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

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| IN THE MATTER OF THE APPEAL OF JOHN D. KOLTISKA, AC RANCH, INC., a Wyoming Corporation, PRAIRIE DOG RANCH, INC. a Wyoming Statutory Close Corporation, and PRAIRIE DOG WATER SUPPLY COMPANY FROM WYPDES PERMIT NO. WY0054364 | ) | Docket No. 09-3805 |

**PETITIONERS' MOTION IN LIMINE TO CLARIFY ISSUES AND LIMIT EVIDENCE**

Petitioners, JOHN D. KOLTISKA, AC RANCH INC., PRAIRIE DOG RANCH, INC., AND PRAIRIE DOG WATER SUPPLY COMPANY, by and through their counsel Kate M. Fox and J. Mark Stewart respectfully submit their Motion in Limine to clarify the issues and limit the evidence on appeal of WY0054364 to the basis for the permit articulated by the DEQ when it issued the permit.

Petitioners file this motion so that the Council can make important decisions regarding the legal issues to be addressed in this case, in advance of the hearing, to bring some order and efficiency to the presentation of evidence. Three issues must be decided:

1. Petitioners have the burden of proving, by a preponderance of the evidence, that DEQ failed to use appropriate scientific methods to derive the permit terms.

2. Respondents should not be permitted to present evidence of scientific methods or analyses that may or may not support the permit terms, but were never considered by DEQ when it originally issued the permit.
3. Petitioners are not required to prove that the effluent discharged under those limits will result in a measurable decrease in crop production.

1. Petitioners' Burden

Petitioners have the burden of proving, by a preponderance of the evidence, that DEQ failed to use appropriate scientific methods to derive the permit terms. This issue may be undisputed.

2. Respondents may not rely on alternative scientific methods

It is DEQ's function to issue permits that comply with the law and the regulations. If the EQC determines that DEQ has failed to fulfill that role, the remedy is to deny the permit. DEQ may then go back and obtain the lacking data, apply an appropriate scientific method, and issue a permit that allows water to be discharged that will not cause a measurable decrease in crop production. EQC cannot fix the permit for DEQ.[1]

If EQC received evidence in the form of data or scientific analysis that was not presented to or considered by DEQ, and then the EQC determined, based on that additional data and analysis, that there is a new and different adequate scientific basis for concluding that the permit terms are protective, it would be doing DEQ's job of writing permits. The EQC does not have the statutory authority to do that. Furthermore, it would only encourage a practice of shoddy

[1] This discussion also goes to DEQ's misplaced belief that it is only a bystander in this battle between the permit applicant and the landowner. In fact, DEQ should be front and center to justify the permitting decision that it made, and to accept and defend its obligation to make that permitting decision under the standards imposed upon DEQ by the Environmental Quality Act.

work to allow DEQ to issue permits based on inadequate data and poor scientific method, and then, only after an affected landowner has gone to considerable effort and expense to challenge the permit, allow the permit applicant to come up with additional data and a new scientific analysis to shore up the inadequate permit that DEQ issued. Shouldn't every permit, challenged or not, be issued by DEQ with the same scientific rigor?[2] Neither the law nor good policy support giving DEQ a second bite at the apple.

- The DEQ Director has the "power and duty to issue, deny, amend, suspend or revoke permits. . ." W.S. 35-11-109(a)(xiii).
- The DEQ Director is to issue permits "upon proof by the applicant that the procedures of this act and the rules and regulations promulgated thereunder have been complied with." W.S. 35-11-801(a)
- The rules relevant to this proceeding are:

  **Agricultural Water Supply.** All Wyoming surface waters which have the natural water quality potential for use as an agricultural water supply shall be maintained at a quality which allows continued use of such waters for agricultural purposes.

  Degradation of such waters shall not be of such an extent to cause a measurable decrease in crop or livestock production.

  Unless otherwise demonstrated, all Wyoming surface waters have the natural water quality potential for use as an agricultural water supply.

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[2] For example, there are approximately 170 WYPDES permits that are based on Tier 2 of the Ag Use Policy. As the Council is aware, there is good reason to believe that policy is unsound, and the permits issued with that methodology do not have an adequate scientific basis. If an affected landowner had the time and the money to challenge one of those permits, and at the hearing on that permit appeal, DEQ, or more likely, the permit applicant, presented all new data and scientific analysis to support the permit terms, the EQC might, on that entirely new basis, find the permit terms to be protective. DEQ would then have very little incentive, when the other 169 permits come up for renewal, to issue them on a sound scientific basis that is transparent to the affected public. It would instead continue to rely on the permit applicant and the Council to do its job for it, only as to those permits that a landowner brought to the Council's attention.

Wyoming Water Quality Rules, Ch. 1, § 20.

and

> Where the administrator determines that an effluent constituent has the reasonable potential to adversely impact a designated use of receiving surface waters of the state and no numeric standard has been promulgated in Wyoming Water Quality Rules and Regulations, Chapter 1 for the constituent, the administrator may establish a numeric effluent limitation based on values derived from appropriate scientific methods.

Wyoming Water Quality Rules, Ch. 2, Section 5(c)(iii)(C)(IV).

