

After considering the parties' filings, arguments, and otherwise being fully advised, Petitioners' motion for stay is denied.² Petitioners' motion is denied because the Council lacks the legal authority to stay (or suspend) the effectiveness of Arbor Works Tree Service's permit during the pendency of this ongoing appeal. The Council's prior decisions³ that addressed a similar issue in *In the Matter of the Appeal from the Permit to Construct #2023-025 Protect Our Water Jackson Hole*, EQC Docket No. 23-3801 and *In the Matter of: Basin Electric Power Cooperative Dry Fork Station, Air Permit CT-4631*, EQC Docket No. 07-2801, are instructive and support denying Petitioners' motion. Based upon the Council's conclusions and reasoning in those prior decisions, the Council is without the legal authority to stay Arbor Works Tree Service's permit during the pendency of Petitioners' appeal.

Petitioners contend that the Council's decision in the Basin Electric appeal referenced above does not support the proposition that the Council is without the legal authority to "stay" a permit during the pendency of an appeal. Petitioners contend that their motion to stay is distinguishable from the Council's prior decision in Basic Electric because according to Petitioners, the Council's Basin Electric decision dealt only with a "motion to suspend" a permit, not a "motion to stay" a permit. Petitioners' argument is unpersuasive. First, the Council's Basin Electric decision addressed both "staying" and "suspending" a permit and concluded that the Council did not have the authority to suspend or stay the air permit in that case. The Council explained in its Basic Electric decision denying the motion to suspend:

16. Both Basin Electric and DEQ argued this Council has no statutory authority to suspend the air quality permit. Both argue that Protestants Motion to

² Petitioners' motion for stay is decided by the hearing examiner without consideration by the full Council. See DEQ Rules, Practice and Procedure, Chapter 2.

³ See Order Denying Protect Our Water Jackson Hole's Motion to Suspend Permit (January 12, 2024), Docket No. 23-3801; see also Order Denying Protestants' Motion to Suspend Air Permit CT-4631 Pending Resolution of Protestants' Appeal (August 21, 2008), Docket No. 07-2801.

Suspend is merely an effort to “stay” the issuance of the permit and construction of the project. This Council agrees with the legal interpretation of Basic Electric’s response and DEQ’s response in that the effect of suspending the permit in this case is equivalent to “staying” the issuance of the permit.

Although Petitioners attempt to distinguish between their motion for stay and the motion to suspend in the Basic Electric appeal, “suspending a permit” or “staying a permit,” is a distinction without a difference. Asking the Council to “suspend” or “stay” the effectiveness of an already issued permit during an appeal is asking for the same remedy. Indeed, to “suspend” is “**to stay, delay, or hinder[.]**” Black’s Law Dictionary, Abridged Sixth Edition, p. 1009 (emphasis added). Further, a “stay” “is **a suspension** of the case or some designated proceedings within it.” Black’s Law Dictionary, Abridged Sixth Edition, p. 983 (emphasis added). The Council concludes that the Basin Electric and Protect Our Water Jackson Hole decisions are still instructive and require the Council to deny Petitioners’ motion for stay.

In addition, Petitioners’ argument that Chapter 1, § 8 of DEQ’s practice and procedure rules authorizes the Council to grant a stay in this case is unconvincing. Petitioners contend that Chapter 1, § 8 of DEQ’s practice and procedure rules provide the Council with the requisite legal authority to stay Arbor Works Tree Service’s permit during this appeal. Section 8 states:

Section 8. Appeals to Council.

(a) Where authorized by the Wyoming Environmental Quality Act, appeals to the Council from final actions of the Administrators or Director shall be made within thirty (30) days of notification of such action.

(b) Within thirty (30) days after notification of the Director’s decision following an informal conference governed by Chapter 9, Section 2 of these rules, the applicant or any person with an interest that is or may be adversely affected may appeal the decision to the Council for a hearing in accordance with Chapters 1 and 2 of these rules. The Director shall notify all persons who submitted timely public comments on the underlying application. The Council shall start the hearing within thirty (30) days of the request for a hearing. The Council shall make a final written decision

within thirty (30) days after the hearing and furnish the decision to the applicant and all parties to the hearing.

(c) Where a hearing is requested under subsection (b) of this section, the Council may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceedings if:

(i) All parties to the proceedings have been notified and given an opportunity to be heard on a request for temporary relief;

(ii) The persons requesting that relief show that there is a substantial likelihood that they will prevail on the merits of the final determination of the proceeding;

(iii) Such relief will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air, or water resources; and

(iv) The relief sought is not the issuance of a permit where a permit has been denied by the Director, except that continuation under an existing permit may be allowed where the operation has a valid permit issued under W.S. § 35-11-406.

See DEQ Rules, Practice and Procedure, Chapter 1, § 8 (emphasis added).

