

EXHIBIT A

STATE OF COLORADO Office of Administrative Courts 1525 Sherman Street, 4 th Floor, Denver, Colorado 80203	
MOUNT CRESTED BUTTE WATER AND SANITATION DISTRICT, Petitioner, vs. COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, WATER QUALITY CONTROL DIVISION, Respondent. And SADDLE RIDGE RANCH ESTATES WATER COMPANY Intervener,	▲ COURT USE ONLY ▲ CASE NUMBER: WQ 2020-0003
ORDER GRANTING IN PART CRESTED BUTTE'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING THE DIVISION'S MOTION FOR PARTIAL SUMMARY JUDGMENT	

Background and Summary

The Petitioner ("Crested Butte") has a permit to discharge effluent, or liquid waste. Such permits are periodically renewed. The Respondent ("Division") renewed the permit December 31, 2019, but imposed new effluent limits. Crested Butte appealed and the matter was referred to the ALJ.

On June 8, 2021, Crested Butte moved for partial summary judgment, or in the alternative, determination of a question of law ("Crested Butte motion"). The Division responded October 29, 2021 ("Division response"). On June 9, 2021, the Division moved for partial summary judgment ("Division motion"), and Crested Butte responded October 29, 2021 ("Crested Butte response"). On November 12, 2021, Crested Butte filed a reply ("Crested Butte reply"). Also on November 12, 2021, the Division submitted a reply ("Division reply").

The ALJ grants Crested Butte's motion for partial summary judgment as to the issue of the application of Regulation 31.8 (3), 5 CCR 1002-31.¹ "Antidegradation review"

¹ Going forward, those Commission Regulations that are part of 5 CCR 1002-31 will be cited by Regulation number only.

is not applicable to the 2019 permit renewal in that there are no new or increased water quality impacts presented with the renewal. The ALJ denies the Division's motion.

Summary Judgment

Summary judgment is appropriate when the pleadings and supporting documentation show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *W. Elk Ranch, L.L.C. v. United States*, 65 P.3d 479, 481 (Colo. 2002). The Colorado Rules of Civil Procedure, the rules of procedure in the district courts, apply "to the extent practicable" to administrative hearings. Section 24-4-105(4), C.R.S.

Background

Crested Butte is a special district to supply water and wastewater services to the City of Mount Crested Butte in Gunnison County. It operates a wastewater treatment plant and has a permit to discharge wastewater into Woods Creek. Washington Gulch and the Slate River are downstream from Woods Creek. Crested Butte's permit was renewed in 2011 and 2013 with no apparent disputes germane to this case. It sought to renew the permit again in 2019. The Division believes that it incorrectly renewed the permit in 2011 and 2013. It therefore put more stringent limits on the 2019 permit in order to correct this perceived error. Crested Butte objects that these limits are unjustified and prohibitively costly. The main dispute concerns the Division's authority to perform "antidegradation review" in relation to the 2019 renewal.

Regulation 31.8 (3)(a) provides in pertinent part:

(3) Antidegradation Review Process

(a) Applicability

These antidegradation review procedures shall apply to the review of regulated activities with *new or increased water quality impacts* that may degrade the quality of state surface waters [Italics added.]

Regulation 31.37 IV. D. also contains the following language:

The Commission directs the Division to work with the regulated community ... to develop a new antidegradation guidance document.

That guidance document is the "AD Guidance" attached to Crested Butte's motion as exhibit A. The "AD Guidance" has not been published as a rule and so is unenforceable as such. Section 24-4-103(10), C.R.S.; *Weaver v. Colo. Dep't of Soc. Servs.*, 791 P.2d 1230 (Colo. App. 1990). Also, no policy or guidance concerning the Commission in article 8 of title 20 of the C.R.S. shall have the force of a rule, unless promulgated as a rule. Section 25-6.5-102(2), C.R.S.

Crested Butte's motion asks the ALJ to rule that the AD Guidance is not entitled to deference. The ALJ agrees. Unpublished guidelines such as AD Guidance lack the force of law and are entitled to respect only to the extent they are persuasive. *Brunson v. Colo.*

Cab Co., LLC, 433 P.3d 93, 96, (Colo. App. 2018). The ALJ notes also that Crested Butte's discussion of Section 24-4-106, C.R.S., deference to agency interpretation, and the arbitrary and capricious standard, are inapplicable to an evidentiary hearing before an ALJ. In such hearings, the ALJ is deciding in the first instance what the agency action is. This proceeding before the ALJ is not "judicial review" as described in Section 25-8-404, C.R.S.

Crested Butte's Motion for Partial Summary Judgment

Crested Butte's motion seeks four things: first, a determination that the Division was wrong to apply antidegradation review to the 2019 permit because there were no "new or increased water quality impacts." Second, that the Division improperly changed its interpretation of the AD Guidance. Third, that the Division did not comply with Regulation 31.8 in that it applied the Regulation to waterways beyond that "impacted by the discharge." And fourth, a statement that the Division has the burden of proof. The Division agrees that it has this burden. The ALJ grants summary judgment as to the first issue only.

