

FILED

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

APR 03 2009

Jim Ruby, Executive Secretary
Environmental Quality Council

IN THE MATTER OF THE APPEAL)
OF PENNACO ENERGY, INC. OF)
CONDITIONS IN RENEWAL OF)
WYPDES PERMIT NO. WY0040797)

Docket No. 09-3601

WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S
MOTION TO DISMISS PENNACO ENERGY, INC.'S PETITION

Respondent Wyoming Department of Environmental Quality (DEQ), pursuant to Chapter II, Sections 3 & 14 of the DEQ Rules of Practice & Procedure and Rule 12(b)(1) of the Wyoming Rules of Civil Procedure, moves to dismiss Petitioner Pennaco Energy, Inc.'s (Pennaco) "Notice of Appeal and Petition for Hearing" (Petition) in the above-captioned case before the Wyoming Environmental Quality Council (EQC) for lack of subject matter jurisdiction on the following grounds:

Chapter II, Section 14 of the DEQ Rules of Practice & Procedure makes the Wyoming Rules of Civil Procedure generally applicable to matters before the EQC. Rule 12(b)(1), Wyo. R. Civ. P. provides for motions to dismiss actions for lack of subject matter jurisdiction.

DEQ issued WYPDES renewal permit WY0040797 (renewal permit) to Pennaco on December 31, 2008, authorizing discharge of coal bed methane (CBM) produced water from specified outfalls to Wild Horse Creek and to Middle Prong Wild Horse Creek (Middle Prong) subject to certain conditions. On February 27, 2009, Pennaco filed its Petition "for review of certain conditions contained in WYPDES [Renewal] Permit No. WY0040797" issued to Pennaco on December 31, 2008. Pennaco's Petition describes the "Action Being Appealed" as follows:

[T]he Statement of Basis – though not the permit – says that end-of-pipe limits are imposed on SAR for those outfalls that are direct

discharges. DEQ has notified Pennaco of its *intent to administratively modify* the [renewal] permit to conform the permit to the Statement of Basis and impose end-of-pipe SAR limits on outfalls that direct discharge to Middle Prong and Wild Horse Creek. (Pet. at 2, emphasis added)

The renewal permit's end-of-pipe limits under the AUPP on direct discharges above supposed "naturally irrigated bottomlands" are unlawful for the further reason that DEQ failed to recognize or consider the draconian effects of the [renewal] permit on Pennaco's ability to operate the impacted CBM wells. Pennaco has no feasible way to meet the SAR limits on the direct discharge outfalls [that] *will be* required under the *modified* permit. (Pet. at 4, emphasis added)

The "Relief Requested" by Pennaco is that the EQC (2) reject the prospective end-of-pipe effluent limitations on EC and SAR and order that the (modified) renewal permit be ultimately issued without them. (Pet. at 6, emphasis added)

As Pennaco itself recognizes, contested renewal permit WY0040797 as issued on December 31, 2008 does not contain the end-of-pipe SAR limits on direct discharges to Middle Prong and Wild Horse Creek. Pet. at 2, 4. These end-of-pipe SAR limits to which Pennaco objects are in the proposed modification that is currently in the public comment period, which runs until April 13, 2009. The notice is posted on the DEQ website (<http://deq.state.wy.us/wqd/events/index.asp>). Wyoming Water Quality Rules & Regulations (WWQRR) require public notice and not less than 30 days for public comment on draft permits prior to issuance. WWQRR, Chapter 2, Section 15(a). DEQ has not issued the proposed modification, and will not do so before reviewing comments received during the public comment period. Unless and until DEQ actually issues such modification, Pennaco is not subject to conditions modified thereby, including effluent limits.

WYPDES permits are issued by the Director of the DEQ. WYO. STAT. ANN. § 35-11-109(a)(xiii). A decision by the Director to issue or modify a WYPDES permit may be appealed to the EQC in accordance with the DEQ Rules of Practice & Procedure. WWQRR, Chapter 2, Section 17. The DEQ Rules of

Practice & Procedure require that all appeals to the EQC shall be made within 60 days of “final actions” of the Administrators or Director. Chapter I, Section 16(a). The petition for hearing shall set forth the permit upon which a hearing is requested. Chapter I, Section 3(c)(ii). To date, the DEQ Director has not issued the proposed modification of WYPDES renewal permit WY0040797 containing the SAR limits to which Pennaco’s Petition objects.

For purposes of determining whether a “final action” of the Administrators or Director is ripe for review under Chapter I, Section 16(a) of the DEQ Rules of Practice & Procedure, the only relevant date is the date of the *final* administrative decision. *Antelope Valley Improvement and Service District of Gillette v. Wyoming State Board of Equalization*, 992 P.2d 563, 567 (Wyo. 1999). A request for review of a DEQ decision before it has been made and is “final” is premature and not timely. Timely filing of a request for administrative review of an agency decision is mandatory and jurisdictional. *Id.* Where untimely filing of a notice of appeal deprives the reviewing agency of subject matter jurisdiction over the appeal, dismissal is appropriate. *Id.*

Rules of statutory interpretation apply to interpretation of administrative rules and regulations. *Antelope Valley*, 992 P.2d at 566. A rule of statutory interpretation assumes that the legislature did not intend futile things. *Corkill v. Knowles*, 955 P.2d 438, 444-445 (Wyo. 1998). Similarly, it must be assumed that the EQC did not intend futile things in adopting Chapter 2 of WWQRR. The requirement in WWQRR, Chapter 2, Section 15(a) that DEQ give public notice and not less than 30 days for public comment on draft permits prior to issuance would be futile if a draft permit modification is appealable prior to the close of the comment period, review of the comment, and actual issuance of the permit.

The gist of Pennaco’s Petition involves an agency action that has not yet occurred. Because the action at issue is not ripe for review, Pennaco’s pending appeal is premature and should be dismissed for lack of subject matter jurisdiction.

The EQC's March 4, 2009 Response Order directs DEQ to file a Response to Pennaco's February 27, 2009 Petition on or before April 3, 2009. Rule 12(a), Wyo. R. Civ. P. provides that the time for filing a responsive pleading will be 10 days after notice of the tribunal's action on a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction. Accordingly, this motion to dismiss tolls the deadline for DEQ to file a response to Pennaco's February 27, 2009 Petition until after the EQC decides this motion.

WHEREFORE, Respondent DEQ requests that Pennaco's appeal in Docket No. 09-3601 be dismissed based on lack of subject matter jurisdiction because the action being appealed is not a final action that is ripe for review, and therefore the appeal is premature.

DATED this 3rd day of April, 2009.



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CERTIFICATE OF SERVICE

This certifies that true and correct copies of the foregoing WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S MOTION TO DISMISS PENNACO ENERGY, INC.'S PETITION was served this 3rd day of April, 2009 by United States mail, postage prepaid, and also by e-mail or facsimile transmission, addressed as follows:

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A handwritten signature in cursive script, appearing to read "W. R. Siler", is written above a horizontal line.