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

REPLY OF THE PITTSBURG & MIDWAY COAL MINING COMPANY TO RESPONSE OF JOHN C. WILLSON TO MOTION TO DISMISS

COMES NOW The Pittsburg & Midway Coal Mining Company ("P & M"), by and through its undersigned attorneys, Poulson, Odell & Peterson, LLC and Brown, Drew & Massey, LLP, and hereby replies to the Response of John C. Willson ("Appellant") to Motion to Dismiss by the Pittsburg & Midway Coal Mining Co. ("Response") as follows:

I. INTRODUCTION AND SUMMARY OF ARGUMENT

P & M's motion to dismiss is properly before the Environmental Quality Council, (the "Council"). Appellant is barred from bringing these proceedings due to his previous failures to assert his rights. Each of Appellant's arguments requires the Council to ignore one legal rule or another. Adherence to these rules, however, forms the basis for the Council's jurisdiction, and they must be followed. The irony of Appellant's position for revocation is that he relies on a very strict and strained interpretation of the Environmental Quality Act, and yet he comes before the Council now asking it to disregard its required process. Simply put, hearing this appeal would be contrary to agency rule, without observance of the procedure mandated by law, in excess of jurisdiction, and prejudicial to P & M.

II. P & M'S MOTION TO DISMISS IS PROPERLY BEFORE THE COUNCIL

Appellant's standing and intervention arguments are without merit. Appellant seeks to deprive P & M of valuable property and/or liberty interests – a mining permit and mining license. Appellant nonetheless argues that P & M is not a party to this appeal unless it moves to intervene in the appeal. He instead characterizes his appeal as a mere "dispute between [the Appellant] and the Director." Appellant is nonetheless demanding this Council to revoke P & M's mining permit and mining license based upon his specious claim that P & M "lied" about its rights to reclaim the surface of his impacted 1.11 acres. In reality he is attempting to circumvent the requirement that he timely and properly serve P & M with his appeal by arguing that it is somehow P & M's obligation to intervene. Appellant is unable to shirk his constitutional and statutory obligation to make P & M a party to his appeal.

First, this is not a mere dispute between the Appellant and Director Corra. Indeed, Appellant's dogged complaints to DEQ belie his suggestion otherwise. These proceedings were commenced by Appellant's filing of a Complaint under W.S.A. § 35-11-701. (Ex. "C", July 26, 2006 letter from Appellant to Administrator Chancellor).[1] Appellant consistently sought to terminate P & M's permit and/or license. For example:

> --"DEQ Land Quality [is required to] revoke P & M Coals [sic] Welch Permit No. 497-T4," (Ex. "A", May 8, 2006 letter from Dan B. Riggs, Esq. to DEQ/ Bob Giurgevich);
>
> --"I insist that the DEQ take action against P & M's improperly issued Permit," (Ex. "C", July 26, 2006 letter from Appellant to Administrator Chancellor);
>
> --"The director should . . . revoke the mining permit," (Ex. "F", Aug. 30, 2006 letter from Appellant to Administrator Chancellor); and
>
> --"DEQ should revoke the permit and the operator's license and has every legal right and responsibility to do so," (Ex. "H", Sept. 20, 2006 letter from Appellant to Administrator Chancellor).

Appellant also specifically requests in his untimely appeal "that the Welch Mine Permit be revoked and that the associated mining license of P & M Coal be revoked . . . ."

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[1] The referenced exhibits are attached to P & M's Memorandum in Support of Motion of The Pittsburg & Midway Coal Mining Co. to Dismiss Purported Appeal, with Prejudice, filed on April 20, 2007.

(Appeal, "Relief Requested," Apr. 12, 2007). Appellant also cites Section 35-11-409 "Permit Revocation," and Section 35-11-412 "License Revocation" as authority in support of his appeal. (*Id.* at ¶ 3(b)(3)). Appellant's dispute is with P & M and not just Director Corra.

