BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF THE APPEAL AND REVIEW OF THE ISSUANCE OF WYOMING POLLUTANT DISCHARGE ELIMINATION SYSTEM (WYPDES) GENERAL PERMITS	)	Dockets No. 06-3816, 06-3817

INTERVENOR'S RESPONSE TO WYOMING OUTDOOR COUNCIL'S MOTION FOR SUMMARY JUDGMENT

BACKGROUND

The Wyoming Outdoor Council (WOC) appealed the Wyoming Department of Environmental Quality's issuance of the Pumpkin Creek General Permit, Docket Number 06-3816, and the Willow Creek General Permit, Docket Number 06-3817 (General Permits).

Yates Petroleum Corporation, Marathon Oil Company and Citation Oil & Gas Corp. own and operate coal bed natural gas facilities located in watersheds subject to the General Permits. These facilities are currently permitted under individual permits authorizing discharge of produced water to several on-channel reservoirs located on various unnamed ephemeral tributaries of the watersheds in the Powder River Basin. Because these individual permits will expire in the future, and at least some of the discharges are (or could become) subject to the terms and conditions set forth in the General Permits, the Environmental Quality Council (EQC) granted Yates, Marathon and Citation's (Intervenor's) Motion for Leave to Intervene in WOC's Appeal of the general

permits. Intervenors hereby supplement their Motion for Leave to Intervene and respond to those issues raised in WOC's Motion for Summary Judgment and present this brief.

MOTION FOR SUMMARY JUDGMENT STANDARD

A motion for summary judgment is properly granted if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wyoming Rules of Civil Procedure, Rule 56(c). "A genuine issue of material fact exists when a disputed fact, if proven, would establish or refute an essential element of a cause of action or a defense that a party has asserted." Linton v. E.C. Cates Agency, Inc., 113 P.3d 26, 28 (Wyo. 2005). The EQC should review the record, "in the light most favorable to the party opposing the motion, affording to that party the benefit of all favorable inferences that may be drawn from the record. If upon review of the record, doubt exists about the presence of issues of material fact, that doubt must be resolved against the party seeking summary judgment." *Id.* at 28.

I. The General Permits Are Not Rules Nor Are They Intended to Be Rules.

WOC alleges that a general permit is a rule and that DEQ did not promulgate the General Permits as rules under the Wyoming Administrative Procedure Act (WAPA). Permits generally, and general permits in particular, are not rules.

WAPA defines a rule as "each agency statement of general applicability that implements, interprets and prescribes law, policy or ordinances of cities and towns, or describes the organization, procedures or practice requirements of any agency..." W.S. 16-3-101(b)(ix). The General Permits are not "agency statements of general applicability." While the General Permits do establish some generally applicable standards for the *permittee*, these standards are *not* statements of general applicability for

one important reason: they apply *only* to certain persons who *apply for and receive coverage under the permit.* The General Permits thus do not have any general applicability at all: there is no consequence to a person of these permits unless that person *elects* coverage.

General permits are *licenses* issued by Wyoming DEQ. A "license" is defined as including "the whole or part of any *agency permit,* certificate, approval, registration, charter or similar form of permission required by law[1]." W.S. 16-3-101(b)(iii) (italics added). WAPA authorizes Wyoming agencies to issue licenses when authorized by the agency statute[2]. Permittees must apply for coverage under a general permit and cannot discharge until DEQ makes a determination on issuance or denial of authorization for coverage under the permit. Thus the Pumpkin Creek and Willow Creek General Permits are not rules, but licenses, and DEQ appropriately issued the General Permits under its WAPA authority to issue licenses.

WOC relies upon other states' treatment of general permits to support its unfounded claim that the General Permits are rules and must be promulgated as such. Other state practices are not binding upon the Council, which must apply the Wyoming APA and EQA. In any event, Intervenors note that WOC's reliance is misleading and actually contradicts WOC's position.

WOC relies on In the Matter of Freshwater Wetlands, 351 N.J. Super 362, 798 A. 2d 634 (2002) and N.J. Admin. Code 7:7A-5.23[3] to claim that the State of New Jersey

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[1] *See also* Littleton v. Burgess, 14 Wyo. 173, 82 P. 864 (1905) (A license is a mere permit to do something that without it would be unlawful).

