of fact and decision of the environmental quality council.

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§ 35-11-414(e) (right to appeal to the Council regarding Director's denial of special license for mineral exploration); W.S. § 35-11-515(k) (right to appeal to the Council regarding Director's decision concerning expenditure from solid waste disposal facility trust account); W.S. § 35-11-517(e) (right to appeal to the Council specifying a contested case hearing, regarding fee assessment for hazardous waste facilities); W.S. § 35-11-518(b) (right to appeal to the Council regarding administrative order issued under hazardous waste program); W.S. § 35-11-601(g) (right to appeal to the Council specifying a hearing regarding the Director's decision on variance); W.S. § 35-11-701(c) (right to appeal before the Council regarding Director's cease and desist order); W.S. § 35-11-1611 (right to appeal to the Council concerning disputes over voluntary remediation agreements); W.S. § 35-11-1612 (right to appeal to the Council regarding fee assessment for voluntary remediation agreements).

[3] "[A]ll portions of an act must be read" so that each and "every word, clause and sentence of it must be considered so that no part will be inoperative or superfluous." *Hamlin v. Transcon Lines*, 701 P.2d 1139, 1142 (Wyo. 1985). "A statute should not be construed to render any portion of it meaningless, [inoperative, superfluous,] or in a manner producing absurd results." *Matter of ALJ*, 836 P.2d 307, 310 (Wyo.1992); *Parodi v. Wyo. Dep't of Transp.*, 947 P.2d 1294, 1295-1296 (Wyo. 1997).

W.S. § 35-11-406(p). As this statute makes clear, the procedure designed by the Legislature for mine permits is as follows. First, an application is filed for a permit. Then, notice of the application is made to the public. If an informal conference with the Director is requested then the Director himself issues the "final written decision," subject to the right to appeal to the Council. If a hearing before the Council is requested, then a hearing is held by the Council, the Council issues findings on the permit, and then the Director issues the final permit incorporating the Council's findings. This makes mine permits final only after a Council hearing, if one is requested. A similar process is set out for the issuance of solid waste permits in Section 35-11-502(k).

However, there are no such provisions in the EQA related to air and water permits. The Legislature thus intended the final permitting process to be different for air and water permits than for mining and solid waste permits. This in turn explains the language in Section 801(b), which provides that "[e]xcept as otherwise provided in this act the director shall take final action on any permit application ...." The "except as otherwise provided" language refers to mining and solid waste permits, which do involve the Council in the permitting process if a hearing is requested. However, for air and water permits the decision issuing the permit by the director is final, and any appeal goes directly to court under Section 35-11-1001.

Protestants seek to destroy the careful statutory distinctions between air and water and mining and solid waste by arguing that Section 112 has the effect of making all permits, not just mine and solid waste permits, not final until the Council conducts a requested hearing and makes findings that then have to be incorporated into what actually becomes the real final permit. Protestants are arguing that the correct procedure for air quality permits is exactly like the procedure for mine and solid waste permits: an application is filed, notice is given, the Director

makes a "preliminary" finding and, if a hearing is requested, the Council must have a trial and make findings. Then, according to Protestants, the Director must issue the "final" permit by incorporating those findings. Thus, Protestants argue that Section 112, through its alleged "appeal" rights, effectively turns the process for all permits into the same process for mine and solid waste permits, even though the statutes provide otherwise.

Protestants' argument therefore: 1) renders the mine and solid waste permitting process meaningless verbiage since Section 112 allegedly requires the same process anyway; 2) rewrites the entire permitting process for air and water permits to make them like mine and solid waste permits even though there are no statutes which so provide; 3) makes the language of Section 35-11-801(b), which provides that decisions taken by the Director on air permits are "final action," meaningless, because in fact such permit decisions are never final until a hearing, if requested, is held by the Council; 4) renders meaningless the authorization to construct accorded to permits issued by the Director under Section 35-11-801(c); and 5) turns this Council into Wyoming's only final permitting authority on all air and water permits **even though there is not a single statute anywhere in the EQA that so provides**. If Protestants are correct, every single permit issued by the DEQ can be tied up by permit appeals until the Council rewrites each permit, one at a time, trial by trial.

