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

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

**RESPONDENT'S OBJECTIONS TO PETITIONERS' PROPOSED FINDINGS OF
FACTS AND CONCLUSIONS OF LAW AND RESPONDENTS PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW**

Respondent, Stephens Energy Company, LLC (Stephens), through counsel, files these Objections to the Powder River Basin Resource Council (PRBRC), and William F. West Ranch, LLC (West) (collectively, Petitioners) Proposed "Order Denying Motion to Strike Expert Witness, Denying Respondent Stephens Energy Company LLC's Motion to Dismiss and Motion for Summary Judgment, Granting Petitioner's Motion for Summary Judgment, and Revoking WYPDES Permit No. WY0094056" (Petitioner Proposed Order) filed on March 25, 2010. Stephens also files the attached Proposed Findings of Fact and Conclusions of Law that

accurately depict the Petitioners' appeal in their protest of the WYPDES Permit No. WY0094056.

I. Objections to Petitioners' Proposed Order

Stephens submits the following specific objections to Petitioners' Proposed Order¹:

1. At the March 11, 2010 Hearing, the Environmental Quality Council (EQC) did not vote on Stephens' Motion for Summary Judgment. Thus, Stephens objects to Petitioners' Proposed Order and any reference to the EQC denying Stephens' Motion for Summary Judgment.

2. Paragraph 4 – Dr. Paige is not qualified to opine on matters regarding WYPDES Permit No. WY0094056 as Dr. Paige has done no study or analysis regarding Stephens' water management related to WYPDES Permit No. WY0094056.

3. Paragraph 8 – WYPDES Permit No. WY0094056 does not authorize “discharge from coalbed methane wells into Spotted Horse Creek.” WYPDES Permit No. WY0094056 does not authorize any intentional discharge whatsoever and requires that all effluent be contained into 3 indentified impoundments.

4. Paragraphs 14 & 15 – Stephens objects that Dr. Paige is not an expert related to WYPDES Permit No. WY0094056 or to the 3 impoundments at issue. Dr. Paige did not conduct any of her own research or analysis in this case.

5. Paragraph 16 – Stephens submitted evidence that the Hendrickx and Buchanan Report does not apply to this appeal and did not consider any situations where, as in WYPDES Permit No. WY0094056, water was discharged into impoundments and not directly into epheremel drainages.

¹ Stephens does not waive its objections to all paragraphs of Petitioners' Proposed Order.

6. Paragraph 17 – The permit establishes a formula to establish an SAR limit. *See* Permit at 7. SAR was not the justification for the EQC’s determination in this appeal.

7. Paragraph 18 – Stephens has never requested, nor been granted, permission by the Wyoming Department of Environmental Quality (DEQ) to release discharges via assimilative capacity credits or in conjunction with any precipitation event.

8. Paragraph 19 – Petitioners presented no evidence that any water leaves the impoundment through infiltration. 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. Dr. Paige is not an expert related to WYPDES Permit No. WY0094056 or to the 3 impoundments at issue.

9. Paragraphs 20 & 21 – 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. Both paragraphs are irrelevant to this appeal.

10. Paragraph 22 – Petitioners are unable to contribute any loss in agriculture production to the current Permit. Petitioners admit that damages to their land and agricultural uses are a result of flooding and direct discharges into Spotted Horse Creek.

11. Paragraphs 25, 26 & 27 – Petitioners have articulated an incorrect standard for standing to challenge DEQ’s issuance of a permit under the EQC’s rules and regulations and the Wyoming Administrative Procedures Act (WAPA). Petitioners did not propose this as the standard in their Motion for Summary Judgment or Opposition to Stephens Motion for Summary Judgment. The EQC made no findings on these issues.

12. Paragraph 31 – Petitioners have articulated an incorrect standard for the burden of proof of an appeal of the issuance of a DEQ Permit. The burden of proof lies with the party appealing the agency’s decision.

