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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE STATE OF WYOMING

IN THE MATTER OF:	)	
BASIN ELECTRIC POWER COOPERATIVE	)	Docket No. 07-2801
DRY FORK STATION,	)	Presiding Officer, F. David Searle
AIR PERMIT CT–4631	)	
	)	

PROTESTANTS' RESPONSE TO BASIN ELECTRIC POWER COOPERATIVE INC'S MOTION TO DIMISS APPEAL

The Wyoming Environmental Quality Act created the Environmental Quality Council ("Council") and gave it broad powers, including both the power to act as the final permitting authority for all permits issued by the Department of Environmental Quality ("DEQ") and the power to promulgate regulations to implement the Act. Under both the Act and the Council's regulations, not only does the Council have jurisdiction to hear Protestants' appeal, but Protestants are required to appeal to the Council prior to proceeding to state court. The Council's longstanding practice of affording environmental organizations and other members of the public the right to appeal is not only proper, it is required by law.

Basin Electric Power Cooperative ("Basin") ignores the plain language of the Environmental Quality Act and the Council's regulations and argues the appeals process is available only to the permittee and not the public. Basin does not, however, provide any legal

support for its attempt to change the Council's entire way of doing business. Indeed, Basin's novel interpretation of the Council's authority conflicts with the plain language of the Environmental Quality Act, the Council's longstanding regulations, and Wyoming Supreme Court case law.

ARGUMENT

I. THE ENVIRONMENTAL QUALITY ACT GRANTS THE COUNCIL JURISDICTION OVER PROTESTANTS' APPEAL.

In the Environmental Quality Act, the Legislature specifically designated the Council as the "hearing examiner" in "any case" contesting DEQ's "grant" of a permit and gave the Council broad authority to pass regulations to govern those hearings. The Council's regulations provide for third-party appeals to the Council. Ignoring this broad authority, Basin argues the Council does not have jurisdiction because no statute specifically provides that "members of the public" or "environmental organizations" have a right to appeal to the Council. There is no support for this exceedingly limited view of the Council's authority.

A. The Environmental Quality Act and the Council's Regulations Authorize Third-Party Appeals.

It is a fundamental principle of administrative law that an administrative agency has only the authority granted to it by the Legislature. Diamond B Servs., Inc. v. Rohde, 120 P.3d 1031, 1048 (Wyo. 2005). Accordingly, an agency's jurisdiction as well as its authority to issue rules and regulations comes from its enabling statute. Id. at 1038, 1048. Wyoming courts will give effect to any agency "regulation which is expressly or impliedly authorized by the enabling statute." Id. at 1048. As long as their actions are consistent with their statutory mandate, "administrative agencies are free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their duties." Tri-State Generation &

Transmission Assoc., Inc. v. Envtl. Quality Council, 590 P.2d 1324, 1332 (Wyo. 1979); see also First Nat'l Bank of Thermopolis, 559 P.2d 42, 48 (Wyo. 1977) ("The ultimate choice of procedure in an administrative proceeding . . . is left to the discretion of the agency.").

The Council's jurisdiction is governed by the Wyoming Environmental Quality Act. The Act established the Council as an independent body with broad authority. W.S. § 35-11-111(a). Under the Act,

> 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 its air quality, land quality, solid and hazardous waste management or water quality divisions.

Id. § 35-11-112(a) (emphasis added). The Legislature articulated three specific scenarios where the Council must hold hearings: (1) rulemakings, (2) cases challenging DEQ's rules or regulations, and (3) cases challenging DEQ permits. The Council shall:

> (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. . . .
>
> (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;

Id. (emphasis added). The Act also granted the Council authority to order that any permit be "granted, denied, suspended, revoked, or modified." Id. § 35-11-112(c)(ii). The Wyoming Supreme Court confirmed the Council's broad authority under these provisions. According to the Court, the Council is "the body established by the Wyoming legislature to hear and decide disputes arising from the implementation of the Wyoming Environmental Quality Act." Platte

Dev. Co. v. Envtl. Quality Council, 966 P.2d 972, 975 (Wyo. 1998). Although Section 112 does not name the specific parties entitled to appeal, its broad language indicates the Wyoming Legislature intended an expansive interpretation.