[2] In DEQ's case, the authorizing statute is the Environmental Quality Act. (*see* W.S. 35-11-109(a)(1) and discussion *infra).*

[3] WOC mistakenly cites to New Jersey Statutes Annotated Section 7:A-5.23, rather than New Jersey Administrative Code 7:7A-5.23. N.J. Admin. Code 7:7A-5.23 is a general permit authorizing wetland dredge and fill operations for cranberry growing operations. WOC fails to note that the appeal of the

defines general permits as rules. WOC, however, fails to note that the New Jersey Administrative Code, and *not* the New Jersey Administration Procedure Act, expressly requires NJ Department of Environmental Protection (NJDEP), when issuing general permits under its Freshwater Wetlands Protection rules, to "publish a draft general permit as a rule proposal pursuant to the New Jersey Administrative Procedure Act." *See* N.J. Admin. Code 7:7A-4.1(a). Wyoming has no similar requirement specifically requiring a general permit to be issued as a rule. In the Matter of Freshwater Wetlands hence provides no support for WOC's contention that general permits must be promulgated as rules.

In the Matter of Freshwater Wetlands actually contradicts WOC's position. What WOC fails to inform the Council is that New Jersey DEP has *no rulemaking requirement* when issuing general permits under New Jersey's Pollutant Discharge Elimination System rules, the analogous case to the one before the EQC. Nearly identical to Wyoming Water Quality Rules and Regulations, Chapter 2, Sections 15 through 17, New Jersey's NJPDES rules require *draft* general permits to go through public notice, comment and hearing upon request. *See* N.J. Admin. Code 7:14A-15 *et seq*. In the Matter of Freshwater Wetlands supports Intervenor's position that general permits, unless expressly defined as rules by law, are not rules.

WOC also erroneously relies on Hawaii's initial general permit program authorization to support its claim that general permits are rules. Hawaii expressly defined its NPDES general permits as rules because, unlike Wyoming, it did not otherwise have the legal authority to issue general permits when it first requested EPA's authorization to

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general permit issued in the cited case was issued under New Jersey's Freshwater Wetlands Protection rules, *not* New Jersey's Pollutant Discharge Elimination System (NJPDES) rules.

administer the program. Upon Hawaii's request for authority to issue general permits in September 1991, Hawaii's existing NPDES permit regulations did not provide for the issuance of general permits. However, Hawaii did have the statutory authority to "issue rules for the abatement of water pollution." 56 Fed. Reg. 55502 (October 28, 1991). Hawaii expressly chose to define general permits as rules under state law so that it could issue general permits pending adoption of state general permit rules under its Administrative Procedure Act[4]. *Id.*

This is not the case with Wyoming. Wyoming expressly sought approval for, and demonstrated to EPA at the time of its request for NPDES General Permit Program authority, DEQ's legal authority to issue general permits under Wyoming Statute and Water Quality Rules. *See* 56 Fed. Reg. 52030 (October 17, 1991) (EPA notice of Wyoming's General Permits Program Approval). Wyoming did not then, nor does it now, need to define general permits as rules to demonstrate legal authority to issue general permits. They are licenses authorized by WAPA.

Because the General Permits are not rules, Wyoming APA rulemaking requirements and procedures do not apply. DEQ appropriately issued the General Permits under its WAPA authority to issue licenses.

II. The EQA Authorizes the Issuance of General Permits.

WOC alleges that Wyoming Department of Environmental Quality (DEQ) does not have the authority to create and issue general permits. This is not supported by Wyoming statute. WAPA provides DEQ the authority to issue licenses, which are

[4] Hawaii has since promulgated regulations authorizing Hawaii Department of Health to issue general permits according to EPA NPDES issuance provisions at 40 C.F.R. § 123.25.

defined to include the whole or part of any permit. Moreover, the EQA provides the DEQ Director authority to administer "permit systems," which include general permits.

The Act gives the Director the power to perform "any and all acts necessary to promulgate, administer and enforce the provisions of [the] Act and any rules, regulations, orders, limitations, standards, requirements *or permits* adopted, established or issued thereunder, and to exercise all incidental powers as necessary to carry out the purposes of [the] Act." W.S. 35-11-109(a)(1)(emphasis added). The Act also empowers the Administrator of DEQ's Water Quality Division to "make recommendations to the [DEQ] director regarding the issuance, denial, amendment, suspension or revocation of *permits* or licenses..." W.S. 35-11-110(a)(ii)(emphasis added). The Administrator is also empowered to "administer, in accordance with [the] Act, *any permit* or certification systems which may be established hereunder..." W.S. 35-11-110(a)(v)(emphasis added). Last, the EQA establishes authority for the Water Quality Administrator to recommend standards, rules, regulations or permits, including *permit systems*, to the DEQ Director. 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 purpose of [the] Act. Such rules, regulations, standards and permit systems shall prescribe:
>
> > ...(v) Standards for the issuance of permits as authorized pursuant to section 402(b) of the Federal Water Pollution Control Act as amended in 1972, and as it may be hereafter amended...

