

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

<b>IN THE MATTER OF THE APPEAL FROM</b>	)	
<b>APPROVAL OF AMENDMENT TO LIMITED</b>	)	
<b>MINING OPERATION NO. ET0961</b>	)	<b>Docket No. 24-4801</b>
<b>DAVID AND BONNIE SCHROEDER</b>	)	

**ORDER GRANTING THE DEPARTMENT  
OF ENVIRONMENTAL QUALITY’S MOTION TO DISMISS**

On December 18, 2024, the Council heard oral arguments on the Department of Environmental Quality’s (DEQ) motion to dismiss Petitioners, David and Bonnie Schroeder’s “Appeal of Approval of Amendment to Limited Mining Operation, Peak Gravel, ET091, TFN7 6/211.” The Council, having heard and considered the relevant filings and oral arguments in this case and being fully advised, finds and concludes (by a 6-0 vote)<sup>1</sup> that DEQ’s motion to dismiss is granted.

**Background**

DEQ issued to Peak Gravel a letter titled “Approval of Amendment to Limited Mining Operation[.]” The amendment increased Peak Gravel’s limited mining operation (LMO) for sand and gravel from ten acres to fifteen acres. Petitioners (who are adjacent landowners to the LMO) appealed from DEQ’s “approval” of the LMO amendment. DEQ’s letter stated “[t]he amendment of 5 acres . . . in Platte County is approved, for a total of 15 acres. Your bond in the amount of \$30,000 was accepted as the reclamation performance bond under separate cover on November 27, 2023.”

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<sup>1</sup> Council member William Stafford was not present during the vote.

Petitioners argue that the Peak Gravel LMO cannot be increased to fifteen acres because of a prior settlement agreement and consent order between DEQ and the prior LMO operator, Tyler Dodge. The settlement agreement stated that “Tyler Dodge agrees not to disturb any additional land, after reclaiming the disturbed area to ten (10) acres, for the duration of his mining operation and/or life of his permit, whichever period is longer.” Peak Gravel was not a party to that settlement agreement.

Petitioners ask the Council to conduct a contested case hearing and deny or revoke the “Permit Approval in its entirety and require [DEQ] to enforce the Consent Order stipulated condition applicable during the life of the Permit ET0961.” Petitioners allege that DEQ inappropriately approved the amendment to the LMO which allowed the affected land to increase to fifteen acres. In their appeal, Petitioners contend that Wyo. Stat. Ann. §§ 35-11-112(a)(iii), (a)(iv), (c)(ii), and 801(d) authorize the Council to hear their appeal.

### **DEQ’s Motion to Dismiss**

DEQ contends that the Council is without subject matter jurisdiction to consider Petitioners’ appeal, and as a result, the Council is without authority to hear this appeal. DEQ first contends that no statute or rule authorizes Petitioners, an interested third party, to appeal from an LMO notification.<sup>2</sup> DEQ alleges that Wyo. Stat. Ann. § 35-11-801(d)’s right to appeal only applies to general permits, not LMO notifications.

In addition, DEQ contends that Wyo. Stat. Ann. § 35-11-112 does not provide a general right of appeal to the Council but merely authorizes the Council to conduct hearings in cases

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<sup>2</sup> DEQ uses the phrase “LMO notification” because it contends that the LMO statute is a notification only process and, therefore, DEQ does not have the authority to approve or deny an “LMO notification”—instead the operator is only required to provide notification of the LMO to DEQ.

in which the Council otherwise has been given jurisdiction to hear an appeal from a DEQ decision. DEQ asserts that the Council has not otherwise been given jurisdiction to hear an appeal from an LMO notification. In addition, DEQ asserts that because LMOs are not permits, licenses, certifications, or variances, § 112 does not apply.

DEQ also argues that because the LMO statute (Wyo. Stat. Ann. § 35-11-401(e)(vi)) is a “notification” statute, DEQ is not authorized to approve or authorize an LMO and, therefore, no appeal can be taken from an LMO notification by an interested third party. DEQ contends that “by challenging the LMO notification in this case, the 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 ‘[c]ourts of record within their respective jurisdictions may declare rights, states and other legal relations.’”

Last, DEQ asserts that the Council does not have the authority to take any action with respect to an LMO notification because the Council cannot provide any relief to the Petitioners. DEQ asserts that the Legislature carefully spelled out the limited forms of relief the Council can provide in Wyo. Stat. Ann. § 35-11-112(c) and setting aside an LMO notification is not within that statute. DEQ argues that because what is at dispute is an LMO notification and not a permit, the Council is without statutory authority to provide any relief outlined in the Environmental Quality Act. Because the Council is without authority to provide any relief to Petitioners, DEQ argues that the Council is without authority to hear the appeal. DEQ contends that the Petitioners should have sought judicial review under the Wyoming Administrative Procedure Act (Wyo. Stat. Ann. § 16-3-114), instead of trying to elicit support from the Council to exercise appellate jurisdiction it does not possess.

