

FILED

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

SEP 14 2009

Jim Ruby, Executive Secretary
Environmental Quality Council

IN THE MATTER OF THE APPEAL OF)
POWDER RIVER BASIN RESOURCE)
COUNCIL, AND WILLIAM F. WEST)
RANCH, LLC., FROM WYPDES)
PERMIT NO. WY0094056)

Docket No. 09-3807

WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S
MOTION TO CONTINUE PRE-HEARING CONFERENCE

Respondent Wyoming Department of Environmental Quality (DEQ), pursuant to Chapter II, Sections 3 & 8(h)(vi) of the DEQ Rules of Practice and Procedure, moves to continue until a later date the preliminary Pre-hearing Conference in the above-captioned matter, currently set for Wednesday, September 16, 2009 at 9:00 a.m. by Order dated September 9, 2009. The reasons for this motion are as follows:

1. Petitioners filed a Petition (Docket No. 09-3807) in which they object to certain conditions in WYPDES Permit WY0094056 (the contested permit) issued to Cedar Ridge, LLC for discharges of coal bed methane (CBM) produced water into the Spotted Horse Creek drainage in Campbell County. Petition, ¶ 3.f.

2. Two permit conditions Petitioners object to involve regulation of electrical conductivity (EC) and sodium adsorption ratio (SAR). Pet., ¶¶ 3.i., 3.j., 3.k., 3.l., 3.m., 3.q.

3. Petitioners object to the contested permit's numeric effluent limit for EC because it is derived from soil salinity data which Petitioners allege is "not based on sound science" or "not derived from an appropriate scientific method." Pet., ¶¶ 3.j., 3.l., 3.m., 3.q.

4. To support that allegation, Petitioners refer to reported opinions by Dr. Jan Hendrickx and Dr. Bruce Buchanan, "who were commissioned by the Wyoming Environmental Quality Council (EQC) to provide an expert opinion on whether the use of soil salinity data is scientifically valid for determining the EC and SAR of water that can be discharged in ephemeral drainages." Pet., ¶¶ n., 3.o.

5. In fact, the EQC “commissioned” Drs. Hendrickx and Buchanan to provide their report as part of the formal rulemaking process currently in progress on proposed Wyoming Water Quality (WQD) Rules, Chapter 1, § 20.

6. A hearing before the EQC in that same rulemaking is set for September 30, 2009.

7. Petitioners do not allege what the numeric effluent limit for EC in the contested permit should be or why the numeric effluent limit in the permit is not protective, but rather only allege that it is “not based on sound science” or “not derived from an appropriate scientific method.” Pet., ¶¶ 3.j., 3.l., 3.m., 3.q.

8. The crux of Petitioners’ objection to the numeric effluent limit for EC in the contested permit is their objection to the methodology used to derive it.

9. That same issue is integral to, and will be addressed in, the formal rulemaking already in progress that is set for hearing before the EQC on September 30, 2009.

10. Petitioners object to regulation of SAR under the contested permit because it regulates SAR without setting a numeric effluent limit for SAR. Pet., ¶ 3.k.

11. Petitioners’ objection to the regulation of SAR under the contested permit in this case is the same as the objection to the regulation of SAR under WYPDES Permit WY0054364 issued to Pennaco Energy, Inc, for discharges of CBM produced water into Prairie Dog Creek and Wildcat Creek asserted in the Petition filed by the *same attorneys* in EQC Docket No. 09-3805.

12. The full evidentiary hearing before the EQC in the Prairie Dog Creek case (Docket No. 09-3805) is already set for November 16-18, 2009.

13. The same SAR issue will be argued by the *same attorneys* and will be heard and decided by the EQC in the Prairie Dog Creek case (Docket No. 09-3805) before it can be heard in this case (Docket No. 09-3807).

14. The EQC’s September 9, 2009 Order in Docket No. 09-3807 set a pre-hearing scheduling conference in this case for September 16, 2009 (two weeks before the rulemaking hearing on September 30th and two months before the full evidentiary hearing in the Prairie Dog Creek case (Docket No. 09-3805) beginning on November 16th).

15. DEQ's counsel called Petitioners' counsel on Friday morning (September 11, 2009) to ask if Petitioners would agree to continue the pre-hearing scheduling conference in Docket No. 09-3807 from September 16th until after the contested case hearing in Docket No. 09-3805 starting November 16th or at least until after the rulemaking hearing on September 30th for the reasons given here.

16. Petitioners would not agree to continue the pre-hearing scheduling conference and appear intent on pressing to have the "Tier 2" methodology issue, which is the aspect of the current rulemaking addressed by Drs. Hendrickx and Buchanan, decided by the EQC in this contested case proceeding, rather than allowing it to be decided by the EQC in the pending formal rulemaking process.

