

Settlement Agreement and Consent Order, concerning further limited mining operations on the property. (See Exhibit 2 of Petition). By the *Consent Order*, it was agreed that the operator could not and would not disturb any additional land other than the originally permitted 10 acres “for the duration of his mining operation and/or the life of his permit, whichever period is longer.” (Exhibit 2, Consent Order, ¶ 4). Since that *Consent Order* was entered, it has not been repealed, modified, or suspended.

Mr. Dodge’s permit was apparently transferred to Peak Gravel, LLC, (“Peak Gravel”) on or about January 27, 2023. As a result of this transfer, Peak Gravel became the successor/assignee of Permit ET0961. Peak Gravel then submitted an amendment to Permit ET0961 for an additional five (5) acres, for a total of fifteen (15) acres. (See Exhibit 1 of Petition, pg. 1). The DEQ approved Peak Gravel’s amendment by stating in a letter to Peak Gravel: “The amendment of 5 acres in the SW1/4 SW1/4, Section 30, T24N, R86W, in Platte County is approved, for a total of 15 acres.” (Exhibit 1, pg. 1).

Petitioners own residential property located immediately adjacent, on the northern boundary line, to the parcel of land containing Peak Gravel’s quarry operations. Petitioners are surface owners located well within one (1) mile of the boundary of the limited mining operations. Petitioners brought this Appeal to request a hearing before the Environmental Quality Council (“EQC” or “Council”), to seek a denial or revocation of the Amendment Approval authorized by the DEQ, and to seek enforcement of the original *Consent Order* limiting the subject operation surface disturbance to ten (10) acres for the duration of the mining operation or the life of Permit ET0961. The DEQ’s approval and authorization is contrary to its *Consent Order*.

Petitioners filed their Appeal on August 30, 2024. The DEQ filed a *Motion to Dismiss for Want of Subject Matter Jurisdiction* (“Motion to Dismiss”) on September 27, 2024. The DEQ also

filed a *Motion to Correct Characterization of Limited Mining Operation Notification ET0961, TFN 7 6/211* (“Motion for Recharacterization”) on the same date. The DEQ’s motions were supported by affidavits submitted by Todd Parfitt and Kyle Wendtland; these affidavits should be stricken and disregarded pursuant to Petitioners’ *Motion to Strike* filed simultaneously herewith.

Petitioners now respond to the Motion to Dismiss and the Motion for Recharacterization, demonstrating that the EQC does in fact have subject matter jurisdiction over this matter, and this matter was not simply a notification but rather an action taken by DEQ that carries with it the right to EQC review. “Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong.” *Amoco Production Co. v. Wyoming State Bd. of Equalization*, 7 P.3d 900, 904 (Wyo. 2000). A tribunal has “subject matter jurisdiction when it has the authority to consider and decide ‘cases of the general class of which the proceeding belongs.’” *Trefren Construction Co. v. V&R Construction, LLC*, 2016 WY 121, ¶ 36, 386 P.3d 317, 326 (Wyo. 2016). “The concept of subject matter jurisdiction is applicable equally to courts and administrative agencies.” *Id.*

II. COUNCIL HAS SUBJECT MATTER JURISDICTION

a. *This Action is Authorized by Statute*

The plain language of the statute authorizes appeals of this nature. The DEQ argues that this appeal is not authorized by WYO. STAT. ANN. § 35-11-112. (Motion to Dismiss, pg. 4) (stating “Section 112 does not authorize this appeal”). The DEQ cites to *Wyoming Dept. of Environmental Quality v. Wyoming Outdoor Council*, 2012 WY 135, 286 P.3d 1045 (Wyo. 2012)¹ in an effort to support its position that Section 112’s “express language further demonstrates that the Council

¹ This case will be referred to as “WOC” throughout this brief.

does not have authority to take any action with respect to the LMO notification² giving rise to Petitioner’s LMO Appeal.” (Motion to Dismiss, pg. 6). The DEQ’s argument is misplaced.

The plain language of the statute provides EQC jurisdiction over appeals of this nature.

The relevant statutory provision states:

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...

