BEFORE THE
WYOMING ENVIRONMENTAL QUALITY COUNCIL

Wyoming Outdoor Council	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
Wyoming Department of Environmental Quality, Water Quality Division,	)	
	)	
Respondent,	)	
	)	
	)	
	)	
	)	Docket No. 06-3816
	)	Docket No. 06-3817

PETITIONER'S BRIEF ON WILLOW CREEK AND PUMPKIN CREEK GENERAL WATERSHED PERMITS

Comes now the Petitionoer in this matter, by and through its attorney, and for their Petition in this matter, hereby presents the following:

BACKGROUND

On Sept. 11, 2006, the Wyoming Department of Environmental Quality (DEQ), Water Quality Division (WQD) issued two general permits allegedly in accordance with DEQ Wyoming Water Quality Rules and Regulations (WWQR&R), entitled Willow Creek Watershed General Permit for Surface Discharges Related to Coal Bed Methane Production (attached hereto as Exhibit 1) and Pumpkin Creek Watershed General Permit for Surface Discharges Related to Coal Bed Methane Production (attached hereto as Exhibit 3) (hereinafter referred to as the "general permits").

The issuance of these permits represented the culmination of a long process of permit development involving stakeholder meetings that began in January of 2005, and went through five different draft versions of the general permits before a final draft was arrived upon and published by the DEQ on February 16, 2006. Public comments were taken and the public comment period was closed on April 3, 2006. The DEQ then took an additional three months to evaluate the comments, and attached Fact Sheets to the permits on August 25, 2006. (The Willow Creek Fact Sheet is attached hereto as Exhibit 2. The Pumpkin Creek Fact Sheet is attached hereto as Exhibit 4.) Then DEQ issued the general permits on Sept. 11, 2006.

Petitioner Wyoming Outdoor Council (WOC) has been heavily involved in the development of the general permits. It provided comments during the public comment period for both of the general permits, and Steve Jones, WOC's Watershed Protection Program Attorney served on the stakeholder committee for the Willow Creek Watershed General Permit.

The Standard for Granting of Summary Judgments

Summary judgments may be granted based upon the standard set forth in Rule 56, Wyoming Rules of Civil Procedure (W.R.C.P.). *See* Adler v. Wal-Mart Stores, Inc., 144 F. 3d 664, 670 (10th Cir. 1998). The W.R.C.P. has been made applicable to proceedings before the Environmental Quality Council by The Rules of Practice and Procedure of the Department of Environmental Quality. Summary judgment is appropriate where there is no genuine issue of material fact and the movant (in this case Wyoming Outdoor Council) is entitled to judgment as a matter of law. Rule 56(c), W.R.C.P.; Treemont, Inc. v. Hawley, 886 P. 2d 589 (Wyo., 1994). The issues presented below do not present an

issue of material fact and are all matters of the interpretation of laws or regulations applicable to this case, specifically the Wyoming Administrative Procedure Act, the Wyoming Environmental Quality Act, and Chapter 2, Section 4, Wyoming Water Quality Rules and Regulations.

ISSUES PRESENTED

1. Should the Willow Creek and Pumpkin Creek General Watershed Permits have been promulgated as rules?

2. Does the Environmental Quality Act authorize the issuance of General Permits?

3. Does the issuance of the General Permits meet the requirements of Chapter 2, WWQR&R?

The General Permits Meet the Definition of a Rule, But Were Not Promulgated as Rules.

The Willow Creek and Pumpkin Creek Watershed General Permits for Surface Discharges Related to Coal Bed Methane Production were issued as general permits, allegedly pursuant to Chapter 1, Section 4, WWQR&R. These permits were merely authorized and signed by the Water Quality Administrator and the Director of the Department of Environmental Quality, but were not promulgated as rules under the Wyoming Administrative Procedure Act (WAPA).

