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

**IN THE MATTER OF THE APPEAL OF)
THE RENEWAL BOND AMOUNT FOR) EQC DOCKET NO. 16-4601
BENTONITE MINING PERMIT NO. 624)**

**DEQ'S MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

Respondent, the State of Wyoming, Department of Environmental Quality, through its undersigned counsel, under Wyo. R. Civ. P. 12(b)(1) and 12(h)(3) 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, *Appeal of Department of Environmental Quality's Determination of Renewal Bond Amount for Bentonite Mining Permit No. 624 and Request for Hearing* (Petition), filed by Good Bentonite Company, LLC (GBC), on the grounds that the Council does not have jurisdiction over this matter.

I. INTRODUCTION

This case involves a bentonite mine operating under Non-Coal Mining Permit 624. (Petition at 2, ¶¶ 5-6.)¹ After an annual inspection of the mine on November 24, 2015, the

¹ The Department disagrees with facts presented in the Petition, including the proper identity of the permit holder and operator. However, those factual disagreements are not important for the purposes of this motion. When reviewing a motion to dismiss for lack of subject matter

Department updated its calculations of the amount of the mine's reclamation bond. (Pet. Ex. A) In a letter dated December 16, 2015, the Director of the Department gave notice of the new bond amount and directed that the permit holder post the additional bond needed to meet the new total. *Id.* On February 4, 2016, GBC filed a petition with the Environmental Quality Council to hold a hearing and order the Department to change the bond amount and to change, or enjoin, the Department from enforcing certain reclamation requirements for the mine. (Pet. at 1-2.) However, the Council does not have jurisdiction to hear the Petition.

The Petition concerns an issue that is outside of the Council's jurisdiction under the Wyoming Environmental Quality Act and asks for relief that the Council cannot grant. Instead, the Act requires a person to challenge the Department's setting of a new bond amount through a petition for judicial review in state district court. Wyo. Stat. Ann. § 35-11-1001(a). Because the Petition is not within the Council's subject-matter jurisdiction, the Council should dismiss it as a matter of law.

II. BACKGROUND ON RECLAMATION BONDING

The Act requires each mine operator to post a reclamation bond with the Department "to assure that the operator shall faithfully perform all requirements of this act and comply with all rules and regulations of the board made in accordance with the provisions of this act." Wyo. Stat. Ann. § 35-11-417(a). The bond amount changes over time, tied to the condition of the property as the mine progresses and reclamation follows. Thus, when an operator first begins operating under his permit, he must provide an initial bond "equal to the estimated cost of reclaiming the affected land disturbed . . . during the first year of operation." Wyo. Stat. Ann. § 35-11-417(c)(i). The

jurisdiction, a court accepts the facts in a complaint as true and views them in the light most favorable to the non-moving party. *Swinney v. Jones*, 2008 WY 150, ¶ 6, 199 P.3d 512, 515 (Wyo. 2008).

Department then reviews the bond amount annually (a “renewal period”) and, when necessary, adjusts it by calculating the “renewal bond” that the operator must post. Wyo. Stat. Ann. §§ 35-11-411(a), (d), -417(c)(ii).

For renewal bonds the amount equal to the estimated cost of reclaiming the land to be disturbed during that renewal period, and the estimated cost of completing reclamation of unreleased lands and groundwater disturbed during prior periods of time. The estimated cost shall be based on the operator's cost estimate, which shall include any changes in the actual or estimated cost of reclamation of unreleased affected lands, plus the administrator's estimate of the additional cost to the state of bringing in personnel and equipment should the operator fail or the site be abandoned.

Wyo. Stat. Ann. § 35-11-417(c)(ii).²

Every year, the operator files an annual report with the Department that includes his estimated renewal bond amount along with the supporting production and technical information. Wyo. Stat. Ann. § 35-11-411(a). Department staff review the operator’s report, request any necessary additional information from the operator, and then conduct an annual inspection of the mine site. Wyo. Stat. Ann. § 35-11-411(b), (c). The Department then issues an inspection report, and the Director sets the renewal bond amount for the ensuing year based on the information the operator provided, the information that Department staff gathered during the inspection, and the Department’s guidelines estimating the additional costs to the state to bring in personnel and equipment. Wyo. Stat. Ann. § 35-11-411(c)-(d).

