STATE OF WYOMING	)	IN THE DISTRICT COURT
	) ss	
COUNTY OF LARAMIE	)	FIRST JUDICIAL DISTRICT

IN THE MATTER OF THE WYOMING ENVIRONMENTAL QUALITY COUNCIL'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (EQC Docket No. 17-4802, In Re Brook Mine Application) AND THE WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S DECISION ON BROOK MINING COMPANY, LLC'S PERMIT APPLICATION (TFN 6 2/025)	)	Civil Action No. 188-771

ORDER REVERSING THE DECISIONS OF THE ENVIRONMENTAL QUALITY COUNCIL

AND THE

DEPARTMENT OF ENVIRONMENTAL QUALITY

This matter came before the Court on an appeal filed by Brook Mining Company, LLC ("Brook") from an Order of the Wyoming Environmental Quality Council (the "Council") and subsequent denial of its permit to mine by the Department of Environmental Quality ("DEQ"). After careful review of the matter, the Court reverses the decision of the Council and vacates the subsequent action taken by DEQ and remands the matter for a determination by the Director on the merits of Brook's permit application.

INTRODUCTION

This appeal concerns an issue of first impression: the proper role of the Council in the permit application process for surface coal mines under Wyo. Stat. Ann. § 35-11-406.

The Council concluded that its role is to determine whether a mine permit should be issued when members of the public have objected to a permit application and the Director has decided not to hold an informal conference to consider those objections. The Council's interpretation of its authority effectively makes it the agency which decides whether a permit should be granted. As explained below, the Court finds that the Council's interpretation was erroneous and contrary to law.

The Wyoming Environmental Quality Act (the "Act") entrusts the final permit decision to the Director, not the Council. Prior to the issuance of any permit the Council does have a role - receiving objections and sending those objections to the Director before he makes an independent decision on the permit. But the Council does not decide to grant or deny a permit application, and the Council does not make the substantive, technical assessment required to approve a permit application as containing no deficiencies. Those functions are entrusted to the Director of DEQ who has the requisite technical expertise.

The Court therefore reverses the Council's findings and interpretation of its role in the permit application process; vacates the Council's Order applying an incorrect legal standard to its review of permit objections; and remands the matter to the Director of DEQ to make a determination on the merits of Brook's permit application, which includes the authority to place conditions on the permit issued.

FACTUAL HISTORY

On October 31, 2014, Brook applied for a permit to mine coal in an area north of Sheridan, Wyoming. DEQ conducted a two-stage review of Brook's application, as required by the Act. DEQ first reviewed for "completeness", as the Act defines that term, certifying the application complete within a few days. DEQ then reviewed the substance of the application for any "deficiencies", as the Act defines that term.[1] After more than a year analyzing Brook's application and additional information Brook provided, DEQ found Brook's application had no deficiencies.[2]

DEQ then directed Brook to publish its permit application for public comment. During the public comment period, DEQ received several objections and requests for an informal conference with the Director. On January 30, 2017, the Director declined to hold an informal conference and referred the permit application to the Council for "their review and determination at a contested case hearing." The Council scheduled a public hearing on the public comments and objections to Brook's permit application to take place from February 13-14, 2017, which was within the 20-day period set out by § 406(k) of the Act.

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[1] DEQ refers to its review for "deficiencies" as the technical review process and a finding of no deficiency as technically adequate.

[2] This process also included Brook obtaining an Order in Lieu of Surface Owner Consent from the Council. That decision was affirmed by this Court in Civil Action No. 187-120.

After the initial scheduling conference, several parties objected to the Council scheduling the hearing so soon after the close of the public comment period and the failure of the Director to hold an informal conference. On its own motion, the Council vacated the hearing and ordered briefing on "whether there is a proper appeal before the Council at this time that necessitates a contested case." Brook argued that the Council was required to hold a public hearing within 20 days of the close of the public comment period under § 406(k) of the Act. The Council, however, found that "there currently is not a proper appeal before it, necessitating a contested case. Currently, no interested person, as part of this docket, has filed a petition for a contested case with the Council that would allow the Council to exercise its jurisdiction over the Brook Mine permit application." As a result, the Council dismissed the case.

After the dismissal, the three parties who objected to the Council's original scheduling order, Big Horn Coal, Powder River Basin Resource Council, and David Fisher and Mary Brezik-Fisher, filed petitions for a contested case hearing to address their objections to Brook's permit application. The Council consolidated these requests and scheduled a hearing for May 22-26, 2017 and June 7-8, 2017, which was 150 days after the close of the public comment period.

At the hearing, DEQ's experts testified that Brook's permit application met all the applicable statutes and regulations. DEQ's experts testified that the permit application

should be approved. DEQ's and Brook's witnesses also rebutted the specific objections to the application.

