

findings about the permit application before the Department Director can issue the requested permit. The statutory provisions directly applicable in this matter are Wyoming Statute § 35-11-406(a) and (b), which contain substantive requirements for permit applications, and Wyoming Statute § 35-11-406(h) through (k), which lay out the technical review process and the process for objecting to a permit application that the Administrator has deemed suitable for publication. The Administrator must make the findings required under Wyoming Statute § 35-11-406(n) before the Director may issue the permit, but the Council should not make those findings now.

II. Statutory Interpretation Principles

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.3d 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. Dept. of Revenue, State of Wyo.*, 2005 WY 60, ¶ 15, 112 P.3d 596, 604 (Wyo. 2005).

III. Overview of Surface Coal Mine Permitting Process

The surface coal mine permitting process follows the order laid out by the Environmental Quality Act and Wyoming Statute § 35-11-406. In brief, the applicant files an application, the Department reviews it, and interested parties may file objections. Wyo. Stat. Ann. § 35-11-406(a), (b), (h) through (k). After either the Director or the Council resolves those objections, then the

Administrator must make specific findings laid out in Wyoming Statute § 35-11-406(n). The statute is laid out in a specific order and the Department takes steps in accordance with that order.

First, applicants must file an application with the Wyoming Department of Environmental Quality, Land Quality Division (the Division), which reviews the application for completeness. Wyo. Stat. Ann. § 35-11-406(e). Review for completeness means ensuring that all of the required parts of the application are present, not that the application complies with Land Quality statutes and regulations.¹ The Division has 60 days to make its completeness determination. *Id.* After the Division deems the application complete, the applicant publishes notice in a newspaper of general circulation that it has filed the application. Wyo. Stat. Ann. § 35-11-406(g).

Next, the Division reviews the application for technical adequacy within 150 days. Wyo. Stat. Ann. § 35-11-406(h). During that review, the Division may decide that the application is suitable for publication, deficient, or denied. *Id.* The statute's phrase "suitable for publication" refers to the Department finding that an application is technically adequate (that it complies with the application requirements in Division statutes and rules) based upon the information known to the Division prior to public objections or comments. *Id.* If an application is deficient, the applicant may submit additional information to attempt to cure the deficiency. *Id.*² The Division then has 30 days to review the additional information. *Id.* In this way, the statute sets up rounds of Division review and applicant response that continue in succession until the Division either determines that the application is suitable for publication or denies the permit.

¹ "'Complete application' under W.S. 35-11-406(e) means that the application contains all the essential and necessary elements and is acceptable for further review for substance and compliance with the provisions of this chapter." Wyo. Stat. Ann. § 35-11-103(e)(xxii).

² "'Deficiency' means an omission or lack of sufficient information serious enough to preclude correction or compliance by stipulation in the approved permit to be issued by the director." Wyo. Stat. Ann. § 35-11-103(e)(xiv).

If an applicant satisfactorily resolves all identified deficiencies in the application, the Division determines that the application is suitable for publication and public comment. Wyo. Stat. Ann. § 35-11-406(h), (j). After publication of the application, interested persons have the right to file written objections to the permit application with the Administrator. Wyo. Stat. Ann. § 35-11-406(k). Objections to a non-coal permit application may be resolved through a contested case hearing before the Council, while objections to a surface coal mining permit application may be resolved through an informal conference with the Department Director or through a hearing before the Council. *Id.* An informal conference is held if the Director determines that the informal conference is preferable to the contested case hearing; otherwise, the contested case hearing is the vehicle that the statute provides for resolving objections to the permit application. *Id.*

In accordance with the order in which the statute is laid out, Wyoming Statute § 35-11-406(n) only comes into play *after* the Director or the Council resolve the objections to the permit application. That section provides that a surface coal mining permit, like the one in this matter, shall not be approved until the Division Administrator makes seven specific findings in writing. Wyo. Stat. Ann. § 35-11-406(n).

