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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE STATE OF WYOMING

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

PETITIONERS' RESPONSE TO PENNACO'S MOTION FOR SUMMARY JUDGMENT AND TO STRIKE EXPERT TESTIMONY

JOHN D. KOLTISKA, AC RANCH INC., PRAIRIE DOG RANCH, INC., AND PRAIRIE DOG WATER SUPPLY COMPANY, respectfully submit their response to Pennaco Energy Inc.'s (Pennaco) Motion For Summary Judgment and to Strike Expert Testimony. Pennaco argues that summary judgment in favor of the Department of Environmental Quality and Pennaco is necessary because the burden is on the Protestants to prove the effluent limits contained in the Permit will lead to a measurable decrease in production of crops, and that the effluent limits were not derived from appropriate scientific methods. Pennaco's argument is without merit and for the reasons stated below, its motion should be denied.

BACKGROUND

Petitioner John D. Koltiska is part owner of AC Ranch, Inc., Prairie Dog Ranch, Inc. and is a shareholder of Petitioner Prairie Dog Water Supply Company. Petitioner Prairie Dog Water Supply Company (PDWSC), is a Wyoming nonprofit mutual benefit corporation which supplies irrigation water to its shareholders through conveyances whose points of diversion are located on Prairie Dog Creek downstream of the discharges permitted by WY0054364. Petitioners John Koltiska, AC Ranch, Inc. and Prairie Dog Ranch, Inc. also irrigate in part with waters from flows originating in Wildcat Creek. Permit WY0054364 authorizes discharge of treated water into both Prairie Dog Creek (via outfall 003) and into Wildcat Creek (via outfall 002 to Paul No. 3 Reservoir).

Prairie Dog Creek is somewhat unique in northeast Wyoming because its flows are primarily derived from a transbasin diversion from Piney Creek above Story, Wyoming. This means historic flows in Prairie Dog Creek have been perennial rather than ephemeral, and they have been of a generally high quality. Prairie Dog Creek is also unusual in that USGS gauges in the creek provide some historic water quality data. Therefore, the analytical methods provided in DEQ's Agricultural Use Protection Policy were not employed to establish effluent limits for discharges into Prairie Dog Creek. Rather, DEQ made use of some of the data available from the USGS, but it did so by using inappropriate methodologies on inadequate and insufficient information and by relying on unproven assumptions. One central flaw in DEQ's methodology for determining background water quality for discharges in Prairie Dog Creek is that it did not simply use the data from the USGS Wakeley station nearest the point of discharge (10 miles downstream from the point of discharge for Outfall 003) to determine

background water quality. Instead, it achieved less protective limits (higher numbers for EC[1] and sodium) by averaging water quality data from the Wakeley station with the water quality data from the Acme station, which is located a further 23 stream miles downstream from Wakeley.[2]

Wildcat Creek, on the other hand, is an ephemeral stream for which no adequate historic water quality data exists. DEQ therefore relied upon the "Ag Use Policy" Tier 1 methodology to determine effluent limits for discharges into Wildcat Creek. Water from the Permit from Outfall 002 will be discharged into the Wildcat Creek drainage, which is a source of irrigation water for AC Ranch, Inc. *See* Map attached as Exhibit 1.

Pennaco, the permittee, does not attempt to defend DEQ's methodology, but instead takes the position that the Protestants bear the burden of proving that the effluent limits DEQ established will result in a measurable decrease in production of the Petitioners' crops, and it argues that permit terms can be justified by a different analysis. (Ex. 2, Schafer Report, pp. 3).

The Council should not be misled by Pennaco's attempt to turn the Wyoming Environmental Quality Act on its head. Pennaco's motion is nothing short of a request that the Council impose the obligation of enforcing the EQA onto the very people that law is intended to protect. As described below, the burden is, as it must be, on the DEQ and Pennaco to prove that discharges authorized by the permit will not result in a measurable decrease in production.

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[1] The data relied upon by DEQ demonstrated the average EC at Wakeley was 885, at Acme 1217. Shreve Deposition, 15:3-4.