### **Petitioners' Contentions**

Petitioners contend that they have the right to appeal DEQ's "approval" of the LMO amendment. They contend that the Council has the authority to review DEQ's approval under Wyo. Stat. Ann. §§ 35-11-801(d), 35-11-112(a), and 112(c). Petitioners claim that § 112(a) authorize the Council to hear this appeal because it provides that the Council shall act as the hearing examiner for DEQ and "shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by [DEQ]." Wyo. Stat. Ann. § 35-11-112(a). Petitioners explain that whether the LMO amendment was issued in accordance with law fits within the Council's general authority under § 35-11-112(a).

Petitioners also contend that they can appeal under § 35-11-112(a)(iii) and (iv) which provides that the Council shall conduct hearings in any case "contesting the administration or enforcement of any law, rule, regulation, standard, or order issued or administered by [DEQ]" and in any case "contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act." Petitioners argue that the LMO amendment is a permit.

Last, Petitioners contend that under *Wyoming Department of Environmental Quality v. Wyoming Outdoor Council*, 2012 WY 135, ¶ 30, 286 P.3d 1045, 1053 (Wyo. 2012), the Wyoming Supreme Court has explained that although the Wyoming Environmental Quality Act may be silent about the right of an interested third party to seek the Council's review of a DEQ decision, that silence should not be read to preclude Council review. *Id.* The Court held that the right to review is presumed, and Council review is precluded only if the Legislature provides clear and convincing evidence of an intent to restrict Council review. *Id.* at ¶ 27.

Petitioners contend that there is no clear and convincing evidence of an intent to restrict Council review of LMOs by interested third parties.

### **Analysis**

Petitioners appealed from a DEQ document titled “Approval of Amendment to Limited Mining Operation, Peak Gravel.” That document states that “[t]he amendment of 5 acres . . . is approved, for a total of 15 acres. Your bond in the amount of \$30,000 was accepted as the reclamation performance bond under separate cover on November 27, 2023.” Petitioners appeal to the Council because they contend that DEQ was not authorized to “approve” the LMO amendment by increasing the LMO land from ten acres to fifteen acres.

There is disagreement among the parties concerning what is an LMO—is it a permit that DEQ must approve or is it something else that DEQ does not approve but instead acknowledges. Wyoming Statute § 35-11-401(e)(vi) governs LMOs and provides that LMOs are exempt from DEQ’s land quality permitting provisions. Wyo. Stat. Ann. § 35-11-401(e). LMOs are limited to fifteen acres for the removal of gravel, sand, scoria, limestone, dolomite, shale, ballast, or feldspar. Wyo. Stat. Ann. § 35-11-401(e)(vi). Section 401(e)(vi) provides that

[t]he operator shall notify the land quality division of the department of environmental quality and the inspector of mines within the department of workforce services of the location of the land to be mined and the postal address of the operation at least thirty (30) days before commencing operations. A copy of the notice shall also be mailed to all surface owners located within one (1) mile of the proposed boundary of the limited mining operation at least thirty (30) days before commencing operations. The operator shall notify the land quality division of the department of environmental quality of the date of commencement of limited mining operations within thirty (30) days of commencing operations.

Wyo. Stat. Ann. § 35-11-401(e)(vi).

Based upon the plain language in the statute, the operator must only “notify” DEQ, the inspector of mines within the Department of Workforce Services, and all surface owners located within one mile of the proposed boundary of the LMO at least thirty days before commencing operations. *Id.* DEQ is not authorized to approve or deny an LMO—the statute only requires that the operator “notify” the relevant agencies and individuals listed in the statute. DEQ concedes this much as it calls the LMO statute a “notification” statute and states that “[DEQ] does not approve or authorize an LMO notification.” *See* DEQ’s Reply to Response to Motion to Dismiss for Want of Subject Matter Jurisdiction, p. 1.

In addition to § 401(e)(vi), DEQ’s rules relating to LMOs similarly state that the operator must only give notification to DEQ, the inspector of mines and surface owners located within one mile of the proposed LMO boundary at least thirty days prior to commencement of the operations. *See* DEQ’s Land Quality – Non Coal rules, Chapter 10. The rules do not provide DEQ with any authority to approve or deny LMOs. Based upon the plain language in the statute, the Council concludes that an LMO is not a permit. The Council also concludes that DEQ is without authority to approve or deny an LMO—instead, an operator is only required to notify DEQ thirty days before commencing operations.<sup>3</sup> Accordingly, the Council agrees with DEQ that the LMO statute is a “notification” statute.