Second, DEQ's rules of procedure demonstrate that Appellant should have named and served P & M as a party to this appeal. Intervention is neither required nor appropriate. Intervention is a "procedure by which an outsider with an interest in a lawsuit may come in as a party though the outsider has not been named as a party by the existing litigants . . . ." Wright and Miller, 7C Fed. Prac. & Proc. Civ.2d § 1901 (West 2007). P & M is no mere "outsider with an interest in a lawsuit." P & M is the avowed target of Appellant's lawsuit. P & M should have been properly and timely served pursuant to DEQ's rules. Those rules are consistent with P & M's position on the matter.

DEQ's intervention rule provides in pertinent part that, once a petition for intervention is granted:

> [T]he petitioner becomes an intervenor and a party to the proceeding with the right to have notice, appear at the taking of testimony, produce and cross examine witnesses, and be heard on the argument of the case.

Wyo. DEQ Rules & Regs., Practice & Proc., Ch. II., § 7(c) (emphasis added). By contrast, "[w]here a protestant is objecting to a permit, he shall also serve the permit applicant with a copy of the petition and all other pleadings and motions." *Id.* Ch. I, § 3(b)(ii). The intervention rule, by granting the intervenor the right to notice, necessarily presupposes the intervenor had no right to notice of the petition and all other pleadings and motions. *See id.* Ch 2., § 7(c). P & M already had the right to be served with the "petition and all other pleadings and motions," however, because it is the "permit applicant." *Id.* Ch. I., § 3(b)(ii). P & M is therefore not an "intervenor" contemplated by DEQ's intervention rule, *i.e.*, an "outsider" who has an interest in the matter but who was not otherwise made a party to the proceedings. Appellant was obliged to timely and properly make P & M a party to this appeal.

The Council has also already ruled that Appellant was required to timely and properly make P & M a party to his appeal. The Council has published a standing Order on Intervention, dated March 3, 2006. It provides that "Permittees are indispensable parties to cases in which their permit is at issue or in jeopardy." (Order on Intervention, Mar. 3, 2006). Accordingly, the Council ordered that "[a]ll persons who are indispensable parties to a contested proceeding before the EQC shall be joined as a party." (*Id.*) The express purpose of the Order on Intervention was to clarify that a permittee must be a party to a proceeding seeking termination of its permit or license.

(*Id.*) Appellant has neither named P & M as a party nor properly made P & M a party. The appeal can not proceed without P & M. *Wyoming Health Servs., Inc. v. Deatherage*, 773 P.2d 156, 157-58 (Wyo. 1989) (holding trial court without jurisdiction and judgment void where entered against a non-party). Hornbook law recognizes that it is incumbent upon the petitioner alone to name the proper party respondents when instituting a proceeding. 59 Am. Jur. 2d Parties § 41 (1987). The Appellant must satisfy this obligation—not P & M.

P & M also undoubtedly has standing to contest Appellant's actions. Standing simply requires a party to be sufficiently affected by the outcome of a given controversy. *Billings v. Wyoming Bd. of Outfitters & Prof. Guides*, 88 P.3d 455, 479 (Wyo. 2004). A person has standing if he has a tangible and legally protectable interest at stake and his interest is injured or threatened with injury by administrative action. *Id.* P & M has standing under Wyoming law because it has tangible and legally protectable interests which Appellant seeks to revoke.

Thus, the only question remaining is whether P & M's motion to dismiss is properly before the Council. P & M's status in this appeal is no different than the status of any other party who was improperly or untimely served with a lawsuit or an appeal. It can file a motion to dismiss for lack of personal jurisdiction, lack of subject matter jurisdiction, and/or insufficient process prior to responsive pleading. W.R.C.P. 12(b)(1), (2), (4). P & M's motion must be heard despite the fact that Appellant failed to properly name and/or timely serve P & M with his appeal. P & M respectfully submits that any other result is a violation of its substantive and procedural due process rights under both the United States Constitution and the Wyoming Constitution.

