Mark R. Ruppert, P.C. (Wyo. Bar No. 6-3593)
Jere C. (Trey) Overdyke, III (Wyo. Bar No. 6-4248)
HOLLAND & HART, LLP
2515 Warren Ave., Suite 450
P. O. Box 1347
Cheyenne, WY 82001
Telephone: (307) 778-4200
Facsimile: (307) 778-8175

Attorneys for Pennaco Energy, Inc.

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

In the Matter of the Appeal of JOHN D. KOLTISKA, AC RANCH, INC., a Wyoming Corporation, PRAIRIE DOG RANCH, INC., a Wyoming Statutory Close Corporation, and PRAIRIE DOG WATER SUPPLY COMPANY from WYPDES Permit No. WY0054364	)	Docket No. 09-3805

MEMORANDUM BRIEF IN SUPPORT OF PENNACO ENERGY INC.'S MOTION TO DISMISS

I. INTRODUCTION

John D. Koltiska, AC Ranch, Inc, Prairie Dog Ranch, Inc., and Prairie Dog Water Supply Co. (Petitioners), filed a Petition to the Environmental Quality Council (Council) purporting to appeal the Department of Environmental Quality's (DEQ) issuance of WYPDES Permit No. WY0054364, dated April 29, 2009 (Permit). Pennaco Energy, Inc., (Pennaco), now moves to dismiss this appeal because Wyoming law does not authorize Petitioners to bring such a petition to the Council, nor does Wyoming law authorize the Council to decide the Petitioners' appeal. Thus, Pennaco moves the Council to recognize that it lacks subject matter jurisdiction and/or dismiss the Petition for failure to state a claim upon which relief can be granted.

II. BACKGROUND

Only a few basic factual details are relevant to determining Pennaco's motion to dismiss. Petitioners own interests in ranch lands in Sheridan County, Wyoming. The Director of DEQ on April 29, 2009, issued to Pennaco WYPDES Permit No. WY0054364, which authorizes, under certain circumstances, discharge of water incident to coalbed methane production. After DEQ issued the Permit to Pennaco, Petitioners filed a Petition to the Council requesting that the Council reverse the DEQ decision. Pennaco answered the Petition and asserted affirmative defenses, including a lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Pennaco now brings a motion to dismiss the Petition on those grounds.

III. ARGUMENT

A. The Petitioners' exclusive remedy under Wyoming law is judicial review.

The right to appeal an agency decision is by statute. "Actions of an administrative agent are not reviewable unless made so by statute." *Holding's Little Am. v. Bd. of County Comm'rs of Laramie County, Wyo.*, 670 P.2d 699, 702 (Wyo. 1983); *see also Pritchard v. Wyo. Div. of Vocational Rehab.*, 540 P.2d 523, 524 (Wyo. 1975) ("appellate process" is "statutory"). Thus, Petitioners have a right of appeal before the Council only if there is a statute that gives them that right. There is none.

The Environmental Quality Act (EQA) authorizes applicants for a permit to bring contested case appeals to the Council. WYO. STAT. § 35-11-802. Petitioners are not applicants for a permit. Under the EQA, Petitioners can appeal the agency decision to the district court, but not to the Council. WYO. STAT. § 35-11-1001. This remedy is consistent with the Wyoming

Administrative Procedure Act, which also allows Petitioners to seek judicial review. WYO. STAT. § 16-3-114(a).

Three provisions in the EQA are relevant to this analysis. First, the Act grants the Council general review authority. WYO. STAT.§ 35-11-112(a), (b) (authorizing Council to conduct contested case hearings and order modification and reversal of department orders and permit decisions). Second, while the Act vests the Council with general review authority, it does not make that review available in all circumstances. Much like the authority vested in an appellate court, the Council is empowered to conduct certain types of hearings, but not every prospective petitioner is entitled to a hearing. Each would-be petitioner must be authorized by statute to seek the Council's review and thereby invoke its authority under the Act. WYO. STAT.§ 35-11-112.

Thus, the second relevant provision of the EQA is the provision that determines who is entitled to request review by the Council on a permitting decision by the Director. The Act provides for appeals to the Council by a permit applicant:

> If the director refuses to grant any permit under this act, **the applicant** may petition for a hearing before the council to contest the decision. . . . At such hearing, the director and appropriate administrator shall appear as respondent and the rules of practice and procedure adopted by the council pursuant to this act and the Wyoming Administrative Procedure Act shall apply.

WYO. STAT. § 35-11-802 (emphasis added). Thus, the Act authorizes only an "applicant" to seek review by the Council, which is authorized to conduct such hearings. *Id.* at § 35-11-112(a), (b).

