BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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

REPLY IN SUPPORT OF MOTION FOR STAY

Jackson Hole Conservation Alliance and the Teton Village Association (collectively, the "Appellants"), by and through their undersigned attorneys, respectfully submit this reply in support of their Motion for Stay filed on April 29, 2024 ("Motion"). The Motion requests that the Environmental Quality Council ("Council") stay the effectiveness of Permit to Construct #P0036295 dated February 29, 2024 (the "Permit") until this Appeal is resolved. The Wyoming Department of Environmental Quality, Air Quality Division ("DEQ") filed a response to the Motion for Stay on May 10, 2024 ("Response").

I. The Council Has the Authority to Grant Appellants' Stay Request

Subsection (c) of Chapter 1, Section 8 of the DEQ Rules of Practice and Procedure (hereinafter, "Subsection (c)") authorizes the Council to stay the Permit until the Appeal is resolved. DEQ argues Subsection (c) only applies to surface coal mining permits (Response at pp. 1–2) but, as explained below, this interpretation is not supported by the rule structure or regulatory history. The Appellants seek a temporary stay of the Permit to protect their members' health and safety and to avoid environmental harm while this Appeal is pending. If the Council concludes it cannot grant a stay, the Council will deprive the Appellants of meaningful and timely relief.

A. The Rule Structure Indicates Temporary Relief is Available in Any Appeal

When interpreting a regulation or statute, the reviewing body must consider the "full text of the statute, paying attention to its internal structure and the functional relation between the parts

and the whole." *Rodriguez v. Casey*, 50 P.3d 323, 326–27 (Wyo. 2002); *Wilson Advisory Comm. v. Bd. of Cnty. Comm'rs, et al.*, 292 P.3d 855, 863 (Wyo. 2012) ("the rules of statutory construction apply to the interpretation of administrative rules and regulations"). "It is a basic rule of statutory construction that courts may try to determine legislative intent by considering the type of statute being interpreted and what the legislature intended by the language used, viewed in light of the objects and purposes to be accomplished." *In re Collicott*, 20 P.3d 1077, 1080 (Wyo. 2001).

The location of Subsection (c) within the broader DEQ Rules of Practice and Procedure (the "DEQ Rules") is important. Subsection (c) is located in Chapter 1, which are the "General Rules" governing all DEQ procedures, and more specifically in Section 8, which is the general rule governing all appeals of any final DEQ action to the Council.

While the first sentence of Subsection (b) of Chapter 1, Section 8 concerns surface coal mining operational decisions, the second, third, and fourth sentences of Subsection (b) appear to apply to all types of appeals because these sentences are not limited by their plain terms to specific situations like the first sentence. Moreover, there is no language in Subsection (c) confining its application only to surface coal mining appeals; rather, it clarifies that "where" hearings are requested, the Council may grant temporary relief. Perhaps most tellingly, the standard for obtaining temporary relief in Subsection (c) is set apart from Subsection (b), and the standard for temporary relief does not appear elsewhere in the DEQ Rules. Finally, the Permit itself directs all appeals to be brought under Chapter 1, Section 8, exemplifying the applicability of the entire rule. *See* Notice of Appeal, Exhibit D at p. 3.

If the DEQ sought to confine the Council's authority to issue temporary relief to only a single type of permit it could not have chosen a more convoluted and unclear method. Why locate this temporary relief in the general procedural rules instead of Chapter 9, which is solely dedicated

to surface coal mining operations? Moreover, as discussed in the Motion and below, there is nothing in the rulemaking record clarifying or limiting the scope of Subsection (c) in the manner DEQ asserts. In the absence of any guidance on "legislative" intent, this Council must interpret its rules "in light of the objects and purposes to be accomplished [by the rules]." *In re Collicott*, 20 P.3d at 1080. Under this standard, the Council has the authority to issue temporary relief pending resolution of any appeal, including this Appeal, to fully preserve the rights of all parties.

B. The Regulatory History of Subsection (c) Does Not Limit it to Surface Coal Mining

As explained in the Motion, there is nothing in the rulemaking record that indicates Subsection (c) generally restricts the Council's authority to grant temporary relief. *See* Motion at pp. 3–4, 10. If the Council had intended to restrict its authority, it should have said so.

C. Determining the Council Lacks Authority to Grant Temporary Relief Would Violate Appellants' Due Process Rights and Generate an Absurd Result

Contrary to DEQ's assertion, the Council would ignore the Appellants', not the permittee's, due process rights if DEQ prevails.[1] "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *see also Robbins v. South Cheyenne Water and Sewage Dist.*, 792 P.2d 1380, 1385 (Wyo. 1990). As explained in more detail below, if the Council agrees with DEQ, the Appellants will not be heard in a meaningful or timely manner, and the appeals process will deprive the Appellants of their due process rights.

The Environmental Quality Act establishes the Appellants' sole appeal pathway. It states the Council "shall hear and determine all cases or issues arising under the laws, rules, regulations,

[1] The Appellants do not "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." *See* Response at p. 4. If DEQ issued the Permit in violation of Wyoming law, the permittee has no right to continue the permitted activity and no right to defend the Permit. The Appellants simply ask this Council to preserve the status quo by granting temporary relief to allow the Council to hear evidence regarding the Appellants' claims and issue a final decision.

