

FILED

DEC 28 2007

Terri A. Lorenzon, Director
Environmental Quality Council

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF THE APPEAL)
AND REVIEW OF THE ISSUANCE)
OF WYOMING POLLUTANT DISCHARGE)
ELIMINATION SYSTEM (WYPDES)) Dockets No. 06-3815
GENERAL PERMITS AND THE) 06-3816, 06-3817
FOURMILE CREEK WATERSHED PLAN) (Consolidated)
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)
)
)
)

**PETITIONERS' BRIEF IN RESPONSE TO WYOMING DEQ'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Petitioners Yates Petroleum Corporation, Marathon Oil Company and Citation Oil and Gas Corp., collectively "Petitioners," pursuant to Rule 56 of the Wyoming Rules of Civil Procedure and Chapter II, Section 14 of the Wyoming Department of Environmental Quality Rules of Practice and Procedure, submit the following Brief in Response to Wyoming Department of Environmental Quality's (DEQ) Motion for Partial Summary Judgment in the above-captioned consolidated case before the Wyoming Environmental Quality Council (EQC).

BACKGROUND

The Wyoming Department of Environmental Quality filed a Motion for Partial Summary Judgment seeking the EQC's determination that two of Petitioners' claims in the above-captioned consolidated case are not ripe for review on the merits. Specifically, DEQ claims Petitioners' appeal of certain provisions contained in the Fourmile Creek

Watershed Permitting Plan (the “Plan”) and the inclusion of the Assimilative Capacity Allocation and Control Process (the Process) in the Pumpkin Creek and Willow Creek General Permits are not ripe for review in this case.

Petitioners disagree with these claims. As issued by DEQ, the Fourmile Creek Permitting Plan is effectively a general permit and DEQ’s argument that the “Plan” is not ripe for review is incongruous with the application of the “Plan.” The conditions complained of in the General Permits are also included in the “Plan” and will apply to any individual permits issued under the “Plan.” In this vein, issuance of the “Plan” is final agency action and is ripe for review. Furthermore, DEQ’s inclusion of the Assimilative Capacity Process in the General Permits and Fourmile Creek Permitting Plan is similarly ripe for review. The Process’ allocation methodology is not at issue; what is at issue is that compliance with the Process *is included* as a provision in the issued General Permits and “Plan” and Petitioners have not received fair notice concerning how they must comply with these yet to be established allocations. Thus, the effects of both of these issues impact Petitioners in a “concrete way” and are ripe for challenge.

MOTION FOR SUMMARY JUDGMENT STANDARD

A motion for summary judgment is properly granted if “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Wyoming Rules of Civil Procedure, Rule 56(c). “A genuine issue of material fact exists when a disputed fact, if proven, would establish or refute an essential element of a cause of action or a defense that a party has asserted.” *Linton v. E.C. Cates Agency, Inc.*, 113 P.3d 26, 28 (Wyo. 2005). The EQC should review the record, “in the light most

favorable to the party opposing the motion, affording to that party the benefit of all favorable inferences that may be drawn from the record. If upon review of the record, doubt exists about the presence of issues of material fact, that doubt must be resolved against the party seeking summary judgment.” *Id.* at 28.

I. **The Fourmile Creek Watershed Permitting Plan Is Effectively a General Permit And Is Ripe For Judicial Action.**

Petitioners timely appealed the Fourmile Creek Watershed Permitting Plan and the current adjudication is the appropriate occasion for judicial action. DEQ argues that the EQC should not review the “Plan” at this time because it is not ripe for review. This argument is unfounded given the effect of the “Plan” itself, DEQ’s intended application of the “Plan” and the conditions set forth in the “Plan.”

a. **Permittees MUST Comply With The Conditions Complained Of.**

Regardless of what DEQ chooses to call the Fourmile Creek Watershed Permitting Plan, it has all the effect of a general permit. To borrow from a well worn cliché, if it looks like a permit and acts like a permit, it must be a permit. On September 11, 2006, John V. Corra, DEQ Director, and John F. Wagner, DEQ Water Quality Administrator, approved the “Plan” and issued it pursuant to Chapters 1 and 2 of the Wyoming Water Quality Rules and Regulations. The “Plan”, in pertinent part, states:

In accordance with the provisions of the Wyoming Environmental Quality Act, facilities that are located within the Fourmile Creek sub-basin of the Powder River drainage located within northeastern Wyoming that have the potential to discharge groundwater produced as a result of coal bed methane production to surface waters of the state of Wyoming *must comply with this plan.*

