

concluded that the application was technically complete and suitable for public notice and comment. During the comment period, the Department received over a dozen letters objecting to the permit application for a wide range of reasons. Several of the objectors requested that the Director of the Department hold an “informal conference” to hear and potentially informally resolve the objections. None of the objectors specifically requested a contested case hearing before the Council.

The Director carefully considered the objections and concluded that an attempt to informally resolve the multiple objections was unlikely to be successful through the informal conference process. Therefore, he concluded that an informal conference process was not preferable to a contested case proceeding in these circumstances. Based on that conclusion, the Director, in his discretion, denied the requests for an informal conference. The Director informed the objectors and the permit applicant about the denial. He also informed them that, in light of his decision not to hold an informal conference, the Department was forwarding copies of the objection letters to the Council so that the Council could schedule and hold a contested case hearing within the limited 20-day time period under Wyoming Statute § 35-11-406(k).

After receiving the objections to the application, the Council initiated these proceedings, held a scheduling conference with the parties, and set a final hearing for February 13 and 14, 2017. On February 6, 2017, the Powder River Basin Resource Council filed a motion to remand the case to the Director and three other parties filed due process objections to the hearing. After reviewing those filings, the hearing officer in this case vacated the scheduled hearing and requested that the parties brief the Council on the issue of “whether there is a proper appeal before the Council at this time necessitating a contested case.”

To resolve the present dispute, the Council must determine if, in substance, the objecting parties requested a contested case hearing. Before the Council can hold such a contested case hearing, the Environmental Quality Act (“Act”) requires objectors to request an informal conference or a hearing. In this case, the Department construed the various objections as requests for a contested case hearing before the Council. If the Council determines that the objections did not include a request for a hearing, the Council should dismiss this proceeding, which will automatically return the application to the Director for a decision. However, in no event does the Act require the Director to hold an informal conference. Accordingly, the Council should deny the Resource Council’s motion to remand for the purpose of holding an informal conference.

II. Background Regarding Public Participation Opportunities in the Application Process for Surface Coal Mining Permits

Wyoming Statute § 35-11-406 governs all applications for mining permits. That statute lists the required contents of mining permit applications, the process the Department must follow to review those applications, and the grounds for granting or denying those applications. *See* Wyo. Stat. Ann. § 35-11-406(a)-(c) (listing requirements), (d)-(h) (describing review process), and (m)-(o) (listing grounds for granting or denying). Most importantly for the question currently before the Council, Wyoming Statute § 35-11-406 also requires public notice of applications, provides an opportunity for public comments and objections, and provides three possible paths through which the permit application may be granted or denied. *See* Wyo. Stat. Ann. § 35-11-406(j)-(k) (describing public notice and comment opportunities), and (p) (stating paths for a final decision on the permit application).

Interested persons have an opportunity to object to a mining permit application and request further proceedings regarding those objections under Wyoming Statute § 35-11-406(k). That section provides:

(k) Any interested person has the right to file written objections to the application with the administrator within thirty (30) days after the last publication of the above notice. For surface coal mining operations, **the director may hold an informal conference if requested** and take action on the application in accordance with the department's rules of practice and procedure, with the right of appeal to the council which shall be heard and tried de novo. A conference shall be held if the director determines that the nature of the complaint or the position of the complainants indicates that an attempt to informally resolve the disputes is preferable to a contested case proceeding. An informal conference or a public hearing shall be held within twenty (20) days after the final date for filing objections unless a different period is stipulated to by the parties. The council or director shall publish notice of the time, date and location of the hearing or conference in a newspaper of general circulation in the locality of the proposed operation once a week for two (2) consecutive weeks immediately prior to the hearing or conference. The hearing shall be conducted as a contested case in accordance with the Wyoming Administrative Procedure Act, and right of judicial review shall be afforded as provided in that act.

Wyo. Stat. Ann. § 35-11-406(k) (emphasis added). Importantly, the Act only provides for informal conference requests for applications for permits for surface coal mining operations. *Id.* But for all other types of mining operations (often referred to as “noncoal”), objectors may only request a Council hearing, not an informal conference. *Id.*¹ Once an objector requests an informal conference or a Council hearing, the Director or the Council, as applicable, has twenty calendar days in which to schedule and hold the proceeding. Wyo. Stat. Ann. § 35-11-406(k).

