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**Jim Ruby, Executive Secretary
Environmental Quality Council**

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**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) Docket No. 09-3805
Close Corporation, and PRAIRIE DOG)
WATER SUPPLY COMPANY from)
WYPDES Permit No. WY0054364)

PENNACO ENERGY INC.'S RESPONSE OPPOSING PETITIONERS' MOTION IN LIMINE

Petitioners propose by a Motion in Limine to deprive the Council of its ability to hear all of the evidence and determine the only question before it, namely: does WYPDES Permit No. WY0054364 (the Permit) protect downstream lands from a measurable decrease in crop production? This is a contested case proceeding governed by the Wyoming Administrative Procedure Act. Because this is a contested case, the Council may not limit the issues as the Petitioners propose. Pennaco Energy Inc. (Pennaco), therefore, opposes Petitioners' efforts to limit the Council's ability to hear evidence on all issues. As grounds for its opposition to the motion, Pennaco states as follows:

I. The Council must determine whether water discharged under the permit conditions would cause a "measurable decrease in crop or livestock production."

On March 5, 2009, Petitioners appealed the Permit claiming that operations under the Permit would "likely result in a measurable decrease in production of irrigated crops." (Petition

¶ 3n; *see also* Am. Petition ¶ 3n, May 15, 2009.) In that filing, Petitioners requested a contested case hearing under the Wyoming Administrative Procedure Act. For the next eight months, Petitioners, DEQ, and Pennaco examined the only question before the Council in this matter: Whether discharge under the Permit will “cause a measurable decrease in crop or livestock production” as prohibited by Wyoming Water Quality Rules and Regulations Ch. 1, § 20. The answer to this question is now clear. Pennaco has invested millions of dollars to treat water to meet the ultra low electrical conductivity (EC) limits of 1,215 or 1,330 (depending on the outfall) and sodium limits that when mixed with lowest irrigation flows will result in an ultra low sodium adsorption ratio (SAR) of less than 3. This is good water that some ranchers need to grow alfalfa and increase the productivity of their lands in this area.

Not surprisingly, the experts have examined these limits and the water quality and determined that the answer to the only question before Council is an emphatic **NO**. The limits in the Permit protect downstream irrigation and there will **NOT** be any measurable decrease in alfalfa production. Faced with the overwhelming facts, Petitioners’ own experts could not say that there would be a measurable decrease in crop production. Petitioners’ proposed expert environmental engineer, James O’Neill, P.E., was not able to provide any opinion on whether the Permit’s limits are protective of alfalfa (O’Neill Dep. Tr. 124:1-6, Sept. 23, 2009); could not opine on protective EC levels regarding alfalfa crops (*id.* at 35:10-14; 43:7-11); and had no scientifically-based opinion regarding an appropriate SAR (*id.* at 59:7-25; 60:1-15). Petitioners’ proposed soil expert, George Vance, PhD, could not definitively testify that the Permit limits will not protect irrigated alfalfa. (Vance Dep. Tr. 18:8-22; 30:14-22; 81:24-82:21, Sept. 25, 2009.)

On the other hand, Pennaco's expert, William Schafer, PhD, can and will show that the Permit limits set by DEQ are protective of irrigated alfalfa and in some respects actually over protective.

In light of the evidence, it is clear why Petitioners have now suddenly switched tactics and are attempting to prevent the Council from hearing all of the evidence, particularly from Dr. Schafer, to enable the Council to make a complete and informed decision on all of the issues. In an effort to avoid the reality that the Permit limits protect downstream irrigation and actually benefit crop production, Petitioners ask the Council to ignore the requirements of the Wyoming Administrative Procedure Act and the authority granted to the Council in the Environmental Quality Act. Instead, Petitioners ask the Council to make a decision without the benefit of a full contested case on all of the issues. Such an approach is in direct conflict with Wyoming law and the rights of the parties and should not be adopted.

II. To determine whether the Permit protects from a measurable decrease, the Council must hear evidence on all of the issues.

A. The Wyoming Administrative Procedure Act requires the Council to conduct a full contested case hearing on all of the issues.

As part of their appeal, Petitioners have requested a hearing before the Council. This proceeding is a contested case hearing brought under the Wyoming Administrative Procedure Act. A contested case is, by definition, a "trial-type hearing." *Foster's Inc. v. City of Laramie*, 718 P.2d 868, 873 (Wyo. 1986). A contested case proceeding is designed to determine the issues in dispute. The Administrative Procedure Act requires that in a contested case "[o]ppportunity shall be afforded all parties to respond and present evidence and argument **on all issues involved.**" WYO. STAT. § 16-3-107(j); *see also* EQC Rules Ch. II, § 8(c) (contested case procedure). All of the usual tools of a trial-type proceeding are available to the parties in a

contested case proceeding to allow them to discover, gather and argue the relevant evidence. Agencies can issue subpoenas, WYO. STAT. § 16-3-107(f), the parties can take depositions, participate in discovery under the Wyoming Rules of the Civil Procedure, *id.* at § 16-3-107(g), and cross examine witnesses, *id.* at § 16-3-108(c). Contested case proceedings culminate in “findings of fact” based on the evidence received at the hearing. *Id.* at §§ 16-3-107(r), 16-3-109.

