

COPY

Jay Jerde
Deputy Attorney General

Nancy Vehr
Senior Assistant Attorney General

Kristen Dolan
Senior Assistant Attorney General
123 Capitol Building
Cheyenne, WY 82002
Telephone: (307) 777-6946
Facsimile: (307) 777-3542

Attorneys for the State of Wyoming

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MAR 12 2008

Terri A. Lorenzon, Director
Environmental Quality Council

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE STATE OF WYOMING

IN THE MATTER OF:)
BASIN ELECTRIC POWER COOPERATIVE)
DRY FORK STATION,) Docket No. 07-2801
AIR PERMIT CT - 4631)

**RESPONDENT DEPARTMENT OF ENVIRONMENTAL QUALITY'S
RESPONSE OPPOSING PROTESTANTS' MOTION TO SUSPEND AIR PERMIT
CT-4631 PENDING RESOLUTION OF PROTESTANTS' APPEAL**

Respondent, the Department of Environmental Quality ("DEQ"), by and through undersigned counsel, hereby responds in opposition to Protestants' *Motion to Suspend Air Permit CT-4631 Pending Resolution of Protestants' Appeal* and respectfully requests this Council deny Protestants' Motion.

I. INTRODUCTION/ BACKGROUND

The underlying foundation for the State of Wyoming's ("State") air quality program is the Wyoming Environmental Quality Act ("WEQA") which establishes a statutory structure designed in part to enable the State to preserve, protect, use, develop, reclaim and enhance its air resources. As the Preamble to the WEQA explains:

Whereas pollution of the air ... of this state will imperil public health and welfare, create public or private nuisances, be

harmful to wildlife, fish and aquatic life, and impair domestic, agricultural, industrial, recreational and other beneficial uses; it is hereby declared to be the policy and purpose of this act to enable the state to prevent, reduce and eliminate pollution; to preserve and enhance the air ... of Wyoming; to plan the development, use, reclamation, preservation and enhancement of the air ... resources of the state; to preserve and exercise the primary responsibilities and rights of the state of Wyoming; to retain for the state the control over its air”

WYO. STAT. ANN. § 35-11-102.

To further the purpose of the WEQA, Wyoming’s legislature created and vested the DEQ with the responsibility for administering and enforcing the WEQA, rules promulgated thereunder, and related permits. WYO. STAT. ANN. §§ 35-11-104, -109; *see also* WYO. STAT. ANN. § 35-11-110. The DEQ’s administrative and enforcement authority extends to permits issued under the WEQA, including air quality permits. WYO. STAT. ANN. §§ 35-11-109, -110, -801.

Pursuant to the WEQA and DEQ regulations, an air quality construction permit is needed before any person commences construction of any new facility or modifies any existing facility which may cause the issuance of air pollution in excess of standards established by the DEQ. WYO. STAT. ANN. § 35-11-801(c); 6 WAQSR § 2. Under this permitting system, the DEQ Director may impose permit conditions consistent with existing rules, regulations or standards that are necessary to accomplish the purpose of the WEQA. WYO. STAT. ANN. § 35-11-801(a). Permits issued pursuant to 6 WAQSR § 2 are commonly referred to as air quality construction or modification permits and the process is referred to as new source review (“NSR”).

In addition to satisfying NSR permitting requirements, major emitting facilities such as power plants must also satisfy Prevention of Significant Deterioration (“PSD”) requirements. 6 WAQSR §§ 2, 4; *see also* 42 U.S.C. § 7475. Congress enacted the federal PSD program in 1977 to insure that “economic growth would occur in a manner consistent with the preservation of existing clean air resources.” 42 U.S.C. § 7470(3). Therefore, the PSD review focuses on a proposed major source’s anticipated air quality impact and includes a site-specific review. *See* 42 U.S.C. §§ 7470-79; *Alabama Power v. Costle*, 636 F.2d 323, 346-52 (D.C. Cir. 1979). The DEQ’s NSR and PSD permitting regulations are included in the State’s State Implementation Plan (“SIP”), giving the State primacy over its air quality permitting program. *See* 40 C.F.R. Part 52, subpart ZZ.

