

NOV 18 2003

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMINGTerri A. Lorenzon, Director
Environmental Quality Council

In the Matter of the Appeal)
 Of Permit No. 03-127) Docket No. 03-3802
 Wyoming Premium Farms)

PETITION FOR REVIEW

Bonnie and Richard Johnson (Johnsons) petition the Wyoming Environmental Quality Council (Council) to review Permit No. 03-127, issued on September 19, 2003 by the Department of Environmental Quality (DEQ), Water Quality Division (WQD), authorizing Wyoming Premium Farms (WPF) to use additional acres for land application for effluent from Farrowing Unit No.1 in Platte County, Wyoming, originally constructed under Permit No. 96-263. In accordance with Chapter I, Section 3(c), Department of Environmental Quality Rules of Practice and Procedure, the Johnsons provide the following in support of their petition for review:

1. The names and address of the Petitioners are Bonnie and Richard Johnson, 251 E. Johnson Road, Wheatland, WY, 82201. Legal Counsel for the Johnsons is Mary A. Throne, Hickey & Mackey, 1800 Carey Avenue, Suite 700, P.O. Box 467, Cheyenne, WY 82003-0467.
2. Under the Wyoming Environmental Quality Act (the Act), Wyo. Stat. § 35-11-112(a)(iv), the Council has the authority to conduct hearings in any case contesting a permit issued by the DEQ/WQD. Wyo. Stat. § 35-11-112(c)(iii) provides that the Council may order the modification of any permit.
3. WDEQ/WQD issued Permit 03-127 (Attachment A) to WPF for the purpose of allowing WPF to increase the land application acreage for its effluent from Farrowing Unit No. 1. The new permit authorizes land application pursuant to an easement granted by Douglas S. Meyer. The Meyers' property borders the Johnson property. The Johnsons participated in the public meeting on

Permit 03-127 on July 28, 2003 and also submitted written comments. The permit as issued does not address the concerns raised by the Johnsons, as well as others, and the response to comments from the WDEQ/WQD is inadequate.

4. WDEQ/WQD erred in not applying Chapter 20 of the Water Quality Rules and Regulations to WPF's land application permit. The expanded land application request represents a modification that triggers the requirements of Chapter 20. Chapter 20 § 5(a) states that its provisions apply to "all confined swine feeding operations that file a permit application after February 28, 1997." To the extent that the WDEQ/WQD interprets Chapter 20 § 5(b) to limit the application of Chapter 20, that interpretation is arguably inconsistent with the statutory intent of Wyo. Stat. § 35-11-302(a)(ix). The purpose of grandfathering existing facilities was to protect the investment in the facilities and not to require reconstruction or retrofitting unless the animal units increased. This argument is not applicable to requests for increased acreage for land application. Even if Chapter 20 does not apply, it does list waste management and odor control provisions for land application that the agency could have applied to the current permit. There is nothing prohibiting the agency from doing so. The Act authorizes the agency to impose permit conditions that "may be necessary to accomplish the purpose of this act which are not inconsistent with the existing rules. . . ." Wyo. Stat. § 35-11-801(a). Given the compliance history of WPF and the community's ongoing concerns, the WDEQ/WQD should have used its authority to impose adequate conditions to limit the offsite impacts of WPF's expanded land application.

5. The Johnsons requested that the WDEQ require WPF to incorporate the effluent directly into the soil rather than

using a spray gun to apply the effluent. Incorporating the effluent limits the odor and potential health effects associated with land application. The WDEQ/WQD response to comments fails to explain why this was not required. Condition 4 of Permit 03-127 provides a buffer zone with neighboring landowners and a requirement that the issue be revisited in a year. This is inadequate protection for the neighboring landowners. The permit allows WPF's land application process to negatively impact adjoining landowners for a year before any adjustments are considered. Chapter 20 § 40 lists a number of provisions for odor control, including mechanical incorporation that should have been required by the agency. The Johnsons request that the EQC modify Permit No. 03-127 to include the relevant provisions of Chapter 20.