Four months later, on September 27, 2017, the Council issued its decision. The Council concluded as a matter of law that DEQ erred in not making the findings required under § 406(n) of the Act before determining the application was complete. The Council concluded that the findings in § 406(n) of the Act "are a prerequisite or condition precedent to the Council considering whether the application should be approved. As a result, the Council finds and concludes that at this time, it is without authority to approve the permit application as a matter of law." Because DEQ had not made the findings under § 406(n) of the Act, including the cumulative hydrologic impact assessment (CHIA), the Council found "Brook's permit application is not accurate or complete because the CHIA has not been produced."

In addition to the Council's findings regarding § 406(n) of the Act, the Council found Brook's application deficient in the areas of hydrology, subsidence, and blasting. For hydrology, the Council found that "more information and planning is needed." The Council ordered Brook's application not be approved and directed Brook to "complete and revise its permit application and then resubmit it to the Division for the administrator to perform his mandatory section 406(n) determinations which are required to be performed prior to the permit application being declared 'suitable for publication' under section 406(h)."

Two weeks after the Council's decision, on October 11, 2017, the Director sent Brook a letter stating he "reviewed the [Council's] Order and determined that Brook's application cannot be approved in its current form…[.]" The Director cited the Council's findings about "procedural and substantive deficiencies" with Brook's application. Specifically, he referred to the Council's findings about § 406(n) occurring "prior to [DEQ] deeming the application suitable for publication." The Director denied Brook's application "without prejudice to Brook's ability to supplement the application under the process described in the [Council's] Order."

Brook timely appealed the Council's decision and the Director's denial of its application.

STATEMENT OF ISSUES ON APPEAL

The following issues are presented in this appeal: (1) whether the Council acted within its statutory authority in issuing its decision; (2) whether the Council's procedure violated the Act; and (3) whether the Director erred in denying the permit application based on the Council's decision.

STANDARD OF REVIEW

The Wyoming Administrative Procedure Act authorizes courts to review agency decisions, including review of "all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." Wyo. Stat. Ann. § 16-3-114(c). A court may set aside an agency's decision if

the decision was: (1) arbitrary, capricious, an abuse of discretion, or not in accordance with law; (2) contrary to the constitution; (3) in excess of the agency's statutory jurisdiction; (4) contrary to procedure required by law; or (5) unsupported by substantial evidence. Wyo. Stat. Ann. § 16-3-114(c)(ii)(A)-(E).

To fix confusion about these statutory standards and unify case law, the Wyoming Supreme Court has explained the statutory standards call for review of an agency's findings of fact, conclusions of law, and procedure. *See Dale v. S&S Builders, LLC*, 2008 WY 84, ¶¶ 22-26, 188 P.3d 554, 561-62 (Wyo. 2008). Courts use the substantial evidence test to review an agency's findings of fact. *Id.* at ¶ 22, 188 P.3d at 561. Courts review the agency's legal conclusions *de novo*, affirming if the conclusion "is in accordance with the law." *Id.* at ¶ 26, 188 P.3d at 561-62. Courts apply the statutory arbitrary and capricious standard as a "safety net" for agency action that "prejudices a party's substantial rights" or may violate one of the other five statutory standards but "is not easily categorized or fit to any one particular standard." *Id.* at ¶ 23, 188 P.3d at 561.

Here, Brook challenges only the Council's legal conclusions, asserting that the Council and the Director have failed to follow the proper procedure under the Act. Thus, the Court reviews the issues in this case *de novo*. *Id.* at ¶ 26, 188 P.3d at 561-62.

LEGAL ANALYSIS

The central issue raised by Brook's appeal is the proper role of the Council under subsections (k) and (p) of Wyo. Stat. Ann. § 35-11-406. When the Director declines to

hold an informal conference to hear objections regarding a permit application, subsection (k) directs the Council to hold a hearing on any objections within 20 days after the deadline for filing objections. Here, the Council declined to hold a hearing within 20 days, as required by the statute, and instead directed the objectors to initiate a new contested case proceeding formally challenging the permit application. The Council then decided the permit application was insufficient, and directed the Director of DEQ to deny issuance of permit. This process results in the Council becoming the permitting agency whenever a hearing is held under subsection 406(k) of the Act.

Respondents contend that the Council may decide whether to grant or deny a permit based on the language providing that "the council shall issue findings of fact *and a decision* on the application[.]" (emphasis added). Wyo. Stat. Ann. § 35-11-406(p). Respondents argue that this language gives the Council the authority to decide whether a permit should be issued and obligates the Director to implement that decision within 15 days.