However, under the EQA the Council is directly involved in writing final permits only for mine and solid waste permits, which is why Protestants repeated reliance on the *Rissler*[4] case actually serves to prove the accuracy of Basin Electric's argument. *Rissler* involved a mining permit, so the repeated citations to *Rissler* by Protestants are just additional examples of Protestants' effort to turn the process for all permits into the process applicable to only mine

[4] *Rissler & McMurry Co. v. State*, 917 P.2d 1157 (Wyo. 1996).

permits. In fact, Protestants are careful to confuse the issue by selectively editing their quotes from *Rissler*. For example, on page 10 of their Brief Protestants make the following incomplete quote from the *Rissler* case: "'The Legislature has charged the Environmental Quality Council with the responsibility for approving or denying applications for ... permits.'" (Response at 9-10.) What Protestants left out in their ellipsis is the word "mining." The actual quote from *Rissler* provides: "The Legislature has charged the Environmental Quality Council with the responsibility for approving or denying applications for **mining** permits." *Rissler* at 1162 (emphasis added). By dropping the word "mining" from their quote Protestants would appear to understand that the process for Council review of mining permits is different than air permits, so they selectively omit the key distinctions in *Rissler* in the hope that they can convince this Council to turn all permits into mining permits.

But there are important reasons why the Legislature did not intend air quality permits to be designed by the Council through contested case hearings. Air quality permits, especially PSD permits for major facilities such as Dry Fork, are driven by extraordinarily complicated atmospheric modeling which requires precise technical expertise. There are numerous federal emission standards that apply, and there are complicated technical analyses that govern the evaluation of best available control technologies and air quality impacts. The DEQ has expert staff resources to evaluate these factors, whereas the EQC does not.[5] Since air quality permitting must be done by an experienced and technically sophisticated staff, rather than a lay council, it makes sense to have the final permit issued by the DEQ and then limit review of the permit to clear errors of law or an abuse of discretion by the DEQ, which is the legal standard that would

[5] Protestants argue that the Council may retain consultants to assist it, but to do so in each case would be a wasteful and costly duplication of work already done by the DEQ staff.

be applied by the courts under W.S. § 16-3-114(c) when a judicial appeal from an air permit is taken under W.S. §35-11-1001, as contemplated by the Legislature.

That is exactly how federal law is designed. The Environmental Appeals Board (EAB) hears appeals of PSD permits issued by the EPA or by non-SIP approved states that have delegated responsibility to administer EPA's PSD program. On appeal, the EAB affords great deference to permits issued by the EPA or regulatory agency. The EPA provides that the EAB's power of review "should be only sparingly exercised," and "most permit conditions should be finally determined at the [permit issuer's] level . . . " 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997). Factual issues relating to a final permit decision, especially those that are essentially technical, are not re-litigated in a trial-type proceedings before the EAB but rather are afforded great deference in an on-the-record review. *See In re Ash Grove Cement Co.*, 7 E.A.D. 387, 403 (EAB 1997).

This is the same legal standard that applies to judicial review of final agency decisions under the Wyoming Administrative Procedures Act (APA), W.S. § 16-3-114(c). As a result, direct judicial review of a final air quality permit issued by the DEQ accomplishes precisely the same thing as an appeal to the EAB under the Clean Air Act in non-SIP approved states: a review for errors of law or abuse of agency discretion. The Legislature's decision to have the DEQ issue final air quality permits, not the Council, and to have final permits reviewed by the courts under an abuse of discretion standard, makes perfect sense and tracks federal law on the same issue.

Protestants argue that broad appellate rights to the Council must be inferred under Section 112 because permit appeals to the Council under W.S. § 35-11-802 are only available to applicants if the Director "refuses to grant any permit." Thus, argue Protestants, even applicants

are stuck without a right of appeal to the Council if the Director issues the permit with terms and conditions to which the applicant objects. Whether or not this is true, Protestants miss the point: there is always the right to judicial appeal, both for applicants and third-party objectors with the necessary standing under Section 35-11-1001. In a judicial appeal, however, the Court reviews only for errors of law or an abuse of discretion under W.S. § 16-3-114(b), which leaves the primary responsibility for permitting decisions in the hands of the agency experts: the DEQ. Permits do not get rewritten or redesigned on appeal, they are corrected only for errors of law or an abuse of discretion.