Furthermore, the Environmental Quality Act requires the Council to "[p]romulgate rules and regulations necessary for the administration of this act." W.S. § 35-11-112(a)(i). The Wyoming Supreme Court concluded this section is a "broad" grant of authority to the Council. Rissler & McMurry v. Envtl. Quality Council, 856 P.2d 450, 454 (Wyo. 1993). According to the Court, it provides "an express provision manifesting a specific delegation of the legislative power to the [Council] to act in a legislative capacity and supplement the statute by filling in the details or making the law." Id.

Acting in this legislative capacity, the Council's lawfully enacted regulations specifically provide for third party appeals. The General Rules of Practice and Procedure define the participants in all hearings before the Council to include both "applicants" for permits and "protestants." Chpt. 1, § 2(a). The Council defines "protestants" to include "[a]ny person desiring to protest the application of a permit or any person requesting a hearing before the . . . Council in accordance with the Environmental Quality Act and who is objecting to an action of [DEQ] and desiring affirmative relief." Chpt. 1, § 2(a)(ii). Section 3 of the regulations confirms that protestants have the right to protest permits and request contested case hearings before the Council. Chpt. 1, § 3. Through its regulations, therefore, the Council has authorized appeals by non-permittees. This regulation is not only consistent with the Council's requirement to conduct hearings in any case challenging a DEQ-issued permit, but is also well within the authority the Legislature granted the Council to pass regulations to administer the Act.

The Council's decision to allow members of the public to appeal also supports the underlying purpose of the Environmental Quality Act, which is protection of "public health and welfare." W.S. § 35-11-102. The Wyoming Supreme Court has long recognized the "public protection" goal of the Act. People v. Platte Pipeline Co., 649 P.2d 208, 212 (Wyo. 1982). To fulfill this goal, the Court held the Act must be interpreted to "insure that the public is in fact protected from the menace the legislature has seen fit to address in the Act." People v. Fremont Energy Corp., 651 P.2d 802, 807 (Wyo. 1982). The Council's appeal regulations reinforce the Act's goal by allowing the public a means of ensuring that DEQ protects the land, air, and water of the State. Basin has provided no evidence to suggest that in doing so, the Council has exceeded its authority. Instead, Basin ignores completely the Council's authority to implement regulations.

B. Under the Administrative Procedure Act, Protestants are Required to Appeal to the Council.

Not only does the Council have the jurisdiction to hear air permit appeals, but the Wyoming Administrative Procedure Act ("APA") requires Protestants to exhaust these appeal rights before they can proceed to state court. The Environmental Quality Act provides for appeals of "final action" in accordance with the APA. W.S. § 35-11-1001(a); see also DEQ, Rules of Practice and Procedure, Chpt. 1 § 8(a). According to the APA, an agency's action does not become effective until all administrative appeals have been exhausted:

> Subject to the requirement that administrative remedies be exhausted and in the absence of any statutory or common-law provision precluding or limiting judicial review, any person aggrieved or adversely affected in fact by a final decision of an agency in a contested case, or by other agency action or inaction . . . is entitled to judicial review in the district court for the county in which the administrative action or inaction was taken.

Id. § 16-3-114(a) (emphasis added); Rissler & McMurry Co. v. Wyo., 917 P.2d 1157, 1163 (Wyo. 1996); Glover v. State, 860 P.2d 1169, 1171-72 (Wyo. 1993). In Rissler, the Wyoming

Supreme Court held that the Council must make a final decision on granting or denying a permit application before the courts have jurisdiction. The Court explained,

> 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 . . . to . . . entertain an appeal from the denial of an application for a permit.

Rissler, 917 P.2d at 1162. Because Section 112(c)(ii) applies to "any permit," including air quality permits, Protestants must avail themselves of this process prior to seeking review in the courts to satisfy their obligation to exhaust administrative remedies. Indeed, DEQ recognized the exhaustion requirement in Basin's permit and specifically stated that all appeals had to be filed with the Council within 60 days.

Basin argues that § 35-11-1001 requires Protestants to go directly to court. However, the plain language of § 35-11-1001 states just the opposite – it requires compliance with the APA and its exhaustion requirement. The company never explains how the Protestants could ignore their legal obligation to first exhaust any available remedies before the Council.

C. The Supreme Court and the Council have Acknowledged the Right of Third Parties to Appeal.

As Basin acknowledges, "third-party appeals to the Council have been routinely undertaken for many years without any person or party ever questioning whether the right to such an appeal actually exists." Motion to Dismiss at 1. That no one has questioned this process or disputed the Council's jurisdiction indicates that it is lawful. Indeed, both the Wyoming Supreme Court and the Council have confirmed the Council's jurisdiction over third-party appeals.