Individuals and entities that are not an "applicant" are entitled to judicial review as an "aggrieved party" under a third provision of the Act, WYO. STAT. § 35-11-1001: This review is conducted by the district court:

> Any aggrieved party under this act, any person who filed a complaint on which a hearing was denied, and any person who has been denied a variance or permit under this act, may obtain **judicial review** by filing a petition for review within thirty (30) days after entry of the order or other final action complained of pursuant to the provisions of the Wyoming Administrative Procedure Act.

WYO. STAT. § 35-11-1001(a) (emphasis added).

These three provisions can be read together to reach but one conclusion: Wyoming law does not grant Petitioners a right of review by the Council. While the EQA gives the Council authority to conduct contested case hearings when that authority is properly invoked, the Act does not also give individuals and entities such as Petitioners a right to seek Council review in this instance. Instead, the Act directs Petitioners to the courts. The Wyoming Supreme Court has held that "a specific statute controls over a general statute on the same subject." *Thunderbasin Land, Livestock & Inv. Co. v. County of Laramie*, 5 P.3d 774, 782 (Wyo. 2000); *see also Amoco Prod. Co. v. Dep't of Revenue*, 94 P.3d 430, 439 (Wyo. 2004). Similarly, "a specific provision in a statute controls over an inconsistent general provision pertaining to the same subject." *Thunderbasin*, 5 P.3d at 782. Moreover, statutes "relating to the same subject or having the same general purpose must be considered and construed in harmony." *Frost Constr. Co. v. Dodson (In re Estate of Frost)*, 155 P.3d 1031, 1034 (Wyo. 2007).

If would-be petitioners could rely solely on the Council's general review authority, it would be unnecessary for the Act to specify at all when a particular party has a right of review before the Council. Nonetheless, the legislature has authorized specific parties to petition the Council in particular situations – none of which apply to the Petitioners in this matter. *See, e.g.*, WYO. STAT. § 35-11-406(k) (right to de novo hearing before Council regarding mining permits);

§ 35-11-211(d) (right to contested case hearing before Council regarding fee assessment for construction and operating permits); § 35-11-414(e) (right to appeal to Council director's denial of special license for mineral exploration); § 35-11-515(k) (right to appeal to Council director's decision concerning expenditure from solid waste disposal facility trust account); § 35-11-517(e) (right to contested case hearing before Council regarding fee assessment for hazardous waste facilities); § 35-11-518(b) (right to appeal to Council agency order in hazardous waste program); § 35-11-601(f), (g), (h), (j) (right to evidentiary hearing before Council regarding director's decision on variance); § 35-11-1611, -1612 (right to appeal to Council voluntary remediation agreement and fee disputes).

If the Council's general power to hold hearings were sufficient to create a review right for anyone that wanted it, the specific statutory grants of appeal rights cited above would be unnecessary and superfluous. But the Act cannot be read to render any portion meaningless. Rather, provisions of the Act must be harmonized, *Frost*, 155 P.3d at 1034, and in doing so the specific controls the general, *Thunderbasin*, 5 P.3d at 782. When the Act is read as Wyoming law requires, the Petitioners' recourse is to the courts, not the Council, and no conflict or inconsistency exists.

This conclusion is demanded by the plain language of the Act and Wyoming Supreme Court precedent. In *Allied Fidelity Ins. Co. v. EQC*, the Council denied a hearing to a surety on the forfeiture of a reclamation bond because the statute granted a right to a hearing only to an "operator." 753 P.2d 1038, 1040-41 (Wyo. 1988). The Council recognized that if there is no statute authorizing the party bringing an appeal to seek review, no such right exists. *Id.* at 1038, 1040. The Council correctly considered the specific statutory grant of a hearing before the

Council. *Id.* at 1040. Although the Supreme Court reversed the district court order affirming the Council's refusal to hear the appeal, it did so because it concluded that the surety did, in fact, stand in the operator's shoes under the Act and therefore was entitled to a hearing before the Council. *Id.* at 1040-1041. The Court expressly held that the decision did not broaden the availability of hearings beyond those expressly permitted by statute, but simply applied the law of subrogation. *Id.* at 1040 ("this opinion imposes onto the statute in question no new meaning.") "Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, we do not resort to rules of statutory construction. Neither this Court, nor the agency charged with administering the statute has a right to look for and impose another meaning." *Id.* at 1040 (citations omitted).