² GBC has questioned the Department’s authority to determine the adequacy or completion of reclamation on the ground. (Pet. at 3). The Department determines whether lands are disturbed or continue to be disturbed (including whether revegetation is completed) and when bonds, or portions of bonds, should be released. Wyo. Stat. Ann. §§ 35-11-110(b), -403(a)(ii), and -417(e); *Rules Wyo. Dep’t of Env’tl. Quality, Land Quality--Noncoal*, ch. 3, § 2(d)(vi). The Department also has discretion to bring actions to enforce the requirements of an operator’s license or the Act. Wyo. Stat. Ann. §§ 35-11-412 and -701.

III. ARGUMENT

A. The Act does not provide for administrative review of a renewal bond calculation.

In its petition, GBC does not identify any legal authority that grants the Council jurisdiction over appeals of reclamation bond amounts or calculations. (*See* Pet. at 1-2.) That is because the Environmental Quality Act does not contain any such authority.

The Act creates the requirements and process for setting and regularly reevaluating the bond amounts but does not provide a person with the right to seek the Council's review of the decisions made during that process. Together, Wyoming Statutes §§ 35-11-411 and 417 describe the annual report and inspection process and establish guidelines for reclamation bonds. Yet, neither they nor any other provision of the Act state that a person may seek administrative review by the Council of a renewal bond amount set by the Director or the calculations underlying that amount.

Like all other administrative agencies, the Council and the Department are creatures of statute whose powers derive from statute, and they 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 Envtl. Quality v. Wyo. Outdoor Council*, 2012 WY 135, ¶ 27, 286 P.3d 1045, 1052 (Wyo. 2012). Thus, agency action is not reviewable unless a statute, ordinance, or constitutional provision 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).

For the Department and the Council, the Act describes each agency's authority, including how the agencies' various actions may be reviewed. *See People v. Fremont Energy Corp.*, 651 P.2d 802, 809 (Wyo. 1982). The Act confers subject matter jurisdiction on the Council to review certain actions of the Department but not others. *See id.* at 810 (holding that under Wyoming Statutes § 35-11-701(c), a person may seek the Council's review of a cease and desist order regarding a non-coal mining violation but not a notice of violation without an accompanying cease and desist order).

The absence of language about Council review of renewal bond amounts is significant because the Act contains several provisions that address the Council's administrative review of Department actions, each specific to a particular action or process. Just within the subject area of mining and mineral exploration regulation, the Act provides at least eleven different processes (excluding rulemaking) that involve Council proceedings or review:

1. "Any interested person" may have the Council hear their objections to a proposed permit application or permit amendment application. Wyo. Stat. Ann. § 35-11-406(k). This also applies to permit revisions that "proposed significant alterations in the reclamation plan." Wyo. Stat. Ann. § 35-11-402(a)(x).
2. If the Director refuses to grant a permit, the applicant may petition the Council to review the Director's decision. Wyo. Stat. Ann. § 35-11-802.
3. Similarly, the Council may hear appeals to the denial of a research and development license. Wyo. Stat. Ann. § 35-11-432.
4. When an aggrieved party challenges a variance or renewal of a variance, the Department may not grant or renew the variance unless the Council hears the challenge and affirms the variance. Wyo. Stat. Ann. § 35-11-601(g)-(h).
5. Before reclamation bond forfeiture proceedings can begin, the Director must obtain the Council's approval. Wyo. Stat. Ann. § 35-11-421(a).

