

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE STATE OF WYOMING

FILED

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IN THE MATTER OF THE APPEAL)
OF THE COPPERLEAF SUBDIVISION WATER)
SUPPLY, TREATMENT, STORAGE, AND)
BOOSTER PUMPING SYSTEMS,)
Permit No. 06-274RR / Reference No. 06-236RR)

) Docket No. 06-3814

Terri A. Lorenzon, Director
Environmental Quality Council

**PETITIONERS' HEARING BRIEF AND RESPONSE TO INTERVENOR'S JUNE
29, 2007 SUPPLEMENTAL ARGUMENT CONCERNING EQC REVIEW OF
THIS CASE**

Petitioners/Appellants David Jamison, Robert Hozzwa and Northfork Citizens for Responsible Development (Petitioners), by and through their undersigned attorneys, hereby submit and provide the following analysis and argument concerning this Council's legal authority and obligation to review Permit No. 06-274RR.

Contrary to unsupported statements set out in recent pleadings filed by the Intervenor in this case, it is very clear that this contested case matter is properly before the Council at this time. A brief description of the EQC's authority to hear and decide this matter is as follows:

I. The Developer cannot build a domestic water supply system for the Copperleaf Subdivision without first fully satisfying all required Chapter 3 and 12 permitting requirements concerning available water quantity for the system as required by the Wyoming Environmental Quality Act ("the Act").

The Wyoming Environmental Quality Act (W.S. §§ 35-11-101 through -405 (LexisNexis2006) provides at W.S. §35-11-301 that:

(a) **No person, except when authorized by a permit issued pursuant to the provisions of this act, shall: . . .**

(v) **Construct, install, modify or operate any public water supply or construct any subdivision water supply, except that no permit to operate shall be required for any publicly owned or**

controlled public water supply and a permit under this section shall not be required for subdivision water supplies consisting of individual wells serving individual lots of a subdivision.

(Emphasis added). Building on this requirement, the Act goes on in section 35-11-302(e) to empower the DEQ to promulgate rules governing the application for and issuance or denial of permits to construct a centralized public water supply system for a large subdivision like Copperleaf by expressly requiring:

(a) The administrator, after receiving public comment and after consultation with the advisory board, shall recommend to the director rules, regulations, standards and permit systems to promote the purposes of this act. Such rules, regulations, standards and permit systems **shall prescribe: . . .**

(iii) **Standards for the issuance of permits for construction**, installation, modification or operation of any public water supply and sewerage system, **subdivision water supply**, treatment works, disposal system or other facility, capable of causing or contributing to pollution; . . .

(xi) **Standards for subdivision applications submitted to the department under W.S. 18-5-306.**

(Emphasis added). Consistent with this express mandate, the DEQ promulgated its subdivision central water supply system permitting and review requirements in Chapters 3, 12 and 23 of the DEQ Water Quality Rules.

The permit at issue for review by the Council in this contested case proceeding is a Chapter 3 and 12¹ water supply system permit. The Copperleaf Developer applied for permit in April 2006 proposing only well water from three wells² as the “source” of

¹ Chapter 12 states at Section 2.(b) that: “These [Chapter 12] standards pertain only to permits required pursuant to Chapter 3, Wyoming Water Quality Rules and Regulations.”

² The three wells identified in the initial April 2006 application are a surface water supply because the State Engineer well permits authorizing them expressly require that all three wells shall always be regulated in priority by the SEO with the surface water in the river

supply for the subdivision water system; that application was later amended in May 2006 to designate a May 2005 priority diversion of surface water from the North Fork of the Shoshone River as the primary "source" of supply for the system.

Chapter 12, Section 6 sets out the description of the substantive information that the Developer must provide to the DEQ in the "Engineering Design Report" portion of the Developer's Chapter 3/12 permit application, those rules provide, in pertinent part:

Section 6. Engineering Design Report.

