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

**IN THE MATTER OF THE PETITION)
FOR HEARING OF:)
TWO ELK GENERATION PARTNERS') DOCKET NO. 14-2801
DEQ AQD PERMIT CT-1352B)
DATED APRIL 24, 2014**

**DEQ'S MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS FOR LACK OF JURISDICTION**

Respondent, Wyoming Department of Environmental Quality (DEQ), through its undersigned counsel, pursuant to Wyo. R. Civ. P. 12(b)(1) and the Environmental Quality Council Rules, Chapter II, Sections 3 and 14, submits the following memorandum in support of its Motion to Dismiss the Petition for a Show Cause Hearing filed by Powder River Basin Resource Council and Sierra Club (Petitioners).

I. INTRODUCTION

On April 24, 2014, Petitioners petitioned the Environmental Quality Council (Council) to hold a show cause hearing related to Air Quality Permit CT-1352B (Permit) issued to Two Elk Generation Partners (Two Elk). Petitioners contend that the Council has the power to hear their complaint under Section 112, Wyo. Stat. Ann. § 35-11-112, of the Wyoming Environmental Quality Act (Act). (*Pet. to the Env'tl. Quality Council for a Show Cause Hearing Related to the*

Validity of Two Elk Generation Partners' Permit, ¶ 6). However, Wyoming statutes clearly mandate that Petitioners must file their complaint as a civil action in the District Court for Laramie County.

Petitioners further contend that their complaint is properly before the Council because the Council has “continuing enforcement and oversight authority” of a settlement agreement entered into by Two Elk and DEQ. (*Id.* at ¶ 6). The Council has already determined that jurisdiction of the settlement agreement properly lies with the District Court of Laramie County. *See EQC Docket No. 07-2601*. Thus, the Council has no jurisdiction to hear the merits of a case improperly placed before it, and should dismiss this Petition as a matter of law.

II. ARGUMENT

A. Petitioners do not have a statutory right to bring this type of case before the Council for review.

Petitioners contend that the Council has a right to hear this case because they believe that the Council has jurisdiction to review the status of any ongoing permit. (*Pet. for Show Cause Hearing*, ¶ 6). Petitioners base this belief on language from Section 112 of the Act, Wyo. Stat. Ann. § 35-11-112, which establishes the general duties and responsibilities of the Council. (*Id.* at ¶ 7). However, other more specific sections of the Act establish clear guidelines for when potential litigants may bring complaints regarding air quality permits before the Council, and those sections do not apply to Petitioners' complaint.

Like all other administrative agencies, the Council is a creature of statute whose power derives from statute, and it may not act without explicit statutory authority. *Exxon Mobil Corp. v. Wyo. Dep't of Revenue*, 2011 WY 161, ¶ 24, 266 P.3d 944, 951 (Wyo. 2011) (citation omitted) (“Like courts, administrative agencies must have jurisdiction before they hear a case.”) Administrative agency actions are only reviewable to the extent that statutes have made them so.

Wyo. Dep't of Env'tl. Quality v. Wyo. Outdoor Council,¹ 2012, WY 135, ¶ 27, 186 P.3d 1045, 1052 (Wyo. 2012). Thus, agency action is not reviewable unless a statute, ordinance, or constitution provides for review. *See, e.g., Bd. of Cnty. Comm'rs of Sublette Cnty. v. State*, 2001 WY 91, ¶ 18, 33 P.3d 107, 114 (Wyo. 2001) (finding that neither statutory law nor due process mandated that the Sublette County Board of Commissioners hold a contested case hearing regarding a previously settled tax agreement); *Carlson v. Bratton*, 681 P.2d 1333, 1338 (Wyo. 1984) (finding that neither statute nor city ordinances required that a police chief be given a contested case hearing prior to being removed from office).