On November 10, 2005, Basin Electric Power Cooperative (“Basin”) submitted an air quality construction permit application to construct a coal-fired electric power generating station, known as the Dry Fork Station, near Gillette, Wyoming. On October 15, 2007, after almost two years of technical review and analysis by the Air Quality Division (“AQD”), the DEQ/AQD determined that Basin’s application for the Dry Fork Station satisfied applicable statutory and regulatory requirements and approved Basin’s application to construct by issuing air quality permit CT-4631 which is both an NSR and a PSD permit. Protestants filed a Protest and Petition for Hearing on November 1, 2008. On February 8, 2008, Protestants moved to suspend air quality permit CT-4631 pending resolution of Protestants’ Protest and Petition for Hearing.

II. ARGUMENT

Protestants center their arguments for permit suspension around their position that allowing construction to proceed “render[s] the appeals process meaningless.” Protestants’ Motion at pg. 2. In support, Protestants argue that the EQC, not the DEQ, issues final air quality permits, their appeal should be heard *de novo*, and that Basin may suffer financial loss if allowed to proceed with construction. Protestants’ Motion at pg. 8.

Protestants’ arguments fail for three reasons. First, the legislature has vested permit issuing authority with the DEQ. The DEQ reviews, analyzes and issues air quality construction permits, not the EQC. Second, permit suspension is only available in DEQ enforcement actions or for failure to substitute acceptable surety bonds, following a contested case hearing. Finally, an EQC *de novo* hearing on appeal is limited to surface coal mine appeals.

A. THE DEQ ISSUES AIR QUALITY PERMITS

1. Agency Authority in General

In Wyoming, agencies have only the powers granted to them by the legislature. *Amoco Prod. Co. v. State Bd. of Equalization*, 12 P.3d 668, 673 (Wyo. 2000). Because an agency is a creature of statute, the statute must provide the agency with authority to act. *Id.*; see also *Pedro/Aspen, Ltd., v. Bd. of County Commr’s for Natrona County*, 2004 WY 84, ¶ 29, 94 P.3d 412, ¶ 29 (Wyo. 2004) (an agency is not a “super legislature” empowered to change statutes under the cloak of assumed delegated power). In other words, an agency is limited to the powers legislatively delegated and “is wholly without power to modify, dilute or change in any way the statutory provisions from which it derives its authority.” *Platte*

Dev. Co. v. EQC, 966 P.2d 972, 975 (Wyo. 1998). “[R]easonable doubt of the existence of a power must be resolved against the exercise thereof. A doubtful power does not exist.” *Mayland v. Flitner*, 28 P.3d 838, 854 (Wyo. 2001), citing *French v. Amax Coal West*, 960 P.2d 1023, 1027 (Wyo. 1998). However, an agency does have implied powers derived by necessary implication from the express statutory authority granted to the agency. *Public Serv. Comm’n v. Formal Complaint of WWZ Co.*, 641 P.2d 183, 186 (Wyo. 1982).

2. DEQ’s Authority to Issue Air Quality Permits

In addition to other powers and duties, the DEQ Director has the authority to “[i]ssue ... permits and licenses.” WYO. STAT. ANN. § 35-11-109(a)(xiii); *see also* WYO. STAT. ANN. § 35-11-110 (administrator recommends to the director the “issuance ... of permits and licenses”). Specifically, with regards to air quality permitting:

(a) When the department [DEQ] 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. In granting permits, 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. An administrator shall not issue permits and may issue a license under this act only as specifically authorized in this act.

* * *

(c) A permit to construct is required before construction or modification of any industrial facility capable of causing or increasing air or water pollution in excess of standards established by the department is commenced.

WYO. STAT. ANN. § 35-11-801 (emphasis added).

Section 35-11-801(a) unambiguously vests permit issuing authority with the DEQ director. In fact, Section 35-11-801 authorizes and directs the DEQ to issue air quality construction permits “upon proof by the applicant that the procedures of this act [WEQA] and the rules and regulations promulgated [thereunder] have been complied with.” *Id.* The legislature’s clear mandate is that the DEQ must evaluate the applicant’s “proof,” then issue or deny an air quality construction permit. Accordingly, Protestants’ claim that the EQC, not the DEQ, issues final air quality construction permits lacks merit as a matter of law.

3. DEQ Permit Issuance is Final Agency Action

Issuing a DEQ/AQD construction permit, in and of itself, is final agency action. Noticeably absent from either statutory or regulatory requirements, and contrary to Protestants’ assertions, are any requirements that other administrative action is required for the issuance of a DEQ/AQD construction permit. For the DEQ to issue a permit, the legislature requires that the applicant prove to the Director that the applicant has complied with the WEQA and applicable rules and regulations. WYO. STAT. ANN. § 35-11-801(a). The DEQ reviews the “proof,” seeks clarification, analyzes and determines the facts, and ultimately issues the permit if the applicant has satisfied the statutory and regulatory requirements.