6. After the Council grants permission to initial forfeiture proceedings, the affected operator then has the right to demand a hearing before the Council to request that the Council not order forfeiture of the bond. Wyo. Stat. Ann. § 35-11-421(b).
7. Cease and desist orders may be reviewed by the Council if the affected person files a timely request for a hearing. Wyo. Stat. Ann. § 35-11-701(c)(ii)-(iii).
8. Emergency orders issued by the Director must be promptly reviewed by the Council. Wyo. Stat. Ann. § 35-11-115(a).
9. For surface coal mining operations, cessation orders may be reviewed by the Council upon timely petition from the affected operator or a person who has an interest which is or may be adversely affected. Wyo. Stat. Ann. § 35-11-437(c)(ii), (d).
10. The Council may also review penalties proposed in conjunction with notices of abatement and cessation orders issued to surface coal mining operations. Wyo. Stat. Ann. § 35-11-902(e)(ii), (g).
11. Finally, the Council holds hearings to consider petitions to designate an area unsuitable for surface coal mining and hear arguments from the petitioner and any other party who wishes to participate. Wyo. Stat. Ann. § 35-11-425(a)-(b).

In each of these processes, the Wyoming Legislature specifically stated that review by the Council was required or available. But the Legislature tailored the timing or manner of the Council's involvement to fit the needs of different processes. For example, in some situations, the Legislature set different deadlines for scheduling Council hearings. *See* Wyo. Stat. Ann. §§ 35-11-406(k) and -437(d) (addressing cessation orders and objections to mining permit applications, respectively). The Act also provides for Council proceedings at different times, including after the action or both at the beginning and end of a process. *See* Wyo. Stat. Ann. § 35-11-406(k) and -421 (relating to mining permit application objections and reclamation bond forfeitures).

While the list and examples above only include actions or processes that are related to regulating mining under Article 4 of the Act, they demonstrate the Legislature's careful attention to identify when and how certain persons may or must engage the Council to review particular activities under the Act. *See Laramie Cnty. Sch. Dist. No. One v. Cheyenne Newspapers, Inc.*, 2011 WY 55, ¶ 2, 250 P.3d 522, 527 (Wyo. 2011) ("The legislature is presumed to act in a thoughtful

and rational manner with full knowledge of existing law, and therefore statutes are required to be construed in harmony with existing law, and as part of an overall and uniform system of jurisprudence.”). In contrast, the absence of language in the Act specifically providing for Council review of renewal bond calculations and settings shows that the Legislature did not intend for, and the Act does not allow, a person to seek the Council’s review of those particular Department actions.

However, the Legislature did not make a renewal bond entirely unreviewable. The Act does not preclude a court from reviewing the setting of a renewal bond. *See* Wyo. Stat. Ann. § 35-11-1001(a). The Director’s decision to set a renewal bond is a “final action”, and as such, the Act provides an operator with the right to seek judicial review by a district court:

(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(a) (emphasis added). The Act defines “aggrieved party” as “any person named or admitted as a party or properly seeking or entitled as of right to be admitted as a party to any proceeding under this act because of damages that person may sustain or be claiming because of his unique position in any proceeding held under this act.” Wyo. Stat. Ann. § 35-11-103(a)(vii). The Act uses the broad definition of “aggrieved party” and broad language of Wyoming Statutes § 35-11-1001(a) to allow a wide variety of people to seek judicial review of many types of Department actions, including an operator appealing a renewal bond.³

³ None of the Act’s seven other provisions providing for judicial review address renewal bonds. *See* Wyo. Stat. Ann. § 35-11-406(k) (relating to Council hearings on objections to mining permit applications); Wyo. Stat. Ann. § 35-11-437(f) (referencing the possibility of judicial review of

The explicit language of Wyoming Statutes § 35-11-1001(a) granting a right to judicial review of many actions under the Act stands in contrast to the Legislature's silence regarding Council review of reclamation bond amounts. This distinction demonstrates that the Act provides a person the right to seek judicial review, but not administrative review, of a reclamation bond amount.

B. The unavailability of administrative review for every Department action is well established in Wyoming law.

Although the Wyoming Supreme Court has not specifically considered the ability of a person to seek Council review of a renewal bond calculation, the court has addressed the ability to seek Council review of notices of violation and cease and desist orders. *See Fremont Energy Corp.*, 651 P.2d at 807-08. *Fremont Energy* is analogous to the issue currently before the Council and supports the conclusion that the Council does not have jurisdiction to review renewal bonds.

