

**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)

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

COMES NOW, Good Bentonite Company, LLC, Petitioner, by and through its attorney, Heather A. Jacobson, Jacobson Law Office, LLC, and respectfully submits this Memorandum in Support of Petitioner's Traverse to DEQ'S Motion to Dismiss.

FACTS:

Petitioner Good (Good) is the holder of the Bentonite Mining Permit No. 624. (Petition at 1.) He is also the owner of the surface of the land described in the mining permit. (Petition at 2). Good has mined the property since 2010. The DEQ has approved all annual reports and bond estimates submitted by Good until 2015. After the submission of the 2015 annual report and bond estimate by Good, DEQ rejected the proposed bond estimate – which would have left the bond amount at the current level – and issued a letter demanding an increase in bond of Fifty-Five Thousand dollars(\$55,000), an increase of Twenty-Five Percent (25%) in a single year. This increase occurred despite the fact that Good had reclaimed a significantly larger area of land than he disturbed in the previous year. After unsuccessful attempts to work the matter out with the DEQ, Good filed this appeal.

ARGUMENT

DEQ bases its Motion to Dismiss on its claim that the Council does not have jurisdiction to hear an appeal of the setting of a renewal bond. However, the Motion to Dismiss should be denied because it is not supported by Wyoming statute, Wyoming case law or public policy considerations.

1) Wyoming statute grants the Council subject matter jurisdiction in this case.

DEQ cites to no statute, case law or rule or regulation that states that the Council lacks this jurisdiction. They argue that W.S. § §35-11-411 and 35-11-417, which are the two statutes that

govern the setting of a reclamation bond, do not specifically state that a permittee can appeal to the Council. Thus, they extrapolate that a permittee does not have the right to appeal the setting of a reclamation bond to the Council. The flaw in this logic is that it fails to acknowledge the language of W.S. §35-11-12. This statute states in part:

35-11-112. Powers and duties of the environmental quality council

(a) The council shall act as the hearing examiner for the department and shall hear and determine all cases or issues arising under the laws, 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...

(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 or 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...

(Emphasis added.)

DEQ's argument that a specific statute must be cited to justify Council jurisdiction ignores the Legislature's inclusion of the term "any case" in both subsection (a)(iii) and (a)(iv) of §35-11-112. It is well settled law that every word in a statute must be given meaning and that the legislature meant to use the words that it did. *Haddenham v. City of Laramie*, 648 P.2d 551 (Wyo.1982). Therefore, the inclusion of the term "any case" instead of the term "any case as authorized under other statutes" or "only those cases otherwise authorized" or some such language means that the legislature granted the Council subject matter jurisdiction in *any case* that is brought challenging the DEQ's administration and enforcement of its rules and permitting process. No other statute needs to be consulted to grant the Council subject matter jurisdiction, unlike the DEQ's claim.

The sole issue that the permittee needs to be able to allege is that he is appealing either the "the administration or enforcement of any law, rule, regulation, standard or order issued or administered by the department or any division thereof" or that he is appealing "the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or

required by this act". In this case, Petitioner is appealing under both subsections. He is appealing the DEQ's administration and enforcement of its statutes and rules in regards to the setting of his renewal bond amount. This grants the Council the right to hear the appeal under subsection a(iii). Petitioner argues additionally that the setting of his renewal bond amount is part and parcel of the renewal of his permit and thus grants the Council jurisdiction to hear his appeal under a(iv) also.

Based upon the foregoing, the Council has been granted statutory authority to exercise subject matter jurisdiction in this matter.

2) Wyoming case law grants the Council subject matter jurisdiction in this case.

Wyoming case law also supports the fact that the Council has subject matter jurisdiction in this case. The Wyoming Supreme Court considered the identical argument that the DEQ is making in this case in the case of *Wyoming Department of Environmental Quality v. Wyoming Outdoor Council*, 286 P.3d 1045 (Wyo. 2012). While Petitioner is certain that the Council members are fully aware of the facts of this case, to briefly summarize; it was the case in which the WOC appealed the DEQ's issuance of general discharge permits to Yates and Marathon during the coal bed methane boom. The CBM companies argued that the Council did not have subject matter jurisdiction to hear WOC's appeal because there was no statute specifically allowing anyone but the permittee to appeal any decision in regards to the issuance of a permit. The Supreme Court, in summarily rejecting this argument and affirming the Council's jurisdiction, cited approvingly to the holding in the case of *Holding's Little America v. Board of County Commissioner's of Laramie County* which stated:

"So far as policy considerations are concerned, it is our view that the interests of the State of Wyoming are best served by a policy which leads to reviewability in most instances." And, to preclude judicial review, the statute, if not specific in withholding that review, must give clear and convincing evidence of an intent to restrict. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold." *Wyoming Department of*

Environmental Quality v. Wyoming Outdoor Council, 286 P.3d at 1052 citing *Holding's Little America*, 670 P.2d at 702-03.

The WOC opinion went on to state:

As applied to our current case, the significant point of our decision in Holding's Little America is that the right to review is presumed, and review is precluded only if the legislature provides "clear and convincing evidence of an intent to restrict." Although Holding's Little America dealt with judicial review of agency action, this point also applies to administrative review of agency action. *Id.*

And finally, the Court stated:

The Wyoming Environmental Quality Act may be silent about the right of an interested third party to seek EQC review of DEQ decisions, but that silence should not be read to preclude EQC review. To the contrary, the opinion in Holding's Little America indicates that statutory silence raises a presumption that EQC review is not precluded. *Id.* at 1053.

While the facts were slightly different in the WOC case, the legal argument is identical and the Wyoming Supreme Court's reasoning in rejecting the legal argument should be adopted by the Council in this case.

3) Public policy considerations support the Council having subject matter jurisdiction in this case.

DEQ also argues that public policy supports the idea that only judicial review should be available to permittees when they dispute bond renewal amount decisions. It appears from the brief that DEQ is under the mistaken belief that a judicial review happens much more quickly than a Council review. Petitioner is unable to understand this reasoning as this hearing was set only months after the date the appeal was filed, whereas a setting in District Court will generally be at least a year out from the date of filing. It also appears that DEQ believes that limiting discovery in a manner that is allowed under the judicial review rules of evidence but not allowed under a Council hearing is somehow supportive of public policy. This is a puzzling argument to make in the State of Wyoming where a cornerstone of our administrative and judicial branches is full information disclosure. Any statement that it is in the public's best interest to deny or limit an aggrieved party's right to discovery material that may substantially impact his livelihood and business is a good and desirable thing is very concerning. When really analyzed, all of the issues that DEQ cite to as supporting their argument of not granting the Council jurisdiction, actually

very strongly support the Council taking jurisdiction. Therefore, public policy considerations support the Council's jurisdiction in this case.

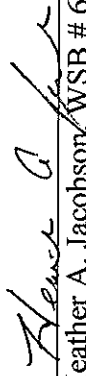
CONCLUSION

Based upon the facts and arguments outlined above, Good asserts that the Environmental Quality Council does have subject matter jurisdiction in this matter. Therefore, DEQ's Motion to Dismiss should be denied, the hearing should be held as scheduled and Good should be awarded any other relief that the Council deems necessary and appropriate under the circumstances.

DATED this 8th day of June, 2016.

Good Bentonite Company, LLC,
Petitioner

By:


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above foregoing Petitioner's Traverse to DEQ'S Motion to Dismiss was filed electronically with the Wyoming Environmental Quality Council's online docket system and served electronically through that system to the following:

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