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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	)	**Docket No. 08-3802**

LANCE OIL AND GAS COMPANY, INC.'S RESPONSE TO CLABAUGH RANCH, INC.'S MOTION FOR SUMMARY JUDGMENT

On or about July 16, 2009, Clabaugh Ranch, Inc. ("Clabaugh") filed a Motion for Summary Judgment. Clabaugh alleges he is entitled to summary judgment based on a revision of the so-called "Hansen Equation;" failure of DEQ to follow a policy of the DEQ; the issuance of a report by outside consultants retained by the EQC; failure of the Permit to establish SAR limits for water that could be potentially discharged from containment reservoirs; and DEQ's reliance on an averaging technique with regard to sampled soil EC and SAR values. Clabaugh's Motion for Summary Judgment is fatally deficient in a number of respects and must be denied.

Lance Oil and Gas Company, Inc. ("Lance") hereby incorporates by reference the Memorandum in Support of Lance Oil and Gas Company, Inc.'s

Motion for Summary Judgment and attached exhibits filed by Lance on or about July 17, 2009 as if fully set forth herein.

As argued in the Lance Motion for Summary Judgment, because Clabaugh has no right to appeal the issuance of a permit by DEQ to the EQC, the EQC has no subject matter jurisdiction to consider the appeal. The appeal must be dismissed forthwith.

Secondly, as argued in the Lance Motion for Summary Judgment, Clabaugh can show no violation of the Wyoming Environmental Quality Act ("WEQA") or Water Quality Rules and Regulations duly adopted and issued by the DEQ. While Clabaugh may be able to show some impact on his ranching operation based on the cumulative effects of coal bed methane discharges upstream of the Clabaugh Ranch, Clabaugh has provided the EQC with no evidence with regard to harm caused to the Clabaugh Ranch from the particular permit in question.[1] Even assuming that Clabaugh has a statutory right to appeal the permit's issuance by DEQ, because Clabaugh has the burden of proof of showing that the permit was somehow issued in violation of

[1] On July 30, 2009, Clabaugh filed a Response to the Lance Motion for Summary Judgment. Clabaugh's Response fails to address the fact that Clabaugh has the burden of proof to show that **the permit in question** was issued in violation of Wyoming law and is causing harm to Clabaugh. Clabaugh, once again, uses a shotgun to blast away at everyone upstream when Wyoming statutes require the use of a rifle. Clabaugh's rambling discourse once again focuses on vague, conclusory allegations regarding end of pipe effluent limits with no allegations or facts to support any claim that the Lance discharge **itself** is causing damage to the Clabaugh Ranch. Clabaugh provides the EQC with no facts to show that the Lance discharge escapes the channel and flows onto his land, no facts to show what the water chemistry might be at the point the Lance discharge comes in contact with Clabaugh lands, no facts to show the quantity of the Lance discharge that may escape the channel and affect Clabaugh lands and no facts to show how such water may affect Clabaugh lands that have some unknown EC and SAR levels. Clabaugh has submitted no evidence that counters the affidavits of either Jason Thomas or Terry Brown. At best, Clabaugh presents argument (and not evidence) that something bad **might** happen if Lance discharges pursuant to the permit. Because Clabaugh has failed to establish any harm from the permit he is appealing or that the permit violates Wyoming law, the EQC has no choice but to grant Lance's Summary Judgment Motion. *See* Rule 12(e), W.R.C.P. (a party opposing summary judgment "may not rest upon the mere allegations or denials . . . but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing there is a genuine issue for trial.")

existing Wyoming law, Clabaugh's Motion for Summary Judgment must be denied. Clabaugh has shown no violation of Wyoming law with regard to the issuance of the permit in question.

In fact, Clabaugh's Motion for Summary Judgment contains no reference to WEQA or the Water Quality Rules and Regulations of the DEQ. Failure to cite cogent authority or make persuasive argument must result in the denial of Clabaugh's Motion for Summary Judgment. *Scherling v. Kilgore*, 599 P.2d 1352, 1359 (Wyo. 1979).

ARGUMENT I

The revision of the Hansen Equation cannot result in revocation of the permit issued by DEQ.

