

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

FILED
AUG 26 2011
Jim Ruby, Executive Secretary
Environmental Quality Council

IN THE MATTER OF THE OBJECTION)
TO THE MINE PERMIT OF) **DOCKET NO. 11-4803**
LOST CREEK ISR LLC,)
TFN 4 6/268)

DEQ'S CLOSING ARGUMENT

The Department of Environmental Quality, Land Quality Division (DEQ), through the Office of the Attorney General, hereby submits its Closing Arguments in the appeal of the Lost Creek ISR, LLC (Lost Creek) mine permit application TFN 4 6/268.

I. INTRODUCTION

Lost Creek filed its application for a mining permit with DEQ in order to develop an in-situ uranium mining operation in Sweetwater County, Wyoming. DEQ reviewed the application, found it to be complete, and after seven rounds of technical comments, allowed Lost Creek to provide notice to the public of DEQ's decision to issue the permit. After notification that Lost Creek's application was complete and technically adequate, the Wyoming Outdoor Council (WOC) timely filed objections to the permit with the DEQ. A contested case hearing was held on the permit application before the Environmental Quality Council (Council) pursuant to WYO. STAT. ANN. § 35-11-406(k) on August 3 – 4, 2011, in Rock Springs, Wyoming.

WOC did not ask the Council to deny the permit in its Amended Written Complaint; instead WOC requested the permit be modified to include conditions or additional consideration of the following four issues: 1) whether a proper groundwater

reclassification zone had been designated; 2) whether the mining operation adequately considered a fault line running through the mining area; 3) whether the operation adequately considered abandoned well holes in the mining area; and 4) whether the mining operation would violate the Governor's Executive Order on Sage Grouse 2011-5 (Executive Order).

DEQ acknowledges, and the parties agree, that the groundwater reclassification boundary for the permit needs to be the same as the aquifer exemption boundary approved by the Environmental Protection Agency (EPA). Since the hearing, EPA, DEQ and Lost Creek have reached an agreement on this issue and EPA has approved Lost Creek's revised groundwater reclassification boundary. The revised statement of basis and groundwater reclassification boundary approved by EPA should be incorporated into the permit and this approval should nullify the need to submit a stipulated condition to the Council on August 31, 2011.

With regard to the issues of the fault line and abandoned wells, WOC failed to meet its burden to show that the permit review did not adequately consider these issues. The only evidence presented at the hearing shows that the permit was properly reviewed and adequate consideration was devoted to the issues of the fault line and abandoned wells.

Finally, the majority of WOC's argument pertained to whether the Lost Creek project complies with the Executive Order. DEQ believes that WOC's argument on this issue must also fail. While WOC does not agree with the Wyoming Game and Fish Department's (Game and Fish) decision regarding the Lost Creek project's compliance

with the Executive Order, Game and Fish's decision is entitled to deference given the agency's expertise and experience with sage grouse. Furthermore, the Executive Order was designed to allow deviation from its recommended stipulations when an agency finds that the site specific conditions will allow for such deviations to occur. Game and Fish evaluated the conditions at the site and used its professional judgment to reach its decision that the Lost Creek project would comply with the Executive Order. DEQ believes that Game and Fish's decision should be upheld based on the fact that the Executive Order contemplates departure from the recommended stipulations and Game and Fish's consideration of the site specific conditions.

II. GROUNDWATER RECLASSIFICATION

As mentioned above, EPA has approved a revised reclassification boundary for the Lost Creek project. *See* Attachment A. Therefore, the statement of basis and groundwater reclassification boundary approved by EPA should be incorporated into the permit and this approval should nullify the need to submit a stipulated condition to the Council on August 31, 2011.

III. WOC PRESENTED ABSOLUTELY NO EVIDENCE ON THE FAULT LINE OR ABANDONED WELLS

The burden of proving arbitrary administrative action is on the complainant, and this burden includes not only the clear presentation of the question, but also placement of evidence in the record to sustain the complainant's position. *Knight v. Environmental Quality Council*, 805 P.2d 268, 273 (Wyo. 1991).

