

STATE OF WYOMING

BEFORE THE

ENVIRONMENTAL QUALITY COUNCIL

IN THE MATTER OF:)	
)	
PETITIONER BIG HORN LLC)	DOCKET NO.: _____
)	
PERMIT NO: WYW0027731)	
)	
)	
)	

APPEAL OF DISCHARGE PERMIT RENEWAL AND REQUEST FOR STAY

Vaquero Big Horn, LLC (“Petitioner”), by and through its undersigned attorneys, submits this Notice of Appeal and Request for Stay of the permit renewal for Wyoming Pollutant Discharge Elimination System Program (“WYPDES”) Permit No. WYW002731, issued by the Wyoming Department of Environmental Quality, Water Quality Division (“WDEQ” or the “Administrator”), and dated October 26, 2021 (the “2021 Permit Renewal”), for failure to provide adequate notice, opportunity for comment, and other required due process protections.

I. BACKGROUND

II. The Petitioner filing this appeal is:

Vaquero Big Horn, LLC
324 Robert Street
Cody, Wyoming 82414

Petitioner is represented in this matter by Eric Waeckerlin and Christine Jochim of Brownstein Hyatt Farber Schreck, LLP, 1807 Capitol Avenue, Suite 203, Cheyenne, Wyoming 82001. Correspondence and information related to this appeal should be served on the undersigned counsel and Mr. Shannon Martin, General Counsel, at the Cody address above.

1. Petitioner operates an oil production treatment unit located at State 30 Lease 70-1284, located in the SW of Section 30, Township 48 North, Range 103 West, Park County (the “Facility”).

2. The 2021 Permit Renewal authorizes wastewater discharges associated with the Facility.

3. A true and correct copy of the 2021 Permit Renewal is attached hereto as

Exhibit A.

A. The 2016 Permit

4. BreitBurn Operating, LP (“BreitBurn”) is the former owner/operator of the Facility. The first WYPDES permit for the Facility was issued to a predecessor to BreitBurn at least five years before Breitburn renewed the same permit in 2016 (*see* A.6 below).

5. In July 2016, WDEQ issued BreitBurn a WYPDES permit renewal to allow for continued wastewater discharges from the Facility to the Greybull River (2AB) via an unnamed, ephemeral drainage (3B), Big Horn River Basin (“2016 Permit”).

6. A true and correct copy of the 2016 Permit is attached as **Exhibit B.**

7. On June 1, 2019, ownership of the Facility changed from BreitBurn to Petitioner. On this date, Petitioner became the company responsible for compliance requirements under the 2016 Permit, as well as subsequent applications for permit renewals.

8. The 2016 Permit expired on October 31, 2021, but was administratively extended pursuant to Wyo. Admin. Code 020.0011.2 § 11 until at least December 1, 2021, when the 2021 Permit Renewal is scheduled to go into effect. *See also* email confirmation from WDEQ dated October 6, 2021, confirming administrative extension, attached as **Exhibit C.**

9. The 2016 Permit included terms relevant to water quality-based effluent limits for total radium:

Total Radium 226 is limited to 46 pCi/L. This value is the result of a wasteload allocation calculation based in part on dilution provided by the eventual receiving water, Greybull River. *See* wasteload allocation explanation below, and wasteload allocation table on page 4 of statement-of-basis.

See **Exhibit B**, at pp. 1-2.

B. The 2021 Permit Renewal

10. On April 25, 2021, Petitioner submitted a complete and timely application for renewal of the 2016 Permit in accordance with Wyo. Admin. Code 020.0011.2 § 10.

11. Petitioner first received notice of WDEQ's decision to renew WYPDES Permit WY0027731, along with a PDF copy of the final renewal, via email from WDEQ staff on October 26, 2021.

12. A true and correct copy of the October 26, 2021 email from WDEQ is attached as **Exhibit D**.

13. By email to Petitioner dated October 29, 2021, WDEQ provided a PDF copy of the public notice for the draft 2021 Permit Renewal, which was purportedly sent by mail to Petitioner in July.