The WAPA defines a "rule" as an "agency statement of general applicability that implements, interprets and prescribes law, policy or ordinances of cities and towns, or describes the organization, procedures, or practice requirements of any agency . . ." W.S. 16-3-101(b)(ix). [emphasis added]

Both general permits authorize the discharge of coal bed methane produced water in Willow Creek and Pumpkin Creek drainages, including all tributaries of those

drainages. The Willow Creek General Permit also includes the Curtis Draw drainage, which is not part of the Willow Creek drainage. Both permits apply to a whole class of persons, not a particular permittee, or a particular site, and regulate the discharge of CBM water in the two general areas. Clearly, the general permit in this case is an agency statement that implements and prescribes law. It tells a whole class of persons how they can discharge coal bed methane produced water without having to go through the process of obtaining an individual permit to discharge. Hence, it meets the "general applicability" requirement, and thus meets the definition of a rule under the WAPA.

The general permits are statements of general applicability that implement, interpret, and prescribe law. The WAPA is very clear that in order for any rule to be legally effective it must go through the rulemaking process. W.S. 16-3-103(c). But the DEQ did not propose or attempt to promulgate these general permits as a rule. The procedures the DEQ must follow to promulgate rules are:

1. The rule is submitted to the Water and Waste Advisory Board (WWAB) for review as required by W.S. 35-11-114(b). The WWAB then makes recommendations to the Environmental Quality Council concerning the adoption of those rules.
2. The rule is submitted to the Environmental Quality Council (EQC) by the DEQ/WQD as a proposed rule to be promulgated by the EQC, upon the recommendation of the Director of DEQ, the Water Quality Administrator and the WWAB. W.S. 35-11-112(a)(i).

3. After adoption of the rule by the EQC, the legislative management council must be given a chance to review the proposed rule and provide a recommendation to the governor. W.S. 28-9-106(a).
4. The legislative service office must be provided a copy of the rule adopted by the EQC and the governor cannot approve any rule until at least 40 days have elapsed, to allow the legislative management council an opportunity to review the rule and make a recommendation. W.S. 28-9-103(b).
5. The rule is submitted to the governor for his approval and signature pursuant to W.S. 16-3-103(d).
6. The rule must be placed on file, within 75 days of the EQC's adoption of the rule, with the Wyoming Secretary of State. W.S. 16-3-104(a).

Since these general permits meet the definition of a rule, the State was required to follow rulemaking procedures, as described above. The DEQ failed to do this. Hence these general permits are null and void.

Promulgating a rule is a much more rigorous, multi-stage process than just issuing an individual permit. There are more checks and balances involved in the promulgation of a rule than there are in the issuance of a permit. Only the administrator of the Water Quality Division and the director of the Department make decisions on the issuance of a permit. That is exactly what happened in this case. Once John F. Wagner and John V. Corra signed the general permits, these permits went into effect. They were issued just as though they were individual permits.

The public has a much greater opportunity to affect the whole process if the matter under consideration is a rule. When the governing body for the whole of the DEQ

(the EQC) becomes involved, the public has a much greater opportunity to influence the process. Public hearings must be held if at least 25 persons make a request for one. W.S. 16-3-103(a)(ii)(A). Citizens are allowed to address the decision makers directly. The governor can also become involved and the public can ask the governor to reject a rule, even after the agency adopts it. The governor is also charged with making a determination as to the rule's compliance with statutory authority and the WAPA. W.S. 16-3-103(d).

These precautions were put in place for salient reasons. The state legislature wanted to make sure that every rule received a thorough review by not only the adopting agency, but also the public, the legislative service office, the legislative management council and the governor. No rule that has the force and effect of law should go into effect in Wyoming unless it has gone through that gauntlet of scrutiny.

The Wyoming Administrative Procedure Act is clear. A rule, to be enacted as a rule, must be promulgated as a rule. W.S. 16-3-103(a) and (c). The general permit qualifies as a rule, but it was not promulgated as one. The general permits were issued as if they were individual permits applicable only to a specific permittee, at a specific location, for a specific effluent discharge.

