

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF THE APPEAL FROM)
THE PERMIT TO CONSTRUCT #P0036295) Docket No. 24-2801
JACKSON HOLE CONSERVATION)
ALLIANCE, ET AL.)

RESPONSE TO MOTION FOR STAY

The Wyoming Department of Environmental Quality Air Quality Division, hereinafter “Air Quality Division” responds as follows to the *Motion For Stay* filed in this matter by Appellants Jackson Hole Conservation Alliance and Teton Village Association:

Appellants attempt to rely on *Rules, Wyo. Dep’t of Env’tl. Quality, Practice and Procedure*, ch. 1, § 8(c) (“Subsection C”) as the purported authority for a request to stay the air quality permit issued by the Air Quality Division. As explained below, Subsection C does not apply.

I. Subsection C only applies to surface coal mining disputes.

Subsection C does not apply to this proceeding. That provision, by the requirements of other specific language of Chapter 1, Section 8, applies only when the underlying permit is for the conduct of surface coal mining.

Subsection C states that “[where a hearing is requested under subsection (b) of this section, the Council may . . . grant temporary relief”. *Rules, Wyo. Dep’t of Env’tl. Quality, Practice and Procedure*, ch. 1, § 8(c). Thus, the Subsection C provision relied on by Appellants applies only when a hearing is requested under “subsection (b).” By its plain language, subsection (b) applies only “[w]ithin thirty (30) days after notification of the Director’s decision following an informal conference **governed by Chapter 9, Section 2 of these rules . . .**” *Id.* at ch. 1, § 8(b) (alterations added) (emphasis added).

Chapter 9, Section 2 of the DEQ rules apply to surface coal mining activities and permitting decisions in relation thereto. The plain language of Chapter 9 provides as follows as to its scope:

“Section 1. Scope

This Chapter shall apply to any hearings, informal conferences, or review before the Department, the Director, an Administrator, or any combination thereof. **This Chapter does not apply to rulemaking hearings, contested cases, or other hearings before the Council.”**

Id. at ch. 9, § 1 (emphasis added). Section 2 of Chapter 9 goes on to provide for informal conferences in disputes relating to surface coal mining operations.

Indeed, as Exhibit C to Appellants’ *Motion For Stay* expressly states “[c]ertain portions of the Uniform Rules conflict with the requirements necessary for the State to retain regulatory primacy over programs delegated under the . . . **Surface Mining Control and Reclamation Act** Certain portions of the Uniform Rules **are inapplicable to the Environmental Quality Council** and the Department of Environmental Quality (“Department”). Those inapplicable portions have not been adopted. **General references in the Uniform Rules were replaced with specific references.**” Appellants’ *Motion For Stay*, Ex. C at p.1, ¶ 4 (emphasis added).

Moreover, the application of the rule providing for temporary relief only in surface coal mining disputes was highlighted by this Council itself when discussing a related matter in the *Basin Electric* decision: “an EQC de novo hearing on appeal is limited to surface coal mine appeals.” *In re Basin Electric Power Cooperative Dry Fork Station*, Order Denying Protestant’s Motion to Suspend Air Permit CT-4631 Pending Resolution of Protestants’ Appeal at 3, No. 07-2801 (EQC Aug. 21, 2008).

In sum, Subsection C does not authorize this Council to stay the air permit issued in this matter by the Air Quality Division. It simply does not apply to this appeal.

II. The EQC does not have authority to stay a permit.

Agencies only have the powers granted to them by the legislature. *Amoco Prod. Co. v. State Bd. of Equalization*, 12 P.3d 668, 673 (Wyo. 2000) (citation omitted). The legislature has not granted the Council authority to stay an issued permit in this context. Instead, the Council has only been granted authority to review a permit issued by the Department and issue a final decision on appeal. As a creature of statute, the agency's authorizing statute must provide an agency with its authority to act. *Id.*; see also *Pedro/Aspen, Ltd., v. Bd. of County Comr. 's for Natrona Cnty*, 2004 WY 84, ¶ 29 (an "agency is not a 'super legislature' empowered to change" statutes "under the cloak of assumed delegated power.") (citation omitted). An agency is limited to the powers the legislature chose to delegate and is "wholly without power to modify, dilute or change in any way the statutory provisions from which it derives its authority." *Platte Dev. Co. v. EQC*, 966 P.2d 972, 975 (Wyo. 1998). "[R]easonable doubt of the existence of a power must be resolved against the exercise thereof. A doubtful power does not exist." *Mayland v. Flitner*, 2001 WY 69, ¶ 47 (citing *French v. Amax Coal West*, 960 P.2d 1023, 1027 (Wyo. 1998)) (alteration added).