[2] There are numerous other defects in the permitting methodology for Prairie Dog Creek discharges, which will be more fully presented at the hearing in this matter.

SUMMARY OF ARGUMENT

Pennaco's Motion for Summary Judgment and to Strike Expert Testimony should be denied for the following reasons:

- The burden is on DEQ and Pennaco to prove that the discharges authorized by the Permit will not result in a measurable decrease in production of Petitioners' crops. Petitioners, therefore, are not required to prove that the discharges authorized by the Permit will result in a measurable decrease in production of Petitioners' crops.
- Petitioners' expert testimony meets the standard that applies in proceedings before the EQC (which is a different standard than that urged by Pennaco) and is sufficient for the EQC to find that DEQ and Pennaco have failed to meet their burden.
- Expert opinion alone is not determinative of all issues in this case.
- Petitioners' evidence, including expert testimony, regarding Wildcat Creek, Outfall 002, and the Paul No. 3 Reservoir is relevant and admissible.
- The EQC may not rewrite the permit when DEQ has failed to fulfill its statutory responsibilities

I. The Burden is on the DEQ and the Applicant to Establish That the Permitted Discharges Will Not Cause a Measurable Decrease in Crop or Livestock Production

It is the burden of the permit applicant to establish for DEQ that the proposed water discharge and management will not degrade the waters to such an extent as to cause a measurable decrease in crop or livestock production. On appeal of the permit, the EQC's function is to decide whether, on the evidence before it at the time, the DEQ

issued a permit that meets the statutory and regulatory standards. It is not the Petitioners' burden to show that water discharged under the permit will be harmful; the standard is whether there exists a valid scientific basis for concluding that the water will not be harmful.

Further, if Pennaco and the DEQ failed to meet that standard based on the data and the analysis at the time the permit was issued, they cannot now present to the EQC some alternative basis to justify the permit terms. It is not for EQC to rewrite a poorly-conceived permit, or to find a scientifically valid substitute basis where none existed when the permit was issued.

Pennaco offers no compelling authority for its proposition that the burden is on the Petitioners, but instead misconstrues the holdings in *Casper Iron & Metal v. Unemp. Ins. Comm'n of Dep't of Employment of Wyo.*, 845 P.2d 387 (Wyo. 1993) and *J.M. v. Dep't of Family Servs.*, 922 P.2d 219 (Wyo. 1996), citing them for the proposition that the burden of proof lies with the party appealing an agency decision.[3] Neither case holds that such is the rule in administrative law. In actuality, these cases say that the general rule in administrative law is that the burden of proof lies with the proponent of the order, but that in Wyoming, the burden of proof is actually determined by considering "the applicable substantive statutes." *J.M, supra* at 22; *acc'd Casper Iron & Metal*, at 393 (stating that "The proper application of burden of persuasion and burden of producing evidence doctrines

[3] Pennaco also relies on WYO. STAT. § 35-11-802 to assert imposition of the burden of proof on the Petitioners. That statute is wholly inapplicable here. It should be noted that Pennaco, in its Motion to Dismiss filed contemporaneously with the present motion, argues that, pursuant to WYO. STAT. § 35-11-802, Petitioners do not have any right to appeal the grant of permit to the EQC. As explained in Petitioners Response to Pennaco's Motion to Dismiss, by its plain language, WYO. STAT. § 35-11-802 applies only where a permit applicant appeals the denial of permit.

requires consideration of the purpose of unemployment insurance.").[4] 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.*

In contrast, in *Casper Iron & Metal*, the contestant was an employer challenging a Wyoming Department of Employment decision that its former employee was not disqualified from claiming unemployment insurance. 845 P.2d at 389. Noting that the purpose of the Wyoming Employment Security Law (WESL) was "to protect the general welfare creating unemployment reserve accounts to be used for the benefit of persons unemployed through no fault of their own," the Court determined that the WESL should be liberally construed in favor of the claimant and that disqualification from benefits should be narrowly construed. *Id.* at 393-94. The Court declined to follow the general rule and imposed the burden of proof on the employer contesting the decision. *Id.* at 394.