Issue 1, new or increased water quality impacts

The parties agree that in relation to the latest permit renewal, Crested Butte does not have any "new activities or facilities," and is not seeking an expansion of them. Crested Butte motion at 7, undisputed fact 2, and Division response, p. 6, undisputed fact 2. According to the Division, it can still apply antidegradation review in the absence of "new activities or facilities." Division response p. 6, paragraph 3. The Division relies on two declarations from Christine Wehner, Environment Protection Specialist, at the Division. Exhibits 1 and 2 to the Division's response. The second declaration provides at paragraph 19 that that "new or increased water quality impacts" means "new or increased impacts on water quality as compared to the reviewable date of the stream segment at issue." She goes on to say that the "reviewable date" for Washington Gulch and the Slate River are in 2000 and that of Woods Creek is 2007. Ms. Wehner's statements are not clear and are not supported by citations to the Regulation or to other controlling authority. She does not clearly identify any new or increased impacts from a time before those dates.

The same rules of construction that apply to statutes also apply to agency rules. *Regular Route Common Carrier Conference v. Public Utilities Commission*, 761 P.2d 737, 745 (Colo. 1988). Words and phrases are construed according to common usage. Section 2-4-101, C.R.S. Regulation 31.8 is not ambiguous and clearly applies to "new or increased water quality impacts." The status quo is that of the 2011 and 2013 renewals. It is a strained reading to say that "new or increased" is that from a time before 2000 and 2007.

Again, the AD Guidance is not a rule, and it is not enforceable except as it is persuasive. It is a statement by the Division as to its understanding of the application of Regulation 31.8. Still, the AD Guidance runs counter to the Division's current position. It provides at page 2:

It is important to note that an antidegradation review applies only to activities with new or increased water quality impacts.

...

An antidegradation review and associated significance determination, is necessary only for regulated activities that will have a new or increased water quality impact. This includes new activities or facilities; expansion of existing activities or facilities resulting in an increased load over the current authorized load; or *at the time of renewal*, any increase in the authorized discharge levels (effluent limits) in a permit over the current authorized discharge levels. [Italics added.]

Per Crested Butte, it is not seeking any increase in “load or limit” from that of its previous permit. Third affidavit of Caroline Byus, attached to Crested Butte’s reply. The AD Guidance also provides at p. 6:

This policy essentially grandfathers existing plants with their existing discharges as of September 30, 2000, so long as the waste load allocations are protective of water quality standards and uses.²

The ALJ grants partial summary judgment to Crested Butte as to this first issue: antidegradation review per Regulation at 31.8 (3) cannot be applied to the 2019 renewal in that there are no new or increased water quality impacts.

Issue 2, Division interpretation of AD Guidance

It is not clear to the ALJ whether the determination as to issue 1 resolves this issue 2. In issue 2, Crested Butte objects that it was allowed certain “non-impact limits” or “NIL’s” in the 2011 and 2013 permit renewals. Per Crested Butte, these were based on nine or ten samples over five years, apparently from 2005 to 2009. Crested Butte objects that the Division is now focusing on two, two-year periods for the two waterways at issue. Those dates are 2005-2006 for Woods Creek non-impact limits, and 2004-2005 for Washington Gulch and Slate River non-impact limits. As can be seen, these periods are not as recent as those advocated for by Crested Butte.

Crested Butte also objects that the Division has now imposed a non-impact limit for silver based on two years of testing that produced results below the detection limit for the test. It then imposed, according to Crested Butte, a non-impact limit also below the detection limit. The ALJ agrees that the very nature of a “non-detect” limit means that a measurement below that limit has no validity.

Crested Butte asserts that the Division did all this as part of an improper interpretation of the AD Guidance document, an interpretation inconsistent with its former practice in 2011 and 2013. But the ALJ has already agreed with Crested Butte that the AD Guidance document is not enforceable as a rule. As stated, this issue may have been resolved with the ALJ’s decision as to issue 1. If it has not been, this issue 2 is not clear enough for summary judgment. Certainly, the ALJ will say that more samples are better

² The AD Guidance was updated once on April 23, 2002. This entry was not modified.

than fewer, and that more recent data is more reflective of current conditions than is older data. Nothing in the AD Guidance changes these facts or mandates that these facts be disregarded.

Issue 3

This issue concerns the language “that portion of the segment impacted by the discharge” in Regulation 31.8(3):

(c) Significance Determination

The initial step in an antidegradation review shall be a determination whether the regulated activity in question is likely to result in significant degradation of reviewable waters The regulated activity shall be considered not to result in significant degradation ... if:

...

(ii) For all pollutants:

...

(B) The *new activity or increased discharge* from the source under review will consume, after mixing, less than 15 percent of the baseline available increment The baseline available increment is the increment between low-flow pollutant concentrations and the relevant standards for critical constituents *for that portion of the segment impacted by the discharge*. ... [T]he baseline low flow pollutant concentration shall represent the water quality as of September 30, 2000 ... and shall be determined at the time of the first proposed *new or increased water quality impacts* to the reviewable waters after that date. [Italics added.]

