

Kate M. Fox (Wy. Bar No. 5-2646)
J. Mark Stewart (Wy. Bar No. 6-4121)
DAVIS & CANNON, LLP
422 W. 26th St.
P.O. Box 43
Cheyenne, WY 82003
Tel: 307-634-3210
Fax: 307-778-7118

FILED
FEB 09 2010
Jim Ruby, Executive Secretary
Environmental Quality Council

**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE STATE OF WYOMING**

IN THE MATTER OF THE APPEAL OF)
POWDER RIVER BASIN RESOURCE) DOCKET NO. 09-3807
COUNCIL, AND WILLIAM F. WEST)
RANCH, LLC FROM WYPDES)
PERMIT NO. WY0094056)

PETITIONERS' MOTION FOR SUMMARY JUDGMENT

Petitioners, by and through their undersigned counsel, respectfully submit this Motion for Summary Judgment, pursuant to WRCP 56 and the Rules of the Environmental Quality Council. Petitioners request that the EQC grant summary judgment in favor of Powder River Basin Resource Council and William F. West Ranch, LLC for the reasons stated below. This Petition requires the Council to answer two questions of law as to which there are no disputed issues of material fact:

1. Can the EQC approve a permit that has been issued by DEQ without a valid scientific basis?
2. Can discharges made under permits issued by DEQ without valid scientific basis continue unless and until an injured landowner is able to prove the discharges will or have caused a measurable decrease in crop or livestock production?

BACKGROUND

On May 6, 2009, with the approval of the Administrator of WDEQ/WQD and the Director of WDEQ, WYPDES Permit No. WY0094056 (the Permit), was issued to Cedar Ridge, LLC (Cedar Ridge) authorizing discharge of water from coalbed methane wells into Spotted Horse Creek. Petitioners appealed the Permit on July 2, 2009 on the bases that the effluent limits for on EC and SAR in the Permit were not derived from appropriate scientific methods in violation of Water Quality Rules and Regulations, Chapter 2, Section 5(c)(iii)(C)(IV) and that the Permit authorized discharges that will not maintain the water supply at a quality which allows continued use of the water for agricultural purposes without a measurable decrease in production in violation of Water Quality Rules and Regulations, Chapter 1, Sec. 20.

Responses were filed by the Wyoming Department of Environmental Quality (DEQ) and Cedar Ridge on August 16 and August 31, 2009. By order entered October 28, 2009, the EQC approved the substitution of Stephens Energy, LLC (Stephens) for Cedar Ridge as a party/permittee. Written discovery, designation of experts and oral discovery have been completed in accordance with the Council's order of September 16, 2009 and the matter is set for hearing on May 12-14, 2010.

STATEMENT OF UNDISPUTED FACTS

WYPDES Permit No. WY0094056 (the "Permit") authorizes discharge from three outfalls into on-channel reservoirs located in ephemeral drainages tributary to Spotted Horse Creek. (Ex. 1, SOB, p. 2). The Permit provides for containment of the discharged water in 3 reservoirs. Outfall 001 discharges to Reservoir 004-SHS, an unlined, 3.32 acre, 19.35 acre-foot on-channel reservoir in Rucker Draw, a tributary of Spotted Horse Creek. (Ex. 1, p. 12; Ex. 2, p. 1) Reservoir 004-SHS is approximately seven (7) stream miles from the West Ranch on Spotted

Horse Creek. Outfall 002 discharges to the Spellman 54-75-6-11 Reservoir, an unlined, 1.82 acre, 19.9 acre-foot on-channel reservoir in Linn Draw, a tributary of Spotted Horse Creek. (Ex. 1, p.12; Ex. 3, p. 1). The Spellman 54-75-6-11 Reservoir is approximately twelve (12) stream miles from the West Ranch on Spotted Horse Creek. Finally, Outfall 003 discharges to the Spellman 54-75-11-11 Reservoir, an unlined, 1.82 acre, 19.9 acre-foot on-channel reservoir in Linn Draw, a tributary of Spotted Horse Creek. (Ex. 1, p. 12, Ex. 4, p.1). The Spellman 54-75-11-11 Reservoir is approximately eleven (11) stream miles from the West Ranch on Spotted Horse Creek.