Here, Protestants seek to use an appeal to the Council for an entirely different purpose: a *de novo* rewrite of the entire permit, as if the permit decision made by the agency never happened. That is a fundamentally different purpose for an appeal, which is why the EQA in its entirety keeps permitting authority and permitting discretion in the hands of the DEQ and not the EQC, except in the case of contested mine and solid waste permits. The Legislature intended the DEQ to issue the operative air quality permits, subject to reversal only for an abuse of discretion or error of law, a standard of review committed by Wyoming law to the court system. The Legislature did not intend the EQC to be Wyoming's "final permitting authority" on air quality permits.

B. The provisions relating to air permits do not authorize this appeal.

For these reasons, as Basin Electric pointed out in its Motion to Dismiss, the specific provisions in the EQA related to appeals of air quality permits do not confer on Protestants a right to appeal to the Council. Appeals to the Council for air quality permits are provided in Sections 35-11-208 and 35-11-802, and those statutes limit appeals to disappointed applicants, not third parties who wish to challenge a permit.

Because these statutes do not extend appeal rights to the Council for Protestants, Protestants try to neutralize both statutes. For example, Protestants claim that Basin Electric "argues that Section 802 and other Environmental Quality Act provisions granting specific appeal rights override Section 112's general authority." (Response at 13.) However, it is Section 112(c) itself that is "subject to the right to appeal." Thus, Basin Electric is not saying that other statutes such as Sections 802 and 406 "override" Section 112; rather, these statutes create the limited "right to appeal" (limited to applicants who are denied permits) that the Legislature specifically stated would invoke the Council's powers in Section 112(c). Section 802 does not "override" general appeal rights in Section 112 because no general appeal rights are granted by Section 112.

Protestants argue that Section 208 of the EQA does not apply to construction permits. (Response at 14-16.) As already explained by Basin Electric, it is reasonable to conclude that Section 208 does apply to this appeal. (Motion at 11-12.) However, whether it applies to this construction permit or not misses the point. Protestants do not dispute that Section 208 follows the existing "dual track" approach of Sections 802 and 1001(a): disappointed permit applicants appeal to the Council, and aggrieved third parties with standing appeal to the courts. Apparently, if this appeal involved an operating permit, Protestants would still be arguing that the Council should review the operating permit at their request, despite the plain language of Section 208, because only this Council is the "final permitting authority." That is plainly not true under the EQA.

Section 208, like Section 802, gives permit applicants an administrative remedy to the Council that third parties appealing DEQ actions do not have. Section 208, like other statutes that authorize parties to appeal to the Council, would be meaningless if Section 112 were the

only authority needed to confer a right to appeal. Whether or not it applies to construction permits, Section 208 reinforces the conclusion that parties may appeal to the Council only when the Legislature has granted a right of appeal. Otherwise, grants of appeal like Sections 208, 802, and 406 would be meaningless and unnecessary for the Legislature to have provided.

Next, Protestants argue that the Legislature's changes to Section 112 in 1992 expanded appeal rights beyond those existing in Section 802 of the original 1973 enactment of the EQA. (Response at 13-14.) This argument is disingenuous. Protestants incorrectly assert that "Section 112 was modified to add the provisions relied on by Protestants **after** the Legislature passed Section 802...in 1973." (Response at 13.) However, the provisions of Section 112 granting the Council broad authority to act as a hearing examiner for DEQ that Protestants rely on [Sections 112(a)(ii), (iii), (iv) and (c)(ii)] all existed **in identical form** in the original 1973 EQA [at Sections 35-487.12(a)(ii), (iii), (iv) and (c)(ii)], just as the identical predecessor to Section 802 existed in the original 1973 EQA at Section 35-487.48.[6] Thus, the Council's powers in Section 112 were not expanded in 1992 when the Council became a separate operating agency.

Finally, Protestants relegate Section 802 and other specific appeal rights in the EQA to the statutory scrap heap: "At most, Section 802 and other specific statutory provisions simply limit the Council's discretion so that the Council could not eliminate those appeal rights." (Response at 14.) But if Protestants were correct that Section 112, standing alone, authorizes all appeals by all parties, then for the Council to eliminate an appeal right would violate Section 112 and there would be no need for Section 802 to preserve that right. This demonstrates how feeble Protestants' effort is to give some meaning to Section 802 without having to concede Basin

[6] Excerpts of Session Laws, Laws 1973 ch. 250, §1, and Laws 1992 ch. 60, § 3, are attached as Exhibit A to illustrate that the alleged language change and expansion of Council powers in Section 112 in 1992 did not occur.