[4] Pennaco also misunderstands the positions of the parties. Pennaco and DEQ are the proponents of an administrative order as they are the parties seeking to have the Permit decision upheld. *See J.M. v. Dep't of Family Servs*, 922 P.2d, 219, 222 (Wyo. 1996).

Applying these principles here, it is clear that 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 Wyoming Environmental Quality Act (EQA), WYO. STAT. §§ 35-1-101 et seq., the policy and purpose of which 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 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]

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

Clearly, the applicable statutes here indicate a legislative intent that the general rule apply and that DEQ and Pennaco, as proponents of the Permit, have the burden of proving compliance with the water quality rules and regulations. The applicable rule at issue here is found at Chapter I, Wyoming Surface Water Quality Standards:

> Section 20. **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.
>
> Unless otherwise demonstrated, all Wyoming surface waters have the natural water quality potential for use as an agricultural water supply.

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.

(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.

II. Petitioners' Expert Testimony Meets the Standard Established for Administrative Hearings.

The standard for admissibility of expert testimony in an administrative hearing is articulated in *Griffin v. State*, in which the Wyoming Supreme Court declined to apply the *Daubert* and *Bunting* tests for admissibility of expert testimony in administrative hearings.[6] The Court stated that the general rule is that "administrative agencies acting in a judicial or quasi judicial capacity are not bound by technical rules of evidence that govern trials by courts or juries. . . . The evidence must be of a type that is 'commonly relied upon by reasonably prudent men in the conduct of their serious affairs.'" 2002 WY 82, ¶11, 47 P.3d 194, ¶11; a*cc'd Smith v. State ex rel. Dep't of Transportation* 2000 W 185, 11 P.3d 931, 934 (Wyo. 2000).

Petitioners' expert testimony meets this standard. Dr. Vance is a Professor of Soil Science at the University of Wyoming and is a well-known expert in soil chemistry and environmental chemistry. He has authored or edited twenty-nine books and book chapters and has been an author on over two hundred refereed journal articles and proceedings on soils and soil chemistry. He teaches classes that deal specifically with environmental quality associated with soils and waters, and coauthored a book on soils and environmental quality. (Ex. 3, Curriculum Vitae of George Vance, pp. 11, 26-39). He has also conducted research and authored peer reviewed articles on the effects on soils from the use of CBM water for irrigation. (Ex. 3, Curriculum Vitae of George Vance; Ex. 4, Vance Deposition, 26:5 – 27:3).

[6] *Daubert* is a federal case articulating the standards for admissibility of expert testimony which is applied in federal courts. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The standard was adopted for Wyoming courts in *Bunting v. Jamieson*, 984 P.2d 467 (Wyo. 1999).

Mr. O'Neill, who has a degree in chemical engineering and is a Wyoming registered professional engineer in environmental engineering, is well versed in water chemistry and in the interpretation and implementation of regulations dealing with water discharges and the development of effluent limitations. (Ex. 5, O'Neill Deposition, 19:17-25). His considerable experience in the design, construction and permitting of water treatment systems on numerous projects in Wyoming and other states is more than adequate for him to render opinions upon the data and methodologies employed by DEQ. (Ex. 6, Resume of James O'Neill; Ex. 5, O'Neill Deposition, 18:4-7).

Pennaco's criticism of Dr. Vance and Mr. O'Neill's expert opinions is, again, based on a misunderstanding of where the burden of proof lies. It is DEQ's responsibility to establish effluent limitations that will not result in a measurable decrease in production. To that end, Dr. Vance and Mr. O'Neill undertook to analyze the methods DEQ used and the effluent limits derived to determine whether DEQ had met its responsibility. They therefore properly limited their review and opinions to the information and methods relied upon by and available to DEQ. It is not the responsibility of the Protestants to do DEQ's job and to undertake expensive and time consuming studies to gather and analyze data that, as Pennaco now asserts, is necessary to determine what effluent limits are protective. This data should have been collected and submitted by Pennaco and analyzed by DEQ in the first instance. What Pennaco now contends is lacking in the expert testimony of Vance and O'Neill is in fact what is lacking in the scientific basis for the Permit. The experts' testimony is relevant and, under the standards for administrative hearings, is admissible. Pennaco's request to strike the testimony of Dr. Vance and Mr. O'Neill should be denied.

