ENVIRONMENTAL QUALITY COUNCIL, DEPARTMENT OF ENVIRONMENTAL QUALITY, STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF THE PITTSBURG & MIDWAY COAL MINING CO.'S WELCH PERMIT NO. 497-T4.	)	Docket No.: 07-4600

MEMORANDUM IN SUPPORT OF MOTION OF THE PITTSBURG & MIDWAY COAL MINING CO. TO DISMISS PURPORTED APPEAL, WITH PREJUDICE

COMES NOW The Pittsburg & Midway Coal Mining Co. ("P & M"), by and through its undersigned attorneys, Poulson, Odell & Peterson, LLC, and Brown, Drew & Massey, LLP, and hereby submits its Memorandum in Support of Motion of The Pittsburg & Midway Coal Mining Co. to Dismiss Purported Appeal, with Prejudice.

I. SUMMARY OF ARGUMENT

This purported appeal for administrative review should be dismissed with prejudice on numerous bases. First, the petitioner/appellant, John C. Willson ("Appellant"), (who has been represented by counsel since these proceedings began almost one year ago), failed to timely appeal from a decision of the Director dated October 16, 2006. That decision completely and finally resolved all of the issues raised by Appellant in the proceedings below.

Second, even if there was something remaining to be decided following the October 16, 2006 Decision Letter, an appeal from Director Corra's January 3, 2007 Decision Letter was due March 5, 2007 – not April 13, 2007. Appellant's delay is a jurisdictional defect which precludes the Council from hearing this matter.

Third, Appellant's January 11, 2007 letter had no legal effect. That letter is not a petition for administrative review. That letter is jurisdictionally deficient because it fails to satisfy DEQ's rules for filing an appeal. Appellant's letter, among other defects, did

not identify the decision to be appealed, and it did not fulfill the due process related requirement that he identify the factual and legal bases supporting his claims. Appellant also completely failed to serve P & M with his January 11, 2007 letter (and even his April, 2007 Appeal was not properly served). In fact, Appellant himself understood that his letter of January 11, 2007 did not serve as a petition for review. This is underscored by Appellant's later and untimely attempt to file a sufficient appeal with the Council.

Finally, this purported appeal should be dismissed because DEQ's rules of practice and procedure have the force and effect of law, and adherence to those rules mandates dismissal.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

P & M acquired the Welch No. 1 North Mine, Permit No. 497-T2 on or about May 10, 1999. (Welch No. 1 North Mine, Permit 497-T3 to T4 Renewal Application, (hereinafter the "T4 Renewal Application"), at tab marked "License").

P & M subsequently entered into a surface use agreement styled "Surface Use Agreement Surface Mine Reclamation" with Bluegrass Coal Development Company, dated July 22, 1999, for a ten year term (the "Surface Use Agreement"). That agreement covered certain real property located in Sheridan County, Wyoming, to wit:

> A tract of land situate in Lot 4 and the SW1/4 of the NW1/4 of Section 1, Township 57 North, Range 84 West, 6th P.M., Sheridan County, Wyoming, containing 56.6 acres, more or less.

Bluegrass Coal Development Company next executed a "Surface Landowner's Consent" form, dated July 26, 1999, approving and consenting to P & M's reclamation plan.

On or about June 14, 2001, Appellant purchased the Bluegrass Property. Appellant purchased the property with knowledge of, and subject to, the Surface Use Agreement, and the Surface Landowner's Consent form. A total of 10.18 acres has been disturbed under the Permit. Reclamation was required on a total of 3.22 acres. Of this 3.22 acres, Appellant owns 1.11 acres.

On or about May 10, 2005, Aqua Terra Consultants, Inc. submitted P & M's T4 Renewal Application to DEQ. The application was submitted for the sole purpose of obtaining a valid permit for the required bond period. (Approval of the Renewal for Permit No. 497-T4, TFN 4 4/211, Aug. 30, 2005).

Appellant was provided with notice of the T4 Renewal Application. (T4 Renewal Application, at tab marked "Notification"). The T4 Renewal Application included a copy of the July 22, 1999 Surface Use Agreement. (T4 Renewal Application, at tab marked "Legal Document 1"). The T4 Renewal Application stated that Permit No. 497-T2 was transferred to P & M on May 10, 1999. (T4 Renewal Application, at tab marked "License"). The T4 Renewal Application then specifically stated that:

> [S]hortly after the transfer of the mine permit to P & M[, it] negotiated a new Surface Use Agreement for Surface Mine Reclamation tabbed as Legal Document 1 to allow long-term access and reclamation activities for an initial 5 year term renewable thereafter for 5 successive one year terms.

(T4 Renewal Application, at tab marked "Right to Mine" (emphasis added)). Appellant neither objected to the application, nor DEQ's approval of that application, until one year later.