DEQ identified irrigation as an agricultural use occurring below the permitted outfalls and that such use occurs on Petitioners' Wests land. (Ex. 1, SOB p. 2). The Permit established an effluent limit for Electrical Conductivity ("EC") of 2,680 $\mu\text{S}/\text{cm}$ for protection of that agricultural use. (Ex. 1, SOB, p. 2). DEQ's Agricultural Use Protection Policy describes a 3-tiered decision making process DEQ uses for establishing effluent limits for EC and Sodium Absorption Ratio (SAR) whenever a proposed discharge will likely reach irrigated lands. (Ex. 5, p. 57). DEQ used the now discredited "Tier 2" methodology to derive the effluent limit for EC in this permit. "Tier 2" attempts to protect agricultural use by limiting effluents so as not to exceed an average "background" water quality, which is derived by sampling and averaging soil electrical conductivity in irrigated fields. (Ex. 5, p. 59). Relying on Tier 2, DEQ determined that the average soil EC in irrigated fields affected by the Permit likely fell within the range of 4,024 to 5,356 $\mu\text{S}/\text{cm}$. (Ex. 1, SOB, p. 3). DEQ then divided the lower value by 1.5 to establish the effluent limit for EC of 2.680 $\mu\text{S}/\text{cm}$.

Petitioners' expert, Dr. Ginger Paige, states that the Tier 2 methodology is scientifically invalid and cannot be used to establish numeric effluent limits for EC and SAR that ensure no

measurable decrease in crop production. (Ex. 6, p. 2). As Dr. Paige explains, no evidence has been found in the peer-reviewed scientific literature that will support the methodology of Tier 2 to accurately determine background water quality. *Id.* Soil salinity is not a direct reflection or result of the quality of water applied. Dr. Paige explains that soil salinity changes with time in semi-arid environments and is primarily the result of soil characteristics, depth to groundwater, climate and irrigation management. *Id.* The Tier 2 methodology does not provide a reasonable or scientifically defensible method to determine the quality of water that historically flowed within a drainage system and will not support the establishment of scientifically defensible effluent limits for discharges that will not cause a measurable decrease in crop production. *Id.* Among the sources cited and relied upon by Dr. Paige in developing her expert opinion is a May 2009 report commissioned by the EQC which also concluded that “[t]he Tier 2 methodology is not reasonable for scientifically valid for determining the EC and SAR of water that can be discharged into an ephemeral drainage in Wyoming so that degradation of the receiving water will not be of such an extent to cause a measurable decrease in crop production.” (Hendrickx & Buchanan, Expert Scientific Opinion on the Tier-2 Methodology – Report to the Wyoming Environmental Quality Council, May 2009, p. iii).¹

The Permit did not set an effluent limit for Sodium Adsorption Ratio (“SAR”) and did not establish a volumetric limit on the quantity of water that may be discharged. Instead, the Permit requires that all effluent be contained in the on-channel reservoirs, unless DEQ grants prior written authorization for a release in association with assimilative capacity credits. (Ex. 1, SOB p. 1-2). The Permit otherwise requires all effluent discharged to the reservoirs to be contained during “dry operating conditions” – which means discharges are authorized in

¹ In the interest of space, Petitioners have not attached a copy of the Hendrickx & Buchanan report, which the Council already has in its possession.

conjunction with natural precipitation events. (Ex. 1, SOB p. 2). In spite of what Respondents may contend, this is not a total containment permit; which is why DEQ employed the Tier 2 methodology in the first place.

The reservoirs are unlined and the water placed in the reservoirs infiltrates into the soils underlying the reservoirs. Respondents can present no evidence that water does not escape the reservoirs through infiltration. (Ex. 7, Tr. 16-17, 22-25, 26-27). In fact, Stephens and its predecessors rely upon infiltration to manage the volume of water discharged. (See, original application for a WYPDES permit that covered reservoir Permittee's predecessor estimated that infiltration rates for ponds in the Spotted Horse Project Area were 5 acre-ft/acre/year and declined at 1.5% per month. (Ex. 8, p. 4)). Infiltrated water can move vertically and horizontally through the soil to reach surface streams. (Ex. 7, p. 23-24).² In addition to the reservoirs in this Permit, there are numerous other unlined reservoirs upstream of the Wests, many of which that leak or otherwise contribute water to Spotted Horse Creek as it crosses the West Ranch. (Ex. 9; Ex. 10, p. 12, 28-32). Despite this, the Permit places no limitation on infiltration nor does it require groundwater monitoring between the reservoirs and the West Ranch, or on the West Ranch. (Ex. 1).