As previously explained in the Affidavit of Jason Thomas submitted in support of Lance's Motion for Summary Judgment, in 2006, the so-called Hansen Equation was revised. Thomas Affidavit, Ex. 2, Memorandum in Support of Lance Oil and Gas Company, Inc.'s Motion for Summary Judgment. Permits issued after revision of the Hansen Equation contain the newly recognized Hansen Equation. As noted by Jason Thomas, in his affidavit and his deposition, the revision to the Hansen Equation results in an approximately 10% lowering of the SAR allowed for any effluent discharge using the revised Hansen Equation. *Id.*

Clabaugh alleges that this permit's failure to recognize the Hansen Equation change must result in the revocation of the permit and a remand to DEQ. Clabaugh cites no authority for this novel proposition and, in fact, fails

to inform the EQC of Thomas' testimony with regard to why the permit does not need to be revised. Jason Thomas expressly testified, at pp. 71-73, that:

> Okay. Do you have -- if Lance's report there in Exhibit 10 was correct and the background SAR in Wild Horse Creek was 2.8, do you have an opinion as to whether or not increasing that SAR to 13.7 or 15 would result in a decrease in infiltration rate in the Wild Horse Creek drainage?
>
> A We think if the SAR meets the limit set forth in the permit that the infiltration rate will not be affected to an extent that would cause a measurable decrease in crop or livestock production.
>
> Q. Even though this permit has the incorrect formula?
>
> A. That's correct.
>
> Q. So you're saying that even though the incorrect formula was used, the effluent limits are okay? Is that right?
>
> A. We think they're fine. You know, certainly, it's something that could be monitored. For one thing, it's a -- it's a relatively small change from the new formula to the old formula. It makes about, as you said, maybe about a 10 percent difference in this case for allowable SAR. Furthermore, the SAR discharged at the outfall is not necessarily the SAR that will be experienced by the irrigated soils directly. Those values can and do change as that water travels downstream. And not only the SAR value itself, but EC can change en route to an irrigated area. So I guess what I'm telling you is there are enough other factors in this that we don't think the SAR effluent limit established in the permit is posing any immediate risk to the irrigated lands just because there has been an update to the formula in the literature.
>
> Q. Because if that -- if it did impose an immediate risk, you would have to go back and rewrite, what, hundreds of permits?

> A. We would do it if we thought there was an immediate risk. I mean, it's not that we would shy away from that responsibility. But in this case, we just don't see an immediate threat.

Clabaugh also fails to inform the EQC that the Lance discharges to Wild Horse Creek have been significantly lower than the effluent limits authorized by the permit and lower than that required by the application of the revised Hansen Equation. *See* Thomas Deposition, pp. 85-86, Ex. 19.

When boiled down, Clabaugh argues that this permit must be revoked to prevent some **unspecified potential and unknown harm that might occur** because of the revision of the Hansen Equation. The argument ignores the fact that the water quality of the discharged water is well below any effluent limit prescribed by application of the revised Hansen Equation. In addition, Clabaugh has failed to provide any evidence or support for his argument that the permit was issued in violation of Wyoming law.

ARGUMENT II

The DEQ did not use a scientifically invalid method for determining the EC and SAR effluent limits in this permit.

Clabaugh alleges that, based on the Hendrickx and Buchanan report, the DEQ has used a scientifically invalid method to determine the effluent limits on this permit. This argument is without merit and must be rejected by the EQC.

It is patently apparent from any reading of the Hendrickx and Buchanan report to the EQC that a fatal error has occurred with regard to this "scientific" study. Hendrickx and Buchanan apparently answered the question of whether the historic background EC and SAR of a body of water could be determined

based on the soil EC and SAR characteristics of a particular piece of land. Hendrickx and Buchanan answered this question in the negative.

Unfortunately, the question answered by Hendrickx and Buchanan has no relevance to the permit in question or DEQ's permitting regimen. As explained by John Wagoner in his deposition, DEQ, in issuing WYPDES permits, strives to set an effluent limit that can be applied to lands downstream of the discharge point with no harm to the lands the water ultimately comes in contact with. Wagoner Deposition, p. 13. This is a dramatically different question than that answered by Hendrickx and Buchanan.

Thus, the Hendrickx and Buchanan report adds nothing to the analysis regarding the effluent limits of this permit because Hendrickx and Buchanan answered the wrong question.