WYO. STAT. ANN. § 35-11-112(a) (emphasis added). Put simply, an approval or authorization of a limited mining operation (LMO) or amendment to such Permit—as is the case here—is an issue arising under the laws, rules, regulations, and orders issued and administered by the Department. The same statutory section also authorizes the EQC to “order that any permit, license, certification or variance be granted, denied, suspended, revoked, or modified...” WYO. STAT. ANN. § 35-11-112(c)(ii). That is precisely the relief requested by Petitioners in this case. Petitioners are asking the EQC to act upon its power which is expressly granted to it in Section 112(c)(i)—to hear the issue and to deny or revoke the ET0961 Amendment Approval, authorizing an increase in disturbance to 15 acres.

b. Availability of Review is Presumed

The legal standard here is not what DEQ states. DEQ argues that the holding in *WOC* precludes review where the statute is silent as to a right of appeal. (Motion to Dismiss, pg. 5). *WOC* actually stands for the opposite proposition: review is widely available, and is even presumed to be available. In *WOC*, the Wyoming Supreme Court described the broad availability of both judicial review and administrative review:

² Throughout its Motion to Dismiss and Motion for Recharacterization, the DEQ refers to the amendment to Permit ET0961 as a “notification.” This characterization is misleading, and argument regarding that issue will follow later in SECTION III of this brief.

The right of judicial review of an administrative agency decision is statutory. Actions of an administrative agent are not reviewable unless so made by statute. **Legislative intent to restrict judicial review of an administrative action must be clear and persuasive; reason must exist to believe that restriction was the legislative purpose...**

‘So far as policy is concerned, it is our view that **the interests of the State of Wyoming are best served by a policy which leads to reviewability in most instances.**’ And, to preclude review, the statute, if not specific in withholding that review, must give clear and convincing evidence of an intent to restrict. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold. *Holding’s Little America*, 670 P.2d at 702-03.

As applied to our current case, the significant point of our decision in *Holding’s Little America* is that **the right to review is presumed, and review is precluded only if the legislature provides ‘clear and convincing evidence of an intent to restrict.’** Although *Holding’s Little America* dealt with judicial review of agency action, **this point also applies to administrative review of agency action.**

WOC, ¶ 27, 286 P.3d at 1052 (emphasis added). The Wyoming Supreme Court held that availability of review is presumed, and its ruling also applies to administrative review of agency action. As such, the EQC is clearly vested with the power to decide this case, and with the power to grant Petitioners the relief they seek.

The legal authority cited by DEQ does not prohibit an appeal of this nature. DEQ fails to provide “clear and convincing evidence” precluding review. DEQ does not cite any legal authority stating that the Council is precluded from reviewing decisions made by the DEQ regarding LMOs or issues arising under the laws, rules, regulations, standards, or orders issued or administered by DEQ. In considering *WOC*, just because the statute does not say something to the effect of “aggrieved parties may appeal an amendment to a limited mining operation” in no way means that administrative review is not available. If anything, DEQ’s summary of the many express rights of appeal simply demonstrates the policy that EQC review is widely available.

c. *Relief Requested is Available from the EQC*

DEQ argues that the relief requested by Petitioners is not within the power of EQC. Specifically, DEQ states: "...Petitioners are asking that the Council issue a declaration with respect to the propriety of the LMO notification. However, the Council does not have the authority to issue a declaratory judgment; only 'courts of record within their respective jurisdictions may declare rights, status and other legal relations.'" (Motion to Dismiss, pg. 7). However, that is not the relief requested by Petitioners. Petitioners request the following relief found at page 5 of their Appeal:

- (1) A hearing before the EQC;
- (2) Denial or revocation of DEQ's approval of the amendment to Permit ET0961; and
- (3) Enforcement of the *Consent Order* stipulated condition for the duration of the mining operation or the life of the permit.

(Appeal of Approval of Amendment to Limited Mining Operation, Peak Gravel, ET0961, TFN 76/211, pg. 5).

