



*Dismiss* at 4-8. In addition, the Resource Council alleges that the Director may have acted arbitrarily, capriciously, or abused his discretion (which the Resource Council argues he does not have) when he denied the Resource Council's informal conference request. *Response to Mot. to Dismiss* at 8-11. Neither of these arguments is compelling.

As explained in the Department's motion to dismiss, the statutes and regulations do not provide the Council the authority to hear an appeal of an informal conference denial. Nor do they require the Director to hold an informal conference on the Resource Council's objections to the Brook Mine permit application. *Mot to Dismiss* at 3-7. The Resource Council's claim that it is entitled to an informal conference is unsupported and should be dismissed. The law grants the Director discretion over informal conference requests. Also, the federal Office of Surface Mining Reclamation and Enforcement knew about this discretion and specifically approved those provisions as part of Wyoming's state program regulating surface coal mining. This Council cannot remand this case or otherwise grant relief based on a claim that contradicts the law. Moreover, the Director did not act arbitrarily, capriciously, or abuse his discretion when he considered the Resource Council's informal conference request. The question of whether or not he did does not change the fact that he has that discretion and that this Council should dismiss the Resource Council's claim that he lacks discretion.

**I. The Council does not have the authority to hear an appeal of the Director's denial of an informal conference request.**

The Wyoming Environmental Quality Act ("Act") does not specifically provide for an interested person to appeal to this Council the Director's decision denying that person's request for an informal conference. Furthermore, Wyoming Statute § 35-11-406(k) prohibits such an appeal because it would make that statutory framework unworkable and be contrary to the statute's purpose.

Administrative agency actions are only reviewable to the extent that statutes have made them so. *Wyo. Dep't of Env'tl. Quality v. Wyo. Outdoor Council*, 2012 WY 135, ¶ 27, 286 P.3d 1045, 1052 (Wyo. 2012). Thus, agency action is not reviewable unless a statute, ordinance, or constitutional provision provides for review. *See, e.g., Bd. of Cnty. Comm'rs of Sublette Cnty. v. State*, 2001 WY 91, ¶ 18, 33 P.3d 107, 114 (Wyo. 2001). For the Department and the Council, the Act describes each agency's authority, including how the agencies' various actions may be reviewed. *See People v. Fremont Energy Corp.*, 651 P.2d 802, 809 (Wyo. 1982). The Act confers subject matter jurisdiction on the Council to review certain actions of the Department but not others. *See id.* at 810 (holding that under Wyoming Statutes § 35-11-701(c), a person may seek the Council's review of a cease and desist order regarding a non-coal mining violation but not a notice of violation without an accompanying cease and desist order).

The Act specifically grants the Council the authority to hold contested case hearings on objections filed against mining permit applications. Wyo. Stat. Ann. § 35-11-406(k). It does not grant similar authority to hear an appeal of the Director's informal conference decision. The absence of such provision demonstrates the Legislature did not intent to provide for such an appeal. *See People v. Fremont Energy Corp.*, 651 P.2d 802, 810 (Wyo. 1982).

Moreover, the informal conference and contested case process established under Wyoming Statute § 35-11-406(k) would be unworkable if an interested person was able to appeal the denial of an informal conference. The purpose of holding an informal conference or a contested case hearing under Wyoming Statute § 35-11-406(k) is to allow an interested person to come before a decision-maker (either the Director or the Council) and argue and provide evidence in support of their objections to a permit application. *See Wyo. Stat. Ann. § 35-11-406(k)*. Either type of proceeding accomplishes that purpose. Therefore, Wyoming Statute § 35-11-406(k) provides that

if the Director, in his statutory discretion, denies an informal conference, the matter proceeds as a contested case before the Council. Wyo. Stat. Ann. § 35-11-406(k), (p). Also, even when the Director holds an informal conference, the Act provides the right to appeal the Director's ultimate decision to the Council for a *de novo* hearing. So, even after participating in an informal conference, the interested person can still have their objections heard with all the benefits and protections provided through the formal contested case process. *Id.*

An appeal to the Council of the Director's denial of an informal conference request is contrary to the language and purpose of Wyoming Statute § 35-11-406(k) and (p). Such an appeal would allow an objector to circumvent the time limits the statute establishes to ensure an expedient resolution of the objections. In addition, such an appeal pursues a remedy other than resolution of the objections. In effect, the Resource Council is asking this Council to compel the Director to hold an informal conference that the Resource Council could then appeal *de novo* for a contested case hearing before the Council. That result provides the very same opportunity to be heard that the Resource Council currently has. The Act guarantees that an interested person like the Resource Council can have their objections heard prior to a permit decision, and that purpose is accomplished by proceeding directly to a Council hearing on the merits. The statute explicitly provides for this opportunity. *See* Wyo. Stat. Ann. § 35-11-406(k), (p).

