Michael J. Wozniak
William E. Sparks
Drake Hill
BEATTY & WOZNIAK, P.C.
216 Sixteenth Street, Suite 1100
Denver, Colorado 80202-5115
Phone: (303) 407-4499
Fax : (303) 407-4494
mwozniak@bwenergylaw.com
wsparks@bwenergylaw.com
dhill@bwenergylaw.com

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE STATE OF WYOMING

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

RESPONDENT'S OPPOSITION TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT

Respondent, Stephens Energy Company, LLC (Stephens), through counsel, files this Opposition to the Powder River Basin Resource Council (PRBRC), and William F. West Ranch, LLC (West) (collectively, Petitioners) Motion for Summary Judgment filed pursuant to Wyoming Rule of Civil Procedure 56(b) (Petitioners Motion).

I. Introduction

In their Motion, Petitioners allege that the Electrical Conductivity (EC) limit in WYPDES Permit No. WY0094056 (Permit) was derived from inappropriate scientific methods and moreover, that it is not their burden to establish that Stephens' discharges authorized by the Permit will cause a measurable decrease in crop production. Petitioners Motion at 6.

Petitioners' Motion should be denied and Stephens' Motion to Dismiss & Motion for Summary Judgment (Stephens Motion) granted because: (1) Petitioners must demonstrate that they are adversely affected by the Wyoming Department of Environmental Quality's (DEQ) issuance of the Permit; (2) the burden of proof for appeals of WYPDES permits is on the Petitioners; (3) Petitioners concede that they cannot meet that burden; (4) the Hendrickx and Buchanan Report does not apply to the Tier 2 Methodology as it relates to Stephens' Permit; and (5) Petitioners can not establish that the Permit's effluent limits are not protective.

The EQC must deny Petitioners' Motion and grant Stephens' Motion because Petitioners bear the burden to prove by a preponderance of the evidence that the Permit will cause a measurable decrease in crop production. Petitioners admit they have no evidence to meet this burden. Petitioners Motion at 5, 6. The EQC, however, need not reach the merits of Petitioners' Motion because Petitioners cannot demonstrate standing to bring their appeal because they are not adversely affected by DEQ's issuance of the Permit.

II. Argument

Under the summary judgment standards of the Wyoming Rules of Civil Procedure (Rule 54(b)), a party is entitled to summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[1] *Neal v. Caballo Rojo, Inc.,* 899 P.2d 56, 58-59 (Wyo. 1995). It is clear that when a plaintiff (or here, a petitioner) can show no loss or harm, that summary judgment against the plaintiff (or petitioner) is appropriate. *Connely v. McColloch (In re Estate of Drwenski)*, 2004 WY 5, ¶ 42, 83 P.3d 457, 468 (Wyo. 2004). It is also clear that summary judgment is appropriate when there is no evidence to support a plaintiff

[1] Chapter 11, Section 14 of the EQC's General Rules of Practice and Procedure makes applicable the Wyoming Rules of Civil Procedure in matters before the EQC.

(or petitioners') claims. *Ahrenholtz v. Laramie Econ. Dev. Corp.,* 2003 WY 149, ¶ 25, 79 P.3d 511, 517 (Wyo. 2003).

A. Petitioners Must Demonstrate That They are Adversely Affected by DEQ's Issuance of the Permit

As a threshold matter, Petitioners must demonstrate that they are adversely affected by DEQ's issuance of the Permit. Petitioners must be able to satisfy this requirement before EQC reaches the issue of who bears the burden of proof and whether the Permit was issued in accordance with the applicable Wyoming statutes, rules and regulations.

Contrary to Wyoming law, however, Petitioners claim that they need not prove that damages have or will occur to appeal DEQ's issuance of Stephens' Permit. Petitioners Motion at 15-16. Under the Wyoming Administrative Procedure Act, "any person aggrieved or adversely affected in fact by a final decision of an agency…is entitled to judicial review in the district court for the county in which the administrative action or inaction was taken." Wyo. Stat. Ann. § 16-3-114(a) (emphasis added). As explained in Stephens' Motion at 13-16, to have standing before the EQC and appeal DEQ's issuance of the Permit, Petitioners must establish that they are aggrieved or adversely affected. Wyo. Stat. Ann. § 16-3-114(a). Petitioners cannot establish they are affected, much less adversely. *Northfork Citizens For Responsible Development v. Park Co. Board of Comm'rs*, 2008 WY 88, ¶ 9, 189 P.3d 260, 262 (Wyo. 2008) ("aggrieved or adversely affected person is one who has a legally recognizable interest in that which will be affected by the action.").