III. THE APPEAL IS UNTIMELY AND IMPROPERLY FILED

A. Appellant Filed His Appeal In the Wrong Forum

The Environmental Quality Act does not grant Appellant a right to appeal to the Council under these circumstances. Appellant should have filed his appeal with the District Court. Under W.S.A. § 35-11-701(a) – the statutory section under which Appellant admittedly proceeded before the DEQ – if "any written complaint is filed with the department alleging a violation, the director, through the appropriate administrator, shall cause a prompt investigation to be made." W.S.A. § 35-11-701(a). For surface coal mining operations, "the investigation shall include a prompt inspection." *Id.* § 701(b). If the investigation discloses an apparent violation, the division administrator may attempt to eliminate the source of the violation. *Id.* § 701(c). If a violation is not remedied or

corrected, the director must give a notice of violation and, in conjunction therewith, he has the option to issue a cease and desist order. *Id.* § 701(c)(i). Any such cease and desist order is final unless the affected person requests a hearing before the Council within ten days. *Id.* § 701(c)(ii). The Council may then affirm, modify, or rescind the cease and desist order and enter such orders as are appropriate. *Id.* § 701(c)(iii). Essentially, "[s]ection 701(c) applies, when it appears, as a result of an investigation conducted pursuant to § 701(a), that a violation of the Act exists." *People v. Fremont Energy Corp.*, 651 P.2d 802, 808 (Wyo. 1982).

The process under § 701 is clear: "Except in the case where DEQ has chosen to issue a cease and desist order, pursuant to § 701(c)(i), there is no opportunity provided by § 701 for a review" to the Council. *Id.* at 807. "[I]f no cease and desist order was issued and served . . . then § 701(c)(ii), (iii) and (iv) [relating to a hearing before the Council] have no effect." *Id.* at 808. Simply put, a cease and desist order is the only event that triggers the Council's appellate jurisdiction after the Administrator and/or Director investigates a complaint filed under § 701. *Id.* Likewise, under § 35-11-437, there is no right to a hearing before the Council unless the Director takes action against the permittee. W.S.A. § 35-11-437; *see id.*

Here, there is no notice of abatement or any other action under either § 701 or § 437 that arose as a result of Appellant's complaint. Therefore, the Council has no statutory jurisdiction to hold a hearing. *Fremont Energy*, 651 P.2d at 808. The legislature did not give the Council the role or responsibility to decide Appellant's case, and "[w]here the council has no responsibility or role under the statute to address the question presented here, [the Wyoming Supreme Court will] refuse to create such a responsibility or role." *Fremont Energy*, at 813.

Without a statutory right to a hearing before the Council, Appellant had exhausted his administrative remedies when Director Corra issued either his October, 2006 decision or his January, 2007 decision. In either event, Director Corra's decision(s) constituted final agency action subject to judicial review. W.S.A. § 16-13-114. Under the Environmental Quality Act, appeals to the district court are governed by the Wyoming Administrative Procedure Act, Rule 12 of the Wyoming Rules of Appellate Procedure, and Sections 35-11-1001 and 1002 of the Environmental Quality Act. Wyo. DEQ Rules & Regs., Practice & Proc., Ch. I, § 8(a). Judicial review may be obtained only "by filing a petition for review within thirty (30) days after entry of the order or other final action complained of." W.S.A. § 35-11-1001; W.R.A.P. 12.04 ("In a contested case, or in an uncontested case, even where a statute allows a different time limit on appeal, the petition for review shall be filed within 30 days after service upon all parties of the final decision of the agency."). Appellant simply failed to appeal Director Corra's decision to the appropriate appellate tribunal, and his time for doing so has long expired.

B. <u>Appellant is Precluded from Collaterally Attacking P & M's Permit/License</u>

The DEQ rules of practice concerning hearings before the Council (including appeals) refer to permit "applicants" and "protestants." *See, e.g.*, Wyo. DEQ Rules & Regs., Practice & Proc., Ch. I, §§ 2(a), 3(b)(ii) & Ch. II, § 1(a). This is significant for two reasons. On one hand, it shows that P & M is an indispensable party to this untimely appeal which seeks revocation of its permit premised on allegedly false statements made in conjunction with its <u>permit application</u>. On the other hand, and more importantly, it shows how Appellant had a full opportunity to object to P & M's renewal application in May of 2005, and to pursue a hearing before the Council at that time, but failed to do so. W.S.A. 35-11-406(k).

