

FILED

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

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Terri A. Lorenzon, Director
Environmental Quality Council

IN THE MATTER OF THE APPEAL OF)
THE COPPERLEAF SUBDIVISION WATER)
SUPPLY, TREATMENT, STORAGE, AND) Docket No. 06-3814
BOOSTER PUMPING SYSTEMS,)
Permit No. 06-274RR/Reference No. 06-236RR)

**WORTHINGTON GROUP OF WYOMING, LLC'S BRIEF ON AUTHORITY OF THE
ENVIRONMENTAL QUALITY COUNCIL TO REGULATE WATER QUANTITY**

COMES NOW the Worthington Group of Wyoming, LLC, by and through counsel, and submits its Brief on the authority of this Council of Environmental Quality as it concerns Petitioner's complaints regarding water quantity.

I. INTRODUCTION

On October 27, 2006 Petitioners filed this request for contested case hearing, alleging that the Department of Environmental Quality breached numerous regulations by issuing the above-referenced permit to construct water supply, treatment, storage and booster pumping systems (hereinafter "Permit No. 06-274"). During the final pre-hearing conference held on June 22nd, 2007, Petitioners revealed their primary complaint. Specifically, Petitioners complain that Permit No. 06-274 should be revoked because the groundwater wells will adversely affect the water *quantity* on neighboring properties. Because this Council does not have statutory or regulatory authority to consider matters regarding water quantity, this issue must be stricken or disregarded during the contested case hearing.

II. EQC STATUTORY AUTHORITY

The Department of Environmental Quality is mandated to promulgate rules and regulations necessary to prevent, reduce and eliminate pollution. *See, Tri-State Generation and Transmission Ass'n., Inc., v. EQC*, 590 P.2d 1324 (Wyo. 1979). The Council's specified powers and duties are set forth in Wyo. Stat. § 35-11-112:

Powers and duties of the environmental quality council.

(a) 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. At the council's request the office of administrative hearings may provide a hearing officer for any rulemaking or contested case hearing before the council, and the hearing officer may provide recommendations on procedural matters when requested by the council. Notwithstanding any other provision of this act, including this section, the council shall have no authority to promulgate rules or to hear or determine any case or issue arising under the laws, rules, regulations, standards or orders issued or administered by the industrial siting or abandoned mine land divisions of the department. The council shall:

(i) Promulgate rules and regulations necessary for the administration of this act, after recommendation from the director of the department, the administrators of the various divisions and their respective advisory boards;

(ii) Conduct hearings as required by the Wyoming Administrative Procedure Act [§§ 16-3-101 through 16-3-115] for the adoption, amendment or repeal of rules, regulations, standards or orders recommended by the advisory boards through the administrators and the director. The council shall approve all rules, regulations, standards or orders of the department before they become final;

(iii) Conduct hearings in any case contesting the administration or enforcement of any law, rule, regulation, standard or order issued or administered by the department or any division thereof;

(iv) 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;

(v) Designate at the earliest date and to the extent possible those areas of the state which are very rare or uncommon and have particular historical, archaeological, wildlife, surface geological, botanical or scenic value. When areas of privately owned lands are to be considered for such designation, the council shall give notice to the record owner and hold hearing thereon, within a county in

which the area, or major portion thereof, to be so designated is located, in accordance with the Wyoming Administrative Procedure Act;

(vi) Adopt and when applicable, enforce the provisions of rule 11 of the Wyoming Rules of Civil Procedure in a contested hearing conducted by the council. The council may modify the procedural provisions of rule 11 to fit the circumstances of a hearing before the council and sanctions imposed by the council. If the provisions of rule 11 are modified at a future date, the council may adopt the modifications.

(b) The council may contract with consultants having special expertise to assist in the performance of its duties.

(c) Subject to any applicable state or federal law, and subject to the right to appeal, the council may:

(i) Approve, disapprove, repeal, modify or suspend any rule, regulation, standard or order of the director or any division administrator;

(ii) Order that any permit, license, certification or variance be granted, denied, suspended, revoked or modified;

(iii) Affirm, modify or deny the issuance of orders to cease and desist any act or practice in violation of the laws, rules, regulations, standards or orders issued or administered by the department or any division thereof. Upon application by the council, the district court of the county in which the act or practice is taking place shall issue its order to comply with the cease and desist order, and violation of the court order may be punished as a contempt.

(d) The director and his staff shall provide the council with meeting facilities, secretarial or clerical assistance, supplies and such other assistance as the council may require in the performance of its duties.

(e) Upon request, the attorney general shall provide such legal assistance as the council may require in the conduct of its hearings, writing of its decisions or the enforcement of its orders. The council may employ independent legal assistance as necessary to the proper performance of its duties.

(f) All proceedings of the council shall be conducted in accordance with the Wyoming Administrative Procedure Act.