Electric's point. In fact, the clear meaning of Sections 802, 406, 502 and other statutes providing appeal rights to the Council is that the Council may hear appeals only by those parties who have been authorized to file appeals. Protestants are thus forced to advance the dubious argument that the Legislature created these specific limited appeal statutes for the purpose of preventing the Council from eliminating those appeal rights. That is exactly backward: statutes specifically authorizing appeals are grants of authority, not limitations of authority imposed upon the Council.

Protestants forget the most basic principle of administrative law in Wyoming. In Wyoming, the power to do something in an administrative context – in this case appeal to the Council – must be explicit:

> Furthermore, the statutes creating and empowering the [agency] must be strictly construed and **any reasonable doubt of the existence of any power must be resolved against the exercise thereof**. This rule of strict construction appropriately limits the exercise of governmental agency powers to those expressly enumerated by constitution or statute, and to those implied or incidental powers necessary and proper to carry out the enumerated powers. Creative statutory construction is not compatible with strict statutory construction.[7]

C. There is no requirement that an appeal to the Council be prosecuted to exhaust administrative remedies.

Protestants argue that the APA legislates a requirement that Protestants appeal to the Council to exhaust administrative remedies. (Response at 5.) This argument is constructed around the false premise that an appeal to the Council is authorized by Section 112 and therefore the Council, not the DEQ, is actually the "final permitting authority" in Wyoming. That is only true for mine and solid waste permits. Air permits are "final action" taken by the Director on the permit application. W.S. §§ 35-11-208; 35-11-801(b). Since they are "final action" by the

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[7] *Pub. Serv. Comm'n v. Formal Complaint of WWZ Co.*, 641 P.2d 183, 186 (Wyo. 1982) (citations omitted) (emphasis added) (cited in *Diamond B Services* case cited by Protestants).

agency, the right to judicial review accrues upon issuance of the permit. W.S. § 35-11-1001 (right to judicial review of "final action" under the EQA). "Final action" by the Director in Section 801(b) means "final action" by the Director, not "preliminary recommendations by the Director to be rewritten by the Council." Only by adopting the false premise that a final air permit is not really final can Protestants construct a failure to exhaust argument.

Protestants cite the APA at W.S. § 16-3-114(a) for the proposition that an agency's action does not become effective until all administrative appeals have been exhausted. (Response at 5.) This is true, but the APA requirement to exhaust administrative remedies applies only where such remedies exist. If Section 112 does not authorize an appeal by Protestants, the exhaustion requirement does not independently create a right to appeal to the Council.

Protestants also cite the *Rissler* case again, this time to bolster their argument that Protestants must take their appeal to the Council before they could take it to the courts. (Response at 6.) Protestants again fail to acknowledge that the Supreme Court in *Rissler* was dealing with a **mining** permit over which the Legislature specifically required appeals and hearings before the Council under the provisions of Section 406 of the EQA. When the Supreme Court in *Rissler* discussed the requirement to exhaust the remedy of an appeal to the Council before a claim could go to court, it focused on the requirements of the EQA Section 1001(b) as to whether the denial of a mining permit becomes a compensable taking:

> The Legislature has charged the Environmental Quality Council with the responsibility for approving or denying applications for **mining permits**. WYO. STAT. § 35-11-112(c)(ii) (1994). Until its determination has been rendered, the courts do not have jurisdiction **under § 35-11-1001(b)** to make a decision on a compensatory taking action or entertain an appeal from the denial of an application for a permit under § 16-3-114 and W.R.A.P. 12.

(Emphasis added.) The Court's reference to Section 1001(b) involving mining permits was omitted in the first ellipsis in Protestants' quote of *Rissler* (Response at 6), just as Protestants

omitted the reference to mining permits in its later quote of *Rissler*. (Response at 9-10.) The omissions are critical, since the EQA specifically provides for a right and requirement to appeal mining permits to the Council before those permits become final and before judicial review is available under the APA. If, as Protestants contend, Section 112 by itself provides both the right of appeal and the APA requirement to appeal to the Council, then the provisions on appeals of mining permits in the EQA are rendered meaningless, as are other provisions regarding permit and other appeal rights to the Council (such as Section 802).