At the end of the public comment period, the nature of the subsequent proceedings depends on whether interested persons file objections, the nature of those objections, whether the objectors request proceedings be held on the objections, and which proceedings they request. *Id.* Depending

¹ Wyoming Statute § 35-11-406 is not unique in distinguishing surface coal mining permits from noncoal mining permits. Other examples include distinctions in permitting requirements, permitting procedures, and permit enforcement mechanisms and procedures. *See, e.g.*, Wyo. Stat. Ann. §§ 35-11-406, 35-11-437, 35-11-902, and 35-11-1001(c). These distinctions are a direct result of the U.S. Secretary of the Interior’s approval of Wyoming’s state program regulating surface coal mining.

on those factors, the Act provides three possible paths through which the Department or the Council may make a final decision. First, if no objections are filed, or objections are filed without an informal conference or Council hearing request, then the Director makes a decision on the application. Wyo. Stat. Ann. § 35-11-406(p). Second, if objections are filed, a Council hearing is requested, and the Council holds that hearing, then the Council issues findings of fact and a decision on the application. *Id.* Finally, if objections are filed, the objectors request an informal conference with the Director, and the Director grants and holds an informal conference, then the Director makes a decision. *Id.* This case concerns an unusual situation that does not fit neatly into one of these three paths.

III. Argument

A. The Council should determine that the objectors requested a contested case.

Under Wyoming Statute § 35-11-406(k) and (p), either the Director or the Council makes the final decision with regard to granting or denying a surface coal mine permit application. When an objector requests a contested case hearing, the Council must provide the hearing and make the decision on the permit. While, there was no clear hearing request in this matter, the objections should, in all fairness, be construed to include a request for hearing in order to provide the objectors an opportunity to be heard.

Several of the persons objecting to the application in this case made a timely request for an informal conference. The Act then required the Director to determine whether an attempt to informally resolve the disputes was preferable to a contested case proceeding. Wyo. Stat. Ann. § 35-11-406(k). If the Director had decided to hold an informal conference, he could have taken action on the application which would have been appealable to the Council. *Id.* However, the Director, in his discretion, and based upon the nature of the objections, determined that a contested case hearing was preferable to an informal conference. Unfortunately, the Act does not clearly

identify the proper process following a decision not to hold an informal conference. There are two possible avenues.

On one hand, the Director could have rendered a final decision on the application within thirty days after completion of the notice period. Wyo. Stat. Ann. § 35-11-406(p). But, according to the statute, that process is available only “if no informal conference or hearing is requested.” *Id.* Several objectors clearly requested an informal conference so the statute appears to preclude the Director from proceeding directly to a final decision. Further, if the Director had simply made a final decision on the application, it would have effectively denied the objectors any opportunity to be heard regarding their objections before a final decision, and the objectors definitely did not ask the Director to proceed directly to his decision. It would be inconsistent and unfair for the Director to determine that a contested case was preferable to an informal conference and then render his decision on the application without referring the matter to the Council for a contested case.

On the other hand, the Council can hold a contested case hearing and then issue findings of fact and a decision on the application. Wyo. Stat. Ann. § 35-11-406(p). According to the controlling statute, once any objector requests an informal conference, the Director has two options; he can determine that an informal conference is preferable, or he can determine that a contested case is preferable. Wyo. Stat. Ann. § 35-11-406(k). In this case, the Director determined that a contested case was preferable. Of course, he made this determination after the end of the notice period, and so the objectors could not have known his decision when they made their informal conference requests. They had no opportunity at that time to amend their objections to request a hearing. As such, he construed the requests as desiring a contested case hearing and logically referred it to the Council for a hearing as allowed by the statute. The same statute grants authority to the Council to hear the objections and render a final decision. *Id.* This result affords

the objectors with an opportunity to be heard on their objections prior to a final decision, as they requested.

If the Council construes the objections as requesting a contested case hearing, as did the Director, the Council should proceed with the hearing. All of the parties would then have the opportunity to provide evidence and argument in support of their positions on the merits of the application. The Council can then make a decision on the application as contemplated by statute. *See* Wyo. Stat. Ann. § 35-11-406(k), (p).

If the Council instead determines that no objector requested a hearing, and chooses not to construe their informal conference requests as requesting a hearing, the Council should dismiss this proceeding. In that event, the Act requires the Director to make a final decision on the application. *Id.* The Director will still consider the information and arguments in the written objections when making his decision. *Id.* Injured parties will retain any rights they have to appeal the Director's decision. *Id.* Also, if none of the parties wish to participate in a contested case, they can certainly inform the Council of that fact and the Director can proceed to make a final decision.