Clabaugh's assertion at page 3 of his Motion for Summary Judgment that "The DEQ obviously now recognizes that Hendrickx and Buchanan are qualified, reliable scientist [sic] because the DEQ entered into a Services Contract with them in June of 2009" is rampant speculation. The purpose and reason for DEQ contracting with Hendrickx and Buchanan must be answered by DEQ and such a contract does not show reliability or an acceptance of the Hendrickx and Buchanan report. It is equally likely that DEQ contracted with Hendrickx and Buchanan to allow Hendrickx and Buchanan to further assess the issue of whether they had answered the proper question with regard to DEQ's Wyoming permitting scheme. To facilitate such further study, someone had to pay Hendrickx and Buchanan for their "expert services" and travel to

Wyoming. To argue that their opinion is reliable and scientific based on a subsequent contract is specious.

ARGUMENT III

Violation of a DEQ "policy" cannot result in revocation of a permit issued by DEQ.

Clabaugh argues that violation of the Agricultural Use Protection **Policy,** currently being considered by the EQC as a proposed rule, must result in revocation of the permit. This argument must be rejected by the EQC.

Only duly adopted rules under WAPA have the force and effect of law. Wyo. Stat. §16-3-102; *Yiek v. Dept. of Revenue*, 595 P.2d 965 (Wyo. 1979). The Agricultural Use Protection Policy is currently being considered for adoption by the EQC. Until such time as this **policy** is duly adopted as a rule and regulation of the State of Wyoming, the policy has no force and effect of law. *Id.* It is disingenuous for Clabaugh to argue on the one hand that the permit was wrongfully issued under the defective and scientifically invalid policy based on the Hendrickx and Buchanan report, and immediately turn around and claim that failure to follow the **policy** should result in revocation of the permit.

Clabaugh's hyper-technical look at the Agricultural Use Protection Policy must be rejected for other reasons. First, Clabaugh's argument totally ignores the fact that under a Tier 2 methodology an effluent limit is set for the EC of the discharge and the SAR limit is controlled by the Hansen Equation. Thomas Deposition, pp. 76-77. Thomas testified that "our focus is on EC when we are looking at whether or not a Tier 2 would be appropriate." *Id.* There is no reliable background EC and SAR historical data for Wild Horse Creek as

admitted by Clabaugh during his deposition. Clabaugh Deposition, p. 60. Even if the **policy** had the force and effect of law, Clabaugh cannot establish by a preponderance of the evidence what the historical background water conditions, including EC and SAR values, are for Wild Horse Creek. Because he cannot establish historical background EC and SAR values for Wild Horse Creek, Clabaugh cannot establish that the effluent limits in the WYPDES permit issued to Lance are worse than background water quality in Wild Horse Creek.

Last, Clabaugh's arguments on this point are very misleading. Clabaugh fails to inform this body that the DEQ's determination in 2006 that soil data showed "a mean SAR of 5" resulted in a Tier 2 SAR limit on the PetroCanada permit in question of 10. *See* Deposition Exhibit 3, p. 1. In addition, Clabaugh conveniently fails to inform this body that one question after the quoted testimony in Clabaugh's Motion for Summary Judgment, Thomas was specifically asked:

> Q. So did you violate the agricultural use protection policy when you issued the Echeta Road permit?
> A. No.

The sworn testimony before this body thus shows that, contrary to Clabaugh's arguments, the issuance of the Lance permit **does not** violate the Agricultural Use and Protection Policy.

ARGUMENT IV

Failure to establish an SAR effluent limit for potential future discharges from containment reservoirs does not violate of Wyoming law.

Clabaugh alleges that the failure to set an SAR limit on future, potential, and unknown discharges from containment reservoirs pursuant to the permit somehow violates Wyoming law. Once again, Clabaugh fails to provide a single reference to Wyoming law or rules and regulations to support this allegation. The argument must be rejected.

Clabaugh fails to inform the EQC that Jason Thomas testified that prior to any discharge from a containment reservoir being allowed by DEQ, the permittee must apply to DEQ for a release authorization. Thomas Deposition, pp. 62-63. Thomas testified that:

> [w]hen an applicant requests a release, there are two primary things we consider. We consider, first of all: Do they have sufficient credits for salt and sodium to be releasing into the Powder River during that month? And: Is there [sic] water suitable to meet downstream uses, including irrigation? So we would not authorize a release of water above irrigated areas if the EC and the SAR were not compatible with irrigation protection.

Id., p. 62.

Thomas further explained that, while these requirements were not contained in a rule or regulation, DEQ followed the procedure in connection with their implementation of the Agricultural Use Protection Policy. *Id.*, p. 63.

