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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

JUL 31 2008

In the Matter of the Administrative)
Order Issued to Arp & Hammond)
Hardware Co. and/or Old Horse)
Pasture, Inc. 2015 Central Ave.,)
Suite 200, Cheyenne, Wyoming)
82001)

Terri A. Lorenzon, Director
Environmental Quality Council

Docket No. 4316-08

EQC 08-5201

PETITION FOR REVIEW AND REQUEST FOR HEARING

Old Horse Pasture, Inc. ("OHP") petitions the Wyoming Environmental Quality Council ("EQC") to review the Department of Environmental Quality's ("DEQ") July 21, 2008 Administrative Order (the "Order") requiring OHP to grant Frontier Refining Inc. ("Frontier") and its contractors access to OHP property adjacent to the Frontier Refinery as needed for installation of a barrier wall boundary control system. OHP further requests a contested case hearing before the EQC on the issues raised and the relief requested in this Petition.

STATEMENT OF FACTS

1. OHP owns property adjacent to the southern and eastern boundaries of the Frontier Refinery (the "Adjacent Property"). The Frontier Refinery is owned and operated by Frontier. OHP is located at 2015 Central Avenue, Suite 200, Cheyenne, Wyoming, 82001.

2. The Adjacent Property has been materially and adversely impacted by Frontier's operations, including but not limited to soil contamination, surface and groundwater contamination, contamination of the surrounding area and damage to the value of the property.

3. A Final Administrative Order on Consent ("AOC") was entered into by Frontier and DEQ in March of 1995, which effectively replaced the Final Order on Consent, U.S. EPA Docket No. 3008(h)-VIII 88-08 that was entered into by the United States Environmental Protection Agency ("EPA") and Frontier in September, 1990. The EPA Order was withdrawn on March 19, 1997. The AOC requires various investigation and cleanup activities related to the Refinery, including on the Adjacent Property.

4. On October 17, 2006, after almost no progress on the required investigations or cleanup, Frontier and DEQ entered a Joint Stipulation for Modification of Administrative Order on Consent, which added a “Special Stipulated Corrective Action Schedule” to Section VI of the AOC. That schedule requires, among other things, site stabilization, including implementation of a DEQ-approved boundary control system by October 15, 2008.

5. Frontier’s Conceptual Design Report, Groundwater Barrier Wall for the Upper Ogallala Aquifer (Trihydro, 2006) (“Barrier Wall Report”) identified two barrier wall configurations as feasible: one design had the barrier wall footprint exclusively on Refinery property, the other had that footprint largely on OHP property. On February 19, 2008, DEQ issued its Final Decision for Frontier to implement the DEQ-approved boundary control at the Frontier Refinery. DEQ’s Final Decision requires Frontier to install a slurry bentonite wall – a barrier wall – at the western, southern and eastern boundaries of the Frontier Refinery to halt the outward migration of contaminants. DEQ’s Final Decision specified the barrier wall configuration that places the wall footprint largely on OHP property.

6. OHP has provided Frontier with temporary access to address pre-construction and engineering surveys and other requirements associated with barrier wall construction, although the last such access request was almost two months ago. Meanwhile, OHP has also been trying to negotiate either access arrangements with Frontier or a sale of the OHP property Frontier requires to construct the barrier wall, although the amount of acreage required remains undefined, and, at the same time, the additional adjacent acreage that has been repeatedly impacted by unpermitted releases and discharges from Frontier’s operations over time and during the last several months in particular. The thought was to effectively “get out of Frontier’s hair,” so to speak, and give Frontier a buffer area for its operations. Frontier never formally responded to OHP’s offer to sell. Given that no agreement has been reached, OHP’s position is that Frontier should build its barrier wall on its own property and OHP is willing to provide temporary access to Frontier, on reasonable terms, to support that effort.

7. On July 21, 2008, DEQ issued the Order requiring OHP to grant Frontier and its contractors access to the Adjacent Property as needed for installation of a barrier wall on the Adjacent Property. This Petition for Review and Request for Hearing follows.

W.S. § 35-11-1802 Does Not Authorize DEQ to Order the Access at Issue

8. DEQ construes W.S. § 35-11-1802 as authorizing DEQ to order OHP to grant Frontier access necessary to install a barrier wall boundary control system on the Adjacent Property. See Administrative Order at ¶¶19, 28. W.S. § 35-11-1802 does not provide DEQ with this authority.

9. Statutes are to be interpreted in accordance with their plain language. See *Merrill v. Jansma*, 86 P.3d 270, 284 (Wyo. 2004) (If the language is clear, there is no need to resort to rules of construction and courts will look to the ordinary and obvious meaning of a statute). The statutory scheme of §§ 35-11-1801 and 35-11-1802 provides a defense to cleanup liability to persons that meet the statutorily outlined criteria. Nothing in the plain language of § 35-11-1802 gives DEQ the extraordinary power to mandate that OHP effectively give part of its property to Frontier so Frontier can install a barrier wall, necessitated by its polluting activities, on OHP property. Nor does § 35-11-1802 provide DEQ with any enforcement mechanism to order a person to grant access to third-parties under these circumstances. See *Stutzman v. Office of Wyoming State Engineer*, 130 P.3d 470, 475 (Wyo. 2006) (“A basic tenet of statutory construction is that omission of words from a statute is considered to be an intentional act by the legislature, and [a court] will not read words into a statute when the legislature has chosen not to include them.”).

