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

_____)
IN THE MATTER OF THE APPEAL)
OF PENNACO ENERGY, INC. FROM)
CONDITIONS IN RENEWAL OF)
WYPDES PERMIT NOS. WY0039721,)
WY0039616, WY0048461, WY0052361,)
WY0048283, WY0030632)
_____)

Consolidated Docket No. 07-3620

**OPPOSITION TO PETITION FOR LEAVE TO INTERVENE
OF POWDER RIVER BASIN RESOURCE COUNCIL**

I. INTRODUCTION

Between May 21, 2007, and December 3, 2007, Petitioner Pennaco Energy Inc. ("Petitioner" or "Pennaco") filed six notices of appeal and petitions for review regarding six separate Wyoming Pollutant Discharge Elimination System ("WYPDES") permits. In a scheduling order dated December 6, 2007, later modified by an order on consolidation dated December 14, 2007, these six appeals were consolidated into Docket No. 07-3620.

On December 21, 2007, the Powder River Basin Resource Council ("Proposed Intervenor" or "PRBRC") filed a petition for leave to intervene in the consolidated appeals. The

petition contained a number of unsupported statements and allegations, and ultimately failed to establish: (1) that PRBRC has organizational standing to intervene in this action, or (2) that PRBRC has protectable interests that could be adversely affected by this appeal. For these reasons, and for the reasons discussed below, Pennaco respectfully requests that PRBRC's Petition for Leave to Intervene be denied.

II. DISCUSSION

A. Legal Standard for Intervention

Intervention in a WYPDES appeal is governed by Chapter 2, Section 7 of the Wyoming Department of Environmental Quality Rules of Practice and Procedure. The applicable rules state that leave to intervene will not be granted unless the Council determines that the party requesting to intervene: (1) is adversely affected by the action, or (2) has a legal right to intervene under either the Environmental Quality Act or the Wyoming Administrative Procedure Act. *See* DEQ Rules of Practice and Procedure, Chapter 2, § 7.

B. PRBRC's Petition Should Be Denied.

1. The Petition Does Not Establish that PRBRC Has Organizational Standing to Intervene In This Action.

An organization has standing to bring suit on behalf of its members when: "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members of the lawsuit." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 670 (10th Cir. 2006). In this case, PRBRC has not established the first factor required for organizational standing. Specifically, PRBRC does not allege that Kenny Clabaugh, Bob Spellman or Bill and Marge West were members of the PRBRC when these consolidated appeals were filed with the EQC. Moreover, PRBRC does

not allege that these individuals would otherwise have standing to intervene in this consolidated appeal in their own right. Absent a supporting affidavit or sworn declaration regarding the membership status of these individuals and their standing to participate in this appeal, the bare assertions within PRBRC's petition do not adequately establish that it has organizational standing to intervene in this case.

2. The Petition Does Not Demonstrate That PRBRC Has a Protectable Interests Could be Adversely Affected by This Appeal.

The Petition for Leave to Intervene does not demonstrate that PRBRC has a protectable interest in the subject of this appeal, or that these interests could be adversely affected by the action. In the context of intervention under Rule 24 of the Wyoming Rules of Civil Procedure, the Wyoming Supreme Court has held that a party seeking intervention must have a protectable interest in the subject of the litigation. *Platte County School Dist. No. 1 v. Basin Electric Power Coop.*, 638 P.2d 1276 (Wyo. 1982). The significant interest must be “in the present litigation and not one that was merely contingent or similar to the interest of any member of the public at large.” *Id.* at 1279.

PRBRC identifies two “interests” it claims will be affected by this litigation: (1) the interests of landowners Kenny Clabaugh, Bob Spellman, and Bill and Marge West, and (2) the interests of PRBRC members in the regulatory environment surrounding future permits. Neither interest provides a sufficient basis for PRBRC's intervention in this appeal.

With regard to the individual landowners, PRBRC has not established that the interests of Clabaugh, Spellman, or the Wests are at stake in this appeal. The Petition states only that “Powder River Basin Resource Council members Kenny Clabaugh and Bob Spellman, landowners on Wildhorse Creek; and Bill and Marge West on Spotted Horse Creek *are specifically impacted by these permits.*” Petition at ¶ 1 (emphasis added). PRBRC does not

provide any further explanation regarding how these individuals are impacted beyond that they are “specifically impacted.” PRBRC does not allege that any of their members’ land would be harmed if Pennaco’s requested relief were granted. Absent such allegations, supported by affidavits or sworn declarations, PRBRC has not demonstrated that its members’ interests are adversely affected by the issues in this appeal.

With regard to PRBRC’s interest in the effectiveness of “future WYPDES permitting,” Petition at ¶ 4, PRBRC has no protectable interest in the issuance of future WYPDES permits and therefore they have no interest in the *present* litigation. PRBRC’s interest is a contingent interest that is no different from that of any other Wyoming citizen. Although PRBRC may have a concern for the outcome, PRBRC has not demonstrated that intervention is warranted to protect its specific interests that may be adversely affected by this appeal.

3. PRBRC Does Not Have A Right To Intervene Under Either the Environmental Quality Act or the Wyoming Administrative Procedure Act.

PRBRC has not alleged, nor could it allege, that it has a legal right to intervene under either the Environmental Quality Act or the Wyoming Administrative Procedure Act. Thus, PRBRC does not satisfy the second criteria for intervention in an EQC contested proceeding.

4. If PRBRC’s Petition for Leave to Intervene is Granted, Petitioners Should be Permitted to Take Discovery of Intervenors’ Alleged Interests and Injuries.

Should the Presiding Officer determine that PRBRC has sufficiently alleged organizational standing and grant PRBRC intervenor status, Pennaco respectfully requests the opportunity to take discovery of PRBRC and its named members’ supposed interests and injuries. If the evidence does not support PRBRC’s bare assertions that it has protectable interests in this consolidated appeal, Pennaco intends to challenge PRBRC’s standing at the

dispositive motions stage. In the event intervention is granted, Pennaco anticipates filing a request to extend the discovery period to allow sufficient time for this inquiry.

III. CONCLUSION

For the foregoing reasons, Petitioner Pennaco Energy Inc. respectfully requests that the Petition for Leave to Intervene of the Powder River Basin Resource Council be denied.

Respectfully submitted,

for: [Handwritten Signature]

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2008 a copy of the foregoing Opposition to Petition for Leave to Intervene was served by first class mail, upon:

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