

FILED

MAY 21 2007

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

**Terri A. Lorenzon, Director
Environmental Quality Council**

**IN THE MATTER OF THE APPEAL OF)
PENNACO ENERGY, INC. OF)
CONDITIONS IN RENEWAL OF)
WYPDES PERMIT NO. WY0039721)**

DOCKET NO. 07-3101e

NOTICE OF APPEAL AND PETITION FOR HEARING

Pennaco Energy, Inc. ("Pennaco"), through its undersigned counsel, hereby appeals certain conditions contained in WYPDES Permit No. WY0039721 ("the Permit") issued by the Department of Environmental Quality ("DEQ") to Pennaco on March 23, 2007 and requests a hearing pursuant to the Environmental Quality Act, the Wyoming Administrative Procedure Act ("WAPA"), and the Rules of Practice and Procedure of the Environmental Quality Council ("EQC"). In support of this appeal, Petitioner advises the EQC as follows:

I. Information About the Petitioner

The petitioner filing this appeal is:

Pennaco Energy, Inc.
3601 Southern Drive
Gillette, Wyoming 82718

Petitioner is represented in this matter by Brent Kunz of Hathaway & Kunz, P.C., 2515 Warren Avenue, Suite 500, Cheyenne, Wyoming 82003 and by Duane Siler and John Martin of Patton Boggs LLP, 2550 M Street, Washington, D.C. 20037. Correspondence and information related to this appeal should be served on the undersigned counsel and on Mr. David Hill at Pennaco Energy, Inc. at the Gillette address above.

II. Action Being Appealed

1. Pennaco appeals, on the following grounds, the requirement, effective March 1, 2008, for impoundment of CBNG produced water discharges in on-channel reservoirs, from which water may be discharged only as a result of precipitation and for not longer than 48 hours continuously.

(A) Pennaco requested in its permit renewal application that DEQ allow continued direct discharge of the existing produced water streams at the existing rate to unnamed ephemeral tributaries of Spotted Horse Creek. Pennaco submitted to DEQ with its permit renewal application a water balance demonstrating that, in the event of continued direct discharges to unnamed ephemeral tributaries of Spotted Horse Creek at the existing permit flow limit, stream losses are such that this effluent would not reach the downstream irrigation compliance point (“ICP”), let alone the Powder River, under normal operating conditions.

(B) Pennaco also submitted to DEQ a mixing analysis showing that, in the event produced water flows were augmented during storm events of various magnitudes, the quality of the resulting diluted flow that might reach an ICP or the Powder River would not be affected by the direct-discharged produced water therein.

(C) This evidence was uncontradicted and DEQ itself determined that “effluent discharged from this facility . . . is unlikely to reach the Powder River or downstream lands” (*see* Statement of Basis, Jan. 9, 2006, at 2), yet DEQ issued the permit renewal with a new and unwarranted requirement for impoundment of all of Pennaco’s produced water in on-channel reservoirs with very limited precipitation-driven discharge opportunities.

2. Pennaco appeals the final end-of-pipe compliance limits for electrical conductivity (“EC”) and sodium adsorption ratio (“SAR”) that would become effective under the renewed permit as of March 1, 2008 on the following grounds:

(A) The Agricultural Use Policy, by means of which DEQ is implementing Section 20 of the Water Quality Regulations, and upon which these limits are based, and as in effect when this permit was issued, is not applicable to permit renewals for existing produced water discharges, absent a showing that existing discharges are harmful to humans or animals. No evidence suggests that the existing discharges under this permit are causing such harm.

(B) DEQ could not lawfully apply the requirements of the Agricultural Use Policy, including the default final effluent limits on EC and SAR, to this permit because DEQ was required to first adopt the “policy” as a rule in accordance with the procedural requirements of the Water Quality Act and the Administrative Procedure Act.

(C) Even if DEQ could lawfully apply these rules without rulemaking, the policy is arbitrary and capricious in establishing final default effluent limits on EC of 1330 uS/cm (and consequent SAR limit of 7.5) instead of higher values recommended to DEQ by the Water and Waste Advisory Board prior to issuance of the renewal and making those limits effective where produced water is actually applied to irrigated land.

(D) It is arbitrary and capricious for DEQ to impose effluent limitations premised on protection of downstream water quality at the point of discharge of CBNG produced water into on-channel reservoirs, as required by this permit after March 1, 2008, in lieu of the existing requirement for water quality compliance at ICPs. These end-of-pipe limits are irrational and unsupported by substantial evidence because they erroneously presume

that the effluent from these outfalls would impact downstream irrigated lands or aquatic life when, in fact, the produced water discharges will be impounded and water in the impoundment cannot be discharged to flow downstream except during precipitation events with attendant dilution, and even then for not longer than 48 hours. DEQ itself determined that "effluent discharged from this facility . . . is unlikely to reach the Powder River or downstream lands."

III. Relief Requested

Petitioner respectfully requests that the EQC grant the following relief:

1. Grant Petitioner a contested case hearing on the challenged provisions of WYPDES Permit No. WY0039721 pursuant to the EQA, the WAPA, and the EQC's Rules of Practice and Procedure.
2. Finally determine Pennaco's application for renewal of WYPDES Permit No. WY0039721; reject the permit provisions referenced herein; and order that the renewed permit shall be finally issued without those provisions.
3. Provide such other relief as the EQC determines just and reasonable under the circumstances.

DATED this 21 day of May, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that on May 21, 2007, the foregoing Notice of Appeal and Petition for Hearing was served by hand as follows:

Original and 10 copies to:

Terri Lorenzon, Director
Environmental Quality Council
Herschler Building, Room 114
122 West 25th Street
Cheyenne, Wyoming 82002

Two copies to:

John Corra, Director
Department of Environmental Quality
Herschler Building, 4th Floor West
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Ben R. Iler