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FILED

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Terri A. Lorenzon, Director
Environmental Quality Council

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

**IN THE MATTER OF THE APPEAL
OF CLABAUGH RANCH, INC. FROM
WYPDES PERMIT NO. WY0049697**

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) **Docket No. 08-3802**
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**MOTION FOR A MORE DEFINITIVE STATEMENT PURSUANT TO THE
GENERAL RULES OF PRACTICE AND PROCEDURE OF THE
ENVIRONMENTAL QUALITY COUNCIL AND RULE 12(e), W.R.C.P.**

On May 19, 2008, Clabaugh Ranch, Inc. ("Clabaugh") filed a Petition with the Environmental Quality Council of the State of Wyoming ("EQC") requesting a hearing with regard to the issuance of WYPDES Permit No. WY0049697 to Lance Oil and Gas Company, Inc. ("Lance") dated March 24, 2008. On June 20, 2008, the EQC issued an Order finding that Lance was a necessary party to the appeal and ordering Lance to file a response to the appeal with the EQC on or before July 21, 2008.

A review of the Petition filed by Clabaugh reveals that the Petition contains numerous vague, ambiguous, and conclusory allegations that prevent Lance Oil and Gas Company, Inc. from framing a proper responsive pleading. Lance hereby requests that the EQC order Clabaugh to file a more definitive statement of the allegations raised by Clabaugh pursuant to the General Rules

of Practice and Procedure of the EQC and Rule 12(e), Wyoming Rules of Civil Procedure.

Rule 12(e), W.R.C.P., provides that:

“If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after the notice of the order or within such other time frame as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.”

All hearings before the EQC are conducted pursuant to the Wyoming Administrative Procedures Act. See, Chapter 1, § 3(a), General Rules of Practice and Procedure before the EQC. While the Wyoming Supreme Court has not definitively ruled on the applicability of Rule 12(e) in the administrative hearing context, the Court has ruled that other more substantive sections of the Wyoming Rules of Civil Procedure have applicability in administrative hearings. See, Neal v. Caballo ROJO, Inc., 899 P.2d 56, 58 (Wyo. 1995). (Administrative hearing officer properly granted summary judgment in administrative hearing under Wyoming Worker’s Compensation Act.) Rollins v. Wyoming Tribune-Eagle, 152 P.3d 367, 369 (Wyo. 2007) (Summary judgment proceedings of Rule 56, W.R.C.P., apply to administrative cases). When presented to the Court, the Court will in all likelihood find that Rule 12(e) likewise applies in the administrative hearing context. Lance, accordingly, urges the EQC to apply Rule 12(e) and order Clabaugh to file a proper petition in this matter which factually alleges why Clabaugh challenges the permit.

In addition, Chapter 1, Section 3(c)(iii) of the General Rules of Practice and Procedure for the EQC requires that a petition for hearing:

“shall set forth: (iii) A statement in ordinary, but concise language **of the facts on which the request or protest is based**, including whenever possible particular reference to the statutes, rules or orders that the Applicant or Protestant alleges have been violated.” (emphasis added)

While Clabaugh cites numerous rules which are allegedly violated by the Permit which is the subject of the appeal, the large majority of his allegations contain no facts that would allow Lance, Wyoming DEQ, or the EQC to even begin to analyze the actual contentions raised by Clabaugh. Unless the EQC requires Clabaugh to file a more definitive statement and follow the General Practice rules of the EQC which **mandate** allegations of **facts** supporting the petition, Lance, Wyoming DEQ, and this body are left to speculate about what real objection is raised by Clabaugh with regard to the contested permit.