Although not decided under the EQA, another decision by the Wyoming Supreme Court demonstrates that review of agency action is governed exclusively by statute. *Albertson's, Inc. v. City of Sheridan*, 33 P.3d 161, 164 (Wyo. 2001); *see also Indus. Siting Council of Wyo. v. Chicago & Nw. Transp. Co.*, 660 P.2d 776, 778 (Wyo. 1983). At issue in *Albertson's* was the City's denial of an application to transfer a liquor license. 33 P.3d at 162. The Supreme Court held that review of agency action is not available unless a statute specifically so provides: "The express language of the statutes provides only a right of appeal from a denial of a renewal request. No express right of appeal is made available from a denial of a transfer application." *Id.* at 168. Because the legislature did not grant a right to appeal from a denial of a transfer, the Court held the legislature's intent was clear and Albertson's had no right to judicial review. Because review by a court is denied where the legislature does not expressly provide for such, it follows that there is no right to review before the Council where the legislature has not expressly

authorized the agency – which is purely a creature of statute – to conduct such a review. *See Diamond B Servs. v. Rohde*, 120 P.3d 1031, 1048 (Wyo. 2005) (describing administrative agencies as "creatures of statute" whose power derives solely from statute) (quoting *Billings v. Wyo. Bd. of Outfitters & Guides (In Re Billings)*, 30 P.3d 557, 568-569 (Wyo. 2001)).

The fact that the EQA does not allow Petitioners to seek review by the Council does not inhibit review of the Director's decision. Under the Act, "any aggrieved party" may "obtain judicial review by filing a petition for review within thirty (30) days after the entry of the order or other final action complained of." WYO. STAT. § 35-11-1001. This grant of judicial review to an "aggrieved party" is consistent with the review provided under Wyoming's Administrative Procedure Act, WYO. STAT. § 16-3-114(a). That provision states, in pertinent part:

> 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.

Id. (emphasis added). In this case, the issuance of the permit constituted a "final decision," *id.* at § 35-11-801(b), and the appropriate avenue of appeal for Petitioners is to the district court.

Because the legislature gave the Petitioners an exclusive remedy in the form of appeal to the judiciary, the Petitioners cannot rely on the Department's regulation to create a means of review not available by statute. The Department's Water Quality Rules & Regulations purport to provide non-applicants with administrative review before the Council. The rule states, "[i]n any case where the director makes a decision to issue . . . a permit . . . any interested person may request a hearing before the Environmental Quality Council." WWQRR Ch. 2 § 17. But unless

such an "interested person" has been granted a right of review to the Council by statute, the Department's rule cannot authorize review.

"An agency enjoys only those powers which the legislature has expressly conferred . . . ." *Jackson v. State ex rel. Wyo. Workers' Comp. Div.*, 786 P.2d 874, 878 (Wyo. 1990). "An administrative agency may not exceed the authority expressly delegated to it by the Legislature when the agency is promulgating regulations." *State Dep't of Revenue & Taxation v. Pacificorp*, 872 P.2d 1163, 1166 (Wyo. 1994). Even longstanding reliance on the Department's rule cannot remedy the fact that it is inconsistent with the EQA. The U.S. Supreme Court has held that a "regulation's age is no antidote to clear inconsistency with a statute." *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (reviewing 60-year-old Veterans Administration rule). The Department's rule, WWQRR Ch. 2 § 17, is inconsistent with statute and cannot create relief that is inconsistent with the remedy granted by the legislature.

The right to appeal an agency decision is entirely statutory. "Actions of an administrative agent are not reviewable unless made so by statute." *Holding's Little Am.*, 670 P.2d at 702. Therefore, Petitioners have a right to appeal to the Council only if there is a statute that expressly so provides. There is none. The EQA authorizes contested case appeals to the Council by permit applicants, not by third parties. WYO. STAT. § 35-11-802. Petitioners are not the permit applicant, so their remedy under statute is to appeal the Director's decision to the district court, not to the Council. *Id.* at § 35-11-1001.

B. The Council lacks jurisdiction over the Petition.

Administrative agencies possess authority limited by the law. Thus, agencies can only act as statutes expressly authorize; agency decisions are reviewable as set forth in the statute; and

doubt about the existence of any authority must be resolved against the exercise of that power by an agency. *Hupp v. Employment Sec. Comm'n of Wyo.*, 715 P.2d 223, 225 (Wyo. 1986); *French v. Amax Coal W.*, 960 P.2d 1023, 1027 (Wyo. 1998). Accordingly, under Wyoming law, appeal from a final agency action is not available unless statute directly authorizes review. As discussed above, the EQA requires Petitioners to take their appeal to the district court, not this Council. WYO. STAT. § 35-11-1001.

Before a court or adjudicative body can "render any decision or order having any effect in any case or matter, it must have subject matter jurisdiction." *United Mine Workers of Am. Local 1972 v. Decker Coal Co.*, 774 P.2d 1274, 1283-1284 (Wyo. 1989); *see Diamond B*, 120 P.3d at 1038. Without subject matter jurisdiction, a court or this Council "lacks any authority to proceed, and any decision, judgment, or other order is, as a matter of law, utterly void and of no effect for any purpose." *Geerts v. Jacobsen*, 100 P.3d 1265, 1269 (Wyo. 2004) (citing *Terex Corp. v. Hough*, 50 P.3d 317, 320 (Wyo. 2002)). This limitation applies to adjudicative agencies as well as courts. *Amoco Prod. Co. v. Wyo. State Bd. of Equalization.*, 7 P.3d 900, 904 (Wyo. 2000).