Pennaco distorts Section 8(b) of Chapter 2 when it asserts that only experts qualified under the *Daubert* and *Bunting* tests may testify. Section 8(b) of Chapter 2 vests with Council with the discretion to require qualification before admitting testimony, but it does not limit that testimony to experts. Again, that discretion should be exercised in favor of admitting expert testimony. The EQC is not a lay jury, but a group of decision makers uniquely qualified to decide matters under the EQA. As the Wyoming Supreme Court has noted, "An agency created by the legislature to perform a specific function is considered to have special expertise." *William F. West Ranch, LLC v. Tyrrell*, 2009 WY 62, ¶ 11, 206 P.3d 722, 728-29 (Wyo. 2009) (citing *Rissler & McMurry Co. v. State*, 917 P.2d 1157 (Wyo. 1996). "The Courts will defer to the experience and expertise of the agency [EQC] in its weighing of the evidence and will disturb is decisions only where it is clearly contrary to the overwhelming weight of the evidence on the record." *Knight v. Environmental Quality Council*, 805 P.2d 268, 274 (Wyo. 1991) (citing *Cody Gas Co. v. Public Serv. Comm'n of Wyoming*, 748 P.2d 1144 (Wyo. 1988) and adopting the district court's findings and decision in upholding EQC approval of an injection permit).

Even were the standards urged by Pennaco to apply, deficiencies, if any, in an expert's qualifications go to the weight accorded the testimony rather than its admissibility. *Seivewright v. State*, 7 P.3d 24, 31 (Wyo. 2000). The EQC's considerable expertise in the matters of consequence here are more than adequate to ensure that the qualifications and opinions of the experts of all parties are given the appropriate consideration and weight. Pennaco's motion to strike Petitioners' expert testimony should be denied.

Pennaco also argues that expert opinion is the only evidence upon which the EQC can determine the issues. The EQC's rules of practice and procedure, which include the right of all parties "to respond and present evidence and argument on all issues involved," do not contemplate that expert opinions alone may determine a contested permit. DEQ Rules of Practice and Procedure, Chapter 2, Section 8(c). Certainly John Koltiska, one of the petitioners in this case, having grown up on Wildcat Creek (Mr. Koltiska's father, Paul Koltiska constructed the dam that created the Paul No. 3 reservoir) and having spent a lifetime ranching, is perfectly qualified to testify about his ranch, crops, soils, irrigation practices and the historic nature of Wildcat and Prairie Dog Creeks and of their use.

III. Petitioners' Evidence Regarding Wildcat Creek, Outfall 002 and the Paul No. 3 is Relevant and Admissible.

There are two parameters for which DEQ sets effluent limits to protect irrigation use – electrical conductivity (EC) and sodium adsorption ratio (SAR). (Ex. 7, Thomas Deposition, 124:15-22). The Permit, however, establishes an effluent limit only for EC at outfall 002 which discharges into Wildcat Creek.[7] The DEQ representative, Mr. Jason Thomas, explained in his deposition that the permit established an effluent limit of 1,330 μmhos/cm, and that this is DEQ's default limit. (Ex. 7, Thomas Deposition, 95:16 – 96:6). The Petitioners contend that the default limit for EC (i.e. Tier 1) is not a scientifically valid method for establishing effluent limits protective of irrigation.

The permit establishes no SAR limit for outfall 002. DEQ determined that an effluent limit for SAR was not necessary at outfall 002 and instead relied on the permittee to contain the discharged effluent and on monitoring downstream of the reservoir. However,

[7] The permit authorizes discharges into the Paul No. 3 Reservoir which is located on the mainstem of Wildcat Creek. Petitioners contend that, semantics aside, the Permit thus authorizes discharges to Wildcat Creek.

