The State of Wyoming
Fifth Judicial District

JOHN T. DIXON, JUDGE
CODY, WYOMING 82414

WANDA M. BAKER
EXECUTIVE ASSISTANT

E.J. ERICKSON, REPORTER
CODY, WYOMING 82414

July 19, 1988

S. B. Freeman, III
Mary B. Guthrie
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RE: Althoff, Inc. v. Wyoming Environmental Quality Council, Park County Civil No. 14910

Counsel:

The present case is brought by Petitioner, Althoff, Inc., seeking review of an Order of the Wyoming Environmental Quality Council, (Council). Petitioner had sought a permit to construct a concrete batch plant from the Department of Environmental Quality, Air Quality Division. A hearing was held on the request and subsequently the Administrator of the Air Quality Division and the Director of the Department of Environmental Quality issued a decision granting the permit. A protest was filed before the Council which made Findings of Fact, Conclusions of Law and Order denying the requrested permit. Petitioner then filed the present action seeking review of the Council's decision.

Jurisdiction and venue is proper in this instance pursuant to the provisions of W.S. § 35-11-1001(a)(1977) and W.S. § 16-3-114(a)(1977). Petitioner states four issues in its brief as follows:

> "1. Without the promulgation of a rule, does the Environmental Quality Council have the authority to include as a requirement or standard for issuance of a permit a finding that the applicant has not begun construction of a facility before the permit is issued, and, if the Environmental Quality Council does not have the authority, is such a requirement reversible error?
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> "2. Does the Environmental Quality Council have the authority to deny a construction permit issued to Althoff Construction Company by the Department of Environmental Quality solely to punish Althoff Construction Company because it constructed its concrete batch plant before the construction permit was issued, and, if the Environmental Qaulity Council does not have such authority, is the denial of the permit reversible error?
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> "3. Where the Environmental Quality Council finds in its Findings of Fact, Conclusion of Law and Order that Althoff Construction Company, in knowing violation of the law, constructed its concrete batch plant without seeking the necessary permit, is this conclusion of law erroneous, and, if the conclusion of law is erroneous, does the erroneous conclusion of law constitute reversible error?

"4. If the Amended Findings of Fact, Conclusions of Law and Order issued by the Environmental Quality Council fails to include the vote by the council on the decision, does this failure violate the rules of practice and procedure of the Department of Environmental Quality, and, if the failure is a violation of the rules of practice and procedure, does the failure to include the vote constitute reversible error?"

The Court will address the last argument first. Petitioner contends that the failure to include in the order the vote of the Council's decision constitutes reversible error. Petitioner points to the Council's Rules of Practice and Procedure, Chapter II, Section 12 which provides that the Council must make a written decision and order in all cases and that decision, "shall contain findings of fact and conclusions of law based exclusively on the record and include the vote on the decision." Respondent does not deny that the order failed to include the results of the vote in the decision but points to pages 16-18 of the minutes of the meeting at which the decision was taken wherein it is stated that the motion carried unanimously. Respondent contends that Petitioner had notice of the outcome of the Council's vote and suffered no prejudice from the Council's failure to include in its order the results of the vote.

Rule 7.04, W.R.A.P. provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The burden is on the Petitioner to show that this error, if it be error, was prejudicial. McCarthy v. Whitlock Construction and Supply, 715 P.2d 218, 221 (Wyo. 1986); Herman v. Speed King Manufacturing Company, 675 P.2d 1271, 1278 (Wyo. 1984). As stated by the Court in ABC Builders, Inc. v. Phillips, 631 P.2d 925, 935 (Wyo. 1981): "/F/or an error to be harmful, there must be a reasonable possibility that in the absence of error the verdict might have been more favorable * * *." Petitioner shows absolutely no prejudice from the Council's failure to comply with its Rules of Practice and Procedure in this instance and this issue is meritless.

The third issue raised by the Petitioner is that the Findings of Fact and Conclusion of Law are not supported by substantial evidence. It is well established that agency action not based on substantial evidence is arbitrary and capricious and must be reversed by a reviewing court. Majority of Working Interest Owners in Buck Draw Field Area v. Wyoming Oil and Gas Conservation Commission, 721 P.2d 1070, 1079 (Wyo. 1986); Holding's Little America v. Board of County Commissioners of Laramie County, Wyo., 670 P.2d 699, 703 (Wyo. 1983). Substantial evidence has been defined to mean "relevant evidence which a reasonable mind might accept as supporting the agency's conclusion, although it means more than a mere scintilla of evidence." Kloefkorn-Ballard Construction and Development, Inc. v. North Big Horn Hospital District, 683 P.2d 656, 660 (Wyo. 1984); Westates Construction Co. v. Sheridan County School District No. 2, Board of Trustees, 719 P.2d 1366, 1372 (Wyo. 1986). The burden is on the Petitioner to establish a lack of substantial evidence. Mountain Fuel Supply Company v. Public Service Commission of Wyoming, 662 P.2d 878, 883 (Wyo. 1983).