Fremont Energy applies to the statutes governing notices of violation and cease and desist orders. Wyoming Statutes § 35-11-701(c)(i) allows the Department to issue: 1) notices of violation for uncorrected violations of the Act or its related regulations, and 2) orders for a violator to cease and desist the violations. Wyo. Stat. Ann. § 35-11-701(c)(i); *Fremont*, 651 P.2d at 807. Subsection 701(c)(ii) then allows a person to request a Council hearing on an "order" under that section and

Council hearings relating to the regulation of surface coal mining and reclamation operations, consistent with Wyoming Statutes § 35-11-902(h)); Wyo. Stat. Ann. § 35-11-502(k) (relating to Council hearings on objections to solid waste management permit applications); Wyo. Stat. Ann. § 35-11-518(b) (pertaining to Council hearings on certain Department orders relating to the Resource Conservation and Recovery Act); Wyo. Stat. Ann. § 35-11-902(h) (relating to final decisions of the Council regarding violations by and penalties for surface coal mining operations); Wyo. Stat. Ann. § 35-11-601(k) (allowing judicial review of the Department's or the Council's granting, renewing, or denial of variances). In addition, of all of these specific provisions, only Wyoming Statutes § 35-11-601(k) addresses decisions made by the Department. *See* Wyo. Stat. Ann. § 35-11-601(k) (allowing judicial review of the Department's or the Council's granting, renewing, or denial of variances).

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subsections 701(c)(iii) and (iv) govern those hearings. Wyo. Stat. Ann. § 35-11-701(c)(ii)-(iv); *Fremont*, 651 P.2d at 808. The court in *Fremont* found that “order” in the statute referred to cease and desist orders and not notices of violation:

From the language in § 701(c)(ii) and (iii), it is clear to [the court] that the order therein referred to is a cease and desist order and not simply a written notice of violation. Had the legislature intended that the mere allegation made by DEQ in issuing and serving a written notice of violation should entitle the individual served to a review before the council, it could have so stated by using the word “notice” along with the word “order” in § 701(c)(ii)—it did not. It is also clear that the legislature's use of the phrase “order contained in a notice” and “order issued as part of a notice” in § 701(c)(iii) indicates that the word “order” in § 701(c)(ii) does not encompass a notice of violation.

Fremont, 651 P.2d at 809. Thus, review by the Council under Subsection 701(c)(ii) does not apply to notices of violation when the Department does not also issue a cease and desist order. *Id.* Notices issued without a cease and desist order must be reviewed by a district court as part of an action by the Department to seek civil penalties for the violations. *Id.* at 808.

Like notices of violation not accompanied by cease and desist orders, the Act also does not provide for the right to appeal to the Council the Department’s determinations setting a renewal bond amount. Given the Act’s detail in describing the circumstances in which the Council has jurisdiction, it is telling that the Act does not mention challenges to annual reclamation bond decisions. *See Fremont*, 651 P.2d at 809 (“Had the legislature intended that the . . . written notice of violation should entitle the individual served to a review before the council, it could have so stated by using the word “notice” along with the word “order”.) For reclamation bonds, the Act only states that a person may seek Council review of bond forfeiture notices. Wyo. Stat. Ann. § 35-11-421(a). And while the Act specifically sets out the annual bond review process, those provisions do not state that a person may seek Council review of that process. *See* Wyo. Stat. Ann. § 35-11-411 and -417. “When the legislature omits language from a statute, [the court considers]

the omission intentional.” *J & T Properties, LLC, v. Gallagher (In re Gallagher)*, 2011 WY 112, ¶ 13, 256 P.3d 522, 525 (Wyo. 2011). The absence of language granting the Council authority to review renewal bond calculations demonstrates that administrative review is not available.