DEQ's own records indicated that, before the permit was issued, the Paul No. 3 reservoir was leaking and water was entering Wildcat Creek below the reservoir. (Exs. 8 and 9). DEQ knew that its premise for imposing no SAR limit – containment – was false. That fact is entirely relevant to whether DEQ fulfilled its responsibility of properly establishing effluent limits that will be protective of irrigation uses. Pennaco's assertion to the contrary is simply incredible.

As to Petitioners' expert testimony on the results of carbon 13 ($\delta^{13}C$) isotope testing conducted by Pennaco in June of 2009, Petitioners' experts are not required to be specifically experienced in isotope chemistry for their testimony to be relevant and admissible. As describe above, the standard for expert testimony in administrative proceedings is that "commonly relied upon by reasonably prudent men in the conduct of their serious affairs." *Griffin, supra* at ¶11. Both Mr. O'Neill and Dr. Vance are well versed in chemistry, and relied on published research regarding the use of $\delta^{13}C$ data to trace CBM waters. (Ex.4 Vance Deposition, pp. 162-164.; Ex. 5, O'Neill Deposition, p. 100-102). Their conclusions are entirely in keeping and consistent with DEQ's own determination that the Paul No. 3 leaks and that water from the reservoir reaches Wildcat Creek. In an effort to deprive the EQC of hearing this evidence, Pennaco asserts the evidence is irrelevant and unreliable, even going so far as to mischaracterize the opinion of its own expert.

Pennaco's expert, Dr. Schafer, admits that the $\delta^{13}C$ data can be explained by leaking of the Paul No. 3 reservoir. He stated: "Water in the monitoring well downgradient of the Paul Reservoir also had elevated $\delta^{13}C$ and bicarbonate indicating that groundwater was derived largely from seepage out of the Reservoir." (Ex. 2, Schafer

Report, p.39). Dr. Schafer, while also offering alternative explanations, concedes that "The somewhat higher $\delta^{13}C$ values in samples from AIMP-1 and IMP-1 [Permit monitoring stations] may be caused by small CBM contributions (as suggested by Vance (2009) and O'Neill (2009))." (Ex. 2, Schafer Report, p. 39). So, contrary to Pennaco's assertion that "Dr. Schafer . . . determined that CBM water was not contributing to upper Wildcat Creek," (Petitioners Brief at 21), Dr. Schafer's testimony is that his data could neither rule in nor out whether the Paul No. 3 Reservoir leaks.

> Q. Can you say with certainty that water discharged into Paul #3 will not express itself in or come to the surface in the channel of Wildcat Creek someplace below Paul #3 in the absence of overtopping or discharge through a pipe?
> A. Okay. Based on the available information, I don't believe that you can determine whether or not leakage occurs. I don't think there's anything in the data that necessitates a belief in me for me to formulate a conclusion that there's leakage from the Paul 3. I can see where one could make that interpretation. It is not entirely inconsistent with the data.
> You could interpret the data either way, but there's nothing in the data that can only be interpreted by assuming that there's leakage out of the Paul 3. So really, you can't, unfortunately, determine uniquely from the data at hand whether leakage occurs or not.

Ex10, Schafer Deposition, 145:22 - 146:13.

Whether the EQC chooses to credit the Petitioners' or Pennaco's experts is a matter that should be determined after a hearing and examination of the witnesses. Pennaco's motion to strike testimony regarding the leaking of Paul No. 3 and Petitioners' expert opinions on this topic should be denied.

IV. It is Not the Function of the Environmental Quality Council to Rewrite Permits When the DEQ has Failed to Meet its Responsibility

Pennaco argues that DEQ's methodology should not decide this case. (Pennaco's Brief at 18). Instead, Pennaco contends that it is the Petitioners' burden to show that

DEQ's errors are prejudicial and affect their substantive rights. This assertion parallels Pennaco's other argument – i.e., that unless Petitioners demonstrate that effluent limits will result in a measurable decrease in Petitioners' crop production the Permit should be upheld – and it is not availing. As explained above, the burden rests with DEQ and Pennaco to prove that the effluent limits established in the Permit will not result in a measurable decrease in production.