W.S. 35-11-302(a)(v)(emphasis added). Thus, the EQA provides the Director the authority to promulgate permit systems.

The EQA does not define "permit systems." There is no need as this term is not ambiguous. A plain and ordinary meaning of the words is certainly broad enough to

encompass general permits. The Wyoming Supreme Court has established its tenet of statutory interpretation:

> In interpreting statutes, we primarily determine the legislature's intent. If the language is sufficiently clear, we do not resort to the rules of construction. We apply our general rule that we look to the ordinary and obvious meaning of a statute when the language is unambiguous.

Albertson's Inc. v. City of Sheridan, 33 P.3d 161, 164 (Wyo. 2001) *quoting* Kirbens v. Wyoming State Board of Medicine, 992 P.2d 1056, 1060 (Wyo. 1999). The legislative intent in providing the Director authority under the Environmental Quality Act to promulgate, administer and enforce *"any permit"* encompasses a general permit system. If there is any ambiguity whether "permit" includes general permits, the Statute's additional plain and ordinary use of the term *"permit systems"* includes the Director's authority to administer general permits.

WOC's contrast of the statutory authority of the Water Quality Division with that of the Air Quality Division has no relevance to the matter at hand. The EQA provides express authority for the Air Quality Department to issue "a general permit covering numerous similar sources." W.S. 35-11-206(d). These general permits "shall comply with all requirements applicable to permits under Title V of the Clean Air Act and operating program." *Id.* This language is a limitation on the use of general permit authority unless certain conditions set forth in the Federal Clean Air Act and regulations are met. *See* 40 C.F.R. § 70.4(b)(2). No similar limitation is found in the Federal NPDES program requirements, and hence, no limiting language was required by EPA.

Wyoming was required, however, at the time it requested authority from the EPA to implement its NPDES general permit program, to

> submit a statement from the State Attorney General...that the laws of the State, or interstate compact, provide adequate authority to carry out the program described under § 123.22 and to meet the requirements of this part. This statement shall include citations to the specific statutes, administrative regulations, and, where appropriate, judicial decision which demonstrate adequate authority. State statutes and regulations cited by the State Attorney General or independent legal counsel shall be in the form of lawfully adopted State statutes and regulations at the time the statement is signed and shall be fully effective by the time the program is approved...

40 C.F.R. § 123.23(a). Wyoming attested[5], prior to receiving EPA's approval to administer its NPDES general permit program, that Wyoming laws provide DEQ adequate authority to carry out the Federal requirements of the general permit program. The Federal Register notice approving Wyoming's authority to administer the NPDES General Permit Program puts it best:

> Wyoming's general permits submission consists of an Attorney General's statement, a copy of the State statutes and regulations providing authority to carry out the program, a copy of the amended Memorandum of Agreement (MOA), and an amended program description.

56 Fed. Reg. 52030 (October 17, 1991).

Last, WOC's claim that the Wyoming Legislature's recent failure to pass House Bill 212 demonstrates that the legislature never intended for DEQ to have the authority to issue general permits is wholly without merit. As recognized by the United States Supreme Court, legislative inaction "lacks persuasive significance because several equally tenable inferences may be drawn from such inaction." Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 187, 114 S.Ct. 1439, 1453 (1994), *quoting* Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 650, 110 S.Ct. 2668, 2678 (1990). "A bill can be proposed for any number of reasons, and it can be rejected for just

[5] Unfortunately, Intervenors could not obtain a copy of the Attorney General's statement.

as many others." Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 170, 121 S.Ct. 675, 681 (2001). Whatever the reason for the Legislature's recent attempt to amend W.S. 35-11-302, it has absolutely no relevance to the present matter.

DEQ's authority to issue NPDES permits, including general permits, is deeply rooted and plainly evident in the Environmental Quality Act, authority provided by WAPA and Wyoming's own declaration that its laws provide adequate authority.