Brook contends, on the other hand, that this interpretation of the Council's role in §§ 406(k) and 406(p) of the Act violates the requirements of the Surface Mining Control and Reclamation Act ("SMCRA"), which Wyoming must follow in order to regulate mining activities within its boundaries. Under SMCRA, a state may assume primacy over the regulation of mining activities if it has an approved plan in place which complies with the requirements of SMCRA. SMCRA sets forth several specific requirements that

all states must follow, and Brook contends that the Council's view of § 406 of the Act violates these requirements. In particular, Brook contends that the Council's interpretation results in the regulatory body being removed from the permit decision process, precludes the Council from acting as an independent administrative body on appeal, and prevents DEQ from obtaining public comments on the mine application before making a final permit decision. For these reasons, Brook argues that only the Director may decide to issue or deny a permit, after considering public comment and the technical sufficiency of the permit application through its own CHIA assessment. These conflicting interpretations of the statute drive the central dispute here.

As explained below, the Court agrees with Brook. The statute must be interpreted in a manner that does not violate the minimum requirements of SMCRA, which dictates that only the supervising regulatory body (here, DEQ) may decide whether to issue a permit following the public comment and required technical assessment, and that there must be an opportunity for an administrative body (here, the Council) to provide independent assessment of the decision on the permit in the case of appeal. Here, only the Director has the statutory authority to grant or deny a permit to mine. If a party objects to a permit application, the Council may receive such objections at public hearing and make findings related to same, but it may not deny a permit application on this basis. That authority rests solely with the Director.

Accordingly, the Court finds the Council acted outside its statutory authority in adjudicating the validity of Brook's permit application, and the Director erred in relying on the Council's decision in denying the application. The Court reverses the Council's decision and remands the cause for further proceedings, as follows.

I. SMCRA Compels This Result.

When deciding a statute's meaning, the Court must give effect to the legislature's intent. *Chevron, U.S.A. v. Dep't of Revenue*, 2007 WY 43, ¶ 10, 154 P.3d 331, 334 (Wyo. 2007). This begins with the plain meaning of the words the legislature chose to find the "most likely, most reasonable, interpretation of the statute, given its design and purpose." *In the Interest of JB*, 2017 WY 26, ¶ 12, 390 P.3d 357, 360 (Wyo. 2017). The Court reads each statutory section *in pari materia* giving effect to each "word, clause, and sentence according to their arrangement and connection." *Id.* In this analysis, the "internal structure and the functional relation between the parts and the whole" guides how the Court should interpret a statute. *Id.* at ¶ 16, 390 P.3d at 361. But the Court cannot read words into the statute, render provisions meaningless, or read the statute to produce "absurd results." *City of Casper v. Holloway*, 2015 WY 93, ¶ 20, 354 P.3d 65, 71 (Wyo. 2015).

The Court also looks to "the historical setting" surrounding the passage of the statute and "all other prior and contemporaneous facts and circumstances that would enable the court intelligently to determine the intention of the lawmaking body." *Palato*

v. State, 988 P.2d 512, 514 (Wyo. 1999). When Wyoming passed the Act, it "implemented the policy" of SMCRA. *Powder River Basin Res. Council v. Wyo. Envtl. Quality Council*, 869 P.2d 435, 438 (Wyo. 1994); *See* 30 U.S.C. § 1201 et. seq. This makes SMCRA "persuasive authority" in construing the Act. *See Apodaca v. State*, 627 P.2d 1023, 1027 (Wyo. 1981) (holding, when the legislature adopts a statute derived from another jurisdiction, case law followed in that jurisdiction construing the statute is persuasive authority). Interpreting law – including federal law – and reviewing compliance with the law are both functions committed to the judicial branch. *See Davidson v. Sherman*, 848 P.2d 1341, 1349 (Wyo. 1993).

SMCRA established "a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations…[.]" 30 U.S.C. § 1202(a). SMCRA requires an operator to obtain a permit before any surface coal mining operations take place. *Id.* at § 1256(a). To obtain a permit, a company or person must submit an application that met SMCRA's technical and environmental requirements. *Id.* at § 1260(a). Should the regulatory authority find in writing that an application met these requirements, the regulatory authority may then approve a permit application. *Id.* at § 1260(b). SMCRA created the Office of Surface Mining ("OSM") to serve as the regulatory authority and "administer the programs for controlling surface mining operations…[.]" *Id.* at § 1211(c)(1).

SMCRA allows states to "assume exclusive jurisdiction" over surface coal mining operations if state law creates a program that "provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this chapter." *Id.* at § 1253(a)(1). States must have "rules and regulations consistent with regulations issued by the Secretary [of the Interior] pursuant to this chapter." 30 U.S.C. § 1253(a)(7). The Secretary of the Interior must approve of a proposed state program. *Id.* at § 1253(b). Article 4 of the Act outlines Wyoming's state program under SMCRA. The Secretary of the Interior approved Wyoming's state program in 1980, and DEQ has administered it ever since. *See* 30 C.F.R. § 950.10.