Although Appellant questions P & M's standing, it is the Appellant who is barred from or, in a sense, without standing to bring these proceedings due to common law preclusive doctrines. *See* Black's Law Dictionary (8th ed. 2004) (defining standing generally as a party's right to make a claim or seek enforcement of a duty or right). This is a jurisdictional issue that may be raised by P & M and considered by the Council at any time. *Hicks v. Dowd,* 2007 WY 74, ¶¶ 17-18 (Wyo. 2007) (noting how standing is a jurisdictional question that may be raised at any time); *Grable v. State*, 664 P.2d 531, 536 (Wyo. 1983) (stating that res judicata deprived the court of jurisdiction to hear certain issues).

The Wyoming Supreme Court has made it abundantly clear that both res judicata and collateral estoppel apply to final determinations made by administrative agencies. *Slavens v. Bd. of County Comm'rs for Uinta County*, 854 P.2d 683, 685 (Wyo. 1993). The court has made it equally clear that both doctrines extend to all issues and claims that <u>could have been raised</u> in the prior proceedings. *Id.* at 686; *Stoneking v. Wheatland Rural Elec. Assoc.*, 72 P.3d 272, 275 (Wyo. 2003). A party who had an opportunity to raise an issue in prior proceedings but failed to do so is foreclosed from raising the matter in a later case. *Stoneking*, at 275-76.

The Environmental Quality Act provides for the right of a private individual to object to a permit (and therefore the corresponding license, *see* W.S.A. § 35-11-410), along with a right to appeal to the Council, during the application process. *See id.* § 406(k). Here, Appellant was specifically given notice of P & M's 2005 renewal application. He was then on notice of the statements made therein concerning the nature and duration of P & M's surface access, and he was on notice of the contents of the Surface Use Agreement (including its expiration date) which was included among the application materials. Under the Environmental Quality Act as well as the DEQ's rules and regulations, he had 30 days after last publication of the notice of P & M's renewal

application to object to renewal based on inadequate surface control and false representations. He also had the right to appeal any adverse initial determination by the Director to the Council. *Id.* He did not avail himself of these rights. Instead, he waited a year to collaterally challenge that which could have been challenged in May of 2005.

For these reasons, Appellant's untimely appeal to the Council should be dismissed for lack of jurisdiction. When the preclusive doctrines of res judicata and collateral estoppel are given effect, Appellant does not have standing to assert before the Council any issues he could have raised in May of 2005 through an untimely and collateral protest to the renewal application. In comparing the permit application process to the instant proceedings, it is self-evident that the parties and their capacities are identical, the subject matter and issues are identical, there was a determination on the merits (the permit was granted, *see* W.S.A. § 35-11-306(p)), and Appellant had a full and fair opportunity to contest P & M's surface control. *See Slavens*, at 686.

Thus, despite his contentions that P & M lacks standing to move to dismiss his appeal, it is the Appellant who in fact is precluded from bring this case before the Council.

C. Director Corra's October 16, 2006 Letter was a Final, Appealable Decision

Appellant contends that Director Corra's October 16, 2006 letter did not constitute a final, reviewable decision because of the language employed by Director Corra in the letter. Director Corra's mistake as to the legal effect of his October 16 decision, however, does not relieve Appellant of his obligation to timely appeal a determination that disposes of the entire case.

Under the Wyoming Rules of Appellate Procedure, an appealable order is any order which, "*in effect*, determines the action and prevents a judgment." W.R.A.P. 1.05(a) (emphasis added). Under the Wyoming Rules of Civil Procedure, incorporated by reference into the DEQ's rules of practice, an appealable judgment is "the final determination of the rights of the parties in [the] action." W.R.C.P. 54(a). The Environmental Quality Act provides for appeals from orders "or other final actions". W.S.A. § 35-11-1001(a). Thus, if Appellant had the right to appeal to the Council, that right was triggered when Director Corra entered his October 16, 2006 decision because that letter, in effect, determined Appellant's complaint in all respects. Director Corra's decision that P & M has adequate surface access renders impossible the contention that P & M made false sworn statements concerning the adequacy of its surface access. Appellant's and Director Corra's common mistake as to the legal effect of the Director's first determination does not alter the nature and effect of the decision and Appellant, who

was represented by counsel, should have recognized its import. If Appellant is allowed to proceed with this case, the rules pertaining to what constitutes a final appealable order will have to be disregarded.