This conclusion is consistent with the holding in *Wyoming Department of Environmental Quality v. Wyoming Outdoor Council*, 2012 WY 135, 286 P.3d 1045 (Wyo. 2012). In that case, the court found that a third party organization could seek Council review of the Department’s decision to issue general water permits. *Id.* at ¶ 31, 186 P.3d at 1053.⁴ The court based its decision on three factors not present among the issues currently before the Council. First, the Department’s water quality regulations specifically allowed an “interested person” to request a hearing regarding “a decision to issue, modify, or terminate” a water quality permit. *Id.* at ¶ 29, 186 P.3d at 1053 (quoting *Rules Wyo. Dep’t of Envtl. Quality, Water Quality*, ch. 2, § 17). Second, the court found a history of similar cases where such challenges had occurred without objection. *Id.* Finally, the court looked to Wyoming Statutes § 35-11-112(a)(iv) and its language stating that the Council shall “Conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act.” *Id.* at ¶ 28, 186 P.3d at 1052-53. Through these factors, the court identified the water quality regulation that provided for administrative review a water permit decision, and then made its holding regarding who could utilize that mechanism.

Unlike the water quality regulations examined in *Wyoming Outdoor Council*, the Department’s land quality regulations do not provide for any mechanism for Council review of

⁴ After the dispute in *Wyoming Outdoor Council* arose, the Wyoming Legislature amended Wyo. Stat. Ann. § 35-11-801 to clarify that general permits are only appealable by aggrieved parties to state district courts. 2012 Wyo. Sess. Laws, ch. 109, § 1 (adding Wyo. Stat. Ann. § 35-11-801(d), which directly provides for appeals of general permits). This amendment effectively overrides the court’s decision regarding general permits.

renewal bonds, there are no previous cases demonstrating Council review of renewal bonds, and the language of Wyoming Statutes § 35-11-112 does not mention bonds. While *Wyoming Outdoor Council* may contain broad statements implying that it should be applied beyond water quality permit approvals, that case is limited to the issues and subject matter before that court. *Bales v. Brome*, 84 P.2d 714 (Wyo. 1938) (quoted by *Gen. Chem. Corp. v. Prasad (In re Claim of Prasad)*, 11 P.3d 344, 348 (Wyo. 2000)) (“The authority of a former decision as a precedent must be limited to the points actually decided on the facts before the court.”). In addition, the differences between the issues addressed in *Wyoming Outdoor Council* and the issues before the Council today demonstrate that *Wyoming Outdoor Council* is not on applicable to GBC’s appeal of the bond amount for Permit 624.

C. Wyoming Statutes § 35-11-112 does not provide the right to seek Council review of a renewal bond amount.

Beyond the language of Wyoming Statutes § 35-11-112(a)(iv) discussed in *Wyoming Outdoor Council*, no other provision of Wyoming Statutes § 35-11-112 supports the right to appeal the setting of a renewal bond amount. An application of the principles of statutory interpretation to the potentially relevant language in section 112 supports this point.

With regard to contested cases, section 112 provides, in part, 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 or its air quality, land quality, solid and hazardous waste management or water quality divisions.

Wyo. Stat. Ann. § 35-11-112(a). Section 112 also directs that the Council shall:

(iii) 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;

(iv) Conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act;

Wyo. Stat. Ann. § 35-11-112(a)(iii). Section 112 also states that the Council may:

- (i) Approve, disapprove, repeal, modify or suspend any rule, regulation, standard or order of the director or any division administrator;
- (ii) Order that any permit, license, certification or variance be granted, denied, suspended, revoked or modified;
- (iii) Affirm, modify or deny the issuance of orders to cease and desist any act or practice in violation of the laws, rules, regulations, standards or orders issued or administered by the department or any division thereof. ...

Wyo. Stat. Ann. § 35-11-112(c)(i)-(iii).

