

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

SEP 04 2007

WYOMING OUTDOOR COUNCIL,)
)
Petitioner,)
)
v.)
)
WYOMING DEPARTMENT OF)
ENVIRONMENTAL QUALITY, WATER)
QUALITY DIVISION,)
)
Respondent.)

Terri A. Lorenzon, Director
Environmental Quality Council

Consolidated Docket
Nos. 06-3816 & 06-3817

RESPONDENT DEQ'S SUPPLEMENTAL MEMORANDUM CONCERNING
ISSUES OF FACT FOR WOC'S MOTION FOR SUMMARY JUDGMENT

Respondent Wyoming Department of Environmental Quality (DEQ), pursuant to Rules 6(c)(1) & 56(c) of the Wyoming Rules of Civil Procedure and Chapter II, Section 14 of the DEQ Rules of Practice & Procedure, submits the following supplemental memorandum concerning issues of fact for Petitioner Wyoming Outdoor Council's (WOC) motion for summary judgment in the above-captioned consolidated case before the Wyoming Environmental Quality Council (Council).

WOC correctly points out that the three legal issues identified in its motion are "susceptible to resolution by summary judgment" *if* there are no material issues of fact in dispute. WOC Reply Br. at 1; Wyo.R.Civ.P. 56(c). Respondent DEQ has agreed all along that these three issues should be appropriate for resolution by summary judgment. In order for that to remain the case, it is necessary to keep this debate free of issues of fact. If the material facts which are truly undisputed can be kept that way, then the parties can argue

about how the law applies and the Council can draw their own conclusions. WOC states that “all parties apparently agree that there are not genuine issues of material fact in dispute.” WOC Reply Br. at 1. This supplemental memorandum addresses the following two factual contentions in WOC’s initial and reply briefs which go beyond the undisputed material facts regarding the issue of statutory authority for general permits.

1. 2007 HB 0212 was introduced as “AN ACT relating to environmental quality; clarifying general watershed permits relating to coal bed methane production; and providing for an effective date” and amending W.S. 35-11-302(a)(v). (DEQ Ex. E). HB 0212 was not enacted into law during the 2007 Legislative Session, and W.S. 35-11-302(a)(v) was left unchanged. Those facts are not disputed. However, WOC goes further by contending that:

- “the Wyoming legislature said ‘no thanks’” to 2007 HB 0212. (WOC Reply Br. at 6);
- 2007 HB 0212 “died an ignominious death” (WOC Br. at 11);
- the fact that 2007 HB 0212 was not enacted into law is an “unequivocal expression of legislative intent” (WOC Br. at 11-12);
- “[t]he legislative intent is clear” (WOC Br. at 13).

The documented facts are these:

- During the 2007 Legislative Session, there were 323 House Bills introduced, of which 128 (40%) ultimately were passed by both the House and Senate. 2007 General Session Bill Statistics (attached hereto as DEQ Ex. G).
- HB 0212 was introduced and referred to House Committee H09, which recommended its passage by a unanimous vote of 8-0 (with 1 excused). 2007 General Session-Journal Digest-HB0212 (attached hereto as DEQ Ex. H).

- HB 0212 was placed on General File in the House and passed Committee of the Whole and 2nd and 3rd Readings by a final vote of 42-18. (DEQ Ex. H).
- HB 0212 was introduced and referred to Senate Committee S09, but was not reported out of committee by the cutoff date. (DEQ Ex. H).
- 68 total recorded votes were actually cast on HB 0212, of which 50 were in favor and 18 were opposed. (DEQ Ex. H).
- The ultimate fate of HB 0212 was not the result of a straight up or down vote in the Legislature. (DEQ Ex. H).

Calling this “an ignominious death,” an “unequivocal expression of legislative intent” and the Wyoming Legislature saying “no thanks” to 2007 HB 0212 does not comport with the documented facts for purposes of WOC’s pending motion for summary judgment.

2. Respondent DEQ cited Wyoming Supreme Court decisions to point out that the Legislature’s knowledge of the Council’s and DEQ’s interpretation of authority for general NPDES permits based on W.S. 35-11-302(a)(v) can be implied from the combined 16 year history of Ch. 18 (1991) and Ch. 2 (2004). DEQ Br. at 12. In particular, legislative knowledge may be implied by virtue of the promulgation of written regulations. *Town of Pine Bluffs v. State Bd. of Control*, 647 P.2d 1365, 1367 (Wyo. 1982). DEQ Br. at 12.