Although the language of subsection 406(p) describes the Council's findings as "a decision on the application," interpreting this phrase to mean a final adjudication of a permit application cannot be harmonized with SMCRA or the practical realities of the permitting process. Instead, it is best understood as the Council's input to the Director, who is free to agree or disagree with those conclusions before making his or her own independent permitting decision. The Court therefore finds the Council's procedure and decision below were in error.

A. Required Permitting Process Under SMCRA

After an applicant submits its application for a permit to mine coal, the regulatory authority reviews its contents to determine if the application is administratively complete. 30 U.S.C. § 1260(a). The Wyoming Act provides the same. Wyo. Stat. Ann. § 35-11-406(a)-(h). "Regulatory authority" under SMCRA includes the OSM or the "department or agency in each State which has primary responsibility at the State level for administering the Act in the initial program, or the State regulatory authority where the State is administering the Act under a State regulatory program…[.]" 30 C.F.R. § 700.5. Under the Wyoming Act, DEQ is the regulatory authority.

Under SMCRA, an administratively complete application includes all requirements of 30 U.S.C. § 1257 and 30 C.F.R. § 777.15. Once the regulatory authority decides the application is complete, the applicant publishes its application for public comment. *Id.* at § 1263(a). Following the public comment period, the regulatory authority holds an informal conference to hear objections. *Id.* at § 1263(b). The same process is contemplated by the Wyoming Act. Wyo. Stat. Ann. § 35-11-406(k).

Thereafter, the regulatory authority proceeds to decide whether to grant or deny the permit application. SMCRA states that "no permit or revision application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing…[.]" and then lists the same requirements found in § 406(n) of the Act. 30 U.S.C. § 1260(b); 30 C.F.R. § 773.15. Federal regulations clarify that in making the

decision to approve an application, which must include the written findings under § 1260(b), "the regulatory authority **must** consider any written comments and objections submitted, as well as the records of any informal conference or hearing held on the application." 30 C.F.R. § 773.7(a) (emphasis added).[3] Based on those findings, the regulatory authority then decides to issue or deny a permit. 30 U.S.C. § 1264(b), (c). This means the regulatory authority cannot make the written findings in § 1260(b) before a permit application is published because the regulatory authority must consider information that can be presented only after publication. The Wyoming Act contemplates the same process in §§ 35-11-406 (n) and (p).

After the regulatory authority issues a permit, SMCRA provides a right of appeal to an administrative body. 30 C.F.R. § 775.11(a). But under SMCRA, during the administrative appeal "no person who presided at an informal conference under § 773.6(c) shall either preside at the hearing or participate in the decision following the hearing or administrative appeal." *Id.* at 775.11(b).

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[3] This is the language of the regulation operative at the time of the public hearing. In November 2017, the regulation changed to state, "[t]he regulatory authority will review an application for a permit...written comments and objections submitted; and records of any informal conference or hearing held on the application and issue a written decision...." 30 C.F.R. 773.7(a) (effective November 17, 2017).

B. Respondents' Interpretation is Inconsistent with SMCRA

Respondents' interpretation of the Act would result in significant deviation from SMCRA. First, if rendering a decision on the application in § 406(p) of the Act effectively allows the Council to decide whether to grant or deny a permit, then the "regulatory authority" is not making the decision on the application as required by 30 U.S.C. § 1264(b) and 30 C.F.R. § 773.15. Under Wyoming's OSM-approved program, DEQ serves as the regulatory authority. Thus, to comply with SMCRA's minimum requirements, DEQ must make the final decision on the application, not the Council.

Second, empowering the Council to decide whether to grant or deny the application would leave Wyoming without an independent administrative appeal body, as required by SMCRA. Pursuant to Wyo. Stat. Ann. § 35-11-802, the denial of a permit is appealed to the Council.[4] But if the Council participates in the decision to deny a permit by telling the Director to do so, then it cannot act as an independent administrative body on appeal. The Council would become ineligible under SMCRA to serve as an administrative appeal body, and Wyoming law provides no authority for any other agency to hear appeals from coal permitting decisions.

[4] Here Brook would have to appeal the Director's denial based on the Council's decision back to the Council. *See* Wyo. Stat. Ann. § 35-11-802. That would create an absurd result.

Third, if the Council can force DEQ to make the written findings necessary to support a permit decision before a permit applicant publishes its application, then DEQ cannot fulfill the regulatory authority duty imposed by SMCRA to consider "any written comments and objections submitted, as well as the records of any informal conference or hearing held on the application." For example, DEQ would have to make a decision on the CHIA long before it received any input from the public, defeating a chief purpose of the public comment process.

II. Coal Permitting Procedure under the Act

Based on SMCRA requirements, and to resolve the ambiguity present in the Act, the Court clarifies the statutory procedure to obtain a permit to mine, as follows.