An agency action in excess of its statutory jurisdiction, authority, or limitations or lacking statutory right will be held unlawful and set aside. Wyo. Stat. § 16-3-114(c)(ii)(C). "An agency is wholly without power to modify, dilute or change in any way the statutory provisions from

which it derives its authority.” *Diamond B. Servs., Inc. v. Rohde*, 2005 WY 130, ¶ 60, 120 P.3d 1031, 1048 (Wyo. 2005). This applies to both express and implied authority:

An administrative rule or regulation which is not expressly or impliedly authorized by statute is without force or effect if it adds to, changes, modifies, or conflicts with an existing statute... An agency’s “implied powers are only those derived by necessary implication from express statutory authority granted to the agency...”

Id.

There is no express or implied authority in the Environmental Quality Act for regulation of water quantity in the absence of a direct tie to water quality. The purposes of the Environmental Quality Act are specifically set out in Wyo. Stat. § 35-11-102:

Whereas pollution of the air, water and land of this state will ... impair domestic, agricultural, industrial, recreational and other beneficial uses; **it is hereby declared to be the policy and purpose of this act to enable the state to prevent, reduce and eliminate pollution**; to preserve, and enhance, the air, water and reclaim the land of Wyoming; to plan the development, use, reclamation, preservation and enhancement of the air, land and water resources of the state.

As used in the EQA, the term “pollution” means as applied to water quality:

... contamination or alteration of the physical, chemical, or biological properties of any waters of the state, including change in temperature, taste, color, turbidity or odor of the waters or any discharge of any acid, or toxic material, chemical or chemical compound, whether it be liquid, gaseous, solid, radioactive or other substance, including wastes, **into any waters of the state** which creates a **nuisance or renders any waters harmful, detrimental or injurious** to public health, safety or welfare, to domestic, commercial, industrial, agricultural, recreational or other legitimate beneficial uses, or to livestock, wildlife or aquatic life, or which degrades the water for its intended use, or adversely affects the environment[.]

Wyo. Stat. § 35-11-103(c)(i) (emphasis added).

DEQ has historically interpreted the EQA to allow regulation of water quantity only to the extent it is directly tied to water quality. *See, Formal Opinion No. 2006-001*, 2006 WL 3627656 (Wyo. A.G.). Chapter 1 of the WQD Rules protect certain uses of water, specifically,

agriculture, fisheries, industry, drinking water, recreation, scenic value, aquatic life, wildlife, and fish consumption. Petitioners allege that the groundwater may be depleted as a result of the issuance of Permit No. 06-274. To the extent Petitioners allege actual harm, the WQD Rules protect drinking water only with respect to water quality, not quantity.¹

The Attorney General has explained that the DEQ takes water quantity into account when regulating water quality, but that it does not have the authority to require any particular stream flow. *Formal Opinion No. 2006-001*, 2006 WL 3627656 (Wyo. A.G.).

III. WYOMING STATE BOARD OF CONTROL AUTHORITY

Petitioners have brought their concerns regarding water *quantity* under the auspices of this contested case hearing seeking to revoke a *permit to construct* issued by the Department of Environmental Quality. Although the DEQ considered the adequacy of the water supply and the effect this permit will have on water quantity, the DEQ's decision relied on the findings of the State Engineer's Office and its issuance of the permits for groundwater and surface water appropriation.

Petitioners are attempting to circumvent the otherwise efficient administration of water rights by questioning adequacy of water supply in this forum. Our Constitution provides that the waters of the state are the property of the state, but their appropriation, *distribution* and diversion shall be under the supervision of the State Board of Control. *See, Lewis v. State Bd. Of Control*, 699 P.2d 822, 826 (Wyo. 1985), *quoting, Wy. Hereford Ranch v. Hammond Packing Co.* 236

¹ **Water Uses.** The objectives of the Wyoming water pollution control program are described in W.S. 35-11-102. These objectives are designed to serve the interests of the state and achieve the related goals, objectives, and policies of the Federal Act. The objectives of the Wyoming program are to provide, wherever attainable, the highest possible water quality commensurate with the following uses: ... (d) Drinking water. The drinking water use involves maintaining a level of water quality that is suitable for potable water or intended to be suitable after receiving conventional drinking water treatment. WQD Rules, Chapter 1, § 3.

P.2d at 770. If this Council hears Petitioner's complaints regarding water supply, it will cripple the permit procedure, negate the doctrine of prior appropriation and make impossible the efficient administration of water. *Lewis, supra*, at 826.

It was intended by the authors of our Constitution that the board of control settle matters regarding water appropriation and supply. In *Farm Investment Company v. Carpenter*, 1899, 9 Wyo. 110, 61 P. 258, 50 L.R.A. 747, 87 Am.St.Rep. 918, Justice Potter, himself a member of the Constitutional Convention, quoted from the Journal and Debates of the Constitutional Convention for the State of Wyoming, p. 503, where it was said on the floor:

“When we appoint a board of control to manage this water system that we say belongs to the state, let us give them authority to control it for the highest and best uses of the people of the state, and don't fix that control by saying that appropriation shall settle the matter. Leave it to the board of control to say what equities enter into this matter of the use of water, and let them consider every question that arises in connection with its appropriation, and then say under all the equities of the case who shall be entitled to the use of that water, and not say that the matter of prior appropriation shall settle it.”