Finally, it is undisputed that petitioners cannot prove by a preponderance of the evidence that the water discharged under the Permit has or will cause a measurable decrease in crop or livestock production on the West Ranch.

² Hendrixx & Buchanan recognized this problem when they said:

In Ivy Creek CBM water discharged in the creek and never makes it to the downstream landowner. This is considered a success but is it? Where did the water and the salts go? Nobody knows since monitoring is not part of a Tier 2 or Tier 1 permit. The water is probably decreasing the depth of an existing water table and will sooner or later reach the root zone and result in soil salinization. Or the saline waters may start seeping towards the downstream landowner.

Hendrixx & Buchanan, *EXPERT SCIENTIFIC OPINION ON THE TIER-2 METHODOLOGY*, Report to the Wyoming Department of Environmental Quality, May 2009, p.19.

ARGUMENT

A. Issues Presented on Summary Judgment.

Pursuant to Wy. R. Civ. P. 56(c) summary judgment may be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. There are two issues in this appeal. First, whether the effluent limits in the Permit meet statutory and regulatory requirements – that is whether the effluent limit for EC was derived by appropriate scientific methods and whether an effluent limit for SAR is required. Second, whether it is the Petitioners' burden to prove that discharges authorized under the permit will result in a measurable decrease in crop production.

There are no disputed facts as to the first issue. Petitioners' expert, as well as the experts commissioned by the Council, have opined that Tier 2 is not scientifically valid and that there is no basis in science for the premise on which it is based – namely that historic water quality can be determined from sampling and analysis of soil salinity data. Respondents have offered no evidence to the contrary.

As to the second issue Petitioners are unable to show by a preponderance of the evidence that the water discharged under the Permit has or will cause a measurable decrease in crop or livestock production on the West Ranch. If the Council believes it is the Petitioners' burden to make that showing, it should grant summary judgment in favor of Respondents.

B. The Permit's Effluent Limitations for Protection of Irrigation Do Not Satisfy Regulatory and Statutory Requirements.

DEQ has identified EC and SAR as the parameters or constituents of concern for protecting irrigation uses below CBM outfalls, and it therefore must establish effluent limitations for both EC and SAR that will ensure there is no measurable decrease in crop production. These must be established by appropriate scientific methods.

1. DEQ Is Required to Use Appropriate Scientific Methods to Establish Numeric Effluent Limits

The policy and purpose of the Wyoming Environmental Quality Act (EQA), WYO. STAT. §§ 35-1-101 et seq. is expressly described in WYO. STAT. § 35-1-102.

Whereas pollution of the air, water and land of this state will imperil public health and welfare, create public or private nuisances, be harmful to wildlife, fish and aquatic life, and impair domestic agricultural, industrial, recreational and other beneficial uses; it is hereby declared to be 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; to plan the development, use, reclamation, preservation and enhancement of the air, land and water resources of the state; to preserve and exercise the primary responsibilities and rights of the state of Wyoming; to retain for the state the control over its air, land and water and to secure cooperation between agencies of the state, agencies of other states, interstate agencies, and the federal government in carrying out these objectives.

The purpose of the EQA is not only to prevent and minimize pollution but to allow pollution only if it does not impair beneficial use of the waters of the state. Thus the EQA prohibits anyone to “cause, threaten or allow the discharge of any pollution or wastes into the waters of the state” or to “alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state” except when authorized by a permit issued pursuant to the EQA. WYO. STAT. § 35-11-301(a)(I) – (ii). The extent to which the EQA allows alteration of the Wyoming’s waters is prescribed by the water quality standards. Wyoming’s water quality standards are contained in Chapter 1 of the Water Quality Rules and Regulations (WQRR). Water quality standards may be either numeric or narrative. (*see* WQRR, Chapter 2, Sec. 3(b)(ci)). At issue in this case is Chapter 1, Section 20 of the WQRR which provides a narrative water quality standard for the protection of agricultural uses, to wit:

All Wyoming surface waters which have the natural water quality potential for use as an agricultural water supply shall be maintained at a quality which allows continued use of such waters for agricultural purposes.

