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**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING**

**In the Matter of the Appeal of the Notice of )  
Violation and Order Issued to Good Bentonite ) Docket 17-4201A  
Company, LLC, DEQ NOV Docket 5748-17 )**

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**DEPARTMENT OF ENVIRONMENTAL QUALITY'S  
MOTION FOR RECONSIDERATION/CLARIFICATION OF THE  
JANUARY 5, 2018 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

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The Wyoming Department of Environmental Quality ("Department"), through its undersigned counsel, respectfully moves the Environmental Quality Council ("Council") to reconsider or clarify the *Findings of Fact, Conclusions of Law, and Order* ("Findings") it entered on January 5, 2017. The Department brings this motion in the interest of clarifying the Council's final determination for both parties and the record regarding the notice of violation and order at issue in this matter.<sup>1</sup>

As noted in the *Findings*, this case is before the Council pursuant to Wyoming Statute § 35-11-701(c). (*Findings* at 4, ¶ 8, and 5, ¶ 12). Under that statute, when the Director of the Department issues a notice of violation ("NOV"), he may also include an order that requires an alleged violator "to cease and desist from the violation within the time the [D]irector may

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<sup>1</sup> The Department assures the Council that neither its decision on this motion, nor its final determination on this case, will affect the Department's ongoing efforts to work with the permittee to establish a reclamation bond amount for the permit's next bonding period.

determine[.]” Wyo. Stat. Ann. § 35-11-701(c)(i).<sup>2</sup> As was done in this case, the recipient of a cease and desist order from the Department may request a hearing before the Council. Wyo. Stat. Ann. § 35-11-701(c)(ii). The Department’s cease and desist order is “stayed pending the [C]ouncil’s final determination thereon[.]” *Id.* Subsection 701(c)(iii) then identifies the actions the Council may take after holding the requested hearing.

Under Subsection 701(c)(iii), the Council must first determine whether or not a violation alleged in the Department’s NOV and order has occurred. Wyo. Stat. Ann. § 35-11-701(c)(iii). If the Council finds that a violation has occurred, the Council shall take one of three actions: (1) affirm the existing cease and desist order; (2) modify the existing cease and desist order; or (3) “issue an appropriate order or orders for the prevention, abatement or control of the violation involved or for the taking of other corrective action.” *Id.* Alternatively, if the Council finds that a violation has *not* occurred, the Council “shall rescind” the existing cease and desist order. *Id.* Essentially, the statute requires the Council to specifically determine whether a violation has occurred, and then to affirm, modify, replace, or rescind the cease and desist order issued by the Department as appropriate. *See id.*

Unfortunately, the Council has yet to make the initial determination required by the statute and failed to take any one of the actions authorized by the statute. According to the *Findings* in this case: “Following deliberations, a motion to affirm or approve the NOV and order as issued was made and seconded.” (*Findings* at 3, ¶ 5). The vote on that motion was three members in favor and two members against. (*Findings* at 3, ¶ 6). After analyzing the requirements of Wyoming

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<sup>2</sup> In this case, the NOV and order alleged that the permittee had violated the law by failing to provide an adequate amount of reclamation bonding, and it ordered the permittee to cease and desist that alleged violation by providing the Department with the balance of the required bond amount. *See Findings* at 2-3, ¶ 1.

Statute § 35-11-111(d)<sup>3</sup>, the Council concluded: “For a matter or motion to be approved by the Council, a majority vote of those on the Council is required—that did not happen in this case when only three members voted for the motion to approve the NOV and order.” (*Findings* at 6, ¶ 18). The Council therefore concluded “that the NOV and order is not approved or affirmed because four Council members failed to approve the motion to affirm the NOV and order.” (*Findings* at 5, ¶ 13). The Council ultimately ordered that the Department’s NOV and order were “not approved.” (*Findings* at 7).

The *Findings* do not constitute a “final determination” on the order as required by Wyoming Statute § 35-11-701(c). First, the Council did not find whether or not the alleged violation occurred as required by the statute. Second, the Council did not, “by a majority vote of those on the [C]ouncil,” affirmatively take one of the actions available to it under Subsection 701(c)(iii) (if a violation occurred: affirm, modify, or replace; if a violation did not occur: rescind). *See* Wyo. Stat. Ann. § 35-11-701(c)(iii). While the *Findings* demonstrate that the Council did not choose to affirm the Department’s order, the *Findings* do not contain the required factual findings or identify the action the Council has chosen regarding the Department’s order going forward. Accordingly, it appears that the cease and desist order is still “stayed pending the [C]ouncil’s final determination thereon[.]” Wyo. Stat. Ann. § 35-11-701(c)(ii).

The Department appreciates the requirements of Wyoming Statute § 35-11-111(d) and the Council’s interpretation of those requirements. Further, the Department is not by this motion disputing the Council’s conclusion that the motion to approve or affirm the Department’s order failed to obtain sufficient affirmative votes. However, the Department is unable to ascertain its

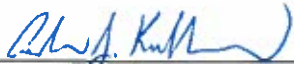
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<sup>3</sup> The statute states, in part: “All matters shall be decided by a majority vote of those on the council.” Wyo. Stat. Ann. § 35-11-111(d).

proper course of action moving forward without a final determination by the Council that meets the statutory requirements.

THEREFORE, the Department respectfully requests that the Council reconsider or clarify its *Findings*. Specifically, the Department asks the Council to find whether or not a violation occurred in this matter. Then, based upon that finding, the Department asks the Council to make a final determination by taking one of actions required by Wyoming Statute § 35-11-701(c)(iii).

Respectfully submitted this 24<sup>th</sup> day of January, 2018.

  
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### **CERTIFICATE OF SERVICE**

I hereby certify that on the 24<sup>th</sup> day of January, 2018, a copy of the foregoing document was filed electronically with the Wyoming Environmental Quality Council's online docket system and copies were served by electronic mail on the following:

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