For example, the Supreme Court heard a case where a third party's appeal was supported solely by the statutory right to appeal provided by Section 112, and the Court never questioned

the jurisdiction of the Council. Knight v. Envtl. Quality Council, 805 P.2d 268 (Wyo. 1991). In Knight, a neighboring landowner challenged DEQ's decision to grant an underground waste water injection well. After DEQ approved this water quality permit, the landowner appealed to the Council, which upheld the permit. Id. at 275. In reviewing this decision, the Court refers to the Council as the "trier of fact," acknowledging the Council's role in the appeals process. Id. at 273-74. This ruling would not have been possible if the Court did not sanction the jurisdiction of the Council.[1]

Likewise, the Council has made express findings of jurisdiction in many third-party appeals. For example, the Council entertained an appeal by members of the public challenging the air permit DEQ granted to Evans Construction Co. In the Matter of the Appeal to the Approval of Application AP-W72 to Modify Air Quality Permit CT-460, MD-745, Docket No. 02-2801 (Order Jul. 20, 2003) (attached as Exh. 1). In the order dismissing the case, the Council held it had "jurisdiction over the subject matter and the parties to this proceeding." Id. at 2. Similarly, the Council held a contested case hearing when members of the public protested the air permit for the Rabbit Gravel Pit. In rendering its decision, the Council confirmed that it had jurisdiction over the appeal as well as the power to suspend, deny, revoke, or modify the permit. In the Matter of Objections to the Air Quality Permit No. MD-1041 of Ken Harvey Rabbit Pit, Docket No. 04-2801, at 5 (Findings of Fact, Conclusion of Law and Order Apr. 21, 2006) (attached as Exh. 2). The Council made these findings deliberately in light of its mandate under the Environmental Quality Act and its own regulations.

[1] Because questions of jurisdiction can be raised at any time, the Supreme Court could have considered this issue on appeal, but did not. Diamond B Servs., Inc. v. Rohde, 120 P.3d 1031, 1038 (Wyo. 2005)

II. BASIN FAILS TO SUPPORT ITS MOTION TO DISMISS.

Through its Motion to Dismiss, Basin seeks to undermine the role of the Council in the permitting process. The company argues that Section 112 is insufficient to grant members of the public the right to appeal, and there must be another specific statute granting that right. Motion to Dismiss at 9-16. According to Basin, Section 802 of the general permitting provisions of the Environmental Quality Act is such a statute, but it only grants applicants the right to appeal. W.S. § 35-11-802. Not only would Basin's approach dramatically change the current operations of the Council, impacting both members of the public and applicants, but the company has provided no compelling legal or practical justification for such a change.

A. Basin's Approach Would Substantially Modify the Council's Procedures and Greatly Reduce the Rights of Members of the Public and Applicants to Appeal DEQ-Issued Permits.

Basin's approach would have much broader implications than simply prohibiting appeals of air permits by members of the public. Under Basin's theory, the public would also have no right to appeal water quality and solid waste permits, because the statutes governing these permits also contain no explicit right of review. See W.S. §§ 35-11-301 et seq., 35-11-501 et seq. The Council's docket shows that it routinely considers these appeals. See http://deq.state.wy.us/eqc/docket.htm.

Basin's approach also would eliminate certain applicant rights to appeal air quality, water quality, or solid waste decisions. Section 802 grants an applicant the right to appeal to the Council only if DEQ "refuses to grant" a permit. W.S. § 35-11-802. It does not grant the applicant the right to appeal if DEQ grants the permit, but the applicant is unhappy with the specific terms, or if DEQ suspends or revokes a permit. Nor is there any specific statute other than Section 112 granting those rights. Therefore, if the Council finds there must be statutory

direction beyond Section 112, as Basin argues, applicants would be barred from appealing specific permit terms or the revocation or suspension of any air, water, or solid waste permit. Basin never discusses this consequence of its approach.

Other power companies do not share Basin's view of the law. Indeed, Two Elk Generation Partners recently appealed DEQ's revocation of a construction permit under Section 112(a)(iv). According to the company's Petition for Review, "[u]nder Wyo. Stat. § 35-11-112(a)(iv), the Council is required to conduct hearings in any case contesting the 'suspension [or] revocation' of a permit or license." Petition for Review (attached as Exh. 3).

