

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL

FOR THE STATE OF WYOMING

FILED

FEB 28 2002

IN THE MATTER OF THE APPEAL )  
OF EDWARD H. SWARTZ )  
FROM NPDES PERMIT NOS WY0036188, )  
WY0036285, WY0036293, WY0036323, )  
WY0036331, WY0036358, WY0036366, )  
WY0036374, WY0036382, WY0038148, )  
WY0038491, WY0038504 )

No. 02-3801 Terri A. Lorenzon, Director  
Environmental Quality Council

**PETITION FOR HEARING**

Edward H. Swartz, by and through his undersigned counsel, files this Petition for Hearing pursuant to Wyo. Stat. Ann. § 35-11-112(a)(iv) (LexisNexis 2001) and Chapter I, Section 3 of the Rules of Practice and Procedure promulgated by the Environmental Quality Council ("Council"). In particular, Mr. Swartz ("Petitioner") protests the above-referenced Department of Environmental Quality's ("DEQ") Authorization to Discharge Under the National Pollutant Discharge Elimination System (the "Permits") issued on January 1, 2002.

The basis for Petitioner's protest is that the Permits were issued:

- (1) In violation of the Wyoming Environmental Quality Act, Wyo. Stat. §§ 35-11-101 et seq. and the rules and regulations promulgated thereunder, specifically Quality Standards for Wyoming Surface Water, Chapter 1, § 20, which states:

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 water 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.

- (2) In violation of the public notice and comment procedure set forth in the State of Wyoming Public Notice, which states:

The purpose of this notice is to invite your comments on these proposed permits **before** they are issued.

When the DEQ/WQD receives comments or objections to a proposed permit, the staff attempts to resolve the issues through open and informal discussions with the proposed permittee and the person(s) objecting to the permit. If these discussions do not resolve the issues and the remaining objections are substantive, the administrator may request the Wyoming Environmental Quality Council (EQC) to hold a public hearing. . . .

- (3) Pursuant to improperly promulgated rules, in violation of the Wyoming Administrative Procedures Act, Wyo. Stat. §§ 16-3-101 et seq.

#### Facts

Ed Swartz is a resident of Campbell County, Wyoming, whose address is P.O. Box 1539, Gillette, WY 82717-1539.

Petitioner's Ranch is located on Wildcat Creek, downstream of numerous Coal Bed Methane wells which, since early October, 1999, have been permitted by the State of Wyoming Department of Environmental Quality to discharge large volumes of water into Wildcat Creek. In some cases, the water is not discharged directly into the Creek, but is stored in reservoirs of varying sizes before it is discharged either by overflow or by seepage into the subsurface groundwater. In other cases, the water is discharged directly into the watershed. The above-referenced Permits are only some of those discharging water into Wildcat Creek. The Permits expired December 31, 2001 and it is their renewal that is appealed from.

Swartz Ranch owns adjudicated water rights, which it has used historically to irrigate approximately 280 acres of hay meadows along the meanders of Wildcat Creek.

These hay meadows form the heart of the ranching operation in this arid country. Since October of 1999, great volumes of CBM discharge water began to flow in the Wildcat Creek, causing demonstrable harm to the creek channel, and reasonably likely harm to the irrigated hay meadows, if the water were applied to irrigate them as it historically has been.

Public Notice of the Permit applications was made November 31, 2001, with a 30-day comment period which expired December 31, 2001. Petitioner submitted his objections to the Permits December 31, 2001, and the Permits were issued January 1, 2002. No review of Petitioner's substantial and technical objections could have been made in that time period. No discussion, or communication of any sort regarding Petitioner's objections, occurred before the Permits were issued. The procedure that occurred rendered public comment meaningless. (The fact the Permits were issued for 180 days instead of the standard five years may be a reflection of DEQ's understanding that the procedure was flawed. This fact also presents a dilemma for Petitioner regarding the effectiveness of an appeal of a short-term permit.)

The substantive consequence of the Permit issuance process is that DEQ issued the Permits in spite of compelling evidence that to do so will result in degradation of the waters of Wildcat Creek to such an extent as to cause a measurable decrease in crop production. Waters discharged pursuant to the Permits are flowing now in Wildcat Creek, causing damage to the soils and vegetation they come into contact with, and under the Permit plans they will continue to flow and to be managed in such a way as to cause continuing and irreparable damage to crop production. Evidence of such damage is fully

set forth in Petitioner's December 31, 2001 Permit objections and attachments, which is attached hereto.

Permits are submitted and pursuant to various "guidance" documents which are in fact "rules" under the definition of the Wyoming Administrative Procedure Act, in that they "describe[] the organization, procedures, or practice requirements of [the] agency." Wyo. Stat. § 16-3-101(b)(ix). These rules, however, have not been enacted subject to the notice and comment procedures required by the WAPA (Wyo. Stat. §§ 16-3-102 and 103), and they are therefore invalid. Furthermore, any action taken pursuant to such improperly promulgated rules, including an action taken to issue these permits, is invalid. Matter of Bessemer Mountain, 856 P.2d 450 (Wyo. 1993); Yeik v. Dept. of Rev. & Taxation, 595 P.2d 965 (Wyo. 1979).

Petitioner respectfully requests a hearing before the Council.

Dated this 28<sup>th</sup> day of February, 2002.



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CERTIFICATE OF SERVICE

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