Petitioners contend that they are entitled to a hearing based on the “broad oversight authority” established for the Council in Section 112 of the Act. (*Pet. for Show Cause Hearing*, ¶ 6). Section 112 provides that the Council:

shall hear and determine all cases or issues arising under the rules, regulations, standards or orders issued or administered by the department [DEQ] or its air quality, land quality, solid and hazardous waste management or water quality divisions.

Wyo. Stat. Ann. § 35-11-112(a). Section 112 further 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 the department of any division thereof.

¹ The court in *Wyoming Outdoor Council* examined the question of whether interested parties have the right to review by the Council in certain circumstances, not whether the Act creates the right to review by the Council. The court determined that the Act granted both applicants and other interested parties review by the Council of denied permit applications. In the case of denied permit applications, the Act clearly affords review by the Council. Wyo. Stat. Ann. § 35-11-802. The Petitioners here are not asking the Council to review a denied permit application, but are instead asking the Council to review an existing permit. The Act does not provide for such review. The Act does, however, provide for judicial review of the Petitioners' claims. Wyo. Stat. Ann. § 35-11-904

Wyo. Stat. Ann. § 35-11-112(a)(iii). Finally, Section 112 authorizes the Council to “order that any permit, license, certification or variance be granted, denied, suspended, revoked, or modified.” Wyo. Stat. Ann. § 35-11-112(c)(ii).

Section 112 establishes the powers and duties of the Council, but it does not grant the right of review to anyone. Section 112 does not specify who has a right to seek review, when review can occur, or what types of actions are subject to review. Moreover, nothing within Section 112 creates a procedure by which a person can petition the Council for a hearing. Reading Section 112 in the manner advocated by Petitioners would render superfluous the portions of the Act specifically providing for hearings in front of the Council. *See, Parker Land and Cattle Co. v. Wyo. Game and Fish Comm’n.*, 845 P.2d 1040, 1048 (Wyo. 1993) (finding that it is impermissible to read a statute in a way that would render other portions of the statute irrelevant). Thus, the plain language of Section 112 does not authorize the Council to review Petitioners’ complaint.

By contrast, sections 208, 802, and 1001 of the Act specifically provide for the right to review actions related to air quality permits. Wyo. Stat. Ann. §§ 35-11-208, -802, and -1001. Only sections 208 and 802 provide parties the ability to request a hearing regarding air quality permits in front of the Council, and neither is applicable to Petitioners’ alleged grievance against the DEQ.

Section 208 establishes the process by which the Council may review actions on permit applications and provides:

- (a) An applicant may seek relief pursuant to W.S. 35-11-802 on any final action taken on a permit including the director’s refusal to grant a permit under the operating permit program or failure to act on a completed application within eighteen (18) months.

- (b) Any person who participated in the public comment process on a permit application and who is aggrieved by any final action taken by the director on a permit application may seek relief pursuant to W.S. 35-11-1001.

Wyo. Stat. Ann. § 35-11-208. Thus, applicants are entitled to a contested case hearing before the Council under Section 802, while participants in the public comment process are entitled to judicial review in the District Court of Laramie County under Section 1001.

Section 802 states that, “[i]f the director refuses to grant any permit under this act, the applicant may petition for a hearing before the council to contest the decision.” Wyo. Stat. Ann. § 35-11-802. This section only allows for review by the Council related to the denial of permit applications. Petitioners’ claim does not fall within this category, therefore the subject matter of their Petition is not entitled to review by the Council under Section 802.

Similarly, Section 1001 does not create a right of review by the Council. Section 1001 states, in pertinent part:

- (a) Any aggrieved party under this act, any person who filed a complaint on which a hearing was denied, and any person who has been denied a variance or permit under this act, may obtain **judicial review** by filing a petition for review within thirty (30) days after entry of the order or other final action complained of pursuant to the provisions of the Wyoming Administrative Procedure Act [§§ 16-3-101 through 16-3-115].