First, a permit application is filed. Wyo. Stat. Ann. § 35-11-406(a)-(c). DEQ then makes a "completeness" determination, at which time DEQ considers the technical sufficiency of the application and requires the applicant to submit any additional information required to address any "deficiencies," as that term is defined in the Act. Wyo. Stat. Ann. § 35-11-406 (d) and (h).[5] Once DEQ determines that the application is technically complete the applicant is notified that it should publish the application for public notice and comment. *Id.*

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[5] DEQ must notify an applicant of any deficiencies, defined as "an omission or lack of sufficient information serious enough to preclude correction or compliance by stipulation in the approved permit to be issued by the director." WYO. STAT. ANN. §§ 35-11-406(h), 35-11-103(e)(xxiv) (defining deficiency).

If anyone objects to the application and requests an informal conference, the Director may hold one within 20 days after the end of the public comment period. Wyo. Stat. Ann. § 35-11-406(k). If no informal conference is held, the Council must hold a public hearing on objections within 20 days after the end of the public comment period. *Id.* The Council then provides its findings and conclusions on any objections to the Director. Wyo. Stat. Ann. § 35-11-406(p). DEQ makes the required findings under § 406 (n) of the Act. Wyo. Stat. Ann. § 35-11-406(n). Finally, the Director decides whether to grant or deny a permit and decides whether to impose stipulations or conditions on the permit based upon any findings of the Council on permit objections. Wyo. Stat. Ann. § 35-11-406(p).

Under this procedure, the DEQ makes all substantive, technical evaluations of a permit application and the Director decides whether any objections to a permit can be addressed by permit conditions. This procedure leaves the regulatory body in charge of the permitting decision and leaves the Council free to act, as intended, as the neutral appeal body once a permit decision is made.

III. The Council Lacks Authority to Grant or Deny Permit Applications

Respondents contend Brook has misinterpreted the phrase "decision on the application" in Section 406(p) and assert those words grant the Council authority to render a decision to issue or deny a permit. The Court disagrees.

The Act requires the Director to issue or deny a permit. Wyo. Stat. Ann. § 35-11-406(p), 801(a). The DEQ Director cannot delegate his authority to make a final decision unless "required by law." Wyo. Stat. Ann. § 16-3-112(e). And § 406(p) of the Act requires the Director in all circumstances—informal conference or not—to issue or deny a permit. Wyo. Stat. Ann. § 35-11-406(p). The Act has no language that says the Council issues or denies a permit as part of the coal mine permitting process. The Act also has no language that the Director is bound by the Council's "decision." The Court will not insert such language into the Act to reach the Respondents' conclusion. *See Holloway*, ¶ 20, 354 P.3d at 71.

Furthermore, Respondents' interpretation renders several parts of the Act meaningless. Construing the statute so as to give the Council effective permitting authority eliminates § 801's requirement that "[w]hen the department has, by rule or regulation, required a permit to be obtained *it is the duty of the director* to issue such permits upon proof by the applicant that the procedures of this act and the rules and regulations promulgated hereunder have been complied with." Wyo. Stat. Ann. § 35-11-801(a)(emphasis added). It would render the Director's authority in § 406(p) to "issue or deny" a permit meaningless because the Council will have already decided the outcome, making the Director's decision a rubberstamp. It would also strip the Director's authority to impose permit conditions. Under the Act, "the director may impose such conditions as may be necessary to accomplish the purpose of this act which are not inconsistent with

the existing rules, regulations and standards." Wyo. Stat. Ann. § 35-11-801(a). But if the Council makes the decision, no part of the Act grants it the authority to impose conditions, and the Council cannot expand its authority. *Amoco Prod. Co. v. State Bd. of Equalization*, 12 P.3d 668, 673 (Wyo. 2000) (explaining an agency's power depends upon statutes, so "they must find within the statute warrant for the exercise of any authority which they claim.")

The cases cited by Respondents on this point are unpersuasive. Respondents cite *Belle Fourche Pipeline Co. v. State*, 766 P.2d 537 (Wyo. 1988); *Grams v. Envtl. Quality Council*, 730 P.2d 784 (Wyo. 1986); and *Rissler & McMurry Co. v. State*, 917 P.2d 1157 (Wyo. 1996), for the proposition that the Council has authority to enter decisions on mine permits pursuant to Section 112 of the Act.[6] But none of these cases relate to the Council's authority under Wyo. Stat. Ann. § 35-11-406(p) or address the coal permitting