Degradation of such waters shall not be of such an extent to cause a measurable decrease in crop or livestock production.

Unless otherwise demonstrated, all Wyoming surface waters have the natural water quality potential for use as an agricultural water supply.

The procedures used to implement this section are described in the "Agricultural Use Protection Policy."

It is the DEQ water quality administrator's duty to establish a permit system that prescribes "Effluent standards and limitations **specifying the maximum amounts or concentrations** of pollution and wastes which may be discharged into waters of the state." WYO. STAT. § 35-11-302(a)(ii). (emphasis added). The permit regulations, described in Chapter 2 of the WQRR, state that where an effluent constituent "has the reasonable potential to adversely impact a designated use of receiving surface waters of the state and no numeric standard has been promulgated . . . for the constituent, the administrator may establish a numeric effluent limitation based on values derived from appropriate scientific methods." WQRR, Chapter 2, Sec. 5(c)(iii)(IV). Effluent limitations are defined as "any restriction established by the state or by the administrator of the Environmental Protection Agency 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." WQRR, Chapter 1, Sec. 2(b)(xv). (emphasis added).

Therefore, it is DEQ's duty to write permits that contain effluent limitations on the amount or concentration of the constituents of concern so that the applicable water quality standards in the receiving water are not violated. DEQ determined that EC and SAR are constituents that have reasonable potential to adversely impact irrigation occurring downstream of the outfalls authorized by the Permit. (Ex. 1, SOB, p. 2; Ex. 5, p. 55). In this Permit, DEQ

elected to establish a numeric limitation on the EC of the discharged water. Having elected to set a numeric limit for EC, the regulations require that it have been derived by an appropriate scientific method.

There is no dispute that Tier 2, DEQ's methodology for deriving a numeric effluent limitation for EC, is not an appropriate scientific method. The only evidence before the Council on this issue is that offered by Drs. Paige, Hendrickx and Buchanan who categorically deny any basis in science for the assumption that background water quality can be determined from sampling soil salinity. (Ex. 3, p. 2, Hendrickx & Buchanan, p. iii, 11-14). A method whose whole premise is based on a scientifically invalid assumption cannot be an appropriate scientific method. Pursuant to the EQA and DEQ's WWRR, the Permit cannot be issued.

2. The Permit Fails to Establish the Required Effluent Limitation for SAR.

DEQ has identified SAR as a parameter of concern in regard to irrigation. (Ex. 5, p. 55). SAR is a ratio of sodium to calcium and magnesium dissolved in the water. Thus, the sodium, calcium and magnesium are effluent constituents that have the potential to adversely impact a designated use. By the plain language of the WYO. STAT. 35-11-302 and WQRR, Chapter 2, Sec. 5(c)(iii)(IV), DEQ was required to establish an effluent limitation for these constituents. The Permit contains no limit on the SAR, or on the concentrations of sodium, calcium or magnesium that may be discharged from the outfalls described in the permit. Neither does it contain a restriction on the quantity or rate that these constituents may be discharged from the outfalls. The Permit allows discharge to Spotted Horse Creek from the reservoirs when DEQ approves a release in association with the use of assimilative capacity credits or when the reservoirs overtop due to natural

precipitation events. In both of these cases, the Permit contains no limit on the quantity, rate or concentration of the sodium, calcium, magnesium that may be discharged.

In addition to overtopping events, because the reservoirs are unlined, the probability is that water stored in the reservoirs will infiltrate into the underlying soils as a result of hydrostatic pressure and the matrix potential of the soils. (Ex. 7, pp. 23-24). As a result of infiltration, water infiltrating from the reservoirs may contribute to base flows in Spotted Horse Creek. *Id.* Respondents provided no evidence that water stored in these reservoirs does not infiltrate the underlying soils. (Ex. 10). The Permit does not prohibit infiltration nor does it require monitoring of infiltration. Without such a requirement, there is no effluent limitation on the amount of water that may contribute to the flow in Spotted Horse Creek and there are no effluent limitations on the SAR of that water.