Permitting Plan Governing Discharges of Produced Water from Coal Bed Methane Wells Located Within the Fourmile Creek Sub-Basin of the Powder River Drainage, Northeastern Wyoming, Page 8 (italics added) (attached as exhibit “A”). While the

“Plan” itself does not authorize discharges, permittees *must* comply with the provisions contained in the “Plan”, including:

1. Effluent Limits (Sections 2 through 8);
2. End of Pipe Monitoring Requirements (Section 11);
3. 50-Year Containment Reservoirs (Sections 6.1 and 7.1); and
4. Additional Requirements Related to the Assimilative Capacity Policy (Section 1.2.1.13).

Even though a permittee must seek authorization through an individual permit, any individual permit will be issued under the “Plan” and contain the exact same conditions as those set forth in the “Plan.” Thus, the “Plan” functions in the same manner as a permit¹.

DEQ itself admits that potential permittees under the “Plan” will be held to these provisions. *Deposition of Kathy Shreve*, October 22, 2007, Pages 6-8 (attached as exhibit “B”). In fact, the sole reason that DEQ decided to issue a “Plan” for Fourmile Creek watershed in lieu of a general permit has nothing to do with the conditions complained of in Petitioners’ appeal. The decision was limited to DEQ’s concern that permit-specific erosion prevention provisions could not be easily addressed under a general permit. Ms. Shreve’s testimony sheds a direct light on how DEQ intends to treat these contested provisions in the “Plan”:

Q. Let me ask you, if I could, why did you issue a -- or why did DEQ issue a plan for Fourmile instead of a permit?

A. Based on comments that we got from primarily the landowners, we recognized that there were probably some unique issues in the Fourmile Creek drainage that would be better addressed under a plan than a general permit; primarily the rugged topography in that area would probably necessitate some creative erosion prevention plans that could not be as easily addressed under a general permit.

¹ Alternatively, for the “Plan” to be binding it could be a rule, but the “Plan’s” procedures complied with none of the provisions for rulemaking specified in the WAPA. *See* WAPA § 16-3-101 *et. seq.* Therefore, if the “Plan” is to have any effect, then it must be a permit.

Q. Can you explain that a little bit more for me, please?

A. In Fourmile Creek the terrain is very rugged. You have quite precipitous drop-offs, and I'm trying to think of the right word, headcuts and so on and so forth going on in the Fourmile Creek drainage. And in order to discharge down those streams with those -- with that extreme topography and those headcuts and the erodible soils in the Fourmile Creek drainage, they're probably going to have to develop site specific erosion prevention plans. And those type of site specific plans are not easily addressed under a general permit. Once you issue a general permit, you're pretty much held to the requirements in the general permit and can't add or take away anything once it's issued.

Q. Are there other differences between the -- let me back up. Are there other, I guess, differences, in broad strokes, between the Fourmile plan and the Pumpkin Creek permit or the Willow Creek permit?

A. There might be some minor differences as far as discharge water quality between Fourmile and Pumpkin Creek. Those -- but those things could easily be addressed under the general permit. It was the topography that led us to believe that the plan might be better suited for Fourmile Creek.

Q. So is the erosion plan, did you -- what did you call --

A. Erosion prevention plan.

Q. Is that the difference between the Fourmile plan and the general permits?

A. Right.

Q. What is your understanding of how the plan is implemented?

A. Under the plan, people would come in for individual surface discharge permits, individual WYPDES permits, which we would issue using the plan as a template for their individual permits.

Q. So it's fairly similar to a general permit?

A. It's similar. You just have a little bit more flexibility on some of the other requirements, for example, the erosion prevention plans.

Q. Now, I know that the Fourmile plan has specific effluent limits set fourth on it for EC and SAR, for example?

A. Right.

Q. So even though a permittee is going to come in and apply for an individual permit under the plan, that permittee is still going to be held to the effluent limits set forth in the plan; is that right?

A. Right.

Id.

