

**FILED**

MAR 17 2006

Terri A. Lorenzon, Director  
Environmental Quality Council

BEFORE THE  
ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING

IN THE MATTER OF THE APPEAL )  
OF THE COPPERLEAF CHAPTER 23 ) Docket No. 05-3805  
SUBDIVISION APPLICATION, #05-S-052 )

DEQ'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS NORTHFORK  
GROUP'S PETITION AND REQUEST FOR HEARING ON MOTION

Respondent, Wyoming Department of Environmental Quality (DEQ), Water Quality Division (WQD), pursuant to Chapter II, Sections 3 & 14 of the DEQ Rules of Practice & Procedure and Rules 7(b)(1) and 12(b)(1) & (6) of the Wyoming Rules of Civil Procedure (W.R.C.P.), submits this Memorandum in Support of DEQ's Motion to Dismiss Petitioner Northfork Group's (NFG or Petitioner) Petition for Review / Request for Hearing (Petition) in the above-captioned contested case before the Wyoming Environmental Quality Council (Council) for lack of subject matter jurisdiction and/or failure to state a claim upon which the requested relief can be granted.

ACTION UPON WHICH PETITIONER REQUESTS A HEARING BEFORE THE COUNCIL

NFG's Petition, ¶2 (pp.1-2) identifies the "Action Upon Which Hearing is Requested" as:

the final decision by the Administrator of the Water Quality Division of the Wyoming Department of Environmental Quality ("DEQ") to Copperleaf's Chapter 23 Subdivision Application. A copy of the decision letter is marked as "Exhibit A."<sup>1</sup>

Petition "Exhibit [B]," the two page letter from the Water Quality Division Administrator to the Chairman of the Park County Board of County Commissioners dated October 28, 2005, regarding the Copperleaf Subdivision Application is in fact a non-binding "recommendation," not a "final decision" by the Administrator as the Petition (¶2, p.1) alleges.

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<sup>1</sup> The referenced October 28, 2005 DEQ letter is actually marked as Petition "Exhibit B," and will be referred to as "Exhibit [B]" in this Memorandum and the Motion.

## STATEMENT OF THE ISSUE

Is a non-binding “recommendation” by the DEQ to the Chairman of the Park County Board of County Commissioners under WYO. STAT. ANN. §§ 18-5-306(c)(iii) and 308(c) subject to review on appeal in a contested case hearing before the Council under Chapter I, Section 16(a) of the DEQ Rules of Practice & Procedure?

## LEGAL BASIS FOR THIS MOTION TO DISMISS

Chapter II, Section 14 of the DEQ Rules of Practice & Procedure provides that the Wyoming Rules of Civil Procedure, insofar as applicable and not inconsistent with Wyoming law and the DEQ Rules of Practice & Procedure, shall apply to matters before the Council. Rule 12(b), W.R.C.P. allows motions to dismiss on certain grounds, including (1) lack of jurisdiction over the subject matter, and (6) failure to state a claim upon which relief can be granted.

Chapter I, Section 16(a) of the DEQ Rules of Practice & Procedure provides for appeals to the Council from “final actions” of the Administrators or Director. The Council’s March 3, 2006 Order On Intervention (copy attached hereto) found that:

1. The EQC holds contested case hearings where *final actions* taken by the Department of Environmental Quality (DEQ) are challenged.
2. Contested case hearings involve DEQ *decisions* that include the issuance, amendment, or revision of permits.
3. The Environmental Quality Act (the Act) provides a right to object to *final permit actions* of the DEQ to those permittees whose permit is affected and to citizens who have an interest in the permit. (Italics added.)

Timely filing of an appeal from a final agency action is a “jurisdictional matter.” A “final” administrative agency action is one ending the proceedings, leaving nothing further to be accomplished. *Ebzery v. City of Sheridan*, 982 P.2d 1251, 1254 (Wyo. 1999). “For an administrative order to be final, it must ‘impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.’” One reason “not [to] review

preliminary or intermediate agency decisions is to avoid extended periods of unnecessary litigation.” *Ash Creek Mining Company v. Lujan*, 934 F.2d 240, 243-244 (10th Cir. 1991).