DEQ failed to use an appropriate scientific method to derive the numeric effluent limitation for EC in the Permit. The Permit also fails to establish an effluent limitation for SAR. As a matter of law, these failures violate WQRR Chapter 2, Sections 5(c)(iii)(IV). Pursuant to WQRR Section 9(a)(vi), the Permit may not be issued. Petitioners therefore request that the EQC grant Petitioners motion for summary judgment.

C. The EQC May Not Approve the Permit Because Petitioners Fail to Show that Discharges Made Under the Permit Will Result in a Measurable Decrease in Crop Production.

As described above, the undisputed facts in this case demonstrate that DEQ has failed to establish effluent limitations for EC and SAR that comply with the EQA, and Wyoming water quality standards and permit regulations. Respondents are expected to argue the EQC can still approve the permit because the Petitioners are unable to show by a preponderance of the evidence that discharges authorized by the Permit will result in a measurable decrease in crop production.

EQC cannot approve the permit on this basis, for two reasons. First, the EQA does not vest the EQC with that authority. Second, burden of proof, including the burden of production and the burden of persuasion, is properly placed on the DEQ and permittee to show by a preponderance of the evidence that discharges under the permit will not result in a measurable decrease in crop production.

1. The EQC Lacks Authority to Approve a Permit that Does Not Meet the Requirements of the EQA and Water Quality Rules and Regulations

If the EQC approves a permit that does not meet the requirements of the EQA and of the Water Quality Rules on Regulations on the basis that a Petitioner appealing the permit has failed to show that he will be suffer damage, it would be excusing DEQ from doing its job of writing permits. WQRR Chapter 2, Section 5(c)(iii)(C)(IV) requires that EQC have evidence that there is adequate scientific basis for concluding that the permit terms are protective. To approve a permit on the basis that the evidence does not show the limits not to be protective is to rewrite the permit for DEQ. The EQC does not have the statutory authority to do that. Furthermore, it would only encourage a practice of shoddy work to allow DEQ to issue permits based on inadequate data and poor scientific method, and to allow discharges to continue under such invalid permits until such time as an affected landowner has gone to considerable effort and expense to challenge the permit. Shouldn't every permit, challenged or not, be issued by DEQ with the same scientific rigor?³

³ For example, there are approximately 170 WYPDES permits that are based on Tier 2 of the Ag Use Policy. As the Council is aware, there is good reason to believe that policy is unsound, and the permits issued with that methodology do not have an adequate scientific basis. If an affected landowner had the time and the money to challenge one of those permits, and at the hearing on that permit appeal, DEQ, or more likely, the permit applicant, presented all new data and scientific analysis to support the permit terms, the EQC might, on that entirely new basis, find the permit terms to be protective. DEQ would then have very little incentive, when the other 169 permits come up for renewal, to issue them on a sound scientific basis that is

- The DEQ Director has the “power and duty to issue, deny, amend, suspend or revoke permits. . .” W.S. 35-11-109(a)(xiii).
- The DEQ Director is to issue permits “upon proof by the applicant that the procedures of this act and the rules and regulations promulgated thereunder have been complied with.” W.S. 35-11-801(a).

As explained above, the rules relevant to this proceeding are Wyoming Water Quality Rules, Ch. 1, § 20 and Wyoming Water Quality Rules, Ch. 2, Section 5(c)(iii)(C)(IV).

The Council’s duties and role does not encompass rewriting WYPDES permits.

- The Council’s duty is to “act as the hearing examiner for the department and [] hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or determined by the” DEQ. WYO. STAT. § 35-11-112(a).
- “The Council shall ... [c]onduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit ... authorized or required by this act...” WYO. STAT. § 35-11-112(a)(iv).
- The Council may “[o]rder that any permit . . . be granted, denied, suspended, revoked or modified.” WYO. STAT. § 35-11-112(c)(ii).
- The Environmental Quality Council “shall not be with the department of environmental quality but shall be a separate operating agency, and . . . all programs and functions specified in chapters 11 and 12 of title 35 shall be with the department of environmental quality.” WYO. STAT. § 9-2-2013.

transparent to the affected public. It would instead continue to rely on the permit applicant and the Council to do its job for it, only as to those permits that a landowner brought to the Council’s attention.