As the Wyoming Supreme Court has stated, "Subject matter jurisdiction cannot be conferred by the consent of the parties . . . . Nor can subject matter jurisdiction be waived." *McDougall v. McDougall*, 961 P.2d 382, 383 (Wyo. 1998) (citations omitted). Even when a court or adjudicative body ultimately concludes that it lacks subject matter jurisdiction, it possesses authority to evaluate its own jurisdiction. *See Geerts*, 1009 P.3d at 1269 (stating that "before proceeding to a disposition on the merits, a court should be satisfied that it does have the requisite jurisdiction") (quoting *Terex Corp.*, 50 P.3d at 320).

Because Petitioners do not have the right to appeal the Permit to the Council, the Council lacks subject matter jurisdiction to hear the issues raised by Petitioners. The EQA vests the Council with the authority to hear contested cases, WYO. STAT. § 35-11-112; but the Wyoming Legislature did not authorize Petitioners to initiate a contested case before the Council. Thus, the Council lacks jurisdiction to hear the Petitioners' appeal. Instead, the legislature vested that authority in the district court. WYO. STAT. § 35-11-1001.

The limits of the Council's jurisdiction in these circumstances are demonstrated by the fact that the Director's decision on this permit application is defined by the EQA as a "final action." WYO. STAT. § 35-11-801(b). "Final action" is a term of art in administrative law and is frequently used by the legislature to indicate the culmination of agency proceedings. *See, e.g.*, WYO. STAT. § 15-4-313 (final action); § 16-3-103 (final action); § 16-3-114(a) (final decision); § 18-3-611 (final action); § 18-12-117 (final action); § 26-31-109 (final action); § 26-42-109 (final action); § 33-40-113 (final action); *Bd. of County Comm'rs for Sublette County v. Exxon Mobil Corp.*, 55 P.3d 714, 723 (Wyo. 2002) (citing *MGTC, Inc. v. Public Serv. Comm'n*, 735 P.2d 103, 106 (Wyo. 1987) (final decision)).

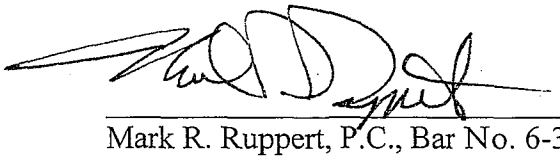
An agency action is final if it "mark[s] the 'consummation' of the agency's decision making process" and determines "'rights or obligations'" "from which 'legal consequences will flow. . . .'" *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (citations omitted). Because the Director's decision is a final agency action, review by the Council without express statutory authority would violate Wyoming administrative law. By definition, and in the absence of express statutory direction, a final agency action means that administrative remedies have been exhausted and any further review, if at all, is vested in the judiciary. Petitioners' appeal from the

Director's decision is, under the Act, a final agency action that can be reviewed only by the district court. Thus, the Council lacks jurisdiction to decide the Petitioner's appeal.

IV. CONCLUSION

Petitioners are not eligible under law to the administrative review they seek. The Council possesses only the authority granted to it by the Wyoming Legislature, which has not authorized the additional administrative procedure that Petitioners request. A remedy is available to Petitioners by appeal to the courts. Because the Council does not have subject matter jurisdiction over the Petition, and because Petitioners lack a right of review before the Council, the Council must dismiss the Petition.

Respectfully submitted October 16, 2009.



Mark R. Ruppert, P.C., Bar No. 6-3593
Jere C. (Trey) Overdyke, III, Bar No. 6-4248
HOLLAND & HART LLP
P. O. Box 1347
Cheyenne, WY 82003-1347
Telephone: (307) 778-4200
Facsimile: (307) 778-8175

ATTORNEYS FOR PENNACO ENERGY, INC.

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2009, I served the foregoing MEMORANDUM BRIEF IN SUPPORT OF PENNACO ENERGY INC.'S MOTION TO DISMISS to the following by:

Mike Barrash
Luke Esch
Wyoming Attorney General's Office
123 Capitol Building
Cheyenne, WY 82002
mbarra@state.wy.us

- [x] U.S. Mail, postage prepaid
- [ ] UPS – overnight delivery
- [ ] Hand Delivery
- [ ] Fax
- [ ] E-mail

Kate M. Fox
J. Mark Stewart
DAVIS & CANNON, LLP
422 W. 26th Street
P. O. Box 43
Cheyenne, WY 82003
kate@davisandcannonchey.com
mark@davisandcannonchey.com

- [x] U.S. Mail, postage prepaid
- [ ] UPS – overnight delivery
- [ ] Hand Delivery
- [ ] Fax
- [ ] E-mail

4632184_3.DOC