14. A true and correct copy of the October 29, 2021 email from WDEQ providing the public notice for the draft 2021 Permit Renewal is attached as **Exhibit E**. The public notice for the draft 2021 Permit Renewal does not include a copy of the draft 2021 Permit Renewal itself.

15. In this same email, WDEQ staff confirmed that it no longer sends public notices via email, but only by mail, and no tracking information is maintained. *See id.*

16. Prior to October 29, 2021, no employee of Petitioner received actual notice via email, or either regular, certified, or registered mail of the public notice or the form or content of the draft permit renewal for the Facility, nor had any employee of Petitioner received any other

type of formal information regarding Petitioner's opportunity to review the public notice and comment on said draft.

17. Further, no employee of Petitioner observed publication of a notice in any local or other newspaper of WDEQ's proposal to issue a draft permit renewal for the Facility.

18. Prior to receipt of the 2021 Permit Renewal via email on October 26, 2021, Petitioner was not aware that WDEQ was seeking to modify the material terms of the permit for the Facility, including to the terms and conditions regarding radium, nor had any employee of Petitioner received any other formal information regarding Petitioner's opportunity to review the public notice and comment on those material changes.

19. After closure of the public notice period, Petitioner learned that the 2021 Permit Renewal includes significant changes to the 2016 Permit, including to the water quality-based effluent limit concentration for radium. In relevant part, the 2021 Permit Renewal states:

- a) Critical low flow (7Q10) within the Greybull River has been recalculated using shareware 'SW Toolbox', developed jointly by the United States Geological Survey and the US EPA. Previously, a 7Q10 of 12.7 cfs was calculated for the Greybull River. Recalculation using the SW Toolbox software provided a slightly more stringent Greybull River 7Q10 value of 11.7 cfs. Use of this value in this permit renewal has resulted in revised effluent limit calculations for chloride and total radium 226.
- b) In addition, the waste load allocation conducted in response to this permit renewal limits the permittee to 20% of the available allocations for chloride and total recoverable radium 226 as per Wyoming Surface Water Quality Standards, Implementation Policies for Antidegradation, Mixing Zones and Dilution Allowances, Turbidity, and Use Attainability Analysis, effective September 24, 2013. Application of 20% of available allocation has resulted in revised effluent limit calculations for chloride and total radium 226.
- c) Previously, a maximum facility effluent flow volume of 1 million gallons per day was used in the waste load allocation calculations. Review of effluent flow volumes reported by the permittee from September 2020 through February, 2021 revealed that the facility's highest reported effluent discharge volume was 15,628 barrels per day, or 0.656 MGD. This is lower than the previously-reported maximum facility discharge volume of 1

MGD, and has resulted in revised effluent limit calculations for chloride and total radium 226.

See **Exhibit A**, at p. 1–2.

III. BASIS FOR APPEAL

A. **The Council Has Authority to Review This Appeal.**

20. Under Wyo. Stat. Ann. § 35-11-112(c)(ii), referenced as the Wyoming Environmental Quality Act (the “Act”), the Wyoming Environmental Quality Council (the “Council”) has authority to “[o]rder that any permit, license, certification or variance be granted, denied, suspended, revoked or modified.” Further, the Council “shall... [c]onduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit” otherwise required by the Act. Wyo. Stat. Ann. § 35-11-112(a)(iv) (emphasis added).

21. WYPDES permits and renewals are required by the Act prior to discharging certain effluents into state waters. *See* Wyo. Stat. Ann. § 35-11-301(a)(i).

22. Chapter 2 of WDEQ’s Water Quality rules and regulations houses the water quality permit regulations for discharges to Wyoming surface waters promulgated under the Act and at issue in this appeal. *See* Wyo. Admin. Code 020.0011.2 (hereafter “Chapter 2”).

23. The Water Quality Division (“Division”) of WDEQ administers Chapter 2, is responsible for issuing WYPDES permit renewals, and in fact, issued the 2021 Permit Renewal. The Division Administrator, acting in his/her official capacity, makes final decisions for the Division, including in cases like this governing permit renewals. *See* Wyo. Admin. Code 020.0011.2 § 3(b)(ii) (defining “Administrator” as “the administrator of the Water Quality Division, Wyoming Department of Environmental Quality.”).