Petitioners’ attempt to constrain the Council’s review of the DEQ’s decision to review only the agency decision-making process is at odds with the Administrative Procedure Act and Wyoming Supreme Court precedent. In *J.M. v. Department of Family Services*, 922 P.2d 219, 223 (Wyo. 1996), the Department had adopted rules that limited contested case hearings to examine only whether the state agency had “acted contrary to law or the Division’s child protective services rules” *Id.* Thus, similar to Petitioners’ position here, a contested case before the Department would only examine what the agency did and could only look at the information used and relied on by the agency to determine if it acted in accordance with the law. The Wyoming Supreme Court determined that this type of limitation to contested case hearings violated the Administrative Procedure Act because it prevented “a full review of the factual issues” at a contested case proceeding. *Id.* at 224. “**The Wyoming Administrative Procedure Act contemplates that agencies will conduct full contested case hearings to determine all the relevant and factual issues.**” *Id.* (emphasis added). The Court continued: “Various provisions of the Wyoming Administrative Procedure Act describe the broad scope of contested case hearings and indicate that such proceedings will include a **determination of all factual and legal issues** between the parties.” *Id.* (citing WYO. STAT. §§ 16-3-107 -112).

An agency reviewing a department's decision – such as this permitting decision – simply cannot “unilaterally limit[] the issues for resolution at the contested case proceeding.” *Id.* That is exactly what the motion in limine asks the Council to do. A contested case hearing under the Administrative Procedure Act requires and allows evidence of all factual and legal issues and cannot be limited to a review of whether the agency decision complied with the rules and statutes. The question before the Council is whether the limits in the Permit protect alfalfa from a measurable decrease. The Administrative Procedure Act requires that the Council hear evidence on all of the “factual issues” to answer that question. *J.M.*, 922 P.2d at 224.

B. The EQC's statutory rules and authority require a hearing on all of the issues.

In addition to the requirements of the Wyoming Administrative Procedure Act, the Environmental Quality Act and the Council's own rules governing contested cases dictate that the Council is required to hear evidence on all issues and determine all relevant factual questions. The Environmental Quality Act vests the Council with authority to “hear and determine” disputes arising under the Act at the agency level:

The council shall act as the hearing examiner for the department and shall **hear and determine all cases and issues** arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions.

WYO. STAT. § 35-11-112(a). In addition to this general authority, the Act also grants the Council the power to order that any permit be “granted, denied, suspended, revoked or modified.” *Id.* at § 35-11-112(c)(ii). Although Pennaco has questioned the Council's jurisdiction to hear Petitioners' challenge to this particular permit, the Council has ruled that it does possess the authority to hear the Petition and this hearing is necessary to exhaust administrative remedies.

(Draft Order Denying Pennaco's Motion to Dismiss ¶¶ 9, 12) (version distributed to the parties by e-mail at 9:10 a.m. on Nov. 10, 2009) (attached as Ex. A). Since the Council has decided to move forward with the hearing, it must follow the requirements for a contested case under the Environmental Quality Act and the Council's own rules. Unless the Council will reverse its view of its jurisdiction in this matter – in which case the motion is moot because no hearing will be conducted – the Council must deny Petitioners' motion.

The Council's rules require that it conduct a contested case hearing that considers all of the issues. As Petitioners acknowledge, the Council's procedural rules give "all parties" the right "to respond and present evidence and argument on **all issues** involved." EQC Rules, Ch. II, § 8(c) (cited in Petitioners' Resp. to Pennaco's Mot. for Summ J. and to Strike Expert Witnesses 12, Oct. 30, 2009). If the Council has authority to hear this appeal at all, the Environmental Quality Act and the Council's own procedural rules require that the Council engage in a full and comprehensive analysis of the Permit. Such a procedure is essential to efficiently address the issues raised by Petitioners.

The Council has previously determined that it is obligated to conduct contested case hearings and "a full evidentiary, de novo hearing is required for further appellate review." *See, e.g., In re Matter of Basin Elec. Power Coop. Dry Fork Station*, Order Denying Basin Elec. Power Coop. Inc.'s Mot. to Dismiss Appeal (EQC Dkt. 07-2801, Aug. 21, 2008) (attached as Ex. B). The Council reasoned, "there must be a record for the appellate court to review in order to determine if DEQ's decision [to issue a permit] was proper, and the record is developed through a due process hearing." *Id.* at ¶ 20. Accepting the Council's ruling that this proceeding is a contested case, the Council must deny the motion in limine because the motion would

improperly narrow the Council's review, leave relevant contested issues unconsidered, and prevent the statutorily mandated development of the record.