To the extent this argument can be distinguished from Pennaco's attempt to shift the burden of proof, Pennaco presents no cogent authority on this issue. The cases Pennaco relies upon are unpersuasive and easily distinguished from the present circumstances. Neither *Nelson v. Sheridan Manor,* nor *Pfeil v. Amax Coal West, Inc.* stand for the proposition that a WYPDES permit is reversible only if it is prejudicial to the petitioner and affects his substantive rights. In *Nelson*, the rule urged by Pennaco was stated in dicta, and in *Pfeil*, the rule was applied only in relation to the issue of whether a permit could be invalidated for failure to fully comply with statutory notice requirements.[8]

These cases in no way support Pennaco's contention that Petitioners must prove prejudice from DEQ's scientifically unsound methodology. As explained previously, the

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[8] *Nelson* dealt with an appeal from a worker's compensation case wherein the appellant claimed the hearing officer relied on deposition testimony that was not properly admitted at the contested case hearing. The Court noted that there was no question the appellant had waived the issue below, and, in dicta explained that even if the issue had not been waived, the appellant, having had the opportunity to cross examine the deponent at both the deposition and at the hearing, was not prejudiced by the hearing officer's consideration of that testimony. *Nelson v. Sheridan Manor*, 939 P.2d 252, 256 (Wyo. 1997).

In *Pfeil v. Amax Coal West, Inc.* the petitioners complained, among other things, that a coal company seeking a revision to its mining permit had not fully complied with the statutory notice requirements regarding revision of its mining permit and that EQC in upholding the permit revision relied upon groundwater monitoring that had not be properly updated. 908 P.2d 956, 959, 962 (Wyo. 1995). The Court's application of the rule urged by Pennaco was applied, as the Court noted, to determine the issue of whether the permit could be invalidated for failing to fully comply with statutory notice requirements. *Id.* at 960. In contrast, on the issue of the content and basis of the revised permit, the Court reviewed the EQC's determination to see if it was supported by substantial evidence. *Id.* at 962.

EQA places the burden on DEQ to provide a scientific basis to prove that the effluent limits it sets will not result in a measurable decrease in production. To hold otherwise is to relieve DEQ of this responsibility and to place it on those the EQA is intended to protect.

In reality, what Pennaco is requesting is that the EQC dispense with a hearing, to simply accept the projections and assumptions of its expert, and to rewrite the permit, and its basis, accordingly. The EQC has neither the authority nor the ability, in the context of a contested case hearing, to do the DEQ's job for it and rewrite its flawed permits. "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). The EQC must look to the record upon which DEQ based its decision and not to post hoc rationalizations.

> A simple but fundamental rule of administrative law [is that] a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what is considers to be a more adequate or proper basis.

SEC v. Chenery Corp., 322 U.S. 194, 196 (1947).[9] Instead, the EQC should revoke the permit and send DEQ back to create the drawing board upon which to write a permit that complies with the law.

V. Conclusion

The EQA imposes upon DEQ and the permittee the burden of proving the effluent limitations in the permit will not result in a measurable decrease in production of

[9] If the EQC is to limit the evidence in this proceeding it should be those portions of Dr. Schafer's report that posit alternate rationales for approving the permit.

Petitioners' crops. That burden must lie with the parties seeking to degrade Wyoming's water resources, especially those upon which Petitioners rely for their livelihoods. To do otherwise is to effectively eviscerate the EQA, leaving DEQ and industry free to establish whatever limits they desire by whatever means they wish and to rely upon those adversely affected to spend the their time and resources on data acquisition and experts to protect themselves and Wyoming's environment.

Petitioners do not have that burden here and Petitioners' expert testimony is both reliable and relevant to the core issue in this appeal – that is whether the DEQ can show that the effluent limits it has established were derived from appropriate scientific techniques and whether those limitations will not result in a measurable decrease in production. For the reasons stated above, Pennaco's motion should be denied.

Dated this 30th day of October, 2009.

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CERTIFICATE OF SERVICE

I certify that on the 30th day of October, 2009, I served a true and correct copy of the foregoing by hand delivery to:

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