In Wyoming, when the Office of State Lands & Investments and the Board of Land Commissioners (Board) “approved pursuing the exchange” of a particular parcel of state school lands for land of equal value without a sale at public auction, a prospective purchaser (Merbanco) filed a petition for review in State District Court, contending that the decision to exchange the school land violated the Board’s constitutional, statutory and administrative authority. The District Court “granted the state’s motion to dismiss the petition for review because *no final agency action* had occurred.”<sup>2</sup> (Italics added.) *Office of State Lands & Investments and the Board of Land Commissioners v. Merbanco, Inc.*, 70 P.3d 241, 244-245 (Wyo. 2003).

#### STANDARD OF REVIEW FOR A MOTION TO DISMISS

When considering a dismissal under W.R.C.P. 12(b)(6) for failure to state a claim upon which relief can be granted, the court must view the allegations in the complaint in the light most favorable to the plaintiff, accepting as true all well pleaded facts. A motion to dismiss, even though sparingly granted, is the proper method for testing the legal sufficiency of the allegations and will be sustained when the complaint shows on its face that the plaintiff is not entitled to the relief requested. *Mummery v. Polk*, 770 P.2d 241, 243 (Wyo. 1989).

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<sup>2</sup> Dismissal of the petition for review was not disturbed, although Merbanco’s subsequent complaint for declaratory judgment challenging the same Board decision survived a motion to dismiss that declaratory judgment suit. *Office of State Lands & Investments and the Board of Land Commissioners v. Merbanco, Inc.*, 70 P.3d 241, 244-245 (Wyo. 2003). *Merbanco* distinguishes between review of an agency action, where the contested action must be final to be ripe for review, and a suit for declaratory judgment, where final agency action is not a prerequisite for subject matter jurisdiction (*Id.* at 248).

Allegations of fact are distinguished from legal conclusions or “characterizations” about alleged facts. By filing a motion to dismiss under Rule 12(b)(6), defendant admits, for purposes of the motion, only that the alleged actions occurred, “but [does] not admit that in doing so it was acting in an unlawful manner.” *Sump v. City of Sheridan*, 358 P.2d 637, 639 (Wyo. 1961). A complaint’s “mere characterization” of a defendant’s activity as “a nuisance” or “unlawful” does not change the nature of the plaintiff’s right to relief. *Sump*, 358 P.2d 637 at 642. Similarly, Petitioner NFG’s “mere characterization” of the DEQ’s recommendations as a “final decision” or “approval” does not make those recommendations ripe for review.

Petitioner apparently recognizes that such non-binding “recommendations” by DEQ to another agency (which is charged with making the actual decision) do not constitute appealable final decisions, because if such “recommendations” were appealable, there would be no need for the Petition to repeatedly characterize them as “final decisions” or “approvals.”

#### ALLEGATIONS IN THE PETITION WHICH ARE AT ISSUE FOR THIS MOTION

The Petition generally alleges: 1) that the questioned DEQ action here (the DEQ’s October 28, 2005 recommendation letter to the Park County Board of Commissioners) is “unlawful” and “not in accordance with law” (Petition, ¶¶3.1., 3.o.), and 2) that it is a “final” agency “decision” or “approval” (Petition ¶¶2., 3.n., 4.), making it ripe for review by the Council. As explained in the *Sump* case cited above, for purposes of this motion to dismiss, the DEQ admits that it conducted the review and made the recommendations at issue, but does not admit that its actions in doing so were “unlawful” or “not in accordance with law,” or that its October 28, 2005 recommendation letter constituted a final decision or approval regarding the sewage or water supply systems proposed in the Copperleaf subdivision application.

Specifically:

The Petition, ¶2 (pp.1-2) identifies the “Action Upon Which Hearing is Requested” as: the *final decision* by the Administrator of the Water Quality Division of the Wyoming Department of Environmental Quality (“DEQ”) to Copperleaf’s Chapter 23 Subdivision Application. A copy of the *decision letter* is marked as “Exhibit [B].”<sup>3</sup> (Italics added.)

The Petition, ¶3.n. (p.5) alleges that “Included within the DEQ finding that Developer meet the requirements of Chapter 23, is an *approval* of a water and sewage treatment system for town homes that have been rejected by the Board [of Park County Commissioners].” (Italics added.)

The Petition, ¶4. (p.5) requests that the Council “*reverse the October 28, 2005 decision* of the Administrator of the Water Quality Division of the DEQ to the Park County Board of Commissioners regarding the Copperleaf Subdivision Application.” (Italics added.)

#### DISCUSSION

The only issue for purposes of this Motion to Dismiss is whether or not the DEQ’s October 28, 2005 non-binding “recommendation” to the Park County Board of County Commissioners under WYO. STAT. ANN. §§ 18-5-306(c)(iii) and 308(c) is a “final” agency action subject to review in a contested case hearing before the Council under Chapter I, Section 16(a) of the DEQ Rules of Practice & Procedure.