Section 3 of the petition filed by Clabaugh entitled “Statement of Facts” contains numerous vague, ambiguous, and conclusory allegations that prevent Lance from filing a responsive pleading without any real knowledge of what facts Clabaugh is alleging. Paragraph 3(a), 3(b), 3(c), 3(d), 3(e), and 3(f) are all properly pled factual allegations. However, paragraph 3(g) through 3(t) are all vague, ambiguous, and conclusory allegations which prejudice Lance in that the allegations do not allege in any manner whatsoever how the Permit may violate the provisions of Wyoming law which are cited within these paragraphs. Each paragraph where a more definitive statement must be provided will be discussed below.

Paragraph 3(g) “Water uses in existence on or after November 28, 1975, and the level of water necessary to protect those uses are not maintained and protected by the permit in violation of Ch. 1, Section 8 of the Water Quality Rules and Regulations of the DEQ.”

This allegation fails to specify factually how the permit is in any way in violation of Ch. 1, § 8 of the Water Quality Rules and Regulations of the DEQ. The allegation fails to contain any factual averment which discloses what water quality is allowed by the permit, what the water quality of the produced water is, and how such production of this water may factually violate Ch. 1, § 8. In essence, the petitioner has done nothing more than allege that the permit was somehow issued in violation of a statutory section. A properly pled allegation would disclose factually and with specificity how the particular permit, and the water that may be produced pursuant to the permit, would violate Ch. 1, § 8 of the Water Quality Rules and Regulations of the Department of Environmental Quality.

Paragraph 3(h) “The Permit does not prevent the presence of substances attributable to or influenced by the activities of man that will settle to form sludge, bank or bottom deposits in quantities which could result in significant aesthetic degradation, significant degradation of habitat for aquatic life or adversely affect agricultural use, plant life or wildlife in violation of Ch.1, § 15 of the Water Quality Rules and Regulations of the DEQ.”

This allegation fails to specify factually how the permit is in any way in violation of Ch. 1, § 15 of the Water Quality Rules and Regulations of the DEQ. The allegation fails to contain any factual averment which discloses what water quality is allowed by the permit, what the water quality of the produced water is, and how such production of this water may factually violate Ch. 1, § 15. In addition, Clabaugh fails to factually allege what “sludge, bank or bottom

deposits” may occur and how such deposits, if such even occur, may cause a “significant aesthetic degradation”, or “significant degradation of habitat”, or “adversely affect agricultural use, plant life or wildlife.” In essence, the petitioner has done nothing more than allege that the permit was somehow issued in violation of a statutory section. A properly pled allegation would disclose factually and with specificity how the particular permit, and the water that may be produced pursuant to the permit, would violate Ch. 1, § 15 of the Water Quality Rules and Regulations of the Department of Environmental Quality.

Paragraph 3(i) “The Permit does not prevent the presence of floating and suspended solids attributable to or influenced by the activities of man in quantities which could result in significant aesthetic degradation, significant degradation of habitat for aquatic life, or adversely affect agricultural water use, plant life, or wildlife in violation of Ch. 1, § 16 of the Water Quality Rules and Regulations of the DEQ.”

This allegation fails to specify factually how the permit is in any way in violation of Ch. 1, § 16 of the Water Quality Rules and Regulations of the DEQ. The allegation fails to contain any factual averment which discloses what floating and suspended solids are allowed by the permit, what the water quality of the produced water is, and how the production of this water may factually violate Ch. 1, § 16. Once again, Clabaugh fails to factually allege that the Permit will cause the harm referenced in Ch. 1 § 16. In essence, the petitioner has done nothing more than allege that the permit was somehow issued in violation of a statutory section. A properly pled allegation would disclose factually and with specificity how the particular permit, and the water that may

be produced pursuant to the permit, would violate Ch. 1, § 16 of the Water Quality Rules and Regulations of the Department of Environmental Quality.

Paragraph 3(j) “The Permit does not prevent the waters from containing substances attributable to or influenced by the activities of man that produce taste, odor and color or that would visibly alter the natural color of the water in violation of Ch. 1, § 17 of the Water Quality Rules and Regulations of the DEQ.”