Petitioners fully admit that they have no evidence that the discharges authorized by the Permit will cause a measurable decrease in crop or livestock production. Petitioners Motion at 5, 6. Specifically, they state, "Petitioners are unable to show by a preponderance of the evidence that the water discharged under the Permit has or will cause a measurable decrease in crop or

livestock production on the West Ranch." *Id.* at 6. Accordingly, not only is it evident that summary judgment cannot be entered in favor the Petitioners, but that Stephens is entitled to judgment as a matter of law due to Petitioners' inability to sustain their burden of demonstrating that they are adversely affected by Stephens' Permit.

B. Petitioners Bear the Burden of Proof in Appeals Before the EQC

Petitioners argue that the burden of production and persuasion is on the DEQ and Stephens "to show by the preponderance of the evidence that discharges under the permit will not result in a measurable decrease in crop production." Petitioners Motion at 11, 14-15. As explained below, Petitioners have a fundamental misunderstanding of the law regarding their burden when challenging an agency decision (i.e. a Permit issued by DEQ). As the Petitioners in this matter, they bear the burden of proof that DEQ erred in granting the permit. This is the same burden borne by all those challenging government action.

In *Casper Iron & Metal, Inc. v. Unemp. Ins. Comm'n of Dep't of Employment of Wyo.*, 845 P.2d 387, 392 (Wyo. 1993), the Wyoming Supreme Court made clear that the burden of proof lies with the party appealing the agency's decision. *See also Williams Production RMT Co. v. State Dept. of Revenue*, 2005 WY 28, ¶ 7, 107 P.3d 179, 183 (Wyo. 2005). If the "party with the burden of persuasion has not sustained it by a fair preponderance of the evidence-if the evidence is in equipoise or the opposing party's preponderates-the party with the burden must fail." *Casper*, 845 P.2d at 393.

Petitioners attempt to sidestep the general rule that one challenging an agency's decision bears the burden of proof by reliance on *JM v. Dep't of Family Servs.*, 922 P.2d 219, 221 (Wyo. 1996) in support of their position that "the general rule in administrative law is that, unless a statute otherwise assigns the burden of proof, the proponent of the order has the burden of

proof." Petitioners Motion at 15. Petitioners argue that DEQ and Stephens are the "proponents of an order that establishes an effluent limitation for EC…." and that DEQ and Stephens bear the burden of proof that discharges into the three impoundments will not result in a measurable decrease in crop production. *Id.* Petitioners have misconstrued the language of *JM.* The general rule regarding the allocation of burden of proof is that the burden of persuasion is attached to the party who runs the risk of nonpersuasion. *JM*, 922 P.2d at 221. The nature of this proceeding is not one of DEQ and Stephens acting as the proponent of an order; the instant proceedings are taken under an alleged aggrieved party's right to challenge the issuance of the Permit. As such, it is undisputed that "the party challenging the sufficiency of the evidence has the burden of showing that lack of substantial evidence to support the agency's findings." *Faber v. State Dept. of Transp.*, 2009 WY 137, ¶ 5, 220 P.3d 236, 237 (Wyo. 2009) (citing *Bradshaw v. Wyo. Dep't of Transp.*, 2006 WY 70, ¶ 24, 135 P.3d 612, 619 (Wyo. 2006)). Accordingly, Petitioners bear the burden of proof, but have admitted they can not sustain that burden. Petitioners Motion at 5. Thus, there is no genuine issue of material fact and Stephens is entitled to judgment as a matter of law.

As a note to the Council, in a similar case before the EQC involving a challenge to a WYPDES Permit, Petitioners and Respondents in that case agree that "Petitioners are required to show by a preponderance of the evidence that discharges meeting the effluent limits established in the Modified Permit will result in a measurable decrease in agricultural production." Petitioners' Proposed Findings of Fact and Conclusions of Law at 15, ¶ 10 & Respondent's Proposed Findings of Fact and Conclusions of Law at 11, ¶ 7, *In The Matter of the Appeal of John D. Koltiska et al.*, Docket No. 09-3805.[2] In *John D. Koltiska*, Petitioners there further

[2] Counsel for Petitioners and Respondent DEQ in Docket No. 09-3805 are the same counsel for the Petitioners and Respondent in this case.

proposed that "Petitioners cannot prevail simply by showing that DEQ did not use appropriate scientific methods to derive numeric effluent limits for EC and SAR." Petitioners' Findings of Fact and Conclusions of Law at 15, ¶ 19. Docket No. 09-3805.