III. Issuance of the General Permits Complies with the Requirements of Chapter 2, WWQRR.

WOC claims that DEQ's issuance of the General Permits did not comply with its own regulations. This claim is unfounded. General Permits may be written to regulate effluent discharges, if the sources all:

> Involve the same or substantially similar types of operations;
> Discharge the same types of pollution or wastes;
> Require the same effluent limitations or operating conditions;
> Require the same or similar monitoring; and
> In the opinion of the administrator, are more appropriately controlled under a general permit than under individual permits.

2 WWQRR § 4(a)(iii). The Pumpkin and Willow Creek General Permits involve the same type of operations (coal bed methane mining) and types of discharges (coal bed produced water) and require Permittees to comply with the same effluent limitations, operating conditions and monitoring. The General Permits were issued based on the Section 4(a)(iii) criteria.

The regulations do *not* restrict DEQ from establishing categories of discharges within a general permit, and certainly allow both Technology Based Effluent Limitations (TBELs) and Water Quality Based Effluent Limitations (WQBELs) in the same permit.

See 2 WWQRR 5(c)(iii). Instead of issuing numerous general permits to cover the same pollutant discharges from the same type of operations, DEQ established different categories of discharges within a single general permit based on the location of the outfall in proximity to the headwater (Water Quality Based Effluent Limits) or whether the discharge is contained in a reservoir prior to discharge (Technology Based Effluent Limits). Within each category of discharge in the Pumpkin Creek and Willow Creek General Permits, each Permittee must comply with the *same* effluent limitations, operating conditions, monitoring and management practices.

Under the General Permits, the Water Quality Based Effluent Limits for Category I are established to be protective of direct discharges to on-channel reservoirs or stream channels with no containment requirements. The WQBELs are established based on the proximity of the discharge from the confluence with the Powder River. These effluent limits rationally should be different based on the different characteristics of the discharge as the discharge occurs further away from the Powder River.

These limits should also be different from Category II limits, which are Technology Based Effluent Limits designed to be protective of discharges to containment reservoirs capable of containing runoff from a 50-year, 24 hour precipitation event. Discharges to reservoirs are contained, and designed not to discharge until only after being mixed with storm precipitation runoff. It would be arbitrary and capricious for DEQ to ignore the completely different characteristics of these different types of discharges and, as WOC propounds, establish the same effluent limitations for all discharges in the General Permits.

IV. **DEQ Followed Its Rules When Issuing the General Permits.**

DEQ followed its public notice requirements under the EQA and WAPA. The issuance of general permits is an open process and inclusive of public participation. 2 WWQRR Section 15-17 requires DEQ to provide public notice and an opportunity for public meeting or hearing. WOC, Intervenors and the general public have been afforded the opportunity to participate and affect the issuance of the General Permits in WOC's self described:

> ...long process of permit development involving stakeholder meetings that began in January of 2005, and went through five different draft versions of the general permits before a final draft was arrived upon and published by the DEQ on February 16, 2006. Public comments were taken and the public comment period closed on April 3, 2006. The DEQ then took an additional three months to evaluate comments, and attached fact sheets to the permits on August 25, 2006...Then DEQ issued the General Permits on September 11, 2006.

WOC Motion for Summary Judgment, Page 2.

As described by WOC, DEQ certainly appears to have followed its rules with respect to the mechanics of permit issuance. While Intervenors take issue with certain provisions in the General Permits and are appealing these conditions under EQC Docket 06-3815, Intervenors believe that they, WOC and the general public were afforded the opportunity by law to provide comments on the development of the General Permits.

V. **There Is No Federal Requirement for Public Notice of Notices of Intent for Permit Coverage.**

There is no Federal requirement that every notice of intent and subsequent approval to discharge under a general permit undergo notice and public comment. Under the Federal general permit program, public notice of the creation of the *draft* permit complies with the statutory requirement for public notice. In EPA's requirements for State NPDES permitting under 40 C.F.R. § 123.25(a)(28), States are specifically required

to give public notice that "a *draft* permit has been prepared." *See* 40 C.F.R. § 124.10(a)(ii). There is absolutely no requirement that every discharge permit issued pursuant to a general permit undergo notice and public comment.