B. Basin's Arguments In Support of a Change in the Council's Interpretation of the Law are Not Persuasive.

1. The Council, not DEQ, is the final permitting authority.

Basin first argues that the DEQ's decision is "final agency action" and therefore not subject to appeal. Motion to Dismiss at 7. In support, Basin cites Section 801, which states DEQ "shall take final action on any application for permit or extension thereof within sixty (60) days after receipt." W.S. § 35-11-801(b). Far from indicating that "no more agency action is or should be required," Motion to Dismiss at 7, the statute states only that DEQ must take its final action on the application within sixty days. Nothing in Section 801 suggests that this decision cannot be appealed.

Basin also argues that Section 801 authorizes the company to proceed full speed ahead with construction once DEQ issues the permit. Id. Actually, Section 801 states only that a permit is required before construction occurs. W.S. § 35-11-801(c). Furthermore, as discussed above and in the Motion to Suspend Air Permit CT-4631 Pending Resolution of Protestants' Appeal, the Legislature firmly established the Council as the final administrative arbiter in the air permitting process. W.S. § 35-11-112; Rissler, 917 P.2d at 1162 ("The Legislature has charged

the Environmental Quality Council with the responsibility for approving or denying applications for . . . permits."); DEQ, Rules of Practice and Procedure, Chpt. 1, § 13(a) & Chpt. 2. For the Council to play any meaningful role in the permitting process, protestants must file appeals with the Council prior to proceeding to court.

Indeed, Basin never explains why the Legislature would establish the Council as DEQ's "hearing examiner" to hear "all cases or issues" if it did not intend for the Council to play this role. As a matter of law, the Council cannot presume Section 112 has no meaning. U.S. v. Menasche, 348 U.S. 528, 538-39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section.") (citation and quotation omitted). As a practical matter, it would be a complete waste of resources for the Legislature to charge the Council with implementing a meaningless process. Because the Legislature did charge the Council with being the final administrative arbiter, it must act before there is "final agency action" subject to judicial review.

Additionally, Basin argues that because of the complex and technical nature of Clean Air Act litigation, appeals to the district courts are more appropriate. Motion to Dismiss at 15-16. It makes no sense, however, that the Legislature would create a Council with expertise in environmental matters and charge it with acting as a hearing examiner, only to have the district courts, which have no special expertise in environmental matters, hear appeals in place of the Council. Furthermore, Basin fails to explain why the Council is equipped to hear complex and technical appeals by applicants, but not complex and technical appeals by others. Additionally, the Legislature anticipated that appeals would involve complex legal and technical matters and gave the Council the right where necessary to rely on hearing officers and consultants with special expertise. W.S. § 35-11-112(a), (b).

Finally, Basin's concern that the Council will become a "super-permitting" agency suggests that Protestants are asking the Council to take unprecedented action. Id. at 15. It is Basin's tortured reading of the statute, however, that would introduce a radical new state of affairs. The Council has long entertained appeals from environmental organizations and other members of the public in accordance with its obligations under the Environmental Quality Act and its own regulations.

2. Allied Fidelity and other cases cited by Basin do not support the company's position.

Basin's argument that there must be a statute specifically authorizing Protestants' appeal is based solely on Allied Fidelity v. Environmental Quality Council, 753 P.2d 1038, 1040-41 (Wyo. 1988). However, the company reads much more into the case than is actually there. In fact, the case is entirely consistent with the explanation of the Council's authority discussed above. In Allied Fidelity, the court looked to the plain language of the Environmental Quality Act to determine whether the Council's refusal to grant a hearing to the surety for an insolvent mining operator was consistent with the statute. Id. at 1040. Based on an interpretation of the plain language of § 35-11-412(b), it found that the Council erred by not granting a right to appeal to both sureties and operators. Id. at 1039. This provision does not apply in the instant case. The court in Allied Fidelity did not discuss the Council's broad authority under Section 112 or discuss whether it was applicable to the case – nor did it need to, because it found the specific provision granted the surety a right to appeal. The court also never examined whether there were lawfully enacted regulations granting appeal rights. Accordingly, other than confirming the legal principle that an agency's authority is governed by statute, the case is inapplicable here. See Cooper Industries, Inc. v. Aviall Servs., Inc., 543 U.S. 157, 170 (2004) ("Questions 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.") (citation and quotations omitted); Supreme Lodge Knights of Pythias v. Withers, 177 U.S. 260, 276 (1900) (refusing to accept case as binding authority where an issue "was not considered, and the trend of the argument is so different that the case cannot be considered an authority upon the propositions here discussed"). Furthermore, Allied Fidelity does not establish a new rule of law that an administrative agency's statute must explicitly detail each and every party that may appeal a decision to the agency.

