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Jim Ruby, Executive Secretary
Environmental Quality Council

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

IN RE LINC ENERGY OPERATIONS, Inc.)

DOCKET NO. 13-4804

**WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S
BRIEF ON JURISDICTION**

This case concerns two discrete DEQ actions on subparts of Linc Energy's application for a research and development license to regulate its underground coal gasification project in Campbell County, Wyoming. As part of its application, Linc requested and DEQ approved a reclassification and exemption of a portion of the Wyodak aquifer. The Powder River Basin Resource Council challenges those actions: DEQ's aquifer reclassification and exemption. At the scheduling conference the Environmental Quality Council held on October 28, 2013, Presiding Officer Searle questioned the Council's jurisdiction to hear the challenge to the aquifer exemption and accordingly directed the Parties to brief that issue. This brief responds to that direction.

STATEMENT OF ISSUES

1. Does the Environmental Quality Council have jurisdiction under Wyo. Stat. Ann. § 35-11-431(a)(vi) to review an aquifer exemption that is a component of a research and development license?

2. Is an aquifer exemption a final action of the Department of Environmental Quality subject to review of the Environmental Quality Council under Wyo. Stat. Ann. § 35-11-112(a)?

STATEMENT OF THE CASE

A. Linc's Underground Coal Gasification Research and Development License

In May of 2012, Linc applied to DEQ for a research and development license under Wyo. Stat. Ann. § 35-11-431 to authorize its Gasifier 6 underground coal gasification project. *See* DEQ Ex. 1. Underground coal gasification converts otherwise unminable coal into a commercially valuable synthesis gas through chemical reactions. *Id.* at 14-2. During the 1970s, 1980s, and 1990s, several entities attempted underground coal gasification projects in Wyoming, with mixed results. *Id.* at 14-4 through 14-9. In light of these historical operations, Linc intends its Gasifier 6 project to demonstrate the feasibility of underground coal gasification in the Powder River Basin by testing the technical, economic, and environmental viability of Linc's design, operation, and restoration processes. *Id.* at 14-1.

Linc's proposed project will occur on a section of state-owned land west of Wright, Wyoming. The land is currently used for grazing and the production of coal bed methane and crude oil. *Id.* at 14-12. The proposed location of the Gasifier 6 met Linc's particular siting criteria for coal seam thickness, quality, and depth; a confined aquifer; suitable hydrostatic pressures; and no geological faulting. *Id.* at 14-11 through 14-12.

From this site, Linc proposed to gasify up to approximately 2,000 tons of coal located in the Wyodak coal seam located around 1,100 feet below the surface. *Id.* at 14-3.

The key components of Linc's gasifier include: (1) an injection well, which delivers the chemical oxidant to the coal to initiate gasification; (2) a production well, which delivers the gas to the surface; and (3) a series of monitoring wells, which test surface subsidence, aquifer water levels, temperature, contaminant migration, and overall water quality. *Id.* at 14-15. Linc's research and development operation will last from 90 to 120 days.

B. DEQ's Exemption of Part of the Wyodak Aquifer.

In its application for a research and development license, Linc requested that DEQ reclassify and exempt the portion of the Wyodak aquifer in which Linc plans to gasify coal. DEQ Ex. 1, at 12-D. As a primacy regulator under the Safe Drinking Water Act's Underground Injection Control Program, DEQ takes the lead in enforcing the Program, which includes classifying and exempting aquifers.