The applicant has the burden to prove that the proposed facility will: (i) comply with all DEQ/AQD rules and regulations and the WEQA’s intent; (ii) not prevent the attainment or maintenance of any ambient air quality standard; (iii) not cause significant deterioration of existing ambient air quality in the region; (iv) be located in accordance with proper land use planning as determined by the responsible state or local agency; (v) utilize the Best

Available Control Technology (“BACT”); (vi) monitor emissions; (vii) achieve the performance specified in the application; and, (viii) not emit air pollutants in amounts that prevent other states from attaining or maintaining National Ambient Air Quality Standards (“NAAQS”) or interfere with such state’s federal PSD or visibility requirements. 6 WAQSR § 2(c)(i - viii); *see also* 6 WAQSR § 2(a)(i)(requiring a DEQ/AQD construction permit before construction is commenced). Even after satisfying the DEQ/AQD regulatory requirements, the applicant must also prove to the DEQ that “the procedures of this act [WEQA] and the rules and regulations promulgated hereunder have been complied with.” WYO. STAT. ANN. § 35-11-801(a). Only then will the DEQ issue a permit. In this case, the DEQ determined that Basin made such a demonstration and issued air quality permit CT-4631.

The DEQ/AQD construction permit regulations, the EQC rules, and even Protestants’ Petition recognize and support the concept that issuing a DEQ/AQD construction permit is final agency action, in and of itself. Pursuant to the DEQ/AQD construction permitting regulations, after the DEQ has issued an air quality construction permit, the permittee must commence construction within twenty-four months or the permit becomes invalid. 6 WAQSR § 2(h) (“approval to construct or modify shall become invalid if construction is not commenced within 24 months after receipt of such approval”). Furthermore, the EQC rules prescribe that all appeals to the EQC must be “from final action of the Administrators or Director.” 1 DEQ Rules § 16(a). Finally, Protestants’ Protest and Petition for Hearing cites the DEQ Rules requiring appeals be from final action as authority for their Protest and Petition. Protestants’ Protest and Petition for Hearing at pg. 1.

B. PERMIT SUSPENSION IS ONLY AVAILABLE IN ENFORCEMENT ACTIONS OR FOR FAILURE TO SUBSTITUTE ACCEPTABLE SURETY FOR BONDS FOLLOWING A CONTESTED CASE HEARING

The WEQA vests both the EQC and the DEQ with the ability to suspend permits. *See* WYO. STAT. ANN. §§ 35-11-112(c)(ii), -109(a)(xiii). However, this authority is limited to DEQ enforcement actions or cases in which an operator has failed to substitute acceptable surety for required bonds. *See* WYO. STAT. ANN. §§ 35-11-701(d)(remedies available in enforcement actions include those available under the WEQA); -306(k)(failure to substitute surety for oil field waste disposal facility bonds); -409(c)(surface coal mine enforcement); -412(b)(land quality enforcement); -420 (failure to substitute surety for land quality bonds); -504(g)(failure to substitute surety for solid waste bonds). The omission of words from a statute is considered intentional on the part of the legislature, particularly where the language appears in one section of a statute but not another. *Matter of Voss' Adoption*, 550 P.2d 481, 485 (Wyo. 1976). Applying this statutory construction principle to these statutes shows that Wyoming's legislature knew how to craft legislation providing for permit suspensions in enforcement actions or for failure to substitute acceptable surety for bonds but chose not to do so for permit appeals.

1. WAPA

The Wyoming Administrative Procedure Act ("WAPA") provides further support for limiting permit suspension to enforcement or for failure to substitute acceptable surety for bonds. For permit suspensions, the WAPA requires the permittee be given an opportunity to "show compliance with all lawful requirements for the retention of the [permit]." WYO. STAT. ANN. § 16-3-113(c) (emphasis added). "Retain" is defined as "to keep in possession

or use” and “retention” is “the act of retaining.” WEBSTER’S NEW COLLEGIATE DICTIONARY 1006 (9th ed. 1988). The WAPA does not provide for suspension where an applicant has complied with requirements to obtain a permit. This makes sense because the presumption is that a final permit issued by an administrative agency is legal, valid, and binding. *See* 1 DEQ Rules § 16(a)(appeals to EQC from final DEQ action).