Lost Creek has already shown to the satisfaction of DEQ that the permit complies with the requirements of WYO. STAT. ANN. § 35-11-406(m). Otherwise, DEQ would not have authorized public notice of the permit and proposed to issue the permit. It is now up to WOC to show that DEQ's proposed issuance is not appropriate. *See In the Matter of the Objection to the Small Mine Permit of Croell Redi-Mix, Inc. TFN 5 6/072, EQC Docket No. 09-4806.* ("Objectors failed to meet the burden of showing any reason why the permit should not be issued in this case.") Therefore, WOC bears the burden of putting forth evidence that DEQ's decision to issue the permit is not in accordance with WYO. STAT. ANN. § 35-11-406(m).

In its Amended Complaint, WOC alleges that "adequate precautions have [not] been taken to prevent lixiviant and associated minerals and contaminants from moving along [the] fault line and contaminate groundwater outside the mineralized zone[.]" and "adequate precautions have [not] been taken with regard to old abandoned wells in the area." *See WOC's Amended Written Objections, p. 1, 2.* However, WOC has failed to provide any evidence, through testimony, exhibits, or otherwise, to support these claims. The only evidence presented at the hearing on these issues was by DEQ and Lost Creek which revealed that these issues were extensively examined.

With regard to the fault issue, Mark Moxley explained that the fault was comprehensively examined over the course of the application review. DEQ required Lost Creek to perform pump tests to determine the extent of the hydrologic connectivity across the fault, which revealed that the fault acted as a partial hydrologic barrier. EQC Hr'g Tr. Vol. I, 28:20-23. DEQ required Lost Creek to submit cross sections showing what types

of formations were juxtaposed across the fault, and also required monitoring wells be placed in these areas to monitor for possible excursions. EQC Hr'g Tr. Vol. I, 29:2-13. Amy Boyle supported Mr. Moxley's testimony when she testified that the fault acted as a hydrologic barrier. EQC Hr'g Tr. Vol. I, 102:3-9. She also testified that measures were put in place by Lost Creek that would monitor the aquifers across the fault to assure that no fluids would escape the production area. EQC Hr'g Tr. Vol. I, 104:10-20.

With regard to the issue of abandoned wells, WOC failed to explain why the conditions already in the proposed permit did not address its concerns. In Count 4 of WOC's Amended Complaint, WOC requests that "a thorough survey of the area should be undertaken to identify, and then plug and properly abandon old wells[.]" This requirement was already contained in the proposed permit. As stated on page D5-9a of the permit, upon issuance of the permit, Lost Creek must attempt to locate and properly abandon all historic drill holes within the monitoring well ring boundary. WOC never attempted to explain how this provision did not address its concerns. Furthermore, WOC never presented any evidence to show that this condition was inadequate.

The only evidence that was presented regarding the abandoned wells was by DEQ and Lost Creek which documented the great efforts of both parties to make sure abandoned wells were located and properly abandoned in the mining area. As Mr. Moxley testified, Lost Creek has made a commitment to conduct pump tests in order to locate and properly abandon any improperly abandoned well which could impact its mining operation. Hr'g Tr. Vol. I, 33:10-24.

In summary, WOC has failed to meet its burden to show that DEQ's consideration of the fault line and abandoned wells in the Lost Creek project were inadequate, and therefore, WOC's allegations should be rejected.

IV. THE LOST CREEK PROJECT MEETS THE GOVERNOR'S EXECUTIVE ORDER ON SAGE GROUSE

The primary focus of WOC's case was whether the Lost Creek project will comply with the Executive Order. WOC believes the Lost Creek project will not comply with the Executive Order because: 1) the roads used to access the Lost Creek project will be located within 0.6 miles of sage grouse leks; 2) the roads will also be within 1.9 miles of sage grouse leks; and 3) the power lines proposed for the project are not going to be buried. Game and Fish considered all these issues, evaluated the site specific conditions, and determined that the project would comply with the Executive Order, therefore, the Council should reject WOC's arguments that the Lost Creek project does not comply with the Executive Order.