Therefore, under the language of the Act, and specifically the language of Wyoming Statute § 35-11-406(k), this Council does not have authority to hear an appeal that would distort the Act's public participation process. That process guarantees members of the public the right to have their objections heard in an expedient manner. The Resource Council is attempting to circumvent that expedient process instead of availing itself of the due process afforded under the statute. The Council should dismiss the Resource Council's appeal of the Director's decision.

**II. The Department agrees that the Council's general authority to remand is not at issue in the Department's motion to dismiss.**

The Resource Council asks this Council to remand this case to the Director for an informal conference based on the Resource Council's claim that the Department's regulations require the Director to hold a conference. *Petition* at 2 (¶ 5) and 5-6 (¶¶ 24-25). In its response to the Department's motion to dismiss, the Resource Council argues that the Department's motion focuses on whether remanding the case is an appropriate remedy, rather than on the Resource Council's claim that it is entitled to an informal conference. *Response to Mot. to Dismiss* at 3-4. Although the Resource Council mischaracterizes the motion to dismiss, the Department's motion does not relate to what form of remedy would be appropriate for the Resource Council's claim. Instead, the motion seeks dismissal of the Resource Council's claim because the Department has no legal obligation to grant the Resource Council's informal conference request. *See, e.g., Mot. to Dismiss* at 1-2.

The Department agrees with the Resource Council that, as an adjudicative body, this Council may remand matters to the Department *when there is a legal basis for doing so*. Here, the law does not support the Resource Council's claim that it is entitled to an informal conference and, therefore, this Council must dismiss that claim and deny any form of relief based upon that claim, remand or otherwise.

**III. The Department does not have a legal obligation to grant the Resource Council's request for an informal conference.**

In its response to the Department's motion to dismiss, the Resource Council argues in support of its claim that it is entitled to an informal conference. *See Response to Mot. to Dismiss* at 4-8. While most of those arguments are repeated from the earlier proceeding, Docket 17-4801, and the Department will not repeat its response to those arguments here, the Resource Council's response also raises some new arguments.

In particular, referring to Chapter 3, Section 3(a) of the Department’s Rules of Practice and Procedure, the Resource Council alleges that “In fact, for the history of the Wyoming program DEQ has granted informal conferences when requested. [The Office of Surface Mining Reclamation and Enforcement] has relied on this regulation – and DEQ action under the regulation – to hold that DEQ is in compliance with the federal requirements.” *Response to Mot. to Dismiss* at 7-8. This allegation has at least two flaws.

First, the Resource Council provides no support that the Office of Surface Mining has in any way relied on the Director’s historic granting of informal conferences. Instead, it only provides implications without any citation to facts or law. Further, the Resource Council’s implication directly conflicts with the law. The Department’s practice, no matter how faithfully followed, cannot modify or nullify Wyoming statute. *See Fullmer v. Wyo. Employment Sec. Comm’n*, 858 P.2d 1122, 1124 (Wyo. 1993) (“[A]n administrative agency is bound to follow the applicable statutes and its own rules and regulations.”); *State ex rel. Dep’t of Workforce Services v. Clements*, 2014 WY 68, ¶ 14, 326 P.3d 177, 181 (Wyo. 2014) (“An agency is wholly without power to modify, dilute or change in any way the statutory provisions from which it derives its authority.”); *see also Wyoming Downs Rodeo Events, LLC v. State*, 2006 WY 55, ¶ 14, 134 P.3d 1223, 1230 (Wyo. 2006) (“An agency may not rewrite a statute through its rulemaking power.”).

Second, contrary to the silent reliance assumed by the Resource Council, the Office of Surface Mining was aware of the discretionary nature of the informal conference statute and approved it. In its *Conditional Approval of the Permanent Program Submission From the State of Wyoming Under the Surface Mining Control and Reclamation Act of 1977*, the Office of Surface Mining received the following public comment: “Wyoming does not provide an automatic right to

informal permit conferences, as required by 30 CFR 840.15.” 45 Fed. Reg. 78678 (Nov. 26, 1980).

The Office of Surface Mining responded to that comment as follows:

[T]he Secretary found that Wyoming’s provisions for holding informal conferences on permit applications and for providing access to the mine plan area are acceptable. Under W.S. 35-11-406(k), an informal conference will be held if the administrator determines that the nature of the complaint or the position of the complainants indicates that an informal conference is preferable to a contested case proceeding. Wyoming has promulgated language in Rule III 3a of the Rules of Practice and Procedure which are consistent with 30 CFR 784.14 concerning informal conferences.