Interpreting the meaning of a statute begins by looking at the plain and ordinary meaning of the words in the statute. *Bender v. Decaria*, 998 P.2d 953, 955 (Wyo. 2000). If the statute is unambiguous, then the plain meaning controls. *Id.* “Every word in legislation is presumed to have a meaning, and a statute should be construed so that no part will be inoperative or superfluous.” *Basin Elec. Power Co-op. v. Bowen*, 979 P.2d 503, 509 (Wyo. 1999). “All statutes must be construed in *pari materia* and, in ascertaining the meaning of a given law, all statutes relating to the same subject or having the same general purpose must be considered and construed in harmony.” *BP America Prod. Co. v. Dep’t of Revenue, State of Wyo.*, 2005 WY 60, ¶ 15, 112 P.3d 596, 604 (Wyo. 2005) (quoting *Loberg v. Wyo. Workers’ Safety & Comp. Div.*, 2004 WY 48, ¶ 5, 88 P.3d 1045, ¶ 5 (Wyo. 2004)).

By its plain meaning, section 112 establishes the duty of the Council to hold hearings in certain circumstances and the power to take certain actions during those hearings. But unlike the explicit judicial review language in Wyoming Statutes § 35-11-1001(a), section 112 does not grant the right of Council review to anyone. *See* Wyo. Stat. Ann. § 35-11-112(a), (c). Although section 112 references hearings and cases, section 112 does not state how those “cases” come to exist or

how or when a person can trigger or request the Council hearings that section 112 mentions. *See id.* Instead, section 112 works with other corresponding statutes in the Act that do provide for how and when cases come before the Council for hearing and disposition.

For example, references in subsections 112(a)(iv) and (c)(ii) to cases about variances tie to Wyoming Statutes § 35-11-601(g), which specifically allows aggrieved parties to request the Council to hear and decide a variance appeal. Wyo. Stat. Ann. § 35-11-112(a)(iv), -112(c)(ii), -601(g). Similarly, references to cases about permits subsections 112(a)(iv) and (c)(ii) tie to the statutes providing for requests for Council hearings related to permits. *See* Wyo. Stat. Ann. § 35-11-406(k) (regarding mining permits); Wyo. Stat. Ann. § 35-11-802 (regarding any denied permit). And the discussions of enforcement actions and cease and desist orders in subsections 112(a)(iii) and (c)(ii) also correspond with more specific statutes. *See, e.g.,* Wyo. Stat. Ann. § 35-11-701(c)(ii) (allowing requests for hearings on cease and desist orders); Wyo. Stat. Ann. §§ 35-11-437(c)(ii), -902(e), -902(g) (relating to hearings on enforcement actions on coal mining permits); Wyo. Stat. Ann. § 35-11-421(b)-(c) (regarding Council hearings in reclamation bond forfeiture proceedings); Wyo. Stat. Ann. § 35-11-409(c) (providing for hearings on show cause proceedings prior to mine permit revocations or suspensions).

By contrast, no corresponding statute provides for Council review of renewal bond determinations. Reading section 112 to include a right of review for all disagreements regardless of the subject would improperly render superfluous the many 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); *BP America Prod. Co.*, ¶ 15, 112 P.3d at 604. These provisions would be unnecessary if their specific language does not affect

when or how persons may seek administrative review. Viewed in context with the remainder of the Act, Wyoming Statutes § 35-11-112 does not provide any person a right to request Council review of the setting of a renewal bond amount.

D. Public policy supports judicial review, rather than administrative review, of the setting of reclamation bond amounts.

The Legislature's decision to limit review of renewal bonds to judicial review also makes sense as a matter of public policy. Judicial review of annual decisions like renewal bond settings allows the parties to more quickly and efficiently reach a final decision resolving the dispute. The Act's judicial review process also provides protections for both operators and the Department from unreasonable appeals brought by third parties.

Regarding the efficiency of the review process, it is helpful to compare the annual setting of a reclamation bond with other actions where the Legislature provided for Council review. The Department's decision to initially grant a permit under Wyoming Statutes § 35-11-406 can only occur once in that permit's life. The same logic holds true for approval of particular amendments or revisions to an existing permit. In the case of cease and desist orders under Wyoming Statutes § 35-11-701 or cessation orders under Wyoming Statutes § 35-11-437, enforcement actions only occur occasionally. In those situations, there is less likelihood that the Council's review process (and the subsequent appeals to the district court and then supreme court) would not be completed prior to the Department having to repeat the process that caused the initial case before the Council. So there is less need to make sure the initial review and any subsequent appeals conclude quickly.