On or around May 8, 2006, Appellant's attorney forwarded a letter to Mr. Bob Giurgevich, District III Assistant Supervisor, DEQ Land Quality Division, alleging that P & M had seriously and substantially violated Welch Permit No. 497-T4 (the "Permit"). Specifically, the letter claimed that P & M had failed to obtain surface control over property owned by Appellant for the duration of the applicable reclamation bond period, because the Surface Use Agreement would terminate before the bond reclamation period would expire. Appellant therefore alleged that P & M would be precluded from completing any remedial reclamation which might arise after expiration of the Surface Use Agreement, but before the time scheduled for final bond release. Appellant thus believed that the Administrator was obligated to terminate P & M's permit. Appellant also accused P & M of knowingly and willfully misrepresenting the duration of the Surface Use Agreement, thus requiring, in his opinion, that DEQ revoke P & M's Permit. (Ex. "A", May 8, 2006 letter from Dan B. Riggs, Esq. to DEQ/ Bob Giurgevich).

On May 19, 2006, Richard A Chancellor, Administrator for the Land Quality Division of the DEQ ("Administrator Chancellor"), forwarded his initial decision to Appellant's attorney. Administrator Chancellor decided that he would "treat [Appellant's] letter as a complaint" brought "[i]n accordance with Land Quality Division Coal Rules and Regulations Chapter 16." Administrator Chancellor then cogently rejected each of Appellant's complaints. Administrator Chancellor concluded there was ample time for P & M to conduct any necessary field studies and remedial action well in advance of the expiration of the Surface Use Agreement. Therefore, there was "no violation at this time concerning the termination date of the land use agreement" and generally "no violations associated with the operation." Further, there were no grounds

for revocation of the Permit. (Ex. "B", May 19, 2006 Decision Letter from Administrator Chancellor to Dan B. Riggs, Esq.).

On or around July 26, 2006, Appellant sent another letter to Administrator Chancellor, copied to Appellant's attorney, largely reiterating the allegations in his May 8, 2006 complaint. Appellant also contested Administrator Chancellor's May 19, 2006 decision letter. Appellant again argued, *inter alia*, that field inspections and studies could not be legally "completed" before the end of the bond period. Appellant also again argued that P & M made false statements in its Permit application in violation of W.S. § 35-11-406. The sole basis for Appellant's accusation was that:

> Wyoming Statutes Title 35, Chapter 11, Section 406, requires that "A sworn statement stating that the applicant has the right and power by legal estate owned to mine from the land for which the permit is desired." This requires a company to have and maintain surface control to all the land necessary to fulfill all the permitted mining and reclamation responsibilities. . . . P & M necessarily falsified their sworn statement; they did not have the required surface control necessary to complete the permitting requirements.

(Ex. "C", July 26, 2006 letter from Appellant to Administrator Chancellor). Appellant styled his July 26, 2006 letter as a request for informal review of Administrator Chancellor's decision by the Director in one paragraph, while stating in another paragraph that his letter should be considered a complaint pursuant to W.S. § 35-11-701.

On or around August 23, 2006, Appellant forwarded yet another letter to Administrator Chancellor, also copied to Appellant's attorney, to complain of purported additional violations observed following an onsite inspection Appellant performed with field office staff. Appellant requested to "amend [his] complaint" to include these violations. Appellant alleged that P & M had failed to replace vegetation in certain affected areas resulting in erosion, instability and unacceptably steep slopes in violation of both state and federal law. (Ex. "D", August 23, 2006 letter from Appellant to Administrator Chancellor). Appellant did not copy P & M with his letter. (*See* Ex. "D").

On August 23, 2006, Administrator Chancellor addressed Appellant's letter of July 26, 2006. Administrator Chancellor deemed Appellant's letter to be a written complaint, as requested. Administrator Chancellor rejected Appellant's contention that P & M's Permit should be revoked under W.S. § 35-11-406(a). He determined that P & M had legal estate to mine from the time P & M sought permit renewal, to date. Administrator Chancellor further found that the original surface owner consent to mine remained valid and operative. Finally, Administrator Chancellor concluded that P & M

did not make false statements and that it did not willfully or knowingly disregard any Permit requirements. (Ex. "E", August 23, 2006 Decision Letter from Administrator Chancellor to Appellant).

On or around August 30, 2006, Appellant sent still another letter to Administrator Chancellor, copied to Appellant's attorney, taking issue with the August 23, 2006 Decision Letter. Appellant's main argument was, once again, that P & M's permit should be revoked pursuant to W.S. §§ 35-11-409(a) (intentional misrepresentations) & 412(a). (Ex. "F", Aug. 30, 2006 letter from Appellant to Administrator Chancellor). Appellant once again elected to not copy P & M with his letter. (*See* Ex. "F").

On September 15, 2006, Administrator Chancellor responded to Appellant's August 23 and 30, 2006 letters. Administrator Chancellor characterized Appellant's August 23 letter as an amendment to Appellant's original complaint, and characterized his August 30 letter as a response to Administrator Chancellor's August 23, 2006 decision. With regard to the amendment to the original complaint (relating to the alleged violations observed at the onsite inspection), Administrator Chancellor found that the slopes called into question had a similar amount of vegetation as native slopes in close proximity, that they were as stable as the native slopes, and, therefore, there were "no violations in regard to these areas." With respect to the issues surrounding surface access during the reclamation bond period, Administrator Chancellor modified his prior decision by concluding that "the access issue must be resolved [by P & M] . . . by April 22, 2009" (90 days before the current Surface Agreement terminates). (Ex. "G", Sept. 15, 2006 Decision Letter from Administrator Chancellor to Appellant).