The Executive Order directs state agencies to "maintain and enhance Greater Sage-Grouse habitats and populations in a manner consistent with [the] Executive Order." See Executive Order at 3. To accomplish this goal, the Executive Order establishes recommended stipulations that apply to projects proposed in core areas. However, the Executive Order also recognizes that some adjustments should be made to the stipulations based on local conditions. *Id.* at 4. The Executive Order states:

State agencies shall strive to maintain consistency with the items outlined in this Executive Order, but it **should be recognized that adjustments to the stipulations may be necessary based upon local conditions and limitations.** The goal is to **minimize future disturbance by co-locating**

proposed disturbances within areas already disturbed or naturally unsuitable.

Id. (emphasis added)

This provision provides the authority for Game and Fish to use its discretion to make the determination which stipulations will be strictly followed and which can be modified in order for a project to still be in compliance with the Executive Order.

Furthermore, Game and Fish's factual determinations are entitled to deference from the Council. The Supreme Court has consistently held that it "[gives] great deference to an agency's findings of fact and [does] not reverse them unless they are contrary to the great weight of the evidence, or not supported by substantial evidence." *Northfork Citizens For Responsible Dev. v. Bd. of Cnty. Comm'rs of Park Cnty.* 228 P.3d 838, 854 (Wyo. 2010).

Per the recommendations of the Executive Order, DEQ relied on Game and Fish to evaluate the proposed project and make recommendations to DEQ to include in the proposed permit. *See* Executive Order at 7-8. In its evaluation, Game and Fish considered the site specific conditions at the Lost Creek project area and weighed the impacts to sage grouse associated with deviating from the recommended stipulations with the impacts that could occur from strict adherence to the recommended stipulations. In Game and Fish's professional opinion, deviating from the recommended stipulations provided the best way to achieve the goals of the Executive Order. While WOC does not agree with Game and Fish's determination, that doesn't prove that Game and Fish's decision wasn't thoughtfully made and entitled to deference from the Council.

With regard to the roads being within 0.6 miles of sage grouse leks, Mr. Gamo explained that Game and Fish gave considerable thought to the location of the roads and their proximity to sage grouse leks. Game and Fish was confronted with the dilemma of either creating additional habitat fragmentation by requiring additional roads outside of the 0.6 mile buffer, which is discouraged in the Executive Order, or permitting roads within 0.6 miles of a lek, which is also discouraged in the Executive Order. EQC Hr'g Tr. Vol. I, 116:2-23. Game and Fish used its expertise and experience and made an informed decision based on the site specific conditions. Mr. Gamo explained it best at the hearing:

The governor's orders asked to use existing disturbance, recognize existing disturbance, minimize new disturbance. And it also suggests, you know, try to be 0.6 miles away from leks. And in the past, with the management we've worked with, we've had success with having topography in between leks and roads. In this case, we felt that the topography would be sufficient to block, even though it is within 0.6 miles.

In addition to that we were concerned with construction of a new road that we might disrupt potential nest areas or further disrupt breeding areas, as grouse have actually fairly high fidelity with those types of habitats, and we didn't know where they were exactly. But we did know that the birds know -- I mean, obviously they know where those roads are currently and aren't nesting on those roads, so we thought the best option was upgrade those roads rather than create new roads.

And the governor's order allows for that discretion, at least our interpretation of it.

EQC Hr'g Tr. Vol. 1, 118 – 119.

Ms. Vicci Herren, WOC's own witness, gave credence to this determination when she stated that habitat fragmentation was the number one threat to sage grouse in Wyoming. EQC Hr'g Tr. Vol. I, 238:15-18. Game and Fish used its professional

judgment to determine whether more damage would occur from additional habitat fragmentation or from using existing roads. This determination was not made without considerable thought and evaluation of line of sight analyses. Based on these factors, it was Game and Fish's determination that upgrading the existing roads would be the better alternative than creating additional habitat fragmentation. This determination complies with the Executive Order and, as a result, the Council should reject WOC's argument that roads, under no circumstances, can be within 0.6 miles of leks.