1. DEQ's Primacy Role in the Underground Injection Control Program

The Safe Drinking Water Act creates the Underground Injection Control Program, also known as Part C, the overarching aim of which is to protect underground sources of drinking water. *See* 42 U.S.C. § 300h – 300h-8. Like other environmental laws, such as the Clean Air Act, the Safe Drinking Water Act operates under a system of cooperative federalism that offers states the opportunity to assume primacy in implementing the Act. *Id.* § 300h-1 (providing for primary state enforcement responsibility). Under the Act, a primacy state takes the frontline role of regulation, though EPA retains an oversight role to ensure that the state carries out its responsibilities. *Id.*

Under the Safe Drinking Water Act, a state obtains primacy by submitting to EPA a state program that includes statutes and regulations adequate to carry out the regulatory

program, as well as an agreement with EPA and the state defining individual responsibilities. *Id.* DEQ submitted its state program to EPA more than thirty years ago and assumed primacy over the Underground Injection Control Program in 1983. *See* 48 Fed. Reg. 32,344 (July 15, 1983) (codified at 40 C.F.R. § 147.1, subpart zz); *see also* 47 Fed. Reg. 52,434 (Nov. 23, 1982) (approving part of the program). Thus, for the last three decades, DEQ has carried out the primary responsibility for classifying, exempting, and protecting aquifers in the state, as well as issuing and enforcing certain types of underground injection control permits and regulations.¹

2. DEQ's Partial Exemption of the Wyodak Aquifer

As part of its primacy program responsibilities, DEQ may exempt an aquifer or portion thereof from protection under the Underground Injection Control program. *See, e.g.,* Rules Dept. Env't. Quality, Land Quality Div. Non-Coal, Ch. 11, § 10(b). DEQ may exempt an aquifer from the Underground Injection Control program if: (1) it does not currently serve as a source of drinking water; and (2) it cannot now and will not in the future serve as a source of drinking water because, among other reasons, it can be shown to contain minerals that are expected to be commercially producible. *See id.; see also* 40 C.F.R. § 146.4. But, before DEQ may exempt an aquifer, DEQ must provide public notice and an opportunity for a hearing. *See* Mem. of Agreement Between DEQ and

¹ The Wyoming Oil and Gas Conservation Commission implements parts of the primacy program related to oil and gas development.

EPA, at 2, § I(D) (Apr. 12, 1983) (“MOA”); *see also* 40 C.F.R. § 144.7(b)(3). This hearing before the Council fulfills that requirement.

STANDARD OF REVIEW

“The issue of subject matter jurisdiction is so fundamental that it cannot be waived, can be raised on the court’s own motion, and can be raised at any time, even on appeal.” *Mutual of Omaha Ins. Co. v. Blury–Losolla*, 952 P.2d 1117, 1120 (Wyo. 1998). “Like a court, an administrative agency is required to have subject matter jurisdiction before it can hear a case.” *Diamond B Svcs., Inc. v. Rhode*, 2005 WY 130, ¶ 13, 120 P.3d 1031, 1038 (Wyo. 2005) (citing *Bruns v. TW Svcs., Inc.*, 2001 WY 127, ¶ 16, 36 P.3d 608, 613-14 (Wyo. 2001)). “The determination of whether the agency has subject matter jurisdiction is a question of law[.]” *Id.* (citing *Director of the Office of State Lands & Investments, Board of Land Commissioners v. Merbanco, Inc.*, 2003 WY 73, ¶ 7, 70 P.3d 241, 246 (Wyo. 2003)).

ARGUMENT

The Council has two independent and adequate bases to review DEQ’s exemption of a portion of the Wyodak aquifer. First, DEQ’s aquifer exemption is a necessary component of Linc’s research and development license, which the Council clearly has jurisdiction to review under Wyo. Stat. Ann. § 35-11-431(a)(vi). Second, even setting aside the Council’s jurisdiction to review the research and development license, DEQ’s aquifer exemption is a final agency action subject to review under the Council’s general jurisdictional authority. *See* Wyo. Stat. Ann. § 35-11-112(a).

I. THE COUNCIL HAS JURISDICTION TO REVIEW DEQ'S AQUIFER EXEMPTION AS A PART OF LINC'S RESEARCH AND DEVELOPMENT LICENSE UNDER WYO. STAT. ANN. § 35-11-431(a)(vi).