Petitioners contend that § 8(c) authorizes the Council to stay the effectiveness of Arbor Works Tree Service’s permit during the appeal because it authorizes the Council to grant temporary relief during an appeal. However, Petitioners are mistaken—Petitioners’ reading of the rule requires the Council to disregard the plain and unambiguous language in § 8. Based upon the rules of statutory interpretation, subsection (c) does not apply to Petitioners’ appeal. If “a statute is clear and unambiguous, we give effect to the plain language of the statute.” *Powder River Coal Co., v. Wyoming State Bd. of Equalization*, 2002 WY 5, ¶ 6, 38 P.3d 423, 426 (Wyo. 2002). We must respect “the ordinary and obvious meaning of the words employed” and give “effect to every word, clause, and sentence, and [] construe together all parts of the statute *in pari materia*.” *Id.* “The rules of statutory interpretation [] apply to the interpretation of administrative rules[.]” *Id.*

Based upon the plain language in § 8, there are two different types of appeals to the Council. First, there is an appeal under subsection (a) which concerns appeals from final actions

of DEQ administrators or the DEQ director. Those appeals must be made within thirty days of notification of such action. *See* DEQ Rules, Practice and Procedure, Chapter 1, § 8(a).

Next, there is a second type of appeal under subsection (b) which concerns appeals from the DEQ director's decision following an informal conference governed by Chapter 9, Section 2. *See* DEQ Rules, Practice and Procedure, Chapter 1, § 8(b). Chapter 9 of DEQ's rules is titled "Director Review of Actions **Involving Surface Coal Mining Operations** and All Hearings Before the Department" and section 2 is titled "Requests for **Informal Conferences Involving Surface Coal Mining Operations.**" *See* DEQ Rules, Practice and Procedure, Chapter 9, § 2 (emphasis added). In this second type of appeal, the applicant or any person with an interest that is or may be adversely affected may appeal to the Council the director's decision following an informal conference involving a surface coal mining operation. That type of appeal requires the director to notify all persons who submitted timely public comments on the underlying application and requires the Council to start the hearing within thirty days of the request for a hearing.

Section 8(c) states that "[w]here a hearing is requested **under subsection (b) of this section**, the Council may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceedings[.]" *See* DEQ Rules, Practice and Procedure, Chapter 1, Section 8(c) (emphasis added). By its plain language, subsection (c) and the Council's authority to grant temporary relief only relates to appeals brought under subsection (b) and subsection (b) relates only to appeals from the "Director's decision following an informal conference governed by Chapter 9, Section 2 of these rules[.]"⁴

⁴ This interpretation concerning subsection (b) is confirmed by the transcript of the hearing proceedings for DEQ's practice and procedure rules where DEQ confirmed that subsection 8(b) only applies to appeals from informal conferences relating to surface coal mining permits. *See* the Multi-Panel Advisory Board, Transcript of Hearing Proceedings, pp. 14, 27-30, June 29, 2016, EQC Docket No. 16-1101. *See Solvay Chemicals, Inc. v. Wyoming Dep't. of Revenue*, 2022 WY 122, ¶ 25, 517 P.3d 1123, 1131-32 (Wyo. 2022)

Accordingly, the temporary relief outlined in § 8(c) only applies to appeals brought under § 8(b) which relates to the director’s decision following an informal conference involving surface coal mining operations. In this case, Petitioners appealed from DEQ’s decision to grant an air quality permit—Petitioners did not appeal from a director’s decision following an informal conference involving surface coal mining operations. It appears Petitioners were aware of this distinction between the types of appeals under subsections (a) and (b) because their appeal petition only refers to § 8(a). (See Petitioners’ Appeal, p. 3, ¶ 4).⁵ In fact, in their appeal petition, it appears Petitioners did not cite or refer to subsections 8(b) or (c).

In addition, there is no statute or rule that grants the Council the authority to stay (or suspend) this permit during the pendency of this appeal. See *Solvay Chemicals, Inc. v. Dep’t of Revenue*, 2018 WY 124, ¶ 13, 430 P.3d 295, 299 (Wyo. 2018) (quoting *Amoco Prod. Co. v. Wyo. State Bd. of Equalization*, 12 P.3d 668, 673 (Wyo. 2000)) (“[a]n administrative agency is limited in authority to powers legislatively delegated. 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”). Petitioners contend that the Council has the inherent authority to grant a stay of the permit in this case even if that authority is not explicit, however, as the Wyoming Supreme Court has stated, an administrative body, such as the Council, has only the power and authority granted to it by the constitution or statutes creating it. *US West Commc’ns, Inc. v. Wyoming Pub. Serv. Comm’n*, 907 P.2d 343, 346 (Wyo. 1995). Those “statutes must be

(even if a statute is unambiguous, the Wyoming Supreme Court has explained that it is allowable to resort to extrinsic aids of interpretation to confirm an interpretation or determination).

⁵ In their separate motion for stay, Petitioners, for the first time, state “[a]s a threshold matter, Petitioners requested a hearing under subsection b of Chapter 1, Section 8 in their Appeal.” See Petitioners’ Motion For Stay, p. 4. This statement appears to be inconsistent with what Petitioners stated in their appeal petition. See Petitioners’ Appeal, p. 3, ¶ 4.

strictly construed” and “any reasonable doubt of existence of any power must be resolved against the exercise thereof.” *Id.* “A doubtful power does not exist.” *Id.*

Accordingly, the Council does not have the legal authority to stay the Arbor Works Tree Service permit during the pendency of Petitioners’ ongoing appeal. Ruling otherwise would be contrary to the Council’s authority.

IT IS HEREBY ORDERED that Petitioners’ motion to stay the effectiveness of Arbor Works Tree Service’s permit is denied.

DATED this 3 day of June, 2024

JD Radakovich
[JD Radakovich \(Jun 3, 2024 17:51 CDT\)](#)
Secretary JD Radakovich, Hearing Examiner
Environmental Quality Council