III. Petitioners misconstrue Wyoming Supreme Court cases and misapply decisions that apply to judicial review of final agency actions.

Petitioners propose that in review of this matter the Council is limited in the scope of its review and the actions that it can take, much in the manner of a court reviewing agency actions. Petitioners want to limit the Council's review to evaluate only whether the DEQ abided by the law governing these permits, and not to consider the merits of Pennaco's application for a permit. According to Petitioners' view, the Council can only hear evidence considered by the DEQ. This argument simply does not appreciate the role that the Council fulfills by conducting a contested case proceeding. The Council is "the body established by the Wyoming legislature to hear and decide disputes arising from the implementation of the Wyoming Environmental Quality Act." *Platte Dev. Co. v. Env'tl. Quality Council*, 966 P.2d 972, 975 (Wyo. 1998). As such, the Council must conduct a full contested case hearing on all of the issues and all of the facts and cannot limit its review as Petitioners propose. *See J.M.*, 922 P.2d at 223.

A. Petitioners misconstrue cases determining the authority of the Board of Equalization, which is not the precise counterpart of the Council.

Petitioners rely on case law construing the duties of the Board of Equalization and the Department of Revenue to argue that the Council will overstep statutory bounds and invade the province of the DEQ if it hears evidence about all the "relevant factual and legal issues" to develop a complete record, which is the purpose of a contested case proceeding. The cases that Petitioners rely upon construe only the scope of the authority of the State Board of Equalization, which is an unusual agency because it is established by the Wyoming Constitution to perform the

constitutionally required duty of equalizing the valuation of property throughout the state. *See* WYO. CONST. art. 15, §§ 9, 10.

Specifically, the cases relied on by Petitioners demonstrate that the Board of Equalization is unique in that “while [the Board] often functions as an administrative agency,” it “also has a separate and distinct role as an appellate body, hearing appeals from decisions by county boards of equalization and final decisions of the Department.” *Antelope Valley Improvement & Serv. Dist. v. State Bd. of Equalization*, 4 P.3d 876, 877-78 (Wyo. 2000). The *Antelope Valley* court’s observation that when an agency sits in its adjudicative capacity it resembles a “lower tribunal” does not support the conclusion that when the Council, or any other administrative body, conducts a contested case hearing it should apply the same limited review that a court applies in review of agency action. The court in *J.M.* specifically rejected that position, which it held is contrary to the Administrative Procedure Act. 922 P.2d at 224.

Petitioners next rely only on *Amoco Production Co. v. Wyoming State Board of Equalization*, 12 P.3d 668 (Wyo. 2000), to support their argument that this Council does not have the authority to, as they argue, “rewrite DEQ permits.” In *Amoco*, the court held that the Board overstepped its statutory bounds when, after conducting a contested case proceeding, the Board did not adopt a position proposed by the taxpayer or the Department, but imposed its own independent valuation method – a function that the Supreme Court determined the legislature had specifically vested in the Department of Revenue. 12 P.3d at 673. There is no risk of such overstepping in this matter, as the Council is specifically authorized under the Environmental Quality Act to modify DEQ permits. WYO. STAT. at § 35-11-112(c)(ii). Petitioners’ claim to the contrary that “the EQC has no authority to rewrite DEQ’s permits” misstates the law. All that

Pennaco asks is that the Council fulfill its statutory mandate and “grant, deny, suspend, revoke or modify” the permit as expressly allowed by law. Wyo. Stat. § 35-11-112(c)(ii).

The *Amoco* decision acknowledges that the Board of Equalization and the Department of Revenue have different specific statutory duties and responsibilities and the Board of Equalization cannot perform a statutory duty assigned to the Department of Revenue. *Id.* at 669. Petitioners provide no argument or evidence to suggest that the same sort of analysis applies in this case. In fact, Wyoming statute expressly authorizes the Council to order that a permit issued by the DEQ be “granted, denied, suspended, revoked or modified.” WYO. STAT. § 35-11-112(c)(ii).

At its crux, the analysis in both *Antelope Valley* and *Amoco* comes down to the authority granted the Board of Equalization by statute and under the Wyoming Constitution. Petitioners fail to demonstrate, by case law or any other authority construing the duties of the Environmental Quality Council, that the Council will overstep its statutory authority by conducting a contested case proceeding embracing and resolving all relevant issues of fact and law in this dispute. Because the Council is authorized by statute to order that any permit be “granted, denied, suspended, revoked or modified,” WYO. STAT. § 35-11-112(c)(ii), the Council is specifically authorized by statute to engage in a comprehensive review of the Department’s permitting decisions. The Council’s authority to order that a permit be “modified” demonstrates that the legislature intended that the Council perform a full review of the DEQ’s permitting decisions, developing a complete record of agency action and giving the agency a final opportunity to “get it right” before the decision may be reviewed by a court.