#### ***Respective Roles of DEQ and Board of County Commissioners Regarding Subdivision Permits***

In Wyoming, the legislature has enacted a comprehensive statutory scheme that permits boards of county commissioners to provide for the physical development of unincorporated

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<sup>3</sup> See footnote 1.

territory within the county. *Marshall v. Board of County Commissioners for Johnson County, Wyoming*, 912 F.Supp. 1456, 1467 (D. Wyoming 1996). Title 18, Chapter 5, Article 3 governs real estate subdivisions. WYO. STAT. ANN. § 18-5-301 vests regulation and control of subdivisions in unincorporated areas of a county in that county's board of county commissioners. WYO. STAT. ANN. § 18-5-304 requires "a subdivision permit from the board of the county" before proceeding with layout or construction of a subdivision in that county. WYO. STAT. ANN. § 18-5-308 ("Approval by the board") states that "The board shall approve or disapprove the subdivision application and issue a subdivision permit or ruling."

WYO. STAT. ANN. § 18-5-306(a)(i) calls for the board to require subdivision applications to include, among other things, satisfactory evidence that the proposed subdivision complies with applicable zoning or land use regulations. WYO. STAT. ANN. § 18-5-307 authorizes planning and zoning commissions to "make recommendations to the board of county commissioners" concerning a subdivision application. However, the board of county commissioners (not the planning and zoning commission) is responsible for final approval or disapproval of subdivision applications (WYO. STAT. ANN. § 18-5-308). *Marshall*, 912 F.Supp. 1456 at 1468.

By the same token, WYO. STAT. ANN. § 18-5-306(a) requires that applications for a subdivision permit include information for evaluation of the adequacy and safety of the proposed subdivision (iv) sewage system and (vi) water supply system. WYO. STAT. ANN. § 18-5-306(c) calls for the DEQ to review those portions of a subdivision application prior to subdivision permit approval by the county board, and then ((c)(iii)) to file its written comments and recommendations on the application with the board of county commissioners. But, it is the

board of county commissioners, not the DEQ, that makes the final decision on issuance of a permit for a proposed subdivision. WYO. STAT. ANN. § 18-5-308(c).

***DEQ Subdivision Recommendations are Not Final Agency Decisions or Approvals***

Black's Law Dictionary, Fifth Edition (pp.1143-1144) defines "recommendation" as referring to "an action which is advisory in nature rather than one having any binding effect." As a general matter, two conditions must both be satisfied for agency action to be "final." First, the action must mark the consummation of the agency's decisionmaking process, and not be of a merely tentative or interlocutory nature. In addition, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. An agency action is not "final" where it serves more like a tentative recommendation than a final binding determination. For example, submission of base closure recommendations by the Secretary of Defense to the President, was "not 'final agency action'" because the recommendations were in no way binding on the President, who had absolute discretion to accept or reject them. *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997). Similarly, DEQ recommendations to the board of county commissioners under WYO. STAT. ANN. §§ 18-5-306(c)(iii) & 308(c) do not constitute final agency action, because such recommendations do not in themselves impose an obligation, deny a right or fix some legal relationship as a consummation of the agency's decisionmaking process, and under §308(c) DEQ recommendations are not binding on the county board.

The Wyoming Administrative Procedure Act (WAPA) itself distinguishes recommendations from final decisions in the context of contested cases. An administrative agency may employ an independent hearing examiner to preside at its contested case hearings. Such hearing examiners may make "recommended decisions" to the agency, but the agency must make the "final decisions." WYO. STAT. ANN. § 16-3-112(b)(viii) & (e). In a case where an

agency's "final decision" did not adopt the hearing examiner's "recommended decision," the issue on appeal was whether the agency should be compelled to adopt the "recommended decision." In affirming the agency's final decision, the Wyoming Supreme Court observed that although the legislature had provided for the use of hearing officers to take evidence and make recommended decisions, the director of the agency was given the responsibility to make the final decision in such cases, and could not delegate the authority to make final decisions to an independent hearing officer, unless required by law. *RM and SM v. Department of Family Services*, 953 P.2d 477, 480-482 (Wyo. 1998). Implicit in the *RM* opinion and in WYO. STAT. ANN. § 16-3-112 is the distinction between a recommendation and a final decision.