By letter dated September 20, 2006, Appellant advised Administrator Chancellor that he did not agree with the September 15, 2006 Decision Letter. Appellant requested informal review of the decision by the Director. (Ex. "H", Sept. 20, 2006 letter from Appellant to Administrator Chancellor). Appellant still again elected to not copy P & M with his letter. (*See* Ex. "H"). Appellant did copy his attorney though.

At some point between September 20, 2006 and October 16, 2006, John Corra, Director of the DEQ, commenced an informal review pursuant to Appellant's September 20, 2006 request. On October 16, 2006, Director Corra filed a decision letter resolving two of the three basic issues raised by Appellant in his various letters. First, Corra affirmed Administrator Chancellor's prior decision regarding surface access (*i.e.*, that P & M has legal access, and it should acquire continued access 90 days prior to expiration of the Surface Use Agreement). Director Corra therefore affirmed Administrator Chancellor's decision that P & M was in compliance with the Permit and applicable laws and regulations. That decision rendered moot the question of whether P & M "deliberately made false statements to DEQ"—it is impossible for P & M to lie about its

compliance when the Director has ruled that P & M was in compliance. Second, the Director reversed and vacated Administrator Chancellor's decision concerning reclamation of the cut bank. Director Corra required P & M to submit a plan of correction for the sloped areas at issue. Appellant made no attempt to appeal these decisions until April 13, 2007.

On the third issue, Director Corra withheld a decision pending further investigation on "[t]he questions of whether the operator deliberately made false statements to DEQ" in order to obtain Permit approval, and generally whether there was any culpability on P & M's part. (Ex. "I", Oct. 16, 2006 Decision Letter from Director Corra to Appellant). He withheld a decision on this issue despite finding that P & M was in compliance with its permit and the applicable law.

On or around November 20, 2006, Director Corra and Administrator Chancellor held an informal conference with P & M pursuant to Wyo. DEQ Rules & Regs., Practice & Proc., Ch. 6, § 3. At this hearing, the DEQ accepted statements from P & M agents in order to determine any culpability on the part of P & M in connection with its most recent Permit renewal application.

On January 3, 2007, Director Corra issued his decision on the third issue, which he incorrectly believed was still pending before him. Following his investigation, Director Corra was "satisfied that there [were] no deliberate attempts to deceive the DEQ" when P & M sought renewal of its Permit. Moreover, "[h]ad DEQ addressed the documentation issues during review of the renewal application, the appropriate remedy" would not have been to deny the renewal application, but rather "to condition renewal to require clarification of the access documentation and require a good faith effort to resolve the issue prior to the expiration date of the current agreement," since "taking any other action would only transfer responsibility to reclaim the area to the DEQ and not resolve the access matter." Therefore, there was no basis to revoke the Permit under either W.S. §§ 35-11-409 or 412. Director Corra also noted in his decision letter that P & M had always operated under a "Surface Owner Consent" document in addition to the Surface Agreement, and that the consent document (which has no expiration date) "is the primary instrument through which DEQ determines an operator's right to disturb and reclaim land." (Ex. "J", Jan. 3, 2007 Decision Letter from Director Corra to Appellant).

By letter dated January 11, 2007, filed with the EQC by Director Corra and received by the Council on January 19, 2007, Appellant wrote to Director Corra the following, which restates the letter in its entirety: "Dear Mr. Corra: I do not agree with your decision concerning my complaint and hereby request an appeal to the Environmental Quality Council. Could you please provide me with dates and any procedural requirements as I need to coordinate this meeting with my attorney." (Ex.

"K", Jan. 11, 2007 letter from Appellant to Director Corra). Yet again, Appellant decided to not copy P & M on his letter. Appellant has never served this letter upon P & M. His letter was copied, however, to his attorney.

By letter dated January 19, 2007, Director Corra acknowledged receipt of Appellant's January 11 letter and noted that he had forwarded Appellant's complaint to the Council. Director Corra advised that the Council would set a hearing and assist him with procedural questions. (Ex. "L", Jan. 19, 2007 letter from Director Corra to Appellant).

On April 13, 2007, Appellant's attorney filed with the Council a document entitled "Appeal." Unlike Appellant's January 11, 2007 letter, this document includes the names and addresses of Appellant and his attorney, sets forth certain facts and issues, requests a hearing, purports to identify the action upon which a hearing is requested, and requests relief from the Council. The action upon which a hearing is requested is identified as "the lack of action by the Department of Environmental Quality concerning the Pittsburg & Midway Coal Mining Company [sic] Welch Mine Permit, Permit No. 497-T4." Some of the claims are being raised for the first time. Counsel for the Appellant also failed to serve P & M via registered mail, return receipt requested as required by DEQ's rules and regulations. It also appears that counsel for Appellant failed to serve the Director and the Chairman of this Council by registered mail, return receipt requested as also required by the rules and regulations. (April 13, 2007 Appeal filed by Dan B. Riggs, Esq. on behalf of Appellant).