The ALJ agrees with Crested Butte that this language is inapplicable to the 2019 renewal. Again, there is no “new activity or increased discharge.”

Regulation 31.8(3)(c) also provides:

For the purposes of this subsection, the phrase “portion of the segment impacted by the discharge” means the portion of the stream from the discharge point to the first major tributary inflow, or as determined by the Division based on site-specific information at the time of the analysis.

Crested Butte also objects to application of this rule to waterways other than Woods Creek, specifically to Washington Gulch and the Slate River. These latter two waterways are below the “first major tributary inflow.” Crested Butte asserts that Washington Gulch and the Slate River are therefore not “impacted by the discharge,” as described in Regulation 31.8(3)(c)(ii)(B).

The ALJ is not clear whether this issue matters since, as decided in issue 1, antidegradation review is inapplicable to water quality impacts that are other than “new or increased.” Still, the “or as determined by the Division” language gives the Division some “site-specific” authority to go beyond the “first major tributary inflow.” The existence of such “site-specific information” is a disputed fact. To the extent this issue has not been resolved by the ALJ’s determination as to issue 1, summary judgment is denied.

Issue 4, Burden of proof

The Division agrees with Crested Butte that it has the burden of proof in this case. The Division appears to concede that it has the burden per Regulation 61.7(d)(ii), 5 CCR 1002-61:

(d) The person requesting the adjudicatory hearing shall have the burden of proof in all hearings ... except that the Division shall have the burden of proof under the following circumstances:

...

(ii) Where the Division denies renewal of a permit or changes the terms of a renewed permit and that denial or change is not based either upon significant changes in the facts relevant to water quality considerations or upon changes in the applicable statutes or regulations.

The Division’s Motion for Partial Summary Judgment

This motion has five issues which the ALJ will label A-E.

Issue A, the two-year data set

This is the other side of the coin from Crested Butte’s issue 2. The Division relies on certain references to the two-year period in the AD Guidance document. As described, that document has not been published as a rule and cannot be enforced against Crested Butte. Summary judgment in favor of the Division on this issue is denied.

Issue B, calculation of non-impact limits

Again, the Division argues that only a two-year period of data should be considered, not the five-year period used for the 2013 renewal. Again, it relies on portions of the AD Guidance. Summary judgment on this issue is also denied.

Issue C, Washington Gulch and the Slate River

This is the other side of Crested Butte’s issue 3, “portion of the segment impacted.” The Division asserts that Regulation 31.8(c) gives it “site-specific” authority to go beyond the “first major tributary inflow” and regulate the waters in Washington Gulch and the Slate River. This assumes, of course, that it can perform such review absent “new or increased water quality impacts.” Assuming for the sake of argument that the Division has authority over these two downstream waterways, there is still the factual dispute of “site-specific information at the time of the analysis.” Also, Regulation 31.8(c)(ii)(B) applies when: “new activity or increased discharge from the source under review will consume, after mixing,

less than 15 percent of the baseline available increment.” These unresolved factual issues make summary judgment as to this issue improper, and it is denied.

Issue D, zero low flows in Woods Creek and Washington Gulch

The Division asserts that Crested Butte failed to provide it with data showing that flows in Woods Creek and Washington Gulch were more than zero. Consequently, it imposed a “critical low flow condition,” which has the effect of not allowing for the dilution of pollutants. Crested Butte disputes that Woods Creek and Washington Gulch ever had zero flows. It asserts that such dilution should be taken into consideration when setting the limits for pollutants. These are factual disputes, and summary judgment is denied for this issue.

Issue E, setting baseline water quality at zero for non-detect

This is the other side to Crested Butte’s issue 2. The Division seeks summary judgment that its new practice of assuming no pollution at all for “non-detect” is correct. The Division admits that this would make it harder for Crested Butte to meet degradation requirements. Crested Butte argues that the detection limit itself should be the baseline. This is apparently what was done with the 2013 renewal. The ALJ agrees that the presence of pollutants cannot be inferred below a non-detect limit. Nevertheless, this issue is not sufficiently clear for the ALJ to grant summary judgment.

DONE AND SIGNED

November 30, 2021.



MATTHEW E. NORWOOD
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have served a true and correct copy of the above **ORDER GRANTING IN PART CRESTED BUTTE'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING THE DIVISION'S MOTION FOR PARTIAL SUMMARY JUDGMENT** was served upon the parties listed below by email to:

Steve Bushong, Esq.
Gunnar Paulsen, Esq.
Porzak Browning & Bushong, LLP
sjbushong@pbblaw.com
gpaulsen@pbblaw.com

Stefanie Neale, Assistant Attorney General
Krista Maher, Assistant Attorney General
Department of Law
stefanie.neale@coag.gov
krista.maher@coag.gov

Aaron Huckstep, Esq.
Huckstep Law, LLC
huck@hucksteplaw.com

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/s/ Jessica Soto
Office of Administrative Courts