D. The Appeal was not Timely Perfected

Appellant's arguments concerning the timeliness of his appeal are also fraught with inconsistencies. On one hand, he says that his January 11, 2007 letter constituted a "Notice of Appeal" and that the later "Appeal" actually initiated the proceedings. On the other hand he contends that the January 11 letter was an appeal which complied with the Council's procedural rules. In another part of the brief he asserts that the April 13, 2007 "Appeal" amended the January letter to conform it to the required format. Each of these arguments requires the Council to ignore either a rule setting a deadline or a content requirement instituted to give notice to the adverse party.

Without rehashing all of P & M's arguments previously made in its original memorandum accompanying its motion to dismiss, it suffices to say that the rules speak for themselves. Assuming for discussion purposes only that Appellant filed his appeal in the correct forum (see discussion *supra* Part III.A.) there is a sixty day deadline to appeal from an Administrator's or Director's decision. Wyo. DEQ Rules & Regs., Practice & Proc., Ch. I § 16(a). There is a thirty day deadline where, as here, an administrative decision follows an informal conference relating to a surface coal mining operation. *Id.* § 16(b). All proceedings before the Council, "appeals or others," must be had according to DEQ rules. *Id.* § 3(a). Immediately following this mandate are specific petition content and service requirements. *See id.* §§ 3(b), (c), (e). The filing of "such petition" – *i.e.,* one that has the required contents and has been served – constitutes the commencement of the proceedings. *Id.* § 3(d). Appellant's January 11 letter, which was never served, was not a petition in any sense and the subsequent April petition was months late. Thus, to accept either one as a valid petition requires the Council to disregard a rule of procedure. Appellant cannot send a letter to the Director asking for procedural advice about how to take an appeal to the Council and then wait for as long as he chooses to file and serve a complete petition (while simultaneously requesting a hearing at the earliest available date). The rules contemplate the provision of timely and complete notice to the permit holder/applicant and the Council. They do not contemplate ambush.

There is no authority for Appellant's argument that the rules contemplate a "Notice of Appeal" followed by an "Appeal," or for the argument that the April 13, 2007 Appeal amended the "Notice of Appeal." The DEQ's rules flatly reject the notice of appeal and subsequent briefing procedure employed in the conventional appellate court context. Given that the Council acts as both an appellate and adjudicatory body, the petition serves as a notice of appeal relative to the legal questions on one hand, and, on

the other hand, as a petition setting forth the facts subject to proof. Appellant questions P & M's citation to analogous appellate rules of procedure in support of P & M's arguments.[2] P & M's citations are consistent with the DEQ's rules, however, while Appellant urges an appellate process which, although used by courts, is wholly inconsistent with the DEQ's rules.

These facts are not changed by the docketing of the appeal by the Council's Executive Assistant. This was merely an administrative task performed by a staff member. She has no authority to pass on the issues at bar (and was not trying to), and, she cannot validate Appellant's attempted appeal. The Council is not restricted from dismissing the case merely because its staff member docketed it. The Wyoming Supreme Court has dismissed cases under the rules of appellate procedure even though they were docketed by the clerk. *See, e.g., Cosco v. Uphoff*, 66 P.3d 702, 702-03 (Wyo. 2003) (dismissing appeal for lack of jurisdiction based on untimely notice of appeal, despite fact that case was docketed as case "02-107"). Furthermore, the Council may (although it is probably unnecessary) rescind the docketing of the appeal if it rules against Appellant. W.R.C.P. 77(c).