Wyo. Stat. Ann. § 35-11-1001 (emphasis added). This section provides a right to judicial review, not review by the Council. Moreover, whether the relevant action is the issuance of permit CT-1352 on February 27, 1998, or the approval of the settlement agreement on November 21, 2007, more than thirty days have passed, and the Petitioners are no longer entitled to judicial review under Section 1001.

Although the Act does not authorize direct review of this Petition by the Council, Section 904 of the Act empowers a broad category of people to bring a wide variety of suits against the DEQ in the District Court of Laramie County. Section 904 reads in pertinent part:

(a) [A]ny person having an interest which is or may be adversely affected, may commence a civil action on his own behalf to compel compliance with this act...

(ii) against the state of Wyoming, department of environmental quality, for alleged failure of the department to perform any act or duty under this act which is not discretionary with the department.

Wyo. Stat. Ann. § 35-11-904. Section 904 gives potential litigants the right to bring suit against the DEQ in the District Court of Laramie County to “compel compliance” with the Act.² *Id.* This is exactly what Petitioners request in their Petition, and their attempt to compel compliance with the Act belongs in the District Court of Laramie County.³

Section 904 is the only section of the Act that applies to Petitioners’ complaint, but it does not entitle Petitioners to bring their complaint before the Council. Instead, the Act gives Petitioners the right to bring their Petition in the District Court of Laramie County. Accordingly, the Council should dismiss the Petition, and, if they wish to proceed, Petitioners should file their complaints related to DEQ’s treatment of Two Elk’s Permit with the District Court of Laramie County.

B. The Settlement Agreement does not give the Council jurisdiction over Petitioners’ Complaint

Finally, Petitioners contend that the Council has subject matter jurisdiction over their Petition as a result of a Joint Stipulated Settlement between DEQ and Two Elk, filed with and approved by the Council. (*Pet. for Show Cause Hearing*, ¶ 8). Petitioners provide no support for this jurisdictional claim, and nothing in the settlement agreement provides the Council with

² Section 904 is consistent with the Wyoming Administrative Procedure Act, which entitles persons “aggrieved or adversely affected in fact...by other agency action or inaction” to judicial review in the District Court of Laramie County. Wyo. Stat. Ann. § 16-3-114(a).

³ As a matter of fact, Section 904 is not the only avenue through which Petitioners could address their grievances related to Two Elk’s Permit. They could also submit their allegations to DEQ by a written complaint pursuant to Section 701 of the Act. Wyo. Stat. Ann. § 35-11-701.

continuing jurisdiction. (*See, Joint Stipulated Settlement Agreement*. EQC Docket No. 07-2601 (Nov. 21, 2007)). In addition, the docket indicates that the previous case has been dismissed. (*Order Approving Parties' Joint Stipulated Settlement, and Dismissing TEGP's Appeal, and Approving the Withdrawal of August 22 Letter*. EQC Docket No. 07-2601 (Dec. 3, 2007) (“[A]ll remaining issues pending in this action are dismissed with prejudice.”); *Order*. EQC Docket No. 07-2601 (Mar. 6, 2008) (“The Council having reviewed the filings and heard arguments, and being fully advised in the premises, hereby finds that the District Court has jurisdiction over the subject matter of this case and therefore it is hereby ordered the above entitled matter is dismissed.”)). The Petitioners are not entitled to bring their complaint before the Council as a result of the settlement agreement, and the Council should dismiss their complaint as a matter of law.

III. CONCLUSION

The Petitioners have no statutory right to bring their Petition before the Council, and, thus, the Council is without statutory authority to preside over the merits of the Petition. Therefore, the Petition should be dismissed as a matter of law.

WHEREFORE, Respondent DEQ respectfully requests the Council enter an Order dismissing the Petition for a Show Cause Hearing and such other and further relief as the Council deems appropriate.

DATED this 3rd day of June, 2014.

FOR RESPONDENT DEQ:



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CERTIFICATE OF SERVICE

I hereby certify that on the 3 day of June, 2014, a true copy of the foregoing document was emailed to the following:

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