III. APPLICABLE PROCEDURAL RULES

The Wyoming Statutes grant a right to file administrative complaints alleging violations of the Wyoming Environmental Quality Act and/or pertinent rules, regulations, standards, permits, variances and licenses. *See* W.S. § 35-11-701(a), (b). In the case of a written complaint relating to surface coal mining operations, a right to an inspection is also included. *Id.* § 701(b). An Administrator initially investigates the complaint and rules upon the complaint, or recommends a ruling to the Director. The Administrator's decision is then subject to review by the Director. Wyo. DEQ Rules & Regs., Land Quality-Coal, Ch. 16, § 1(e). More generally, the Director "may review, by informal conference, or otherwise . . . any decision, order, notice by the Administrator or assessment of a penalty by the agency," and upon review, may affirm, modify, terminate or vacate an Administrator's decision. *Id.*, Practice & Proc., Ch. 6, § 1(a).

Review by the Director from an Administrator's decision may be sought by petition. *Id.* §§ 1(b), 2(a). Thereafter, the Director may grant or deny the petition and, if granted, resolve the issues via an informal adjudicatory process. *See id.* §§ 2(b), 3.

Appeals from the Director's decision are effectuated pursuant to specific and mandatory rules. An appellant must "inform the Council that he wishes to proceed with [an] appeal to the Council," and, additionally, initiate formal proceedings before the Council. *Id.*, Ch. 6, § 4(a); Ch. 1, § 3(a) ("All hearings before the Council, appeals or others, shall be held pursuant to these rules."). Thus, a party seeking administrative review to the Council, whether protesting a permit or requesting a hearing (or both), is required to: (1) "file two copies of a written petition directed to and served upon both the Chairman of the Council and the Director of the Department," service to be effected by registered mail, return receipt requested, and (2) serve the petition upon the permit applicant, return receipt requested, in cases where the protestant is objecting to a permit. *Id.*, Ch. 1, § 3(b).

The DEQ Rules of Practice and Procedure also mandate the petition to provide: (1) the name and address of the person making the request or protest, (2) the name and address of the person's attorney, if he has one, (3) the decision, order, permit or other action upon which hearing is requested or objection is made, (4) a statement in ordinary and concise language of the facts and law forming the basis of the protest and/or request, including, whenever possible, particular reference to applicable rules, statutes, or orders that were allegedly violated, and (5) a request for a hearing before the Council. *Id.* § 3(c).

Finally, Section 16 of Chapter I (General Rules of Practice and Procedure) governs the timelines within which the above petition requirements must be completed. Section 16(a) provides that "all appeals to the Council from final actions of the . . . Director shall be made within sixty (60) days of such action." *Id.*, Ch. I, § 16(a). In cases involving an "administrative decision following an informal conference relating to a surface coal mining operation," however, the adversely affected party must appeal "[w]ithin 30 days after notification of any administrative decision . . . in accordance with Chapters I and II." *Id.* § 16(b).

IV. ARGUMENT

DEQ's rules and Appellant's own actions bar Appellant from appealing any issues decided in Director Corra's October 16, 2007 Decision Letter and/or his January 3, 2007 Decision Letter.

First, Director Corra's October 16, 2006 decision affirmed Administrator Chancellor's earlier rulings that P & M had and continues to have adequate surface access from the time of Permit renewal until at least April 22, 2009, and that P & M is in full compliance with the Permit and applicable law and regulations. Appellant never appealed from the Director's October decision until April 13, 2007 – four months after

his time to appeal had lapsed under the DEQ's procedural rules. Therefore, Director Corra's decision became the agency's final determination on the issues decided therein. That final decision renders Appellant's accusations about misrepresentations moot because those accusations are solely dependent upon P & M allegedly not having surface access and/or not being in compliance with the Permit and applicable law and regulations. P & M can hardly be accused of making "false sworn statements" about its compliance with the Permit and the law, based upon the Surface Use Agreement, when the Administrator and the Director have conclusively ruled that P & M is in compliance with the Permit and applicable law, and that P & M has secured adequate access. It is factually and legally impossible to find otherwise. Simply put, Appellant's decision to not timely appeal Director Corra's October 16, 2006 decision leaves nothing to be decided in the instant appeal. Appellant's entire "appeal" should be dismissed with prejudice.

Second, even if there was something remaining to be decided following the October 16, 2006 Decision Letter, an appeal from Director Corra's January 3, 2007 Decision Letter was due March 5, 2007 – not April 13, 2007. Appellant's delay is a jurisdictional defect which precludes the Council from hearing this matter.