The statutes under which the appeal is brought explicitly authorize the EQC to grant Petitioners their requested relief. WYO. STAT. ANN. § 35-11-112(a) authorizes the EQC to "**conduct hearings in any case** contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act." WYO. STAT. ANN. § 35-11-112(c)(ii) further authorizes the EQC to "**[o]rder that** any permit, license, certification or variance be granted, **denied**, suspended, **revoked** or modified." In this case, Petitioners only request relief that which is expressly authorized by statute: a hearing, denial or revocation of the amendment approval for Permit ET0961, and enforcement of the *Consent Order's* stipulated condition limiting Peak Gravel's operation to 10 acres.

d. Petitioners are An Interested Party in This Appeal

Petitioners are an interested party in the context of this appeal. DEQ argues that Petitioners do not have the ability to challenge the approval of the Permit ET0961 Amendment in violation of the *Consent Order*. (Motion to Dismiss, pg. 10). Petitioners own land located adjacent to Peak Gravel's operations on the northern boundary. "'Adjacent lands' means all lands within one-half mile of the proposed permit area." WYO. STAT. ANN. § 35-11-103(e)(vii). Furthermore, Petitioners are surface owners within one (1) mile who are to be given notice. WYO. STAT. ANN. § 35-11-401(e)(vi). One must ask, what is the purpose of required notice, if those required to be noticed are not interested parties?

Since the boundary line of the lands owned by Petitioners is shared with Peak Gravel, Petitioners are certainly owners of land within one-half mile of the permit area. See map below for illustration of the location of lands:



Petitioners' land is outlined in orange and the number "457" is in the middle of their parcel. Peak Gravel, LLC's land where it operates is highlighted in blue.³

The *WOC* case is also helpful for the purpose of analyzing a party's right to administrative review. In *WOC*, the Wyoming Outdoor Council was not a permit applicant, yet was still entitled to review as an interested third party:

DEQ regulations also provide that any 'interested person' may request a hearing before the EQC concerning 'a decision to issue, modify, or terminate a permit.' WWQR & R, ch. 2, § 17. *See also* General Rules of Practice and Procedure of the Department of Environmental Quality, ch. 1 §§ 2-3...Moreover, this Court has heard a number of cases over the years in which interested third parties received hearings before the EQC, and later sought judicial review of the EQC's decisions. *See, e.g., Sierra Club v. Wyoming Dep't of Env'tl. Quality*, 2011 WY 42, 251 P.3d 310 (Wyo. 2011); *Powder River Basin Res. Council v. Wyoming Env'tl. Quality Council*, 2010 WY 25, 226 P.3d 809 (Wyo. 2010); *Powder River Basin Res. Council v. Wyoming Dep't of Env'tl. Quality*, 869 P.2d 435 (Wyo. 1994).

WOC, ¶ 29, 286 P.3d at 1053 (internal citations included for reference). *WOC* also tells us that:

...there is no statute expressly granting *WOC* [an interested third party] the right to administrative review. However, there is also no statute that clearly and convincingly precludes such review and, **in the absence of any such restriction, the right to review is presumed.** In addition, we note another statutory provision that strongly indicates the legislature's intent to allow EQC review of 'all cases or issues' arising under the Wyoming Environmental Quality Act...

WOC, ¶ 28, 286 P.3d at 1052 (emphasis added). DEQ has failed to provide the EQC with the required showing of clear and convincing evidence of the legislature's intent to restrict interested parties from administrative review of this type of issue arising under the Act. DEQ also fails to demonstrate how this issue does not "arise under" the laws, rules, regulations or standards of the WEQA.

³ This map was generated using Greenwood Maps for Platte County; the blue overlay was created by counsel. This map is not intended to delineate boundary lines or legal rights; it is simply used for illustrative purposes.

In contrast, such issues certainly “arise under” the laws, rules, regulations, and standards of the WEQA. The words “limited mining operation” only appear twice in the Wyoming Statutes, both under Title 35 – Public Health and Safety, Chapter 11 – Environmental Quality, and Article 4 – Land Quality. *See* WYO. STAT. ANN. § 35-11-401; WYO. STAT. ANN. § 35-11-417. The result that DEQ argues for—no review of such issues by the EQC—is an absurd one.⁴ Were the EQC to find that LMO issues somehow do not “arise under” the WEQA, the EQC would have to ignore that LMOs are part of the WEQA, and there would be no avenue for review (or enforcement) of any LMO issue. This surely cannot be what the legislature intended. In fact, DEQ’s own summary of the many rights of appeal just provides further evidence that the legislature intended EQC review to be widely available for all issues or cases arising under the WEQA. It would render the language of WYO. STAT. ANN. § 35-11-112(a) meaningless (which states that EQC review is available for *all cases or issues* arising under the WEQA) to find that the word “all” did not in fact include all issues, such as issues regarding an LMO.