D. The DEQ Rules on which Protestants rely must have a statutory basis for creating appeal rights to the Council.

Protestants also seek to rely on the DEQ Rules of Practice and Procedure, repeating their mantra that Section 112 authorizes their appeal. This argument again puts the cart before the horse. In order for the DEQ and the Council to have authority to issue rules relating to permit appeals, there must be a statute authorizing such appeals. Agencies cannot by rule give themselves or Protestants power to do something not authorized by statute. This principle is found in the very cases Protestants cite. For example, in the *Diamond B Services* case cited by Protestants the following discussion succinctly summarizes the power – and limitations – of agencies to make rules:

> An administrative agency is limited in authority to powers legislatively delegated. Administrative agencies are creatures of statute and their power is dependent upon statutes, so that they **must find within the statute warrant for the exercise of any authority** which they claim. An agency is wholly without power to modify, dilute or change in any way the statutory provisions from which it derives its authority. Thus, administrative agencies are bound to comply with their enabling statutes. An administrative **rule or regulation which is not expressly or impliedly authorized by statute is without force or effect if it adds to**, changes, modifies, or conflicts with an existing statute.[8]

[8] *Diamond B Servs., Inc. v. Rohde*, 120 P.3d 1031, 1048 (Wyo. 2005) (citations omitted) (emphasis added).

Protestants do not dispute that the Rules on which they rely need to have specific statutory authority. Therefore, Protestants' argument relying on the Rules comes back to the issue of what Section 112 means. The Council's regulations, by themselves, cannot overcome a lack of Protestants' right to appeal a permit in Section 112. In short, if Protestants' theory about Section 112 creating an automatic right of appeal by anyone of any permit is flawed, so too is their reliance on DEQ Rules if those Rules rest on Section 112 alone – as Protestants concede that they do.

E. Protestants' attempt to distinguish *Allied Fidelity* and *Albertson's* fail.

Protestants suggest that the cases cited by Basin Electric are inapplicable. Protestants argue that the *Allied Fidelity* case, 753 P.2d 1038, does not apply because the Court did not discuss the Council's alleged broad authority under Section 112 and because the surety in that case was allowed to appeal to the EQC. However, *Allied Fidelity* is squarely on point and reflects prior recognition by this Council of the need for an independent appeal right to the Council. The statute at issue in that case expressly granted a right to "operators" to appeal to the Council regarding forfeiture of a reclamation bond. As a result, there was an appeal right that could be invoked to obtain Council review, which is precisely the statutory authorization lacking here. The Supreme Court held that a surety on the bond could appeal to the Council because it **stood in the shoes of the operator** and therefore was entitled to the same statutory appeal right as the operator, making clear that only persons with a statutory right to do so may appeal to the Council.

Protestants also attempt to distinguish the *Albertson's* case, 33 P.3d 161. While Protestants are correct that the court in that case recited the general rule that a right to judicial review is presumed in the absence of clear and convincing evidence that the Legislature intended otherwise, the court found that there was clear and convincing evidence where the statute

authorized review of a denial of a renewal of a liquor license but **did not expressly authorize review** of denial of a license transfer. The court's ruling supports the conclusion that where the EQA expressly authorizes appeals to the Council by specified persons in specified circumstances, but does not authorize appeals in other cases, there is no right to appeal in the other cases. Basin Electric's Motion to Dismiss is squarely in accord with the legal principles informing the analysis and outcomes in both *Albertson's* and *Allied Fidelity*.