Petitioners' reliance on these cases also misses the mark because even in Board of Equalization cases, the Board will hear **evidence on all of the issues** and does not limit the parties' presentation of evidence. The Board of Equalization's Rules governing contested case hearings provide:

- A contested case including an "opportunity for hearing as provided by W.S. 16-3-107." Board of Equalization Rules, Ch. 2, § 4.
- That there is full and complete discovery. *Id.* at § 25.
- That the hearing officer shall hear evidence on "all matters presented." *Id.* at § 17.
- That the parties participate in a hearing and present evidence through live testimony and documentary evidence. *Id.* at § 18.
- That the Board's "findings of fact shall be derived from the evidence of record in a proceeding." *Id.* at § 34.

The Board of Equalization's rules governing contested case hearings show that the Administrative Procedure Act applies and the parties can present evidence on all of the issues. Those familiar with practice before the Board understand that contested case hearings there involve putting on evidence of all the issues and allowing the Board to make a complete and competent decision. *Amoco* and *Antelope Valley* have no bearing on the Council's ability or authority to hear evidence in this contested case proceeding.

B. Authority related to judicial review of a final agency decision does not apply to the requirement that the Council hear evidence on all of the issues.

Judicial review of agency action is highly deferential and careful to respect the constitutional boundary between the courts and the executive branch. That concern does not apply where one administrative entity reviews, by statute, the work of a subordinate administrative agency to arrive at a final agency decision. Thus, Petitioners' citations to U.S.

Supreme Court precedent governing judicial review are not helpful to the Council. Petitioners seem blind to the fact that both of the cases they rely on concern judicial review of agency action. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (judicial review of National Highway Traffic Safety Administration rulemaking decision); *SEC v. Chenery Corp.*, 322 U.S. 194 (1974) (construing substantial evidence standard applying in judicial review of SEC decision).

The rule stated in *Motor Vehicle* and *Chenery* is well recognized and has been cited thousands of times, but it does not support Petitioners' argument because it has no application within the administrative context. Federal courts have held that arguments such as the Petitioners' "confuse[] the assigned roles of [an administrative review] Board, itself a part of the administrative agency structure, and the courts." *Licausi v. Office of Pers. Mgmt.*, 350 F.3d 1359, 1363 (Fed. Cir. 2003). Although the Council is performing an adjudicative role and is in that sense a kind of "lower tribunal," that does not require that the Council's function is similarly limited by any of the restraints that apply when a court reviews the decisions of another branch of government.

Petitioners' motion in limine wrongly proposes that the EQC should behave as if it were a court reviewing an agency decision. When reviewing the Council's decisions, the district court "will not substitute its judgment for that of the board or commission," or "perform duties assigned by law to administrative boards, committees and officers." *Knight*, 805 P.2d at 273 (quoting, adopting and affirming district court opinion). Furthermore, judicial review is "confined to the administrative record." *Id.* at 273-74. By contending that the Council cannot hear evidence supporting the Permit on the merits and must limit its review to only the

information “presented to” and “considered by” DEQ, Petitioners would improperly narrow the Council’s role to mimic judicial review. Such an approach not only undermines the statutory role of the Council but also cripples judicial review because it would prevent the Council from assembling the record of agency action, which is essential to review on appeal. *FMC v. Lane*, 773 P.2d 163, 165 (Wyo. 1989) (development of agency record essential to rational judicial review). Petitioner’s position is simply inconsistent with Wyoming administrative procedure and the law governing judicial review of agency action.

Finally, although Petitioners propose that the issue of whether the DEQ used appropriate scientific methods “may be undisputed,” Pennaco would clarify that this issue is disputed although Pennaco does not dispute that Petitioners bear the burden of demonstrating that DEQ failed to use appropriate scientific methods. However, as this response demonstrates, Pennaco does not believe that the Council is powerless to address other matters regarding the propriety of the Permit, should the Council conclude that the scientific method used by the DEQ were inadequate. Whether DEQ used appropriate methods is a contested issue about which reasonable minds may differ. Furthermore, because of its plenary review authority, the Council can uphold and approve the Permit even if it concludes that the DEQ initially granted the Permit on inadequate or incorrect grounds.

Respectfully submitted November 12, 2009.