(a) **Scope and purpose.** An engineering design report shall be submitted with each application. **The purpose of the report shall be to describe and provide technical justification for all aspects of the proposed construction, modifications and/or installations. The report should address existing conditions (if any), known or suspected problems, proposed actions, and the reasoning used to arrive at those proposed actions. . . .**

(c) **Treatment facilities.** The engineering report shall include: .

(v) **Sources of water supply** shall be described to include:

(A) **Groundwater sources.**

(I) **Geology of aquifer and overlying strata.**

(II) **Summary of source exploration data, including test well depth and method of construction, test pumping rates and duration; and water levels and specific yield. . . .**

(B) **Surface water sources.**

(I) **Safe annual yield, the quantity of water available from the source during the average and driest years of record.**

as a single source of supply pursuant to W.S. § 41-3-916. The surface water priority for the three wells ranges from November 2005 to March 2006. The wells are junior in priority to the Developer's surface right.

(II) **Hydrological data, stream flows and diversion records . . .**

To the extent that it may be applicable, the “General Permit” section of the Chapter 12 regulations also expressly provides in Section 14 (a)(v) that the Director of the DEQ will deny a general permit for a subdivision central water system when:

(v) The project, if constructed, would result in public water supply demand in excess of source, treatment or distribution capabilities; . . .

(Emphasis added).

These words in the controlling regulations are to be read giving them their plain meaning and in context. *See, e.g., Swift v. Sublette Board of County Commissioners*, 2002 WY 32, ¶ 7, 40 P.3d 1235, 1237 (Wyo. 2002). All of these regulatory requirements clearly require proof in the design report that the water “source” proposed to be used for a Chapter 3 and 12 facility will be a source that has a dependable and adequate safe annual yield of water available year-round. The permit applicant is required to prove the average flows available for a proposed “source” and is also required to show the flows available in the driest years. Among other things, this requirement would necessarily require the applicant to admit and describe any times when its proposed water source would go dry or be regulated to shut-off by the State Engineer under water regulation. These requirements are not just procedural hoops, they are expressly designed to allow the DEQ to make a fully informed decision about whether there will be an adequate and dependable year-round source of water for the facility for which a permit is sought. If such a water source cannot be proven, then these requirements cannot be met and the DEQ should refuse to issue the permit for the facility.

This is, in fact, exactly how the DEQ and the Developer have always interpreted the requirements for proof of an adequate and dependable water supply for the Copperleaf subdivision in the Chapter 3 and 12 process. In the Intervenor's amended May 2006 Chapter 3 Water Supply and Treatment Design Report (Petitioner Exhibit 20), the Intervenor's engineer included a specific section in its report on the proposed Copperleaf "Surface Water Source" at pages 6-7 thereof in which the Intervenor expressly represented to the DEQ that: "Based upon this information, we believe the above water right satisfies the dependability requirement for a public water system." (Emphasis added). In a May 31, 2006 letter that the Intervenor's engineer sent to the DEQ concerning the Chapter 3 and 12 amended permit application (Petitioner's Exhibit 21), the Intervenor expressly stated, in pertinent part:

We modified the original application on May 26, 2006. The modified application includes the above [a water system supplied solely by three wells] in conjunction with an infiltration gallery and surface water treatment (filtration in addition to chlorination). **Copperleaf maintains both "sources" are adequate to serve the development alone.**

(Emphasis added). These statements in exchanges between the Developer and the DEQ concerning the Developer's Chapter 3 and 12 permit applications amounted to express recognition and admissions by the Developer and the DEQ that establishing the adequacy and dependability of the proposed water source for the Copperleaf Subdivision water system was a necessary component of the permitting process. The record reflects that the DEQ purported to review the Intervenor's Chapter 3 application on that basis. The Intervenor is in no position now to "change horses" and suddenly claim that no such quantity requirement exists under Chapters 3 and 12.