B. The Director has discretion under Wyoming Statute § 35-11-406(k) to deny requests for informal conferences.

The Resource Council argues that “the Director has a mandatory duty to hold an informal conference and he does not have the authority to refer the matter directly to the EQC.” *Motion to Remand* at 2. The Resource Council asks this Council to remand this case to the Director and order him to hold an informal conference. *Id.* Alternatively, if this Council finds that the Director has discretion to deny informal conference requests, the Resource Council asks the Council to “stay proceedings until such time as an objecting party formally petitions for review of the Directors’ decision and thereby initiates proceedings pursuant to DEQ’s Rules of Practice and Procedure.” *Id.*

As noted above, after the Director denied the objectors' informal conference requests, he chose to construe their requests as requests for a contested case hearing. If the Council decides not to provide the objectors with a hearing, the Council should dismiss, not stay, this proceeding and the application will automatically return to the Director for his decision. Wyo. Stat. Ann. § 35-11-406(p).

But regardless of whether the Council chooses to continue with or dismiss this proceeding, the Council should deny the Resource Council's motion because the Act clearly gives the Director of the Department discretion to deny requests for an informal conference regarding this permit.

The Act provides:

For surface coal mining operations, the director **may** hold an informal conference **if requested** and take action on the application in accordance with the department's rules of practice and procedure, with the right of appeal to the council which shall be heard and tried de novo. A conference **shall be held if the director determines** that the nature of the complaint or the position of the complainants indicates that an attempt to informally resolve the disputes is preferable to a contested case proceeding.

Wyo. Stat. Ann. § 35-11-406(k) (emphasis added). Before the Director must hold an informal conference, Section 406(k) requires an objector to request the conference, and requires the Director to determine that "an attempt to informally resolve the disputes is preferable to a contested case proceeding." *Id.* The Act places control over the first requirement with the objector, and control over the second requirement with the Director. *See id.*

The Resource Council argues that Chapter 3, Section 3(a) of the Department's Rules of Practice and Procedure requires the Director to hold an informal conference when requested. *Mot. to Remand* at 3. That regulation provides:

(a) Any request that the Administrator hold an informal conference on any application for a surface coal mining permit shall briefly state the issues to be discussed, whether the requester desires the conference to be held in the locality of the proposed mining

operation, and whether access to the proposed permit area is desired. If requested, the Administrator may arrange with the applicant to grant parties to the conference access to the permit area for the purpose of gathering information relative to the conference. The conference shall be held in the locality of the operation or at the state capitol, at the option of the requester, within 20 days after the final date for filing objections unless a different period is stipulated to by the parties. If all parties requesting the conference reach agreement and withdraw their request, the conference need not be held.

The Resource Council prefers this rule over Section 406(k) because of the phrase, “The conference shall be held...” and argues that the rule applies to this permit application, but that Section 406(k) does not. *Mot. to Remand* at 3, 3 n.2.²

The Resource Council claims that Chapter 3, Section 3(a) is “a rule of practice and procedure specifically related to an informal conference request on any application for a surface coal mining permit[.]” *Id.* at 3. Referring to the rule, the Resource Council states: “These requirements related to ‘applications for a surface coal mining permit’ are distinctive from the general requirements, and corresponding discretion, afforded under W.S. § 35-11-406(k) related to ‘surface coal mining operations.’” *Id.* In a footnote, the Resource Council concedes that Wyoming Statute § 35-11-406(k) affords the Director discretion to deny a request for an informal conference, but argues that Section 406(k) “is not specific to applications for a new surface coal mine permit. Here, the regulations that are specific to the situation before the EQC governs.” *Id.* at 3 n.2. The Resource Council’s interpretations are wrong for at least two reasons.

First, Section 406(k) applies to applications for new surface coal mine permits. The phrase, “application for a surface coal mining permit” in Chapter 3, Section 3(a) of the rules is not more specific than the phrase “for surface coal mining operations” found in Wyoming Statute § 35-11-

² The Resource Council’s current position is inconsistent with its objection letter, which stated: “Pursuant to W.S. § 35-11-406(k), the Resource Council requests an informal conference with the Director to discuss our objections and hopefully resolve them to the benefit of our members and the DEQ.” *PRBRC Objection Ltr.* at 1 (Jan. 27, 2017).

406(k). The phrase, “surface coal mining operations”, as used in Section 406(k) only provides for informal conferences for surface coal mining permit applications, as opposed to noncoal mining permit applications. Wyo. Stat. Ann. § 35-11-406(k) (“**For surface coal mining operations**, the director may hold an informal conference if requested and **take action on the application** in accordance with the department's rules of practice and procedure. . . .”) (emphasis added). Looking beyond the single sentence “for surface coal mining operations”, the rest of Section 406(k) applies to all mining permit applications. *See* Wyo. Stat. Ann. § 35-11-406(k) (“Any interested person has the right to file written objections to **the application** . . .”) (emphasis added). Looking even more broadly than just subsection (k), Section 406, as a whole, applies to both surface coal mining and noncoal mining permit applications, and does not address any subjects other than mining permit applications, as opposed to, for example, permit enforcement or reclamation standards. *See, e.g.*, Wyo. Stat. Ann. § 35-11-406(a) (“Applications for a mining permit shall . . .”), (a)(xiv) (“For surface coal mining permit applications . . .”), (b) (“The application shall include . . .”), (n) (“The applicant for a surface coal mining permit . . .”). Accordingly, Wyoming Statute § 35-11-406(k) specifically applies to permit applications for surface coal mines like the Brook Mine. Therefore, Section 406(k) applies to the informal conference requests in this case.

Second, the Resource Council mistakes the meaning and effect of Chapter 3, Section 3(a). The Resource Council asserts that the following sentence makes informal conferences mandatory when requested: “The conference shall be held in the locality of the operation or at the state capitol, at the option of the requester, within 20 days after the final date for filing objections unless a different period is stipulated to by the parties.” *Rules Wyo. Dep’t of Env’tl. Quality, Practice & Procedure* ch. 3, § 3(a). However, this sentence does not remove the Director’s discretion to grant or deny informal conference requests under Wyoming Statute § 35-11-406(k). When read together

with the Director's discretion under Section 406(k), this sentence in Chapter 3, Section 3(a) merely describes the required location of the informal conference in those cases where the Director grants a request for an informal conference. *See Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991, 996 (10th Cir. 1996) (“[A] regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements.”). Had the Director decided that an informal conference was preferable to a contested case proceeding, he would have held that conference at the locality of the operation or at the state capitol in accordance with Chapter 3, Section 3(a).

In this case, the Director properly exercised his discretion. The Director carefully considered the requests and the objections and only denied the requests for an informal conference after making the determination required by Wyoming Statute § 35-11-406(k). *See, e.g., Parfitt Ltr. to Anton Bocek* at 1 (Jan. 30, 2017). Accordingly, the Council should deny the Resource Council's motion.

C. The Office of Surface Mining Reclamation and Enforcement has the responsibility for determining whether the Act and state regulations are consistent with federal laws governing surface coal mining, not the Council.

The Department administers the State of Wyoming's state program under the federal Surface Mining Control and Reclamation Act (“SMCRA”), and Wyoming's program is subject to federal standards. In its motion, the Resource Council argues that the Director cannot deny an informal conference request because that would be less stringent or less effective than SMCRA and its related federal regulations. *Mot. to Remand* at 2-3. Therefore, the Resource Council argues, the Director's discretion under Wyoming Statute § 35-11-406(k) is contrary to SMCRA and the Council should order the Director to hold an informal conference notwithstanding the clear discretion afforded by Section 406(k) to the Director. *Id.* at 3 n.2.

The Director's discretion is part of Wyoming's federally-approved state program and the law of Wyoming. The Council does not have authority to order an informal conference contrary to state law.

SMCRA is federal legislation addressing surface coal mining operations. *See* 30 U.S.C. § 1202. SMCRA uses a system of cooperative federalism, "in which responsibility for the regulation of surface coal mining in the United States is shared between the U.S. Secretary of the Interior and State regulatory authorities." *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275, 288 (4th Cir. 2001); *see* 30 U.S.C. §§ 1253 through 1255. "Under this scheme, Congress established in SMCRA "minimum national standards" for regulating surface coal mining and encouraged the States, through an offer of exclusive regulatory jurisdiction, to enact their own laws incorporating these minimum standards, as well as any more stringent, but not inconsistent, standards that they might choose." *Id.* "Once the Secretary is satisfied that a State program meets these requirements and approves the program, the State's laws and regulations implementing the program become operative for the regulation of surface coal mining, and the State officials administer the program, *see id.* § 1252(e), giving the State "exclusive jurisdiction over the regulation of surface coal mining" within its borders, *id.* § 1253(a)." *Bragg*, 248 F.3d at 288. If a state does not have an approved program, or if the Secretary of the Interior, through the Office of Surface Mining, withdraws approval of the state program, then the Secretary implements a federal program and the Office of Surface Mining obtains exclusive regulatory jurisdiction in the state. *Id.* at 288-89; § 30 U.S.C. § 1254(a).