***Separate DEQ Permits are Required in Addition to Subdivision Permits***

WYO. STAT. ANN. § 35-11-301(a)(iii) requires a separate permit from DEQ to construct or install any sewage system, treatment works, or disposal system. WYO. STAT. ANN. § 35-11-301(a)(v) requires a separate permit from DEQ to construct or install any subdivision water supply (except for individual wells serving individual lots). Consequently, in addition to the county board's approval of a subdivision permit, the subdivider will also have to apply for and obtain permits from the DEQ to proceed with development of the proposed sewage system and/or the proposed water supply system. DEQ decisions to grant or deny a DEQ Chapter 3 permit are final agency actions subject to appeal before the Council under Chapter I, Section 16 of the DEQ Rules of Practice & Procedure and the Council's March 3, 2006 Order on Intervention.

Although the relevant portions of it are reviewed by the DEQ for purposes of WYO. STAT. ANN. § 18-5-306(c), the application for a subdivision permit is not the equivalent of a



full application for a DEQ Chapter 3 permit to construct or install a sewage system or a subdivision water supply system, as required by WYO. STAT. ANN. §§ 35-11-301 & 302(a)(iii). DEQ “recommendations” to the board of county commissioners under W.S. 18-5-306(c)(iii) do not constitute DEQ approval of full applications for Chapter 3 permits for subdivision water supply and/or sewage systems required under WYO. STAT. ANN. § 35-11-301(a)(v)&(iii).

By its own terms, the DEQ letter (Petition Exhibit [B], p.1) only “constitutes [DEQ’s] conclusions regarding the *feasibility* of the proposed water and sewage systems pursuant to W.S. 18-5-306(c)” (italics added), and it expressly points out that the DEQ’s recommendations do not relieve the subdivider of the obligation to obtain required state permits or commit the DEQ to issue any permits for proposed water supply and/or wastewater systems (Petition Exhibit [B], p.2). Whatever recommendation the DEQ offers on the proposed sewage system and /or water supply system portions of a subdivision application, the subdivider still must submit full applications for, and obtain, DEQ Chapter 3 permits apart from and in addition to a subdivision permit from the county board, before proceeding to actually construct or install those systems.

### ***Review of Final Agency Decisions***

For purposes of the Wyoming Administrative Procedure Act, “agency” includes any board or commission of a county or other political subdivision of the state. WYO. STAT. ANN. § 16-3-101(b)(i). The local board of county commissioners, not the DEQ, is the agency that decides whether to approve or disapprove of a subdivision application, and whether or not to issue a subdivision permit. WYO. STAT. ANN. §§ 18-5-304 & 308. The board may approve a subdivision application notwithstanding an adverse recommendation by the DEQ. WYO. STAT. ANN. § 18-5-308(c). If the board of county commissioners issues a subdivision permit for the

proposed Copperleaf subdivision and the Northfork Group objects, that board action is subject to judicial review under the WAPA. WYO. STAT. ANN. § 16-3-114(a). In a case involving a petition for review of a board of county commissioners' decision to issue industrial development revenue bonds, the Wyoming Supreme Court held that the county board was an "agency" as defined in §16-3-101(b)(i) of the WAPA, and that issuance of the bonds was "other agency action" reviewable by the Court. *Holding's Little America v. Board of County Commissioners of Laramie County*, 712 P.2d 331, 331-332, 333 (Wyo. 1985).

As explained above, DEQ subdivision recommendations under WYO. STAT. ANN. § 18-5-306(c) are not final DEQ decisions on the necessary DEQ Chapter 3 permits. If the DEQ issues (or denies) such permits, those DEQ permitting decisions will be final agency actions subject to review by the Council on appeal by either an objector or the subdivider.

### ***Conclusion***

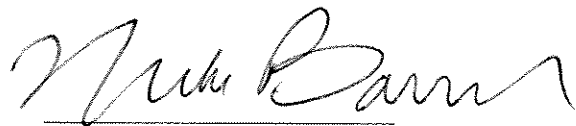
Regardless of what the DEQ recommends (and regardless of the Council's decision, were it to hear an appeal of the DEQ's recommendation), the county board is not bound to follow the DEQ recommendations in deciding whether to grant or deny a subdivision permit. WYO. STAT. ANN. § 18-5-308(c). The Council's jurisdiction does not extend to appeals involving county board decisions on the issuance or denial of subdivision permits. If the Council were to proceed with a hearing on an appeal of a DEQ recommendation to the county board under WYO. STAT. ANN. § 18-5-306(c), the outcome of Council hearing could not control the county board's ultimate decision on the fate of a subdivision permit under WYO. STAT. ANN. § 18-5-308.