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) (emphasis added); *see also Wyoming Dep't of Env't Quality v. Wyoming Outdoor Council*, 286 P.3d 1045, 1052 (Wyo. 2012). DEQ issued the Permit pursuant to its authority under Article 2 of the Environmental Quality Act and Chapter 5, Section 2 of the Wyoming Air Quality Standards and Regulations. *See* Notice of Appeal, Exhibit D at p. 1. Wyoming law requires the Appellants to pursue the Appeal before this Council; there are no other administrative review pathways.[2]

"The exhaustion doctrine applies where an agency alone has been granted or found to possess exclusive jurisdiction over the case." *People v. Fremont Energy Corp.*, 651 P.2d 802, 811 (Wyo. 1982). "The purpose of the doctrine then is to avoid premature interruption of the administrative process where the agency has been created to apply a statute in the first instance." *Id.* Here, the Appellants must appeal the Permit to the Council before they can seek judicial review using the following process. First, the Environmental Quality Act provides the appeal right to "[a]ny person who participated in the public comment process on a permit application and who is aggrieved by any final action taken by the director on a permit application may seek relief pursuant to W.S. 35-11-1001." Wyo. Stat. Ann. § 35-11-208(b). The referenced statute states "[a]ny aggrieved party . . . 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). Finally, and most critically, the relevant provision of the Wyoming Administrative

[2] DEQ states: "By law, only the Director of the Department of Environmental Quality has the power to [suspend a permit]." Response at 3. DEQ does not cite any method or appeal mechanism for the Director to issue such suspension at this stage in the proceeding because there is none. The Appellants have no procedural pathway for administrative reconsideration or other method to request the Director to reconsider her decision to issue the Permit. The sole option is an appeal to this Council. Thus, to the extent DEQ suggests the Appellants must ask the Director for temporary relief now or somehow in conjunction with this Appeal, that suggestion is a legal and procedural impossibility.

Procedure Act authorizes judicial review only once the Appellants have exhausted their administrative remedies. Wyo. Stat. Ann. § 16-3-114(a). Because the Council must "hear and determine all cases or issues" arising under the Environmental Quality Act, Wyo. Stat. Ann. § 35-11-112(a), the Appellants must appeal the Permit to the Council before seeking judicial review.

The purpose of a stay is to preserve the status quo while an appeal is pending. A request for stay should be granted if denial would harm the requesting party and the stay would not cause hardship or prejudice the party against whom the stay is sought. *See Rivermeadows, Inc. v. Zwaanshoek Holding & Financiering*, B.V., 761 P.2d 662, 667 (Wyo. 1988). While "[t]he Wyoming Rules of Civil Procedure do not provide a means for requesting a stay . . . it is generally recognized that courts have inherent power to stay an action." *TEP Rocky Mountain LLC v. Rec. TJ Ranch Ltd. P'ship*, 516 P.3d 459, 477 (Wyo. 2022). Like the Wyoming courts, the Appellants assert the Council inherently has authority to grant a stay as the sole administrative arbiter of appeals under the Environmental Quality Act even if that authority is not explicit. And because the Council has exclusive jurisdiction over this Appeal, the Council's ability to grant temporary relief is arguably as important as its other mandates to ensure it upholds the rights of all parties.

The Council must interpret its regulations to avoid an absurd result. *See Seherr-Thoss v. Teton Cnty. Bd. of Cnty. Comm'rs*, 329 P.3d 936, 945 (Wyo. 2014). If the Council determines it has no authority to grant temporary relief while an appeal is pending—unless the request concerns surface coal mining operations—the Council would perpetrate an absurd result by depriving the Appellants of any remedy while their Appeal is pending, risking permanent and irreparable harm.

The Appellants understand a hearing before the Council typically takes several months to schedule and the Council may hear this Appeal until late summer or fall. After the Council hears

the Appeal, it will take some time for the Council to issue its decision. Thus, even if the process is accelerated, the Appellants likely will wait between nine and twelve months for a decision.

Should the Council decide it cannot issue a temporary stay pending resolution of the Appeal, the Appellants will be deprived of timely and meaningful relief for many months. If the Appellants seek review of an order denying their Motion through an interlocutory appeal, that process will be expensive, inefficient, and subject to its own delays.[3] Worse, if the Appellants cannot pursue an interlocutory appeal, they likely will be forced to wait nine to twelve months before they can seek a temporary judicial stay of the permit. By that time, much—or all—of the damage may be done, because the Council would have allowed the permittee to continue to operate its burner in a windy and fire-prone area without adequate terms and conditions to protect public health and safety, and the environment. Either way, if the Council agrees with DEQ, that decision would result in an appeals process that effectively denies the Appellants any meaningful opportunity for the temporary relief.

Justice delayed is often justice denied. The Appellants urge the Council to determine it has the authority to issue temporary relief to avoid these harmful outcomes.