As a practical matter, Deputy Director Edwards cannot make the findings under Wyoming Statute § 35-11-406(n) at this time. For example, the cumulative hydrologic impact assessment, the document which would support a finding that “the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area,” has not been completed yet. Wyo. Stat. Ann. § 35-11-406(n)(iii). The Division is responsible for preparing this assessment, not the permit applicant. In preparing the cumulative hydrologic impact assessment, the Division relies, in part, on information and commitments in the permit application. Because

those items could change as a result of Council's resolution of the objections in this contested case, the Council's decision could affect the Division's cumulative hydrologic impact assessment.

In addition, Wyoming Statute § 35-11-406(n)(v) requires Deputy Director Edwards to find that "the proposed operation would ... not interrupt, discontinue, or preclude farming on alluvial valley floors[,]” and would “[n]ot materially damage the quantity or quality of water in surface or underground water systems that supply these alluvial valley floors. Wyo. Stat. Ann. § 35-11-406(n)(v)(A) and (B). The Division has investigated potential alluvial valley floors (“AVFs”) in the area and reviewed the application against the application requirements relating to AVFs. *See Div. Coal Rules*, chs. 2 § 4(a)(xv), 3 § 2, and 12 § 1(a)(i). However, if the Council determines that the application does not yet meet those requirements, changes to the application could change the AVFs that the operation might affect and the nature of the potential effects. For these reasons, it is not possible for Deputy Director Edwards to make the findings under Wyoming Statute § 35-11-406(n) at this time.

Similarly, the first two findings, that “the application is accurate and complete” and that “the reclamation plan can accomplish reclamation as required,” will be informed by how the Council resolves the objections in this matter. Wyo. Stat. Ann. § 35-11-406(n)(i) and (ii). These findings refer to a final determination, after public objections and comments are taken into account, that the application is technically adequate. Deputy Director Edwards's³ ability to make these findings will be substantially informed by how the Council resolves the objections, because many of the objections relate to specific substantive standards that the permit application must meet

³ As discussed at the hearing, Administrator Kyle Wendtland has recused himself from making decisions on this permit application and Deputy Director Alan Edwards is acting as the Administrator for this matter.

under Wyoming Statute § 35-11-406(a) and (b) and the Land Quality rules and regulations to be technically adequate.

For example, the charge that the application lacks sufficient baseline data on water quality and quantity can be resolved by looking to the baseline data requirements in Wyoming Statute § 35-11-406(a)(vii) (a description of annual rainfall, current surface and underground waters, water rights, and water uses) and -406(a)(ix) (a map showing current water bodies and wells), as well as the Division's Coal Rules, chapter 2, sections 4(a)(xi),⁴ 4(a)(xii),⁵ and 4(a)(xiv).⁶ These requirements are in addition to the water-related requirements for the mine, reclamation, and monitoring plans. *See, e.g.*, Wyo. Stat. Ann. § 35-11-406(b)(xiv)-(xvi) and (xviii); *Div. Coal Rules*, ch. 2, § 5(a)(ix). If the Council determines that, in this example, the objections demonstrate that the permit application does not meet the baseline water data requirements, the Council's determination would affect Deputy Director Edwards' decision on the finding under Wyoming

⁴ Chapter 2, section 4(a)(xi) of the Division's Coal Rules relates to baseline surface water data and requires, by subsection: (A) a list and description of surface water bodies; (B) a description of current surface water uses; (C) baseline monitoring information on surface water quantity, including information on seasonal flow rates and identification of drainage area acreage; (D) water quality data sufficient to identify seasonal variability, including at a minimum data on total dissolved solids, total suspended solids, pH levels, total and dissolved iron, and total manganese; and (E) baseline alkalinity and acidity information, if there is potential for acid drainage.

⁵ Chapter 2, section 4(a)(xii) of the Division's Coal Rules relates to baseline groundwater data and requires, by subsection: (A) an estimate of the depth and quantity of groundwater, and potentially drilling and monitoring data of exact depth, quantity and quality of groundwater in affected geological formations; (B) a description of lithology and thickness of known aquifers; (C) water quality data, including at a minimum data on total dissolved solids, total and dissolved iron, total manganese, and pH levels; and (D) a description of the groundwater's recharge, storage, and discharge characteristics.