Thus, the only provisions within the Fourmile Creek Permitting Plan that may differ from permit to permit are the erosion prevention requirements. Effluent limits will not change. End-of-pipe monitoring requirements will not change. 50-year reservoir containment requirements will not change. Compliance with the Assimilative Capacity Policy will not change. DEQ cannot hide behind semantics and refuse prospective permittees the opportunity to challenge this final action because it chooses to call what effectively looks like and operates as a general permit a “plan.”

b. The Permitting Plan is Ripe for Review

Petitioners are affected in a concrete way by DEQ’s issuance of the Permitting Plan; thus, Petitioners’ claims are ripe for review. Wyoming’s Administrative Procedure Act sets forth the standard for seeking judicial review of an agency action:

Subject to the requirement that administrative remedies be exhausted and in the absence of any statutory or common-law provision precluding or limiting judicial review, *any person aggrieved or adversely affected in fact by a final decision of an agency in a contested case, or by any other agency action or inaction*, or any person affected in fact by a rule adopted by an agency, is entitled to judicial review in the district court for the county in which the administrative action or inaction was taken, or in which any real property affected by the administrative action or inaction is located, or if no real property is involved, in the district court for the county in which the party aggrieved or adversely affected by the administrative action or inaction resides or has its principal place of business. The procedure to be followed in the proceeding before the district court shall be in accordance with rules heretofore or hereinafter adopted by the Wyoming Supreme Court.

W.S. 16-3-114(a) (*italics added*). While this rule applies to appeals to the District Court from decisions of the EQC, and not appeals to the EQC from actions of the DEQ Administrators or Director², the Supreme Court's treatment of the rule is instructive for purposes of this Motion. In *Jacobs v. Wyoming Worker's Safety and Compensation Division*, the Wyoming Supreme Court applied this statute using a two pronged approach. First, a party must be "aggrieved or adversely affected in fact" by the agency action, and second, the party must feel the effects of the agency's action "in a concrete way." 100 P.3d 848, 849-850 (Wyo. 2004).

i. Petitioners Are Adversely Affected By The "Plan."

Petitioners are aggrieved and adversely affected in fact by the challenged action. "An aggrieved or adversely affected person is one who has a legally recognizable interest in that which will be affected by the action." *Id.* at 850. Petitioners own coal bed natural gas leases in the Fourmile Creek watershed. As the "Plan" explicitly states and DEQ confirms, Petitioners "must" comply with, among other provisions, (1) effluent limits, (2) end of pipe monitoring requirements, (3) 50-Year containment reservoirs and (4) additional requirements related to the assimilative capacity policy. These are the exact same provisions forming the basis for Petitioners' complaint in the Pumpkin Creek and Willow Creek general permits.

Additionally, "a potential litigant must show injury or potential injury by alleging a perceptible, rather than a speculative, harm resulting from the agency action." *Id.* As enumerated in its Notice of Appeal and Request for Hearing, Petitioners' discharges are,

² DEQ General Rules of Practice and Procedure, Chapter I, Section 16, requires "unless otherwise provided by these Rules or the Environmental Quality Act, all appeals to Council from final actions of the Administrators or Director shall be made within sixty (60) days of such action." Petitioners filed leave to appeal certain provisions of the Fourmile Creek Watershed Permitting Plan within 60 days of DEQ's issuance of the Plan.

or will be, regulated by this “Plan.” There is no apparent difference between the conditions in the “Plan” and the same conditions being appealed in the Pumpkin Creek and Willow Creek General Permits, which DEQ does not allege are not ripe for review.

Last, “the interest which will sustain a right to appeal must generally be substantial, immediate, and pecuniary. A future, contingent, or merely speculative interest is ordinarily not sufficient.” *Id.* Petitioners interests are substantial, immediate (as all dischargers must comply with the “Plan” upon issuance of a permit) and pecuniary. The ability to discharge coal bed methane produced water directly affects Petitioners’ operations. Thus, Petitioners are aggrieved and adversely affected by the challenged action and meet the Court’s test for ripeness.

ii. **Petitioners Feel The Effects Of The “Plan” In A Concrete Way.**

The administrative decision to issue the “Plan” has been finalized. As DEQ admits, the only provisions in the “Plan” which are not “concrete” are the erosion prevention controls. *See* Shreve Deposition, at 8. Effluent limits, end-of pipe monitoring requirements, reservoir containment size requirements and compliance with the assimilative capacity policy are fixed. Permittees “must” comply with the “Plan.” These provisions form the very basis for appeal of the General Permits. The “Plan” is no different.

As the *Jacobs* Court explains, “the ripeness doctrine is a category of justiciability developed to identify the appropriate occasions for judicial action.” *Id.* “The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Id.* This adjudication *is the appropriate time* for EQC to decide the merits of the Fourmile

Creek Permitting Plan. The Permitting Plan has the exact same issues, limits and provisions as those being appealed in the Pumpkin and Willow Creek General Permits. Withholding court consideration of the “Plan” based on DEQ’s semantics is contrary to the Supreme Court’s construction in *Jacobs* and is contrary to the notion of judicial economy.