The process used by DEQ to evaluate whether a discharge from a containment reservoir will occur requires any discharge from the reservoir to comply with downstream effluent limits. While the permit in question does not contain an explicit SAR effluent limit, DEQ's practice and procedure is to insure that no harm will result to downstream users of the water. One has to question why Clabaugh would make such an argument without providing the

critical and significant fact that DEQ would never allow a discharge from a containment reservoir which exceeded effluent limits that could be discharged directly into the watershed in question.

These types of slight of hand arguments once again show that Clabaugh can show no harm or detriment from the individual permit in question. Rather than deal with or point to facts or evidence showing that Clabaugh has suffered, or will suffer, any harm whatsoever from WYPDES permit number 49697, Clabaugh engages in speculative arguments concerning future events that may not even occur. Even then, Clabaugh can only generally allege that, if a discharge from a containment reservoir is allowed at some **unknown point in the future**, DEQ **might** authorize a discharge from a containment reservoir at an SAR level that **might** exceed the effluent limits set in this permit and such a discharge thereafter **might** cause harm to Clabaugh. Rampant speculation about **future events** and the **potential** failure of DEQ to follow their standard operating procedures cannot result in the revocation of a WYPDES permit issued under Wyoming law.

ARGUMENT V

Clabaugh cannot establish that the permit in question will cause a measurable decrease in livestock or crop production on the Clabaugh Ranch.

Clabaugh alleges that DEQ's use of an average EC value of fields sampled upstream of the Clabaugh Ranch will necessarily result in a measurable decrease in livestock or crop production because of the discharge

pursuant to this permit. Such argument is wholly without merit and must be rejected.

First, the argument advanced by Clabaugh in support of summary judgment ignores the testimony of Clabaugh that coal bed methane discharge water has been used on the Clabaugh Ranch for a large number of years. Clabaugh noted in his deposition that water being produced from coal seams underlying the Clabaugh Ranch has been stored in reservoirs on the Clabaugh Ranch for years and used for livestock and wildlife watering purposes. Clabaugh Deposition, pp. 34-38. Clabaugh could point to no damage or detriment to the Clabaugh Ranch by use of this coal bed methane water over the years. Clabaugh admitted that soil conditions around the reservoirs where the coal bed methane water had been stored at least since Clabaugh was in high school was not noticeably different than other areas of the Ranch. *Id.*, p. 39.

Despite these facts admitted by Clabaugh himself, Clabaugh somehow argues that averaging the EC and SAR of sampled fields upstream will necessarily cause a measurable decrease in livestock or crop production **if** this water ever leaves the channel and comes in contact with lands or livestock on the Clabaugh Ranch. The fallacy of this argument is self-evident. Having used the very water from the coal seams now being discharged to Wild Horse Creek for a large number of years, Clabaugh cannot argue that **treated** water pursuant to the Lance permit will have any effect on his livestock or crop production. In addition, Clabaugh cannot point to any measurable decrease of

livestock production from the permit in question. *Id.* pp. 61-62, 94-96. If Clabaugh can show any harm, he can show harm based on the collective discharges upstream of his ranch. Because Clabaugh bears the burden of proof of showing some harm or detriment because of the discharge from WYPDES permit number 49697, Clabaugh's argument with regard to an alleged error caused by the averaging of EC and SAR values must be rejected by the EQC.

CONCLUSION

The EQC must deny the Motion for Summary Judgment filed by Clabaugh. Clabaugh's Motion for Summary Judgment, which fails to cite to any violation of Wyoming law, actually supports the Summary Judgment Motion filed by Lance in this matter. Because Clabaugh cannot show that there are any contested issues of material fact as argued by Lance in its Motion for Summary Judgment, the EQC has no choice but to grant the summary judgment motion filed by Lance in this matter and deny the summary judgment motion filed by Clabaugh. Clabaugh's concerns relate to the **quantity** of water being discharged into Wild Horse Creek, Clabaugh Deposition, pp. 58, 78, 81-82, and not with regard to the **quality** of water being discharged pursuant to WYPDES permit number 49697. Clabaugh's Petition challenging the Lance permit must be dismissed.

The arguments raised by Clabaugh are all based on speculation and surmise. Clabaugh argues that, even though he cannot show what harm this permit might cause, the permit must be revoked because something bad **might**

happen because of the Lance discharge. If the EQC allows this matter to go forward, it is clear that there are contested issues of material fact with regard to the issues raised by Clabaugh that preclude summary judgment.

Dated this 31st day of July, 2009.

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CERTIFICATE OF SERVICE

This is to certify that on the 31st day of July, 2009, a true and correct copy of the foregoing was served upon counsel as follows:

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