BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

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Jim Ruby, Executive Secretary
Environmental Quality Council

IN THE MATTER OF THE APPEAL OF JOHN D. KOLTISKA, AC RANCH, INC. A Wyoming Corporation, PRAIRIE DOG RANCH, INC., a Wyoming Statutory Close Corporation, and PRAIRIE DOG WATER SUPPLY COMPANY, FROM WYPDES PERMIT NO. WY0054364	)))))))	Docket No. 09-3805

WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S BRIEF IN OPPOSITION TO PETITIONER'S MOTION IN LIMINE

Respondent, the Wyoming Department of Environmental Quality (DEQ), by and through the Wyoming Attorney General's Office, submits this brief in opposition to Petitioners' Motion in Limine (Motion). Petitioners' Motion should be denied because it contradicts the Wyoming Environmental Quality Act (Act), the DEQ Rules of Practice and Procedure, and past practices of the Wyoming Environmental Quality Council (Council). Furthermore, Petitioners are attempting to use their Motion to draw the Council's attention away from the fundamental issue in this case, which is whether WYPDES permit WY0054364 is protective of irrigated agriculture and in accordance with Chapter 1, Section 20 of the Wyoming Water Quality Rules and Regulations (WWQRR). DEQ will address each of Petitioners' arguments below as they were listed in their Motion.

1. Petitioners' Burden

DEQ agrees with Petitioners that they have the burden of proving that DEQ failed to use appropriate scientific methods to derive the permit terms. The burden of proving arbitrary administrative action is on the complainant, and this burden includes not only the clear presentation of the question, but also placement of evidence in the record to sustain the complainant's position. *Knight v. Environmental Quality Council,* 805 p.2d 268, 273 (Wyo. 1991). However, the inquiry does not stop there. Even if Petitioners were to show that DEQ used

inappropriate methods, Petitioners must also show that regardless of how they were derived, the permit limits do not satisfy the requirements of Ch.1 § 20, the ultimate issue in the case.

2. Petitioners Attempt to Limit Evidence in the Contested Case

In their second argument, Petitioners attempt to prevent the Council from hearing certain evidence that is relevant to whether the limits are protective and comply with Ch. 1 § 20. Petitioners attempt to relegate the Council to a role of an appellate tribunal and strip it of its statutory authority to hear contested cases in which it can consider more information than what was considered by DEQ. *See* Motion at 4. Petitioners argue that "the Council can only approve or disapprove the permit as written by the DEQ[.]" Motion at 6. This argument fails to take into account the statutory authority to modify contested permits granted to the Council by the legislature and is contrary to the DEQ Rules of Practice and Procedure (Rules), as well as the Council's practice in past cases.

As stated in the Act, it is "the policy and purpose of this act to enable the state to prevent, reduce and eliminate pollution; to preserve, and enhance the air water and reclaim the land of Wyoming." WYO. STAT. ANN.§ 35-11-102. In the pursuit of these goals, the legislature established the DEQ and a separate agency, the Council. The legislature deemed it appropriate that each agency be given certain responsibilities and authority in order to attain the goals and purposes of the Act. DEQ was granted the authority "to issue, deny, amend, suspend, or revoke permits." WYO. STAT. ANN.§ 35-11-109(a)(xiii). The Council was delegated with the authority to "[c]onduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act[.]" WYO. STAT. ANN.§ 35-11-112(a)(iv). The Council was also granted the authority to "[o]rder that any permit, license, certification or variance be granted, denied, suspended, revoked or modified[.]" WYO. STAT. ANN.§ 35-11-112(c)(ii). Finally, the Council was

authorized to promulgate rules and regulations. WYO. STAT. ANN. §§ 35-11-112(a)(i), 16-3-102(a)(i).

As directed by statute, the Council developed rules regarding how contested cases would be conducted in front of the Council. *See* Rules, Ch. 2. These Rules make clear in a number of areas that all parties have the right to present evidence and arguments on all issues to the Council. Rules Ch. 2, § 4(a)(iii); Ch. 2, § 8(c). Furthermore, the Rules state that the presiding officer may even offer evidence on behalf of the Council. Ch. 2, § 4(a)(iv). These Rules refute Petitioners' arguments that any appeal to the Council must be restricted to that information which was considered by DEQ in making the decision being contested.

Petitioners' argument is also contrary to the past practice of the Council in contested case proceedings. Less than a year ago, in the Matter of the Appeal and Review of the Issuance of WYPDES General Permits: Willow Creek and Pumpkin Creek and the Four Mile Creek Watershed, Consol. Docket Nos. 06-3815, 06-3816, and 06-3817, the Council received evidence from all parties regarding the whether a general permit met the requirements of Ch. 1, § 20. All parties to the proceeding, which included both proponents and opponents of the permit, were allowed to call witnesses, present evidence, and submit exhibits supporting their respective arguments that went beyond what the DEQ considered at the time the contested permits were issued.