This allegation fails to specify factually how the permit is in any way in violation of Ch. 1, § 17 of the Water Quality Rules and Regulations of the DEQ. The allegation fails to contain any factual averment which discloses what water quality is allowed by the permit, what the water quality of the produced water is, and how such production of this water may factually violate Ch. 1, § 17. No factual allegation alleges how the produced water will affect the “taste, odor, and color” of the existing water where the discharge will occur. In essence, the petitioner has done nothing more than allege that the permit was somehow issued in violation of a statutory section. A properly pled allegation would disclose factually and with specificity how the particular permit, and the water that may be produced pursuant to the permit, would violate Ch. 1, § 17 of the Water Quality Rules and Regulations of the Department of Environmental Quality.

Paragraph 3(k) “The Permit allows degradation of Wyoming surface waters to such an extent as to cause a measurable decrease in crop or livestock production in violation of Ch. 1, § 20 of the Water Quality Rules and Regulations of the DEQ. The Permit does not establish effluent limitations that will protect livestock consumption.”

This allegation fails to specify factually how the permit is in any way in violation of Ch. 1, § 20 of the Water Quality Rules and Regulations of the DEQ.

The allegation fails to contain any factual averment which discloses what water quality is allowed by the permit, what the water quality of the produced water is, and how such production of this water may factually violate Ch. 1, § 20. There is no factual claim regarding how the produced water will cause a “measurable decrease in crop or livestock production.” In essence, the petitioner has done nothing more than allege that the permit was somehow issued in violation of a statutory section. A properly pled allegation would disclose factually and with specificity how the particular permit, and the water that may be produced pursuant to the permit, would violate Ch. 1, § 20 of the Water Quality Rules and Regulations of the Department of Environmental Quality.

Paragraph 3(l) “The Permit fails to assure compliance with the turbidity requirements of Ch. 1, § 23 of the Water Quality Rules and Regulations of the DEQ.”

This allegation fails to specify factually how the permit is in any way in violation of Ch. 1, § 23 of the Water Quality Rules and Regulations of the DEQ. The allegation fails to contain any factual averment which discloses what water quality is allowed by the permit, what the water quality of the produced water is, and how such production of this water may factually violate Ch. 1, § 23. There are no facts alleged showing either the turbidity of the produced water or the receiving waters. In essence, the petitioner has done nothing more than allege that the permit was somehow issued in violation of a statutory section. A properly pled allegation would disclose factually and with specificity how the particular permit, and the water that may be produced pursuant to the permit,

would violate Ch. 1, § 23 of the Water Quality Rules and Regulations of the Department of Environmental Quality.

Paragraph 3(m) “The Permit fails to establish conditions to provide for and assure compliance with the Clean Water Act, the Wyoming Environmental Quality Act, and the Wyoming Water Quality Rules and Regulations prior to the final administrative disposition of the permit in violation of Ch. 2, § 5(c)(ii) of the Water Quality Rules and Regulations of the DEQ.”

This allegation fails to specify factually how the permit is in any way in violation of Ch. 2, § 5(c)(ii) of the Water Quality Rules and Regulations of the DEQ. The allegation fails to contain any factual averment which discloses what water quality is allowed by the permit, what the water quality of the produced water is, and how such production of this water may factually violate Ch. 2, § 5(c)(ii). There are no facts alleged regarding how this permit may violate the Clean Water Act, the Wyoming Environmental Quality Act, or rules adopted thereunder. In essence, the petitioner has done nothing more than allege that the permit was somehow issued in violation of a statutory section. A properly pled allegation would disclose factually and with specificity how the particular permit, and the water that may be produced pursuant to the permit, would violate Ch. 2, § 5(c)(ii) of the Water Quality Rules and Regulations of the Department of Environmental Quality.

Paragraph 3(n) “The Permit fails to require that the discharge ensures compliance with the applicable water quality requirements of all affected states in violation of Ch. 2, § 9(a)(v).”