Contrary to Wyoming case law (DEQ Br. at 12), WOC “reject[s]” the “idea that the 16-year history of regulations” governing DEQ issuance of NPDES general permits “implies legislative consent or authorization” for NPDES general permits. WOC Reply Br. at 6. WOC makes the factual allegation that “[t]he most likely probability is that the Wyoming legislature was not alerted to the general permit issue for water quality permits until this last

[2007] legislative session.” WOC Reply Br. at 6. This allegation is not consistent with the following undisputed facts:

- WWQR&R Chapter 18, which initially prescribed the process for DEQ issuance of NPDES general permits, was adopted by the Council as a rule in 1991. (DEQ, Ex. A).
- The general permit provisions of Chapter 18 were incorporated into current Chapter 2 by rule adopted by the Council in 2004. (DEQ Ex. C).
- Chapter 18 (DEQ Ex. A) and current Chapter 2 (Section 1(a)) both specifically cite W.S. 35-11-302(a)(v) as statutory authority for NPDES general permits.
- W.S. 35-11-1002 requires that any rule promulgated under the Wyoming Environmental Quality Act (WEQA) shall be published and distributed to members of the Legislature.
- W.S. 16-3-103(a)(i) requires that an agency shall give notice of proposed rules to the legislative service office (LSO).
- “[T]he legislative management council must be given a chance to review the proposed rule.” WOC Br. at 5.
- “The legislative service office must be provided a copy of the rule adopted by the EQC.” WOC Br. at 5.
- Notice of intended rulemaking for WWQR&R Chapter 2 and the proposed rule in strike and underscore format were provided to the LSO on July 13, 2004. November 10, 2004 Secretary of State file-stamped Certification Page for WWQR&R Chapter 2 (attached hereto as DEQ Ex. I).

DATED this 4th day of September, 2007.




Mike Barrash
Wyoming Attorney General's Office
123 State Capitol Building
Cheyenne, Wyoming 82002
(307) 777-6946

CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of the foregoing RESPONDENT DEQ'S SUPPLEMENTAL MEMORANDUM CONCERNING ISSUES OF FACT FOR WOC'S MOTION FOR SUMMARY JUDGMENT (with DEQ Exhibits G, H & I) were served this 4th day of September, 2007 by United States Mail, first class postage prepaid, and by facsimile transmission and/or e-mail, addressed as follows:

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Wyoming Attorney General's Office

2007 General Session Bill Statistics

Bills Drafts:

695 Bill Drafting Requests
171 Bill Drafts Cancelled
525 Total Bills & Resolutions Jacketed & Numbered for Introduction

Bills Introduced:

323 House Bills Introduced
10 Joint Resolutions Introduced
8 House Bills Withdrawn or Not Considered for Introduction

176 Senate Files Introduced
4 Senate Joint Resolutions Introduced
2 Senate Filed Withdrawn or Not Considered for Introduction

Bills passed Both Houses:

128 House Bills
0 House Joint Resolutions
128 House Total

94 Senate Files
1 Senate Joint Resolutions
95 Senate Total

222 Total Bills

1 Total Joint Resolutions

223 Total Bills and Resolutions

Governor Signed:

219 Chapters
1 Resolution
3 Vetoes

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EXHIBIT

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DEQ Ex G

H.B. No. 0212 Water quality-watershed permits.

Sponsored By: Representative(s) Brown and Childers and Senator(s) Jennings and Townsend

AN ACT relating to environmental quality; clarifying general watershed permits relating to coal bed methane production; and providing for an effective date.