II. **Review Of The Assimilative Capacity Allocation Process Contained In The General Permits and Permitting Plan Is Appropriate in the Current Adjudication**

There is a critical distinction DEQ overlooks in its Motion: Petitioners are appealing the General Permits and the Permitting Plan, the issuance of which constitutes final agency action. To the extent that DEQ argues the Assimilative Capacity Process is not yet ripe for review, it is similarly not ready for inclusion in the general permits as issuance of the general permits constitutes final agency action. Moreover, DEQ’s assertion that the Assimilative Capacity Process is not ripe for review actually supports Petitioners’ contention that inclusion of the Process does not provide fair notice to permittees in that the ultimate requirements imposed upon permittees are not known at the time the permit is sought.

Applying the *Jacobs* test to the inclusion of Assimilative Capacity Allocation requirements in the permits yields the same result: this claim is ripe for review in the present adjudication, at least in terms of its inclusion in the permits and “Plan.” Potential permittees are aggrieved by the provisions contained in the Pumpkin and Willow Creek General Permits and Fourmile Creek Permitting Plan referring to “additional requirements related to assimilative capacity in the Powder River, as determined by the “Wyoming Powder River Assimilative Capacity Allocation and Control Process.”

General Permits at Section 1.2.2.13; Permitting Plan at 1.2.1.13. Adverse effects of this Process will be immediately felt by prospective permittees, albeit in a yet to be determined fashion.

As Petitioners argue in their appeal of the general permits and “Plan,” incorporation of the incomplete allocation process violates due process considerations. DEQ claims that due process is satisfied because Petitioners will be able to appeal the allocations once DEQ issues a written authorization to discharge under the general permit or issues an individual permit under the permitting plan. This, however, does not satisfy the judicial test for “fair notice.”

In *Excel Corporation v. United States Department of Agriculture*, the 10th Circuit held that an agency failed to give sufficient fair notice when the regulation at issue is “so ambiguous that a regulated party cannot be expected to arrive at the correct interpretation using standard tools of legal interpretation.” 397 F.3d 1285, 1297 (10th Cir. 2005). In this case, once a notice of intent to be covered by a General Permit (or an application for coverage under the “Plan”) is submitted, prospective permittees will be required to comply with the conditions of the general permits or “Plan.” However, neither the authorizing instrument nor the Assimilative Capacity Process itself provide a permittee with an indication as to what will be required to comply with the condition. Some permittees may find, once they receive their allocation, that they are precluded from discharge altogether. Permittees will certainly feel these effects in a “concrete way.”

In other words, prospective permittees have no way of knowing what their allocation limits will be in the permit, only that some allocation will be imposed. DEQ opines that it has not yet finalized the allocation process:

Q. Is this [the allocation limits] on the website?

A. I don't know if it's on the website or not. It will be. And as the -- As the operators -- and we are now starting to get, like I said, *this is evolving so there's kind of a phased implementation*. We're waiting. Operators are sending us their lease boundaries. It's a pretty complicated thing. We work out problems with the -- GIS layers. When they're all resolved, we calculate and send to the producers what their assimilative capacity is, and we will - - *This isn't on the website yet, but it's anticipated*. Once we have kind of a complete picture, the whole bank itself will be - - will be there, and an operator can look and see what he has in balance in any particular month to be able to discharge.

Deposition of Bill Dirienzo, October 23, 2007, Page 83-84 (italics added) (attached as exhibit "C"). Thus, there is no way for a permittee to be able to fully comply with the permit because the allocation limit has yet to be determined. DEQ does not provide sufficient fair notice by incorporating a placeholder for allocations into the general permits and "Plan" at this point in time.

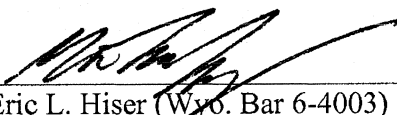
The current adjudication is the appropriate occasion for judicial action. Should EQC grant DEQ's partial summary judgment on this issue, the first and only time for comment (and appeal) of the inclusion of assimilative capacity allocation into the general permits and "Plan" will be in a piecemeal fashion as the permits are issued. This is not a judicious result. The issue concerning whether the inclusion of the Assimilative Capacity Process in the permits provides "fair notice" to prospective permittees is ripe for review in the current proceeding. In the alternative, if the EQC determines the issue is not ripe, it follows that the inclusion of the Process in the permits does not provide the regulated public with "fair notice" (precisely because it does not provide guidance to permittees) and, hence, the Process should be stricken from the permits or the permits should be remanded until such time as the Process is fully completed.