*Id.*<sup>2</sup> The comment response demonstrates that the Office of Surface Mining knew that Wyoming Statute § 35-11-406(k) provided the Department with discretion to grant or deny informal conference requests. The Secretary of the Interior specifically found those provisions were “acceptable.” *See id.*

The provisions of Wyoming Statute § 35-11-406(k) granting the Department discretion over informal conference requests were part of Wyoming’s state regulatory program when it was first approved in 1980. *See* 45 Fed. Reg. at 78673-74, 78678. Since that time, those statutory provisions have remained the operative law in Wyoming which govern informal conference requests. *See Bragg v. West Virginia Coal Ass’n*, 248 F.3d 275, 289 (4th Cir. 2001) (“[A]fter 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.”).

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<sup>2</sup> In 1980, Wyoming Statute § 35-11-406(k) stated that the Land Quality Division Administrator, rather than the Director of the Department, would hold informal conferences and exercise discretion over requests for informal conferences. 1980 Wyo. Sess. Laws ch. 67, § 1. In 1992, the Legislature amended that language and substituted the Director in place of the Administrator. 1992 Wyo. Sess. Laws ch. 60, § 2. The Legislature did not modify any other language in the statute, including the language describing the Administrator’s (now the Director’s) discretion over granting informal conferences. *Id.*

The right to receive an informal conference is therefore governed by Wyoming Statute § 35-11-406(k), not federal law. Under the controlling state law, the Director is not required to hold an informal conference whenever one is requested.

**IV. The Resource Council's new claim that the Director acted arbitrarily, capriciously, or in abuse of his discretion over informal conferences does not change the fact that the Department does not have a legal obligation to hold an informal conference.**

The Department's motion to dismiss relates to the Resource Council's original claim that it is entitled by law to an informal conference. *Mot. to Dismiss* at 2, 8. As previously noted, the Resource Council continues to assert that claim through its response to the Department's motion to dismiss. *See Response to Mot. to Dismiss* at 4-8. However, in addition to that original claim, the Resource Council now asserts that Director acted arbitrarily and capriciously and abused his discretion when he denied the Resource Council's informal conference request. *Response to Mot. to Dismiss* at 8-11. The Resource Council could have raised this argument in its petition, but it did not. *See Petition* 1-9. In effect, the Resource Council is asking to amend its petition for hearing to insert this new claim.<sup>3</sup> However, the Resource Council's new alternative claim is irrelevant to the Department's motion to dismiss.

The Resource Council's new claim assumes that the Director has discretion under Wyoming Statute § 35-11-406(k), an assumption completely at odds with its original claim. *See Response to Mot. to Dismiss* at 7-9. The new claim is therefore completely discrete from the

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<sup>3</sup> The Resource Council alleges that it reserved its "right to supplement its objections and ground for hearing based on discovery provided by DEQ and Brook as part of this hearing process." *Response to Mot. to Dismiss* at 8. The Resource Council appears to be claiming that it has an unlimited right to amend its petition at any time during this short contested case process. However, the Resource Council's ability to amend its petition is subject to the Council's discretion. *Rules Wyo. Dep't of Envtl. Quality, Practice & Procedure* ch. 2, § 13(a). Amending a petition late in this already short process could prejudice the Department or Brook Mining with new allegations at the last minute and without an opportunity to respond. The Department therefore reserves its right to object to new claims the Resource Council may devise in the future.



Resource Council's original claim and should be treated as such. In other words, the Council should still dismiss the Resource Council's original claim for the reasons stated in the Department's motion to dismiss, regardless of whether the Council decides to entertain the Resource Council's new theory.

**V. The Director did not act arbitrarily, capriciously, or abuse his discretion when he denied the Resource Council's request for an informal conference.**

The Director's denial of the Resource Council's informal conference request was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, as the Resource Council now speculates. *See Response to Mot. to Dismiss* at 8-11. The Resource Council's mere speculation does not change that conclusion, nor can speculation satisfy the legal standard necessary to set aside the Director's denial of the informal conference.

As the legal basis of its new claim, the Resource Council cites the Wyoming Administrative Procedure Act. Wyo. Stat. Ann. § 16-3-114(c)(ii). Under that act, a district court conducting judicial review of a final administrative action must “[h]old unlawful and set aside agency action, findings and conclusions” that the district court finds are “[a]rbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” Wyo. Stat. Ann. § 16-3-114(c)(ii). To make that finding, a court would apply the following standard:

The arbitrary and capricious test requires the reviewing court to review the entire record to determine whether the agency reasonably could have made its finding and order based upon all the evidence before it. The arbitrary and capricious standard is more lenient and deferential to the agency than the substantial evidence standard because it requires only that there be a rational basis for the agency's decision.