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CERTIFICATE OF SERVICE


I hereby certify that on November 12, 2009, I served the foregoing document to the following by:

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**BEFORE THE
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A Wyoming Corporation, PRAIRIE DOG)	
RANCH, INC. a Wyoming Statutory Close)	DOCKET NO. 09-3805
Corporation, and PRAIRIE DOG WATER)	
SUPPLY COMPANY FROM WYPDES)	
PERMIT NO. WY0054364)	

**ORDER DENYING PENNACO ENERGY'S INC'S
MOTION TO DISMISS APPEAL**

THIS MATTER came before the Environmental Quality Council (Council) on November 4, 2009, for oral argument on Pennaco Energy's Motion to Dismiss Appeal filed on October 16, 2009, and Protestant's October 30, 2009 Response to Pennaco Energy's Motion to Dismiss Appeal. Council members present at the motion hearing included Dennis M. Boal, Chairman via telephone conference, John N. Morris in person, Dr. Fred Ogden in person, Tim Flitner via telephone conference and Thomas Coverdale via telephone conference. James Ruby, Executive Secretary of EQC was also present. Pennaco Energy appeared by and through counsel, Mark Ruppert and Trey Overdyke. The Protestants, John D. Koltiska, AC Ranch, Inc., Prairie Dog Ranch and Prairie Dog Water Supply Company appeared by and through counsel, Mark Stewart and Kate Fox. The Department of Environmental Quality, Water Quality Division (DEQ) appeared by and through Senior Assistant Attorney General, Mike Barrash and Assistant Attorney General Luke Esche. The Council has considered the motion, written responses and argument of the parties, and finds as follows:

I. JURISDICTION

“The council shall act as the hearing examiner for the department and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions.” Wyo. Stat. Ann. § 35-11-112(a) (LEXIS 2007).

The council shall, “Conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act.” Wyo. Stat. Ann. § 35-11-112(a)(iv) (LEXIS 2007).

The Protestants disputed the Director of DEQ’s approval of Pennaco’s water quality permit WY0054364 for discharge of water into Prairie Dog and Wildcat Creeks and requested a hearing before the Council. Therefore, the Council has jurisdiction to hear and decide this matter.

II. STATEMENT OF THE CASE

Pursuant to the Wyoming Environmental Quality Act (WEQA) and DEQ regulations no person, except when authorized by a permit issued pursuant to the provision of this act, shall cause, threaten or allow the discharge of any pollution or wastes into the waters of the state or alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state. Pennaco Energy applied for Permit No. WY0054364 and DEQ issued said permit to Pennaco Energy, Inc., 3601 Southern Drive, Gillette WY 82718 on January 6, 2009.

On March 5, 2009 the Protestants filed a Petition and Request for Hearing alleging that the DEQ erred in issuing the permit to Pennaco Energy. On October 16, 2009, Pennaco Energy filed a Motion to Dismiss Protestant’s appeal in this matter asserting the Protestants have no statutory right to appeal the WYPDES permit issued to Pennaco Energy.

On October 30, 2009, Protestant's responded that EQC is required to hear Protestant's appeal to the Council prior to proceeding to District Court. Protestant's also argued that the WEQA as well as DEQ's Rules of Practice and Procedure allow for this appeal.

DEQ did not take a position on this motion.

III. ISSUES AND CONTENTIONS

The issue raised by Pennaco Energy in its Motion to Dismiss is whether Protestants can appeal, to this Council, the Director's decision to issue Pennaco Energy water quality permit. Pennaco Energy argued the right to appeal any agency action is entirely statutory and therefore must be found in the WEQA. According to Pennaco Energy, there is no statute which authorizes this Council to hear the appeal, therefore the Council lacks jurisdiction in this matter, and the proper venue for this case is the district court.

Protestants argued Wyo. Stat. Ann. § 35-11-112 (LEXIS 2007) and DEQ's Rules of Practice and Procedure provides a general right to appeal any case contesting the grant of any permit. Protestants additionally argued the Wyoming Administrative Procedures Act (WAPA) requires exhaustion of administrative remedies prior to appealing a case directly to District Court and therefore, this Council has jurisdiction to hear this matter.

IV. FINDINGS OF FACT

1. On January 6, 2009, Pennaco Energy was issued a water quality permit to discharge water into Prairie Dog Creek and Wildcat Creek in Sheridan County, Wyoming.
2. On March 5, 2009 the Protestant's filed a Petition and Request for Hearing with the Environmental Quality Council.
3. The appeal was filed within 60 days of the issuance of the permit pursuant to Section 16, Chapter 1 of the General Rules of Practice and Procedure, Department of Environmental Quality.

4. Pennaco Energy thereafter filed its October 16, 2009 Motion to Dismiss this appeal asserting that Protestant's have no statutory right to appeal and therefore this Council lacks jurisdiction in this matter. According to Pennaco Energy, DEQ's decision to issue the water quality permit is a final agency action and the Protestants must appeal the decision directly to the district court.