SUMMARY

Based on the foregoing, there are material issues of fact concerning the ripeness of the two issues raised by DEQ. As such, DEQ's Motion for Summary Judgment must be DENIED.

WHEREFORE, Petitioners respectfully request that the EQC deny DEQ's Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 28TH day of December, 2007.



Eric L. Hiser (Wyo. Bar 6-4003)
Matthew Joy
Jorden Bischoff & Hiser, PLC
7272 East Indian School Road, Suite 360
Scottsdale, Arizona 85251
(480) 505-3900

ATTORNEYS FOR PETITIONERS

Certificate of Service

I certify that on this 22nd day of December, 2007, service of a true and complete copy of Petitioners' Response to DEQ's Motion for Partial Summary Judgment in Consolidated File Nos. 06-3815, 06-3816 and 06-3817 was made upon each party or attorney of record herein as indicated below.

The ORIGINAL and ten (10) copies were filed by Federal Express and also emailing a .pdf version of the same on December 22, 2007 with:

Terri Lorenzon, Director / Attorney
Wyoming Environmental Quality Council
122 W. 25th Street
Herschler Bldg., R. 1714
Cheyenne, Wyoming 82002

COPIES were served by Federal Express and emailing a .pdf version of the same on December 22, 2007 with:

Steve Jones
Watershed Protection Program Attorney
Wyoming Outdoor Council
262 Lincoln Street
Lander, Wyoming 82520

Mike Barrash
Senior Assistant Attorney General
123 Capitol Ave.
Cheyenne, WY 82002

COPIES were served by Federal Express on December 22, 2007 with:

John Wagner
Wyoming DEQ, Water Quality Division
122 W. 25th Street
Herschler Building, 4th Floor
Cheyenne, WY 82002

John Corra, Director
Wyoming DEQ
122 W. 25th Street
Herschler Building, 4th Floor
Cheyenne, WY 82002



Exhibit A

**Fourmile Creek Watershed Plan for Surface
Discharges Related to Coal Bed Methane
Production**

**Wyoming Department of Environmental Quality
Water Quality Division
WYPDES Program**

Plan


Revised 08-25-06

PERMITTING PLAN GOVERNING DISCHARGES OF PRODUCED WATER FROM COAL BED METHANE WELLS LOCATED WITHIN THE FOURMILE CREEK SUB-BASIN OF THE POWDER RIVER DRAINAGE, NORTHEASTERN WYOMING

In accordance with the provisions of the Wyoming Environmental Quality Act, facilities that are located within the Fourmile Creek sub-basin of the Powder River drainage located within northeastern Wyoming that have the potential to discharge groundwater produced as the result of coal bed methane production to surface waters of the state of Wyoming must comply with this plan.

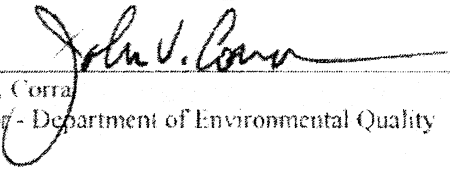
This permitting plan is approved under the provisions of Chapters 1 and 2 of the Wyoming Water Quality Rules and Regulations.

This permitting plan, governing individual WYPDES permits authorizing surface discharges of groundwater produced as the result of CBM operations, shall become effective on the date of issuance, and shall expire at midnight, five years after permitting plan issuance. All individual permits issued under this plan also expire at midnight, five years after the permitting plan is issued.


John F. Wagner
Administrator - Water Quality

Date

9/11/06


John V. Corra
Director - Department of Environmental Quality

Date

9/11/06

Exhibit B

1 BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
 2 STATE OF WYOMING
 3 Dockets No. 06-3815, 06-3816, 06-3817 (Consolidated)

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 6 IN THE MATTER OF THE APPEAL AND REVIEW OF THE ISSUANCE
 7 OF WYOMING POLLUTANT DISCHARGE ELIMINATION SYSTEM
 8 (WYPDES) GENERAL PERMITS

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DEPOSITION OF KATHY SHREVE
Monday, October 22, 2007
8:33 a.m.

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17 Taken in behalf of the Yates Petroleum, Marathon,
 18 Citation, pursuant to Notice, and in accordance with the
 19 Wyoming Rules of Civil Procedure, in the Yellowstone
 20 Room of the Herschler Bldg., 4 West, 122 W. 25th St.,
 Cheyenne, Wyoming, before Merissa Racine, Registered
 Diplomate Reporter and Notary Public in and for the
 County of Laramie, State of Wyoming.

