

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL STATE OF WYOMING

FILED

NOV 13 2009

Jim Ruby, Executive Secretary Environmental Quality Council

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

ORDER DENYING PENNACO ENERGY'S INC'S MOTION TO DISMISS APPEAL

THIS MATTER came before the Environmental Quality Council (Council) on November 4, 2009, for oral argument on Pennaco Energy's Motion to Dismiss Appeal filed on October 16, 2009, and Protestant's October 30, 2009 Response to Pennaco Energy's Motion to Dismiss Appeal. Council members present at the motion hearing included Dennis M. Boal, Chairman via telephone conference, John N. Morris in person, Dr. Fred Ogden in person, Tim Flitner via telephone conference and Thomas Coverdale via telephone conference. James Ruby, Executive Secretary of EQC was also present. Pennaco Energy appeared by and through counsel, Mark Ruppert and Trey Overdyke. The Protestants, John D. Koltiska, AC Ranch, Inc., Prairie Dog Ranch and Prairie Dog Water Supply Company appeared by and through counsel, Mark Stewart and Kate Fox. The Department of Environmental Quality, Water Quality Division (DEQ) appeared by and through Senior Assistant Attorney General, Mike Barrash and Assistant Attorney General Luke Esche. The Council has considered the motion, written responses and argument of the parties, and finds as follows:

I. JURISDICTION

"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." Wyo. Stat. Ann. § 35-11-112(a) (LEXIS 2007).

The council shall, “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.” Wyo. Stat. Ann. § 35-11-112(a)(iv) (LEXIS 2007).

The Protestants disputed the Director of DEQ’s approval of Pennaco’s water quality permit WY0054364 for discharge of water into Prairie Dog and Wildcat Creeks and requested a hearing before the Council. Therefore, the Council has jurisdiction to hear and decide this matter.

II. STATEMENT OF THE CASE

Pursuant to the Wyoming Environmental Quality Act (WEQA) and DEQ regulations no person, except when authorized by a permit issued pursuant to the provision of this act, shall cause, threaten or allow the discharge of any pollution or wastes into the waters of the state or alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state. Pennaco Energy applied for Permit No. WY0054364 and DEQ issued said permit to Pennaco Energy, Inc., 3601 Southern Drive, Gillette WY 82718 on January 6, 2009.

On March 5, 2009 the Protestants filed a Petition and Request for Hearing alleging that the DEQ erred in issuing the permit to Pennaco Energy. On October 16, 2009, Pennaco Energy filed a Motion to Dismiss Protestant’s appeal in this matter asserting the Protestants have no statutory right to appeal the WYPDES permit issued to Pennaco Energy.

On October 30, 2009, Protestant’s responded that EQC is required to hear Protestant’s appeal to the Council prior to proceeding to District Court. Protestant’s also argued that the WEQA as well as DEQ’s Rules of Practice and Procedure allow for this appeal.

DEQ did not take a position on this motion.

III. ISSUES AND CONTENTIONS

The issue raised by Pennaco Energy in its Motion to Dismiss is whether Protestants can appeal, to this Council, the Director’s decision to issue Pennaco Energy water quality permit. Pennaco Energy argued the right to appeal any agency action is entirely statutory and therefore must be found in the

WEQA. According to Pennaco Energy, there is no statute which authorizes this Council to hear the appeal, therefore the Council lacks jurisdiction in this matter, and the proper venue for this case is the district court.

Protestants argued Wyo. Stat. Ann. § 35-11-112 (LEXIS 2007) and DEQ's Rules of Practice and Procedure provides a general right to appeal any case contesting the grant of any permit. Protestants additionally argued the Wyoming Administrative Procedures Act (WAPA) requires exhaustion of administrative remedies prior to appealing a case directly to District Court and therefore, this Council has jurisdiction to hear this matter.

IV. FINDINGS OF FACT

1. On January 6, 2009, Pennaco Energy was issued a water quality permit to discharge water into Prairie Dog Creek and Wildcat Creek in Sheridan County, Wyoming.

2. On March 5, 2009 the Protestant's filed a Petition and Request for Hearing with the Environmental Quality Council.

3. The appeal was filed within 60 days of the issuance of the permit pursuant to Section 16, Chapter 1 of the General Rules of Practice and Procedure, Department of Environmental Quality.

4. Pennaco Energy thereafter filed its October 16, 2009 Motion to Dismiss this appeal asserting that Protestant's have no statutory right to appeal and therefore this Council lacks jurisdiction in this matter. According to Pennaco Energy, DEQ's decision to issue the water quality permit is a final agency action and the Protestants must appeal the decision directly to the district court.

V. CONCLUSIONS OF LAW

A. Principles of Law

5. The Council's jurisdiction is governed by the Environmental Quality Act. Wyo. Stat. Ann. § 35-11-111 (LEXIS 2007).

6. Pursuant to the WEQA, 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.” Wyo. Stat. Ann. § 35-11-112(a) (LEXIS 2007) (emphasis added).