13. Paragraphs 36 & 37 – The Hendrickx and Buchanan Report does not apply to this appeal and did not consider any situations where, as in WYPDES Permit No. WY0094056, water was discharged into impoundments and not directly into ephemeral drainages.

14. Paragraph 38 – The Permit does establish a SAR limit. Petitioners admit this in their own Proposed Order Paragraph 17. *See also* Permit at 7. SAR was not the justification for the EQC’s determination in this appeal.

15. Paragraph 39 – Petitioners presented no evidence that any water leaves the impoundment via infiltration. Stephens has never requested, nor been granted, permission by the DEQ to release discharges via assimilative capacity credits or in conjunction with any precipitation event. 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.

16. Paragraph 40 – Stephens objects to the sentence that “DEQ cannot contend these are full containment reservoirs without obtaining such information.” This is beyond the scope of Petitioners challenge and irrelevant to this appeal. Petitioners presented no evidence that any water leaves the impoundment via infiltration. 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.

17. Paragraph 41 – Petitioners presented no evidence that any water leaves the impoundment in any way. Stephens has never requested, nor been granted, permission by the

DEQ to release discharges via assimilative capacity credits or in conjunction with any precipitation event. 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.

18. Paragraph 42 – The Permit does establish a SAR limit. Petitioners admit this in their own Proposed Order Paragraph 17. *See also* Permit at 7. SAR was not the justification for the EQC’s determination in this appeal.

19. Paragraphs 43 & 44 – The Permit does not violate, as a matter of law, QRR Chapter 2 because it failed to establish a SAR. The Permit does establish a SAR, as Petitioners have admitted several times in their own Proposed Order. *See also* Permit at 7. SAR was not the justification for the EQC’s determination in this appeal.

20. Paragraphs 46 & 47 – Petitioners have articulated an incorrect standard for the burden of proof of an appeal of the issuance of a DEQ Permit. The burden of proof lies with the party appealing the agency’s decision. Petitioners did not propose this as the standard in their Motion for Summary Judgment or Opposition to Stephens Motion for Summary Judgment.

21. Conclusion - The Permit does establish a SAR, as Petitioners have admitted several times in their own Proposed Order. *See also* Permit at 7. SAR was not the justification for the EQC’s determination in this appeal.

II. Additional Proposed Findings and Facts and Conclusions of Law

In addition to the objections to Petitioners’ Proposed Order discussed above, Stephens submits its Proposed Findings of Fact and Conclusions of Law which more accurately depict the current appeal.

FINDINGS OF FACT

1. The three impoundments described in the Permit were constructed in 2001. The DEQ authorized produced water discharges into these three impoundments in 2001 by Permit Nos. WY0045829 and WY0046469, and these impoundments have been in use since.

2. The Wests' property is located approximately 10 miles downstream from the three impoundments. The Permit requires that all effluent discharge be contained within the three impoundments. Permit at 1. The Permit does not authorize intentional discharge which would enter and cross the Wests' lands.

3. Neither Petitioners, nor Dr. Paige, have visually inspected any of the three impoundments, tested any of the discharges, nor sampled and tested any of the water or soils in and around the impoundments. Marge West Depo. at 8, Bill West Depo. at 30 and Jill Morrison Depo. at 43-44.

4. Petitioners have no evidence that Stephens discharges water into Spotted Horse Creek or its ephemeral tributaries. Petitioners have no evidence that Stephens discharges water that would enter or cross their land. "8. WYPDES Permit No. WY0094056 does not authorize any intentional discharge of water into any ephemeral tributary of Spotted Horse Creek or Spotted Horse Creek. **Petitioners' Response:** Admit" & "17. **Petitioners Response:** Petitioners admit they have no evidence that water from Stephens' impoundments has escaped or otherwise left the impoundment so as to reach a tributary of Spotted Horse Creek or so as to reach Spotted Horse Creek." Petitioners' Responses to Stephens First Combined Discovery Requests, Nos. 8 & 17.