The Conclusion of Law attacked by Petitioner states: "Permit CT-583 should be denied as the Applicant, Althoff Construction, in knowing violation of the law, constructed its concrete batch plant without seeking the necessary permit." Petitioner

focuses on the language "without seeking the necessary permit," as being unsupported by the evidence. A review of the file in this matter clearly shows that Petitioner did seek to obtain the necessary permit. The Council's Findings of Fact themselves state that Petitioner applied for the permit on March 9, 1984. The evidence also reflects that Petitioner did construct the batch plant before it had received the permit but after it had applied for one. (Testimony of Mr. Althoff, pp. 17-18, Transcript of Public Hearing, August 22, 1984). Respondent argues in its brief that the record is repleat with evidence which supports the Conclusion of Law: "that the plant was constructed without a permit, in knowing violation of the environmental laws." (Respondent's Brief, p.19). Whether or not Petitioner constructed the plant without a permit is not what the Council stated in its Conclusion of Law, the Council stated that Petitioner constructed the plant without seeking the necessary permit. Not only is the evidence not supportive of this Conclusion, it is overwhelmingly opposed to it. Perhaps the Council meant to find that Petitioner constructed the plant before receiving a permit but that is not what their Conclusion states. Since there is no substantial evidence supporting the Conclusion of the Council it cannot be sustained.

Even if the Court were to conclude that there is substantial evidence supporting the finding of the Council, its decision would still have to be reversed. Petitioner argues and this Court agrees that evidence that Petitioner may have constructed the plant prior to obtaining the permit was not relevant to the question of whether Petitioner was entitled to the permit under the statutes, rules and regulations then existing. It is clear from the record, and Respondent does not contest, that Petitioner had made a showing sufficient to comply with the requirements for issuance of the permit under the then existing regulations. The important statutory provision for this argument are W.S. §35-11-112(c)(1977) and W.S. § 35-11-801(1977). Section 35-11-112(c) deals with the powers of the Council and provides:

> "(c) Subject to any applicable state or federal law, and subject to the right to appeal, the council may:
> (i) * * *
> (ii) Order that any permit, license, certification or variance be granted, denied, suspended, revoked or modified;
> (iii) * * *."

Section 35-11-801 deals specifically with the issuance of permits and provides:

> "(a) When an administrator, after consultation with the appropriate advisory board, 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."

As noted above, there is no question that Petitioner complied with the rules and regulations with respect to what it was required to establish to entitle it to the permit. Section 35-11-801 then makes it mandatory that the administrator issue the permit. While the Council, under the provisions of § 35-11-112(c) does have the power to deny permits, that provision is qualified by the language "subject to any applicable state

or federal law." Under § 35-11-801, the administrator was required to issue the permit upon the showing made by Petitioner and this statutory provision limited the Council's right to deny that permit.

In response to this argument, Respondent asserts that the action of the Council was an adjudication and that it was entitled to take into account the Petitioner's construction of the plant prior to the issuance of the permit. Respondent cites Securities and Exchange Commission v. Chenery Corporation, 332 U.S. 194, 202-203, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947) and National Labor Relations Board v. Bell Aerospace Company Division of Textron, Inc., 416 U.S. 267, 293, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974) for the proposition that agencies may base an adjudication upon a new rule of law that is announced for the first time in a decision. What the Court stated in Chenery and quoted again in Bell Aerospace was the following:

> "The function of filling in the interstices of the /Securities/ Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. . . . Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.
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> "In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant regidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-by-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards.' Id at 202-203, 91 L.Ed. 1995." Bell Aerospace, 416 U.S. at 292-293, 40 L.Ed.2d at 153. (Emphasis removed).

The problem with Respondent's reliance on these authorities is that the Council had already provided for the situation at hand through their rules and regulations. There is nothing in Bell Aerospace or Chenery that would permit an agency to adopt rules and regulations for a given situation, apply those rules and regulations and then in the middly of applying them, change them. That is what the Council did in this instance when it denied the permit to Petitioner on a basis not contained in the rules and regulations. That an agency may have to decide cases before it without prior rule-making is what was approved of in Bell Aerospace and Chenery. Those cases do not permit the agency to play fast and loose with the rules and regulations that it does

adopt when applying them to a given factual situation. The the Council may want to take into account past history of an applicant is not at issue in this case. Since the Council had rules and regulations governing the application for the permit and its issuance, it was required to apply those rules and regulations, not change the rules in midstream. The Court therefore finds that the Council was without authority to deny the Petitioner's permit on the grounds that it did so.

The Court need not discuss the other issues raised by Petitioner in its Petition since the above holding completely settles the controversy before the Court.

Counsel for Petitioner shall prepare the appropriate Order, submit it to opposing counsel for approval as to form and, if opposing counsel have not approved same as to form within five days, then to me for signature, together with proof of date of submission.

Very Truly Yours

John T. Dixon
District Judge

JTD/lbj