7. The Council **shall**, “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.” Wyo. Stat. Ann. § 35-11-112(a)(iv) (LEXIS 2007) (emphasis added).

8. All hearings before the Council, appeals or others, shall be held pursuant to these rules, the provisions of the Environmental Quality Act W.S. § 35-11-101 through 1104 and the Wyoming Administrative Procedure Act. Department of Environmental Quality, Rules of Practice and Procedure, Chapter 1, Section 3 (DEQ’s Rules).

9. The Wyoming Administrative Procedures Act (WAPA) requires exhaustion of administrative remedies before going to district court.

Subject to the requirement that administrative remedies be exhausted and in the absence of any statutory or common-law provision precluding or limiting judicial review, any person aggrieved or adversely affected in fact by a final decision of an agency in a contested case, or by other agency action or inaction ... is entitled to judicial review in the district court for the county in which the administrative action or inaction was taken.

Wyo. Stat. Ann. § 16-3-114(a).

10. Chapter 1, Section 2(a)(ii) of DEQ’s General Rules of Practice and Procedure defines Protestants as, “Any person desiring to protest the application of a permit or any person requesting a hearing before the Environmental Quality Council in accordance with the Environmental Quality Act and who is objecting to an action of the Department of Environmental Quality and desiring affirmative relief.”

B. Application of Principles of Law

11. The WEQA specifically designated the Council as the “hearing examiner” in “any case” contesting DEQ’s “grant” of a permit and gave this Council broad authority to pass regulations to govern those hearings.

12. Pennaco Energy argued that specific statutes in the WEQA that actually provide a party with a right to a hearing before this Council become meaningless if this Council relies upon the general statutory authority to hold contested case hearings in Wyo. Stat. Ann. § 35-11-112. This Council disagrees with Pennaco's position in this matter. The statute argued by the Applicant only applies to permit applicants and their right to review by the council it is a limit on the applicant not other aggrieved parties. The Council's contested case hearing authority exists so that a separate statutory right to review is not required in every different section of the Act that applies to different permits or different actions by the DEQ.

13. This Council's practice has always been to allow permit appeals by aggrieved parties who are not permit applicants.

14. The Council's decision to allow this appeal to proceed supports the underlying purpose of the Environmental Quality Act which is the protection of public health and welfare, as well as to provide an avenue for third party appeals of DEQ issued permits. It is the place for citizens who feel aggrieved by some environmental action to have their complaints heard. Pennaco Energy is asking this Council to ignore the underlying premise of the act. It has been an agency practice for nearly 30 years to hear appeals in any case where DEQ grants a permit. Therefore, there is a presumption in favor of this appeal to be heard by the council.

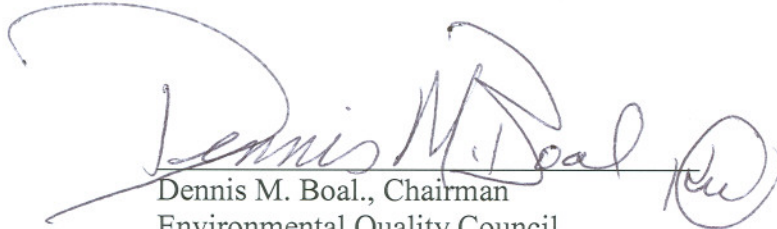
15. The Legislature established this Council to use **its** expertise in environmental matters and charged it to act as hearing examiner. In fact, if the district court would hear this appeal with no evidentiary record, it would be unable to make an informed decision. There must be a record for the appellate court to review in order to determine if DEQ's decision to issue a permit was proper. The WAPA clearly requires exhaustion of administrative remedies and in the absence of statutory preclusion of review, this Council has jurisdiction.

ORDER

IT IS THEREFORE ORDERED that:

1. Pennaco Energy's October 16, 2009 Motion to Dismiss Appeal is hereby DENIED.

SO ORDERED this 13th day of November, 2009.

A handwritten signature in blue ink that reads "Dennis M. Boal" followed by a circular mark containing the letters "DW". The signature is written over a horizontal line.

Dennis M. Boal., Chairman
Environmental Quality Council
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CERTIFICATE OF SERVICE

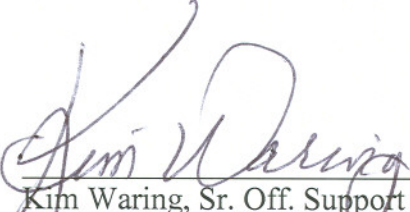
I, Kim Waring, certify that at Cheyenne, Wyoming, on the 13th day of November, 2009, I served a copy of the foregoing **ORDER DENYING PENNACO ENERGY'S INC.'S MOTION TO DISMISS APPEAL** by electronic mail to the following:

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