Regardless, Appellant's January 11, 2007 informal letter to Director Corra was neither intended to be a petition, nor does it qualify as a valid petition. Appellant's January 11, 2007 informal letter to Director Corra (a) was not properly filed with or served upon the Director or the Chairman of the Council, (b) was not served upon P & M in any manner, (c) did not include the address of the petitioner's attorney, (d) did not identify a specific decision, permit, order or other action being appealed, (e) did not state the factual or legal bases for the protest as required by due process, and (f) did not request a hearing. Appellant acknowledges as much by submitting his April 13 filing. P & M respectfully submits that the Council neither has subject matter jurisdiction over these proceedings nor personal jurisdiction over P & M. Moreover, to proceed to hear Appellant's case would violate DEQ's rules and regulations.

A. Appellant's Purported Appeal is Moot

Appellant erroneously claims that P & M lacks adequate legal estate to mine from the permitted land because P & M allegedly lacks adequate surface control (even though surface control is irrelevant to whether P & M has obtained the necessary mineral rights, *i.e.*, the legal estate to mine). Appellant therefore rashly concludes that P & M must have made false sworn statements to the DEQ concerning the adequacy of its surface control. Thus, Appellant's brash "false statements" claim is derivative of his "surface control" claim. As stated by Appellant: "P & M necessarily falsified their sworn statement; they

did not have the required surface control necessary to complete the permitting requirements." (Ex. "C").

Director Corra's October 16, 2006 decision was an appealable decision subject to this Council's review. Director Corra provided to Appellant a written statement which was fully dispositive on the issues of whether P & M had adequate surface access and whether P & M was in compliance with the law and the Permit. Director Corra affirmed Administrator Chancellor's decision, finding that "he adequately responded to the issue of surface owner consent by requiring the operator to obtain the necessary access assurances prior to the expiration of the surface use agreement." Appellant had at most 60 days to appeal this decision. He never appealed Director Corra's October 16 decision, however, until April 13, 2007, some six months after the decision. Consequently, the Council lacks subject matter jurisdiction to hear Appellant's purported appeal. *Antelope Valley Improvement Dist. v. State Bd. of Equalization*, 992 P.2d 563, 567 (Wyo. 1999) ("[t]imely filing of a request for administrative review of an agency decision is mandatory and jurisdictional."); *Fullmer v. Wyo. Empl. Sec. Comm'n*, 858 P.2d 1122, 1124 (Wyo. 1993); see also *Dept. of Rev. & Taxation v. Shipley*, 579 P.2d 415, 419 (Wyo. 1978) (Wyo. 1978) (holding that the "failure to timely request an administrative hearing . . . constitute[s] a waiver of the right to administrative review").

Director Corra's final decision on October 16, 2006 renders this instant appeal moot because Appellant's accusations concerning P & M's alleged misrepresentations are solely dependent upon P & M not having sufficient surface access and not being in compliance with the Permit and applicable law and regulations. Again, P & M can hardly be accused of lying about its surface access based upon the Surface Use Agreement, and its compliance with the Permit and the law, when the Administrator and the Director have conclusively ruled that P & M is in compliance with the Permit and applicable law and that P & M had at the time of Permit renewal, and continues to have, adequate surface access. It is legally and factually impossible for P & M to have made a misrepresentation or false statement as alleged by Appellant because DEQ has already determined the truth and accuracy of P & M's representations. Appellant's decision to forego a timely appeal of Director Corra's October 16, 2006 decision therefore leaves nothing to be decided in the instant appeal. Appellant's appeal should be dismissed with prejudice.

B. The Council has Neither Subject Matter Jurisdiction Over Appellant's Purported Appeal Nor Personal Jurisdiction over P & M

Even if there was something remaining to be decided following the October 16, 2006 Decision Letter, Director Corra's January 3, 2007 Decision Letter constituted final agency action for purposes of an appeal to the Council. Therefore, Appellant had until March 5, 2007, at the latest to file a petition for review of Director Corra's January 3, 2007 Decision Letter. Wyo. DEQ Rules & Regs., Practice & Proc., Ch. I, § 16(a). Appellant failed to meet this deadline as well. Appellant's April 13, 2007 Appeal was more than two months late, or almost 40 days late assuming the lengthier 60 day filing period. Pursuant to *Antelope Valley*, *Fullmer*, and *Shipley*, *supra*, Appellant's delay is a jurisdictional defect which precludes the Council from hearing this matter.

Given his dilatory conduct, Appellant will likely argue that his January 11, 2007 letter nonetheless serves as a petition for review pursuant to the DEQ's rules of practice and procedure. That letter, however, cannot objectively be construed as a petition for review. There are numerous substantial deficiencies. First, Appellant did not state his attorney's address even though his attorney clearly stated he was representing the Appellant in this matter. (Ex. "A"). Second, he did not request a hearing before the Council. Although he requested an appeal and asked for available dates for a meeting, he did not request a hearing. Third, Appellant did not sufficiently identify the decision being appealed. Fourth, Appellant did not set forth the factual and legal bases supporting his complaint. Fifth, Appellant never served P & M or the Council with his January 11, 2007 letter. Of these five defects, even if the first two could be characterized as technical deficiencies or defects only as to form, the latter three are substantial because they bear on the notice given to P & M (or lack thereof).