Clearly, it is DEQ's job to issue, deny, amend, suspend or revoke permits. EQC's job is to review the DEQ's permit decision on appeal. When the Council acts in its adjudicative capacity and hears a contested case, it resembles a "lower tribunal," not an administrative agency. *Antelope Valley Imp. v. State Bd. of Equalization*, 4 P.3d 876, 2000 WY 85 ¶6. As such, the Council may not depart from its adjudicative role and may not proceed to rewrite DEQ permits.

The Wyoming Supreme Court has answered this question before in the context of the Board of Equalization, which acts as the reviewing body for the Department of Revenue; in the same way that the EQC acts as the reviewing body for the DEQ. In *Amoco Prod. Co. v. Wyoming State Bd. of Equalization*, 12 P.3d 668, 2000 WY 84, the Wyoming Supreme Court invalidated the Board's decision because the Board had exceeded its statutory authority when it departed from its role of reviewing a final decision of the Department, and instead proceeded to prescribe the system to establish fair market value for mineral production. *Id.* at ¶1. The Court held that the Board improperly departed from its adjudicatory role to assume functions statutorily assigned to the Department of Revenue. *Id.* The Court held:

The only way to harmonize the various descriptions of the review or appeal function of the Board is to hold that the Board is limited to an adjudicatory decision making its review on the record. **It is only by either approving the determination of the Department, or by disapproving the determination and remanding the matter to the Department, that the issues brought before the Board for review can be resolved successfully without invading the statutory prerogatives of the Department.**

Id. at ¶23 (emphasis added).⁴

⁴ This conclusion is consistent with the "functional division" created by government reorganization, that generally disconnects traditional executive branch activities (such as tax collection and permitting) from the rule making and review functions retained by quasi judicial separate operating agencies (such as the Council and the State Board of Equalization). *Amax Coal Co. v. State Bd. of Equalization*, 819 P.2d 825, 833 (1991). "Any other exercise of authority violates the clear intent of the legislature." *Antelope Valley Imp. v. State Bd. of Equalization*, 992 P.2d 563, 1999 WY 165 ¶16, citing *Basin Electric*, 970 P.2d at 849.

Because the EQC has no authority to rewrite DEQ's permits, it should exclude any evidence of a new and different scientific basis to justify the permit terms.

Because the Council can only approve or disapprove the permit as written by the DEQ, the Council is without authority to approve a permit that does not meet the requirements of the EQA and water quality rules and regulations.

2. The Burden of Proof is Properly on the Agency

"Allocation of the burden of proof is a matter of law." *J.M. v. Dep't of Family Servs.*, 922 P.2d 219 (Wyo. 1996). The general rule in administrative law is that, unless a statute otherwise assigns the burden of proof, the proponent of an order has the burden of proof. *Id.* "In general, an agency is the proponent of its orders, while an applicant for benefits or for a license is the proponent in eligibility determinations." *Id.* The burden of proof has two components - the burden of production and the burden of persuasion. *Id.*

In *J.M.* a father challenged a decision by the Department of Family Services to place his name on a central registry of persons who were the subjects of child abuse complaints. 922 P.2d at 220. The Wyoming Supreme Court, looking to the purposes of the pertinent statutory provisions determined that

in acknowledging the seriousness of child abuse accusations, the legislature intended for the general rule which places the burden of proof upon the agency to apply. The agency was the proponent of an order holding that the child abuse allegations against the father had been substantiated and, therefore, had both the initial burden of production and the ultimate burden of persuasion.

Id. at 222. The Court also determined that public policy supported placing the burden on the agency, noting that "if the agency has truly substantiated the child abuse reports, it should not be reluctant to assume the burden of proof at the hearing." *Id.*

Here, DEQ and Stephens are the proponents of an order that establishes an effluent limitation for EC of 2,860 $\mu\text{S}/\text{cm}$ and established no effluent limitation on SAR. DEQ and Stephens must therefore produce evidence that the EC limitation was derived from appropriate scientific methods and that an effluent limitation for SAR is not required. The DEQ and Stephens also bear the burden of proof (both of production and persuasion) that discharges made under the Permit will not result in a measurable decrease in crop production.