DEQ's exemption of a portion of the Wyodak aquifer is a necessary component of Linc's research and development license. Linc applied for and DEQ has proposed to approve the license under Wyo. Stat. Ann. § 35-11-431. That statute requires every research and development license application to be subject to the processes set forth in Wyo. Stat. Ann. § 35-11-406(k). *See* Wyo. Stat. Ann. § 35-11-431(a)(vi). Section 406(k), in turn, affords any interested person the right to object to the issuance of the license and to a subsequent hearing before the Council. Wyo. Stat. Ann. § 35-11-406(k). As an interested party, the Powder River Basin Resource Council accordingly has a statutory right to a hearing on Linc's research and development license, including the aquifer exemption. The Council therefore has jurisdiction under Section 431(a)(vi) to hear the Powder River Basin Resource Council's challenge to the aquifer exemption.

II. THE COUNCIL HAS JURISDICTION TO REVIEW DEQ'S AQUIFER EXEMPTION AS A FINAL DEQ ACTION UNDER WYO. STAT. ANN. § 35-11-112(a).

Even if the aquifer exemption at issue in this case were not a part of a research and development license subject to the Council's jurisdiction under Section 431, the Council nonetheless has jurisdiction to review the aquifer exemption as a final DEQ action under Wyo. Stat. Ann. § 35-11-112(a). That statute provides that: "The council ... shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department[.]" Wyo. Stat. Ann. § 35-11-112(a).

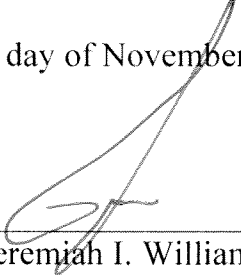
The Department administers Article 3 of the Environmental Quality Act, a host of Water Quality and Land Quality regulations, as well as various standards, pursuant to Wyoming's primacy agreement with EPA under the Safe Drinking Water Act's Underground Injection Control Program. For example, DEQ administers Wyo. Stat. Ann. § 35-11-301(a)(i), which prohibits the discharge of pollutants into waters of the state, including ground water, without a permit. *See also id.* § 35-11-103(c)(vi) (defining "waters of the state" to include ground water). More specifically, DEQ administers Chapter 8 of the Water Quality regulations, which provide for the classification of aquifers consistent with the Safe Drinking Water Act, and Chapters 9 and 13 of the Water Quality regulations, which govern underground injection control permits. Similarly, DEQ administers Chapter 11 of the Land Quality Non-Coal Regulations, which set forth the criteria for exempting an aquifer for non-coal in situ mining. Finally, and perhaps most importantly, DEQ also administers the memorandum of agreement between DEQ and EPA, which sets forth the standards for DEQ processing of aquifer exemptions under DEQ's primacy arrangement.

Those statutes, regulations, and standards guided DEQ's exemption of a portion of the Wyodak aquifer as part of Linc's research and development license. DEQ submitted that exemption to EPA as a revision to DEQ's primacy implementation program in accordance with the memorandum of agreement. That action represents DEQ's final action on this issue and, as such, is subject to the Council's review under Wyo. Stat. Ann. § 35-11-112(a).

CONCLUSION

For the foregoing reasons, DEQ urges the Council to conclude that it has jurisdiction to hear a challenge to DEQ's exemption of a portion of the Wyodak aquifer.

Respectfully submitted this 12th day of November, 2013.



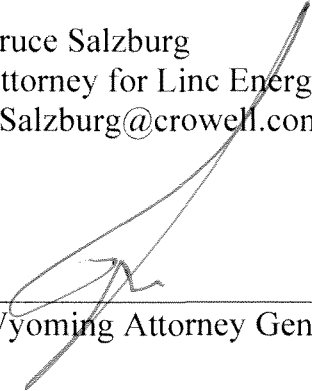
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of November, 2013, a true and correct copy of the foregoing *Wyoming Department of Environmental Quality's Brief on Jurisdiction* was served by delivering the same via electronic mail to the following:

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