

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

Objections to Linc Energy's Proposed)
Research & Development License for)
Underground Coal Gasification and the) Docket No. 13-4804
Proposed Reclassification & Exemption of)
a Portion of the Fort Union Formation)

**POWDER RIVER BASIN RESOURCE COUNCIL'S BRIEF REGARDING
WHETHER THE ENVIRONMENTAL QUALITY COUNCIL HAS
JURISDICTION TO GRANT AN AQUIFER EXEMPTION**

FILED

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Jim Ruby, Executive Secretary
Environmental Quality Council

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STATEMENT OF THE ISSUES

As requested by the Presiding Officer's Order of October 29, 2013 ("Order"), the Environmental Quality Council ("Council" or "EQC") asked the parties to address "whether the council has subject matter jurisdiction over the issue of the aquifer exemption." Order at 1. The Council also asked the parties to "describe the final action taken by the Water Quality Division of the DEQ that is the appealable action." Order at 2.

STATEMENT OF FACTS AND LAW

I. Introduction

The issue of whether the Council has subject matter jurisdiction over aquifer exemptions is not an easy one to address. It involves the complex interplay between the Wyoming Department of Environmental Quality ("DEQ") and the United States Environmental Protection Agency ("EPA") and even the interplay between various branches of the DEQ.

There is no state law that governs this question. The phrase "aquifer exemption" is not mentioned once in the Environmental Quality Act ("EQA"). Instead, federal regulations, two memorandums of agreement, and some mildly persuasive case law are the extent of the legal authority on this issue – and none of these authorities directly refer to the Council.

Therefore, the issue of whether the Council has jurisdiction is an open-ended question and one that is a case of first impression.

II. Overview of EQC Jurisdiction under the EQA.

The EQA describes the Council's jurisdiction broadly:

The council shall act as the hearing examiner for the department and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions.

W.S. § 35-11-112(a). In relation to the case at hand, the EQA informs us that the Council shall “[c]onduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act.” *Id.* at § 112(a)(iv). In such proceedings, the Council has the authority to “[o]rder that any permit, license, certification or variance be granted, denied, suspended, revoked or modified.” *Id.* at § 112(c)(2). Typically, those hearings involve final permits and licenses issued by the Air and Water Quality Divisions. In such cases, a permit applicant can proceed with its project even before the Council has made its decision.

However, the EQA treats Land Quality Division mining permits differently by granting the Council special authority to carry out hearings regarding *draft* mining permits. *Id.* at § 406(k). In relation to these permits, an “interested person” has the right to “file written objections to the application.” *Id.* Although the section largely refers to permits for surface coal mining operations, the Council has interpreted the section to require “a public hearing . . . within twenty (20) days after the final date for filing objections” for any mining permit. The EQA further extends these requirements to in situ mineral mining permits and testing licenses. *Id.* at § 426(b). Specifically, the EQA

directly makes the requirements of section 406(k) applicable to research and development licenses, which is the type of license Linc seeks in this proceeding. *Id.* at § 431(a)(vi).

Therefore, it is clear that the public hearing requirements of section 406(k) apply to Linc's research and development license. However, the clarity ends there as the EQA is silent on aquifer exemptions and specifically (1) whether an aquifer exemption is a "permit" or "license" and should therefore be issued as part of a research and development license subjecting it to the requirements of section 406(k)¹ or (2) whether a separate application and corresponding decision (by DEQ and/or the Council) needs to be made on the exemption itself. The EQA is also silent on the federal/state jurisdictional complexities of this case and whether the Council can act as an intermediary between DEQ and EPA once DEQ has made its recommendation to designate the exemption and has forwarded that recommendation to EPA for its review and final decision.

III. Overview of DEQ and EPA's Jurisdiction under the Safe Drinking Water Act and EPA Regulations

Since state law is silent on the issue of aquifer exemptions, one must look to federal law and regulations to determine the jurisdiction of various environmental agencies.

DEQ has an approved state program under the Safe Drinking Water Act ("SDWA"), the main federal law governing the underground injection control ("UIC")

¹ Section 431 of the EQA spells out the requirements for research and development license applications, but it does not mention the requirement to apply for an aquifer exemption. Similarly, section 428 of the EQA spells out requirements for in situ mining permit applications, but it does not mention the requirement to apply for an aquifer exemption.

program and protection of underground sources of drinking water. *See* 40 C.F.R. § 147.2550 (approving Wyoming’s state program to permit UIC Class III wells). Therefore, under the SDWA, DEQ can permit UIC Class III wells provided that such wells “will not endanger drinking water sources.” 42 U.S.C. § 1421(b)(1)(B), SDWA § 300h(b)(1)(B).