WOC provides that where the WEQA is silent, a presumption is raised *in favor* of review.

At paragraph 30, it states: “

The Wyoming Environmental Quality Act may be silent about the right of an interested third party to seek EQC review of DEQ decisions, but that silence should not be read to preclude EQC review. To the contrary, the opinion in *Holdings’s Little America* indicates that **statutory silence raises a presumption that EQC review is not precluded.**

⁴ “[W]e strive to avoid an interpretation [of statutes] that produces an absurd result or that renders a portion of the statute meaningless.” *Seherr-Thoss v. Teton Bd. of County Com’rs*, 2014 WY 82, ¶ 19, 329 P.3d 936, 945 (Wyo. 2014) (citing *Rodriguez v. Casey*, 2002 Wyo 111, ¶ 9, 50 P.3d 323, 326 (Wyo. 2002); *Kunkle v. State ex rel. Wyo. Workers’ Safety & Comp. Div.*, 2005 WY 49, ¶ 11, 109 P.3d 887, 890 (Wyo. 2005)).

WOC, ¶ 30, 286 P.3d at 1053 (emphasis added). In summary, the *WOC* decision tells us that review is favored; the silence of the WEQA on review raises a presumption that review is available, not the other way around, as DEQ argues.

D. AMENDMENT TO PERMIT ET0961 IS NOT MERELY A “NOTIFICATION”

The approval of the amendment to Permit ET0961 is not a “notification,” as DEQ argues. In fact, that argument is misleading the EQC as to what action DEQ took. If this was as DEQ argues, the letter from DEQ concerning the enlargement of acreage would simply state something to the effect of “your notification has been received.” Rather, the DEQ’s own language in their letter shows that action was taken by DEQ to “approve the amendment.” The letter states: “The amendment of 5 acres in the SW1/4 SW1/4 Section 30, T24N, R86W, in Platte County **is approved**, for a total of 15 acres.” (Exhibit 1, pg. 1). Following the submission of the LMO Form by Peak Gravel, the DEQ took action⁵ on the submission by approving the amendment. An approval of an amendment can hardly be said to be merely a receipt of notification.

In addition, it is an expressly authorized power of the EQC to revoke, deny, and/or modify a permit or approval. WYO. STAT. ANN. § 35-11-112(c)(ii) states: “[s]ubject to any applicable state or federal law, and subject to the right of appeal, the council may: ... (ii) order that any permit, license, certification or variance be granted, denied, suspended, revoked or modified...” The plain language of this statute indicates that EQC has the power to modify a permit or other approval. That is exactly the action taken by DEQ which gives rise to this appeal. The Department approved a modification of acreage to Permit ET0961 in violation of its previous *Settlement Agreement and Consent Order* which encumbers the quarry operations and Permit ET0961 for the duration of the

⁵ *Action* – the process of doing something; conduct or behavior. A thing done. BLACK’S LAW DICTIONARY (5th ed.).

operations or the life of the permit. In addition, the statute shows that the EQC has such power over not just permits, but other licenses, certifications, or variance. So, even if the EQC accepts DEQ's argument that Permit ET0961 is not a "permit," the EQC still holds its power to revoke, deny, and/or modify other types of authorizations or permissions given by DEQ to operators such as Peak Gravel.

In summary, the DEQ took action in approving Peak Gravel's application for an amendment of the surface acreage disturbed by its operations. This was not a notification, but rather an action by the Department subject to review by EQC.

WHEREFORE, Petitioners request that the EQC deny the DEQ's Motion to Dismiss for Want of Subject Matter Jurisdiction and Motion for Recharacterization.

DATED this 15th day of October 2024.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 15th day of October 2024, a true and correct copy of the foregoing was served by mail to the addresses below:

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