- The Council's duty is to "act as the hearing examiner for the department and [] hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or determined by the" DEQ. W.S. 35-11-112(a).
- The Council shall ... [c]onduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit ... authorized or required by this act...." W.S. § 35-11-112(a)(iv).
- The Council may "[o]rder that any permit . . . be granted, denied, suspended, revoked or modified." W.S. 35-11-112(c)(ii).
- The Environmental Quality Council "shall not be with the department of environmental quality but shall be a separate operating agency, and . . . all programs and functions specified in chapters 11 and 12 of title 35 shall be with the department of environmental quality." W.S. 9-2-2013.

Clearly, it is DEQ's job to issue, deny, amend, suspend or revoke permits. EQC's job is to review the DEQ's permit decision on appeal. When the Council acts in its adjudicative capacity and hears a contested case, it resembles a "lower tribunal," not an administrative agency. *Antelope Valley Imp. v. State Bd. of Equalization*, 4 P.3d 876, 2000 WY 85 ¶6. As

such, the Council may not depart from its adjudicative role and may not proceed to rewrite DEQ permits.

The Wyoming Supreme Court has answered this question before in the context of the Board of Equalization, which acts as the reviewing body for the Department of Revenue; in the same way that the EQC acts as the reviewing body for the DEQ. In *Amoco Prod. Co. v. Wyoming State Bd. of Equalization*, 12 P.3d 668, 2000 WY 84, the Wyoming Supreme Court invalidated the Board's decision because the Board had exceeded its statutory authority when it departed from its role of reviewing a final decision of the Department, and instead proceeded to prescribe the system to establish fair market value for mineral production. *Id.* at ¶1. The Court held that the Board improperly departed from its adjudicatory role to assume functions statutorily assigned to the Department of Revenue. *Id.* The Court held:

> The only way to harmonize the various descriptions of the review or appeal function of the Board is to hold that the Board is limited to an adjudicatory decision making its review on the record. **It is only by either approving the determination of the Department, or by disapproving the determination and remanding the matter to the Department, that the issues brought before the Board for review can be resolved successfully without invading the statutory prerogatives of the Department.**
> *Id.* at ¶23 (emphasis added).[3]

[3] This conclusion is consistent with the "functional division" created by government reorganization, that generally disconnects traditional executive branch activities (such as tax collection and permitting) from the rule making and review functions retained by quasi judicial separate operating agencies (such as the Council and the State Board of Equalization). *Amax Coal Co. v. State Bd. of Equalization*, 819 P.2d 825, 833 (1991). "Any other exercise of authority violates the clear intent of the legislature." *Antelope Valley Imp. v. State Bd. of Equalization*, 992 P.2d 563, 1999 WY 165 ¶16, citing *Basin Electric*, 970 P.2d at 849.

Because the EQC has no authority to rewrite DEQ's permits, it should exclude any evidence of a new and different scientific basis to justify the permit terms.

Opinions of the United States Supreme Court further support this approach. "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). The EQC must look to the record upon which DEQ based its decision and not to post hoc rationalizations.

> A simple but fundamental rule of administrative law [is that] a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what is considers to be a more adequate or proper basis.

*SEC v. Chenery Corp.*, 322 U.S. 194, 196 (1947).

Because the Council can only approve or disapprove the permit as written by the DEQ, any evidence of additional data or alternative scientific method is irrelevant and would only confuse the issue. All such evidence should be excluded.

3. Petitioners Need Not Prove That Damage *Will* Occur

Pennaco's Motion for Summary Judgment, which has been denied by the Council, presents this issue: "Petitioners bear the burden of proving that the treated effluent limits will lead to a measurable decrease of irrigated alfalfa. . ." *Pennaco's Memorandum in Support of Motion for Summary Judgment and to Strike Expert Testimony*, p. 2. Petitioners disputed this interpretation of the law, and will not repeat their argument here. *Petitioners' Response to Pennaco's Motion for Summary Judgment and to Strike Expert Testimony.* The purpose of the EQA and the statutes and rules cited above is to prevent damage. If the landowner is required to present the Council with a

dead body before it will take action, then the permit objective will already have failed and there will be no way to bring the corpse back to life.

Petitioners have not and will not contend that effluent discharged under the permits will cause a measurable decrease in crop production. What they say is that the data is insufficient and the scientific method is inadequate to make that determination. Therefore the DEQ should not have issued the permit.

Petitioners believe that the Council understood this pure legal issue and denied Pennaco's summary judgment on that basis; however, clarification on that issue would be helpful. Petitioners need not prove that effluent will lead to a measurable decrease in crop production.

WHEREFORE, Petitioners pray for the following determination by the Council before the presentation of evidence:

1. Petitioners have the burden of proving, by a preponderance of the evidence, that DEQ failed to use appropriate scientific methods to derive the permit terms.
2. Evidence of data and scientific analysis which were not considered by the DEQ at the time it issued the permit may not be presented by Respondents to support the permit terms. Data and scientific analysis which was not considered by DEQ at the time it issued its permit will be allowed only for the limited purpose of establishing whether DEQ used appropriate scientific methods to derive permit limits.
3. Petitioners are not required to prove that the effluent discharged under those limits will result in a measurable decrease in crop production.

Dated this 9th day of November, 2009.

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CERTIFICATE OF SERVICE

I certify that on the 9th day of November, 2009, I served a true and correct copy of the foregoing by email to:

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