



Wyoming Outdoor Council

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Jim Ruby, Executive Secretary
Environmental Quality Council

June 25, 2009

Wyoming Environmental Quality Council
122 West 25th Street
Herschler Building, Room 1714
Cheyenne, Wyoming 82002

Re: Ozone Petition for Rulemaking, EQC Docket No. 09-1101

Dear Environmental Quality Council Members:

The purpose of this letter is to follow up on and elaborate on several issues that became apparent at the June 3, 2009 hearing on this matter that was held in Rock Springs. The three issues we will address are: (1) Whether the Department of Environmental Quality (DEQ) should assume control of this rulemaking, if the Environmental Quality Council (EQC) accepts this matter for rulemaking following its August 18 meeting; (2) Whether a cost-benefit analysis needs to be conducted as part of this rulemaking, whether it is handled by the DEQ or the EQC; and (3) Whether this rulemaking should be focused on Sublette County only, as requested in the petition, or should be a statewide rule. We will address each of these issues in turn below.

The DEQ Should Not Assume This Rulemaking.

The Wyoming Administrative Procedure Act (APA) specifically provides that “[a]ny interested person may petition an agency requesting the promulgation, amendment or repeal of any rule and may accompany his petition with relevant data, views, and arguments.” W.S. § 16-3-106. The Wyoming Environmental Quality Act (EQA) provides that the EQC is a “separate operating agency of state government.” W.S. § 35-11-111. Thus, the petitioners are specifically given the right to petition the EQC to adopt rules. While the petitioners might well have petitioned the DEQ to promulgate this rule, they did not do so, they petitioned the EQC to take the requested action, and thus the EQC not the DEQ should handle this request for rulemaking.

After providing that interested persons may petition an agency to adopt rules, the APA goes on to provide that upon the submission of a petition, “the agency as soon as practicable either shall deny the petition in writing . . . or initiate rulemaking proceedings” conducted in accordance with section 16-3-103 of the APA. W.S. § 16-3-106. We feel this makes it clear the agency that must engage in the rulemaking effort (assuming the petition is accepted) is the

agency that has been petitioned—the EQC—not some other agency. Moreover, as allowed by the APA, the EQC has adopted provisions governing citizen petitions as part of its Rules of Practice and Procedure. The Rules of Practice and Procedure reinforce the view that the DEQ should not assume this rulemaking. “Any party may petition the *Council* to promulgate, amend, or repeal any rule or rules.” EQC Rules of Practice and Procedure Ch. III § 2 (emphasis added). “After the filing of the petition, the *Council* may hold a prehearing conference to review the petition and its persuasiveness” and “[a]s soon as practicable the *Council* shall deny the petition in writing . . . or initiate rule-making procedures.” *Id.* Ch. III §§ 2(c)-(d) (emphasis added).

Petitioners do not dispute that the DEQ also has rulemaking authority. *See* W.S. § 35-11-109. But the DEQ’s role is subservient to that of the EQC: “The [EQC] shall act as the hearing examiner for the [DEQ] and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the [DEQ] or its air quality, land quality, solid and hazardous waste management or water quality divisions.” W.S. § 35-11-112(a). The EQA then goes on to give the EQC the authority to “[a]pprove, disapprove, repeal, modify, or suspend any rule, regulation, standard, or order of the director [of DEQ] or any division administrator.” W.S. § 35-11-112(c)(i). Thus, we feel it is clear that the EQC has rulemaking authority that is independent of any authority the DEQ has and in addition the EQC has an *obligation* to pursue rulemaking *itself* as the agency which has been petitioned to take action in this matter.

There is a long line of precedent establishing that the EQC, not the DEQ, will undertake any rulemaking resulting from a citizens’ request. Most recently this was evidenced by the petition for rulemaking filed by the Powder River Basin Resource Council relative to issues related to coalbed methane produced water discharges, which was handled entirely by the EQC not the DEQ. So far as we know the EQC has never turned a citizens’ rulemaking petition over to the DEQ. Petitioners welcome DEQ’s input into this matter and their expertise will be valuable, but we believe the law is clear this matter should be under the control and guidance of the EQC not the DEQ. We believe that EQC control of this matter is required under the applicable statutes, as discussed in some detail above, but at least as importantly we feel retention of control by the EQC is necessary to ensure this matter remains under the jurisdiction of a citizen Council that represents the citizens of Wyoming and not under the control of technical experts who may or may not fully appreciate and represent the views and concerns of the citizens of Wyoming.