24. “Where authorized by the Act, appeals to the Council from final actions of the Administrators or Director shall be made within thirty (30) days of notification of such action.” Wyo. Admin. Code 020.0008.1 § 8.

25. The 2021 Permit Renewal is a final agency action. *Nat’l. Ass’n of Home Builders v. U.S. E.P.A.*, 956 F. Supp. 2d 198, 209 (D.D.C. 2013), *aff’d sub nom. Natl. Ass’n of Home Builders v. E.P.A.*, 786 F.3d 34 (D.C. Cir. 2015) (holding that an agency’s action is final if it marks the “consummation of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature” and if the action is one in which “rights or obligations have been determined” or “from which legal consequences will flow.”)

26. Here, Petitioner first received notice of the 2021 Permit Renewal via email on October 26, 2021. *See Exhibit D.*

27. Thus, this appeal is timely and proper.

B. Procedural Due Process Requires Adequate Notice That Provides Petitioner a Meaningful Opportunity to Comment

28. Article 1, § 6 of the Wyoming Constitution states: “No person shall be deprived of life, liberty or property without due process of law.” Whether Petitioner received adequate and proper notice of WDEQ’s issuance of the draft 2021 Permit Renewal implicates Petitioner’s ability to use its property, and therefore, procedural due process principles apply. *See N. Laramie Range Found. v. Converse Cnty. Bd. of Cnty. Comm’rs*, 290 P.3d 1063, 1082–83 (Wyo. 2012), *quoting Pfeil v. Amax Coal West, Inc.*, 908 P.2d 956, 960 (Wyo. 1995) (finding that failure to comply with statutory notice requirements ““must be prejudicial and affect the substantial rights of the appellant to warrant reversal.””).

29. “Procedural due process principles require reasonable notice and a meaningful opportunity to be heard before government action may substantially affect a significant property

interest.” *Pfeil v. Amax Coal West, Inc.*, 908 P.2d 956, 961 (Wyo. 1995), citing *Amoco Prod. Co. v. State Bd. of Equalization*, 882 P.2d 866, 872 (Wyo. 1994).

30. When considering whether notice was adequate, “the main consideration is the gravity of the error, not is mere occurrence” *Grams v. Env’t. Quality Council*, 730 P.2d 784, 787 (Wyo. 1986).

31. Reversal is warranted when an interested party has not received legal notice and can demonstrate that the error was prejudicial and affected their substantial rights. *N. Laramie Range Found. v. Converse Cnty. Bd. of Cnty. Comm’rs*, 290 P.3d 1063, 1082–83 (Wyo. 2012) (finding that although applicant failed to provide legal notice, error was not prejudicial because interested party had actual notice of the proceeding and participated in it).

C. WDEQ Prejudiced Petitioner by Not Providing Adequate or Proper Notice Nor a Meaningful Opportunity to Comment

32. Chapter 2 sets forth the notice WDEQ must provide for any permit application it determines is complete. *See* Wyo. Admin. Code 020.0011.2 *et seq.*

33. Chapter 2, 020.0011.2 § 15, titled “Public Participation,” governs notice requirements for reissuance of every permit, and provides that “public notice of every draft permit . . . shall be given.”

34. Chapter 2, 020.0011.2 § 15(a)(i) states, in relevant part, that “notice shall be circulated by one or more of the following methods”:

(A) For individual permits, posting in the post office and other public places of the municipality nearest the location(s) of the proposed discharge(s);

(B) For individual permit, posting near the entrance to the applicant’s premises;

(C) For individual permits, publication in newspapers of general circulation in the locations of the proposed discharges;

(D) For individual permits and general permits, publication in a newspaper with statewide distribution . . . ;

35. In addition to the methods set forth in Chapter 2, 020.0011.2 § 15(a)(i)(A) through (E) above, notice must also be given “on the Wyoming Department of Environmental Quality Internet Website (<http://deqstate.wy.us>).” Chapter 2, 020.0011.2 § 15(a)(v).

