

reason for the EQC to consider the untimely appeal. The Council recently determined that an untimely appeal should be dismissed on facts that are in all material respects the same as the facts at issue here. See *In the Matter of the Issuance of DEQ Permit 10-254R, issued to SALL, LLC*, EQC Docket No. 10-3801. As a result, the EQC should dismiss the instant appeal for the same reasons.

In addition, NFP contends that the EQC lacks jurisdiction to hear an appeal of a water quality permit to construct from a non-permittee and that the remedy for non-permittees who contend they are “aggrieved parties” under the Environmental Quality Act (“EQA”) seeking to challenge final DEQ action is under the Wyoming Administrative Procedure Act, as provided for in W.S. § 35-11-1001. However, because the instant appeal should be dismissed based on the untimely filing, the EQC need not reach this separate jurisdictional challenge and may dismiss the Protest because it was not timely filed.

Argument:

1. The Protest is untimely and should be dismissed:

Timely filing of a petition with an administrative body is mandatory and jurisdictional. *Employment Sec. Com'n of Wyoming v. Young*, 713 P.2d 198, 201 (Wyo.,1986). As the EQC has recognized under similar facts in the SALL, LLC matter cited above, a Protest that is late filed should be dismissed.

Chapter I, Section 3(d) of the General Rules of Practice and Procedure (“GRPP”) provides that “[t]he **filing** of such a petition shall constitute the commencement of the proceeding **on the date filed.**” (emphasis added). The EQC’s docket reflects in this case that the date of filing of the Protest was July 5, 2011. Chapter I, Section 16 of the GRPP mandates that “all

appeals to Council from final actions of the Administrators or Director shall be made within sixty (60) days of such action.” The Protest was not filed within 60 days of the DEQ Director’s issuance of the permit and therefore the EQC lacks jurisdiction to hear the Protest and it must be dismissed.

Sixty days from May 2, 2011 was July 1, 2011. Thus, July 1st marked the expiration of the time for filing any Protest to the Permit. The mailing of the Protest on July 1st does not satisfy the filing requirement. The EQC did not receive the document for filing until July 5th. In the SALL, LLC matter, the Protestant argued that by serving the Protest on the date it was due by putting it in the mail, it should be counted as filed on the date of mailing, even if it is received by the EQC after the deadline for filing. *See Town of Alpine’s Response to Motion to Dismiss dated September 16, 2010 under EQC Docket No. 10-3801.* The EQC rejected that position in SALL, and should likewise reject it here. *January 14, 2011 Order of Dismissal, EQC Docket No. 10-381.* Because the Protest in this case was filed more than sixty days after the issuance of the Permit, the Protest should be dismissed.

2. The EQC lacks jurisdiction to hear an appeal from a non-permittee on a water quality permit to construct:

Because the Protest was untimely, the EQC need not reach this second issue, and may dispose of the case on the grounds argued above. However, NFP cites this jurisdictional argument here to be clear that it does not waive the argument, should this matter proceed.

The Protestants do not have the right as a matter of law to bring their Protest to the EQC and the EQC lacks subject matter jurisdiction to hear the Protest. The Environmental Quality Act (“EQA”) provides that a non-permittee contending it is an aggrieved party under the EQA has the ability to contest a final decision of the DEQ is through an appeal to the District Court. *W.S. § 35-11-1001.* The right of appeal to an agency is available only if it is provided for by

statute. *Holding's Little America v. Board of County Commissioners of Laramie County, Wyo.*, 670 P.2d 699, 702 (Wyo. 1983). An applicant for a permit may seek review before the Council, but a non-permittee in this instance has no such right. W.S. § 35-11-802.

While the EQA includes a general review statute under W.S. § 35-11-112(a) and (b) authorizing the EQC to conduct contested cases and take action with respect to DEQ decisions, it does not provide for review of all DEQ actions. Instead, the specific provisions of the EQA guide when the EQC has jurisdiction to review DEQ action. This is evident from the provisions of W.S. §35-11-112(c), which make the EQC's exercise of authority over DEQ decisions "subject to" state laws and the right of appeal. Thus, if the statutes do not provide for a specific right of appeal to the EQC, no right to appeal exists. See *Thunderbasin Land, Livestock & Investment Co. v. County of Laramie*, 5 P. 3d 774, 782 (Wyo. 2000) ("a specific statute controls over a general statute on the same subject.") The legislature has specifically defined those instances under the EQA in which a right to appeal to the EQC exists. As examples, see W.S. § 35-11-211(d), 414(e), 515(k), 517(e), 518(b), 601, 701(c), 802. If the general provision in Section 112 of the EQA were sufficient to grant review to anyone desiring to contest any permit issue, the specific provisions of the sections of the EQA cited above would be rendered superfluous. None of the specific statutory provisions apply to the Protestants in this instance.

Agencies possess only that authority conferred upon them by statute. In the absence of statutory authority to entertain an appeal in this instance, the EQC lacks subject matter jurisdiction. Without subject matter jurisdiction, the EQC lacks any authority to proceed. *Geerts v. Jacobsen*, 100 P. 3d 1265, 1269 (Wyo. 2004), *Amoco Production Co. v. Wyo. State Board of Equalization*, 7 P. 3d 900, 904 (Wyo. 2000).

NFP recognizes that this issue has been previously raised and addressed in other EQC matters involving appeals of permits and that the EQC has determined it has jurisdiction to hear a non-permittee's permit appeal in a similar context. However, as the issue has not been addressed in a judicial context it is raised in this context to preserve the issue. NFP concurs with the arguments raised by Pennaco Energy Inc. in its *Memorandum Brief in Support of Pennaco Energy Inc. 's Motion to Dismiss* filed under EQC Docket No. 09-3805 and refers the EQC to that Brief for further legal analysis of this issue.

In sum, there is no right for Petitioners in this instance to file a protest with the EQC, and the EQC lacks subject matter jurisdiction to entertain the Protest. As previously discussed, however, the EQC need not reach this jurisdictional issue in this instance, due to the fact that the Protest was not timely filed under the GRPP and this case may be disposed of on that basis.

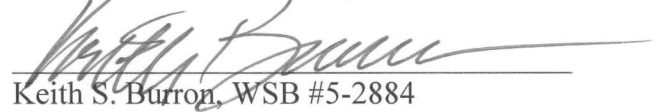
Conclusion:

For the reasons stated herein, NFP respectfully requests that the EQC dismiss the Protest on the grounds that it is untimely filed, and/or in the alternative on grounds that the EQC lacks subject matter jurisdiction to hear an appeal from a non-permittee in this instance. As provided for in its Motion to Dismiss, NFP does not, by the filing of this motion, waive any defense or argument that may be raised in its response to the Protest, which is not due until August 4, 2011. Instead, NFP urges the EQC to dispose of this matter on the grounds cited herein, so that NFP

does not incur unnecessary expense in defending against a protest that is not properly before the EQC.

Respectfully submitted this 15th day of July, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2011 I served a true, full and correct copy of the foregoing Memorandum in Support of Motion to Dismiss upon the following by depositing the same in the US Mail, postage prepaid and addressed as follows:

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