V. CONCLUSIONS OF LAW

A. Principles of Law

5. The Council's jurisdiction is governed by the Environmental Quality Act. Wyo. Stat. Ann. § 35-11-111 (LEXIS 2007).

6. Pursuant to the WEQA, the council **shall**, "Act as the hearing examiner for the department and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions." Wyo. Stat. Ann. § 35-11-112(a) (LEXIS 2007) (emphasis added).

7. The Council **shall**, "Conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act." Wyo. Stat. Ann. § 35-11-112(a)(iv) (LEXIS 2007) (emphasis added).

8. All hearings before the Council, appeals or others, shall be held pursuant to these rules, the provisions of the Environmental Quality Act W.S. § 35-11-101 through 1104 and the Wyoming Administrative Procedure Act. Department of Environmental Quality, Rules of Practice and Procedure, Chapter 1, Section 3 (DEQ's Rules).

9. The Wyoming Administrative Procedures Act (WAPA) requires exhaustion of administrative remedies before going to district court.

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

Wyo. Stat. Ann. § 16-3-114(a).

10. Chapter 1, Section 2(a)(ii) of DEQ's General Rules of Practice and Procedure defines Protestant as, "Any person desiring to protest the application of a permit or any person requesting a hearing before the Environmental Quality Council in accordance with the Environmental Quality Act and who is objecting to an action of the Department of Environmental Quality and desiring affirmative relief."

B. Application of Principles of Law

11. The WEQA specifically designated the Council as the "hearing examiner" in "any case" contesting DEQ's "grant" of a permit and gave this Council broad authority to pass regulations to govern those hearings.

12. Pennaco Energy argued that specific statutes in the WEQA that actually provide a party with a right to a hearing before this Council become meaningless if this Council relies upon the general statutory authority to hold contested case hearings in Wyo. Stat. Ann. § 35-11-112. This Council disagrees with Pennaco's position in this matter. The statute argued by the Applicant only applies to permit applicants and their right to review by the council it is a limit on the applicant not other aggrieved parties. The Council's contested case hearing authority exists so that a separate statutory right to review is not required in every different section of the Act that applies to different permits or different actions by the DEQ.

13. This Council's practice has always been to allow permit appeals by aggrieved parties who are not permit applicants.

14. The Council's decision to allow this appeal to proceed supports the underlying purpose of the Environmental Quality Act which is the protection of public health and welfare, as well as to provide an avenue for third party appeals of DEQ issued permits. It is the place for citizens who feel aggrieved by some environmental action to have their complaints heard. Pennaco Energy is asking this Council to ignore the underlying premise of the act. It has been an agency practice for nearly 30 years to hear appeals in any case where DEQ grants a permit. Therefore, there is a presumption in favor of this appeal to be heard by the council.

15. Pennaco Energy's argument that Wyo. Stat. Ann. § 35-11-802 limits appeals of these permits to denials of permits by the applicant does not create consistency between the different sections of the EQA and the EQA and the APA. Rather the applicant's argument creates inconsistency between the various sections of the EQA and between the EQA and the APA. Under Pennaco's argument if the Department were to grant their application with conditions that were not acceptable to Pennaco, then Pennaco would be required to appeal to the district court and not the Council. Pennaco itself would have to rely on the Council's own interpretation to achieve an appeal to the council under those circumstances. That result is clearly contrary to the intentions of the EQA even though a clear reading of Wyo. Stat. Ann. § 35-11-802 seems to demand that result.

16. The Legislature established this Council to use **its** expertise in environmental matters and charged it to act as hearing examiner. In fact, if the district court would hear this appeal with no evidentiary record, it would be unable to make an informed decision. There must be a record for the appellate court to review in order to determine if DEQ's decision to issue a permit was proper. The

WAPA clearly requires exhaustion of administrative remedies and in the absence of statutory preclusion of review, this Council has jurisdiction.

ORDER

IT IS THEREFORE ORDERED that:

1. Pennaco Energy's October 16, 2009 Motion to Dismiss Appeal is hereby DENIED.

2. The hearing remains set in this matter for November 16, 17 and 18, 2009. The Hearing shall commence at 1:00 p.m. on November 16th, 2009 in room B63 of the Herschler Building, Cheyenne WY.

SO ORDERED this ____ day of November, 2009.

Dennis M. Boal., Chairman
Environmental Quality Council
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CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing document was served upon the Environmental Quality Council and a true and correct copy was served upon the parties by mailing same, postage prepaid, on the ____ day of August, 2008, addressed to the following:

I. JURISDICTION

“The council shall act as the hearing examiner for the department and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions.” Wyo. Stat. Ann. § 35-11-112(a) (LEXIS 2007).

The council shall, “Conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act.” Wyo. Stat. Ann. § 35-11-112(a)(iv) (LEXIS 2007).