F. It is Protestants, not Basin Electric, who seek to change the Council's role.

Protestants finally suggest that they are only asking for the kind of third-party appeal that "[t]he Council has long entertained." (Response at 11.) In support of this assertion, Protestants cite the Council's website to suggest that the Council "routinely considers these appeals [of air permits by members of the public]." (Response at 8.) This is not factually true, as Basin Electric is unaware of any previous appeals by third parties of a final air quality permit to construct. Moreover, even a cursory review of the Council's docket reveals many cases that have nothing to do with third-party appeals of air permits. Certainly Basin Electric is unaware of any decision by this Council establishing that the Council is "Wyoming's final permitting authority for all permits," as Protestants argue. That is a sweeping assertion based entirely upon Section 112, and is in direct conflict with many other provisions of the EQC. This Council should be very cautious about accepting the mantle of Wyoming's sole final permitting authority – the statutes were plainly not designed that way, and the burden if accepted would be immense. Shifting the permitting power and responsibility from DEQ to the Council only serves to insure that the DEQ's efforts are undermined. Why, for example, would the DEQ work hard on an air quality permit application if the Council is just going to start all over again anyway?

While it is true that this Council has previously entertained some third-party permit appeals, particularly in water permits cases over the last few years, the issue presented in this

case has not previously come before the Council because the parties in these other appeals have not raised it. But past oversights do not make a right. The fact that this Council has issued routine orders that assumed it had jurisdiction in prior third-party appeals is of no moment. Protestants themselves quote no less an authority than the United States Supreme Court for the proposition that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Industries, Inc. v. Aviall Servs. Inc.*, 543 U.S. 157, 170 (2004). (Protestants Brief at 11-12.) The same is true for decisions of the Council.

II. CONCLUSION

Basin Electric respectfully requests that this appeal be dismissed for lack of statutory authority.

DATED April 3, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2008, I served the foregoing Reply to Response to Motion to Dismiss Appeal by electronic mail and by placing a true and correct copy thereof in the United States mail, postage prepaid and properly addressed to the following:

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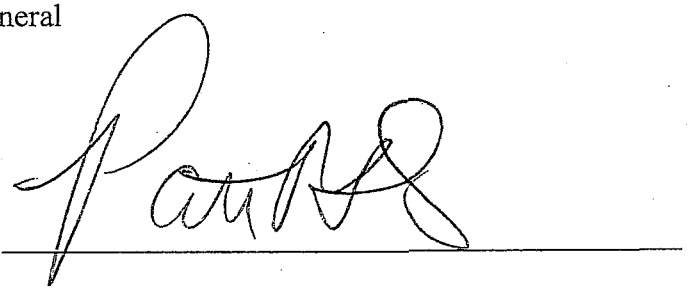

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EXHIBIT
A

Not more than four of the members shall be of the same political party. Council members shall be appointed by the governor with the advice and consent of the senate. No employee of the state or any of its political subdivisions, other than employees of institutions of higher education, shall be a member of the council.

(b) The terms of the members shall be for four years, except that on the initial appointment, members' terms shall be as follows:

(i) Three shall serve for two years, two shall serve for three years and two shall serve for four years, as designated by the initial appointment. When a vacancy occurs, the governor shall appoint a new member for the remaining portion of the unexpired term.

(c) The first meeting of the council shall be held within 60 days after the effective date of this act at which time a chairman shall be elected from among the members to serve a one year term. The council shall also annually elect from its membership a vice-chairman and a secretary, each for a term of one year, and it shall keep a record of its proceedings.

(d) The council shall hold at least four regularly scheduled meetings each year. Special meetings may be called by the chairman, and special meetings shall be called by the chairman, upon a written request submitted by any three or more members. Five members shall constitute a quorum. All matters shall be decided by a majority vote of those on the council.

(e) Each member of the council shall receive the same per diem, mileage and expense allowances while attending and traveling to and from meetings of the council in the same manner and amount as employees of the state.

35-487.12. Powers and duties of the environmental quality council.

(a) The council shall act as the hearing examiner for the department and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or any division thereof. The council shall:

(i) Promulgate rules and regulations necessary for the administration of this act, after recommendation from the director of the department, the administrators of the various divisions and their respective advisory boards;

(ii) Conduct hearings as required by the Wyoming Administrative Procedure Act for the adoption, amendment or repeal of rules, regulations, standards or orders recommended by the advisory boards through the administrators and the director. The council shall approve all rules, regulations, standards or orders of the department before they become final;

(iii) Conduct hearings in any case contesting the administration or enforcement of any law, rule, regulation, standard or order issued or administered by the department or any division thereof;

(iv) Conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act;

(v) Designate at the earliest date and to the extent possible those areas of the state which are of a unique and irreplaceable, historical, archeological, scenic or natural value.