6. The reporting requirements for testing contained in Permit No. 03-127 are inadequate. The permit requires frequent testing of the effluent, but there is no obligation to report these results until the annual report. WDEQ/WQD generally receives WPF's annual reports in June of the following year—well after the end of the irrigation season. More frequent reporting of testing should be required during the irrigation season so that WDEQ will have the necessary information at the appropriate time to address any concerns. In at least one annual report, for example, WPF did not include the fecal coliform testing results. Fecal coliform testing is for the purpose of protecting human health and the environment and if those results are not received closer to the time of the application of the effluent, they are a useless protection for public health. Given that WPF, on at least one occasion, has failed to include fecal coliform results in their annual report, stricter reporting requirements are reasonable and consistent with the Act.

7. Permit 03-127 does not contain adequate provisions to insure that the application of the effluent does not exceed agronomic rates. The Permit's reporting requirements are inadequate to insure that excess application of nutrients is addressed in a timely fashion. Over the last few years, EPA, WDEQ and even WPF have expressed concerns that nutrient application may be exceeding agronomic rates. In June 2002, WQD intended to hire a consultant to review the 2001 annual report because it was "obvious that there are a number of land application areas where the residual nitrate levels require careful evaluation." (Memorandum from Lou Harmon to Dennis Hemmer, Attachment B). Mr. Harmon also noted that there were no qualified DEQ staff to review the situation. Despite these concerns, it is the Johnsons' understanding that the WDEQ/WQD has never required WPF to develop an enforceable plan for addressing agency concerns about over application of nutrients. Permit 03-127 continues this casual approach to the most important condition of any land application permit. Condition 6 should be modified to require WPF to develop a plan that will then become enforceable under the Permit in the event application of nutrients exceeds agronomic rates. Similarly, Conditions 8 and 9 of the permit should be strengthened to require immediate reporting and certification to the WDEQ that WPF has met the Permit's requirements to remedy excess phosphorous application.

8. The Petitioners believe that Permit No.03-127 must be modified to fulfill the requirement of both the Act and the relevant Water Quality Regulations. WDEQ has issued multiple Notices of Violation to WPF for various violations of the Act and Water and Air Quality Regulations. In addition, the agency has written warning letters to WPF for non-compliance, including

one for allowing effluent to stray across the property line during land application. Given this compliance history, the conditions in Permit 03-127 are inadequate to protect the Petitioners and others from the potential effects of the expanded land application. Accordingly, the Johnsons are requesting that the Council conduct a hearing to consider their Petition.

DATED this 18th day of November, 2003.


Mary A. Throne
Hickey & Mackey
1800 Carey Avenue, Suite 700
P.O. Box 467
Cheyenne, WY 82001
(307) 634-1525

ATTORNEYS FOR RICHARD AND
BONNIE JOHNSON

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 18th day of November 2003, in accordance with the requirements of Chapter 1, Section 3(b) of the Department of Environmental Quality Rules of Practice and Procedure, this Petition for Review was served as follows:

Two copies were served upon the Chairman of the Environmental Quality Council, Herschler Building, Cheyenne, 1st Floor West, WY 82002, by certified mail, return receipt requested.

Two copies were served upon John Corra, Director of the Department of Environmental Quality, Herschler Building, Cheyenne, WY 82002, by certified mail, return receipt requested.

One copy was served upon Doug DeRouchey of Wyoming Premium Farms, P.O. Box 457, Wheatland, WY 82201, by certified mail, return receipt requested.

Copies of the Petition for Review were served by hand
delivery to the following:

Environmental Quality Council
Herschler Building, 1st Floor West
Cheyenne, WY 82002

Vicci Colgan
Senior Assistant Attorney General
Natural Resources Division
Herschler Building
Cheyenne, WY 82002

John Wagner
Administrator
Water Quality Division
Herschler Building
Cheyenne, WY 82002



Hickey & Mackey

PERMIT TO CONSTRUCT

New
Renewal
X Modified

PERMIT NO. 03-127
SPECIAL CONDITIONS
REF/PERMIT NO. 96-263

Wyoming Premium Farms Farrowing Unit No. 1, Additional Land Application Areas

This permit hereby authorizes the applicant:

Wyoming Premium Farms
P.O. Box 457
Wheatland WY 82201

to utilize additional areas under Grant of Easement from Douglas S. Meyers for land application of liquid wastes generated by WPF Farrowing Unit No. 1 according to the procedures and conditions of the application number 03-127. The additional land applications areas are Section 22 - tracts in E 1/4, Section 23 - W 1/4 & portions of E 1/4, Section 26 - N 1/4 & portions of S 1/4, Section 27 - portions of E 1/4, T26N R68 W of the 6th P.M. in the county of Platte, in the State of Wyoming. This permit shall be effective until July 28, 2008.