a. Petitioners Have Met Their Burden While DEQ and Stephens Have Not

Pursuant to the general rule of administrative law, Petitioners have the burden of production to show that DEQ failed to use appropriate scientific methods to derive the effluent limit for EC and that there is no effluent limit for SAR. As explained in part A above, Petitioners have produced evidence showing that DEQ failed to use appropriate scientific methods to derive the effluent limit for EC. Petitioners have therefore met this burden. The burden of persuasion rests with DEQ and Respondents to persuade the Council that DEQ used appropriate scientific methods to derive the effluent limit for EC and that an effluent limit for SAR is not required. DEQ and Stephens have failed to produce any evidence to the contrary.

b. Petitioners Need Not Prove That Damage Will Occur

The purpose of the EQA and the statutes and rules cited above is to prevent damage. If the landowner is required to present the Council with a dead body before it will take action, then the permit objective will already have failed and there will be no way to bring the corpse back to life.

The EQA places the burden of proof on the agency in a contested case challenging the grant of a WYPDES discharge permit. The applicable substantive statute here is

The EQA addresses permit issuance in WYO. STAT. § 35-11-801(a):

When the department has, by rule or regulation, required a permit to be obtained it is the duty of the director to issue such permits **upon proof by the applicant that the procedures of this act and the rules and regulations promulgated thereunder have been complied with.**

(emphasis added).⁵ Clearly, the applicable statutes here indicate a legislative intent that DEQ and the permittee, as proponents of the Permit, have the burden of proving compliance with the water quality rules and regulations. Again, the applicable rule at issue here is found at Chapter I, Wyoming Surface Water Quality Standards

Since, as DEQ recognizes in its Agricultural Use Protection Policy where it states, at ¶ III, “The goal is to ensure that pre-existing irrigated crop production will not be diminished as a result of the lowering of water quality,” the applicable statutes, rules and regulations taken together impose the upon the agency and the applicant the burden of proving that the effluent limits will not result in a measurable decrease in crop or livestock production. To hold otherwise would relieve DEQ of the duties imposed upon it by the EQA, as DEQ could establish effluent limits based on little to no information, using whatever methods it desires (including throwing darts at a dartboard) and force the persons it is charged with protecting to prove that those limits are not protective. Such a holding would completely undermine and defeat the purpose of the EQA.

CONCLUSION

There are no genuine disputes of material fact that the effluent limitation established for EC in Permit WY0094056 was not derived using appropriate scientific methods as required by

⁵ See also Wyo. Stat. § 35-11-302(a)(vi) which requires the administrator, in recommending a permit, consider all of the following:

- (A) The character and degree of injury to or interference with the health and well being of the people, animals, wildlife, aquatic live and plant life affected;
- (B) The social and economic value of the source of pollution;
- (C) The priority of location in the area involved;
- (D) The technical practicability and economic reasonableness of reducing or eliminating the source of pollution; and
- (E) The effect upon the environment.

WWQR, Chapter 2, Section 5(c)(iii)(C)(IV). Additionally, there is no dispute that the Permit does not contain an effluent limitation for SAR as required by the EQA and WWQR. Petitioners therefore request that the Council grant Petitioners' Motion for Summary Judgment and revoke Permit WY0094065.

DATED this 9th day of February, 2010.

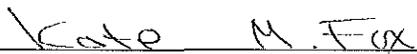
Kate M. Fox
Kate M. Fox (Wy. Bar No. 5-2646)
J. Mark Stewart (Wy. Bar No. 6-4121)
DAVIS & CANNON, LLP
422 W. 26th Street
Cheyenne, Wyoming 82003
307-634-3210
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I certify that on the 9th day of February, 2010, I served a true and correct copy of the foregoing by U.S. mail and email to:

Luke Esch
Mike Barrash
Wyoming Attorney General's Office
123 Capitol Building
Cheyenne, WY 82002
MBARRA@state.wy.us
Attorney for WDEQ

Michael J. Wozniak
William E. Sparks
Beatty & Wozniak, P.C.
216 Sixteenth Street, Suite 1100
Denver CO 80202-5115
mwozniak@bwenergylaw.com
wsparks@bwenergylaw.com



J. Mark Stewart