5. Petitioners have no evidence demonstrating that effluent has leaked, infiltrated seeped or in any way escaped the three impoundments in this Permit. M. West Depo. at 8; B. West Depo. at 32; Morrison Depo. at 43-44; Paige Depo. at 20, lines 12-15. "**Question:** Do you

have any specific information about these reservoirs in particular, that they leak? **Answer:** No.” Morrison Depo. at 14, lines 1-4. Petitioners’ discovery responses are consistent with these statements:

6. Petitioners have no evidence that Stephens has not fully complied with the terms of the Permit. M. West Dep. at 33.

7. Petitioners have no evidence that issuance of the Permit will cause a decrease in water quality of Spotted Horse Creek or crop production. B. West Depo. at 37, lines 12-15, M. West Depo. at 36, lines 2-13. **“Question:** So you cannot contribute any loss of crop production to these three specific impoundments. **Answer:** Not specifically, no.” B. West Deposition at 32, lines 10-17; 37 at lines 12-15. **“Petitioners have no evidence that CBM water discharged specifically from Stephens’s impoundments has decreased their agricultural production. **Petitioners Response:** Admit.”** Petitioners’ Responses to Stephens First Combined Discovery Requests, No. 19.

8. Petitioners admit they have not put forward any evidence showing that the effluent limits set forth in the Permit would harm Petitioners. Neither Petitioners, nor Dr. Paige, have any evidence on the specific conditions in the Permit, nor that the EC and SAR limits in the permit are not protective. Paige Depo. at 22; Morrison Depo. at 27, lines 18-25.

9. Petitioners admit they “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.” Petitioners’ Motion for Summary Judgment at 6.

10. Crop production has increased during the time which the discharges into the impoundments have occurred. Petitioners Response to DEQ’s Discovery at 9, ¶ 9

11. Stephens does not discharge any water into the Spotted Horse Creek or any ephemeral tributary of Spotted Horse Creek. Logan Decl. at ¶ 8. Although the Permit allows for discharges with use of the assimilative capacity credits, Stephens has never applied for or been granted authorization to discharge water into Spotted Horse Creek under this program. Logan Decl. at ¶ 11. Stephens' operations contain all discharge water in the three impoundments described in Permit No. WY0094056. Logan Decl. at ¶ 9.

12. The three impoundments described in Permit No. WY0094056 have never overtopped nor leaked, and water has not breached the impoundments in any way. Logan Decl. at ¶ 9.

13. Either Stephens or its contractors visually inspect the three impoundments on a consistent basis, but no less than once per week. Logan Decl. at ¶ 10. There has never been any visual evidence of leaks, seepage, overtopping, nor any examples of the impoundments not containing all of the water that is discharged into them. Logan Decl. at ¶ 10.

14. The DEQ has not previously found Stephens to be in violation of Permit No. WY0094056. DEQ's Resp. to Disc. No. 6; Logan Decl. at ¶ 12. The DEQ has not sent Stephens a notice of violation regarding any aspect of Permit No. WY0094056. DEQ's Resp. to Disc. No. 6.

CONCLUSIONS OF LAW

Standing to Challenge Before the EQC

15. An "aggrieved party" is defined by the Environmental Quality Act (EQA) as: "any person named or admitted as a party or properly seeking or entitled as of right to be admitted as a party to any proceeding under this act because of damages that person may sustain

or be claiming because of his unique position in any proceeding held under this act” Wyo. Stat. Ann. § 35-11-103(vii).