The proper procedure for adopting a general permit is to promulgate that permit as a rule. See, In the Matter of Freshwater Wetlands Protection Act Rules, 351 N.J. Super 362, 798 A. 2d 634, 639 (2002). ("The State general permit that is the subject of this appeal was promulgated by the [New Jersey] DEP and approved by the EPA.") See also Weber v. Trinity Meadows Raceway, Inc., 42 E.R.C. 2063 (N. D. Tex. 1996). In the

Weber case, the Federal District Court discussed the difference between general and individual permits in the context of concentrated animal feeding operations (CAFOs):

> 2. Region VI's General Permit
> On February 8, 1993, Region VI of the EPA **promulgated** final regulations in which it authorized the discharge of pollutants from CAFO point sources under certain conditions. *See* 58 Fed.Reg. 7610 (Feb. 8, 1993). This "general" permit became effective on March 10, 1993 and will expire on March 10, 1998. *Id.* at 7627. The Fifth Circuit has explained the difference between an individual and general NPDES permit:
> 'There are two types of NPDES permits: individual and general. Typically, EPA will **promulgate** a nationally uniform "effluent limitation" on the discharge of a particular pollutant and implement that limitation in the form of individual NPDES permits issued to entities discharging that pollutant. See 33 U.S.C. 1311, 1342. Where EPA has not yet promulgated such an effluent limitation, however, it may regulate the discharge of pollutants by issuing a general NPDES permit that applies to a class of similar entities located in a particular geographical region.' [quoting from Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F. 3d 546 (5th Cir., 1996), fn 10] [emphasis added]

This distinction was made abundantly clear in the recent case of Natural Resources Defense Council v. Environmental Protection Agency, 279 F. 3d 1180 (9th Cir., 2002). The Circuit Court stated:

> ... General permits, on the other hand, are issued for an entire class of hypothetical dischargers in a given geographical region **and are issued pursuant to administrative rulemaking procedures**. *See id.* [40 CFR]§ §122.28, 124.19. General permits may appropriately be issued when the dischargers in the geographical area to be covered by the permit are relatively homogenous. *See id.* [40 CFR] §§122.28(a)(2). 279 F. 3d at 1183 [emphasis added]

See also, to the same effect, the following cases which reference the issuance (i.e., promulgation) of general permits: U. S. v. Cumberland Farms of Connecticut, 647 F. Supp. 1166, 1179 (D. Mass., 1986); American Tuna Boat Assn. v. Brown, 67 F.3d 1404, fn 1 (9th Cir., 1995); Kokechik Fisherman's Assn. v. Secretary of Commerce, 839 F.2d 795, 798 (D.C. Cir., 1988. Notice that the context of the entire discussion in each of

these cases is that general permits must be promulgated as rules, while individual permits need not be.

In the same way that the DEQ lists specific rivers as having Class 1 status in Chapter 1, WWQR&R, DEQ can and should promulgate watershed general permits as rules, even if it applies only to one geographic area.

Hawaii and New Jersey are two states that have developed their own general permitting system and both states' general permits must be promulgated as rules In the Matter of Freshwater Wetlands Protection Act Rules, 852 A.2d. 167, 169 (2004). See also Revision of the Hawaii National Pollutant Discharge Elimination System (NPDES) Program to Authorize the Issuance of General Permits, 56 Fed. Reg. 55502 (proposed Oct. 28, 1991). The proper procedure for adopting a general permit is to promulgate a permit as a rule. The State of Hawaii has defined general permits as rules, "under State law and the State proposes to issue general permits as rules following State rulemaking provisions and including provisions necessary to comply with NPDES regulations applicable to general permits...." Revision of the Hawaii National Pollutant Discharge Elimination System (NPDES) Program to Authorize the Issuance of General Permits 56 Fed. Reg. 55502 (proposed Oct. 28, 1991).

Similarly, New Jersey promulgates general permits as rules pursuant to N.J. Stat. Ann. Section 7:A-5.23. New Jersey has authority over general permits for dredge and fill material under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C.A. §1344. The New Jersey Appellate Court noted, for instance, that "the State general permit that is the subject of this appeal was promulgated by the [New Jersey] DEP and approved by the EPA" (emphasis added). In the Matter of Freshwater Wetlands

Protection Act Rules, 798 A.2d 634, 639 (2002). The New Jersey Supreme Court found that the New Jersey Department of Environmental Protection's general permits were upheld as being at least as stringent as the federal guidelines. Id.