Frankly, we are deeply concerned that if this matter were turned over to the DEQ for rulemaking there would be inevitable undue delay. We believe the effect of such a decision could well be to effectively negate this citizen request for action to protect the public health in Sublette County. For example, since at least last August the Air Quality Division has been promising to revise the Best Available Control Technology (BACT) guidelines for oil and gas development operations in Sublette County and has repeatedly told us that release of the proposed revisions is imminent. But nothing has happened yet, the BACT guidelines remain unchanged. This is not intended as an attack on DEQ, they may well not have sufficient funding to pursue needed actions in the mostly timely manner, but that is exactly our point, turning this matter over to

DEQ could well lead to unacceptable delay, which deeply concerns, in fact distresses, the petitioners, who feel their health is immediately threatened.

For the above reasons we feel the EQC should retain control of this rulemaking. It is our view that allowing DEQ to assume this rulemaking would violate the APA, EQA, and the EQC's Rules of Practice and Procedure.

There Is No Requirement For A Cost-Benefit Analysis.

In her presentation in Rock Springs, Nancy Vehr from the Attorney General's Office indicated she felt that it may be necessary to do a cost-benefit analysis prior to adopting any rule. This issue was addressed in some detail in the petition and the answer to this question is unequivocal: no cost-benefit analysis is required as a prerequisite to adopting a rule.

This issue was addressed on pages 6, 17-18, and 45-53 in the petition. The Wyoming Supreme Court has held that the EQC's obligation when adopting air quality rules is to "promulgate rules and regulations necessary to prevent, reduce and eliminate pollution." *Tri-State Generation & Transmission Ass'n v. Environmental Quality Council*, 590 P.2d 1324, 1332 (Wyo. 1979). This language tracks that in the EQA, which also establishes a policy and purpose to "prevent, reduce and eliminate pollution." W.S. § 35-11-102. While the EQA does reference the "social and economic value" of sources of pollution and the "economic reasonableness" of reducing the pollution, W.S. §§ 35-11-202(b)(i)(B) and (D), as considerations the air quality division administrator must make when recommending rules to the director of the DEQ, the Wyoming Supreme Court specifically held that while it may be advantageous for the EQC to refer to these (and other) factors mentioned in the EQA and that courts may find them of assistance when determining if relevant factors have been considered, "[t]here [is] no express statutory requirement that the Council conform its decision-making" to the factors specified in W.S. §§ 35-11-202(b)(i)(A)-(E). *Tri-State Generation*, 590 P.2d at 1332. And as discussed in the petition, given that the term "air pollution" is defined in the EQA to mean the presence in the outdoor air of contaminants "in such quantities and duration which may be injurious to human health or welfare, animal or plant life, or property, or unreasonably interferes with the enjoyment of life or property," W.S. § 35-11-103(b)(ii), it is the petitioners view that the obligation to "prevent, reduce or eliminate pollution" means the focus must be on health and welfare concerns, not economics.

Furthermore, as discussed on pages 48-52 of the petition, the EPA engaged in a detailed consideration of economic costs and benefits in its last ozone rulemaking in its Regulatory Impact Analysis (RIA). Thus, any needed cost-benefit analysis is already largely available. While this analysis was not Wyoming-specific, it provides a substantial treatment of costs and benefits that allows for an informed and rational consideration of the economic impacts of the proposed rule. And again, developing a Wyoming-specific cost benefit analysis would likely take a considerable amount of time (and money) and thus may primarily serve as a source of delay rather than generating needed information that is not already available in the RIA and which is discussed in the petition.

The Petitioners Continue To Request That This Rulemaking Be Confined To Sublette County, But If This Council Wishes To Make This A Statewide Rulemaking The Petitioners Would Not Object.

At the hearing in Rock Springs, two council members expressed some concern about this requested rulemaking being limited to Sublette County and not being statewide. The petitioners have discussed this concern extensively and have decided against amending their petition to request a statewide standard..