The State Engineer and the Board of Control are better equipped than this Council to determine complicated matters regarding water appropriation. *See, White v. Wheatland Irr. Dist.*, 413 P.2d 252, 259 (Wyo. 1966), *citing, Laramie Rivers Co. v. Le Vasseur*, 202 P.2d 680, 694 (Wyo. 1949). The Board of Control should be utilized to settle water matters because of its peculiar knowledge and expertise as to the technicalities involved, as well as the realities pertaining to water use and appropriation. *Kearney Lake, Land and Reservoir Co. v. Lake De Smet Reservoir Co.*, 475 P.2d 548 (Wyo. 1970). The Wyoming Supreme Court has noted the merits of having matters concerning water appropriation reviewed by the Board of Control, rather than the courts, thereby avoiding “the ludicrous spectacle of learned judges solemnly decreeing water rights.” *Louth v. Kaser*, 364 P.2d 96, 102 (Wyo. 1961). This Council must heed Justice Harnsberger's admonition.

Irrigation matters frequently involve many technicalities in connection with which courts cannot be expected to be experts, while the members of the Board of Control supposedly are. Now, if the trial court would have had the right to ask the parties to go and have the matters of priorities first determined by the Board of Control, there would be no reason to hold that the parties may not themselves initiate proceedings before it, at least in the absence of the court's objection, if, in the meantime, the action brought in court has not been finally determined, as is true in this case. In other words, we can find no good reason why the court may not avail itself of the aid which may be furnished by having a previous adjudication of the right made by the Board of Control, just as it might refer a case to a referee, and that is in substance the situation in this case.

Louth v. Kaser, at 101-102.

The conclusiveness of adjudications of water rights is established in Wyo. Stat. § 41-4-326:

The final orders or decrees of the state board of control, in the proceedings provided by law for the adjudication and determination of rights to the use of the public waters of the state, shall be conclusive as to all prior appropriations, and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the adjudication, subject, however, to the provisions of law for rehearings in such proceedings and for the reopening of the orders or decrees therein and for appeals from such orders or decrees.

Colorado has established a similar system to Wyoming's for the regulation of water. It regulates water quality and water quantity through two separate entities. *See, City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 91 (Colo. 1996). Water quality is the province of the Colorado Water Quality Control Commission and the Water Quality Division. Water quantity, on the other hand, is governed by a prior appropriation system regulated by the judiciary and the water court. The Colorado legislature made its intention clear that the water quality agencies cannot compromise the appropriative rights of present or future water users. *Colorado Wild, Inc. v. U.S. Forest Service*, 122 F.Supp.2d 1190 (D.Colo. 2000).

Similarly, Article 3 of Wyoming's Environmental Quality Act (Wyo. Stat. § 35-11-301 et seq.) is specifically aimed at regulating the discharge of pollution, whereas the Sections 2 and 5 of Article 8 of Wyoming's Constitution establishes the Board of Control to supervise the

appropriation, distribution and diversion of the state's water resources. This division of regulatory authority is constitutionally mandated and must be recognized by this Council. The Wyoming Supreme Court has explained:

When questions arise involving the power and authority of the State Engineer and the Board of Control it is vital to remember that both the Board and the State Engineer are created by the state constitution and not by the result of any legislative enactment. Their general powers are derived from the constitution and not from the legislature, §§ 2 and 5 of Article 8, Wyoming Constitution. It is further noted that, constitutionally, the Board of Control has supervision of the water, its "appropriation, distribution and diversion" within this state under such regulations as may be set by the legislature and that the State Engineer by virtue of § 5, Art. 8, has general supervision of the waters of this state and the officers who administer the same. *This distinguishes the Board of Control and its operations from some other administrative agencies.*

If this court were to hold that the powers of the Board of Control are strictly limited to those as prescribed or set out specifically by the legislature, we would deny them the authority and the right of supervision of the waters of this state, their appropriation, distribution and diversion and thus defeat a clearly stated constitutional objective. The Board must, in order to insure proper administration and use of our water be said to possess such powers as will insure the maximum beneficial use of all water, without regard to its source.

McTiernan v. Scott, 31 P.3d 749, (Wyo. 2001), quoting, *John Meier & Son v. Horse Creek Conservation Dist.*, 603 P.2d 1283, 1288 (Wyo. 1979).

IV. CONCLUSION

This Council does not have the authority to consider effects Permit No. 06-274 has on the water quantity without a direct link to water quality. Accordingly, any issues raised in the contested case hearing regarding water quantity must be stricken and disregarded.

DATED this 6th day of July, 2007.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, Jessica Rutzick, hereby certify that on the 6th day of July, 2007, the foregoing *Brief on the Authority of the EQC to Regulate Water Quantity* was served by depositing a true and accurate copy thereof in the U.S. Mail, postage prepaid and addressed as follows:

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