There is a bright line between what constitutes a general permit and what constitutes an individual permit. An individual permit applies to one specific permittee at a specific location, for a specifically authorized discharge, with outfalls that are specified. A general permit covers a broad swath or category of sites and locations, an unlimited number of different permittees, and many different discharges, at many different locations. While the general permit does set forth certain parameters and terms that must be met in order for the general permit to be applicable, it is nevertheless general in its coverage, in that it covers a category of persons and circumstances. It is an agency statement of general applicability. Therefore, it must be promulgated as a rule.

The Wyoming APA requires rulemaking procedures for "agency statements of general applicability. . . ." W.S. 16-3-101(a) (ix). The Pumpkin and Willow Creek General Permits were not promulgated as rules. Therefore, the Pumpkin and Willow Creek General Permits are illegal and must be repealed.

The Environmental Quality Act Does Not Authorize The Issuance of Water Quality General Permits

The Wyoming Environmental Quality Act (EQA) does not authorize the DEQ/WQD to issue general permits. In W. S. 35-11-301 et seq, the water quality article of the Wyoming Environmental Quality Act (EQA), general permits are not mentioned. Additionally, the water quality administrator's duties and authority section, W.S. 35-11-302, does not describe any authority of the administrator to issue or administer general permits.

This is contrasted with the air quality division. Under the air quality article of the EQA, W.S. 35-11-201 et seq., general permits are authorized. W.S. 35-11-206(d) states:

> The department may, after notice and opportunity for public hearing, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to permits under title V of the Clean Air Act and the operating permit program. No source covered by a general permit shall thereby be relieved from the obligation to file an application under W.S. 35-11-205.

Clearly the legislature understands the difference between general permits and individual permits and was careful to allow general permits for "numerous similar" air emission sources. But the legislature was also careful to circumscribe this general permit authority by indicating that even with air quality general permits, a permit application must still be filed by the individual company seeking to come under the general permit, pursuant to W.S. 35-11-205. (This feature contrasts with the general permits in this case, where a company can simply issue a notice of intent to the water quality division. A permit application is not necessary, under the terms of the Willow Creek and Pumpkin Creek Watershed General Permits.)

It should also be noted that W.S. 35-11-801(b) implies that all permits issued by the DEQ must be accompanied by a permit application. Yet the general permits in this case do not require the filing of a permit application .

The State of Connecticut has a general permitting statute that is very specific. The statute is entitled Permit for new discharge. Regulations. Renewal. Special category permits or approvals. Limited delegation. General permits. Conn. Gen. Stat. §22a-430 (2007). There is considerable detail as to who and how general permits are to be authorized by the commissioner. In order for general permits to be granted they must go through a rigorous process including notice and comment, a proposal must be submitted

including plans and specifications to protect the water. Each step is defined in the statute including the renewal procedure and violation procedures.

In Wyoming, however, there are no provisions allowing for a system of general permits to be used for water discharges. The DEQ has blithely ignored this lack of statutory authority and charged ahead with these watershed general permits, without ever seeking legislative authority to have such a system of permits.

Additional evidence that the Wyoming Legislature did not intend to grant the administrator of the water quality division the power to issue or promulgate general permits recently came to the fore with the introduction of House Bill 212 in the 2007 legislative session. House Bill 212 (attached as Exhibit 5) would have amended W.S. 35-11-302 as follows:

> **W.S. 35-11-302. Administrator's authority to recommend standards, rules, regulations, or permits.**
> (a) The administrator, after receiving public comment and after consultation with the advisory board, shall recommend to the director rules, regulations, standards, and permit systems to promote the purposes of this act. Such rules, regulations, standards and permit systems shall prescribe:
> ... (v) Standards for the issuance of permits as authorized pursuant to section 402(b) of the Federal Water Pollution Control Act as amended in 1972, and as it may be hereafter amended, <u>including watershed general permits for surface discharges related to coal bed methane production</u>; ...
>
> [The underlined language is the proposed amendment.]