The issuance of this permit confirms that the Department of Environmental Quality (DEQ) has evaluated the application submitted by the permittee and determined that it meets minimum applicable construction and design standards. The compliance with construction standards and the operation and maintenance of the facility to meet the engineer's design are the responsibility of the permittee, owner, and operator.

Granting this permit does not imply that the Wyoming DEQ guarantees or ensures that the permitted facility, when constructed, will meet applicable discharge permit conditions or other effluent or operational requirements. Compliance with discharge standards remains the responsibility of the permittee.

Nothing in this permit constitutes an endorsement by the DEQ of the construction or the design of the facility described herein. This permit verifies only that the submitted application meets the design and construction standards imposed by the DEQ statutes, rules and regulations. The DEQ assumes no liability for, and does not in any way guarantee or warrant the performance or operation of the permitted facility. The permittee, owner and operator are solely responsible for any liability arising from the construction or operation of the permitted facility. By issuing this permit, the state does not waive its sovereign immunity.

The permittee shall allow authorized representatives from the DEQ, Water Quality Division, to enter and inspect any property, premise or place on or at which the facility is located or is being constructed or installed for the purpose of investigating actual or potential sources of water pollution, and for determining compliance or non-compliance with any rules, regulations, standards, permits or orders.

The permittee shall notify representatives from the DEQ, Water Quality Division the day construction commences and give an estimate of completion of the project. The authorized representative in your area can be contacted at the following address: Southeast District, State of Wyoming, DEQ, Water Quality Division, Herschler Building, 4th Floor West, 122 West 25th Street, Cheyenne, Wyoming 82002; telephone (307) 777-7781; FAX (307) 777-5973.

Nothing in this permit shall be construed to preclude the institution of any legal action or other proceeding to enforce any applicable provision of law or rules and regulations. It is the duty of the permittee, owner and operator to comply with all applicable federal, state and local laws or regulations in the exercise of its activities authorized by this permit.

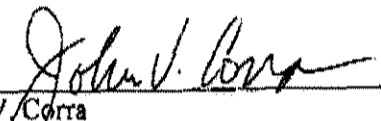
The issuance of this permit does not convey any property rights in either real or personal property or any invasion of personal rights, nor any infringement of federal, state or local laws or regulations.

~~shall construct and operate the permitted facility in accordance with the statements, representations,~~

Attachment A

- 1 of 10 All land application of liquid wastes shall be accomplished in accordance with conditions of Water Quality Division Permit 96-263 and the approved Operation and Maintenance Manual for Wyoming Premium Farms Farrowing Unit No. 1, as amended by the conditions of this permit.
- 2 of 10 Any irrigation well connected to a center pivot sprinkler system used to apply liquid waste shall be protected by a chemigation valve installed in accordance with Water Quality Division Policy 13.29.3.
- 3 of 10 The swine wastes applied through the center pivot sprinklers shall be diluted a minimum ratio of 2 parts well water to one part swine waste at the time of application. The center pivot sprinklers may only apply waste through drop nozzles, high angle end guns, or sprinkler nozzles may not be operated while swine waste is being applied. Swine waste application must be discontinued any time there is a potential for spray drift to leave the property.
- 4 of 10 Swine waste may not be applied within 100 foot of a third party property line or State of Wyoming Highway R.O.W. To assure this condition, all sprinkler nozzles within 100 foot of a third party property line or State of Wyoming Highway R.O.W. shall be plugged or valved closed. After one full season of waste application the 100 ft set back shall be jointly evaluated by Wyoming Premium Farms, the land owner, and DEQ. The setback may be adjusted by the DEQ by plus or minus 70 feet depending on the results of the first year's operation as necessary to prevent spray drift from leaving irrigated property.
- 5 of 10 Use pan tests under the traveling sprinkler to verify amount applied, total nitrogen applied, and to take samples for a fecal coliform test. At least one composite test using three pans shall be taken each week of application operations.
- 6 of 10 The nutrients supplied by a land application plus the residual nutrients in the soil shall not exceed the agronomic requirements of the crop to be seeded.
- 7 of 10 The liquid applied by an application of animal wastes shall not exceed the retention capacity of the upper 12 inches of the soil less the pre-existing moisture content of the soil. The liquid application rates shall be adjusted as necessary for the most restrictive soil type within a management parcel.
- 8 of 10 The amount of phosphorus present in the upper 12 inches of soil shall be monitored. If the phosphorus loading exceeds 300 pounds per acre, additional soil testing shall be undertaken to evaluate the potential for deleterious salt and alkali accumulations.
- 9 of 10 If phosphorus loading exceeds 300 pounds per acre or deleterious amounts of salt accumulate, land application to that management parcel shall stop until the parameter of concern is remedied.
- 10 of 10 The review and approval of this permit is based upon the items identified in the attached "Statement of Basis."