In this case, Petitioners further acknowledge that "it is undisputed that petitioners cannot prove by a preponderance of the evidence that the water discharged under [Stephens'] Permit has or will cause a measurable decrease in crop or livestock production on the West Ranch." Petitioners Motion at 5.[3] Accordingly, because Petitioners bear the burden of proof, and admit they have no evidence to satisfy their burden, there is no material issue of fact as to the Petitioners' appeal and Stephens is entitled to judgment as a matter of law. *See* Petitioners Motion at 6 ("If the Council believes it is the Petitioners burden to make that showing, it should grant summary judgment in favor of Respondents.").

C. The Petitioners' Challenge to the Tier 2 Methodology is Not Applicable to this Case

The Permit at issue in this case is a Permit that authorizes discharges into full containment reservoirs. When DEQ set out to meet its requirement to protect against measurable decreases in crop or livestock production, it did so by requiring full containment.[4]

Yet, as though challenging a different permit than the one before the Council, the Petitioners' claims focus on the scientific basis and methodology used to establish the EC and SAR limits as relating to discharges into ephemeral drainages. This case does not, however, deal

[3] Petitioners rely on the "dead body" analogy to allege that the purpose of the statute is to prevent harm. Petitioners Motion at 15. For the impoundments in this case, as Petitioners admit, coalbed methane discharges began as early as 2001 and for the past nine years, no harm has resulted from these impoundment. Petitioners have had nine years to find and produce their alleged "dead body," but to date have no evidence so much as a stubbed toe, much less a claim that the issuance of this Permit has or will cause a measurable decrease in crop production. They acknowledge that they have not and cannot provide such evidence. Petitioners Motion at 5.

[4] Petitioners new and novel claims related to infiltration of water through the impoundments is irrelevant. As to all of the other claims of Petitioners, they have no evidence of harm related to infiltration. Nor can Petitioners present evidence or contribute any measurable loss in crop or livestock production from infiltration under the Permits.

with discharges into ephemeral drainages—it deals with full containment reservoirs. *Id.* at 9. The Hendrickx and Buchanan report has no application to full containment reservoirs. The EC and SAR limits are immaterial as the Permit at issue requires full containment.

Whether the Petitioners could somehow prevail in shedding the burden of proof, the Petitioners have simply picked the wrong case to raise their theoretical complaints. The Hendrickx and Buchanan report, upon which Petitioners' expert Ginger Paige bases her opinions, has no application to full containment reservoirs. Dr. Paige admits that the report has nothing to do with full containment reservoirs (the subject of the Petitioners' challenge):

> Q: A couple of quick questions on the Hendrickx Buchanan report. Would you agree that this report did not address the issue or the full containment of reservoirs but only the direct discharge of waters into the ephemeral streams or tributaries?
> A: I believe it was actually addressing discharge on surface water, and not containment or full containment.
> Q: It did not address full containment?
> A: Correct.

Depo. G. Paige at 25 (Exhibit A to Stephens' Motion to Strike Testimony of Ginger Paige).

In fact, Petitioners' expert has admitted that the EC and SAR limits would be irrelevant if the discharges were fully contained in the impoundments:

> Q: Okay. Would the limit matter if all the water was contained in the impoundment?
> A: No. If you could prove that all the water was to be contained, no, it wouldn't matter.

Depo. G. Paige at 22.

When asked if the effluent limit established by the Permit was too high, the Petitioners' expert (Dr. Paige) said, "I'm not at liberty to actually respond directly to the limit. I'm talking about the process of determining the limit." *Id.* Put simply, in order to not be obstructionists, the Petitioners must show what scientific method should have been used but was not used. Of

course this would have to be tied to actual data supporting their position. They cannot simply state that the method used by DEQ was scientifically inadequate without offering any proof of that assertion.

