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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF:	)	Docket No. 09-2801
MEDICINE BOW FUEL & POWER,	)	
LLC AIR PERMIT CT-5873	)	

SIERRA CLUB'S RESPONSE TO MOTIONS IN LIMINE

Introduction

Respondent DEQ has moved to limit the scope of relief available to Sierra Club in this action. The motions[1] must be denied because they are without foundation in law or fact. Moreover, although DEQ was clearly put on notice of the nature and scope of the relief Sierra Club seeks when the hearing petition was filed to initiate this case, the particular scope of claims asserted in this action were pin-pointed no later than November 16, 2009, when the Club filed its motion for summary judgment. However, DEQ's response to the Club's summary judgment motion was silent regarding the issue of "over breadth" now raised literally on the eve of the trial of this matter, under the guise that DEQ is somehow "surprised" by the nature of relief Sierra Club seeks. In such circumstances, the Wyoming Supreme Court has held that the appropriate remedy to be sought is a continuation of the proceedings, rather than an effort to restrict the scope of this body's review. Indeed, the Wyoming Supreme Court has held that an administrative agency's decision to limit the scope of its review when confronted by a factually well-founded effort to seek redress is violative of Wyoming's Administrative Procedure Act.

Because the relief Sierra Club seeks in this action is well within the scope of notice provided by Sierra Club's hearing petition, DEQ's motions in

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[1] During the pre-hearing conference on December 4, 2009, DEQ indicated that it would file two motions, each challenging a separate issue it believes fall outside the scope of Sierra Club's contested case hearing petition. Sierra Club assumes DEQ will follow through and file two separate motions. However, because the legal analysis relevant to both situations is the same, in order to avoid redundancy, Sierra Club files this unified response intended to address both motions comprehensively.

limine must be denied. DEQ failed to timely alert the parties and the EQC of its purported "surprise" regarding the scope of relief sought by Sierra Club when it filed its summary judgment response and should not be allowed to restrict that scope here. Finally, Wyoming jurisprudence establishes that an administrative agency adjudicating a contested case matter must resolve all legal and factual issues relevant to the claims presented to it by the parties to a proceeding.

For all of these reasons, DEQ's motions in limine must be denied.

DISCUSSION

Sierra Club's petition adequately established the parameters of relief sought in this matter.

Chapter II, Section 14 of the DEQ Rules of Practice & Procedure (DEQ RPP) makes the Wyoming Rules of Civil Procedure applicable to matters before the EQC. DEQ RPP Ch. 2, § 14. The Wyoming Rules of Civil Procedure embrace the "notice" concept of pleading drafting as opposed to a more technically specific "fact pleading" process. "We have previously determined that notice pleading is recognized by our rules of civil procedure." *BB v. RSR*, 149 P.3d 727, 732 (2007), citing *Jackson State Bank v. Homar*, 837 P.2d 1081, 1085 (Wyo. 1992); W.R.C.P. 8(a)(1). "Technical forms of pleading are not required under the rule." *Id.* In *Watts v. Holmes*, 386 P.2d 718, 719 (Wyo. 1963), the Wyoming Supreme Court explained that:

> To the pleadings is assigned the task of general notice giving; the task of narrowing and clarifying the basic issues, ascertain-

> ing the facts relative to those issues, is the role of deposition-discovery process aided by the pretrial hearing. In other words, a pleading should give notice of what an adverse party may expect, and issues should be formulated through deposition-discovery processes and pretrial hearings.

Id., at 733.

First, in its initial petition, Sierra Club adequately alleged not only that Medicine is a major source of HAPs in light of its methanol emissions, but also because of its total HAP emissions. The petition alleged that Medicine Bow would be a major source of HAPs, as defined in specified federal and state law, requiring WYDEQ to conduct a MACT analysis "for all HAPs emitted by the facility." Petition at 15, par. 59. The petition also cited the applicable major source thresholds for HAP emissions: 10 tons per year of any one HAP or 25 tpy for a combination of HAPs. *Id.* at par. 55. Second, the petition also alleged, albeit in the section focusing on SO2 emissions, that VOC emission (of which HAP emissions are a part) stem from flare emissions during cold startup events, as well as from fugitive VOC/HAP emission leaks from valves, flanges, pumps, and other components.

Even if the petition itself were in some way insufficiently specific, Sierra Club's Nov. 16 motion on summary judgment was crystal clear on both points. Accordingly, there can be no doubt that, at least from that date, DEQ and Medicine Bow fully understood that Sierra Club's allegations encompassed its concern that the PTE for total HAPs (in addition to any particular HAP) was erroneous, and that wrongfully excluded HAP emissions from

flares comprised part of the methodological errors that rendered clearly erroneous DEQ's overall determination that the facility would be only a minor source of HAPs. Sierra Club Motion at 32-37. DEQ and Medicine Bow, moreover, impliedly consented to Sierra Club's understanding of the scope of the claims by raising no objection in their subsequent responses to Sierra Club's motion for summary judgment. Similarly, DEQ's pre-hearing memorandum is completely silent regarding the purported over-breadth of Sierra Club's requested relief.