AUTHORIZED BY:



 John V. Corra
 Director
 Department of Environmental Quality

9/19/03

 Date of Issuance

LBH/bb/3-0972.ltr
 attachment: Policy 13.29.3
 cc: Platte County Commissioners

- I. Permit Number: 03-127
- II. Application reviewed for compliance with the following regulations.
- A. Chapter XI. YES
- B. Chapter XII. NO
- III. Basis for issuing permit: Review of application package indicates proposed facility will be in compliance with applicable regulations identified in Section II.
- IV. Application requires review to determine groundwater impacts in accordance with Section 17, Chapter 3.
- YES
- V. If Section 17 of Chapter 3 is applicable, indicate the basis of determining groundwater will be protected.
- The facility will not allow a discharge to groundwater.
- The land application of liquid wastes at agronomic rates prevents a discharge of dissolved constituents to the ground water.
- VI. Documentation of Statement of Basis.
- The archives file for this permit will include adequate documentation of all sections of this Statement of Basis.

CERTIFICATION

The issuance of this permit is based upon a review of the application package submitted in accordance with the requirements of Section 6, Chapter III, Wyoming Water Quality Rules and Regulations. This review was performed by Louis B. Harmon, Southeast District Engineering Supervisor, and completed on September 11, 2003. Permit issuance is recommended based upon statements, representations, and procedures presented in the permit application and supporting documents, permit conditions, and the items identified in this "Statement of Basis."

LBH/bb/3-0972.ltr

STATEMENT OF BASIS

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LBH/bb/3-0972.ltr

ROBERT BUNNIE JOHNSON 13073221589 P.01

Memorandum from Lou Harmon

Southeast District Engineer, Wyoming Department of Environmental Quality/Water Quality Division
Phone (307) 777-7088, Fax (307) 777-5973, email: lharmo@state.wy.us

TO: Dennis Hemmer

THROUGH: Gary Beach *Gary said OK Lou*

SUBJECT: Request for Services Contract to Evaluate Wyoming Premium Farms Annual Report for Land Application of Swine Wastes

1. As required by Permits to Construct 01-432, 01-022, 01-023, and 01-024, the Wyoming Premium Farms annual report of waste treatment operations and land application of swine manure was received June 3, 2002. This report details the quantities and strength of manure applied and includes soil tests of the application areas.
2. At least three years of land application of swine manure has occurred at each of the four Wyoming Premium Farms sites. The application rates in most instances have been made at or near the maximum assimilative capacity of the crops and soils. The annual report needs to be evaluated by an individual or organization with expertise in soils, movement of nutrients and minerals through the soil, and crop uptake of nutrients such as nitrates and phosphates.
3. I have reviewed the previous Wyoming Premium Farms annual reports and have not recommended any enforcement actions as a result of those reviews. After a preliminary examination of the 2001 annual report, it is obvious that there are a number of land application areas where the residual nitrate levels require careful evaluation. I feel that we need a second expert opinion before drawing any conclusions. After an inventory of Department of Environmental Staff, it does not appear that there are qualified personnel on staff available to conduct an independent review of the annual report.
4. After checking with Steve Toalson and Ann Barrett about allowable contracting practices, I make the following recommendation. We should invite selected firms with the required expertise to respond to a request for proposal. The proposal would allow two weeks to respond with a written scope of services, statement of qualifications, and price. A committee of three would select the firm to be awarded a contract. I suggest that committee consist of Kevin Frederick, Brian Lovett, and myself. The rest of the details appear in the attached draft request for proposal.
5. I estimate that the probable cost of these services will be in the range of \$6000 to \$8000.

Approved 6-27-02

[Signature]

Attachment B

Memo from Lou Harmon
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June 27, 2002

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