This matter will not escape review, but not each step in the process leading to a final decision is subject to review. Even without Council review of DEQ subdivision

recommendations, subdivision objectors, such as the Northfork Group, will have two opportunities to pursue their objections to *final* agency actions, if necessary: 1) Council review, if the DEQ issues Chapter 3 permits to construct or install subdivision sewage and/or water supply systems, and 2) judicial review under the WAPA if the county board issues a subdivision permit.

For the Council to proceed with hearings on DEQ subdivision recommendations, prior to a final decision by DEQ on issuance of the necessary sewage system and/or water supply system Chapter 3 permits, would be premature. Accordingly, Petitioner NFG's Petition in this matter should be dismissed for lack of subject matter jurisdiction and/or failure to state a claim upon which the requested relief can be granted.

DATED this 17th day of March, 2006.



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CERTIFICATE OF SERVICE

True and correct copies of the foregoing DEQ'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS NORTHFORK GROUP'S PETITION AND REQUEST FOR HEARING ON MOTION, were served by United States mail, first class postage prepaid, this 17th day of March, 2006, addressed as follows:

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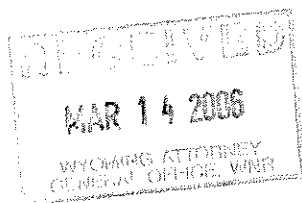
Mike Barr

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MAR 03 2006

Terri A. Lorenzon, Director  
Environmental Quality Council

BEFORE THE  
ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING



**ORDER ON INTERVENTION**

At a public meeting on February 16, 2006 the Wyoming Environmental Quality Council (EQC) considered Motions to Intervene and Rule 19, Wyoming Civil Rules of Procedure. In the interest of fairness and economy the EQC whose members are Mark Gordon, Jon Brady, Richard C. Moore, P.E., Wendy Hutchinson, John Morris, Dennis M. Boal, and Sara M. Flintner, by an unanimous vote hereby find, conclude and order following:

1. The EQC holds contested case hearings where final actions taken by the Department of Environmental (DEQ) are challenged.
2. Contested cases hearings involve DEQ decisions that include the issuance, amendment, or revision of permits.
3. The Environmental Quality Act (the Act) provides a right to object to final permit actions of DEQ to those permittees whose permit is affected and to citizens who have an interest in the permit.
4. When persons, who are not the permittee, object to a final permit action taken by DEQ, a contested case is docketed with the EQC. Permittees are indispensable parties to cases in which their permit is challenged.
5. Landowners or other persons may be indispensable parties in contested cases where a permit is challenged, depending on the nature of their interest in the outcome of the case.
6. Permittees, landowners, or other persons who are or may be indispensable parties are not named as parties when a contested case is docketed and they are then left to file a motion to intervene to become a party to the case.
7. Because of the nature of their interest in proceedings affecting their permit or interest, a permittee, a landowner, or other person should be a party to the case.
8. W.R.C.P. 19, incorporated by reference in the EQC's Rules of Practice and Procedure, addresses indispensable parties and provides a process to join parties in a proceeding.

**Therefore, the EQC concludes:**

1. Permittees are indispensable parties to cases in which their permit is at issue or in jeopardy.
2. Landowners or other persons may be indispensable parties, depending on the nature of their interest.
3. Joining indispensable parties to a case is a procedural decision that may be made by the EQC member presiding over the case.

4. Should a person who is indispensable decline to participate in the case, or should a person's status as indispensable be questioned, the matter shall be referred to a majority of those on the EQC for a decision on how to proceed, which will include consideration of the procedures provided in W.R.C.P. 19.

**IT IS HEREBY ORDERED THAT:**

1. All persons who are indispensable parties to a contested proceeding before the EQC shall be joined as a party.
2. The EQC member presiding over a case where the joinder of an indispensable party is necessary may join that party without having the matter decided by the full EQC.
3. Where joinder is challenged or where issues as to the interests of a party are challenged, the matter will be referred to the entire EQC for a decision on how to proceed.

**DATED** this 3<sup>rd</sup> day of March, 2006

A handwritten signature in black ink, appearing to read "Mark Gordon", written over a horizontal line.

Mark Gordon, Chairman  
ENVIRONMENTAL QUALITY COUNCIL