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Jim Ruby, Executive Secretary
Environmental Quality Council

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

IN THE MATTER OF THE APPEAL OF)
POWDER RIVER BASIN RESOURCE) DOCKET NO. 09-3807
COUNCIL, AND WILLIAM F. WEST)
RANCH, LLC FROM WYPDES)
PERMIT NO. WY0094056)

**PETITIONERS' OPPOSITION TO STEPHENS' MOTION TO STRIKE
TESTIMONY OF GINGER PAIGE, PhD**

Stephens Energy Company, LLC's Motion to Strike Testimony of Ginger Paige, PhD, rests on two incorrect premises: First, that the *Daubert* standard for admission of expert testimony is applicable to administrative law in Wyoming; and second, that this is a full containment permit.

I. Petitioners' Expert Testimony Meets the Standard Established for Administrative Hearings.

The standard for admissibility of expert testimony in an administrative hearing is articulated in *Griffin v. State*, in which the Wyoming Supreme Court declined to apply the *Daubert* and *Bunting* tests for admissibility of expert testimony in administrative hearings.¹ The Court stated that the general rule is that "administrative agencies acting in a judicial or quasi judicial capacity are not bound by technical rules of evidence that govern trials by courts or

¹ *Daubert* is a federal case articulating the standards for admissibility of expert testimony which is applied in federal courts. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The standard was adopted for Wyoming courts in *Bunting v. Jamieson*, 984 P.2d 467 (Wyo. 1999).

juries. . . . The evidence must be of a type that is ‘commonly relied upon by reasonably prudent men in the conduct of their serious affairs.’” 2002 WY 82, ¶11, 47 P.3d 194, ¶11; *acc’d Smith v. State ex rel. Dep’t of Transportation* 2000 W 185, 11 P.3d 931, 934 (Wyo. 2000).

Petitioners’ expert testimony meets this standard. Dr. Paige has a Master’s of Science degree in soils physics from the University of Massachusetts, and a PhD in watershed hydrology management from the University of Arizona. She has been employed at the University of Wyoming since 2004 as Assistant Professor of Water Resources, Department of Renewable Energy. She has authored or edited numerous research projects and refereed articles and proceedings on soils and soil chemistry, including on CBM water’s effects on soils. (Ex. 13, Curriculum Vitae of Ginger Paige, pp. 4-9.)

Dr. Paige is very familiar with the impacts of CBM water in ephemeral drainages in the Powder River Basin, and she is very familiar with the Tier 2 methodology that was used to derive effluent limits for this permit. She is fully qualified to give the opinion that **“In general, effluent limits established for WYPDES 0094056 have not been determined using a method that results in scientifically defensible or reasonable limits for EC of discharge waters that are protective of agricultural uses.”** Exhibit 7, Paige Deposition, p. 8:16-20. This opinion conforms with the opinion of the experts hired by the Council and the DEQ, Hendrickx and Buchanan.² Dr. Paige’s qualifications, experience and knowledge meet the standards for expert testimony in administrative hearings.

² The EPA has also expressed its concerns that Ag Use Policy provisions are inconsistent with the Clean Water Act. *See* Exhibit 14, pp. 9-11.

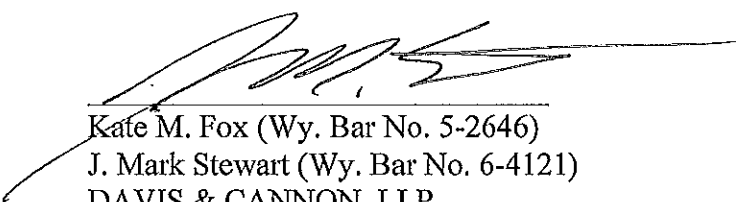
II. These Are Not Full Containment Reservoirs

This Permit is an Option 2 permit because the reservoirs are on-channel and are allowed to overtop with natural precipitation events, and because, like all unlined reservoirs, water infiltrates into the underlying soils and shallow groundwater and travels downstream, where long-term impacts are likely.³

It defies common sense for Stephens to so strenuously assert that these are full containment reservoirs, when this is not a full containment permit. Full containment permits do not require a Tier 2 analysis. DEQ determined that downstream agriculture needed to be protected from the WY0094056 discharges. DEQ should do it right, and Tier 2 is not right.

Dr. Paige's testimony is relevant and is of a type that is commonly relied upon by reasonably prudent men in the conduct of their serious affairs. Stephens's request to strike the testimony of Dr. Paige should be denied.

DATED this 23rd day of February, 2010.



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³ Hendrickx & Buchanan recognized this problem when they said:

In Ivy Creek CBM water discharged in the creek and never makes it to the downstream landowner. This is considered a success but is it? Where did the water and the salts go? Nobody knows since monitoring is not part of a Tier 2 or Tier 1 permit. The water is probably decreasing the depth of an existing water table and will sooner or later reach the root zone and result in soil salinization. Or the saline waters may start seeping towards the downstream landowner.

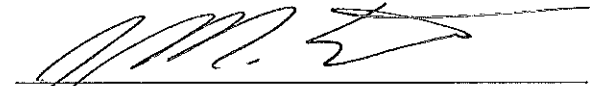
Hendrickx & Buchanan, *EXPERT SCIENTIFIC OPINION ON THE TIER-2 METHODOLOGY*, Report to the Wyoming Department of Environmental Quality, September, 2009, p.19.

CERTIFICATE OF SERVICE

I certify that on the 23rd day of February, 2010, I served a true and correct copy of the foregoing by U.S. mail and email to:

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