The Council's authority to hear evidence in contested cases has also been confirmed by the Wyoming Supreme Court. In *Knight v. Environmental Quality Council,* 805 p.2d 268, (Wyo. 1991), the Court affirmed a holding from the District Court which held that the Council's decision to issue a permit for an injection well was not arbitrary and capricious. In *Knight,* the Court adopted the District Court's findings which documented the proceedings in front of the Council. The applicants for the permit were allowed to present witnesses supporting the issuance of the permit. *Id.* at 275. Furthermore, the District Court

held that the Council was the "trier of fact" and the weight it gave to the evidence presented was "to be determined by that agency in light of the expertise and experience of its members[.]" *Id.* at 273-274.

Petitioners cite the case of *Amoco Prod. Co. v. Wyoming State Bd. Of Equalization,* 12 P.3d 668, 2000 WY 84, to support their claim that the Council is only to operate as a reviewing body for DEQ and does not have the authority to hear evidence outside of that which was in the administrative record. *See* Motion at 5. However, Petitioners are incorrect when they state that *Amoco* supports their position. *Amoco* is distinguishable from the current situation because the Council, as opposed to the Board in the *Amoco* case, has the statutory authority to hear evidence outside of the record and modify permits issued by DEQ as explained above.

Petitioners cite two other cases to support their arguments; *Motor Vehicle Mfrs. Ass'n of U.S., Inc., v. State Farm* 463 U.S. 29 (1980), and *SEC v. Chenery Corp.,* 322 U.S. 194 (1947). These cases generally state that an agency's actions must be upheld based on the grounds the agency states for that decision (hereinafter referred to as the *Chenery* rule). This general rule, however, does not apply in all cases.

In the case of *Licausi v. Office of Personnel Management,* 350 F.3d 1359, (C.A. 2003), the Court of Appeals for the Federal Circuit held that the *Chenery* rule does not apply when the reviewing body is granted statutory authority to make an "independent determination." *Id.* at 1365. Stated another way, the *Chenery* rule does not apply when the reviewing body is granted with the authority to make new determinations and hear new evidence. The Council's role in contested case hearings is such a case. Parties are authorized to present evidence and witnesses to support their cases. The presiding officer of the Council is even authorized to present evidence. *See* Rules Ch. 2, § 4(a)(iv).

If Petitioners' argument were correct, no evidence could be allowed that was not before DEQ at the time of the permit issuance. Even Petitioners are not

arguing that outcome. Instead, they argue that only some non-record evidence should be allowed. Petitioners argue that only the evidence that may support their claim that DEQ did not use appropriate scientific methods should be allowed. *See* Motion at 7.[1] Petitioners cannot have their cake and eat it too. New evidence can be presented by all parties to the contested case. If the review was limited to the record in front of the agency, the Rules authorizing evidence to be presented would be superfluous, as would the entire contested case process.

3. Petitioners' Did Allege That the Permit Violates Ch. 1, § 20

Contrary to what Petitioners state in their Motion, they have contended that the limits under the permit will cause a measurable decrease in crop production. *See* Petitioners' Amended Petition ¶ 3.n. Whether they continue to pursue that claim is one thing, but, the issue of whether the effluent limits will cause a measurable decrease in crop production in violation of Ch. 1, § 20, was the subject of extensive discovery and is the fundamental issue in this case. The scientific method used to derive effluent limits is not an end in itself and cannot be separated from the ultimate issue of whether the limits are protective. The ultimate question that the Council should be concerned with is whether the limits are protective. Whether the methods used to get to the protective limits are universally accepted in the scientific community is but one factor to consider.

The purpose of the Act is to protect the environment; DEQ believes that whether the limits proposed in the permit will result in a measurable decrease in crop production is the bottom line, whether Petitioners elect to focus on it or not.

4. Conclusion

In summary, DEQ asserts that the Council is not prohibited from hearing evidence regarding the protectiveness of the effluent limits in the permit developed outside of the record before DEQ. The statutory language authorizes

[1] Petitioners only want certain evidence to be allowed into the contested case hearing as shown by their prayer for relief in the Motion. "Data and scientific analysis which was not considered by DEQ at the time it issued its permit will be allowed only for the limited purpose of establishing whether DEQ used appropriate scientific methods to derive permit limits." Motion at 7.

additional evidence to be presented during contested cases and subsequent hearings. Furthermore, the Petitioners should be required to allege that the permit limits will cause some measureable decrease in production because the purpose of the Act is to protect the environment.

DATED this 9th day of November, 2009.

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CERTIFICATE OF SERVICE

This certifies that true and correct copies of the foregoing WYOMING DEPARMENT OF ENVIRONMENTAL QUALITY'S BRIEF IN OPPOSITION TO PETITIONER'S MOTION IN LIMINE was served this 17th day of November, 2009 by United States mail, postage prepaid, and also by hand delivery, e-mail or facsimile transmission, addressed as follows:

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