This allegation fails to specify factually how the permit is in any way in violation of Ch. 2, § 9(a)(v) of the Water Quality Rules and Regulations of the DEQ. The allegation fails to contain any factual averment which discloses

what water quality is allowed by the permit, what the water quality of the produced water is, and how such production of this water may factually violate Ch. 2, § 9(a)(v). In essence, the petitioner has done nothing more than allege that the permit was somehow issued in violation of a statutory section. A properly pled allegation would disclose factually and with specificity how the particular permit, and the water that may be produced pursuant to the permit, would violate Ch. 2, § 9(a)(v) of the Water Quality Rules and Regulations of the Department of Environmental Quality.

Paragraph 3(o) “The conditions of the Permit do not provide compliance with applicable requirements of Wyo. Stat. § 35-11-302 and the Water Quality Rules and Regulations of the DEQ.”

This allegation fails to specify factually how the permit is in any way in violation of Wyo. Stat. § 35-11-302 and the Water Quality Rules and Regulations of the DEQ. The allegation fails to contain any factual averment which discloses what water quality is allowed by the permit, what the water quality of the produced water is, and how the production of this water may factually violate Wyo. Stat. § 35-11-302 and the Water Quality Rules and Regulations of the DEQ. In essence, the petitioner has done nothing more than allege that the permit was somehow issued in violation of a statutory section. A properly pled allegation would disclose factually and with specificity how the particular permit, and the water that may be produced pursuant to the permit, would violate Wyo. Stat. § 35-11-302 and the Water Quality Rules and Regulations of the DEQ.

Paragraph 3(p) “The Permit fails to include the conditions and limitations that are required in all permits by Ch. 2, Appendix H paragraphs (b)(i)(ii)(v)(vii) and (ix) of the Water Quality Rules and Regulations of the DEQ.”

This allegation fails to specify factually how the permit is in any way in violation of Ch. 2, Appendix H paragraphs (b)(i)(ii)(v)(vii) and (ix) of the Water Quality Rules and Regulations of the DEQ. The allegation fails to contain any factual averment which discloses what water quality is allowed by the permit, what the water quality of the produced water is, and how the production of this water may factually violate Ch. 2, Appendix H paragraphs (b)(i)(ii)(v)(vii) and (ix) of the Water Quality Rules and Regulations of the DEQ. Clabaugh totally fails to identify what “conditions and limitations” he believes may be missing from the permit. In essence, the petitioner has done nothing more than allege that the permit was somehow issued in violation of a statutory section. A properly pled allegation would disclose factually and with specificity how the particular permit, and the water that may be produced pursuant to the permit, would violate Ch. 2, Appendix H paragraphs (b)(i)(ii)(v)(vii) and (ix) of the Water Quality Rules and Regulations of the DEQ.

Paragraph 3(q) “The Permit fails to require the permittee to take all reasonable measures to prevent downstream erosion that would be attributable to the discharge of produced water as required by Ch. 2, Appendix H paragraph (d)(iv) of the Water Quality Rules and Regulations of the DEQ.”

This allegation fails to specify factually how the permit is in any way in violation of Ch. 2, Appendix H paragraph (d)(iv) of the Water Quality Rules and Regulations of the DEQ. The allegation fails to contain any factual averment which discloses what water quantity or quality is allowed by the permit, what

the water quantity or quality of the produced water is, and how such production of this water may factually violate Ch. 2, Appendix H paragraph (d)(iv) of the Water Quality Rules and Regulations of the DEQ. Clabaugh makes no factual allegation that the permit will cause “downstream erosion.” In essence, the petitioner has done nothing more than allege that the permit was somehow issued in violation of a statutory section. A properly pled allegation would disclose factually and with specificity how the particular permit, and the water that may be produced pursuant to the permit, would violate Ch. 2, Appendix H paragraph (d)(iv) of the Water Quality Rules and Regulations of the DEQ.