17. There are numerous other CBM discharge permits in Spotted Horse Creek, many of which are due for renewal in the next year or two. *See attached printout listing Spotted Horse permits.*

18. Other discharge permit holders in Spotted Horse Creek stand to be affected by an EQC decision on the Tier 2 issue in either the pending rulemaking or in this contested case (Docket 09-3807).

19. A similar situation occurred in 2002-2003 in the matter of multiple appeals before the EQC of permits to discharge in Wildcat Creek, which were consolidated under Docket No. 02-3801.

20. The EQC entered an "Amended Order to Consolidate" on May 9, 2003 in Docket No. 02-3801 (*copy attached*), which found and concluded that: ("3") the EQC's decision for some but not all of the permit holders in that drainage would inevitably affect the remaining permit holders, and ("4") common issues to the NPDES permits should be argued before the EQC during a consolidated hearing.

21. Petitioners objections in this case to the Tier 2 methodology that is concurrently at issue in the formal rulemaking creates a similar situation to that in Docket No. 02-3801, where numerous other permit holders stand to be affected by an EQC decision in a contested case proceeding and have interests the EQC has found to necessitate their participation.

22. The consolidated hearing in Docket No. 02-3801 became an expensive procedural quagmire (2 dozen expert depositions, complicated presentation of cases with revolving examination and cross-examination of witnesses, a hearing schedule that required 6 days in July with another 8 days later that fall), whereas here there is a formal rulemaking already in progress that gives the EQC and all interested parties a statutory process to address the Tier 2 issue.

23. Whether in the rulemaking process or in a contested case proceeding, it will be the EQC that makes the decision on Tier 2 either way.

24. Even without the potential for turning this case (09-3807) into a multi-party quagmire, when the two primary issues in 09-3807 are already set for a rulemaking hearing (Tier 2 issue) in 2 weeks (September 30th) and a contested case hearing in 09-3805 (SAR issue) in 2 months (November 16th -18th), both before the EQC and with the attorneys for Petitioners in this case also the attorneys for Petitioners in 09-3805, launching into a schedule for costly and time consuming discovery in 09-3807 now is not an efficient use of limited time and resources.

WHEREFORE, Respondent DEQ requests that the preliminary Pre-hearing Conference in 09-3807 be continued until after the rulemaking hearing on September 30, 2009 and the contested case hearing in 09-3805 on November 16-18, 2009, at which time all the parties in this case (09-3807) will be better able to evaluate just which issues remain for hearing and what discovery actually will be needed to prepare for it.

DATED this 14th day of September, 2009.



Mike Barrash (WY Bar #5-2310)
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CERTIFICATE OF SERVICE

This certifies that true and correct copies of the foregoing WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S MOTION TO CONTINUE PRE-HEARING CONFERENCE were served this 14th day of September, 2009 by United States mail, postage prepaid or by hand delivery and also by e-mail or facsimile transmission, addressed as follows:

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W. B. Bann

Spotted Horse Permits

WYPermitNu	Permittee	PermitType	PermitIssu	PermitExpi
WY0094056	Cedar Ridge LLC	Coal Bed Methane	5/6/2009	2/28/2014
WY0056596	Comet Energy, LLC	Coal Bed Methane	2/9/2009	3/31/2012
WY0056634	Comet Energy, LLC	Coal Bed Methane	1/17/2009	3/31/2012
WY0048291	Continental Production Company, LLC	Coal Bed Methane	5/30/2007	6/30/2012
WY0038377	Devon Energy Production Company, LP	Coal Bed Methane	11/5/2008	3/31/2010
WY0045829	Federated Oil and Gas Properties	Coal Bed Methane	8/31/2007	3/31/2010
WY0045888	High Energy, Inc.	Coal Bed Methane	7/13/2007	3/31/2010
WY0052680	JM Huber Corporation	Coal Bed Methane	3/23/2007	3/31/2010
WY0051829	Lance Oil and Gas Company, Inc.	Coal Bed Methane	4/2/2008	3/31/2010
WY0054143	Lance Oil and Gas Company, Inc.	Coal Bed Methane	2/4/2008	3/31/2013
WY0049701	Lance Oil and Gas Company, Inc.	Coal Bed Methane	12/28/2007	3/31/2010
WY0053236	Lance Oil and Gas Company, Inc.	Coal Bed Methane	8/31/2007	3/31/2010
WY0053228	Lance Oil and Gas Company, Inc.	Coal Bed Methane	2/4/2008	6/30/2011
WY0049859	Lance Oil and Gas Company, Inc.	Coal Bed Methane	3/26/2008	3/31/2011
WY0039560	Medallion Exploration	Coal Bed Methane	12/28/2007	12/31/2011
WY0053694	Pennaco Energy, Inc.	Coal Bed Methane	12/28/2007	3/31/2010
WY0038351	Storm Cat Energy Corporation	Coal Bed Methane	12/31/2008	3/31/2012
WY0048615	Yates Petroleum Corporation	Coal Bed Methane	4/13/2007	3/31/2011
WY0049336	Yates Petroleum Corporation	Coal Bed Methane	3/26/2008	3/31/2010
WY0051756	Yates Petroleum Corporation	Coal Bed Methane	3/6/2008	3/31/2010
WY0054071	Yates Petroleum Corporation	Coal Bed Methane	4/2/2008	12/31/2012
WY0054861	Yates Petroleum Corporation	Coal Bed Methane	5/23/2008	3/31/2012
WY0055565	Yates Petroleum Corporation	Coal Bed Methane	4/13/2007	2/29/2012
WY0056073	Yates Petroleum Corporation	Coal Bed Methane	12/7/2007	3/31/2012
WY0056448	Yates Petroleum Corporation	Coal Bed Methane	10/7/2008	6/30/2013
WY0050199	Yates Petroleum Corporation	Coal Bed Methane	5/15/2008	3/31/2012
WY0051306	Yates Petroleum Corporation	Coal Bed Methane	3/26/2008	3/31/2010
WY0037362	Yates Petroleum Corporation	Coal Bed Methane	5/23/2008	3/31/2012
WY0056171	Yates Petroleum Corporation	Coal Bed Methane	2/4/2008	6/30/2012
WY0055573	Yates Petroleum Corporation	Coal Bed Methane	4/13/2007	2/29/2012