[6] The general provisions addressing the Council's authority provide: "subject to any applicable state or federal law, and subject to the right to appeal, the council may...[o]rder that any permit, license, certification or variance be granted, denied, suspended, revoked or modified." Wyo. Stat. Ann. § 35-11-112(c)(ii) (emphasis added). The Council's general authority to issue permits is not self-executing and depends upon whether some other part of the Act specifies that the Council actually grants the permit. But this part of the Council's authority does not apply because the Council's authority to grant permits "is subject to applicable state law," which includes those parts of the Act that specifically provide that the Director issues the permit, not the Council. See *id.* at §§ 109(a)(xiii), 406(p), 801(a). Here, the Act specifically provides that the Director issues a mine permit, not the Council. This specific authority to grant a mine permit controls over the more general grant of authority in § 112(c)(ii). *See Cheyenne Newspapers, Inc. v. Bd. of Tr. of Laramie Cty. Sch. Dist. No. One*, 2016 WY 113, ¶ 23, 384 P.3d 679, 685 (Wyo. 2016).

process under SMCRA. None of these cases directly address the issue presented here, particularly in the context of SMCRA. The Council's general authority to issue permits under Wyo. Stat. Ann. § 35-11-112 must yield to the particular requirements applicable to coal mining. Accordingly, they are not binding on the Court; nor do they provide persuasive authority on the central issue here.

Based upon the foregoing, when a public hearing is requested in the permitting process, the Council's role is to provide a forum for public comment and objection, and to make a finding on such objections, in order to inform the Director's decision to grant or deny the permit application. The Director must then decide whether to grant or deny the permit application, based on DEQ's technical review and assessment of the application and objections. The Director, through DEQ, is the responsible agency that must ultimately issue the mining permit. The Council may not usurp this role by adjudicating the validity of the permit application. Doing so would violate the Act and SMCRA's minimum requirements.

IV. The Council's Decision is Contrary to Law

A. Section 406(n) Findings Are Not Required Prior to Public Hearing

Brook also contends the Council erred in determining that DEQ must make § 406(n)[7] findings as a prerequisite or condition precedent to the Council considering

[7] Section 406(n) describes steps that DEQ must take before approving a permit application, stating:

[n]o surface coal mining permit shall be approved unless the applicant affirmatively demonstrates and the administrator finds in writing:

(i) The application is accurate and complete;

(ii) The reclamation plan can accomplish reclamation as required by this act;

(iii) The proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area;

(iv) The area proposed to be mined is not included within an area designated unsuitable for surface coal mining pursuant to W.S. 35-11-425, within an area where mining is prohibited pursuant to section 522(e) of P.L. 95-87 [30 U.S.C. § 1272(e)], or within an area under review for this designation under an administrative proceeding, unless in such an area as to which an administrative proceeding has commenced pursuant to W.S. 35-11-425, the operator making the permit application demonstrates that, prior to January 1, 1977, he has made substantial legal and financial commitments in relation to the operation for which he is applying for a permit;

(v) The proposed operation would:

(A) Not interrupt, discontinue, or preclude farming on alluvial valley floors that are irrigated or naturally subirrigated, but, excluding undeveloped range lands which are not significant to farming on said alluvial valley floors and those lands as to which the administrator finds that if the farming that will be interrupted, discontinued or precluded is of such small acreage as to be of negligible impact on the farm's agricultural production; or

(B) Not materially damage the quantity or quality of water in surface or underground water systems that supply these alluvial valley floors. Paragraph (n)(v) of this section shall not affect those surface coal mining operations which in the year preceding August 3, 1977, produced coal in commercial quantities, and were located within or adjacent to alluvial valley floors or had obtained specific permit approval by the administrator to conduct surface coal mining operations within said alluvial valley floors. If coal deposits are precluded from being mined by this paragraph, the administrator shall certify to the secretary of the interior that the coal owner or lessee

whether the application should be approved. The Court finds the statutory language is contrary to the Council's determination. For the reasons discussed above, the Council does not have the authority to "consider whether the application should be approved." Additionally, the Act is structured to suggest that the § 406(n) findings should be made following the informal conference or public hearing step in the permit application process. Accordingly, on remand, DEQ shall make a determination on the merits of Brook's application.

Section 406(h) explains the steps DEQ must take to decide a permit application is "suitable for publication." That section states:

> The administrator shall review the application and unless the applicant requests a delay advise the applicant in writing within

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> may be eligible for participation in a coal exchange program pursuant to section 510(b)(5) of P.L. 95-87 [30 U.S.C. § 1260(b)(5)].
>
> (vi) If the area proposed to be surface coal mined contains prime farmland, the operator has the technological capability to restore such mined area, within a reasonable time, to equivalent or higher levels of yield as nonmined prime farmland in the surrounding area under equivalent levels of management and can meet the soil reconstruction standards of this act and the regulations promulgated pursuant thereto;
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> (vii) The schedule provided in paragraph (a)(xiv) of this section indicates that all surface coal mining operations owned or controlled by the applicant are currently in compliance with this act and all laws referred to in paragraph (a)(xiv) of this section or that any violation has been or is in the process of being corrected to the satisfaction of the authority, department or agency which has jurisdiction over the violation.