House Bill 212, while it passed through the Wyoming House of Representatives, failed to pass in the Wyoming Senate. It did not even come up for a vote. It died an ignominious death. The Wyoming Legislature apparently did not want the water quality administrator to have the authority to authorize general watershed permits. Yet, curiously, the DEQ has not withdrawn the Willow Creek and Pumpkin Creek Watershed General

Permits, despite this unequivocal expression of legislative intent. The failure to pass legislation has been held to be an indicator of legislative intent. Ball v. State, 52 A.D.2d 47, 50, 382 N.Y.S.2d 835 (N.Y.A.D. 1976). While some courts have held that the failure to pass an amendment to an existing statute can offer only limited guidance for legislative intent, California Court Reporters Assn. v. Judicial Council of California, 39 Cal.App.4th 15, 46 Cal.Rptr.2d 44, 55, (Cal.App. 1 Dist.,1995), it is nevertheless quite clear what happened in this case. House Bill 212 was clearly designed to address the lack of statutory authority for general permits to be issued by the water quality division. Therefore, appropriate conclusions can be drawn from its failure to pass the legislature and be enacted into law. This is not a case where the legislature failed to pass legislation of any kind, in the abstract. It is a situation where legislation specifically addressing the problem of a lack of statutory authority for general permits was introduced, but then failed to pass. Under such a scenario, it has clear implications for legislative intent.

The plain meaning of the EQA is clear: the water quality administrator does not have the authority to promulgate or issue general permits. There is a complete absence of any discussion of the administrator of water quality having the authority to issue general permits. W.S. 35-11-302. When the plain meaning is clear, there is no need for further interpretation of a statute. United States v. Missouri Pacific Railroad, 278 U.S. 269, 278 (1929), Caminetti v. United States, 242 U.S. 470, 490 (1917).

In more recent Supreme Court cases, the plain meaning rule is not a prohibition but a flexible principle for ascertaining the intent of Congress. Heppner v. United States, 665 F.2d 868, 870 (9th Cir.1981). Instead, the Court has been clear on the plain meaning rule and additional evidence, "(A)scertainment of the meaning apparent on the face of the

single statute need not end the inquiry. . . This is because the plain meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.' Boston Sand Co. v. United States, 278 U.S. 41, 48 (1928)." The fact that House Bill 212 did not pass is strong additional evidence of legislative intent. By failing to pass H.B. 212, the Wyoming legislature has made it clear that there was no original intent, when the EQA was passed in 1973, to grant authority to issue general permits. In 1992, when the legislature decided to amend the EQA to allow general permits to be issued for air quality discharge permits, it could have also amended the Act to allow for water quality general permits. But it chose not to do so. And then in 2007, when it had the opportunity to allow the water quality administrator to issue general watershed permits, it again chose not to do so. The plain meaning combined with history, provides quite persuasive evidence as to legislative intent, it is obvious the administrator did not have the authority to issue or otherwise authorize the Willow and Pumpkin Creek general watershed permits.

The wording of the EQA is clear. The legislative intent is clear. The Wyoming Legislature has not authorized the issuance or promulgation of general watershed permits by the water quality division, and the general permits are therefore beyond the statutory authority of the DEQ and thus null and void.

The Willow Creek and Pumpkin Creek General Permits do not meet the Requirements of Chapter 2 of the Wyoming Water Quality Rules and Regulations

Wyoming Water Quality Rules and Regulations (WWQR&R), Chapter 2, Section 4, includes requirements that general permits may only be issued under certain circumstances. These include:

...

(iii) Effluent discharges, other than discharges described in (i) and (ii) above, if the sources all:
(A) Involve the same or substantially similar types of operations;
(B) Discharge the same types of pollution or wastes;
(C) Require the same effluent limitations or operating conditions;
(D) Require the same or similar monitoring; and
(E) In the opinion of the administrator, are more appropriately controlled under a general permit than under individual permits.

In making such a finding, the administrator shall consider: the types of discharges; the expected nature of the discharges; the potential for toxic and conventional pollutants in the discharges; the expected volumes of the discharges; and the estimated number of discharges to be covered by the permit. The administrator shall provide in the public notice of the general permit the rationale for utilizing a general permit rather than individual permits for the permitted activity.

WWQR&R, Chapter 2 Section 4(iii).