The Protestants disputed the Director of DEQ’s approval of Basin Electric’s Air Quality Permit CT-4631 for the Dry Fork Station project and requested a hearing before the Council. Therefore, this Council has jurisdiction to hear and decide this matter.

II. STATEMENT OF THE CASE

Pursuant to the Wyoming Environmental Quality Act (WEQA) and DEQ regulations, an air quality construction permit is needed before any person commences construction of any new facility or modifies any existing facility which may cause the issuance of air pollution in excess of the standards set by the DEQ. On November 10, 2005, Basin Electric submitted an air quality construction permit application to DEQ to construct a coal-fired power generating station, known as Dry Fork Station, near Gillette, Wyoming. On October 15, 2007, after nearly two years of technical review and analysis by the Air Quality Division, the Director of DEQ determined that Basin Electric’s application for construction of the Dry Fork Station satisfied the applicable statutory and regulatory requirements and approved Basin Electric’s application to construct Dry Fork Station by issuing Air Quality Permit CT-4631.

Basin Electric filed a Motion to Dismiss Protestant's appeal in this matter asserting the Protestants have no statutory right to appeal the air quality permit issued to Basin Electric.

Protestant's responded that EQC is required to hear Protestant's appeal to the Council prior to proceeding to District Court. Protestant's also argued that the WEQA as well as DEQ's Rules of Practice and Procedure allow for this appeal.

DEQ did not take a position on this motion.

III. ISSUES AND CONTENTIONS

The issue raised by Basin Electric in its Motion to Dismiss is whether Protestants can appeal, to this Council, the Director's decision to issue Basin Electric an air quality permit. Basin Electric argued the right to appeal any agency action is entirely statutory and therefore must be found in the WEQA. According to Basin Electric, there is no statute which authorizes this Council to hear the appeal, therefore the Council lacks jurisdiction in this matter, and the proper venue for this case is the district court.

Protestants argued Wyo. Stat. Ann. § 35-11-112 (LEXIS 2007) and DEQ's Rules of Practice and Procedure provides a general right to appeal any case contesting the grant of any permit. Protestants additionally argued the Wyoming Administrative Procedures Act (WAPA) requires exhaustion of administrative remedies prior to appealing a case directly to District Court and therefore, this Council has jurisdiction to hear this matter.

IV. FINDINGS OF FACT

1. On November 10, 2005, Basin Electric submitted an air quality construction permit application to construct a coal-fired electric power generating plant, known as Dry Fork Station, near Gillette, Wyoming.

2. On February 26, 2007, DEQ provided notice to the public that it intended to issue an air quality permit to Basin Electric authorizing the construction of Dry Fork Station. The DEQ notice invited comments from the public and Protestants submitted lengthy comments in support of their position that the proposed permit violated Wyoming law. *Protestants' Exhibits 1 and 2.*

3. On October 15, 2007, the Director of DEQ determined that Basin Electric's application for construction of the Dry Fork Station satisfied the applicable statutory and regulatory requirements and issued Air Quality Permit CT-4631. By issuing the permit, the Director of DEQ determined the permit satisfied both New Source Review (NSR) and Prevention of Significant Deterioration (PSD) requirements. *Protestants' Exhibits 3 and 4.*

4. In Air Quality Permit CT-4631, DEQ states the appeal rights available as follows:

Any appeal of this permit as a final agency action of the Department must be made to the Environmental Quality Council within sixty (60) days of permit issuance per Section 16, Chapter 1, General Rules of Practice and Procedure, Department of Environmental Quality.

Protestants' Exhibit 4.

5. In accordance with this guidance and the DEQ's Rules of Practice and Procedure, Protestants filed their Protest and Petition for Hearing on November 1, 2007 and the case was referred to the EQC. *Protestants' Exhibit 5.*

6. Basin Electric thereafter filed its February 8, 2008 Motion to Dismiss this appeal asserting that Protestants have no statutory right to appeal and therefore this Council lacks jurisdiction in this matter. According to Basin Electric, DEQ's decision to issue the air quality permit is a final agency action and the Protestants must appeal the decision directly to the district court.

V. CONCLUSIONS OF LAW

A. Principles of Law

7. The Council's jurisdiction is governed by the Environmental Quality Act. Wyo. Stat. Ann. § 35-11-111 (LEXIS 2007).

8. Pursuant to the WEQA, the council shall, "Act as the hearing examiner for the department and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions." Wyo. Stat. Ann. § 35-11-112(a) (LEXIS 2007) (emphasis added).

9. The Council shall, "Conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act." Wyo. Stat. Ann. § 35-11-112(a)(iv) (LEXIS 2007) (emphasis added).

10. All hearings before the Council, appeals or others, shall be held pursuant to these rules, the provisions of the Environmental Quality Act W.S. § 35-11-101 through 1104 and the Wyoming Administrative Procedure Act. Department of Environmental Quality, Rules of Practice and Procedure, Chapter 1, Section 3 (DEQ's Rules).