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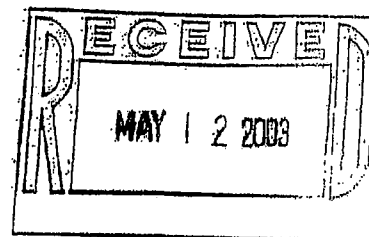
MAY 09 2003

Terri A. Lorenzon, Director
Environmental Quality Council

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

IN THE MATTER OF)
THE APPEAL OF)
EDWARD SWARTZ et. al)

Docket No. 02-3801



AMENDED ORDER TO CONSOLIDATE

The Environmental Quality Council (EQC) reviewed pending motions to consolidate from the Department of Environmental Quality, Water Quality Divisions (DEQ), Devon Energy, and Pennaco Energy at a public hearing, on February 13 & 14, 2003. At the same hearing DEQ moved to withdraw the State's Motion to Consolidate. There were no objections from the parties. After reviewing the record and being advised in the premises the EQC:

HEREBY FINDS AND CONCLUDES:

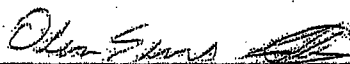
1. NPDES permit nos. WY0036188, WY0036285, WY0036293, WY0036323, WY0036331, WY0036358, WY0036366, WY0036374, WY0036382, WY0038148, WY0038491, WY0038504, WY0048224, WY0048232, WY0047384, WY0047376, WY0048852, WY0039951, WY0039969, and WY0039977 all discharge in to the Wildcat Creek Basin.
2. All of the above mentioned NPDES permits have been appealed to the EQC for review and final decision.
3. A final decision for some but not all of the above mentioned NPDES permit holders would inevitably affect the cases for the remaining permit holders.
4. Common issues to the NPDES permits should be argued before the EQC during a consolidated hearing.
5. Unique issues for individual permit holders can be separated and heard within the consolidated hearing.
6. All Wildcat Creek Basin NPDES permits that have not been issued by the DEQ as of February 14, 2003 should be stayed until the EQC issues a decision.

7. An operator, if prejudiced by this stay, can petition the BQC for relief or to intervene in this matter.

HEREBY ORDERS

1. All of the above mentioned cases, docket nos. 02-3801, 02-3804, 02-3600, 02-3602, 02-3603, 02-3604, 03-3600, 03-3601, and 03-3601 shall be consolidated under docket no. 02-3801.
2. Caption for the above mentioned cases as a consolidated case shall read "IN THE MATTER OF THE APPEAL OF EDWARD H. SWARTZ, et. al."
3. All Wildcat Creek Basin NPDES permits that have not been issued by the DEQ as of February 14, 2003 are stayed until the BQC issues a decision in this matter.
4. In the interest of fairness, any person affected by this order can petition the BQC for relief and to intervene as a party in this case.
5. A hearing in this matter shall be held on or before June 30, 2003.

DATED this 9th day of May, 2003.



Olin Simas, Hearing Examiner
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CERTIFICATE OF SERVICE

I, Joe F. Girardin, certify that at Cheyenne, Wyoming, on the 9th day of May, 2003, I served a copy of the foregoing AMENDED ORDER TO CONSOLIDATE by depositing copies of the same in the United States mail, postage prepaid, duly enveloped and addressed to:

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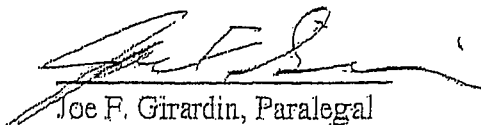
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also to the following persons via interoffice mail:

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