*Wilson Advisory Comm. v. Bd. of County Comm'rs*, 2012 WY 163, ¶ 21, 292 P.3d 855, 861 (Wyo. 2012) (internal citations omitted). “This standard also works as a “safety net” to catch agency action which ... is not easily categorized or fit to any one particular standard.” *Id.* (internal

quotation omitted). In this case, the Director clearly had a rational basis for denying the Resource Council's informal conference request.

Time is of the essence in these types of cases. The 20-day time limit for holding an informal conference or a contested case hearing under Wyoming Statute § 35-11-406(k) begins immediately following the end of the objection period. The Director must make a quick decision regarding the proper path. In addition, the time limit only allows for either an informal conference or a contested case hearing, but not both proceedings. Wyo. Stat. Ann. § 35-11-406(k). Holding an informal conference on some objections and a contested case hearing on others would be unworkable under the constrained time limit. That scenario would result in the Council having to hold one hearing within the statutory 20 days, and then potentially another hearing on the same application when the Director makes a decision following the informal conference. Also, until the Director decides whether to grant an informal conference, the parties do not know whether to prepare for an informal conference or a contested case hearing. The Director does not have the luxury of lengthy deliberation because every day he spends forming his decision is one less day the applicant, the objectors, and agency staff have to prepare for a 20-day proceeding.

This case well illustrates the difficulties presented by the statutory time constraints. During the objection period for the Brook Mine permit application the Department received fifteen separate objection letters from interested persons. *See* objection letters filed in EQC Docket 17-4801. The objection letters began arriving at the Department on January 12, 2017, and then continued to come in until the objection deadline, January 27, 2017. *See Ltr. from John Barbula* (filed in Docket 17-4801); *Ltr. from Resource Council* (filed in Docket 17-4801). During that time, the Director and the Department reviewed the letters and considered the objectors' requests for an informal conference. They had already considered the objections and the informal conference

requests from the early objectors by the time they received the Resource Council's letter on the last day of the objection period. Thus, the Director was able to quickly review the late-arriving objection letters and make a final decision on whether "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." See Wyo. Stat. Ann. § 35-11-406(k). The quantity and nature of the objections revealed that if the Director held an informal conference, the conference would not resolve the substantial disputes and the matter would be brought to the Council for a *de novo* hearing, regardless. On January 31, 2017, three *calendar* days after he received the Resource Council's objection letter and three days into the 20-day window, the Director denied the informal conference requests and sent notice of his decision to the parties. See *Ex. 2 to Petition* at 1. As a courtesy, the Director contacted the Council's staff late on the previous Friday afternoon to inform them of the likelihood that he would deny the informal conference requests and refer the objection letters to the Council so that it could hold a contested case hearing under Wyoming Statute § 35-11-406(k).

The Resource Council speculates that it might, through the discovery process, unearth some grounds for a claim that the Director acted arbitrarily and capriciously. *Response to Mot. to Dismiss* at 9-11. But in order to prevail on that claim, the Resource Council must establish that there was no rational basis behind the Director's decision. See *Wilson Advisory Committee*, 2012 WY 163, ¶ 21, 292 P.3d at 861. As stated above, the quantity and nature of the objections in this matter, coupled with the compressed time limits, clearly provide a rational basis for the Director's decision. No amount of discovery will change those facts, and dedicating additional time to the Resource Council's new, meritless claim will only distract from the real issues related to the permit

application objections. Therefore, this Council should dismiss the Resource Council's new claim as well.

## VI. Conclusion

The Department respectfully requests that this Council dismiss the Resource Council's appeal of the Director's denial of an informal conference because it does not have authority under the Act to hear that appeal and because the Resource Council's claim that it is entitled to an informal conference is one for which this Council cannot grant relief. The language of Wyoming Statute § 35-11-416(k) specifically makes informal conferences discretionary, and the Office of Surface Mining both know of this discretion and approved the provisions when it authorized Wyoming's state regulatory program. In addition, the Department requests that this Council dismiss the Resource Council's speculations that the Director acted arbitrarily, capriciously, in abuse of his discretion, or otherwise not in accordance with law when he denied the Resource Council's informal conference request. The Director clearly had a rational basis for his decision and the Resource Council's claim is meritless. For those reasons, the Council also should not grant the Resource Council's request to remand this case to the Director for an informal conference.

Dated this 21<sup>st</sup> day of March, 2017.



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**CERTIFICATE OF SERVICE**

I hereby certify that on the 21<sup>st</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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