Moreover, even if the relief now sought by Sierra Club was beyond the scope of redress originally requested in its hearing petition — and Sierra Club asserts that it is not — the proper recourse would be to deem the complaint amended to conform to the facts of the case as provided by Wyo. R. Civ. Proc. Rule 15 which states:

> Amendments to conform to the evidence. -- When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Wyo. R. Civ. Proc. Rule 15(b). The Wyoming Supreme Court has expressly held that this provision is applicable in administrative proceedings. *White v. Board of Trustees*, 648 P.2d 528, 537 (Wyo. 1982), *cert. denied*, 459 U.S. 1107, 103 S. Ct. 732 (1983) ("This is consistent with the policy of Rule 15(b), W.R.C.P the application of which is not inconsistent with application to an administrative proceeding where no more should be required.").

In *White*, the Supreme Court held that rather than limit the scope of review, the responding party should be allowed further time to respond, because "if the appellant genuinely felt that he was surprised by the evidence and it was not reflected in the charges, failure to request a continuance on the ground of surprise precludes him from now contending that he was prejudiced." *Id.* The rationale for this conclusion — that a delay in the resolution is preferable to a narrowing of the scope of review — is rooted in the language of DEQ's rules of procedure and the terms of the Wyoming Administrative Procedure Act itself. DEQ's contested case hearing regulations state simply that:

> The petition for hearing shall set forth: (i) Name and address of the person making the request or protest and the name and address of his attorney, if any. (ii) The action, decision, order or permit upon which a hearing is requested or an objection is made. (iii) A statement in ordinary, but concise language of the facts on which the request or protest is based, including whenever possible particular reference to the statutes, rules or orders that the Applicant or Protestant alleges have been violated. (iv) A request for hearing before the Council.

DEQ RPP Ch. 1 § 3. The Wyoming Supreme Court has interpreted the contested case provision of the Wyoming APA to require a full, comprehensive, resolution of all potential claims, legal and factual, presented by the parties, in order discharge its mandate:

> The Wyoming Administrative Procedure Act contemplates that agencies will conduct *full contested case hearings to determine all the relevant factual and legal issues*. Wyo. Stat. § 16-3-101(b)(ii) (Supp.1996) broadly defines a contested case as being "a proceeding ... in which legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." Various provisions of the Wyoming Administrative Procedure Act describe the broad scope of contested case hearings and indicate that such proceedings will include a determination of all factual and legal issues between the parties. *See* Wyo. Stat. §§ 16-3-107 to -112 (1990 & Supp.1996).
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> The department acted beyond the scope of its statutory authority when it unilaterally limited the issues for resolution at the contested case hearing. *See Union Telephone Company, Inc. v. Wyoming Public Service Commission,* 910 P.2d 1362, 1364 (Wyo.1996).

JM v. Department of Family Services, 922 P.2d 219, 224 (Wyo. 1996) (emphasis added). Here, the DEQ is attempting to unilaterally limit the scope of Sierra Club's claims so that the Council would be unable to resolve all the significant issues pending between the parties in this matter, and already briefed on summary judgment. Further, the Wyoming Rules of Civil Procedure mandate that the courts, and agencies such as the EQC governed by the Rules, shall construe and administer them "to secure the just, speedy, and inexpensive determination of every action." Wyo. R. Civ. Proc. Rule 1.

CONCLUSION

On this record, it is clear that Sierra Club's hearing petition adequately notified the respondents of the issues now before the EQC under Wyoming's "notice pleading" provisions applicable to EQC matters. Further, Wyoming's civil procedure rules allow for amendment of the pleadings to conform to the evidence and proscribe limitation of the scope of APA review when legal and factual issues are properly before an agency. The Wyoming Supreme Court has ruled that the proper response to any "surprise" experienced by DEQ would be to seek a continuance of the proceeding in order to undertake further discovery, something DEQ has not sought. Indeed, DEQ's summary judgment response, and more tellingly, its pre-hearing memorandum, are entirely silent regarding the issue it now asserts is undermining its ability to defend itself in this matter.

For all these reasons, DEQ's motions in limine must be denied.

Respectfully submitted this 7rd day of December 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true and correct copy of the forgoing *SIERRA CLUB'S RESPONSE TO MOTIONS IN LIMINE* via electronic mail on this the 7th day of December, 2009 to the following:

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