⁶ Chapter 2, section 4(a)(xiv) of the Division's Coal Rules requires a description of surface water, groundwater, and geology "sufficient to assess the probable hydrologic consequences." That rule also allows the Division to require additional baseline surface water or groundwater information to evaluate the probable hydrologic consequences and the reclamation activities. *Id.*

Statute § 35-11-406(n)(i) that “the application is accurate and complete.” This is true even though the Division believed, prior to the public objections and comments, that the permit application was technically adequate and suitable for publication.

But the fact that the objections have triggered this contested case and the fact that the Council’s resolution of the objections may affect Deputy Director Edwards’s findings under Wyoming Statute § 35-11-406(n) does not change *who* the statute requires must make those findings. Regardless of whether objections are filed or a Council hearing or informal conference are held, Wyoming Statute § 35-11-406(n) unambiguously lays the responsibility for making the findings at the feet of the Administrator. Because the statute is unambiguous, the plain language of the statute should control. *Bender v. Decaria*, 998 P.3d 953, 955 (Wyo. 2000). It is not the Council’s role to determine, for example, whether the “proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area”; rather, it is the Council’s role to determine whether the permit application complies with the rules and regulations which detail what hydrologic information and plans must be present in permit applications. Wyo. Stat. Ann. § 35-11-406(n)(iii). Once the Council has made those determinations, Deputy Director Edwards will be responsible for applying the Council’s determinations and making a decision on the findings listed in Wyoming Statute § 35-11-406(n).

IV. The Council’s Role in this Contested Case

The Council’s role in this contested case is to determine whether the application satisfies the requirements found in Wyoming Statute § 35-11-406(a) and (b) and complies with Land Quality coal rules and regulations in order to resolve the objections raised by the Powder River Basin Resource Council, Big Horn Coal Company, and Mary Brezik-Fisher. Wyo. Stat. Ann. §

35-11-406(h) through (k). This process may include the Council finding that some objections could be resolved through a permit condition to cure minor issues.

In the event that the Council resolves the objections by deciding that the application satisfies the substantive requirements in Wyoming Statute § 35-11-406(a) and (b) and the Land Quality rules and regulations, the Administrator must then make the findings under Wyoming Statute § 35-11-406(n) before the Department Director makes a decision on permit issuance or denial. Wyo. Stat. Ann. § 35-11-406(k), (n), and (p). The statute expressly places this responsibility and authority with the Administrator of the Land Quality Division, not the Council. Wyo. Stat. Ann. § 35-11-406(n). If the Director issues the permit, and the objectors believe that Deputy Director Edwards made the findings required by Wyoming Statute § 35-11-406(n) in error, they may appeal the Director's decision to issue the permit. Wyo. Stat. Ann. § 35-11-1001.

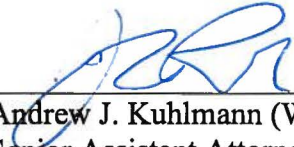
Moreover, the Division Administrator's responsibility and authority under Wyoming Statute § 35-11-406(n) exists regardless of whether there are objections to the permit application or not. Wyo. Stat. Ann. § 35-11-406(n). That responsibility and authority does not change simply because the parties filed objections in this matter and the Council must resolve those objections. *See* Wyo. Stat. Ann. § 35-11-406(k), (n).

V. Conclusion

The Council should not apply Wyoming Statute § 35-11-406(n) to this matter. Instead, the Council should resolve the objections by using Wyoming Statute § 35-11-406(h) through (k), which lay out the process by which the Division determines that the application is technically adequate and by which interested persons may file written objections, as well as Wyoming Statute § 35-11-406(a) and (b) and the Land Quality coal rules and regulations, which lay out substantive requirements for permit applications. The Department's written closing argument and proposed

findings of fact and conclusions of law will detail the statutes, rules, and other legal guidance which the Council must use to resolve the objections.

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CERTIFICATE OF SERVICE

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