

THE STATE OF WYOMING



*Please forward to  
Wayne E. Patton  
Agriculture  
Conservation Commission*

ED HERSCHLER  
GOVERNOR

*Attorney General*

CHEYENNE, WYOMING 82002

V. FRANK MENDICINO  
ATTORNEY GENERAL

November 10, 1977

Mr. William L. Garland  
Administrator  
Water Quality Division  
Department of Environmental Quality  
Hathaway Building  
Cheyenne, Wyoming 82002

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Dear Mr. Garland:

In response to your request, our office has reviewed your questions concerning the authority of the Department of Environmental Quality pursuant to the Environmental Quality Act and advises you as follows:

QUESTION #1: Under the existing authority of the Wyoming Environmental Quality Act, can this office enforce water quality standards against a polluter who does not fall within the scope of our discharge permit program?

The water quality standards adopted pursuant to the Environmental Quality Act are enforceable. W.S. 35-502.19(a)(i) specifically provides the authority for the adoption of water quality standards. Administrative rules, regulations and standards have the force and effect of law. Barnes v. Transak Pipeline Co., 549 P.2d 819 (Ok. 1976); United States v. Millsap, 208 F. Supp. 511 (D. Wyo. 1962). The Environmental Quality Act clearly envisioned that water quality standards would be enforced. W.S. 35-502.49 provides for enforcement, through the payment of penalties, against "any person who violates any provision of this act, or any rule, regulation, standard or permit adopted hereunder." (emphasis added). W.S. 35-502.46, providing for the issuance of administrative orders, uses similar language and specifically provides for the enforcement of standards.

Despite the clear authority for the adoption of enforceable water quality standards, there will be practical problems of proof when the standards are applied to polluters who do not fall within the scope of the discharge permit program. It will be necessary for proof to clearly establish that the action of a particular person is, in fact, causing a water quality standard

to be violated. This will be more difficult in relation to non-point sources than point sources which are regulated by a discharge permit. Clearly, in the case of a non-point sources, questions will arise concerning source of the pollution, background levels in the stream, other contributing sources, and measuring points.

QUESTION #2: Can the Water Quality Division enforce best management practices under present statutes? Enclosed is a definition of a best management practice and a draft section for possible inclusion in the proposed water quality standards. Is this acceptable for inclusion in the standards and would this make best management practices enforceable?

QUESTION #3: If best management practices are site specific, such as for individual farm units, would failure to comply with best management practices constitute an enforceable violation? Assuming that water quality standards are violated, would it be necessary to prove that a particular polluter caused or contributed to the violation or would failure to comply with identified best management practices constitute an enforceable violation?

Best Management Practices (BMP's), as defined by DEQ, constitute specific practices or processes, certified by the State, which apply to specific activities. BMP's appear to be both a type of permit system and an operational standard. The basic question concerning BMP's is whether the statutory scheme of the Environmental Quality Act intended control over the actual technology or processes used or whether the control was to extend only to the pollution which was caused from a facility or activity. To determine statutory authority and enforceability, it is necessary to determine if the BMP process fits any of the statutory permit systems or standards.

The Environmental Quality Act provides specific areas in which the Department of Environmental Quality has the authority to prescribe enforceable requirements. Those include W.S. 35-502.19(a)(i)-(v):

(i) Water quality standards specifying the maximum short-term and long-term concentrations of pollution, the minimum permissible concentrations of dissolved oxygen and other matter, and the permissible temperatures of the waters of the state;

(ii) Effluent standards and limitations specifying the maximum amounts or concentrations of pollution and wastes which may be discharged into the waters of the state;

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

(iv) Standards for the definition of technical competency and the certification of operating personnel for public water supply and sewerage systems, treatment works and disposal systems and for determining that the operation shall be under the supervision of certified personnel;

(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;

These specifically delineated activities include discharge permits, standards for operating personnel of public water supply and sewerage plants, standards for permits for construction and operation of specified facilities, effluent standards, and water quality standards. In each area the statute specifies either standards alone or standards and permits.

The general rule is that "where a statute enumerates the subjects or things on which it is to operate, or the persons affected, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned under the rule of 'expressio unicus est exclusio alterius.'" Town of Pine Bluffs v. State Board of Equalization, 333 P.2d 706, 708 (Wyo. 1959).

It is arguable that the first sentence of W.S. 35-502.19(a) gives the DEQ general authority to adopt standards

and permits which "promote the purposes" of the Environmental Quality Act. However, that sentence is directly followed by the delineation of specifically what those standards and permits "shall prescribe." The doctrine of ejusdem generis requires that where general words are followed by an enumeration of particular or specific things, the general words are not given their broadest meaning, but are limited to the same general class as those specifically mentioned. Goldsmith v. U.S., 42 F.2d 133. That doctrine does not apply if the opposite intent is clear. It should be noted that elsewhere in the Environmental Quality Act the rule promulgating authority is more broad, exhibiting a different intent. Relating to air quality, W.S. 35-502.17(a) provides "such...requirements...as may be necessary..." Likewise, the land quality section authorizes "rules and regulations pursuant to the following reclamation standards...including but not limited to..." W.S. 35-502.21(a). Such general intent does not exist with respect to the water quality rules and regulations.