Consequently, before the DEQ could have ever properly issued any individual or general Chapter 3 and 12 water system permit to the Intervenor for the Copperleaf subdivision water system, the Intervenor was required under Chapters 3 and 12 to accurately prove that there is, in fact, a sufficient dependable, reliable and adequate “safe annual yield” quantity of water for the proposed system. If the Intervenor’s application for the Copperleaf Chapter 3 and 12 water supply system permit did not provide information proving that the proposed subdivision water system will be operated using a surface water source with a safe annual yield in the average and driest years to provide adequate and dependable year-round water for the system, then the DEQ could not properly issue the requested Chapter 3 and 12 permit. If the DEQ issued the Intervenor’s Chapter 3 and 12 permit incorrectly anyway, then the Chapter 3 and 12 permit at issue here must be revoked by the Council for non-compliance with controlling statutory and regulatory requirements as arbitrary and/or unsupported by substantial evidence. W.S. 16-3-114 (LexisNexis 2006). This is the water quantity issue that the Petitioners have properly raised in this case and that is one of the important issues before the Council in this proceeding.³

³ Chapter 3 also expressly provides in Section 9 that:

Section 9. Application Processing Procedures.

(a) All individual permit applications will be processed in the following manner.

(x) **Interested persons** may appeal the issuance of the individual permit in accordance with the department’s Rules of Practice and Procedure.

This is precisely what Mr. Jamison, Mr. Hoszwa and the North Fork Citizens Group as interested persons have done with the DEQ and in this case.

II. To the extent that the DEQ used or relied upon any of its Chapter 23 analysis or decision about the proposed subdivision water source to analyze the dependability or adequacy of the Developer's Chapter 3 and 12 permit application, the DEQ arbitrarily used and relied upon inaccurate information submitted by the Developer.

The Developer's Chapter 23 submission on the proposed subdivision water source for the Copperleaf subdivision may also be relevant to this case and may show that any decision by the DEQ determining that the proposed Copperleaf subdivision has an adequate and dependable domestic water supply is incorrect. When a Developer like the Intervenor seeks County zoning approval for a subdivision that will include a subdivision water supply system, the Developer first submits a request for recommendation on the system to the DEQ in the form of a W.S. § 18-5-306 subdivision application under Chapter 23 of the DEQ Rules to the DEQ. The DEQ is supposed to review that application under the standards set forth in W.S. § 18-5-306 and in Chapter 23. The W.S. § 18-5-306 standards expressly include a mandatory DEQ analysis of, among other issues:

(vi) A study evaluating the water supply system proposed for the subdivision and the **adequacy and safety of the system**. The study shall, at a minimum, include the following: . . .

(B) For all water supply systems except individual on-lot wells, a report submitted by the subdivider demonstrating the adequacy and safety of the proposed water supply system. **The report shall address, at a minimum, the following issues:**

(I) The estimated total number of gallons per day for the subdivision water supply system;

(II) Documentation that the proposed water supply system will be compatible with and not adversely affected by the sewage system proposed for the subdivision or any other sources of pollution within a reasonable distance;

(III) **List of all surface and groundwater rights which will be used or which may be affected**, including state engineer application and permit numbers and description of expected effects;

(IV) Plans for the mitigation of water right conflicts resulting from the use of water within the proposed subdivision;

(VI) Where a centralized water supply system is proposed containing a new source of water supply to be developed, the report shall also demonstrate that the water supply system is sufficient in terms of quality, quantity and dependability and will be available to ensure an adequate water supply system for the type of subdivision proposed. The report shall include a narrative summary of:

(1) Where the water supply system source is derived from groundwater, the geologic setting of the water supply system source and the area of influence such as nearby communities, sources of pollution, surface water bodies and aquifers described by a Wyoming registered professional geologist;

(2) The quantity, quality and source of the water to be used including proposed and existing surface and groundwater facilities and their locations. Where the proposed water supply system for the subdivision is from a groundwater source, a written report submitted by the subdivider demonstrating that the proposed source is sufficient in terms of quality, quantity and dependability for the type of subdivision proposed;

(3) The proposed disposal of water not consumed, including water obtained under permits, storm drainage, dewatering, sewage and other wastewater sources;

(4) A delineation of primary sources of water, secondary sources and occasional or seasonal sources;

(5) Graphic location of all water supply sources including wells, raw water intakes, treatment facilities, treated water storage facilities and ponds;

(6) Documentation of all data sources on the occurrence and availability of surface and groundwater;

(7) Historic stream flows and well levels;

(8) Senior water rights;

(9) Flood damage and flood protection;

(10) Impact of and protection from supply shortages.