Paragraph 3(r) “The Permit does not require that the produced water be used for agriculture or wildlife during periods of discharge in violation of 40 C.F.R. Part 435 Subpart E. The Permit does not require that the produced water have use in agriculture or wildlife propagation and actually be put to such use during periods of discharge and Lance has not documented that the produced water will actually be put to use during periods of discharge in violation of Ch. 2, Appendix H paragraph (a)(i) of the Water Quality Rules and Regulations of the DEQ.”

This allegation fails to specify factually how the permit is in any way in violation of Ch. 2, Appendix H paragraph (a)(i) of the Water Quality Rules and Regulations of the DEQ or 40 C.F.R. Part 433 Subpart E. The allegation fails to contain any factual averment which discloses what water quality is allowed by the permit, what the water quality of the produced water is, and how such production of this water may factually violate Ch. 2, Appendix H paragraph (a)(i) of the Water Quality Rules and Regulations of the DEQ or the Code of Federal Regulations. In essence, the petitioner has done nothing more than allege that the permit was somehow issued in violation of a statutory section.

A properly pled allegation would disclose factually and with specificity how the particular permit, and the water that may be produced pursuant to the permit, would violate Ch. 2, Appendix H paragraph (a)(i) of the Water Quality Rules and Regulations of the DEQ and the Code of Federal Regulations.

Paragraph 3(s) “The Permit’s effluent limits will not protect plant life from adverse effects of the discharge, and water with the quality allowed by the Permit will cause a measurable decrease in crop and livestock production.”

This allegation fails to specify factually how the permit is in any way in violation of the Water Quality Rules and Regulations of the DEQ or the Wyoming Environmental Quality Act. The allegation fails to contain any factual averment which discloses what water quality is allowed by the permit, what the water quality of the produced water is, and how such production of this water may factually violate some unknown statutory provision. Clabaugh fails to factually allege any cause and effect between the discharge and crop or livestock production. In essence, the petitioner has done nothing more than allege that the permit was somehow issued in violation of some unknown statutory section. A properly pled allegation would disclose factually and with specificity how the particular permit, and the water that may be produced pursuant to the permit, would violate the Water Quality Rules and Regulations of the Department of Environmental Quality or the Wyoming Environmental Quality Act.

Paragraph 3(t) “The Permit violates the anti-backsliding provisions of the Clean Water Act.”

This allegation fails to specify factually how the permit is in any way in violation of the Water Quality Rules and Regulations of the DEQ of the Clean Water Act. The allegation fails to contain any factual averment which discloses what water quality is allowed by the permit, what the water quality of the produced water is, and how such production of this water may factually violate some unspecified statutory section or rule. In essence, the petitioner has done nothing more than allege that the permit was somehow issued in violation of some unidentified provision. A properly pled allegation would disclose factually and with specificity how the particular permit, and the water that may be produced pursuant to the permit, would violate the Water Quality Rules and Regulations of the Department of Environmental Quality, the Wyoming Environmental Quality Act, or the Clean Water Act.

CONCLUSION

The EQC must require Clabaugh to file a more definitive statement which specifically and factually alleges how the contested permit is in violation of Wyoming law, federal law, or water quality rules and regulations. The present petition fails to comply with the Rules of Practice and Procedure before the EQC, the Wyoming Administrative Procedures Act, and the Wyoming Rules of Civil Procedure. To allow Clabaugh to use the vague, ambiguous, shotgun approach exhibited in his pleadings leaves Lance, the Wyoming DEQ, and the EQC with no information that would allow the proper consideration of the permit in question. If Clabaugh desires to contest a permit that has been

issued after great consideration by Wyoming DEQ and Lance, Clabaugh must be required to factually allege how the permit does not conform with Wyoming law.

Dated this 18th day of July, 2008.

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CERTIFICATE OF SERVICE

This is to certify that on the 10th day of July, 2008, a true and correct copy of the foregoing was served upon counsel as follows:

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