Although DEQ used the word “approval” in its letter to Peak Gravel and in the LMO application form, no statute or rule authorizes DEQ to “approve” LMOs. Indeed, during oral argument, DEQ admitted that using the word “approval” was incorrect because DEQ does not

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<sup>3</sup> Although DEQ does not have the authority to approve or deny LMOs on the front end when an LMO form is filed with DEQ, under Wyo. Stat. Ann. § 35-11-401(e)(vi), DEQ must still ensure that an operator complies with the statutory requirements in (vi)(A) through (G). If an operator fails to comply with the requirements, DEQ may carry out an enforcement action against the operator.

deny or approve LMOs but instead acknowledges LMOs. DEQ further admitted that the LMO application form has been changed to remove the word “approval,” because under the statute, DEQ is limited to acknowledging the LMO application form.

The Council has not found any specific statute or rule that authorizes an interested third party to appeal an LMO to the Council. Because there is no specific statute that authorizes the Council to review appeals of LMOs brought by interested third parties, the Council believes it must look to the Wyoming Supreme Court’s decision in *Wyoming Dep’t of Env’t Quality v. Wyoming Outdoor Council*, 2012 WY 135, 286 P.3d 1045 (Wyo. 2012).

In *Wyoming Outdoor Council*, the Wyoming Supreme Court addressed whether an appeal to the Council was authorized under the Wyoming Environmental Quality Act when no statute expressly granted such an appeal. *Wyoming Dep’t of Env’t Quality v. Wyoming Outdoor Council*, 2012 WY 135, ¶ 30, 286 P.3d 1045, 1053 (Wyo. 2012). The Court concluded that although the Act may be silent about the right of an interested third party to seek the Council’s review of a DEQ decision, that silence should not be read to preclude Council review. *Id.* To the contrary, statutory silence raises a presumption that Council review is not precluded. *Id.* The Court held that the right to review is presumed and Council review is precluded only if the Legislature provides clear and convincing evidence of an intent to restrict Council review. *Id.* at ¶ 27.

Accordingly, the Council believes that the issue of whether Petitioners can appeal an LMO to the Council rests on whether there is clear and convincing evidence of an intent to restrict Council review of an appeal of an LMO brought by an interested third party. The Council believes there is clear and convincing evidence of an intent to restrict Council review of an appeal of an LMO.

First, an LMO is not a permit. An LMO is specifically exempted from the permitting process. Wyo. Stat. Ann. § 35-11-401(e)(vi). Because the Wyoming Environmental Quality Act and DEQ rules do not authorize DEQ to approve or deny LMOs like it does with permits, there is no DEQ “final action” or decision that an interested third party may appeal to the Council. Chapter 1, Section 8 of the Council’s rules of practice and procedure only allow “appeals to the Council from final actions of the Administrators or Director.” Because DEQ is not authorized to approve or deny an LMO, DEQ does not take a “final action” or make a final decision which is appealable to the Council. DEQ is only acknowledging the LMO application form.

Second, there does not appear to be a statute that provides the Council with the authority to provide Petitioners with any relief relating to the LMO because the relief the Council may provide in § 112 is limited to “approve, disapprove, repeal, modify, or suspend any rule, regulation, standard, or order” of the DEQ director or any division administrator or “order that any permit, license, certification or variance be granted, denied, suspended, revoked, or modified.” Wyo. Stat. Ann. § 35-11-112(c). An LMO is not a rule, regulation, standard, order, permit, license, certification, or variance. Because the Council is without any authority to provide relief to an interested third party relating to an LMO, the Council cannot consider an appeal from an LMO.

Last, the Council does not believe that Wyo. Stat. Ann. § 35-11-112 provides an interested third party a general right of appeal to the Council from an LMO notification.

The Council finds it persuasive that an LMO is not a permit, that the LMO statute is a “notification” statute, and that DEQ does not have the authority to approve or deny an LMO on the front end when an LMO form is filed with DEQ. Accordingly, there is no DEQ final



decision or final action to appeal to the Council. Next, the Council finds it convincing that the Council is without any statutory authority to provide any relief or remedy to an interested third party relating to an LMO.

Based on the foregoing, the Council believes there is clear and convincing evidence of an intent to restrict Council review of an appeal from an interested third party from an LMO. Accordingly, the Council believes it is without any authority and jurisdiction to hear this appeal.

**IT IS HEREBY ORDERED** that DEQ's motion to dismiss Petitioners' appeal is granted.

**IT IS FURTHER ORDERED** that Petitioners' appeal is hereby dismissed.

**IT IS FURTHER ORDERED** that all pending motions and scheduling orders are vacated because this appeal is hereby dismissed.

**DATED** this 4th day of February, 2024



JD Radakovich (Feb 4, 2025 21:51 CST)

J.D. Radakovich, Hearing Examiner  
Environmental Quality Council