While Chapter 2, WWQR&R, clearly requires the same effluent limitations for all discharges falling under the umbrella of a general permit, the Willow Creek general permit alone outlines three different categories of effluent discharge. See Exhibit 1, Willow Creek Watershed General Permit. Furthermore, Category I has three subcategories, so there are a total of five categories of discharges for the Willow Creek Permit. Each of these categories of discharges has different effluent requirements. Similarly, the Pumpkin Creek Watershed General Permit, Exhibit 2, has three categories of discharges, which includes four subcategories, for a total of six different discharge categories. Again, each of those categories has different effluent requirements.

The issuance of the general permits violates Chapter 2, Section 4, WWQR&R. Wyoming courts have interpreted administrative rules using the same basic tenants of statutory interpretation. The Wyoming Supreme Court noted, "[w]e interpret rules in the

same manner as statutes, looking first to the plain language." RME Petroleum Company v. Wyoming Department of Revenue, 150 P.3d 673, 688 (Wyo., 2007). The plain meaning of Section 4(iii)(C) of WWQR&R states that a general permit must "require the same effluent limitations or operating conditions." But the general permits in this case specify that there are different effluent limitations throughout the drainages. Therefore the general permits do not meet the requirements of Chapter 2 of the WWQR&R and must be declared illegal.

Each of the three categories of effluent discharges outlined in the Willow Creek General Permit specifies separate "effluent characteristics" for each of the three "categories of discharges." Further, Category I specifies three sub-categories of discharges that all specify separate "effluent characteristics."

There are a total of five separate categories of "effluent characteristics" contained in the Willow Creek General Permit alone. The WWQR&R plainly requires that for effluent discharges to meet the requirements for a general permit they must be the "same effluent limitations." The five separate categories of effluent discharge specified in the Willow Creek General Permit clearly do not meet this requirement and therefore the general permits are in violation of Chapter 2 of the WWQR&R §4(a)(iii)(c).

In response to public comments regarding this violation of its own regulations, DEQ responded "[t]he use of separate discharge categories in this general permit does not violate Chapter 2, Section 4. Each category complies with the five criteria established in section 4(a)(iii), for issuance of a general permit to cover effluent discharges." *Available at*http://deq.state.wy.us/wqd/WYPDES_Permitting/WYPDES_cbm/Pages/CBM_Watershed_Permitting/Willow_Creek/Willow%20Creek%20Downloads/Final%20GP%20docs/

WILLOW%20%20CREEK%20RESPONSE381.pdf. This response is unmitigated sophistry. It entirely ignores the plain meaning of §4(a)(iii), which clearly requires, quite simply, the "same effluent limitations" and not the same effluent limitations within limitless sub-categories of effluent discharge, as the DEQ/WQD would have us believe. DEQ/WQD's apparent reading of §4(a)(iii), that there can be an unlimited number of "categories of discharge" within a general permit, is completely unsubstantiated by the plain meaning and clear intent of WWQR&R Chapter 2. DEQ's irresponsible interpretation of the provisions of Chapter 2 governing general permits would leave the meaning of the phrase "same effluent limitations" inexplicable, or worse yet, meaningless.

Since the issuance of the Willow Creek and Pumpkin Creek General Permits violate Chapter 2, Section 4 (iii), WWQR&R, the DEQ/WQD is in violation of its own regulations. The case law in Wyoming is well established that an administrative agency must comply with its own regulations. "Administrative rules have the force and effect of law, and an administrative agency must follow its own rules and regulations or face reversal of its action." RME Petroleum Company v. Wyoming Department of Revenue, 150 P.3d 673, 688 (Wyo., 2007). In the instant case, the DEQ/WQD is in violation of its own regulations by disregarding the plain meaning of §4(a)(iii)(c) of Chapter 2 of the WWQR&R. Applying the holding from the Wyoming Supreme Court, the DEQ/WQD must be reversed regarding the issuance of the general permits because they were issued in violation of a rule.

Another well known and much followed rule of administrative law is that administrative agencies are given deference in how they interpret their own rules. In

Croxton v. Board of County Commissioners of Natrona County, 644 P.2d 780, 784 (Wyo. 1981), the Court expressed the rule that "[n]ormally, in construing an administrative body's regulation, we defer to the agency's construction of its own rule." However, the Court continued in this case and added that, "[h]owever, where the agency's interpretation is clearly erroneous or inconsistent with the rule or regulation's plain meaning, we must disregard it." Id.