(Emphasis added). Chapter 23 of the DEQ regulations also expressly adopts these mandatory requirements when they expressly provide:

DEQ Ch. 23: Minimum Standards for Subdivision Application.

§ 1. Authority. W.S. 35-11-302(a)(xi).

§ 8. Standards for Water Supply systems . . .

(c) . . . applications . . . shall contain the following:

(i) **A demonstration that the water supply system is sufficient in terms of quality, quantity and dependability and will be available to ensure an adequate water supply system for the type of subdivision proposed.** The report shall include a narrative summary of:

(B) A written report demonstrating that the proposed source [domestic water supply] is sufficient in terms of . . . dependability:

(Emphasis added).

The DEQ conducted this review of the Copperleaf Subdivision proposal in 2005. The Petitioners have always contended in litigation that the DEQ's Chapter 23 review of the Copperleaf subdivision application concerning the proposed water source for domestic supply was flawed and was based on inaccurate and untrue statements and representations by the Developer. That DEQ review and supporting file information remained in its files after the DEQ completed that review and made a non-binding recommendation to the County zoning authority about water supply.

Later, when the Intervenor applied for its Chapter 3 water supply system permit, the DEQ may have used that erroneous Chapter 23 file information for review of the Chapter 3 and 12 permit. Consequently, to the extent that the DEQ reviewed the

Intervenor's April/May 2006 Chapter 3 and 12 permit application using or in any way relying upon information that was reviewed by the DEQ or relied upon by it in its 2005 Chapter 23 review of the proposed water supply for the Copperleaf subdivision, the DEQ used all or part of that review to determine whether there will in fact be a "safe annual yield" of water available for the Copperleaf subdivision under Chapter 3. DEQ's review and conclusions concerning the proposed water source for the Copperleaf Subdivision under Chapter 23 are therefore also at issue in this proceeding if they in any way formed all or part of the basis for the DEQ's decision to grant the Chapter 3 and 12 permit for the Copperleaf Subdivision.

II. Conclusion.

Contrary to the Intervenor/Developer's recent arguments that the Council does not have jurisdiction or authority to review the DEQ's quantity determinations for Copperleaf Permit 06-274RR, Chapter 12, Section 6(a)(v), expressly requires substantive review of that very issue along with others addressed in Chapters 3 and 12 for this case. The Developer's diversionary arguments about totally unrelated CBM rulemaking issues are simply wrong; they would require the Council to totally ignore the controlling mandates of W.S. § 35-11-301 and Chapters 3 and 12 and the actual course of application and review for this permit below. The water "quantity" issue of whether the DEQ failed to establish compliance with Chapter 12, Section 6(c)(v) is squarely and properly before this Council for contested case review in this proceeding. The Developer's June 29, 2007 arguments to the contrary appear to intentionally ignore the obvious controlling statutory authority set out above in this memorandum that govern these proceedings. Controlling law obviously places the quantity, dependability and adequacy of the Developer's

domestic water source for the water system it seeks to build under this permit directly at issue in this case.

On this basis, the Petitioners respectfully move the Council to deny any pending motion filed by the Intervenor/Developer in this case advocating that the Council should not hear this DEQ Chapter 3 permit review matter.

Dated this 6th day of July, 2007.

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CERTIFICATE OF SERVICE

I certify that on the 6th day of July, 2007, I served a true and correct copy of the foregoing as follows:

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