However, in relation to aquifer exemptions, EPA retains authority to grant or deny exemption requests. Western Nebraska Resources Council v. EPA, 793 F.2d 194, 200-201 (8th Cir. 1986). In essence, the SDWA regulations set up a two-step permitting process. First, the state may identify an aquifer that qualifies for exemption and submit its proposed designation to EPA for review. 40 C.F.R. § 144.7(b). Second, EPA considers the state’s designation of exempted aquifers under 40 C.F.R. 146.4(b) “as a program revision.” *Id.*; see also DEQ Land Quality Rules and Regulations Ch. 11 § 10(c) (“A request for an aquifer exemption shall be presented to the Administrator [of] the EPA as a state program revision.”). The federal rules provide that “[n]o designation of an exempted aquifer submitted as part of a UIC program shall be final until approved by the Administrator as part of the UIC program.” *Id.*; see also 40 C.F.R. § 145.32 (“A program revision shall become effective upon approval of the Administrator.”).

In regards to the jurisdictional issue at hand, the federal rules also require “notice and opportunity for a public hearing” *before* the state can identify “additional exempted aquifers.” *Id.* However, the rules do not specify whether such hearing should be

conducted as a public comment hearing, routinely held by DEQ, or a contested case hearing held by the Council.² The regulations simply use the phrase “public hearing.”

IV. Overview of DEQ’s Actions

At issue in these proceedings are two potential actions by DEQ. The first action – taken by the Land Quality Division – is DEQ’s publishing of the public notice for Linc’s application and proposed aquifer reclassification/exemption. This notice identified how interested parties could submit objections and request a hearing and is the basis for this proceeding before the Council. The second action – taken by the Water Quality Division on August 29, 2013 – is DEQ’s submittal to EPA of the agency’s statement of basis for the proposed aquifer reclassification and exemption. Members of the public do not have the ability to object or comment on that Water Quality Division action, but for all intents and purposes the Land Quality Division action covers the same subject matter.³

The Water Quality Division’s action was carried out pursuant to the terms and conditions of the Memorandum of Agreement (“MOA”) between the DEQ and EPA. *See* Memorandum of Agreement between State of Wyoming and EPA, Apr. 12, 1983, Linc Exhibit 3 at 2. According to the MOA, the Water Quality Division is the lead agency designated to coordinate the UIC program and “to facilitate communication between EPA and the State agencies having program responsibilities.” *Id.* at 1. Regarding proposed aquifer classifications and exemptions, the Water Quality Division provides EPA with

² Some states allow for both public comment meetings and contested case hearings on aquifer exemptions. *See* Texas Administrative Code 30 § 39.655.

³ The statement of basis for the aquifer reclassification and exemption submitted by the Water Quality Division to EPA was the same statement of basis included in Linc’s license application.

findings on the current use of the affected aquifer and whether the aquifer contains commercially producible minerals. *Id.* at 2. The EPA then reviews the Water Quality Division's findings, but responds to both the Water Quality Division and the Land Quality Division. *Id.*

As explained above, under the federal regulations implementing the SDWA, the "opportunity for a public hearing" must occur *before* DEQ identifies and proposes to designate exempted aquifers. 40 C.F.R. § 144.7(b)(3) (" . . . the Director may *after* notice and opportunity for a public hearing . . .") (emphasis added).⁴ However, under the MOA, DEQ provides its findings to EPA prior to the "public participation process." MOA at 2. EPA makes "an interim response pending receipt and review by EPA of the results of the public participation process conducted by LQD/WQD." *Id.* "If comments are received during the comment period or the public hearing the interim response will become final if not modified within 20 days of the receipt of all the comments by Region VIII." *Id.*

ARGUMENT

I. The EQC Does Not Have Specific Jurisdiction over Aquifer Exemptions

As discussed above, neither state nor federal law specifically provides jurisdiction to the Council to make decisions on aquifer exemptions. Under state and federal law, decisions on aquifer exemptions are made by the DEQ (identification of proposed

⁴ According to EPA, in "UIC Programs in Primary States, the Director is the person responsible for permitting, implementation, and compliance of the State, Territorial, or Tribal UIC Program." EPA, Underground Injection Control Glossary, *available at* <http://water.epa.gov/type/groundwater/uic/glossary.cfm#d>

designation of an exempted aquifer) and EPA (final approval of the aquifer exemption designation).

II. A Hearing on DEQ's Proposed Exemption Is Required, but It Is Not Clear Whether Such a Hearing Should be a Contested Case Hearing before the EQC

As discussed above, federal regulations clearly require an opportunity for a hearing by the state *before* the DEQ (or any state program implementing the UIC program) identifies and recommends an aquifer exemption. 40 C.F.R. § 144.7(b). However, in this case, the DEQ – by submitting findings to EPA on the proposed reclassification and exemption – has already identified and recommended an exemption. In essence, DEQ has made its decision. If ordered by the Council, presumably DEQ would go back and modify its decision, but it appears the federal regulations more accurately contemplate a situation where DEQ holds a public comment hearing *prior* to submitting any information regarding the identification and proposed designation of an aquifer exemption. This is not the situation that is described in the MOA, but it appears to be what is required by the federal regulations. A common principle of administrative law is that if the plain meaning of a regulation is clear, an agency is not entitled to deference in interpreting that regulation. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In this case, the plain meaning of the federal regulations is clear – DEQ must afford an opportunity for public hearing *before* it identifies an aquifer exemption.