36. Further, with respect to the applicant, Chapter 2, 020.0011.2 § 15(a)(vii), specifically states that “[t]he applicant shall be mailed a copy of the fact sheet, which includes the public notice, a draft copy of the permit, and the statement of basis. The applicant will not be mailed a copy of the application materials, which is also part of the fact sheet.”

37. Chapter 2, 020.0011.2 § 15(a)(ix) requires the administrator “provide a period of not less than 30 days following the date of public notice during which interested persons may submit their comments on draft permits.”

38. Here, Petitioner did not receive adequate notice:

- a) Petitioner has no records to indicate it received via mail a copy of the notice, a copy of the fact sheet, or a copy of the draft 2021 Permit Renewal prior to October 29, 2021. This includes no record of the mailing being sent via certified or registered mail, or having otherwise been delivered to Petitioner.
- b) Petitioner did not observe any posting of the notice, a copy of the fact sheet, or a copy of the draft 2021 Permit Renewal on its premises, or other public premises prior to October 29, 2021.
- c) Petitioner did not observe any publication of the notice in a newspaper of general circulation in the location of the Facility, or any other statewide newspaper.
- d) Petitioner received no other communication, instructions or guidance from WDEQ that would be considered reasonable under these circumstances, including via email or telephone, prior to October 29, 2021, indicating that WDEQ was seeking to modify the terms in the 2016 Permit, including to the proposed changed terms and conditions regarding radium.

39. The first meaningful and actual notice of the draft 2021 Permit Renewal received by Petitioner came via email on October 29, 2021, when WDEQ provided a Petitioner employee with a digital copy of the July 26, 2021 public notice via email, which Petitioner had not received prior to that date. In this same email, WDEQ confirmed that it no longer sends public notices via email, but only by mail. According to WDEQ, the public notice was purportedly sent in July, but not an actual copy of the permit renewal itself. No tracking was maintained. *See **Exhibit E***.

40. As purported evidence that timely and proper legal notice occurred prior to October 29, 2021, WDEQ staff forwarded two emails to Petitioner staff on November 3, 2021, and November 5, 2021, respectively, indicating, among other things:

41. November 3 Email: WDEQ “keeps a log of all mail that bounces back” and further indicates the letter sent to Petitioner “has not bounced back.” *See **Exhibit F***.

42. November 5 Email: “It does appear that Matt Smith of your organization was notified that the permit was in PN during the PN period.” *See **Exhibit G*** (referencing July 27, 2021 email exchange between Kathy Schreve (WDEQ) and Matt Smith (Petitioner)).

43. Regarding the November 3 Email, a “bounce back log” is not a legally sufficient or reasonable means to ensure that an applicant, whose rights stand to be most substantially affected, receives adequate and proper notice of, including opportunity to comment on, changes to the terms and conditions of an existing permit.

44. Regarding the November 5 Email, although reference was made in a July 26 email exchange between Kathy Shreve/DEQ and Matt Smith/Petitioner to “public notice,” there were no attachments or links included with this email, and this type of informal communication from WDEQ is not a legally sufficient or reasonable means to ensure that an applicant, whose

rights stand to whose rights stand to be most substantially affected, receives adequate and proper notice of, including opportunity to comment on, changes to the terms and conditions of an existing permit.

45. Further, WDEQ admitted it did not send a copy of the public notice and draft 2021 Permit Renewal to anyone at Petitioner via email. See **Exhibit E**.

46. Petitioner's case is distinguished from others where adequate notice was found simply due to the fact Petitioner did not comment on its own renewal permit, which contained new conditions that substantially affected its rights, nor did Petitioner request a hearing. See e.g. *Pfeil v. Amax Coal West, Inc.*, 908 P.2d 956, 960 (Wyo. 1995) (finding adequate notice where, although mailed to the incorrect address, petitioner timely filed an objection and did not make a request for continuance); *Northern Laramie Range Foundation v. Converse Cty Bd. of Cty. Comms'n.*, 290 P.3d 1063, 1082-82 (Wyo. 2012) (adequate notice was given where petitioners had actual notice ***and*** participated in the proceeding) (emphasis added).