Appellant's January 11 letter identified the decision to be appealed as "your decision concerning my complaint." This is problematic for several reasons. Throughout the prior proceedings before the agency – proceedings in which P & M did not participate in an adversarial capacity – Director Corra issued at least two different written decisions deciding at least three discrete issues. In addition, Director Corra had at least one phone conference with Appellant wherein he communicated conclusions. (*See* Ex. "J", January 3, 2007 Decision Letter). Given the issues raised by Appellant before both the Administrator and the Director, "your decision" provided no indication to P & M or the Council of what specific issues Appellant wanted the Council to review. Until April 13, 2007, neither P & M, the Director, nor the Council, had any idea as to whether Appellant desired to appeal each of the determinations made by Director Corra or just some of them. Moreover, it was not until April 13 that P & M learned that Appellant desired to raise new issues not reflected in the written correspondence below, and that he desires a

hearing on these issues at "the earliest available date." (Ex. "N", Letter from Dan B. Riggs, Esq. to Kim McGee dated April 13, 2007).

For these reasons, strict and timely compliance with the requirement that the protestant/petitioner identify the decision being appealed was necessary. In Wyoming, the supreme court has steadfastly required appellants to identify the decision being appealed, even in situations where it could be ascertained by implication (as distinguished from the situation here, where the applicable decision(s) is completely uncertain). For example, in *Colton v. Brann*, the Wyoming Supreme Court dismissed an appeal where the plaintiff-appellant's notice of appeal designated the order being appealed as the trial court's "Order Denying Plaintiff's Motion for Judgment Notwithstanding the Verdict, And In the Alternative, Motion For A New Trial." 786 P.2d 880, 881 (Wyo. 1990). The court reiterated the rule that an appellant must timely appeal from "the judgment entered on the verdict," rather than an order deciding a post trial motion. *Id.* Under *Colton*, even if the appellant's intention could reasonably be determined, a defect in identifying the judgment will result in dismissal if it is not cured within the time frame for filing a notice of appeal. *See id.*; *see also Parker v. Kahn,* 758 P.2d 570 (Wyo. 1988) (dismissing appeal where appellant identified order denying motion to alter or amend judgment as the appealable order).

Appellant's void Appeal must be dismissed in light of the case law cited above. The Wyoming Supreme Court has adopted a strict and literal approach and has routinely dismissed appeals where the notice of appeal identifies the wrong order. Presumably the court would reach the same result where no specific order is identified whatsoever because, in *Colton* and *Parker*, at least an argument could have been made that the appealable order could be identified by inference. Here, based on the reasons discussed above, neither Appellant's January 11, 2007 letter nor his April 13, 2007 Appeal adequately serves as a petition for review because neither document specifically identifies the decision(s) he intends to appeal.

Likewise, Appellant's omission from the January 11, 2007 letter of the factual and legal bases supporting his administrative appeal renders the letter fatally defective as a petition for review. Among all of the requirements imposed by the DEQ rules of procedure, the content items set forth in § 3(c) go to the essence of a petition for administrative review in that they are the means by which the respondent is able to present its defense both legally and factually. The § 3(c) content rules are premised on the due process requirement in Wyoming that "only issues and violations identified within a proper notice and complaint may be pursued at a hearing and considered in issuance of any agency decision." *FRJ Corp. v. Mason*, 4 P.3d 896, 900 (Wyo. 2000); *Dorr v. Wyo. Bd. of Certified Pub. Accountants*, 21 P.3d 735, 744 n.5 (Wyo. 2001). Where the petitioner, as here, fails to identify *any* basic facts, statutes, regulations, case

law, etc. upon which the petition is based within the time allotted by agency rule, the mandate in *FRJ* and *Dorr* must be honored and the petition must be dismissed.

Of equal importance is the fact that (1) Appellant completely failed to serve P & M with his January 11, 2007 letter, and (2) Appellant failed to serve P & M with his April 13, 2007 Appeal within the time or in the manner required by law. DEQ rules of practice and procedure state that all appeals "shall be made" within 60 days of the appealable action. Wyo. DEQ Rules & Regs., Practice & Proc., Ch. 1, § 16(a). In cases where the appealable action is the Director's decision following an informal conference relating to a surface coal mining operation, the appellant/petitioner must appeal the decision within 30 days "in accordance with Chapters I and II." *Id.* § 16(b). Therefore, the question becomes what procedural steps concerning notice to adverse parties must a petitioner take in order to properly perfect an appeal or how an appeal is to be carried out "in accordance with Chapters I and II."