1/15/2007 Bill Number Assigned
 1/16/2007 H Received for Introduction
 1/17/2007 H Introduced and Referred to H09
 1/24/2007 H09 Recommended Do Pass

ROLL CALL

Ayes: Representative(s) Brechtel, Edmonds, Esquibel, F., Harvey, Lockhart, Meyer, Quarberg and Steward

Excused: Representative(s) Hammons

Ayes 8 Nays 0 Excused 1 Absent 0 Conflicts 0

1/24/2007 H Placed on General File
 2/1/2007 H Passed CoW
 2/2/2007 H Passed 2nd Reading
 2/5/2007 H Passed 3rd Reading

ROLL CALL

Ayes: Representative(s) Anderson, R., Bagby, Berger, Blake, Brechtel, Buchanan, Childers, Craft, Diercks, Dockstader, Edmonds, Edwards, Esquibel, F., Esquibel, K., Gentile, Gingery, Goggles, Hallinan, Hammons, Harshman, Harvey, Illoway, Jaggi, Jones, Landon, Lockhart, Madden, Martin, McOmie, Meyer, Millin, Petersen, Samuelson, Simpson, Slater, Steward, Thompson, Throne, Walsh, Warren, White and Zwonitzer, Dv..

Nays: Representative(s) Alden, Brown, Cohee, Davison, Gilmore, Iekel, Jorgensen, Lubnau, Mercer, Miller, Olsen, Philp, Quarberg, Semlek, Shepperson, Teeters, Wallis and Zwonitzer, Dn..

Ayes 42 Nays 18 Excused 0 Absent 0 Conflicts 0

2/5/2007 S Received for Introduction
 2/7/2007 S Introduced and Referred to S09; No Report Prior to CoW Cutoff
 3/1/2007 Died In Committee

EXHIBIT

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DEQ Ex H

100-5680

CERTIFICATION PAGE FOR RULES

Adoption date: (*August 27, 2004*)

To guarantee review by the Secretary of State within the 60 day deadline, this package must be submitted to the Secretary of State by: (*October 25, 2004*)

GENERAL INFORMATION:

1. Agency: Department of Environmental Quality, Water Quality Division
Address: 122 West 25th Street, Herschler Building, Cheyenne, WY 82002
Agency Contact Person for these Rules: *Todd Parfitt*
Work Telephone: 777-7781
2. Are these new rules? ("new" - means the first set of regular rules to be promulgated by this agency after the Legislature adopted a new statutory provision or significantly amended an existing statute. Yes ___ No X)
3. Chapter # of rules being created, amended or repealed: Chapter 2 - Amended
Chapters 7, 10 and 18 Repealed
4. Does this rule replace an existing rule? Yes X No ___ If yes, which chapter(s)?
2, 7, 10, and 18

NOTICE OF INTENDED RULEMAKING TO AG, LSO AND SECRETARY OF STATE

5. Notice of intended rulemaking containing all of the information required by W.S. 16-3-103(a) was filed with the Secretary of State on: July 13, 2004.
6. Notice of intended rulemaking and proposed rules in strike and underscore format were provided to the Legislative Service Office and courtesy copies of the notice and proposed rules were provided to the Attorney General and the Governor on: July 13, 2004.

PUBLIC NOTICE OF INTENDED RULEMAKING:

7. Yes X No ___ (If applicable) Notice was mailed 45 days in advance to all persons who made a timely request for advance notice.
8. Yes X No ___ A public hearing was held on the proposed rules on: May 17, 2004

FINAL FILING OF RULES:

9. Yes X No ___ A disk with an exact copy of the attached rules is attached or the electronic copy was sent via electronic mail to the Secretary of State on September 3, 2004 *DA*
10. Final rules with original signatures were sent to the Attorney General's office for the Governor's signature and filing with the Secretary of State on September 3, 2004

NOV 10 2004

EXHIBIT

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DEQ Ex I

11. Final rules were sent to the Legislative Service Office the same date listed in number 10 above.

CERTIFICATION BY AGENCY:

The undersigned certifies that the foregoing information is correct.

Date 9/03/04 James A. Eppelt
Title: Director

GOVERNOR'S CERTIFICATION

I have reviewed these rules and determined that they:

- (1) are within the scope of the statutory authority delegated to the adopting agency; and
- (2) appear to be within the scope of the legislative purpose of the statutory authority.

Therefore, I approve the same.

11/8/04 Wade Freeland
Date Approved Governor

Bold/italics is only to show where info is needed - remove for final document.

/pjb
3-0164-duc

STATE OF WYOMING
 Office of the Secretary
 Filed the 10th day of November
2004 at 11:30 P.M.
 Joseph B. Meyer
 Secretary of State