Basin also cites to a number of cases that stand for the unremarkable proposition that the Legislature must authorize judicial review of agency action. Motion to Dismiss at 8-10.[2] This rule does not apply to administrative appeals, where legality is determined by the agency's enabling statute and regulations, as discussed above. However, even if the Council applies the legal principles established in these cases, they would support rather than refute Protestants' right to appeal to the Council. Indeed, as Basin fails to mention, these cases establish a "presumption of reviewability." Albertson's Inc. v. Sheridan, 33 P.3d 161, 164 (Wyo. 2001). To rebut this presumption, a party must show "clear and convincing" evidence that the Legislature did not intend to allow review. Id.; see also Holding's Little Am. v. Bd. of County Comm'rs. Of Laramie County, 670 P.2d 699, 702 (Wyo. 1983). The failure of a statute to explicitly include a right of review is not sufficient to preclude review under this standard. Pisano v. Shillinger, 835 P.2d 1136, 1140 (Wyo. 1992) ("Statutory silence regarding judicial review constitutes neither a persuasive reason nor a manifestation of legislative intent to prohibit review."); Holding's Little Am., 670 P.2d at 703.

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[2] In support of this rule, the agency cites Albertson's Inc. v. Sheridan, 33 P.3d 161, 164 (Wyo. 2001), Holding's Little Am. v. Bd. of County Comm'rs of Laramie County, 670 P.2d 699, 702 (Wyo. 1983), and Industrial Siting Council v. Chicago and North Western Transp. Co., 660 P.2d 776, 778 (Wyo. 1983).

In this case, rather than clear and convincing evidence that the Legislature did not intend to allow members of the public to appeal, there is clear and convincing evidence that it did. The Environmental Quality Act establishes the Council as the hearing examiner for the Air Quality Division, authorizes the Council to conduct hearings in "any case" contesting the grant of an air permit, and gives the Council broad authority to issue regulations. These regulations specifically allow for an appeal by Protestants.

In contrast, where the Legislature did not intend for the Council to have jurisdiction, it stated so explicitly. Section 112(a) establishes the Council as the final permitting authority for only some DEQ decisions, specifically air, land, solid and hazardous waste, and water. In contrast, the statute specifically states "the council shall have no authority . . . 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." W.S. § 35-11-112(a). Accordingly, when the Legislature wanted to preclude judicial review, it did so. Because the Legislature did not preclude members of the public from appealing air permits, the Council should not read such a prohibition into the Act. Stutzman v. Wyoming State Engineer, 130 P.3d 470, 475 (Wyo. 2006) (holding that it violates a "basic tenet of statutory construction" to read language into a statute because "omission of words from a statute is considered to be an intentional act of the legislature").

3. Statutory provisions granting applicants a right to appeal do not preclude third-party appeals.

Basin next argues that Section 802 and other Environmental Quality Act provisions granting specific appeal rights override Section 112's general authority. Motion to Dismiss at 14. However, Section 112 was modified to add the provisions relied on by Protestants after the Legislature passed Section 802. Section 802 was passed in 1973. Laws 1973 ch. 250, § 1. In

1992, the Legislature "establish[ed] the environmental quality council as a separate operating agency" and "provid[ed] powers and duties of [the] environmental quality council." 1992 Wyoming Laws 1st Sp. Sess. Ch. 60 (H.B. 37) (attached as Exh. 4). The Legislature was aware that it had already granted applicants a right to appeal to the Council when it granted the broad authority to the Council to act as hearing examiner for the DEQ. Therefore, the Legislature intended to broaden the rights available.