(b) The council may contract with consultants having special expertise to assist in the performance of its duties.

(c) Subject to any applicable state or federal law, and subject to the right to appeal, the council may:

(i) Approve, disapprove, repeal, modify or suspend any rule, regulation, standard or order of the director or any division administrator;

(ii) Order that any permit, license, certification or variance be granted, denied, suspended, revoked or modified;

(iii) Affirm, modify or deny the issuance of orders to cease and desist any act or practice in violation of the laws, rules, regulations, standards or orders issued or administered by the department or any division thereof. Upon application by the council, the district court of the county in which the act or practice is taking place shall issue its order to comply with the cease and desist order, and violation of the court order may be punished as a contempt.

(d) The director and his staff shall provide the council with meeting facilities, secretarial or clerical assistance, supplies and such other assistance as the council may require in the performance of its duties.

(e) Upon request, the attorney general shall provide such legal assistance as the council may require in the conduct of its hearings, writing of its decisions or the enforcement of its orders. The council may employ independent legal assistance as necessary to the proper performance of its duties.

(f) All proceedings of the council shall be conducted in accordance with the Wyoming Administrative Procedure Act.

35-487.13. Advisory boards created; membership; terms; meetings; expenses.

(a) There is created within the department three advisory boards, one for each division. Each advisory board shall consist of five members appointed by the governor. Each board shall have one member who represents industry, one member who represents agriculture, one member who represents political subdivisions and two members who represent the public interest. Not more than three members of each board shall be from the same political party.

(b) For the initial appointments to each board, the governor shall appoint one member for a six year term, two members for four

cent (10%) of his income from any permit applicant shall not act on a permit application from that applicant.

35-11-112. Powers and duties of the environmental quality council.

(a) The council shall act as the hearing examiner for the department and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or ~~any division thereof~~ ITS AIR QUALITY, LAND QUALITY, SOLID AND HAZARDOUS WASTE MANAGEMENT OR WATER QUALITY DIVISIONS. NOTWITHSTANDING ANY OTHER PROVISION OF THIS ACT, INCLUDING THIS SECTION, THE COUNCIL SHALL HAVE NO AUTHORITY TO PROMULGATE RULES OR TO HEAR OR DETERMINE ANY CASE OR ISSUE ARISING UNDER THE LAWS, RULES, REGULATIONS, STANDARDS OR ORDERS ISSUED OR ADMINISTERED BY THE INDUSTRIAL SITING OR ABANDONED MINE LAND DIVISIONS OF THE DEPARTMENT. The council shall:

35-11-113. Advisory boards created; membership; removal; terms; meetings; expenses.

(a) There is created within the department three (3) advisory boards, one (1) for each ~~division~~ OF THE AIR QUALITY, LAND QUALITY AND WATER QUALITY DIVISIONS. Each advisory board shall consist of five (5) members appointed by the governor. Each board shall have one (1) member who represents industry, one (1) member who represents agriculture, one (1) member who represents political subdivisions and two (2) members who represent the public interest. Not more than three (3) members of each board shall be from the same political party. The governor may remove any member of any of the advisory boards as provided in W.S. 9-1-202.

35-11-114. Powers and duties of the advisory boards.

(a) The advisory board shall recommend to the council through the administrator and director, comprehensive plans and programs for THE MANAGEMENT OF SOLID AND HAZARDOUS WASTE, the prevention, control and abatement of air, water and land pollution and the protection of public water supplies.

35-11-201. Discharge or emission of contaminants; restrictions. No person shall cause, threaten or allow the discharge or emission of any air contaminant in any form so as to cause pollution which violates rules, regulations and standards adopted by the ~~administrator after consultation with the advisory board~~ COUNCIL.

35-11-303. Duties of the administrator of water quality division.

(a) In addition to other duties imposed by law, the administrator of the water quality division AT THE DIRECTION OF THE DIRECTOR:

35-11-401. Compliance generally; exceptions.

(j) The council, ~~after consultation with the administrator and the advisory board~~ UPON RECOMMENDATION FROM THE ADVISORY BOARD THROUGH THE ADMINISTRATOR AND DIRECTOR, may