11. The Wyoming Administrative Procedures Act (WAPA) requires exhaustion before going to district court. WAPA contains a specific provision addressing the requirement

for an agency's action does not become effective until all administrative appeals have been exhausted:

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

Wyo. Stat. Ann. § 16-3-114(a).

12. Chapter 1, Section 2(a)(ii) of DEQ's General Rules of Practice and Procedure defines Protestant as, "Any person desiring to protest the application of a permit or any person requesting a hearing before the Environmental Quality Council in accordance with the Environmental Quality Act and who is objecting to an action of the Department of Environmental Quality and desiring affirmative relief."

B. Application of Principles of Law

13. The WEQA specifically designated the Council as the "hearing examiner" in "any case" contesting DEQ's "grant" of a permit and gave this Council broad authority to pass regulations to govern those hearings.

14. Basin Electric argued the specific statutes in the WEQA that actually provide a party with a right to a hearing before this Council become meaningless if this Council relies upon the general statutory authority to hold contested case hearings in Wyo. Stat. Ann. § 35-11-112. This Council disagrees with Basin Electric's position in this matter. The Council's contested case hearing authority exists so that a separate statutory right to review is not required in this case.

15. This Council's practice has always been to allow permit appeals by aggrieved parties who are not permit applicants. The DEQ has also provided such right in the issuance of

the permit itself. In the body of the permit, Protestants are specifically provided a right of review before the Council.

16. The Council's decision to allow this appeal to proceed supports the underlying purpose of the Environmental Quality Act which is the protection of public health and welfare, as well as provide an avenue for third party appeals of DEQ issued permits. It is the place for citizens who feel aggrieved by some environmental action to have their complaints heard. Basin Electric is asking this Council to ignore the underlying premise of the act. It has been an agency practice for nearly 30 years to hear appeals in any case where DEQ grants a permit. Therefore, there is a presumption in favor of this appeal to be heard by the council.

17. Likewise, Basin Electric's argument that Wyo. Stat. Ann. § 35-11-208 is the only section that authorizes an appeal in this matter, is not persuasive. By its reference to Wyo. Stat. Ann. § 35-11-802, the section is clearly pertinent to operating permits, not construction permits.

18. DEQ's decision to issue an air quality permit becomes a final agency action only if the decision to issue the permit is **not** appealed. DEQ provides this very right to appeal in its permit, wherein it advises the public that its decision to issue the permit will, in fact, become a final agency action **unless** appealed within 60 days. Therefore, the issuance of the air permit is not a final agency action in this case until this appeal has been heard and decided. Upon filing a petition for review of the agency's action with this Council, a full evidentiary, *de novo* hearing is required for further appellate review.

19. Finally, Basin Electric argued that since DEQ only issued the air quality permit after an exhaustive investigation into all of the available emission control technologies and reviewed and evaluated complex data and evidence, the permit to construct is a final agency

action not subject to review by the Council because they lack the expertise to review the matter. This Council disagrees with Basin Electric's argument.

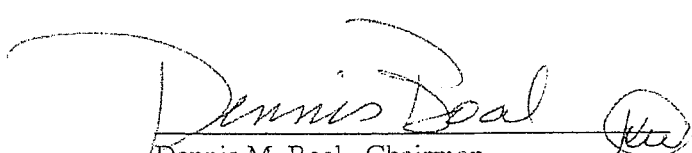
20. The Legislature established this Council to use **its** expertise in environmental matters and charged it to act as hearing examiner. In fact, if the district court would hear this appeal with no evidentiary record, it would be unable to make an informed decision. There must be a record for the appellate court to review in order to determine if DEQ's decision to issue an air quality permit was proper, and the record is developed through a due process hearing. The WAPA clearly requires exhaustion of administrative remedies and in the absence of statutory preclusion of review, this Council has jurisdiction.

ORDER

IT IS THEREFORE ORDERED that:

1. Basin Electric Power Cooperative Inc's February 8, 2008 Motion to Dismiss Appeal is hereby DENIED.
2. The hearing remains set in this matter for November 17, 2008.

SO ORDERED this 21st day of August, 2008.


Dennis M. Boal, Chairman
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CERTIFICATE OF SERVICE

I, Kim Waring, certify that at Cheyenne, Wyoming, on the 21st day of August, 2008, I served a copy of the foregoing ORDER DENYING BASIN ELECTRIC POWER COOPERATIVE INC'S MOTION TO DISMISS APPEAL by electronic email to the following persons:

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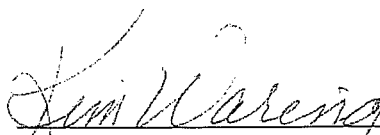
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