The Wyoming Environmental Quality Act (Act) is devoid of any authority for this Council to stay a permit issued by the Air Quality Division. As noted by this Council in the *Basin Electric* ruling cited above, a "stay" of a permit is functionally equivalent to a "suspension" of a permit." *In re Basin Electric Power Cooperative Dry Fork Station*, Order Denying Protestant's Motion to Suspend Air Permit CT-4631 Pending Resolution of Protestants' Appeal at 7-8, No. 07-2801 (EQC Aug. 21, 2008).

The Act and the regulations promulgated pursuant to the Act outline a process by which a permit may be suspended. By law, only the Director of the Department of Environmental Quality has the power to do so. Under the Act, the Director of the Department shall "[i]ssue, deny, amend, suspend or revoke permits and licenses" Wyo. Stat. Ann. § 35-11-109(a)(xiii); see also Wyo.

Stat. Ann. § 35-11-110(a)(ii) (an administrator recommends to the director the proposed “suspension . . . of permits and licenses.”) (alteration added).

Appellants’ request for a stay also ignores the permit holder’s due process rights. The Wyoming Administrative Procedure Act places procedural due process requirements on the Department and this Council with respect to any permit to be stayed or suspended. The Wyoming Administrative Procedure Act, defining a license to include any permit issued by a state agency¹ states that:

[N]o revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license.

Wyo. Stat. Ann. §§ 16-3-113(c) (alteration added).

That statute also states that an agency may only order “summary suspension” of a license, pending proceedings for revocation or other action, upon a finding by the agency that public health, safety or welfare imperatively require emergency action. Wyo. Stat. Ann § 16-3-113(c). Here, Appellants ask the Council to violate the permit holder’s due process rights by staying its permit prior to this Council hearing any evidence in this action, in a proceeding to which it is not even a party. Such an action would plainly violate the Wyoming Administrative Procedure Act and the permittee’s due process rights.

The statutory role of this Council is to “act as the hearing examiner for the department,” and to “hear and determine all cases or issues arising under the law, rules, regulations, standards or orders issued or administered by the department” Wyo. Stat. Ann. § 35-11-112(a). In its

¹ Wyo. Stat. Ann. § 16-3-101(b)(iii).

role as the hearing examiner for the Department, the Act requires the Council to specifically conduct hearings, “contesting the grant . . . of any permit . . . authorized or required by this Act.” Wyo. Stat. Ann. § 35-11-112(a)(iv).


The Act also outlines the various actions the Council may take at the conclusion of a contested case. With respect to the appeal of a permitting action by the Air Quality Division, the Council may “order that any permit, license, certification or variance be granted, denied, suspended, revoked or modified.” Wyo. Stat. Ann. § 35-11-112(c)(ii). Thus, while this Council has the power to suspend the air permit in question *after the conclusion of the hearing* in this matter, it has no authority to do so on a temporary basis during the pendency of this action before consideration of the volume of evidence that led to the Air Quality Division’s issuance of the permit in the first place.

In conclusion, Wyoming law provides a specific, but limited, process by which a permit may be suspended. That process cannot be changed or upended by a request for unilateral action by the Appellants. The Council does not have the power to independently enforce the Act in the first instance. That power is reserved to the Department, and in exercising that power, even the Department must afford the permittee the procedural due process outlined in the Act and the Wyoming Administrative Procedure Act. The Council’s job is to serve as the independent hearing examiner for any appeal of a permit issued by the Department through the Air Quality Division. This process—and only this process—assures a permittee with requisite procedural due process.

III. Conclusion

In conclusion, for the reasons set forth above, the Council should deny the Appellant’s *Motion For Stay*.

RESPECTFULLY SUBMITTED this 10th day of May, 2024.



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CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of May, 2024, I electronically filed the foregoing document with the Environmental Quality Council and served all parties using the Council's electronic notification service. The permit holder in this matter was served via U.S. Mail at:

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