II. The *Basin Electric* Order is Distinguishable

The Council's August 21, 2008 order in *Basin Electric* (EQC Docket No. 07-2801; hereinafter the "07-2801 Order") is not dispositive, as the Appellants explain in their Motion at pages 8–10. The Council did not declare in *Basin Electric* that suspensions in every case are equivalent to stays or temporary stays as DEQ implies on page 3 of its Response. *See* 07-2801 Order at pp. 7–8 ("suspending the permit in this case is equivalent to "staying" the issuance of the

[3] The Appellants are not aware of any Wyoming law addressing an interlocutory appeal from an order of this Council, or, more specifically, an order denying a motion for stay.

permit) (emphasis added). Nor does this issue appear to have been briefed or closely examined. *Id.* at p. 8 ("No grounds to support a stay were presented.").

The consequences of the suspension request in *Basin Electric* are significantly and materially different. Because Basin Electric had already committed substantial financial resources and began constructing a coal-fired power generating station upon permit issuance, Basin Electric estimated a suspension would cost $124M as well as skilled workers and housing opportunities in the area. 07-2801 Order at p. 5.

No comparable impacts would occur if the Council stayed the Permit at issue in this Appeal. According to the Permit application, the permittee planned to purchase an Air Burner S-223 manufactured by AirBurners. *See* Notice of Appeal, Exhibit C at p. 3. The AirBurners website provides a price range of $169,371 to $203,049 for that device.[4] AirBurners sells fully assembled burners which, unlike the Basin Electric coal-fired power generating station, do not require the permittee to spend years and billions of dollars to construct. The Appellants maintain the economic considerations of a stay is a relevant factor as to whether a stay should be issued; however, the mere existence of adverse economic consequences should not serve as a reason for the Council to find it has no authority to issue temporary relief in the first instance.

III. The Request for Stay Does Not Ignore the Permittee's Due Process Rights

DEQ incorrectly alleges the Appellants ignored the permittee's due process rights by requesting a stay. *See* Response at p. 4.[5] In accordance with Chapter 2, Section 5 of the DEQ Rules, the Appellants served the permittee with the Appeal (which contained the original request for a stay) on March 30, 2024, and the Motion on April 29, 2024. Chapter 2, Section 9 of the DEQ Rules

[4] https://airburners.com/products/firebox-series/ (last accessed May 24, 2024).
[5] DEQ's citations on page 4 of its Response apply to a suspension request, which this Council has differentiated from a stay request, and therefore are not relevant. *See* 07-2801 Order at pp. 7–8; *see also* Motion at p. 9.

authorize the permittee to intervene in this Appeal. The fact that the permittee has not chosen to intervene despite its ability to do so cannot be blamed on the Appellants. Therefore, any allegations that the permittee's due process rights have been violated are unwarranted.

IV. Conclusion and Request for Relief

The potential harm to the Appellants if the Permit is not stayed for the pendency of this Appeal cannot be disregarded. Upon information and belief, the permittee is currently operating the burner. The operations pose a severe fire risk to the Appellants and a stay is necessary to avoid adverse public health, safety, and imminent environmental harm. Based on their Motion and the foregoing Reply, the Appellants respectfully request that the Council:

A. Grant the Appellants' Motion for Stay;

B. Immediately stay the effectiveness of the Permit pending resolution of this Appeal, including during any additional agency reconsideration that may be ordered, consistent with the Council's authority under Wyo. Stat. Ann. § 35-11-112(c)(i) and (ii), and WY Rules and Regulations 020.0008.1 § 8(c);

C. Grant the Appellants any additional relief this Council deems just and proper.

Respectfully submitted this 24th day of May, 2024.

/s/ Courtney M. Shephard

Eric P. Waeckerlin, WY Bar #7-5874
Affie B. Ellis, WY Bar #6-4406
Courtney M. Shephard, WY Bar #8-7071
Brownstein Hyatt Farber Schreck, LLP
1807 Capitol Avenue, Suite 203
Cheyenne, Wyoming 82001
Phone: (303) 223-1100
Email: ewaeckerlin@bhfs.com
aellis@bhfs.com
cshephard@bhfs.com

Attorneys for Appellants Jackson Hole Conservation Alliance and The Teton Village Association

CERTIFICATE OF SERVICE

The undersigned certifies that on May 24, 2024, the Reply in Support of Motion for Stay was served by uploading the Reply in Support of Motion for Stay to Docket No. 24-2801 at wyomingeqc.wyo.gov, in accordance with Rules of Practice and Procedure, Chapter 2, Section 5(b), and by U.S. Mail to the following recipients:

Mr. Corey Felton
Arbor Works Tree Service
P.O. Box 1836
Jackson, WY 83014

Wyoming EQC Office
Attention: Joe Girardin
2300 Capitol Ave. Ste 136
Cheyenne, WY 82002

David DeWald
2424 Pioneer Avenue
Cheyenne, WY 82002

/s/ Kevin J. Cloutier
Paralegal
Brownstein Hyatt Farber Schreck, LLP