Also as discussed above, the Council has generally broad jurisdiction over DEQ actions and specific jurisdiction to carryout hearings on mining permit applications,

including applications for research and development licenses. W.S. § 35-11-406(k). However, it is unclear whether the hearing required by the federal regulations implementing the UIC program is the same type of hearing contemplated by section 406(k). Specifically, “public hearing” denotes that the hearing is open to the public. Here, the Council is carrying out a contested case hearing where only parties that have requested the hearing can participate. DEQ routinely offers the opportunity for a “public hearing” on draft permits and those hearings are typically carried out by the DEQ, not the Council, and allow any interested person the opportunity to testify and provide public comments. *See* DEQ, Public Notice for Air Pollution Source Draft Operating Permit, available at <http://deq.state.wy.us/aqd/TitleVPermitsOutPublicComment.asp>. Therefore, merely because a public hearing is required does not mean that the Council must, should, or even can carry out that hearing. Instead, the DEQ could carry out the hearing as a public comment hearing. Such a public hearing would be better suited to meeting the public participation goals and objectives of the SDWA because it would allow broader participation and would not be as burdensome a process for individuals or organizations that wish to participate in a hearing.

III. No Final Action Has Been Taken by the DEQ

The Council also asked parties to describe the final agency action taken by the Water Quality Division that would trigger the right to appeal to the Council. The Resource Council is unable to describe such an action because in relation to Linc Energy’s request for aquifer exemption and classification, the Water Quality Division has

not made a final agency action. The Division has forwarded its recommendation regarding the aquifer exemption to the EPA, but according to the regulations, that recommendation should not be made until *after* the public hearing process. Moreover, the final agency action will be one taken by the EPA. Similarly, the Land Quality Division has solicited “objections” on the research and development license application but has not issued a final license to Linc.

However, the finality of the DEQ’s actions are not the real issue here as this proceeding is being carried out under W.S. § 35-11-406(k), which is a hearing on objections to an application, not an appeal of a final permit.

Therefore, the more relevant jurisdictional question, as discussed above, is whether the public hearing requirements of 40 C.F.R. § 144.7(b)(3) are designed to be satisfied by the section 406(k) hearing process. If that is the case, the Council would have jurisdiction over the proceedings. If a different hearing is needed – specifically a public comment hearing open to the public – then the DEQ would most likely be required to hold such a hearing and the Council would not have jurisdiction, unless that hearing was more akin to a rulemaking type public comment hearing that the Council conducts.⁵

Regardless, the state hearing process is an interim step between DEQ’s recommendation and EPA’s final decision. A complication stemming from this state/federal relationship relates to the right to seek judicial review of agency actions. For instance, in the case of the Council’s decision, the Resource Council may not be able to

⁵ There is an argument for that type of rulemaking public comment hearing because aquifer exemptions are considered program revisions.

appeal that decision to state court because it would not be a final agency action within the meaning of the Wyoming Administrative Procedure Act (“APA”). However, not being able to appeal would contravene the requirements of the APA because the right seek to judicial review of agency decisions in contested case hearings is afforded under W.S. § 16-3-114(a). Instead, the Resource Council would need to wait until EPA makes its final decision.⁶ In this case, the Council’s decision would merely be a review of DEQ’s recommendation as an interim step between DEQ’s and EPA’s actions. The Council’s decisions – and other documents in the administrative record for the contested case hearing – would be forwarded by DEQ to EPA for consideration during the final decision process.

CONCLUSION

The Council’s jurisdiction related to aquifer exemptions is not defined in law or regulation. While it is clear that DEQ has some role in the process, the Council’s role is undefined. Moreover, while an opportunity for “public hearing” is required under the federal regulations, that hearing process is supposed to occur *before* the DEQ decision, not after the fact as it is here. Finally, the final agency action will be made by EPA and it

⁶ Given the paucity of case law authority in this area, it is unclear whether a party such as the Resource Council would be able to appeal the recommendation of the DEQ or the DEQ’s recommendation combined with the EPA’s decision to state court. Previous appeals of aquifer exemptions have taken place in federal court, but again, there have not been many appeals over the multi-decade history of the UIC program. It is also unclear whether such a state court case would be binding on the EPA. Finally, it is unclear whether the deadlines for filing such a state court appeal of the Council’s decision would be stayed pending EPA review and final decision.

is unclear whether the Council can act as an intermediary between the DEQ and EPA.

The Resource Council believes all of these questions must be addressed before the Council can determine that it has jurisdiction.

Dated 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, the foregoing BRIEF REGARDING WHETHER THE ENVIRONMENTAL QUALITY COUNCIL HAS JURISDICTION TO GRANT AN AQUIFER EXEMPTION was served on the following parties via electronic mail:

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