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COPY

PROCEEDINGS

KATHY SHREVE,

having been first duly sworn, was examined and testified as follows, to-wit:

EXAMINATION

BY MR. JOY:

Q. Good morning, Kathy. How are you doing this today?

A. Fine.

Q. Is it okay if I call you Kathy?

A. Yes.

Q. I didn't ask you. Please call me Matt. Could you state your full name for the record.

A. Kathy Shreve.

Q. And could you spell your last name.

A. S-h-r-e-v-e.

Q. Thank you. Could you give me your address and telephone number here at the Department of Environmental Quality?

A. The address is 122 West 25th Street, Herschler Building, 4 West, Cheyenne, Wyoming, 82002.

Q. And your phone number?

A. 307-777-6682.

Q. Thanks. What is your title here at DEQ?

A. My official title is environmental program

principal.

Q. And what do you do? What does that entail?

A. I do water quality modelling, and statistical analysis for the WYPDES program.

Q. Have you had your deposition taken before?

A. I have.

Q. So you know the rules?

A. Yes.

Q. Just kind of ask you some questions. If Mike wants to object, give him an opportunity to.

A. Okay.

Q. You were actually here last Thursday for Jason Thomas's deposition?

A. I was.

Q. You just mentioned that you do water quality modelling for the WYPDES program. Can you explain that a little bit to me?

A. What I do is try to get a handle on how various things that we do might affect water quality in a certain stream, like, for instance, I might look at flow, to try to get a handle on what average flows are for a particular water body, that sort of thing.

Q. So do you use computer programs to --

A. Only basic things, like Access, and Excel spreadsheets and things like that, GIS information, that kind

of thing.

Q. What is GIS information?

A. Stands for Geographical Information System. It's a way of looking at data spatially, like, for instance, in the form of a map.

Q. How long have you worked for DEQ?

A. It will be, let me think here, seven years in February.

Q. Have you worked in the WYPDES program all that time?

A. Yes.

Q. Did you do a similar type of work in the past before coming to DEQ?

A. No.

Q. What did you do before?

A. The job I had immediately before I started working for DEQ, I was a data processor for a geophysical company called Veritas.

Q. Could you spell that, please?

A. V-e-r-i-t-a-s.

Q. Thanks. Are you currently involved in the watershed based permitting program?

A. I am.

Q. How long have you been involved in this program?

A. Since it started. I was in on the Pumpkin Creek

general permit development, and that was one of the first watersheds that we tackled.

Q. Okay. I believe last week that Jason Thomas mentioned that he thought you were the primary permit writer for Pumpkin Creek; is that correct?

A. That's right.

Q. For the Pumpkin Creek general permit?

A. Right.

Q. And also for the Fourmile watershed plan; is that right?

A. That's right, yes.

Q. Let me ask you, if I could, why did you issue a -- or why did DEQ issue a plan for Fourmile instead of a permit?

A. Based on comments that we got from primarily the landowners, we recognized that there were probably some unique issues in the Fourmile Creek drainage that would better be addressed under a plan than a general permit; primarily the rugged topography in that area would probably necessitate some creative erosion prevention plans that could not be as easily addressed under a general permit.

Q. Can you explain that a little bit more for me, please?

A. In Fourmile Creek the terrain is very rugged.

1 You have quite precipitous drop-offs, and I'm trying to
 2 think of the right word, headcuts and so on and so forth
 3 going on in the Fourmile Creek drainage. And in order
 4 to discharge down those streams with those -- with that
 5 extreme topography and those head cuts and the erodible
 6 soils in the Fourmile Creek drainage, they're probably
 7 going to have to develop site specific erosion
 8 prevention plans. And those type of site specific plans
 9 are not easily addressed under a general permit. Once
 10 you issue a general permit, you're pretty much held to
 11 the requirements in the general permit and can't add or
 12 take away anything once it's issued.

13 Q. Are there other differences between the -- Let me
 14 back up. Are there other, I guess, differences, in
 15 broad strokes, between the Fourmile plan and the Pumpkin
 16 Creek permit or the Willow Creek permit?

17 A. There might be some minor differences as far as
 18 discharge water quality between Fourmile and Pumpkin
 19 Creek. Those -- but those things could easily be
 20 addressed under the general permit. It was the
 21 topography that led us to believe that plan might be
 22 better suited for Fourmile Creek.