The most basic point is that the Hendrickx and Buchanan report did not even address full containment.[5] Beyond this, neither Hendrickx and Buchanan nor Dr. Ginger Paige have asserted what should have been done in their view to make the DEQ's permit conditions more effective than full containment. This leaves the Council chasing shadows, trying to consider whether DEQ should be required to prove or disprove a negative of what one trying to block development can dream up.

D. The Permit's Effluent Limits Are Protective of Petitioners Agricultural Uses

Petitioners can point to no evidence, and have in fact admitted they have no evidence, establishing a measurable decrease in crop production on Petitioner West's irrigated lands from the operation of Stephens' Permit. Petitioners further admit that they have no evidence that the effluent limits on the Permit are not protective. Petitioners Motion at 5, 6.

Petitioners candidly admit that "it is undisputed that petitioners cannot prove by a preponderance of the evidence that the water discharged under the Permit has or will cause a measurable decrease in crop or livestock production on the West Ranch." Petitioners Motion at 5. In fact, crop production has increased during the time which the discharges into the impoundments have occurred. Petitioners Response to DEQ's Discovery at 9, ¶ 9. Thus, because Petitioners cannot meet their burden to establish by a preponderance of the evidence that

[5] Plaintiffs attempt to characterize Stephens' impoundments as not fully containing the discharges is unpersuasive. As Stephens explained in its Motion and Declaration of Terry Logan, Stephens has contained all effluent in the impoundments, the impoundments have never leaked, over topped or breached in any way, and Stephens has never applied for and DEQ has never approved assimilative capacity credits. Stephens Motion at 7; Terry Logan Decl. at ¶¶ 9-11. Petitioners have no evidence to the contrary, nor any evidence that infiltration has or will cause a measurable decrease in crop production.

Stephens' authorized discharges into the three impoundments will cause a measurable decrease in crop production, there is no genuine issue of material fact and Stephens is entitled to judgment as a matter of law.

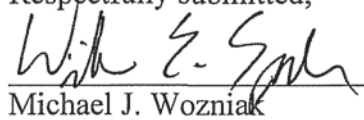
III. Conclusion

Petitioners must establish that they are specifically harmed by the issuance of the Permit. Here, Petitioners can not establish a genuine issue of material fact that they are adversely affected by the issuance of the Permit and summary judgment should be granted to the Respondents. The Petitioners' Appeal is based entirely upon Petitioners' incorrect legal assumption that DEQ and Stephens bear the burden of proof for Petitioners' appeal and challenge. To file an appeal before the EQC, Petitioners must establish that they are specifically harmed and adversely affected by the agency decision. Here, Petitioners can not establish a genuine issue of material fact that they are adversely affected by the issuance of the Permit and summary judgment should be granted to the Respondents.

Petitioners have not shown themselves to be in fact "aggrieved" or "adversely affected" for the purposes of Wyo. Stat. Ann. § 16-3-114(a) and § 35-11-103(a)(vii). This appeal rests on speculation and unfounded assumptions, and as such, there is no issue of material fact raised by Petitioners and Stephens is entitled to judgment as a matter of law. The EQC must deny Petitioners Motion for Summary Judgment and grant Stephens Motion for Summary Judgment.

Dated this 23rd day of February, 2010.

Respectfully submitted,



Michael J. Wozniak
William E. Sparks
Drake Hill
BEATTY & WOZNIAK, P.C.
216 Sixteenth Street, Suite 1100
Denver, Colorado 80202-5115
Phone Number: (303) 407-4499
Fax Number: (303) 407-4494
mwozniak@bwenergylaw.com
wsparks@bwenergylaw.com
dhill@bwenergylaw.com

Attorneys for Stephens Energy Company, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2010, I sent a copy of the foregoing via electronic mail and overnight mail to:

Kate Fox
J. Mark Stewart
DAVIS & CANNON, LLP
422 West 26th Street
Cheyenne, WY 82003
kate@davisandcannonchey.com
mark@davisandcannonchey.com

Chairman Environmental Quality Council
122 West 25th Street
Herschler Building, Room 1714
Cheyenne, WY 82002
kwarin@wyo.gov

Director, Department of Environmental Quality
122 West 25th Street
Herschler Building, 4th Floor West
Cheyenne, WY 82002
jcorra@wyo.gov

Mike Barrash
Luke Esch
Wyoming Attorney General's Office
123 Capitol Building
Cheyenne, WY 82002
mbarra@state.wy.us
Lesch@state.wy.us

Emily Nelson