WOC also claims that roads which are located within 1.9 miles of a lek violate the Executive Order. Game and Fish acknowledged that the roads would be within 1.9 miles of leks, but stated that the provision of the Executive Order which recommended this distance was subject to interpretation and intended to address haul roads associated with large amounts of traffic similar to gas production in the Jonah Field rather than a small amount of traffic for the Lost Creek project. EQC Hearing Tr. Vol. 1, 129 – 130. Ms. Vicci Herren, WOC's witness, agrees that this provision is subject to interpretation and requires evaluation of site specific factors. Ms. Herren stated "[i] think the provision is general on purpose, and subject to interpretation. And based on what we know about disturbance factors for sage grouse, it's important to look at how many trips a day and the size of the vehicles, or, you know, the amount of noise produced, and those kinds of things that might affect the sage grouse." EQC Hr'g Tr. Vol. I, 248:1-6.

Furthermore, Game and Fish is authorized to take into account the local conditions pursuant to the Executive Order and deviate from the Executive Order's recommendations when the site specific conditions demand such flexibility. Evidence

presented at the hearing supports Game and Fish's determination, this determination is entitled to deference, and the Council should reject WOC's argument that roads must be greater than 1.9 miles from leks.

Finally, WOC argues that the overhead lines for the Lost Creek project must be buried or the project will violate the Executive Order. That is not the case. The Executive Order states:

Overhead Lines: Bury lines when possible, if not; locate overhead lines at least 0.6 miles from the perimeter of occupied sage-grouse leks. New lines should be raptor proofed if not buried.

Executive Order at 9.

From Game and Fish's standpoint, the Executive Order presents an option. Mr. Gamo testified, "[p]er the governor's order, in this section -- I'm not going to allude to it, but you can either bury or put raptor deterrents on power lines, and they opted to go with the raptor deterrents on power lines." EQC Hr'g Tr. Vol. I, 131:17-23. Based on a clear reading of this provision, Lost Creek does not violate the Executive Order because it has agreed to raptor proof the overhead lines. Furthermore, Ms. Herren, WOC's witness, acknowledged that the project would not violate this provision of the Executive Order because the new lines would be raptor proofed. EQC Hr'g Tr. Vol. I, 244:6-22, 245:5-10. As such, WOC's argument on this issue should be rejected.

By its very terms, the Executive Order anticipates deviation from the recommended stipulations when local conditions deem it necessary. The authority exists in the Executive Order and the reasons for doing so were explained to the Council. Game and Fish's expert determinations and recommendations are entitled to deference.

Therefore, WOC's arguments should be rejected and the Council should approve DEQ's determination that the Lost Creek project complies with the Executive Order.

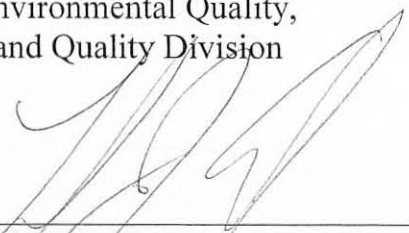
V. CONCLUSION

The evidence presented at the hearing demonstrates that the Lost Creek permit should be granted. It was established that the groundwater reclassification boundary must be modified to be set at the same boundary that EPA establishes for the aquifer exemption. It was established at the hearing that the abandoned wells and fault line were adequately considered. It was also established that the Executive Order provides discretion to modify the recommended stipulations based on site conditions and that the Lost Creek project complies with the Executive Order. Therefore, the requirements of WYO. STAT. ANN. § 35-11-406(m) are met and the Lost Creek mine permit should be granted.

WHEREFORE, DEQ requests that the Lost Creek permit be approved subject to the incorporation of the EPA approved groundwater reclassification boundary.