There are a number of reasons for taking this position. These reasons include the following:

- Sublette County has seen by far the highest ozone levels of any area in the State. Eight-hour levels in Sublette County have reached as high as 122 parts per billion (ppb), a level which clearly threatens the public health in this area. While other monitors such as those in Yellowstone National Park and most significantly the Thunder Basin National Grasslands monitor may be detecting levels that would exceed the proposed standard, the petitioners do not feel that generally the ozone problems in these areas are nearly as immediate as what we are seeing in Sublette County.
- The conditions favoring ozone formation in Sublette County appear to be unusual, namely wintertime ozone formation.
- The State's recommended ozone nonattainment area that it has made to the EPA is focused on Sublette County, and small portions of Sweetwater and Lincoln Counties.¹
- Oil and gas development, which the DEQ has unequivocally determined is the source of the ozone precursor emissions in Sublette County, is particularly intense in Sublette County, with literally thousands of new wells projected for the area.
- The petitioners are residents of Sublette County. This is their home and the place they care most about. They do not feel they should be attempting to make rules for those who live in other areas.
- As discussed in Mr. Pendery's presentation in Rock Springs, the EQA is very explicit that air quality standards "may vary from area to area." W.S. § 35-11-202(a). *See also* W.S. § 35-11-110(a)(ix). And in fact the State of Wyoming already has in place provisions for particulate matter that are tailored specifically for the coal mining region in the Powder River Basin. *See Wyoming Air Quality Standards and Regulations Ch. 2 § 2(c)* (defining the term "ambient air" with respect to the particulate matter standard uniquely for the coal mining area of the Powder River Basin). We would note that this unique definition of "ambient air" is an even more far reaching provision than establishing a unique Wyoming Ambient Air Quality Standard level would be—this rule *eliminates* a large area of northeastern Wyoming from application of the particulate matter standard by defining the coal mines as not being ambient air at all since they are not open to the general public. And thus the particulate matter standard does not even apply in the defined area.

¹ As stated in footnote 38 in the petition, we would not object if the proposed rulemaking area were expanded to coincide with the State's proposed nonattainment area, so as to ensure consistency.

- Sublette County is at high altitude and there is extreme cold when ozone formation occurs. Altitude and cold are factors which challenge the respiratory system to an even greater degree than occurs at lower elevations under warmer conditions. These factors are probably less in play elsewhere.

Given these considerations the petitioners have decided to maintain their request that the requested action be taken for Sublette County only. **That said, if this Council were to disagree with this view and were to feel that a statewide rulemaking is more appropriate, the petitioners would not object to the Council taking such an action, modifying the petition to make it statewide.** The petitioners feel there is no doubt the Council can modify the petition in this way if it so chooses. The petitioners especially do not feel this issue should cause the EQC to not accept their petition for full consideration, and consequently if it is necessary to convert this to a statewide petition in order for the EQC to accept the petition, the petitioners would not object.

Earlier the petitioners submitted a proposal for the exact regulatory language they were proposing to be adopted. The petitioners have come to realize that the proposed language was in error because it was statewide in scope (the petitioners mistakenly only focused on the ozone level when they submitted the proposed language and failed to consider the scope of the rule). Given this problem, the petitioners attach herewith modified proposed regulatory language and ask that this be considered as their proposal, not the previously submitted language.

Thank you for considering these thoughts and views and we look forward to remaining engaged in this process.

Sincerely,



Bruce Pendery
On behalf of the Petitioners

cc: Jim Ruby, EQC Executive Secretary

Enclosure

**Proposed Rule Change Requested in the Petition Filed by Crumpley et al.-- EQC Docket
No. 09-1101**

The proposed change is to Wyoming Ambient Air Quality Standards and Regulations, Chapter 2, Section 6:

Section 6. Ambient standards for ozone.

- (a) The level of the 8-hour primary and secondary ambient air quality standards for ozone, measured by a reference method based on 40 CFR part 50, Appendix D and designated in accordance with 40 CFR part 53 is ~~0.08~~ 0.065 parts per million (ppm), daily maximum 8-hour average, in Sublette County, Wyoming. The level of the 8-hour primary and secondary ambient air quality standards for ozone in the remainder of the State, measured by a reference method based on 40 CFR part 50, Appendix D and designated in accordance with 40 CFR part 53 is ~~0.08~~ 0.075 ppm, daily maximum 8-hour average.
- (b) The 8-hour primary and secondary standard ozone ambient air quality standards are met at an ambient air quality monitor site in Sublette County, Wyoming when the average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to ~~0.08~~ 0.065 ppm, as determined in accordance with 40 CFR part 50, Appendix I. The 8-hour primary and secondary standard ozone ambient air quality standards are met at an ambient air quality monitor site in other portions of the State when the average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to ~~0.08~~ 0.075 ppm, as determined in accordance with 40 CFR part 50, Appendix I.