Clearly, W.S. 35-502.19(a) provides for specific types of standards and permit programs. If a standard or permit program is not included within those listed, the Department of Environmental Quality has no authority to promulgate said standard or permit program. An agency cannot promulgate rules which go beyond the bounds marked by the legislature by extending the statute to situations not covered by statute. 2, F. Cooper, State Administrative Law, p. 783-86. It is necessary, therefore, to review the statutorily authorized permits and standards to determine if they allow BMP requirements.

1. Permits - The Environmental Quality Act, as above discussed, provides for two types of permits, discharge permits and construction permits for public water and sewer facilities.

A. The standards for permits for public water supply and sewerage systems specifically include the operation of such a system. Thus it appears the intent of the statute is to control the actual operation of such a system, in addition to the discharge from the system. A BMP for a public water or sewerage system, regulating the process itself, could be included within the operation permit of such system. Thus the statute does provide authority to establish BMP's for public water and sewerage systems.

B. The other statutorily authorized permit system is the discharge permit. W.S. 35-502.19(a)(v). By regulation, DEQ has limited the discharge permit requirement to point sources

only. Ch. II, § 3a Wyoming Water Quality Rules and Regulations. In addition, the Environmental Quality Act [W.S. 35-502.19(a)(v)] gives authority for discharge permits "as authorized pursuant to § 402(b) of the Federal Water Pollution Control Act...." Thus the Wyoming discharge permit is intended to be consistent with the federal discharge permit under the F.W.P.C.A.

The general thrust of the discharge permit program is to control the numerical amount of particular pollutants that leave a facility through a point source. Ch. II, Wyoming Water Quality Rules and Regulations. The legislative history of the federal discharge permit program, after which the Wyoming program is patterned, frequently emphasizes that permits were to contain numerical restrictions on the discharge of pollutants but not to compel the use of any particular control technology. P.L. 92-500, Sen. Report, p. 1495. Thus, as a general proposition, the federal law does not provide authority to make BMP's or process-related controls a requirement of a discharge permit.

However, a state discharge permit may constitute a limited authority to require BMP's or operational requirements. This authority stems from § 8f, Ch. II, Wyoming Water Quality Rules and Regulations and § 208(e), F.W.P.C.A. The regulations allow discharge permits to contain requirements necessary to comply with plans developed pursuant to § 208, and § 208(e) prohibits the issuance of a discharge permit if it is inconsistent with a § 208 plan. These § 208 water quality management plans will include operational methods for the control of non-point sources of pollution. § 208(b)(2). Thus, the § 208 requirements of a discharge permit may indirectly require compliance with BMP's. This discharge permit requirement is enforceable having its basis in the Environmental Quality Act, F.W.P.C.A., and Ch. II of the Wyoming Water Quality Rules and Regulations.

2. The Environmental Quality Act includes standards for operating personnel or public water and sewer systems, water quality standards, and effluent standards and limitations.

A. As mentioned above, public water and sewer systems are subject to operating regulations.

B. W.S. 35-502.19(a)(i) clearly limits water quality standards to concentrations of pollution allowed in waters of the state. This section does not include operational standards for facilities on the land which may effect waters of the state, but instead centers on in-stream concentrations of pollution. BMP's,

by governing operations, cannot be considered water quality standards.

C. The third area, effluent standards and limitations, also does not include BMP's. Although the Environmental Quality Act does not statutorily define "effluents," Ch. II § 2f of the Wyoming Water Quality Rules and Regulations does. That definition reads as follows:

Effluent limitation means any restriction established by the State or by the Administrator of the EPA on quantities, rates, and concentrations of chemical, physical, biological and other constituents which are discharged from point sources into waters of the State, including schedules of compliance.

This definition is consistent with the federal definition found at § 502(ii), F.W.P.C.A. Thus both by regulation and by federal statute, effluent standards are limited to amounts of pollution discharge from point sources, not operational standards.

Viewed as a whole, the Environmental Quality Act gives authority to regulate public water and sewer systems and point sources by permit and allows regulation or standard setting only on the effluent or what concentrations of pollution leaves the point source and the in-stream concentrations. The public water and sewer permits and discharge permits contain limited authority over operations and thereby BMP's.

BMP's, however, appear to go further and to apply to non-point sources, such as runoff and return flows from irrigation, and to require specific on-land modes of operations aimed at meeting water quality standards. It is not sufficient for the water quality standards to simply state that BMP's are enforceable. The agency must have the statutory authority to establish operational standards.

In summary, Best Management Practices may be adopted and enforced in the following situations only:

1. Operating permits for public water and sewerage systems governing operating practices, including the certification of operating personnel.

2. Discharge permits governing point sources may include requirements necessary to comply with approved 208 plans.

However, statutory authority does not exist for the adoption or enforcement by DEQ of BMP's as water quality standards or as requirements on non-point sources.

QUESTION #4: The 208 management plans will contain specific best management practices as well as processes for developing best management practices for specific activities as the need arises. For example, some projects of the Wyoming Highway Department will require the development of best management practices. Those practices which are included in the management plans will be certified and adopted by the Council and the Governor. Can the Administrator of the Water Quality Division certify the best management practices developed in accordance with the approved process?

The certification of BMP's and water quality management plans required by § 208, F.W.P.C.A., is not specifically dealt with in the Environmental Quality Act or the regulations promulgated thereunder. However, W.S. 35-502.10(a)(v) gives the Administrator of the Water Quality Division the authority to administer "certification" programs. The F.W.P.C.A. requires certification by the Governor or his designee. § 208(b), F.W.P.C.A. Thus the Administrator could be designated by the Governor to be responsible for certification of BMP's.

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Very truly yours,



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