23 Q. So is the erosion plan, did you -- what did you
 24 call --

25 A. Erosion prevention plan.

1 A. It was very similar to Jason's role. We set up
 2 meetings. We met with the various -- identified the
 3 various stakeholders. We contacted them telling them
 4 what we were planning to do. Then we met with them over
 5 a series of meetings. And I can't remember exactly how
 6 many we had, but it was at least half a dozen different
 7 meetings, describing to them what we were planning to
 8 do, soliciting information from them; working with them
 9 to help them understand some of the things related to
 10 WYPDES permitting that they perhaps had not had cause to
 11 try and understand before; that sort of thing.

12 Q. And you attended these meetings?

13 A. Yes.

14 Q. In your opinion why do you think the general
 15 permitting program such as the Pumpkin Creek general
 16 permit is advantageous versus issuing individual
 17 permits?

18 A. It provides the WYPDES program with a
 19 bureaucratically efficient -- I know that's an oxymoron,
 20 but a bureaucratically efficient way of issuing permits,
 21 and it also provides the operators who are seeking
 22 permits a mechanism through which they know what's
 23 required of them, they know what their limits are going
 24 to be up front. So it's advantageous on both sides, I
 25 think.

1 Q. Is that the difference between the Fourmile plan
 2 and the general permits?

3 A. Right.

4 Q. What is your understanding of how the plan is
 5 implemented?

6 A. Under the plan, people would come in for
 7 individual surface discharge permits, individual WYPDES
 8 permits, which we would issue using the plan as a
 9 template for their individual permits.

10 Q. So it's fairly similar to a general permit?

11 A. It's similar. You just have a little bit more
 12 flexibility on some of the other requirements, for
 13 example, the erosion prevention plans.

14 Q. Now, I know that the Fourmile plan has specific
 15 effluent limits set fourth in it for EC and SAR, for
 16 example?

17 A. Right.

18 Q. So even though a permittee is going to come in
 19 and apply for an individual permit under the plan, that
 20 permittee is still going to be held to the effluent
 21 limits set forth in the plan; is that right?

22 A. Right.

23 Q. What -- You heard me asking Jason quite a bit
 24 about his role in the watershed based permitting
 25 process. Can you explain what your role was or is?

1 Q. What are some of the reasons that, as far as you
 2 know, that DEQ decided to go down the general permit
 3 road instead of individual permits? Was it basically
 4 just for the bureaucratic streamlining?

5 A. It was mainly for streamlining, and we felt that
 6 we were far enough along in the coal bed methane plan
 7 that we had a pretty good idea of what effluent quality
 8 was, what limits were needed and that sort of thing.

9 Q. I know Jason did it, I'm going to ask you a lot
 10 of the same questions I asked Jason, and I'm not going
 11 to pick apart answers, it's just to help me. This
 12 weekend I went back over and reviewed what Jason had
 13 mentioned to me, and I had some questions, so I'm going
 14 to ask you a lot of the same questions. And there might
 15 be, you know -- I might ask you kind of from a different
 16 angle, is the way I'm approaching this.

17 Jason and I talked a lot about what DEQ does when
 18 they look at a watershed, just in general now, to
 19 determine whether or not a general permit such as the
 20 ones that have been issued, is appropriate. Can you
 21 sort of run me through those steps?

22 A. Well, we realized early on when we were
 23 considering the general permit development, that a
 24 general permit for the entire Powder River Basin
 25 probably would not be appropriate due to site specific

Exhibit C

1 BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
 2 STATE OF WYOMING
 3 Dockets No. 06-3815, 06-3816, 06-3817 (Consolidated)

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5
 6 IN THE MATTER OF THE APPEAL AND REVIEW OF THE ISSUANCE
 7 OF WYOMING POLLUTANT DISCHARGE ELIMINATION SYSTEM
 8 (WYPDES) GENERAL PERMITS

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DEPOSITION OF BILL DIRIENZO
 Tuesday, October 23, 2007
 8:34 a.m.

Taken in behalf of the Yates Petroleum, Marathon, Citation, pursuant to Notice, and in accordance with the Wyoming Rules of Civil Procedure, in the Yellowstone Room of the Herschler Bldg., 4 West, 122 W. 25th St., Cheyenne, Wyoming, before Merissa Racine, Registered Diplomate Reporter and Notary Public in and for the County of Laramie, State of Wyoming.