The 7th Circuit affirmed this interpretation in Texas Independent Producers and Royalty Owners Association v. Environmental Protection Agency. 410 F.3d 962 (7th Cir. 2005). Petitioners in that case claimed that the Clean Water Act's language in Section 1342(j), "a copy of each permit application issued under this section shall be available to the public," and Section 1342(a)(1), "the Administrator may, after opportunity for public hearing, issue a permit," applied to Notices of Intent for coverage under general permits. *Id.* at 977. EPA strongly disagreed with this interpretation and argued that Petitioner's claim that "requiring an additional public hearing on each individual NOI...would eviscerate the administrative efficiency inherent in the general permitting concept, in effect making the general permit scheme no different from the process for obtaining individual permits." *Id.* at 978. The 7th Circuit agreed with EPA's "eminently reasonable" interpretation[6]. *Id.*

VI. WOC's Public Policy Concerns Provide No Legal Basis for Permit Denial.

WOC pontificates on why it believes DEQ's procedure for issuance of general permits should include even more extensive public notice, and why it inappropriately limits the opportunity for public comment, does not provide the same degree of safeguards as individual permits and should follow a Minnesota Court's created rule for

[6] The 7th Circuit's opinion creates a split between the circuits. The 9th Circuit, in a similar appeal, held that NOIs are the "functional equivalent" of a permit application and thus are subject to public availability and hearing requirements. Pursuant to Federal Circuit Court Rules, the 7th Circuit circulated an advance copy of its opinion to the full court. "No judge in active service voted to hear the case en banc." *Id.* at FN 13.

public notice on each and every general permit coverage approval. None of these policy concerns is a legal basis for the EQC to deny these legitimately issued permits. WOC's appropriate relief is through petition to the Legislature or Council for a change in the *rules,* not in the adjudicative proceeding at hand. WOC's policy arguments do not provide valid grounds for EQC's denial of the General Permits and its arguments are contrary to State and Federal law.

SUMMARY

WOC has not presented the EQC with any genuine issues of material fact. Rather, WOC's claims are all matters of law that are answered in Intervenor's favor by the Environmental Quality Act, the Wyoming Administrative Procedure Act and the Wyoming Water Quality Rules and Regulations.

First, the General Permits are not rules, but licenses. Thus, WAPA rulemaking requirements and procedures do not apply. The Permits are *not* statements of general applicability for one important reason: they apply *only* to certain persons who apply for and receive coverage under the permit. DEQ appropriately issued the Pumpkin Creek and Willow Creek General Permits under its WAPA authority to issue licenses.

Second, DEQ's authority to issue NPDES permits, including general permits, is deeply rooted and plainly evident in the Environmental Quality Act, authority provided by WAPA Environmental Quality Act and Wyoming's own declaration in its request to administer the NPDES general permit program that its laws provide adequate authority.

Third, the General Permits were issued based on WWQRR Section 4(a)(iii) criteria. The regulations do *not* restrict DEQ from establishing categories of discharges

within a general permit, and certainly permit both Technology Based Effluent Limitations (TBELs) and Water Quality Based Effluent Limitations (WQBELs) in a permit.

Fourth, DEQ followed its public notice requirements under the EQA, WAPA and its Water Quality Rules. WOC, Intervenors and the general public were afforded the opportunity to participate in the issuance of the General Permits.

Fifth, under the Federal general permit program, public notice of the creation of the *draft* permit complies with the statutory requirement for public notice. There is no Federal requirement, nor Wyoming State requirement, that every notice of intent and subsequent approval to discharge under a general permit undergo notice and public comment.

Last, none of WOC's policy concerns is a legal basis for the EQC to deny these legitimately issued permits. WOC's appropriate relief is through petition to the Legislature or Council for a change in the *rules,* not in the adjudicative proceeding at hand.

WHEREFORE, there being no genuine issue of material fact with respect to the issues WOC sets forth in its Summary Judgment Motion, Intervenors respectfully request that the EQC deny WOC's Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 2nd day of August, 2007.

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ATTORNEYS FOR INTERVENORS

Certificate of Service

I certify that on this 2nd day of August, 2007, service of a true and complete copy of Intervenors' Response to Wyoming Outdoor Council's Motion for Summary Judgment in Consolidated File Nos. 06-3816 and 06-3817 was made upon each party or attorney of record herein as indicated below.

The ORIGINAL and ten (10) copies were filed by Federal Express and also emailing a .pdf version of the same on August 2, 2007 with:

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