Here we are confronted with an analogous situation to the one the court dealt with in Croxton. While some deference to the agency may be appropriate as a general rule, when the agency's interpretation is inconsistent with a plain meaning interpretation it must be disregarded by the Court. Therefore the Environmental Quality Council should not accord the DEQ any deference when the conclusion that is reached is, quite simply, absurd. The EQC should therefore disregard DEQ's misinterpretation of their own rule in favor of its plain meaning.

When one considers the broader public policy issues at stake in this matter, it is clear that general permits were intended for routine, non-controversial discharges that would be unlikely to have a significant impact on the environment. Consider the language of Chapter 2, Section 4(i)(i):

> (i) Requiring an individual permit.
>
> (i) The administrator, for good cause, may require any person authorized by a general permit or seeking coverage under a general permit to apply for and obtain an individual permit. Cases where an individual WYPDES permit may be required include, but are not limited to, the following:
>
> (A) The permittee is not in compliance with the conditions of the general WYPDES permit;
>
> (B) A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants applicable to the point source;

(C) Effluent limitation guidelines are promulgated for point sources covered by the general WYPDES permit;

(D) A water quality management plan containing requirements applicable to such point sources is approved;

(E) Circumstances have changed since the time of the request to be covered so that the discharger is no longer appropriately controlled under the general permit, or either a temporary or permanent reduction or elimination of the authorized discharge is necessary;

(F) The discharge(s) is a significant contributor of pollutants. In making this determination, the administrator may consider the following factors:

(I) The location of the discharge with respect to surface waters of the state;

(II) The size of the discharge;

(III) The quantity and nature of the pollutants discharged to surface waters of the state; and

(IV) Any other relevant factors.

In particular, Section 4 (i)(i)(F) sets forth various rationales for requiring an individual permit instead of a general permit. It is clear from a reading of those factors that, where the discharge is a "significant contributor of pollutants," an individual permit is appropriate, and a general permit is not appropriate. This reflects good public policy. Individual permits give more control over the permittee, and allow for more involvement of the public in the permitting process. Clearly, individual permits are the preferable mechanism for control of significant pollution. This is the obvious intent of Chapter 2.

A Minnesota court addressed the issue of the requirements for public comment in regard to general permits. Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency, 660 N.W.2d 427 (Minn. App., 2003). The Minnesota Center for Environmental Advocacy (MCEA) challenged a general permit that was issued by the Minnesota Pollution Control Agency (MPCA) which covered the discharge of storm water by small municipalities. Id. at 430. Of particular relevance to this issue, the MCEA challenged whether "the issuance of the general permit impermissibly deprive[s] the public of its right to notice and comment." Id. at 432.

While the Minnesota case deals with storm water rather than CBM water, it is similar to the instant case since both cases involve the issuance of a general permit by the controlling state water quality agency. Even more critically, both cases involve a general permitting process which is commonly derived from the Clean Water Act and is granted authority under the NPDES and which only provide for one period of public comment at the initial issuance of the general permit. The Court held that, "because there is no opportunity for public hearings on *each* [permit], the general permit procedure violates the public participation requirements of the Clean Water Act. We conclude that the public is entitled to be heard on *each* [permit]." Emphasis added. Id. at 435.

Applying this rule to the instant case, the Willow Creek and Pumpkin Creek general permits should be found to violate the public comment requirements of the Clean Water Act because they fail to provide the public an opportunity to comment on *each* permit discharge that is authorized under the general permits.

Furthermore, it is not in the public interest to have only one opportunity for public comment in regard to CBM produced water discharge for an entire watershed. Certainly it is not a stretch to imagine a situation where members of the public will become affected by the discharges allowed by the general permits, before the five-year time line of the general permits has expired, and members of the public may be clambering for an opportunity to speak out on this matter. But unfortunately, with these general permits, that opportunity has passed. All CBM discharges for these drainages that come under the permits will be allowed, without further public comment, for the next five years. Only when the general permits are up for renewal in 2011 can matters of public concern be raised again. Members of the public may or may not have been aware of the plans to drill

up to 180 wells in the drainages at issue in this case. If they are not currently aware of these plans, it is not fair to keep them from participation in how their natural resources are used and exploited for a five-year period, without a forum to voice their concerns.