Wyo. Stat. Ann. § 35-11-406(n).

> one hundred fifty (150) days from the date of determining the application is complete, that it is suitable for publication under subsection (j) of this section, that the application is deficient or that the application is denied.... If the applicant submits additional information in response to any deficiency notice, the administrator shall review such additional information within thirty (30) days of submission and advise the applicant in writing if the application is suitable for publication under subsection (j) of this section, that the application is still deficient or that the application is denied.

Wyo. Stat. Ann. § 35-11-406(h). The Council determined the administrator is required to make § 406(n) findings at the time he determines whether the application is suitable for publication pursuant to WYO. STAT. ANN. § 35-11-406(h).

The plain language of the Act does not support this determination. In making the § 406(n) findings, the administrator must look at the completeness and deficiency review to find if an application is "accurate and complete." *See* Wyo. Stat. Ann. § 35-11-406(n)(i). Section 406(n) does not require the administrator to make the findings before DEQ deems a permit application suitable for publication. Instead, the sequence and structure of the Act suggests the administrator make the § 406(n) findings after publication and public comment but before permit approval or denial. *See In the Interest of JB*, ¶ 16, 390 P.3d at 361.

While the language of the Act is silent as to when the administrator makes the written findings under § 406(n), the Act's structure and implementation of SMCRA require the administrator to make the § 406(n) findings after the application is published

and all comments are received. As noted above, SMCRA requires the Section 406(n) CHIA assessment to be made after receipt of public comments, not before. Thus, the Court finds that the Council erred in requiring § 406(n) findings prior to completion and publication of the permit application.

B. The Council Does Not Determine "Deficiencies."

The Council also erred in determining that Brook's application was deficient in the areas of blasting, subsidence, and hydrology because it failed to apply the correct definition of deficiency. The Act defines deficiency as "an omission or lack of sufficient information serious enough to preclude correction or compliance by stipulation in the approved permit to be issued by the director." Wyo. Stat. Ann. § 35-11-103(e)(xxiv). The correction or compliance by stipulation refers to the Director's authority when approving a permit to "impose such conditions as may be necessary to accomplish the purpose of this act which are not inconsistent with the existing rules, regulations and standards." Wyo. Stat. Ann. § 35-11-801(a). "Deficiency" therefore means a problem which cannot be corrected or addressed by permit conditions. It does not mean "the Council would like more data."

For hydrology, the Council found that the application was deficient because "more information and planning is needed." For subsidence, the Council made a similar deficiency finding based on "insufficient analysis." For blasting, the Council found Brook's blasting plan "does not contain reasonable limits." But placing whatever

constitutes reasonable limits on the plan would correct the issue, which the Director can do by permit conditions. As a result, none of these issues "preclude correction or compliance by stipulation" and are thus not "deficiencies." Wyo. Stat. Ann. § 35-11-103(e)(xxiv).

The Council was free to identify issues of concern and provide them to the Director, but the Director remained free to condition any permit with requirements suggested by the Council. The Council did not find that no mining permit could ever issue because no correction to any problems were possible; rather, the Council found that more study should be done or permit blasting time frames should be imposed. The Director remains free to impose such requirement as conditions to the permit, if he deems them appropriate.

C. A Showing of No "Material Damage to Hydrologic Balance" is Not Required.

The Council determined Brook had not "met its burden that there will not be material damage to the hydrologic balance at the minesite and outside the permit area under section 406(b)(xvii)." This standard does not appear in the Act. On remand, DEQ will make a determination as to whether the application meets the technical requirements applicable to hydrologic impact under the standards set forth in Wyo. Stat. Ann. § 35-11-406(b)(xvii) and the regulations promulgated by DEQ.

The Council may receive comments and render findings on this issue at public hearing, but it may not prevent a decision on this basis. The Council shall leave this authority to DEQ.

V. The Proceedings Below Were Contrary to Law

Brook also contends the Council erred because it did not hold a public hearing within 20 days of the public comment. The Court agrees, but finds that Brook was not prejudiced by this delay.

The Act provides that, "[a]n 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." Wyo. Stat. Ann. § 35-11-406(k)(emphasis added). The Act makes the Council the body that holds public hearings, explaining that the Council "shall act as the hearing examiner for the department and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions." *Id.* at Wyo. Stat. Ann. § 35-11-112(a). The use of the word "shall" in both statutes "indicates a mandatory intent." *Loghry v. Loghry*, 920 P.2d 664, 668 (Wyo. 1996) (explaining how the Court interprets "shall" in statutes). Therefore, the Act mandates either an informal conference or a public hearing occur within 20 days after the final date for filing public objections. The only exception to this mandate requires a stipulation by the parties.