Although a “show cause” demonstration to retain a permit makes sense in the context of enforcement actions or failure to meet bond surety requirements, it makes little sense in the context of air quality construction permit appeals because permit retention requirements are not triggered until after the permit has been issued. *See* 6 WAQSR § 2(h) (permit becomes invalid if construction not commenced within 24 months). To “obtain” an air quality construction permit, there are no “retention” requirements that must be satisfied. *See* 6 WAQSR §§ 2, 4. Given the plain statutory language, it makes sense that the legislature did not provide the EQC or the DEQ with the ability to issue a permit and then immediately turn around and suspend that permit, unless of course, the permittee is in non-compliance and the subject of an enforcement action. Protestants have not alleged that Basin is not complying with the terms of permit CT-4631. Therefore, permit suspension is not an available remedy.¹

2. Avoid Absurd Results

Limiting DEQ’s and EQC’s permit suspension ability to enforcement or lack of surety for reclamation bonds also avoids the absurd results that would follow if suspension

¹ WAPA also requires a contested case proceeding before a permit may be suspended. *See* WYO. STAT. ANN. § 16-3-113(a); *see also* WYO. STAT. ANN. §§ 16-3-101(b)(iii) (“license” includes permits), -107 (WAPA contested case procedure), § 35-11-112(f)(EQC proceedings conducted in accordance with WAPA), 2 DEQ Rules §§ 1-14 (EQC contested case procedure).

was allowed in the permit issuance context. In construing statutes and regulations, absurd results should be avoided. *See Matter of Cordova*, 882 P.2d 880, 883 (Wyo. 1994). It is presumed that the legislature, or for that matter the administrative agency, adopts laws that are reasonable and logical, not futile. *Stauffer Chem. Co. v. Curry*, 778 P.2d 1083, 1093 (Wyo. 1989). To obtain a DEQ air quality construction permit, the applicant has the burden to demonstrate to the DEQ's satisfaction that it has complied with the law. WYO. STAT. ANN. § 35-11-801; *see also* 6 WAQSR §§ 2, 4. It makes no sense that the legislature would dictate that a permit not issue until the applicant has demonstrated that it has complied with the law and then turn around and provide that such a lawfully issued permit may then be suspended pending the outcome on appeal.

C. 'TRIAL DE NOVO' DOES NOT APPLY TO DEQ PERMIT APPEALS

Protestants argue that the EQC should conduct a *de novo* hearing, as if no decision had previously been rendered, because Protestants contend it is the EQC, not the DEQ, that is the "final decision-maker in the permitting process." Protestants' Motion at pgs. 8-11. However, the legislature vests permit issuing authority with the DEQ. It is the DEQ, not the EQC, that issues air quality construction permits. WYO. STAT. ANN. §§ 35-11-109(a)(xiii), -801; *see supra* at A.2. (discussing DEQ's authority to issue air quality permits). Taking the DEQ's technical review and analysis required by statute and regulation, conducted over a two year span and encompassing over 12,000 pages, completely out of the picture makes the permitting process required by law a meaningless exercise and transforms the EQC's quasi-judicial role into that of a super-permitting agency. Furthermore, the land quality permit appeal process requiring *de novo* review is limited to surface coal mine appeals. Wyoming's

legislature knew how to but did not provide for EQC *de novo* review, except in the case of surface coal mine appeals.

1. The WEQA's Procedural Requirements for Land Quality Permit Appeals Do Not Apply

Protestants argue that the EQC should conduct *de novo* review of this air quality construction permit because the authority granted by the legislature to the EQC for approving or denying mining permits also applies to air quality permits. *See* Protestants' Motion to Suspend at pg. 11; *see also Rissler & McMurry Co. v. State*, 917 P.2d 1157, 1162 (Wyo. 1996). However, the DEQ's statutory authority for issuing mining permits is very different from the DEQ's statutory authority for issuing other DEQ permits. *Compare* WYO. STAT. ANN. §§ 35-11-406(k), (m), (p) (if any objections to the land quality mining permit application, the permit is not issued until after an EQC contested case in which the EQC makes the findings of fact) *with* WYO. STAT. ANN. § 35-11-801 (DEQ issues permit upon proof by applicant of compliance with applicable law). The only DEQ permitting action in which the legislature specifically provided for *de novo* hearings on appeal is for surface coal mining appeals. *See* WYO. STAT. ANN. § 35-11-406(k)(appeal to the EQC "shall be heard and tried *de novo*").