**The Police Power Does Not Authorize the Administrative Order
or the Taking That Would Result**

10. A State agency can only exercise those police powers delegated to it by the legislature. *Schoeller v. Bd. of County Commissioners*, 568 P.2d 869, 875 (Wyo. 1977) (in exercising its delegated police powers, the agency must operate strictly within the confines of the express or implied authority which has been delegated).

11. Under the Wyoming Environmental Quality Act (the “Act”), DEQ is authorized to issue administrative orders only to persons that are violating provisions of the Act. W.S. § 35-11-701(c). The State of Wyoming has not delegated to DEQ any other authority except that contained in the Act. See *Cuba Soil and Water Conservation Dist. v. Lewis*, 527 F.3d 1061, 1065 (10th Cir. 2008) (“It is an elemental canon of statutory construction that where a statute expressly provides for a particular remedy...a court must be chary of reading others into it.”) (quoting *Transamerica Mtg. Advisors, Inv. v. Lewis*, 444 U.S. 11, 19 (1979)). It is Frontier, not OHP, that has violated the Act repeatedly and flagrantly, with barely any enforcement response by any regulatory agency. Indeed, other than its extraordinary claim under § 35-11-1802, DEQ does not allege that OHP has violated any provision of the Act. Therefore, DEQ has no authority under the Act or the State’s police powers to issue the Order.

12. DEQ’s Order requires OHP to grant Frontier a property interest to install, and then maintain and monitor, the barrier wall, which will also require restrictions on allowed land uses above and proximate to the wall. The Order amounts to an unprecedented and impermissible physical taking, without compensation. The government effects a physical taking where it requires the landowner to submit to the physical occupation of its land. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 527 (1992). A permanent physical occupation authorized by the government is a taking regardless of the public interests it might serve. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); see also *Hoeck v. City of Portland*, 57 F.3d 781, 787 (9th Cir. 1995) (“An otherwise valid exercise of the police power constitutes a taking for which compensation is due if the owner suffers a permanent, physical occupation of the property.”). If a taking is permitted, which it is not here, just compensation is required. See Wyo. Const. Art. I, § 7; *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 729 (Wyo. 1985); *Kern v. Deerwood Ranch*, 528 P.2d 910, 912 (Wyo. 1974); see also U.S. Const. Amend. V; *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

OHP Has Not Violated W.S. § 35-11-301

13. Without explanation, the Order references W.S. § 35-11-301(a)(i), which provides that “[n]o person, except when authorized by a permit issued pursuant to the provisions of this

act, shall [c]ause, threaten or allow the discharge of any pollution or wastes into the waters of the state[.]”

14. “Discharge” is defined as “any addition of any pollution or wastes to any waters of the state[.]” W.S. § 35-11-103(c)(vii).

15. Although the Order does not allege that OHP has violated § 35-11-301(a)(i), OHP notes its request that Frontier provide payment for a permanent property interest prior to constructing the barrier wall on OHP’s property is not a violation of § 35-11-301(a)(i). Frontier has caused and allowed the unlawful addition of pollution or wastes to the waters of the State. OHP has not added or released any pollutants or wastes to the waters of the State.

16. The pollution or waste discharged by Frontier has since migrated onto the Adjacent Property through no fault of OHP. The “addition” of pollutants does not include the migration of residual contamination resulting from a previous release. See, e.g., *Wilson v. Amoco Corp.*, 33 F. Supp. 2d 969, 975 (D. Wyo. 1998) (Clean Water Act); *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 121 (E.D.N.Y. 2001) (same); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1354 (D.N.M. 1995) (same).

**DEQ’s Issuance of the Administrative Order is Arbitrary and Capricious
and In Excess of Its Statutory Authority**

17. Agency action that is (1) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority or limitations or lacking statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence in a case reviewed on the record of an agency hearing provided by statute must be held unlawful and set aside. W.S. § 16-3-114(c)(ii)(A)-(E).

18. For the reasons stated herein, the Order is arbitrary and capricious, unconstitutional, in excess of statutory authority, constitutes an impermissible taking, and is unsupported by substantial evidence, all in violation of W.S. § 16-3-114(c)(ii)(A)-(E). OHP has made repeated efforts to accommodate Frontier’s access needs and DEQ lacks the authority,

expertise or the record to assess or judge the reasonableness of those efforts. If acceptable access arrangements cannot be had, the record, through the findings of Frontier's own consultant, documents that installation of a barrier wall within the Refinery boundary is feasible. DEQ clearly has the authority and the record to order Frontier to proceed with the alternative alignment. Remaining issues regarding off-site contamination can then be addressed through the long-delayed RFI process, albeit this process is also woefully behind schedule, with multiple missed deadlines and inadequate deliverables. Again, enforcement efforts should be directed to Frontier, the polluter, not OHP.

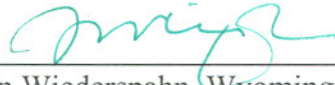
RELIEF REQUESTED

OHP respectfully requests that the EQC vacate DEQ's July 21, 2008 order requiring OHP to grant Frontier and its contractors access to OHP property adjacent to the Refinery as needed for installation of the barrier wall boundary control system on OHP property.

DATED this 31st day of July, 2008.

PETITIONER: OLD HORSE PASTURE, INC.

By:



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Attorneys for Petitioner Old Horse Pasture, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 2008, a true and correct copy of the foregoing document was served by certified mail, return receipt requested, addressed to:

Dennis M. Boal, Chairman
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