Individual permits are a more appropriate management tool for the Willow Creek and Pumpkin Creek watersheds than general permits. The idea behind the issuance of general permits, as can be gleaned from Section 4, is to regulate discharges that are routine and typical -- with the same effluent limitations. General permits were designed as a management tool for non-controversial discharges where public comment would be limited because of the less-complicated and less-controversial nature of the discharge.

The situation we are confronted with here simply does not fall into any of the above policy goals laid out for general permits. The DEQ is misusing and inappropriately stretching the limits of general permits in its attempt to utilize this tool in this case. Discharges from over 100 potential wells is controversial and the public deserves the opportunity to comment more than once in five years. The DEQ/WQD has laid out five sub-categories of discharge (six categories in the case of the Pumpkin Creek Watershed General Permit) in violation of the plain language for the issuance of general permits. Finally, although produced water discharge is becoming common in this state, the discharge of millions of gallons of produced water is by no means "typical" and thus should not fall under the umbrella of a general permit.

WOC respectfully asks that the Environmental Quality Council enforce both the plain meaning and the intent of Chapter 2, Section 4, WWQR&R, and reign in the DEQ/WQD's misapplication of the Willow Creek and Pumpkin Creek general permits in

favor of individual permits, which are a more appropriate management tool for the planned effluent discharge.

SUMMARY

The issuance of general permits by DEQ in this case clearly violates the Wyoming Administrative Procedures Act, W.S. 16-3-101 et seq. They are general permits and as such constitute agency statements of general applicability. This meets the definition of an agency rule, which must be promulgated pursuant to WAPA. But these general permits were merely issued, not promulgated, avoiding all the safeguards envisioned by WAPA for the issuance of binding rules that have the force and effect of law.

Secondly, there is no authority in the EQA that empowers the administrator of the water quality division to issue general permits. This contrasts significantly with the fact that the Wyoming Legislature extended the power to issue general permits to the air quality division of the DEQ. W.S. 35-11-206(d).

Finally, the requirements of Chapter 2, Section 4, WWQR&R, have not been met in any event. Section 4(a)(iii) requires the same effluent limitations be used in general permits such as the ones in this case. But the general permits in this case have different sets of effluent limitations set forth in the permit (five or six categories of discharges, depending on the general permit in question). These permits, moreover, are not the sort of permits intended to be administered as general permits. They involve tremendous volumes of water and great potential for significant pollution to waters of the State and the environment. Monitoring of these discharges is also quite variable, depending the location of the discharge within the drainage in question.

These general permits should never have been issued. They should be revoked by the EQC. DEQ/WQD should be sent back to the drawing board.

There being no genuine issue of material fact with respect to the issues set forth above, the Petitioner asks that the EQC set aside the general permits at issue herein and issue such further orders to the DEQ/WQD as it may deem just and equitable.

WHEREFORE, Petitioner moves that its Motion for Summary Judgment be granted.

Dated this 13th day of July, 2007.

Steve Jones
Attorney for Petitioner
Wyoming Outdoor Council
262 Lincoln St.
Lander, WY 82520
307-332-7031 ext. 18
307-332-6899 (FAX)
steve@wyomingoutdoorcouncil.org

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petitioner's Brief on Willow Creek and Pumpkin Creek General Watershed Permits, together with attached exhibits, by placing a copy of the same in the U.S. mail, postage prepaid, on the 13th day of July, 2007, addressed to the following:

Michael Barrash
Assistant Attorney General
Wyoming Attorney General's Office
123 Capitol Bldg.
Cheyenne, WY 82002
mbarra@state.wy.us

Kim McGee
Environmental Quality Council
Herschler Bldg., Room 1715
122 W. 25th St.
Cheyenne, WY 82002
kmcgee@state.wy.us

Steve Jones