47. WDEQ's failure to provide Petitioner with adequate and proper notice of the proposed changes to the 2016 Permit deprived Petitioner of its constitutional due process rights and otherwise prejudiced Petitioner. Among other things, WDEQ's failure to provide notice deprived Petitioner of the ability to timely comment on draft proposed terms and conditions of the Permit Renewal or otherwise engage with WDEQ in a constructive matter. This deprivation included the inability of Petitioner to discuss and comment on the significant changes to the water quality-based effluent limits for radium.

D. Stay Pending Appeal

48. The Council has broad authority to issue temporary relief, including to stay the effectiveness of the 2021 Permit Renewal pending resolution of this appeal. The Council's

authority includes the ability to “approve, disapprove, repeal, modify or suspend any . . . order of the Director or any division Administrator” and “order that any permit, license, certification or variance be granted, denied, suspended, revoked or modified.” Wyo. Stat. Ann. § 35-11-112(c).

49. A stay pending resolution of this appeal would allow Petitioner to continue operating under the current terms and conditions of the 2016 Permit, which it has been doing for the past five years.

50. Moreover, the ultimate relief Petitioner requests is reissuance of the 2021 Draft Renewal to provide it a meaningful opportunity to comment and be heard. This can be accomplished relatively quickly. Accordingly, preserving the “status quo” pending resolution of the appeal will not prejudice WDEQ or any other interested party, and will not cause any harm or risk of harm to public health, welfare or the environment.

IV. CONCLUSION, REQUEST FOR HEARING, AND REQUESTED RELIEF

Based on the foregoing, Petitioner respectfully requests that this Council grant the following relief:

1. Grant Petitioner a contested case hearing on its appeal pursuant to the Environmental Quality Act, Wyo. Stat. Ann. § 35-11-112, the Administrative Procedure Act Wyo. Stat. Ann. § 16-3-101, and the Council’s Rules of Practice and Procedure.
2. Withdraw the 2021 Permit Renewal and order WDEQ to reissue the draft 2021 Permit Renewal for public notice and comment, including notice via certified mail and email to Petitioner, consistent with the requirements of Chapter 2: Permit Regulations for Discharges to Wyoming Surface Waters and generally applicable, basic due process requirements.
3. Grant Petitioner a stay that would allow Petitioner to operate the Facility under the terms and conditions of the 2016 Permit pending resolution of this appeal.

4. Grant Petitioner any additional relief this Council deems just and proper.

Respectfully submitted this 22nd day of November, 2021.

/s/ Erik P. Waeckerlin
Erik P. Waeckerlin
Brownstein Hyatt Farber Schreck, LLP
1807 Capitol Avenue, Suite 203
Cheyenne, Wyoming 82001
Phone: (303) 223-1100
Email: ewaeckerlin@bhfs.com

Christine A. Jochim
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202
Phone: (303) 223-1100
Email: cjochim@bhfs.com

Attorneys for Petitioner Vaquero Big Horn, LLC

CERTIFICATE OF SERVICE

The undersigned certifies that on November 22, 2021, the APPEAL OF DISCHARGE PERMIT RENEWAL AND REQUEST FOR STAY was served by Express Mail, Return Receipt Requested as noted below to the following:

Wyoming Environmental Quality Council
2300 Capitol Avenue
Hathaway Bldg., 1st, Room 136
Cheyenne, WY 82002
[Express Mail #EJ-597-824-103 US - Return Receipt Requested]

Todd Parfitt, Director
Department of Environmental Quality
200 West 17th Street, #400
Cheyenne, WY 82002
[Express Mail #EJ-597-824-117 US – Return Receipt Requested]

/s/ Patricia Davis _____
Paralegal
Brownstein Hyatt Farber Schreck, LLP

23381842.8