The legislature's omission of words from a statute is considered intentional, particularly where the language appears in one section of a statute but not another. *Matter of Voss' Adoption*, 550 P.2d 481, 485 (Wyo. 1976). Applying that statutory construction principle shows that Wyoming's legislature knew how to craft legislation for a permit issuing process by which the EQC, not the DEQ, made the findings of fact necessary to decide

whether a permit should issue, as the legislature did for land quality permits, but chose not to do so for the issuance of other DEQ permits. Likewise, Wyoming's legislature knew how to and did craft legislation providing for a *de novo* hearing on appeal, but limited that process to surface coal mining applications.

The legislative scheme makes sense especially where the DEQ/AQD permitting staff spent almost two years of review and analysis, resulting in a record exceeding 12,000 pages, before the DEQ issued this complex, highly technical permit. Protestants' assertion that because surface coal mining appeals are heard *de novo* means the EQC must consider other appeals *de novo* and make entirely new findings on entirely new evidence would take DEQ's extensive and highly technical review and analysis entirely out of the picture. See Protestants' Motion at pg. 11. In essence, granting Protestants' request for a *de novo* hearing means that the DEQ's technical permit review and analysis, although required by law, becomes a meaningless exercise - an empty charade. Granting Protestants' request would also transform the EQC from its quasi-judicial role as DEQ hearing examiner to some sort of super-permitting agency, annually responsible for issuing thousands of DEQ permits following *de novo* review. Wyoming's legislature knew how to provide for EQC *de novo* review, but chose not to do so except for surface coal mine appeals.

2. DEQ Permit Decisions Should be Given Deference

The presumption of validity and legality, and the deference accorded agency decisions is another reason why *de novo* review of DEQ permitting actions is not appropriate. Agency decisions are presumed legal and valid, and even on judicial review Wyoming courts will not substitute their judgment "for that of the administrative body entrusted by the legislature" to

make the decision. *See In re Charter of Security Bank*, 616 P.2d 1273, 1277 (Wyo. 1980). This is so because it is presumed that governmental agencies exercise honest judgment in accordance with applicable statutes, rules and regulations. *Chicago, Burlington & Quincy R.R. Co. v. Bruch*, 400 P.2d 494, 499 (Wyo. 1965).

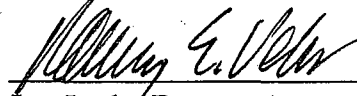
It is also well recognized that an agency's decision as to the facts is accorded deference. *PacifiCorp, Inc. v. Dept. of Revenue*, 13 P.3d 256, 259-60 (Wyo. 2000). The United States Supreme Court even accords an agency's scientific determinations its highest level of deference. *See Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). The process of analyzing and issuing NSR and PSD permits is a highly technical process. *See* 6 WAQSR §§ 2, 4. The EQC must accord deference to, not ignore, the DEQ decision.

III. CONCLUSION

For the foregoing reasons, the DEQ respectfully requests this Council deny Protestants' Motion to Suspend Air Permit CT-4631 Pending Resolution of Protestants' Appeal.

DATED this 12th day of March, 2008.

FOR RESPONDENT DEQ/AQD:



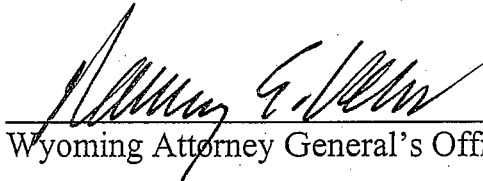
Jay Jerde, Deputy Attorney General
Nancy Vehr, Senior Assistant Attorney General
Kristen Dolan, Senior Assistant Attorney General
123 Capitol Building
Cheyenne, WY 82002
Telephone: (307) 777-6946
Facsimile: (307) 777-3542
Attorneys for the State of Wyoming

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing *Respondent Department of Environmental Quality's Response Opposing Protestants' Motion to Suspend Air Permit CT-4631 Pending Resolution of Protestants' Appeal* through United States mail, postage prepaid on this the 12th day of March, 2008 to the following:

James S. Angell
Robin Cooley
Andrea Zaccardi
Earthjustice
1400 Glenarm Place, #300
Denver, CO 80202

Patrick R. Day, P.C.
Mark R. Ruppert
Holland & Hart LLP
2515 Warren Avenue, Suite 450
P.O. Box 1347
Cheyenne, WY 82003-1347



Wyoming Attorney General's Office