Renewal bond determinations are different. The Department calculates and sets renewal bonds each year for every mine permit in the State. Wyo. Stat. Ann. § 35-11-411(d); Wyo. Stat. Ann. § 35-11-417(c)(ii). By directing challenges to renewal bonds straight to district court, the Act justly grants an aggrieved operator the legal right to have the Department's actions reviewed by

an outside authority. But the Act also acknowledges the annual nature of the bond review process and limits appellate review to only two possible levels (district court and supreme court). This reduces the amount of time an operator may delay posting a reclamation bond. If the Legislature had provided each mine operator with three levels of appellate review (Council, district court, and supreme court), each operator could significantly postpone his annual obligation to post updated bonding.

Providing only judicial review for renewal bond appeals also provides for a less complex and more efficient review process. For example, a district court or the Wyoming Supreme Court reviews only an established administrative record, with limited discovery only as appropriate under the courts' rules.⁵ Wyo. R. App. P. 12.08 and 12.09(a). By contrast, the Council's rules of procedure allow for discovery in all cases and a trial-type contested case hearing with the administrative record established only through the evidence and testimony received at the Council's hearing. *See Rules Wyo. Dep't of Envtl. Quality, Practice and Procedure*, ch. 2; *Sierra Club v. Wyo. Dep't of Envtl. Quality*, 2011 WY 42, ¶ 24, 251 P.3d 310, 317 (Wyo. 2011). The Council's process includes additional steps and takes more time than a court's judicial review of the Department's final action to set a renewal bond.

A two-step process of judicial review under Wyoming Statutes § 35-11-1001(a) also benefits operators when it comes to third parties appealing the Department's decision setting a renewal bond, even when the operator does not disagree with the Department's decision. If reclamation bond amounts were generally subject to administrative review without specific

⁵ The "administrative record" for a renewal bond calculation would include documents from both the Department and documents from the operator. For example, the record would include the operator's annual report and the bond calculations contained within that document. This ensures that both parties have input into the information going before the courts.

language providing for it, then the specific provisions in the Act that limit Council review to particular persons would also not apply. Third parties would not have to meet any statutory requirements to be able to appeal a renewal bond and could freely challenge, and thereby delay, any action by the Department to either decrease a bond amount based on an operator's reclamation progress or to set a bond at an amount that the third party did not think was sufficient. This could result in an appeal of one bonding decision overlapping a subsequent decision and harm the operator's ability to know what its legal bonding obligations are at any one time.

The Legislature's decision to only provide for judicial review of renewal bond decisions helps prevent third parties from abusing the review process. The judicial review provisions in the Act include specific limitations on who holds rights to appeal a renewal bond setting. Under Wyoming Statutes § 35-11-1001(a), a third party to the bond has to qualify as an "aggrieved party" to seek judicial review under Wyoming Statutes § 35-11-1001(a). "Aggrieved party" status is contingent on a person's "damages" and "unique position" in the proceeding held under the Act. Wyo. Stat. Ann. § 35-11-103(a)(vii). This allows third parties actually affected by a renewal bond decision to seek review of the Department's action. But it prevents unaffected persons from abusing the availability of judicial review and harming the Department's ability to set, and the operator's ability to provide, reclamation bonds that protect the environment and encourage operator compliance with their permit.


IV. CONCLUSION

A person has the right to seek judicial review of a renewal bond amount. However, the Legislature did not provide a right to seek the Council's administrative review for renewal bonds. Both the language of the Act and sound policy support the Legislature's decision. Because there is no statutory right to ask the Council to review the setting of a renewal bond amount, the Council

is without statutory authority to preside over the merits of GBC's petition. Therefore, the Council should dismiss the petition as a matter of law.

The Department respectfully requests that the Council enter an order dismissing the petition and providing such other and further relief as the Council deems appropriate.

DATED this 26th day of May 2016.


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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of May, 2016, a true and correct copy of the foregoing document was filed electronically with the Wyoming Environmental Quality Council's online docket system and served electronically through that system on the following:

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