Nor may the deficiencies inherent in Appellant's appeal be ignored because his January 11, 2007 letter is identified as a "*pro se* action." First, any alleged rule of leniency under Wyoming law is afforded only to *pro se* "litigants," not parties represented by counsel who sometimes act on their own behalf rather than through counsel. *Stoneking, supra*, at 276. Second, even if Appellant was *pro se* (which he was not), there is not a rule of leniency in favor of *pro se* parties. "One has the right to appear *pro se*; but when a person chooses to do so, he must be held to the same standard as if he were represented by counsel. . . . He cannot be given an advantage by virtue of his *pro se* appearance." *Id.* (emphasis added). "[T]he proper administration of justice requires reasonable adherence to the same rules of evidence, procedure and requirements of the court as expected of those qualified to practice law." *Id.* (emphasis added). Appellant did not adhere to the rules of procedure at all, much less in a manner expected of licensed attorneys.

Finally, Appellant argues that his failure to serve an appeal on P & M until mid-April, 2007 is not a jurisdictional defect. Assuming merely for argument's sake that Appellant is not wrong, it does not help him with respect to the multiple deficiencies discussed above and the fact that P & M was never served in any fashion with the document that has now been labeled a Notice of Appeal (Jan. 11, 2007 letter to Corra).

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[2] The petition requirements in the DEQ rules of procedure are analogous to W.R.A.P. 2.07. Also, the reiteration by the Wyoming Supreme Court of the jurisdictional nature of a timely request for administrative review aligns with W.R.A.P. 1.03.

Pursuant to an interpretation of the rules that reads one clause in isolation, Appellant argues that proceedings before the Council are initiated by simply filing a petition, and that service may be effected at any time. By Appellant's reasoning, one could file a petition, obtain a hearing date, and then gain an advantage by waiting until the last possible moment to serve the opposing party. This interpretation, however, is unsupported by the DEQ's rules when they are read in "pari materia."

First, Appellant's argument ignores the fact that Section 3 of Chapter I of the DEQ Rules of Practice and Procedure is entitled "Initiation of Proceedings." Subsection (b) of § 3 provides who must be served and how. It logically follows that proceedings are not initiated until the "Initiation of Proceedings" elements are satisfied. Indeed, the filing of "such petition" as used in subsection (d) means a petition that meets the content requirements of subsection (c) and the service requirements of subsection (b). Second, Appellant's argument ignores the DEQ's rules of practice which require perfection of an appeal (*i.e.*, all steps to appeal have been taken) within the applicable time period. Section 16(a) of Chapter I says that appeals "shall be made" within sixty days of the action. Wyo. DEQ Rules & Regs., Practice & Proc., Ch. I, § 16(a). For decisions following an informal hearing pertaining to a surface coal mining, section (b) says that appeals have to be taken "in accordance with Chapters I & II." *Id.* § 16(b). These rules require that appeals be "made" or perfected within set times, not simply filed.

This understanding comports with the authority cited by P & M in its original memorandum and with case law generally. The timely filing of a proper petition confers the appellate body with subject matter jurisdiction and the timely service of the petition results in personal jurisdiction over the respondent. Here, Appellant did neither: He never served the January 11, 2007 letter upon P & M at all, and his Appeal was filed months late. As such, the Council has neither subject matter nor personal jurisdiction.

The argument that P & M was "not in the dark" about Appellant's complaint is to no avail. Aside from the fact that the discovery produced to date indicates that P & M has not seen certain material correspondence, it is well accepted in Wyoming and elsewhere that actual notice is not a substitute for proper service, and that nothing short of strict compliance with service of process rules will confer a court or agency with jurisdiction. *See Gookin v. State Farm Fire & Cas. Ins. Co.*, 826 P.2d 229, 233-34 (Wyo. 1992); *Pease Bros., Inc. v. Am. Pipe & Supply Co.*, 522 P.2d 996, 1003 (Wyo. 1974). Further, even if Appellant had served P & M with his January 11, 2007 letter (which he did not), P & M would still not have notice of the order or action being appealed, the legal basis for his appeal, and the factual basis for his appeal. *See* Wyo. DEQ Rules & Regs., Practice & Proc., Ch. I, § 3(c). Thus, P & M remains "in the dark" as to substantial issues, and, in any event, actual notice does not cure deficient service. In sum,

every position taken by Appellant in his Response requires the Council to disregard a rule of procedure which has the force and effect of law.