The rules are clear that an appellant protesting a permit must serve the permit applicant with a copy of the petition via registered mail, return receipt requested (as original service) within 60 or 30 days. *Id.* §§ 3(b)(ii), (ii); 16. Until this occurs, the appeal has not been perfected. In this case, Appellant directly protests P & M's Welch Permit No. 497-T4. Specifically, he rashly argues that the Permit should be revoked because of alleged misrepresentations made by P & M to the DEQ concerning surface access. Thus, under the DEQ's rules, P & M was entitled to service by certified mail, return receipt requested, of Appellant's letter within 30 (or at most 60) days of Director Corra's decision. Appellant never served P & M with the January 11, 2007 letter. The untimely April 13, 2007 Appeal also was not served by registered mail, return receipt requested. P & M did not learn of Appellant's January 11, 2007 letter until Kim McGee notified it on or around February 12, 2007 that an appeal had been docketed. (Ex. "M", Feb. 12, 2007 from Kim McGee to P & M).

Thus, the Council must also determine the effect of Appellant's failure to properly serve P & M. Whereas the other deficiencies result in a lack of subject matter jurisdiction only, this particular deficiency results in a lack of personal jurisdiction over P & M in addition to a lack of subject matter jurisdiction. In *Cotton v. Hand*, the Wyoming Supreme Court dismissed an appeal on jurisdictional grounds where the appellant failed to serve his notice of appeal and failed to provide a succinct statement of the argument supporting his appeal. 563 P.2d 1343 (Wyo. 1977). *Cotton* followed what has been the longstanding rule in Wyoming for many years. *See also Lobell v. Stock Oil Co.*, 115 P. 69 (Wyo. 1911) (holding that appeal had not commenced before applicable deadline and court had no jurisdiction where petition was filed but defendant was not served before that date); *Culbertson v. Ainsworth,* 181 P. 418, 418-19 (Wyo. 1919). More recently, however, the Wyoming Supreme Court has recognized that, in some cases, dismissal may

not be appropriate. For example, where the record does not initially reflect that the appellant properly effected service, but the respondent does not dispute that he was served, a court may decline to dismiss the case. *See First Nat'l Bank of Thermopolis v. Bonham*, 559 P.2d 42, 50-51 (Wyo. 1977). Similarly, in *DS & RS v. Dept. of Pub. Assistance & Soc. Servs.*, the court found that dismissal due to late service was not warranted under the circumstances of the case, but it did so with "the admonition to all concerned that failure to serve a notice of appeal upon all parties contemporaneously with the filing of the notice may, and probably will, in most cases, result in dismissal of the appeal." 607 P.2d 911, 914-15 (Wyo. 1977). The court relied on "the relatively short delay" between filing and service and W.R.A.P. 1.02 in reaching its holding. *Id.* at 915. Rule 1.02, which is inapplicable to the instant proceedings, allows the supreme court to use its discretion when rules of appellate procedure, other than the rule requiring timely filing of a notice of appeal (which is jurisdictional), are violated.

Here, Appellant's purported appeal should be dismissed on jurisdictional grounds for failure to serve an interested party. Appellant never served P & M with the January 11, 2007 letter. Similarly, the April 13, 2007 Appeal is defective because Appellant completely ignored or otherwise failed to adhere to the rule requiring service by certified mail, return receipt requested. Unlike the *First Nat'l* case where the party in interest did not deny service and the record ultimately reflected timely service, P & M denies receiving Appellant's January 11 letter until the Council itself informed P & M of the docketing of the appeal one month later. Further, Appellant failed to set forth the factual and legal bases for his appeal until mid April – months after the pertinent deadline – so any alleged notice to P & M was accomplished through improper and insufficient service. Nor is this case similar to *DS & RS* where the order being appealed terminated the appellants' parental rights and service on the guardian ad litem was carried out within a week after the pertinent deadline. Months have lapsed since Appellant's deadline and, unlike the Council, the *DS & RS* court had explicit authority under Rule 1.02, Wyoming Rules of Appellate Procedure, to exercise its discretion. Simply put, this case aligns with the well settled general rule that dismissal is appropriate where service is not made as required by law. As such, Appellant's appeal to the Council should be dismissed for lack of subject matter jurisdiction and personal jurisdiction over P & M.

In addition to the foregoing, P & M notes Appellant himself accorded no legal effect to his January 11, 2007 letter. First, it was directed only to the lower tribunal. As stated several times herein, Appellant was required by DEQ rule to file and serve, by registered mail, return receipt requested, a petition upon P & M, the Director, and the Chairman of the Council. Wyo. DEQ Rules & Regs., Practice & Proc., Ch. I, § 3(b).[1]

[1] It is noteworthy also that the certificate of service appended to Appellant's April 13, 2007 Appeal indicates that the Appeal was not served on P & M, the Director or the Chairman of the Council by

Instead of following this process, Appellant apparently mailed his January 11 letter to the Director only, and there is no indication that it was sent by registered mail to any of the relevant parties. Indeed, the Council would never have received Appellant's January 11 letter had Director Corra not forwarded it to the Council himself. Moreover, P & M would have never received the letter had the Council's Executive Assistant not copied P & M on her February, 2007 letter. If Appellant intended to appeal or give notice of his intent to appeal the Director's decision, one would think that he, or his attorney, would notify in some manner the adverse party and, more importantly, the appellate tribunal – as they imperfectly did when they filed their untimely April 13, 2007 appeal.