16. Under the Wyoming Administrative Procedure Act, “any person aggrieved or adversely affected in fact by a final decision of an agency...is entitled to judicial review in the district court for the county in which the administrative action or inaction was taken.” Wyo. Stat. Ann. § 16-3-114(a). An “aggrieved or adversely affected person is one who has a legally recognizable interest in that which will be affected by the action.” *Northfork Citizens For Responsible Development v. Park Co. Board of Comm’rs*, 2008 WY 88, ¶ 9, 189 P.3d 260, 262 (Wyo. 2008) (citing *Roe v. Board of County Comm’rs, Campbell County*, 997 P.2d 1021, 1023 (Wyo. 2003)). The harm alleged must be “a perceptible, rather than a speculative, harm resulting from the agency action.” *Id.* The interest affected must be “substantial, immediate, and pecuniary. A future, contingent, or merely speculative interest is ordinarily not sufficient.” *Id.*

17. DEQ’s General Rules of Practice & Procedure provide that a “Protestant” is: Any person desiring to protest the application of a permit or any person requesting a hearing before the Environmental Quality Council in accordance with the Environmental Quality Act and who is objecting to an action of the Department of Environmental Quality and desiring affirmative relief. *See* Chapter 1, Section 2(a)(ii).

Burden of Proof

18. The Wyoming Supreme Court made clear that the burden of proof lies with the party appealing the agency’s decision. *Casper Iron & Metal, Inc. v. Unemp. Ins. Comm’n of Dep’t of Employment of Wyo.*, 845 P.2d 387, 392 (Wyo. 1993); *see also Williams Production RMT Co. v. State Dept. of Revenue*, 2005 WY 28, ¶ 7, 107 P.3d 179, 183 (Wyo. 2005). If the “party with the burden of persuasion has not sustained it by a fair preponderance of the evidence-

if the evidence is in equipoise or the opposing party's preponderates-the party with the burden must fail.” *Casper*, 845 P.2d at 393.

19. Petitioners are required to show by a preponderance of the evidence that discharges meeting the effluent limits established in the Permit will result in a measurable decrease in agricultural production. Petitioners acknowledge that “it is undisputed that petitioners cannot prove by a preponderance of the evidence that the water discharged under [Stephens’] Permit has or will cause a measurable decrease in crop or livestock production on the West Ranch.” Petitioners Motion for Summary Judgment at 5.

20. “[T]he party challenging the sufficiency of the evidence has the burden of showing that lack of substantial evidence to support the agency’s findings.” *Faber v. State Dept. of Transp.*, 2009 WY 137, ¶ 5, 220 P.3d 236, 237 (Wyo. 2009). Accordingly, Petitioners bear the burden of proof.

21. In order to succeed on a permit appeal, Petitioners are required to show that the permit conditions authorized by DEQ are unfounded or otherwise not in accordance with the law. “Findings of Fact, Conclusions of Law and Order,” *In Re: Appeal of Prairie Dog Ranch, Inc.*, EQC Docket No. 09-3805, ¶ 16 (Mar. 12, 2010); *see also Knight v. Env'tl. Quality Council*, 805 P.2d 268 (Wyo. 1991).

22. In a contested case, Petitioners must demonstrate by a preponderances of the evidence that the conditions in the permit issued by DEQ were not “supported by relevant evidence” which a “reasonable mind” might accept. “Findings of Fact, Conclusions of Law and Order,” *In Re: Appeal of Prairie Dog Ranch, Inc.*, EQC Docket No. 09-3805, ¶ 18; *see also Penny v. Wyo.*, 2005 WY 117, ¶12, 120 P.3d 152, 160 (Wyo. 2005) and *Dale v. S&S Builders, LLC*, 2008 WY 84, 188 P.3d 554 (Wyo. 2008).

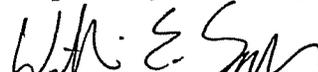
Conclusions of Law

23. Water Department of Water Quality Rules and Regulations, Chapter 1, Section 20 states, "**Agricultural Water Supply.** 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."

24. "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." Petitioners' Motion for Summary Judgment at 6.

Dated this 9th day of April, 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE

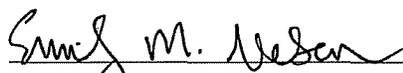
I hereby certify that on this 9th day of April, 2010, I sent a copy of the foregoing via electronic mail and overnight mail to:

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