IV. PREJUDICE TO P & M IS IMMATERIAL, ALTHOUGH P & M WILL BE PREJUDICED IF THE CASE IS NOT DISMISSED

Appellant maintains that P & M will not be prejudiced if the Council declines to dismiss the case. This contention is not only incorrect, but, more importantly, the presence or absence of prejudice cannot cure jurisdictional defects.

Allowing Appellant to proceed before the Council would not only violate rules of law, but it would also disturb the finality of Director Corra's decision upon which P & M is entitled to rely. Moreover, ongoing litigation, whether in the administrative or judicial setting, adversely affects business going forward and potential consequences are not limited to the issues that are directly in question. Such litigation is not justified where the complainant: (1) had a full opportunity more than two years ago to raise the issues during the renewal application process, (2) did in fact collaterally raise all of his issues before field office staff, the Administrator and then the Director (which issues were thoroughly reviewed and decided on the merits), and (3) failed to follow the basic rules that confer the Council with subject matter and personal jurisdiction.

Additionally, this controversy has no impact beyond the parties, and therefore it has no public interest component. There is no public policy which favors revocation of a mining permit to <u>prevent</u> reclamation of a surface owner's land. Nor has Appellant personally been affected by the permit for an extensive period of time, because he has only owned the subject land for six years. If Appellant believes that there is a public interest generally in the type of relief he seeks, he needs to adhere to the appropriate DEQ process regarding petitions for rulemaking.

V. CONCLUSION

P & M has standing to bring its motion to dismiss and the motion is properly before the Council for determination. Under the applicable rules, P & M was not required to intervene. Upon a closer look, it is the Appellant who is barred from bringing these proceedings due to his previous failures to assert his rights. Regardless, each argument advanced by Appellant requires the Council to ignore one legal rule or another. Adherence to these rules, however, forms the basis for the Council's jurisdiction, and they must be followed. The irony of Appellant's position for revocation is that he relies on a very strict, if not strained, interpretation of the DEQ statutes, and yet he comes before the Council now asking it to disregard its required process. As in *S & M Devel. v.*

State Div. of Housing & Cmty. Renewal, this administrative appeal should be dismissed. 182 A.D.2d 995 (N.Y. App. Div. 1992).

Dated this 15th day of June, 2007.

The Pittsburg & Midway Coal Mining Co.

Scott M. Campbell
Nick A. Swartzendruber
Poulson, Odell & Peterson, LLC
1775 Sherman Street, Suite 1400
Denver, Colorado 80203
Phone: (303) 861-4400
Facsimile: (303) 861-1225
E-mail: SCampbell@popllc.com

Thomas F. Reese
Brown, Drew & Massey, LLP
159 North Wolcott, Ste. 200
Casper, Wyoming 82601
Phone: (307) 234-1000
Facsimile: (307) 265-8025
Email: tfr@browndrew.com

Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of June, 2007, a true and correct copy of the foregoing REPLY OF THE PITTSBURG & MIDWAY COAL MINING COMPANY TO RESPONSE OF JOHN C. WILLSON TO MOTION TO DISMISSwas served upon the persons identified below by depositing a true and correct copy thereof in the United States mail, postage prepaid and properly addressed to:

Chairman - Wyoming Environmental Quality Council (also via e-mail)
122 West 25th Street
Herschler Building - Room 1714
Cheyenne, WY 82002

Director - Wyoming Department of Environmental Quality
122 West 25th Street
Herschler Building - Room 1714
Cheyenne, WY 82002

John Burbridge
Assistant Wyoming Attorney General
Wyoming Attorney General's Office
123 Capitol Building
Cheyenne, WY 82002

Dan Riggs (also via e-mail)
LONABAUGH AND RIGGS, LLP
P. O. Box 5059
Sheridan, WY 82801

The Pittsburg & Midway Coal Mining Co.
116 Inverness Drive East, Suite 207
Englewood, CO 80112

By: