



*Mine Permit* (“Petition”) regarding its objections to the permit application submitted by Brook Mining Company, LLC. Among other claims in its petition, the Resource Council argues that “the EQC should immediately issue an order remanding the Resource Council’s objections to the DEQ and ordering the agency to hold an informal conference on the objections, held pursuant to the Environmental Quality Act, SMCRA, and associated state and federal regulations.” *Petition* at 8, ¶ 42.

As explained below, the Council should dismiss the Resource Council’s request to remand this case because there is no legal basis upon which this Council may grant the requested relief. *See* Wyo. R. Civ. P. 12(b)(6). Under Wyoming Statute § 35-11-406(k), the Director has discretion to grant or deny the Resource Council’s informal conference request. In this instance, the Director denied the Resource Council’s request. Therefore, the Resource Council is not legally entitled to an informal conference and this Council has no basis to remand the case as requested.

## **II. Standard for Motion to Dismiss**

Under Wyoming Rule of Civil Procedure 12(b)(6), a party may move to dismiss all or part of a complaint because of the complaint’s “failure to state a claim upon which relief can be granted.” When reviewing a motion to dismiss under Rule 12(b)(6), a court “accept[s] the facts stated in the complaint as true and view[s] them in the light most favorable to the plaintiff.” *Accelerated Receivable Solutions v. Hauf*, 2015 WY 71, ¶ 10, 350 P.3d 731, 734 (Wyo. 2015). The court “will sustain such a dismissal when it is certain from the face of the complaint that the plaintiff cannot assert any fact which would entitle him to relief.” *Id.* Under its rules, this Council may consider motions to dismiss. *Rules Wyo. Dep’t of Env’tl. Quality, Practice & Procedure* ch. 2, §§ 1, 3, and 14.

### III. Argument

The Resource Council argues that “DEQ is under legal obligation to hold an informal conference on the Resource Council’s objections.” *Petition* at 5-6, ¶ 24.<sup>1</sup> The Resource Council cites several legal provisions to support its argument, yet disregards the operative provision in the Wyoming Environmental Quality Act. *See id.* (citing DEQ Rules of Practice and Procedure Ch. 3, § 3(a); 30 U.S.C. § 1263(b); 30 C.F.R. § 773.6(c)). Accordingly, this Council should dismiss this claim. *See* Wyo. R. Civ. P. 12(b)(6).

Although the Resource Council would like to ignore it, the Act clearly provides the Director with discretion to grant or deny informal conference requests, and the laws cited by the Resource Council do not override that statutory discretion. While the Resource Council did request that the Director hold an informal conference on this permit application, the Resource Council is not entitled to an informal conference because the Director lawfully denied that request.

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 may hold an informal conference, Section 406(k) requires an objector to request the conference, and requires the Director

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<sup>1</sup> The Resource Council made an identical request in its motion for remand filed in Council Docket 17-4801, which was the original Council matter regarding objections to the Brook Mine permit application. The Resource Council and the other parties all fully briefed and argued that issue. Presumably, the Resource Council will raise the same arguments to support its current request that it raised in the earlier motion to remand. Therefore, the Department hereby incorporates the contents of the its brief filed in Council Docket 17-4801, entitled *Department of Environmental Quality’s Brief on the Environmental Quality Council’s Jurisdiction Over this Contested Case Proceeding*.

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 discretion over the second requirement with the Director. *See id.*

The Resource Council cites Chapter 3, Section 3(a) of the Department's Rules of Practice and Procedure to support its request for remand. *Petition* at 5-6, ¶ 24. When it previously requested remand in Docket 17-4801, the Resource Council argued that this regulation requires the Director to hold an informal conference whenever one is requested. *Mot. to Remand* at 3 (Docket 17-4801).

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.

*Rules Wyo. Dep't of Envtl. Quality, Practice & Procedure* ch. 3, § 3(a).

One sentence in that rule states, "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." *Id.* However, that 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).

The federal statute (30 U.S.C. § 1263(b)) and federal regulation (30 C.F.R. § 773.6(c)) that the Resource Council cites also do not override the Director’s discretion under the Act because Wyoming Statute § 35-11-406(k) is a part of Wyoming’s federally-approved state program under the federal Surface Mining Control and Reclamation Act (“SMCRA”). 30 C.F.R. § 950.10; 45 Fed. Reg. 78673-74, 78678. The state program is what gives the Department, rather than a federal regulatory agency, authority under SMCRA to permit and regulate surface coal mining operations in Wyoming. 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 Reclamation and Enforcement, 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. Federal regulations would only apply if, at the conclusion of the procedures required by SMCRA, the Secretary revokes federal approval of Wyoming's statutes and rules. *See* 30 U.S.C. § 1271.

Wyoming's federally-approved state program includes 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. Therefore, 30 U.S.C. § 1263(b) and

30 C.F.R. § 773.6(c) are not the applicable laws governing the Director's discretion or the Resource Council's request for an informal conference.<sup>2</sup>

Despite the Resource Council's preference, the Council cannot ignore the provisions of Wyoming Statute § 35-11-406(k). 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.* Therefore, the Resource Council's interpretation of the informal conference provisions in the Act and the Department's Coal Rules is incorrect.

In this case, the Director denied the request for an informal conference after making the determination required by Wyoming Statute § 35-11-406(k). *See Petition*, Ex. 2. Accordingly, the Resource Council is not entitled to an informal conference on its objections to the Brook Mine permit application.

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<sup>2</sup> The Resource Council states that it intends to file a complaint with the Office of Surface Mining Reclamation and Enforcement under 30 C.F.R. § 733.12(a)(2) regarding the Director's denial of the Resource Council's request for an informal conference. *Petition* at 3, ¶ 9 n.3. The Resource Council has a right to do so, but it is of no consequence to the claim pending before this Council.

#### IV. Conclusion

Under its rules of practice and procedure and Wyoming Rule of Civil Procedure 12(b)(6), this Council should dismiss the Resource Council's request that this Council remand this case to the Director and order him to hold an informal conference because this Council cannot grant the requested relief. Under a Wyoming statute, the Director has discretion to grant or deny requests for informal conferences on objections to a surface coal mining permit application. The Council must enforce that Wyoming statute because it is state law and is part of Wyoming's federally-approved state program under SMCRA. In this case, the Director lawfully exercised his discretion in denying the Resource Council's informal conference request. Consequently, the Resource Council is not entitled to an informal conference on its objections and there is no legal basis for this Council to remand the case and order the Director to hold an informal conference.

THEREFORE, the Department respectfully requests that the Council dismiss the Resource Council's request to remand this case to the Director and order him to hold an informal conference.

Dated this 7<sup>th</sup> day of March, 2017.



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**CERTIFICATE OF SERVICE**

I hereby certify that on the 7<sup>th</sup> day of March, 2017, a copy of the foregoing document was filed electronically with the Wyoming Environmental Quality Council's online docket system and copies were served electronically via that system on the following:

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