COPY

1 doing to try and create what this pie is that we are
 2 going to divide up. So when you get your one percent of
 3 assimilative capacity or your five percent, and you want
 4 to apply for a permit to discharge, we know how -- how
 5 much water you'll be able to discharge, and so do you.

6 MR. BARRASH: Is this part of the lawsuit,
 7 that's being used in the lawsuit?

8 A. I don't know. This is what we're using to
 9 implement the assimilative capacity program.

10 MR. BARRASH: Okay.

11 A. I don't know how much this is in the lawsuit or
 12 not.

13 Q. (By Mr. Joy) Does that actually break it down
 14 into pounds --

15 A. Yes.

16 Q. -- as well? Wow. I know some people that might
 17 be interested in that.

18 MR. BARRASH: Is that available on the
 19 website?

20 A. It's not secret. In fact, we've -- we've had to
 21 allocate some to people, I mean we tell them what their
 22 load is.

23 MR. BARRASH: Is this on the website?

24 A. I don't know if it's on the website or not. It
 25 will be. And as the -- As the operators -- and we are

1 now starting to get, like I said, this is evolving so
 2 there's kind of a phased implementation. We're waiting.
 3 Operators are sending us their lease boundaries. It's a
 4 pretty complicated thing. We work out problems with
 5 the -- with the GIS layers. When they're all resolved,
 6 we calculate and send to the producers what their
 7 assimilative capacity is, and we will -- This isn't on
 8 the website yet, but it's anticipated. Once we have
 9 kind of a complete picture, the whole bank itself will
 10 be -- will be there, and an operator can look and see
 11 what he has in balance in any particular month to be
 12 able to discharge.

13 Q. (By Mr. Joy) Okay.

14 A. So these two sheets, one shows -- One shows
 15 sodium and the other shows TDS. And the way that that
 16 would calculate in June, you come all the way over here.
 17 We add this last credit. This last thing is when they
 18 first had this concept they put them into credits, which
 19 one credit is ten pounds. If you want to look for the
 20 actual poundage it's here.

21 MR. JONES: Excuse me. Could we maybe make
 22 this an exhibit and get copies to everybody?

23 MR. JOY: Yeah, that sounds like a good idea.

24 (Thereupon the instrument described herein
 25 was identified as Deposition Exhibits 1 & 2.)

1 (Recess from 11:58 a.m. until 12:02 p.m.)

2 Q. (By Mr. Joy) Okay.

3 A. Now, these aren't titled very well.

4 Q. Why don't we refer to one as Final Calcs?

5 A. That's TDS.

6 Q. Okay. Is this, the one that says Final Calcs up
 7 here, is TDS?

8 A. Yeah.

9 MR. BARRASH: Exhibit 1.

10 MR. JOY: There we go. That's why we just
 11 did that.

12 A. And Exhibit 2, sodium.

13 Q. (By Mr. Joy) Sodium.

14 MR. JONES: Just so we know, Exhibit 2 is the
 15 one that said AssimCap at the top.

16 A. Yes.

17 Q. (By Mr. Joy) Okay.

18 A. And the columns are all pretty much
 19 self-explanatory. The column next to the end on the
 20 right would show the number of pounds of either sodium
 21 or TDS that are available each month. That's the sodium
 22 and TDS pies.

23 Q. Okay. Let me -- Let's kind of go through this a
 24 little bit. So we have original Powder. This is the
 25 fifth column from the left. We have a column entitled

1 Original Powder River Median Monthly Concentration SC.
 2 And what is that?

3 MR. BARRASH: That's Exhibit 1 you're talking
 4 about?

5 MR. JOY: This is Exhibit 1, in Final Calcs.

6 A. What number does that represent you mean?

7 Q. (By Mr. Joy) Yeah.

8 A. I -- Well, Kathy is the -- is the person who can
 9 most explain exactly, but I believe that is just the
 10 specific conductance number, the median specific
 11 conductance number for January. And then the next
 12 column, concentration TDS, that specific conductance is
 13 converted to TDS because TDS is what has to be managed.

14 You can't have a load of specific conductance, so it
 15 gets converted to a TDS, or a total dissolved solids.
 16 And then the rest of the calculations follow from that.
 17 And then --

18 Q. So the column entitled on the same Exhibit 1,
 19 Montana standard EC, that's the -- That's the EC --

20 A. Right. That would be the 2000, or if it's in
 21 January it might be 2500 times .762, to convert it.

22 Q. So this is like their water quality standard for
 23 the Powder River for EC?

24 A. Yes.

25 Q. Okay. Surface water quality standard. And then