Thus, SMCRA provides for *either* State regulation of surface coal mining within its borders *or* federal regulation, but not both. The Act expressly provides that one or the other is exclusive, *see* 30 U.S.C. §§ 1253(a), 1254(a), with the exception that an approved State program is always subject to revocation when a State fails to enforce it, *see id.* §§ 1253(a); 1271(b). Federal oversight of an

approved State program is provided by the Secretary's obligation to inspect and monitor the operations of State programs. *See id.* §§ 1267, 1271. Only if an approved State program is revoked, as provided in § 1271, however, does the *federal* program become the operative regulation for surface coal mining in any State that has previously had its program approved. *See id.* §§ 1254(a), 1271.

In sum, because the regulation is mutually exclusive, either federal law or State law regulates coal mining activity in a State, but not both simultaneously. Thus, after a State enacts statutes and regulations that are approved by the Secretary, these statutes and regulations become operative, and the federal law and regulations, while continuing to provide the “blueprint” against which to evaluate the State's program, “drop out” as operative provisions. They are reengaged only following the instigation of a § 1271 enforcement proceeding by the Secretary of the Interior.

Bragg, 248 F.3d at 289 (emphasis in original). In short, Wyoming's approved statutes and regulations that implement its State program are operative and control. Only if federal approval is revoked would federal regulations apply as the Resource Council argues.

Since 1980, the Department has served as Wyoming's state regulatory authority and has held exclusive jurisdiction to regulate surface coal mining operations in Wyoming. 30 C.F.R. § 950.10 (approving Wyoming program). Wyoming's state program includes applicable statutes within the Wyoming Environmental Quality Act and the Land Quality Division's Coal Regulations. These include the informal conference provisions in Wyoming Statute § 35-11-406(k) and Chapter 3, Section 3(a) of the Department's Rules of Practice and Procedure. *See* 45 Fed. Reg. 78674, 78678 (approving Wyoming's state program). As part of Wyoming's federally-approved program, these provisions are the laws that regulate surface coal mining in Wyoming. *See Bragg*, 248 F.3d at 289.

The Council is an administrative agency and, as such, “is limited in authority to powers legislatively delegated.” *Amoco Prod. Co. v. Wyo. State Bd. of Equalization*, 12 P.3d 668, 673 (Wyo. 2000). “Administrative agencies are creatures of statute and their power is dependent upon

statutes, so that they must find within the statute warrant for the exercise of any authority which they claim.” *Id.* “An agency is wholly without power to modify, dilute or change in any way the statutory provisions from which it derives its authority.” *State ex rel. Dep’t of Workforce Services v. Clements*, 2014 WY 68, ¶ 14, 326 P.3d 177, 181 (Wyo. 2014) (quoting *Wyo. Dep’t of Revenue v. Guthrie*, 2005 WY 79, ¶ 18, 115 P.3d 1086, 1093 (Wyo. 2005)). Through Wyoming Statute § 35-11-406(k), the Act grants the Director discretion to deny requests for informal conferences, and the Council does not have the authority to modify or ignore the Act. *See id.*

Wyoming’s program complies with SMCRA, and any question about the stringency of Wyoming’s program is one for the federal Office of Surface Mining Reclamation and Enforcement, not the Council. The Act and the Department’s regulations are part of Wyoming’s federally-approved program under SMCRA, and are therefore the laws that govern surface coal mining in Wyoming and the laws that both the Department and the Council must enforce. By asking this Council to decide that an informal conference is mandatory despite contrary state law, the Resource Council asks this Council to invalidate or ignore lawfully enacted Wyoming statutes based upon federal laws that are not the operative laws in Wyoming. *See Mot. to Remand* at 3 n.2. The Council should deny that request and instead confine its decision to the requirements of Wyoming law.

IV. Conclusion

Whether the Council should proceed with this contested case proceeding depends on whether the objections should be construed as requests for a hearing. If, like the Director, the Council construes the objectors’ informal conference requests as requests for a contested case hearing, the Council should proceed with the hearing. If it does not, the Council should simply dismiss this case. The application will then return to the Director for his decision. In either event,

the Director has discretion under Wyoming law to grant or deny informal conference requests. That law is controlling in Wyoming because it is part of Wyoming's federally-approved state program under SMCRA. Accordingly, the Council should deny the Resource Council's motion to remand.

Dated this 15th day of February, 2017.



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CERTIFICATE OF SERVICE

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