Second, in his January 11, 2007 letter, Appellant asks Corra to advise him of "any procedural requirements" that Appellant might need to follow to perfect an appeal and/or obtain a hearing. This statement indicates that even Appellant understood his letter as merely (1) a notice only to the lower adjudicatory tribunal of his intent to submit a petition at a later date, and (2) a request for more information. Appellant's untimely attempt in April of 2007 to file a petition for review comports with this understanding of Appellant's actions. Basically, Appellant failed to timely carry out his own future intentions to submit a sufficient petition within the time allowed by law.

S & M Devel. v. State Div. of Housing & Cmty. Renewal is highly instructive to the situation at bar. 182 A.D.2d 995 (N.Y. App. Div. 1992). There, the appellate court affirmed the lower court's dismissal of the case due to the petitioner's failure to exhaust its administrative remedies. *Id.* at 995. The appellant failed to exhaust its administrative remedies due to its previous failure to timely seek administrative review. *Id.* The appellate court reasoned:

> [P]etitioner never filed a petition for administrative review of an order of a District Rent Administrator for respondent which found that petitioner had to restore discontinued services to a cooperative apartment building. Petitioner attempts to characterize a letter it wrote within the time for appeal as a petition for review. That letter, however, was not in proper form, did not request administrative review and was not addressed to the proper administrative review body. Furthermore, case law has upheld the proposition that there is no discretion to excuse the failure of a party who is seeking administrative review of an order issued by a District Rent Administrator to [timely] file a petition for administrative review.

Id. (citations and quotations omitted) (alteration in original).

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registered mail with return receipt requested as required under prescribed by DEQ rule. Wyo. DEQ Rules & Regs, General Rules of Prac. & Proc., Ch. 1, § 3(b).

For the reasons stated in the *S & M* case, Appellant cannot be permitted to characterize his January 11, 2007 letter as a petition for review and, as such, this appeal should be dismissed as untimely. In his initial letter in January, Appellant failed to provide the required attorney identification information, failed to request a hearing, failed to adequately identify the decision sought to be appealed, and failed to state the factual and legal bases for his appeal. Additionally, Appellant did not file and serve his letter upon the agency in a proper fashion, and did not serve it upon P & M in any fashion. That letter was simply not a petition for review. Furthermore, Appellant's April, 2007 Appeal was filed months beyond the applicable deadline, failed to identify the decision being appealed, and, based on its certificate service, was not properly served on P & M, the Director, or the Chairman of the EQC. The Council therefore lacks subject matter jurisdiction over this controversy and it lacks personal jurisdiction over P & M.

C. The Council must Abide by and Enforce its DEQ Rules

The Council will be acting in accordance with the widely recognized principle that agencies must follow their own rules and regulations if it holds that Appellant has failed to perfect an administrative appeal as required by law and that he no longer has a right to administrative review. "Administrative rules and regulations have the force and effect of law, and an administrative agency must follow its own rules and regulations or face reversal of its actions." *RME Petroleum Co. v. Wyo. Dept. of Rev.*, 150 P.3d 673, 688 (Wyo. 2007). The Wyoming Administrative Procedure Act confirms this statement in its mandate to courts to "[h]old unlawful and set aside agency action, findings and conclusions" which are not in accordance with law, in excess of jurisdiction, or "[w]ithout observance of the procedure required by law." W.S. § 16-3-114(ii)(A), (C), (D).

Although courts will defer to an agency's construction of its own rules, any construction given by the agency that is clearly erroneous or contrary to a rule's plain language will not be upheld. *RME*, at 688-89. The above analysis demonstrates that Appellant failed to even marginally comply with DEQ's unambiguous rules and regulations. This appeal should therefore be dismissed with prejudice.

D. Appellant is Precluded from Raising New Claims in this Purported Appeal

Appellant is submitting issues to the Council which he failed to first raise with Administrator Chancellor or Director Corra. The law is well settled that appellants are precluded from asserting claims for the first time on appeal. Accordingly, Appellant's new claims should be dismissed with prejudice.

IV. CONCLUSION

Appellant's appeal should be dismissed with prejudice. The Administrator and the Director thoughtfully addressed every allegation raised by Appellant as he proceeded with the assistance of counsel unilaterally before the DEQ, often based upon letters which Appellant never delivered to P & M. Appellant should be denied yet another bite at the apple where he has completely failed to follow the DEQ's rules governing administrative review.

Dated this 20th day of April, 2007.

The Pittsburg & Midway Coal Mining Co.

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Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of April, 2007, a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION OF THE PITTSBURG & MIDWAY COAL MINING CO. TO DISMISS PURPORTED APPEAL, WITH PREJUDICE was served upon counsel for the Petitioner/Protestant by depositing a true and correct copy thereof in the United States mail, postage prepaid and properly addressed to:

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