Furthermore, the Council need only resort to the rule of statutory construction that "specific statutes control over general statutes" if there is a conflict between the two statutes. Thunderbasin Land, Livestock & Inv. Co. v. Laramie County, 5 P.3d 774, 782 (Wyo. 2000). As Basin states, where possible, the Council should read the statutes "in harmony" and give "meaning to every word, clause and sentence." Motion to Dismiss at 14 (citing In the Matter of the Estate of Jame T. Frost v. Dodson, 155 P.3d 1031, 1034 (Wyo. 2007)). Here, there is no inconsistency. That applicants have a specific statutory right to appeal to the Council if DEQ denies an air permit under Section 802 does not preclude the same right for other appeals authorized by different provisions. 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.

4. Section 208 does not apply to Basin's air permit.

Basin also relies on W.S. § 35-11-208 to support its contention that Protestants have no right to appeal to the Council. Motion to Dismiss at 2, 11. Section 208 does not apply in this case. As Basin concedes, "Section 208 is included within the 'operating permit program.'" Motion to Dismiss at 11. This case, however, falls within the construction permit program. The operating permit program and construction permit program are separate parts of the Clean Air Act and Wyoming's implementation of the Act. Under the New Source Review program, major

new sources of air pollution are required to obtain construction permits prior to commencing construction. 42 U.S.C. §§ 7475, 7503. Wyoming's requirements for construction permits are found at Wyoming's Air Quality Standards and Regulations ("WAQSR") Chpt. 6 § 2. Construction permits are then rolled into operating permits, which are part of the comprehensive facility permits required under Title V of the Clean Air Act and govern operation after construction. 42 U.S.C. § 7475, 7503. Wyoming's requirements for operating permits are found at W.S. §§ 35-11-203 to 212 and WAQSR Chpt. 6 § 3.

There is no evidence that the Legislature intended the appeal provisions of Section 208 to apply to construction permits. The Environmental Quality Act specifically defines the "operating permit program" as "the permitting program authorized by W.S. 35-11-203 through 35-11-212." W.S. § 35-11-103(b)(v). The Legislature enacted these provisions in 1992 to "establish[] an operating permit program . . . specify[] sources requiring a permit . . . provid[e] permit requirements . . . [and] provid[e] for review of actions taken on applications." 1992 Wyoming Laws 1st Sp. Sess. Ch. 70 (H.B. 33) (attached as Exh. 5). The only logical reading of this statement is that the "permits" and "applications" to which the Legislature refers are "operating permits and applications."

A plain reading of the Section 208 also supports this view. In its entirety, Section 208 states:

> (a) An applicant may seek relief pursuant to W.S. 35-11-802 on any final action taken on a permit including the director's refusal to grant a permit <u>under the operating permit program</u> or failure to act on a completed application within eighteen (18) months.
>
> (b) Any person who participated in the public comment process <u>on a permit application</u> and who is aggrieved by any final action taken by the director on a permit application may seek relief pursuant to W.S. 35-11-1001.

W.S. § 35-11-208 (emphasis added). In this case, the reference to "permit application" in part (b) is an obvious reference back to an application "under the operating permit program" as stated in part (a). Indeed, it would make no sense for the Legislature to enact a permitting rule applicable to all permits through one subsection of a statutory provision dealing only with operating permits. Basin provides no evidence to suggest this was the Legislature's intent.

Relying on Sections 205(a) and 211(b), Basin argues that not all provisions of Sections 203 to 212 apply solely to operating permits. As these provisions demonstrate, however, where the Legislature intended to include construction permits, it referred to them by name. W.S. §§ 35-11-205(a), 211(b). Because Section 208(b) makes no reference to construction permits, the Council should not read such language into the statute. Stutzman, 130 P.3d at 475.

Furthermore, even if Section 208 applied to construction permits, it would not change the outcome in this case. The Act specifically requires appeal pursuant to W.S. 35-11-1001. As discussed earlier, this statute requires exhaustion of all available administrative remedies prior to proceeding to court. Accordingly, Protestants are still required to appeal to the Council.

CONCLUSION

For these reasons, Protestants' request the Council deny Basin's Motion to Dismiss and allow Protestants to proceed with their appeal.

Dated: March 12, 2008

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CERTIFICATE OF SERVICE

I, Robin Cooley, certify that on this day of March 12, 2008, I served a copy of the foregoing **RESPONSE TO BASIN ELECTRIC POWER COOPERATIVE INC'S MOTION TO DIMISS APPEAL** via e-mail and by depositing copies of the same in the United States mail, postage prepaid, duly enveloped and addressed to:

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