DATED, this 26th day of August, 2011.

Wyoming Department of
Environmental Quality,
Land Quality Division



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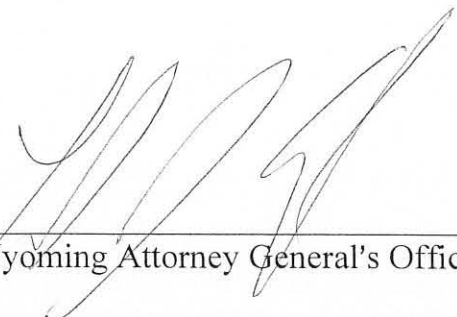
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the DEQ's Closing Argument was served by U.S. mail and electronic mail, this 26th day of August 2011, to the following:

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Attachment A



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AUG 23 2011

Ref: 8P-W-GW

Mr. Kevin Frederick
Wyoming Department of Environmental Quality
Water Quality Division
122 West 25th Street
Cheyenne, Wyoming 82002

Re: Lost Creek ISR, LLC Project
HJ Horizon Aquifer Exemption
Sweetwater County, Wyoming

Dear Mr. Frederick:

Based on a review of the revised application and additional supporting information provided by Lost Creek ISR, LLC and the Wyoming Department of Environmental Quality, the U.S. Environmental Protection Agency, Region 8 has no objection with the WDEQ's proposed reclassification of a portion of the HJ Formation of the Battle Spring Formation as Class V (Mineral Commercial) Groundwater of the State, pursuant to Wyoming Water Quality Rules and Regulations Chapter 8.

This proposed groundwater reclassification is consistent with aquifer exemption criteria established at 40 CFR §146.4. This response on reclassification of the referenced portion of the HJ Formation of the Battle Spring Formation, and the EPA approval of that area as an exempted aquifer, will be considered a final non-substantial revision of the WDEQ Underground Injection Control Program pursuant to 40 CFR §144.7(b)(3), §145.32 and Ground Water Protection Branch Guidance 34.

BACKGROUND

In conjunction with a Class III UIC in-situ recovery (ISR) uranium mining permit, an aquifer exemption is required to inject into and mine the HJ Formation of the Battle Spring Formation because this aquifer meets the definition of an Underground Source of Drinking Water. The HJ Formation of the Battle Spring Formation produces sufficient quantity of ground water to supply a public water system and the total dissolved solids ranges from 236 to 706 mg/L.

The HJ Formation of the Battle Spring Formation contains uranium mineralization and is the production zone in the Lost Creek ISR Project. Currently, there are no known domestic drinking water wells completed into the proposed exemption area of the HJ Formation of the Battle Spring Formation.

Based on a review of the information provided, the EPA concurs with the WDEQ's conclusions concerning the aquifer exemption criteria listed below:

- it does not currently serve as a source of drinking water, and
- it is mineral producing and can be demonstrated to contain minerals that considering their quantity and location are expected to be commercially producible.

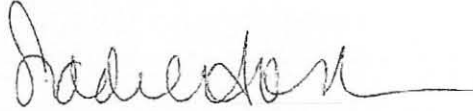
DESCRIPTION OF THE EXEMPTED AQUIFER

The depth and extent of the aquifer reclassification/exemption is as follows:

HJ Formation of the Battle Spring Formation with average thickness of 120 feet, located approximately 285 to 650 feet below ground surface (elevation range is greater than 120 feet because of displacement caused by Lost Creek fault), and horizontally described by the monitor well ring plus an additional 120 feet beyond the monitor well ring as shown in the July 29, 2011, Figure II-1 which was received by the EPA on August 17, 2011.

Please contact Wendy Cheung of my staff at (303)312-6242, with questions or concerns regarding this matter.

Sincerely,



Stephen S. Tuber
Assistance Regional Administrator
Office of Partnerships and Regulatory Assistance



cc: Nancy Nuttbrock, WDEQ
Bob Smith, OGWDW