Here, the final date for public comment was January 27, 2017; thus, the Council was required to hold its public hearing within 20 days of that date, on or before February 16, 2017. The Council started its public hearing on May 22, 2017, over three months after the statutory deadline, without stipulation of the parties. The Court finds this error, but error which did not prejudice Brook. The Wyoming Supreme Court has previously considered whether a departure from the procedure outlined in Section 406 warrants reversal. *See Pfeil v. Amax Coal West, Inc.*, 908 P.2d 956, 960 (Wyo. 1995) (considering the failure to comply with Section 406(j)'s notice requirements). In that decision, the Court observed that "the error must be prejudicial and affect the substantial rights of the appellant to warrant reversal". *Id.* (citing *Grams*, 730 P.2d at 787). Brook has not shown any prejudice from the EQC's failure to hold the contested case hearing within the twenty (20) day period. The Court therefore finds that the EQC's failure to timely hold the contested case hearing was not prejudicial error that would warrant reversal of the EQC's decision.

VI. The Director Erred in Relying on the Council's Decision

The Act states the Director "shall not deny a permit" except if:

> (i) The application is incomplete;
>
> (ii) The applicant has not properly paid the required fee;
>
> (iii) Any part of the proposed operation, reclamation program, or the proposed future use is contrary to the law or policy of this state, or the United States;

(iv) The proposed mining operation would irreparably harm, destroy, or materially impair any area that has been designated by the council a rare or uncommon area and having particular historical, archaeological, wildlife, surface geological, botanical or scenic value;

(v) If the proposed mining operation will cause pollution of any waters in violation of the laws of this state or of the federal government;

(vi) If the applicant has had any other permit or license issued hereunder revoked, or any bond posted to comply with this act forfeited;

(vii) The proposed operation constitutes a public nuisance or endangers the public health and safety;

(viii) The affected land lies within three hundred (300) feet of any existing occupied dwelling, home, public building, school, church, community or institutional building, park or cemetery, unless the landowner's consent has been obtained. The provisions of this subsection shall not apply to operations conducted under an approved permit issued by the state land commissioner in compliance with the "Open Cut Land Reclamation Act of 1969";

(ix) The operator is unable to produce the bonds required;

(x) If written objections are filed by an interested person under subsection (g) of this section;

(xi) If information in the application or information obtained through the director's investigation shows that reclamation cannot be accomplished consistent with the purposes and provisions of this act;

(xii) through (xiv) Repealed by Laws 1980, ch. 64, § 3.

(xv) If the applicant has been and continues to be in violation of the provisions of this act;

> (xvi) No permit shall be denied on the basis that the applicant has been in actual violation of the provisions of this act if the violation has been corrected or discontinued.

Wyo. Stat. Ann. § 35-11-406(m)(i)-(xvi).

Here, the Director denied Brook's permit because he "reviewed the [Council's] order and determined that Brook's permit application cannot be approved in its present form." The Director cited the Council's findings about § 406(n) and deficiencies in the areas of hydrology, subsidence, and blasting. As the Director did not find any basis for denial consistent with the statute above, that denial was in error. On remand, the Director has a duty to complete the permit application process independent of the Council's errors below. The Director has a statutory duty to issue or deny Brook's permit application based on the findings of the agency, not those of the Council.

CONCLUSION

For the reasons set forth above, the Court reverses and vacates the Council's decision to the extent it is inconsistent with the Court's opinion above, and the Director's denial of the permit application. The cause is remanded to DEQ to complete the permit application process and issue a determination on the sufficiency of Brook's permit application. The Director is not bound by the findings of the Council. The Director is the only regulatory authority empowered to render a decision on whether to issue Brook's permit application.

STATE OF WYOMING COUNTY OF LARAMIE, SS CHEYENNE

I Diane Sanchez, Clerk of the District Court in and for the County of Laramie, Wyoming, do hereby certify that the within and foregoing is a full true and correct copy of the original thereof as the same appears on file or of record in my office and that the same is in full force and effect as of this date.

Witness my hand and seal of said court this 25 day of Oct 20 19

DIANE SANCHEZ
Clerk of District Court

By _____ Deputy

SO ORDERED.

DATED this 25 day of October, 2019.

Hon. Catherine R. Rogers
FIRST JUDICIAL DISTRICT COURT JUDGE

Clerk of District Court certifies copies were distributed on 10-25-19 to:

Copies after execution to:

B Day/Sansonetti/DeWald (Petitioners)
M Burron/Gregersen (Respondent Big Horn Coal Company)
M Anderson (Respondent Powder River Basin Resource Council)
M Gilbertz (Respondent Fishers)
M Kaste/VanWormer (Respondent Wyoming Department of Environmental Quality)

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